



**Discrimination in Employment on the Basis of Criminal Record Discussion Paper
December 2004 (submitted 3 March 2005)**

Thank you for the opportunity to comment on the Discrimination in Employment on the Basis of Criminal Record Discussion Paper -December 2004 (Discussion Paper_.

VALS supports the principle of protecting Australian citizens from discrimination in employment on the basis of criminal record. VALS has produced the following submissions that support the introduction of a spent conviction scheme as a means to attempt to eliminate discrimination in employment on the basis of criminal record:

- Submission to Department of Justice in response to 'Uniform Spent Convictions: A proposed Model Discussion Paper August 2004 (submitted 11 October 2004).
- Submission to Scrutiny of Acts and Regulations Committee in response to 'Inquiry into Discrimination in the Law' (submitted June 2004).
- Submission to Department of Justice in response to 'Working with Children Bill 2005 Discussion Paper' December 2004 (submitted March 2005).

The Extent and Nature of Discrimination in Employment on the Basis of Criminal Record

2(d) *What special difficulties face juveniles with criminal records?*

Special difficulties face juveniles with criminal records and these difficulties have led to spent conviction schemes distinguishing between juveniles and adults. For instance, in Queensland a conviction becomes spent for a juvenile after five years and a conviction becomes spent for an adult after 10 years [*Criminal Law (Rehabilitation of Offenders) Act (QLD) 1986*]. This distinction is justified because juvenile offenders are still maturing which shows they are capable of reform. Also, juvenile offenders should be given the chance to lay their past to rest and get on with their lives without further problems arising. Often if juveniles are not given this chance they become entrenched in a criminal life style and it is hard to break free from this lifestyle if it is all that you have known from an early age.

2(e) *What special difficulties face Indigenous people with criminal records?*

Indigenous Australians with criminal records face special difficulties in gaining and holding employment. VALS welcomes the acknowledgement at page 8 of the Discussion Paper that the over-representation of Indigenous Australians in the criminal justice system contributes to an over-representation of Indigenous Australians in unemployment

figures. Indigenous Australians in Victoria are twelve times more likely to come into contact with the criminal justice system. The unemployment rates in the cities of Darebin and Yarra (North) at the time of the 2001 census was 17% of Indigenous Australian people and 8.7% of non-Indigenous Australian people.¹

VALS welcomes the acknowledgment at page 7 of the Discussion Paper that many people with a criminal record also experience other social and economic disadvantages. Indigenous Australians experience extreme disadvantage and it is common for Indigenous Australians to experience layers of discrimination. Often discrimination on the basis of criminal record is accompanied by discrimination on the basis of race or social status. Many Indigenous Australians experience poverty and such poverty is criminalized, such as having failure to pay a fine recorded on their criminal record.

A problem that arises specifically in the Indigenous Australian community in relation to discrimination on the basis of criminal record is the Indigenous Australian community is denied benefits that a reformed person can provide. Indigenous Australians who have criminal records, but are reformed, face difficulty in working or volunteering in the criminal justice field. For instance, the requirement of a criminal record check acts as a barrier for reformed Indigenous Australians wishing to volunteer as Official Aboriginal Prison Visitors. It is beneficial to Indigenous Australians in prison that they are visited by other reformed Indigenous Australians that they can identify with because they share an understanding of culture and difficulties in finding the right path in life. However, the criminal record check acts as a distinct barrier to Indigenous Australians becoming volunteers as they are reluctant to undergo a check.

VALS Civil Law Solicitor is aware of the following examples of alleged discrimination in employment on the basis of criminal record towards Indigenous Australians:

- A client applying for a position with an Aboriginal organisation was refused a job because of a conviction for a driving offence (he was to be a driver of a small bus- this position required an Comprehensive Car Insurance Policy).
- A client who had a position as an Indigenous Prison Liaison Officer was sacked because of a criminal record relating back to his early childhood (he didn't disclose the minor theft conviction).
- A client was a Primary Teacher who was requested to resign because a criminal record check resulted in disclosure of a breach of a Stalking Order.
- A client applying for a position with a Government Department was refused an offer of employment because a criminal record disclosed a conviction for being drunk many years ago.

¹ Aboriginal and Torres Strait Islander Commission, 'Tumbukka Regional Plan 2004-2006'(2004) p.51

2(g) *What strategies might address ongoing stereotyping of people with criminal records in the work place?*

A possible strategy to address ongoing stereotyping of people with criminal records in the work place is to harness the influential power of the media over public opinion. Currently the manner in which law and order issues are represented in the media is encouraging discrimination against people with a criminal record and attitudinal change is required. The press often represents an unbalanced perspective on the rights of employers and people with criminal records seeking employment, which is often to the detriment of the latter, which leads to the public being misinformed. The press often represent the stance that a 'tough on crime' and punitive approach is most appropriate. The press fails to represent the opinion of people with criminal records such as the following:

- It inappropriate to treat people with a criminal record as second class citizens or deny them the chance to prove they have reformed.
- Discrimination in employment on the basis of criminal record is informally punishing people for something that they have already been formally punished for (ie: imprisonment). Such duplication of punishment is unfair as it means people with a criminal record are given a 'life sentence'.
- A tough on crime approach directed at people with criminal records places barriers in their way to contributing to society effectively and is not a smart on crime approach. For instance, a person who is unable to find employment may fall back into a cycle of crime out of lack of options or a sense of hopelessness.
- A smart of crime approach is to rehabilitate offenders rather than continually punish them.

The press should represent the above mentioned opinions of people with criminal records in the interests of objectivity. The result of this could be that:

- Australians are no longer ignorant about issues affecting Australians with a criminal record but are attuned to them.
- Attitudinal change can occur and such attitudinal change is required if current law or future reform of the law that protects people with criminal records is to be effective.
- A more equitable balance is struck between the rights of employers and people with criminal records seeking employment.

Also, the Department of Justice Sentencing Advisory Council should play more of a role in achieving the above outcomes.

The Adequacy and Effectiveness of Anti-discrimination and Other Laws to Protect Against Discrimination in Employment on the Basis of Criminal Record

3(a) Are there currently sufficient legal protections against discrimination in employment on the basis of criminal record?

There are insufficient legal protections against discrimination in employment on the basis of criminal record at both State and Federal levels. The Victorian Equal Opportunity Act 1995 fails to prohibit discrimination on the basis of criminal record. The Human Rights and Equal Opportunity Commission Act (Cth) 1986 (HREOC Act) does not provide sufficient protection for alleged victims of discrimination on the basis of criminal record when it is not possible to conciliate a dispute. If a dispute cannot be conciliated the Human Rights and Equal Opportunity Commission (HREOC) is limited in its action, and can be argued to be a toothless tiger (ie: prepare a report with unenforceable recommendations to the Attorney-General for tabling in Parliament). The Industrial Relations Act (Cth) 1988 may help fill the gaps that have been identified for people who had jobs and have been dismissed, but does not help people who have been denied a job in the first place.

Measures which may be taken to Protect People against Discrimination in Employment on the Basis of Criminal Record

3(b) If there needs to be additional protection against discrimination in employment on the basis of criminal record, what form should it take and what elements should be included?

There needs to be additional protection against discrimination in employment on the basis of criminal record and the form it should take and the elements that should be included are as follows:

- All States/Territories should have laws that specifically prohibit discrimination on the basis of criminal record, not just Tasmania and the Northern Territory (ie: amend s6 of the Equal Opportunity Act 1995 Vic). Ideally, the laws should be uniform to prevent inconsistency in the protection afforded to employees in different areas of Australia. VALS notes that there will be an increased need for such legislation in Victoria if the State Government's proposed Working with Children Check is implemented. The proposal is in Bill form and please refer to VALS submission in response to the Working with Children Bill 2005 Discussion Paper - December 2004 (submitted March 2005) for further information.
- If the proposed Working with Children Check goes ahead, the HREOC should consider the need to educate employers, potential employees and employees of their rights and responsibilities in relation to the check.

- All States/Territories should have a spent conviction scheme (Victoria currently does not have one) or a uniform spent conviction scheme should be enacted to provide consistency throughout the country.
- It should become law that convictions for certain minor crimes should not be permitted to prevent or be used to prevent a person obtaining certain employment.
- In the case of crimes relating to traffic offences the records of such offences kept by VicRoads and those recorded on a criminal record should be made consistent. At the moment every three years a driver's slate is wiped clean by VicRoads (ie: demerit points are replaced). However, a traffic offence remains on a criminal record for life. In the interests of consistency the traffic offences should be wiped from a criminal record after three years.
- The HREOC Act should be amended so that findings relating to discrimination on the basis of criminal record are enforceable via legal proceedings. There should not be a distinction between complaints of discrimination based on sex, race or disability with criminal record. However, there is a distinction which means the complainant can seek a legal remedy for discrimination in the former category only.
- An employer or potential employer should not be entitled to access a complete criminal record, but only receive part of the record that is relevant to the inherent responsibilities of a position. There is the danger that if a complete criminal record is provided that irrelevant criminal matters will prejudice the interests of the employee/potential employee. For instance, the employer will informally consider or be influenced by extraneous material on the criminal record. VALS is aware of such a situation arising in the Court system. Magistrates hearing matters for people over eighteen are not permitted to consider convictions in the Children's Court. However, as convictions in the Children's Court are recorded on the criminal record and are available to Magistrates in the Magistrates' Court in reality such Magistrates are often influenced by them in making a determination.
- On a practical level a criminal record consent form could specifically list categories of offences (ie: traffic, sexual, violent and dishonest offences etc). The person filling out the consent form will choose from the targeted categories listed, whilst taking into account the inherent responsibilities of the position. Also, by way of safeguard the consent form could include a description of the position that the criminal record is sought in regards to.
- An employee or potential employee should have the right to be given a copy of the criminal record that the employer or potential employer receives from the police. This will enable the potential employee or employee to check the accuracy of the record as it is possible for criminal records to be incorrect. Also, if a potential employee or employee has a copy of the criminal record they will be able to speak to it. Employers who are considering sacking or not employing someone on the basis of a criminal record should give them an opportunity to give a written or oral

submission. Employers should not sack or refuse to employ a person as a knee-jerk reaction without giving the employee or potential employee a chance to state their case or provide other relevant information (ie: conviction recorded many years ago and since reformed).

- An employer or potential employer should obtain a police record check within a reasonable amount of time, and if they fail to do this they waive their right to check a criminal record. For instance, a criminal record check should be completed within the common three month probation period. It is unfair to sack a person after six months of employment once a criminal record comes to light if they have proven reliable as an employee during that time.
- Employees should not have to disclose pending charges as this could prejudice their chances of employment or continued employment when the matter has not been tested in a Court of law.

Resource Pack: The Rights and Responsibilities of Employers and Employees in Relation to Employment and Criminal Records

VALS acknowledges the value of a Resource Pack that addresses the rights and responsibilities of employers and employees as an outcome of this inquiry into discrimination in employment on the basis of criminal record. However, VALS is concerned to stress that the outcome of this inquiry should go beyond simply a resource pack, but also result in the reform of the law as outlined in the above section.

The Resource Pack should contain information such as follows:

- Guidance for employers on how to determine the relevance of conviction: (ie: age of offender, length of time since the conviction, rates of recidivism for particular offences).
- Guidance for an employee as to what exactly a criminal record is. For instance, some people are unaware that traffic offences are included on their record.

Conclusion

Discrimination in employment and volunteering activities on the basis of criminal record impacts Indigenous Australians in a specific manner. For instance, the over-representation of Indigenous Australians within the criminal justice system correlates to the under-representation of Indigenous Australians in employed positions. Victorian Indigenous Australians do not receive sufficient protection from the legal system at a State or Federal level and reform is required. The perspective of people with criminal records should be more adequately portrayed in the media in an attempt to address bias against such people. The provision of a resource pack for employers and employees is only one step towards addressing discrimination on the basis of criminal record.

Thank you for the opportunity to comment on the ‘Discrimination in Employment on The Basis of Criminal Record Discussion Paper’ (December 2004). If you have any queries please contact Greta Jubb (Research Officer).

With Compliments:

Victorian Aboriginal Legal Service Co-operative Limited

Bibliography:

Aboriginal and Torres Strait Islander Commission, ‘Tumbukka Regional Plan 2004-2006’(2004)