

Discrimination on the basis of criminal records

Position paper of the PILCH Homeless Persons' Legal Clinic



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Introduction

Discrimination on the ground that a person has a criminal record is widespread in Victoria, particularly in obtaining and maintaining employment and housing.

There has been a significant increase in the number of criminal record checks undertaken in Victoria over the past decade. Victoria Police data shows a 6000 per cent increase in checks between 1992-93 and 2003-04¹. Indeed, in the employment sphere, 'criminal record checks are fast becoming a routine part of the recruitment process'.² In this context, it is increasingly concerning that there is no law in Victoria prohibiting discrimination on the basis of a person's irrelevant criminal record.

This position paper illustrates the types of discrimination faced by people with a criminal record and the reasons why they are frequently discriminated against, and examines the serious effects of discrimination. Reform of discrimination legislation is needed to protect individuals from discrimination on the basis of irrelevant criminal record.

Discrimination on the basis of irrelevant criminal records

Direct discrimination against individuals with a criminal record is based on stereotypes about what a criminal record means for a person's financial capacity or 'trustworthiness'. People with previous convictions should be considered on their merits, assessed on their strengths and weaknesses in terms of skills, knowledge, experience, reliability and any other relevant factor. However, research conducted in the UK shows that 'employers who routinely ask for information on previous convictions as part of the recruitment process tend to use it in a blanket discriminatory way rather than to inform their assessment of the general suitability of candidates, and any risk they may present in the workplace'.³

In some circumstances, a criminal record will be relevant to a job a person is seeking or the service they are trying to access. However, only where the nature of the offence indicates a real likelihood of re-offending, or where there is a genuine need for someone not to have a criminal record, should a criminal record be relevant to a person's employment or their ability to access a service. As Hugh de Kretser, Executive Officer of the Federation of Community Legal Centres, explained in his 2006 opinion piece in *The Age*:

It is perfectly legitimate for a child-care centre to ensure that no staff have relevant sex offences. But it is unreasonable for a real estate agency to refuse to hire

*a receptionist because she was fined \$50 for using cannabis nine years ago. A bank could refuse to hire someone with a recent fraud or dishonesty offence, but it would be unreasonable for a supermarket to dismiss a shelf-stacker because the criminal record check revealed a drunk and disorderly conviction six years ago.*⁴

Discrimination in employment

Criminal record checks are increasingly becoming a standard part of the recruitment process. Individuals with a criminal record will often self-exclude from applying for positions which require a criminal record check as they believe that the existence of a criminal record – no matter how irrelevant, minor or old – will prevent them from being fairly considered for the position. Employers will often not consider applicants with a criminal record. As this case study from a report by the Fitzroy Legal Service and Job Watch shows, even a finding of guilt with no conviction recorded, can create barriers to employment:

Rhianna was charged and found guilty on several counts of obtaining property by deception. Rhianna pleaded guilty and no conviction was recorded. She received a fine and a Community Based Order for six months to perform 70 hours of unpaid community work.

*When Rhianna applied for work a short time later she was requested to undergo a police check. To her surprise the check revealed the guilty verdict. She was refused employment due to her record. Not only was Rhianna shocked because she did not think that a non-conviction would be recorded on her criminal record; she was also upset because she did not feel that the charges were relevant to the job.*⁵

In other circumstances, individuals will not disclose their criminal record – either because they are not asked to when applying for the job, or because they had no conviction recorded by the court and (incorrectly) believe that it will not show up on a criminal record. Often when an employer subsequently finds out that an employee has a criminal record the employer terminates the employee's employment regardless of how well they were performing their job, or how irrelevant or old the offence is. This case study demonstrates a typical response of an employer, following the discovery of a criminal record:

Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told his services were no longer required because of his prison record. Dimitri was devastated, having completely run his own cleaning business in the past. He was assisted to find similar employment

at an organisation that did not conduct criminal record checks.⁶

Discrimination in accommodation

Individuals with a criminal record also experience difficulty in securing accommodation. It is difficult for an individual to explain gaps in rental history without explaining their prison history. Real estate agents will often refuse to consider applicants with a criminal record.

The following case study, reported by John Clonan, a support worker with the Salvation Army, demonstrates the difficulty former offenders experience in seeking private rental accommodation:

Kelvin was released from prison and lived for a short period with his girlfriend. He was referred to our service by police after his relationship broke down and he became homeless. Kelvin stayed in our service for six weeks, during which time he investigated private rental with my support. He was apprehensive as he believed he had no hope of finding private rental. At one real estate agent I accompanied him to the front door and he went in to make an enquiry. Shortly after he came out saying, 'I told you they won't even listen to my enquiry', as he was only able to give them a brief window of the past and his prison story. Next day I wrote a letter to the management but no answer was received, despite follow up calls.

During his time with us, Kelvin was an excellent tenant, rigid in keeping his unit clean and in paying rent. The real issue was discrimination by the real estate agent towards homeless people and ex-prisoners. In fact, if one reflects upon a prison existence, many prisoners have pretty good living and house skills which can be carried into civilian life.⁷

The effects of discrimination

Discrimination can have extremely negative consequences including:

- (a) hindering access to employment, accommodation, goods and services;
- (b) increasing the likelihood of recidivism;
- (c) exacerbating social exclusion and stigmatisation; and
- (d) harmful mental and psychological effects.

Discrimination can systematically exclude people from accessing employment and accommodation. The consequences of such discrimination can be particularly serious for people who have just re-entered the community after a period of incarceration as those individuals often lack social networks to turn to for assistance. It has been noted that the 'use of information about an older minor criminal conviction, which in itself is not a reliable indicator of future behaviour, can seriously disadvantage people in getting on with their lives'.⁸

Discrimination is particularly detrimental when it prevents former offenders from securing employment. If a person cannot obtain employment because of an irrelevant criminal record, it immediately limits their other opportunities in the community. Moreover, an individual who is unable to secure gainful employment is more likely to resort to low level offences like begging and theft. Research in the United Kingdom has shown that employment can reduce re-offending by between a third to a half.⁹

Discrimination also exacerbates social exclusion and stigmatisation of former offenders. An inability to 'make a fresh start', or the experience of unequal treatment when attempting to 'go straight' creates barriers to reintegrating into the community. One respondent to consultations undertaken by the Clinic reported:

I felt terrible. I felt not wanted and couldn't understand it. I thought it was unreasonable. I wasn't going to do anything bad to anybody.¹⁰

Experiencing discrimination can also have health consequences. Recent research undertaken by VicHealth¹¹ has shown that people who suffer from discrimination are also more likely to develop problems such as depression and anxiety. The report notes that there is a strong link between poor mental health and poor physical health, so the impact of mental distress from discrimination is a double burden of ill-health. The report discusses a range of responses that people can have to discrimination including suffering from depression, anxiety and anger, or engaging in self-destructive behaviour such as smoking, drinking, substance abuse or violence. Jesuit Social Services has described the impacts of discrimination on its clients:

Discrimination, especially in the areas of private housing, room and caravan rental, and also in health, is both widespread and can result in significant psychological deterioration as well as material deprivation of the recipient. Indeed, consistent discrimination of this nature results in deepening of identification with the marginalised condition so as to make negotiation through their issues more difficult.¹²

Allowing discrimination on the basis of irrelevant criminal records is unfairly punishing former offenders who have already served their debt to society.

The inadequacy of current protections and the need for reform

Equal Opportunity Legislation

There is legislation in other states and territories that prohibits discrimination on the ground of 'irrelevant criminal record'. In Victoria however,

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the *Equal Opportunity Act 1995 (Vic)* (**EO Act**) is silent on the issue of criminal record discrimination, meaning that discrimination on this basis is not prohibited despite the Government committing to considering protections for this vulnerable group.¹³

At the Commonwealth level, legislation prohibits discrimination on a number of grounds, including criminal record.¹⁴ Where a potential or existing employee considers that they have been discriminated against on the basis of their criminal record, a written complaint can be made to the Human Rights and Equal Opportunity Commission who has the power to investigate and conciliate the complaint. If conciliation is unsuccessful, the Commission can report the breach to the Commonwealth Attorney General who can, in turn, table a report in Federal Parliament. However, there is no power to award compensation and no enforcement power to remedy a breach.

Hence, there is little protection in Victoria against criminal record discrimination.

The *Charter on Human Rights and Responsibilities Act (2006)* (**Charter**) has enshrined certain civil and political rights in Victorian domestic legislation. Section 8 of the Charter deals with recognition and equality before the law, and provides that:

- ▶ Every person has the right to recognition as a person before the law;
- ▶ Every person has the right to enjoy his or her human rights without discrimination; and
- ▶ Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

However, 'discrimination' for the purposes of section 8 of the Charter is limited to the attributes set out in the EO Act, which currently does not include irrelevant criminal record. This compares unfavourably with other parts of the world, which do protect people from discrimination on the basis of their irrelevant criminal record.¹⁵

In August 2007, the Attorney-General appointed former Victorian Public Advocate, Julian Gardner, to conduct a review of the EO Act. The final report from the review recommended that:

- ▶ the EO Act be amended to include 'irrelevant criminal record' as a protected attribute;
- ▶ guidelines be developed for employers and service providers to assist in determining whether a person's criminal

record is relevant; and

- ▶ discrimination on the basis of irrelevant criminal record should only be lawful in the area of employment where a person is unable to satisfy the 'inherent requirements' of the position.¹⁶

Some state and territory governments have already introduced legislation to prohibit discrimination on the basis of criminal record.¹⁷

Spent conviction schemes

Spent convictions schemes are set out in legislation and provide that after a qualifying period, convictions are permanently removed from a person's criminal record. In most circumstances, these regimes operate such that no obligation is imposed on job applicants or employees to disclose the existence of a spent criminal record. Spent convictions also do not appear on a criminal record check. All states and territories, except Victoria and South Australia, have a spent convictions scheme.¹⁸

As Victoria does not have a spent conviction scheme, the release of criminal history information is governed by the Victoria Police Information Release Policy.¹⁹ Victoria Police releases criminal history information on the basis of findings of guilt. This means that findings of guilt without conviction are released on a person's criminal record in the same way as findings of guilt with conviction. This creates a situation in Victoria where unjustifiable discrimination is more likely to occur as employers will have access to information where an individual has pleaded guilty but no conviction has been recorded, or where they have been subject to a good behaviour bond without conviction.

All findings of guilt (except convictions which resulted in a custodial sentence of 30 months or more) will cease to appear on a person's criminal record if ten years lapses after the person's last finding of guilt. If the person was a child at the time of the last finding of guilt, then all findings of guilt will cease to appear if five years has lapsed. The Standing Committee of Attorneys-General is working towards a national model Bill for spent convictions. In November 2008 they released a Consultation Paper and consultation draft *Model Spent Convictions Bill (Bill)*. If adopted, the Bill would introduce a spent convictions scheme in Victoria.

The PILCH Homeless Persons' Legal Clinic strongly supports the introduction of a spent convictions scheme in Victoria. But spent convictions regimes are no substitute for effective anti-discrimination laws. The very nature of a spent conviction

means that discrimination can only be prevented when the relevant period has expired. In every other instance a spent convictions regime does nothing to prevent a job applicant or employee from being discriminated against on the basis of their criminal record.

Protections afforded by anti-discrimination legislation

Adequate and effective protection from discrimination would enable people with a criminal record to access employment, accommodation and other goods and services on an equal footing with the rest of the community. Social inclusion and participation in civil, political, social, cultural and economic life can reduce and resolve marginalisation, disadvantage and poverty, all of which are causal factors and risk indicators of homelessness, unemployment and criminal activity.

Including irrelevant criminal record as an attribute would have concrete benefits for affected individuals. It would:

- ▶ establish a norm of non-discrimination against people with an irrelevant criminal record;
- ▶ create public awareness that affected individuals should not be treated less favourably;
- ▶ give people an avenue to complain and seek redress when they have experienced discrimination on the basis of an irrelevant criminal record;
- ▶ impose an obligation upon the Victorian Government to respect the right to non-discrimination on the basis of irrelevant criminal record and abstain itself from discriminating on that basis; and
- ▶ encourage the Victorian Government to take positive steps to address the special needs of affected individuals

Moreover, while Victoria has no spent convictions scheme, and Victoria Police continue to release criminal records on the basis of guilt (including records for which no conviction was recorded), anti-discrimination legislation could offer further protection to individuals who have committed offences in circumstances where a Court did not consider that a conviction should be recorded.

The inclusion of 'irrelevant criminal record' as a prohibited ground of discrimination would ensure that all persons are subject to the equal protection of the law and that people with criminal records can compete on a rational basis in the market for employment, accommodation and goods and

services.

The cost of not addressing discrimination on the ground of criminal record for society, from both an economic and a human rights perspective, as well as for the individuals themselves, is more than can be afforded.

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1 The relevant statistics are: 3459 to in 1992-93 compared to 221,236 in 2003-04. Hugh de Kretser, 'Criminal Record Checks can Raise Skeletons Better Left Buried', *The Age*, 23 May 2006, 13.

2 Ibid.

3 United Kingdom Home Office, *Breaking the Circle: A report on the review of the rehabilitation of offenders*, 2002, available online at <<http://www.homeoffice.gov.uk/documents/breaking-the-circle.html>> [3.16].

4 de Kretser above n1

5 Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform*, 2005, 28.

6 Ibid, 19.

7 Ibid, 21.

8 CCH, *Federal Privacy Handbook: A Guide to Federal Privacy Law and Practice*, [45-520].

9 Kingdom Home Office above n3

10 PILCH Homeless Persons' Legal Clinic, *Submission to the Victorian Attorney-General's Independent Review of the Equal Opportunity Act 1995 (Vic)*, January 2008, 22.

11 VicHealth, *More than Tolerance: Embracing Diversity for Health*, September 2007, available online at <<http://www.vichealth.vic.gov.au/Resource-Centre/Publications-and-Resources/Freedom-from-discrimination/More-than-Tolerance.aspx>>. Although the VicHealth research focuses on discrimination on the basis of race and cultural heritage, it is important to note that these negative effects extend to all forms of discrimination. Poor physical health was also a frequent consequence in 35 to 40 per cent of cases. Poor mental health, social isolation and family or relationship difficulties were each indicated as a consequence of discrimination in 37 to 40 per cent of cases.

12 Letter of support from Jesuit Social Services to PILCH Homeless Persons' Legal Clinic, dated 22 August 2002.

13 See Department of Planning and Community Development, *A Fairer Victoria: Standing together through tough times*, May 2009, 66; Department of Justice, Attorney-General's Justice Statement 2, October 2008, 22.

14 *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* s 3(1); *Human Rights and Equal Opportunity Commission Regulations 1989 (Cth)* reg 4(b)(ii).

15 See Section 3(1) of the Canadian Human Rights Act; See *Thlimmenos v Greece*, 6 April 2000, Application No 34369/97; Sections 4(1)(b) and 4(2)(b) of the *Rehabilitation of Offenders Act 1974 (UK)*.

16 Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008, Recommendations 48, 49, 50.

17 See *Anti-Discrimination Act 1998 (Tas)*, s 16(q); *Anti-Discrimination Act 1992 (NT)*, s 19(q).

18 See *Discrimination Act 1991 (ACT)*; *Spent Convictions Act 2000 (ACT)*; *Spent Convictions Act 1998 (WA)* and *Equal Opportunity Act 1994 (WA)*; *Criminal Record (Spent Convictions) Act 1992 (ACT)*.

19 Available online at <http://www.police.vic.gov.au/content.asp?Document_ID=692>.