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A Community Legal Centre

Criminal Record Discrimination - Seeking better protections for Victorians

Fitzroy Legal Service supports changes to Victorian laws that better protect the right to work of persons with a criminal record. No protection currently exists under Victorian equal opportunity laws in relation to criminal record discrimination.

Why urgent reform is needed

- ***Increased reliance on criminal record vetting processes which increases the risk of discrimination***

We believe a balanced legislative framework balancing the right to work of all Victorians against risk management considerations is long overdue. Allowing discrimination to occur unchecked will otherwise function as a tacit sanction of discrimination, regardless of the relevance of the criminal record. The absence of legislation also fails to provide employers with a clear mandate of when it will be acceptable to hire someone with a criminal record.

Criminal record checks are increasingly used as a standard risk management tool in relation to any form of paid or voluntary work. For example, bus drivers, supermarket attendants, volunteers in community organisations, are routinely required to undergo criminal record checks.

Crim Trac, the government agency responsible for providing national criminal history checks for accredited agencies including Victoria Police, processed approximately 2.5 million checks to 78 different accredited agencies over a twelve month period from 2008 - 2009. This is a more than five-fold increase from the reporting period 2000 - 2001.¹

These changes are reflective of an increasing shift towards risk aversion with attendant pressures on employers to vet persons with a criminal record.

The reliability of a background check as a standard work-place risk management tool has avoided meaningful scrutiny in the context of this trend. Clearly many people who have committed offences have never been apprehended, while others who have previously been found guilty of offences may equally be unlikely to ever re-offend.

The increased reliance on standard criminal record checks is particularly concerning given the rigorous regulatory and licensing schemes that already apply in sensitive employment areas such as aged care/ working with children to ensure safe service provision.

Over a third of complaints received by the Australian Human Rights Commission between July 2006 and June 2007 related to criminal record discrimination.² This is a clear and reliable indicator that criminal record discrimination is a human rights issue of major significance in Australia.

- ***Long-term exclusionary impacts for minor and serious offences alike***

Generally a criminal record will be released for a period of ten years, five years where the person sentenced is a child. Some more serious offences will be released forever. The information

¹ Crimtrac Annual Report 2008-2009 http://www.crimtrac.gov.au/documents/Crimtrac_0809_full.pdf

² Australian Human Rights Commission – Discrimination on the Basis of Criminal Record
http://www.hreoc.gov.au/human_rights/criminalrecord/index.html

released on standard criminal record checks in Victoria includes minor offences (where no conviction or other penalty was imposed by the Court) and provide little context to the nature or circumstances of offending.

In these circumstances, the period for which a record is released often fails to reflect processes of rehabilitation, reintegration and personal change. As a result, for more and more people sentenced in Victorian and Australian Courts, a criminal record has become the most significant penalty attached to their experience with the justice system.

There is often an assumption that 'bad' people have criminal records, and therefore there is no obligation to provide equal opportunity protection to them. We note that close to 100,000 people were sentenced in Victorian Courts in the 2008-2009 reporting period.³ The largest portion of these received fines for their offences.⁴ Regardless of the nature of the offence, a ten year period of disclosure will attach to all findings of guilt of criminal offences heard in the Court.

Once disclosed the prejudicial impacts of a criminal record are difficult to avert. Equally, impacts on self-confidence and the voluntary self-exclusion of job seekers is a consistent theme from affected community members.

Pursuant to the ILO 111, discrimination in employment occurs where a person is treated less favourably on the basis of an attribute that is *irrelevant* to the inherent requirements of their job. In this context, the discrimination might include refusal of employment, dismissal, denial of training/promotion, or harassment at work on the basis of a criminal record.⁵ Discrimination does not occur where an affected person's record means they are unable to perform the inherent requirements of the job.⁶

We believe enacting legislation to reflect an enforceable obligation in terms such as these is not radical; we believe it would instead clarify the appropriate approach to balancing risk management against equal opportunity considerations.

The community interest in facilitating improved workforce participation should also be borne in mind. The impacts of criminal record discrimination include unemployment, under-employment, associated harms to health and wellbeing, and wasted human resources, resulting in significant costs to families and to the broader community.

- **Case studies**

The following statements were provided by peer participators in criminal record reform with the Fitzroy Legal Service:

Case Study 1 - I believe the information revealed in my criminal records check is no longer a true reflection of my character... This police check process, in its current form, is I believe discriminatory as it permanently disallows a person like me to totally reintegrate myself back into society. In doing so it denies me exactly the one thing that everyone deserves: a second chance.

Case study 2 - I have not been in trouble with the Police or any other authority ever since my conviction 11 years ago. I have tried very hard to forget about the things that are in my

³ Sentencing Advisory Council, Sentencing Statistics, People Sentenced
<http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/justlib/Sentencing+Council/Home/Sentencing+Statistics/People+Sentenced/>

⁴ *Ibid*

⁵ Discrimination (Employment and Occupation) Convention 1958, (No. 111)
<http://www2.ohchr.org/english/law/employment.htm>

⁶ Australian Human Rights Commission – Discrimination on the Basis of Criminal Record
http://www.hreoc.gov.au/human_rights/criminalrecord/index.html

past and to create a new and more productive life for myself and now also my children. I live in a very high unemployment area ... and have even been offered a position in another nursing home, which I had to decline. Unless these laws are changed in Victoria I can most likely throw all the training and education that I acquired out the window. When I began my training I had never even considered that I would have a problem such as this as the offence was so far in my past. If I paid my debt to society 11 years ago then why I am I being discriminated against all these years later. I am not a violent person and never really have been. I just did some stupid things as a young man that these days I would never even consider.

Case Study 3 - The issues that surround having convictions in the past is that when one tries to establish some sort of balance in life, like working for a living being a good husband and father. This issue has caused my family great hardship over recent years. It seems if you've had some sort of past society thinks you shouldn't expect to achieve much in life, what with employment and study options being so limited. It seems not much has changed over the past 30 years. Employment opportunities that involve hospitals, community related employment, government sectors, conservation and land - they all require criminal record checks. It really influences the outcome for persons with the desire to achieve and blend in with society. I think the law in Victoria needs to be reviewed. My priors included armed robbery, but I served my time, and that was more than twenty-five years ago.

- ***Call for balanced approaches to criminal record discrimination***

We believe the following recommendations of An Equality Act for a Fairer Victoria – Equal Opportunity Review Final Report (June 2008) Department of Justice must be endorsed into the new equal opportunity Bill in order to protect the rights of Victorians who are working or seeking work:

That the Act be amended to include 'irrelevant criminal record' as a protected attribute. (Recommendation 48)

That guidelines be developed for employers and service providers to assist in determining whether a person's criminal record is relevant. (Recommendation 49)

That discrimination on the basis of a criminal record should be lawful in the area of employment where a person is unable to satisfy the 'inherent requirements' of the position. (Recommendation 50)⁷

The incorporation of these recommendations is crucial to fostering a balanced approach to risk management in recruitment practices, and served the community interest by supporting the right of all people 'to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.'⁸

The existing lack of protection against criminal record discrimination is particularly troubling given the following net-widening features of the Spent Convictions Model Bill (September 2009) drafted through the Standing Committee of Attorneys-General:

- Criminal records that can never become 'spent' under the proposed Bill (that is, become no longer routinely available on a criminal record check) will include any imprisonment

⁷ Gardiner, Julian 'An Equality Act for a Fairer Victoria: Equal Opportunity Act for a Fairer Victoria' (June 2008) Department of Justice pp 99 - 104

<http://www.justice.vic.gov.au/wps/wcm/connect/90008100404a4171a7d2fff5f2791d4a/Final+Version+-+Final+Report.pdf?MOD=AJPERES>

⁸ Citing preamble of Discrimination (Employment and Occupation) Convention 1958 (No. 111) <http://www2.ohchr.org/english/law/employment.htm>

sentence longer than 12 months (24 months for a juvenile)⁹ as opposed to imprisonment sentences of more than 30 months under the Victoria Police Information Release Policy presently operating.¹⁰ This increases the number of people who will permanently have to deal with criminal record discrimination.

- The proposed continuation of release of 'no conviction' records is also of great concern. Provisions of the Sentencing Act 1991 (Victoria) under which considerations relevant to the decision whether or not to impose a 'conviction' clearly identify consideration of 'the impact of the recording of a conviction on the offender's economic or social wellbeing or on his or her employment prospects'.¹¹

No protection exists under Victorian equal opportunity laws in relation to criminal record discrimination.

We oppose changes that increase the systematic discrimination faced by persons with criminal record and perpetuate conditions of disadvantage and exclusion.

We support an expanded capacity through the implementation of the abovementioned recommendations to provide the Victorian Human Rights and Equal Opportunity Commission with responsibility to support employers and employees to engage in equal opportunity employment practices as they relate to this area.

The experience and challenge of being defined by prior criminal conduct can be experienced as an insurmountable barrier to 'moving on'.

We believe the changes recommended by the Report go some way to supporting affected Victorians to continue to pursue their right to work in common with others.

We believe these changes will also assist employers to improve risk management practices in a manner compliant with human rights, and create improved clarity around rights and responsibilities in this important area.

⁹See Definitions section - 'eligible adult offence' & 'eligible juvenile offence' of Spent Convictions Model Bill 2009 (South Australia), released through Standing Committees of Attorneys-General

http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws

¹⁰ Victoria Police Criminal Record Information Release Policy

http://www.police.vic.gov.au/content.asp?Document_ID=692

¹¹ Section 8 Sentencing Act 1991 (Victoria)