IN THE SHADOW OF A CRIMINAL RECORD: PROPOSING A JUST MODEL OF CRIMINAL RECORD EMPLOYMENT CHECKS

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[Requests for criminal record checks have increased significantly in recent years as employers focus on risk avoidance in seeking employees with no criminal record. This trend has coincided with local incidents, global fears and hardening 'law and order' agendas. However, there has been no comparable attention given to the implications for the rehabilitation of former offenders, and for discrimination and privacy issues. Employment is fundamental to rehabilitation and reintegration; failure to obtain employment creates a high risk of reoffending. This article examines the role of the law in Australia in facilitating, encouraging and even compelling the making of criminal record checks; the scope of legal mechanisms (such as spent convictions and anti-discrimination regimes) which attempt to balance employer needs with those of former offenders; and the impact of complex, piecemeal and inconsistent laws on issues related to criminal record checks. A new legal framework is proposed, one which seeks to provide a more just model of using criminal record checks in the employment process.]

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I INTRODUCTION

In recent years there has been an exponential increase in the disclosure of criminal history information throughout the world. In Australia, requests to CrimTrac, the national criminal record agency, increased 35 per cent from 1.7 million in 2005–06 to 2.3 million in 2006–07.[1] Moreover, requests to the Australian Federal Police in the same period rose 22 per cent from 490 000 to 600 000.[2] Over a longer period the increases are more startling: requests to the Australian Federal Police have increased sevenfold since 1997; requests to CrimTrac have increased more than sevenfold since 2000; and Victoria Police received only 3459 requests for a criminal record check in 1992–93 compared with 467 878 in 2006–07.[3] Commercial internet-based services, both local and international, have also proliferated, disseminating information scoured not only from official sources but also from newspaper reports and other public sites.[4]

The continued use of criminal history information can seriously affect the lives of individuals with criminal convictions and undermines the principle that people who have 'served their time' should be able to make a fresh start.[5] Moreover, the use of this information to exclude people from employment damages an ex-offender's prospects of rehabilitation and increases their risk of reoffending, along with all of the economic and social costs associated with recidivism. At the same time, it reduces both the potential contribution of that individual and the pool of labour and skills available to society generally. This can have a pervasive effect given that a not insignificant number of people have some form of criminal record.[6]

Research in the United Kingdom found that approximately two-thirds of employers requested information from job applicants about their criminal history, often irrespective of which position they were applying for.[7] Job advertisements in Australia can require applicants to undergo a police check and recruitment agencies can include questions about criminal history in their first telephone contact with all prospective applicants. Searches of websites also show, for example, that recruitment agencies and universities recruiting students for

1 CrimTrac Agency, *Annual Report 2006–07* (2007) 37.

2 Australian Federal Police, *Annual Report 2006–07* (2007) 106.

3 These increases have been calculated from figures in annual reports: see above nn 1–2; Australian Federal Police, *Annual Report 1997–98* (1998) 98; CrimTrac, *Annual Report 2000–01* (2001) 23. Statistics of requests for criminal record checks to Victoria Police have been sourced from Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform* (2005) 8; Victoria Police, *Annual Report 2006–07* (2007) 8, 27.

4 See, eg, CrimeNet <http://www.crimenet.com.au>. This website is operated from California and contains 'a database of thousands of mostly Australian criminal records with emphasis on records relating to fraud, paedophilia, sex-related crimes and crimes of violence.'

5 As a basic principle of sentencing, the principle of proportionality requires that punishment be proportionate to the seriousness of the crime, and that once the proper sentence has been set by the courts and served by the offender, no further punishment should be imposed: Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489, 494–5. See, eg, *Sentencing Act 1991* (Vic) ss 5(1), (3).

6 See below Part IV(F).

7 Hilary Metcalf, Tracy Anderson and Heather Rolfe, Department for Work and Pensions, United Kingdom, *Barriers to Employment for Offenders and Ex-Offenders — Part One: Barriers to Employment for Offenders and Ex-Offenders*, Research Report No 155 (2001) 74.

particular courses stipulate prerequisites for entry which generally include criminal record checks.[8]

Some of the factors explaining the increased use of criminal record checks might include fears about terrorism, organised crime, paedophilia and child abuse, as well as the impact of high profile cases in these areas. Concerns over litigation risks and community safety are also commonly cited as triggers for requiring checks.[9]

The increased demand for criminal record checks forms part of a broader preoccupation with security and the management of risk. This has the potential to seriously undermine social cohesion. The eminent sociologist Professor David Garland has warned of the potentially irreversible consequences of this development. He argues that 'the imposition of more intensive regimes of regulation, inspection and control' results in our entire civic culture becoming 'increasingly less tolerant and inclusive, increasingly less capable of trust.'[10]

It would seem that a key focus of the community and of government has been on risk minimisation and the rights of employers to use criminal history information when making employment decisions. Competing interests in the rehabilitation of past offenders have been sidelined, as have discrimination and privacy issues. To date, there has been little debate about the appropriate use of criminal record checks or about the implications of their current indiscriminate use. While there have been two national inquiries — one focusing on human rights and discriminatory aspects and the other on spent conviction regimes[11] — the issue has yet clearly to enter the broader community consciousness. This article aims to stimulate such a debate by highlighting the issues and by arguing that competing interests must be articulated and addressed.

The laws that permit or require access to criminal record information, as well as those which restrict the use of such information, are piecemeal and inconsistent across the states. This article outlines and critiques those laws and proposes reforms aimed at producing a fairer, more unified and balanced regime across Australia. The central argument is that the indiscriminate use of criminal record checks in employment may lead to negative social and economic consequences. Instead, there should be legal restrictions on releasing criminal record information to employers.

[8] See, eg, Student Centre, The University of Sydney, *Criminal Record Checks — For Certain UAC Commencing Students* (13 March 2008) <http://www.usyd.edu.au/studentcentre/enrolments/CRC.shtml>.

[9] See, eg, Office of the Victorian Privacy Commissioner, *Controlled Disclosure of Criminal Record Data: Report to Attorney-General Pursuant to Section 63(3) of the* Information Privacy Act 2000 (2006) 3.

[10] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001) 194–5.

[11] The Human Rights and Equal Opportunity Commission ('HREOC') reviewed the operation of anti-discrimination laws nationally in 2004: see HREOC, *Discrimination in Employment on the Basis of Criminal Record*: *Discussion Paper* (2004) ('*HREOC Discussion Paper*'). The Standing Committee of Attorneys-General ('SCAG') has been considering a national regime for spent convictions: see SCAG, *Uniform Spent Convictions: A Proposed Model* (Discussion Paper, 2004). In Victoria, the Fitzroy Legal Service and JobWatch have been advocating reform in the area for some time: see Fitzroy Legal Service and JobWatch, *Criminal Records in Victoria: Proposals for Reform* (2005).

II THE LEGAL FRAMEWORK: PERMITTING OR COMPELLING CRIMINAL RECORD CHECKS

Employers may undertake criminal record checks for one or more of the following reasons:

1 employers are lawfully able to take criminal records into account in employment decisions;
2 there are legal principles operating which encourage employers to make criminal record checks; and
3 there are laws compelling employers to make checks or not to employ those with criminal records.

This Part explores the legal frameworks that permit, encourage or compel employers to undertake criminal record checks.

A *Freedom to Make Employment Decisions Based on Criminal Record*

The common law imposes no constraint on employers using criminal history information in making employment decisions. An employer has a wide discretion, with some exceptions, to examine and take into account a person's criminal record. It is significant to note that the law does not positively confer this particular discretion on employers; the discretion exists because it is not curtailed by law as it is part of the broader notion of freedom of contract.

The doctrine of freedom of contract confers on employers — in the absence of any legislative intervention[12] — the absolute right to decide whom that employer hires as an employee.[13] This right applies not only in terms of the qualifications and previous work experience required of applicants for the job but also with respect to their personal characteristics. (An employer so minded could, for example, decide to engage only attractive staff.)[14] Similarly, these checks on an applicant's suitability for employment may include routine criminal record checks as part of the recruitment process.

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 employer can also request permission to obtain an official criminal record check or may require the employee to seek access to their own record (for example, under freedom of information legislation or via the use of a private agent) and to provide a copy of it to the employer.[15] Whilst the applicant's consent is a

12 See below Part III.

13 See, eg, *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 (Jessel MR).

14 The only statute to make 'physical features' a prohibited ground of discrimination and therefore *unlawful* direct discrimination is Victoria: *Equal Opportunity Act 1995* (Vic) s 6(f). Moreover, if a hiring policy were to result in the disproportionate non-employment of older persons, there may be a basis to argue indirect discrimination on the ground of age. Anti-discrimination legislation at federal and state levels prohibit age discrimination: see, eg, *Age Discrimination Act 2004* (Cth) ss 5–6, 14–16; *Equal Opportunity Act 1995* (Vic) s 6(a).

15 See, eg, MyPoliceCheck <http://www.rnc.net.au>, which advertises an Australia-wide service for individuals wishing to obtain their National Criminal History Record Check.

prerequisite in all these instances, this is unlikely to be negotiable in the context of an employment interview.[16]

There is generally no mechanism at common law in private sector employment to review the exercise of the employer's discretion whether or not to employ a particular person, or to ensure that the decision has been made according to law. There is similarly no requirement that the employer make decisions based only on relevant considerations or that the decision is itself a reasonable one. Such concepts may be applicable in the public sector if employment is pursuant to a statute, but in nearly all cases the employer's discretion remains beyond review on the merits or for its legality.[17] The only redress may be through the law of negligence in a very particular set of circumstances where an employer has relied on carelessly provided information to reject the job applicant.[18]

Whilst statutory protection is provided to employees who are unfairly dismissed on the basis of a reason which is not valid or justified,[19] there is no analogous constraint on (or review mechanisms in respect of) decisions to initially employ a person or to make their engagement conditional on whether they have a relevant (or indeed any) criminal record.[20] Where the criminal history information is readily available through the media and the internet, it will not be regarded as confidential information, thus remaining outside the protection of laws relating to confidentiality. Similarly, privacy laws provide minimal constraints on the consensual collection and use of personal information, or the non-consensual collection of personal information from public sources.[21]

B *Legal Principles Encouraging Employers to Make Checks*

In Australian common law and statutory law, there exist laws which do not directly require employers to make criminal record checks but which nevertheless encourage employers to adopt stringent measures and recruit only those with no criminal record. The contract of employment brings with it implied duties of good faith (and arguably duties of mutual trust and confidence) between an employer and an employee.[22] These implied duties may encourage an employer

16 The applicant usually has no practical choice but to agree to the employer's request for access to criminal records if the applicant wishes to be considered for the position.

17 Public law does not provide a review mechanism for private agreements, and the law of contract does not apply to provide a remedy as a disappointed party would have no contract.

18 See, eg, *Spring v Guardian Assurance plc* [1995] 2 AC 296.

19 The *Workplace Relations Act 1996* (Cth) provides for unfair dismissal protection. Since the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), from 27 March 2006, the unfair dismissal protection applies only to employers who engage 101 or more employees: *Workplace Relations Act 1996* (Cth) s 643(10). The Rudd Labor government plans to amend the *Workplace Relations Act 1996* (Cth) to provide the statutory unfair dismissal protection to most employees and to exempt only small business employers which engage less than 15 employees: Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces* (2007) 19–20 <http://www.alp.org.au/download/fwf_finala.pdf>.

20 See, eg, *Public Service Act 1999* (Cth) s 22(6)(d), which provides that the Australian Public Service ('APS') can require security or character checks to be undertaken by a job applicant as a condition of being engaged in the APS.

21 See, eg, *Privacy Act 1988* (Cth) s 14.

22 If an employer owes greater duties to an employee in any decision to terminate the employment contract — as was held in *Russell v Trustees of the Roman Catholic Church for the Archdiocese*

to check the character and good standing of a prospective employee.[23] Perhaps, more importantly, the employment contract also contains an implied duty to reasonably ensure the safety of workers, which includes ensuring that employees are safe from the behaviour of fellow employees.[24] These duties to employees, enforceable by actions for breach of contract, may indirectly encourage the employer to adopt recruitment policies and make decisions which seek to minimise risk.

Apart from contract law, occupational health and safety laws and the law of negligence reinforce this preference for cautious recruitment and scrutiny. Employers may discharge their obligations under occupational health and safety legislation at state level and the common law of negligence by undertaking criminal record checks to take care for the safety of fellow employees, and for the safety of other persons such as contractors, customers and suppliers who may enter the employer's premises or otherwise be in contact with the employee.[25] These checks may occur more often in certain work environments, such as where employees are working together in remote or isolated areas; where they are working at night; where there are security issues; or where the employment position itself is one linked to security.

Naturally an employer wishes to protect itself and its business from the acts of its employees by ensuring that the employee is appropriately qualified, experienced and of good character. For example, an employer engaging persons in positions of significant financial responsibility will try to ensure that they are 'fit for purpose' and undertake criminal history checks. Legal responsibilities to ensure safe custody of valuable items or property to fulfil bailment, contractual and insurance obligations may also tend to encourage record checks: for example, criminal record checks may be required before employing those who will be entrusted with keys to property in the real estate business or art work in the art dealer industry.

Legal duties of referees may bring a criminal matter to light and force the employer to take this into account. If referees are attesting to the suitability of an applicant for a position, they may need to disclose any criminal record information of which they are aware to fulfil the duty owed by the referee to the prospective employer. A duty of care on referees to provide accurate information to employers about job applicants has been recognised in cases where the careless provision of incorrect information results in the loss of employment or prospective employment.[26] This duty was extended to persons vouching for others or referring them for employment in the case of *Monie v Commonwealth*.[27] In this

of Sydney (2007) 167 IR 121 — then it is very likely that the employer will be more careful in process of appointment.

23 See generally Rosemary Owens and Joellen Riley, *The Law of Work* (2007) 254–60; Marilyn J Pittard and Richard B Naughton, *Australian Labour Law: Cases and Materials* (4th ed, 2003) 220–41.

24 See, eg, *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44. A similar obligation is imposed under state occupational health and safety legislation: see, eg, *Occupational Health and Safety Act 2004* (Vic) s 21.

25 See *Hollis v Vabu* (2001) 207 CLR 21.

26 See *Wade v Victoria* [1999] 1 VR 121; *Spring v Guardian Assurance plc* [1995] 2 AC 296.

27 [2007] NSWCA 230 (Unreported, Mason P, Beazley and Campbell JJA, 3 September 2007).

case, the New South Wales Court of Appeal held that the Commonwealth Employment Service owed a duty of care to the employer, to whom it referred a prospective employee, to disclose his past criminal record and was liable for loss suffered when the employee shot and injured his employer.[28]

Principles of vicarious liability of employers for the acts of their employees may further entrench the checking of criminal records. The Full Court of the Supreme Court of South Australia in *Ffrench v Sestili* recently confirmed that an employer is liable for the dishonesty and fraud of an employee which occurs in the course of their employment.[29] It is not relevant whether the dishonesty or fraud was committed for the employer's or the employee's benefit.[30] In *Ffrench v Sestili*, the employer agency had engaged a carer for a disabled person. The carer dishonestly obtained approximately $33 000 by misusing the disabled person's credit card information, and the employer was held liable to reimburse this sum.[31] Whilst there was no suggestion of previous dishonesty or fraud by the carer employee in this instance, this is the very situation where an employer may be encouraged to undertake a criminal record check — that is, where the person is being engaged to carry out duties for vulnerable persons and in circumstances where financial trust is required.

C *Mandatory Criminal Record Checks*

Legislators, like employers, can assume that a criminal record is an objective indicator of risk and use it as a hurdle requirement, sometimes with no flexibility or scope for discretion. Some occupations specifically prohibit membership by people with particular sorts of criminal record. This may be expressed legislatively, or in the accreditation processes of the profession or occupation. Within the last decade, most states have established regimes to ensure that people with a particular criminal record do not work with children.[32] The Victorian regime, for example, mandates record checks for both employees and volunteers whose activities involve regular direct contact with children in circumstances where that contact is not directly supervised by another person. The regime encompasses a broad range of offences, including those of a less serious nature, and provides for mandatory exclusion with no scope for the exercise of discretion in respect of the most serious categories of offences (primarily sexual offences).[33]

People convicted of an offence punishable by more than 12 months imprisonment or an offence that involves dishonesty and is punishable by imprisonment for at least three months are also unable to hold management positions in corporations.[34] People with a criminal record can also be ineligible to apply for

28 Ibid [55]–[62] (Campbell JA).
29 [2007] SASC 241 (Unreported, Debelle, Sulan and Layton JJ, 28 June 2007) [72] (Debelle J).
30 Ibid.
31 Ibid [14], [72].
32 *Commission for Children and Young People Act 1998* (NSW); *Care and Protection of Children Act 2007* (NT); *Commission for Children and Young People and Child Guardian Act 2000* (Qld); *Children's Protection (Miscellaneous) Amendment Act 2005* (SA); *Working with Children Act 2005* (Vic); *Working with Children (Criminal Record Checking) Act 2004* (WA).
33 *Working with Children Act 2005* (Vic) ss 12–14.
34 *Corporations Act 2001* (Cth) s 206B(1).

particular occupational licences. 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 10 years of making the application.[35] An applicant for a private security licence in Victoria will similarly be automatically ineligible if the applicant has, for example, a conviction for specific serious drug and assault offences.[36] More broadly, registration in Victoria can also be refused where the applicant has been convicted of a particular indictable offence within the past 10 years or has been found guilty (without conviction) within the past five years of a particular indictable offence that 'in the opinion of the Chief Commissioner would render the person unsuitable'.[37]

Some occupations define eligibility for admission in terms of 'fitness' or 'good character', which includes (but is not limited to) a mandatory criminal record check. Admission to the legal profession requires that the person satisfy a general 'fit and proper person' (or similar) test.[38] This requires disclosure and consideration of matters that would not be revealed on criminal record checks, including juvenile warnings and certain disciplinary matters (for example, sanctions imposed by universities for plagiarism).[39] Similarly, employment as a teacher requires compliance with the requirements imposed by teacher registration boards, which include (but are not limited to) Working with Children Checks.[40] The stringency of this approach was illustrated in Victoria in 2006 when a school teacher was forced to resign in respect of a minor sexual offence occurring in his youth for which no conviction had been recorded, but where there was no discretion in the registration body to decide not to take the offence into account.[41]

III Regimes Restricting the Use of Criminal Records

Whilst employers can and are sometimes encouraged or obliged to consider a criminal record when making employment decisions, there are also a range of legal regimes which restrict the use of criminal records, both directly by targeting specific uses and indirectly by restricting access to criminal record information. This Part addresses three key Australian regimes which potentially affect pre-employment criminal record checks: spent convictions regimes,

35 *Security Industry Act 1997* (NSW) s 16; *Security Industry Regulations 1998* (NSW) reg 11.

36 *Private Security Act 2004* (Vic) ss 13, 25(2)(f).

37 *Private Security Act 2004* (Vic) s 26(2)(e).

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

39 See, eg, *Legal Profession Act 2004* (Vic) s 1.2.6; Board of Examiners, *Admissions* (31 March 2008) Supreme Court of Victoria <http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Board+of+Examiners/Admissions/>.

40 See, eg, *Education and Training Reform Act 2006* (Vic), which establishes the Victorian Institute of Teaching ('VIT'); *Teachers Registration and Standards Act 2004* (SA), which establishes the Teachers Registration Board of South Australia. VIT is authorised under the *Education and Training Reform Act 2006* (Vic) s 2.6.22 to request police checks from Victoria Police without obtaining the consent of the applicant. The Victorian Privacy Commissioner notes that the VIT now obtains police checks directly from CrimTrac as an accredited agency, a process which he concludes 'has an unclear basis in law': Office of the Victorian Privacy Commissioner, above n 9, 12.

41 The teacher later received a financial settlement from the Victorian Department of Education and Training: 'Victorian Teacher Paid Out after Sex Controversy', AAP (Melbourne), 21 April 2006.

anti-discrimination laws and information privacy regimes. These each consist of an amalgam of federal and state schemes which vary considerably in their content and scope of application.

A *Spent Convictions Regimes*

Spent convictions regimes apply to older convictions for less serious categories of offences. The regimes restrict access to information about those offences which qualify as 'spent'. They have the aim of allowing ex-offenders to 'clear the slate' and are based on the rationale that a criminal record is not necessarily a good predictor of an individual's current or future behaviour.[42] The prejudicial effect of continued accessibility then outweighs the (reduced) risk represented by the person's previous law-breaking behaviour.

All Australian jurisdictions other than Victoria and South Australia have legislative spent convictions regimes,[43] as do many overseas jurisdictions.[44] The UK and Australian legislative schemes, established in 1974 and from the late 1980s respectively, limit information about past offending and arose from concerns for the rehabilitation of former offenders. While Victoria and South Australia do not have a legislative regime, both states have internal rules which limit the disclosure by police of certain older convictions through the criminal checks process.[45] The spent convictions laws have a number of common features but they vary in the extent to which they limit the use of pre-employment criminal record checks.

Protection from disclosure is defined in terms of the length of time since the occurrence of the conviction, the seriousness of offence and the context in which the criminal record information is used. In most instances only less serious offences can become spent, and this only occurs once a waiting period has passed. The Australian regimes generally allow for specified convictions to become spent after 10 years in the case of crimes committed as an adult and after five years or less in the case of those committed as a child.[46] Some categories of offences may never be spent, such as sexual offences and offences attracting longer prison sentences.[47]

There are, however, considerable differences as to the categories of offence that are capable of being spent. For example, the regimes in the Australian Capital Territory, NSW, Northern Territory and Tasmania allow only for convic-

42 Law Reform Commission, Ireland, *Report: Spent Convictions*, Report No 84 (2007) 16–17.

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

44 For a summary of schemes in countries other than Australia, see Sentencing and Offences Unit, Home Office, UK, *Breaking the Circle: A Report of the Review of the* Rehabilitation of Offenders Act (2002) 65–74.

45 See Victoria Police, *National Police Certificates: Information Release Policy* (3 December 2007) <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=7356>.

46 See, eg, *Criminal Records Act 1991* (NSW) s 10 (offences committed by children lapse after three years); *Annulled Convictions Act 2003* (Tas) s 6(2)(b) (lapses after five years).

47 See, eg, *Spent Convictions Act 2000* (ACT) s 11; *Criminal Records Act 1991* (NSW) s 7; *Criminal Records (Spent Convictions) Act 1992* (NT) ss 5–6; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2); *Spent Convictions Act 1988* (WA) s 4.

tions to be spent in respect of non-custodial sentences and custodial sentences of six months or less.[48] In contrast, the Commonwealth and Queensland regimes are broader and allow for some convictions to be spent where there was a custodial sentence of 30 months or less.[49] The Western Australian scheme differs from the others in that it requires a convicted person to apply to have their criminal record wiped once the specified time period has elapsed.[50] There are also differences between regimes in terms of the impact of subsequent offences. In most regimes, spent convictions have no further impact once the relevant period has expired. However, the Victorian guidelines state that if the last offence qualifies for release, then *all* findings of guilt will be released, including juvenile offences.[51]

Restrictions on disclosure are subject to a range of exceptions, including exceptions for employment in sensitive positions and occupations (such as police and prison officers), employment to work with vulnerable people (in the case of teachers or careworkers), and applying for particular licences (such as childcare services).[52] All of the Australian regimes operate to restrict disclosure by the police in the context of pre-employment criminal record checks. In addition, most of the statutory regimes restrict access to information about criminal convictions by limiting the convicted person's obligation to answer truthfully questions concerning convictions which have become spent.[53] Some schemes further control access by specifically prohibiting the disclosure of information about spent convictions by persons other than the police.[54]

The statutory regimes also curb use of criminal record information by providing that a person is not entitled to take a spent conviction into account in assessing a person's character.[55] As discussed below in the context of anti-discrimination regimes, the Western Australian regime makes it unlawful to discriminate against a person on the basis of a spent conviction.[56] By way of

48 *Spent Convictions Act 2000* (ACT) s 11(2)(a); *Criminal Records Act 1991* (NSW) s 7(1)(a); *Criminal Records (Spent Convictions) Act* (NT) s 6(1); *Annulled Convictions Act 2003* (Tas) s 3(1).

49 *Crimes Act 1914* (Cth) s 85ZM; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2)(b).

50 *Spent Convictions Act 1988* (WA) ss 6–7.

51 See Victoria Police, *Information Release Policy*, above n 45, 2. Cf *Spent Convictions Act 2000* (ACT) s 15; *Crimes Act 1914* (Cth) s 85ZX.

52 For the Commonwealth scheme, see *Crimes Act 1914* (Cth) ss 85ZL–85ZZK. Areas which are not subject to this spent convictions regime are specified in s 85ZZH of the *Crimes Act 1914* (Cth). The Commonwealth Privacy Commissioner administers the scheme and can recommend further exemptions to the Minister: *Crimes Act 1914* (Cth) s 85ZZ(1)(b). The Commissioner has recommended such exemptions — for, inter alia, employment involving the care of prisoners and people with disabilities, and industries susceptible to the infiltration of organised crime, such as casinos — but has refused exemptions for financial institutions and for blanket checks by the Commonwealth Government: see Jim Nolan, 'Privacy in the Workplace — Part 1: Legal Issues' (1995) 2 *Privacy Law and Policy Reporter* 1, 4. Most recently an exemption was recommended and implemented in relation to AusCheck: see Office of the Privacy Commissioner, *Annual Report 2006–07* (2007) 16.

53 Regimes in the ACT, NSW and Tasmania each provide that a person's criminal history is taken to refer only to convictions which are not spent: *Spent Convictions Act 2000* (ACT) s 16(a); *Criminal Records Act 1991* (NSW) s 12(a); *Annulled Convictions Act 2003* (Tas) s 9(1)(b).

54 See, eg, *Crimes Act 1914* (Cth) s 85ZW(b).

55 See, eg, *Spent Convictions Act 2000* (ACT) s 16(c); *Criminal Records Act 1991* (NSW) s 12(c); *Criminal Records (Spent Convictions) Act* (NT) s 11(c).

56 See below n 70 and accompanying text.

illustration, the Commonwealth scheme under Part VIIC of the *Crimes Act 1914* (Cth) provides that where a conviction is spent, the person can lawfully decline to disclose it and can deny that they were ever charged with, or convicted of, the offence even when under oath.[57] There is also a duty on anyone knowing of the existence of a spent conviction not to disclose this information without the ex-offender's consent.[58] A convicted person may complain to the Federal Privacy Commissioner about any act or practice which is in breach of these restrictions.[59] The range of remedies available to the complainant in respect of breaches of privacy include declarations requiring the respondent to do any reasonable act to redress any loss or damage suffered by the complainant, employ or re-employ the complainant, or pay the complainant compensation for any loss or damage suffered.[60]

The issue of a possible uniform national spent convictions scheme is currently under consideration by the Standing Committee of Attorneys-General ('SCAG'). It was first raised at SCAG in 2000 as a response to the issues arising from the online dissemination of criminal record information from databases such as CrimeNet. SCAG published a discussion paper in 2004[61] and has now given the Parliamentary Counsel's Committee the task of drafting model legislation.[62]

B *Anti-Discrimination Laws*

Another important set of laws potentially affecting the use of pre-employment criminal record checks are the anti-discrimination regimes operating throughout Australia. These prohibit discrimination in relation to specified activities, including employment. Discrimination is most commonly understood as arising where a distinction, exclusion or preference has an impact directly on a particular individual.[63] It may also arise indirectly when a condition is imposed which would have a disproportionate impact on a particular group. However, indirect discrimination is generally quite difficult to establish.[64]

Anti-discrimination laws are limited to the grounds specified in the legislation. Only the Commonwealth, Tasmanian and Northern Territory laws contain a general prohibition of discrimination on the grounds of criminal record.[65] For example, the definition of 'discrimination' in s 3 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) reproduces the definition in the *Convention (No 111) Concerning the Discrimination in Respect of Employment*

57 *Crimes Act 1914* (Cth) ss 85ZV–W(a). However, an ex-offender cannot deny the existence of the conviction in criminal proceedings: *Crimes Act 1914* (Cth) s 85ZZH(c).

58 *Crimes Act 1914* (Cth) s 85ZW(b).

59 *Crimes Act 1914* (Cth) s 85ZZA.

60 *Crimes Act 1914* (Cth) s 85ZZD.

61 SCAG, *Uniform Spent Convictions: A Proposed Model*, above n 11.

62 See SCAG, 'SCAG Summary of Decisions — March 2008' (Communiqué, 28 March 2008) 5. (South Australia is the instructing jurisdiction.)

63 See, eg, *Anti-Discrimination Act 1992* (NT) s 20.

64 See Beth Gaze, 'The *Sex Discrimination Act* after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914.

65 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3; *Anti-Discrimination Act 1992* (NT) s 19; *Anti-Discrimination Act 1998* (Tas) s 16.

and Occupation.[66] Discrimination is defined as including any other 'distinction, exclusion or preference' that

> (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
>
> (ii) has been declared by the regulations to constitute discrimination for the purposes of the Act.[67]

The *Human Rights and Equal Opportunity Commission Regulations* formulated in 1989 expressly include 'criminal record' as a ground for discrimination.[68]

Under such statutory schemes, however, employers can lawfully refuse to employ someone on the basis of their criminal record where the criminal record is relevant to the 'inherent requirements of the job'.[69] While this is consistent with ensuring that such information is used appropriately, it is important that 'inherent requirements' is tightly defined. Information may be relevant where a past offence falls into a category that has some direct relationship to the employee's duties. For example, an offence of dishonesty may be broadly *relevant* to a job which requires an employee to be responsible for financial transactions. However, taking it into account may not be *appropriate* or *reasonable* where the offence was old or trivial, such as where a person as a student lost a railway pass, borrowed a friend's pass and was found guilty of obtaining services by deception.

By way of contrast, the ACT and Western Australia prohibit discrimination on the grounds of spent convictions.[70] While that goes some way toward addressing the problems associated with past convictions, it does not prevent an employer's use of more recent and/or serious convictions which may be irrelevant to the particular job.

In the case of the other jurisdictions, there may be further grounds which are broadly relevant. For example, the *Equal Opportunity Act 1995* (Vic) prohibits discrimination on the basis of political belief or activity.[71] Refusal to employ a person because of a crime committed relating to political activity or belief

66 Opened for signature 25 June 1958, 362 UNTS 31, art 1 (entered into force 15 June 1960).

67 Ibid.

68 *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) reg 4(a)(iii). *Anti-Discrimination Act 1992* (NT) s 19(1)(q) and *Anti-Discrimination* Act *1998* (Tas) s 16(q) prohibit discrimination on the basis of 'irrelevant criminal record'. For a review and critique of the Australian provisions, see Submission to HREOC, *Discrimination in Employment on the Basis of Criminal Record*, February 2005, Submission No 22, 19–23 (Public Interest Law Clearing House Homeless Persons' Legal Clinic) ('PILCH Submission').

69 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 3(1). This is inherent in the Northern Territory and Tasmanian concept of 'irrelevant criminal record'. The Tasmanian legislation permits discrimination on the basis of 'irrelevant criminal record' where it is necessary for positions involving care of children: *Annulled Convictions Act 2003* (Tas) s 50.

70 A recent review of the Western Australian *Equal Opportunity Act* recommended adding as a ground of prohibited discrimination 'irrelevant criminal record': see Equal Opportunity Commission, Western Australia, *Review of the* Equal Opportunity Act 1984 (2007) 4, 22–3. The *Equal Opportunity Act 1995* (Vic) is currently under review and the inclusion of criminal record as a prohibited ground of discrimination is one of the issues raised in the Equal Opportunity Review, 'Equal Opportunity Review: Discussion Paper' (Discussion Paper, Department of Justice, Victoria, 2007) 34–5.

71 *Equal Opportunity Act 1995* (Vic) s 6(g).

(although likely to be a rare occurrence) might therefore be a prohibited form of discrimination, unless necessitated by the inherent requirements of the job.[72]

Charters of rights, such as that recently enacted in Victoria, incorporate concepts of rights and protection from discrimination which are stated in international conventions, particularly the *International Covenant on Civil and Political Rights*.[73] Whilst the definition of 'discrimination' in the *Victorian Charter* refers back to the *Equal Opportunity Act 1995* (Vic),[74] and therefore offers no additional protections for criminal record usage, there may be an argument that discrimination on the basis of criminal record contravenes the right to privacy which has been held in other jurisdictions to include constituents of identity and autonomy.[75]

In the United States, given the over representation of African Americans in the criminal justice system, a blanket exclusion from employment of people with a criminal record is likely to be found to constitute indirect race discrimination (unless clearly necessary for the specific job).[76] A similar argument might apply in Australia in relation to indigenous job applicants.[77] Given figures which show that more men, as compared to women, are likely to have a criminal record, an argument might also be made that use of criminal records is indirectly discriminatory on the ground of sex.[78] As noted, however, it may be very difficult in practice to establish indirect discrimination.

Following complaints to the Commonwealth Human Rights and Equal Opportunity Commission ('HREOC') from people alleging discrimination in employment on the basis of criminal record, HREOC carried out a review of the area in 2004.[79] Guidelines published by HREOC in 2006, in response to its consulta-

[72] For example, a conscientious objector to compulsory conscription to the armed forces may decide, consistent with the objector's beliefs or objecting to the country's war involvement, to refuse to follow the lawful process available to establish the conscientious objection, thereby committing a criminal act. It is arguable that an employer's refusal later to engage such a person because of that criminal record may constitute discrimination on the basis of political belief.

[73] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

[74] *Victorian Charter* s 3(1).

[75] Lord Lester of Herne Hill and David Pannick (eds), *Human Rights Law and Practice* (1st ed, 1999) ch 4.8.

[76] *Civil Rights Act*, 42 USC §§ 2000(e)–(e)(17) (2000 & Supp IV, 2005). See also US Equal Employment Opportunity Commission, *Questions and Answers about Race and Color Discrimination in Employment* (16 May 2006) <http://www.eeoc.gov/policy/docs/qanda_race_color.html>; Philippa Wells and Jacquelin MacKinnon, 'Criminal Records and Employment: A Case for Legislative Change' (2001) 19 *New Zealand Universities Law Review* 177, 180.

[77] According to the Australian Bureau of Statistics ('ABS'), indigenous people were 13 times more likely than non-indigenous people to have been incarcerated in 2006: ABS, *Prisoners in Australia*, ABS Catalogue No 4517.0 (2007) 6. Even where racial discrimination could be established, Beth Gaze argues that laws to protect against racial discrimination are not wholly effective; other action is required such as education: see Beth Gaze, 'Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11 *Australian Journal of Human Rights* 171, 172.

[78] See below Part IV(F).

[79] *HREOC Discussion Paper*, above n 11, including summary of complaints in Attachment A to the Discussion Paper. See also two HREOC determinations on this issue: Sev Ozdowski, HREOC, *Reports of Inquiries into Complaints of Discrimination in Employment on the Basis of Criminal Record:* Mr Mark Hall v NSW Thoroughbred Racing Board, HREOC Report No 19 (2002);

tions and submissions, endeavour to address the applicability and appropriate use of criminal records by employers.[80] A key provision is that

> [e]mployers should only ask job applicants and employees to disclose specific criminal record information if they have identified that certain criminal convictions or offences are relevant to the inherent requirements of the job.[81]

The Guidelines are not enforceable but do provide that employers should determine the inherent requirements of the *specific* job and articulate the types of offences which will be relevant to that specific position. The label of the offence too may mislead as to its true nature in a particular instance, as in the example given above of the offence of 'obtaining services by deception' where the student used a friend's travel pass on one occasion.

The Victorian Equal Opportunity and Human Rights Commission (formerly the Victorian Equal Opportunity Commission) has also published a general guide with the same purpose.[82] This document does not refer specifically to appropriate ways of taking account of criminal record, but such educational guides for employers will be important means of enhancing employer decision-making.

C *Information Privacy Regimes*

Information privacy regimes require compliance with privacy principles which regulate the collection, use, storage and disclosure of personal information about identifiable individuals. As with spent convictions schemes, they may (to varying extents) restrict access to, and impose limitations on, the use of criminal history information. Moreover, they potentially enhance the operation of anti-discrimination laws by providing rights of access to people who are the subject of the information (thus also providing evidence of the information that was taken into account in the decision-making).[83] Those rights of access may also enable people to become aware of information about them which is factually incorrect so that they may take steps to correct it at its source.[84]

Australian information privacy laws currently apply to the activities of public sector bodies in all jurisdictions other than Queensland, South Australia and Western Australia,[85] and to the activities of those private sector organisations that

HREOC, *Reports of Inquiries into Complaints of Discrimination in Employment on the Basis of Criminal Record:* Ms Renai Christensen v Adelaide Casino Pty Ltd, HREOC Report No 20 (2002).

80 HREOC, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (revised ed, 2007).

81 Ibid 8.

82 Equal Opportunity Commission Victoria, *A Fair Go for Job Seekers: Best Practice Guidelines for the Recruitment Industry and Employers* (2005).

83 See, eg, National Privacy Principle ('NPP') 6 in *Privacy Act 1988* (Cth) sch 3.

84 See, eg, Information Privacy Principle ('IPP') 7 in *Privacy Act 1988* (Cth) s 14. This means, for example, that an applicant who becomes aware that the police have provided incorrect information about them may use the correction principle in the relevant public sector information privacy regime to request an amendment of the relevant police record.

85 *Privacy Act 1988* (Cth); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Act 2002* (NT); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2000* (Vic). The ACT public sector is regulated by the *Privacy Act 1988* (Cth). The Information Privacy Bill 2007 (WA) was introduced in the Western Australian Parliament in

are regulated by the private sector provisions in the *Privacy Act 1988* (Cth).[86] These laws are supplemented by health records laws in the ACT, NSW and Victoria,[87] and by administrative rules in South Australia and Queensland.[88]

Information privacy regimes contain two specific types of principles which potentially have an impact on pre-employment criminal record checks. First, disclosure limitation principles operate by limiting disclosure of personal information in accordance with the purpose for which it was collected.[89] These are of primary significance in relation to disclosure by public sector bodies such as the police. Secondly, collection limitation principles generally impose limitations designed to ensure that information is collected fairly.[90] Some regimes impose more onerous collection limitations in respect of 'sensitive information', including criminal record information.[91] Sensitive information may be collected only if the individual has expressly or impliedly consented, or if its collection is required by law.[92]

A significant shortcoming of the collection principles is that they do not apply to information which is publicly available.[93] The fact of a conviction and sentence will (in principle) be public, given their origin in an open court hearing as well as the presumption that prosecutions be publicly reported for purposes of deterrence and denunciation.[94] Courts in New Zealand have, however, adopted the view that there may be actionable privacy rights arising from the disclosure of old criminal convictions.[95] Commercial internet-based service providers constantly surf for and collect criminal information. Reporting on such public

March 2007 and was submitted to the Legislative Council for Second Reading on 4 December 2007.

86 Section 6D of the *Privacy Act 1988* (Cth) currently excludes many private sector bodies from its operation as 'small business operators'. These are defined as businesses with annual turnover of under $3 million. This is, however, subject to exceptions: for example, it does not apply to any body such as CrimeNet that sells or trades in personal information: s 6D(4).

87 *Health Records (Privacy and Access) Act 1997* (ACT); *Health Records and Information Privacy Act 2002* (NSW); *Health Records Act 2001* (Vic).

88 Department of Justice and Attorney-General, Queensland, *Privacy* (2008) <http://www.justice.qld.gov.au/40.htm>; Department of Premier and Cabinet, South Australia, *PC012 — Information Privacy Principles Instruction* (Cabinet Administrative Instruction No 1, 1989) <http://www.premcab.sa.gov.au/pdf/circulars/Privacy.pdf>.

89 See, eg, *Privacy Act 1988* (Cth) s 14 IPP 11, sch 3 NPP 2; *Privacy and Personal Information Protection Act 1998* (NSW) s 18; *Information Privacy Act 2000* (Vic) sch 1 IPP 2.

90 See, eg, *Privacy Act 1988* (Cth) s 14 IPP 1–3, sch 3 NPP 1; *Privacy and Personal Information Protection Act 1998* (NSW) ss 8–11; *Information Privacy Act 2000* (Vic) sch 1 IPP 1.

91 See, eg, *Privacy Act 1988* (Cth) sch 3 NPP 10; *Privacy and Personal Information Protection Act 1998* (NSW) s 19; *Information Privacy Act 2000* (Vic) sch 1 IPP 10.

92 See, eg, *Privacy Act 1988* (Cth) sch 3 NPP 10; *Privacy and Personal Information Protection Act 1998* (NSW) s 19; *Information Privacy Act 2000* (Vic) sch 1 IPP 10.

93 See, eg, *Privacy Act 1988* (Cth) s 6(1), which excludes generally available publications from the definition of 'record'.

94 See, eg, *Sentencing Act 1991* (Vic) ss 5(1)(b), (d). The United States Supreme Court in *Paul v Davis*, 424 US 693 (1976) held that criminal records did not fall within the scope of constitutional privacy protection available under the Fourteenth Amendment.

95 See, eg, *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, where the High Court of New Zealand held that a plaintiff whose fundraising campaign for a heart transplant was endangered when a newspaper threatened to publish details of previous sex convictions had an actionable privacy interest. The Court refused to grant injunctive relief, however, on the basis that it would be futile to do so: at 736 (McGechan J).

information does not necessarily breach information privacy principles.[96] However, it is a current area of concern in light of the availability of commercial internet sites which sell information about past criminal convictions.[97]

In reality, it is important to note that the practical effect of both the collection and disclosure limitation principles is very minimal because they allow for disclosure and collection with the consent of the information subject. As previously noted, consent is seldom negotiable in the employment context.[98]

IV PROBLEMS WITH THE EXISTING LEGAL FRAMEWORK AND ITS OPERATION

Although there may be good reasons for employers to check criminal records, the indiscriminate use of checks undermines the intentions of the sentencing court, unnecessarily reduces the labour pool, hinders the rehabilitation of the past offender, excludes ex-offenders from income and social connection, risks the economic and social costs of reoffending, and raises significant privacy and discrimination issues.[99] In this Part, we discuss these problems with reference to principles of equity and fairness, discrimination and privacy, and rehabilitation goals. Practical problems of inconsistent provisions across Australian jurisdictions are also highlighted, as are concerns about the accuracy of criminal record information being relied on by employers.

A *Equity and Fairness*

The principle of equity goes beyond the idea of fairness to encompass the idea of justice, including moral justice. On this view, people should not be automatically excluded from employment as a result of their membership of a category, being 'people with a criminal record'. There must be consideration of individual factors: the nature of the offence, its context and the person's character, including changes in maturity since the offence was committed. In the Middle Ages criminals were regarded as forever 'tainted' by their crime;[100] such a concept should no longer have any currency in the 21st century.

Research in the UK by Hilary Metcalf, Tracy Anderson and Heather Rolfe in 2001 found that one of the reasons employers tended to reject people with a

96 Information privacy laws do not preclude the collection of information from publicly available sources: see Office of the Privacy Commissioner, Australian Government, *Private Sector Information Sheet 17 — Privacy and Personal Information That Is Publicly Available* (2003) <http://www.privacy.gov.au/publications/IS17_03.pdf>.

97 See, eg, CrimeNet <http://www.crimenet.com.au/>; GovtRegistry.com <http://www.govtregistry.com/au>.

98 See above Part II(A). The Australian Law Reform Commission ('ALRC') has recently released a Discussion Paper which proposes extensive reforms to the *Privacy Act 1988* (Cth) as well as Australia-wide adoption of a unified set of privacy principles: see ALRC, 'Review of Australian Privacy Law', Discussion Paper No 72 (2007).

99 For a discussion of the arguments for and against protecting ex-offenders' employment rights, see Helen Lam and Mark Harcourt, 'The Use of Criminal Record in Employment Decisions: The Rights of Ex-Offenders, Employers and the Public' (2003) 47 *Journal of Business Ethics* 237.

100 See *Dugan v Mirror Newspapers Ltd* (1979) 142 CLR 583; Note, 'The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"' (1989) 102 *Harvard Law Review* 1300, 1301–2.

criminal record was that '[p]eople with a criminal record are seen, generally, as undesirable, outside the employers' experience and alien.'[101] Associate Professor Devah Pager refers to this as the 'credentialing' 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.'[102] Similarly, Australian researchers have found that ex-offenders were regarded as less likely to obtain employment than people with chronic illnesses, physical disabilities or communication difficulties — only applicants with intellectual or psychiatric disabilities were rated lower.[103]

An approach which requires attention to the unique attributes of an individual challenges this 'common sense' reliance by society on categories with stereotypical characteristics for evaluating people. The labelling of people — as 'unemployed' or 'criminal' — and treatment of them by reference to their group category (rather than their individual propensities) must be challenged where such a practice so clearly disadvantages them in terms of equity and fairness.

B *Discrimination and Privacy*

The increasing use of criminal history screening undermines individual privacy, dignity and autonomy. Prospective employees are deprived of the ability to exercise control over sensitive personal information and information which has the potential to result in both stigmatisation and discrimination.

Indiscriminate access to and use of criminal record information is likely to be contrary to Australia's international obligations.[104] The International Labour Organization specifically states that in principle an employer should not collect personal data about a worker's criminal convictions, while noting that there may be 'exceptional circumstances' justifying collection of this information.[105] In such a case the data collected must be 'directly relevant to an employment decision', and to ensure that 'only pertinent information is collected … employers should not be allowed to ask workers to provide a copy of their conviction record.'[106]

In contrast to the current situation in Australia, it is explicitly prohibited under the *Quebec Charter of Rights and Freedoms* to

101 Metcalf, Anderson and Rolfe, above n 7, 4.

102 Devah Pager, 'The Mark of a Criminal Record' (2003) 108 *American Journal of Sociology* 937, 942.

103 Joe Graffam et al, *Attitudes of Employers, Corrective Services Workers, Employment Support Workers, and Prisoners and Offenders towards Employing Ex-Prisoners and Ex-Offenders* (2004) 26. This was a study of the attitudes of employers, correctional staff and offenders to the employability of ex-offenders, compared with a range of persons with differing disabilities.

104 See *Convention (No 111) Concerning the Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31, arts 1(1)(a), (2), (3) (entered into force 15 June 1960). See also *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

105 International Labour Office, *Protection of Workers' Personal Data* (1997) 5, 32.

106 Ibid.

> refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment …[107]

Research into the use of criminal records in other jurisdictions suggests that discrimination is not uncommon. In Britain, Metcalf, Anderson and Rolfe found that employers asked about criminal records in 63 per cent of vacancies, saying that they wanted to protect their customers.[108] 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.[109] Likewise, Pager's recent study found that employers in the US were significantly less willing to employ persons with criminal records, and even less so where the applicant with a criminal record was black.[110] Discrimination in employment on the basis of criminal record was the main area of complaint to HREOC under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), representing 34 per cent of complaints.[111] Complaints in this category exceeded complaints of discrimination in employment on the basis of religion, age, trade union activity or sexual preference.[112]

Indiscriminate use of criminal records may therefore be contrary to broader goals of protection of privacy and fair treatment of individuals who have particular characteristics, in this case offenders who have already been punished.

C *Rehabilitation Goals of the Criminal Justice System*

The community expects the criminal justice system to rehabilitate offenders as well as to punish them. Rehabilitation is vital both for individual offenders and for the communities to which they will return.

As noted by Alan Westin and Michael Baker, the socially beneficial process of encouraging individuals to reform their lives 'is impeded when individuals know (or feel) that they will automatically be barred by their past "mistakes" at each of the later "gate-keeping" points of social and economic life.'[113] Studies have reported that employment can reduce recidivism by between a third and a half,

107 *Charter of Human Rights and Freedoms*, RSQ 1975, c C-12, s 18.2.

108 Metcalf, Anderson and Rolfe, above n 7, 74, 111, 199.

109 Ibid 199. Similarly, employer discrimination has been identified as the most common labour market disadvantage suffered by ex-offenders in the UK: Graffam et al, above n 103, 5–6.

110 Pager, above n 102, 957–61. See also the findings of Metcalf, Anderson and Rolfe, above n 7, 104. Earlier research has reported similar findings in respect of criminal records, based on matched application letters: Bruce Western, Jeffrey Kling and David Weiman, 'The Labor Market Consequences of Incarceration' (2001) 47 *Crime and Delinquency* 410, 412–15. The authors reviewed the literature, which identifies differences in effect in relation to types of criminal sanctions, age of offender and previous employment. It must also be noted that factors of marginalisation which may be related to a person offending (and to being sentenced to prison) may also be relevant to their employability. Imprisonment itself can also affect the employability of ex-offenders by reducing their job skills and their social networks, and in many cases by interrupting a young person's transition into a stable career.

111 HREOC, *Annual Report 2006–07* (2007) 63. Complaints under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) are separate from those under the specific legislation dealing with discrimination on the basis of sex, race, age and disability.

112 *HREOC Discussion Paper*, above n 11, 40.

113 Alan F Westin and Michael A Baker, National Academy of Sciences Project on Computer Databanks, *Databanks in a Free Society: Computers, Record-Keeping and Privacy* (1972) 267.

but that 60 per cent of ex-offenders were being refused jobs because of their criminal record.[114]

The commission of a past crime is not automatically an accurate predictor of future offending behaviour. The likelihood of reoffending differs with the type of offence, but past offenders are generally less likely to reoffend as they age.[115] Research has found, for example, that one-third of males desisted (that is, were not 'reconvicted' for at least five years) at 19 years of age, rising to one in two desisting by 34 years of age.[116] This finding was far more striking in the case of female offenders, 65 per cent of whom desisted, with little difference with reference to age.[117]

Current recruitment practices reduce the pool of available labour skills as well as inhibit the successful rehabilitation of offenders. Both occur where a person who poses no potential threat is wrongly excluded from employment by a prospective employer, or where that person 'self excludes' by deciding not to make the job application on the assumption that they will be stigmatised and discriminated against. In other words, the increased resort to criminal record checks may be having an impact on employment in terms not only of the people who are rejected on the basis of their record but also of those who are discouraged from applying in the first place. There are already labour shortages in Australia, and stringent uses of criminal record checks aggravate the shortages.[118] The link between employment and decreased risks of reoffending is already recognised.[119]

Blanket requirements for criminal record checks now even limit access to professional training, with course requirements pre-emptively indicating the necessity for undergoing a criminal record, or a Working with Children Check.[120]

114 Sentencing and Offences Unit, *Breaking the Circle*, above n 44, 75.

115 See Lam and Harcourt, above n 99, 243.

116 Julian Prime et al, *Criminal Careers of Those Born between 1953 and 1978* (2001) 6 <http://www.homeoffice.gov.uk/rds/pdfs/hosb401.pdf>. The authors note that this may of course also indicate that people become more adept at avoiding detection as they age.

117 Ibid.

118 Currently there are labour shortages in various industries. The skilled migration scheme under the *Migration Act 1958* (Cth), whereby temporary work permits are granted to overseas workers to allow them to work in certain industries for a limited period of time, has recently been utilised extensively: see Department of Immigration and Citizenship, *Temporary Business (Long Stay): Standard Business Sponsorship (Subclass 457)* <http://www.immi.gov.au/skilled/skilled-workers/sbs/index.htm>. This is indicative of the shortage of labour because this visa is stated to operate in areas where there is shortage of local skilled labour, for example, trades.

119 See, eg, Department for Education and Skills and Department for Work and Pensions, Home Office, UK, *Reducing Re-Offending through Skills and Employment: Next Steps* (2006) <http://www.dfes.gov.uk/offenderlearning/uploads/documents/Reducing%20Re-Offending%20Through%20Skills%20and%20Employment%20Next%20Steps.pdf>. This initiative is now coordinated by the new Department for Innovation, Universities and Skills: see generally <http://www.dius.gov.uk>.

120 See Malcolm Cowburn and Peter Nelson, 'Safe Recruitment, Social Justice, and Ethical Practice: Should People Who Have Criminal Convictions Be Allowed to Train as Social Workers?' (2007) *Social Work Education* 1. Teaching and social work courses typically include these requirements. For example, students seeking entry into the Bachelor of Social Work at Griffith University are informed that they may have to undergo a Working with Children Suitability Check: Griffith University, *Bachelor of Social Work — Logan* <http://www17.griffith.edu.au/cis/p_cat/admission.asp?ProgCode=1282&Type=apply>. Similarly, applicants for the same course at the University of South Australia are required to provide evidence of a current police check

The increased use of criminal record checks is especially problematic for indigenous people given their over representation in the Australian criminal justice system.[121] The continuing shadow of a criminal record disproportionately affects indigenous communities, perpetuating unemployment (along with broader social dysfunction from alcohol abuse and family violence).[122] The existence of a criminal record also excludes indigenous people from important work within their communities and restricts the capacity of indigenous community members to work formally with the justice system (for example, as community police) to address indigenous issues.[123]

Furthermore, there are serious implications for the broader community where a person who cannot obtain rewarding employment is at risk of social exclusion and ultimately reoffends.[124] The then UK Prime Minister Tony Blair noted, in the foreword to a report on the social exclusion of ex-offenders, that '[p]ublic safety is not safeguarded when prisoners are released into homelessness, with no prospect of employment.'[125] This supports Pager's conclusion that 'incarceration is associated with limited future employment opportunities and earnings potential, which themselves are amongst the strongest predictors of recidivism.'[126]

In fact, there seems to be growing awareness on the part of some employers that people with convictions may provide a useful source of employees for positions which might otherwise be difficult to fill (in the context of labour shortages).[127] Some Australian examples include the Second Step Treatment Program, which provides eligible recovering drug addicts with training (through the Disability Employment Action Centre, a specialist employment service), and job placement with participating companies such as Toll Holdings.[128] Women ex-offenders are being successfully placed with employers by Melbourne Citymission's Women 4 Work program.[129]

before commencing their placement; The University of South Australia, *08: Social Work and Human Services* (2007) 3 <http://www.unisa.edu.au/study/progcourses/undgradpdf08/social_work.pdf>.

121 In 2006, indigenous people were imprisoned at 13 times the rate of non-indigenous people: ABS, above n 77.

122 See Submission to SCAG in response to *Uniform Spent Convictions: A Proposed Model Discussion Paper*, 11 October 2004, 2 (Victorian Aboriginal Legal Service).

123 Ibid. See also the case study used in Graeme Innes, 'Police Checks: A Human Rights Perspective' (Speech delivered at the Occupational Health and Safety and Human Resources Conference, 2 November 2007) <http://www.hreoc.gov.au/about/media/speeches/human_rights/2007/police_checks20071102.html>.

124 In Victoria, 63 per cent of people in custody were unemployed before conviction: Department of Justice, Victoria, *Statistical Profile of the Victorian Prison System 2002–03 to 2006–07* (2008) Table 29. Offending, reoffending and employment, and any causal relations between them, are (of course) complex issues.

125 Social Exclusion Unit, Office of the Deputy Prime Minister, UK, *Reducing Re-Offending by Ex-Prisoners* (2002) 4.

126 Pager, above n 102, 939 (citations omitted).

127 Chartered Institute of Personnel and Development, *Employing Ex-Offenders to Capture Talent* (2007) 2 <http://www.cipd.co.uk/NR/rdonlyres/CC2DF252-2364-4214-9A7A-4C4212CC4EFA/0/empexoffndcaptalpdf.pdf>.

128 See The First Step Program <http://www.firststepprogram.org>.

129 The program is funded by Corrections Victoria under its *Better Pathways* strategy: see Department of Justice, Victoria, *Better Pathways: An Integrated Response to Women's Offending and Re-Offending — A Four-Year Strategy to Address the Increase in Women's Imprisonment in Victoria 2005–2009* (2005).

Furthermore, the evidence suggests that employers who have previously employed people with convictions are generally more inclined to employ them again.[130] British research found that many ex-offenders were loyal and committed employees, almost half staying with the one employer for more than three years.[131] Importantly, the research also suggested that the risk of reoffending was low, with only eight reported cases of reoffending reported by 144 human resources professionals who employed ex-offenders.[132]

D *Inconsistent Regimes across Jurisdictions*

All Australian jurisdictions provide for spent convictions, but there is no uniform set of criteria and some jurisdictions adopt formal statutory schemes whilst others act administratively.

The jurisdictions differ as to the categories of offence that are capable of being spent, and as to the exceptions under which all convictions remain open to disclosure. They differ as to whether convictions are cleared as a matter of automatic procedure or require application to formally clear the record.[133] There are also differences concerning an individual's obligations when being asked questions concerning convictions which have become spent. In the ACT, NSW, the Northern Territory and Tasmania, a question about a person's criminal history is taken to refer only to convictions which are not spent.[134] In Queensland, the regime is less useful as the applicant should still disclose, but the employer is required to disregard, a spent conviction.[135] Jurisdictions also differ as to what is included in a 'criminal record'.[136]

The availability of protection from indiscriminate record checks and any remedies generally depend on the job (for example, public or private sector employment), as well as the state jurisdiction (in terms of information privacy laws and anti-discrimination laws). Thus there exist inconsistencies between jurisdictions and substantial gaps in the levels of protection provided.

E *Quality of Information*

An underlying and fundamental problem is the quality of the information on which employers rely. Inaccurate records can disadvantage individuals if they are

130 See Graffam et al, above n 103, 56–7.

131 Neil Wallace, Chartered Institute of Personnel and Development, *Employing People with Criminal Records* (March 2008) <http://www.cipd.co.uk/subjects/dvsequl/exoffenders/crimrec.htm?IsSrchRes=1>.

132 Press Office, Chartered Institute of Personnel and Development, *HR Professionals Positive about Ex-Offenders' Performance in the Workplace* (23 October 2002) <http://www.cipd.co.uk/pressoffice/_articles/23102002130100.htm>.

133 See, eg, *Spent Convictions Act 1988* (WA) ss 6–7.

134 *Spent Convictions Act 2000* (ACT) s 16(b); *Criminal Records Act 1991* (NSW) s 12(b); *Criminal Records* (*Spent Convictions) Act 1992* (NT) s 11(b); *Annulled Convictions Act 2003* (Tas) s 9(1)(c).

135 See *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9. See generally PILCH Submission, above n 68, 23.

136 See, eg, *Spent Convictions Act 2000* (ACT) s 16(b); *Criminal Records Act 1991* (NSW) s 12(b); *Criminal Records* (*Spent Convictions) Act 1992* (NT) s 11(b); *Annulled Convictions Act 2003* (Tas) s 3.

falsely attributed with a criminal history. This may occur, for example, because an individual shares a name and date of birth with a convicted person or in cases of identity theft. It was reported recently that approximately 2700 people in the UK had been 'wrongly labelled as criminals' by the Criminal Records Bureau, leading to applicants being denied employment and refused entry to university courses on the basis of this incorrect information.[137] The Victorian Privacy Commissioner also reported similar errors arising from the Victorian police database.[138]

Whilst it is possible for individuals to apply for their own official police record check, employees would need to apply under freedom of information legislation to get an incorrect record amended.[139] Moreover, this legislation does not provide any right of compensation in respect of harm which has resulted from a record which is incorrect. In most cases the individual is unlikely to be aware that inaccurate records are being used and may continue to be wrongly excluded from employment for which they would otherwise qualify.

Conversely, if a record fails to include a relevant criminal conviction, an individual may be employed in circumstances where the employer is falsely confident about their suitability and therefore fails to take appropriate precautions, such as periodic audits or random monitoring.[140]

F *Potential Reach of Criminal History*

A final point to make is that the use of criminal history information potentially has a major impact on a large section of society. The existence of a criminal record is in fact relatively widespread (at least in the male population) but it does not of itself indicate either a violent history or a custodial experience.

Across Australia in 2005–06, 586 202 defendants had charges determined or 'finalised' in the courts.[141] In Canada, statistics show that 20 per cent of men and five per cent of women aged between 15 to 69 years have a criminal record.[142] Research in the UK made similar findings, reporting that 27 per cent of men and six per cent of women aged between 18 and 45 in 2001 had at least one criminal conviction.[143] Most of the people in this age bracket were first convicted of a

137 *Criminal Records Mix-Up Uncovered* (21 May 2006) BBC News <http://news.bbc.co.uk/2/hi/uk_news/5001624.stm>. It has been estimated that 400 000 Americans experienced criminal identity theft and related issues with criminal records in one year: Sharon M Dietrich, 'When "Your Permanent Record" Is a Permanent Barrier' (2007) 41 *Clearinghouse Review: Journal of Poverty Law and Policy* 139, 143.

138 Office of the Victorian Privacy Commissioner, above n 40, 5–6.

139 See, eg, *Freedom of Information Act 1982* (Vic) pt V.

140 The potential for such errors was graphically highlighted in the 'Soham murders' case in the UK in August 2002. A school employee who caused the deaths of two young girls would not have been employed had his previous criminal history been properly recorded: Riazat Butt, 'Soham Murderer Will Serve at Least 40 Years', *The Guardian* (London), 30 September 2005, 4. The case led to the Bichard Inquiry in 2004, which looked into, inter alia, the 'effectiveness of … intelligence-based record keeping': Sir Michael Bichard, *The Bichard Inquiry: Report* (2004) 19.

141 ABS, *Criminal Courts, Australia, 2005–06*, ABS Catalogue No 4513.0 (2007) 3.

142 Verónica B Piñero, *On Panopticism, Criminal Records and Sex Offender Registries* (December 2006) First Monday <http://firstmonday.org/issues/issue11_12/pinero/index.html>.

143 Prime et al, above n 116, 6.

minor nonviolent offence, usually theft or handling stolen goods.[144] Whilst a relatively significant proportion of the population had at least one conviction, few people in this age group had experienced custodial sentences: 7.5 per cent of men and 0.5 per cent of women aged under 46 had been in prison.[145] Most convictions had not resulted in custodial sentences.[146]

The use of criminal record checks does not simply affect some separate and alien category of 'other people' — the effect pervades the wider community.

V RETHINKING THE FIELD

The use of criminal record checks by employers raises two competing issues which must be balanced by the Australian community. Maintaining a safe work environment and employers' freedom to select employees in accordance with their own criteria must be balanced against maximising access to work and therefore the scope for rehabilitation of ex-offenders, as well as the optimal use of scarce labour resources.

In considering this balance, it must be remembered that criminal record checks are not the 'magic bullet' for avoiding risk. They will never negate the risks posed by the first time offender or the criminal who has successfully avoided detection. Moreover, extensive use can come at a high cost both in terms of the individual and the community. Indeed, to the extent that rehabilitation of offenders is successful, their reintegration and desistance from crime make places of work, as well as the general community, safer.

Nevertheless, there are clearly circumstances in which the use of criminal history checks will be justified. These include cases where an ex-offender has an established propensity to reoffend in the commission of certain (relevant) crimes, or where the risk of commission of the crime has grave and serious consequences (as in the case of violence when working with vulnerable persons). What is required, therefore, is to find a better balance between the competing goals, and to reduce the existing pressures on employers to make broadbrush and unreflective use of criminal record checks.

We need to rethink the field and to take seriously the interests of all stakeholders in the employment process: employers, would-be employees, clients, customers, the community and the justice system itself. In our view, none of the regimes considered so far in this article — relating to spent convictions, anti-discrimination and privacy — have the potential to provide a complete solution to the problems identified, although appropriate reforms would enhance their effectiveness in preventing or discouraging inappropriate practices. In this Part, we outline the minimum reforms that should be made to these existing regimes in order to help meet the problem of widespread use of criminal records. However, rethinking the field requires consideration of an alternative model to achieve a just system, one which takes into account all of the competing interests and goals.

144 Ibid 8.
145 Ibid 10–11.
146 Ibid 9–11.

A *Reforms to Existing Regimes*

Spent convictions laws have the potential to address one dimension of the problems identified — the inappropriate use of older information about less serious offences. However, as argued above, the existing regime is piecemeal in nature, with serious gaps in terms of the protection offered in some jurisdictions, especially those which lack legislation. As argued in SCAG's 2004 discussion paper, an effective spent convictions regime should not only be uniform nationally and limit access to spent convictions, but also should protect past offenders from disclosing or acknowledging spent convictions information to an employer or third party unless the employer or third party has a specific exemption.[147] The regime must also be reasonably broad in terms of the offences that it covers. It must restrict disclosures to those obtained by the official criminal record check processes and provide appropriate sanctions and remedies for wrongful disclosure and wrongful uses, including unlawful discrimination on the grounds of criminal record.

Anti-discrimination laws have a role to play in targeting inappropriate uses of criminal records, although their effectiveness is limited by practical difficulties in establishing that discrimination has occurred. If they are to play any meaningful role in reducing inappropriate practices, these laws need to be uniform in the extent to which they apply to discrimination on the grounds of criminal record. As discussed above, it is also important to ensure that exceptions based on the 'inherent requirements of the job' do not undercut the laws' effectiveness.[148]

Privacy laws have a more minor role to play given the practical limitations of consent-based exceptions in the employment context. However, removal of the small business operator exceptions, as recommended by the ALRC,[149] would enhance the ability of privacy laws to complement anti-discrimination laws. This would be achieved by providing a general right of access to information for the purposes of correcting the record or to provide evidence that criminal record information has been collected and used.

As with privacy laws, education for employers (for example, via guidelines) and the community about the appropriate and relevant use of criminal records, although useful, is unlikely to have a significant impact in the absence of measures addressing the existing pressures on employers to engage in criminal record checks.

A different and unified approach would minimise the likelihood of irrelevant use of criminal history information by targeting its availability and disclosure, and by limiting the information released to employers on the basis of its relevance as opposed to the seriousness of the offence committed. This is the approach we submit and outline below.

147 SCAG, *Uniform Spent Convictions: A Proposed Model*, above n 11, 41.

148 See also the more detailed reforms to the federal regimes proposed in PILCH Submission, above n 68.

149 ALRC, above n 98, ch 5.

B *A Model for Reform: Restricting Access to Information in Employment Decision-Making*

Criminal history information should prima facie be regarded as private information and should not be automatically accessible, irrespective of its currency. This is the key to our proposal. While spent convictions regimes have an important role to play in terms of prohibiting the disclosure of older information (for any purpose), they need to be enhanced by additional provisions that restrict disclosure for employment purposes on the grounds of relevance.

The Victorian Privacy Commissioner recommended legislation — a Controlled Disclosure of Criminal Records Bill — to provide a clear statutory framework for the handling of criminal record data, with graded levels of disclosure tailored to the level of risk.[150] In NSW at present, police provide criminal record checks only for private employers in specifically identified fields, such as casino employees and some childcare and disability service providers.[151] This is similar to the situation in Britain, where only 'registered bodies' can access the Criminal Records Bureau services.[152]

These approaches provide a minimum protection by restricting access in terms of relevant *sectors*. However, they are too broad as they continue to provide a full criminal history once the 'gatekeeper' criteria have been met, irrespective of whether the information is relevant to the specific position being filled. We do not support the adoption of these types of controls or other piecemeal remedies.

In principle, criminal record information should so far as possible be managed and (where appropriate) disclosed by official sources only. Disclosure by other sources, including job applicants themselves, should be prohibited.[153] We recognise that there are important countervailing arguments based on freedom of the press and open justice that might be at odds with any general prohibition on disclosure from non-official sources. One possible approach to this difficulty is to regulate those practices which are viewed as being especially problematic. For example, the use by employers of commercial criminal checking services should be prohibited, whilst protecting the role of the press to publish criminal records information in the context of the reporting of *current* cases. The new statutory tort of privacy recommended by the ALRC in its review of the *Privacy Act 1988* (Cth)[154] would partially address the issue by providing compensation for people affected by inappropriate disclosures of criminal record information.[155]

In the case of official records, we propose the establishment of a centralised system for the selective disclosure of criminal record information. Disclosure

150 Office of the Victorian Privacy Commissioner, above n 9, 15–19.

151 Checks have to be conducted as part of licensing for some occupations, such as inquiry agents and security officers, health professionals, and some dangerous occupations. People working with children also have to obtain a separate Working with Children Check.

152 See Criminal Records Bureau, Home Office, UK, *Applicant's Guide to the CRB's Disclosure Service* (29 February 2008) <http://www.crb.gov.uk/default.aspx?page=1871>.

153 In order to avoid employers circumventing restrictions on official access by asking applicants directly about their criminal records, such questions would need to be prohibited.

154 ALRC, above n 98, 294.

155 We recognise the practical difficulties arising from internet sites based in foreign jurisdictions. However, we speculate that the measure we propose will have some impact on their operation.

should include only those convictions relevant to a specific category of employment. Currently in Australia, CrimTrac carries out a more limited centralised function, releasing criminal history information about an individual in line with the regime of collection, disclosure and spent convictions applying in each state.[156] This role could be expanded further to deal with targeted disclosures as discussed here.

We propose that criminal record information could be released as follows:

1 only employers in relevant sectors would be eligible to receive the information, such as those working with vulnerable persons or in security; and
2 the information disclosed would constitute information about convictions alone, and would be restricted to those relevant to the specific position.

To permit the disclosure of information in point two above to any employer (and not just the employer described in point one) would be unnecessarily intrusive. In the absence of strong evidence that the commission of past crimes is a predictor of future behaviour or character, we suggest that the employer must establish a need to receive the information by reference to the type of industry or sector in which it operates. This restriction on the type of employer eligible to receive criminal record information then operates to preserve as far as possible the principle that an offender who has already been punished should receive no further punishment outside the court system. For employers generally, reference checks in recruitment may be made in the ordinary way to ascertain how employees have performed in their previous jobs.

The proposed regime is comparable in some respects to that involving the Criminal Records Bureau, which operates in England and Wales. The Criminal Records Bureau only makes criminal history information available to authorised organisations, that is, organisations representing professions and occupations specified in the Exceptions Order to the *Rehabilitation of Offenders Act 1974* (UK) c 53.[157] The would-be employee applies for what is called 'Disclosure', providing the name and number of the authorised organisation.[158]

However, our proposal recommends a more targeted and proportional regime than that operated by the UK Criminal Records Bureau, which releases the full record — including convictions, cautions and charges — once the employer organisation is within the Exceptions Order. The Bureau addresses discrimination and storage issues by requiring authorised organisations to subscribe to its Code of Practice.[159]

156 CrimTrac has established a process of accreditation for agencies requiring regular record checks (at least 500 per year). The agency can then apply directly to CrimTrac, provided it can show that checks will produce a 'community benefit', defined by reference to security requirements and vulnerable client groups: see CrimTrac, *Accreditation Procedures to Access National Criminal History Record Checking (NCHRC) Services* (2007) <http://www.crimtrac.gov.au/files/file/nchrc_accreditation_procedures.pdf>. Other agencies and individuals can still seek criminal record checks, but do so through their state police force.

157 *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975* (UK).

158 Criminal Records Bureau, *Applicant's Guide to the CRB's Disclosure Service*, above n 152.

159 See Criminal Records Bureau, Home Office, UK, *What Is the Code of Practice?* (29 February 2008) <http://www.crb.gov.uk/Default.aspx?page=311>; Criminal Records Bureau, Home Of-

As an illustration of our proposal, an employer involved in aged care would be authorised or accredited to seek criminal history information about applicants seeking work in the primary care of adult patients. The disclosure agency would release information only about *relevant convictions* according to legislated criteria, which would be those typically relating to violence or sexual assault. The employer would be prohibited from compelling the applicant themselves to provide the information in other cases.

The responsibility for applying for criminal record information could alternatively be that of the job applicant, rather than the employer, applying by reference to the employer's authorisation. In particularly sensitive areas, it would be possible to legislatively articulate criteria for employment and to require an applicant for employment in that field to obtain a check or licence, personal to themselves and transferable, such as occurs currently with Working with Children Checks.[160]

Limiting disclosure to *relevant* information protects the privacy, dignity and autonomy of individuals, and it minimises the risk of decision-making based on irrelevant information, as well as the risks associated with the ongoing storage of personal information.[161] It helps to ensure *appropriate* use of information and reduces the opportunity for intended or unintended discrimination on the basis of a criminal record, and indirect discrimination on the basis of race or sex. Labour shortages, too, may be partially relieved by 'releasing' more people into the supply pool.

Moreover, the complexity of decision-making and the potential for liability on the part of employers would be reduced. The employer could not be 'blamed', for example, via the law of negligence for failing to make a check where it was not lawful to obtain and use the information.

VI CONCLUSION

The recent and widespread use of criminal record checking by employers has largely gone unchallenged in the broader community. Yet it poses a serious risk to the community by the exclusion and marginalisation of potentially productive citizens. On their own, criminal records are blunt instruments for avoiding risk. They are too broad, but at the same time too narrow, because they identify only people whose behaviour has previously been prosecuted when it is widely recognised that much abusive behaviour has historically gone unreported.[162] We have argued that the existing legal regimes governing criminal record disclosure

fice, UK, *Sample Policy Statement on the Recruitment of Ex-Offenders* (2005) <http://www.crb.gov.uk/PDF/CRB_DIP011-Policy-Statement_Ex-offenders_Eng.pdf>.

160 See, eg, *Working with Children Act 2005* (Vic) pt 2.

161 For example, the risk that information stored may be hacked into or inappropriately disclosed.

162 See, eg, Jan O'Grady, Ombudsman, Tasmania, *Listen to the Children: Review of Claims of Abuse from Adults in State Care as Children* (2004); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle — 'Little Children Are Sacred'* (2007); Gregory Smith, *The Harm Done: Towards Acknowledgement and Healing in New South Wales* (2007) The Bellingen Institute <http://www.bellingeninstitute.com.au/media/php?action=fullnews&id=43>; Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (2004).

are piecemeal, fragmented, uneven and inconsistent; they require rethinking in light of the increased use of pre-employment checks. This reconceptualisation requires more than simply reforms to the existing regimes, which would perpetuate that piecemeal, fragmented approach.

This article has outlined what we consider to be the most promising model for ensuring appropriate use of criminal record data by employers. Appropriate use of criminal records can best be achieved by restricting the information which is available for employer decision-making. We proposed a centralised system for the selective disclosure of criminal records information, based on the disclosure of only those convictions relevant to a specific category of employment. We argued further for a comprehensive spent records regime, to be supplemented by Australia-wide restrictions on discrimination based on criminal records. A comprehensive policy for managing criminal history disclosure is necessary for a just model that achieves the desired balance — promoting equity and the rehabilitation of past offenders, whilst protecting legitimate and reasonable interests of employers and the community.