



Spent Conviction Discrimination Guideline

COMPLYING WITH THE EQUAL OPPORTUNITY ACT 2010

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**Victorian Equal Opportunity
& Human Rights Commission**

Spent Conviction Discrimination Guideline



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1

About this guideline



All people have the right to be treated fairly and have the opportunity to fully participate in society despite their spent convictions. Under the *Equal Opportunity Act 2010 (Vic)* (Equal Opportunity Act), it is against the law to discriminate against a person on the basis of a spent conviction, unless an exception applies. A spent conviction is a conviction that in most circumstances does not appear on a person's criminal record.

It is unlawful for duty holders under the Equal Opportunity Act to discriminate against a person on the basis of a spent conviction. These duty holders include employers, providers of accommodation, education, goods and services, clubs and sporting organisations. They also have a legal obligation to take reasonable and proportionate measures to eliminate spent conviction discrimination as far as possible. This is known as the 'positive duty'. Simply responding to complaints that arise is not enough to comply with the law.

Employers can be liable if their employee discriminates against someone because of a spent conviction and they fail to take appropriate preventative steps. It is therefore crucial that duty holders understand their legal obligation to not discriminate against staff, tenants, students, clients, consumers, club members and sporting participants and also to prevent and eliminate discrimination from their organisation. By complying with the positive duty, duty holders will be taking steps towards meeting their other obligations, avoiding liability under the Equal Opportunity Act and creating a rights respecting environment where everyone is treated fairly and with dignity.

Part 1 sets out information on this guideline, including:

- the purpose of the guideline (Part 1.1)
- the Commission's authority (Part 1.2)
- our consultation process (Part 1.3)
- key terms (Part 1.4).

1.1 Purpose

This guideline has been written for all Victorian duty holders to provide assistance in meeting their legal obligations under the Equal Opportunity Act, including the positive duty. It provides practical guidance on how to prevent and respond to spent conviction discrimination.

This guideline will also assist individuals who feel they have experienced spent conviction discrimination and are looking for clarification on their rights, and the responsibilities owed to them by an organisation or body. This includes understanding how information about their spent conviction can and can't be used and what to do if they believe they have been treated unfairly.

Advocates and supporters of those who are experiencing or have experienced spent conviction discrimination will also find this guideline of assistance in clarifying rights and responsibilities.

1.2 Authority

The Victorian Equal Opportunity and Human Rights Commission (Commission) is an independent statutory body with responsibilities under the following Victorian laws:

- the *Equal Opportunity Act 2010*
- the *Charter of Human Rights and Responsibilities Act 2006* (Charter)
- the *Racial and Religious Tolerance Act 2001*
- the *Change or Suppression (Conversion) Practices Prohibition Act 2021*.

Our role is to protect and promote human rights and to eliminate discrimination, sexual harassment, victimisation and change or suppressions practices, to the greatest extent possible. We do this through a range of functions, including resolving complaints and reports, completing research, educating, advocating for Victorians, monitoring the operation of the Charter and enforcing the Equal Opportunity Act, Racial and Religious Tolerance Act and Change or Suppression (Conversion) Practices Prohibition Act.

This guideline is not legally binding. However, a court or the Victorian Civil and Administrative Tribunal (VCAT) may consider whether a duty holder has complied with this guideline when considering whether spent conviction discrimination has occurred.

The Commission may also use the guideline when we:

- investigate systemic issues of spent conviction discrimination
- conduct reviews
- educate duty holders
- assist Victorians to understand their rights.

This guideline is not designed to address issues that may arise relating to the general use of criminal records (other than spent convictions) as their use is not protected from discrimination under the Equal Opportunity Act. However, we acknowledge that the use of criminal records and the associated negative impacts are inextricably linked to spent conviction discrimination. Therefore, the minimum

standards set out in this guideline will also help duty holders take positive steps towards preventing unnecessary use of criminal records more broadly.¹

This guideline does not cover every possible situation and circumstance that duty holders may encounter. If you have a matter you need to clarify, consider seeking legal advice. If you require more information on spent conviction discrimination you can contact the Commission's free Enquiry Line on 1300 292 153.

The minimum standards set out in Part 4.2 have been adapted from the Commission's six minimum standards for general compliance with the positive duty. The standards have been tailored to provide specific guidance on how to eliminate spent conviction discrimination.

Due to the recent implementation of the spent conviction scheme in Victoria, all examples and case studies in this guideline are hypothetical.

1.3 Consultation

The Commission developed this guideline in consultation with stakeholders under section 148 of the Equal Opportunity Act.² We consulted industrial organisations, unions, advocacy organisations for communities affected by the use of criminal records, as well as other regulators and experts on criminal record discrimination. Through these consultations, we heard of people who have been negatively impacted by their broader criminal record in finding employment, securing housing and accessing essential services. This helped to inform our understanding and approach in developing this guideline.



1.4 Key terms

| Term | Meaning |
|-------------------------------------|--|
| Conviction period | A conviction period refers to the length of time a person may need to wait after they are convicted, before the conviction can be spent. If it applies, the conviction period is five years for children and young people under 21 (generally speaking), and 10 years for people 21 and over at the time of sentencing. ³ |
| Criminal record | A document created by law enforcement that includes a person's criminal convictions. ⁴ |
| Discrimination | <p>Discrimination can be direct or indirect:</p> <ul style="list-style-type: none">• Direct discrimination happens when someone is treated unfairly because of an attribute protected by the Equal Opportunity Act.• Indirect discrimination happens when there is an unreasonable requirement, condition or practice that disadvantages a person, or a group of people, with a protected attribute. <p>For more information, see Part 3.1.1 below.⁵</p> |
| Disclosable spent conviction | <p>All spent convictions are disclosable in certain circumstances. A disclosable spent conviction is a conviction which a law enforcement agency or a court or a tribunal may disclose as part of a person's criminal record in certain circumstances.⁶</p> <p>For more information, see Part 2.4 below.</p> |
| Duty holder | A duty holder is anyone who has responsibilities under the Equal Opportunity Act. This includes employers, providers of accommodation, education, goods and services, clubs, and sporting organisations. |
| Irrelevant criminal record | <p>Irrelevant criminal record refers to:</p> <ul style="list-style-type: none">• where a person has been charged but the proceedings have not been finalised or the charge has lapsed or withdrawn• where the person was found not guilty• a conviction that has since been annulled, expunged, quashed or set aside• a conviction where the circumstances of the offence are not directly relevant to the situation in which discrimination arises (such as the job they are applying for)• a spent conviction.⁷ <p>See Part 3.4 below for further information on other jurisdictions.</p> |

Positive duty Under the Equal Opportunity Act, the positive duty is the legal obligation that duty holders have to take reasonable and proportionate measures to eliminate discrimination (including spent conviction discrimination), sexual harassment and victimisation as far as possible.⁸

Rights holder Rights holders are people who have rights under the Equal Opportunity Act and the Charter, including the right to not be discriminated against on the basis of a spent conviction. For the purposes of this guideline, rights holders include current and prospective employees (excluding volunteers and unpaid workers who are not protected from discrimination under the Equal Opportunity Act⁹), tenants, students, clients, consumers, club members and sporting participants.

Spent conviction A spent conviction is a conviction that will not appear on a person's police record check in most circumstances (see Part 2.3). A person with a spent conviction does not need to disclose their spent conviction nor can they be asked about it by a duty holder, unless permitted by the law. Exemptions that allow spent convictions to be disclosed are outlined in Part 2.4 below.¹⁰

Spent conviction discrimination Spent conviction discrimination occurs when:

- someone treats another person unfairly because of a spent conviction (direct discrimination); or
- an organisation introduces an unreasonable requirement, condition or practice that disadvantages people with a spent conviction (indirect discrimination).

2

Understanding the Spent Convictions Act



Part 2 sets out information on the Spent Convictions Act, including:

- information about the Act (Part 2.1)
- the importance of the Spent Convictions Act (Part 2.2)
- the types of spent convictions (Part 2.3)
- disclosable spent convictions (Part 2.4).

2.1 About the Spent Convictions Act

The *Spent Convictions Act 2021 (Vic)* (Spent Convictions Act) limits the circumstances in which information about someone's criminal convictions for minor and/or historical offences can be disclosed. Once a conviction is spent, no one should find out about or disclose the conviction, except in specific circumstances outlined in the Spent Convictions Act. Anyone who discloses information about a spent conviction could be committing an offence unless they are legally allowed to disclose it. This removes some of the unfair barriers faced by Victorians who previously committed a minor offence but have since demonstrated their commitment to turn their life around or have been unjustly treated for minor offending.

The Spent Convictions Act:

- establishes a scheme for convictions to become spent automatically or on application (see Part 2.3)
- provides for limited collection, use and disclosure of a spent conviction for the purposes of the administration of justice, to inform a holistic assessment of risk for the purposes of public safety, or the performance of statutory functions¹¹ (see Part 2.4)
- creates offences for disclosing information about a spent conviction or obtaining information about a spent conviction fraudulently or dishonestly¹² (see Part 3.1.3)
- amends the Equal Opportunity Act to prohibit spent conviction discrimination (see Part 3).

There are different spent convictions schemes applicable to Commonwealth offences and to offences from other states and territories. A conviction spent under such laws will also be regarded as spent for the purpose of the Victorian Act.¹³ Part 3.4 sets out further information on key laws from other Australian jurisdictions.

2.2 The importance of the Spent Convictions Act

The Spent Convictions Act removes unfair barriers and ensures that Victorians have the opportunity to move on from some historical and/or minor offending.

2.2.1 Drivers of discrimination

Given the relatively new nature of the spent convictions scheme in Victoria, research on the drivers of spent conviction discrimination is limited. However, there is more research available on the drivers of broader criminal record discrimination, which is still relevant and useful to consider in the context of spent convictions.¹⁴

Research has shown some people believe that once an individual has committed a criminal offence, they deserve ongoing punishment because of their criminal behaviour, regardless of whether they have completed their sentence.¹⁵ This is a type of stigma - the attachment of negative thoughts or connotations to an individual based on distinguishing characteristics such as a person's criminal history.¹⁶ This can result in animosity towards individuals with a criminal record, along with broad and often unfounded assumptions around reliability, honesty or potential for relapse. As such, some people may consequently and unfairly believe that such individuals should be denied opportunities such as employment, access to services, or accommodation.

Fear is another prevalent driver. This may stem from a lack of understanding about the potentially minor offences an individual has previously been convicted of and whether the individual is 'dangerous', or the personal circumstances that may have led to the original conviction.¹⁷ Similarly, employers' hesitancy to employ people with a criminal record seems to flow from an assumption that these individuals pose more of a risk in the workplace.¹⁸ This perceived risk may be in relation to reputation to the business, the trustworthiness of the employee, expectations around the ability of the individual or concerns regarding potential client or colleague discomfort.¹⁹ These assumptions and judgements particularly impact individuals who are from a non-white background, with these groups experiencing this type of discrimination in employment at a disproportionately higher rate than white people.²⁰

These drivers may result in ongoing spent conviction discrimination, despite the fact that spent convictions usually involve minor and/or historical offences with an individual having fulfilled the conditions of their sentence and conviction, and in some cases, never reoffended.

2.2.2 Impacts of criminal records

Individuals with a criminal record face deep stigmatisation and social exclusion.²¹ Yet this prejudice runs counter to the foundational principle underpinning our criminal justice system that once an individual has completed their sentence, they should no longer be punished. Denying individuals access to opportunities such as employment or accommodation is punishing them to a greater extent than what was included in their original sentence.²² This practice disproportionately focusses on the potential risk for employers or other duty holders, rather than balancing the value for broader society of individuals with a criminal record being gainfully employed and included in society.²³

Given there is limited evidence available on the impacts of spent conviction discrimination in Australia, the impacts identified are based on evidence involving broader criminal record use and its ongoing impacts on the lives of affected individuals.

Type of impacts

Criminal records can lead to substantial social, economic and health impacts. Individuals face discrimination in accessing employment, housing and other services, which limits their ability to effectively rehabilitate and participate in the community. The stigma attached to a criminal record can have significant ongoing impacts on a person's opportunities, prospects and mental health, irrespective of the seriousness of the conviction or how long ago it occurred. Rights holders are subsequently socially disadvantaged, which is then interpreted by broader society as a lack of ability, creating more prejudice and reinforcing stereotypes.²⁴

Spent conviction discrimination can also lead to higher rates of reoffending as individuals find it difficult to engage effectively in society with significant barriers to employment and access to services and accommodation.

Impacted groups

Systemic inequalities lead to particular groups being disproportionately impacted by criminal records and in turn experiencing discrimination.

Aboriginal and Torres Strait Islander people and those from other culturally diverse backgrounds, including the African community, are over-policed as offenders.²⁵ They are often disproportionately charged and convicted of low-level crimes and therefore overrepresented in the criminal justice system and subsequently at an increased risk of experiencing discrimination.²⁶

People with a mental health condition, children in out-of-home care and people from low socio-economic backgrounds are also at risk of being discriminated against after their convictions are spent due to their overrepresentation in the criminal justice system.²⁷

CASE STUDY

Cycle of reoffending

Kai gets convicted of graffitiing on a private property when he is 14. Despite the conviction being spent immediately, people in his small town know about the conviction and brand him as a criminal. After he finishes high school, he looks for a job and is refused employment at multiple different businesses because they had heard of his spent conviction even though it wouldn't appear in any police record check for employment purposes.

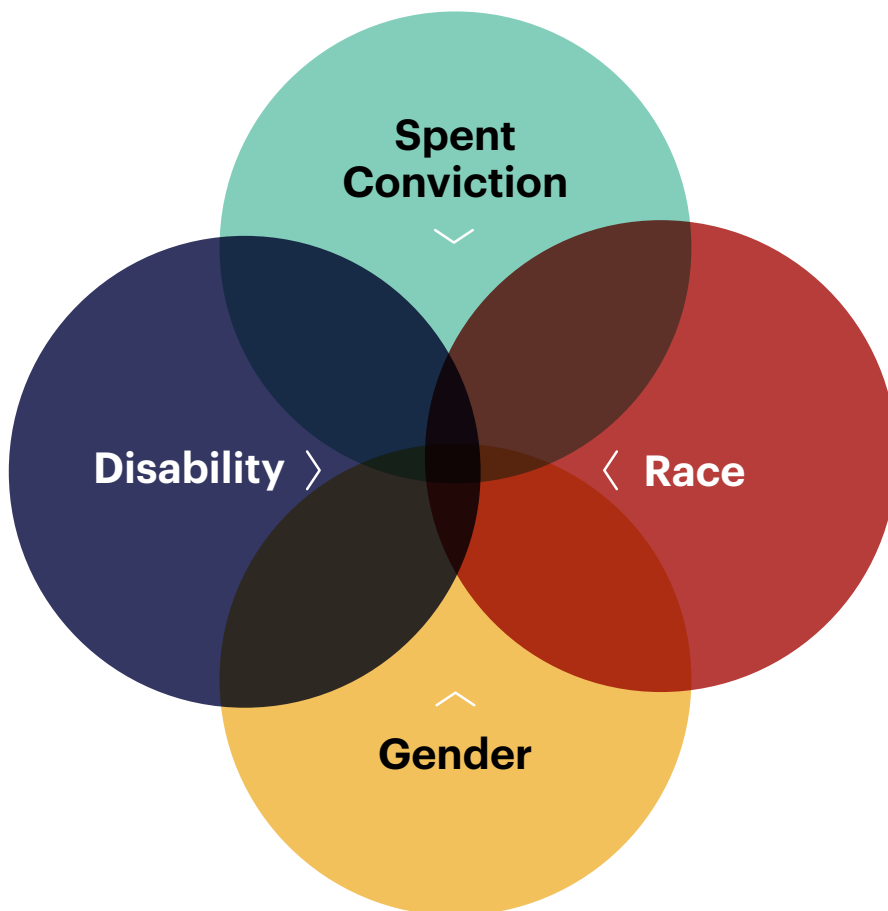
Kai needs to work to support himself so decides to move to a different town, but without a secure job he cannot find accommodation and ends up sleeping in his car. He is seen by the police one evening and fined. As he repeatedly defaults on his fine payments, he is sent to prison. Feeling isolated and disenfranchised, Kai's time in prison now makes it harder for him to obtain employment and accommodation, all stemming from his first conviction and subsequent discrimination when he was young.

Intersectional discrimination

Spent conviction discrimination may not be experienced in isolation. Multiple personal characteristics, such as race or disability, can overlap with one another resulting in harsher and more harmful consequences.²⁸ Blanket policies that target people with a criminal record may disproportionately impact marginalised communities overrepresented in the justice system, restricting their full access to society.²⁹ For example, for Aboriginal and Torres Strait Islander Peoples, spent conviction discrimination can further entrench disadvantage, which limits the capacity for the broader Aboriginal and Torres Strait Islander community to achieve self-determination.

The following diagram illustrates how an individual can experience more than one form of discrimination simultaneously (intersectional discrimination) (see Part 3.1.1 for a discussion on spent conviction discrimination). For example, a person may experience discrimination because of the intersection between their disability, race, gender and a spent conviction. Disadvantage that is based on two or more of these traits is said to compound, rather than simply add together, so that the person's experience of marginalisation is far greater than those with just one of these traits.

Figure A1 **Intersectional Discrimination**



2.3 Types of spent convictions

A person's interaction with the criminal justice system appears on their criminal record, usually in the form of a conviction. A conviction is considered 'spent' when it is protected from disclosure under the Spent Convictions Act.

A person generally does not have to disclose a spent conviction except in limited circumstances and they cannot be asked about it unless the law specifically permits the question (see Part 2.4).

The Spent Convictions Act distinguishes three categories of spent convictions:

1. those which are immediately spent automatically
2. those which become automatically spent after a defined conviction period (see definition of 'conviction period' in Key Terms section)
3. those which may be spent by application to and determination by the Magistrates' Court.

The Act also defines a spent conviction to include a conviction that is spent under a law of another State, Territory or the Commonwealth.³⁰



| When a conviction becomes spent | Description |
|---|---|
| Immediately | <p>In some circumstances, a conviction will be spent immediately at the time the conviction is recorded, or, if there are conditions attached to the sentence imposed, at the time those conditions are completed.</p> <p>This includes if individuals were under the age of 15 when they committed the offence, or if the court made its order 'without conviction'.</p> <p>Other than completing any relevant conditions required under the sentence for the offence in question, individuals do not need to do anything for these convictions to be spent.³¹</p> |
| Automatically after a period of time | <p>Some convictions will be spent automatically after an individual completes a conviction period. This applies to:</p> <ul style="list-style-type: none"> • convictions for an offence that was not a serious violence offence or a sexual offence³², and • where the term of imprisonment, or detention in a youth justice facility, imposed by the court was 30 months or less. <p>For those who were 21 years or older at the time of sentencing, these convictions will be spent after 10 years, and for those under the age of 21 at the time of sentencing, these convictions will be spent after five years (generally speaking).³³ If someone is subsequently convicted during their first conviction period, in some situations the conviction period of the first conviction resets and will run from the person's most recent conviction date.</p> |
| Following an application to the Magistrates' Court | <p>Some serious convictions can be spent by application to the Magistrates' Court in limited circumstances.³⁴ A serious conviction includes convictions for:</p> <ul style="list-style-type: none"> • sexual offences • serious violence offences • other offences where the court sentenced the person to prison or detention in a youth justice facility for more than 30 months.³⁵ <p>Individuals must have completed the relevant conviction period before making an application.³⁶</p> <p>In some cases, a person cannot have their serious conviction spent. A person's conviction can never become spent if they were 21 years or older at the time they were sentenced and:</p> <ul style="list-style-type: none"> • they were convicted of a sexual offence or serious violence offence where any period of imprisonment was imposed; or • they were convicted of another serious offence (i.e. other than a sexual offence or serious violence offence) where they were sentenced to more than five years' imprisonment.³⁷ |

More information on spent conviction pathways and what offences fall under each spent conviction pathway can be found on the Department of Justice and Community Safety (DJCS) website.³⁸

2.4 Disclosable spent convictions

In general, a spent conviction will not appear on a police record check and is not disclosable to anyone. However, in some cases as set out below, disclosure is permitted or required.

Statutory functions

In certain circumstances, police, courts and tribunals are required to disclose convictions to each other or specific agencies that are legally permitted to collect, use and disclose spent convictions for a particular statutory purpose.³⁹ For example, a criminal record, including spent convictions can be released to the Registrar of Marriage Celebrants for the purpose of assessing an application for registration as a marriage celebrant.⁴⁰

Where a spent conviction is disclosable, the specified person or body that it is disclosed to can use that information to exercise particular functions under another law. See Part 3.2.2 for information on when agencies can lawfully discriminate in the exercise of their functions, by relying on the statutory authority exception under the Equal Opportunity Act.

Administration of justice

Criminal records, including any spent convictions, can be disclosed by law enforcement agencies, courts and tribunals to other law enforcement agencies, courts and tribunals to allow for the performance of their functions.⁴¹ This limited disclosure aids the administration of justice and the protection of community safety.⁴²

Criminal record checks

Law enforcement agencies can also disclose spent convictions to specified persons or bodies as part of a criminal record check.⁴³ For example, spent convictions can be disclosed to DJCS to assess an application for a Working with Children Check (WWC Check) or as part of a driver history report issued by VicRoads to assess a person's suitability for driving-related work. These examples are discussed in more detail below.

Other examples of where spent convictions can be disclosed on a criminal record include where the check is conducted for:

- specific types of employment such as bus operators or drivers
- licensing for areas including liquor, gambling and firearm licences
- accreditation or registration for certain occupations including lawyers or teachers
- registration of marriage celebrants
- regulation of disability workers and disability students.⁴⁴

A full list of permitted disclosures can be found in the Spent Convictions Act and the Spent Convictions Regulations 2021.⁴⁵

Individual disclosure

A person does not have to disclose a spent conviction to anyone, except in limited circumstances required by law.⁴⁶ For example, a person must disclose their criminal history (including any spent convictions) to the relevant registration body for the purposes of registration as a health practitioner.

2.4.1 Working with Children Checks

As an employer, you must ensure your workers or volunteers are suitable for child-related work. If you are advertising child-related work, the applicant may need a WWC Check. The laws about spent convictions do not change the WWC Check process.

What is child-related work?

The *Worker Screening Act 2020* states that child-related work is paid or unpaid work in specified fields (such as childcare) that usually involves direct contact with a child. Child-related work does not include occasional direct contact with children that's incidental to the work. Some exemptions apply.

You can visit www.workingwithchildren.vic.gov.au to find out if your employees need a check.

A WWC Check is a screening process undertaken by DJCS that considers an individual's suitability for child-related work, including their background and criminal history. In order to assess an application for a WWC Check, Victoria Police will disclose an individual's criminal record, including any spent convictions, to DJCS.

DJCS is only required to provide the outcome of the WWC Check to an employer or potential employer of a person undertaking child-related work and will not provide the reason for an exclusion, which may include a spent conviction. However, DJCS is required to provide an applicant with the reason that a check was not passed.

Part 4.3.1 provides guidance on preventing discrimination related to WWC Checks.

2.4.2 Checks for driving-related work

Driver accreditation

If a driving-related conviction is spent, it will usually not show up on a police record check for employment unless an exemption applies.⁴⁷ However, if a person needs to be accredited as a driver for a specific purpose (such as a commercial driver), the relevant regulator (for example, Commercial Passenger Vehicles Victoria) will be able to receive information about a spent conviction on a police record check for the purpose of deciding whether to grant driver accreditation. However, the employer will not see any spent convictions on the police record check it receives for employment purposes.

CASE STUDY

Applying for a driving job with a tour company

Remi applied to work for a tour company in Melbourne. He has a spent conviction for driving 20kms over the speed limit, but as the conviction is spent, Remi thought it would no longer be relevant. The tour company requires all their drivers to have a Driver's Accreditation Certificate issued by Commercial Passenger Vehicles Victoria.

As part of assessing Remi's application for driver accreditation, Commercial Passenger Vehicles Victoria consider his criminal record (including the spent conviction) and decide not to issue him with a Driver's Accreditation Certificate. As a result of Remi not receiving the accreditation, the tour company is unable to give Remi the job. This is not against the law.

Driver history reports

An employer can also ask a job applicant to obtain a driver history report issued by VicRoads to assess their suitability for driving-related work. A driver history report includes a complete history of all demerit points and all applicable convictions on VicRoads records. Driving convictions that are spent appear on a driver history report, which can be issued to an employer by VicRoads, with the person's written consent.⁴⁸

Part 4.3.1 provides guidance on preventing discrimination related to driver history reports.

3

Understanding the Equal Opportunity Act



Part 3 sets out the law relating to spent conviction discrimination, including information on:

- unlawful conduct (Part 3.1)
- when discrimination is lawful (Part 3.2)
- the positive duty (Part 3.3)
- other relevant laws (Part 3.4).

Remember!

For the purposes of this guideline:

A **duty holder** is anyone with responsibilities under the Equal Opportunity Act, including employers, providers of accommodation, education, goods and services, clubs and sporting organisations.

A **rights holder** is an individual with rights under the Equal Opportunity Act, including current and prospective employees, tenants, students, clients, consumers, club members and sporting participants.



Examples of duty holders

This table sets out examples of duty holders with obligations in different areas of public life under the Equal Opportunity Act. Most of these duty holders will also be employers with a legal obligation to eliminate spent conviction discrimination in employment. For this reason, all duty holders who are employers should also consider the guidance in Part 4.3.1 on preventing discrimination in employment.

| | |
|---|---|
| Providers of accommodation such as:  | Providers of clubs that:  |
| <ul style="list-style-type: none">• business premises• public or private housing or flats• a hotel or motel• a boarding house or hostel• a caravan or mobile home• a camping site | <ul style="list-style-type: none">• have more than 30 members• have a liquor licence• gather for social, literary, cultural, political, sporting or other lawful purposes |
| Employers:  | Educational institutions such as:  |
| <ul style="list-style-type: none">• A person or organisation (of any size) that employs, contracts, or engages people to work on commission | <ul style="list-style-type: none">• schools• colleges• universities• TAFEs |
| Providers of goods and services such as:  | |
| <ul style="list-style-type: none">• community and health services, including disabilities services• banking, financial and insurance services• entertainment and recreation• goods transport and travel services | |

3.1 Unlawful conduct and liability

3.1.1 Spent conviction discrimination

The Equal Opportunity Act protects people with a spent conviction from being treated unfairly at work, in accessing accommodation, in education settings, in the provision of goods and services, in clubs and sporting organisations because of a spent conviction. This helps those with a previous criminal conviction covered under the Spent Convictions Act to move on with their lives and participate fully in society.

Definition of discrimination under the Equal Opportunity Act

Direct discrimination happens when someone is treated unfairly because of a personal characteristic or attribute protected by the Equal Opportunity Act.⁴⁹ Examples of protected attributes include age, disability, race, sexual orientation or having a spent conviction.

Discrimination is against the law when it occurs in an area of public life, including employment, education, accommodation and the provision of goods and services.⁵⁰

Examples of conduct that can amount to direct discrimination include:

- not hiring someone or dismissing someone from work
- not admitting someone to an educational program
- not approving an application for accommodation
- expelling a student or evicting a tenant
- not providing a service to someone, such as a health or community service
- refusing to deliver a business service in someone's home, where the service is typically home-based
- refusing someone's application for club membership.

Indirect discrimination happens when there is an unreasonable requirement, condition or practice that disadvantages a person, or a group of people, with a protected attribute.⁵¹

Like other types of discrimination, spent conviction discrimination can be direct or indirect.

Direct spent conviction discrimination is when someone treats another person unfairly because of a spent conviction.⁵² This may mean that an individual is unfairly refused employment, accommodation, an educational opportunity, club membership or the provision of goods or services because of a spent conviction. For example, subject to any applicable exceptions, it is against the law to refuse to:

- employ someone after finding out about their spent conviction through word-of-mouth
- extend a tenant's lease after the tenant voluntarily discloses a spent conviction (noting that disclosure by a tenant or prospective tenant is not legally required)
- provide an educational opportunity to a student after finding out about their spent conviction in an old newspaper article
- accept someone's application for club membership after another member mentions that they think the person has a spent conviction
- let someone join a sporting organisation after the person makes a post on Facebook about a spent conviction.

CASE STUDY

Discrimination in the workplace

Dani lives in a small town in regional Victoria. When Dani was 16, she received a conviction for vandalism. Dani is now 30 and has not had any further convictions. Since that time, her conviction has become spent.

Dani applies for a job at a local restaurant. Before the interview, the hiring manager googles Dani and sees an article on small town crime which mentions her by name. When asked about this in the interview, Dani states this conviction is now spent, but the manager refuses to employ Dani anyway because of the conviction.

This is against the law.

CASE STUDY

Discrimination in housing

A landlord refuses to rent a house to an applicant because they have knowledge of a previous conviction, even though the conviction occurred over 10 years ago when the applicant was 14 and the applicant has committed no further offending since that time.

This is against the law.

Indirect spent conviction discrimination is when an unreasonable requirement, condition or practice disadvantages a person or group of people with spent convictions.

For example, if you have a blanket requirement for all prospective employees to have a valid WWC Check, but the specific job does not involve child-related work, you may be liable for indirect discrimination. This is because the requirement is:

- likely to disadvantage people with a spent conviction who may be deterred from applying for a job due to the risk of being refused a WWC Check (particularly when the check is unnecessary because the job is not child-related)
- unlikely to be reasonable, particularly given the availability of other alternatives that would result in less disadvantage for people who already face barriers to employment (such as a criminal record check that won't reveal spent convictions to the employer).

For more information on WWC Checks, see Parts 2.4.1 and 4.3.1.

It is also against the law to discriminate against a person because of their personal association with someone with a spent conviction.⁵³ For example, it is against the law to refuse to provide a service to someone because their partner has a spent conviction.

3.1.2 Authorising or assisting discrimination

It is against the law for any person, including duty holders, to request, instruct, induce, encourage, authorise or assist someone to discriminate against another person.⁵⁴

Authorising or assisting another person to discriminate against someone may also include a situation where a duty holder is aware discrimination is occurring but chooses not to do anything to stop it or to prevent it from reoccurring. It will depend on the facts, but in some situations, a duty holder in these circumstances could be found to be authorising or assisting in the discrimination.⁵⁵

CASE STUDY

Instructing an employee to refuse a service

Donna wants to seek the services of a community organisation who helps with career counselling. The manager Dave knows about Donna's spent conviction through family friends so advises his employee to refuse the service to Donna because she is 'a criminal'. In this case, Dave is encouraging his staff member to discriminate against Donna.

This is against the law.

3.1.3 Discriminatory requests for information

Discriminatory requests for information can form the basis for a complaint under the Equal Opportunity Act. It is against the law for a person to request information from another person that could be used to discriminate against them, unless they can show that they need that information for a legitimate purpose.⁵⁶ For example, it is against the law for an employer to ask someone if they have a spent conviction for the purposes of assessing a job application except if allowed by law.⁵⁷

It is also unlawful under the Spent Convictions Act to ask another person to disclose the existence of a spent conviction or information about a spent conviction except in set circumstances.⁵⁸ This includes making verbal or written requests, and also applies to printed and online application forms.

CASE STUDY

Unlawful request to disclose a spent conviction

Maria is applying to rent a new apartment. She is given an application form to fill in that asks applicants to disclose if they have any convictions. The application specifically asks applicants to include any prior convictions, spent or otherwise.

It is against the law to request information about a spent conviction and is therefore likely to be an unlawful request for discriminatory information. It is also unlawful under the Spent Convictions Act. Maria would not be required to comply with the request as it related to spent convictions.⁵⁹

3.1.4 Victimisation

The Equal Opportunity Act makes it unlawful to victimise someone because they have raised a complaint about spent conviction discrimination.⁶⁰

Victimisation means treating or threatening to treat someone badly because they have:

- made a complaint or allegation of spent conviction discrimination or it is believed they might make a complaint
- helped someone else make a complaint of spent conviction discrimination.⁶¹

Examples of victimisation include bullying and intimidating someone who has made a complaint about spent conviction discrimination, demoting or threatening to demote someone because they helped a colleague to make a complaint or refusing a service to someone who has previously made a complaint about spent conviction discrimination.

CASE STUDY

Victimisation after a complaint in the workplace

James makes a formal complaint at work when he wasn't put up for a manager position after his boss found out about his spent conviction. James' hours at work are then reduced and his boss tells him it's because he's "a troublemaker and shouldn't have spoken to HR".

This is victimisation and it is against the law.

3.1.5 Legal liability

Liability refers to legal responsibility for unlawful discrimination. Under the Equal Opportunity Act, people can be individually liable for their own conduct and employers can be vicariously liable for the conduct of their staff. Identifying who is liable determines who is responsible for making amends for the discrimination (for example, by paying compensation).

| Type of liability | Description |
|-----------------------------|---|
| Individual liability | If a person (including an individual or an unincorporated association or organisation) discriminates against another person, they may be individually liable. This means they are held directly responsible for their conduct and may be ordered to personally pay compensation to the person they discriminated against. ⁶² |
| Vicarious liability | <p>If a person discriminates in the course of their employment or while acting as an agent for an organisation, their employer can also be held legally responsible for their conduct. This is known as vicarious liability.</p> <p>An employer can be found to be vicariously liable if they have not taken reasonable precautions to prevent discrimination.⁶³</p> |

Organisation held vicariously liable for staff member's discriminatory actions

Nana's manager refuses to promote her when she finds out that Nana has a spent conviction for theft when she was a teenager. Nana is aware there may be a workplace behaviour policy but cannot find it or any reference to spent conviction discrimination on the internal intranet. There has not been any training on workplace equality in over five years and Nana is unsure about how to go about making a complaint internally.

Nana enquires at the Commission and discovers that the organisation has not fulfilled their positive duty by taking steps to prevent spent conviction discrimination from happening, such as incorporating spent conviction discrimination in its equal opportunity policy and making it easily available to staff. Nana's employer could be held vicariously liable for her manager's unlawful conduct.

3.2 When discrimination is lawful

The Equal Opportunity Act makes discrimination against the law, but it also recognises the need for some flexibility in how the law is applied to balance all rights. Under the Equal Opportunity Act, it is not against the law to:

- take special measures to promote substantive equality for groups of people with a protected attribute under the Act (Part 3.2.1)
- make exceptions in the specific circumstances where Parliament has decided that treating people differently is lawful (some of the exceptions that might be relevant in the context of spent conviction discrimination are set out in Part 3.2.2)
- apply for exemptions from the Equal Opportunity Act for a set period of time (Part 3.2.3).

3.2.1 Special measures

A duty holder may wish to take action to promote the rights of people with a spent conviction, such as limiting a job offer to people with a spent conviction, because they want to identify an opportunity to actively address discrimination or disadvantage. This is called a 'special measure' under the Equal Opportunity Act. A special measure recognises the disadvantage that some people have, such as people with a spent conviction, and allows duty holders to offer special assistance to help them have the same opportunities as others. Special measures must meet certain requirements.

For example, if an employer wants to create a dedicated position for people with a spent conviction, the employer will need to determine whether the action is a special measure aimed at achieving substantive equality. A special measure must be:

- directed at members of a group with an attribute, such as people with a spent conviction, for the purpose of promoting or realising substantive equality
- undertaken in good faith to help promote or achieve substantive equality for members of that group
- reasonably likely to achieve this purpose
- a proportionate means of achieving this purpose
- justified because the members of the group have a particular need for advancement or assistance.

A special measure is not unlawful discrimination, therefore a person who takes a special measure is not discriminating against another person.⁶⁴

CASE STUDY

Hiring people with lived experience of spent convictions

Paula runs a community organisation to mentor and support kids who have had contact with the criminal justice system. She prioritises employing people with a spent conviction to build up their confidence and open future employment pathways to overcome their disadvantage.

In advertising the new role, she states that the organisation only wants to employ people with spent convictions. She outlines that successful job applicants will benefit from sharing their experiences with others. This may be a special measure under the Equal Opportunity Act.

3.2.2 Exceptions

The Equal Opportunity Act includes exceptions to discrimination. If an exception applies, conduct that would otherwise be unlawful discrimination is lawful.

The exceptions set out below are relevant to spent conviction discrimination.

Protecting the wellbeing of children

The Equal Opportunity Act includes an exception for employment that involves the care, instruction or supervision of children, if the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children.⁶⁵

Whether discrimination is 'reasonably necessary' to protect children is assessed objectively and will depend on the particular circumstances. However, because most spent convictions are for relatively minor and/or historical offending (rather than serious and/or child-related offending), this exception would only be available in limited circumstances.

In most cases, a job applicant will be required to apply for a WWC Check for child-related work and an employer can rely on the outcome of the check in deciding whether to employ them (see Parts 2.4.1 and 4.3.1 for information on WWC Checks).

Domestic and personal services

A person may also lawfully discriminate in relation to employment involving domestic and personal services, including childcare services, in their own home.⁶⁶ This exception applies to an individual who employs someone to work in their own home, as well as a business providing in-home services on request by the person receiving the service in their home. The exception does not otherwise allow businesses providing in-home services to discriminate.⁶⁷

CASE STUDY

Not hiring someone to work as a cleaner in a home

Kira is looking for someone to provide cleaning services in her house and decides to put up a flyer in the local community notice board. She gets a call a few days later from Lizzy who is offering her services. Being a small community, Kira is aware of a conviction that Lizzy had for theft when she was 18 that is now spent. Based on this information, Kira does not offer the position to Lizzy.

Kira can rely on the exceptions related to the provision of domestic or personal services to lawfully refuse to offer Lizzy the job.

Residential accommodation

A person can discriminate when deciding who is going to share residential accommodation with them or a near relative when the shared house can accommodate no more than three people in addition to the person discriminating.⁶⁸ This exception does not apply to housing providers.

CASE STUDY

Choosing housemates in residential accommodation

Seema is looking for a new housemate to live with her in the house she owns. She finds Tony on a popular flatmate finder website and thinks they would be a good fit for the house. Before offering Tony the room she decides to do a google search. Seema comes across some old newspaper articles on Tony which outline a crime he committed when he was 18. This conviction is now spent but based on this information she decides that she does not want to live with Tony and does not offer them the room.

Seema can rely on the accommodation exception to lawfully refuse to offer Tony the room in her house.

Statutory authority

The Equal Opportunity Act allows duty holders to discriminate if the discrimination is necessary to comply with or is authorised by another law (statutory authority exception).⁶⁹

Organisations who have access to disclosable spent convictions under the Spent Convictions Act can rely on the statutory authority exception to discriminate against a person on the basis of a spent conviction if the discrimination is authorised by another law. For example, the *Firearms Act 1996* (Vic) authorises the Chief Commissioner of Victoria Police to refuse a person's application for a firearm licence if satisfied that the applicant is not a 'fit and proper person' (including because of their prior criminal activities).⁷⁰ If the Chief Commissioner was satisfied that the applicant was not a fit and proper person to hold a firearm licence because of their spent conviction, then they would be authorised by the Firearms Act to refuse the licence and this would not constitute unlawful discrimination.

CASE STUDY

Spent convictions affecting entry into certain professions

Charlie is applying to be a teacher. In accordance with section 22 of the Spent Convictions Act, the Victorian Institute of Teaching (VIT) can view their criminal record (including their spent conviction) as part of their application process.

The *Education and Training Reform Act 2006* (Vic) allows VIT to refuse to register an applicant as a teacher if they have been found guilty of certain offences. If the VIT relies on these provisions to refuse Charlie's application, the discrimination will be necessary to comply with, or authorised by, the Education and Training Reform Act, and will therefore be lawful because of the statutory authority exception in the Equal Opportunity Act.



Legal proceedings

It is also lawful to discriminate against an individual on the basis of a spent conviction if the discrimination is necessary to comply with an order of a court or tribunal.⁷¹

3.2.3 Temporary exemptions

Unlike special measures and exceptions, a duty holder can apply to VCAT if they want a temporary exemption from parts of the Equal Opportunity Act.⁷² VCAT will only consider granting an exemption if the request is not a special measure, is not covered by one of the exceptions in the Act and is a reasonable limitation on the right to equality in the Charter. In some circumstances, VCAT may still grant an exemption for certain conduct, even though an exception may apply.



3.3 The positive duty

Under the Equal Opportunity Act, duty holders have a legal obligation to take reasonable and proportionate measures to eliminate spent conviction discrimination as far as possible.⁷³ This is known as the ‘positive duty’ because it requires organisations to proactively prevent discrimination rather than simply responding to complaints when something goes wrong.

Part 4 includes detailed guidance on the positive duty, including setting out six minimum standards that organisations must comply with to meet the positive duty.

3.4 Other relevant laws

In addition to the Equal Opportunity Act, there are other laws that protect people from discrimination on the basis of their criminal records (including spent convictions) in Australia.

| Law | Description |
|---|--|
| Australian Human Rights Commission Act 1986 (Cth) (AHRC Act) | <p>The AHRC Act protects people in Victoria who have been discriminated against in a workplace on the basis of an irrelevant criminal record. This form of discrimination refers to any unfair treatment of an individual due to their irrelevant criminal record.⁷⁴</p> <p>The Commonwealth provides a process for individuals to lodge a complaint regarding discrimination on the basis of an irrelevant criminal record, but only within the context of employment or occupation.</p> |
| Fair Work Act 2009 (Cth) (Fair Work Act) | <p>People in Victoria may be able to pursue an unfair dismissal proceeding under the Fair Work Act if they have been dismissed as a result of their employer finding out about their past criminal record.</p> <p>Unfair dismissal proceedings are conducted at the Fair Work Commission through conciliation and are available to employees who have been dismissed from their job in a harsh, unjust or unreasonable manner.⁷⁵</p> |
| Other jurisdictions | <p>Tasmania,⁷⁶ the Northern Territory⁷⁷ and the Australian Capital Territory⁷⁸ have laws to protect individuals from discrimination on the basis of irrelevant criminal records and procedures that enable them to make complaints. Western Australia prohibits discrimination based on ‘a spent conviction’. However, this only applies in the area of employment.⁷⁹</p> |

4

Complying with the positive duty in practice



Part 4 sets out information on how you can comply with the positive duty to eliminate spent conviction discrimination, including:

- what the positive duty is (Part 4.1)
- minimum standards for compliance (Part 4.2)
- the positive duty in practice (Part 4.3)
- the positive duty checklist (Part 4.4).

Remember!

For the purposes of this guideline:

A duty holder is anyone with responsibilities under the Equal Opportunity Act, including employers, providers of accommodation, education, goods and services, clubs and sporting organisations.

A rights holder is an individual with rights under the Equal Opportunity Act, including current and prospective employees, tenants, students, clients, consumers, club members and sporting participants.

4.1 The positive duty

The positive duty requires duty holders to take reasonable and proportionate measures to eliminate spent conviction discrimination as far as possible.⁸⁰ The positive duty promotes an environment where unlawful behaviour is unlikely to occur in the first place. It helps organisations create a safe and respectful culture, just as occupational health and safety laws require employers to take steps to ensure injuries don't occur.⁸¹

The positive duty applies regardless of the size, nature or resources of your organisation. However, it only requires duty holders to take steps that are 'reasonable and proportionate' in the circumstances. This means that the way an organisation chooses to implement the standards will vary depending on factors such as:

- the size of the business or operations
- the nature and circumstances of the business or operations
- available resources and budget
- business and operational priorities
- the practicality and the cost of measures.⁸²

The positive duty is not just about compliance with the law. It has a range of significant benefits for rights holders (such as job applicants, rental applicants, clients and students) and duty holders (including small, medium and large organisations in Victoria).

Benefits for rights holders >

- Shifts the burden of addressing discrimination from people who suffer harm to organisations who can influence the environment in which discrimination occurs
- Emphasises prevention by requiring duty holders to take proactive steps to eliminate discrimination
- Reduces the risk of harm due to discrimination, which can be cumulative and long-term
- Addresses systemic disadvantage for groups of Victorians who are disproportionately impacted by spent convictions
- Ensures that essential areas of public life, such as workplaces and services, are safe, respectful and accessible.

Benefits for duty holders >

- Helps to avoid legal liability for discrimination (including vicarious liability for employers) (see Part 3.1.5)
- Reduces or eliminates the costs of discrimination (such as defending litigation and providing sick leave for employees)
- Strengthens organisational reputation, by demonstrating best practice leadership to promote equality
- Improves the safety, fairness and effectiveness of workplaces, delivery of goods and services, educational institutions, clubs and accommodation.

4.2 The minimum standards

The Commission has identified six minimum standards that organisations must comply with to meet the positive duty. For each minimum standard, the guideline:

1. identifies three key **outcomes** you must achieve to comply with the standard
2. provides examples of **actions** you can take to implement the standard.

Snapshot of the minimum standards

| | | |
|---|--|---|
|  <p>Standard 1: Knowledge and understanding</p> |  <p>Standard 2: Systems, policies and procedures</p> |  <p>Standard 3: Leadership and culture</p> |
| <p>Organisations understand their obligations under the Equal Opportunity Act and have up-to-date knowledge about spent conviction discrimination</p> | <p>Organisations effectively prevent and respond to spent conviction discrimination by reviewing and updating relevant systems, policies and procedures</p> | <p>Organisational leaders and managers champion equality and build the organisational culture to prevent and respond to spent conviction discrimination</p> |
| <p>See page 40 ></p> | <p>See page 42 ></p> | <p>See page 46 ></p> |
|  <p>Standard 4: Risk management</p> |  <p>Standard 5: Reporting and response</p> |  <p>Standard 6: Continuous improvement</p> |
| <p>Organisations regularly identify and manage risk related to spent conviction discrimination</p> | <p>Organisations respond to reports and complaints about spent conviction discrimination in a fair, timely, confidential and victim-centred way (also referred to sometimes as a victim-survivor centred way)s</p> | <p>Organisations regularly review and evaluate policies and practices to drive continuous improvement</p> |
| <p>See page 49 ></p> | <p>See page 52 ></p> | <p>See page 55 ></p> |

Standards 1-4 are about prevention. This means taking proactive steps to prevent discrimination from happening in the first place.

Standards 5-6 are about response. This means responding to discrimination a fair, timely, confidential and victim-centred way and driving continuous improvement.

As set out in Part 4.1, the actions required to comply with the standards will vary depending on the size, resources and nature of your organisation. As a duty holder, you should consider what is reasonable and proportionate in the circumstances. This is reflected in the range of practical examples included below.

Part 4.4 includes a practical checklist to help you consider whether you are meeting the minimum standards to eliminate spent conviction discrimination.

Importantly, organisational leaders and managers play a critical role in implementing the minimum standards, including by providing a genuine and visible commitment to preventing and responding to spent conviction discrimination in a safe, respectful and effective way.



We can help

The Commission has a range of education and consultancy services that can support your organisation to implement the minimum standards. For example, we can work with your organisation to provide tailored education programs or support processes for action planning to meet the positive duty. You can also seek support from other organisations and professionals such as employer associations, human resources professionals, law firms and consultants.



Standard 1: Knowledge and understanding

Standard 1: Organisations understand their obligations under the Equal Opportunity Act and have up-to-date knowledge about spent conviction discrimination

| | |
|--|--|
| Outcomes | <ul style="list-style-type: none"> • Organisational leaders, managers and staff understand their rights and responsibilities related to spent conviction discrimination, including their positive duty to eliminate discrimination and what a spent conviction is. • Organisational leaders and managers understand how to identify and respond to spent conviction discrimination safely and effectively. • Organisational leaders, managers and staff understand the drivers and impacts of spent conviction discrimination and how it disproportionately impacts some groups of people. |
| Examples of actions to implement Standard 1 | <ul style="list-style-type: none"> • Provide regular training to leaders and managers on proactively eliminating spent conviction discrimination. • Provide regular training to staff on spent conviction discrimination (for example, as part of equal opportunity training). • Encourage managers and staff to familiarise themselves with this guideline to understand the law on spent conviction discrimination, the drivers and impacts, and how to prevent discrimination. • Incorporate information on spent conviction discrimination in staff induction materials (for example, ensuring that a staff induction manual refers to all forms of discrimination). • Communicate to staff where they can go for further information (for example, including contact details for the Commission’s enquiry service on your organisation’s intranet). • Consider who may be impacted by spent conviction discrimination in your organisation (for example, job applicants, rental applicants or applicants for club membership) and whether they may experience ‘intersectional discrimination’ because of multiple protected attributes (for example, Aboriginal people being disproportionately impacted by prior convictions). |

What do you need to know about spent conviction discrimination?

Understanding spent conviction discrimination is fundamental to meeting the positive duty. This includes building your knowledge and understanding about:

- what spent conviction discrimination is
- what your legal obligations are
- your positive duty to eliminate discrimination
- how spent conviction discrimination may impact in your organisation
- what the drivers and impacts of spent conviction discrimination are
- how to identify and respond to spent conviction discrimination (see Standard 5 for guidance on how to respond in a victim-centred way that avoids re-traumatisation)
- how you can be legally liable for discrimination
- where to go for further information, advice and support.

As a best practice approach to training, all staff should undertake formal equal opportunity training every two years (including training on spent conviction discrimination) which should be reinforced by informal staff development opportunities such as staff and team meetings, supervision, internal communications on policies and practices and performance processes. Specialist training should be provided every year to staff in support roles such as contact officers and health and safety representatives to keep them up to date with any changes to the law and best practice approaches to eliminating discrimination.

CASE STUDY

A small real estate firm books in a training session

Rajesh manages a small real estate firm with under 20 employees in rural Victoria. At a conference he attends for small business owners, there is a seminar on workplace equality which mentions that 'spent conviction' has been added to the Equal Opportunity Act as a protected attribute. Rajesh reflects that he has not done training for his staff on the Equal Opportunity Act for a couple of years so decides to book in a training session, with a focus on recent changes to the Act, including the protection from spent conviction discrimination.



Standard 2: Systems, policies and procedures

Standard 2: Organisations effectively prevent and respond to spent conviction discrimination by reviewing and updating relevant systems, policies and procedures

| | |
|--|--|
| Outcomes | <ul style="list-style-type: none">• Organisations have reviewed and updated existing systems, policies and procedures (in consultation with relevant rights holders where possible) to ensure they are up-to-date, lawful and refer to spent conviction discrimination.• Rights holders are aware of and can access policies and procedures related to spent conviction discrimination.• Organisational leaders have proactively implemented relevant policies related to spent conviction discrimination. |
| Examples of actions to implement Standard 2 | <ul style="list-style-type: none">• Review and update existing systems and databases to ensure your organisation doesn't hold or 'flag' information that could lead to discrimination (such as an historical criminal record check that still includes convictions that are now spent).• Review and update existing policies and procedures to provide guidance on how to prevent and respond to spent conviction discrimination, including policies and procedures related to:<ul style="list-style-type: none">– equal opportunity– recruitment– access to services.• Review and update existing complaints procedures to provide guidance on responding to complaints in a fair, timely, confidential and victim-centred way (for example, by including safe and accessible options for making a complaint).• Make relevant policies and procedures easily accessible and regularly communicate them to rights holders (for example, publishing policies on your intranet).• Ensure that relevant policies and procedures include a mechanism for review and improvement (for example, building in a requirement to review policies and procedures annually). |

How should you update your systems, policies and procedures?

Ensuring that you have effective and up-to-date systems, policies and procedures is critical to effectively preventing and responding to spent conviction discrimination. Remember that the actions you take to implement the standards will depend on your size and resources.

To update your systems, policies and procedures, you can:

Audit



- Conduct an audit of your systems, policies and procedures to determine what needs to be updated to prevent and respond to spent conviction discrimination (remembering to reflect on who may be most impacted by spent conviction discrimination in your organisation).
- Think beyond your equal opportunity policy, to other documents that should be updated such as recruitment, complaints and service policies.
- Consider whether there are any new policies or procedures you need to develop to effectively prevent and respond to spent conviction discrimination.

Review



- Review any relevant systems and databases to ensure they won't enable discrimination (for example, by storing and relying on historical criminal records that may include convictions that are now spent). Also think about steps you can take such as placing restrictions on access to historical records/information, introducing policies requiring current criminal record checks and removing 'flags' for historical convictions that may be spent.
- Review any relevant policies and procedures to ensure that they are lawful, up-to-date and reflect best practice (see tips below).
- Consult with rights holders (such as staff and their representatives, students and clients), advocates (such as unions and peak bodies) and other stakeholders to draw on their experience, knowledge and ideas.

Communicate



- Communicate any changes to your systems, policies and procedures with staff and/or other rights holders.
- Ensure your updated policies and procedures are easily accessible (for example, emailing them to staff or putting them on noticeboards, discussing them at team meetings, and publishing them on your intranet or website).

The need to update systems that store historical criminal record checks

A real estate agent keeps historical criminal record checks for previous applicants of rental accommodation. In 2010, Taylah applied for a house with the agency but was rejected because of a prior conviction for common assault. Taylah has recently lost her secure rental accommodation due to the owner selling the apartment and is at risk of homelessness. Taylah applies for a rental house with the same agent that rejected her application in 2010.



The agency has an out-of-date system that maintains applicant's historical criminal record checks indefinitely and 'flags' any convictions for violent offences if the person applies for a rental again. When Taylah applies for the house, the system flags her historical conviction for common assault which has now become spent. The agent rejects Taylah's application without requiring an up-to-date criminal record check that would not include the spent conviction on it.

This is unlawful discrimination. To avoid future discrimination, the agent should review its out-of-date system and database and make changes such as requiring up-to-date criminal record checks for housing applications and removing 'flags' for historical convictions that may be spent.

Tips for updating your policies and procedures

The following table includes tips for updating common policies and procedures to effectively prevent and respond to spent conviction discrimination. As a minimum, you should review and update your equal opportunity policy. Depending on your organisation, you may also want to update other policies such as policies related to employment and service delivery.

All relevant policies and procedures should include a mechanism for regular review.

| Example  | Tips for updating policies/procedures  |
|---|--|
| Equal opportunity | <p>Ensure your equal opportunity policy/procedures:</p> <ul style="list-style-type: none"> • include and define ‘spent conviction’ as a protected attribute • state that discrimination is unlawful and won’t be tolerated • commit to the positive duty to eliminate discrimination • state the consequences of non-compliance (such as disciplinary action) • include how to make a complaint or refer to your complaints procedure. |
| Recruitment | <p>Ensure your recruitment policy/procedures:</p> <ul style="list-style-type: none"> • promote equal opportunity for all job applicants • state that it is unlawful to discriminate against a job applicant, including because of a spent conviction • do not ask an applicant to disclose their spent convictions • do not unintentionally authorise discrimination (such as unlawfully requiring job applicants to disclose all convictions, including spent convictions) • do not include spent convictions as a criteria for making decisions about who will get a job (for example, by excluding applicants with a spent conviction) • do not require unnecessary police or WWC Checks that may unintentionally result in unlawful discrimination (see Part 4.3.1). |
| Complaints | <p>Ensure your complaints policy/procedures:</p> <ul style="list-style-type: none"> • are victim-centred, impartial and fair (see Part 4.2.5) • are accessible, flexible and timely • explicitly include spent conviction discrimination • make it clear that a complainant will not be victimised (treated badly) • include a range of pathways for making a complaint • include a range of response options • set out the possible outcomes of a complaint or investigation. <p>Part 4.2.5 provides detailed guidance on how to respond to complaints.</p> |
| Access to services | <p>Ensure your access policies/procedures:</p> <ul style="list-style-type: none"> • promote equal opportunity in accessing your services • clearly state it is unlawful to discriminate in service provision, including because of a spent conviction • do not unintentionally authorise discrimination (such as unlawfully requiring clients of services to disclose spent convictions) • do not include spent convictions as a criteria for making decisions about who can access your services. |

A manufacturing company decides to update their policies

A large manufacturing company in Melbourne gets an HR email alert about recent changes to the Equal Opportunity Act, including the introduction of 'spent conviction' as a protected attribute. The human resources officer notifies his manager who suggests they update their policies. The human resources officer audits their existing policies and makes changes to the Equal Opportunity Policy, Complaints Policy and some of their recruitment documents to make sure they are lawful, up-to-date and refer to spent conviction discrimination.



Standard 3: Leadership and culture

Standard 3: Organisational leaders and managers champion equality and build the organisational culture to prevent and respond to spent conviction discrimination

Outcomes

- Leaders and managers set clear expectations about preventing and responding to spent conviction discrimination.
- Leaders and managers are accountable for identifying and responding to spent conviction discrimination.
- Leaders and managers encourage and support bystanders to 'speak up' if they witness or hear about spent conviction discrimination.

Examples of actions to implement Standard 3

- Require leaders and managers to set expectations (for example, through a performance review process or code of conduct).
- Make leaders and managers accountable for identifying and responding to spent conviction discrimination (for example, by incorporating the requirement to prevent and respond to discrimination in senior position descriptions and KPIs).
- Encourage and support bystanders to 'speak up' (for example, by encouraging staff to report discrimination if they witness or hear about it and ensuring them that victimisation will not be tolerated).

What is best practice organisational leadership?

Organisational leaders can champion equality and build organisational capability to prevent and respond to spent conviction discrimination by setting clear expectations, being accountable and encouraging and supporting bystanders to 'speak up'.

Setting expectations >

Leaders and managers play a critical role in setting clear expectations about preventing and responding to spent conviction discrimination.

Leaders and managers can set clear expectations by:

- communicating that spent conviction discrimination is against the law and won't be tolerated (for example, in emails, team meetings or one-on-one performance or disciplinary discussions)
- encouraging staff to read this guideline and get to know the law (for example, by providing equal opportunity training or encouraging staff to attend equal opportunity training)
- reminding staff about relevant policies and procedures and ensuring they understand their obligations in them
- modelling appropriate behaviour by proactively taking steps to prevent and respond to spent conviction discrimination (for example, acting quickly in response to a staff member failing to provide a service because of someone's spent conviction).

Being accountable >

Holding leaders and managers to account can help organisations to take action to prevent and respond to spent conviction discrimination.

For example, you can promote accountability by:

- including the requirement to prevent and respond to discrimination (including spent conviction discrimination) in senior position descriptions, performance plans (and KPIs) and codes of conduct
- linking best practice prevention and response to performance incentives (such as bonuses) and promotion processes.

Supporting bystanders >

Leaders and managers can encourage and support bystanders to 'speak up' if they hear about or witness spent conviction discrimination.

For example, encouraging staff to report spent conviction discrimination to their manager by assuring them that they won't be treated badly (victimised) for making a report.

Any steps to encourage bystanders to 'speak up' must be supported by a safe and supportive reporting procedure for bystanders to raise concerns or make a report (Standard 2), including providing support options for bystanders (such as an Employee Assistance Program).

CASE STUDY

A business owner updates their staff on spent conviction discrimination

Mel is the owner of a recruitment firm that routinely asks clients about their criminal history for the purposes of seeking employment. In an update email from a human resources subscription, they are informed that the Equal Opportunity Act now prohibits spent conviction discrimination.

Mel sends an email to their colleagues to let them know that spent conviction discrimination is now against the law and that they cannot deny services to someone because of a spent conviction and should never ask someone if they have a spent conviction regardless of the type of work they are looking for. Mel explains that everyone is welcome to access their services regardless of whether they have a spent conviction and that everyone has the right to a second chance. Mel provides a link to this guideline for further information and explains that they will review their systems, policies and procedures to ensure they are lawful and up-to-date.





Standard 4: Risk management

Standard 4: Organisations regularly identify and manage risk related to spent conviction discrimination

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|--|---|
| Outcomes | <ul style="list-style-type: none">• Organisations have identified the risk factors that increase the likelihood of spent conviction discrimination, informed by feedback from staff and other rights holders where possible.• Organisations understand the likelihood and potential harm of spent conviction discrimination, including for people who are more vulnerable to spent conviction discrimination.• Organisations have taken steps to effectively minimise and control risk factors, including keeping effective compliance records. |
| Examples of actions to implement Standard 4 | <ul style="list-style-type: none">• Identify risk factors for spent conviction discrimination (for example, rumours, a practice of unnecessarily asking rental or job applicants for information about spent convictions or out-of-date systems that hold historical criminal record checks that include convictions that may now be spent).• Undertake a risk assessment to identify the likelihood of spent conviction discrimination occurring in your organisation and any potential harm to staff or other rights holders (such as students or clients) – recognising that some people are more vulnerable to spent conviction discrimination than others.• Take steps to eliminate or control risk factors (for example, amend job application forms by explicitly stating that job applicants do not have to disclose spent convictions as part of a job application).• Incorporate spent conviction discrimination in your existing risk management frameworks and tools (such as a risk register).• Keep records of compliance with the positive duty, such as:<ul style="list-style-type: none">– training attendance records– staff emails and meeting papers– updated policies and procedures– a formal plan to develop staff capability– position descriptions for senior staff– updates to staff, other rights holders and stakeholders– updated risk frameworks and tools– complaints register, including complaint outcomes– records of monitoring and evaluation activities. |

What are the risk factors for spent conviction discrimination?

The first step in assessing and managing risk related to spent conviction discrimination is to identify the risk factors for spent conviction discrimination in your organisation.

A risk factor is something that increases the likelihood of spent conviction discrimination happening in your organisation, such as a lack of organisational knowledge about your legal obligations (including the positive duty), a lack of staff awareness about whether or not they can ask someone about a spent conviction, or out-of-date policies, procedures and practices that may unintentionally authorise unlawful discrimination – for example, by unlawfully requiring job applicants to disclose their criminal history, including spent convictions.

It is also important to recognise that some rights holders are likely to be disproportionately impacted by spent conviction discrimination as a result of systemic inequality and disadvantage. For example, this includes Aboriginal and Torres Strait Islander people, people with a disability, people with a mental health condition and people from low socio-economic backgrounds who are overrepresented in the criminal justice system.

You can use the following questions to help you identify the risk factors for your organisation. This is not an exhaustive list but can be used to prompt a discussion about risk. Depending on the nature and size of your organisation, you may also want to seek feedback from your staff and other rights holders (such as clients) to understand the unique risk factors for your organisation (for example, by seeking feedback through an anonymous survey).



Guide to identifying risk factors for spent conviction discrimination

- Do your leaders, managers and staff understand the law and the positive duty to prevent spent conviction discrimination?
- Do your leaders, managers and staff know what a spent conviction is and how it is different to other convictions?
- Have you identified how spent conviction discrimination may arise in your organisation (for example, in recruitment or selection for club membership)?
- Have you considered how you could find out about someone's spent conviction (for example, by unlawfully asking them, by someone self-disclosing, on the rumour mill, third-party disclosure or the internet)?
- Have you identified who may be impacted by spent conviction discrimination (for example, prospective or current employees, tenants or students)?
- Have you considered who may be disproportionately impacted (such as Aboriginal and Torres Strait Islander people, people with a disability or people from low socio-economic backgrounds)?
- Are your relevant policies and procedures up-to-date and lawful (for example, do they refer to the current law on spent conviction discrimination)?
- Do your policies and procedures unintentionally authorise discrimination (for example, by unlawfully requiring job applicants to disclose spent convictions)?
- Are your relevant policies and procedures easily accessible to your staff and do they understand their obligations in them (for example, through training)?
- Do your leaders and managers set expectations with your staff about preventing spent conviction discrimination (for example, in team and staff meetings)?

How should you assess and manage risk?

Once you have identified the risk factors for spent conviction discrimination, you should:

- assess the likelihood of spent conviction discrimination in your organisation
- assess any potential harm if spent conviction discrimination happens (which will help you to identify risks that should be addressed as a priority)
- take proactive steps to eliminate or control any risk factors.

If you are a larger organisation, your identification, assessment and management of risk related to spent conviction discrimination should be incorporated in your existing risk management frameworks and tools (such as a risk matrix or register).

You should also keep records of actions taken to eliminate or control risk, such as training attendance records, staff emails, meeting papers and updated policies and procedures.

A large corporate firm updates their risk management framework

A large corporate firm are doing their annual risk audit. With the addition of 'spent conviction' as a protected attribute under the Equal Opportunity Act, the human resources director decides to undertake a risk assessment to identify the likelihood and potential harm of spent conviction discrimination occurring. Line break/new para

The director identifies that spent conviction discrimination could arise in recruitment if staff unintentionally ask job applicants to disclose their entire criminal history. The director decides to update its recruitment policies and procedures to provide guidance to staff, as well as providing training to hiring managers on the changes to the Act. Spent conviction discrimination is added to the firm's risk management framework (which is approved by and overseen by its board).



Standard 5: Reporting and response

Standard 5: Organisations respond to reports and complaints about spent conviction discrimination in a fair, timely, confidential and victim-centred way

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| <p>Outcomes</p> | <ul style="list-style-type: none"> • Responses to reports and complaints about spent conviction discrimination are fair, timely, confidential and victim-centred. • Complainants are safe and supported throughout the complaints process, including by identifying and avoiding victimisation. • Rights holders (such as staff, students and clients) know how and where to report spent conviction discrimination or make a formal complaint. |
| <p>Examples of actions to implement Standard 5</p> | <ul style="list-style-type: none"> • Provide guidance to staff who are responsible for managing complaints on how to respond to complaints in a fair, timely, confidential and victim-centred way (for example, by building this requirement into relevant position descriptions). • Identify appropriate support options for complainants to ensure they are safe and supported through the complaints process, including by addressing victimisation (for example, consider providing training for managers to equip them to respond to discrimination complaints in a victim-centred way). • Share information on how and where to make a complaint (for example, send a staff email or publish information about your complaints procedure on your intranet or website). |

How should you respond to reports and complaints?

What is the difference between a report and complaint?

A **report** involves informally raising concerns about spent conviction discrimination, without making a formal complaint. For example, an employee talking to a trusted colleague or manager about their concerns or a client raising concerns with a service provider or case manager.

A **complaint** involves making a formal complaint using an organisation's complaint procedure or to an external body, such as the Commission.

Responding to reports and complaints about spent conviction discrimination should be fair, timely, confidential and victim-centred. There is not a one-size-fits-all approach to handling reports and complaints and most organisations will already have their own complaint handling procedure. However, there are key principles that support effective complaint handling, which you may want to incorporate in your existing complaint handling procedure.⁸³

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|------------------------------------|---|
| Victim-centred | <ul style="list-style-type: none">• The interests, wishes, safety and wellbeing of complainants are protected and prioritised• Processes are designed to minimise harm to complainants• Supportive processes are designed with the complainant at their centre, promote choice and control and maintain confidentiality |
| Impartial and fair | <ul style="list-style-type: none">• Everyone involved is treated objectively, respectfully and fairly• Processes, actions and outcomes are, and are seen to be, consistent, proportionate and hold respondents to account appropriately |
| Accessible | <ul style="list-style-type: none">• Clear pathways mean that complainants trust, understand and can easily access a range of internal and external complaint pathways• Referral pathways for diverse complainants are culturally safe and accessible• Processes and available outcomes are clear, easily understood and well communicated |
| Flexible | <ul style="list-style-type: none">• A range of reporting and response options are available, including informal and formal options and options to report anonymously• As far as possible, the approach is tailored to meet the needs of everyone involved in a report and complaint process |
| Timely | <ul style="list-style-type: none">• Responses to reports and complaints should be timely and aim to resolve matters before they escalate• Everyone involved in a report or complaint is updated regularly |
| Transparent and accountable | <ul style="list-style-type: none">• The provision of open and accountable information about processes means that people know what they can expect• The reasons for actions and decisions are communicated to everyone involved, where safe and appropriate, and are subject to appropriate oversight |

What is a victim-centred approach?

A victim-centred approach means prioritising the complainant's interests, wishes, safety and wellbeing. A victim-centred response is compassionate, sensitive and non-judgmental. It engages the complainant in the process and minimises any re-traumatisation.⁸⁴

Examples of things you can do to promote a victim-centred approach include:

- listening to the complainant with empathy, respect and concern
- not judging or blaming them
- clarifying the privacy and confidentiality of the process and any limits as soon as possible
- maintaining strict privacy and confidentiality as far as possible, while meeting obligations to provide a safe workplace
- providing choice and control, such as a flexible range of options to raise and resolve complaints
- letting them know they can have a support person through the process
- asking them how they want to resolve the complaint and what outcome they want
- providing enough information to support them to make decisions
- being responsive and communicating regularly
- making referrals to support services if needed
- letting them know they won't be treated badly (victimised) for making a complaint
- providing reasonable adjustments in the complaints process where needed.

Taking a victim-centred approach does not mean that your response will be unfair or biased. It simply means that the complainant will feel safe and supported, while responding to the complaint in a fair and impartial way that respects all of the parties involved.

CASE STUDY

A community college reshapes their policies with all staff

A local community college sees that the Equal Opportunity Act has been updated and proactively incorporates spent conviction discrimination into their complaints procedures. This creates a good opportunity to reshare their complaints procedure in a staff-wide email, directing them to where staff can find information on reporting discrimination. The community college also decides to provide refresher training for its management team on responding to all equal opportunity complaints in a safe, supportive and victim-centred way.



Standard 6: Continuous improvement

Standard 6: Organisations regularly review and evaluate policies and practices to drive continuous improvement

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| Outcomes | <ul style="list-style-type: none">• Organisations collect and analyse complaint and other relevant data for trends, patterns and lessons on spent conviction discrimination to drive continuous improvement.• Organisational leaders take proactive steps to address issues identified through monitoring and evaluation.• Organisations share deidentified trends and lessons on spent conviction discrimination with staff, other rights holders and stakeholders. |
| Examples of actions to implement Standard 6 | <ul style="list-style-type: none">• Regularly monitor complaints and other relevant data to identify trends, patterns and lessons on spent conviction discrimination to improve compliance (for example, discussing trends and lessons at a Board or management meeting).• Seek feedback from rights holders and advocacy groups where possible (such as surveying clients of your services or engaging with a community reference group if relevant).• Incorporate strategies to prevent spent conviction discrimination into your existing monitoring and evaluation framework.• Require leaders to proactively address issues identified through monitoring and evaluation (for example, updating policies and procedures to strengthen your organisation's response to discrimination).• Be open and transparent with staff, other rights holders and stakeholders on trends and lessons related to spent conviction discrimination (for example, sharing deidentified data at a staff meeting or on your organisation's intranet or website). |

How can you improve compliance with the Equal Opportunity Act?

Collecting and analysing data

To strengthen compliance and drive continuous improvement, you should regularly collect and analyse data for trends, patterns and lessons. Examples of relevant data include:

- reporting and complaints data - for example, how many reports or complaints have you had about spent conviction discrimination and are there any trends?
- feedback - for example, have you asked your staff and clients how well you prevent and respond to discrimination and what you could do better?
- confidential records of performance and disciplinary processes – for example, have your staff been disciplined for unlawful discrimination and what was the outcome?

You may also want to consider incorporating strategies to prevent and respond to spent conviction discrimination in your existing monitoring and evaluation framework.



Remember!

A lack of formal complaints doesn't mean that discrimination isn't a problem in your organisation. It may be because people don't have the confidence to make a complaint, don't know how to make a complaint or are worried about the consequences of making a complaint.

Promoting accountability and transparency

Any de-identified trends, patterns or lessons that you identify should be:

- reported to organisational leaders and managers to promote accountability
- shared with staff, other rights holders and stakeholders to promote transparency.

This includes reporting and sharing any issues raised through monitoring and evaluation, as well as recognising and celebrating achievements that promote equality in your organisation. You may also want to share information about deidentified complaints of spent conviction discrimination and complaint outcomes (if it is safe to do so and protects confidentiality).

Importantly, organisational leaders can drive continuous improvement by proactively addressing issues that are identified through monitoring and evaluation. For example, if you received multiple complaints about spent conviction discrimination in recruitment, leaders should prioritise reviewing your recruitment policies, procedures and practices to ensure they are up-to-date, lawful and don't authorise discrimination.

CASE STUDY

A large health service aims to collect data in order to track trends

In order to ensure continuous improvement, a large health service decides to collect its complaint data on discrimination to see if any trends exist. After a year, the organisation reviews its complaints data and discovers there have been a couple of complaints made by people who have been denied services because of their criminal history (including a spent conviction).

The firm reviews its service delivery policy to make it clear that spent conviction discrimination is against the law. It develops a case study to put on its internal intranet to share the lessons learned from its complaints data.

4.3 The positive duty in practice

This part provides guidance on how to eliminate spent conviction discrimination in employment and other areas of public life where spent conviction discrimination may happen. It will help you to implement the minimum standards and comply with the positive duty.

4.3.1 Preventing discrimination in employment

Spent conviction discrimination can happen against job applicants, existing employees and contract workers. It can also happen in a range of circumstances, such as:

- deciding who should be offered employment (recruitment)
- determining the terms or conditions of someone's employment
- denying an employee access to benefits such as training or promotions.

It is against the law to discriminate against a job applicant, employee or contract worker because of an actual or presumed spent conviction unless a legal exception applies. Exceptions for working with children and driving-related jobs are discussed below.

Recruitment is one of the key areas in employment where spent conviction discrimination can occur. This includes when you ask job applicants about their criminal history, or you make decisions about jobs that are related to children or driving that require screening.

Asking job applicants about their criminal history

Although an employer can legally ask a job applicant about their criminal history and ask them to consent to a police record check, it is an offence to ask a job applicant if they have a spent conviction or for information about the conviction.⁸⁵ It is important to make it clear that job applicants do not have to disclose spent convictions. This will help you avoid legal liability and ensure you don't discriminate by asking an applicant about a spent conviction.



What can I ask in a job application?

An example of wording you can use in job application forms is:

Do you have a criminal conviction which you are required by law to disclose to us? Please note that if you have a conviction that is spent under the *Spent Convictions Act 2021*, you do not need to disclose it to us and it will not appear on a criminal record check.

Please answer 'no' to this question if you have a conviction that is spent. Please be aware that if you have a spent conviction, you still need to disclose any other convictions you have.

Incorporating this type of statement in your job application procedures and forms will help you to meet Standard 2 (Systems, policies and procedures).

Making decisions about working with children

As set out in Part 2.4.1, spent convictions can be disclosed to DJCS to assess applications for a WWC Check. Although DJCS can consider a spent conviction in determining the outcome of a check, an employer will not know whether or not the person has a spent conviction or find out any information about the conviction. Instead, the employer will simply be notified whether or not the person received a WWC Check.

As an employer, you can prevent spent conviction discrimination during the WWC Check process and once you know what the outcome of the check is.

What happens if a WWC Check is 'under investigation'?

If the department notifies you that an application for a WWC Check is 'under investigation', it is important you don't presume the job applicant has a spent conviction.

Not giving someone a job because of a presumed spent conviction can amount to unlawful discrimination. This is because the Equal Opportunity Act extends unlawful discrimination to discrimination on the basis of a presumed attribute, including a presumed spent conviction.⁸⁶

What happens if a job applicant is issued with a WWC exclusion?

If the department notifies you that a job applicant has been issued with a WWC exclusion, you must not employ that person for child-related work. This is because it is an offence to engage a person who does not have a WWC clearance in child-related work.⁸⁷

If a job applicant is issued with a WWC exclusion but the job is not child-related, you cannot rely on the exclusion to justify not employing them.

Disclosable spent convictions in Working with Children Checks

Bob has a previous conviction which is spent under the Spent Convictions Act.

Bob sees a job advertisement as a children's carer and decides to apply. As part of the application process, the employer requests Bob to apply for a WWC Check. Although Bob's previous conviction is spent, it is still disclosed to DJCS in his criminal record as part of the WWC Check screening process. This is because law enforcement agencies are able to disclose criminal records to the DJCS, including spent convictions, as part of the WWC Check process.

DJCS determined that Bob did not pass the WWC Check. The employer was informed that Bob did not pass the check and as a valid WWC Check was a requirement of the job, the employer did not offer Bob the role.

The employer has not unlawfully discriminated against Bob. This is because an employer must not employ a job applicant for child-related work if they have not passed a WWC Check.

Making decisions about driving-related work

As set out in Part 2.4.2, an employer may ask a job applicant to obtain a driver history report to assess their suitability for driving-related work. Spent convictions appear on a driver history report, which can be issued to an employer, with the person's written consent.

You may be liable for indirect discrimination if you have a blanket requirement for job applicants to have a 'clean driving record' and cannot demonstrate that the requirement is reasonable. A clean driving record is commonly understood to mean things like no prior driving offences, accidents, speeding tickets or demerit points. A blanket requirement for a clean driving record (regardless of the nature, age or seriousness of a conviction) is likely to significantly disadvantage people with a spent conviction who may be deterred from applying for a job and face increased barriers to participating in the workforce.

You should also make sure that you don't require a driving history report for jobs that are not driving-related. This could deter people with a spent conviction from applying for the job.

CASE STUDY

Unlawfully requiring a 'clean driving record'

Nina sees an advertisement in the local paper to work as a driver with Rent-a-Removalist. The ad says all drivers need a 'clean driving record'. Nina has a spent conviction for using a phone while driving from over 10 years ago so she decides not to apply for the job.

Rent-a-Removalist may be liable for indirect discrimination due to its blanket requirement for all drivers to have a clean driving record, regardless of the nature and seriousness of their criminal history, including spent convictions.



Practice tips to prevent discrimination in recruitment

The following practice tips will help you to prevent spent conviction discrimination in recruitment and meet the following minimum standards:

- Standard 1 (Knowledge and understanding) by ensuring that you understand the law
- Standard 2 (Systems, policies and procedures) by ensuring your policies and procedures are up-to-date, lawful and implemented in practice.

Practice tips to prevent spent conviction discrimination in recruitment

Review your policies and procedures

- Update your recruitment policies and procedures so they don't unintentionally authorise unlawful discrimination (for example, by unlawfully including spent convictions as a criteria for making decisions about who will get a job).
- Ensure you don't indirectly discriminate against people with a spent conviction by having blanket policies that may unreasonably disadvantage them (such as requiring all job applicants to have a WWC clearance, regardless of whether the work is child-related).

Review your recruitment practices

- Never ask a job applicant if they have a spent conviction or for information about it. This is against the law and may result in unlawful discrimination.
- Consider whether it is necessary to ask a job applicant for information about their criminal history more broadly. If it is necessary, make sure that you explicitly let them know that they don't have to disclose spent convictions.
- Update your job advertisements and application forms to ensure they don't ask applicants about spent convictions or require a 'clean driving record'.
- Consider whether you need to screen job applicants (such as requiring an unnecessary driver history report for work that isn't driving-related or an unnecessary WWC check for work that isn't child-related).
- If you request a driver history report for a driving-related job, consider whether the person may still be suitable for the job, even if they have a spent conviction.
- Remember that a job applicant has no obligation to consent to a driver history report being released to you.

Make lawful decisions

- If you find out about a spent conviction, never make decisions based on a job applicant's actual or presumed spent conviction (unless an exception applies under the Equal Opportunity Act).

4.3.2 Preventing discrimination in other areas of public life

As well as employment, spent conviction discrimination can also happen in other areas of public life covered by the Equal Opportunity Act, such as accommodation, education, goods and services, clubs and sport. This includes treating prospective and current tenants, students, clients, consumers and club members unfairly because of an actual or presumed spent conviction.

Spent conviction discrimination can have significant impacts on the ability of a person to participate in public life and access the things we often take for granted – such as employment, housing and access to essential community and health services.

CASE STUDY

Unlawful discrimination leads to inability to rent a home in a small town

Aarjun is applying to rent a house with his wife Riva. He has a previous spent conviction for theft in his youth and subsequently spent time in prison.

When filling in the application for the property, Aarjun has to detail his rental history for the last three properties, which includes the period he was in prison. The real estate agent rings Aarjun and asks about the gap in his rental history. Aarjun doesn't know he doesn't have to disclose his full criminal history, so he tells them he spent a small time in prison, but the conviction is now spent.

The real estate agent denies Aarjun's application telling him they have an informal policy to not rent to people with criminal histories. To avoid this happening again, Aarjun and Riva decide to apply for the next rental under Riva's name. They apply for a property with a different real estate agent but because it is a small town, the real estate agent has already told other agents in the area not to rent to anyone with their surname because they are 'criminals'. Riva's application is denied on this basis.

Rejecting Aarjun's application for a rental because of his spent conviction is unlawful discrimination by the first real estate agent.

Rejecting Riva's application because of her surname may also be unlawful discrimination because of her personal association with Aarjun who has a spent conviction (personal association is also a protected attribute).

Can I ask someone if they have a spent conviction?

Regardless of whether you are providing accommodation, education, goods and services or club membership, a person has no legal obligation to tell you about a spent conviction except in limited circumstances (see Part 2.4). This means if you ask them whether they have any criminal convictions or a 'criminal history', they don't have to tell you about any spent convictions.

It is also against the law to ask someone if they have a spent conviction or to ask them to provide details about a spent conviction.⁸⁸ This means that you cannot ask a prospective or current tenant, student, client, consumer or club member about a spent conviction.

To prevent discrimination, you should never ask someone if they have a spent conviction or for information about a spent conviction.

Unlawfully asking about a criminal history results in not being offered a career counselling service

Anita is thinking about a change in her career and wants to engage a career counsellor. She visits a career counselling service in town that takes walk-ins. The counsellor has an initial consultation with Anita and asks about her current job, what industries she is interested in and whether there is anything else relevant they might need to know including a criminal record. The counsellor doesn't let Anita know that she doesn't have to disclose any spent convictions.

Anita mentions that she has a previous conviction that is now spent so it shouldn't be relevant in the industries she's hoping to get into. Later that afternoon Anita gets a call from the career counselling service saying that she will not be able to access their services as they don't take on clients with criminal backgrounds because of the risk to their reputation.

This is unlawful discrimination on the basis of a spent conviction. The career counselling service cannot deny Anita access to their service because of her spent conviction, even if they are concerned about their reputation.

What should I do if I find out someone has a spent conviction?

It is against the law to treat someone unfairly because of a spent conviction unless an exception applies (see Part 3.2.2 for information on exceptions). This includes knowledge of an actual spent conviction or a presumption that someone has a spent conviction (for example, if there is a delay in processing an application for a WWC Check and you presume that the delay is because the person has a spent conviction).

If you know or presume someone has a spent conviction, you cannot use that information to inform your decision-making and you should not share that information with anyone else. For example, you cannot use actual or presumed knowledge about a spent conviction to refuse a person accommodation, stop providing them a service or cancel their membership.



How do I know if someone has a spent conviction?

There are different ways you might find out someone has a spent conviction. This includes:

- unlawfully asking someone to disclose a spent conviction
- a person voluntarily self-disclosing a spent conviction
- a third party disclosing or spreading a rumour about someone else's spent conviction
- historical or community knowledge about someone's spent conviction
- referring to out-of-date systems and databases that store historical criminal record checks that include convictions that may now be spent
- finding out about a spent conviction online or in the media.



Practice tips to prevent discrimination in other areas of public life

The following practice tips will help you to prevent spent conviction discrimination in accommodation, goods and services, education, clubs and sports. They will also help you to meet:





- Standard 1 (Knowledge and understanding) by ensuring you understand the law
- Standard 2 (Systems, policies and procedures) by ensuring your policies and procedures are up-to-date and lawful and implemented in practice.



| Practice tips to prevent spent conviction discrimination | |
|--|--|
| Review your policies and procedures | <ul style="list-style-type: none">• Update your organisation's policies and procedures so they don't unintentionally authorise unlawful discrimination (for example, by unlawfully including spent convictions as a criteria for making decisions about who is eligible for accommodation, educational courses, services or club membership). |
| Review your practices | <ul style="list-style-type: none">• Never ask a prospective or current tenant, student, client, consumer or club member if they have a spent conviction or for information about a spent conviction. This is against the law and may result in unlawful discrimination.• Update your application forms to ensure they don't ask about spent convictions (such as rental application forms or club membership forms).• Update your systems so you don't retain and use historical criminal record checks that may include convictions that may now be spent• Remember that a prospective or current tenant, student, client, consumer or club member does not have to tell you about a spent conviction. |
| Make lawful decisions | <ul style="list-style-type: none">• If you find out about a spent conviction, never make decisions based on a person's actual or presumed spent conviction (unless an exception applies). |

4.4 Positive duty checklist

As a duty holder, the positive duty checklist prompts you to reflect on whether you are meeting your positive duty to eliminate spent conviction discrimination. Remember that the actions you take to implement the standards will depend on your size and resources.

The checklist is based on the minimum standards discussed in Part 4.2.

| Standard | Questions for your organisation |
|--|--|
|  <p>Standard 1: Knowledge and understanding Page 40</p> | <ul style="list-style-type: none"> • Do your leaders, managers and staff understand their rights and responsibilities, including their positive duty to eliminate discrimination? Do they know what a spent conviction is and how it is different to other convictions? • Do your leaders and managers know how to eliminate to spent conviction discrimination safely and effectively? • Do your leaders, managers and staff understand what the drivers and impacts of spent conviction discrimination are? |
|  <p>Standard 2: Systems, policies and procedures Page 42</p> | <ul style="list-style-type: none"> • Have you reviewed and updated your systems, policies and procedures to ensure they are up-to-date, lawful and refer to spent conviction discrimination? • Are rights holders (such as staff and clients) aware of your policies and procedures related to spent conviction discrimination, including how to make a complaint, and are they easily accessible? • Do your organisational leaders proactively implement relevant policies and are they held to account for the commitments in them? |
|  <p>Standard 3: Leadership and capability Page 46</p> | <ul style="list-style-type: none"> • Do your leaders and managers set clear expectations about preventing and responding to spent conviction discrimination? • Are your leaders and managers accountable for identifying and responding to spent conviction discrimination? • Do your leaders and managers encourage and support bystanders to 'speak up' if they witness or hear about spent conviction discrimination? |
|  <p>Standard 4: Risk management Page 49</p> | <ul style="list-style-type: none"> • Have you identified the risk factors that increase the likelihood of spent conviction discrimination in your organisation? • Do you understand the likelihood and potential harm of spent conviction discrimination in your organisation? • Have you taken steps to minimise and control any identified risk factors, including keeping effective compliance records? |

| Standard | Questions for your organisation |
|--|--|
|  <p>Standard 5: Reporting and response Page 52</p> | <ul style="list-style-type: none"> • Do rights holders (such as staff) know how and where to report spent conviction discrimination or make a formal complaint? • Are your responses to reports and complaints about spent conviction discrimination fair, timely, confidential, and victim-centred? • Do complainants feel safe and supported throughout the complaints process? |
|  <p>Standard 6: Continuous improvement Page 55</p> | <ul style="list-style-type: none"> • Do you collect and analyse complaint and other relevant data for trends, patterns and lessons to drive continuous improvement? • Do your leaders take proactive steps to address any issues identified? • Do you share deidentified trends and lessons related to spent conviction discrimination with staff, other rights holders and stakeholders? |

For more information

For more information on spent conviction discrimination, you can contact the Commission's free Enquiry Line on 1300 292 153 or visit our website at <https://www.humanrights.vic.gov.au/for-individuals/spent-conviction/>.

For more information on spent convictions, you can visit the Department of Justice and Community Safety website at <https://www.justice.vic.gov.au/information-for-employers-spent-convictions-act>.

Endnotes

1. See the discussion of criminal record use more broadly in Stan Winford et al, *Criminal Record Discrimination Project* (Submission to Aboriginal Justice Forum, 4 April 2017); Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper, December 2004; Australian Human Rights Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record Report*, 2012).
2. *Equal Opportunity Act 2010* (Vic) s 148(2) requires the Commission to consult with persons or bodies that we consider to represent the areas or persons to whom the guideline will relate.
3. *Spent Convictions Act 2021* (Vic) s 9.
4. Ibid s 3; 'Information Release Policy', Victoria Police (Policy, 22 May 2019) <https://www.police.vic.gov.au/sites/default/files/2019-05/Info_Sheet_Info_Release_Policy%20May19_1.pdf>
5. For more detail, see 'Spent conviction', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-individuals/spent-conviction/>>; 'Discrimination', *Victorian Equal Opportunity and Human Rights Commission* (Web Page), <<https://www.humanrights.vic.gov.au/for-individuals/discrimination/>>.
6. For more detail, see Department of Justice and Community Safety, 'Spent Conviction Scheme', *Justice and Community Safety* (Web Page) <<https://www.justice.vic.gov.au/spent-conviction-scheme>>.
7. For more detail, see 'Irrelevant criminal record discrimination', *Equal Opportunity Tasmania* (Web Page) <https://www.equalopportunity.tas.gov.au/html_version/irrelevant_criminal_record>; 'Irrelevant Criminal Record', *ACT Human Rights Commission* (Web Page) <<https://hrc.act.gov.au/discrimination/irrelevant-criminal-record/>>.
8. For more detail, see 'Positive Duty', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>>.
9. *Equal Opportunity Act 2010* (Vic) s 4.
10. In this document an exemption refers to an instance under the Spent Convictions Act where spent convictions are disclosable or a temporary exemption under the Equal Opportunity Act that can be applied for. Exceptions, however, are instances outlined in the Equal Opportunity Act where discrimination is lawful.
11. *Spent Convictions Act 2021* (Vic) s 21.
12. Ibid ss 21, 23.
13. Ibid s 5.
14. Crosby Hipes, 'The impact of a felony conviction on stigmatization in a workplace scenario' (2019) 56 *International Journal of Law, Crime and Justice* 89, 95.
15. Ali M Ahmed and Elisabeth Lang, 'The employability of ex-offenders: a field experiment in the Swedish labor market' (2017) *IZA Journal of Labor Policy* 6, 5; Crosby Hipes, 'The impact of a felony conviction on stigmatization in a workplace scenario' (2019) 56 *International Journal of Law, Crime and Justice* 89, 95.
16. Crosby Hipes, 'The impact of a felony conviction on stigmatization in a workplace scenario' (2019) 56 *International Journal of Law, Crime and Justice* 89, 90.
17. Ibid 89, 93.
18. Jocelyn Simonson, 'Rethinking Rational Discrimination against Ex-Offenders' (2006) XIII(2) *Georgetown Journal on Poverty Law and Policy* 284.
19. Crosby Hipes, 'The impact of a felony conviction on stigmatization in a workplace scenario' (2019) 56 *International Journal of Law, Crime and Justice* 89, 90.
20. Colin P. Holloway and Richard L. Wiener, 'Criminal History, Sex, and Employment: Sex Differences in Ex Offender Hiring Stigma' (2020) 20(1) *Analyses of Social Issues and Public Policy* 214.
21. Crosby Hipes, 'The impact of a felony conviction on stigmatization in a workplace scenario' (2019) 56 *International Journal of Law, Crime and Justice* 89, 95.
22. Jocelyn Simonson, 'Rethinking Rational Discrimination against Ex-Offenders' (2006) XIII(2) *Georgetown Journal on Poverty Law and Policy* 284.

23. Ibid.
24. Andrea Romei and Salvatore Ruggieri, 'Discrimination Data Analysis: A Multi-disciplinary Bibliography' in: B Custers et al (eds), *Discrimination and Privacy in the Information Society: Data Mining and Profiling in Large Databases* (Springer, Berlin) 1.
25. Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business; Koori women and the justice system* (Report, August 2015) 39-96; Victorian Equal Opportunity and Human Rights Commission, *Annual Report (2014/15)* 48.
26. Stan Winford et al, *Criminal Record Discrimination Project* (Submission to Aboriginal Justice Forum, 4 April 2017).
27. Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the basis of criminal record* (Discussion Paper, December 2004).
28. Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) 1989(1) *University of Chicago Legal Forum* 139, 149; Shreya Atrey, *Intersectional Discrimination* (Oxford University Press, Oxford, 2019) 14-48.
29. Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the basis of criminal record* (Discussion Paper, December 2004).
30. *Spent Convictions Act 2021* (Vic) s 3.
31. Ibid s 7.
32. For further details on serious convictions see 'Serious Convictions', *Department of Justice and Community Safety* (Webpage) <<https://www.justice.vic.gov.au/justice-system/laws-and-regulation/serious-convictions-community-information-spent-convictions>>.
33. *Spent Convictions Act 2021* (Vic) s 8.
34. Ibid s 11.
35. Ibid s 3.
36. This application process commenced on 1 July 2022.
37. *Spent Convictions Act 2021* (Vic) s 11(b).
38. Department of Justice and Community Safety, 'Spent Convictions Act 2021', *Justice and Community Safety* (Web Page) <<https://www.justice.vic.gov.au/spent-convictions-act-2021>>.
39. *Spent Convictions Act 2021* (Vic) s 22.
40. Ibid (table).
41. Ibid s 21(1).
42. Ibid s 21(3).
43. Ibid s 22.
44. Ibid.
45. Ibid; *Spent Convictions Regulations 2021* (Vic) ss 5-8.
46. *Health Practitioner Regulation National Law 2009* (Vic) s 77.
47. Fox example, an exception would apply if the person were employed by the Corrections Commissioner, IBAC, Victoria Police or any of the bodies in s 22 of the *Spent Convictions Act 2021*.
48. For more detail see, 'Driving - community information – Spent Convictions', *Department of Justice and Community Safety* (Web Page), <<https://www.justice.vic.gov.au/justice-system/laws-and-regulation/driving-community-information-spent-convictions>>; 'Check your demerit points and driver history', *VicRoads* (Web Page) <<https://www.vicroads.vic.gov.au/licences/demerit-points-and-offences/check-driver-history>>.
49. *Equal Opportunity Act 2010* (Vic) s 8.
50. For more detail, see 'Discrimination', *Victorian Equal Opportunity and Human Rights Commission* (Web Page), <<https://www.humanrights.vic.gov.au/for-individuals/discrimination/>>; *Equal Opportunity Act 2010* (Vic) Part 4.
51. *Equal Opportunity Act 2010* (Vic) ss 8, 9, 66.
52. 'Spent conviction', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-individuals/spent-conviction/>>.

53. *Equal Opportunity Act 2010* (Vic) s 6.
54. *Ibid* s 105.
55. *Ibid* s 106; *Oliver v Bassari* (Human Rights) [2022] VCAT 328 [82]-[83].
56. *Equal Opportunity Act 2010* (Vic) s 107.
57. See, for example, *Health Practitioner Regulation National Law (Victoria)* s 77; *Sex Offenders Registration Act 2004* (Vic); *Spent Convictions Act 2021* (Vic) s 22.
58. *Spent Convictions Act 2021* (Vic) s 20.
59. *Ibid* s 20(1)(b).
60. *Equal Opportunity Act 2010* (Vic) s 103.
61. *Ibid* s 104.
62. *Ibid* s 125.
63. *Ibid* ss 109, 110.
64. *Equal Opportunity Act 2010* (Vic) s 12(2); ‘Special measures’, *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-organisations/special-measures/>>.
65. *Equal Opportunity Act 2010* (Vic) s 25.
66. *Ibid* s 24.
67. *Ibid*.
68. *Ibid* s 59.
69. *Ibid* s 75.
70. *Firearms Act 1996* (Vic) s 17.
71. *Equal Opportunity Act 2010* (Vic) s 76.
72. *Ibid* s 89.
73. *Ibid* s 15.
74. *Australian Human Rights Commission Act 1986* (Cth) s 3(1); *Australian Human Rights Commission Regulations 2019* (Cth) r 6.
75. *Fair Work Act 2009* (Cth) s 385.
76. *Anti-Discrimination Act 1998* (Tas) s 16(q).
77. *Anti-Discrimination Act 1992* (NT) s 19(q).
78. *Discrimination Act 1991* (ACT) s 7(1)(k).
79. *Spent Convictions Act 1988* (WA) ss 18-23.
80. *Ibid* s 15.
81. For more detail, see ‘Positive duty’, *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>>; *Occupational Health and Safety Act 2004* (Vic) s 21.
82. *Equal Opportunity Act 2010* (Vic) s 15(6).
83. Adapted from *Royal Commission into Institutional Responses to Child Sexual Abuse: Improving Institutional Responding and Reporting* (Final Report, December 2017) vol 7, 140.
84. Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 679–80.
85. *Spent Convictions Act 2021* (Vic) s 20(1)(c).
86. *Equal Opportunity Act 2010* (Vic) s 7(2)(d).
87. *Worker Screening Act 2020* (Vic) s 123.
88. *Spent Convictions Act 2021* (Vic) s 20(1)(c).

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