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

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

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

Background: increasing numbers of criminal record checks

There has been increasing use of criminal record checks since the 1990s across much of the English-speaking world. The Australian national criminal records agency, CrimTrac, processed approximately 2.7 million criminal history checks in the period of 2009–10.² Most — though not all — would have been in relation to job seeking. This is a substantial increase from the 1.7 million requested in 2005–6.

This raises significant social and economic issues. Almost 500,000 Australians were found guilty of an offence in 2010–11.³ The Human Rights and Equal Opportunity Commission observed in 2005:

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

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

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

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

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

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

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

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

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

Risks with using criminal record information

Unfairness to ex-offenders and to the general community

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

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

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

Exclusion on the basis of criminal history may be illegal

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

Accuracy of information

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

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

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

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

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

Spent conviction regimes

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

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

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

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

Research on reoffending

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

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

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

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

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

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

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

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

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

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

In the US, an interagency reentry council has recently been established by the Federal Attorney-General to assist former offenders find work and reduce recidivism.

Incentives are offered to employers who employ ex-offenders; at the same time, the council aims to help employers make decisions about the most appropriate uses of a criminal record when making employment decisions with “reentry myth busters”.²²

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

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

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

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

Comparable countries do not use this method of risk management

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

Conclusions and suggestions

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

As concluded by the Law Reform Commission of WA:

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

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

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

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

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

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

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



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Footnotes

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

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

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