



public interest
ADVOCACY CENTRE LTD

**Undermining the second chance:
Submission to the National Legal Profession
Reform Taskforce**

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based, public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Requirements in respect of employment of non-legal staff members in a legal practice

Background

PIAC, as a legal practice, is prevented by Part 2.2 Division 3 of the *Legal Profession Act 2004* (NSW) (the Legal Profession Act) from employing a person who has been convicted of a serious offence (as defined in the Legal Profession Act) or who has been disqualified from practising as a legal practitioner (as defined in the Legal Profession Act), unless the person has been approved by the relevant authority. In addition, it is a criminal offence for such a person to seek to be employed by a legal practice such as PIAC, without first informing that legal practice of their conviction or disqualification. A failure to comply with the provisions can result in a finding of unsatisfactory professional conduct or professional misconduct against the Principal Solicitor of the practice or against any legal practitioner within the practice who is aware of the conviction or disqualification. There are separate rules regulating the employment of legal practitioners.

A serious offence is defined in the Legal Profession Act to include indictable offences, which are serious offences heard before a judge and jury in the District or Supreme Court, and indictable offences dealt with summarily, which are less serious offences that may be dealt with by a magistrate in the Local Court. A conviction includes a finding of guilt, or the acceptance of a guilty plea, whether or not a conviction is recorded.¹ It is also defined to include offences committed outside of NSW or in a foreign country that would be indictable offences if committed in NSW.

A disqualified person includes a person who has been removed from the roll of legal practitioners and not subsequently re-admitted, whose practising certificate has been suspended or cancelled, whose application for renewal of a practising certificate has been refused or who is the subject of a relevant order under the Legal Profession Act.

The Legal Profession Act provisions extend not only to employees but to associates, which is defined broadly to include agents or persons paid in connection with the law practice. The term 'associate' is dealt with in section 7 of the Legal Profession Act:

7 Terms relating to associates and principals of law practices

- (1) For the purposes of this Act, an associate of a law practice is:
 - ...
 - (b) an agent of the law practice who is not an Australian legal practitioner, or
 - (c) an employee of, or person paid in connection with, the law practice who is not an Australian legal practitioner, or

- (2) For the purposes of this Act:
 - ...
 - (b) a lay associate of a law practice means an associate of the practice who is not an Australian legal practitioner.
 - ...

¹ PIAC notes that a criminal record check will not necessarily disclose if a person has a finding of guilt against them with no conviction recorded.

- (4) For the purposes of this Act, an associate of an Australian lawyer is:
- (a) a person who is a partner, agent or employee of the Australian lawyer, or
 - (b) a person who is an associate of a law practice of which the Australian lawyer is also an associate.

Enquiries of the Law Society of NSW indicate that the term 'associate' is to be broadly construed and includes, for example, volunteers, student interns and members of governance committees (directors and management committee members) of community legal centres.

As a result, PIAC is obliged to make reasonable enquiries of potential employees and associates who are not currently enrolled legal practitioners in order to determine and meet its obligations under the Legal Profession Act.

In the case that a person discloses that they have been found guilty of a serious offence (as defined) or have been disqualified from practicing as a legal practitioner (as defined), PIAC is prohibited from employing the person unless an application is made to the Administrative Decisions Tribunal of NSW (in the case of a serious offence) or to the Law Society of NSW (in the case of a disqualification) and approval is granted.

PIAC is concerned that this provision imposes a significant burden on both the individual and the legal practitioners to go through what could be a lengthy and public hearing process to obtain such permission. In reality, as far as PIAC is aware, very few legal practices ascertain whether or not non-legal 'associates' of their practice have any convictions for serious offences.

In-principle position on criminal records and employment

Discrimination in employment is prohibited by the *International Labour Organization Discrimination (Employment and Occupation) Convention No 111* (ILO 111). It is discrimination to exclude a person from employment on the basis of criminal record if they are able to perform the inherent requirements of the particular job.

PIAC (and many other legal practices) oppose discrimination on the basis of criminal record on principle, believing that our system should be focused on the rehabilitation of offenders and that once a person has 'done their time', their criminal history should, unless relevant to the particular employment, not affect their employment rights.

Spent convictions

PIAC is concerned that the benefits of the *Criminal Records Act 1991* (NSW) (the Criminal Records Act) may be undermined by Part 2.2 Division 3 of the Legal Profession Act. The Criminal Records Act provides that certain convictions, defined as 'spent convictions', are not required to be disclosed for any purpose. A conviction is spent after the expiration of a specified period of time, usually ten years or three years for offences by children. Section 12 states that:

12 What are the consequences of a conviction becoming spent?

If a conviction of a person is spent:

- (a) the person is not required to disclose to any other person for any purpose information concerning the spent conviction, and

- (b) a question concerning the person's criminal history is taken to refer only to any convictions of the person which are not spent, and
- (c) in the application to the person of a provision of an Act or statutory instrument:
 - (i) a reference in the provision to a conviction is taken to be a reference only to any convictions of the person which are not spent, and
 - (ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of spent convictions.

While it appears that section 12 of the Criminal Records Act means that spent convictions do not need to be disclosed pursuant to the Legal Profession Act, the position is not clear. Complex principles of statutory interpretation need to be applied to ascertain how the various provisions work together.

A further issue is raised by section 11 of the Legal Profession Act, which states that a reference in that Act to 'a conviction' includes a finding of guilt, or the acceptance of a guilty plea, whether or not a conviction is recorded. This suggests that orders such as an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the Sentencing Procedure Act) must be disclosed and are captured by section 17 of the Legal Profession Act. However, the Criminal Records Act states that where there is a finding that an offence has been proved, or that a person is guilty of an offence, and the finding does not proceed to a conviction that finding is spent immediately after the finding is made. Again, it is not clear which provision prevails. Section 10 of the Sentencing Procedure Act provides a mechanism for offenders to be given a second chance, yet the Legal Profession Act may undermine that purpose.

PIAC is concerned that the provisions of the Legal Profession Act and the Criminal Records Act are potentially inconsistent, leaving the applicable law unclear. If the provisions of the Criminal Records Act in relation to spent convictions are overridden by the Legal Profession Act, PIAC is concerned that the Legal Profession Act is disproportionately weighted against the rights of offenders to rehabilitation and non-discrimination, particularly in relation to orders under section 10 of the Sentencing Procedure Act.

Practical difficulties

PIAC finds it is difficult to manage its obligations pursuant to the Legal Profession Act in terms of timeliness when making decisions about employment and acceptance of students and graduates on placement. Individuals often do not recall the precise nature of orders made against them some time in the past (particularly if the order was made when the person was young). Spent convictions and section 10 orders do not always show up on a criminal record check. Because of the potential inconsistencies between the Legal Profession Act and Criminal Records Act, PIAC has had to obtain counsel's advice in relation to the employment of certain individuals. All of these challenges make the process cumbersome and onerous.