LIVING DOWN THE PAST:

Criminal Record Checks and Access to Employment for Ex-offenders: Final Report

Bronwyn Naylor, Georgina Heydon, Moira Paterson and Marilyn Pittard
May 2018

MONASH University

GROUP OF EIGHT AUSTRALIA

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The Research Team

Chief Investigators:

Dr Bronwyn Naylor is a Professor in RMIT's Graduate School of Business and Law. Prior to this, she was an Associate Professor in the Faculty of Law at Monash University. She has published extensively in the fields of criminal law and criminal justice, in particular on criminal record checking, and on human rights of people held in detention.

Dr Georgina Heydon is an Associate Professor in the School of Global, Urban and Social Studies at RMIT University and an expert in credibility assessment, evidential interviewing and qualitative data analysis.

Professor Moira Paterson works in the Faculty of Law at Monash University. She has published extensively in the fields of freedom of information and privacy law.

Professor Marilyn Pittard researches and lectures in labour and employment law in the Faculty of Law, Monash University. Her fields of research include the electronic workplace and the contract of employment, and regulatory coverage of employment, including fairness of treatment in employment to ex-offenders.

The following Partner Organisations participated in the research and provided valuable support as Partners:

- The Australian Human Rights Commission (AHRC)
- Corrections Victoria
- Fitzroy Legal Service
- JobWatch
- The Victorian Association for the Care & Resettlement of offenders (VACRO)
- The Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

Acknowledgements

This research project was generously funded by the Australian Research Council (ARC) under its Linkage Projects scheme (LP0990348 2009) and supported by Monash University. We would particularly thank our Partner Organisations for their financial and practical support for the project, their commitment to the issue of enhancing employment opportunities for former offenders, and their close engagement with the research design, analysis of research outcomes, and implementation and dissemination of findings.

We are of course also extremely appreciative of the people who so generously responded to our surveys and who offered to take part in interviews for this research.

In addition we thank our Research Assistants, Antoinette Saliba, Duncan Wallace and Jenna Amos. We also thank our Project Managers at various time in the project: Francesca Guillaci, Kathryne Radcliffe, Su Vien Tan, Lisa Harrison and Meli Voursoukis.

LtoR: L to R: Carol Nikakis (VACRO), Kieran McCann (Corrections Victoria), Bronwyn Naylor (Monash Law), Julian Alban (Victorian Equal Opportunity and Human Rights Commission), Janice Miller (formerly WISE), The Hon Catherine Branson QC, former President Australian Human Rights Commission, Moira Paterson (Monash Law), Georgina Heydon (RMIT), Marilyn Pittard (Monash Law), Prue Burns (Monash researcher), Barry Rickard (Group Training Association of Victoria).

Executive Summary

This report summarises research undertaken for the Australian Research Council (ARC) Linkage Scheme to fund the project *Living Down the Past: Criminal Record Checks and Access to Employment for Ex-offenders* (LP0990348). This project was a partnership between academics at the Monash Law Faculty and the School of Global, Urban and Social Studies at RMIT University, three government agencies and three non-governmental organisations.

Criminal record checking is now a commonplace aspect of the employment process and affects a significant proportion of the population. Routine use of criminal record checks risks inhibiting rehabilitation of ex-offenders. At the same time there is very little understanding of either the drivers for criminal records checking or how criminal records data is treated by employers when it is provided to them by the police.

The research project was designed to address this issue by shedding light on the current practices of employers in their discretionary use of criminal record checks in recruitment. The aim of the project was to critically analyse these practices with a view to providing public policy actors and agencies with up-to-date and sophisticated information based on this research, to support their work with employers and to stimulate broader social debate in relation to aspects of the regulatory framework that require reform.

The project was based on qualitative research with human resources managers and involved date collection from a range of sources, including interviews, surveys, and document analysis. The research and its outcomes are summarised below.

The research found that legal frameworks play a key role in driving the trend towards criminal records checking, that there are a multiplicity of laws that have this effect, and that these laws have been enacted at different times, in different terms and often with widely ranging prescriptions.

It found that the other key driver is concern with risks, but that this exists in a context where such limited data on recidivism as is available may be inconsistent with common perceptions concerning offenders.

The research also suggests that there is still limited concern with, or appreciation of, human rights issues, including rights to privacy and the right not to be discriminated against on the basis of irrelevant criminal records.

Introduction

In recent years there has been a huge increase in requests for disclosure from individuals of criminal history information, in Australia as in many other countries. Crim Trac, the national Australian criminal record agency processed 3.9 million checks in 2014-2015, a huge increase from the 2.3 million in 2006-07.[1]

The upward trend in criminal record checking has implications for a significant proportion of the population, as a substantial minority of individuals will have some form of criminal record. For example, it is estimated that one in six Australians has a criminal record.[2] Across Australia 511,773 defendants were proven guilty in state and territory criminal courts in 2014-2015.[3] In England and Wales it is estimated that (at 2006) 15% of people between the ages of 10 and 52 had at least one conviction for a 'standard list 1 offence' (24% of males; 6% of females), and that 33% of males born in 1953 had been convicted of at least one standard list offence before the age of 53.[4] More than one in four Americans is estimated to have a criminal record, or approximately 65 million people.[5] Older New Zealand data indicates that one in four males had a criminal record by age 25.[6]

Two pilot research projects conducted by the four Chief Investigators prior to the commencement of this project highlighted the need for a better understanding of the factors relevant to employer decision-making in order to frame recommendations for legal and regulatory reforms.[7]

Research conducted in the United Kingdom in 2001 had found that a reason for employers' rejection of applicants with a criminal record was that they are generally seen 'as undesirable, outside the employer's experience and alien'.[8] However, very little was known of the actual perceptions of Australian employers in making decisions about a criminal record.

[1] CrimTrac, *Annual Report 2014-2015.*

[2] Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 288 [11.4.5].

[3] Australian Bureau of Statistics, Criminal Courts, Australia (2014-2015). http://www.abs.gov.au/ausstats/abs@.nsf/mf/4513.0

[4] 'Conviction histories of offenders between the ages of 10 and 52, England and Wales', Ministry of Justice Statistics Bulletin, Ministry of Justice, United Kingdom, published 15 July 2010. "Standard list offences are all indictable and triable-either-way offences plus a range of more serious summary offences such (sic) assault, criminal damage (£5,000 or less) and driving without insurance." (p 15).

[5] Michelle N. Rodriguez and Maurice Emsellem, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment (New York: National Employment Law Project, 2011), pp. 27 and 3. http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf

[6] Ron Lovell and Marion Norris, *One in Four: Offending from Age 10-24 in a Cohort of New Zealand Males: Study of Social Adjustment:* Research Report No. 8. (Wellington: Department of Social Welfare, 1990) 1, cited in in Helen Lam and Mark Harcourt, 'The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public', (October 2003) 47(3) *Journal of Business Ethics* 237.

[7] See Georgina Heydon, Bronwyn Naylor, Moira Paterson and Marilyn Pittard 'Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel' (2011) 32 *Adelaide Law Review* 205-225.

[8] Hilary Metcalfe, Tracy Anderson and Heather Rolfe, Department for Work and Pensions (UK), *Barriers to Employment for Offenders and Ex-offenders*, Research Report No 155 (2001), 4.

Aims

A key aim of the project therefore was to significantly augment the information available by identifying the current practices of employers in their discretionary use of criminal record checks in recruitment. This included evaluating both their reasons for seeking and using criminal record information and the ways in which they draw on criminal record information in their decision making, and critically analysing these practices.

Two further related aims flowing from this research and analysis were to:

- Provide public policy actors and agencies with up-to-date and sophisticated information based on this research, to support their work with employers and with offenders to manage risk while improving the employability of groups in the ex-offender population; and

- Formulate proposals for legal and regulatory reforms to address these issues, with view to stimulating broader social debate.

Research Methodology

The project involved detailed searches of relevant literature, including government reports, academic books, articles and case law, together with qualitative research based on surveys, interviews and documentary analysis. In addition, a comprehensive examination was made of statutes and regulations in Victoria to identify legislative requirements for criminal record checking. Findings from this research are more fully reported in ongoing publications by the Chief Investigators (see full list below). Findings from the empirical research is also briefly summarised here.

The empirical research was conducted primarily in 2011 and 2012, based on surveys and interviews of Human Resources (HR) managers across a wide range of industries. HR managers were invited to participate in an online survey about various aspects of criminal record checking including the use of policy frameworks in their workplace, if and how checks are carried out, and their organisation's attitude towards criminal justice concerns such as rehabilitation. Additionally, the survey collected demographic data and information about each respondent's organisation, such as its size and industry sector, as well as data about the respondent's work experience. The survey, which attracted 149 responses, was distributed in two phases: first, to a commercially available database of HR managers who had provided their email addresses for research purposes; and, secondly, to members of the Victorian Employers' Chamber of Commerce and Industry (VECCI).

A final page of the survey invited respondents to participate in an in-depth interview. A total of 20 interviews were subsequently conducted with respondents who provided their contact details for this purpose. Although the sample size was small, this interview data was extremely informative in providing explanations and examples of the responses collected in the survey.

Survey results were analysed through Survey Monkey, using mixed methods and cross-tabulation of results. Interview transcripts were analysed thematically in Nvivo. To extend our understanding of the issues identified, interviews and focus groups were also conducted with alcohol and drug agencies and with the staff implementing Working with Children Checks in Victoria.

Research Findings – Survey data

Why do employers seek criminal record information?

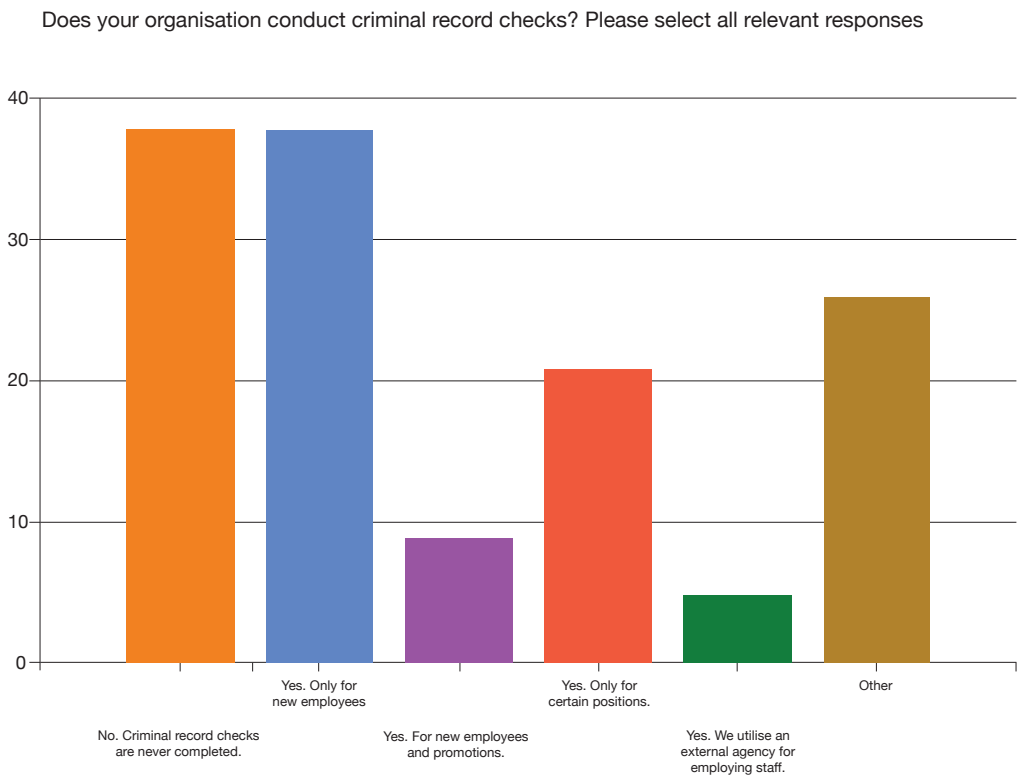
The responses to the survey indicated that of the roughly two thirds who conducted criminal records checking, the number who did so as result of regulatory requirements outnumbered those who did not by approximately 4 to 3. This is important as it suggests that the high levels of checking identified by prior research may in fact be due more to the legal environment and industry level regulation than to organisational strategy. This finding was further supported by the findings in relation to the reasons for conducting the checks, where the highest priority was on average given to regulatory/legislative requirements over any other reason.

Reasons relating to risk management also rated highly, although respondents were fairly evenly divided as to which type of risk was most important, and a small majority identified minimising risk to customers. Their responses suggest a higher level of concern about the risk of direct impact on another person (risk to customers, risk to other employees) than of any risk of recidivism in the offending behaviour itself.

How does criminal record checking affect employers' decision-making in recruitment?

Significantly, the vast majority of HR managers surveyed did not consider the criminal record to be a conclusive indicator of suitability and conducted further investigations. However, 9% of the surveyed HR managers indicated that a positive check would result in that candidate being automatically excluded from the recruitment process.

Figure 1 (Survey Question 9) Prevalence of Criminal Record Checking (N=121)



How are HR managers responding to human rights concerns about criminal records checking?

Less positively, the majority of HR managers were unclear whether their employer considered that the rehabilitation of offenders was important and, if so, how this was reflected in their practices. There was also little evidence of any sense of duty of care to applicants, and virtually no recognition of human rights obligations towards ex-offenders, or specifically of the explicit guidelines developed by the Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, on avoiding employment discrimination on the grounds of irrelevant criminal records.[9]

Figure 2 Organisational responses to ex-offenders in recruitment (N=121)

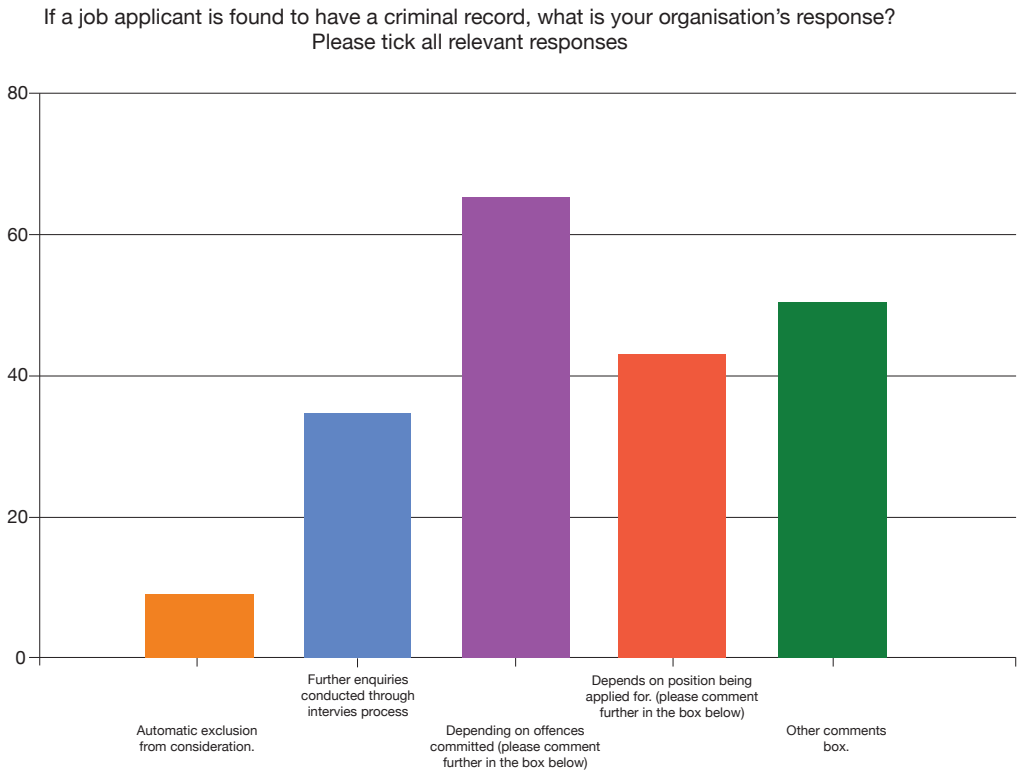
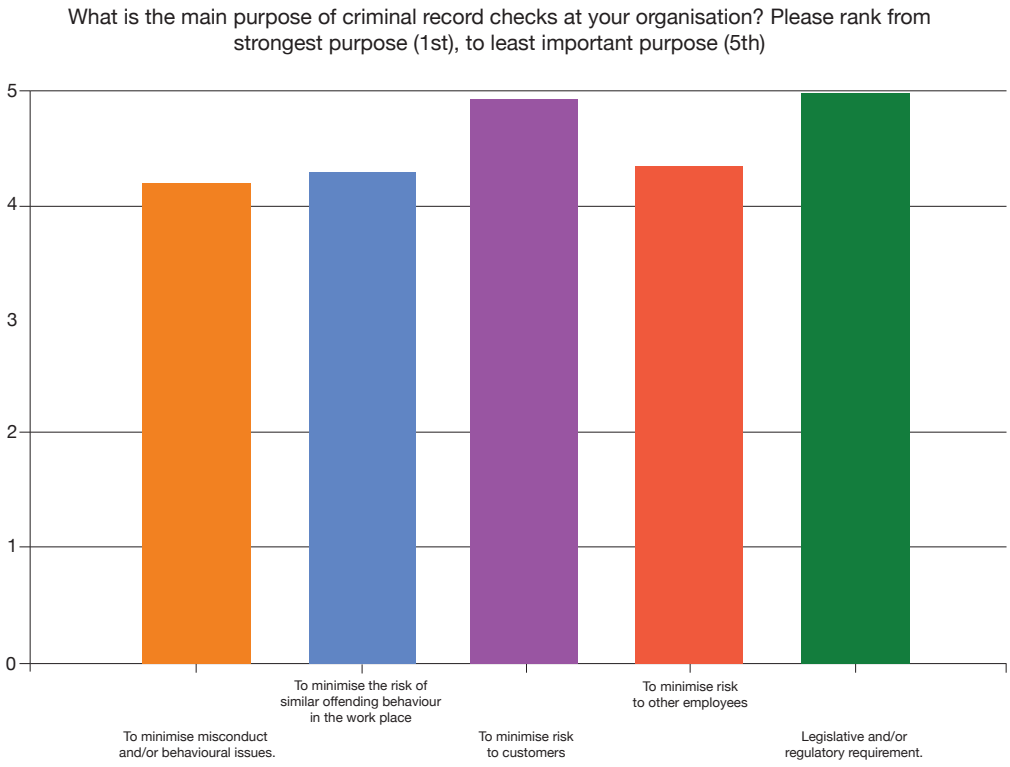


Figure 3 Main purpose for conducting checks.



[9] AHRC, 'On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record' (2012). https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-record

Research Findings – Interview Data

Why do employers seek criminal record information?

The responses to the interviews tended to confirm the survey findings. The choice to collect or not collect criminal record information, as discussed by the HR managers, reflected the image the organisation tried to promote amongst staff. For example, the HR Manager of a large foreign-owned automotive parts manufacturer, where criminal record checks were not conducted, described the organisation as having a 'people focus' and explained that the importance of a good 'fit' between the employee and the organisation was more important than the results of a criminal record check (HRINT1).[10]

As identified in the survey, an important motivation for record checking was the regulatory environment. This is not always straightforward, with regulations applying in one part of the organisation but not another. Some organisations choose consistency, as demonstrated in an interview with an insurance company. In this interview the employer described a practice of applying the same standard of criminal record checking for all positions, even though only some sectors of the business had a regulatory requirement to carry out checks, to ensure future staff mobility across business units (HRINT2).

Some organisations instigated criminal record checking following an incident of criminal activity by a staff member. A large parts manufacturer, similar in size and practices to the organisation interviewed in HRINT1, made a decision to implement criminal records checking following a case of fraud (HRINT3). The checking was universal and not without opposition from management, but was seen as an appropriate response where the fraud had damaged the company financially. Thus, in this case, criminal record checking was seen as a necessary risk-management tool.

Risk management was often described as a motivation for records checking, but this was also far from straightforward. For instance, risk to the organisation could overlap with the risk to other employees, with risk to clients being only a secondary concern. In an interview with a legal and financial services sector employer, the HR manager referred to risks to the firm (financial risk), to other employees, and to clients. However, when this interviewee expanded upon these views, it became clearer that the risk referred to was the risk to the firm's reputation, and not a demonstrable risk to the actual integrity of the organization.[11]

How does criminal record checking affect employers' decision-making in recruitment?

As in the survey-based research, the interview-based research also considered the impact that criminal record checking would have on the decision-making process. In the case of the automotive parts organisation (HRINT1), the decision not to conduct criminal record checking was based on an uncertainty about how the information obtained from the check would inform their decision-making process. In the case of another large parts manufacturer, the use of the information obtained in the criminal record check was carefully considered and a discretionary decision made based on the nature of the offending and the future role of the job applicant in the organisation. Amongst the professions, formal HR practices had only recently been instigated in the firms we visited, and in most cases, the HR managers were the first to be appointed to that role in the history of the firm. Prior to their appointment, recruitment had been managed by the professional staff (accountants, lawyers and engineers in our data), with little or no training in the relevant processes, such as addressing equal opportunity requirements, undertaking rigorous screening processes or providing adequate professional development opportunities (eg HRINT4).

[10] Interviewees were coded to ensure anonymity of the interview data.

[11] HRINT4: "You know in a large regional town where you've had enjoyed the um great reputation …well it only just takes one thing to think oh gosh no hang on a second I actually don't feel like I can trust them anymore."

The criminal record check was also seen by some of our respondents as an opportunity to consider the candidate's integrity: honesty in disclosure was considered an indicator of personal integrity, along with the nature of any prior convictions. This view was expressed by the HR manager of an insurance company (HRINT2),[12] as well as the HR manager for the large parts manufacturer (HRINT3).[13] In both cases, the candidate who was not forthcoming in disclosing their criminal record was regarded as potentially untrustworthy. Both of these firms were based in Victoria, where there is no spent convictions law, so these instances of failure to disclose might refer to anything in the candidate's criminal history. In Victoria (as in a number of other jurisdictions) the criminal history disclosed via check can include non-conviction dispositions and charges pending (see for example the Victoria Police Information Release Policy – Appendix 3). It is therefore quite possible that candidates who failed to disclose non-convictions because they believed these were not part of their 'criminal record' might still be regarded as deceitful by these employers.

How are HR managers responding to human rights concerns about criminal records checking?

To a large extent, recruitment management processes appeared to be relatively uninformed about human rights obligations, and avenues that a complainant might have through state or federal human rights commissions. This interpretation is based on the responses to the question, 'what are the resources you were able to draw on when developing your HR policy in relation to criminal records checking?' The AHRC Guidelines were never mentioned, nor was there any reference to publications or information distributed by state or federal governments in relation to this issue, or to the Australian Standard on Employee Screening. There was, however, an occasional reference to equal opportunity or privacy legislation.

The response from the HR Manager for the parts manufacturer about resources relied on was typical of the data, simply referring to the 'Acts' and the 'EEO' (HRINT3). In some cases, HR Managers referred to what others were doing and best practice industry standards. The HR manager of a rural accountancy firm indicated that professional bodies for accountancy and human resources would be the first port of call for information about criminal record checking processes.

One notable exception was a large charitable organisation that took a particularly nuanced approach to their interactions with the AHRC. It was their policy not to engage in mediation with a complainant (where the complainant was alleging unfair dismissal on the basis of a claimed irrelevant criminal record). This decision was based on the fact that the outcome of the mediation would not be binding, as the AHRC does not have the power to require an employer to re-employ the complainant. Thus, should the mediation result in a recommendation to reemploy, the decision to do so is at the discretion of the employer, who then carries all the risk and responsibility for the consequences of that decision. In the event that the reinstated employee does reoffend, and the offending results in damages, there is no recourse for the employer to claim compensation from the AHRC – they must bear all the responsibility for the decision to reemploy a known offender.

[12] HRINT2: "the first thing that's really critical to us is that the individual's actually disclosed any issues and been honest with us."

[13] HRINT3: "so there'll be times when people will come to us and say I want to tell you about this about me and they're the ones that we really welcome rather than get all the way through and then look at the Police Check and think oh my goodness".

While some respondents recognised the importance of their role as gatekeepers for ex-offenders' rehabilitation and talked about that person's right to re-enter society once they have paid the penalty for their offence, they often followed this with more generalized statements about the need to protect their clients, staff or reputation from the risk of re-offending by employees with a record. This was particularly well demonstrated in one interview with a number of representatives of a government department which handles very large sums of money. Early in the interview, the obvious need to manage the risk of theft was discussed in relation to checking criminal records for relevant offences. At this time, the interviewees spoke of the importance of giving people an opportunity to gain employment through discretionary decision-making in employment. The interviewees gave examples of young people doing foolish things and then settling down, never to offend again. Such people were cast by the interviewees as low risk, especially when the offence related to something irrelevant, or something that was unlikely to place the person in a position where they might be susceptible to bribery or extortion:

> "Depending on what it was if it was something like nine years ago and it was a DUI well ok they were young foolish a bit of a wally they've settled down now some cases we've looked at it and we've brought the people in and discussed it." (HRINT5)

Here one speaker refers to a low risk offence 'something like nine years ago'. The reference to 'nine years' is relevant because this agency operates in a jurisdiction that has a spent convictions regime, and most offences over ten years old would not appear anyway.

It is noteworthy that these interviewees pointed out that they did employ staff at very high security levels; in such cases any spent convictions regime would not apply, that is, all convictions would have been disclosed. However, for the most part it was assumed that the offences they would be looking at on a criminal record would be less than ten years old. It is also interesting to compare the time periods referred to here with those mentioned in other interviews where there was no spent convictions law in operation, as is the case in Victoria. In the HRINT5 interview a conviction that was nine years old was considered too old to be a real indicator of the person's current character or behaviour. By contrast, in the Victorian interviews, a conviction was likely to be considered 'old' after fifteen or twenty years. This view is likely to be a direct result of the lack of a spent convictions regime which would expunge most offences after ten years.

It is significant, however, that when the interviewer asked about violent or sexual offences in the interview with the government agency (HRINT5) there was much more ambivalence. The respondents struggled to articulate a clear opinion about the likely response to such a record. Eventually the HR manager gave a straightforward admission that, even though such convictions were not obviously relevant to the work, they did not know how such a record might be handled in an application for employment.

Discussion of the Research Findings

The legislative 'patchwork'

The lack of uniformity of laws in the states and federally dealing with criminal records and employment, that is spent conviction legislation and discrimination legislation, has created a patchwork of varied regulation. This has been highlighted in several publications by the Chief Investigators.[14]

This research highlighted that the impact on individuals varies according to the state in which they reside and therefore which protective regulatory regime covers, or does not cover, them. The impact on the person's dignity and autonomy, their ability to earn an income, their ability to support a family and the degree of their dependence on social security are all affected by the different legal frameworks governing criminal records and employment.

However it is not only the uneven application of the laws that is significant. The research findings from the survey and interviews as to how criminal records are taken into account in practice in making employment decisions also demonstrate the need to have spent conviction schemes in all jurisdictions (or some scheme to expunge the criminal record after a period of time) and to extend discrimination laws to cover discrimination on the grounds of irrelevant criminal record in jurisdictions where this is not already in place.[15] They also highlight the need for wider publicity to be given, for example, to AHRC Guidelines - *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* - on appropriate use of criminal record checking in employment decision making.

Legislative requirements

Based on the identification of regulatory requirements as a key motivator for criminal records checking, we conducted further research to gauge the nature and extent of the legislative provisions which *require* criminal records checking, either directly or via the imposition of requirements to make assessments based on character. This research focussed on legislation in Victoria. Such legislation mandates criminal record checks as a mechanisms for promoting (for instance) the protection of vulnerable persons or the need for good character for professional licensing, but brings with it inevitable employment consequences (see Appendix 2 for some examples).

This research highlights the following:

- There are a small number of statutes that mandate criminal records checking per se: these include laws designed to protect vulnerable individuals such as children (for example, the *Education and Training Reform Act* 2006 (Vic) relating to Victorian teachers), security and justice employment, and employment in transport industries including taxi and bus driving work.[16] These are augmented by the *Working with Children Act 2005* (Vic) which requires individuals to undergo a criminal records checking process as a precondition for working with children (including in a volunteer capacity).

- There are a large number of statutes that make access to specific occupations dependent on character-based assessments (for example via requirements that the applicant must be a fit and proper person); these schemes have been enacted at different times, in different terms and often with widely ranging prescriptions.[17]

[14] See B Naylor, M Paterson and M Pittard, 'In the Shadow of a Criminal record: Proposing a Just Model of Criminal Record Employment checks' (2008) 32 *Melbourne University Law Review* 171; and see additional articles referred to under 'Publications' below.

[15] See for example the articles by the CIs, Paterson, M, 'Restrictions on employers' handling of criminal records information: privacy and confidentiality issues' (2012) 18 (8) *Employment Law Bulletin* 120-123; Pittard, M, 'Discrimination law: constraints on criminal record checks in recruitment' (2012) 18 (8) *Employment Law Bulletin* 124 – 128; Naylor, B, 'Living down the past: why a criminal record should not be a barrier to successful employment' (2012) 18 (8) Employment Law Bulletin 115-119 – Appendix 5 below.

[16] For example *Education and Training Reform Act* 2006 (Vic), ss 2.6.22 and 2.6.23; *Private Security Act* 2004 (Vic) s.25. *Transport (Compliance and Miscellaneous) Act* 1983 (Vic) ss. 132B, 132D.

[17] See for example, former *Legal Profession Act* 2004 (Vic) s 2.3.3 on the requirement for an applicant seeking admission to practice to be a 'fit and proper' person.

- Some schemes establish a body to make decisions on professional licensing or accreditation and specify that a criminal record be considered, for example the *Conveyancers Act 2006* (Vic), *Estate Agents Act 1980* (Vic) and the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic).

- Many of the legislated requirements or incentives to conduct criminal record checks provide no guidance about what the employer is to do if a criminal record is disclosed, although they may preclude employment if a person has convicted a specific type of offence.[18]

- The detail of many of these requirements is in less accessible documents such as Regulations, policy documents and protocols.

It can be assumed that the majority of laws which impose broad obligations to conduct record checks, have been enacted without regard to their broader consequences in terms of employment opportunities for ex-offenders. However, they encourage employers to avoid employing a person with a criminal record, as a matter of caution or due to the employer's uncertainty about what is required for compliance.

These statutory provisions and practices also inevitably deter from applying people who are not sure whether and how a criminal record will be considered. Thus there is a certain 'self selection' that operates, whereby applicants with a criminal record will not even reach the stage of being considered for a job.

Availability of information for decision making

There are many sources of information about how to conduct and assess criminal record checks - and reminders not to use such checks as blanket exclusions - including in the AHRC Guidelines,[19] the Australian Standard for Employment checking,[20] ; a Victoria police Information Sheet [21] and Victorian Public Sector Commission Police Checks Guidance Note.[22] These do not, however, seem to be well known.

The widespread use of record checks also highlights the need for sources of information and guidance for people with a criminal record who are seeking work. Such organisations and information sources include Fitzroy Legal Service, and the Service's long running *The Law Handbook*,[23] JobWatch (the Employment Rights Community Legal Centre)[24] and Victoria Legal Aid.[25] These sources of information are important in providing people with a criminal record with the knowledge of their rights and how to exercise them, and also of their avenues for addressing potential exclusion.

Extent of criminal record disclosure

A further issue that arose from the research studies concerned the nature and extent of the criminal history information made available in a criminal record checks. Where jurisdictions have spent convictions regimes, these provide protection for older convictions of a minor nature. However, the regimes vary in the nature and extent of protection they provide and are subject to exceptions in respect of specific types of work. This means that there are many cases where employment checks generate information about minor offences that have been committed many years ago. In addition, the information released can extend beyond convictions; in many spent conviction regimes findings of guilt in respect of which there has been no conviction recorded will be disclosed, along with other encounters with the criminal justice system.[26]

On the other hand, there have been ad hoc recent legislative interventions aimed at relieving the consequences of convictions for offences that are no longer criminal offences today. Whilst spent conviction legislation does not generally exist in Victoria, the *Sentencing Act 1991* (Vic) was amended with effect from 1 September 2015 to expunge those convictions for homosexual activity that would not be criminal today; it authorises a person not to disclose such a conviction or finding of guilt 'for any purpose'. [27]

[18] See, for example, *Education and Training Reform Act* 2006 (Vic), s 2.6.29.

[19] AHRC, On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record (2012).

[20] Standards Australia, Employment Screening - AS 4811-2006.

[21] See the (slightly difficult to locate) document 'Procedure for obtaining a national police certificate' at http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=38446

[22] http://vpsc.vic.gov.au/html-resources/police-checks-guidance-note/

[23] http://www.lawhandbook.org.au/2018_03_09_02_understanding_your_criminal_record
And see: http://www.activistrights.org.au/police_record_checks

[24] http://www.jobwatch.org.au/

[25] https://www.legalaid.vic.gov.au/find-legal-answers/going-to-court-for-criminal-charge/possible-outcomes-for-criminal-offences/criminal-records

[26] See for example Crimes Act 1914 (Cth) s 85ZM(1)(b); Annulled Convictions Act 2003 (Tas) s 3(2); Spent Convictions Act 1988 (WA) s 12(b)(ii); Criminal Records (Spent Convictions) Act 1992 (NT) s 3(1). The disclosure policy of Victoria Police similarly includes non-conviction dispositions: see Appendix3 which sets out the disclosure policy of Victoria Police as an example.

[27] Sentencing Act 1991 (Vic) s.105 J.

The difficulty of identifying coverage and disclosure under the various spent conviction regimes in Australia led to further paper-based research, which provide a matrix of spent convictions regimes within Australia, as summarised in Appendix 1. Two of the CIs published a critical analysis of the operation of these regimes, having regard to their interrelationship with the criminal sentencing process and having regard to lessons to be learned from practices in other countries.[28]

It is significant that legislation in the United Kingdom, which provided for similarly wide disclosure in some circumstances, has recently been amended in the light of case law which established that it contravened human rights legislation, because it amounted to an unjustifiable breach of the privacy rights of individuals adversely affected by it. The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013 established a new filtering regime to govern disclosure of criminal records information by the Disclosure and Barring Service. This regime, which provides for the non-disclosure of single convictions for non-violent, non-sexual offences that did not lead to a custodial sentence (including a suspended sentence) after 11 years (or 5.5 years for juvenile offences) was implemented in response to the 2013 decision of the Court of Appeal in T*, R (on the application of) v Greater Manchester Chief Constable & Ors*.[29]

Conclusion and Way Forward

This project has shed valuable light on the current practices of employers in their discretionary use of criminal record checks in recruitment. It is clear that there is considerable variation in motivations by employers for checking, in the extent to which there is a nuanced use made of criminal records information, and in awareness of current best practice.

Our analysis of the data highlights the need for improvements in current practices and provides a basis for more informed debate in relation to aspects of the regulatory framework that require reform.

The necessity in Victoria for spent convictions legislation, and for anti-discrimination legislation which identifies 'irrelevant criminal record' as a protected attribute, is also highlighted by this and other research by the authors.

The project also suggests a number of matters that require further exploration.

The survey and interview research, together with the work done to identify Victorian laws that mandate some form of either criminal record checking or assessment of character, indicate that current legislative requirements may be contributing significantly to the proliferation of criminal records checking. The importance of regulatory requirements in employer decisions whether to require criminal record checking was highlighted by participants in the empirical research. This issue warrants further exploration in its own right and consideration of whether such requirements should be made clearer and more targeted.[30] It will also be important to identify other measures, including legislative reforms that can be implemented to address inappropriate criminal records checking practices that arise from these contexts.

A further issue warranting separate analysis is the disproportionate impact that the practice of criminal records checking is likely to have on individuals of Aboriginal and Torres Strait Island descent. This group is over represented in criminal justice interventions and in the prison community, for a range of reasons.[31] Members of this group are therefore more likely to have a criminal record of some type which may be a hurdle – whether or not actually relevant – to general employment, to engagement with government agencies in liaison or elder roles, and to broader community engagement as volunteers, as kinship carers, and on community boards and corporations.

A summary of main publications and outcomes of this project is set out next.

[28] M Paterson and B Naylor, 'Australian Spent Convictions Reform: A Contextual Analysis', (2011) 34(3) University of NSW Law Journal 938 - 963

[29] T, R (on the application of) v Greater Manchester Chief Constable & Ors [2013] EWCA Civ 25.

[30] See the proposed scheme outlined in Naylor, Paterson and Pittard (2008).

[31] There is considerable literature on this complex issue. See for example Senate Select Committee on Regional and Remote Indigenous Communities, 'Indigenous Australians, Incarceration and the Criminal Justice System' (Discussion paper) March 2010; Samantha Jeffries and Christine Bond, 'Indigenous disparity in lower court imprisonment decisions: A study of two Australian jurisdictions, 1998 to 2008' AIC Trends and Issues no. 447, 2012.

Dissemination of Research Data

The publications and submissions as detailed below have resulted in a number of citations by major Australian and NZ Law Reform bodies, including the Tasmanian Sentencing Council and the NZ Law Commission. In addition to publications and conferences, research data was disseminated at a Stakeholder Roundtable and a Public Symposium.

Stakeholder Roundtable November 2011

The findings from surveys and interviews, along with the results of our legal research into the current regulatory regime for criminal record checks, were presented at a Roundtable, held at the Monash University Law Chambers on the 23 November 2011. The Roundtable provided an opportunity for a presentation of findings to date, and for a range of invited stakeholders to give feedback on the work to date, and the next steps. The event was attended by nineteen people from a range of organisations, including our partner organisations, VEOHRC, JobWatch, Australian Human Rights Commission, Fitzroy Legal Service, VACRO and the Department of Justice, as well as other Victorian and Commonwealth Government Departments, an employer association, and a number of not-for-profit agencies.

Public symposium March 2013

A key outcome of the project was a Symposium on Criminal Records and Employment Decision-Making, which was held at the Monash University Law Chambers on Monday 18 March 2013 (see Appendix 4). The Symposium was opened by the Hon Catherine Branson QC, formerly President of the Australian Human Rights Commission (one of our partner organisations). It included speakers from two service providers (WISE Employment, and Group Training Australia), the Second Step Program at Toll Holdings, and from our Partner Corrections Victoria. The Researchers presented findings from the Project and proposals for reforms. This day-long symposium provided an opportunity to share new ways of thinking about recruitment and risk management and practical recommendations for possible reforms, with input from the partner organisations, employers and others directly involved in initiatives to enhance the employment of ex-offenders. The program was developed with the partner organisations and was attended by a broad range of individuals and organisations including employers, corrections staff, job service providers, government agencies and advocacy groups.

PowerPoint slides from the symposium are available at

http://www.monash.edu/law/research/projects/criminal-records-checks-and-employment-project

The symposium was written up in the following publications:

- Omitting criminal records discrimination “regrettable”: Branson, Workplace Express, March 2013, https://www.workplaceexpress.com.au/nl06_news_print.php?selkey=50076 (see appendix 6)
- HR challenges accompany big rise in pre-emplyment criminal record checks, Workplace Express, April 2013, http://www.workplaceexpress.com.au/nl06_news_print.php?selkey=50163 (see appendix 7)
- Criminal Records and Employment Symposium, Monash Law Matters, Issue 1/13 (see appendix 8)

Documents and reports for this project are available at:

http://www.monash.edu/law/research/projects/criminal-records-checks-and-employment-project

Publications

Published

Heydon G and Naylor, B 'Criminal record checking and employment: The importance of policy and proximity', (2017) *Australian & New Zealand Journal of Criminology*. Prepublished August, 2017

Pittard, M, 'General Editor's note: is a job applicant's criminal history relevant to employment? The law and employer practice in recruitment', (2012) 18 (8) *Employment Law Bulletin* 114 (see Appendix 5).

Naylor, B, 'Living down the past: why a criminal record should not be a barrier to successful employment' (2012) 18 (8) *Employment Law Bulletin* 115-119 (see Appendix 5).

Paterson, M, 'Restrictions on employers' handling of criminal records information: privacy and confidentiality issues' (2012) 18 (8) *Employment Law Bulletin* 120-123 (see Appendix 5).

Pittard, M, 'Discrimination law: constraints on criminal record checks in recruitment' (2012) 18 (8) *Employment Law Bulletin* 124 – 128 (see Appendix 5).

Heydon, G, 'Risk and rehabilitation in criminal records checking by employers: what employers are doing and why?' (2012) 18 (8) *Employment Law Bulletin* 129 – 135 (see Appendix 5).

Paterson, M and Naylor, B 'Australian Spent Convictions Reform: A Contextual Analysis', (2011) 34(3) *University of NSW Law Journal* 938 - 963.

Cited in: Tasmanian Sentencing Council, Non Conviction Sentences *'Not Recording a Conviction as a Sentencing Option'*, 2014.

Paterson, M, 'Criminal Records: Spent Convictions and Privacy: A Trans-Tasman Comparison' (2011) *New Zealand Law Review* 35-66.

Cited in: Tasmanian Sentencing Council, Non Conviction Sentences *'Not Recording a Conviction as a Sentencing Option'*, 2014; New Zealand Law Commission, *Review of the Privacy Act*, Report 123, 2011.

Heydon, G, Naylor, B, Paterson, M and Pittard, M 'Lawyers on the Record: Criminal Records Employment Decisions and Lawyers' Counsel' (2011) 32 (2) *Adelaide Law Review* 205-226.

Naylor, B *Criminal Records and Rehabilitation in Australia' (2011) 3/1 European Journal of Probation* 79-96.

Pittard, M, 'Workplace misconduct, the Small Business Fair Dismissal Code and the criminal process' (2010) 16(8) *Employment Law Bulletin* 111.

Naylor, B, Paterson, M and Pittard, M 'In the Shadow of a Criminal record: Proposing a Just Model of Criminal Record Employment checks' (2008) 32 *Melbourne University Law Review* 171.

Cited in: Parliament of Australia, *Bills Digest no. 25* 2009–10, Crimes Amendment (Working With Children Criminal History) Bill 2009.

Forthcoming

Pittard, M, 'Criminalisation, Social Exclusion and Access to Employment' in Alan Bogg, Jennifer Collins, Mark Freedland, and Jonathan Herring (eds), *Criminality at Work* (Oxford University Press, forthcoming) ch 11.

Submissions

Naylor, B. "Introduction of Spent Conviction Legislation in Victoria" with Law Institute of Victoria, April 2015.

Naylor, B. and Heydon, G. Submission on the Consolidation of Commonwealth Discrimination Laws: Discussion Paper, February 2012.

Cited in: Attorney-General's Department, Parliament of Australia, Consolidation of Commonwealth Anti-Discrimination Laws: Regulation Impact Statement (2012)

Naylor, B. Submission (invited) to Standing Committee on Law and Justice, Parliament of NSW, Spent convictions for juvenile offenders (Report July 2010)

Cited extensively in: Standing Committee on Law and Justice, Parliament of New South Wales, Spent Convictions for Juvenile Offenders (2010).

Naylor, B. Submission to Standing Committee of Attorneys General on Draft Spent Convictions Bill, January 2009.

Naylor, B. Submission (invited) to Equal Opportunity Act Review – Report; May 2008

Cited in: Julian Gardner, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, 30 June 2008

Naylor, B., Paterson, M. and Pittard, M. Submission (invited) to Equal Opportunity Act Review January 2008

Cited in: Julian Gardner, Department of Justice, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, 30 June 2008

Conference presentations

Pittard, M "Unregulated space in the collective system of labour law: discrimination and irrelevant criminal record", New Zealand Industrial Law Society, November 2013

Naylor, B. "Would you employ a person with a criminal record?" ACSO Conference, Melbourne, October 2013.

Pittard, M "Areas outside labour regulation: criminal record discrimination", Fair Work Ombudsman Conference, April 2013

Pittard, M, "Legal issues: criminal records and recruitment processes' Guest lecture, LLM Law of Workforce Management, April 2013.

Pittard, M "Public Interest, Recruiting Employees and Criminal Records' Checks: Policy and the *Fair Work Act 2009* (Cth)", Australian Labour Law Association National Conference 2012, Canberra, November 2012.

Naylor, B. "Obstacles to Employment for Ex-offenders in a climate of risk management" European Society of Criminology, Bilbao, Spain, February 2012.

Heydon, G and Naylor,B, "Risk and Trust: Why do employers want criminal history information?" 11th Annual Conference of the European Society of Criminology, Vilnius, Lithuania, September 2011

Heydon, G, Naylor, B, Pittard, M, and Paterson, M. "Risk and Responsibility in Employing Ex-offenders" 24th Annual ANZOC Conference, Geelong, September 2011

Naylor, B. "Living down the past: Criminal RecordChecks and Access to Employment" Criminal Justice Research Consortium, Melbourne, April 2011.

Naylor, B. "Employer use of Police Record Checks"; Post-release Employment Seminar, Institute of Criminology, Sydney University, 2 December 2010.

Heydon, G and Naylor, B, "Walking the employment tightrope: balancing ex-offender needs and employer risk minimization in the use of pre-employment criminal records checks" 23rd Annual ANZOC Conference, Alice Springs, September 2010

Naylor, B. "Employer use of criminal record checks in employment decision making" Field Officers Conference, Group Training Association of Victoria, Geelong, 22 October 2009.

Naylor, B. "Employer attitudes to criminal records" Transition Forum, 24 July 2009.

Appendix 1: A comparative table of spend convictions laws (from Paterson, M and Naylor, B 'Australian Spent Convictions Reform: A Contextual Analysis', (2011) 34(3) *University of NSW Law Journal* 938–963)

Comparative table of spent convictions laws (in all states and territories except Victoria)

	Model Bill [32]	**ACT** [33]	**Cth** [34]	**NSW** [35]	**NT** [36]	**QLD** [37]	**SA** [38]	**Tas** [39]	**WA** [40]
Qualifying period (years)	10 adult 5 child	10 adult 5 child	10 adult 5 child	10 adult 3 child	10 adult 5 child	10 adult child	10 adult 5 child	10 adult 5 child	10 adult 2 child
Covered offences NB these are subject to exceptions for sexual offences everywhere except QLD and WA and with an option for exception in the Model Bill.	≤ 12 months adult ≤ 24 months (child)	≤ 6 months	≤ 30 months	≤ 6 months	≤ 6 months	≤ 30 months	≤ 12 months adult < 24 months (child)	≤ 6 months	Serious: ≥12 mths or ≥$15000 Lesser: ≤ 12 mths
Start of qualifying period									
Date of conviction	✓	–	✓	✓	✓	✓	✓	✓	–
End of imprisonment	–	✓	–	–[41]	–[42]	–	–	–	–
Other									End of period of sentence irrespective of time served
Effect of being spent Not required to disclose Criminal history refers only to unspent convictions	✓	✓	✓	✓	✓	✓	✓	✓	✓
• questions	✓	✓		✓	✓		✓	✓	✓
• statutory obligations	✓	✓		✓	✓		✓		✓
Statutory etc duties to assess character/ fitness exclude spent convictions	✓	✓	✓	✓	✓	✓[43]	✓	✓[44]	✓
Lying about spent conviction permitted									
Prohibited dealings									
Not to be taken into account in assessing character	✓	✓		✓	✓		✓	✓	✓
Other	Refusing/ revoking appointment etc						Refusing/ revoking appointment etc.[45]		
Consequences									
Offence to disclose public record	✓	✓		✓	✓	✓	✓	✓	✓
Other offence	Disclosure in course of business activities Offence to improperly obtain	Offence to improperly obtain	Must not disclose or take into account Privacy Commissioner complaint	Offence to improperly obtain	Not to be taken into account for unauthorised purpose Offence to improperly obtain	Offence to contravene Act,	Disclosure in course of business activities Not to be taken into account for unauthorised purpose	Offence to improperly obtain Threat to disclose	Offence to improperly obtain Unlawful to discriminate on grounds of spent conviction

[32] *Model Spent Convictions Bill* 2008.
[33] *Spent Convictions Act* 2000 (ACT).
[34] *Crimes Act* 1914 (Cth).
[35] *Criminal Records Act* 1991 (NSW).
[36] *Criminal Records (Spent Convictions) Act* 1992 (NT).
[37] *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld).
[38] *Spent Convictions Act* 2009 (SA).
[39] *Annulled Convictions Act* 2003 (Tas).
[40] *Spent Convictions Act* 1988 (WA).
[41] *See Criminal Records Act* 1991 (NSW) s 9.
[42] *See Criminal Records (Spent Convictions) Act* 1992 (NT) s 6(2).
[43] *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) s 8.
[44] *Annulled Convictions Act* 2003 (Tas) s 9.
[45] *Annulled Convictions Act* 2003 (Tas) s 9.

Appendix 2: A selection of Victorian statutes referring to criminal record checks as part of licensing or accreditation schemes (at August 2013)

Accident Towing Services Act 2007
Building Act 1993
Bus Safety Act 2009
Children, Youth and Families Act 2005
Children's Services Act 1996
Conveyancers Act 2006
Corrections Act 1986
Education and Training Reform Act 2005
Education and Care Services National Law Act 2010
Estate Agents Act 1980
Firearms Act 1996
Fundraising Act 1998
Health Practitioner Regulation National Law (Victoria) Act 2009
Mineral Resources (Sustainable Development) Act 1990
Motor Car Traders Act 1986
Non-Emergency Patient Transport Act 2003
Pharmacy Regulation Act 2010
Private Security Act 2004
Professional Boxing and Combat Sports Act 1985
Retirement Villages Act 1986
Second-Hand Dealers and Pawnbrokers Act 1989
Sex Work Act 1994
Supported Residential Services (Private Proprietors) Act 2010
Surveying Act 2004
Transport (Compliance and Miscellaneous) Act 1983
Travel Agents Act 1986
Veterans Act 2005
Veterinary Practice Act 1997
Working With Children Act 2005

What will be released

Victoria Police release criminal history information on the basis of findings of guilt at court, and will also release details of matters currently under investigation or awaiting court hearing. It is important to note that a finding of guilt without conviction is still a finding of guilt and will be released according to the information release policy. Victoria Police release police records in accordance with any or all of the following guidelines:

- If the individual was an adult (eighteen years* or over) when last found guilty of an offence and ten years have since elapsed, subject to exceptions listed below, no details of previous offences will be released.
- If the individual was a child (under eighteen years*) when last found guilty of an offence and five years have since elapsed, subject to exceptions listed below, no details of previous offences will be released. (Note: Court Orders on care/protection applications will not be released regardless of the age of the order).
- If the last finding of guilt resulted in a non-custodial sentence or custodial sentence of 30 months or less, the ten or five year period commences from the day the individual was found guilty.
- If the last finding of guilt is an appeal or re-hearing, the ten or five year period will be calculated from the original court date.
- If the last offence qualifies to be released, then all finding of guilt will be released, including juvenile offences.
- If the record contains an offence that resulted in a custodial sentence of longer than 30 months the offence will always be released.
- If 10 years have elapsed since the last finding of guilt, then only the offence(s) that resulted in a custodial sentence of longer than 30 months will be released.
- If the individual is currently under investigation or has been charged with an offence and is awaiting the final court outcome the pending matters/charges are released. It is noted on the certificate that the matter/charge cannot be regarded as a finding of guilt as either the matter is currently under investigation or the charge has not yet been determined by a court.

Please Note: Findings of guilt without conviction and findings of guilt resulting in a good behaviour bond are findings of guilt and will be released under this policy.

Exceptions

There are some other circumstances where a record that is over ten years old will be released, these are:

1. If the record check is for the purpose of:
   - Registration with a child-screening unit and/or Victorian Institute of Teaching
   - Assisted Reproductive Treatment (Act 2008)
   - Registration and accreditation of health professionals
   - Employment or contact with prisons or state or territory police forces
   - Casino or Gaming Licence
   - Prostitution Service Provider's Licence (Prostitution Control Act 1994)
   - Operator Accreditation under the Bus Safety Act (2009)
   - Private Security Licence (Private Security Amendment Act 2010)
   - Taxi Services Commission (Transport, Compliance & Miscellaneous Act 1983 & Road Safety Act 1986)
   - Firearms Licence (Firearms Act 1996)
   - Admission to legal profession (Legal Profession Act 2004)
   - Building and Plumbing practitioner (The Building Act 1993)
   - Independent Broad-based Anti-Corruption Commission (IBAC)
   - Poppy Industry (Drugs, Poisons and Controlled Substance Act 1981)
   - Honorary Justice (The Honorary Justices Act 2014)
   - Marriage Celebrants Registration
   - Court Services Victoria
2. If the record includes a serious offence of violence or a sex offence and the records check is for the purposes of employment or voluntary work with children or vulnerable people.
3. In circumstances where the release of information is considered to be in the interests of security, crime prevention or the administration of justice and/or otherwise necessary for the proper, legal or statutory assessment of an applicant.
4. Victoria Police will release traffic offences where the court outcome was a sentence of imprisonment or detention.
5. Serious Offences where the result was 'Acquitted by reason of insanity/mental impairment' or 'Not guilty by reason of insanity/mental impairment'.

Criminal Records and Employment Decision-Making

Monday 18 March 2013, 8.45am to 3.30pm

Monash University Law Chambers, 555 Lonsdale St Melbourne

"They make amazing employees. They are just given a chance they probably never thought they would get. I just find that they are so grateful for the chance and their work ethic is so good. It's just been wonderful."

(Former CEO of Toll Group, Paul Little, 7 January, 2012, *Australian Financial Review*).

Employment is vital for ex-offenders to be productive members of society, and ex-offenders can be loyal and valuable employees. However it is increasingly common for employers to collect criminal records information about existing and prospective employees, and exclude ex-offenders due to concerns about risk. These practices close off to employers a large pool of potentially valuable employees and impede ex-offenders' reintegration efforts. Excluding ex-offenders may be legal, and for some jobs it is mandatory, but nonetheless these practices raise important legal, practical and social issues.

This symposium addresses the many factors that frame criminal record checking and offers new ways of thinking about recruitment and risk management in relation to ex-offenders as employees, and practical recommendations for possible reforms. The symposium will include interactive panel presentations from local and interstate experts on:

- Employers and the recruitment experience
- Pathways from justice to jobs
- Opportunities for rehabilitation
- Findings from current ARC: funded research project

Who should attend?

Astute employers on the lookout for new pools of talent, job placement agencies, policy-makers and academics will find this symposium informative, practical, and inspiring.

Presenters:

The Hon. Catherine Branson QC, formerly President of the Australian Human Rights Commission
Roger Antochi, Second Step Program Coordinator – TOLL Group
Rod Wise, Deputy Commissioner, Operations, Corrections Victoria
Barry Rickard, Program Manager, Group Training Association of Victoria
Phil Munnings, Offender Development Manager, Fulham Correctional Centre
Janice Miller, Industry Expert
Prue Burns, PhD researcher, Monash University
Vicki-Anne Herman, Social Enterprise Business Manager, Mission Australia
Bronwyn Naylor, Associate Professor, Monash University
Marilyn Pittard, Professor, Monash University
Moira Paterson, Associate Professor, Monash University
Georgina Heydon, Dr RMIT University

MONASH University

RMIT UNIVERSITY

Program

8:45am	Registration
9am	Symposium Welcome and Introduction **The Hon. Catherine Branson QC,** formerly President of the Australian Human Rights Commission
9.20am	PANEL ONE: Pathways from justice to jobs
	Roger Antochi, Second Step Program Coordinator – TOLL Group
10 am	PANEL TWO: Correction and Rehabilitation – What is possible inside the prison system
	Speaker 1: Rod Wise, Deputy Commissioner, Operations, Corrections Victoria **Speaker 2: Barry Rickard,** Program Manger, Group Training Association of Victoria **Speaker 3: Phil Munnings,** Offender Development Manager, Fulham Correctional Centre
11am	Morning tea
11.15am	PANEL THREE: Employers and Recruitment
	Speaker 1: Janice Miller, Industry Expert **Speaker 2: Prue Burns**, PhD researcher. Research title, Businesses that provide re-integrative employment opportunities to former prisoners **Speaker 3: Vicki-Anne Herman,** Social Enterprise Business Manager, Mission Australia
12.30pm	Lunch
1.15pm	PANEL FOUR: Research Findings – Report and future directions
	Project Report and Recommendations **Associate Professor Bronwyn Naylor, Professor Marilyn Pittard, Associate Professor Moira Paterson – Monash University and Dr Georgina Heydon**, RMIT
2.30pm	Partner Organisations Response: Implications for industry
3.15pm	Future directions and closing

Note: Program speakers may change

Registration form – *use as a tax invoice (ABN 123 776 14012)*

Criminal Records and Employment Decision-Making

Monday 18 March, 2013

Name _____ Company _____

Address _____

_____ State _____ Postcode _____

Telephone _____ Fax _____ Email _____

Amount: $100 (includes refreshments throughout the day). Reduced rate available on application.

Method of payment

☐ For registration via internet click *http://ecommerce.law.monash.edu.au/categories.asp?cID=5*

☐ Cheque *(payable to Monash University)*

Dietary requirements _____

Registrations close Monday 11 March, 2013.

RSVP Meli Voursoukis, Monash University, Faculty of Law, building 12, Clayton Campus, VIC 3800
Phone: (03) 9905 4135 or email meli.voursoukis@monash.edu

CPD points may be applicable for this event.

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LexisNexis welcomes submissions to this newsletter. Please send proposals to the editor, Banita Jadroska, at banita.jadroska@lexisnexis.com.au.

Information contained in this newsletter is current as at November/December 2012

LexisNexis® Butterworths

Employment Law
Bulletin

General Editor's note: Is a job applicant's criminal history relevant to employment? The law and employer practice in recruitment

The employer has decided on a preferred candidate to fill a position and then discovers that the applicant has committed a crime in the past. In recruiting for jobs, employers occasionally ask the applicant questions about his or her criminal history, even where there is no legal requirement to do so, as for example, under mandatory schemes for people who work with children to show a "clean" criminal history.

Questions arise:

1. Is such criminal history relevant to the decision to employ a person?
2. In what circumstances might a person's criminal record be relevant?
3. How should employers approach this matter and what does the law say?
4. How should any records be kept about an applicant's criminal history?

This issue of *Employment Law Bulletin* outlines the contemporary and topical issue of the pitfalls for employers who decide to make criminal record checks where the law does not oblige them to do so.

There are many relevant laws — privacy laws and discrimination laws, for example — which the employer must be aware of in the context of checking a job applicant's criminal record. The articles as part of this special issue explore these laws and also examine what spent conviction legislation tells us about what offences can be ignored (and not disclosed by the applicant) because they are old and "spent". How do employers in practice regard the checking of criminal records? This is discussed in the articles.

Further, the evidence about why a criminal record should not be a barrier to employing a job applicant is discussed — and will inform employers and may provide solutions to relieving job shortages in some industries.

Marilyn Pittard
Professor, Faculty of Law
Monash University
Marilyn.pittard@monash.edu

Living down the past: why a criminal record should not be a barrier to successful employment

Associate Professor Bronwyn Naylor *MONASH UNIVERSITY*[1]

Employment is the key to reintegrating former offenders into society and preventing reoffending. However, increasing numbers of employers require criminal record or police checks as part of the employment process, making this reintegration process more difficult for former offenders and reducing the available labour pool for their industry/business.

This article critiques the argument that a criminal record is necessarily a barrier to successful employment, and outlines evidence supporting a more nuanced approach by employers wishing to manage risk and to support productive reintegration.

Background: increasing numbers of criminal record checks

There has been increasing use of criminal record checks since the 1990s across much of the English-speaking world. The Australian national criminal records agency, CrimTrac, processed approximately 2.7 million criminal history checks in the period of 2009–10.[2] Most — though not all — would have been in relation to job seeking. This is a substantial increase from the 1.7 million requested in 2005–6.

This raises significant social and economic issues. Almost 500,000 Australians were found guilty of an offence in 2010–11.[3] The Human Rights and Equal Opportunity Commission observed in 2005:

> At least 30,000 adult offenders are being returned to the Australian community from prison each year. However, the real number of people with a criminal record will be even higher than this, since many people with a criminal record have never been to prison.[4]

In fact most people found guilty of an offence are not sentenced to imprisonment; in 2010–11, only 11 per cent of people found guilty (55,663 people) received a custodial sentence.

Most criminal cases are heard in the magistrates' courts (91 per cent), and most convictions in those courts are for non-violent offences; almost half are for traffic and vehicle regulatory offences (for example, exceeding blood alcohol limits, licence and registration offences, and speeding).[5]

Employers may have legitimate concerns about a history of offences involving dishonesty, where they are recruiting for a position involving the handling of money or similar requirements of trust. However, the statistics indicate that it will not be entirely uncommon, statistically, for a member of the community to have *some* form of criminal history, but that most of these offences will not involve violence or dishonesty. It is therefore important that employers have thought carefully about how they take account of a criminal history when making employment decisions.

Reasons for the use, and the increase in usage, of criminal checks

Information in general has become more accessible with the establishment of computer-based databases and internet availability, for both authorised and unauthorised release. In Victoria, police records of offenders became available from 1993 when they were centralised on the LEAP database.[6]

This increased access has coincided with widening revelations about previously hidden predatory sexual offending behaviours in institutions such as schools and churches, and has led parliaments to legislate for people working with children (and subsequently vulnerable older people) to have their criminal history disclosed. Working with Children Checks and equivalent are now widely required in Australia (and elsewhere). These usually focus specifically on relevant offending, that is, sexual or violent offending against children.

In other sectors, specific concerns about criminal association or perceived risk of offending have seen requirements for police and judicial officers to have no criminal history and to be of "good character"; for company directors to have no history of fraud offences; and for security staff to have no history of violence.[7]

However, media reporting and increasing fear of crime (which is not necessarily based on actual increases in the occurrence of crime), and legal due diligence requirements are also leading some employers to consider asking for criminal history information more generally, even where the employer is not required by law to check job applicants' criminal history.[8]

Employment Law
Bulletin

Risks with using criminal record information

Unfairness to ex-offenders and to the general community

Criminal record checks are a significant hurdle for ex-offenders wanting to reintegrate into society, to "go straight", to work and to contribute. Even advertising that a check will be required can lead to self-exclusion (that is, otherwise qualified people deciding not to apply for the job or any job), and potential loss to the employer. After all, the person has been punished already by the court system and completed their sentence.

Assisting a former offender to obtain employment contributes to successful rehabilitation, thereby reducing any potential risk of public harm.[9]

Employment is a key factor in a person establishing and maintaining a non-criminal lifestyle. Most simply, a person who is unable to obtain legitimate work may be left to engage in criminal activities as his or her only way to survive financially. More generally, employment provides not only income, but the structure, discipline, community engagement and proof of self-worth which support the person's aim of leaving a criminal past behind.[10]

Exclusion on the basis of criminal history may be illegal

There is a risk that an employer will fall foul of anti-discrimination laws if it excludes an applicant on the basis of a criminal record, where the specific record does not relate to the "inherent requirements of the job". This is a breach of the Australian Human Rights Commission Act 1986 (Cth), and also prohibited under a number of state anti-discrimination Acts.[11] This is discussed in Marilyn Pittard's article at page 125.

Accuracy of information

Where criminal record information is referred to, employers should be aware that the accuracy and relevance of information provided in a criminal record check may be problematic.[12]

The details provided by CrimTrac are also limited, leaving a potential employer unclear about the level of seriousness of the actual offending. Shoplifting a single item will be recorded as a theft; travelling without a train ticket will be recorded as a fraud ("obtaining a financial advantage by deception"). Even the most minor offence, the circumstances of which led a court to decide it is not necessary to record a conviction (perhaps a minor property damage or theft) will be recorded on the police history provided.

An employer cannot afford to rely solely on the existence — or non-existence — of a criminal record: reference checks and other processes will be at least as important.

The blanket exclusion of people with a criminal background is not justified by the evidence

Recent research demonstrates that the criminal record on its own is a blunt "risk management" instrument. Two arguments can be identified here. First, most jurisdictions provide for some criminal records to be "expunged" or closed after a period of time, demonstrating the assumption that any risk of reoffending does not persist indefinitely. Second, research is increasingly showing that risks of reoffending vary with the nature of the offence, the person's age and so on, such that the simple fact of having a conviction is not, on its own, necessarily predictive of risk.

Spent conviction regimes

First, most jurisdictions provide for the expunging of a less serious criminal record after the passage of a set period of time under "spent convictions" legislation. That is, the legislation assumes that people can, and should be allowed to, move on from earlier minor offences. In Australia, the usual period for which a person has to prove his or her "good behavior" is 10 years for adult offences, and five years for juvenile offences.[13]

In many other countries, lesser periods of crime-free behavior are specified.[14] This is significant both because it is more supportive of rehabilitation, and — of most relevance here — because it demonstrates that the 10-year hurdle is an arbitrary attempt to assess risk of reoffending, with other jurisdictions comfortable with lower periods.

For example, a bill was recently introduced in the UK to support rehabilitation by substantially reducing the eligibility periods to four years after completion of the sentence for a sentence of four years imprisonment or more, to two years for a prison sentence less than four years, and to one year for a non-custodial sentence (or six months for a juvenile offender).[15]

In Ireland, the Criminal Justice (Spent Convictions) Bill 2012 provides an expungement process for offences sentenced to up to 12 months imprisonment, setting shortened eligibility/rehabilitation periods ranging from three to seven years.

Research on reoffending

The second argument against using criminal records as a simple risk management tool is that recent research is providing the evidentiary basis for a more nuanced approach to calculating the existence of risk of reoffending. For example, a large US study of people arrested for

the first time in 1980 concluded that the risk of subsequent offending for young property offenders approached that of non-offenders in around five years, while for young violent offenders it took around eight years to have a comparably low level of risk.[16] This could warrant further gradations within a spent conviction scheme to adjust the agreed "good behavior" period with reference not only to the sentence length but also the particular offence.

Recidivism studies show that the risk of reoffending decreases substantially both with the age of the offender and the passage of time.[17] Further, studies of what makes a person desist from crime show, for example, that employment is a strong predictor of desistance.[18] They also show that the degree of future risk does not necessarily correlate with the seriousness of the offence.[19]

It should also be recognised that any statistical prediction of risk does not guarantee that any one person will therefore offend. An individual's risk of reoffending should be evaluated in the context of his or her individual circumstances and in the light of (for example) character references. There are many reports of successful employment of former offenders, and indeed programs of support by employers for former offenders, which demonstrate the employability of many people despite their criminal record.

Evidence shows that good staff are being lost or passed over when decisions are made on the basis of criminal record

Research supports the success of employment of many people with a criminal past. Too-sweeping use of criminal records excludes potentially excellent staff.

A UK 2007 survey of employers by the Chartered Institute of Personnel and Development found that around one in 10 organisations surveyed actively seek to employ ex-offenders for reasons including boosting the recruitment pool. The survey concluded that:

> Employing ex-offenders is no less viable than employing people without offending backgrounds — no more difficult and no less satisfactory — while reoffending at work, as reported by employers themselves, is rare.[20]

The study found employers were initially concerned that ex-offenders would not have "the soft skills" of honesty (92 per cent), reliability (89 per cent) and personal behaviour (84 per cent):

> But their experience of employing ex-offenders refutes such concerns, as respondents report satisfaction with the soft skills of ex-offenders they've employed and don't see them as less viable employees than their colleagues and co-workers.[21]

In the US, an interagency reentry council has recently been established by the Federal Attorney-General to assist former offenders find work and reduce recidivism. Incentives are offered to employers who employ ex-offenders; at the same time, the council aims to help employers make decisions about the most appropriate uses of a criminal record when making employment decisions with "reentry myth busters".[22]

One Australian example of an employer actively recruiting ex-offenders is the Second Step Program run by the international logistics company Toll Holdings.[23] In its 2011 annual report, Toll Holdings reported:

> The Second Step employment program offers employment opportunities for people whose ability to obtain or retain employment is compromised by a history of addiction or incarceration. Toll's Second Step program was started by Paul Little AO who remains a passionate supporter. To date, Toll has helped over 240 people maintain satisfying and rewarding employment.[24]

In Victoria, as in the US, there are also financial incentives to employing ex-offenders (and other hard-to-employ groups).[25]

Agencies working in Australia with employers to "reverse market" former offenders on leaving prison, for example, find that key concerns of employers are job-readiness and skills, which can be developed with good industry-based employment within the prisons and preparation and support by agencies before and after the person is released. With appropriate consideration of skills and risk — for example, employers may be particularly concerned not to employ someone with an offending history of violence — people are being successfully employed, in ongoing contracts.[26]

Comparable countries do not use this method of risk management

Finally, as a point of comparison, many developed countries, particularly in Europe, strictly control access to criminal records. It is not seen as relevant or appropriate to seek criminal record information in relation to employment, and it can in fact be expunged altogether.[27] In more recent years, an exception has been made for people working with young children/vulnerable people, but otherwise employers do not commonly ask and do not see this information as relevant.[28]

Conclusions and suggestions

Enabling a person to rejoin society as a contributing member benefits both the individual and the community. The individual is assisted to "shed a negative (criminal) identity and (re)assume a positive, non-criminal one".[29] The productive participation of a person in the workplace and the community — with the benefits to the employer and to the person's children and other family members — cannot be underestimated.

As concluded by the Law Reform Commission of WA:

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> [It] enables former offenders to develop their potential to undertake employment, to marry and raise a family, and to develop full social and community relationships and not to be unnecessarily tempted or driven to further criminal involvement.[30]

Employers should therefore review the nature of the position and the potential risks in that specific position and workplace, when deciding whether to seek a criminal record check.

The 2007 UK study found that employers did specifically want guidance for how best to employ ex-offenders. They wanted guidance on risk assessment and safeguards to use when employing ex-offenders, on legal obligations and on access to rehabilitation schemes to support ex-offenders. Those who had not previously employed ex-offenders also wanted access to employer networks to discuss practical issues with such employment.[31]

If an employer does decide a record check is needed, that employer should ascertain the relevance of any resulting report of a criminal offence to its ultimate decision whether to employ the person, and give the applicant an opportunity to explain and discuss the relevance of the offence. The employer should also establish policies for employing people with a criminal record and train staff to ensure appropriate recruitment processes, including in anti-discrimination and spent convictions legislation.

There are sources of guidance.[32] The Australian Human Rights Commission has also provided guidelines to assist employers, discussed in Marilyn Pittard's article in this issue.[33] Key issues on which guidance is given include:

- deciding the relevance of any criminal record to the specific employment;
- allowing the applicant to provide further information about any record; and
- training of staff regarding their practical and legal obligations (such as anti-discrimination and privacy requirements).

A criminal record is not a necessary barrier to successful employment, and employers can play a major role, not only in managing risk, but in supporting the productive reintegration of former offenders.

Bronwyn Naylor
Associate Professor, Faculty of Law
Monash University
Bronwyn.naylor@monash.edu

About the author

Bronwyn has researched and published in criminal law, criminal justice and the consequences of conviction. She was admitted to practise as a barrister and solicitor in Victoria, and has also provided advice to government and law reform bodies.

Footnotes

1. The author acknowledges the helpful comments of the anonymous referee. Research for this article was supported by an Australian Research Council grant. See: www.law.monash.edu.au.
2. CrimTrac, *Annual Report 2009–10*, Australian Government, Canberra, 2010, p 58, accessed 13 November 2012, www.crimtrac.gov.au. Requests for criminal records checks made to CrimTrac show an increase of nearly 60 per cent from 1.7 million in 2005–6 to 2.7 million in 2009–10: CrimTrac, *Annual Report 2006–07*, Australian Government, Canberra, 2007, p 106, accessed 13 November 2012, www.crimtrac.gov.au; CrimTrac, *Annual Report 2009–10*, Australian Government, Canberra, 2010, accessed 13 November 2012, www.crimtrac.gov.au.
3. A total of 479,197 defendants were found guilty in the Magistrates and Higher Courts in Australia in 2010–11 out of a total of 586,391 cases finalised across Australia: Australian Bureau of Statistics, *Criminal Courts, Australia, 2010–11*, ABS Catalogue No 4513.0 (2012).
4. Human Rights and Equal Opportunity Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*, Australian Government, Canberra, 2005, p 5, accessed 13 November 2012, www.humanrights.gov.au.
5. ABS, *Criminal Courts, Australia, 2010–11*, ABS Catalogue No 4513.0 (2012).
6. A Saliba, "Beyond the prison walls: The role of a criminal record check in balancing risk management and reintegration through employment", 2012, RMIT PhD thesis under examination.
7. See, for example, Legal Profession Act 2004 (Vic) s 1.2.6; Board of Examiners, *Admissions*, Supreme Court of Victoria, 31 March 2008, accessed 13 November 2012, www.supremecourt.vic.gov.au; and Corporations Act 2001 (Cth), s 206B(1). See, for example, in NSW: Security Industry Act 1997 (NSW) s 16; Security Industry Regulations 1998 (NSW) reg 11; in Victoria, Private Security Act 2004 (Vic) ss 13 and 25(2)(f).
8. Discussed further in the articles by Moira Paterson and Georgina Heydon in this issue of *Employment Law Bulletin.*
9. Employment has been found to provide a good predictor of (non)recidivism: P Gendreau, C Goggin and G Gray, *Case needs review: employment domain*, University of New Brunswick (Centre for Criminal Justice Studies), 2000, accessed 13 November 2012, www.ccoso.org.
10. See, D Pager, "The mark of a criminal record" (2003) 108 *American Journal of Sociology* 937, 939.

11. For example, Anti-Discrimination Act 1992 (NT) s 19; Anti-Discrimination Act 1998 (Tas) s 16.
12. It was reported in 2006 that approximately 2700 people in the UK had been "wrongly labeled as criminals" by the Criminal Records Bureau, leading to applicants being denied employment and refused entry to university courses on the basis of this incorrect information: see, *Criminal records mix-up uncovered*, BBC News, United Kingdom, 21 May 2006, accessed 13 November 2012, www.news.bbc.co.uk. It has been estimated that 400,000 Americans experienced criminal identity theft and related issues with criminal records in one year: S M Dietrich, "When 'your permanent record' is a permanent barrier" (2007) 41 *Clearinghouse Review: Journal of Poverty Law and Policy* 139, 143.
13. These schemes are discussed further in Moira Paterson's article in this issue of *Employment law Bulletin*. See also, M Paterson and B Naylor "Australian spent convictions reform: a contextual analysis" (2011) 34(3) *University of NSW Law Journal* 938–63.
14. See, for a summary, Sentencing and Offences Unit, Home Office of the United Kingdom, *Breaking the circle: a report of the review of the rehabilitation of offenders act*, The National Association of Reformed Offenders, United Kingdom, 2002, p 65–74, accessed 13 November 2012, www.unlock.org.uk.
15. Rehabilitation of Offenders (Amendment) HL Bill (2010–11) 89. The Bill was read for the second time in the House of Lords in January 2011: HL Deb 21 January 2011, vol 724, cols 637–9. However, it failed to complete its passage before parliament was prorogued in May 2012 and will not proceed.
16. A Blumstein and K Nakamura, "Redemption in the presence of widespread criminal background checks" (2009) 47 *Criminology* 327, 344.
17. D P Farrington, "Age and Crime" (1986) 7 *Crime and Justice* 189; K Soothill and B Francis, "When do ex-offenders become like non-offenders?" (2009) 48 *Howard Journal of Criminal Justice* 373.
18. Above, A Blumstein and K Nakamura, n 15 at p 331; C Uggen, "Work as a turning point in the life course of criminals: a duration model of age, employment, and recidivism" (2000) 65 *American Sociological Review* 529.
19. For example, research indicates that sex offenders reoffend less than many other types of offenders: A Birgden, "Serious Sex Offenders Monitoring Act 2005 (Vic): a therapeutic jurisprudence analysis" (2007) 14 *Psychiatry, Psychology and Law* 78, 82.
20. Chartered Institute of Personnel and Development, *Employing ex-offenders to capture talent*, CIPD, United Kingdom, 2007, p 4, accessed 13 November 2012, www.cipd.co.uk.
21. Above, n 20 at p 3–4.
22. See, www.nationalreentryresourcecenter.org/reentry-council.
23. The First Step Program: www.firststepprogram.org. For Toll Holdings guide to the Second Step Program visit www.tollgroup.com.
24. Toll Annual Report, 2011, p 5.
25. See, for example, the current Victorian Industry Skills Centre Pilot available at www.gtavic.asn.au.
26. Personal communication, Group Training Association of Victoria.
27. M Herzog-Evans, "Judicial rehabilitation in France: helping with the desisting process and acknowledging achieved desistance" (2011) 3(1) *European Journal of Probation* 4; A Ramakers et al, "The effect of labour market absence on finding employment: a comparison between ex-prisoners and unemployed future prisoners" (2012) 9(4) *European Journal of Criminology* 442.
28. See: C Morgenstern, "Judicial rehabilitation in Germany: the use of criminal records and the removal of recorded convictions" (2011) 3(1) *European Journal of Probation* 24; M Boone, "Judicial rehabilitation in the Netherlands: balancing between safety and privacy" (2011) 3(1) *European Journal of Probation*, 63.
29. P Raynor and G Robinson, *Rehabilitation, Crime and Justice*, Palgrave Macmillan, Australia, 2009, p 10.
30. Law Reform Commission of Western Australia, *Project No 80: The Problem of Old Convictions*, Discussion Paper (1984) 3 [1.6].
31. Above, n 20 at 4.
32. See, Standards Australia, *Employment Screening Handbook*, HB 323–2007, Sydney, 2007.
33. Human Rights and Equal Opportunity Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*, Australian Government, Canberra, 2012, accessed 13 November 2012, www.hreoc.gov.au.

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Restrictions on employers' handling of criminal records information: privacy and confidentiality issues

Associate Professor Moira Paterson *MONASH UNIVERSITY*[1]

The practice of criminal records checking raises a number of important issues which are highlighted in a recently updated set of guidelines issued by the Australian Human Rights Commission (AHRC).[2] These guidelines, which were initially prepared in 2005 in response to concerns arising from a significant number of complaints alleging employment discrimination of the grounds of criminal record,[3] focus primarily on discrimination but they also refer to broader privacy and confidentiality concerns. These issues are important as they are relevant to decisions whether to collect criminal records information and, if so, whether to retain it after the completion of employment decision-making.

Obligations arising under privacy laws

Privacy statutes in Australia

Privacy laws exist in all Australian jurisdictions except for SA and WA.[4] The state and territory laws apply to public sector bodies in those jurisdictions, while the Commonwealth Privacy Act applies to the Commonwealth and ACT public sector and to those private sector bodies that do not fall within the small business operator exemption. The focus of this article is on the National Privacy Principles (NPPs)[5] which regulate the private sector. It should be noted that the government has recently introduced into parliament an amending Bill which replaces the NPPs with a set of Australian Privacy Principles (APPs) which apply also to Commonwealth government agencies.[6] However, this does not affect the specific features outlined below.

NPPs: application

The NPPs do not apply in respect of acts and practices of employers in respect of information relating to their employment relationship with current or former employees,[7] and are therefore relevant only to the handling of criminal records information about *prospective employees*. In consequence, the collection of criminal records information affects private sector employers only to the extent that they have a gross annual turnover of more than $3 million (or are excluded from the small business operator exemption, for example, because they provide health services)[8] and then only in respect of prospective employees. However, employers should bear in mind that the Australian Law Reform Commission (ALRC) has recommended that both the small business operator and the employee record exceptions should be removed from the Act.[9] It is possible therefore that these provisions will apply more widely in the future. Further, as stated by the AHRC:

> It is best practice for employers to follow privacy principles as closely as possible when dealing with information relating to a person's criminal record. Breaches of privacy in relation to criminal record can complicate relations between an employee and employer, and may lead to claims of discrimination.[10]

The NPPs, to the extent that they are applicable, require compliance with privacy principles which regulate the handling of identifiable personal information.[11] They impose limitations on the collection, use and disclosure of such information and also additional requirements, including requirement to keep information secure, to keep it accurate and up-to-date and to delete it when no longer required.

NPPs relevant to criminal record information

There are two privacy principles which regulate the collection of criminal records information. The collection limitation principle in NPP 1 imposes some general limitations on the manner in which identifiable personal information is collected. These include requirements that information must be collected by "lawful and fair means", that it must, if practicable, be collected only from the individual to whom it relates and that the individual must be informed about specific matters including the fact that his or her information has been collected.[12] In addition, NPP 10 imposes further restrictions on the collection of "sensitive information", including information about an individual's criminal record. Unless the collection of that information is required by law, it cannot be collected without the individual's consent.[13]

These principles are unproblematic in respect of information collection from official sources as this requires the express consent of the individual concerned. However, they do impose important constraints on an employers' collection of information in other ways (for example, via websites which provide criminal records searches). Such collection is permissible only with the consent of the individual concerned, which means that employers who are bound by the NPPs are precluded from using such sources to gather information about prospective employees except with their consent. Collection from non-official sources may also be contrary to the law to the extent that it contravenes any applicable spent convictions law as discussed further below.

Can criminal record information be further use or disclosed and should it be destroyed?

Also of direct relevance are the use and disclosure limitations in NPP 2[14] and the associated requirement in NPP 4.2[15] to take reasonable steps to destroy or permanently de-identify any information that is no longer needed for any of the purposes for which it may be used or disclosed. Subject to some exceptions that are unlikely to be of relevance to an employer's collection of criminal records information, NPP 2 states that personal information collected must not be used or disclosed for a purpose other than the purpose for which it was collected without the individual's consent, unless the purpose is related to the primary purpose of collection and is one which the individual would reasonably expect.

This principle is unproblematic to the extent that information is used for the purpose of considering whether or not to employ an individual, but it requires careful consideration when deciding whether or not to retain it beyond that point. Whether or not it is appropriate to retain the information depends on whether there are any further purposes related to that purpose that might reasonably be expected by the individual concerned. Thus, there may be an arguable case for retaining information about an individual's conviction for the purposes of being able to impose appropriate supervision arrangements relevant to his or her criminal history. However, the position might be different in relation to an old conviction that is unrelated to the performance of that individual's employment duties. It would also be different if it is decided not to employ that individual.

In general terms, it is good practice not to retain any personal information for any longer than required as this removes any further privacy requirements, including the requirement to keep it secure and up-to-date.

The relevance of spent convictions: when can an employee lawfully not disclose a conviction to the employer?

Legislative spent convictions regimes exist in all Australian jurisdictions other than Victoria[16] and provide partial protection for older, less serious offences.[17] They apply to offences that are more than 10 years old (or five years old in the case of offences committed by juveniles) and carry low maximum jail terms (in most states these vary from six[18] to 30[19] months). In WA, there is a two-part regime which provides for different procedures for offences carrying a maximum jail term of 12 months and other more serious offences. Victoria instead has an administrative regime which operates to restrict disclosure of criminal records information by police but does not confer any legally enforceable rights or obligations.[20] Except in WA, where ex-offenders must apply for certificates before their convictions can qualify as exempt, convictions become spent automatically when they meet the required criteria.

Effect of "spent" conviction for employer and employee

The effect of a conviction becoming spent is that there is no obligation on the ex-offender to disclose it and it is also generally permissible to disregard it for the purposes of obligations relating to disclosure of criminal history information. In addition, subject to some exceptions,[21] spent convictions laws forbid employers and others from taking into account spent convictions in making assessments about character and fitness. A number also criminalise and/or forbid other specified dealings with criminal records (such as threaten to disclose[22] or to fraudulently or dishonestly obtain spent convictions information from an official record).[23]

Liability at common law

As noted by the AHRC, the handling of criminal records information may also potentially expose employers to potential claims under common law for breaches of privacy and wrongful disclosure of confidential information.[24]

Breach of confidential information

Obligations of confidentiality are more likely to be relevant where the information is collected directly from the individual concerned.[25] To sue for breach of confidence, a plaintiff must establish that the information in question was confidential in nature, that it was imparted on the understanding that it would be treated as confidential, and that it has been disclosed inconsistently with that obligation and to the detriment of the plaintiff.[26]

The requirement that information is confidential in nature generally requires consideration of the extent to which it has been kept secret or not in the public domain. While an individual's convictions are a matter of public record, it is arguable that they possess the necessary quality of confidence to the extent that they are not generally well known and that their disclosure will

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generally result in some detriment to the individual to whom they relate. The requirement that information must be imparted on the understanding that it will be treated as confidential does not require that there must be any express discussion or stipulation; the obligation may be inferred from the circumstances.

The issue has yet to be judicially considered but it is arguable that the very sensitive nature of information coupled with the context in which it is gathered (that is, the specific context of employment decision-making) may create a reasonable inference that it is provided in confidence by the prospective employee to the employer for that purpose and that it is not to be disclosed for other purpose(s). In cases where the documentation relating to the employment application is headed "private and confidential", the obligation will be more explicit. That is also the case where criminal records information is disclosed in an interview context and the applicant has been informed that the interview is confidential or words to that effect.

This may be significant in such circumstances where the employer decides to engage the applicant as an employee. For example, the employer may not disclose to other employees within the workplace information about that new employee's record; or to another employer when that employee is seeking a reference.

Breach of privacy

The position regarding common law liability for breach of privacy remains less clear, given the absence of any decision by a higher court, which has found in favour of a plaintiff on the basis of breach of privacy, despite the fact that the High Court[27] has cleared the way for the development of a privacy-based right of action (as occurred elsewhere, including in the UK and New Zealand).[28] Further, there is some New Zealand authority for the proposition that the disclosure of criminal records information can raise serious privacy issues.[29] It should also be noted that the ALRC has recommended the enactment of a statutory privacy tort.[30]

Conclusion

While there may be good reasons (and even positive obligations) for employers to conduct criminal records checking, they should also be aware of the possible legal obligations that this may create. These can generally be minimised by conducting criminal records checks only where appropriate and minimising the retention of any information collected once employment decision-making has been completed. Employers who are bound by the Privacy Act need to bear in mind that they are bound by the NPPs in respect of their handling of information about employees who are ultimately appointed for the period pending their appointment.

Legal risks can also be reduced by complying with the best practice as outlined by the AHRC and, in particular, its recommendations that criminal record checks should only be conducted with the written consent of the job applicant or current employee[31] and that information about a person's criminal record should always be stored in a private and confidential manner, and used only for the purpose for which it is intended.[32]

Moira Paterson
Associate Professor, Faculty of Law
Monash University
moira.paterson@monash.edu

About the author
Moira has published extensively on privacy related topics, including spent convictions laws. She is a member of the Privacy Advisory Committee to the Office of the Australian Information Commissioner and is admitted to practise as a barrister and solicitor in Victoria.

Footnotes

1. The author acknowledges the helpful comments of the anonymous referee. Research for this article was supported by an Australian Research Council grant. See: www.law.monash.edu.au.
2. Human Rights and Equal Opportunity Commission, *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*, Australian Government, Canberra, 2012, accessed 13 November 2012, www.hreoc.gov.au.
3. Above, n 2 at p 7.
4. Privacy Act 1988 (Cth), Privacy and Personal Information Protection Act 1998 (NSW); Northern Territory Information Act 2002 (NT); Information Privacy Act 2009 (Qld); Personal Information and Protection Act 2004 (Tas); and Information Privacy Act 2000 (Vic). In the case of the ACT, the Commonwealth Act applies to ACT government agencies. South Australia has an administrative regime based on a set of IPPs: see, www.legislation.sa.gov.au. The Information Privacy Bill 2007 (WA) currently remains before the WA parliament.
5. The NPPs can be accessed at the Office for the Australian Information Commissioner website: www.privacy.gov.au.
6. Privacy Amendment (Enhancing Privacy Protection) Bill 2012.
7. Privacy Act 1988, s 7B(3).
8. Privacy Act 1988, s 6D.
9. ALRC, *For Your Information: Australian Privacy Law and Practice*, Australian Government, Canberra, 2008, recommendations 39 and 40, accessed 13 November 2012, www.alrc.gov.au.
10. Above, n 2 at p 11–12.

11. See, for further guidance concerning their operation, Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles*, Australian Government, Canberra, 2001, accessed 13 November 2012, www.privacy.gov.au.
12. The equivalent requirement are in APP 3, as found in the Privacy Amendment Bill, n 6.
13. The equivalent requirement are also in APP 3, as found in the Privacy Amendment Bill, n 6.
14. Use and disclosure limitations are contained in APP 6, as found in the Privacy Amendment Bill, n 6.
15. The equivalent requirement are in APP 1, as found in the Privacy Amendment Bill, n 6.
16. Crimes Act 1914 (Cth), Pt VIIC; Spent Convictions Act 2000 (ACT); Criminal Records Act 1991 (NSW); Criminal Records (Spent Convictions) Act 1992 (NT); Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld); Spent Convictions Act 2011 (SA); Annulled Convictions Act 2003 (WA); and Spent Convictions Act 1988 (Tas). Victoria has instead an administrative regime which restricts disclosure of criminal records information by police but do not confer any legally enforceable rights or obligations: see Victoria Police, *Information Release Policy — National Police Certificate*, Victorian Government, Melbourne, 2011, accessed 13 November 2012, www.police.vic.gov.au.
17. See, for a more detailed discussion, M Paterson and B Naylor, "Australian Spent Convictions Reform: a contextual analysis" (2011) 34 *UNSW Law Journal* 938–963.
18. ACT, NSW, NT and Tasmania.
19. The Commonwealth and Queensland.
20. Above, n 16: Victoria Police, *Information Release Policy — National Police Certificate*.
21. These include exceptions for access and use by courts or police or in relation to screening checks for specific public appointments, as well as for employment involving children and other vulnerable groups: see, for example, Spent Convictions Act 2000 (ACT) s 19 and Criminal Records Act 1991 (NSW) Pt 3 Div 2 — Exclusions.
22. See, for example, the Annulled Convictions Act 2003 (Tas), s 11.
23. See, for example, the Annulled Convictions Act 2003 (Tas), s 12, and Spent Convictions Act 2000 (ACT), s 18.
24. Above, n 2 at p 14.
25. But note that any person who receives information as a result of another's breach of confidence may be restrained from using or disclosing the information once he or she has notice of the breach: *Fraser v Evans* [1969] 1 QB 349; [1969] 1 All ER 8; [1968] 3 WLR 1172.
26. *Coco v AN Clark (Engineers) Ltd* (1968) 1A IPR 587; [1968] FSR 415; [1969] RPC 41.
27. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63; BC200107043 at [107], [187], [313]–[320]. See further, G Taylor and D Wright, "Australian Broadcasting Corporation v Lenah Game Meats: Privacy, Injunctions and Possums: An Analysis of the Court's Decision" (2002) 26 *Melbourne University Law Review* 707.
28. See, for example, *Campbell v MGN* [2004] 2 AC 457; (2004) 62 IPR 231; [2004] 2 WLR 1232; [2004] UKHL 22; *Hosking v Runting* [2003] 3 NZLR 28. These cases are further discussed in N Moreham, "Recognising privacy in England and New Zealand: Campbell v MGN Ltd and Hosking v Runting" (2004) 63 *Cambridge Law Journal* 555–558.
29. *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716. In that case, the applicant obtained preliminary relief to restrain the public broadcast of information about his 20 year old convictions for various offences, including indecent assault.
30. ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108, 2012, [74.198].
31. Above, n 2, recommendation 5.
32. Above, n 2, recommendation 6.

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Discrimination law: constraints on criminal record checks in recruitment

Professor Marilyn Pittard *MONASH UNIVERSITY*[1]

Many employers undertake criminal record checks because they are required to under mandatory schemes which exist in many states — where, for example, the employees will be working with children. However, employers not under such obligations may decide as a discretionary matter to undertake such background checks as part of their recruitment practices. There are some legal constraints in the field of discrimination law which employers should have in mind when adopting criminal record checks as a standard practice in recruitment.

Employers who undertake criminal record checks on prospective employees and decline them employment on the basis of their criminal record may be found to have breached anti-discrimination legislation. This article addresses the anti-discrimination law in relation to this issue, discusses a recent case study, identifies the trap of unlawful indirect discrimination and examines other laws of relevance.

Statutory framework: federal and state discrimination laws

There are a number of relevant statues which proscribe the use of criminal record checks in employment decisions. "Criminal record" is a ground of discrimination in the statutes in three jurisdictions in Australia:

- under the Anti-Discrimination Act 1998 (Tas);[2]
- the Anti-Discrimination Act 1992 (NT);[3] and
- federally, under the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act) (formerly the Human Rights and Equal Opportunity Commission Act 1986 (Cth)).

The main focus of this article is the AHRC Act, given its wide coverage and that persons in Tasmania and the NT have a choice as to whether to proceed under their jurisdiction's specific laws or under the Commonwealth Act.

Commonwealth Australian Human Rights Commission Act 1986

Coverage

In terms of workers, the AHRC Act applies to all employees as well as prospective employees, whether they are part-time or full-time, permanent or casual. In relation to employers, there are no limitations on size of business, by way of contrast to the different approaches, according to the number of employees, required in the Fair Work Act 2009 (Cth) in relation to unfair dismissal. The Act applies to:

- private sector employers, corporate or non-corporate;
- Commonwealth Government as employer;
- state and territory government employers.

Discrimination and criminal record

The AHRC Act includes discrimination on the basis of "criminal record".[4] A person may be discriminated against in employment not only where he or she is dismissed from employment for grounds in the Act, but also where he or she is denied certain opportunities during employment, such as promotion. The person does not have to be currently employed to be covered by the Act: a job applicant may be discriminated against through being denied the job on being refused employment. Thus, the Act is relevant to employers who decide to undertake criminal background checks in recruitment.

Inherent requirements of the job

A criminal record may only be taken into account where it means that a person cannot carry out the "inherent requirements" of the job. To elaborate further, it means that the criminal record must prevent that person carrying out the essential duties in the position. The employer who obtains information that the person has committed a crime in the past (and that person does not have to declare that criminal record because it was regarded as too long ago and thus "spent" under state spent conviction legislation) must not exclude the person from employment simply because of the existence of that record. Further enquiries should be made: what is the nature of the crime on the record? And, does that crime impede or affect the performance of the essential aspects of the job? For example, a driving offence would be irrelevant to the performance of a person's role as a finance manager in an enterprise. However, conviction for assault may mean the employer needs to make more inquiries about the circumstances of the crime if the

position being sought is that of security officer, in order to ascertain whether this might prevent the person from properly carrying out essential duties of security officer.

What is a "criminal record"?

Many statutes, including the AHRC Act, do not define criminal record at all. The definition of criminal record is assumed to include the police record, but the Australian Human Rights Commission (AHRC) has interpreted it more broadly to include "the circumstances of the conviction including the underlying conduct".[5] More specifically, the then Human Rights and Equal Opportunity Commission President stated:

> In my view, the provisions of the HREOC Act [its successor Act is the AHRC Act] should be given a liberal construction. I consider it would be unduly restrictive to define the term 'criminal record' as just meaning the conviction(s) as recorded. In my view, the term encompasses not only the actual record of a conviction but also the circumstances of the conviction including the underlying conduct.[6]

More recently, in its guidelines, the AHRC stated as follows:

> Under the AHRC Act, there is no definition of what constitutes "criminal record". However, it has been interpreted broadly to include not only what actually exists on a police record, but also the circumstances of the conviction.
>
> This means that a complaint of discrimination under the AHRC Act is not limited to an allegation of discrimination based on what appears on a police record check only. A criminal record for the purposes of the AHRC Act can include charges which were not proven, investigations, findings of guilt with non-conviction and convictions which were later quashed or pardoned. It also includes imputed criminal record. For example, if a person is denied a job because the employer thinks that they have a criminal record, even if this is not the case, a person may make a complaint to the Commission.[7]

Thus, even where an employer takes into account, in deciding not to engage that person as an employee, that the person has been charged but the charges are not proven, the employer may contravene the AHRC Act.

Complaint of discrimination on the basis of criminal record to AHRC

Persons may make complaint to the body empowered to deal with such complaints, the AHRC, and have their complaint dealt with first by means of conciliation. If there is not settlement of the matter, the AHRC may investigate the matter and make recommendations which are tabled as a report to parliament.

The AHRC performs its functions free of costs to the parties. Where it makes recommendations to the employer, the employer, it should be noted, is not under an obligation to follow the AHRC's recommendations as they are not legally enforceable. It may be seen as responsible by an employer, though, not to depart from AHRC recommendations. The AHRC also has other roles relating to training and making recommendations to improve training of the employer.

A recent complaint investigated by AHRC is illustrative of the type of refusal to engage a person because of a past, irrelevant criminal record. The case helps us to understand the scope and application of the law in this area.

Case study of a complaint to AHRC: the Railcorp case

On 12 March 2012, the AHRC tabled its report in federal parliament arising from a complaint: *Mr CG v NSW (RailCorp NSW)*.[8] The report, in essence, found that Mr CG's prospective employer, the State of NSW (RailCorp NSW) had discriminated against Mr CG when it declined to employ Mr CG on the basis that he had a criminal record.

The position Mr CG applied for in June 2009 was that of market analyst. He was short listed for the position and was the preferred candidate. However, he was not ultimately offered the position and was told that he was not offered it because of his convictions: for "middle range" driving offences in 2001 and for a "low range" drink driving offence in 2008. The employer took the view that this record meant that Mr CG could not perform the inherent requirements of the position as market analyst. It should be noted that Mr CG had been employed in another capacity with RailCorp. The offences in 2001 and 2008 were not connected with or did not occur while he was at work, and they did not seem to have an impact on or be a concern to his employment during this previous period of employment.

The AHRC (Catherine Branson QC was the Commission President) investigated Mr CG's complaint and found:

- driving did not form part of the duties of market analyst;
- safety matters were not part of the services provided by that position to RailCorp; and
- the inherent requirements of the job did not require the applicant to have not committed previous driving offences.

Thus RailCorp was held to have discriminated against Mr CG in contravention of the AHRC Act.

The recommendations in the AHRC's comprehensive report were that RailCorp should:

- compensate Mr CG by paying $7500 for hurt, humiliation and distress suffered by him; and
- provide training to staff involved in making employment decisions — that is, human resources and

management staff — as prevention against further contraventions of the discrimination legislation in relation to criminal records.

Implications of the case

This case has provided some insights about criminal records in relation to the essential aspects of the job. It highlights that an employer engaging employees and examining a criminal record cannot have a blanket prohibition on employment for a criminal record. Further, the employer cannot simply state that a criminal record (in this case driving offences) will prevent a person performing the job — both the criminal offence on the one hand and the nature of the job and what entails on the other hand must be examined to ascertain the connection between the job and the criminal record.

The case, in addition, shows that human resources departments of even reasonably sized employers may have an imperfect understanding of when a criminal record can, or cannot, be taken into account when deciding whether to employ a person. At the end of the day, Mr CG, the prospective employee, did not succeed in obtaining employment. RailCorp declined to compensate the complainant, despite the recommendation, but indicated that it would review its policies and practices in recruitment to ensure that criminal records are not wrongly used in employment decisions in the future.

AHRC: "best practice" guidelines to assist employers

The AHRC guidelines — *On the record: Guidelines for the prevention of discrimination in employment on the basis of criminal record*[9] — assist employers in navigating their way round the tricky issue of how to deal in employment with checking a criminal record.

The guidelines were first issued in 2005, were revised first in 2007 and in April 2012 further revised guidelines were issued. Given that they have been reviewed and revised over the years and therefore kept up-to-date and relevant, it is advisable for employers and their employment decision-makers and human resources departments to be familiar with these guidelines. They provide a check list of matters to consider and also assist employers with tests to evaluate whether the past record is a matter of relevance to the current job and whether it would pose any problem for the employer if the person were selected for the job. Matters of occupational health and safety, too, are addressed. As their name suggests, they are guidelines only and thus not enforceable. However, they do represent good practice in the field.

In addition to the AHRC guidelines, there is also a comprehensive discussion fleshing out the scope of the Act, the nature of criminal record and so on. The essence is contained in the AHRC's 10 guidelines[10] which are extracted below:

1.	Employers should create an environment which will encourage an open and honest exchange of criminal record information between an employer and job applicant or employee.
2.	Employers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.
3.	Oral and written questions during the recruitment process should not require a job applicant or employee to disclose spent convictions unless exemptions to spent conviction laws apply.
4.	Advertisements and job information for a vacant position should clearly state whether a police check is a requirement of the position. If so, the material should also state that people with criminal records will not be automatically barred from applying (unless there is a particular requirement under law).
5.	Criminal record checks should only be conducted with the written consent of the job applicant or current employee.
6.	Information about a person's criminal record should always be stored in a private and confidential manner and used only for the purpose for which it is intended.
7.	The relevance of a job applicant's or employee's criminal record should be assessed on a case-by-case basis against the inherent requirements of the work he or she would be required to do and the circumstances in which it has to be carried out. A criminal record should not generally be an absolute bar to employment of a person.
8.	If an employer takes a criminal record into account in making an employment decision, in most cases the employer should give the job applicant or employee a chance to provide further information about their criminal record including, if they wish, details of the conviction or offence, the circumstances surrounding the offence, character references or other information, before determining the appropriate outcome in each case.
9.	If criminal record information is considered relevant, an employer should have a written policy and procedure for the employment of people with a criminal record which can be incorporated into any existing equal opportunity employment policy, covering recruitment, employment and termination.
10.	If criminal record information is considered relevant, an employer should train all staff involved in recruitment and selection on the workplace policy and procedure when employing someone with a criminal record, including information on relevant anti-discrimination laws.

The guidelines also make it clear that it is important to avoid a "one size fits all" approach — two persons who have records for theft, for example, may have different outcomes in terms of job offers because one is able to provide character references and other relevant

information to convince the employer of his or her suitability for employment, while the other one may not be able to satisfy the employer in the same way.

A hidden trap: unlawful indirect discrimination

One little discussed issue is the area of indirect discrimination. Those employers who routinely take into account criminal record when making employment decisions may, unwittingly, breach the indirect discrimination provisions of the anti-discrimination legislation. This occurs when an employment condition is in place which, although on its face is neutral in the sense that it applies to all employees or prospective employees, has a greater or disproportionate effect on a particular group of people. An example which occurred in the employment context involved the High Court decision in *Australian Iron & Steel Pty Ltd v Banovic*,[11] where the employer, which had recently engaged many female workers thereby improving the participation of women in its workforce, applied the "last on first off" rule to redundancies. This condition fell unevenly on women — it was the female workers who bore the brunt of this criterion — hence, there was indirect discrimination.

Applying this in the criminal record context, employers who require applicants to have a clean criminal record may find that it falls unevenly on particular groups of people. For example, it might fall disproportionately in effect and operation on men of a certain age group as they have been more prone to commit crimes in their youth; or it might fall adversely on indigenous workers as they generally have a higher level of crime, as reported in the statistics.[12]

Employers may need to be aware that they are indirectly discriminating, even if on the face the condition they have put in place, that is, having a clean criminal record, applies to each and every job applicant. Thus, a seemingly neutral condition may contravene, through indirect discrimination, other prohibited grounds of discrimination in the anti-discrimination legislation, for example, sex or race.

This is neither a fanciful nor a remote possibility. This very situation recently confronted the company, Pepsi Beverages, in the US. Pepsi Beverages had a criminal background check policy which it applied to prospective employees — it would not employ applicants who had a criminal conviction or who had been arrested pending prosecution. The US Equal Employment Opportunity Commission noted that the result of this policy was that over 300 African Americans were not offered permanent employment by Pepsi. Title VII of the Civil Rights Act of 1964 was breached, as this group of prospective employees was adversely and disproportionately affected by the recruitment policy. Pepsi Beverages agreed to pay the sum of $3.13 million as compensation to this group and also undertook to train its employees in anti-discrimination law.[13]

Other laws relevant to criminal record checks and prospective employees

Fair Work Act 2009 (Cth)

The Fair Work Act 2009 (Cth), since 1 July 2009, has proscribed adverse action in the "general protections" part of that Act.[14] This includes discriminating against employees on grounds stated in the legislation. Although a criminal record is not included in this Act as a prohibited ground, employers applying criminal record checks may possibly contravene the Act on other prohibited grounds. For instance, if an employer refuses to engage an employee with, say, convictions arising from engaging in a political protest — for example, trespass or affray — discrimination on the prohibited ground of "political opinion" may arguably occur and the Fair Work Act be breached. Notably, if the criminal record is not relevant to employment, it might be argued that the underlying political opinion was the motivating reason or one of the reasons that the employer denied employment; alternatively, it might be quite challenging for the employer to argue that the political opinion is not such a reason for the failure to employ the person, given that there are reverse onus of proof provisions.

Of course, should an employer dismiss an employee for a recently discovered or committed conviction, that employer may breach the unfair dismissal provisions of the Fair Work Act, risking an order for reinstatement or monetary compensation, if there were no valid reason for terminating the employment.

Past convictions and spent convictions legislation

Spent conviction legislation protects potential employees from answering questions about their past employment record after a certain number of years since the conviction.[15] Thus even where an employer asks about a criminal history, the employee is not obliged to disclose it — the record is treated as "spent". The Commonwealth, all of the states except Victoria, and each territory have such legislation.[16] The nature of the legislation, the types of convictions covered and timelines for rendering them spent vary significantly among the jurisdictions.

However, the spent conviction legislation of two jurisdictions — the ACT and WA — prohibits discrimination against job applicants in respect of certain past convictions.[17]

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Concluding suggestions

Employers should be mindful of the protection to employees and prospective employees in relation to their criminal record. Employers should consider very carefully whether they do need to check a job applicant's criminal record and whether they are inappropriately using such checking policy as a blanket screening device in recruitment. Where there is a justifiable need to undertake background checks, the employer should have a policy which addresses recruitment needs and outlines the considerations which are relevant to be considered for employment decisions. Staff should also be trained and educated in their use.

Of importance is the need to take account of the AHRC Act and other relevant legislation which are aimed at promoting equality of opportunity for persons with a criminal record. Particular attention should be paid to the relevance of the job to the criminal record, subsequent work experience of the job applicant and character references. The applicant should be given an opportunity to explain the record.

Employers should also note that not only might there be direct discrimination unlawfully committed to exclude from employment on the basis of an irrelevant criminal record, but there might potentially be unlawful indirect discrimination where the burden of meeting the condition or requirement falls more heavily on an identifiable group of people, for example, applicants of a particular race. The AHRC has useful and extensive guidance to employers on how to treat such applications.

Marilyn Pittard
Professor, Faculty of Law
Monash University
Marilyn.pittard@monash.edu

About the author

Marilyn publishes and researches in the field of labour and employment law, workplace regulation and business innovation from a labour law perspective. Admitted to practise as a barrister and solicitor in Victoria, she is Vice President of the Australian Labour Law Association.

Footnotes

1. The author acknowledges the helpful comments of the anonymous referee. Research for this article was supported by an Australian Research Council grant. See: www.law.monash.edu.au.
2. Anti-Discrimination Act 1998 (Tas), s 16(q).
3. Anti-Discrimination Act 1992 (NT), s 19(1)(q).
4. See Regulations 1989, reg 4(a)(iii).
5. Reports of inquiries into complaints of discrimination in employment on the basis of criminal record, *Mr Mark Hall v NSW Thoroughbred Racing Board*, HREOC Report No 19.
6. See above, n 5 at 9.2.2.
7. Human Rights and Equal Opportunity Commission, On the Record: *Guidelines for the prevention of discrimination in employment on the basis of criminal record*, Australian Government, Canberra, 2012, accessed 13 November 2012, www.hreoc.gov.au.
8. *Mr CG v NSW (RailCorp NSW)* [2012] AustHRC 48. See: www.humanrights.gov.au.
9. Above, n 7.
10. Above, n 7.
11. *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165; 89 ALR 1; 29 IR 398; BC8902682.
12. ABS data 2006: indigenous people are more likely to be incarcerated than those who are not indigenous — in fact the figure given shows this is 13 times more likely.
13. See: www.eeoc.gov.
14. Fair Work Act 2009 (Cth), Pt 3–1.
15. See article by Moira Paterson in this issue of *Employment Law Bulletin*.
16. Crimes Act 1914 (Cth); Criminal Records Act 1991 (NSW); Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld); Spent Convictions Act 1988 (WA); Annulled Convictions Act 2003 (Tas); Spent Convictions Act 2009 (SA); Spent Convictions Act 2000 (ACT); and Criminal Records (Spent Convictions) Act 1992 (NT).
17. Spent Convictions Act 1988 (WA) Pt 3 Div 3; Discrimination Act 1991 (ACT), s 7(1)(0), includes spent conviction under the Spent Convictions Act 2000 (ACT) as a prohibited ground of discrimination.

Risk and rehabilitation in criminal records checking by employers: what employers are doing and why?

Georgina Heydon *RMIT UNIVERSITY*[1]

The use of criminal record checking has dramatically increased over the last 10–15 years, leading to concerns that ex-offenders are disadvantaged in seeking employment and therefore at greater risk of engaging in reoffending.[2] In order to better understand why and how employers are using criminal record checks, a two-stage empirical research project was conducted involving a survey of and interviews with HR managers across a wide variety of industries. As indicated, a number of disadvantages to the wholesale use of criminal record checking in employment have been identified previously, such as obstructing the reintegration of ex-offenders and encouraging recidivism, limiting the labour pool, and exposing the organisation to discrimination claims and to the overreliance on a single type of risk assessment.[3] This research, therefore, seeks to understand how these disadvantages are apparently outweighed from an employer's perspective by opposing factors in the recruitment process.

This article focuses on findings that address two key questions:

1. How do employers think about risk management in relation to ex-offenders?
2. To what extent are concerns about risk management mitigated by an appreciation of rehabilitation and reintegration efforts?

Findings

In partnership with several stakeholder organisations,[4] the researchers conducted a survey of HR managers across a wide range of industries in order to quantify some of the central factors in their use of criminal records checking. The online survey was distributed in two phases:

- first, to a list of HR managers who had provided their email addresses to a data management company for research purposes; and
- second, to members of the Victorian Employers' Chamber of Commerce and Industry (VECCI).

The first part of the survey collected basic demographic data, as well as information about the respondents' organisation, industry or sector, and work experience. The first section had eight questions in total.

The second part of the survey asked the respondents about various aspects of criminal records checking that covered the use of policy frameworks in their workplace, if and how checks are carried out, and their organisation's attitude towards criminal justice concerns, such as rehabilitation. Twelve questions were included in this second section, and those that are most relevant to this paper are described in more detail below.

A final page of the survey invited respondents to participate in an in-depth interview. A total of 20 interviews were subsequently conducted with respondents who provided their contact details for this purpose. The interview data are not discussed in this paper, but were greatly informative in providing explanations and examples of the responses collected in the survey.

The survey was conducted anonymously and the abovementioned contact details were not linked to an individual's survey responses.

There were 149 responses to the survey, of which 121 completed both sections.

Criminal record checking processes

In this part of the analysis, the findings from the survey that relate to the respondents' organisational approach to using criminal record checks are presented. This includes their decision as to whether or not to conduct checks, and the kind of regulations, policies or processes that might be governing the use of checks in that workplace.

Responses to an initial question about the prevalence of criminal record checks (N=121) indicate that 68.6% of the survey respondents do undertake some kind of criminal record check. This is broken up into various categories, with the largest percentage (31.4%, N=38) conducting checks only on new employees. In addition to the remaining options, 21.5% provided a text response in the "other" category, almost invariably indicating that they conducted checks on all employees, mostly at three year intervals.

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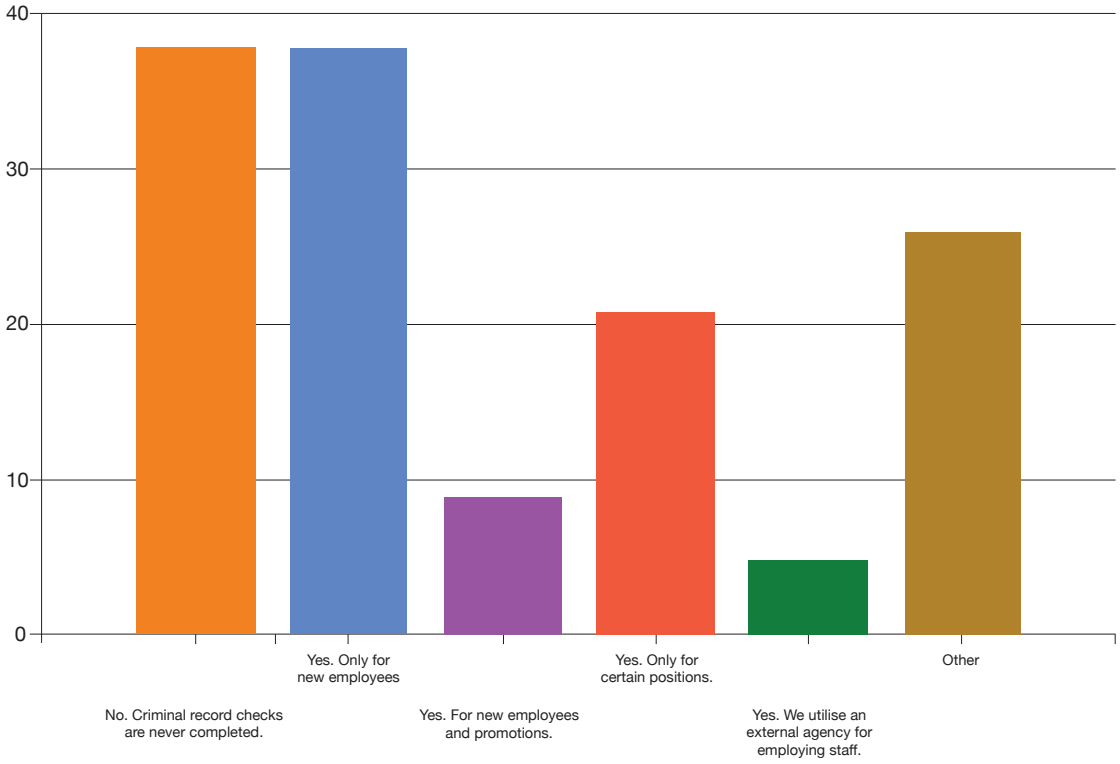
Almost one third of respondents (31.4%) indicated that their organisation does not conduct criminal record checks.

Figure 1 provides the relevant data. The question allowed respondents to select more than one response, therefore, the collective percentage of respondents conducting all kinds of checks was calculated by subtracting the number who indicated no checking was conducted from the total.

Figure 1 (Survey Question 9) Prevalence of criminal record checking (N=121)

Does your organisation conduct criminal record checks? Please select all relevant responses



Whether or not they conducted checks, respondents were asked to indicate which, if any, regulatory or administrative conditions applied to their organisation in relation to criminal record checking. This question was intended to provide data about the administrative processes that may regulate criminal record checking in organisations, and the extent to which decision-making was informed by policy, or recognised procedures.

For the purposes here, the most important aspect of these data is the number of responses to the first option on the list, which identified whether the respondent's organisation had "Legislative Requirements (Regulations, Licensing, Acts)" in relation to criminal record checking. The results of the survey indicate that for 39.7% of respondents, a legislative or regulatory environment applies to their criminal record checking process. This result will be discussed in the context of risk management in s 3 further on, but for the time being it is sufficient to note that this is a sizable proportion of the organisations represented by the survey results conducting checks directly or indirectly, non-voluntarily.

Moreover, after subtracting the 31.4% of respondents who do not conduct checks, it can be concluded that there remain approximately only 30% of respondents who conduct checks voluntarily. It should be recognised that it is possible to find instances where an industry requires employees to hold a licence or permit, and as a result, employers do not require a separate criminal record check of such employees. However, any such licence or permit, such as a legal practising certificate, would entail a criminal record check in any case. Thus, it can be surmised that the nearly 40% of respondents

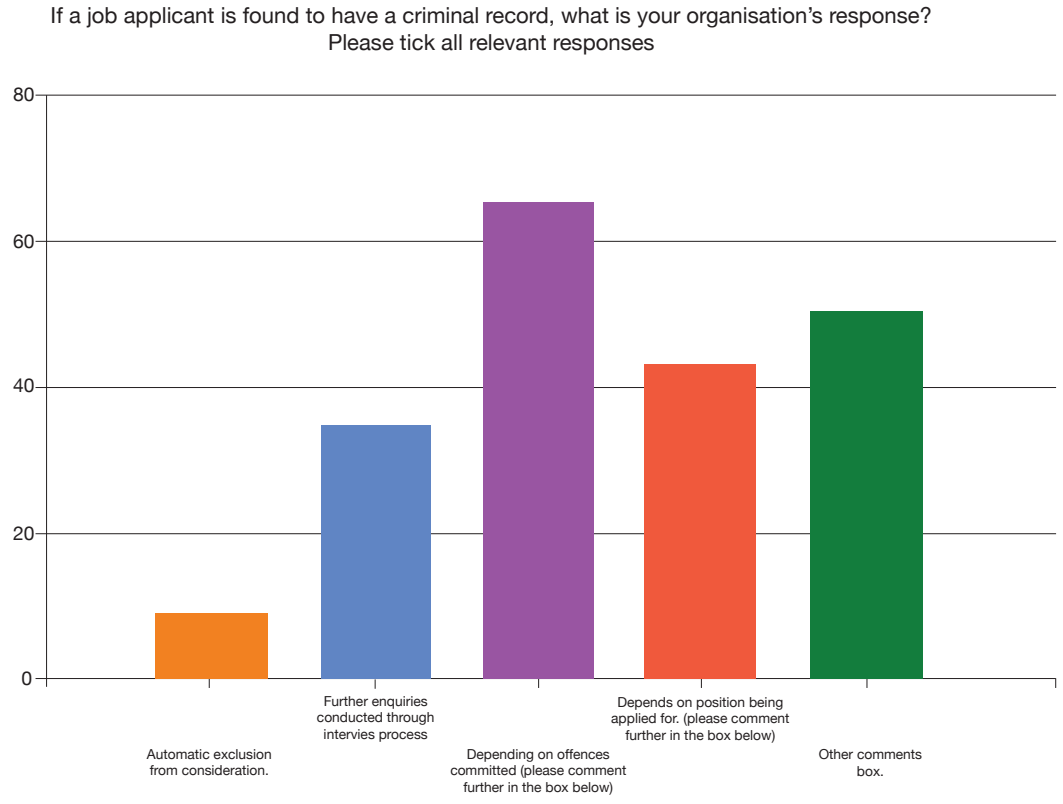
who indicated that their organisation is subject to "Legislative Requirements (Regulations, Licensing, Acts)" in relation to criminal record checks, do indeed require employees to have undertaken a criminal record check at some stage. It has been assumed that these respondents would not therefore have responded to the first question by stating that they do not conduct checks at all, however, it is possible that they did. If the latter is the case, then it may be that the number of respondents who do not conduct checks (directly or indirectly) is smaller than the survey indicates, and that the number of organisations calculated to conduct checks voluntarily may be greater than the previously mentioned figure of approximately 30%.

Organisational attitudes to ex-offenders

An important indicator of employer attitudes to ex-offenders in the workplace is supplied by the responses to question 15 of the survey. Here, respondents were asked to indicate how their organisation would respond to a positive check returned by a job applicant.

The results indicated that most HR managers did not consider the criminal record to be a conclusive indicator of suitability and conducted further investigations. For a small minority (9.1%) of respondents, a positive check would result in that candidate being automatically excluded from the recruitment process. For the remainder of the respondents, however, organisational responses to a positive criminal record check could include making further enquiries through an interview (34.7%), taking the type of offence into consideration (65.3%), and taking the employment position into consideration (43%).

Figure 2: Organisational responses to ex-offenders in recruitment (N=121)



Respondents to this question were also invited to comment further in a free text box. The 61 comments received here were coded and analysed in relation to four categories:

- position relevant;
- rehabilitation concerns;
- regulated environment; and
- workplace risk.

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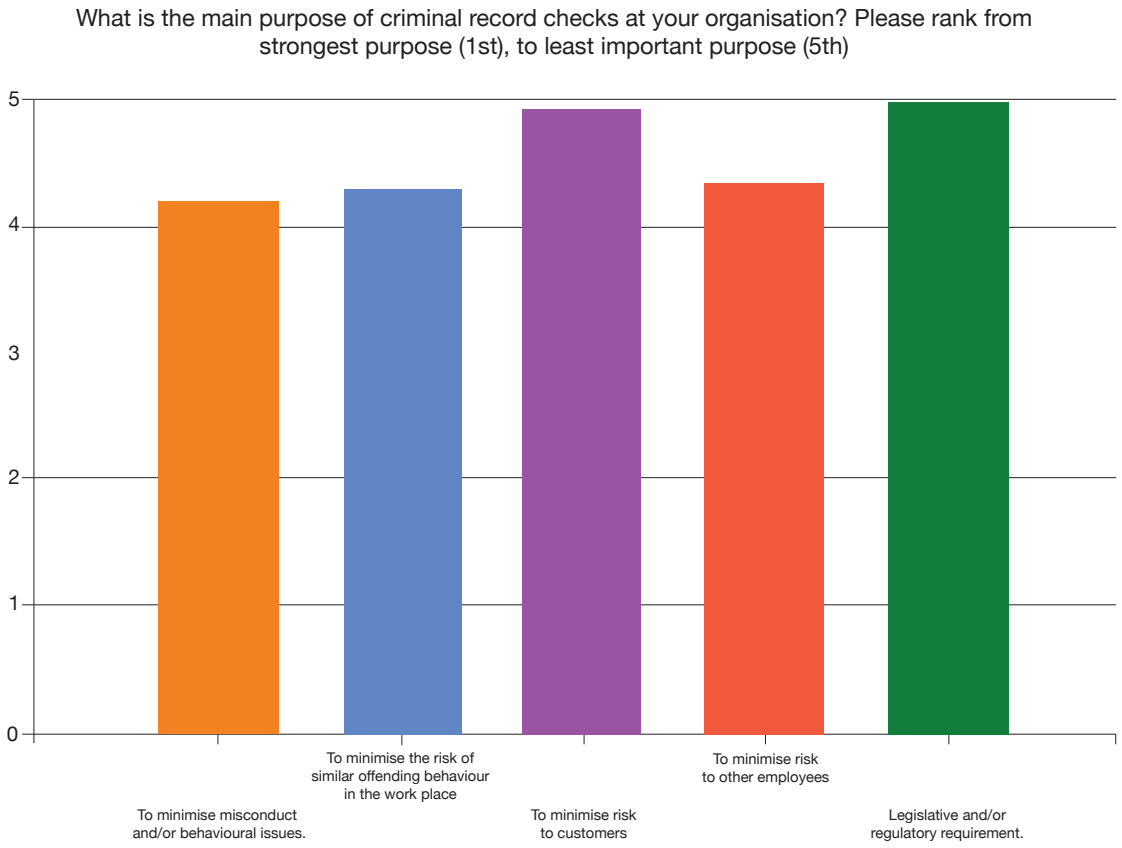
Of these categories, the most highly represented was the workplace risk category (N=38), followed by relevance of the offending to the position (N=29), regulated environment (N=13), and last, rehabilitation concerns (N=11). Seven responses were uncategorised.

A subsequent question required respondents to identify the main purpose for their organisation to conduct criminal record checks and to rank these purposes in order of priority. Although the chart below indicates that the difference in average rating for each category was not great, it can be observed that the purpose given the highest priority for conducting checks was legislative and/or regulatory requirements: 40% of respondents ranked this as their number one purpose for conducting checks. Minimising risk to customers was the next most important purpose for checks (34.8% of respondents ranked this as the most important purpose of checks).

Figure 3: Main purpose for conducting checks



Looking at the average score for each category across all rankings, minimising misconduct was scored lower on average (4.21) than minimising the more specific risk of similar offending behaviour in the workplace (4.32), or minimising risk to other employees (4.36). Minimising the risk to customers was scored higher again on average (4.95) and complying with regulations or legislation (4.99) scored the highest average ranking.

Organisational concerns about rehabilitation

Respondents were asked to give their opinion about whether or not their organisation considered the rehabilitation of ex-offenders to be important. The results indicate that over half of the respondents did not know if this issue was important to their organisation, 28.1% responded positively and 19.8% responded that it was not important to their organisation.

In the next question, respondents who believed that their organisation did consider rehabilitation to be an important issue were asked how their organisation demonstrated this. Although only 34 respondents had earlier stated that their organisations considered the issue important, 83 responses were given to this question, of which 38 stated that it was not demonstrated at all, 26 said they were unsure of how it was demonstrated

and 19 gave specific examples of how it was demonstrated by their organisation.

Of these text responses, nine actually described risk management strategies, for example:

> Undertaking investigation of a disclosable outcome from a Police Check and then making a decision whether to hire the candidate based on the charges/history. (from free text response to Question 18)

All the responses were coded for risk management, and/or reflecting a moral or individual concern, and/or relating to human rights. The 19 coded text responses covered the three categories roughly evenly, with the same number of responses coded for risk management as for human rights (N=10 in both cases).

Finally, there were two opportunities for respondents to express freely any general thoughts or feedback about criminal records checking. The first, in question 19, asked for any further comments about any aspect of checking criminal records in employment. There were 29 text responses collected and coded for either risk management or rehabilitation (or both). Seven responses remained uncoded.

Of the 29 responses, 15 were related to risk management, and 13 related to rehabilitation.

Question 20 gave respondents a second chance to comment, this time on the research field more broadly, but in fact the responses were of a very similar nature. The same coding schema was applied to these data but with an additional category of "process/costs" to cover those responses that commented on the application for a criminal record check itself, or the cost of the checks. There were also 29 responses to this question and the analysis results showed that six related to process/costs, 11 related to rehabilitation and 16 related to risk management. Two responses remained uncategorised.

Discussion and conclusion

In interpreting these results, it was useful to consider what might be driving the increase in criminal record checking by employers. The research aimed to identify the concerns for HR managers and how their responses to this survey provide a sense of the organisational pressures that affect criminal record checking.

Risk management

In this part of the analysis, findings from the survey that relate to the respondents' expression of the risks to their organisation in employing ex-offenders will be presented, as well as the use of criminal record checks in addressing those perceived risks. To this extent, the intension is to answer the initial question posed above: how do employers think about risk management in relation to ex-offenders?

We saw in the above analysis that nearly 70% of the 121 respondents to the survey do conduct criminal record checks in their workplace, but that for nearly 40% of respondents (that is, more than half of those who conduct checks) their criminal record checking procedure is guided by regulations or legislation. This indicates that the high levels of checking identified by prior research may in fact be due more to the legal environment and industry level regulation than organisational strategy. This finding is further supported by the findings in relation to the reasons for conducting the checks where the highest priority was on average given to regulatory/legislative reasons over any other reason.

Nonetheless, reasons relating to risk management still rated highly, and it appears that, after the straightforward compliance issues, respondents ranked highest those categories that implied a direct impact on another person (risk to customers, risk to other employees), ahead of the actual risk of recidivism in the offending behaviour itself. This appears consistent with the findings of Hardcastle, Bartholomew and Graffam,[5] that a key obstacle to reintegration of ex-offenders is discomfort with the personal proximity of ex-offenders to the respondent.

The findings relating to the organisational response to a positive check in the recruitment process indicate again that risk management is a key concern, with most of the respondents identifying the type of offence as the most likely factor in responding to an applicant with a positive criminal record check. This is pertinent given that the adjacent option was that the response would depend on the position being applied for. Respondents could choose more than one option, so the high level of responses for "offence-dependent" demonstrates a fairly clear concern with the potential impact of a type of offender on the workplace more broadly, rather than the relevance of the offence to the position. Automatic exclusion, which was selected by less than 10% of respondents, indicates a very high level of risk management in relation to the issue, and discussing the matter further in the interview can be consistent with the focus on "offence-dependent" decision-making, rather than position-relevance, though this will be discussed further on in relation to rehabilitation.

In the final part of the analysis, it was demonstrated that the overriding concern of HR managers was risk management, but that this did not preclude a concern for the human rights of the applicant, or the possibility of rehabilitation (see further on).

Rehabilitation

In addition to describing the decision-making process around criminal records checks, we have attempted to describe the extent to which concerns about risk management might be mitigated by an appreciation of rehabilitation and reintegration efforts for and by ex-offenders.

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The fact that 31.4% of respondents' organisations do not conduct checks at all may indicate a concern for the rehabilitation of ex-offenders, in that these organisations have chosen not to risk the exclusion of that cohort on this basis. However, there are other possibilities: one respondent in the text comments said that in a small town, such checks are unnecessary, and others have noted that criminal record is an ineffective tool for risk management in their industry. Some organisations may feel that the relevant positions do not have any requirements that would necessitate or warrant such an intrusive practice as checking criminal records, or that they have not experienced problems that would be alleviated by checking employees' criminal records.

Further clarification can be found in the comments provided at the end of the survey, where exactly half of the 58 comments made in response to the two final questions were supportive of the notion of rehabilitation of ex-offenders. In some cases, this was simply an acknowledgement that people change over time, and indeed the "timing" of the offending was seen as an important factor in the decision-making process for many respondents. Other comments were more explicitly pro-rehabilitation, mentioning giving people a second chance, such as in this example:

> I think we take the approach that if a person has made a few bad decisions that could present moderate risk should they re-offend we are prepared to give them a chance with special risk control mechanisms in place.
> (from free text response to Question 20)

Very few respondents mentioned the term "human rights" and only one referred specifically to the Australian Human Rights Commission's (AHRC) position in relation to the relevance of a criminal record to the requirements of the position.

Very few respondents mentioned the term "human rights" and only one referred specifically to the Australian Human Rights Commission's (AHRC) position in relation to the relevance of a criminal record to the requirements of the position.

Conclusion

The survey results have indicated that the overriding concern for HR managers in decision-making processes around criminal record checks for job applicants and employees is risk management. The opportunity for the rehabilitation of ex-offenders was prominent, but clearly secondary as an HR consideration, and did not figure highly as a concern for organisations at the executive level, from the HR perspective at least.

The motivation to conduct checks in the first place was found to be based for the majority of respondents on the regulatory or legislative environment which encouraged or mandated such checks. However, it is notable that it was in fact a minority of employers in the research who undertook criminal record checks voluntarily and such a practice was not found to be widespread.

As mentioned, a majority of the respondents were motivated to conduct check due to a legislative or regulatory environment, but this was closely followed by respondents' concerns about risk minimisation, particularly where the risk might be related to their customers or staff. In other words, there was a strong sense of the duty of care towards staff and customers when employing ex-offenders.

By contrast, there was less evidence of a sense of a duty of care towards the applicant or employee with a criminal record. While the survey elicited a significant number of general comments about giving people a second chance and allowing for the vagaries of youth, there was virtually no express recognition of the human rights obligations towards ex-offenders, or the explicit guidelines of the AHRC that do not permit employment discrimination on the grounds of irrelevant criminal records. It is concerning that the legal and ethical ramifications of such discrimination are not on the radar for most of these 121 HR managers.

Perhaps this last oversight is due in part to lack of awareness — as one respondent put it:

> I suspect that many people in positions that allow or compel them to make decisions on the basis of criminal records do so without due understanding of criminal records and the implications of the information they disclose, likely creating poor outcomes for those being judged on the basis of those records.

Georgina Heydon
Senior Lecturer, Criminal Justice Administration, School of Global, Urban and Social Studies
RMIT University
georgina.heydon@rmit.edu.au

About the author
Georgina has expertise in linguistics with a specialisation in interviewing methodologies. She has published research in criminal justice and forensic linguistics.

Footnotes

1. The author thanks the anonymous referee for their helpful comments. Research for this article was supported by an Australian Research Council Grant LP0990348. See: www.rmit.edu.au.
2. See, for example, B Naylor, M Patterson and M Pittard, "In the shadow of a criminal record: proposing a just model of criminal record employment checks" (2008) 32(1) *Melbourne University Law Review* 171.

3. See article by B Naylor this issue of *Employment Law Bulletin*. Also see, H Lam and M Harcourt, "The use of criminal record in employment decisions: the rights of ex-Offenders, employers and the public" (2003) 47 *Journal of Business Ethics* 237.
4. Corrections Victoria, Australian Human Rights Commission (AHRC, formerly HREOC), JobWatch, Fitzroy Legal Service, the Victorian Association for the Care and Resettlement of Offenders (VACRO), and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).
5. Hardcastle, Lesley, Bartholomew, Terry and Graffam, Joe, "Legislative and community support for offender reintegration in Victoria" (2011) 16(1) *Deakin Law Review* 111–32.

Employment Law
Bulletin

PUBLISHING EDITOR: Banita Jadroska PUBLISHER: Joanne Beckett
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
TELEPHONE: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au Editorial inquiries: banita.jadroska@lexisnexis.com.au
ISSN 1440-4532 Print Post Approved PP 243459/00130 This newsletter may be cited as (2012) 18(8) ELB

Appendix 6: Omitting criminal records discrimination 'regrettable': Branson

WORKPLACE express www.workplaceexpress.com.au

Omitting criminal records discrimination "regrettable": Branson

22 March 2013 11:08am

Former Human Rights Commission President Catherine Branson QC says it is "regrettable" that the draft legislation to consolidate Australia's discrimination laws - which is now being re-assessed - has excluded criminal records as a basis for discrimination complaints to the Commission.

Opening a symposium on criminal records and employment decision-making in Melbourne on Monday, Branson said that while she wasn't privy to the discussions leading to the proposed change, it would mean that there would only be "two jurisdictions in Australia (Northern Territory and Tasmania) where discrimination on the ground of criminal record is on the statute book".

Branson said the Federal Government might be considering asking the Australian Law Reform Commission to examine issues relating to expunging criminal records after a period of time.

"I think we do need to think more carefully about how long criminal records remain relevant and able to be searched and then used against people, particularly in the employment field."

"But I think that's not quite enough, of itself, to make up for what will be lost if indeed it is lost as the draft bill before the House suggests."

Branson explained to the symposium that while discrimination on the ground of criminal record is not unlawful under federal law, people have been able to take a complaint of discrimination on this basis to the Human Rights Commission.

The Commission president, she said, can then use their power to conciliate the matter and/or report to the Federal Government.

Branson gave as an example a case involving the NSW Department of Education's refusal to employ as a teacher a person who, before undertaking several university degrees, had had a criminal record.

She said after looking at the 15 years that had lapsed since the man's last criminal offence and the significant changes that had led to him becoming an active member of his local community, she ruled that the Department had discriminated against him and recommended $38,500 compensation.

The Department declined to pay the person compensation, but allowed him to undertake 12 months of casual teaching, as had previously been recommended by an independent review.

According to the AHRC website, some 23% of all complaints received by the Commission under the AHRC Act between July 2010 and June 2011 were on the basis of criminal record discrimination.

"It is a quite complex area of law. It's not that you can never discriminate on the grounds of criminal record, but you have to show ordinarily that there is some inherent requirement of the job that makes it impossible for the person to continue," she said.

She said there remains "a sense within the community that criminal records ought to be at least some sort of barrier in the area of employment".

People convicted of criminal offences, she said, "pay their debt to society by paying the penalty the judiciary imposes on them" and should then be free to become a "productive member of society".

"One of the great fears I have is if discrimination on the ground of criminal record becomes common in jurisdictions where it now won't be proscribed is that it will actually be an impediment to the rehabilitation into society of people coming out of prison. . . or people who have served whatever penalty was imposed on them."

"Employment is a great encouragement and a great assistance to get yourself out of a culture of offending. But, if the record is held over them forever and they are prevented from becoming again productive members of the community, then the great risk is that they will go back and offend again".

On Wednesday, Attorney-General Mark Dreyfus announced that the draft legislation had been sent back to his department for further detailed consideration (see Related Article).

The Senate Legal and Constitutional Legislation Committee included a recommendation that "irrelevant criminal records" be included in the list of protected attributes in the Federal Government's harmonised anti-discrimination legislation.

Related links

- Related Article : Consolidation bill not dumped but needs more work, says Government
- Related Article : Senate inquiry calls for axing of offence clause

Appendix 7: HR challenges accompany big rise in pre-employment criminal record checks.

WORKPLACE express www.workplaceexpress.com.au

HR challenges accompany big rise in pre-employment criminal record checks

02 April 2013 2:53pm

Prospective employers are requesting criminal record checks in increasing numbers, but are finding it difficult to assess the significance of criminal history and how to weigh the risks associated with employing former offenders, according to university researchers.

Professor Marilyn Pittard from Monash University told a recent forum in Melbourne that checks had increased by 70% in three years to 2009-10, but not enough attention had been given to the effects on employment prospects of former offenders.

A three-year research project, Living Down the Past: Criminal Record Checks and Access to Employment for Ex-Offenders, being jointly conducted by Monash University and RMIT University researchers, has also found that many ex-offenders are being denied a valuable rehabilitation opportunity if employers decide against engaging them because of their past.

Pittard – who recently presented on the research at a symposium in Melbourne – said the project's central aim is to identify employer practices involved in using criminal record checks and determine the potential effects on the employment of ex-offenders.

Led by Associate Professor Bronwyn Naylor, Professor Pittard and Associate Professor Moira Paterson (all from Monash University) and Dr Georgina Heydon from RMIT, the research project has been funded by an Australian Research Council Linkage grant and has been conducted with the support of Corrections Victoria, the Australian Human Rights Commission, JobWatch, Fitzroy Legal Service, Victorian Association for the Care and Resettlement of Offenders (VACRO) and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).

HR practitioners not inclined to automatically exclude former offenders

More than 120 HR managers across a range of organisations and industries responded to a survey conducted as part of the research, with 20 HR practitioners taking part in detailed interviews.

While the data from the surveys and interviews is still being analysed, the project's preliminary research findings suggests that ex-offenders tend to self-exclude from employment opportunities when criminal record checks are used, so their contribution is lost before it could be considered.

The preliminary findings also indicate that HR managers:

- **prefer** to engage in dialogue rather than automatically exclude applicants with a criminal record;
- **tend** to commission a check late in the process, which raises challenges where the applicant is otherwise the preferred candidate;
- **feel** some discomfort about the extent and level of information provided in checks;
- **express** uncertainty about how to evaluate the seriousness and relevance of information provided in a check;

- **recognise** that a 'zero tolerance' policy can be unfair, and also that rehabilitation issues should not be forgotten.

Pittard said that federal government agency CrimTrac conducted 1.6 million criminal records checks in 2005-2006, but this increased to 2.7 million in 2009-2010.

"This shows that criminal records checks are being increasingly used as a recruiting tool by employers, even where there are no mandatory requirements for checking criminal histories, for example jobs which involve working with children".

"Employment is essential to the rehabilitation of offenders, yet employers routinely check criminal records in pre-employment processes and deny offenders employment," she said.

"Little attention has been given to the implications of the exponential growth in criminal record checking for society's reintegration of offenders."

She said HR managers and employers were also being required to consider the relevance of criminal history "while negotiating privacy, anti-discrimination and spent convictions schemes" which vary considerably between states and territories.

Changes to Fair Work Act: a missed opportunity

Pittard said that the Fair Work Act failed to address the fact that there is "no inclusion of irrelevant criminal record in respect of prospective employee or employee" in the grounds for discrimination protected in s351.

And while the inclusion of this ground into the Federal Government's now postponed discrimination harmonisation legislation has been recommended, Pittard echoed the concerns of former AHRC President Catherine Branson that the legislation might ultimately remove the Commission's current power to investigate potential discrimination on the basis of criminal record (see Related Article).

Related links

- Related Article : Omitting criminal records discrimination "regrettable": Branson
- Related Article : AHRC finds consultant entitled to criminal record discrimination protections
- Related Article : Railcorp discriminated against candidate because of criminal record: AHRC
- Related Article : Senate inquiry calls for axing of offence clause
- Related Article : Failure to declare criminal record not a sacking offence
- Related Article : Criminal record discrimination unjustified, says HREOC President

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Monash Law School ranks **13th** in the QS World Rankings

Criminal Records and Employment Symposium

In March 2013, a Symposium was held at the Monash University Law Chambers to explore the law and practice relating to background checks undertaken by employers on a job applicant's criminal records.

Monash Law academics, Professor Marilyn Pittard and Associate Professors Bronwyn Naylor and Moira Paterson, presented findings of their research on "Living Down the Past: Criminal Record Checks and Access to Employment for Ex-offenders" to a large group of attendees who work, research or are interested in this topical area. This research project is funded by an Australian Research Council Linkage Grant.

The Symposium was opened by the Honourable Catherine Branson QC, who was former President of the Australian Human Rights Commission. Her Honour explored the role of that Commission in investigations of complaints by people denied jobs due to their criminal record and the recent review of federal discrimination legislation.

These presenters were joined by Dr Georgina Heydon, RMIT University, another investigator in the ARC grant funded project, and speakers from a wide range of organisations with involvement in assisting persons with criminal records to find employment. Roger Antochi, Second Step Program National Coordinator, Toll Group together with Vicki-Anne Herman, Social Enterprise Business Manager with Mission Australia and Janice Miller, Industry Expert, informed the Symposium about schemes to assist people with criminal records to find employment and the success of these programs. Toll Group's Second Step program, for example, provides career pathways for people who have been incarcerated and/or have a history of addiction.

The Symposium also examined the issue of correction and rehabilitation – just what is possible inside the prison system - with insights from Rod Wise, Deputy Commissioner Operations, Corrections Victoria; Barry Rickard, Program Manager, Group Training Association of Victoria; and Phil Munnings, Offender Development Manager, Fulham Correctional Centre.

The uneven and uncertain legal framework in the Australian States and the Territories and at federal level was addressed by Marilyn Pittard *Employers who have a blanket prohibition on employing anyone with a criminal record may breach laws dealing with indirect discrimination if that policy falls more heavily on certain groups, for examples, indigenous people or older age groups. Similar situations have occurred in the United States where the 'no criminal record' policy of a large employer fell disproportionately on African American job applicants and substantial compensation was paid out by the US company to compensate for this indirect discrimination when this group was denied employment,* said Professor Pittard.

The patchy laws pose problems for human resources managers and recruitment agencies who are faced with how to assess the relevance of a criminal record for the particular job. Some jurisdictions in Australia prohibit discrimination in employment on the basis of 'irrelevant criminal record'.

The survey work and interviews of employers conducted as part of the researchers' ARC Linkage project revealed employers' concerns about assessing safety risks in the workplace and the difficulties that employers face in determining whether a person's criminal record is, or is not, relevant to the prospective job.

Moira Paterson explored the privacy and record keeping issues arising from employers' seeking and storing information about a person's criminal record. In examining rehabilitation of persons with criminal records, Bronwyn Naylor addressed the link between work and rehabilitation – a job is important to a person's prospects of rehabilitation in society, yet a record revealing past crimes, for which there has already been punishment, often prevents that person from successfully obtaining work.

Monash PhD researcher, Prue Burns, told the Symposium about her research which focusses on businesses that provide re-integrative employment opportunities to former prisoners, and how this special class of firm might be expanded so that more former prisoners are able to obtain work that supports their reintegration into the community.

Involved also in the Symposium were representatives from partner organisations supporting the ARC Linkage grant project: Zara Byetheway, Executive Director, JobWatch; Meghan Fitzgerald, Fitzroy Legal Service; Kieran McCann, Corrections Victoria; Carol Nikakis, VACRO; Kylie Allen, Australian Human Rights Commission; and Julian Alban, Victorian Equal Opportunity and Human Rights Commission.

The Symposium was a great success and the topics discussed were well received by all who attended.

L to R: Carol Nikakis (VACRO), Kieran McCann (Corrections), Bronwyn Naylor (Monash Law), Julian Alban (Victorian Equal Opportunity and Human Rights Commission), Janice Miller (formerly WISE), The Hon Catherine Branson QC, former President Australian Human Rights Commission, Moira Paterson (Monash Law), Georgina Heydon (RMIT), Marilyn Pittard (Monash Law), Prue Burns (Monash researcher), Barry Rickard (Group Training Association of Victoria).

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