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# ENDING CRIMINAL HISTORY DISCRIMINATION IN QUEENSLAND

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**EMPOWERING THE COMMUNITIES OF INALA AND SURROUNDING AREAS**

This law reform paper reflects the law as of late February 2022.

Drafted by Hub Community Legal solicitor – John Michael Shanahan.

Hub Community Legal (which has experienced several organisational name changes) was established in 1986 by community members of Inala and surrounding areas, who saw a distinct need for a locally based free advice centre. Since this inception, the Centre has grown, whilst remaining true to its original purpose and goals.

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## CONTENTS

CONTENTS .....	3
CASE STUDY .....	4
Outline.....	5
PROPOSAL 1 .....	7
Introducing an attribute of ‘irrelevant criminal history’ .....	7
PROPOSAL 2 .....	8
Introducing an attribute of ‘criminal history’ .....	8
Ancillary amendments which would also be required.....	9
CONCLUSION .....	11
REFERENCES.....	12

## CASE STUDY

A client approached Hub Community Legal for legal advice regarding an employment matter. The client had applied for an advertised position at a community health organisation. Having successfully interviewed for the position, she had then received a formal offer of employment. However, at the time of making this offer, the employer stipulated that this offer was conditional upon our client submitting a 'police check' prior to commencement.

The client duly applied for and then received her National Police Certificate. This certificate disclosed two quite minor convictions for offences from 1991 and 1994. Whilst, under Queensland laws such offences are classified as Spent Convictions (which don't attract any positive duty to disclose), they still appeared on her record as her national check was for someone intending to work with Children/Vulnerable Persons. Such national checks authorise wide disclosure, including of spent convictions.

Now aware of these historical convictions, the employer in turn withdrew their offer the day before our client was due to commence. The client wanted to know her rights.

Our advice to the client was firstly that there was no remedy under State law. And that whilst under Federal law, there was a process to apply to the Australian Human Rights Commission, we advised our client that this process was solely conditional upon the good will and participation of the employer. If the employer had not wanted to participate or accept any recommendations of the Australian Human Rights Commission - there would have been no further options for our client.

Fortunately for our client, the employer willingly and openly participated in this Federal process. And our client reached a favourable settlement. However, it was not lost on our centre and our client, that if the employer was unwilling to participate it would have been a very different outcome.

## Outline

This paper is designed for consideration as part of a review being undertaken by the Qld Human Rights Commission (“QHRC”) into the *Anti-Discrimination Act 1991* (Qld) (“ADA”). In the course of carrying out this review the Commission released a discussion paper in late 2021.<sup>1</sup> The discussion paper sought to elicit responses in regard to a number of different propositions. One such proposition was whether the ambit of the ADA should be extended by introducing further protected attributes. The discussion paper then called for comment regarding certain potential attributes which could be included, in particular a person’s ‘criminal history’. It is this specific attribute and its prospective inclusion in the ADA which forms the crux of this paper. With our Centre, strongly recommending that the QHRC adopt our proposal for its inclusion, as outlined in Proposal 2 of this paper.

Underpinning this discussion paper is a recent review carried out by researchers from the University of Queensland.<sup>2</sup> Their review, which is provided as an accompaniment-piece to this paper, examined the legal protections in place for persons living in Queensland who may encounter discrimination due to the existence of a criminal history. The research team concluded that there is currently no effective coverage to prevent this type of discrimination in Queensland. The researchers examined the co-regulatory oversight of the State and Federal discrimination Acts. Concluding, that despite the existence of these two statutory instruments of anti-discrimination law, neither Act currently affords deterrence against criminal history discrimination. This results due to the fact, that at a State level, the ADA is silent as to this form of discrimination. Whilst as seen in our case study above, at a Federal level, any action is dependent upon the voluntary participation of the party alleged to have carried out the discrimination.

Therefore, it is the inadequacy of any meaningful legal redress that currently marks the Queensland experience; a state of affairs and stands in contrast to legislative trends across other States and Territories where laws have

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<sup>1</sup> Queensland Human Rights Commission, Review of Queensland’s Anti-Discrimination Act: Discussion Paper, November 2021, <https://www.qhrc.qld.gov.au/law-reform/have-your-say/discussion-paper>

<sup>2</sup> The University of Queensland Pro Bono Centre, Reforming Criminal Conviction Discrimination in Queensland, Linklater-Steele et al, 3 February 2022

been enacted to outlaw this form of discrimination. It also stands in contrast to one of the overriding principles of the justice system, being not only to punish and deter but also to allow for rehabilitation.

It is with these factors in mind that this paper strongly argues that the time is right for legislative reform. And to assist in the process, offers forward to suggested pathways to reform.

These are:

**Proposal 1:** Amend the ADA to include a protected attribute of "irrelevant criminal history"

**Proposal 2:** Amend the ADA to include a protected attribute of 'criminal history'

**and** ancillary reforms to accompany Proposal 2

# PROPOSAL 1

## Introducing an attribute of ‘irrelevant criminal history’

The first proposal for discussion is an amendment of Part II of the *Anti-Discrimination Act* which would add an attribute of irrelevant criminal history. This proposal, if adopted, would amend the section to read as:

### **Section 7: Discrimination on the Basis of Certain Attributes Prohibited**

The Act prohibits discrimination on the basis of the following attributes .....

(a).....

.....

(NEW SUBSECTION) Irrelevant Criminal History

This is the proposal ultimately advanced by the team of researchers from University of Queensland and would bring Queensland into line with Tasmania, the Northern Territory and the Australian Capital Territory. As such, it confers the experience of the abovenamed jurisdictions, in having successfully introduced such a change without any contentious litigation or public rancour. This reform would undoubtedly be a significant step forward for protection against this discrimination.

Nevertheless, our Legal Centre raises several concerns to do with this proposal. Which are firstly to do with the day-to-day implementation of this reform and secondly whether such a reform goes far enough towards eradicating this form of discrimination.

Such a reform places a prospective employer in a position of uncertainty without clear guiding principles. They would be required to decide the potential relevancy of any criminal history, whilst not having any clear guidance, as to what aspects of a criminal history would be relevant and to what. It is argued that having a position of ambiguity and uncertainty as the cornerstone of this proposal would not offer the clarity needed to fully eradicate this form of discrimination.

## PROPOSAL 2

### Introducing an attribute of ‘relevant criminal history’

This proposal if adopted would amend the relevant section of the ADA to read as:

**Section 7: Discrimination on the Basis of Certain Attributes Prohibited**

The Act prohibits discrimination on the basis of the following attributes .....

(a).....

.....

(NEW SUBSECTION) Criminal History

This second proposal is raised in an attempt to eliminate of the ambiguity attached to proposal 1. It does this by making it a clear starting legal principle that discrimination based upon criminal history is prohibited. It removes relevance as a starting consideration and creates a legal protection framework in line with the critical recommendations of *Westrope*<sup>3</sup>, who argued that to effectively eliminate discrimination of this type, it is key to impose a clear legal position prohibiting such discrimination.

Naturally, this raises the issue of whether there are circumstances where a person or organisation would be lawfully justified in considering a person’s criminal history, and how they would go about knowing they are protected from any unmeritorious discrimination claim.

The answer turns on the key fact, that there already exists the ability in the domain of pre-employment and employment for consideration of criminal history. The current law states that it is not discriminatory for an

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<sup>3</sup> Elizabeth Westrope, ‘Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy’ (2018) *Journal of Criminal Law and Criminology* 367.



employer to impose a requirement due to genuine occupational requirements of a position. This position is enshrined in section 25 of the *ADA*.

### Practical implications

Were this second proposal to be implemented, employers would have certainty of mind. Knowing as a starting position, that it is unlawful to treat an employee or prospective employee less favourably due to a criminal history (direct discrimination), or to set an unreasonable requirement that a person cannot comply with due to having a criminal history (indirect discrimination). A Criminal history could only come into play and be requested for considerations in line with the genuine occupational exception in section 25.

This proposal would require an employer to specifically turn their mind to and articulate what a job's genuine occupational requirements are and secondly how could a criminal history entry could impact these genuine requirements. By bringing such decision making to the fore, it is argued, that this this would be a major step towards having clarity and eradicating this form of discrimination.

### Ancillary amendments which would also be required

The above discussion has been fixed upon the work and work-related domains contained in Part IV – Division 2 of the *ADA*. A natural consequence of the fact, that it is the domain which most readily would be affected by criminal history discrimination. However, our Legal Centre acknowledges that if introduced as a protected attribute it would be applicable to all domains in the act, including the domains of education, insurance, goods and services and accommodation areas. And as seen within the discussion of the pre-employment/employment domain it is acknowledged that when weighing risk in these disparate domains, criminal history arises in certain cases, as a relevant consideration.

Therefore, it is proposed that similar genuine ground amendments could be required in these domains. These could be framed in similar terms to Section 25.

Proposals for ancillary reform:

*Goods and Services Domain* - “Whereby, it is not unlawful a provider of goods or services is able to impose genuine requirements for ascertaining of appropriate risk”. - or

*Insurance Domain* - “Whereby, it is not unlawful for an insurer to impose genuine requirements for the ascertaining of appropriate risk in the provision of insurance”.

*Accommodation Domain* - “It is not unlawful for the relevant authority to impose genuine requirements for ascertaining risk in the provision of accommodation services”.

## CONCLUSION

It is submitted that a clear legislative renunciation of this type of discrimination would be a highly transformative law change. Removing the spectre that having a criminal history, for any charge, automatically disqualifies a person from any and all work. Accordingly, the proposed reforms align with the stated goal of the Queensland Government in relation to advancing human rights. And whilst it is maintained that either of the reforms proposed in this paper would be commendable, it is the second proposal which our Centre must strongly advocate for the QHRC to adopt as its own in finalising its report to the Attorney General. The second proposal is the law reform measure, which would best achieve certainty for employer's as well as creating protection for individuals who have a criminal history. By taking the time to introduce simultaneous 'genuine requirement exceptions' which mirror section 25 – any concerns for preventing the appropriate and measured consideration of criminal history will be allayed.

## REFERENCES

Queensland Human Rights Commission, Review of Queensland's Anti-Discrimination Act: Discussion Paper, November 2021, <https://www.qhrc.qld.gov.au/law-reform/have-your-say/discussion-paper>

The University of Queensland Pro Bono Centre, Reforming Criminal Conviction Discrimination in Queensland, Linklater-Steele, Morsali, Sullivan and Woodfield, 3 February 2022

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