



Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper

This submission addresses one issue: the strengthening of protection from discrimination on the ground of irrelevant criminal record.

As noted in the Discussion Paper, a range of attributes not presently covered by the RDA, SDA, DDA and ADA is nonetheless covered by the discrimination in employment and occupation provisions of the Australian Human Rights Commission Act.

It is submitted that a Commonwealth discrimination law should address all attributes covered by the existing ILO jurisdiction. In particular, the legislation should address criminal record discrimination in employment.

Discrimination on the ground of 'irrelevant criminal record' is already prohibited in Tasmania and the Northern Territory; the ACT prohibits discrimination on the basis of 'spent convictions'. Inclusion in the Victorian *Equal Opportunity Act 1995* of irrelevant criminal record as a ground of discrimination was recommended in 2009 but was not accepted. It should be clearly included in any new Commonwealth legislation.

Criminal record checks are increasingly required by employers in Australia. The national criminal records agency, CrimTrac, processed around 2.9 million criminal history checks in 2010-11. This is a huge increase on its first years of operation (2000-2003) which averaged less than 0.5million checks per year.

The impact of this rapidly increasing level of checking is demonstrated by the fact that, according to the ABS, over half a million Australians were found guilty of an offence in 2009–2010. Over half a million Australians this year will therefore risk being refused employment where an employer uses a criminal record check as a screening mechanism. Some of those people will return to crime when they see no other option.

Of particular significance now is the extraordinary level of access to personal information through the internet. Until recently it would have been rare for a person's criminal record to continue to be available indefinitely; privacy and spent conviction schemes also limited the impact of the record over time. However, the proliferation of information in the public domain has produced a situation where a finding of guilt can 'forever stigmatise a person'.¹

¹ Office of the Victorian Privacy Commissioner, *Controlled Disclosure of Criminal Record Data: Report to the Attorney-General Pursuant to Section 63(3) of the Information Privacy Act 2000*, Report No 02.06 (2006) 4 [22]. See also Moira Paterson and Bronwyn Naylor, 'Australian Spent Convictions Reform' (2011) 34/3 *UNSW Law Jn* 938.

Employment is a key to successful rehabilitation for an ex-offender, not only as a source of income but also as a source of social contact and self worth. Studies of what makes people desist from crime show, for example, that stable marriage and employment are strong predictors of desistance.²

The increasing rates of criminal record checking make rehabilitation less likely.

Much research and anecdotal evidence suggests that employers are wary about employing ex-offenders. They are concerned about the risk of reoffending specifically, but also that an offender will be an unreliable or challenging employee.

Using criminal record checks as a risk management tool can however unfairly exclude people from employment at which they can make a contribution and also re-establish law-abiding lives.

For example, research does show that people with criminal records are initially more likely to offend in the future, but it also shows that this risk decreases substantially both with the age of the offender and the passing of time.³ And the existence of a criminal record does not, of course, mean that any one particular person will reoffend. Further, the degree of risk that the person will reoffend is not uniform: it depends on the type of offence and the offender's circumstances. For example, recent US research found different reoffending rates for different serious offences.⁴

At the same time, targeted employment programs for offenders have been reasonably successful, and a range of Australian employers now employ ex-offenders, with excellent results.⁵

Research being carried out by my colleagues and me with employers, lawyers, and human resources managers is highlighting some important issues:⁶

- many employers assume they are legally entitled to request a criminal record check, and that existing anti-discrimination legislation has little force;
- employers do not necessarily connect their criminal record check requests with specific job requirements;
- employers and human resources staff can be unsure how to evaluate a criminal record;

² Kiminori Nakamura, 'Redemption in the Presence of Widespread Criminal Background Checks' (Research Paper, The Heinz School, Carnegie Mellon University, 21 April 2008) 3 <<http://www.heinz.cmu.edu/research/233full.pdf>>.

³ Keith Soothill and Brian Francis, 'When Do Ex-Offenders Become Like Non-Offenders?' (2009) 48 *Howard Journal of Criminal Justice* 373.

⁴ Alfred Blumstein and Kiminori Nakamura, 'Redemption in the Presence of Widespread Criminal Background Checks' (2009) 47 *Criminology* 327.

⁵ See for example Joe Graffam, Alison Shinkfield, Stephen Mihailides and Barb Lavelle *Creating a Pathway to Reintegration: The Correctional Services Employment Pilot Program (CSEPP) Evaluation Report 2005*; and see Toll Holding's Second Step program: 'A Helping Hand' <http://www.abc.net.au/7.30/content/2007/s2197475.htm>

⁶ Georgina Heydon, Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'Lawyers on the Record: Criminal Records, Employment Decisions And Lawyers' Counsel' (2011) 32 *Adelaide Law Review* 205. For ongoing ARC-funded research see <http://www.law.monash.edu.au/research/projects/crep/index.html>.

- employers and human resources staff can be unaware of how to record, archive and use the criminal history information they receive;
- some human resources staff are uncomfortable asking for criminal record information, since they receive the full criminal record, and therefore hold information they recognise as private and sensitive, which nevertheless may have no relevance to the job in question;
- some human resources staff invite the job applicant to explain their prior offending, but not all have the expertise to assess this information;
- it is widely recognised that former offenders self-exclude if a criminal record check is required, removing themselves from the labour pool entirely.

Criminal record discrimination is a growing problem. It excludes good people from participating in the job market, and makes it harder for former offenders to re-establish themselves. It is vital that employers understand that they should only consider – and only ask for – a criminal history that is directly relevant to the tasks to be done by the employee.⁷ A strong anti-discrimination law is one solution.

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⁷ See further Bronwyn Naylor, Moira Paterson and Marilyn Pittard (2008) 32 'In The Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' *Melbourne University Law Review* 171.