

Workplace Discrimination & Criminal Records

Discrimination generally occurs when a person is treated less favourably because of a particular characteristic. Anti-discrimination provisions regarding discrimination in employment on the basis of criminal record are found in Australia's international, Federal, and some State and Territory laws.

What is the Federal discrimination legislation in Australia?

This is covered under the Australian Human Rights Commission Act ("AHRC Act"). The AHRC Act provides a general exception to discrimination in employment, known as the "inherent requirements" exception. The Act does not define what is meant by "inherent requirements", however it is generally understood that there is no discrimination if an applicant does not get a job or promotion because they cannot fulfil the essential aspects of a particular job.

Can an employer discriminate against a job applicant or employee based on their criminal record in Australia?

No, an employer cannot discriminate against a job applicant or employee based solely on their criminal record. The Australian Human Rights Commission (AHRC) Act states that it is unlawful for employers to discriminate against someone based on their criminal record, unless the criminal history is relevant to the particular job or industry. For example, if someone is applying for a job in aged care or childcare, then a criminal history involving violence or abuse would be considered relevant to the job and may be taken into account.

What are the legal implications for employers who discriminate against job applicants or employees based on their criminal record?

Employers who discriminate against job applicants or employees based on their criminal record may face legal action. The Australian Human Rights Commission can investigate complaints of discrimination and, if a complaint is upheld, may order the employer to pay compensation or take other corrective measures. In addition, state and territory anti-discrimination laws may also apply, and employers who breach these laws may face fines and other penalties.

Can employers request a criminal record check?

Yes, if they have the consent of the person. The information that may be disclosed in a criminal record check will vary from jurisdiction to jurisdiction and from case to case depending on the purpose of the check, the agency requesting it, the types of offences, the spent conviction legislation and the required level of disclosure in the relevant legislation. A spent conviction is a conviction that is 10 years from the date of the conviction and the individual was not sentenced to imprisonment for more than 30 months and the individual has not re-offended during the 10-year waiting period.

Spent conviction legislation allows the criminal records of offenders to be amended by removing some offences after a certain period of time. The idea behind spent convictions schemes is to allow former offenders to 'wipe the slate clean' after a certain period of time, depending on the offence. In Australia, a Commonwealth spending convictions scheme was introduced in 1990. Spent conviction legislation also exists in all States and Territories.

What steps can employers take to ensure they are not discriminating against job applicants or employees based on their criminal record?

Employers should have a clear policy on how they will consider criminal history when making hiring decisions. This policy should be based on the job requirements and industry standards, and not on assumptions or stereotypes about people with criminal records.

What steps can employers take to ensure they are not discriminating against job applicants or employees based on their criminal record?

Employers should also ensure that their hiring process is fair and transparent, and that they do not ask job applicants about their criminal history unless it is relevant to the job. If an employer does ask about criminal history, they should give the job applicant an opportunity to explain their situation and how it may or may not be relevant to the job.

When might a criminal record be relevant to employment?

To avoid discrimination on the basis of a criminal record, an employer can only refuse to employ a person if the person's criminal record means that he or she is unable to perform the inherent requirements of the particular job.

However, there can be difficulties in determining what the inherent requirements of a particular job are, and whether a person's particular criminal record will necessarily disqualify him or her from satisfying those requirements.

In any event, it is important to keep in mind that no matter what the inherent requirements of a position are, and no matter what a person's criminal record, each person's ability to fulfil those requirements should be assessed on a case-by-case basis to avoid discrimination.

How Do You Determine The “Inherent Requirements” Of A Particular Job?

Since each job and each person's criminal record is different, there is no steadfast rule in determining the “inherent requirements” of a particular job. While the case law does not reveal any simple test, the following principles appear to represent the current state of the law:

An “inherent requirement” is something that is “essential” to the position rather than incidental, peripheral or accidental;

The burden is on the employer to identify the “inherent requirements” of the particular position and consider their application to the specific employee before the “inherent requirements exception” may be invoked;

The “inherent requirements” should be determined by reference to the specific job that the employee is being asked to do and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted; and

There must be a “tight correlation” between the “inherent requirements” of the particular job and an individual's criminal record. There must be more than a “logical link” between the job and a criminal record.



What is the approach to criminal checks for people working with children?

All jurisdictions in Australia have made a policy decision that the protection of children is so important that the criminal records of persons working with children should be closely scrutinised.

There are different approaches in each jurisdiction to criminal record checks for people working with children. In some States there are legislative requirements for criminal record checks and in other States there are policy guidelines recommending such checks.

When examining a person's criminal record for a position in which they will be working with children, one of the overriding factors is to ensure that the safety and well-being of children is protected. In this circumstance, it could be said that an "inherent requirement" of the job is that the individual can be trusted to work with children, and this may be a high threshold to meet.

However, as discussed previously, another important principle is to ensure that a person's ability to fulfil the inherent requirements be assessed on a case-by-case basis. So, while a certain type of criminal record may weigh heavily against a person's suitability to work with children, the inherent requirements principle still requires an assessment of a person's individual circumstances to be weighed against the particular job being performed.

What is the law for Persons Applying For Licence Or Registration In Certain Occupations?

There are a number of professions and trades which seek to restrict the participation of people with a criminal record or, at the very least, examine a person's criminal record prior to their admission, registration or licensing. This can include liquor sellers and solicitors.

Where there are "good character" requirements, the case law states that the mere fact of a criminal record does not determine a person's character and that the passage of time can heal past wrongdoing.

It is important to note, however, that just because there are rules requiring a criminal record to be examined prior to licensing, it does not mean that every person with a criminal record will, or ought to be, excluded. There still needs to be a clear connection between the individual's criminal record and the licensing or registration requirements.

This does not necessarily prevent a licensing body from developing criteria concerning the admission of people with certain criminal records. However, licensing rules and regulations ought to ensure that there is an opportunity for individuals to state their case.

Do Employees Have To Voluntarily Disclose A Criminal Record?

There is no universal duty on a prospective employee to volunteer anything about his or her prior record, even if those facts are likely to affect the employer's willingness to employ him or her.

In some cases, however, legislation and registration or licensing rules require disclosure. In other cases, the specific circumstances of the position may require disclosure.

Do Employees Or Job Applicants Have To Disclose Their Criminal Record When Asked?

Where there is a clear legal requirement that an employee should not have a criminal record, or that they should be of good character, generally speaking employers should ensure that they ask the employee about his or her criminal record or obtain consent for a criminal record check.

Even where there is no external obligation on an employer to inquire about a person's criminal record, the employer can still ask a person if he or she has a criminal record. It is best practice, however, to only ask about a criminal record where there is some connection between the requirements of the particular job and the criminal record, to minimise risk of discrimination where an applicant is denied employment on overall suitability.

While there is no absolute obligation to answer an appropriate question about a criminal record, an employer may be entitled to refuse to hire a person on the basis of failure to answer a reasonable question. When an employee does answer a question about a criminal record, the response should be honest and fully candid.

Do Employees Or Job Applicants Have To Disclose Their Criminal Record When Asked? What is the impact of making decisions about actual or prospective employees based on a criminal record?

Once an employer has gathered information about a person's criminal history, he or she will engage in a process of making decisions on the basis of that information. The kind of process used may have an impact on whether or not there is discrimination.

The procedures for reviewing and considering criminal records are likely to be very clear in the case of mandatory legislative checks. Some agencies have also developed policies that set out selection procedures for job applicants, the requirements regarding criminal record checks and the criteria used to assess the relevance of those criminal records checks.

Do Employees Or Job Applicants Have To Disclose Their Criminal Record When Asked? What is the impact of making decisions about actual or prospective employees based on a criminal record?

Whether a criminal record is a relevant consideration in making a decision about a particular job is often a difficult question. An unclear process for considering the issue can make the task much more challenging. It can also increase the risk of discrimination because it reduces the likelihood that careful consideration has been put into whether a criminal record is truly relevant to the job.

When assessing the application of a person with a criminal record, questions an employer may need to address might include:

- Has the applicant or employee been informed about the possible relevance of a criminal record?
- Do we have clear procedures for making decisions about applicants with a criminal record? For example, who makes the decision and when is it made?
- Does the applicant or employee's specific criminal record mean that he or she cannot fulfil the inherent requirements of the particular job?
- Has the applicant or employee been given the opportunity to explain the circumstances surrounding any criminal record?
- Is there an avenue for the employee to appeal the decision?

It is also important to ensure that the process is transparent and provides an individual with procedural fairness. One important issue to keep in mind is that different jobs will have different requirements, even when they are in the same industry. This means that where there are positions for which a certain criminal record may be irrelevant, a blanket policy of criminal record checks across the industry may be inappropriate and increase the risk of discrimination.

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