



Hosted by Associate Professor Moira Paterson, Professor Marilyn Pittard,  
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# ARC Linkage Project 'Living Down the Past'

Criminal Records and Employment  
project – Roundtable 23 November 2011



# Legal Developments

## Criminal Records and Employment

Presented by Associate Professor Moira Paterson  
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# Privacy-related developments

## Criminal Records and Employment

# Overview

- **Spent Convictions**
  - The SCAG draft bill
  - SA legislation
- **Information privacy**
  - The draft APPs
- **A statutory privacy tort**
  - The government's Issue paper

# Spent Convictions 1

- Spent convictions regimes limit the use and disclosure of information about older minor convictions.
- Until recently there were statutory regimes in all jurisdictions except SA and Vic.
- In 2009 the Standing Committee of Attorneys General developed a model bill for uniform Australia-wide spent convictions regime



## Spent Convictions 2

- Since then SA has passed a new law based on the Model Bill.
- Victoria still has an administrative regime which limits disclosures by police but does not limit collection/uses by others.
- An important issue is the fact that the Victorian regime information disclosed includes information about guilty findings without conviction.



# Information Privacy 1

- Information privacy laws apply to most state public sector bodies and to Cth public sector bodies and some private sector bodies.
- These limit the collection, use and disclosure of identifiable personal information, including information about criminal convictions.
- Private sector bodies are regulated via the National Privacy principles in the Privacy Act 1998 (Cth).
- Those principles do not apply to small business operators or to records of current and past employees

## Information Privacy 2

- The NPPs provide limited protection for criminal records due to exceptions and because they do not preclude information handling with consent.
- The 2008 ALRC report contained a large number of recommendations for reform, including abolition of small bus and employee exceptions.
- The government has deferred consideration of the exceptions but has issued draft new Australian Privacy Principles.

# A statutory privacy tort 1

- In countries such as UK and NZ there is a right to sue at common law for privacy breaches, eg breaches by the media.
- However, the Australian higher courts have not yet confirmed such a right.
- The ALRC recommended the enactment of a statutory tort based on the NZ common law action and statutory torts in North America. The VLRC and NSWLRC have also made similar but not identical recommendations.



## A statutory privacy tort 2

- The government initially deferred consideration of a privacy tort.
- However, the proposal has been revived following the UK phone tapping scandal.
- The government published an Issue Paper: A Commonwealth Statutory Cause of Action for Serious.
- Submissions closed on 4 November.

## Useful Links

### **SCAG Consultation paper**

- [http://www.justice.tas.gov.au/\\_\\_\\_data/assets/pdf\\_file/0010/113887/Model\\_Spent\\_Convictions\\_Bill\\_-\\_consult\\_paper\\_Oct\\_2008.pdf](http://www.justice.tas.gov.au/___data/assets/pdf_file/0010/113887/Model_Spent_Convictions_Bill_-_consult_paper_Oct_2008.pdf)

### **ALRC Privacy law and practice webpage**

- <http://www.alrc.gov.au/publications/report-108>

### **Draft APPs (Senate Finance Committee report)**

- [http://www.aph.gov.au/senate/committee/fapa\\_ctte/priv\\_exp\\_drafts/report\\_part1/report.pdf](http://www.aph.gov.au/senate/committee/fapa_ctte/priv_exp_drafts/report_part1/report.pdf)

### **Privacy Tort Issues Paper**

- [http://www.dpmc.gov.au/privacy/causeofaction/docs/issues%20paper\\_cth\\_stat\\_cause\\_action\\_serious\\_invasion\\_privacy.pdf](http://www.dpmc.gov.au/privacy/causeofaction/docs/issues%20paper_cth_stat_cause_action_serious_invasion_privacy.pdf)

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# Developments in labour and employment law

## Criminal Records and Employment



## Developments in the United States: Employer liability for ‘negligent hiring’

- What is it?
- Tort where employer has primary liability for tortious acts of employee because employer has breached duty to exercise reasonable care in selecting the employee leading to injury



## *Ponticas v KMS Investments* 331 N.W.2d 907 (Minnesota 1983)

- Early case of negligent hiring
- The owner of an apartment complex was found negligent in failing to make a reasonable investigation into the background of an employee ('E')
- E and wife engaged as apartment manager for building
- E had a criminal record involving crimes of violence
- Credit check undertaken; No references followed up
- E subsequently raped one of the tenants.



## The Court decision:

- liability of owner employer for damages for negligent hiring
- particularly concerned with the fact that the employee was placed in a position of trust
- conducting a criminal background check was not necessarily sufficient
- needed to make inquiry/investigation of fitness for job



## ***Blair v Defender Services, Inc*** **386 F.3d 623 (4th Circuit, 2004)**

The Court cited *Ponticas v KMS Investments* that (at 911):

*Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.*

# Implications for Australia of US 'negligent hiring'

- Clash of principles –  
liability of employer (discourages  
employing ex offender) versus  
rehabilitation of ex offender (encourages  
employment)
- *Monie v The Commonwealth*: Australia's  
closest example



## US Developments in *Banning the Box*

- Campaign challenging requirement of job applicants to ‘tick the box’ if they have a criminal record
- Political movement
- Goes beyond employment to housing etc
- State by state approach



## Massachusetts legislature: Example

- Significant campaign and lobby
- Enacted landmark reform legislation
- Re criminal records, included provision 'Ban the Box'.
- Only after assessing employee is qualified for the job may employer undertake background checks



## *Fair Work Act 2009 (Cth)*

- Some Australian discrimination statutes have irrelevant criminal record as prohibited ground of discrimination in employment
- Uneven application – state by state; federal discrimination statute weak
- Opportunity missed in *Fair Work Act*
- General protections for ‘adverse action’



## *Fair Work Act 2009 (Cth) – cont'd*

- Grounds of discrimination ‘traditional’ grounds, do not include irrelevant criminal record
- Protections designed not to make unlawful action not unlawful at state level etc
- Opportunity for law reform with review of *Fair Work Act* in 2012?
- Interrelationship with current federal proposal for one discrimination statute?



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# Approaches in other countries and developments in Victoria

## Criminal Records and Employment

# Some international initiatives

## US

- Second chance legislation
- ‘ban the box’ campaigns
- Promoting names of employers willing to employ ex-offenders

# Example

## **ADVOCATE TRAINING: Reducing Employment Barriers for People with Criminal Records**

**Tuesday, November 22, 2-3 PM EST**

**Hosted by The Sentencing Project, the National Employment Law Center and the National H.I.R.E. Network**

**U.S. Attorney General Eric Holder and experts in the field of reentry have called on the states to take a close look at their occupational screening laws to reduce barriers to employment of people with criminal records.**

**In this webinar, you'll learn about the latest developments in state legislation relating to criminal records and employment, with a focus on (1) occupational and licensing laws requiring criminal background checks for employment, (2) expungement and sealing of criminal records, (3) state "ban the box" reforms, and (4) other helpful policy reforms. In addition, you'll hear about problematic state legislation from the past year that state advocates and policy makers should expect to reemerge and be prepared to challenge in their 2012 state legislative sessions.**



## United Kingdom

- NACRO – ‘Change the Record’ campaign: amendments to Rehabilitation of Offenders Act (spent convictions) (Bill in HL Nov 2011):
  - Fines to be disclosed for one year.
  - Prison sentences of less than four years to be disclosed for two years.
  - Prison sentences lasting four years or more to be disclosed for four years.
  - Life sentences to be disclosed in perpetuity.
  - Buffer periods for young people to be halved.

## Europe - examples

France – less ‘punitive’; primary value is ‘resettlement’/ ‘resocialization’; ‘right to be forgotten’.

- Limits access to different levels of detail of criminal record for employment purposes (level 2 and 3 bulletins)
- Removal of level 2 and 3 bulletins
  - Automatic deletion after passage of time without reconviction (3-10 yrs)
  - On application: Offender can also apply for deletion – immediately (eg needing to have clear record for job), or later with evidence of ‘desistance’ and good behaviour.

## Recent local events

- Defunding W4W
  - ‘Putting the bars up. Women remain prisoners of circumstance’ Maribyrnong Leader 18/10/11
  - ‘Ending aid for ex-prisoners ‘false economy’ Maribyrnong Weekly 09/11/2011
- Interview on 774 with Zana, JobWatch

## Hansard: Leg Council 25/10/11

**Ms HARTLAND** (Western Metropolitan) — My adjournment matter this evening is for the Minister for Employment and Industrial Relations on behalf of the Minister for Corrections. Melbourne Citymission provides assistance to Victorians who are disadvantaged, isolated or vulnerable.

One of Melbourne Citymission's programs has fallen as yet another victim of the Baillieu government's community services funding cuts. The Baillieu government has cut funds to Melbourne Citymission's Women 4 Work program based in Footscray within my electorate. The program has been operating successfully for 10 years.

## Some Victorian services

- Industry Skill Centre/ GTA
- Employment Expos at DPFC
- Linkout – support for male ex-prisoners (VACRO, ACSO, Salvation Army and Brosnan Centre)
- Konnect - Indigenous offender's employment support program.
- Koori employment brokers
- YMCA

## Useful links

### US 're-entry' sites

- [http://www.reentrypolicy.org/government\\_affairs/second\\_chance\\_act](http://www.reentrypolicy.org/government_affairs/second_chance_act)
- <http://www.nationalreentryresourcecenter.org/>

### UK

- <http://www.nacro.org.uk/policy/change-the-record/>

### Europe

- [http://www.ejprob.ro/index.pl/january\\_2011](http://www.ejprob.ro/index.pl/january_2011)

### Victoria

- [http://www.vacro.org.au/Justice\\_System\\_Services/Mens\\_Services/Link\\_Out.htm](http://www.vacro.org.au/Justice_System_Services/Mens_Services/Link_Out.htm)
- <http://gtavic.asn.au/projects/industry-skills-centre>
- <http://www.jss.org.au/programs/all-programs/konnect>