



Department of Corrective Services



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Our Reference:

Your Reference:

Dear Commissioner

Comments on Discrimination in Employment on the Basis of Criminal Record

I refer to your letter dated 13 December 2004 and to the attached discussion paper.

The Department of Corrective Services (the Department) is very mindful of its obligations under the Human Rights and Equal Opportunity Act 1986 (HREOC Act) to treat employees and applicants for employment fairly. At the same time, the Department, as an arm of the criminal justice system, has an obligation to ensure that it only employs persons with high level of integrity so that public trust and confidence in the work of the Department is not compromised. Generally speaking, the Department's position is that a criminal record is inconsistent with the inherent requirements of many of the particular jobs performed by staff in the Department.

At present the Department has a criminal record policy which in effect differentiates between particular positions and particular categories of offences. Correctional Officers and other staff who work directly with inmates and offenders are regarded differently from those staff who perform other clerical or administrative duties. The inherent requirements of the jobs of those staff who work directly with inmates and offenders mean that applicants who have convictions for certain serious offences are, at present, automatically excluded from appointment. Applicants with convictions for less serious offences are considered on a case by case basis after taking into account the circumstances of the offence and any comments that the applicant may wish to make in relation to the matter. Applicants for other clerical and administrative positions which do not involve direct contact with inmates and offenders and who possess a criminal record are treated on a case by case basis.

As you would be aware, the position of correctional officer (or "prison officer" as it is referred to) is one of the categories of occupation which is exempted from the spent conviction legislation under the section 15(1) of the Criminal Records Act 1991 (NSW). This means that the Department may take into account the applicant's entire criminal history. An anomaly however is that the exemption does not extend to other occupations within the Department which involve direct contact with inmates and offenders such as Probation and Parole Officers, Alcohol and Other Drug Workers, Psychologists, Welfare Officers etc. Thus an applicant for the position of correctional officer would be automatically excluded at present for a serious offence which occurred, say, 11 years ago, but an applicant for the position of Probation and Parole Officer who had committed the same offence at the same time would not be excluded - even though the inherent requirements of the two positions (in terms of integrity) are the same - as the criminal record in the case of the Probation and Parole Officer applicant would be spent. The Department finds this inconsistency undesirable as there appears no logical reason why the two positions should be treated differently. The discrepancy makes it possible for unsuitable persons to be appointed to positions which require a high level of integrity as the person's spent convictions could not be relied upon.

While the Department does not consider that its policy in relation to criminal records is discriminatory (as it applies the inherent requirements test), the Department is in the process of reviewing the current policy and the manner in which it is implemented. Amongst the proposals being considered is the establishment of an Employee Screening Unit which would conduct more rigorous checks of applicants for certain positions not only in terms of a criminal history but also in relation to other indicators of suitability such as employment history, criminal associations, membership of organisations and such. The Department is mindful that the existence or non existence of a criminal history by itself is often not a reliable indicator of an applicant's suitability or unsuitability and that it should be considered along with other factors. The Department is also mindful that an inflexible policy that does not allow for any consideration of the particular circumstances of a case could be regarded as unfair and potentially unlawful if there is a change to the legislation.

An essential part of the proposed screening process therefore would be inviting the applicant under review to make written and/or oral submissions in relation to the integrity issue of concern. The Department is committed to ensuring that only those persons who have met the inherent requirement of high level integrity and trust are appointed to front line and sensitive positions. At the same time the Department wants to ensure that applicants are afforded natural justice and that certain groups, such as indigenous applicants, are not unfairly disadvantaged by an inflexible policy. Clearly appropriate weight must be given not only to the objective seriousness of the offence but also to factors such as the length of time since the offending behaviour, the person's age at the time of the offence, the particular circumstances of the offence and the applicant's personal and employment history since the offence. In taking such matters into account, the

Department is confident that it can meet its objective of maintaining public confidence in the integrity of its employees whilst ensuring the fairness of its selection process.

In relation to non front line positions – that is, positions of a clerical or administrative nature which do not involve direct contact with inmates or offenders – the Department is aware that the inherent requirements for these positions require different considerations of criminal records. As indicated above, such instances are considered on a case by case basis with issues such as the seniority of the position, its particular functions, any access to sensitive data bases etc needing to be taken into account when considering the particular offence disclosed on the criminal record. However, as previously indicated, underlying all considerations is the fact that the Department is an arm of the criminal justice system and as such, the public expects a higher standard of integrity of all its employees than it may expect from employees of another agency. Thus a criminal record will always be a relevant factor - but not necessarily one which results in exclusion - when considering an applicant for any position in the Department.

In relation to the specific questions posed in your discussion paper I make the following comments in relation to those questions relevant to this Department.

3. Current discrimination laws

Clearly there is no legal protection against discrimination in employment on the basis of criminal record in New South Wales. There is no provision in the Anti-Discrimination Act 1977 (NSW) and the provisions in the HREOC Act are ineffectual in the sense that any orders made by the Commission are not enforceable. It is possible that a member of a particular group, such as an indigenous person, may claim indirect discrimination in relation to the conditions in which employment is offered on the grounds of race under the Anti-Discrimination Act, on the basis that an inflexible criminal record policy is more likely to disadvantage applicants from that group. I am not aware whether any application along these lines has ever been lodged with the Anti Discrimination Board.

If it is considered necessary to provide enforceable legislative protection against discrimination in employment on the grounds of criminal record, it is the Department's view that any such legislation should quite clearly and unequivocally set out the relevant exemption – that is, the inherent requirements of the position.

5. Relevance of criminal record to employment

As already indicated, it is the Department's view that a criminal record is a relevant consideration for all its positions due to the nature of the Department's

business and the necessity for public confidence and trust in the integrity of those persons who perform the Department's work. A criminal record is particularly relevant to those positions which involve direct contact with inmates and offenders. An applicant who has spent time in custody or who has committed offences of violence, sexual assault, dishonesty, involvement with prohibited substances - or any offence which could incur a custodial sentence - would need to be carefully considered. It is generally accepted that it is incongruous that a person could be tasked with the incarceration and management of offenders when he or she has committed the same offence or offences as the persons who are being incarcerated or managed. Similarly, a criminal record is relevant when considering applicants for non front line positions in the Department, particularly those which make decisions affecting inmates and offenders or which otherwise are at a senior level, have sensitive functions, are influential in their scope or which have access to confidential information. Again it is an inherent requirement of such positions that the position holder be a person of uncompromised integrity.

6. Disclosure of criminal record

The Department makes it clear to all applicants that integrity is an inherent requirement and that all applicants must consent to a criminal record check if their application is to proceed. Applicants for correctional officer positions are fingerprinted to ensure a more comprehensive criminal record check than is obtained from a name check only. If the applicant does not consent to being finger printed or to having a criminal record check conducted, the application does not proceed.

In addition to the criminal record check, applicants are requested to disclose on the application form whether they have a criminal record. This form has recently been amended to make it clear that applicants for correctional officer positions must disclose their entire criminal history – including convictions which would otherwise be spent. Applicants for all other positions are advised that they must disclose only convictions which are not spent. The form details what convictions are not spent and both forms make it clear that “conviction” includes offences which are proven although no conviction is recorded.

If an applicant is dishonest about his or her criminal record – rather than simply making an error – the application will not proceed. If the deception is discovered after employment has commenced then the person's employment would be terminated on the grounds of dishonesty.

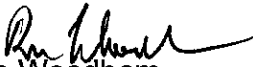
7. Review of decisions

In this Department at present, a person whose application was rejected on the grounds of the person's criminal record may seek a review of that decision from the Department's Executive Director of Human Resources Management. The

Department does not consider any other review process is necessary. In the event that discrimination in employment on the basis of criminal record became an enforceable ground of unlawful discrimination at the State or Commonwealth level, then there would be ample opportunity for the aggrieved person to seek a review and a remedy.

Thank you for this opportunity to comment on your discussion paper. Should you require any further information please contact Margaret Parmeter, Director, Employment and Administrative Law Branch on 9289 1060 or email margaret.parmeter@dcs.nsw.gov.au

Yours sincerely


Ron Woodham
Commissioner

21 March 2005