

Information brochure: Discrimination in employment on the basis of *criminal record*

The Human Rights and Equal Opportunity Commission (the Commission) has produced this brochure for people with a criminal record who are seeking work or who are in employment.

It outlines:

- the legal protections against discrimination in employment on the basis of criminal record
- definitions of what is and isn't discrimination
- a range of options available if you think you have been discriminated against because of your criminal record
- a list of useful contacts.

What does the Human Rights and Equal Opportunity Commission Act do?

The *Human Rights and Equal Opportunity Commission Act* (the HREOC Act) provides some protection for a person who has suffered discrimination in employment or occupation on the basis of criminal record.

What is discrimination in employment and occupation under the HREOC Act?

The HREOC Act covers discrimination in employment and occupation. This includes when you have been:

- refused a job
- dismissed from employment
- denied training opportunities
- denied promotion
- subjected to less favourable working conditions
- harassed at work
- denied an employment-related licence or registration.

The HREOC Act covers discrimination by Commonwealth, state or territory public sector employers, private sector employers, employment agencies and licensing and registration organisations.

What can I do if someone discriminates against me?

If you think you have been discriminated against because of your criminal record, you can make a complaint to the Commission under the HREOC Act. The Commission will investigate your complaint and, where appropriate, try to

resolve the complaint by conciliation. Conciliation is a process where the Commission brings the two parties (in this case usually an employer and a person with a criminal record) together to try to resolve the matter. This service is free.

The President of the Commission may discontinue the complaint for a number of reasons, for example if a person's criminal record is relevant to the job.

If the President decides that it is discrimination, and the complaint cannot be conciliated, the President will then present a report to the federal Attorney-General making recommendations. However, these recommendations are not enforceable under law.

What is a criminal record under the HREOC Act?

There is no definition of what is a criminal record in the HREOC Act. However, a criminal record is not limited to what appears on your police record. It includes your convictions, charges, police investigations, spent convictions and unrecorded convictions. Not all of these will appear on your official police record.

You can also make a complaint about discrimination because of an 'imputed' criminal record. This is when an employer thinks you have a criminal record, even if you do not have one, and treats you unfairly as a result.

Can an employer refuse to employ me because of my criminal record?

Under the HREOC Act, it is *not* discrimination if your criminal record means that you are unable to perform the 'inherent requirements' of the job. This means that an employer can refuse to employ you, or can dismiss you from employment, if your criminal record is relevant to the particular job.

For example, fraud convictions may be relevant to a job in financial management.

If you make a complaint of discrimination and the employer claims that the criminal record is relevant to the job, the Commission will investigate the complaint and make a decision on whether the employer's actions are justified by the inherent requirements exception.

An example of a complaint to the Commission

Ms C applied for a job as a bartender at a casino. She declared her prior conviction for stealing two bottles of alcohol when she was 15 years old. She was refused employment on the basis that the inherent requirements of the job required her to be trustworthy and of good character.

Ms C made a complaint to the Commission. The Commission agreed with the casino that it was an inherent requirement of the job that a barperson be of good character and trustworthy. However, it disagreed with the casino that Ms

C's criminal record meant that she could not meet these requirements. It said that many factors were relevant to an assessment of Ms C's character including

- she was 15 when the conviction occurred
- the conviction was eight years old
- since her conviction she had held several jobs in the hospitality industry including as a bar manager/waitress which involved handling large amounts of money
- and she had references from some of those employers.

Because her complaint was unable to be conciliated, in 2002 the Commission made a report to the federal Attorney-General recommending that the casino apologise to Ms C and not exclude her from applying again.
(HREOC Report No.20)

Do I have to tell an employer about my criminal record?

You do not have to volunteer information about your criminal record to an employer *unless* there is a legal requirement to do so. For example, in some states it is a legal requirement that people working with children disclose their criminal record. There may be penalties for failing to volunteer your criminal record in these circumstances.

An employer should only ask you to disclose your criminal record if a criminal record is relevant to the particular job. The employer may ask you directly in an interview or job application form, or request your consent to a police check.

If an employer asks you to disclose your criminal record when you apply for a job, you should answer honestly. However, if the employer refuses you employment because of your criminal record, and you think your criminal record is irrelevant to the job, you can make a discrimination complaint to the Commission.

You may not need to disclose *all* of your criminal record when asked. If you have an old conviction which is 'spent', generally you do not need to disclose the conviction to an employer, even when asked (except for some occupations such as correctional officers). (See information on spent convictions laws below).

Can I be refused a licence or registration?

Licensing boards and registration organisations may ask you to disclose your criminal record and undertake a police check. However, they can only refuse you a licence or registration if your criminal record is relevant to the occupation. If you think you have been discriminated against by a licensing board or registration organisation, you can make a complaint to the Commission.

What other options do I have if I think I have been treated unfairly?

Explain your side of the story to the employer

Sometimes open and honest communication can help resolve misunderstandings between an employer and a person with a criminal record.

If you think you have been discriminated against by an employer or prospective employer because of your criminal record, try to explain to the employer why your criminal record is irrelevant to the job. The following information may help to persuade an employer:

- the circumstances of your offence which could count in your favour
- any indications that a court viewed the offences as relatively minor (eg. if the conviction was unrecorded)
- if the offence was a 'one-off'
- the length of time since the offence took place
- your youth or immaturity when you committed the offence
- any evidence that you have taken steps in your personal or work life to move on from your past (eg. evidence that you have accepted responsibility for your actions)
- any character references from people who are aware of your criminal record.

Seek review of the decision

In some organisations you can apply for a review of employment decisions. Licensing bodies often have a review mechanism for decisions to reject a licence application or revoke a licence.

If you think you have been unfairly refused employment in the public sector because of your criminal record you may also be able to complain to the state or Commonwealth Ombudsmen.

State and territory anti-discrimination laws

Tasmania and the Northern Territory have laws that prohibit discrimination on the basis of criminal record, which cover other areas as well as employment.

You can make a complaint to the Northern Territory Anti-Discrimination Commission or the Tasmanian Office of the Anti-Discrimination Commissioner if you live in these states. The recommendations of these Commissions are enforceable by law.

In WA and the ACT there are laws that prohibit discrimination on the basis of spent convictions. You can make a complaint to the WA Equal Opportunity Commission or the ACT Human Rights Office.

Privacy laws

There are privacy laws which cover the public sector in most states and territories which may provide you with some protection from breaches of your privacy. Private sector employers are covered by the Commonwealth *Privacy Act 1988* (Cth). Complaints can be made to the Office of the Privacy

Commissioner. The Privacy Commissioner also accepts complaints of breaches of the Commonwealth spent convictions law.

Spent convictions laws

A spent conviction is an old conviction which the law says no longer needs to be disclosed, except in special circumstances. Some laws also prohibit an employer from taking a spent conviction into account in employment decisions.

A conviction must be over ten years old in order to be spent (for an offence committed as an adult) and less for a juvenile offence (three or five years, depending on the law). You need to have committed no further offences since that time. Also, serious offences usually cannot become spent, no matter how long ago they were committed.

There are different Commonwealth, state and territory spent convictions laws, so you need to know which one applies to you. A legal service or the police service may help you find out.

If you think an employer has unlawfully taken your spent conviction into account, you can make a complaint to the body responsible in your state or territory (the police, or an equal opportunity commission (in WA or ACT) – see contacts below), or at the Commonwealth level (the Office of the Privacy Commissioner).

Industrial tribunals

If you think you have been unfairly dismissed from employment because of your criminal record, you may be able to make a complaint to state industrial tribunals or the Australian Industrial Relations Commission. However, not all employees are covered by unfair dismissal laws.

Useful contacts

Human Rights and Equal Opportunity Commission

Level 8 Piccadilly Tower
133 Castlereagh Street, Sydney NSW 2000

GPO Box 5218, Sydney NSW 2001

Telephone: (02) 9284 9600
TTY: 1800 620 241 (free call)
Complaints Info line: 1300 656 419 (local call)

Website: <http://www.humanrights.gov.au>

Complaints Information Web Pages at:
http://www.humanrights.gov.au/complaints_information/index.html

Information on criminal record discrimination can be found at:
http://www.humanrights.gov.au/human_rights/criminalrecord.

Northern Territory Anti-Discrimination Commission

Level 7 National Mutual Building
9-11 Cavenagh Street Darwin NT 0800

Telephone: (08) 8999 1444
Toll free: 1800 813 846 (Australia wide)
TTY: (08) 8999 1466
Website: <http://www.nt.gov.au/ad/>

Tasmanian Office of the Anti-Discrimination Commissioner

Level 1, 54 Victoria Street
Hobart Tasmania 7000

Telephone: (03) 6233 4841 or 1300 305 062 (Statewide local call)
TTY: (03) 6223 6234
Website: www.antidiscrimination.tas.gov.au

ACT Human Rights Office

(for discrimination on the basis of spent convictions)

Level 12, 14 Moore Street, Canberra ACT 2601
Telephone: (02) 6207 0576
TTY: (02) 6207 0525
Website: <http://www.hro.act.gov.au>

Western Australia Equal Opportunity Commission

(for discrimination on the basis of spent convictions)

Level 2,
141 St George's Terrace, Perth WA 6000
Telephone: (08) 9216 3900
Toll Free: 1800 198 149 (only within WA)
TTY: (08) 9216 3936
Website: <http://www.equalopportunity.wa.gov.au>

Office of the Privacy Commissioner

Level 8 Piccadilly Tower
133 Castlereagh Street, Sydney NSW 2000

GPO Box 5218, Sydney NSW 2001

Telephone: 1300 363 992 (local call cost from anywhere in Australia)
TTY: 1800 620 241

Website: www.privacy.gov.au

For spent convictions information, go to
<http://www.privacy.gov.au/act/convictions/index.html>.

Disclaimer: This is a guide only. You should seek independent legal advice if you have specific questions about your own case.