



# Office of the Anti-Discrimination Commissioner

*Celebrating Difference, Embracing Equality*

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3 March 2010

Mr Bruce Kemp  
Manager Child Protection  
Child Protection (South East Services)  
Department of Health and Human Services  
GPO Box 125  
Hobart TAS 7001

Dear Mr Kemp,

**Discussion paper – A Working with Children and other Vulnerable People  
Checking System for Tasmania.**

Thank you for the opportunity to provide a submission on the discussion paper *A Working with Children and other Vulnerable People Checking System for Tasmania*.

By way of background, the Office of the Anti-Discrimination Commissioner (OADC) administers the Tasmanian *Anti-Discrimination Act 1998* (the ADA). The ADA prohibits discrimination and other specified conduct and provides for the investigation and conciliation of, and inquiry into, complaints in relation to such discrimination and conduct. The ADA prohibits discrimination on the ground of irrelevant criminal record in a number of public areas of life including employment, education, accommodation, the provision of facilities, goods and services and membership and activities of clubs. The definition of employment in the ADA includes paid, or unpaid, casual, permanent or temporary employment.

Irrelevant criminal record is defined to include when there is a record relating to arrest, interrogation or criminal proceedings and:

- No further action was taken
- A charge was not laid
- A charge was dismissed
- A charge was laid but the prosecution was withdrawn
- The person was discharged, whether or not on conviction
- The person was found not guilty
- The person's conviction was quashed or set aside
- The person was granted a pardon; and also where
- A person was convicted of an offence but the circumstances relating to the offence are not directly relevant to the situation in which the discrimination arises

By including irrelevant criminal record as an attribute under the ADA, it recognises that there are often significant barriers faced by those people that have been to prison or have been convicted of a criminal offence in going about their daily lives, especially when seeking employment. It is a matter of balancing the rights of people who have a criminal record but also recognising that in some circumstances the criminal record might present too much of a risk in a particular situation. It is often a question of whether a criminal record is relevant or irrelevant to the particular circumstances, whether it is in relation to employment, education, accommodation, the provision of facilities, goods and services or in the membership and activities of clubs.

There is already an existing exception in section 50 of the ADA dealing with an irrelevant criminal record. A person may discriminate against another person on the ground of an irrelevant criminal record in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical psychological or emotional wellbeing of children having regard to the relevant circumstances.

The OADC supports the paramountcy principle and the rights of the child as set out and enshrined in the UN Convention on the Rights of the Child. The best interests of the child is the paramount consideration and the OADC supports a cautionary approach being taken where the welfare of children is at stake. The OADC supports measures that advance and protect the welfare and interests of children, but wherever possible this should be done in a non-discriminatory way consistent with the objects of the ADA.

As a matter of principle the assessment of criminal records that touch upon or raise issues of child protection and or child welfare are relevant in relation to the education, care and training of children and not going to infringe the provisions of the ADA because of the operation of the existing exception in section 50.

An issue arising in connection with the proposed scheme is whether there might be a need for legislative review to the existing exception. The screening process outlined in the discussion paper is very broad. The current exception in section 50 is limited in its application. It only allows discrimination in education, training and care of children. If the scheme canvassed in the paper is adopted there are a range of activities contemplated by the screening process that would not be protected by the exception such as transport services, commercial entertainment, party services, commercial photography and commercial talent competitions specifically for children. The exception only relates to children and not others such as vulnerable people. There is no similar exception to cover vulnerable people as defined by the ADA.

The OADC agrees that background checking for employees or volunteers who are in contact with children and vulnerable people is an important part of creating a safe working environment. It is important that a checking system provide review and appeal mechanisms, so that prospective employees and volunteers who may be excluded from positions have the right to challenge any adverse decisions.

An important consideration is the scope of the screening programme and ensuring a balance is maintained between protecting children and vulnerable people while

observing non-discrimination rights. Vulnerable people themselves may be in a position of dependence as a consequence of a protected attribute under the ADA. For example some people living with a disability are at risk of abuse and there may be a power imbalance in their contact with service providers.

If a person is excluded from employment because of past inappropriate behaviour, where there is no criminal record (as defined by the ADA) it is not unlawful discrimination. The screening process should ensure any prior information about behaviour is robust and there is sound evidence of inappropriate behaviour, for example disciplinary proceedings. It is also important to ensure that the past behaviour has a direct bearing on the work undertaken.

A critical issue is how the screening process will deal with non-conviction information. The factors to be considered are listed in the discussion paper. If a provider wants to consider non-conviction factors, currently they only have an exception in relation to the education, training and care of children. If the risk factors for non-conviction information is adopted an amendment to the ADA is required. As noted above the current exception only covers education, training and care of children. Any activities beyond the education, training and care of children are outside the terms of the exception, and the provider can't rely on it. There is no exception in the ADA covering vulnerable people

It is essential to have in place a firm evidentiary base when considering non-conviction factors. The OADC endorses the factors listed for non-conviction information to be taken into account. The OADC supports the seeking of expert advice when complex assessments arise. The OADC agrees that people doing checks, particularly the complex checks and assessments should have appropriate professional qualifications, such as in the law, child welfare, social work, psychology and criminology.

The OADC recognise that there may be situations where people may be subject to discrimination on the grounds of an irrelevant criminal record, but non conviction information may raise concerns such that the applicant would still fail the screening test. However even though there may be potential for unfairness this can be dealt with by robust appeal mechanisms. When the screening process is assessing conviction and non conviction information, the OADC supports the applicant having a right to respond to interim negative notices.

The screening process is based on a registration scheme. From a non discrimination perspective to comply with best practice there should be a focus on the inherent requirements of a particular position, which may involve additional steps than a general registration type model for various areas or classes of employment which is the basis of the model proposed by the paper.

If a person applies for a position and is unsuccessful, and believes that an irrelevant criminal record is a factor in that decision they can lodge a complaint with the OADC. The OADC investigates complaints of discrimination in employment on the ground of irrelevant criminal record and assesses the specific job and inherent requirements of the position and whether the record is relevant or irrelevant to the circumstances of the position. The screening test proposed would not necessarily protect an

organisation against a complaint. An issue that may arise with a registration model that applies to various types or classes of employment is that a person may argue that the organisation did not assess the inherent requirements of the position. Ideally the screening test should not simply be a test of being relevant to the employment in a general sense but include a consideration of how it relates to the requirements of the position.

The OADC acknowledges that there is a tension between adopting a registration type model as outlined in the paper and a position based assessment that focuses on the inherent requirements of the duties in a specific role. The OADC notes that the model canvassed in the paper is principally based on a registration system with position based assessments in certain circumstances, with the support of an employer or organisation, unsuccessful applicants may make a further application for a position-based assessment and to that extent is a hybrid of the two approaches.

Please contact me if you have any queries.

Yours sincerely,



Catherine Edwards  
**Acting Anti-Discrimination Commissioner**