

Employment Law Fact Sheet

Police Records, Spent Convictions and Employment Discrimination

This fact sheet contains information about the Victorian Spent Convictions Scheme and what you can do if you believe that an employer or potential employer has discriminated against you because of a spent conviction.

What is the Spent Convictions Scheme and why is it relevant?

Often when you are applying for a new job, or sometimes during your existing employment, you are required to provide your potential employer or employer with information about your criminal record. This can include the requirement to provide a police check.

Under the Spent Convictions Scheme there are limits on:

- the information that will be disclosed to most employers or potential employers during a police check; and
- how most employers or potential employers can use the information they obtain about a person's criminal record.

Most employers and potential employers will not be able to access information about "spent convictions" or discriminate against you on the basis of such a conviction.

What is a spent conviction and how do I work out if my conviction is spent?

A spent conviction is a record of a criminal offence ('a conviction') that occurred in the past or is otherwise considered to be 'spent' by the new legislation and will not appear on a police check in most circumstances.

There are three ways a conviction can become spent:

1. immediately;
2. after the expiry of the 'conviction free period'; or
3. on application to the court.

Convictions which are spent immediately

Examples of a conviction which will be automatically spent include where:

- the court did not record a conviction – this occurs if you have been found guilty but the court has chosen not to record a conviction with the penalty imposed; or
- the conviction was an infringement conviction; or
- you were under the age of 15 when the offence was committed; or
- the only penalty imposed was a fine in the Children's Court.

Note: if your penalty had conditions attached to it then your conviction will only be spent when the conditions are met.

Convictions which are spent after the expiry of the 'conviction free period'

For all other convictions except serious convictions, the conviction will be spent after the expiry of the 'conviction free period'.

The length of the conviction free period depends on your age at the time of conviction:

- For a person aged 15 to 20 years old at the time they were sentenced the conviction free period is **5 years**
- For a person aged 21 or older at the time they were sentenced the conviction free period is **10 years**

The conviction free period will restart if you receive another conviction in the 5 or 10 year period following your conviction, subject to some exceptions.

Convictions which require an application to the court – serious convictions

If your conviction is considered a 'serious conviction' then it will only become spent upon a successful application to the court.

A serious conviction is one of the following:

- a sentence of more than 30 months' imprisonment or detention; or
- being found guilty of a sexual offence; or
- being found guilty of a serious violence offence.

There are also certain convictions that cannot be spent due to their seriousness.

What if I am asked about my criminal history?

An employer or potential employer may request information from you about your criminal history in a number of ways.

They may ask you for information in an application or interview, or they may ask you to provide a police check.

Making a disclosure in an interview or application

If an employer or potential employer asks you about your criminal history, you are not required to disclose to them a spent conviction.

However, it is important that you do not mislead your employer or potential employer about your criminal history. If this is later discovered, this could be a basis for disciplinary action.

Police checks

If you are asked to provide a police check then, for most employers, spent convictions will not form part of your police check. Further, your employer or potential employer will not be allowed to ask the police to disclose information about a spent conviction.

Certain employers will still be notified of spent convictions

Some employers will still receive details of your spent convictions in a police check. These employers include Victoria Police and Court Services Victoria.

Your spent convictions will also be disclosed to certain bodies involved in licensing for the purposes of employment – such as Working With Children Checks and Passenger Vehicle Licensing.

What can I do if I think that I have been discriminated against based on a spent conviction?

The *Equal Opportunity Act 2010* (Vic) protects employees, prospective employees and contractors from unlawful discrimination on the basis of spent convictions.

If you believe that:

- you have been treated unfavourably because of your spent conviction; or
- your employer or potential employer has imposed an unreasonable condition or requirement that has the effect of disadvantaging you because of your spent conviction

then you may have been unlawfully discriminated against in your employment.

Types of employment discrimination

Discrimination in employment includes the following actions:

- denying you employment;
- dismissing you from your employment;
- denying you training opportunities;
- denying you a promotion; or
- subjecting you to less favourable working conditions.

If you believe this has occurred because of your spent conviction you have two options to bring a claim in Victoria:

1. File a complaint with the Victorian Human Rights and Equal Opportunity Commission (VHREOC); or
2. Bring a claim to the Victorian Civil and Administrative Tribunal (VCAT).

You can first file a complaint to the VHREOC and then, if your matter does not resolve, file a claim with VCAT.

Filing a complaint with VHREOC

If you believe that you have been subjected to unlawful discrimination you may file a complaint with VHREOC.

VHREOC cannot make a decision in relation to your complaint but can try to assist the parties to resolve the issues. This includes conducting a dispute resolution process which can result in an agreed outcome, like an apology, compensation or equal opportunity training implemented by the employer or potential employer.

It is free to file a complaint with VHREOC. See www.humanrights.vic.gov.au for more information about VHREOC.

Bringing a claim to VCAT

If you do not wish to file a complaint with VHREOC or if you cannot resolve your complaint through their assisted dispute resolution mechanism, you can file a claim with VCAT alleging unlawful discrimination. VCAT will then hear and determine your claim and, if it finds that the discrimination did occur, make orders. These orders can include financial compensation.

It is important to note that you should file your claim with VCAT **within 12 months** of the alleged discrimination, otherwise your claim may be rejected.

See www.vcat.vic.gov.au/equal-opportunity for more information about VCAT claims.

Note: The information in this document is general information only and should not be relied on as legal advice. It is current as at 29 March 2023. If you need further assistance, please contact Deakin Law Clinic.

