Discrimination law: constraints on criminal record checks in recruitment

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Many employers undertake criminal record checks because they are required to under mandatory schemes which exist in many states — where, for example, the employees will be working with children. However, employers not under such obligations may decide as a discretionary matter to undertake such background checks as part of their recruitment practices. There are some legal constraints in the field of discrimination law which employers should have in mind when adopting criminal record checks as a standard practice in recruitment.

Employers who undertake criminal record checks on prospective employees and decline them employment on the basis of their criminal record may be found to have breached anti-discrimination legislation. This article addresses the anti-discrimination law in relation to this issue, discusses a recent case study, identifies the trap of unlawful indirect discrimination and examines other laws of relevance.

Statutory framework: federal and state discrimination laws

There are a number of relevant statutes which prescribe the use of criminal record checks in employment decisions. “Criminal record” is a ground of discrimination in the statutes in three jurisdictions in Australia:

- under the Anti-Discrimination Act 1998 (Tas); 2
- the Anti-Discrimination Act 1992 (NT); 3 and
- federally, under the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act) (formerly the Human Rights and Equal Opportunity Commission Act 1986 (Cth)).

The main focus of this article is the AHRC Act, given its wide coverage and that persons in Tasmania and the NT have a choice as to whether to proceed under their jurisdiction’s specific laws or under the Commonwealth Act.

Commonwealth Australian Human Rights Commission Act 1986

Coverage

In terms of workers, the AHRC Act applies to all employees as well as prospective employees, whether they are part-time or full-time, permanent or casual. In relation to employers, there are no limitations on size of business, by way of contrast to the different approaches, according to the number of employees, required in the Fair Work Act 2009 (Cth) in relation to unfair dismissal. The Act applies to:

- private sector employers, corporate or non-corporate;
- Commonwealth Government as employer;
- state and territory government employers.

Discrimination and criminal record

The AHRC Act includes discrimination on the basis of “criminal record” 4 A person may be discriminated against in employment not only where he or she is dismissed from employment for grounds in the Act, but also where he or she is denied certain opportunities during employment, such as promotion. The person does not have to be currently employed to be covered by the Act: a job applicant may be discriminated against through being denied the job on being refused employment. Thus, the Act is relevant to employers who decide to undertake criminal background checks in recruitment.

Inherent requirements of the job

A criminal record may only be taken into account where it means that a person cannot carry out the “inherent requirements” of the job. To elaborate further, it means that the criminal record must prevent that person carrying out the essential duties in the position. The employer who obtains information that the person has committed a crime in the past (and that person does not have to declare that criminal record because it was regarded as too long ago and thus “spent” under state spent conviction legislation) must not exclude the person from employment simply because of the existence of that record. Further enquiries should be made: what is the nature of the crime on the record? And, does that crime impede or affect the performance of the essential aspects of the job? For example, a driving offence would be irrelevant to the performance of a person’s role as a finance manager in an enterprise. However, conviction for assault may mean the employer needs to make more inquiries about the circumstances of the crime if the
position being sought is that of security officer, in order to ascertain whether this might prevent the person from properly carrying out essential duties of security officer.

What is a “criminal record”?

Many statutes, including the AHRC Act, do not define criminal record at all. The definition of criminal record is assumed to include the police record, but the Australian Human Rights Commission (AHRC) has interpreted it more broadly to include “the circumstances of the conviction including the underlying conduct”. More specifically, the then Human Rights and Equal Opportunity Commission President stated:

In my view, the provisions of the HREOC Act [its successor Act is the AHRC Act] should be given a liberal construction. I consider it would be unduly restrictive to define the term ‘criminal record’ as just meaning the conviction(s) as recorded. In my view, the term encompasses not only the actual record of a conviction but also the circumstances of the conviction including the underlying conduct. More recently, in its guidelines, the AHRC stated as follows:

Under the AHRC Act, there is no definition of what constitutes “criminal record”. However, it has been interpreted broadly to include not only what actually exists on a police record, but also the circumstances of the conviction.

This means that a complaint of discrimination under the AHRC Act is not limited to an allegation of discrimination based on what appears on a police record check only. A criminal record for the purposes of the AHRC Act can include charges which were not proven, investigations, findings of guilt with non-conviction and convictions which were later quashed or pardoned. It also includes imputed criminal record. For example, if a person is denied a job because the employer thinks that they have a criminal record, even if this is not the case, a person may make a complaint to the Commission.

Thus, even where an employer takes into account, in deciding not to engage that person as an employee, that the person has been charged but the charges are not proven, the employer may contravene the AHRC Act.

Complaint of discrimination on the basis of criminal record to AHRC

Persons may make complaint to the body empowered to deal with such complaints, the AHRC, and have their complaint dealt with first by means of conciliation. If there is no settlement of the matter, the AHRC may investigate the matter and make recommendations which are tabled as a report to parliament.

The AHRC performs its functions free of costs to the parties. Where it makes recommendations to the employer, the employer, it should be noted, is not under an obligation to follow the AHRC’s recommendations as they are not legally enforceable. It may be seen as responsible by an employer, though, not to depart from AHRC recommendations. The AHRC also has other roles relating to training and making recommendations to improve training of the employer.

A recent complaint investigated by AHRC is illustrative of the type of refusal to engage a person because of a past, irrelevant criminal record. The case helps us to understand the scope and application of the law in this area.

Case study of a complaint to AHRC: the Railcorp case

On 12 March 2012, the AHRC tabled its report in federal parliament arising from a complaint: Mr CG v NSW (RailCorp NSW). The report, in essence, found that Mr CG’s prospective employer, the State of NSW (RailCorp NSW) had discriminated against Mr CG when it declined to employ Mr CG on the basis that he had a criminal record.

The position Mr CG applied for in June 2009 was that of market analyst. He was short listed for the position and was the preferred candidate. However, he was not ultimately offered the position and was told that he was not offered it because of his convictions: for “middle range” driving offences in 2001 and for a “low range” drink driving offence in 2008. The employer took the view that this record meant that Mr CG could not perform the inherent requirements of the position as market analyst. It should be noted that Mr CG had been employed in another capacity with RailCorp. The offences in 2001 and 2008 were not connected with or did not occur while he was at work, and they did not seem to have an impact on or be a concern to his employment during this previous period of employment.

The AHRC (Catherine Branson QC was the Commission President) investigated Mr CG’s complaint and found:

- driving did not form part of the duties of market analyst;
- safety matters were not part of the services provided by that position to RailCorp; and
- the inherent requirements of the job did not require the applicant to have not committed previous driving offences.

Thus RailCorp was held to have discriminated against Mr CG in contravention of the AHRC Act.

The recommendations in the AHRC’s comprehensive report were that RailCorp should:

- compensate Mr CG by paying $7500 for hurt, humiliation and distress suffered by him; and
- provide training to staff involved in making employment decisions — that is, human resources and
Implications of the case

This case has provided some insights about criminal records in relation to the essential aspects of the job. It highlights that an employer engaging employees and examining a criminal record cannot have a blanket prohibition on employment for a criminal record. Further, the employer cannot simply state that a criminal record (in this case driving offences) will prevent a person performing the job — both the criminal offence on the one hand and the nature of the job and what entails on the other hand must be examined to ascertain the connection between the job and the criminal record.

The case, in addition, shows that human resources departments of even reasonably sized employers may have an imperfect understanding of when a criminal record can, or cannot, be taken into account when deciding whether to employ a person. At the end of the day, Mr CG, the prospective employee, did not succeed in obtaining employment. RailCorp declined to compensate the complainant, despite the recommendation, but indicated that it would review its policies and practices in recruitment to ensure that criminal records are not wrongly used in employment decisions in the future.

AHRC: “best practice” guidelines to assist employers

The AHRC guidelines — On the record: Guidelines for the prevention of discrimination in employment on the basis of criminal record — assist employers in navigating their way round the tricky issue of how to deal in employment with checking a criminal record.

The guidelines were first issued in 2005, were revised first in 2007 and in April 2012 further revised guidelines were issued. Given that they have been reviewed and revised over the years and therefore kept up-to-date and relevant, it is advisable for employers and their employment decision-makers and human resources departments to be familiar with these guidelines. They provide a check list of matters to consider and also assist employers with tests to evaluate whether the past record is a matter of relevance to the current job and whether it would pose any problem for the employer if the person were selected for the job. Matters of occupational health and safety, too, are addressed. As their name suggests, they are guidelines only and thus not enforceable. However, they do represent good practice in the field.

In addition to the AHRC guidelines, there is also a comprehensive discussion fleshing out the scope of the Act, the nature of criminal record and so on. The essence is contained in the AHRC’s 10 guidelines which are extracted below:

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<td>1.</td>
<td>Employers should create an environment which will encourage an open and honest exchange of criminal record information between an employer and job applicant or employee.</td>
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<td>2.</td>
<td>Employers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.</td>
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<td>3.</td>
<td>Oral and written questions during the recruitment process should not require a job applicant or employee to disclose spent convictions unless exemptions to spent conviction laws apply.</td>
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<td>4.</td>
<td>Advertisements and job information for a vacant position should clearly state whether a police check is a requirement of the position. If so, the material should also state that people with criminal records will not be automatically barred from applying (unless there is a particular requirement under law).</td>
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<td>5.</td>
<td>Criminal record checks should only be conducted with the written consent of the job applicant or current employee.</td>
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<td>6.</td>
<td>Information about a person’s criminal record should always be stored in a private and confidential manner and used only for the purpose for which it is intended.</td>
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<td>7.</td>
<td>The relevance of a job applicant’s or employee’s criminal record should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person.</td>
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<td>8.</td>
<td>If an employer takes a criminal record into account in making an employment decision, in most cases the employer should give the job applicant or employee a chance to provide further information about their criminal record including, if they wish, details of the conviction or offence, the circumstances surrounding the offence, character references or other information, before determining the appropriate outcome in each case.</td>
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<td>9.</td>
<td>If criminal record information is considered relevant, an employer should have a written policy and procedure for the employment of people with a criminal record which can be incorporated into any existing equal opportunity employment policy, covering recruitment, employment and termination.</td>
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<td>10.</td>
<td>If criminal record information is considered relevant, an employer should train all staff involved in recruitment and selection on the workplace policy and procedure when employing someone with a criminal record, including information on relevant anti-discrimination laws.</td>
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The guidelines also make it clear that it is important to avoid a “one size fits all” approach — two persons who have records for theft, for example, may have different outcomes in terms of job offers because one is able to provide character references and other relevant
information to convince the employer of his or her suitability for employment, while the other one may not be able to satisfy the employer in the same way.

**A hidden trap: unlawful indirect discrimination**

One little discussed issue is the area of indirect discrimination. Those employers who routinely take into account criminal record when making employment decisions may, unwittingly, breach the indirect discrimination provisions of the anti-discrimination legislation. This occurs when an employment condition is in place which, although on its face is neutral in the sense that it applies to all employees or prospective employees, has a greater or disproportionate effect on a particular group of people. An example which occurred in the employment context involved the High Court decision in *Australian Iron & Steel Pty Ltd v Banovic*, where the employer, which had recently engaged many female workers thereby improving the participation of women in its workforce, applied the “last on first off” rule to redundancies. This condition fell unevenly on women — it was the female workers who bore the brunt of this criterion — hence, there was indirect discrimination.

Applying this in the criminal record context, employers who require applicants to have a clean criminal record may find that it falls unevenly on particular groups of people. For example, it might fall disproportionately in effect and operation on men of a certain age group as they have been more prone to commit crimes in their youth; or it might fall adversely on indigenous workers as they generally have a higher level of crime, as reported in the statistics.

Employers may need to be aware that they are indirectly discriminating, even if on the face the condition they have put in place, that is, having a clean criminal record, applies to each and every job applicant. Thus, a seemingly neutral condition may contravene, through indirect discrimination, other prohibited grounds of discrimination in the anti-discrimination legislation, for example, sex or race.

This is neither a fanciful nor a remote possibility. This very situation recently confronted the company, Pepsi Beverages, in the US. Pepsi Beverages had a criminal background check policy which it applied to prospective employees — it would not employ applicants who had a criminal conviction or who had been arrested pending prosecution. The US Equal Employment Opportunity Commission noted that the result of this policy was that over 300 African Americans were not offered permanent employment by Pepsi. Title VII of the Civil Rights Act of 1964 was breached, as this group of prospective employees was adversely and disproportionately affected by the recruitment policy. Pepsi Beverages agreed to pay the sum of $3.13 million as compensation to this group and also undertook to train its employees in anti-discrimination law.

**Other laws relevant to criminal record checks and prospective employees**

**Fair Work Act 2009 (Cth)**

The Fair Work Act 2009 (Cth), since 1 July 2009, has proscribed adverse action in the “general protections” part of that Act. This includes discriminating against employees on grounds stated in the legislation. Although a criminal record is not included in this Act as a prohibited ground, employers applying criminal record checks may possibly contravene the Act on other prohibited grounds. For instance, if an employer refuses to engage an employee with, say, convictions arising from engaging in a political protest — for example, trespass or affray — discrimination on the prohibited ground of “political opinion” may arguably occur and the Fair Work Act be breached. Notably, if the criminal record is not relevant to employment, it might be argued that the underlying political opinion was the motivating reason or one of the reasons that the employer denied employment; alternatively, it might be quite challenging for the employer to argue that the political opinion is not such a reason for the failure to employ the person, given that there are reverse onus of proof provisions.

Of course, should an employer dismiss an employee for a recently discovered or committed conviction, that employer may breach the unfair dismissal provisions of the Fair Work Act, risking an order for reinstatement or monetary compensation, if there were no valid reason for terminating the employment.

**Past convictions and spent convictions legislation**

Spent conviction legislation protects potential employees from answering questions about their past employment record after a certain number of years since the conviction. Thus even where an employer asks about a criminal history, the employee is not obliged to disclose it — the record is treated as “spent”. The Commonwealth, all of the states except Victoria, and each territory have such legislation. The nature of the legislation, the types of convictions covered and timelines for rendering them spent vary significantly among the jurisdictions.

However, the spent conviction legislation of two jurisdictions — the ACT and WA — prohibits discrimination against job applicants in respect of certain past convictions.
Concluding suggestions

Employers should be mindful of the protection to employees and prospective employees in relation to their criminal record. Employers should consider very carefully whether they do need to check a job applicant’s criminal record and whether they are inappropriately using such checking policy as a blanket screening device in recruitment. Where there is a justifiable need to undertake background checks, the employer should have a policy which addresses recruitment needs and outlines the considerations which are relevant to be considered for employment decisions. Staff should also be trained and educated in their use.

Of importance is the need to take account of the AHRC Act and other relevant legislation which are aimed at promoting equality of opportunity for persons with a criminal record. Particular attention should be paid to the relevance of the job to the criminal record, subsequent work experience of the job applicant and character references. The applicant should be given an opportunity to explain the record.

Employers should also note that not only might there be direct discrimination unlawfully committed to exclude from employment on the basis of an irrelevant criminal record, but there might potentially be unlawful indirect discrimination where the burden of meeting the condition or requirement falls more heavily on an identifiable group of people, for example, applicants of a particular race. The AHRC has useful and extensive guidance to employers on how to treat such applications.

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Footnotes

1. The author acknowledges the helpful comments of the anonymous referee. Research for this article was supported by an Australian Research Council grant. See: www.law.monash.edu.au.
2. Anti-Discrimination Act 1998 (Tas), s 16(q).
5. Reports of inquiries into complaints of discrimination in employment on the basis of criminal record, Mr Mark Hall v NSW Thoroughbred Racing Board, HREOC Report No 19.
6. See above, n 5 at 9.2.2.
10. Above, n 7.
11. Australian Iron & Steel Pty Ltd v Ranovic (1989) 168 CLR 165; 89 ALR 1; 29 IR 398; BC8902682.
12. ABS data 2006: indigenous people are more likely to be incarcerated than those who are not indigenous — in fact the figure given shows this is 13 times more likely.
15. See article by Moira Paterson in this issue of Employment Law Bulletin.
16. Crimes Act 1914 (Cth); Criminal Records Act 1991 (NSW); Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld); Spent Convictions Act 1988 (WA); Annulled Convictions Act 2003 (Tas); Spent Convictions Act 2009 (SA); Spent Convictions Act 2000 (ACT); and Criminal Records (Spent Convictions) Act 1992 (NT).
17. Spent Convictions Act 1988 (WA) Pt 3 Div 3; Discrimination Act 1991 (ACT), s 7(1)(o), includes spent conviction under the Spent Convictions Act 2000 (ACT) as a prohibited ground of discrimination.