

17 February 2005

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Stephen Duffield
Director, Human Rights Unit
Human Rights & Equal Opportunity Commission
GPO Box 5218
SYDNEY NSW 2001

Dear Sir

Discrimination in Employment on the Basis of Criminal Record

I write this submission on behalf of the Shopfront Youth Legal Centre, a free legal service for homeless and disadvantaged young people. The Shopfront is located in Darlinghurst and is a joint project of Freehills, Mission Australia and the Salvation Army.

Since 1993 the Shopfront has worked with homeless and marginalised young people between the ages of about 12 and 25. Our four solicitors represent and advise clients on a range of legal issues. About 75% of our practice involves criminal law.

The Shopfront's primary client base is in inner-city Sydney; however, we work with young people from all over Sydney and surrounding areas. A substantial proportion of our clients have a serious mental illness, an intellectual disability and/or a substance abuse problem. Most have a history of abuse, neglect and homelessness.

We have read your discussion paper on Discrimination in Employment on the Basis of Criminal Record, and we welcome the opportunity to make a submission. We make the following comments:

1. The majority of the Shopfront's clients have been convicted of at least one criminal offence, either as a juvenile or as a young adult. In the case of juvenile offences, a conviction may not have been recorded or may be spent by the time the offender is in their early twenties. However, a large number of our clients also have convictions for adult offences, which take 10 years to become spent.
2. A criminal record is just one of the many barriers to employment faced by young people. For the Shopfront's clients, the main obstacle to employment is inadequate literacy, numeracy and vocational skills. A significant number of our clients also have (or have had in the past) a drug

dependency, mental illness or disability, and they may experience unlawful discrimination as a result. A criminal record is a further handicap for young people in a very difficult employment market.

3. We do not have any empirical evidence about the extent of criminal record discrimination against our clients. However, we do have anecdotal evidence from our clients, and from workers in youth services and employment agencies, that discrimination on the basis of criminal record is a significant issue.
4. In our experience, offending by young people is often strongly linked to factors beyond the young person's control, such as homelessness, physical or sexual abuse, mental illness or intellectual disability.
5. A person with an indigenous, non-English-speaking or low socio-economic background is much more likely to acquire a conviction than their white middle-class equivalent, even when engaged in exactly the same type of conduct. For example, statistics show that indigenous juveniles are less likely to be diverted under the NSW *Young Offenders Act* (and therefore more likely to be sent to court) than their non-indigenous peers. Another example is that of people who elect to take infringement notices to court because they cannot afford to pay the fine. Our experience is that the magistrate will usually reduce the fine, but will record a conviction which would not have been recorded had the offender simply paid the fine.
6. Some young people also acquire convictions in the pursuit of conscientiously-held beliefs (for example, students convicted of trespassing or resisting police during an anti-war or environmental protest).
7. We suggest that offences committed against a background of social disadvantage or conscientious political protest do not necessarily mean that a person is inherently violent, dishonest or untrustworthy. We have seen many young offenders mature into law-abiding and responsible adults.
8. We acknowledge that, in some cases, a criminal record may be inconsistent with the inherent requirements of a particular job. However, even in occupations which require a high level of integrity, a criminal record does not necessarily indicate that a person is unfit for the job. The triviality of the offence, the circumstances in which it was committed and the length of time that has elapsed are all highly relevant factors.
9. In our view, discrimination on the basis of criminal record should be unlawful unless it is clearly related to the inherent requirements of the job. However, any attempt to define the inherent requirements of a job is fraught with difficulties. As the Discussion Paper shows, employees and employers often have different ideas as to which criminal convictions are relevant to the job.
10. If a prospective employee is required to disclose *all* convictions to a prospective employer, there is a risk that an employer may inappropriately discriminate on the basis of convictions that are irrelevant. On the other hand, if a prospective employee is required to disclose only *relevant*

criminal history, he or she may fail to disclose matters that are relevant to the job, and be faced with dismissal if these matters are discovered by the employer. The best solution is perhaps a requirement for prospective employees to disclose all convictions, but this needs to be accompanied by very strong protection for employees who experience discrimination based on irrelevant criminal history.

11. A system similar to the NSW “Working with Children Check”, where an external agency performs the criminal record check and reports back to the employer with a risk assessment, may be worth exploring. However, we concede that such a measure would be costly and difficult to implement in practice. An external agency is unlikely to have a sufficient understanding of the inherent requirements of different jobs across a range of workplaces and industries.
12. We believe it is unreasonable to expect prospective employees to volunteer information about criminal convictions when not specifically asked to do so. While it may be reasonable to dismiss an employee for lying about their criminal record, it is unfair to dismiss someone for failing to provide information which was not specifically requested.
13. Employers should be prohibited from requiring a person to disclose spent convictions (including matters where the offence has been proved but no conviction recorded) except in those occupations where there is a statutory exception to the spent convictions legislation. The spent convictions legislation serves a very important social purpose in allowing ex-offenders to get on with their lives without the permanent stigma of a conviction, and it should not be undermined.
14. We have observed that some job application forms include inappropriate questions such as “Have you ever been in trouble with the police?”. We support a legislative prohibition on employers asking such questions, which are unfair and, in most cases, irrelevant. Young people are often “in trouble with the police” through no fault of their own, it is often the case that charges are not laid or are ultimately dismissed.
15. Finally, we believe that public education is a vital component of any anti-discrimination initiative. Many employers and members of the general public have misconceptions about people who have committed criminal offences. There is a tendency to view such people as inherently bad, without understanding the context of their offending. There is a need for greater public awareness of the fact that society cannot be divided into neat categories of “criminals” and “innocent law-abiding citizens”, and that most offenders are able to achieve rehabilitation.

We would be happy to discuss any matters arising from this submission, including providing client case studies if requested. Please feel free to contact me at jane.sanders@freehills.com or on 9360 1847.

Yours faithfully

Jane Sanders
Solicitor

