PUBLIC INTEREST, RECRUITING EMPLOYEES AND CRIMINAL RECORDS’ CHECKS: POLICY AND LEGISLATION

PROFESSOR MARILYN PITTARD
FACULTY OF LAW
MONASH UNIVERSITY
Criminal history, offenders and job applicants

- Recruiting tool by employers, even where no mandatory checking schemes (e.g., working with children)

- Increased requests for criminal record in Australia:
  - **CrimTrac**:
    - 2009-10: 2.7mil criminal records checks processed
    - cf 2005-6: 1.6mil
Australian data on offenders

- AHRC (2005): 30,000 adult offenders per year released from prison to community
- Most offenders are not imprisoned (approx 89% no prison sentence)
- Recent data: approx 500,000 guilty of offence (2010-11)
Fair Work Act 2009 (Cth)

- Part 3-1, General Protections
- ‘Traditional’ grounds for discrimination protected in section 351
- No inclusion of irrelevant criminal record in respect of prospective employee or employee
What do relevant discrimination laws say?

- Tasmania:  
  - *Anti-Discrimination Act 1998*

- Northern Territory:  
  - *Anti-Discrimination Act 1992*

- Prohibit discrimination on criminal record
Commonwealth: 
Australian Human Rights Act 1986

- Basis for complaint to AHRC: discrimination because of ‘criminal record’
- AHRC can investigate complaint
- Inherent requirements of the job taken into account
- No power of AHRC to make orders
- Case example: March 2012
  - Mr CG v State of NSW (Rail Corp NSW)
AHRC Guidelines: *On the Record*

- 10 guidelines
- Kept up-to-date (introduced 2005)
- Checklist of matters to consider
- Assist employers to evaluate whether a past crime is relevant to the current job
- Represent good practice
Indirect discrimination

- Neutral condition on its face – ‘clean criminal record for all job applicants’
- May operate unevenly/disproportionately on different groups
- Pepsi Cola case in the US:
  - above policy excluded approx 300 African Americans from employment
  - company paid $3.13mil compensation; training to staff
Spent Conviction Legislation

- In all States (except Victoria) and Territories
- ‘Old’ convictions are not required to be disclosed by job applicant
- Legislation varies in different jurisdictions
- ACT and Western Australia: spent conviction legislation also prohibits discrimination for certain past crimes in employment
Why do some employers check criminal records in practice?

- ARC Linkage Grant project: *Living Down the Past: Criminal Record Checks and Access to Employment for Ex-Offenders*
  
  Chief Investigators - Pittard, Naylor, Paterson and Heydon

- Employers surveyed

- Risk management issues identified
Uneven and patchy application of existing protections

Scenario 1: Victorian job applicant is unable to ‘keep quiet’ about past convictions, however old. If refused job on basis of criminal record, only redress is complaint to AHRC; no orders

Scenario 2: NSW applicant with same criminal history need not disclose certain ‘old’ offences.
Scenario 3: NT applicant with same criminal history: protected by spent conviction legislation and Territory discrimination law
Opportunity missed for *Fair Work Act* and NEW DRAFT DICRIMINATION BILL to protect for irrelevant criminal record

- But does it really matter?

- Should irrelevant criminal record be a prohibited ground of discrimination at federal level?
MAKING DISCRIMINATION ON GROUND OF IRRELEVANT CRIMINAL RECORD UNLAWFUL

- Examine relevant interests - the ‘public interest’:
  - Ex-offender job applicant
  - Employer
  - Society and job applicant’s family
Ex-offender job applicant

- Rehabilitation
- Double punishment
- Risk of re-offending
- Impact on family
- Unfairness
- Self exclusion from seeking employment because application requires check/record question
- Accuracy of criminal record
Employer

- Reduces labour shortages
- Unnecessarily excluding qualified applicants
- Socially responsible
- Equity issues
Society

- Social inclusion barriers
- Costs in re-offending (of person not rehabilitated through employment)
- Fairness issues: including state punishment (charge proved; punishment given) being supplemented by exclusion from workforce (‘private’ punishment?)
International Standards

- ILO Convention
  Discrimination (Employment and Occupation) Convention 1958 (No 111)

- Experience and practice of other countries