

GUIDANCE FOR CONDUCTING POLICE CHECKS



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Purpose

When recruiting someone to a job, employers want to be satisfied that the applicant is able to perform the work. They will most probably ask the applicant about their skills and experience in doing similar work. They will ask referees about the applicant's employment history. In particular circumstances, they might also conduct a national police check to find out about an applicant's criminal history. This is most often done when the role has responsibility for significant resources, sensitive information or has contact with vulnerable people.

Organisations must have in place a system of controls to prevent corruption and other misconduct from occurring. National police checks are one of the controls that may form part of that system. The checks may safeguard an organisation's integrity by helping to prevent the employment of unsuitable people. However the checks must be done in a way that does not breach privacy, human rights or equal opportunity laws. Decisions must be based on individual circumstances.

This guidance note will help employers take reasonable steps when conducting national police checks by identifying the major considerations to be taken into account. It balances their obligation to protect an organisation's reputation, resources and clients, against the applicant's right to privacy and freedom from discrimination. It takes employers through the recruitment process from identifying the inherent requirements of particular jobs; deciding whether a police check is warranted; collecting, analysing and storing criminal history information; and finally making the selection decision.

Obligations and risks

Why is information about an applicant's criminal history sought?

Some criminal convictions may prevent a person from being able to perform the inherent requirements of a job. For example someone with a history of fraud would not be suited to a finance job.

Employers, employees, recruitment agencies and referees each have a duty of care in the recruitment process. These duties stem from areas including common law, contract law, occupational health and safety laws and the law of negligence:

- **Employers** have a duty to ensure the safe conduct of business. They must protect the organisation's assets and the safety of

employees, volunteers, contractors, clients and anyone else who enters their premises or who comes into contact with their employees. They may also be vicariously liable for any dishonest acts that an employee commits whether it is to benefit the organisation or the employee.

- **Employees** have a duty to act in good faith and to exercise reasonable care and skill in undertaking their duties. Failure to disclose a relevant criminal conviction that is later identified from a police check may justify a new recruit's employment being terminated.
- **Recruitment agencies** can have a duty to disclose any information they may have about an applicant's relevant criminal history to their prospective employer. The more extensive their involvement in the recruitment process, the greater the likelihood they will owe a duty to the employer.
- **Referees** can have a duty to both the prospective employer and the applicant to provide a reference that is fair, accurate and true. In a similar fashion to the recruitment agency, they may also need to disclose any information they have about an applicant's relevant criminal history.

What type of risks do employers need to manage?

The 2014 Pricewaterhouse Coopers (PwC) *Global Economic Crime Survey* asked organisations to identify which types of economic crime they had experienced. The most common were:

- Theft (reported by 69 per cent of respondents)
- Procurement fraud (29 per cent)
- Bribery and corruption (27 per cent)
- Cybercrime (24 per cent)
- Accounting fraud (22 per cent)

While procurement fraud is less common than theft, its impact is greater because it tends to be systemic. It might therefore pose a particular risk for organisations to manage.

Employers should also consider ways of mitigating the risks associated with staff who have unsupervised direct contact with vulnerable people, staff who work together in remote and isolated locations and staff who work at night. Additionally they should control access to sensitive information.

What individual rights need to be protected when conducting police checks?

Individuals have the right to privacy and freedom from discrimination. The relevant legislation is:

- *Charter of Human Rights and Responsibilities 2006*: A person has the right not to have their privacy unlawfully or arbitrarily interfered with or their reputation unlawfully attacked.
- *Privacy and Data Protection Act 2014*: Organisations must not collect sensitive information such as criminal records unless the person has consented or the collection is required under law.
- *Australian Human Rights Commission Act 1986 (Cth)* and the *Australian Human Rights Commission Regulations 1989 (Cth)*: Discrimination means any distinction, exclusion or preference made on the ground of criminal record, apart from that based on the inherent requirements of a particular job.

Are people with a criminal history protected from discrimination in employment?

The Australian Human Rights Commission can conciliate complaints and make recommendations where a person believes they have been discriminated against because of an irrelevant criminal record. Discrimination does not include cases where the criminal record would prevent a person from performing the inherent requirements of a particular job.

Why is employment important for rehabilitating offenders?

Employment allows prisoners and other people found guilty of crime to make a fresh start in life. It is an effective way of rehabilitating offenders and decreasing their risk of reoffending. It is therefore important not to discriminate against them unfairly. In 2007, the Australian Institute of Criminology reported that 57 per cent of prisoners were known to have served a sentence prior to their current prison term.

Why is a police check not a failsafe?

A police check that returns no findings against a person may give an employer a false sense of security. It will not detect people who might offend in the future or people who have avoided detection in the past. For example, KPMG has found that most people who commit corporate fraud do not have a known history of dishonesty. Reference checks and other ongoing risk management processes are equally important to police checks.

Why should police checks be part of a wider risk management strategy?

PwC estimates that fraud is committed because of a combination of personal pressure, opportunity and rationalisation. Of these, opportunity is most within an organisation's control and accounts for 73 per cent of cases. Some of the methods organisations use to detect fraud are:

- Analysing suspicious transactions and other corporate data
- Having a robust system of controls for payments, accounts and financial reporting
- Routinely conducting internal audits
- Managing corporate (IT and physical) security
- Rotating staff to other roles in the organisation
- Encouraging staff to report misconduct
- Reporting suspected crimes to Victoria Police

Information about national police checks

Who can conduct a national police check?

Victorian applicants for employment or occupational licensing or registration may apply to Victoria Police for a national police check. Interstate applicants must apply to their state or territory police service. Overseas applicants must apply to the Australian Federal Police.

Individuals and organisations can also apply to CrimTrac or one of its accredited brokers for a national police check. CrimTrac is a commonwealth government agency that shares information with police and law enforcement agencies.

Organisations requiring fewer than 500 checks within a three year period can contact the relevant police service or an accredited CrimTrac broker. Organisations requiring more than 500 checks within a three year period can apply for accreditation with CrimTrac.

Some accredited Victorian public sector organisations have arrangements in place to undertake national police checks for other organisations.

How can the records of applicants who have spent significant time overseas be checked?

The Australian Department of Immigration and Border Protection has information about the government or law enforcement agency to contact for a police check in more than 200 countries; from Albania to Zimbabwe. The information may change without notice and

should be checked on the website of the relevant agency, embassy or consulate at the time it is needed.

What information is contained in a national police check?

Victoria Police releases criminal history information on the basis of findings of guilt. Therefore the national police check will include findings of guilt without conviction and findings of guilt resulting in a good behaviour bond. They will also contain details of matters currently under investigation or awaiting court hearing. They will not contain information about spent convictions^[1]. Note that, unlike other states and territories, Victoria does not have a spent convictions scheme.

Why does the job description need to identify the inherent requirements of the job?

Identifying the inherent requirements of a job helps employers to decide whether a police check is warranted and gives them the right to take relevant criminal offences into account. It also helps applicants decide whether or not to apply for a particular job.

An inherent requirement is something that is essential to the job and not something peripheral. Applying the same standards to all jobs could be discriminatory. For example a communications officer is not held to the same standards as a member of the police force. The latter has authority to carry firearms and to make arrests, and so is rightly held to a higher standard.

Which occupations legally require police checks?

Police checks may be legally required for licensing, registration or employment in some occupations. Victorian examples can include teachers, lawyers, building practitioners, the police, bail justices, correctional staff, gaming and liquor inspectors, health practitioners and aged-care workers. Additionally, the law requires individuals to apply for certification before they can work with children. A Working with Children Check is valid for five years. The individual's criminal record continues to be checked over this period.

Can all convictions be disclosed and taken into account?

In many situations, convictions older than 10 years for an adult or five years for a juvenile are not disclosed or taken into account under the Commonwealth spent convictions scheme and the Victoria Police *Release Policy*. However, the *Crimes Act 1914* (Cth) and the *Crimes Regulations 1990* (Cth) detail some exclusions from the spent convictions scheme. These include:

- Prescribed persons or bodies, for instance, the Secretary to the Department of Justice, for the purpose of assessing the suitability of employees and volunteers who work or seek to work with children
- Law enforcement, intelligence or security agencies for the purpose of assessing prospective employees, consultants or members of those agencies.
- Prison administrators taking convictions for violent offences into account when assessing someone's suitability to control or care for prisoners
- Residential care providers taking convictions for violent offences into account when assessing someone's suitability to care for the disabled in a residential setting
- An employer taking offences against the person into account when assessing someone's suitability to act as an advocate or care for a person with an intellectual disability

What other types of job might require a police check?

Employers should identify the inherent requirements of specific jobs before deciding whether a police check is required. Jobs that may warrant a check include those involving direct access to vulnerable clients, sensitive or highly confidential information, financial delegations or resources or other items of significant value. Those who have the authority to issue licenses or handle firearms as part of their role may also warrant a check.

The check might be conducted as part of the recruitment process or every few years depending on the level of risk involved and the legal basis for the check.

How is crime classified in Australia?

The Australian Bureau of Statistics uses the *Australian and New Zealand Standard Offence Classification* to enable comparison of crime statistics between states and territories (table 1). The offences are divided into three groups, those committed against a person, those relating to property and those committed against organisations, government and the community. Note that robbery is an offence against a person and also an offence relating to property. The table is useful for thinking about which crimes would prevent a person from performing the inherent requirements of a particular job. For example crimes against a person could prevent someone from working with vulnerable clients. Crimes relating to property could prevent someone from managing significant assets. Depending on the actual offence, crimes against organisations, government and the community could prevent someone from handling drugs or carrying weapons.

Table 1: Australian and New Zealand Standard Offence Classification (ANZSOC) 2011

Offences against a person	Offences relating to property	Offences against organisations, government (local, state or federal) and the community in general
01 Homicide and related offences 02 Acts intended to cause injury 03 Sexual assault and related offences 04 Dangerous or negligent acts endangering persons 05 Abduction, harassment and other offences against the person 06 Robbery, extortion and related offences	06 Robbery, extortion and related offences 07 Unlawful entry with intent/burglary, break and enter 08 Theft and related offences 09 Fraud, deception and related offences 12 Property damage and environmental pollution	10 Illicit drug offences 11 Prohibited and regulated weapons and explosives offences 13 Public order offences 14 Traffic and vehicle regulatory offences 15 Offences against government procedures, security and operations 16 Miscellaneous offences including defamation, libel and privacy

Recruiting new staff

How should employers alert applicants to the police check?

The job advertisement might include a clause such as: 'The preferred applicant for this job will be asked to consent in writing to a police check. People with criminal records are not automatically barred from applying for this job. Each application will be considered on its merits. Call <contact person> to find out more information.' The contact person should be someone who can speak about the inherent requirements of the job but not be involved with the selection process. This allows an open and honest discussion between the contact person and the applicant.

How might applicants react when asked to consent to a police check?

People with a relevant criminal record are likely to exclude themselves voluntarily from applying for a particular job. Most public sector organisations report few cases of people with a relevant criminal history applying for jobs.

However, some people with an irrelevant criminal record may also be discouraged from applying. For example a person found guilty of being drunk and disorderly in a public place was too embarrassed to apply for an administrative job once he knew that he might need to consent to a police check. His record was not relevant to the inherent requirements of the job and would not have been taken into account by the selection panel.

How could employers encourage applicants to disclose all relevant information?

The application form might ask applicants to confirm that:

- They consent to employment screening checks being conducted on them
- The information provided in support of their application is true
- They acknowledge that any employment or offer of employment may be withdrawn if they have provided false information in support of their application

Applicants are not obliged to consent to a police check.

Why is a police check only conducted on the preferred applicant?

The most important consideration are whether the applicant is the best person for the job and suitable for the role. Police checks are just one of the background checks that might be conducted before finalising an appointment.

Can employers ask about an applicant's criminal history in the interview?

Employers should ask questions about relevant criminal offences only. If there is a clear connection between the applicant's criminal history and the inherent requirements of the job, then a failure to respond honestly to a direct question may provide valid grounds for dismissal following the commencement of employment.

Employers can also ask applicants why they left their previous job. Applicants are obliged to tell their employer about previous misconduct if asked.

Does a criminal conviction prevent the applicant from being employed?

The employer should provide the applicant with an opportunity to explain the circumstances surrounding the conviction. Each case must be decided in its proper context. Factors the employer might consider include:

- The age of the applicant at the time of the offence
- How recently the offence occurred
- Whether there is a pattern of reoffending
- The seriousness of the offence and its relationship to the specific job
- The sentence imposed by the courts
- Any evidence of rehabilitation including subsequent work experience and character references

The seriousness of the offence is not always clear from the police check. Travelling on the train without a valid ticket might be recorded as fraud.

The risk of offending decreases with age and the passage of time. And criminal history is not always detrimental to employment. An applicant who was a reformed drug addict was well qualified to give telephone counselling advice to other people undergoing treatment for drug addiction.

How should information about an applicant's police check be treated?

Employers must not collect sensitive information such as criminal records unless the applicant has consented or the collection is required under law. They should store the information securely and disclose it only to those involved in the recruitment decision^[2]. Employers should allow the applicant to explain the circumstances surrounding the criminal history and to apply to Victoria Police if they believe the criminal record is incorrect.

The Public Records Office (PROV) issues a guide called the *General Retention and Disposal Authority for Records of Common Administrative Functions*. The guide requires employers to destroy police checks six months after recruitment is finalised or a periodic review of employees is completed. Employers might consider retaining minimal information on file such as a note saying that a police check was completed and the decision reached.

Checking current employees

Can current employees be asked to undergo a police check?

Employers do not have a general right to police check employees or require them to disclose criminal convictions, unless their employment is subject to regulations, their contract requires ongoing disclosure or ongoing disclosure is otherwise necessary for the employee to continue to fulfil the inherent requirements of their position.

Can an employee with a criminal history be dismissed?

There is no general presumption that a criminal conviction is a valid reason for dismissal. Each case must be decided on the facts.

Finding out more

Where can employers find more information?

There are a number of places where employers can find out more information including the:

- Victorian Public Sector Commission for advice on treating employees in a fair and reasonable way and making employment decisions on merit
- Australian Human Rights Commission for advice on how to prevent discrimination on the basis of irrelevant criminal history
- Fair Work Ombudsman for advice on how to avoid dismissals that are harsh, unjust or unreasonable
- Privacy and Data Protection Victoria for advice on how to handle personal information including criminal history
- Victoria Police to seek a national police check
- Australian Department of Immigration and Border Protection for information about applying for police checks from a government or law enforcement agency outside Australia
- CrimTrac for advice on how to become an accredited agency, find a broker or arrange a police check
- Public Records Office for advice on the storage and disposal of criminal history information and other public records
- Relevant legislation for particular occupations

Footnotes

1. Under s. 85ZM of the *Crimes Act 1914* (Cth) a person's conviction is spent if the sentence was no more than 30 months and the waiting period has ended (10 years for an adult or five years for a juvenile). A person is not required to disclose a spent conviction. They are protected from it being disclosed by another person or having it taken into account. [↔](#)

2. Personal information must be collected, used and disclosed consistently with the Information Privacy Principles and any protective data security standards issued under the *Privacy and Data Protection Act 2014*. [↔](#)