

DO NOT PASS GO

The impact of criminal record checks on employment in Australia

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Criminal record checks are becoming a way of life in Australia. Victoria Police had 3459 requests for a criminal record check for employment purposes in 1992–93. This had increased to 221 236 checks in 2003–04.¹

At the same time, at least three major government inquiries are currently reviewing the use of criminal record checks: in the context of developing broad checks for people working with children;² in terms of the potential for discrimination in employment;³ and in relation to spent convictions regimes.⁴

This article examines the implications of this heightened attention to criminal records in employment.

What do we know about criminal convictions?

A question about criminal record in a job application may affect more people than is realised. Few people are convicted of serious violent offences, but there are many people in the community who have received a criminal conviction at some time in their life. Over half a million people nationally had criminal cases determined in 2003–04, most of which resulted in a finding of guilt.⁵

Driving offences alone are committed by many people in the community each year. In 2003–04, almost 250 000 defendants appearing in Australian Magistrates' Courts (44% of defendants in those courts) faced road traffic and motor vehicle regulatory charges; 42 000 defendants (9%) faced public order charges, and 37 000 (8%) were charged with theft or related offences such as shoplifting.⁶

Across the seven major crime categories most convictions in Australia are for property offences, including unlawful entry with intent, motor vehicle theft and other theft. That is, relatively few convictions (about 14%) are for violent crimes.⁷ Further, most people with criminal convictions remain in the community; imprisonment is generally a last resort in sentencing.⁸ Most sentences are therefore non-custodial, for example fines and community-based orders. Of all offenders who are being managed by corrective service authorities nationally, 70% are in community-based programs and 30% in custody.⁹

Even where imprisonment is imposed, it is usually for 12 months or less.¹⁰ The vast majority of people who have been imprisoned do return to the community; only 4% of prisoners nationally are serving life

sentences.¹¹ It has been estimated that over 30 000 people return to the community each year from a period of imprisonment.¹²

This means that despite the media's focus on serious and violent offenders, in reality there are very few people serving long prison terms for hideous crimes — mass murderers, terrorists, predatory paedophiles. There are, however, large numbers of people in the community with a criminal record of some type.

What do we know about the likelihood of an offender re-offending?

Our prisons indicate high levels of recidivism: about 58% of people in prison have been there before.¹³ Key factors in reducing most types of recidivism are accommodation and employment.¹⁴ Employment brings income and structure, but also a connection to society, self-esteem, and a community of peers reinforcing 'legitimate' norms and values.

UK studies have reported that employment can reduce recidivism by between a third and a half — but that 60% of ex-offenders were being refused jobs because of their criminal record.¹⁵

What is driving this increased demand for criminal record disclosure?

A criminal record is likely to be regarded as inimical to the performance of jobs in some areas, such as justice and the police force. Some kinds of criminal history might reasonably be expected to preclude employment involving, for example, the care of vulnerable people. However, the exponential increase in criminal record checks in recent years is unlikely to be connected solely to such work.

UK researchers Metcalfe, Anderson and Rolfe concluded recently that:

The way that a criminal record is currently used in recruitment is largely discriminatory, with little realistic assessment of the implications of a criminal record on the ability to do the job (including the risks of re-offending at work).¹⁶

There is an air of moral panic about the evident spiralling demand for police checks in the recruitment process, reflecting fear and prejudice, popular punitiveness, and also perhaps fear of litigation on the part of employers.

REFERENCES

1. Fitzroy Legal Service Inc and Job Watch Inc, *Criminal Records in Victoria: Proposals for Reform* (2005) 8.
2. Department of Justice (Vic), *Working with Children Bill 2005*, Discussion Paper (2004).
3. Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record: Discussion Paper* (2004) ('HREOC Discussion Paper').
4. Standing Committee of Attorneys-General: see Department of Justice (Vic), *Uniform Spent Convictions: A Proposed Model — Discussion Paper: August 2004* (2004).
5. AusStats, *4513.0 Criminal Courts, Australia* (2005) Australian Bureau of Statistics <www.abs.gov.au/Ausstats/abs@.nsf/0/62e9baff94dad459ca2568a9001393fe?OpenDocument> at 31 May 2005. The ABS reports 544 689 defendants 'finalised' during 2003–04, with 461 813 found guilty at trial.
6. *Ibid.*
7. Australian Institute of Criminology, *Australian Crime: Facts and Figures 2003* (2004).
8. See, eg, *Sentencing Act 1991* (Vic) s 5(4).
9. AIC, above n 7, 73.
10. For example, in Victoria, 82% of men and 90% of women who received prison sentences in 2000–01, received sentences of 12 months or less: Office of the Correctional Services Commissioner (Vic), *Statistical Overview of the Victorian Prison System* (2003).
11. Australian Bureau of Statistics, *Prisoners in Australia* (2003).
12. Maria Borzycki and Eileen Baldry (Australian Institute of Criminology), *Promoting Integration: The Provision of Prisoner Post-Release Services*, Trends and Issues in Crime and Criminal Justice Paper No 262 (2003).
13. *Ibid.* It should be recognised that many people leaving prison have multiple forms of disadvantage which may affect their capacity to gain employment and to avoid re-offending, besides the specific issue of criminal record discrimination. Other forms of disadvantage include previous unemployment, limited job skills, poor educational levels, and medical and family difficulties.

Key factors in reducing most types of recidivism are accommodation and employment.

Fear and prejudice

The debates around refugees and asylum seekers since the Tampa episode and John Howard's 'children overboard' re-election have shown how fearful the Australian community has become about people who are 'different'; fearful also that their own rights and entitlements will be usurped. In this context then, it is not difficult to see how any person with a criminal record may be seen as the dangerous 'other', especially if he or she has been imprisoned. David Garland has identified the consequences of the heightened demand for security and the management of risk, being the 'imposition of more intensive regimes of regulation, inspection and control and, in the process, our civic culture becom[ing] increasingly less tolerant and inclusive, increasingly less capable of trust'.¹⁷

Metcalf et al found that employers tended to reject people with a criminal record for a number of reasons, including that 'people with a criminal record are seen, generally, as 'undesirable', outside the employers' experience and alien'.¹⁸

A criminal record therefore becomes a badge of shame. It takes on what can be called a 'master status', becoming the dominant characteristic upon which people judge the individual, without regard to their other qualities and competencies. It can be seen as a marker of untrustworthiness, unworthiness, unreliability, and lack of respectability.

Popular punitiveness

We can also see evidence that communities in Australia and elsewhere have become increasingly punitive. Governments have been at times too quick to respond to calls for longer prison sentences, greater security and surveillance, at the expense of individual liberties and protections. There seems to be little compassion or concern for those in detention, whether in prisons, detention centres, or in US bases.

Tabloid news reporting trumpets the principle of 'lesser entitlement': the view that the person who has broken the law should not (ever?) be entitled to as much as the person who — despite hardship — has never broken the law.

A basic principle of sentencing is proportionality — that the punishment should be proportionate to the seriousness of the crime. This is embodied in the 'just deserts' principle and requires that, once the proper sentence has been set by the courts and served by the offender, no further punishment should

be imposed. The fact of the conviction and sentence should not then attract further punishment in the form of social exclusion. Such fundamental principles can be overridden by the demand for community protection and denunciation of the former offender, even if this has the effect of continuing the person's punishment beyond that imposed by the court.

Fear of litigation

Fear of litigation — or perhaps it is a strong sense of a duty of care on the part of employers — may also be discerned in the increasing demand for criminal record checks, particularly in employment involving children and vulnerable adults. Metcalfe et al in their research did identify employers' concern that they 'would be held responsible for recruiting a person with a criminal record who then offended at work'.¹⁹

What is the relevance of a criminal record to employment decisions?

Some occupations specifically prohibit membership by people with particular sorts of criminal record. This may be expressed legislatively, or in the accreditation processes of particular professions or occupations. There are regimes in many jurisdictions to ensure that people with any criminal record involving sexual offences do not work with children.²⁰ Admission to the legal profession requires that the person satisfy a general 'fit and proper person' (or similar) test.²¹ People can be ineligible for management positions in

14. See, eg, Social Exclusion Unit, Office of the Prime Minister (UK), *Reducing Re-offending by Ex-prisoners* (2002).

15. Home Office (UK), *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act* (2002) 75.

16. 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.

17. David Garland, *The Culture of Control* (2001) 194–5.

18. Metcalfe, Anderson and Rolfe, above n 16, 4.

19. *Ibid.*

20. See 'blue card' scheme under the *Commission for Young People and Children Act 2000* (Qld); the 'Working with Children Check' under the *Children and Young People Act 1998* (NSW); the 'Assessment Notice' under the *Working with Children (Criminal Record Checking) Act 2004* (WA). The *Working with Children Draft Bill 2005* (Vic) would preclude employment of anyone with a record of serious sexual offences, with discretion to exclude where there are other violent and drug-related offences.

21. See, eg, *Legal Profession Act 2004* (Vic) ss 1.2.6, 2.3.3; *Legal Practice Act 2003* (WA) s 39.



corporations with specific sorts of criminal record.²² People with a criminal record can also be ineligible to apply for particular licenses. For example, an applicant for a security industry licence in NSW must not have committed any offence involving 'firearms, drugs, assault, fraud, dishonesty or stealing within ten years of making the application'.²³

An employer is generally entitled to ask about a prospective employee's criminal history during a job interview or in a job application form. The record may be directly relevant, indicating a real risk of re-offending (perhaps a recent history of breaches of trust in financial positions) or going to the capacity to carry out the job (for example, loss of driving licence). But such questioning on the part of employers may also be essentially discriminatory. In the UK, Metcalfe et al found, for example, that employers asked about criminal records in relation to 63% of vacancies, saying that they wanted to protect their customers. Employers did differentiate between relevant and irrelevant convictions in many instances, but the researchers nevertheless concluded that the way criminal record information was used in recruitment was often discriminatory.²⁴

The implications for employment of having a criminal record

It is clear that employers are less inclined to employ someone where they have a criminal record. In a recent US study, matched pairs of applicants applied for entry-level jobs, where the only difference was existence of a criminal record and race. The study's author, Devah Pager, found that employers were significantly less willing to employ the person with the criminal record, and even less so where the applicant was black.²⁵ Earlier research has reported similar findings based on matched application letters.²⁶

Employers may see the criminal record as indicating that the person is untrustworthy, or likely to be unreliable or irresponsible.²⁷ Employers may also be concerned about their customers' 'discomfort if they knew that an employee was an ex-convict'.²⁸

Pager refers to this as the 'credentialling' effect of imprisonment, by which people convicted of crimes, especially if imprisoned, come to be 'branded as a particular class of individuals ... with implications for their perceived place in the stratification order'.²⁹

There can be a further effect. The stereotypes and prejudices about people with a criminal record are of course well known. Fear of such prejudice may lead the person applying for a job to deny their criminal record. If this is subsequently revealed, the person is likely either to be unsuccessful in the application, or be dismissed, at least ostensibly on the basis of dishonesty.³⁰

This process has significant implications for the Indigenous community. Indigenous people are over-represented in the criminal justice system, for a range of well-known reasons.³¹ The continuing shadow of a criminal record thus disproportionately affects

Indigenous communities, perpetuating unemployment (along with broader social dysfunction from alcohol abuse and family violence).³² The existence of a criminal record also restricts the capacity of Indigenous community members to work formally with the justice system to address Indigenous issues.³³

The broader implications are obvious. As Pager concludes, 'incarceration is associated with limited future employment opportunities and earning potential ... which themselves are amongst the strongest predictors of recidivism'.³⁴

What criminal record information is provided and who holds it?

Criminal records generally contain substantially more information than simply a person's criminal convictions. Individual state police services maintain most criminal history information. The specific information that is kept, and whether it is made available, differs between jurisdictions. The information kept usually includes court appearances, convictions and penalty, bonds and findings of guilt where a conviction was not recorded, charges, matters awaiting hearing, police intelligence and traffic infringements.³⁵

Any or all of these matters may be disclosed in a record check depending on the jurisdiction and the nature of the inquiry. Release will also depend on the operation of any 'spent convictions' schemes (discussed further below).

State police records are also co-ordinated by CrimTrac, a Commonwealth agency which carries out National Criminal History Record Checks. CrimTrac provides a National Police Certificate on request, indicating whether a criminal record exists and including disclosable criminal history details.³⁶

What is disclosed differs between jurisdictions. For example, a National Police Certificate relating to a Victorian criminal record may include findings of guilt without conviction, good behaviour bonds, and matters which are pending a court hearing.³⁷ However not all police services release charges.

Records held by police and CrimTrac should only be disclosed with the consent of the person involved. People may request their own record; requests are also made by government agencies, individuals, and private organisations. Even though individuals should be asked for their consent before a criminal record check is conducted for employment purposes, there is usually very little choice on a practical level, as a refusal to consent will most probably result in not being employed.

How is access to criminal records regulated?

Access to criminal record information is regulated under various regimes aiming to balance the public interests involved.

Privacy laws

Privacy laws require sensitive information such as criminal record information to be provided only with

22. *Corporations Act 2001* (Cth) s 206B.

23. See generally HREOC Discussion Paper, above n 3, 22.

24. Metcalfe, Anderson and Rolfe, above n 16.

25. Devah Pager, 'The Mark of a Criminal Record' (2003) 108 *American Journal of Sociology* 937. Pager found that ex-offenders were one half to one third as likely to be considered by a potential employer compared to equivalent applicants with no criminal record. Metcalfe, Anderson and Rolfe had similar findings: Metcalfe, Anderson and Rolfe, above n 16, 104.

26. See Bruce Western, Jeffrey Kling and David Weiman, 'The Labor Market Consequences of Incarceration' (2001) 47 *Crime and Delinquency* 410, 412.

27. Western, Kling and Weiman, above n 26, 7.

28. Rachele Giguere and Lauren Dundes, 'Help Wanted: A Survey of Employer Concerns about Hiring Ex-Convicts' (2002) 13 *Criminal Justice Policy Review* 396. This study found greatest concerns regarding hiring ex-offenders related to offenders' lack of people skills (82% of respondents) and customer discomfort (81%).

29. Pager, above n 25, 942.

30. HREOC Discussion Paper, above n 3, 7.

31. In 2002 Indigenous people were imprisoned at a rate 12 times higher than the rate for non-Indigenous people: AIC, above n 7, 79. See generally Chris Cunneen and David McDonald, Aboriginal and Torres Strait Islander Commission, *Keeping Aboriginal and Torres Strait Islander People out of Custody: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (1997).

32. See Victorian Aboriginal Legal Service, *Submission on the Uniform Spent Convictions Discussion Paper* (2004).

33. Ibid.

34. Pager, above n 25, 939.

35. HREOC Discussion Paper, above n 3, 47. The information kept is governed by legislation in each jurisdiction: see, eg, Office of Public Service Merit and Equity (Queensland), *Guidelines: Criminal Record Checking*.

36. See CrimTrac Website (2001) <www.crimtrac.gov.au> at 31 May 2005.

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the consent of the person concerned. In Victoria, the *Information Privacy Act 2000* applies to Victorian government agencies, local government and statutory bodies, including Victoria Police. Victoria Police's internal policy, which governs the provision of national police certificates, has been drafted so as to comply with this Act. At a federal level, the *Privacy Act 1988* (Cth) covers Commonwealth government agencies and some private sector bodies. The practical reality of the requirement for consent in employment applications has already been noted.

Spent convictions regimes

All Australian jurisdictions have policies, if not legislation, about 'spent convictions'. These schemes have the aim of allowing the ex-offender to 'clear the slate', and limit disclosure of some convictions. Protection from disclosure is defined in terms of length of time since the occurrence of the conviction, by seriousness of offence, and by the purpose of the check.

There is spent convictions legislation in the Commonwealth, as well as all the states and territories other than South Australia and Victoria.³⁸ The issue of a possible uniform national spent convictions scheme is currently under review by the Standing Committee of Attorneys-General.

The various schemes all have significant differences. In most instances, only less serious offences can become 'spent', and this only occurs once a waiting period has passed (usually ten years without a conviction). Some categories of offences may never be 'spent', such as sexual offences, and offences attracting longer prison sentences.³⁹

All the legislative schemes have exemptions, which permit disclosure of all criminal records. Exemptions usually include appointments to sensitive positions, employment in sensitive occupations (eg police, prison officers), employment to work with vulnerable people (eg as teachers, care-workers), and applying for particular licences (eg child-care services).⁴⁰

In Victoria, there is no spent convictions legislation, and the police apply an internal policy in determining what criminal history information to disclose. Victoria Police's *Police Records Information Release Policy* broadly applies the ten-year waiting period when defining the 'findings of guilt' that can be disclosed. Consistent with most of the statutory schemes, it permits disclosure of findings of guilt without conviction (a point discussed

further below). However, it also permits the release of information regarding charges which have not yet been determined in court.⁴¹ Such information can also be disclosed under the current draft of the Working with Children Bill 2005 in Victoria.

Anti-discrimination regimes

International and Australian human rights law contains a general recognition of the right to be free of discrimination. This is embodied in the federal *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the various state anti-discrimination acts. The Act and its accompanying regulations, together with equal opportunity legislation in Tasmania and the Northern Territory prohibit discrimination in employment on the basis of criminal record. In Western Australia and the Australian Capital Territory, legislation prohibits discrimination on the basis of spent convictions.⁴² An important exception is made to allow employers to refuse to employ someone on the basis of their criminal record where the criminal record is relevant to the 'inherent requirements of the job'. The Human Rights and Equal Opportunity Commission is currently carrying out a review of discrimination in employment on the basis of criminal record.

Discussion

We must look more critically at the ways in which we use criminal records to manage risk.

There are undoubtedly areas of work where people with a particular criminal history should be excluded. Predatory sex offenders, for example, who continue to pose a risk, should not be working with children or other vulnerable groups of people. Criminal justice officials should generally have a clean slate. When assessing prospective employees in these situations the primary focus should be on the risk of re-offending (not just presumed general propensity).

At the same time, recent history has shown that some people in positions of trust — for example, in churches and schools — have been able to abuse people in their care, sometimes for long periods of time, without coming to the attention of the criminal justice system at all. A formal criminal record check as they moved through the system would not have discovered anything adverse as they had not acquired a criminal record. The criminal record is of limited assistance in the broader search to render particular employment and places of employment 'safe'. A negative criminal record check is

37. HREOC Discussion Paper, above n 3, 48; see Consent to Check and Release National Police Record (application form) (2004) Victoria Police <www.police.vic.gov.au/files/documents/365_820AAug04%5B1%5D.pdf> at 31 May 2005.

38. *Crimes Act 1914* (Cth); *Criminal Records Act 1991* (NSW); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Spent Convictions Act 2000* (ACT); *Criminal Records (Spent Convictions) Act 1992* (NT); *Spent Convictions Act 1988* (WA); *Annulled Convictions Act 2003* (Tas).

39. See summary of Australian schemes in HREOC Discussion Paper, above n 3, appendix C. For a summary of schemes in other countries, see Home Office (UK), above n 15, annex D.

40. See HREOC Discussion Paper, above n 3, 53–4.

41. As with the legislative schemes, exemptions are also applied in Victoria for serious offences of violence or sex offences, for offences leading to long prison terms, and for checks for employment in relation to vulnerable people or in sensitive areas such as police, prisons and the gaming industry. There is also a general exemption in 'exceptional circumstances where the release of information is in the interest of crime prevention or the administration of justice': see 'Information Sheet — Information Release Policy' (2005) Victoria Police <www.police.vic.gov.au/files/documents/422_Information-Release-Policy.pdf> at 31 May 2005.

42. See HREOC Discussion Paper, above n 3, 14.

not a guarantee that there is no abusive propensity, or that the person has compassion or respect for others.

Effective reference checking, interviewing and screening, and maintaining ongoing workplace training are vital.⁴³ In the context of working with children, which is an area of great public concern currently, establishing a protective working environment, exercised by everyone involved with children, may indeed provide greater protection than a formal process based simply on criminal record checks, which may encourage complacency.

Anti-discrimination regimes

We should aim to minimise the scope for discrimination on the basis of criminal history in the area of employment. As already discussed, there are readily identifiable areas where a criminal history will be relevant to employment. However, outside these areas there should be a presumption that there should be no inquiry into a job-seeker's criminal history.

Effective anti-discrimination laws are vital to protect people with a criminal record from decisions based inappropriately on the fact of their history. As demonstrated in the HREOC Discussion Paper, current anti-discrimination laws are largely ineffective. The federal *Human Rights and Equal Opportunity Commission Act 1986* (Cth) provides some protection only against the federal government, and without any power of enforcement.

Only two other Australian jurisdictions explicitly prohibit discrimination on the basis of criminal record. Further, under federal and some State legislation there will be no unlawful discrimination if the employer's decision was based on the 'inherent requirements of the job'.

Anti-discrimination legislation should instead provide a broad prohibition on discrimination on the basis of criminal record. It should provide for substantial and effective sanctions, and should be consistent across all jurisdictions. It should then be possible for employers to apply specifically for exemption from the prohibition, the burden being on the applicant employer to justify their claims (as provided in the Tasmanian and Northern Territory legislation).⁴⁴

Where exemptions were granted they should be as specific as possible. They should, for example, be limited by reference to particular jobs in the industry, and/or to particular types of offences. Broader exemptions may also be appropriate in some areas, such as work involving children. In this area a legislative exception to the principle of non-discrimination may be appropriate.

If this were not possible, the existing Commonwealth regime should at least be broadened to apply to other employers, and a right attached to seek enforcement in the Federal Magistrates Court, as applies to other areas of discrimination.

A practical limitation of anti-discrimination legislation as it currently operates is that it requires the employee

to prove that the employment decision was in fact based on inappropriate — indeed unlawful — factors. An option for reform to address this, and to assist employers prospectively in determining the relevance of particular offences and avoiding discriminatory practices, would be the development of guidelines and standards for employers, to be adopted under the relevant legislation, as are being developed under the *Disability Discrimination Act 1992* (Cth).⁴⁵

Spent convictions schemes

There is always the risk that acting on the basis of a known criminal record will stigmatise and exclude an individual irrespective of the extent to which that person may have changed in the time since the offence was committed. For most offences and in most cases, the longer a person lives in the community without re-offending, the less chance there is they will re-offend at all. This is the rationale of spent convictions schemes. Most schemes are limited to less serious offences. But the underlying belief is that people who have served their sentence should be allowed to demonstrate that they have 'paid their dues' and have been rehabilitated, particularly by showing they can maintain a lawful lifestyle for an extended period of time.

A range of reforms are needed. For example, the information to be included on a criminal record check should be clarified, and should be consistent with the objective, under spent convictions legislation, of providing people with the opportunity of a 'clean slate'. It is argued here that a criminal record check should usually exclude, for example, findings of guilt where no conviction is recorded, and matters which have not been determined in court, other than in specifically defined circumstances.

It is of concern that police record checks in Victoria currently include information about findings of guilt where the court ultimately decided not to record a conviction. The decision whether or not to record a conviction is a separate sentencing option for the judge, at the lowest end of the sentencing scale. Factors taken into account by judges in the sentencing process usually include details about the offender's character and the potential impact of a conviction on the offender's employment prospects. A finding of guilt where no conviction is recorded is 'not to be taken to be a conviction for any purpose'.⁴⁶

Such findings of guilt are referred to in most Australian spent convictions schemes as being capable of being 'spent'; this is desirable, but also indicates that, until spent, these findings are able to be lawfully disclosed. The better alternative would be a scheme whereby findings of guilt without conviction could not (subject to appropriate exceptions) be routinely disclosed as part of a criminal record check for employment-related purposes.

As Fitzroy Legal Service and Job Watch have argued in the Victorian context, 'the daily exercise of judicial discretion to not impose convictions is routinely and systematically undermined in Victoria by the

43. Some useful resources in relation to workplaces with the care of children are collected at the National Child Protection Clearinghouse Website (2004) <www.aifs.gov.au/nch/policechecks.html> at 31 May 2005.

44. See discussion and recommendations in PILCH Homeless Persons' Legal Clinic, *Discrimination in Employment on the Basis of Criminal Record: Submission to the Human Rights and Equal Opportunity Commission* (2005).

45. See Disability Standards and Guidelines (2005) HREOC <www.hreoc.gov.au/disability_rights/standards/standards.html> at 31 May 2005.

46. See, eg, *Sentencing Act 1991* (Vic) ss 8(1)(c), 8(2).

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contradictory philosophy underpinning the Police Records Information Release Policy'.⁴⁷

It is also of concern that untried charges and current investigations are included in the Victorian scheme for release of criminal records, given that our criminal justice system is premised on the fundamental principle of a presumption of innocence until proven guilty. A recent letter to a Melbourne newspaper outlined the case of a person with a mental illness who was initially charged for behaviour arising from their mental illness. The charges were not proceeded with, but these charges were later disclosed in a criminal record check, leading to the refusal of employment. Such matters should not routinely appear on a criminal record check.⁴⁸

There must, in addition, be review and clarification of the rights of employers to ask about criminal history, about the obligation on the job-seekers to disclose, and the implication of non-disclosure of a criminal record. Practical solutions are needed for applicants where criminal history questions are asked, and where they are asked about convictions which the applicant believes to be 'spent'. On this point, reforms to the various Australian spent convictions schemes should also be linked to reforms to anti-discrimination regimes.⁴⁹

There is a need for education of employers about the significance of a criminal record, about what they can and cannot ask (for example to be compliant with anti-discrimination legislation) and about how spent convictions schemes work. Spent conviction schemes seem to be poorly understood by employers, both here and in other jurisdictions.⁵⁰

We should also pay attention to the risks of ever-increasing linkage of databases — by community consent — as government agencies require criminal record checks to be updated directly by police services, as police and court information is fed continuously into the system, and as employers, institutions, and professional bodies both provide and search for criminal record information.

As the UK study by Metcalfe et al concluded, the widespread use of criminal record checks to reject job applicants:

... is likely to result in the rejection of people with criminal records who would be a crime risk and so, probably, reduces the likelihood of crime at work. However, it will also result in the rejection of applicants who pose little or no risk of offending at work, reducing the pool of

applicants from which employers may choose and raising unemployment amongst people with a criminal record. Since rejection is largely based on prejudice rather than real risk (of re-offending and its consequences), a less discriminatory approach should be possible, in which fewer of those with a criminal record who pose little risk are rejected whilst those who are a risk continue to be rejected.⁵¹

Conclusion

As a community we must resist the temptation of implementing quick and simple solutions so as to eradicate risk and guarantee community safety.

Criminal record checks as a solution are both too broad and too narrow. They are too broad when they extend to offences which are not relevant to the real assessment of risk and so are unfairly discriminatory. They are also too narrow; we know all too well that record checks only reveal people with a relevant record.

The sad irony of this moral panic about the criminal 'other' is that, excluded from lawful employment and from acceptable ways of sustaining life and lifestyle, the person with the criminal record may well turn to illegal sources of support. Their skills will be lost to industry and business, and they themselves will be a loss to the community, unable to support themselves or their family, unable to engage in their local school or sporting communities. Unable even to 'pass go', they may instead return to gaol on a regular basis.

Appropriate and rewarding employment is a key factor in an ex-offender's rehabilitation. It is vital that we reconsider our use of criminal history information in employment, and look to facilitating ex-offenders' engagement with the community rather than putting further obstacles in their way.

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47. Fitzroy Legal Service and Job Watch, above n 1, 13.

48. Letter to the Editor, *The Age* (Melbourne) 9 April 2005, 8.

49. See PILCH, above n 44, 23–7; Fitzroy Legal Service and Job Watch, above n 1, recommendations 11–13.

50. For a Victorian survey, see Fitzroy Legal Service and Job Watch, above n 1. A UK study also found little understanding of the operation of spent conviction regimes by either employers or ex-offenders: Home Office (UK), above n 15.

51. Metcalfe, Anderson and Rolfe, above n 16, 4.