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Background Briefing Paper – Criminal Record Discrimination & the Law

Standard criminal record checks are an increasingly common prerequisite to employment in diverse fields, and regarded as an important step in employee recruitment and workplace risk-management.

What is a criminal record check and what does it show?

- ***Victoria Police Information Release Policy***

The release of criminal record information in Victoria is presently governed primarily by the Victoria Police Information Release Policy.¹

Applications for a National Police Certificate lodged through Victoria Police will show outcomes from criminal law court proceedings across Australia. As different policies and legislative schemes govern the release of criminal record information across state and territory jurisdictions, the domestic scheme will first be applied to the release of information, followed by application of the Victoria Police Policy. Consent from the affected person must be obtained to conduct this kind of criminal record check.

Under the current Policy a criminal record is available for a period of:

- 10 years from the time of sentencing provided the affected person is an adult at the time of sentencing;
- 5 years from the time of sentencing when the person affected was a juvenile at the time of a finding of guilt;
- A record is always available for release if a sentence of imprisonment is imposed of more than 30 months;
- Findings of guilt include no conviction records and community based orders;
- Any findings of guilt for further criminal offences will result in all prior criminal record information, including that relating juvenile offences, being released; (time will begin to run again from the last sentencing date as set out above).

A number of exceptions exist under the Victoria Police Policy to criminal records that may otherwise effectively become 'spent' (no longer to be disclosed) after the applicable period of time has lapsed. These include:

- where a person has been found guilty of a sex offence or serious offence of violence, and the check is being conducted for the purpose of work (voluntary or paid) with children or vulnerable people; and
- where an accused person has been acquitted of a serious offence on grounds of insanity of mental impairment.

- ***Private traders in criminal record information***

There are a number of private companies trading in criminal record information.² These companies do not obtain the consent of the affected person before conducting searches, and the information released is not governed by the Victoria Police Information Release Policy.

¹ Victoria Police Information Release Policy – National Police Certificate
http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=38447

² For example 'PeoplePublicRecords.org' <http://www.peoplepublicrecords.org/?gclid=CNya1vfCnqACFYMwpAodviKNdQ>
'Online Public Records Search' <http://onlinepublicrecordssearch.com/>

- **Other criminal record checking processes that operate in Victoria**

A range of regulatory and licensing schemes that include more extensive criminal record checking also occur in Victoria.

For example, the working with children check for persons engaged in any forms of work (paid or voluntary) that may include unsupervised contact with children³, and licensing for particular professions including taxi drivers, bus drivers, lawyers, doctors, teachers, nurses, police, prison officers, aged-care workers and so on.

In these areas, statutory bodies or licensing boards will make decisions about the relevance of criminal record information according to identified criteria in granting or refusing permission to engage in specific forms of employment.

Who is affected by criminal record discrimination?

Victorian courts sentenced close to 100,000 people from 2007 to 2008.⁴ The vast majority of matters were heard in the Magistrates' Courts, and of these the largest portion were disposed of with a fine. Regardless of the punishment imposed, provided a finding of guilt is attached to a criminal charge, these matters will be disclosed on a criminal record.

The numbers of checks conducted also continues to grow. In 2008-2009, 2.5 million National Police Certificates were processed through CrimTrac.⁵ These numbers do not account for unregulated background checks conducted through private agencies operating off-shore.

What protections are currently available to people with a criminal record?

Where it can be shown a person's employment was unfairly terminated on the basis of a criminal record, an affected person may be eligible to make an unfair dismissal claim in the Australian Industrial Relations Commission seeking reinstatement or compensation in lieu of reinstatement.

The Australian Human Rights Commission has jurisdiction to investigate and conciliate complaints of criminal record discrimination.⁶ Complaints may be made regarding harassment, being refused a job, or denial of training opportunities on the basis of a criminal record that does not relate to 'the inherent requirements of the job'.⁷ Whilst the Commission has power to make recommendations to the federal Attorney-General, its recommendations are not enforceable.

During the period July 2006 to June 2007, 34% of all complaints received by the Commission were on made on the basis of criminal record discrimination.⁸

Victoria does not have state-based laws prohibiting discrimination on the basis of an irrelevant criminal record. As stated above, federal laws do not provide enforceable remedies in relation to criminal record discrimination either. As a result, it is not closed to employers to refuse an application for employment because of an old, minor or irrelevant criminal record.

Changes - proposed and rejected - that will impact on Victorians with a criminal record

- **Rejected – changes to equal opportunity laws to protect against discrimination on the basis of irrelevant criminal record**

³ Department of Justice Victoria – Working With Children Check <http://www.justice.vic.gov.au/workingwithchildren>

⁴ Sentencing Advisory Council, Sentencing Statistics, People Sentenced

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

⁵ Crimtrac Annual Report 2008-2009 http://www.crimtrac.gov.au/documents/Crimtrac_0809_full.pdf

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

⁷ Ibid.

⁸ Ibid.

In 2008-2009 a substantial review of Victoria's Equal Opportunity Act 1995 was undertaken on behalf of the Department of Justice.⁹ Submissions were put forward advocating for changes whereby criminal record discrimination would be prohibited. The changes sought would mean that where a criminal record was unrelated to the inherent requirements of a job, it would no longer be lawful to treat a person on a discriminatory way on that basis. Similar laws operate in New South Wales and Tasmania¹⁰, though there is no federal legislation prohibiting criminal record discrimination per se.

The Equal Opportunity Laws Review Final Report made the following relevant recommendations:

- 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)¹¹

It was hoped that the adoption of the above Review recommendations would achieve much in supporting the right to work of persons with a criminal record, both by offering affected person's some meaningful remedy, and by fostering community approaches that would support their social inclusion through equal opportunity in employment.

These recommendations have not been adopted in the new equal opportunity laws Bill put before Parliament.

- ***Proposed – Model Spent Convictions Bill 2009 to operate nationally***

Over a period of some years, legislation governing the release of criminal record information has been drafted through the Standing Committee of Attorneys-General to provide for uniform practices through the States and Territories.

Under the Model Spent Convictions Bill 2009¹² that has been put forward, the following practices as they presently operate under the Victorian Police Policy will be legislated for:

- Findings of guilt disclosed for 10 years from the time of sentencing provided the affected person is an adult at the time of sentencing
- 5 years from the time of sentencing when the person was a juvenile at the time of sentencing
- Findings of guilt that are released on a criminal record include those where 'no conviction' is recorded.

A significant change under the Spent Convictions Bill is that, where a person is sentenced to a period of imprisonment of 12 months or more (24 months or more if a juvenile), that criminal record will always be released and cannot become 'spent'. As mentioned above, under the existing Victorian policy, this practice has only applied to sentences of 30 months imprisonment or more.

⁹ <http://www.justice.vic.gov.au/wps/wcm/connect/90008100404a4171a7d2fff5f2791d4a/Final+Version+-+Final+Report.pdf?MOD=AJPERES>

¹⁰ Discrimination on the basis of 'irrelevant criminal record' is prohibited under the Anti-Discrimination Act 1992 (Northern Territory) section 37 & the Anti-Discrimination Act 1998 (Tasmania) section 50

¹¹ 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>

¹² Spent Convictions Bill 2009 (South Australia) Draft 24.9.2009 (35)

[http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_Convictions_Bill_2009_Attachment_A.pdf/\\$file/Spent_Convictions_Bill_2009_Attachment_A.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/Spent_Convictions_Bill_2009_Attachment_A.pdf/$file/Spent_Convictions_Bill_2009_Attachment_A.pdf)

This will increase the numbers of people permanently affected by their criminal record, and in many cases, the attendant experiences of exclusion from full equal and meaningful participation in the workforce.

For more information:

- **Victoria Police National Police Record Check Resources**
http://www.police.vic.gov.au/content.asp?Document_ID=274
- **Standing Committees of Attorney-General Spent Convictions Model Bill (September 2009)**
http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_model_laws
- **Australian Human Rights Commission – Discrimination in Employment on the Basis of Criminal Record** http://www.hreoc.gov.au/human_rights/criminalrecord/index.html
- **Department of Justice Victoria Equal Opportunity Act Review**
<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Equal+Opportunity/JUSTICE+-+Equal+Opportunity+Review+-+Documents>
- **Julian Gardner, An Equality Act for a Fairer Victoria – Equal Opportunity Review Final Report (June 2008) Department of Justice**
<http://www.justice.vic.gov.au/wps/wcm/connect/90008100404a4171a7d2fff5f2791d4a/Final+Version+-+Final+Report.pdf?MOD=AJPERES>
- **Fitzroy Legal Service Law Handbook ‘Criminal Record Checks’**
<http://www.lawhandbook.org.au/handbook/ch04s06s03.php>