

## AUSTRALIAN SPENT CONVICTIONS REFORM: A CONTEXTUAL ANALYSIS

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### I INTRODUCTION

The increasing use of criminal records checks has had the consequence of adding indirectly to the punishment of offenders. Criminal records are used to make decisions adverse to ex-offenders, including decisions not to employ them or to deny promotion. This is a matter of serious concern given that over half a million Australians were found guilty of an offence in 2009–10,<sup>1</sup> and that the national criminal records agency, CrimTrac, processed around 2.7 million criminal history checks in the same period.<sup>2</sup> As noted by the Human Rights and Equal Opportunity Commission 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.<sup>3</sup>

The Model Spent Convictions Bill ('Model Bill') developed by the Standing Committee of Attorneys-General ('SCAG')<sup>4</sup> provides for a long overdue uniform national spent convictions regime. That development is especially significant for Victoria, the only Australian jurisdiction which currently lacks a statutory spent conviction scheme.

Of particular significance is the relatively new development of previously unimaginable ease of access to criminal history information. Prior to the advent

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1 538 468 defendants were found guilty in the Magistrates and Higher Courts in Australia in 2009–10: Australian Bureau of Statistics, *Criminal Courts, Australia, 2009–10*, ABS Catalogue No 4513.0 (2010) 10.

2 CrimTrac, *Annual Report 2009–10* (2010) 58. Requests for criminal records checks made to CrimTrac show an increase of nearly 60 per cent from 1.7 million in 2005–06 to 2.7 million in 2009–10: CrimTrac, *Annual Report 2006–07* (2007) 106; CrimTrac, *Annual Report 2009–10* (2010).

3 Human Rights and Equal Opportunity Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, Report (2005) 5.

4 The Bill, which was released in late 2009, can be accessed at <[http://www.pcc.gov.au/uniform/Spent\\_Convictions\\_Bill\\_2009.pdf](http://www.pcc.gov.au/uniform/Spent_Convictions_Bill_2009.pdf)>.

of the Internet it was rare for a criminal record to continue to haunt an individual given that knowledge of a criminal history would not have gone much beyond local notoriety and the persistence of the local newspaper in chasing down public records. This facilitated a rehabilitative process whereby 'a person who committed a crime could prove to be redeemed by leading a life as a productive member of society'.<sup>5</sup> However, the proliferation of conviction information now in the public domain has produced a state of affairs where '[r]eadily accessible, searchable online databases ... increase the risk that a finding of guilt will forever stigmatise a person'.<sup>6</sup>

In those jurisdictions where they exist,<sup>7</sup> spent convictions regimes form a significant element of the legal and regulatory context governing the use and potential accessibility of criminal records. They essentially operate by limiting access to information about older records relating to minor crimes, as well as limiting the convictions a person is required to reveal on questioning and about which employers can ask questions.<sup>8</sup> Spent convictions regimes therefore operate to reduce the continuing indirect punishment resulting from some criminal records and to enhance prospects for rehabilitation.

Spent convictions laws in common law countries have their origins in the mid-1970s when the United Kingdom ('UK') enacted the *Rehabilitation of Offenders Act 1974*.<sup>9</sup> While such schemes have proliferated in many jurisdictions since that time, their interrelationship with sentencing and punishment more generally has not been closely explored. This is despite growing awareness of the potential for changed uses of criminal records information to affect the impact of sentencing and, even in some cases, to undermine it. Of particular concern are cases where a judge exercises discretion to make a guilty finding without conviction so as to advance the offender's rehabilitation, but information about the guilty finding is made available in the context of criminal records checks, thereby undermining the judicial objective.<sup>10</sup>

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5 Kiminori Nakamura, 'Redemption in the Presence of Widespread Criminal Background Checks' (Research Paper, The Heinz School, Carnegie Mellon University, 21 April 2008) 3 <<http://www.heinz.cmu.edu/research/233full.pdf>>.

6 Office of the Victorian Privacy Commissioner, *Controlled Disclosure of Criminal Record Data: Report to the Attorney-General Pursuant to Section 63(3) of the Information Privacy Act 2000*, Report No 02.06 (2006) 4 [22].

7 As well as operating throughout Australia, spent convictions regimes exist in many overseas countries including New Zealand, Canada, Ireland, the United Kingdom and many parts of mainland Europe.

8 However, a more complete solution would require also a strengthening of anti-discrimination and privacy laws as well as additional restrictions concerning the information that is made available to employers for decision-making in relation to employment: see Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171.

9 That legislation was enacted in response to a Committee established jointly by JUSTICE, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders, *Living It Down – The Problem of Old Convictions* (Stevens & Sons, 1972).

10 In Victoria, for example, the list of relevant factors to which a court must have regard in deciding whether or not to record a conviction include 'the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects': *Sentencing Act 1991* (Vic) s 8(1)(c).

This article aims to explore in more detail the interrelationship between spent convictions regimes, principles of punishment and sentencing rationales, and to provide an overview and critique of the Model Bill. We begin by outlining the rationales for, and some objections to, spent conviction schemes. We will then analyse how spent conviction schemes relate to the broader sentencing principles, before examining the provisions of the Model Bill in the light of this analysis.

## II JUSTIFICATIONS FOR SPENT CONVICTIONS REGIMES

Spent convictions laws are traditionally justified on the basis that they allow persons with minor convictions to make a fresh start, free of criminal taint. Arguably this justification is also applicable to more serious offences. As pointed out by the Australian Law Reform Commission ('ALRC'):

An old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator as to how the former offender will behave in the future. In such circumstances reliance on the old conviction will result in serious prejudice to the offender which will outweigh to a large extent its value as an indicator of future behaviour.<sup>11</sup>

Spent convictions schemes give effect to the principle that '[p]ersons who have been convicted of offences should not necessarily have to suffer the consequences for the rest of their lives'.<sup>12</sup> More recently their purpose has been described as being 'to ensure that a convicted offender is not overly burdened with the stigma of a criminal conviction'<sup>13</sup> and 'to encourage the rehabilitation of offenders in order that they may become responsible and productive members of society'.<sup>14</sup> Removal of the stigma of conviction redresses the harm of being labelled as 'deviant', the process by which a person acquires and cannot shake off what has been termed the 'master status' of a criminal.<sup>15</sup> This, in turn, contributes to the ex-offender's rehabilitation.

In legal terms, spent convictions laws reflect the longstanding principle that a sentence should be proportional to the seriousness of the harm and should, by definition, have an end point after which no further punishment is appropriate. In other words, people who have 'served their time' should be able to make a fresh start. This should not be undermined by the fact that criminal history information is now retained and can be used for much greater lengths of time than was previously the case. As explained by Knowler:

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11 ALRC, *Spent Convictions*, Report No 37 (1987) xi–xii [3].

12 Law Reform Commission of Western Australia, *Project No 80: The Problem of Old Convictions*, Report (1986) 31 [4.3].

13 Standing Committee of Attorneys-General, *Discussion Paper: Uniform Spent Convictions: A Proposed Model* (August 2004) 4.

14 New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1991, 392; cited in Standing Committee on Law and Justice, *Spent Convictions for Juvenile Offenders*, Report No 42 (2010) 5 [2.2].

15 See Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (The Free Press, 1963) for the classic discussion of labelling theory.

The law prescribes a punishment to be imposed for the commission of an offence and once that has been served the offender has paid his or her 'dues' to society. When society is satisfied that the person is not likely to re-offend, it should relieve that person of the stigmatising effect of his or her criminal conviction. Otherwise the punishment, in effect, extends beyond that imposed by the court and the system does not meet its fundamental objective of making the punishment just.<sup>16</sup>

### III ANALYSIS AND CRITIQUE OF OBJECTIONS TO SPENT CONVICTIONS SCHEMES

The scope and application of spent convictions regimes are nonetheless controversial. By their nature, they restrict access to information to which employers and others feel they have a legitimate right. Restrictions on free access to such information can be viewed as contrary to the public interest for three main reasons.<sup>17</sup>

First is the argument that they permit an 'institutionalized lie'<sup>18</sup> by allowing a person to pretend that the offending behaviour never took place. It should be pointed out, however, that they involve a lesser form of lie than expungement schemes, such as those that exist in the United States ('US'), which involve the permanent deletion or sealing of a conviction. Spent conviction regimes simply restrict the public availability of particular spent convictions; the convictions still remain accessible to the courts and law enforcement bodies.

The ALRC considered this issue in its 1987 report on spent convictions in which it proposed a Commonwealth spent convictions regime.<sup>19</sup> It drew a distinction between permitting individuals to lie about their past convictions (which it did not support) and modifying the interpretation of statutory provisions requiring disclosure of criminal records information so that they were interpreted as excluding convictions which had become 'spent'.

The difficulty with the approach suggested by the ALRC is that, in the absence of strong anti-discrimination laws to prohibit discrimination on the grounds of irrelevant criminal record, it is insufficient to prevent employers and others from questioning an ex-offender about past offences. Moreover, any potential harm resulting from the 'statutory lie' should be lessened by the fact that employers and others are on notice as informed citizens that criminal history information needs to be understood as excluding any spent convictions.

A second objection to spent convictions regimes is that they undermine public safety by concealing important information and therefore leave the public, in general, and employers, in particular, at a disadvantage. This goes to the heart of the use of criminal records checks, the belief that the fact that a person has

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16 Jeanette Knowler, 'Living Down the Past: Spent Convictions Schemes in Australia' (1994) 1 *Privacy Law & Policy Reporter* 103, 103.

17 See Irish Law Reform Commission, *Spent Convictions Report*, LRC 84-200 (2007) 19–21 [1.38–1.44].

18 See Michael Mayfield, 'Revisiting Expungement: Concealing Information in an Information Age' [1997] *Utah Law Review* 1057, 1066.

19 ALRC, above n 11, 17 [25].

been convicted in the past (or, conversely, that they have a clean record) provides a good predictor of future offending behaviour.

Research does indicate that ex-offenders are initially more likely than non-offenders to offend in the future.<sup>20</sup> However, it also shows that with the passage of time – sometimes only a few years – their statistical risk of reoffending reduces to that of any other member of the community.<sup>21</sup> At the same time it must be accepted that any statistical prediction of risk does not guarantee that any one person will therefore offend. If it did, we would be justified in excluding all young males, being the cohort of the population statistically most likely to commit crime, particularly combined with poor school attendance and low literacy levels.

Moreover, certain categories of offending that are seen to pose a higher than average risk can be dealt with by way of exceptions to spent convictions laws. Spent convictions laws will also be overridden by specific restrictions on access to employment involving vulnerable groups of people, such as children, and employment in sensitive fields, such as policing and security.

It can also be argued that any potential harm to the community may be balanced by community benefits. As noted by the Western Australian Law Reform Commission, '[a] spent conviction scheme offers an incentive to convicted persons to become rehabilitated, and rewards them if they do so by limiting the effect of their old convictions.'<sup>22</sup> Also, to the extent that it assists an ex-offender in finding employment, it contributes to successful rehabilitation, thereby reducing any potential risk of public harm.<sup>23</sup>

A final objection to spent convictions regimes is that they seriously curtail freedom of information and free speech<sup>24</sup> and 'the interest of the public in having full access to matters of public record.'<sup>25</sup> However, such rights are often subject to compromise with competing rights (for example, the right to privacy under article 17 of the *ICCPR*). Moreover, the *Convention Concerning Discrimination in Respect of Employment and Occupation* requires all countries who are parties to the Convention to 'promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and

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20 See Megan Kurlychek, Robert Brame and Shawn Bushway, 'Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?' (2006) 5 *Criminology and Public Policy* 483, 489–90.

21 See, eg, Christy A Visher, Pamela K Lattimore and Richard L Linster, 'Predicting the Recidivism of Serious Youthful Offenders Using Survival Models' (1991) 29 *Criminology* 329, 351; Alfred Blumstein and Kiminori Nakamura, 'Redemption in the Presence of Widespread Criminal Background Checks' (2009) 47 *Criminology* 327.

22 Law Reform Commission of Western Australia, above n 12, 32 [4.3].

23 It is now generally accepted that employment provides a moderately strong predictor of (non)recidivism: see, for example, the meta-analysis in Paul Gendreau, Claire Goggin and Glenn Gray, 'Case Needs Review: Employment Domain' (Research Report, Centre for Criminal Justice Studies, University of New Brunswick, June 2000) <<http://www.ccoso.org/employmentaspredictor.pdf>>.

24 Irish Law Reform Commission, above n 17, 21 [1.44]. These rights are recognised in *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19 ('*ICCPR*').

25 ALRC, above n 11, 20–21 [32].

occupation, with a view to eliminating any discrimination'.<sup>26</sup> Australia has included discrimination on the basis of criminal record as one of the prohibited grounds of discrimination under regulation 4 of the *Australia Human Rights Commission Regulations 1989* (Cth) (formally the *Human Rights and Equal Opportunity Commission Regulations 1989*).

It follows therefore that rights of freedom of expression need to be balanced against countervailing values, including the rights to privacy and non-discrimination in employment. Criminal history information is highly prejudicial, as recognised by its classification under Australian privacy schemes as 'sensitive' information requiring additional protection over and above other categories of personal information.<sup>27</sup>

#### IV SENTENCING RATIONALES AND SPENT CONVICTIONS

The relationship between spent convictions schemes and principles of sentencing is central to an evaluation both of the competing policy considerations and the specific provisions of the Model Bill. Using criminal records to make an adverse decision about an individual who has served their sentence in effect lengthens the penalty. Whether this is acceptable must therefore logically be linked to the rationales which underlie the sentencing process.

The aims of sentencing and punishment are commonly understood to include punishment (or 'retribution'), deterrence, community protection (for example by incapacitation) and rehabilitation.<sup>28</sup> As pointed out by Bagaric and Edney, sentencing rationales are determined by the theories of punishment which underpin them, and which provide the justification for the state imposition of sanctions.<sup>29</sup>

H L A Hart has observed that theories of punishment are 'moral *claims* as to what justifies the practice of punishment – claims as to why, morally, it *should* or *may* be used'.<sup>30</sup> Theories of punishment fall into two broad groups: utilitarian theories focussed on achieving benefits which outweigh the harm imposed by punishment; and retributive theories focussed on punishment as a justified consequence of the offence committed. The former traditionally support rationales such as incapacitation, community safety, deterrence and rehabilitation while the latter traditionally support rationales based on punishment and

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26 *ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, [1974] ATS 12 (entered into force 15 June 1960) art 2.

27 See, eg, the *Privacy Act 1988* (Cth) s 6(1) (definition of 'sensitive information'); *Privacy Act 1988* (Cth) sch 3 (*National Privacy Principles*), item 10.

28 Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (Oxford University Press, 2004) 17–8. See, eg, *Sentencing Act 1991* (Vic) s 5(1).

29 Mirko Bagaric and Richard Edney, 'The Sentencing Advisory Commission and the Hope of Smarter Sentencing' (2004) 16 *Current Issues in Criminal Justice* 125, 127.

30 H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2008) 72 (emphasis in original).



retribution.<sup>31</sup> In practice, courts adopt a mixture of approaches, although they may give more emphasis to one or other.

We argue here that both utilitarian and retributive principles demand that limitations be placed on the impact of a criminal conviction on the offender's life once the sentence has been served. This is because the benefits of an offender having capacity to work and reintegrate outweigh those resulting from exclusion of offenders for safety and deterrence. Retribution must be understood to be served by the sentence itself, and not by any unpredictable subsequent consequences of recording of the conviction.

In the next section we will consider each sentencing aim in turn in terms of its relevance to criminal records.

### A Punishment and Retribution

Punishment essentially involves publicly imposing pain that is in some way commensurate with the harm caused by the illegal behaviour. The pain may involve loss of liberty, financial sanctions or constraints on the offender's use of his or her time (for example, via community work or curfew). The recording, and continued public availability of, the record of this decision can also be seen as an aspect of punishment. In the past this approach to punishment was reflected in some more extreme sanctions such as branding and exile. However, in recent years the principle of punishment has been reframed to provide a more nuanced response to crime, based on proportionality, or 'just deserts'. The 'just deserts' principle emphasises the relationship between the punishment and the crime; the more serious the harm committed, the harsher is the punishment warranted.<sup>32</sup> Applied to the question of a persisting criminal record, this principle requires that a criminal history should not continue indefinitely as a potential life sentence for all offences.

Proportional sentencing is consistent with human rights prohibitions against cruel, inhuman and degrading treatment or punishment.<sup>33</sup> It is grossly disproportionate punishment to allow individuals convicted of crimes, no matter

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31 See Bagaric and Edney, above n 29, 127.

32 See generally Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press, 1993).

33 ICCPR art 7; *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) arts 2, 16 ('CAT'). The ICCPR was signed by Australia on 18 December 1972 and ratified by Australia on 13 August 1980. The CAT was signed by Australia on 10 December 1985 and ratified by Australia on 8 August 1989. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10 ('Victorian Charter') includes this protection, as does *Human Rights Act 2004* (ACT) s 10 ('ACT Human Rights Act').

how minor, to face a potentially unlimited penalty.<sup>34</sup> Such extended secondary punishment also risks breaching the prohibition against double punishment.<sup>35</sup>

At the same time a persisting criminal record is also an unpredictable ‘punishment’. It will affect some people significantly, but will have little effect on others who, for example, already have employment, or who do not require employment, or who move to another jurisdiction where that information is less readily available.

### B Deterrence

Deterrence is taken to be achieved by the public finding of guilt, recording of a conviction and allocation of sentence. On the principle of specific deterrence these actions will deter the individual offender from offending again. They are also seen to serve the principle of general deterrence, deterring the broader community from future offending.

However, the deterrence principle assumes that people make rational decisions about whether or not to break the law. This may be true in some instances, for example, white-collar crimes, but is unlikely to be true for many other crimes. It is not clear that sentencing does deter offenders. There is mixed evidence to support the deterrent role of the criminal justice system and sentencing processes, although assumptions about deterrence are still politically powerful.<sup>36</sup>

We would also argue that it is morally repugnant to punish a person, and sustain their punishment by continued publication of their conviction, to achieve the deterrence of others.<sup>37</sup>

### C Community Safety

Many people see catching and punishing offenders as a key requirement for community safety. This rationale depends in part on specific and general deterrence, but also encourages routine use of custody as a penalty, and long prison terms, to ‘warehouse’ anybody believed to be at risk of reoffending in any

34 There is extensive precedent for the view that the prohibition against cruel and inhuman punishment requires consideration not just of the nature of the punishment itself but also of the extent to which it is proportionate to the circumstances of the offence committed, although that discussion has to date focussed on the duration of imprisonment rather than the ongoing consequences of conviction. See also Dirk van Zyl Smit and Andrew Ashworth, ‘Disproportionate Sentences as Human Rights Violations’ (2004) 67 *Modern Law Review* 541; New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) [10.5]. *Charter of Fundamental Rights of the European Union* [2000] OJ C 364 E/1 art 49(3) provides that ‘[t]he severity of penalties must not be disproportionate to the criminal offence.’

35 ICCPR art 14(7); see also *Victorian Charter* s 26; *ACT Human Rights Act* s 24.

36 See McSherry and Naylor, above n 28, 22–23. The research suggests that offenders are most likely to be deterred by the perceived likelihood of being caught; where they believe this is unlikely, factors such as sentence are not taken seriously: Raymond Paternoster, ‘How Much Do We Really Know About Criminal Deterrence?’ (2010) 100 *Journal of Criminal Law and Criminology* 765.

37 For discussion of Kant’s principle that a person should never be treated as a ‘mere means to an end’ see Joram Graf Haber (ed), *Absolutism and Its Consequentialist Critics* (Rowman & Littlefield Publishers, 1994).



way in the future. The public safety rationale would support continuous access to criminal history information in order to assist the community in taking precautions to protect itself against potential re-offenders.

However, considerations of community safety, while clearly important, need to be balanced by considerations of proportionality and justice more generally. In addition, an over-emphasis on this dimension of public safety ignores the potential dangers of strategies which stigmatise and exclude members of the community from support and gainful employment, increasing the risk that they will reoffend as a result. As explained by the Law Reform Commission of Western Australia, non-disclosure of old criminal records information '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.'<sup>38</sup> That occurs not just by avoiding overt discrimination but also by avoiding the more insidious consequences of criminal labelling. The act of physically deleting or making inaccessible a person's criminal record may therefore perform a valuable symbolic function; it enables a person 'to shed a negative (criminal) identity and (re-) assume a positive, non-criminal one'.<sup>39</sup>

#### D Rehabilitation

The rehabilitation goal focuses on improving and restoring the offender to become a law-abiding member of the community (for example, through treatment programs and vocational training in and outside prison). It requires that the response to crime should encompass considerations based on the diagnosis and classification of the offender and their individual potential for rehabilitation.<sup>40</sup> This approach may justify extended periods of detention or treatment (punishing individuals for what they might do rather than for what they have done). However, it also prioritises the need to address post-sentence consequences with a view to enhancing rehabilitation and reintegration into the community.

Although they are not inconsistent with other criteria, spent convictions regimes inherently reflect a preference for rehabilitation, as opposed to punishment or deterrence. As explained by Raynor and Robinson:

the legal notion of rehabilitation sees the act of physically deleting a person's criminal record as performing an important symbolic function: that is, it serves to 'de-label' a person, ... it is about reinstating the person as a law-abiding citizen.<sup>41</sup>

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38 Law Reform Commission of Western Australia, *Project No 80: The Problem of Old Convictions*, Discussion Paper (1984) 3 [1.6].

39 Peter Raynor and Gwen Robinson, *Rehabilitation, Crime and Justice* (Palgrave Macmillan, 2009) 10.

40 *Ibid* 23–4.

41 *Ibid* 10.

### **E Assessing the Relevance of Sentencing Rationales to Spent Convictions Regimes**

The priority given to specific rationales will be relevant both in assessing the cost-benefit of spent convictions laws and in structuring their application.

An emphasis on rehabilitation justifies an approach involving a statutory lie in respect of past convictions. It suggests that society has a responsibility to restore and rehabilitate criminals, in order to redress the damage caused by punishing them. Under this approach, criminal records should be capable of being expunged altogether, as occurs in some parts of Europe,<sup>42</sup> or at least sealed for most practical purposes, as occurs in some parts of the US.<sup>43</sup>

On the other hand, an approach which emphasises public safety may require individuals to seek court orders before convictions can be treated as spent (so as to allow for individualised assessment of future risk). It may also include requirements for a longer crime-free period and limit the range of offences that are eligible to be spent.

We would also argue that deterrence as a goal should be relevant only at the time of sentencing. The deterrent effect of any stigma resulting from a criminal record is likely to be unpredictable, depending for example on whether the offender works in a field where criminal records checks are the norm. It follows therefore that consideration of deterrence should be irrelevant to the design of spent convictions regimes and that the focus of punishment should be on the sentence imposed rather than on the vagaries of any continuing criminal records checking. In other words, spent convictions regimes have an important role to play in ensuring that punishment is proportionate and not allowed to continue indefinitely.

To address the issues of rehabilitation and public safety, attention must be given to what is now known about the drivers of recidivism. Evidence that particular offenders, or particular groups of offenders, are unlikely to reoffend should be taken into account when designing a spent convictions regime. Recidivism studies can shed light on the significance of a range of different factors, including the type of offence, the actual penalty imposed, the age and other individual characteristics of the offender and how long has elapsed since their last conviction or guilty finding. Their contribution to the design of a spent convictions scheme will be discussed in more detail in the context of the Model Bill, below.

While recidivism is clearly relevant, a policy which is based purely on concern about an individual's possible future actions (as opposed to what they have done in the past) or the extent to which they might be capable of reform, raises similar human rights issues to those previously noted in the context of indefinite sentencing. Moreover, taking account of potential rehabilitation is

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42 Martine Herzog-Evans, 'Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance' (2011) 3(1) *European Journal of Probation* 4.

43 See, eg, NY Criminal Procedure Law § 160.58 (2011); *Criminal Record Sealing Act of 2006*, DC Code tit 16 ch 8 (2011).

consistent with a public safety objective. Public safety is clearly enhanced by increased numbers of rehabilitated ex-offenders. As observed by the Victorian Supreme Court in a recent decision concerning an application by a person with old criminal convictions for accreditation to drive buses, evidence of the applicant's rehabilitation was directly relevant to the question of whether he would drive buses honestly in the future.<sup>44</sup>

In addition, consideration of public safety, while clearly important, should not automatically take precedence over competing human rights. The UK Supreme Court considered this issue recently in the context of police practices in disclosing old criminal records information.<sup>45</sup> In its view the issue was essentially one of proportionality. It was 'of the greatest importance' that the balance between the two competing considerations in this case – the need to protect children and vulnerable adults, and the applicant's right to respect for her private life – was struck in the right place.

In summary, the emphasis given to punishment, deterrence, community safety and rehabilitation has an important role to play in determining appropriate design of any spent convictions regime. These criteria will be employed to assess the proposed Model Bill.

## V THE UNIFORM SPENT CONVICTIONS BILL

### A Overview

The ALRC proposed a Commonwealth Spent Convictions Scheme in its Report 37 in 1987, and the proposal was implemented in June 1990.<sup>46</sup> The ALRC also proposed that the states and territories develop such schemes, an invitation which was not taken up at the time. The idea of uniform Australia-wide spent convictions regimes was then raised at SCAG in 2000 in response to the issues created by 'the online dissemination of criminal record information from databases such as CrimeNet'.<sup>47</sup> A working party produced an issues paper on the topic in 2001.<sup>48</sup> This was followed by the publication in 2004 of a discussion paper proposing a uniform spent convictions regime.<sup>49</sup>

A further five years elapsed before the release of the Model Spent Convictions Bill and consultation paper in late 2009. The Model Bill has been described as being designed 'to reduce the confusion created by different

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44 *Director of Public Transport v Wilkins* [2009] VSC 506 (29 October 2009) [12]; see *Transport (Compliance and Miscellaneous) Act 1983* (Vic) ss 164, 169.

45 *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410.

46 It appears in *Crimes Act 1914* (Cth) pt VIIC.

47 Standing Committee of Attorneys-General, above n 13, 4.

48 Victorian Department of Justice, *Online Dissemination of Criminal History Information Obtained from Public Sources* (2001).

49 See Justice Debra A Mullins, 'Judicial Writing in an Electronic Age' (Paper presented at the Supreme and Federal Courts Judges Conference, Darwin, 26 January 2005) 4  
<<http://www.austlii.edu.au/au/journals/QLdJSchol/2005/4.html>>.

requirements in different jurisdictions' and 'assist with problems associated with the sharing of criminal history information'.<sup>50</sup>

The Model Bill provides a procedure which is applicable only to minor convictions. These would automatically become spent after specified qualifying periods. Convictions are eligible to become spent if the offender:

- receives a prison sentence of less than 12 months in the case of an adult (or 24 months in the case of a juvenile offender);<sup>51</sup> and
- completes a conviction-free period of 10 years (or five years for a juvenile) commencing on the date of the conviction.<sup>52</sup>

The Bill operates by making it unnecessary for ex-offenders to answer questions or to reveal information about convictions which have become spent<sup>53</sup> and by criminalising unauthorised dealings with spent convictions information.<sup>54</sup> However, spent convictions can still be disclosed for the purposes of sentencing by the courts and there are also a large number of other exceptions (for example, in relation to employment in child-related occupations and in positions requiring high standards of integrity such as judges or police officers).<sup>55</sup>

In assessing the main features of the Model Bill, it is useful to compare key aspects with those in existing Australian spent convictions legislation (as summarised in the Appendix below), as well as taking account of the theoretical and policy issues discussed above.

## **B Assessment of the Bill's Use of Length of Sentence as an Eligibility Criterion**

The Model Bill defines eligible offences in terms of the sentence imposed by the court, as a measure of offence seriousness. It does not distinguish between different categories of offences, other than sex offences (as discussed below) and offences committed by corporations (which are excluded from the regime).

### **1 Offences Other than Sex Offences**

The term 'eligible adult offence' is defined as 'an offence committed by an adult where, on conviction of the defendant:

- (a) a sentence of imprisonment is not imposed; or
- (b) a sentence of imprisonment is imposed but the sentence is 12 months or less'.<sup>56</sup>

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50 New South Wales, *Parliamentary Debates*, Legislative Council, 12 November 2009, 19 466 (John Hatzistergos).

51 Model Bill cl 3 (definition of 'eligible adult offence').

52 Model Bill cl 7(1).

53 Model Bill cl 11.

54 Model Bill cls 12–13.

55 See Model Bill sch 2 – Exclusions.

56 Model Bill cl 3 (definition of 'eligible adult offence').

Similarly, ‘eligible juvenile offence’ means ‘an offence committed while the defendant was a child where, on conviction of the defendant:

- (a) a sentence of imprisonment is not imposed; or
- (b) a sentence of imprisonment is imposed but the sentence is 24 months or less’.<sup>57</sup>

A conviction is also spent if it is quashed or the person convicted for it receives a pardon.<sup>58</sup> It should be pointed out that such ‘convictions’ include findings of guilt, even where no conviction was recorded.

The coverage of the scheme reflects not only a moral judgement as to when someone is entitled to ‘redemption’, but implicitly an assessment of how much extended punishment is needed. Eligibility is directly related to the length of the sentence, and thus indirectly to the court’s assessment of the seriousness of the original offence. A longer sentence presumably indicates a more serious offence, or more serious form of an offence, and thus is excluded from the scheme.

The eligibility criteria also reflect assumptions about the likelihood of rehabilitation. A longer sentence is taken to indicate a reduced chance of rehabilitation and a higher risk of reoffending. This makes intuitive sense but is not supported by the empirical evidence. While recidivism studies show that persons with criminal records are initially more likely to offend in the future than other persons, they also show that this risk decreases substantially both with the age of the offender and the passage of time.<sup>59</sup> Studies of what makes people desist from crime show, for example, that stable marriage and employment are strong predictors of desistance.<sup>60</sup> They also show that the degree of future risk does not necessarily correlate with the seriousness of the offence.<sup>61</sup> For example, a study in the United States of America (‘US’) found different recidivism rates for robbery, burglary and aggravated assault (all serious offences).<sup>62</sup>

While the eligibility criteria would have brought around 80 to 90 per cent of offences within the scheme as at 2008,<sup>63</sup> political pressures may also lead over time to longer sentences being imposed across the board,<sup>64</sup> thereby reducing the coverage provided. We would argue that the need to set a threshold should be reconsidered in light of the lack of evidence that serious offenders are more

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57 Model Bill cl 3 (definition of ‘eligible juvenile offence’).

58 Model Bill cl 4.

59 David P Farrington, ‘Age and Crime’ (1986) 7 *Crime and Justice* 189; Keith Soothill and Brian Francis, ‘When Do Ex-Offenders Become Like Non-Offenders?’ (2009) 48 *Howard Journal of Criminal Justice* 373.

60 Blumstein and Nakamura, above n 21, 331; Christopher 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.

61 For example, research indicates that sex offenders reoffend less than many other types of offenders: Astrid Birgden, ‘*Serious Sex Offenders Monitoring Act 2005* (Vic): A Therapeutic Jurisprudence Analysis’ (2007) 14 *Psychiatry, Psychology and Law* 78, 82.

62 Blumstein and Nakamura, above n 21.

63 See Victorian Department of Justice, *Draft Model Spent Convictions Bill*, Consultation Paper (2008) 2.

64 See generally, Julian Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003).

likely to re-offend than those who have committed less serious crimes and would support the recommendations in the ALRC's 1987 report<sup>65</sup> that all offences be eligible to be spent.

To justify the eligibility of even the most serious offences, the Commission proposed a standard 10-year period of good behaviour, to be calculated from the completion of sentence. It observed that for serious offences, a longer period was required before the conviction could be spent.<sup>66</sup> We will discuss the required period of 'good behaviour' further below.

We would also argue that, irrespective of where the line is drawn, it should always be possible for a conviction to be spent, even if that process is not automatic. A compromise approach is that adopted in Western Australia, where individuals who have committed serious offences can apply for a court order declaring that the conviction is spent.<sup>67</sup> This allows an individualised assessment of the level of risk associated with the specific crime and of rehabilitation achieved. A disadvantage, however, is that a public hearing risks re-inflaming community concern and re-stigmatising an offender contrary to the purposes sought to be achieved. It would therefore be appropriate to close such hearings to the public.<sup>68</sup>

## 2 *Sexual Offences*

The Model Bill provides scope for jurisdictions to exclude sexual offences from their spent convictions regimes. In that case clause 5(2) provides that a sex offence is not capable of being spent. The definition of 'sex offence' leaves it to each state to prescribe by regulation which offences qualify for exclusion.<sup>69</sup> Where a state chooses to exclude sex offences, clause 9 contains a modified process for offenders convicted of a 'prescribed eligible offence' (presumably a more minor category of sex offence) to apply for a court order<sup>70</sup> that the offence be 'spent' if specific criteria have been met.<sup>71</sup> Clause 9(5) provides that the making of such an order 'is at the discretion of the Court and that discretion will be exercised having regard to:

- (a) the nature, circumstances and seriousness of the offence;
- (b) the length and kind of sentence imposed in respect of the conviction;
- (c) the length of time since the conviction;
- (d) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the

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65 ALRC, above n 11, 29 [47].

66 Ibid.

67 *Spent Convictions Act 1988* (WA) s 6.

68 The ALRC considered and rejected the requirement for a tribunal decision in relation to serious offences, on the basis of concerns about delay, administrative burden, and counter-productive publicity for ex-offenders: ALRC, above n 11, 33 [53].

69 Model Bill cl 3 (definition of 'sex offence').

70 In the case of the Model Bill which is drafted as if it is a South Australian Act, the relevant court is the South Australian District Court: see definition of 'court' in cl 3.

71 Model Bill cl 9.



time of the application and whether the applicant appears to have rehabilitated and to be of good character;

- (e) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment; and
- (f) whether there is any public interest to be served in not making an order.’

The option to exclude sex offences is consistent with current policies which treat sex offenders as uniquely threatening and as presenting a higher risk of reoffending than other offenders. Specific restrictive measures apply to sex offenders, such as sex offender registers.<sup>72</sup> However, the evidence does not suggest that sex offending carries a higher risk of recidivism than other offenders; on the contrary, they are, if anything, less likely to reoffend.<sup>73</sup> The spent convictions regime in Queensland does not treat sex offending differently from other offending, and there is no evidence that this approach over 24 years has been problematic.<sup>74</sup> The process in Western Australia by which sex offenders can apply for a spent conviction order also appears to be uncontroversial.<sup>75</sup> The arguments against indefinite ‘labelling’ of offenders apply as strongly to this group as to any other. It is unprincipled to extend the punishment of sex offenders alone, by refusing access to a spent convictions regime.

Sex offences should therefore be capable of being spent in the same way as any other offence, and any situations where there is a countervailing public interest in disclosure should be dealt with via exceptions. The Model Bill provides that relevant offences cannot be treated as spent for specific professions such as childcare and care of the elderly (discussed further below), and these would prevent sexual offences being spent in these situations. This is a preferable approach to managing perceived areas of risk.

If it is considered that some sexual offences nonetheless require special attention, the proposed court process for determining whether the conviction could be spent after expiry of the eligibility period should be made available in respect of all of them and not just for selected ones, as is currently the case under clause 9(5). We would, however, suggest that the process be limited to more serious sexual offences and offences with a clear link to recidivism and risk. It

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72 Sex offender registers operate in all Australian jurisdictions as well internationally: see, eg, *Sex Offenders Registration Act 2004* (Vic). CrimTrac also co-ordinates the Australian National Child Offender Register (ANCOR).

73 See Karen Gelb, ‘Recidivism of Sex Offenders’ (Research Paper, Sentencing Advisory Council, January 2007) <<http://sentencingcouncil.vic.gov.au/landing/publications>>. See also Birgden’s research finding that sex offenders reoffend less than many other types of offenders and that sex offenders are more likely to reoffend if their victims are adults: Birgden, above n 61, 82.

74 See discussion in relation to juvenile sex offenders in Standing Committee on Law and Justice, Parliament of New South Wales, *Spent Convictions for Juvenile Offenders*, Report No 42 (2010) 9 [2.23]–[2.24].

75 Of 18 applications for orders in 2008, three involved sexual assault convictions, and all were successful: *ibid* 10 [2.28].

should not be necessary for less serious offences. Excluding offences from a spent convictions scheme without some discretionary procedure for inclusion is undesirable in principle and fails to take into account the high degree of variation amongst offenders in terms of moral culpability and potential future risk. It prioritises punishment goals over either rehabilitation or the assessment of risk of reoffending.

In summary, there should be a legislative presumption that all categories of convictions should be capable of being spent, subject to clear criteria for a contrary finding.

### **C Assessment of the Bill's Specified Period of Time for Convictions to Become Spent**

Under the Model Bill, eligible offences become spent only after 10 years following the date of conviction in the case of adult offences and five years in the case of offences committed while a child.<sup>76</sup> By implication, offenders are therefore expected to experience, for the periods prescribed, continued additional indirect punishment after the expiration of their sentence, and reduced capacity for rehabilitation.

Although periods of 10 and five years respectively are consistent with the position adopted in most Australian jurisdictions (see Appendix), these periods are too long when considered in the light of the sentencing rationales identified earlier.

A regime which effectively allows for the imposition of an additional period of 10 years further incidental punishment (or five years for juvenile offences) is inconsistent with the concept of proportionality. While it provides a formula which is both simple and easy to apply, it has the disadvantage of being excessively rigid.

The 10-year eligibility period is also inimical to the objective of rehabilitation. Rehabilitation is dependent on ex-offenders being able to access employment as soon as possible and being able to reintegrate into the community free of discriminatory labelling. As observed by the Western Australian Law Reform Commission:

If the primary purpose of reform is seen as the rehabilitation of offenders then the speedy integration of the offender into society is desirable. It is then arguable that provisions should operate upon the offender's release from prison or the discharge of the penalty.<sup>77</sup>

Countervailing arguments are primarily based on concerns about community safety together with the moral claim that ex-offenders should prove themselves as worthy before being fully accepted back into the community.

The difficulty in relation to the former argument is that community safety may be as much prejudiced as advantaged where an ex-offender is excluded from the employment and other benefits which provide the incentives to avoid

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<sup>76</sup> See qualification period in cl 7.

<sup>77</sup> Law Reform Commission of Western Australia, above n 38, 48 [9.14].

criminal activity. As noted earlier, there is clear evidence that the factors which are important in assisting individuals to desist from crime – stable routines, family relationships and self-respect – are assisted by employment. While rehabilitation initiatives have had a mixed track record to date, this may be in part because of the failure to provide suitable environments and supports for ex-offenders, including effective pathways into gainful employment.

The demand that ex-offenders ‘prove themselves’ similarly makes much more sense where the offender has been given realistic opportunities to do so.

A fairer approach would be to have different good behaviour eligibility periods based on the length of sentence imposed. This approach is directly linked to the proportionality principle of punishment and of just deserts, and implicitly continues to respect the original judge’s assessment of the offender’s culpability and risk.

Many European countries, and some states in the US, employ staggered ‘good behaviour’ periods beginning at less than 10 years and linked to the length of the sentence.<sup>78</sup> In New Zealand the eligibility period is seven years post sentence without further conviction, although the eligible offences exclude any that attracted a custodial sentence.<sup>79</sup> A bill has been introduced in the UK to reduce the eligibility periods for any sentence, other than life or preventive detention, 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).<sup>80</sup>

In line with all these arguments, there is a strong claim to be made that minor offences where no conviction is recorded should be treated as spent immediately as was recommended by the ALRC in 1987 and as is the case in New South Wales.<sup>81</sup> These should not appear on an individual’s criminal record at all. This follows from the fact that a non-conviction disposition is a specific sentencing decision, recognising the judge’s assessment of the low level of seriousness of the offence and expressly intended to mitigate the impact of a formal record on a person’s future. The Victorian *Sentencing Act 1991*, for example, provides that where a court is deciding whether or not to record a conviction, it must have regard to factors including the impact of recording a conviction on ‘the offender’s economic or social well-being or on his or her employment prospects’.<sup>82</sup> The Act goes on to state that, unless otherwise provided by

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78 For a summary see Sentencing and Offences Unit, Home Office of the United Kingdom, *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act (2002)* 65–74.

79 *Criminal Records (Clean Slate) Act 2004* (NZ) ss 4 (definition of ‘rehabilitation period’), 7(1).

80 Rehabilitation of Offenders (Amendment) HL Bill (2010–11) 89. The Bill was first introduced in November 2009, and has been reintroduced since the UK election. It was read for the second time in the House of Lords in January 2011: HL Deb 21 January 2011, vol 724, cols 637–9.

81 Australian Law Reform Commission, above n 11, [63]; *Criminal Records Act 1991* (NSW) s 8(2). Similarly a release on a good behaviour bond is regarded as spent upon completion of the period of the bond: at s 8(4).

82 *Sentencing Act 1991* (Vic) s 8(1)(c).

legislation, ‘a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose.’<sup>83</sup>

Recent research is providing the evidentiary basis for a more nuanced allocation of eligibility periods that reflects the risk of recidivism, rather than a moral or punitive agenda. 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, whilst for young violent offenders it took around eight years to have a comparably low level of risk.<sup>84</sup> This could warrant further gradations within a spent conviction scheme to adjust the agreed ‘good behaviour’ period with reference not only to the sentence length but also the particular offence.

#### **D Protections from Being Required to Disclose a Conviction**

Spent convictions laws commonly contain provisions designed to limit access to and use of ex-offenders’ spent convictions by employers and others. As shown in the Appendix, the Model Bill includes four key features generally found in existing Australian laws. It provides that:

- an ex-offender is entitled to omit spent convictions when answering questions about, his or her criminal history;<sup>85</sup>
- an ex-offender is not required to disclose a spent conviction for any purpose;<sup>86</sup>
- references to convictions should be taken as not referring to spent convictions;<sup>87</sup> and
- references to a person’s fitness or character are not to be interpreted as requiring or permitting regard to spent convictions information.<sup>88</sup>

While we would support this approach, we nevertheless have concerns that the wording of this provision is not sufficiently tight. It is widely recognised that employers may ask questions in a variety of ways; the proposed section 11(a) should refer to ‘a question about the person’s criminal history *however expressed*’ to include questions about ‘charges’ and about ‘any contact with the criminal justice system’.

Another important feature of the Model Bill is that it directly tackles the issue of adverse decisions based on spent convictions. It does not, and cannot in

83 *Sentencing Act 1991* (Vic) s 8(2).

84 Blumstein and Nakamura, above n 21, 344.

85 Clause 11(a) states that: ‘a question about the person’s criminal history is taken not to refer to the spent conviction, but to refer only to any of the person’s convictions that are not spent’.

86 Clause 11(b) states that: ‘the person is not required to disclose to any other person for any purpose 15 information concerning the spent conviction’.

87 Clause 11(c)(i) states that: in the application to the person of an Act, statutory instrument, agreement or arrangement ‘reference to a conviction, however expressed, is taken not to refer to the spent conviction.’

88 Clause 11(c)(ii) states that: in the application to the person of an Act, statutory instrument, agreement or arrangement ‘a reference to the person’s character or fitness, however expressed, is not to be taken as allowing or requiring account to be taken of the spent conviction.’

practice, totally prevent decision-makers from obtaining access to spent convictions information. For example, that information may be available from an overseas website or from some excepted report or authorised publication. The Bill therefore states specifically in clause 11(d) that a spent conviction is not a proper ground either for refusing a person any appointment, post, status or privilege or for revoking any appointment, status or privilege held by the person, or dismissing him or her from any post.<sup>89</sup>

Clause 11(d) of the Model Bill does not however provide individuals affected with any direct form of redress, in contrast to the situation under anti-discrimination laws where discrimination on the grounds of a spent conviction provides grounds for a discrimination complaint. However, it does indirectly provide for redress in some cases. For example, a person who was dismissed on the basis of a spent conviction would have grounds for bringing an action for unfair dismissal. Similarly, a person who was denied a licence based on a spent conviction would have grounds for seeking judicial review on the basis that the decision-maker had taken into account an irrelevant consideration in arriving at its decision.

We fully endorse measures to protect the secrecy of spent convictions information. However, our research suggests that both offenders and employers are unclear about how spent convictions provisions of this type apply in specific cases.<sup>90</sup> It is therefore important that governments minimise the risk of illegal disclosures, and failures to disclose, by providing wide-ranging education about the scheme.

Measures should also be included to assist ex-offenders to obtain certainty about the status of their conviction. There is merit in providing for a scheme along the lines of the Western Australian Act whereby ex-offenders can apply for a certificate which specifies that a conviction qualifies as spent.<sup>91</sup> We would, however, argue that a spent convictions scheme should be self-executing, and that a procedure for obtaining a certificate should be provided simply as a means of formally representing the fact that the convictions are spent, and not a precondition for obtaining spent status.

### **E Dealings with Spent Convictions Information by Third Parties**

Another important feature of any spent convictions law is the inclusion of provisions which criminalise or otherwise forbid the disclosure of information about spent convictions.

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89 Clause 11(d) states that: 'the spent conviction, or the non-disclosure of the spent conviction, is not a proper ground for:

- (i) refusing the person any appointment, post, status or privilege; or
- (ii) revoking any appointment, status or privilege held by the person, or
- (iii) dismissing the person from any post.'

90 Georgina Heydon, Bronwyn Naylor, Moira Paterson and Marilyn Pittard. 'Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel' (2011) 32(2) *Adelaide Law Review* (forthcoming); Sentencing and Offences Unit, above n 78, 60.

91 *Spent Convictions Act 1988* (WA) s 6.

Traditionally the main concern has been with disclosure of public records relating to spent convictions. Most Australian jurisdictions criminalise the wrongful disclosure of public records. The Model Bill follows a similar approach, although it contains a drafting note which allows for an alternative remedy such as a complaint to a Privacy Commissioner.<sup>92</sup> Clause 12 makes it an offence subject to a maximum penalty of \$10 000 for a person with access to records of convictions kept by or on behalf of a public authority to disclose information about a spent conviction held by the authority, if he or she knew, or ought reasonably to have known that the information was about a spent conviction.<sup>93</sup> It is, however, a defence if the disclosure is made with the consent of the individual concerned.

A more recent concern relates to businesses which provide employers and others with information about criminal records gleaned from public sources such as newspapers and websites. The Model Bill addresses this issue by making it an offence for a person, in the course of carrying on a business that includes or involves the provision of information about convictions for offences to disclose information about a spent conviction in circumstances where he or she knew, or ought reasonably have known, at the time of the disclosure, that the information was about a spent conviction.<sup>94</sup> That offence also carries a maximum penalty of \$10 000.

A gap which continues to exist, however, is the availability of criminal records information via overseas websites which provide similar services and which are potentially accessible by employers and others. Those websites are beyond the jurisdiction of Australian law but their use can, and should, be addressed by measures to actively discourage their use by local decision-makers. One possibility would be to make it a criminal offence for a person who has made use of an overseas service or website to access information which he or she knows, or ought reasonably to know, relates to a spent conviction to take it into account when making an employment decision.<sup>95</sup>

Given the reality that there will be many employers who may be interested in accessing criminal records information, even illegally, we would argue that the Bill should provide clear sanctions for such behaviour. A range of sanctions and remedies is provided in Part VIIC of the *Crimes Act 1914* (Cth) which should be considered here. In particular, the legislation should:

- penalise Australians for publishing spent convictions on the internet and for accessing and using spent convictions information in decisions affecting individuals (irrespective of where that information is uploaded onto the Internet);

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92 That is the approach currently taken in the *Crimes Act 1914* (Cth) pt VIIC div 5.

93 Model Bill cl 12(1).

94 Model Bill cl 13. It is not clear how easy this provision would be to prosecute; it may be difficult to show that a business, including an internet-based information provider, 'ought reasonably to have known' that a particular spent convictions regime applied.

95 This would include any decision not to employ or promote that person or any decision to dismiss them from an existing job.



- include appropriate sanctions for reliance on a spent conviction in relation to any appointment, licence application or accreditation process; and
- ensure that under clause 13 dealing with unlawful disclosure in the course of business activities, ‘person’ includes both natural and corporate persons, and anyone operating a website.

### F Exceptions

Spent convictions regimes differ from expungement regimes in that they are only designed to limit the availability and use of spent convictions information. As noted by the Irish Law Reform Commission, ‘[s]ince a person’s criminal convictions are not actually deleted from the record under a spent convictions scheme, it operates instead by curtailing the range of individuals to whom the conviction must be disclosed.’<sup>96</sup>

Spent convictions regimes do not limit access and use by courts or police or in relation to screening checks for specific public appointments, including judicial appointments. They also generally include exceptions for decisions in relation to specific categories of employment such as those involving working with children or the aged.

The Model Bill contains a large number of exceptions in clause 14. In summary, these relate to the following categories of bodies and documents:

- justice agencies in relation to the exercise of their powers;
- Commonwealth agencies, including in relation to employment in intelligence agencies, AUSTRAC and designated positions and for employment purposes and for migration/citizenship decision-making;
- designated courts and tribunals in connection with their proceedings;
- parole boards and equivalent bodies in relation to their proceedings;
- in relation to employment of judicial and associated officers;
- care, employment and other activities involving children, the aged and persons with disabilities;
- firefighting (convictions relating to the setting of a fire);
- official records (disclosures made in the course of duties);
- archives and libraries (in accordance with normal procedures);
- specified categories of reports and authorised publications; and
- non-identifying information.<sup>97</sup>

While these exceptions are not novel, they are very wide-ranging especially in relation to ‘care, employment and similar activities.’<sup>98</sup> This category covers

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<sup>96</sup> Irish Law Reform Commission, above n 17, 60 [250].

<sup>97</sup> See table in cl 14; the exceptions are not exhaustive.

<sup>98</sup> See Model Bill cl 14 (Item 6 of Table).

not only employment and other activities involving children and the aged, as would be expected. It extends much more generally to registration, enrolment, licencing or accreditation, in or in relation to an occupation, profession or position that requires the person, pursuant to statute, to be a fit and proper person or to be a person of good character.

We would argue that exceptions of this type should be restricted to, at most, the release of *relevant* convictions, that is, convictions relevant to specific types of reoffending. For example, where the former offender seeks to work with children or elderly people, the exception should be limited to release of relevant sexual and/or violent offences, if these are the behaviours of concern.

It is our view that activities involving vulnerable groups such as the aged or children are best regulated by regimes such as the Victorian Working with Children checks scheme.<sup>99</sup> These schemes do not generally involve the direct disclosure of information to employers but rather require workers to obtain a check which is based on an evaluation of relevant criminal history information. They require evaluation of different categories of relevant offences and include provision for appeal and review.

We would further suggest that allowing release of all prior convictions under a 'fit and proper' test is too broad, and that any exception should only permit release of information specific to the occupation or profession.

## VI CONCLUSION

Principles of sentencing and punishment provide little excuse for indefinite availability of a person's criminal history.

We have argued that the provision of information about previous offending should be strictly regulated by reference to risk, that the evidence demonstrates that the passage of time substantially reduces the relevance of most records for future behaviour, and that all offences should be regarded as capable of becoming 'spent' unless there are exceptional reasons not do so.

SCAG's Model Spent Convictions Bill provides an important first step in addressing the potentially negative impacts of criminal records checks and their uses by employers and others. National legislation is also an important positive step. However, it is too narrow in its scope to provide much assistance to the large number of individuals who are now affected by criminal records checking. An analysis of the competing criminal justice rationales demonstrates that a more generous and more nuanced approach is called for.

Spent convictions regimes, of their nature, are concerned with older and less serious offences. They are therefore, at best, a partial measure for addressing the consequences of criminal records checking, especially for ex-prisoners at the

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99 *Working with Children Act 2005* (Vic). See also the '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).

critical time when they are first trying to reintegrate back into society. Any spent convictions regime must therefore always be supplemented by additional measures such as equal opportunity laws which make it illegal to discriminate on the grounds of irrelevant criminal records and measures to ensure that employers and others do not collect and use criminal records information for irrelevant purposes.

Positive support for the employment of ex-offenders should also be government strategy. Such support is needed to reduce disadvantage and enhance reintegration of this substantial labour pool, and in recognition of the fact that rehabilitation and community protection are not conflicting goals. In the meantime, a generous national spent convictions regime is an essential starting point.

APPENDIX

	Model Bill <sup>a</sup>	ACT <sup>b</sup>	Cth <sup>c</sup>	NSW <sup>d</sup>	NT <sup>e</sup>	QLD <sup>f</sup>	SA <sup>g</sup>	Tas <sup>h</sup>	WA <sup>i</sup>
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	√	-	√	√	√	√	√	√	-
	-	√	-	-j	-k	-	-	-	-

<sup>a</sup> Model Spent Convictions Bill 2008.  
<sup>b</sup> Spent Convictions Act 2000 (ACT).  
<sup>c</sup> Crimes Act 1914 (Cth).  
<sup>d</sup> Criminal Records Act 1991 (NSW).  
<sup>e</sup> Criminal Records (Spent Convictions) Act 1992 (NT).  
<sup>f</sup> Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld).  
<sup>g</sup> Spent Convictions Act 2009 (SA).  
<sup>h</sup> Annulled Convictions Act 2003 (Tas).  
<sup>i</sup> Spent Convictions Act 1988 (WA).  
<sup>j</sup> See Criminal Records Act 1991 (NSW) s 9.  
<sup>k</sup> See Criminal Records (Spent Convictions) Act 1992 (NT) s 6(2).

									Other	End of period of sentence of irrepective of time served
Effect of being spent	✓	✓	✓	✓	✓	✓	✓	✓	Lying about spent conviction permitted	✓
Not required to disclose	✓		✓	-	✓	✓	✓	✓		✓
Crim history refers only to unspent convictions	✓	✓	✓	✓	✓	✓	✓	✓	to assess	✓
questions statutory obligations	✓	✓	✓	-	✓	✓	✓	✓	character/ fitness exclude spent convictions	✓
Statutory etc duties	✓	✓	✓	-	✓	✓	✓	✓	Lying about spent conviction permitted	✓
to assess	✓	✓	✓	✓	✓	✓	✓	✓	Prohibited dealings	✓
character/ fitness exclude spent convictions	✓	✓	✓	✓	✓	✓	✓	✓	Not to be taken into account in assessing	✓
Lying about spent conviction permitted	✓	✓	✓	✓	✓	✓	✓	✓		✓
Prohibited dealings	✓	✓	✓	✓	✓	✓	✓	✓		✓
Not to be taken into account in assessing	✓	✓	✓	✓	✓	✓	✓	✓		✓

<sup>i</sup> Criminal Law (Rehabilitation of Offenders) Act 1986 (Old) s 8

<sup>m</sup> Annulled Convictions Act 2003 (Tas) s 9.

