

## APPENDIX 1

### WORKFORCE STANDARDS AND PERFORMANCE UNIT RESPONSE TO THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CRIMINAL RECORD – DECEMBER 04 DISCUSSION PAPER

QUESTION	RESPONSE	COMMENT
<i>What impact might a criminal record have in the area of employment?</i>		
2(a) <i>Do you know of any employers with a successful track record of employing people with criminal records?</i>	Not to our knowledge.	
2(b) <i>What practical difficulties face people with criminal records who are seeking employment?</i>	They may feel deterred from applying for certain jobs for fear of being exposed or embarrassed regarding past convictions for offences.	
2(c) <i>How do people with criminal records address the difficulties they encounter in seeking employment?</i>	Use of complaint/appeal mechanisms where adverse decisions are made.	
2(d) <i>What special difficulties face juveniles with criminal records?</i>	The recency of their convictions when young people apply for jobs and stereotyping of young offenders as “thugs” or “vandals”.	
2(e) <i>What special difficulties face Indigenous people with criminal records?</i>	Given the over-representation of Indigenous people in the criminal justice system there may be many Indigenous people with criminal records who are deterred from applying for jobs thinking it would be pointless to apply given their criminal records.	

QUESTION	RESPONSE	COMMENT
2(f) <i>Why might employers be reluctant to employ someone with a criminal record?</i>	<p>Legislative provisions of the Commission for Children and Young People and Child Guardian Act 2000 prevent people with convictions for certain serious offences from obtaining a suitability notice for working with children and therefore prevent this Department from employing them.</p> <p>Given this Department's responsibility to educate and provide a safe environment for children there is a need to ensure employees are good role models for children and that the public has confidence in the State school system.</p>	Refer also to Appendix 2.
2(g) <i>What strategies might address ongoing stereotyping of people with criminal records in the workplace?</i>	<p>Centralised decision making regarding employment of persons with criminal histories in this Department assists in ensuring as far as possible anonymity and confidentiality are preserved.</p> <p>General awareness raising campaigns and training regarding discrimination in the workplace and respect for persons could be employed to promote greater tolerance.</p>	
<b><i>What do discrimination laws say about taking a person's criminal record into account in employment?</i></b>	See Appendix 2.	
3(a) <i>Are there currently sufficient legal protections against discrimination in employment on the basis of criminal record?</i>	As above.	
3(b) <i>If there needs to be additional protection against discrimination in employment on the basis of criminal record, what form should it take and what elements should be included?</i>	As above.	

QUESTION	RESPONSE	COMMENT
3(c) <i>What remedies should be available for people who have experienced discrimination on the basis of criminal record?</i>	As above.	
3(d) <i>What difficulties might face a person with a criminal record who wishes to use the current anti-discrimination legislation? What can be done to overcome these difficulties?</i>	As above.	
<b>What does a criminal record include?</b>	As above	
4(a) <i>Do employers and employees understand the categories of information that might be included or excluded on a criminal record check provided by police?</i>	Queensland legislation specifies what information is available but it is a complex area and confusion can arise sometimes.	
4(b) <i>When requesting a criminal record check, do employers seek information about specific offences or do they request a general review?</i>	Mostly only general information is sought but further specific information may be sought when there are concerns about particular cases.	
4(c) <i>What difficulties, if any, have employers and employees encountered in obtaining criminal record checks?</i>	<p>For this Department problems include:</p> <ul style="list-style-type: none"> <li>❑ restriction on the thoroughness and comprehensiveness of information that is allowed to be provided given the impact of conviction legislation and FOI/privacy restrictions imposed by the Police service;</li> <li>❑ use of aliases by applicants or incorrect information being held about persons by Police;</li> <li>❑ administrative issues including the length of time the criminal history process takes delaying appointment of people, costs in terms of time and resources in conducting the checks in a large organisation with high staffing needs</li> </ul>	

QUESTION	RESPONSE	COMMENT
4(d) <i>Have there been instances where a criminal record check has been completed without an individual's consent?</i>	Not to our knowledge.	
<b><i>When might a criminal record be relevant to employment?</i></b>	Refer also to Appendix 2.	
5(a) <i>In what occupations might a criminal record be a relevant ground for excluding a person from employment, licensing or registration? For these specific occupations what criminal record would be relevant and why?</i>	Professions involving the care and education of children. Records involving offences related to harm against children. In cases where occupations involve handling money, offences of fraud, theft and dishonesty would be relevant because they may indicate potential risk areas.	
5(b) <i>In what occupations would a criminal record never, or almost never, be relevant?</i>	Not known.	
5(c) <i>Are there any examples where criminal record checks are conducted unreasonably (i.e. go beyond the inherent requirements)?</i>	Not to our knowledge.	
5(d) <i>Are there examples of licensing, admission or registration rules that go beyond the inherent requirements of the position?</i>	Not to our knowledge.	
5(f) <i>What guidance is available to help employers determine the inherent requirements of the job in the context of employees with a criminal record?</i>	Recruitment and selection directive of the Office of Public Service Merit and Equity.	

QUESTION	RESPONSE	COMMENT
5(g) <i>What information should be available to actual or prospective employees regarding the inherent requirements of the job?</i>	Good quality position descriptions	
5(h) <i>What mechanisms are available to appeal disqualification from employment, licensing or registration?</i>	See Appendix 2.	
5(i) <i>What examples do you have of possible discrimination on the basis of criminal record?</i>	None to our knowledge.	
5(j) <i>Do licensing or registration rules allow for individual assessment of a person's criminal record and its relevance to the inherent requirements of a particular job within the industry?</i>	Not known.	
<b>Questions for employers:</b>		
6(b) <i>Do you expect employees to voluntarily disclose their criminal record?</i>	Departmental policy requires that a criminal history check is performed on recommended applicants for positions pursuant to Public Service Act and OPSME Directive.	
6(c) <i>How do you respond if an employee refuses to answer questions about their criminal record?</i>	A prospective employee would only be required to comment where it was being considered not to employ that person on the basis of their criminal history.	
6(d) <i>How do you respond if an employee is dishonest about their criminal record?</i>	Disciplinary action could be considered.	

QUESTION	RESPONSE	COMMENT
6(e) <i>How should employers make sure that they comply with the requirements of spent conviction legislation?</i>	This is not applicable in the Department's case as the Police apply relevant spent conviction legislation and filter all criminal histories prior to providing them to the Department.	
<b>Questions for applicants/employees:</b>		
6(f) <i>Do you have any examples of a person voluntarily disclosing their criminal record and than experiencing discrimination?</i>	Not to our knowledge.	
6(g) <i>Do you have any examples of instances where an employee has been dishonest about their criminal record? What were the reasons? What was the result?</i>	Not to our knowledge.	
6(h) <i>Do you have any examples of an employee refusing to answer questions about their criminal record?</i>	Not to our knowledge.	
<b>Questions for employers?</b>		
7(a) <i>Do you have any examples of clear procedures for examining an applicant's criminal record? Are there currently guidelines in your organisation or industry?</i>	Yes. See attached guidelines for the Department's Recommended Persons Suitability Assessment Committee – Appendix 3.	Refer to the Office of Public Service Merit and Equity Directive number 2/04 Criminal History Checks at the following web site: <a href="http://www.opsme.qld.gov.au">www.opsme.qld.gov.au</a>

QUESTION	RESPONSE	COMMENT
7(b) <i>What would further assist you in understanding your responsibilities and in what form would the information be most useful?</i>	Further written publications including case law and research on this topic would be useful.	
7(c) <i>Do you have any examples of confusion about whether a criminal record is relevant to the job?</i>	No.	
7(d) <i>What review or appeal processes should there be for decisions made on the basis of criminal record?</i>	See Appendix 2.	
7(e) <i>Does your organisation have any training materials that address these issues?</i>	Not to our knowledge.	
<b>Questions for applicants/employees:</b>		These questions are for employees only.
7(f) <i>What information should you have about how your criminal record might be considered by an employer?</i>	N/A.	
7(g) <i>Do you have any examples where employers have not had clear or fair procedures for considering an applicant's criminal record?</i>	N/A.	
7(h) <i>What opportunities should be given to an applicant to explain their criminal record?</i>	N/A.	

<b>QUESTION</b>	<b>RESPONSE</b>	<b>COMMENT</b>
<i>7(i) Do you have any examples where dishonesty has resulted in dismissal even when the criminal record is not relevant to the job?</i>	N/A.	

## **APPENDIX 2**

### **ADVICE FROM THE DEPARTMENT'S ADMINISTRATIVE LAW SERVICES UNIT IN RESPONSE TO THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CRIMINAL RECORD – DECEMBER 04 DISCUSSION PAPER**

#### **1. The operation of discrimination law in the area of criminal record.**

Section 7 of the *Anti-Discrimination Act 1991* (ADA) sets out the “attributes” on which discrimination is prohibited in Queensland; ‘criminal record’ is not one of the fifteen listed attributes. The ADA was amended on 1 April 2003 resulting in the clarification of one attribute, the expansion of another and the addition of three fresh attributes. The Queensland Government did not see fit to add ‘criminal record’ as an attribute at this time.

Accordingly, a Queensland resident must look to the Commonwealth's *Human Rights and Equal Opportunity Commission Act 1986* for protection against discrimination on the basis of ‘criminal record’ in the area of employment. For Departmental employees there are three areas in which their criminal record - and a consequent potential for discrimination - would arise in the course of their employment. These areas are:

- For teaching staff, criminal record checks are mandatory for their registration or restoration of their registration as per section 37A of the *Education (Teacher Registration) Act 1988*. This process is administered by the Teacher's Registration Board, a statutory body, independent of the Department.
- For workers otherwise working with children, criminal record checks are required in order for the person to obtain a “positive suitability notice” for child-related employment as per Part 6 of the *Commission for Children and Young People and Child Guardian Act 2000*. This process is administered by the Commission for Children and Young People and Child Guardian, another independent statutory body.
- For all other Departmental staff a “police criminal history check” is a mandatory requirement of employment as per the Office of Public Service Merit and Equity (OPSME) Directive, *Criminal History Checks (2/04)*. This process is administered internally through the Department's Workforce Standards and Performance Unit.

Underpinning each of the above requirements is ensuring a “child's entitlement to be cared for in a way that protects the child from harm and promotes the child's wellbeing.” The capacity to ensure children are not at risk or are not harmed by workers and Departmental staff is an undisputed inherent requirement of employment.

Additionally, Queensland public servants are legislatively required to comply with their relevant Department's “Codes of Conduct” which codifies the following “ethics principles” as provided for under the *Public Sector Ethics Act 1994*:

- Respect for the law and the system of government;
- respect for persons;
- integrity;
- diligence;
- economy and efficiency.

To this end, Part 9A of the *Public Service Act 1996* permits the Department to conduct a criminal history check on prospective employees. The purpose underlying this process is to ensure that anyone engaged to perform Departmental duties is “suitable to perform them”.

This is the equivalent process to the “fit and proper person” test of the Commonwealth Public Service.

As in all areas of employment, should a prospective employee’s criminal record be *genuinely* considered to be such that they failed to satisfy the inherent requirement of ‘suitability’, the Department would not have ‘unlawfully discriminated’ against the person in refusing them employment. Similarly should a person’s criminal record be such that it cast genuine doubt on their capacity to be trusted with children, the Department would also not have ‘unlawfully discriminated’ against the person in refusing them employment.

## **2. Criminal history screening for employees – discrimination issues**

What is a criminal record?

In Queensland a variety of legislation operates to determine the complexion of a “criminal record”. The following Acts are relevant in terms of impacting upon the operations of the Department of Education and the Arts in terms of criminal history screening of teachers, departmental employees and mature age students:

- Criminal Law (Rehabilitation of Offenders) Act 1986 {C L (R of O) Act}
- Education (General Provisions) Act 1989
- Education (Teacher Registration) Act 1988
- Public Service Act 1996 and Commissioner’s Directive 2/04
- Commission for Young People and Child Guardian Act (in relation to volunteers as a category of “employment” in state schools)

### ***Criminal Law (Rehabilitation of Offenders) Act 1986***

Section 3 of that Act contains relevant definitions: a conviction is “a conviction (not including convictions not recorded) by or before any court for any offence, whether recorded in Queensland or elsewhere before or after the commencement of this Act”; “criminal history” means, in relation to any person the convictions recorded against that person in respect of offences; “offence” means an act or omission that renders the person doing the act or making the omission liable to punishment.

The Act provides a spent convictions or “rehabilitation” scheme for convictions resulting in either no period of imprisonment or a period of imprisonment less than 30 months –

- where a person is not dealt with as a child and is convicted on indictment the conviction is expunged from their record 10 years after the date on which the conviction was recorded (unless an order of the court relating to the conviction remains unsatisfied within the 10 years)
- where a person is not dealt with on indictment as an adult the conviction is expunged from their record 5 years after the date of conviction (unless an order of the court relating to the conviction remains unsatisfied within the 10 years).

A conviction that is set aside or quashed or a charge is not part of the criminal history. It is lawful for a person to deny convictions where the rehabilitation period has expired. In assessing a person’s fitness to be admitted to a profession, occupation or calling, regard cannot be had to spent convictions unless a specific legislative provision requires the conviction should be disclosed and taken into account. The Act includes provision that in the case of persons employed in certain positions the rehabilitation scheme will not be available in respect of certain offences including convictions deemed not to be convictions (convictions not recorded) e.g. 1. registered teachers, 2. employees of the Department of Education (teachers, teachers aides, members of staff at a state school 3. a member of a

state school council – offences contained in Criminal Code chapter 22 (offences against morality), 32 (rape and sexual assaults), 33 (offences against liberty), 34 (offences relating to marriage and parental rights and duties) or Drugs Misuse Act 1986 Part 2 (drug trafficking) and contraventions of any provision, committed in Queensland or elsewhere, constituting an offence of a similar nature or involving an assault of a sexual nature.

### ***Education (General Provisions) Act 1989 – mature age students***

In 2004 the Department of Education and the Arts introduced a scheme for criminal history screening of mature age students. A mature age student is an adult (a person over 18 years). A principal is not permitted to enrol a mature age student at their school unless the student has a current positive notice for that school. The positive notice is obtained from the Director-General following consideration of the student's criminal history. A criminal history includes every conviction for an offence, whether in Queensland or elsewhere, at any time and any charge made against the person for any offence in Queensland or elsewhere at any time. A conviction means any finding of guilt by a court or acceptance of a plea of guilty by a court whether or not a conviction is recorded. The provisions specifically oust the operation of the *Criminal Law (Rehabilitation of Offenders) Act 1986* so that otherwise spent convictions are taken into account in the decision making process and accordingly criminal histories include such convictions.

### ***Education (Teacher Registration) Act 1988***

The Act provides that the Board of Teacher Registration must not approve an application for registration as a teacher unless the Board is satisfied the person is of good character and in making this determination, the Board must have regard to the criminal history of an applicant and further must ask the Commissioner of the Police Service to give the Board a written report about the criminal history of an applicant for registration. Criminal history means "every conviction (including convictions not recorded) of the person for an offence, in Queensland or elsewhere at any time and every charge made against the person for an offence in Queensland or elsewhere at any time whatever the outcome of the charge." The Act states expressly that the *Criminal Law (Rehabilitation of Offenders) Act 1986* does not apply in relation to serious offences included in the criminal history – serious offence means an offence (including the counselling or procuring the commission of, or attempting or conspiring to commit an offence or committing an offence against a law that substantially corresponds to such an offence) as defined by the schedule to the Penalties and Sentences Act 1992\*.

### ***Public Service Act 1996 and Commissioner's Directive 2/04***

The Act allows the criminal history screening of public sector employees, subject to condition set out in a directive issued by the Public Service Commissioner. When the chief executive of any government department proposes to engage a person to perform duties, the chief executive may, under a directive issued, ask the person for written consent for the chief executive to obtain the person's criminal history. Directive Number 2/04 has been issued and sets out the circumstances in which criminal history checks may be conducted on a person recommended for proposed employment in the Queensland public service. The Directive states that a chief executive may decide to conduct a criminal history check on a recommended person in certain circumstances not already covered by other specific legislation dealing with criminal history. If a criminal history check is conducted, the chief executive must have regard to the information to ensure their suitability to perform the relevant duties of the position. A decision as to whether it is necessary to have regard to a person's criminal history must be based on the nature of the relevant duties to be performed, although regard may also be had to the perception of the public and client confidence in the

performance of the relevant duties and in the department and the occupational values, code of behaviour and client service required by the performance of the relevant duties.

Although the person must give their consent to the criminal history screening if such consent is not forthcoming the chief executive is not required to consider or further consider the person for employment.

The criminal history to be obtained is as per the *Criminal Law (Rehabilitation of Offenders) Act 1986*. The criminal history will not include those matters which are expunged by the rehabilitation scheme.

***Commission for Young People and Child Guardian Act*** (in relation to volunteers as a category of "employment" in state schools)

One of the purposes of the Act is to ensure that only suitable persons are employed in certain child-related (regulated) employment or carry on certain child-related (regulated) businesses. Accordingly, the Act incorporates a scheme whereby criminal history information is provided to the Commissioner for the purposes of assessing a person's suitability to work with children. If the person is deemed suitable, they are issued with a positive notice by the Commission. The criminal history information obtained is extensive and may include information about charges, even where there has been no conviction. Charge means a charge in any form, including, for example, the following-- (a) a charge on an arrest; (b) a notice to appear served under the Police Powers and Responsibilities Act 2000, section 214;46 (c) a complaint under the Justices Act 1886; (d) a charge by a court under the Justices Act 1886, section 42(1A),47 or another provision of an Act; (e) an indictment. If the person has a criminal history, the commissioner may ask the police commissioner for a brief description of the circumstances of a conviction or charge mentioned in the criminal history.

In addition, following recent amendments to the Act, the commission is entitled to obtain information from the police concerning any investigations for serious sexual offences allegedly committed against children where the subject was never charged but where the police would have been in a position to lay a charge had it not been for the unwillingness or inability (e.g. through illness or death) of the complainant to proceed.

The Act specifically removes the operation of the rehabilitation scheme provided by the *Criminal Law (Rehabilitation of Offenders) Act 1986*

The Act defines employment extremely broadly and includes volunteers working in schools. Such employment is regulated employment if-- (a) the usual functions of the employment include, or are likely to include-- (i) providing services at a school that are directed mainly towards children; or (ii) conducting activities at a school that mainly involve children; and (b) the employee is neither a registered teacher nor a volunteer who is a parent of a child enrolled at the school. Provided the person is engaged performing such duties for a sufficient period (specified by a formula), they will be regarded as being in regulated employment.

According to the scheme, if a person has a conviction for a serious offence (as defined in the Act\*\*), the commissioner must issue a negative notice effectively prohibiting a person from engaging in the relevant employment unless the commissioner is satisfied it is an exceptional case in which it would not harm the best interests of children for the commissioner to issue a positive notice.

\* The following offences are "serious offences" per the Penalties and Sentences Act 1992 - Punishment of unlawful assembly, Punishment of riot, Threatening violence, Escape by persons in lawful custody, Unlawful

sodomy, Attempted sodomy, Indecent treatment of children under 16, Owner etc. permitting abuse of children on premises, Carnal knowledge with or of children under 16, Abuse of intellectually impaired persons, Procuring young person etc. for carnal knowledge, Procuring sexual acts by coercion etc., Incest, Maintaining a sexual relationship with a child, Manslaughter, Attempt to murder, Killing unborn child, Disabling in order to commit indictable offence, Stupefying in order to commit indictable offence, Acts intended to cause grievous bodily harm and other malicious acts, Carrying or sending dangerous goods in a vehicle, Obstructing rescue or escape from unsafe premises, Intentionally endangering safety of persons travelling by railway, Endangering safety of persons travelling by aircraft, Grievous bodily harm, Torture, Attempting to injure by explosive or noxious substances, Bomb hoaxes, Maliciously administering poison with intent to harm, Wounding and similar acts, Endangering life of children by exposure, Dangerous operation of a vehicle, Assaults occasioning bodily harm, Serious assaults, Rape, Attempt to commit rape, Assault with intent to commit rape, Sexual assaults, Kidnapping, Kidnapping for ransom, Punishment of robbery, Attempted robbery, Burglary, Entering or being in premises and committing indictable offences, Unlawful anal intercourse, Conspiracy to defile, Incest by man, Incest by adult female, Preventing escape from wreck, Carrying on the business of trafficking in a dangerous drug, Aggravated supply of dangerous drugs (to minors, intellectually handicapped people, in schools and in correctional institutions), Producing dangerous drugs (producing first schedule drugs in excess of the third schedule Drugs Misuse Act)

\*\* The following Criminal Code offences are “serious offences” Bestiality, Taking child for immoral purposes, Conspiracy to defile, Obscene publications and exhibitions, Contamination of goods, Hoax contamination of goods, Dealing in contaminated goods, Unlawful homicide, Accessory after the fact to murder, Threats to murder in document, Conspiring to murder, Aiding suicide, Concealing the birth of children, Failure to supply necessities, Setting mantraps, Deprivation of liberty, Threats, Punishment of unlawful stalking, Child-stealing, Abduction of child under 16, Cruelty to children under 16, Demanding property, benefit or performance of services with threats, Attempts at extortion by threats, Procuring execution of deeds etc. by threats, Taking control of aircraft, an offence against a provision mentioned in the schedule to the Penalties and Sentences Act 1992\* or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, an offence mentioned above or an offence against a law of another jurisdiction that substantially corresponds to an offence mentioned above.

## **APPENDIX 3**

### **RECOMMENDED PERSON SUITABILITY ASSESSMENT COMMITTEE**

#### **TERMS OF REFERENCE**

The Recommended Person Suitability Assessment Committee is charged with the responsibility of making recommendations to the Director-General concerning employees/potential employees whose criminal convictions are revealed as a result of criminal history check when an employee or potential employee is applying for a position.

In doing so, it shall be the role of the Committee to:

- Assess cases of prospective employees and current employees against the criteria set out in the Office of the Public Service Commissioner directive *Criminal History Checks (02/04)*;
- Act as the conduit between the employee/prospective employee and the Director – General on all matters associated with particular case;
- Act as a conduit between the chairperson of the selection panel and the Director-General; and
- Ensure that all recommendations forwarded to the Director-General are ethically and legally defensible.

#### **Composition of the Committee**

The Director, Workforce Standards and Performance will chair *The Recommended Person Suitability Assessment Committee*. Other members of the committee will consist of the Principal Advisor (Training), Principal Advisor (Client Services), both of the Workforce Standards and Performance Unit and the Director, Administrative Law Services Branch or nominee. The Workforce Standards and Performance Branch will also supply the administrative services required for the committee to fulfil its role.

All appointed members of the committee must have a criminal history check to ensure the integrity of committee.

The Director-General shall have the authority to determine the membership of the Committee, including the ability to substitute members if necessary.

#### **Proxies**

Members who are unable to attend a Committee meeting, are able to send a proxy, if necessary.

#### **Quorum**

A quorum shall consist of three members.

#### **Criteria**

*The Recommended Person Suitability Assessment Committee* will assess applicants for appointment against criteria set out in the Office of the Public Service Commissioner directive *Criminal History Checks (02/04)*.

**Notification**

Any person who is subject to a negative determination by *The Recommended Person Suitability Assessment Committee* will be advised of the outcome in writing and of their appeal rights.

**Minority Reports**

In the event that the committee can not come to an unanimous decision, a committee member may make a minority report to the Director-General.