

Criminal Records

Spent Convictions and Employment

JobWatch
Employment Rights Legal Centre

What information from your criminal record can be released by the police to your employer/prospective employer?

In Australia we have federal, state and territory police agencies. Each police agency keeps its own criminal history information about individuals.

Criminal history information includes all of the interactions a person has had with the criminal justice system in that particular jurisdiction. This includes criminal convictions, penalties, appearances in court, charges, matters waiting to be heard in court and even matters under investigation.

Generally, when you ask for a police check or you give your consent for a third party (ie, an employer or prospective employer) to access your police check, only certain criminal history information will be released by the relevant police agency. Each police agency applies its own document release policy and applicable legislation when determining what information can be disclosed.

NB: You must give your written consent to the police agency for them to release your criminal record or police check to your employer or prospective employer.

All jurisdictions in Australia have 'spent convictions' schemes. This means that *certain* information on a person's criminal record will not be released, and cannot be requested, if a prescribed amount of time has elapsed or if the information otherwise fits the definition of a **spent conviction** in that jurisdiction.

Spent Convictions in Queensland

In **Queensland**, the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) provides that, unless you got a jail sentence of more than 30 months, your conviction will lapse after 5 or 10 years (depending on whether you were convicted as a child or as an adult). After that time, the conviction will no longer appear on your criminal record, provided you have not re-offended. Generally, you do not have to reveal a spent conviction if asked, but this will depend on several factors, including what job you are applying for.

Spent Convictions in Tasmania

In **Tasmania**, the *Annulled Convictions Act 2003* (Tas) provides that, unless you got a jail sentence of more than 6 months or you were convicted for a sexual assault, your conviction will be annulled (or spent) after 5 or 10 years (depending on whether you were convicted as a child or as an adult). You must not have re-offended since your last conviction.

About this infosheet

This infosheet explains state and federal laws that protect employees and prospective employees from discrimination on the basis of an irrelevant **criminal record** or on the basis of a **spent conviction**.

In this infosheet, when we refer to your **criminal record** we are referring to the criminal history information about you that is released by the relevant police agency.

Disclaimer

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

JobWatch
www.jobwatch.org.au

Melbourne metro: (03) 9662 1933
Qld, Tas and regional Vic: 1800 331 617

Mon-Fri 9am-5pm
and until 8:30pm on Wed
(all times in AEDT)

Spent Convictions in Victoria

In **Victoria**, the *Spent Convictions Act 2021* (Vic) came into force on 30 March, 2021. Parts of Act will come into force on December 1, 2021, with the remainder to come into force in July 2022.

Relevantly, on December 1, 2021, Victoria's *Equal Opportunity Act* will be amended so as to include spent conviction as a protected attribute under Victorian law. This means that it will be unlawful for an employer to discriminate against an employee because of a spent conviction.

From 30 March, 2021:

- a. A *spent conviction* will not form part of your criminal record;
- b. You will not be required to disclose the existence of a *spent conviction*;
- c. Employers/prospective employers will not be allowed to ask the police to disclose information about a *spent conviction*; and
- d. Unless employers/prospective employers have an exemption under the police's information release policy, a police check will not return information about a *spent conviction*.

It will also be unlawful for employers/prospective employers to obtain information relating to a *spent conviction* by fraud or dishonesty.

A conviction may become *spent* either with immediate effect or upon expiry of the conviction period. Examples of when your conviction may in some circumstances become spent on the day when you are convicted include:

- a. where there is **no** conviction **recorded by a court**;
- b. where the conviction is for an offence committed when you were **under the age of 15**;
- c. where the conviction is an **infringement** conviction.

Convictions other than serious convictions may in some circumstances become spent when the conviction period expires, as follows:

- a. for a conviction of a child— after **5 years**; or
- b. for a conviction of any other person— after **10 years**.

If you re-offend during the 5 or 10-year period, the conviction period will start again.

When should you make voluntary disclosures of a criminal record to your employer/prospective employer?

There is no general statutory obligation requiring you to voluntarily disclose your criminal history or to give a copy of your police check to your employer/prospective employer. However, there are some occupations that have strict eligibility requirements and you must not mislead your employer/prospective employer about whether you are eligible for the job.

If you are asked about your criminal record by your employer/prospective employer, it is important that you:

- Understand exactly what they are asking you to disclose (don't make assumptions!)
- Answer their questions truthfully and accurately.

If it is later discovered that you were being untruthful, this may justify your employer terminating your employment.

Note: In each jurisdiction, there are exceptions and exemptions that apply. The legislation varies from one jurisdiction to the next. If you need more details about the spent convictions scheme in your jurisdiction, please contact your local police agency.

This information is a general summary only, and whether a particular conviction is spent or not depends on many factors such as the type of conviction and age. Advice should be sought from a suitably qualified criminal lawyer.

What is discrimination?

You have been discriminated against if any of these things have happened:

- You have been refused a job
- You have been dismissed from employment
- You have been denied training opportunities
- You have been denied promotion
- You have been subjected to less favourable working conditions
- You have been harassed at work
- You have been denied an employment-related licence or registration.

However, it is not considered “discrimination” if your criminal record means that you are (or were) unable to perform the **inherent requirements** of your particular job. If a requirement is *essential* to the task – not just incidental, peripheral or accidental – then it will be an inherent requirement of the job.

What laws protect you from discrimination?

Australia-wide – file at AHRC within 6 months

Under the *Australian Human Rights Commission Act 1986* (Cth), you may complain to the Australian Human Rights Commission (AHRC) if you are discriminated against on the basis of an irrelevant criminal record. There is no statutory definition of ‘irrelevant criminal record’.

The AHRC oversees the Commonwealth’s anti-discrimination laws. Complaints must be filed with the AHRC, which will conduct a conciliation to try to settle the dispute by agreement. It is mandatory for the parties to attend the AHRC conciliation.

You have 6 months from the date of the discriminatory conduct to file your complaint at the AHRC.

Victoria – file in VCAT within 12 months (from 1 December 2021)

In **Victoria**, the *Equal Opportunity Act 2010* (Vic) will, from 1 December 2021, protect job applicants, employees and contract workers against discrimination on the basis of a **spent conviction**. This protection will not extend to volunteers or other unpaid workers.

The new laws will also impose an obligation on employers to take **reasonable and proportionate measures to eliminate discrimination** on the basis of a spent conviction as far as possible.

Under the EO Act, there are two types of discrimination:

- **Direct discrimination** – where a person treats or proposes to treat a person unfavourably because of the protected attribute; and
- **Indirect discrimination** – where a person imposes or proposes to impose, a requirement, condition or practice that has or is likely to have, the effect of disadvantaging persons with a protected attribute, that is not reasonable. For example, an advertisement for a job as a cleaner that requires an applicant to never have had a criminal conviction.

The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) is an independent body with responsibilities under the EO Act including complaint handling.

Note: Employers in certain industries may also be legally obliged to refuse employment to people with certain types of criminal records.

NB: The Federal legislation does not make the conduct of an employer unlawful. The AHRC has no power to make any binding decisions or order any remedies, however they can make a finding of discrimination and report their recommendations to the Federal Parliament.

Australian Human Rights Commission (AHRC)

Phone: 1300 656 419
Website:
humanrights.gov.au

Victoria (cont.)

If a complaint of discrimination is made to VEOHRC, VEOHRC will assist the parties to try reach a voluntary settlement usually by conducting a conciliation. It is not mandatory to file a complaint at VEOHRC and your employer or prospective employer can choose not to engage in the process.

If the VEOHRC conciliation is unsuccessful or you choose not to file a complaint at VEOHRC, you have **12 months** from the date of the discriminatory conduct to file a complaint at the Victorian Civil and Administrative Tribunal (VCAT). VCAT has the power to hear and determine your complaint and award you compensation if your complaint is successful.

Queensland

In **Queensland**, the *Anti-Discrimination Act 1991* (Qld) does not cover discrimination based on a criminal record. However, workers in Queensland are protected by the federal anti-discrimination laws.

Tasmania – file at Equal Opportunity Tasmania within 12 months

In **Tasmania**, the *Anti-Discrimination Act 1998* (Tas) protects workers in both paid and unpaid work from discrimination on the basis of an irrelevant criminal record. Tasmania uses a 'direct' and 'indirect' discrimination model similar to Victoria's, described above.

An irrelevant criminal record includes:

- A record of arrest or police questioning where no charges are laid or the charges are withdrawn;
- Criminal proceedings resulting in no finding of guilt;
- A conviction which has been annulled, quashed or set aside;
- A conviction in circumstances where the circumstances of the offence are not directly relevant to the job in question.

To lodge a complaint, contact Equal Opportunity Tasmania within **12 months** in writing, by email or by telephone.

Once a written complaint is lodged, the Anti-Discrimination Commissioner will decide whether to accept it within 42 days. Once the Commissioner has investigated a complaint, the matter can be either resolved with dispute resolution mechanisms, such as conciliation, or referred onto the Anti-Discrimination Tribunal.

If a complaint is dismissed, a person has the right to ask the Anti-Discrimination Tribunal to review the decision of the Commissioner. The Anti-Discrimination Tribunal has the power to conduct inquiries into discrimination complaints. An inquiry by the Tribunal is usually preceded by a conciliation meeting.

Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

Phone: 1300 292 153

Website:
humanrights.vic.gov.au

Victorian Civil and Administrative Tribunal (VCAT)

Phone: 1300 018 228

Website:
vcat.vic.gov.au

NB: If you file a complaint with VEOHRC or VCAT, you cannot then change to the Commonwealth jurisdiction.

NB: It is an offence in Tasmania for a person to threaten to disclose information about another person's annulled conviction. It is also an offence for a person with access to official criminal record to, without lawful authority, disclose any information about another person's annulled conviction without their consent.

Equal Opportunity Tasmania

Phone: 1300 305 062

Website:
equalopportunity.tas.gov.au

What other action can I take?

If you have been dismissed from your job or other discriminatory conduct has occurred and you believe it was because of your criminal record, or because you shared information regarding your criminal history, you may be available to you to make the following claims:

- unfair dismissal; or
- general protections claim, if you have been subjected to adverse action because you have workplace rights in relation to your criminal record or because you have complained or enquired about something related to them, e.g. your employer's policy on criminal records.

Unfair dismissal claims are subject to eligibility requirements. See JobWatch's infosheets on unfair dismissal and general protections at www.jobwatch.org.au.

Useful contacts

JobWatch

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Australian Human Rights Commission (AHRC)

P: 1300 656 419

W: humanrights.gov.au

Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

P: 1300 292 153

W: humanrights.vic.gov.au

Victorian Civil and Administrative Tribunal (VCAT)

P: 1300 018 228

W: vcat.vic.gov.au

Equal Opportunity Tasmania

P: 1300 305 062

W: equalopportunity.tas.gov.au

Note that unfair dismissal claims and general protections claims involving dismissal must be lodged within 21 days of the dismissal taking effect.

Acknowledgements

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.