



Human Rights and Equal Opportunity Commission
Discrimination in employment on the basis of criminal record
Discussion Paper 2004

Introduction

The Australian Nursing Federation (ANF) welcomes this opportunity to comment on the Discussion Paper titled 'Discrimination in Employment on the basis of Criminal Record'.

The ANF is the national union for nurses in Australia with branches in each state and territory. The ANF is also the largest professional nursing organisation in Australia. The ANF's core business is the industrial and professional representation of nurses and nursing in Australia.

The ANF's 145,000 members are employed in a wide range of enterprises in urban, rural and remote locations in the public, private and aged care sectors, including hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, offshore territories and industries.

The ANF participates in the development of policy in nursing, nursing regulation, health, community services, veterans affairs, education, training, occupational health and safety, industrial relations, immigration and law reform.

The ANF supports the Commission's position that further research and discussion in this area is required and endorses the principles of non-discrimination outlined in the introduction to the Discussion Paper.

The ANF strongly supports the position that ‘...any differentiation that excludes a person with a criminal record from employment be made on an objective and appropriate basis’ following a thorough assessment of the inherent requirements of the job; the nature of the crime; and the relevant circumstances surrounding the conviction.

There are indeed a number of complex and competing interests to be considered in addressing this issue and it is hoped the process of research and consultation currently being undertaken will assist in overcoming some of the practical problems identified in the paper. As the paper suggests, the increasing concerns by the community around security issues, may lead to even greater scrutiny of job applicants and tighter controls on employment creating further problems in this area.

Registration requirements for Nurses

To gain employment as a registered nurse, nurses are required to hold a current practising certificate or licence to practise, issued by the nursing regulatory authority established by statute in each State and Territory. The nurse regulatory authorities (as they are commonly known) register the nurse on graduation and thereafter require an annual renewal of their status. As well as issuing licences, the nurse regulatory authorities maintain a register and roll and perform a number of other regulatory functions such as the accreditation of courses and development of standards for nursing practice.

Nurses are required, through the application for registration and annual renewal process, to provide information on any criminal history, criminal charges, convictions, or charges pending. The exact nature of what must be disclosed appears to vary between the States and Territories, which leads to concerns about a possible lack of consistency in the application of regulatory requirements. For example, the Queensland Nursing Council requires nurses to declare every conviction and every charge against a person while the Nurses Board of South Australia excludes ‘minor traffic offences’.

Information is provided to nurses by the relevant nurse regulatory authority concerning the nature of the information required however it does not explain in detail or comprehensively what may constitute a 'criminal record'.

In general terms, once a nurse has declared any criminal record, the nurse regulatory authority will assess the application against the requirements of their State/Territory legislation that the person is competent and fit to practise nursing. The course this process takes depends on the nature of the conviction but it will begin with an individual assessment on the basis of all the information available including the circumstances of the case. The onus is on the nurse to provide the necessary supporting evidence that he/she is fit to practise. The matter may be resolved at this point however if further action is found to be necessary it will be referred to the nursing Tribunal or Board for hearing and determination.

An appeal process is available from this point subject to the specific mechanisms available in each State/Territory.

It would appear that the general approach taken by the various nurse regulatory authorities is to ensure the individual is given full opportunity and assistance to provide information relevant to the decision making process. While the process is standardised, the assessment itself is, in theory, based on the individual circumstances and a wide range of factors can be taken into account.

In addition to registration and renewal requirements, nurses are also subject to mandatory criminal record checks applied to persons who work with children.

Individual employers may also require a criminal record check before a nurse is employed. It is difficult to establish how widespread this practice is in the health industry but it would appear to be a growing trend. In South Australia for example, all nurses are required to undergo police checks as part of the pre-employment screening applied across the public sector. The practice is relatively common in the private health care sector as well.

The processes for registration and annual renewals laid down by the nurse regulatory authorities already do contain and allow for many of the elements identified in the discussion paper as essential to minimise the possibility of discrimination. For example, nurses are provided with information about their respective rights and responsibilities; clear procedures are in place; there are opportunities to provide further information; and avenues of appeal are available.

However, it can be the form of the legislation itself that may be discriminatory. For example, the Nurses Board of Victoria may refuse to grant registration in the following circumstances:

- ‘S7 (2) (a) that the character of the applicant is such that it would not be in the public interest to allow the applicant to practise as a registered nurse;
- (b) that the applicant is unfit to practise as a registered nurse because she or he is an alcoholic or drug-dependent person;
- (c) that the applicant has been found guilty of:
- (i) an indictable offence in Victoria an equivalent offence in another jurisdiction; or
 - (ii) an offence where the ability of the applicant to practise is likely to be affected because of the finding of guilt or where it is not in the public interest to allow the applicant to practise because of the finding of guilt’.¹

Section 7 subsection 2(c)(i) of the *Nurses Act of Victoria* can be construed as mandatory that a nurse’s registration be refused, cancelled or suspended in these circumstances regardless of relevance to the job or other such factors.

Subsection 2(c)(ii) can also operate to the detriment of persons found guilty of an offence not directly related to the practice of nursing. The following case that was appealed to the Victorian Administrative Appeals Tribunal (VCAT) and again to the Supreme Court illustrates this point.

A nurse had been convicted of defrauding the Commonwealth as a result of receiving unemployment benefits for two and a half years after being employed as a casual enrolled nurse in a nursing home. The Nurses Board of Victoria found that the nurse had engaged in unprofessional conduct of a serious nature and ruled that it was 'not in the public interest to allow her to continue to practice because of the finding of guilt'.^{ii.}

VCAT upheld the finding and on appeal to the Supreme Court, the Judge dismissed an argument by the appellant that the offence referred to in the legislation, must occur in the course of or be directly related to the practice of a nurse.

He observed that the legislation referred both to the protection of the public and the public interest and that the wording suggested that the legislation '... extends to ensuring both the reality and the perception that the nursing profession is comprised of persons who are honest and trustworthy, and in whom the public ... may therefore have confidence'. The judge upheld the decision to suspend the nurse's registration.^{iii.}

Going back to the original decision by the Nurses Board of Victoria, it appears from the evidence that because of the wording of the legislation, there was a connection between the criminal record and the registration requirements even though it could be argued that the criminal record was not directly related to the practice of nursing. The Board also chose to disregard the 'circumstances' that involved financial difficulties and the fact that the nurse was in the process of repaying the amount concerned. To then prevent the nurse from working by suspending her registration for three months seems particularly harsh, (given the circumstances).

The Board also ruled that the nurse not be permitted to work in any capacity within the health industry. This part of the decision was subsequently overturned in the Supreme Court decision.

Having identified some of the difficulties for nurses in terms of registration, it should be said that we are not aware of a large number of problems arising from the process as it relates to criminal record. That does not mean there are not problems. However, without a detailed examination of decisions by the respective nurse regulatory authorities in relation to this issue it is difficult to determine the extent of possible discrimination on this basis. It is clear though, that nurses cannot work as registered nurses without a practising certificate or authority to practise so the implications of a decision to refuse, cancel or suspend registration based on criminal record are extremely serious.

In relation to the working with children legislation introduced in New South Wales and Queensland, few problems have arisen at this stage although it is probably too early to allow a proper assessment of the application and impact of the legislation.

Discrimination Legislation

The ANF is concerned that individuals are not able to pursue a legal remedy in relation to complaints about discrimination on the basis of criminal record under the Human Rights and Equal Opportunity (HREOC) Act. The limited power of the Commission in these circumstances sends the wrong message and reinforces the negative attitudes and generalisations of employers and the general community.

Given that Tasmania and the Northern Territory are the only States or Territory with laws that specifically prohibit discrimination on the basis of criminal record and the limited powers of HREOC, there is a definite lack of legal protection against discrimination in employment on the basis of criminal record.

The ANF is not in a position to state what form particular legislation should take but we would support greater protection through legislation against discrimination on the grounds of 'irrelevant criminal record'. The legislation should make provision for a range of legally enforceable remedies including compensation; payment of wages; and re-employment if relevant.

Subject to the limitations of the specific legislation applicable to the relevant jurisdiction, persons dismissed from their employment on the basis of their criminal record may have access to State or Federal unfair dismissal legislation but this is not necessarily a sufficient or appropriate forum to resolve such matters.

Conclusion and Recommendations

The ANF is of the view that the current anti-discrimination laws regulating the area of discrimination on the basis of criminal record are inadequate and that further research is required in relation to proposals for legislative change in this respect. While there are currently no major problems for nurses at this point in time, (as far as we can ascertain), there are potential issues as nurses become increasingly subject to criminal record checks by individual employers and as a requirement to working with children in addition to the scrutiny applied as part of the registration and annual renewal process.

Related to this point is the potential for duplication of the process of administering criminal record checks and the resources that will be required.

The ANF agrees that a set of guidelines should be developed for employers and employees, which aims to clarify the rights and responsibilities of the parties. Such guidelines should be developed through a consultative process including both employer and union representatives and cover, but not be limited to, the following areas:

- relevant legislation;

- information on what is contained in a criminal record and jurisdictional differences;
- relevant administrative guidelines;
- obligations of the employee;
- how to approach the question of relevance to job and determine the 'inherent requirements' of a particular job;
- issues to consideration in the decision making; and
- processes, appeal mechanisms and procedural fairness.

In developing a set of guidelines, attention should be directed to ensuring the protection of information privacy, particularly with regard to private sector organisations subject to the Privacy Act 2000 (Cth) which currently exempts employee records from the National Privacy Principles.

i. The Nurses Act 1993 pp.7,8

ii. Nurses Board of Victoria FH20 of 1999 p.6

iii. Domburg v Nurses Board of Victoria VSC369, Ashley J2000 paras 36-42