

REFORMING CRIMINAL CONVICTION DISCRIMINATION IN QUEENSLAND

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This report was researched and authored by UQ law students **Charlotte Linklater-Steele, Emitis Morsali, Archer Sullivan and Hannah Woodfield**. This report was prepared for and on behalf of HUB Community Legal Centre. Student researchers undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.

The UQ Pro Bono Centre and student researchers thank HUB Community Legal Centre for allowing us to contribute to its vital work.

About this Document

This document is intended to provide research, information and law reform recommendations for HUB Community Legal Centre to use in its advocacy and policy work.



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1. Executive Summary

In May 2021, the Attorney-General asked the Queensland Human Rights Commission to undertake a review of the *Anti-Discrimination Act 1991* (Qld) and consider whether section 7 of the *Anti-Discrimination Act 1991* (Qld) should be reformed to include irrelevant criminal record discrimination as a protected attribute. The research group's task was to undertake research on how discrimination based on a person's criminal record could be appropriately introduced into s 7 as an attribute, similarly to existing attributes such as race and sex. In undertaking this task, the research group conducted a literature review of relevant academic material on irrelevant criminal record discrimination and researched existing criminal record discrimination provisions in other Australian jurisdictions and their application in practice. The group found that irrelevant criminal record discrimination is not currently a protected attribute in Queensland, New South Wales, Western Australia and Victoria; whereas, it is a protected attribute in the Northern Territory, Tasmania, the Australian Capital Territory and under Commonwealth law. Additionally, the group found that the Federal legislation is a "toothless tiger" in terms of the inherent requirement exception and because there is currently no avenue to pursue this matter in the federal courts. The group concluded that making discrimination based on a person's criminal record a protected attribute across all Australian jurisdictions is an important step towards securing equal employment opportunities and prospects for people with a criminal record. The Queensland Government has taken many strides in the area of human rights, and irrelevant criminal record discrimination is an area which is live with potential for reform. There is momentum for change which has been seen across other jurisdictions. The group, therefore, welcomes the amendment of s 7 of the *Anti-Discrimination Act 1991* (Qld) to include 'irrelevant criminal record' as a protected attribute.

2. Methodology

The research group's objective was to investigate the effectiveness of and summarise the current legislation on irrelevant criminal record discrimination in all Australian jurisdictions. The Australian Capital Territory, Northern Territory, Tasmania and the Commonwealth were identified as jurisdictions with irrelevant criminal record as a ground for discrimination under their anti-discrimination legislation. The research group contacted the relevant commissions of these jurisdictions to obtain reports, tribunal and conciliation decisions and statistical data on the use of the irrelevant criminal record provisions. The information provided by the commissions and the research conducted by the group was used to inform the legislative overview and statistical analysis of this report.

3. Literature Review

The process of criminal record checks has become a routine and almost ingrained part of the employment process. While an employer's concern about a candidate's criminal history stems from valid concerns, it has evolved into a source of discrimination and prejudice for some applicants. There is an overwhelming body of literature that indicates that a recorded criminal history should not constitute a barrier to successful employment. This review will examine factors which have contributed to the prominence of criminal record checks, whilst also exploring arguments as to why they are not justifiable motivation for denying employment in certain circumstances. This will be done through an examination of Federal and State law, and an examination of the implications of refusing employment due to past criminal convictions.

Naylor (2012) found that criminal record checks have been increasingly used by employers since the 1990s, with Australia alone conducting an estimated 2.7 million criminal record checks between 2009 and 2010.¹ This can be attributed to increased access to authorised and unauthorised databases, making it easier for

¹ Bronwyn Naylor, 'Living Down the Past: Why a Criminal Record Should Not Be a Barrier to Successful Employment' [2012] (November/December) *Employment Law Bulletin* 115, 115.

employers to gain information about a person's prior criminal history.² This is coupled with an increasing concern about previously hidden criminal offences, most prominently predatory sexual behaviours towards children and young people in institutions, such as churches and schools.³ This, amongst other factors, has resulted in a rise of not only moral fear, but also fear of litigation.⁴ This fear has been exacerbated by widespread media reporting, leading employers to undertake criminal record checks even where there is no legal requirement.⁵

It is important to note that criminal records do not only contain information regarding prior criminal convictions, but all other information pertaining to past criminal history.⁶ This may include court appearances, bonds and findings of guilt where a conviction was not recorded, matters awaiting hearing, and traffic infringements.⁷ Whether an employer has access to this information is dependent on jurisdiction, in particular the operation of 'spent conviction' schemes.⁸

Under the Federal jurisdiction, discrimination is regulated by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).⁹ In regard to employment, the statute defines discrimination as:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.¹⁰

However, the statute goes on to state that 'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed discrimination'.¹¹ This has been interpreted to mean that an employer may discriminate against an applicant if their past criminal history would interfere with the essential duties of the sought position.¹² As a result, an examination of various factors, including the nature of the offence committed is necessary for the principle under the statute to be enlivened.¹³

Despite the existing frameworks, Ash and Grellman (2019) have found that the AHRC Act provides a weak solution to the issue in State and Territory jurisdictions without provisions prohibiting discrimination based on irrelevant criminal record. This is because State and Territory anti-discrimination provisions offer a greater range of remedies to complainants.¹⁴ In reaching this conclusion, Ash and Grellman considered two case studies, namely *Ms Jessica Smith v Redflex Traffic Systems Pty Ltd* and *BE v Suncorp Group Ltd*.¹⁵ These cases demonstrate that even in instances where employers have been found to have unfairly discriminated against candidates, the Australian Human Rights Commission (AHRC) can only make suggestions, which employers can opt to accept or reject.¹⁶ *BE v Suncorp Group Ltd* is particularly effective in demonstrating the inadequacy of the framework, as although the defendants were found to have discriminated against the plaintiff, the defendants suffered virtually no repercussions.¹⁷

There are currently only three Australian jurisdictions that have legislated provisions regarding employment discrimination based on prior criminal history.¹⁸ These jurisdictions are Tasmania, the Northern Territory and

² Naylor (n 1).

³ Ibid.

⁴ Bronwyn Naylor, 'Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia' (2005) 30(4) *Alternative Law Journal* 174, 175.

⁵ Naylor (n 1) 115.

⁶ Naylor (n 4) 176.

⁷ Ibid.

⁸ Ibid.

⁹ Marilyn Pittard, 'Discrimination Law: Constraint on Criminal Record Checks in Recruitment' [2012] (November/December) *Employment Law Bulletin* 124, 124.

¹⁰ *Australian Human Rights Commission Act 1986* (Cth), sch 1 art 1(a) ('AHRC Act').

¹¹ Ibid sch 1 art 2.

¹² Pittard (n 9) 124.

¹³ Ibid.

¹⁴ Abraham Ash and Timothy Grellman, 'When Can an Employer Refuse to Employ a Potential Employee Because of their Criminal Record?' [2019] (June) *Employment Law Bulletin* 14, 14.

¹⁵ [2018] AusHRC 125 ('*Jessica Smith v Redflex*'); [2018] AusHRC 121 ('*BE v Suncorp Group Ltd*').

¹⁶ Ash and Grellman (n 14) 15.

¹⁷ Ibid 16.

¹⁸ Pittard (n 9) 124.

the Australian Capital Territory.¹⁹ In Tasmania, s 16(q) of the *Anti-Discrimination Act 1998* (Tas) prohibits discrimination against another based on an “irrelevant criminal record”.²⁰ *The Anti-Discrimination Act 1992* (NT) and the Australian Capital Territory have similar provisions.²¹

Naylor (2012) asserts there is not enough valid data to justify exclusion based on a prior criminal record.²² On the contrary, studies show that potentially ‘excellent’ staff are being lost to the emphasis on prior criminal history.²³ This is significant when one considers that an estimated one in six Australians have a criminal record.²⁴ Research conducted in the United Kingdom also indicated that employers’ concerns that ex-offenders would lack reliability and honesty was refuted in practice.²⁵ Naylor (2005) also emphasises that discrimination based on prior criminal history is not only destroying opportunities for employers and employees alike, but it is also harming society on a larger scale.²⁶ This is due to the fact that, without re-employment and re-integration, there are no substantially effective tools in preventing criminal recidivism.²⁷ Bradfield (2015) notes that mechanisms already in place to prevent recidivism, such as judicial discretion not to record a conviction, have not been as efficient as initially anticipated where employers are able to access wider information about a person’s criminal record, such as whether they were charged with a criminal offence.²⁸

Westrope (2018) suggests that the only universal and successful remedy to this issue is an explicit statutory ban on discrimination regarding prior criminal history.²⁹ Westrope’s recommendation is akin to creating a presumption that all criminal history discrimination is prohibited. This would in turn shift the onus onto employers/potential discriminators to have ready a defence that they have considered the job and the inherent requirements of the position, similar to the federal system, which would be good if it had teeth. For the provision to be effective, it is suggested that consideration be given to the particular jurisdiction’s Fair Work Commission, whilst also requiring employers to list disqualifying offences immediately.³⁰ It must also place a time limit past which employers cannot legally consider old offences.³¹ As this new statute would not rely on discretion, applicants would also be able to openly discuss their criminal history without fear of negative consequences.³²

Applicants with prior criminal convictions are being unnecessarily discriminated against. This is in large part due to the lack of an adequate protective mechanism. This leaves ex-offenders vulnerable to recidivism as well as lower qualities of life, not only due to the lack of a stable income but also the lack of connection to society. As a result, more Australian jurisdictions have been urged by scholars to introduce provisions regarding employment discrimination based on prior history into their anti-discrimination legislation.

4. Statutory Framework of Criminal Record Discrimination in Australian Jurisdictions

4.1 Overview of State and Territory Legislation

At the State and Territory level, irrelevant criminal record discrimination is a protected attribute in the Northern Territory, Tasmania and the Australian Capital Territory. In Queensland, New South Wales, South Australia,

¹⁹ Ibid.

²⁰ *Anti-Discrimination Act 1998* (Tas) s 16(q) (*‘ADA Act Tas’*).

²¹ *Anti-Discrimination Act 1992* (NT) s 19(1)(q) (*‘ADA Act NT’*).

²² Naylor (n 1) 116.

²³ Ibid 117.

²⁴ Rebecca Bradfield, ‘Sentences Without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment’ (2015) 41(1) *Monash University Law Review* 40, 41.

²⁵ Ibid.

²⁶ Naylor (n 4) 174.

²⁷ Naylor (n 4) 174.

²⁸ Bradfield (n 24) 40.

²⁹ Elizabeth Westrope, ‘Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy’ (2018) *Journal of Criminal Law and Criminology* 367, 388.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

Western Australia and Victoria, irrelevant criminal record discrimination is not a protected attribute. Discrimination on the ground of a spent or expunged historical homosexual offence conviction is a protected attribute in Western Australia and Victoria. However, all Australian jurisdictions have enacted laws allowing certain criminal convictions to become spent after a period of time to prevent discrimination based on prior convictions. At the federal level, a person may complain about discrimination in employment on the ground of an irrelevant criminal record under the AHRC Act.

4.1.1 Tasmania

4.1.1.1 Irrelevant Criminal Record

Section 16(q) of the *Anti-Discrimination Act 1998* (Tas) makes it unlawful in Tasmania to discriminate against another person on the ground of the attribute of an irrelevant criminal record. Section 3 of the Act sets out the meaning of an 'irrelevant criminal record' as 'a record relating to arrest, interrogation, or criminal proceedings' in a number of circumstances, including where a charge was not laid³³ or was dismissed,³⁴ the person was found not guilty,³⁵ or the person's charge or conviction was expunged under the *Expungement of Historical Offences Act 2017* (Tas).³⁶

A record where the circumstances relating to the offence for which the person was convicted are 'not directly relevant to' the situation in which the discrimination arises is also irrelevant.³⁷ While the legislation fails to elaborate further on the meaning of 'directly relevant', the Anti-Discrimination Commissioner has provided illustrative examples. For example:

Jeremy is refused employment as an administration officer because he has a conviction for drink driving. Since the offence is not directly related to the job he applied for and he would not be required to drive for work ... [this is] discrimination on the basis of irrelevant criminal record.³⁸

4.1.1.2 Direct and Indirect Discrimination

Direct and indirect discrimination on the ground of an irrelevant criminal record is prohibited under the *Anti-Discrimination Act 1988* (Tas). Direct discrimination arises if a person treats another person on the basis of the attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.³⁹ It need not be the sole or dominant ground for unfavourable treatment that the person who discriminates regards the treatment as unfavourable, or that the person who discriminates has a particular motive in discriminating, to amount to direct discrimination.⁴⁰ Meanwhile, indirect discrimination arises if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who share, or are believed to share, a prescribed attribute or any characteristics imputed to it.⁴¹ That the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people is not required to establish indirect discrimination.⁴²

4.1.1.3 Exceptions

Notably (and similarly to the Northern Territory's legislation), the Act exempts discrimination on the ground in relation to education, training, or care of children where it is reasonably necessary to protect the physical, psychological, or emotional well-being of children.⁴³

³³ *ADA Act Tas* (n 20) s 3(b).

³⁴ *Ibid* s 3(c).

³⁵ *ADA Act Tas* (n 20) s 3(f).

³⁶ *Ibid* s 3 (j).

³⁷ *Ibid* s 3(i).

³⁸ Office of the Anti-Discrimination Commissioner, 'Irrelevant Criminal Record Discrimination', *Equal Opportunity Tasmania* (Web Page, 2021) <https://equalopportunity.tas.gov.au/html_version/irrelevant_criminal_record>.

³⁹ *ADA Act Tas* (n 20) s 14(2).

⁴⁰ *Ibid* s 14(3).

⁴¹ *Ibid* s 15(1).

⁴² *Ibid* s 15(2).

⁴³ *ADA Act Tas* (n 20) s 50.

4.1.1.4 Complaints Process and Remedies

In Tasmania, a complaint about discrimination in employment on the ground of an irrelevant criminal record may be brought by the person or member of a class of persons whom alleged similar discrimination, a trade union that represents that person or member, an organisation against which alleged discrimination was directed, as well as an agent or person on behalf of the person allegedly discriminated against.⁴⁴ The Commission may investigate the complaint⁴⁵ and dismiss it, or proceed to conciliation or an inquiry.⁴⁶ If a finding of discrimination is made, a variety of legal remedies are available, including the Tribunal ordering an employer not to repeat or continue the prohibited conduct, or to pay compensation or take specific action, such as re-employing the person.⁴⁷ This avenue is consistently relied upon by people in Tasmania as opposed to the federal complaints mechanism, with 8, 15, 8 and 9 complaints being made respectively in the years from 2016 to 2019.

4.1.2 Western Australia

An 'irrelevant criminal record' is not an attribute for which people are protected from discrimination in employment under Western Australia's *Equal Opportunity Act 1984* (WA). However, discrimination on the basis of having a spent conviction is prohibited under the *Spent Convictions Act 1988* (WA).⁴⁸ In Western Australia, a spent conviction is a criminal conviction which has been declared by a District Court judge,⁴⁹ or for which a certificate has been issued by the Commissioner of Police,⁵⁰ after a certain period of time (typically 10 years) has lapsed,⁵¹ or has become spent in another specified jurisdiction.⁵²

This is exemplified in the recent case of *AA v RR*,⁵³ where the complainant ('AA') worked as an office cleaner for employer RR for a several years, and RR disengaged AA's services after being informed that AA had spent convictions relating to drug possession offences. The Tribunal found that AA's complaint of discrimination was substantiated under the Act and RR was ordered to pay damages by way of compensation for loss and damages suffered.

Job applicants and employees, commission agents, contract workers, applicants, or members of professional or trade organisations, persons applying to qualifying authorities and persons seeking the services of employment agencies are protected from discrimination on this ground.⁵⁴ However, there are several exceptions to the prohibition set out in Schedule 3 of the Act.

Where it is alleged that a person has been discriminated against on the basis of having a spent conviction, a complaint may be lodged under section 83(1) or (2) of the *Equal Opportunity Act 1984* (WA).⁵⁵ Under the Act, the Commissioner for Equal Opportunity has the power to investigate complaints,⁵⁶ and the complainant may have access to remedies under the Act.

Equally, discrimination on the basis of having an expunged homosexual conviction is prohibited under section 17 of the *Historical Homosexual Convictions Expungement Act 2018* (WA). Similarly, discrimination in the workforce on the ground of publication of relevant details on the Fines Enforcement Registrar's website is unlawful under the *Equal Opportunity Act 1984* (WA). 'Relevant details' are defined under section 56C of the *Fines, Penalties, and Infringement Notices Enforcement Act 1994* (WA) and include an individual's name and

⁴⁴ Ibid s 60.

⁴⁵ Ibid s 69.

⁴⁶ Ibid s 71.

⁴⁷ Ibid s 89.

⁴⁸ *Spent Convictions Act 1988* (WA) ss 17-24 ('*Spent Convictions Act WA*').

⁴⁹ Ibid ss 6, 9.

⁵⁰ Ibid ss 7, 10.

⁵¹ Ibid s 11.

⁵² Ibid s 8.

⁵³ [2019] WASAT 141.

⁵⁴ *Spent Convictions Act WA* (n 48) ss 17-24.

⁵⁵ Ibid s 24.

⁵⁶ *Equal Opportunity Act 1984* (WA) s 80 ('*Equal Opportunity Act WA*').

address. General exceptions to the provision are listed under Part VI of the Act. On both bases, a complaint may be brought under the *Equal Opportunity Act 1984* (WA). If a finding of discrimination is made, the Tribunal may order the wrongdoing party to stop what they are doing or to do it again, to pay compensation, or to do something to remedy the discrimination.⁵⁷

4.1.3 Victoria

Similarly to Western Australia, 'irrelevant criminal record' is not an attribute for which people are protected from discrimination in the context of employment under Victorian law. However, direct or indirect discrimination⁵⁸ on the basis of an expunged historical homosexual offence conviction is unlawful under section 6(pa) of the *Equal Opportunity Act 2010* (Vic). In Victoria, an 'expunged homosexual conviction' means an expunged conviction within the meaning of Pt 8 of the *Sentencing Act 1991* (Vic). However, the Act contains a number of exceptions in relation to discrimination by an employer against an employee or independent contractor, including political employment and the care of children.⁵⁹

In 2017, there was no law in Victoria with respect to criminal discrimination or even spent convictions, setting Victoria behind other Australian jurisdictions. Consequently, these two areas were made the focus of the Criminal Innovative Justice and Woor-Dungin Reform Project.⁶⁰ Spent conviction legislation was the first area to be reformed: the *Spent Convictions Act 2021* (Vic) passed on 18 March 2021 and came into force in December 2021. The Act will see the *Equal Opportunity Act 2010* (Vic) amended to protect spent convictions as an attribute from discrimination. The meaning of a 'spent conviction', and the Act itself, aligns with other State legislation and should reduce barriers placed on people who have a criminal record seeking employment. For example, an employer can currently lawfully discriminate against an applicant who committed an offence when they were under 15 years old. The *Spent Convictions Act 2021* will automatically render such convictions "spent" and will prohibit employers from discriminating against job applicants on this basis.

4.1.4 South Australia

Although South Australia was one of the first Australian jurisdictions to implement legislation regarding spent convictions, it is one of the few jurisdictions not to have any specific discrimination legislation making it unlawful to discriminate against a person on the grounds of a spent conviction. Notably, there is also no legislation prohibiting discrimination in employment on the basis of an expunged historical homosexual offence conviction or irrelevant criminal record. Thus, a person who alleges discrimination on any of these grounds must bring a complaint under Commonwealth law.

4.1.5 Northern Territory

4.1.5.1 Irrelevant Criminal Record

The *Anti-Discrimination Act 1991* (NT) prohibits discrimination against another person based on certain protected attributes.⁶¹ Irrelevant criminal record is a protected attribute that is defined broadly to include spent records,⁶² expunged records,⁶³ and records relating to arrest, interrogation, or criminal proceedings in circumstances such as where the person was found not guilty, no charges were laid or where the prosecution was withdrawn.⁶⁴ Where a finding of guilt has been made against a person that has not been spent or

⁵⁷ *Equal Opportunity Act WA* (n 56) s 127.

⁵⁸ *Equal Opportunity Act 2010* (Vic) ss 7-9.

⁵⁹ *Ibid* Part 4, Part 5.

⁶⁰ 'RMIT - Centre for Innovative Justice', *Criminal Record Discrimination Project* (Web Page) <<https://cij.org.au/research-projects/criminal-record-discrimination-project/>>.

⁶¹ *ADA NT* (n 21) s 19.

⁶² *Criminal Records (Spent Convictions) Act 1992* (NT) ('*Spent Convictions Act NT*').

⁶³ *Expungement of Historical Homosexual Offence Records Act 2018* (NT).

⁶⁴ *ADA Act NT* (n 21) s 4.

expunged, discrimination is precluded where the finding of guilt is not directly relevant to the situation in which the discrimination arises.⁶⁵

4.1.5.2 Direct and Indirect Discrimination

Discrimination based on a person's irrelevant criminal record may be direct.⁶⁶ Direct discrimination based on a person's irrelevant criminal record may be made out where the complainant can show that they were treated less favourably because of their criminal record.⁶⁷ Indirect discrimination occurs where an unreasonable condition is imposed that places a person or group with an attribute at a disadvantage. Discrimination law in the Northern Territory does not specifically cover indirect discrimination. A person would still be eligible on grounds of indirect discrimination under Commonwealth law, however, as noted, this process offers different outcomes for the complainant.

4.1.5.3 Exceptions for Discrimination relating to Work

There are two relevant exemptions that permit discrimination relating to employment against a person based on a criminal record.⁶⁸ Generally, an employer may exclude a person from participating in an area of work where it is deemed that the discrimination is based on the person's inability to perform the inherent requirements of the work.⁶⁹ This would require the employer to establish that that the person's criminal record is directly relevant to the inherent requirements of a particular area of work.⁷⁰ Discrimination is also permitted based on a person's criminal record where the work involves the care, instruction, or supervision of vulnerable persons.⁷¹

4.1.5.4 Exceptions

Furthermore, an organisation can apply for an exemption from the *Anti-Discrimination Act 1991* (NT). This exemption is granted by the Commissioner, having regard to the desirability of certain discriminatory conduct being permitted to redress the effect of past discrimination and any other factor that the Commissioner considers relevant.⁷² The Commissioner may grant an exemption for a period of up to three years.⁷³

Religious educational institutions may also discriminate against an applicant where the discrimination is on the grounds of religious belief or activity or sexuality and this is in good faith to avoid offending their religious beliefs.⁷⁴ Additionally, the *Anti-Discrimination Act 1991* (NT) does not apply generally in relation to religious bodies.⁷⁵

4.1.5.5 Complaints Process

A complaint may be made to the Anti-Discrimination Commission (ADC) about discrimination or prohibited conduct.⁷⁶ The Commissioner will ask the parties to complete compulsory conciliation.⁷⁷

If a particular complaint is not resolved by the conciliation process, the complainant can request that the matter is elevated. The Commissioner evaluates whether there is merit to refer the case to the Northern Territory Civil

⁶⁵ *ADA Act NT* (n 21) s 4(ix).

⁶⁶ *Ibid* s 20.

⁶⁷ *Ibid* s 19.

⁶⁸ *Ibid* Division 3.

⁶⁹ *Ibid* s 35(b)(ii).

⁷⁰ *Ibid* s 4.

⁷¹ *ADA Act NT* (n 21) s 37.

⁷² *Ibid* s 59(3).

⁷³ *Ibid* s 59(5).

⁷⁴ *Ibid* s 37A.

⁷⁵ *Ibid* s 51.

⁷⁶ *Ibid* s 78.

⁷⁷ *Ibid* s 79.

and Administrative Tribunal (NTCAT).⁷⁸ If the Commissioner declines to refer the matter, the complainant can apply directly to the NTCAT.⁷⁹

4.1.5.6 Remedies

The *Anti-Discrimination Act 1991* (NT) provides a broad range of legal remedies where a finding of discrimination is made by a Tribunal.⁸⁰ The Tribunal may order an individual not to repeat or continue the prohibited conduct, and/or to pay the complainant or another person compensation for the damage caused by the prohibited conduct. The Tribunal may also order the respondent to undertake a specific action, such as employing, reinstating or re-employing the person, promoting the person, or moving the person to a particular position.⁸¹

4.1.5.7 Requesting a Criminal Record from Persons

If there is a legal requirement that an employee does not have a criminal record or that the person is of good character, then employers should obtain the applicant's criminal record or consent to conduct a criminal record check. In *Hosking v Fraser Central Recruiting*, the Northern Territory Anti-Discrimination Commission found that an employment agency should not have sought criminal record information from all applicants for a nursing position because it was not relevant to the inherent requirements of the position.⁸² Ms Hosking was a registered nurse who was applying for the position through an employment agency. Ms Hosking refused to consent to a criminal record check even though she had no criminal record. The Northern Territory Anti-Discrimination Commission found that the requirements of performing the duties of a nursing position were not directly relevant to having a clear criminal record. On this basis, a policy requiring applicants to consent to a criminal record check amounted to discrimination under the *Anti-Discrimination Act 1991* (NT).

4.1.5.8 Spent Convictions

Where a conviction is deemed spent, a person is not required to disclose it in any circumstances, unless the person is applying for certain positions, such as a police officer or a Judge. Under the *Criminal Records (Spent Convictions) Act 1992* (NT), a criminal record is a spent conviction on the expiration of a period where the offender was convicted in the Juvenile Justice Court after five years, and in any other case after 10 years.⁸³ The spent convictions scheme does not apply to criminal records relating to sexual offences.⁸⁴ Discrimination on the basis of a person's spent convictions is prohibited.⁸⁵

4.1.6 Australian Capital Territory

4.1.6.1 Irrelevant Criminal Record

In the Australian Capital Territory, it is unlawful to discriminate against a person because of a protected attribute that person has in an area of public life, such as employment, education, provision of goods and services and accommodation.⁸⁶ Amendments to the *Discrimination Act 1991* (ACT) in April 2017 saw that the Act included 'irrelevant criminal record' as a prohibited ground of discrimination.⁸⁷ An irrelevant criminal record is defined to include a record relating to an offence, or an alleged offence, if:

- (a) the person has been charged with the offence but —
 - (i) a proceeding for the alleged offence is not finalised; or

⁷⁸ *ADA Act NT* (n 21) s 79.

⁷⁹ *Ibid* s 79.

⁸⁰ *Ibid* s 88.

⁸¹ *Ibid* s 88(2).

⁸² (1996) EOC 92-859.

⁸³ *Spent Convictions Act NT* (n 62).

⁸⁴ *Ibid*.

⁸⁵ *ADA Act NT* (n 21) s 4.

⁸⁶ *Discrimination Act 1991* (ACT) s 7 ('*DA Act ACT*').

⁸⁷ *Discrimination Amendment Act 2016* (ACT); *DA Act ACT* (n 86) s 7(2).

- (ii) the charge has lapsed, been withdrawn or discharged, or struck out; or
- (b) the person has been acquitted of the alleged offence; or
- (c) the person has had a conviction for the alleged offence quashed or set aside; or
- (d) the person has been served with an infringement notice for the alleged offence; or
- (e) the person has a conviction for the offence, but the circumstances of the offence are not directly relevant to the situation in which discrimination arises; or
- (f) the person has a spent conviction or an extinguished [historical homosexual] conviction, within the meaning of the *Spent Convictions Act 2000*, for the offence.

The *Discrimination Act 1991* (ACT) prohibits both direct and indirect discrimination.⁸⁸ A person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has one or more protected attributes.⁸⁹ A person indirectly discriminates against someone else if the person imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging the other person because the other person has one or more protected attributes.⁹⁰ A condition or requirement that is reasonable in the circumstances will not give rise to indirect discrimination.⁹¹ In deciding whether a condition or requirement is reasonable, the matters to be considered include the nature and extent of any disadvantage that results from imposing the condition or requirement; the feasibility of overcoming or mitigating the disadvantage; and whether the disadvantage is disproportionate to the result sought by the person who imposes, or proposes to impose, the condition or requirement.⁹²

4.1.6.2 Exceptions

Part 4 of the *Discrimination Act 1991* (ACT) sets out various exceptions to unlawful discrimination. General exceptions include discrimination relating to domestic duties, adoption, residential care of children, insurance, superannuation and acts of religious bodies.⁹³ The ACT Human Rights Commission may grant an exemption from provisions of the Act protecting against unlawful discrimination, sexual harassment and related protections.

It is not unlawful for a person to be requested to provide their criminal history and non-conviction information when applying to be registered under the *Working with Vulnerable People (Background Checking) Act 2011* (ACT). Agencies can access criminal record information where it is authorised or required by an ACT law, for example, the *Health Practitioner Regulation National Law (ACT) Act 2010* and the *Crimes (Child Sex Offenders) Act 2005* (ACT).

*Complainant 201823 v Insurance Australia Group Ltd t/a NRMA [2019] ACAT 64 [11]*⁹⁴

In *Complainant 201823 v Insurance Australia Group Ltd t/a NRMA*, the applicant was refused public liability insurance with NRMA for his gardening business because he had been convicted of a sexual offence against a minor.⁹⁵ NRMA made the determination in accordance with its moral guidelines which held that a person with a conviction for a serious criminal offence within the last 10 years could not obtain insurance. This guideline considered that the person lacked judgement and therefore constituted a greater insurance risk than a person who did not have a conviction for the offence. The applicant argued NRMA discriminated on the basis of his irrelevant criminal record in the provision of goods and services. Section 28 of the *Discrimination Act 1991* (ACT) provides that it is not unlawful for discrimination to occur in relation to an insurance policy if the discrimination is reasonable in the circumstances, having regard to any actuarial or statistical data on which it

⁸⁸ Ibid s 8.

⁸⁹ Ibid s 8(2).

⁹⁰ Ibid s 8(3).

⁹¹ Ibid s 8(4).

⁹² *DA Act ACT* (n 86) s 8(5).

⁹³ Ibid Part 4 Division 4.1

⁹⁴ Although this case does not pertain to the discrimination of a prospective employee, it demonstrates how the *Discrimination Act 1991* (ACT) functions.

⁹⁵ [2019] ACAT 64.

is reasonable for the first person to rely.⁹⁶ NRMA was not able to demonstrate that they had relied on any statistical or actuarial data. On this basis, the tribunal concluded that the NRMA had discriminated against the applicant based on an irrelevant criminal conviction.

4.1.6.3 Spent Convictions

It is unlawful to discriminate on the basis of a person's spent convictions.⁹⁷ Similar to jurisdictions previously discussed, the *Spent Convictions Act 2000* (ACT) allows certain convictions to become spent after the person has not committed another offence for a period of 10 years, or five years if the person was not dealt with as an adult.⁹⁸ Any conviction can become spent, other than a conviction for which a sentence of more than six months was imposed, a conviction for a sexual offence, a conviction of a corporation, or a conviction prescribed under the regulations.⁹⁹

4.1.7 Commonwealth

4.1.7.1 Irrelevant Criminal Record

Under federal law, namely the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA), discrimination based on a person's 'irrelevant criminal record' constitutes discrimination. However, there is one exception known as the 'inherent requirements exception'. Discrimination on the basis of a person's 'irrelevant criminal record' will not constitute discrimination if the person is unable to fulfill the inherent requirements of the job because of his or her criminal record.

Under the AHRCA, the Australian Human Rights Commission deals with complaints about discrimination based on a person's 'irrelevant criminal record'. The function of the Commission in relation to equal opportunity is to 'inquire into any act or practice (including any systemic practice) that may constitute discrimination and if the Commission considers it appropriate to do so – endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry'.¹⁰⁰ The Commission's jurisdiction to deal with complaints about discrimination on the basis of a person's 'irrelevant criminal record' comes from the *International Labour Organisation (Employment and Occupation) Convention 1958* ('ILO111') which Australia ratified in 1973.¹⁰¹ The AHRCA therefore mirrors and is similar to the ILO111 in its construction and wording.¹⁰²

The AHRCA covers all employers and employees in all Australian States and Territories.¹⁰³ The Act also covers apprentices, trainees, and casual, part-time and full-time employees.¹⁰⁴ Volunteers, however, are not covered unless their volunteer work directly leads to employment or is related to a particular job.¹⁰⁵ The Act defines employment and occupation as 'access to vocational training, access to employment and to particular occupations, and terms and conditions of employment'.¹⁰⁶ Therefore, the Commission investigates allegations of discrimination on the basis of 'irrelevant criminal record' in recruitment, vocational training, promotions, conditions at work, termination and licencing/registration.¹⁰⁷

Discrimination is defined as 'any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.¹⁰⁸ As well as 'any other distinction, exclusion or

⁹⁶ DA Act ACT (n 86) s 109.

⁹⁷ Ibid s7; *Spent Convictions Act 2000* (ACT) ('*Spent Convictions Act ACT*').

⁹⁸ *Spent Convictions Act ACT* (n 97) ss 12, 13.

⁹⁹ Ibid ss 11.

¹⁰⁰ *AHRC Act* (n 10) s 31(b).

¹⁰¹ Australian Human Rights Commission, 'On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record' (2012) 6 ('*On the Record*').

¹⁰² Ibid 6.

¹⁰³ Ibid 9.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ *AHRC Act* (n 10) sch 1 art 1(3).

¹⁰⁷ Australian Human Rights Commission, *On the Record* (n 101) 9.

¹⁰⁸ *AHRC Act* (n 10) s 3.

preference that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation and has been declared by the regulations to constitute discrimination for the purposes of this Act'.¹⁰⁹ Discrimination does not include 'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job or in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed'.¹¹⁰

The *Australian Human Rights Commission Regulations 1989* (1989 Regulations) declared that discrimination on the basis of a person's 'criminal record' constituted discrimination under the AHRCA.¹¹¹ Under the 1989 Regulations, it was unlawful for an employer to discriminate against a job applicant or employee based on his or her 'criminal record' unless the person's criminal record meant that they couldn't fulfill the inherent requirements of the job. In 2019, the 1989 Regulations were replaced by the *Australian Human Rights Commission Regulations 2019* (2019 Regulations).¹¹² Under the 2019 Regulations, it is unlawful for an employer to discriminate against a job applicant or employee based on his or her 'irrelevant criminal record' unless the person's criminal record meant that they couldn't fulfill the 'inherent requirements' of the job.

The catalyst for the change of 'criminal record' to 'irrelevant criminal record' was the case of *BE v Suncorp Group Ltd*.¹¹³ In this case, the Commission found that Suncorp had discriminated against a job applicant, Mr BE, on the basis of his criminal record.¹¹⁴ In 2008, Mr BE was convicted of multiple child pornography offences.¹¹⁵ Mr BE argued Suncorp excluded him from employment by rescinding a conditional offer of employment and excluding him from the role of 'Work@Home Consultant' on the basis of his child pornography convictions.¹¹⁶ Suncorp argued that Mr BE's criminal record meant he was untrustworthy and not of good character and thus was unable to be trusted on the job or to deal with confidential information, which were inherent requirements of the job.¹¹⁷ The Commission found that Mr BE's criminal record was very serious but did not mean that he was unable to fulfill the inherent requirements of the job to be trustworthy and be of good character.¹¹⁸ The Commonwealth Minister for Industrial Relations at that time said that the case 'demonstrated that our laws in this area were not working and were at complete odds with common sense'.¹¹⁹

The 1989 Regulations, 2019 Regulations and the AHRCA do not define 'criminal record' or 'irrelevant criminal record'. However, the phrases have been interpreted broadly in case law as to include not only what actually exists on a police record, but also the circumstances of the conviction.¹²⁰ It can include charges which were not proven, investigations, findings of guilt which the person was not convicted for and convictions which were quashed or pardoned.

4.1.7.2 Inherent Requirements Exception

The AHRCA provides an exception to discrimination known as the 'inherent requirements exception'. Under s 3 of the Act, it is not discrimination if the person's 'irrelevant criminal record' means that he or she is unable to perform the inherent requirements of the job. The Act does not define 'inherent requirements'. However, it has been interpreted in the case law.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ *Australian Human Rights Commission Regulations 1989* s 4.

¹¹² *Australian Human Rights Commission Regulations 2019* s 6.

¹¹³ *BE v Suncorp Group Ltd* (n 15).

¹¹⁴ Ibid 121 [75], 24.

¹¹⁵ Ibid [62], 21.

¹¹⁶ Ibid [6], 7.

¹¹⁷ Ibid [12], 9.

¹¹⁸ Ibid.

¹¹⁹ Clare Raimondo, *HWL Ebsworth Lawyers*, 'Criminal Background Checks – What Amounts to Discrimination When Considering An Employee's Criminal Record?' (Web Page, 7 April 2020) <<https://hwlebsworth.com.au/criminal-background-checks-what-amounts-to-discrimination-when-considering-an-employees-criminal-record/>>.

¹²⁰ *Mr Mark Hall v NSW Thoroughbred Racing Board*, HREOC Report No. 19, 20 ('Hall's Case').

Some key principles identified in case law for assessing inherent requirements have been published in the Australian Human Rights Commission's *On the Record Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record 2012*. Firstly, an inherent requirement is 'something that is 'essential' to the position rather than incidental, peripheral or accidental'.¹²¹ Gaudron J of the High Court stated:

[A] practical method of determining whether or not a requirement is an inherent requirement ... is to ask whether the position would essentially be the same if that requirement were dispensed with.¹²²

Secondly, 'the burden is on the employer to determine the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked.¹²³ The inherent requirements of a particular job are tested objectively. It has been observed that 'the responsibility for deciding what the inherent requirement of a particular job falls on the employer, [and] these requirements must be able to be justified objectively'.¹²⁴ Thirdly, the inherent requirements 'should be determined by reference to the specific job to be done and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted'.¹²⁵ Fourthly, 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'.¹²⁶ Fifthly, the inherent requirements exception will be 'interpreted strictly so as not to defeat the purpose of the anti-discrimination provisions'.¹²⁷

4.1.7.3 Assessing 'Inherent Requirements' in the Context of Criminal Record Discrimination in Employment

On the Record Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record 2012 sets out the type of information an employer might consider when assessing the employee's or job applicants criminal record:¹²⁸

1. The seriousness of the conviction or offence and its relevance to the job in question;
2. Whether in relation to the offence there was a finding of guilt but without conviction, which indicates a less serious view of the offence by the courts;
3. The age of the applicant when the offences occurred;
4. The length of time since the offence occurred;
5. Whether the applicant has a pattern of offences;
6. The circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context;
7. Whether the applicant's circumstances have changed since the offence was committed (for example, past drug use)'
8. Whether the offence has been decriminalised by Parliament or it was an offence overseas but not in Australia'
9. The attitude of the job applicant to their previous offending behaviour; and

¹²¹ *X v Commonwealth* [1999] HCA 63 (2 December 1999) ('X's Case'), *Qantas Airways v Christie* (1998) 193 CLR 280, *Hall's Case* (n 120) 32, 34; *Qantas Airways v Christie* (1998) 193 CLR 280 ('Christie's Case'), 294 [34] (Gaudron J); *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).

¹²² *Christie's Case* (n 121) (Gaudron J).

¹²³ *Hall's Case* (n 120) 36, *Zraika v Commissioner of Police, NSW Police* (2004) NSW ADT 67.

¹²⁴ *Jessica Smith v Redflex* (n 15) 125 [84].

¹²⁵ *X's Case* (n 121) 208, *Christie's Case* (n 121), *Hall's Case* (n 120) 33.

¹²⁶ *Hall's Case* (n 120) 35-36, *Commonwealth v Bradley* (1999) 95 FCR 237 (Black CJ), *Wall v NT Police Services, Anti-Discrimination Commission*, 14 March 2005 ('Wall's Case').

¹²⁷ *Hall's Case* (n 120) 34-35, *Wall's Case* (n 126) 18.

¹²⁸ Australian Human Rights Commission, *On the Record* (n 101) 27.

10. References from people who knew about the offending history.

4.1.7.4 Guidelines

In December 2004, the Australian Human Rights Commission (AHRC) published a Discussion Paper on discrimination in employment on the basis of criminal records and called for submissions from relevant stakeholders.¹²⁹ The submissions called for practical guidelines for employers and employees.¹³⁰ The guidelines were first published in 2005, revised in 2007, and revised again in 2012.¹³¹ Ten guidelines were published in *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*.¹³²

1. 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;
2. 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;
3. 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;
4. 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);
5. Criminal record checks should only be conducted with the written consent of the job applicant or current employee;
6. Information about a person's criminal record should always be stored in a private and confidential manner and used only for the purposes for which it is intended;
7. 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;
8. 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;
9. 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; and
10. 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.

These guidelines are not legally binding – they only provide practical guidance on the rights and responsibilities relating to discrimination in employment on the basis of criminal record under the AHRCA. Nonetheless, the

¹²⁹ Australian Human Rights Commission, *On the Record* (n 101) 7.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.* 5.

guidelines demonstrate that determining whether people may be precluded from employment based on their criminal record cannot be achieved with a 'one-size-fits-all' approach; rather, it should be decided on a case-by-case basis.

4.1.7.5 Complaints Process

The Australian Human Rights Commission will inquire into any act or practice that may constitute discrimination if it is requested to do so by the Attorney-General or a complaint is made in writing by or on behalf of the aggrieved person alleging the act or practice constitutes discrimination, or if it believes it would be desirable to do so.¹³³ A complaint must be made within 12 months of when the act was done and the Commission must endeavour to deal with the complaint within 12 months after the complaint was made.¹³⁴ If the Commission is of the opinion that the act or practice does constitute discrimination and the complaint is unable to be conciliated, then the Commission may issue a report with recommendations to the Attorney-General for tabling in Federal Parliament.¹³⁵ The Commission's recommendations are not legally binding or enforceable; therefore, employers do not have to comply with them. This was seen in *BE v Suncorp Group Ltd*. Hence, the Commission has been labelled a 'toothless tiger'. The AHRCA does not make discrimination on the basis of a person's criminal record unlawful and there is currently no avenue to pursue this matter in the federal courts.

4.1.7.6 Fair Work Act 2009 (Cth)

Similarly to the AHRCA, there are State and Federal industrial laws that can help protect people with a criminal record from unfair treatment at work, particularly unfair dismissal. Under the *Fair Work Act 2009* (Cth), 'an employer cannot take adverse action against a person who is an employee or job applicant because of his or her race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin'.¹³⁶ A person's criminal record or irrelevant criminal record is omitted from this definition. Unfair dismissal is defined under the Act as: an employee was dismissed; the dismissal was harsh, unjust, or reasonable; the dismissal was not a case of genuine redundancy; and the dismissal was not consistent with the *Small Business Fair Dismissal Code*.¹³⁷

Recently, there have been a number of cases where decisions have been handed down where an employee was unfairly dismissed as a direct result of an employer finding out about an employee's criminal record. In *Kelvin Nijau v Superior Food Group Pty Ltd*, the Fair Work Commission held there was no valid reason why the employee was dismissed because of his criminal record.¹³⁸ The employer did not make it a condition of employment that the employee should not have a criminal record and that condition could not have been imposed on the employee without a relevant connection to the 'inherent requirements' of the job.¹³⁹ The Commission stated that:

denying a person the opportunity for employment must be carefully considered in light of the inherent requirements of the particular role as well as the individual facts and circumstances of the case. A blanket rule that no person with a criminal record can obtain, or maintain, employment, is prone to difficulty.¹⁴⁰

4.1.7.7 Spent Convictions

There is currently no Commonwealth law that makes discrimination on the basis of spent convictions unlawful. There are, however, provisions that exist under the *Crimes Act 1914* (Cth) that cover spent convictions. The *Crimes Act 1914* (Cth) deals with the collection, use and disclosure of criminal convictions. The Commonwealth Spent Convictions Scheme aims to prevent discrimination on the basis of previous criminal convictions once

¹³³ *AHRC Act* (n 10) s 32(1).

¹³⁴ *Ibid* s 32(3)(c)(i), s 32(5)(b).

¹³⁵ *Ibid* s 32A.

¹³⁶ *Fair Work Act 2009* (Cth) s 351.

¹³⁷ *Ibid* s 385.

¹³⁸ [2018] FWC 7626, [24] (*'Kelvin v Superior Food'*).

¹³⁹ *Ibid* [11].

¹⁴⁰ *Kelvin v Superior Food* (n 139) [23].

a waiting period of 10 years has passed and provided the person has not re-offended during the waiting period.¹⁴¹ The Scheme also covers ‘quashed’ and ‘pardoned’ convictions.¹⁴²

A person will be convicted of an offence if he or she was convicted summarily or by indictment, if he or she was charged and found guilty of the offence but a conviction was not recorded, and if he or she was not found guilty of the offence but the court took into account sentencing the person for another offence.¹⁴³ A conviction becomes spent if the person has been granted a pardon, the person was not sentenced to imprisonment, or the person was not sentenced to imprisonment for more than 30 months.¹⁴⁴

If a person’s conviction of a Commonwealth, State or Territory offence becomes spent, the person is not required in any State or Territory to disclose the fact that he or she was charged with or convicted of an offence.¹⁴⁵ There are, however, some exceptions. For example, criminal history will need to be disclosed when assessing people who work with children.¹⁴⁶

4.1.8 Queensland

4.1.8.1 Irrelevant Criminal Record

In Queensland, discrimination on the basis of a person’s ‘irrelevant criminal record’ is currently not a protected ‘attribute’ under section 7 of the *Anti-Discrimination Act 1991* (Qld). Presently, the Act prohibits discrimination on the basis of sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, trade union activity, lawful sexual activity, gender identity, sexuality and family responsibilities.¹⁴⁷ As the Act does not prohibit discrimination on the basis of a person’s ‘irrelevant criminal record’, a person who alleges discrimination on this ground would submit their complaint to the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986* (Cth).

4.1.8.2 Spent Convictions

There is currently no legislation in Queensland that makes discrimination on the basis of spent convictions unlawful. There are, however, provisions that exist under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) on spent convictions, which are similar to the federal legislation above. The aim of the Act is to ‘provide with respect to the rehabilitation of persons convicted for offences’ and other related purposes.¹⁴⁸ The Act does not relieve a person’s responsibility to disclose his or her criminal history in connection with seeking admission or offering himself or herself for selection for any profession or occupation.¹⁴⁹

Under the Act, a conviction that has been set aside or quashed does not form part of a person’s criminal record.¹⁵⁰ A conviction becomes spent upon the relevant rehabilitation period.¹⁵¹ If the person was convicted in the District Court or Supreme Court and at the time was an adult, the relevant rehabilitation period is 10 years commencing on the date the conviction was recorded.¹⁵² If the person was convicted as a child, then the relevant rehabilitation period is five years.¹⁵³ A rehabilitation period only applies if no term of imprisonment was imposed for the conviction or if a term of imprisonment of no more than 30 months was imposed on the person.¹⁵⁴

¹⁴¹ *Crimes Act 1914* (Cth) s 85ZL.

¹⁴² *Ibid* s 85ZR, s 85ZT.

¹⁴³ *Ibid* s 85ZM (1).

¹⁴⁴ *Ibid* s 85ZM (2).

¹⁴⁵ *Ibid* s 85ZV.

¹⁴⁶ *Ibid* s 85ZZGA.

¹⁴⁷ *Anti-Discrimination Act 1991* (Qld) s 7.

¹⁴⁸ *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) (*‘Rehabilitation of Offenders Act Qld’*).

¹⁴⁹ *Ibid* s 4(2).

¹⁵⁰ *Ibid* s 5.

¹⁵¹ *Ibid* s 3(1), s 3(2).

¹⁵² *Rehabilitation of Offenders Act Qld* (n 148) s 3(1)(a).

¹⁵³ *Ibid* s 3(1)(b).

¹⁵⁴ *Ibid* s 3(2).

A person is not required or obliged to disclose his or her criminal conviction for any purpose if that conviction is not part of their criminal history or any charge against them or another person.¹⁵⁵ However, there are some exceptions. A spent conviction cannot be disclosed by that person or another person unless: the person whom the conviction is recorded against wishes to disclose the conviction; it is disclosed under a permit granted under s 10; or the person makes the disclosure in applying for employment in a specific profession.¹⁵⁶ A person who assesses someone's fitness to be admitted into a profession or a specific job is not allowed to take into account a person's spent conviction unless the person being assessed is required to disclose it by law, the person assessing is required to by law or the person being assessed is not relieved from his or her responsibility to disclose it under s 4.¹⁵⁷

Under s 10 of the Act, a person can apply for a permit asking another person to disclose any spent conviction.¹⁵⁸ The permit will be given if the applicant has a 'legitimate and sufficient purpose' for requiring disclosure of a conviction.¹⁵⁹ A person who discloses information about the spent conviction of a convicted person without their consent will be liable to a maximum penalty of 100 penalty units.¹⁶⁰

Nonetheless, there are some special cases. Under s 9A of the Act, there are positions, offices and statutes that require a person to disclose his or her criminal record and their spent convictions.¹⁶¹ These include police officers, corrective services officers, Justices of the Peace, teachers, security guards, licensees, lawyers and electoral candidates.¹⁶²

4.1.9 New South Wales

4.1.9.1 Irrelevant Criminal Record

There is currently no legislation in New South Wales prohibiting discrimination on the basis of an 'irrelevant criminal record'. The *Anti-Discrimination Act 1977* (NSW) prohibits racial discrimination, sexual harassment, sex discrimination, discrimination on transgender grounds, discrimination on the ground of marital or domestic status, discrimination on the ground of disability, discrimination on the ground of a person's responsibilities as a carer, age discrimination and discrimination on the ground of homosexuality.¹⁶³ As the Act does not cover discrimination on the ground of an 'irrelevant criminal record', a person who alleges discrimination on this ground would submit their complaint to the Australian Human Rights Commission under the *Australian Human Rights Commission Act 1986* (Cth).

4.1.9.2 Spent Convictions

In New South Wales, there is currently no legislation that renders discrimination on the basis of spent convictions unlawful. There are, however, provisions that exist under the *Criminal Records Act 1991* (NSW) that cover spent convictions. The aim of the Act is to 'implement a scheme to limit the effect of a person's conviction' if he or she completes a period of crime-free behaviour.¹⁶⁴ If he or she completes the period of crime-free behaviour, then the conviction is spent and will not form part of their criminal history (subject to some exceptions).¹⁶⁵ The crime-free period for convictions of courts other than the Children's Court is ten years and the crime-free period for convictions of the Children's Court is three years.¹⁶⁶

¹⁵⁵ Ibid s 5(2).

¹⁵⁶ Ibid s 6.

¹⁵⁷ Ibid s 4.

¹⁵⁸ Ibid s 10.

¹⁵⁹ Ibid s 9A (3).

¹⁶⁰ Ibid s 12.

¹⁶¹ Ibid s 9A.

¹⁶² Ibid.

¹⁶³ *Anti-Discrimination Act 1977* (NSW) Part 2 – Part 4G.

¹⁶⁴ *Criminal Records Act 1991* (NSW) s 3(1).

¹⁶⁵ Ibid s 3(1).

¹⁶⁶ Ibid ss 9, 10.

All convictions are able to become spent except for convictions where a prison sentence of more than six months was imposed, convictions for sexual offences, convictions imposed against bodies corporate and convictions prescribed by the regulations.¹⁶⁷

The consequence of a conviction becoming spent are that: the person is not required to disclose the spent conviction; a person's criminal history only refers to convictions which are not spent; a statutory provision that refers to a conviction is taken to be a reference only to a conviction which is not spent; and a statutory provision that refers to a person's character or fitness is not to be interpreted as permitting or requiring account to be taken of the spent convictions.¹⁶⁸ This will not apply in relation to an application for employment in the judiciary, police, Corrective Services, education, Department of Communities and Justice, where a working with children clearance is required, or where a person is seeking employment in firefighting or fire prevention who has been convicted of arson or attempted arson.¹⁶⁹

4.2 Duty to Disclose

There is no duty on job applicants within Australian jurisdictions to disclose any information about their prior criminal record, even if those facts may affect the employer's willingness to employ them.¹⁷⁰ This was illustrated in the Western Australian case of *Stock v Narrabri Nominees*.¹⁷¹ In this case, Stock—a tyre fitter—was dismissed by his employer after the employer was informed that Stock had once been convicted of stealing and other dishonest offences. The Industrial Relations Commissioner found that 'an employee is not under any duty to volunteer facts regarding his personal antecedents' and that Stock had been unfairly dismissed.¹⁷² Only where legislation requires disclosure of a criminal record, such as working with children, is a job applicant required to disclose the information. Additionally, if an employer asks a reasonable question regarding a person's criminal history where relevant to the job and the person fails to provide a reasonable answer, the employer may be entitled to refuse to hire them. Although, this may give rise to a complaint of imputed discrimination if it is irrelevant to the role.

It is possible that recent developments in implied duties of good faith and mutual trust and confidence may lead to a new consideration regarding disclosure of a criminal record. This emphasises the importance of anti-discrimination legislation relating to irrelevant criminal records.

4.3 Trends in State and Territory Legislation

Across Australian jurisdictions, there has been an evident shift in legislation towards expanding protections against discrimination. This is made clear when reflecting on recent spent conviction legislation and some States recognising an irrelevant criminal record as a protected attribute. These changes are arguably motivated by an increased recognition for human rights and equality. Ultimately, by prohibiting discrimination based on criminal records, the stigma of a criminal record and the practical problems it creates, such as a person's right to find a job, may lessen.

4.4 Timeline and Complaints Data

In Tasmania, the implementation of the *Anti-Discrimination Act 1998* (Tas) made it unlawful to discriminate against another person on the ground of the attribute of an irrelevant criminal record. Annualised reports

¹⁶⁷ *Ibid* s 7(1).

¹⁶⁸ *Ibid* s 12.

¹⁶⁹ *Ibid* s 15.

¹⁷⁰ *Andrew Gordon Stock v Narrabri Nominees Pty Ltd trading as Tyre Mart Bunbury*, Western Australian Industrial Relations Commission (16 August 1990) ('*Andrew's Case*'); *Bell v Lever Brothers Ltd* [1932] AC 161; *Concut Pty Ltd v Worrell* (2000) 176 ALR 693; *Gordon & Gotch (Australasia) Ltd v Cox* (1923) 31 CLR 370; *Hands v Simpson Fawcett & Co Ltd* (1928) 44 TLR 295.

¹⁷¹ *Andrew's Case* (n 172).

¹⁷² *Stock v Narrabri Nominees*, Western Australian Industrial Relations Commission, No.1122 of 1990, citing *Cambourn v A.E. Leer and B.A. Leer* (1979) AR (NSW) 523.

produced by Equal Opportunity Tasmania demonstrate the use by complainants of irrelevant criminal record as a ground of discrimination:¹⁷³

Attribute	2019-2020	2018-2019	2017-2018	2016-2017	2015-2016	2014-2015	2013-2014	2012-2013
Irrelevant Criminal record number of Complaints	8	15	8	9	9	16	19	13

In the Northern Territory, implementation of the *Anti-Discrimination Act 1991* (NT) prohibited discrimination based on irrelevant criminal record. The Northern Territory Anti-Discrimination Commission's annualised report for 2017-2018 reported the following number of complaints were made based on irrelevant criminal record:¹⁷⁴

Attribute	2017-2018	2016-2017	2015-2016	2014-2015
Irrelevant Criminal record number of Complaints	37	50	29	29

From April 2017, the law in the Australian Capital Territory included new protections against discriminatory treatment for irrelevant criminal record. Existing grounds that protected persons from discrimination based on spent convictions were updated to provide clarity and to strengthen protection for people based on irrelevant criminal record.

The ACT Human Rights Commission reported one complaint between 2016 and 2017 based on the protections from spent conviction discrimination. The implementation of the 'irrelevant criminal record' attribute saw an increase in complaints to 7 between 2017 and 2018. The number of complaints has remained consistent with 13 complaints from 2018 to 2019 and 8 from 2019 to 2020.¹⁷⁵ The number of complaints in the ACT demonstrates that the expansion of protection based on irrelevant criminal record has not led to an unreasonably high number of complaints being lodged. Importantly, this indicates that if similar reforms were implemented in Queensland, it would not lead to a highly litigious environment in relevant areas of discrimination, such as employment and insurance. If amendments were introduced with appropriate exceptions, this would ensure that an 'irrelevant criminal record' attribute would not lead to an unreasonable number of complaints being lodged based on that attribute (see, for example, section 28 of the *Discrimination Act 1991* discussed at 4.1.6.2).

5. Conclusion

This research paper has investigated the effectiveness and summarised the current legislation on irrelevant criminal record discrimination in all Australian jurisdictions. At the federal level, irrelevant criminal record discrimination is a protected attribute. However, the federal legislation has been labelled a 'toothless tiger' because of the inherent requirements exception and because there is currently no avenue to pursue this matter

¹⁷³ Equal Opportunity Tasmania, *Annual Report 2019-20* (Report 1, September 2020); Equal Opportunity Tasmania, *Annual Report 2018-19* (Report 1, September 2019); Equal Opportunity Tasmania, *Annual Report 2017-18* (Report 1, September 2018); Equal Opportunity Tasmania, *Annual Report 2016-17* (Report 1, September 2017); Anti-Discrimination Commissioner Equal Opportunity Tasmania, *Annual Report 2015-16* (Report 1, September 2016); Anti-Discrimination Commissioner Equal Opportunity Tasmania, *Annual Report 2014-15* (Report 1, September 2015); Anti-Discrimination Commissioner Equal Opportunity Tasmania, *Annual Report 2013-14* (Report 1, September 2014); Anti-Discrimination Commissioner Equal Opportunity Tasmania, *Annual Report 2012-13* (Report 1, September 2013).

¹⁷⁴ Northern Territory Anti-Discrimination, *Annual Report 2017-18* (Report 1, September 2018).

¹⁷⁵ Australian Capital Territory Human Rights Commission, *Annual Report 2019-20* (Report 1, December 2020).

in the federal courts. At the State and Territory level, irrelevant criminal record discrimination is a protected attribute in the Northern Territory, Tasmania and the Australian Capital Territory. In Queensland, New South Wales, South Australia, Western Australia, and Victoria, irrelevant criminal record discrimination is not a protected attribute. Discrimination on the ground of a spent or expunged historical homosexual offence conviction is a protected attribute in Western Australia and Victoria. However, all Australian jurisdictions have enacted laws allowing certain criminal convictions to become spent after a period of time to prevent discrimination based on prior convictions.

A criminal record can have a significant impact on a person's employment opportunities and prospects and, furthermore, on a person's ability to earn an income and connect with society. Making discrimination on the basis of a person's criminal record a protected attribute across all Australian jurisdictions is an important step towards improving equality for job applicants with a criminal record. In recent years, the Queensland Government has taken many strides in the area of human rights and is open to discussing areas where reform is needed. In light of the Queensland Human Rights Commission undertaking a review of the *Anti-Discrimination Act 1991* (Qld) and considering whether to add irrelevant criminal record as a protected attribute, this research paper supports the affirmative. As established in the literature review of this paper, the area of discrimination of job applicants based on criminal records is live with potential for reform. A number of jurisdictions in Australia have already begun to recognise the significance of such reform by implementing changes to their own anti-discrimination legislation. Therefore, this research group welcomes 'irrelevant criminal record' being added as a protected attribute to section 7 of the *Anti-Discrimination Act 1991* (Qld).



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