

YOUNG PEOPLE, CRIMINAL RECORDS AND DISCRIMINATION IN EMPLOYMENT

A report by Marrickville Legal Centre and
Youth Justice Coalition NSW



**Marrickville
Legal Centre**
From the inner west,
serving NSW

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This report was researched and written on the traditional lands of the Gadigal and Wangal peoples. We pay our respects to Elders past, present and emerging, and acknowledge Aboriginal and Torres Strait Islanders as the first people of Australia. They have never ceded sovereignty and remain strong in their enduring connection to land and culture.

A note about case studies used in this report: Names and other identifying features of clients have been changed for the purposes of this submission, all other facts and events reflect the true experiences of clients who sought assistance from Marrickville Legal Centre, Youth Law Australia, Redfern Legal Centre and Legal Aid NSW. Case studies from other sources have been republished and referenced with permission.

ABOUT THE YOUTH JUSTICE COALITION

The Youth Justice Coalition is a network of youth workers, youth and children's lawyers, academics and policy workers who promote the rights of children and young people in NSW and across Australia, including their rights under the UN Convention on the Rights of the Child and other international human rights instruments. The YJC seeks to promote appropriate and effective legislation, policies and practices in juvenile justice, child welfare and other areas of law affecting children and young people, and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debates.

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INTRODUCTION

This report was commissioned by the Youth Justice Coalition in response to growing concerns among youth workers and advocates that young people with a criminal record are unable to gain employment. The concern is well founded; in recent years we have seen an exponential increase in employers requiring a criminal record check as part of standard recruitment processes, alongside an increase in legislation that prevents people with a criminal record from participation in certain types of occupations.

Young people are keenly aware of the impact a criminal record is likely to have on future employment opportunities; one of the most common enquiries made by young people to the Youth Legal Service¹ is about what will happen if a conviction is recorded against them in court proceedings. This type of advice is usually sought by a young person with no criminal history who has never been to court before. They may be facing charges for a minor offence – drug possession, property damage, larceny, traffic offences and trespass are the most common examples. Many of them are still studying at TAFE or university and most of them are terrified that their careers plans will be ruined.

The number of legal frameworks that surround the recording and release of criminal history information is staggering. This is not helped by the fact that systems and processes between the states are not always the same. Some of the states and territories have a spent conviction scheme while others do not, a few of the states and territories have some protection against criminal records discrimination while most have none. Another issue of concern is the lack of checks and balances; we have no centralised body or authority that monitors or restricts requests for the release and use of criminal histories in employment decisions. Provided an employer has obtained consent from a prospective employee, they are permitted to obtain the criminal record information without having any regard for whether it is necessary, appropriate or relevant to the job they are applying for.

Criminal records discrimination is experienced by people of all ages, but it may have a worse impact upon young adults who have limited training and workforce experience. The impact of a criminal record on a young person is likely to have a detrimental effect over a number of years as they are excluded from opportunities to volunteer, work, study and travel. The impact of the stigma and exclusion experienced by people with a criminal record is often disproportionate to their offending – resulting in the punishment outweighing the crime.

In the NSW Children's Court, judicial officers are required to consider the impact of a sentencing decision upon the child's engagement with employment and education.²

¹The Youth Legal Service is a free, statewide advice and casework service for young people up to 25 years of age run by Marrickville Legal Centre.

²*Children (Criminal Proceedings) Act 1987* (NSW), s 6(c).

No such protection applies to young people who are over 18 years of age once they enter the adult system, though the importance of maintaining links with education, training and employment opportunities clearly continues well into young adulthood. The primary purpose of this report is to recommend reform to sentencing, discrimination and privacy legislation in NSW. The secondary purpose is to provide more information on the social and legal issues to assist lawyers, youth workers and advocates who work with young people affected by criminal records discrimination. We also hope that it will provoke discussion among employers in the public and private sectors leading to implementation of less intrusive and discriminatory recruitment practices.

Some of the case studies in this report are anecdotal in order to preserve client confidentiality. We further acknowledge that the lack of available data and research prevents us from covering this subject as comprehensively as we would like. Despite these limitations, we hope that this report contributes to public debate and that our recommendations be seriously considered by employers and policymakers.

SUMMARY OF RECOMMENDATIONS

AMENDMENTS TO ANTI-DISCRIMINATION LAWS

- That discrimination on the basis of an irrelevant criminal record be uniformly prohibited in anti-discrimination legislation across all Australian states and territories.
- That the *NSW Anti-Discrimination Act 1977* be amended to prohibit discrimination on the basis of an irrelevant criminal record.
- That s351 of the *Fair Work Act* be amended to include irrelevant criminal records as a protected attribute.
- That protection against criminal records discrimination be legislated at the federal level, enabling a pathway for complaints to the Federal Court.
- That anti-discrimination laws between the states, territories and at the federal level be harmonised wherever possible.

INCREASED MONITORING AND OVERSIGHT OF CRIMINAL RECORD CHECKS

- That a national oversight body be established with statutory power to monitor and refuse requests for criminal record information that are unnecessary or unlawful.
- That the *Australian Criminal Intelligence Commission (ACIC)* require employers to identify the purpose and position information when requesting a criminal record check.
- That ACIC record and publish data on the purposes of criminal record checks that it provides; for example, for employment, migration or other purposes.
- That a longitudinal study into the impacts of a criminal record checks on young Australian jobseekers be established.

AMENDMENTS TO SENTENCING PROCEDURES AND SPENT CONVICTION SCHEMES

- That s21A(3) of the *Crimes (Sentencing and Procedure) Act 1999* (NSW) be amended to explicitly include age as a mitigating factor for consideration in sentencing.
- That s21A(3) of the *Crimes (Sentencing and Procedure) Act 1999* (NSW) be amended to include capacity to obtain or maintain employment as a mitigating factor for consideration in sentencing.

INCREASED FUNDING FOR COMMUNITY LEGAL CENTRES

- That more funds and resources be allocated to youth-specific legal services.
- That a specific legal advice and information service be established to assist employers meet their ethical and legal obligations with respect to privacy, non-discrimination and risk management.

MORE SAFEGUARDS APPLIED TO WORKING WITH CHILDREN CHECKS AND NDIS WORKER SCREENING CHECK PROCESSES

- That employers requiring WWCC Clearances or NDIS Worker Screening Checks be required to demonstrate to the Office of the Children's Guardian or to the NDIS Commission that a check is relevant to the inherent requirements of a role in situations where a check or clearance is not otherwise required by law.
- That the *Anti-Discrimination Act 1977* (NSW) be amended to:
 - Enable the Anti-Discrimination Board to have jurisdiction to hear discrimination complaints about employers and training providers requiring WWCC Clearances or NDIS Worker Checks when not required by law or in circumstances where there is no relevance.

OR

- That the *Civil and Administrative Tribunal Act 2013* (NSW) be amended to:
 - Enable the NSW Civil and Administrative Tribunal (NCAT) to hear discrimination complaints about employers and training providers requiring WWCC Clearances or NDIS Worker Checks when not required by law or in circumstances where there is no relevance.

THAT PRIVATE AND PUBLIC SECTOR WORKPLACES IMPLEMENT CHANGES IN PROCESS AND CULTURE

- That all employers implement an 'inherent requirements' test when criminal records information is requested in pre-employment and probationary screening processes.
- That employers address procedural bias against employing individuals with criminal histories where that history is low risk or irrelevant.

GLOSSARY

Apprehended Violence Order	An Apprehended Violence Order (AVO) is a civil order made in court to restrain a person using violence or threatening behaviour. An AVO should not be disclosed in a National Police Check, but it may be disclosed for a <i>Working with Children Check</i> or a <i>NDIS Worker Screening Check</i> .
Criminal Record	A criminal record is a formal list of all criminal offences where a finding of guilt has been made in court and the conviction has been formally recorded. Spent convictions are not included in a criminal record.
Criminal History	A criminal history is broader than a criminal record. It includes all offences that a person has attended court for, including offences for which a person has been found guilty but a conviction has not been formally recorded, charges that have been withdrawn or dismissed, spent convictions, warrants, bonds or AVOs. A full criminal history should not be released in a National Police Check, but it may be disclosed for a <i>Working with Children Check</i> or a <i>NDIS Worker Screening Check</i> .
National Police Check/National Police Certificate	The National Police Check, also known as a "Police Check", is a document summarising the police and criminal record information on an individual collected from police databases in all Australian jurisdictions. In NSW, a Police Check will show convictions as well as pending charges and matters that are awaiting hearing, but it should not include spent convictions. ³
NDIS Worker Check (Worker Check)	The <i>NDIS Worker Check</i> is a clearance required for all workers in NSW that provide support and services to people with disabilities under the National Disability Insurance Scheme. ⁴

³National Police Check, *National Coordinated Criminal History Check* (2019), <https://www.infotrackgo.com.au/my-police-check>

⁴*National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW); *National Disability Insurance Scheme Act 2013* (Cth).

Spent Conviction A spent conviction is a conviction that is not disclosed on a person's criminal record after the designated "crime free period" has passed. The crime free period for most adult convictions in NSW is 10 years.⁵ Some more serious convictions can never be spent.⁶

Unrecorded Conviction Unrecorded convictions occur where a court has found a person guilty of an offence and has made a determination not to formally record it. Unrecorded convictions should not be disclosed in a National Police Check, but they may be disclosed in a *Working with Children Check*, a *NDIS Worker Screening Check*, or for people seeking employment in a designated occupation.⁷

Working with Children Check (WWCC) A *Working with Children Check* (WWCC) is a clearance issued by the Office of the Children's Guardian (OCG) that authorises a person to engage in "child-related work".

⁵*Criminal Records Act 1991* (NSW) s 9(1).

⁶This includes serious assaults and sexual offences. Legal advice should be sought where there is doubt about whether a conviction may be spent.

⁷See *Criminal Records Act 1991* (NSW) s 15. Designated occupations include judge, magistrate, justice of the peace, police officer, member of staff of Corrective Services NSW, teachers and teacher's aides.

EMPLOYERS AND CRIMINAL RECORD CHECKS

The practice of employers conducting pre-employment criminal record checks in Australia has increased exponentially in recent years. *The Australian Criminal Intelligence Commission* (ACIC) has observed the trend of criminal record checks increasing by approximately 400,000 every year.⁸ The numbers are remarkable: in 2005, ACIC produced 1.7 million criminal record checks, or the equivalent of roughly one in every ten members of the Australian population.⁹ By the 2018-2019 financial year that figure had tripled and ACIC produced 5.6 million criminal record checks, which was more than one in every five members of the population.¹⁰ Considering that the 'working age' segment of the population makes up only 65% of the total population, we estimate that a criminal record check is performed, on average, on as many as one in every three eligible members of the workforce every year.^{11,12}

One of the reasons cited for the rapid escalation of criminal record checks is an increasing preoccupation among employers, government services and within the community with "risk management", which has been accompanied by stricter policies and levels of security in recruitment procedures. In the context of employment, this frequently results in the competing interests of individual privacy, and equal opportunity being side lined in favour of the employer's desire to mitigate against perceived risk.¹³

Other reasons include prejudicial beliefs held by some employers that applicants with a criminal record pose a higher risk of dishonesty, unreliability and irresponsibility, while some are concerned about changed customer or client perceptions if the criminal record of an employee becomes known.¹⁴

Although the decision to screen and prohibit this class of job applicants may be intended to save money, criminal checks do not always benefit business. Current research suggests that employees with a record are often more trustworthy, productive and loyal employees than those who have a "clean" record.¹⁵ The cost of running a criminal record check is also an unnecessary expense in many cases, with most public and private employers outsourcing this task to for-profit enterprises.

⁸Australian Commission of Criminal Intelligence. (2019). *CrimTrac: Annual Report 2018-2019*. Canberra, 50.

⁹Naylor, B., Paterson, M., and Marilyn Pittard. (2008). 'In the shadow of a criminal record: Proposing a just model of criminal record employment checks' *Melbourne University Law Review* 32, 172.

¹⁰Australian Commission of Criminal Intelligence. (2019). *CrimTrac: Annual Report 2018-2019*, Canberra, 50.

¹¹Australian Bureau of Statistics. (2019). *Australian Demographic Statistics*, Jun 2019, 3101.0.

¹²We note that criminal record checks are also performed for migration and other purposes. Unfortunately, there is no available data on the purpose of checks performed by ACIC, so it is not possible to break down the proportion of checks that are conducted for employment of other purposes.

¹³Naylor, B., Paterson, M., and Marilyn Pittard. (2008). 'In the shadow of a criminal record: Proposing a just model of criminal record employment checks' *Melbourne University Law Review* 32, 173.

¹⁴Human Rights and Equal Opportunity Commission. (2004.) *Discrimination in Employment on the Basis of Criminal Record*, Discussion Paper, 7.

¹⁵Trone Private Sector and Education Advisory Council to the American Civil Liberties Union. (2017). *Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefits Your Company* 8.

Discrimination on the grounds of an irrelevant criminal record is one of the most common grounds of complaint made to the Australian Human Rights Commission, which has emphasised the disproportionate impact upon Aboriginal people due to their over-representation in the criminal justice system.¹⁶ The existing gaps in discrimination laws often permit discrimination against Aboriginal people who have a criminal record – while it is unlawful for an employer to reject the application of an Aboriginal person on the basis of their race,¹⁷ it is not unlawful for an employer to reject the application of an Aboriginal person on the basis of their criminal record. This form of racialised discrimination is often more covert than intentional or deliberate racism. Many well-meaning employers discover that they have inadvertently created conflicting policies in situations where they seek to employ more Aboriginal people through targeted recruitment programs but are then blocked from making an otherwise suitable candidate an offer of employment due to competing policies on criminal records and risk management.

Most criminal records discrimination occurs at the application and recruitment stage of employment, or before an employment relationship has actually been established. This means it will be difficult for an applicant to argue or prove that discrimination has occurred, as there is no requirement for employers to provide reasons for deciding not to employ a person or to explain why one candidate was chosen over another. In situations where an applicant's record becomes known by an employer during the course of a person's employment, it often results in dismissal, being denied training opportunities, being denied opportunities for advancement or being harassed in the workplace.¹⁸

Perhaps understandably, private employers may not see it as their responsibility to provide opportunities for people with a record. However, opportunities to engage in rehabilitation through employment or other opportunities are essential in a democratic society that believes in the traditional value of the "fair go".¹⁹ The trend of increasing criminal records checks entrenches the disadvantage of some of our most vulnerable community members, effectively excluding and marginalising people that have already been punished at law.²⁰

Rehabilitation has long been established as one of the core principles that judicial officers must take into consideration when making a sentencing decision.²¹ Access to employment

¹⁶ Australian Human Rights Commission. (2019). *Free and Equal: An Australian Conversation on Human Rights. Discussion paper: Priorities for federal discrimination law reform.* Sydney. 10.

¹⁷ *Racial Discrimination Act 1975* (Cth)

¹⁸ Human Rights and Equal Opportunity Commission. (2004). *Discrimination in Employment on the Basis of Criminal Record. Discussion Paper.* 8.

¹⁹ Snow, D. (2019) 'Australian Values: What the bloody hell are they?' The Sydney Morning Herald retrieved from <https://www.smh.com.au/national/australian-values-what-the-bloody-hell-are-they-20190118-p50s76.html>

²⁰ Tilbury, C. (2014) 'Working with Children Checks- time to step back?' *Australian Journal of Social Issues* 49(1), 94.

²¹ *Veen v R (No 2)* (1988) 164 CLR 465.



I was going for a job with a cleaning agency. I thought I had done well and that I was really close to getting the job. Then they asked to do a check right at the very end. If I had know that they would ask me that, I never would have bothered to apply in the first place as I knew they would give it to someone else."

Christina

is essential for a person's reintegration into community – it brings income and structure, connection to society, a sense of purpose, self-esteem and a community of peers. Perhaps most importantly from a criminal justice perspective, employment also reduces rates of re-offending.²² Rehabilitation through employment can only occur when employers are able to look past a criminal record and provide opportunities. Blanket policies that reject applicants who have a criminal record disrupt opportunities for rehabilitation while undermining the principle that people who have "done their time" deserve a second chance.²³

Many charities and not-for profits now require volunteers to complete checks and related clearances prior to commencing work in unpaid positions. While it is often the case that checks are in place to mitigate risk or to comply with policies designed to protect vulnerable community members, it is worth noting that in most cases criminal record checks are not required by law when volunteers are under adequate supervision.²⁴ Excluding people with a record from volunteering opportunities leads to huge losses in productivity and output. It also demonstrates a shift in the values of forgiveness and equality that have traditionally been held by our charitable institutions.

WHAT PROCESSES ARE INVOLVED IN A CRIMINAL RECORD CHECK?

In Australia, all employers are entitled to make enquiries about a prospective employee's criminal record as part of their recruitment process. There is no requirement that the check is necessary or relevant to a role before making this enquiry. For many recruiters and employers, a mandatory criminal record check is now as routine in the pre-employment process as confirming qualifications and checking references.

Consent must always be obtained before an employer seeks the criminal record of an applicant. However, the unequal bargaining power often makes it difficult for applicants to refuse to consent if they wish to be considered for a position. Sometimes job applicants are not informed that there will be a criminal record check until the final stages of recruitment or until after they have been offered a position.²⁵ This can be even more distressing for an applicant who has completed the entire application process only to be disqualified in the very final stage of recruitment.

Once an employer has obtained consent for criminal record check, the application is sent to the Australian Criminal

²²Bradfield, R. (2015). 'Sentences without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment'. *Monash Law Review* 41, 40.

²³Naylor, B., Paterson, M., and Marilyn Pittard. (2008). 'In the shadow of a criminal record: Proposing a just model of criminal record employment checks' *Melbourne University Law Review* 32, 172.

²⁴See pages 25-27 and 26-28 for further discussion on Working with Children's Checks and NDIS worker checks.

²⁵Bradfield, R. (2015). 'Sentences without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment'. *Monash Law Review* 41, 43.

Intelligence Commission (ACIC) which performs a search on all state and federal police databases. This is also known as the 'national police check'. Once the checks are complete, ACIC returns any relevant information found in the check to the applicant and the employer.

Convictions that have been spent will not show up on a police check as they cannot be disclosed.²⁶ All other recorded convictions, good behaviour bonds and conditional release orders that have not expired will show up. Charges that have not yet been to court will also be displayed on the police check as 'pending', causing potential discrimination issues for people who have been charged with an offence that has not yet been to court. As delays in the court system are common, this could mean that a person may have a pending charge on their record for months or even years. Although a pending charge is not the same as a conviction and should not be judged as one, many employers would not make this distinction, or in any event may determine that an applicant is unsuitable for employment while there are outstanding charges against them.

ACIC ACCREDITED AGENCIES

The majority of employers outsource the criminal record check process to an agency that has been accredited by ACIC.

Accredited agencies can apply directly to ACIC for police checks on behalf of individuals that are current or prospective employees of the employer that is seeking the information.²⁷ They are usually involved in bulk recruitment activities and are often able to produce results more quickly. Although accredited agencies are still required to obtain consent from an applicant, the process is much more streamlined. Given the large scale recruitment activities that accredited agencies perform, it is likely that consideration of whether a check is relevant or necessary for a role is not considered, particularly as most accredited agencies are submitting checks to ACIC on behalf of the employers that have engaged their services.

Agencies that are currently ACIC accredited are publicly listed on the ACIC website. A large number of these agencies appear to have been established solely for the purpose of facilitating the application process of criminal record checks for employers. Some of the currently listed entities include; *Clear to Work Pty Ltd*, *Checked Australia Pty Ltd*, *Key Vetting Services Pty Ltd* and *Job Seeker Pty Ltd*.²⁸

²⁶See pages 40-42 for discussion on spent convictions.

²⁷Australian Criminal Intelligence Commission, National Police Checking Service. *I'm interested in becoming accredited*. (2020). Retrieved from <https://www.acic.gov.au/our-services/national-police-checking-service/im-interested-becoming-accredited>

²⁸Australian Criminal Intelligence Commission, National Police Checking Service. *Find out more information*. (2020). Retrieved from <https://www.acic.gov.au/our-services/national-police-checking-service/find-out-more-information>.

Case study

Tom had been working in the hospitality sector for more than a decade. He started working for a new company, where he was quickly offered a promotion and a pay rise, subject to a criminal record check. The check revealed that Tom had two convictions on his record from 1994 and 1998. Because the convictions were more than 10 years old, they should not have shown up on his record as they were 'spent'. Tom lost his job. He contacted the police to ask why these offences were disclosed. Tom reported that he was told the information had been released by mistake.

Tom's employment was not restored.

The emergence of a for-profit industry that collects and disseminates criminal record information for employers is concerning. Employers continue to be able to apply for a criminal record check directly with ACIC themselves, however the streamlined service offered by accredited agencies effectively outsources a task that could otherwise be performed by a human resources department on a case by case basis as required.

Larger employers and government agencies are able to apply for ACIC accreditation and apply for police checks on their own behalf. Alongside private businesses, a large number of not-for-profit and charitable organisations that work with a large base of staff and volunteers are listed as ACIC accredited agencies, which means that it is very likely they have implemented criminal record checks in their recruiting practices for the majority of staff and volunteers. Australian employers that are currently listed as having ACIC accreditation include: *Volunteer Marine Rescue VIC*, *The Clean Energy Regulator*, *Cancer Council NSW* and the *Australian Red Cross*.²⁹ Although a criminal record check may be relevant for a number of roles within these organisations, including positions where staff are working supervised with vulnerable community members, it is otherwise difficult to conceive what relevance a criminal record may have to volunteering with marine wildlife or in roles involving fundraising and disaster relief. Charitable organisations that have traditionally provided employment and volunteering opportunities for people from diverse backgrounds may now be turning people away because they have a criminal record or a criminal history.

Some employers request and use criminal record checks as a technique to 'weed out' prospective employees from a larger pool of applicants. In times of low unemployment and high market demand, rejecting applicants that have a criminal record simplifies the decision-making process for employers and recruiters that choose to disregard whether this practice is unfair or discriminatory.

Rejecting a job applicant who has a criminal record – even in circumstances where the record has no relevance to an advertised role – is not unlawful in NSW. Unfortunately, criminal records are not recognised as protected attribute under the *Anti-Discrimination Act 1977* (NSW).³⁰ The proliferation of information that is now available online also allows employers to research the criminal and personal histories of prospective and current employees. Online information may have come from any number of sources – news reports, blogs, social media and reported court judgements are a few examples. This information does not always distinguish between situations

²⁹Australian Criminal Intelligence Commission, National Police Checking Service. *Find out more information*. (2020). Retrieved from <https://www.acic.gov.au/our-services/national-police-checking-service/find-out-more-information>.

³⁰Tasmania, the Australian Capital Territory and the Northern Territory are the only jurisdictions that prohibit discrimination on the basis of an irrelevant criminal records. See page 34 for further discussion on the law in these jurisdictions.

where a person has been found guilty of an offence, where a person has been found not guilty of an offence, where a conviction has been quashed or successfully appealed or where a matter has been withdrawn by the prosecution. The permanent availability of online information that may be inaccurate or misleading increases the possibility that any contact with the judicial system will permanently stigmatise a person long after the conclusion of their contact with the criminal justice system.

Routine and mandatory criminal record checks are also a deterrent for many people who would otherwise be attempting to secure work. The embarrassment and shame of having to disclose a criminal record leads to many people with a record to simply give up applying for jobs. Additionally, some applicants disclose information that would otherwise remain confidential because they think that they have a criminal record, when in fact they do not. Many people who have come into contact with police and the court system report confusion about the outcome of those interactions. This confusion is understandable as the system is complex – some convictions are not recorded, some are deemed 'spent' after a certain period, some convictions can never be spent, whereas a check for certain types of clearances discloses more information than would ordinarily be produced in a police check.³¹ This situation also creates difficulty and confusion for employers, who may not have the relevant skills to interpret criminal history information once it has been disclosed.

Recommendations

- That statutory restrictions be placed on employers seeking access to criminal record information that is not otherwise required by law.
- That a longitudinal study into the impacts of criminal record checks on young Australian jobseekers be established.

That private and public sector workplaces implement changes in process and culture:

- That address bias against employing individuals with criminal histories where their offending is historic or irrelevant; and
- That clearly and realistically assess the relevance of an individual's criminal record to the inherent requirements of a position.

³¹For example, information produced for a Working with Children Check may produce information about spent convictions, while a standard police check will not.

YOUNG PEOPLE AND CRIMINAL RECORD CHECKS

Young people with a record are increasingly likely to encounter challenges securing employment as more employers conduct pre-employment checks in their recruitment processes. Lacking in experience and with less time having passed since having a conviction recorded, many young people are at greater risk of rejection from even the most basic, entry level opportunities.

The overall adult unemployment rate in Australia is quite low, making up around 5% of the workforce,³² while rates of unemployment amongst young people are much higher, at 11.8%. The unemployment rate of Aboriginal and Torres Strait Islander young people is close to three times the youth unemployment figures, at around 30%.³³

These figures are set to markedly increase following the impact of the Covid-19 pandemic, which has also disproportionately impacted upon young workers. Aboriginal and Torres Strait Islander young people are also likely to experience intersectional discrimination on grounds of both their criminal record and their racial background. In 2009, Aboriginal people made up less than 2% of the NSW population but accounted for 13% of all persons charged with a criminal offence.³⁴ In some cases, criminal records discrimination has simply replaced what was formerly racial discrimination – many employment and training opportunities that specifically target Aboriginal applicants then reject those same applicants because they have a criminal record. This is especially an issue for roles within the government and public sectors, which frequently require a criminal record check as part of the recruitment process.³⁵

WHY ARE YOUNG PEOPLE MORE AT RISK?

Young people are able to identify from an early age that having a criminal record will have an adverse impact on their employment opportunities. A recent survey of young people in custody asked about perceived barriers to education and employment upon release and in adulthood. The survey found that 46% of respondents identified "*getting into trouble with the law*," as a significant obstacle, with a further 26% identifying "*a criminal record*" as a direct barrier to them getting a job.³⁶

Young jobseekers have less demonstrable experience – both in life and in work – to counter any negative information that may be produced in a criminal record check; nor have they had as much time to demonstrate evidence of remorse or of rehabilitation. Yet an extended period of unemployment for

³²Australia Bureau of Statistics. (18 April 2019). 6202.0 – *Labour Force, Australia*, March 2019.

³³Australian Bureau of Statistics. (19 February 2018). 2076.0 – *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islanders 2016*.

³⁴Beranger, B., Weatherburn, D., and Moffatt, S. (2010). *Crime and Justice Statistics Bureau Brief No. 54: Reducing Indigenous Contact with the Court System*. Sydney: NSW Bureau of Crime Statistics and Research, 1.

³⁵Work for NSW, *The recruitment process*. (2019). Retrieved from <https://iworkfor.nsw.gov.au/the-recruitment-process>

³⁶Wagland, P. & Blanch, B. (2013) 'Youths in custody in NSW: Aspirations and strategies for the future.' *BOCSAR NSW Crime and Justice Bulletins* 1.

a young person may have a scarring impact that is felt for a number of years beyond the period of actual unemployment.³⁷

Supermarkets have traditionally provided entry level employment opportunities for young people, with many employers actively targeting younger employees in their recruitment campaigns. For a number of the larger Australian supermarket chains, criminal record checks are now a prerequisite for all applications, leaving fewer opportunities for young people who are seeking work with a record.³⁸

As discussed in the previous chapter, many employers hold perceptions about people with a criminal record as being less trustworthy or reliable, despite the evidence suggesting that a history of prior offending is not, on its own, an accurate predictor of predict future criminal behaviour. Long-term unemployment and entrenched disadvantage, on the other hand, does lead to repeated offending.⁴⁰ This is especially relevant for young offenders, whose contact with the criminal justice system can often be chalked up to youthful impulsivity, boredom, immaturity and more frequent contact with police. Indeed, young people are more likely than adults to have proceedings brought against them though involvement in criminal activity decreases with age.⁴¹

When a young person is unable to find ongoing employment, additional strain is placed on Centrelink, Housing, Health and other social welfare services. Unemployment can have significant long-term effects on young people that continue well into adulthood, including an increased risk of offending and reoffending, an increased likelihood of homelessness and increased drug and alcohol and mental health issues.⁴² For young people with a history of offending, one of the most effective predictors of successful re-integration into community is through stable employment. Meaningful engagement in employment and education opportunities also reduces reoffending.^{43,44} When these opportunities are not provided, the risk of a young person committing further offences increases.⁴⁵

³⁷Smerdon, X. (2015) 'Youth Unemployment has a "Scarring" Effect' *ProBono Australia*, 20 July 2015.

³⁸Coles Group, *Privacy*. (November 2018). <<https://www.colescareers.com.au/privacy>>. IGA Supermarkets, *Privacy Policy*. <<https://www.iga.com.au/privacy/>>.

³⁹Noble, P. & Marchetti, G. (2005) *Criminal Records in Victoria: Proposals for Reform*. Melbourne: Fitzroy legal Service and Jobs Watch, 20. We note in NSW a conviction of this nature would be spend and would not show up on a criminal record check.

⁴⁰Naylor, B., Paterson, M., and Marilyn Pittard. (2008). 'In the shadow of a criminal record: Proposing a just model of criminal record employment checks' *Melbourne University Law Review* 32, 172.

⁴¹Australian Institute of Health and Welfare (2020) *Youth Justice in Australia*. Cat. No JUV 132 p 39.

⁴²Lindeman, K., Howard, M., & Abilio de Almeida Neto. (August 2017). *Research Publication No. 57: Evaluation of vocational training in custody: Relationships between Training, Post-Release Employment and Recidivism*. NSW Corrective Services.

⁴³Australian Law Reform Commission. (1997) *Report No 84: Seen and Heard: Priority for Children in the Legal Process*. Canberra.

⁴⁴Todis, B., Bullis, M., Waintrup, M., Schultz, R., a D'Ambrosio, R. (2001). 'Overcoming the odds: Qualitative examination of resilience among formerly incarcerated adolescents.' *Exceptional Children* 68, 119-139; Bullis, M. s et al., (2002). 'Life on the "Outs"—Examination of The Facility-To-Community Transition of Incarcerated Youth' *Exceptional Children* 69(1).

⁴⁵Bernburg, J. G., and Krohn, M.D. (2003). 'Labelling, Life Chances and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in early Adulthood.' *Criminology* 41(4).

Case study

Vince had been employed as a casual labourer for about six months when his employer checked his criminal record. He had been convicted of a theft related offence 10 years earlier, when he was 16 years of age. When he was applying for the job, Vince filled out a form asking about any criminal convictions. When he filled it out, he said that he had no convictions, believing that juvenile offences did not appear on a police check. Vince lost his job.³⁹

Case study

Billy applied for the TAFE NSW IPROWD Program, which aims to recruit Aboriginal young people and train them up for administrative and support roles within the NSW Police Force. Billy was told that because he had conviction on his record for assault from when he was 16 years old, he was not eligible to work for the NSW Police Force.

Employment provides a vulnerable young person with more than financial security. It is associated with a range of non-economic benefits, including increased mental and physical wellbeing, and connection to community.⁴⁶ In one study, the protective factor of employment was a fundamental step towards a stable adulthood for young offenders, as it helped to occupy their time and avoid negative behaviours, while offering an environment to learn and practice community values.⁴⁷

Unemployed young people are vulnerable in situations where the only barrier to being offered an entry level job is their criminal record if that record is being used to cull from a larger pool of applicants. There are currently no restrictions placed upon employers using criminal record information to determine suitability for positions that are entry level and would ordinarily be performed under supervision. The construction and retail sectors, for example, should not have any need to conduct a pre-employment criminal record check.

SENTENCING PROCEDURE FOR CHILDREN AND YOUNG ADULTS IN NEW SOUTH WALES

Current sentencing practices in NSW may be compounding some of the issues, with different processes applying upon entry to the adult jurisdiction. The *Children (Criminal Proceedings) Act 1987 (NSW)*, which deals with offenders that are between the ages of 10 and 18, requires that the Court consider the age, level of maturity and the desirability of maintaining connections with education and employment when making a sentencing decision.⁴⁸ Young people who come before the NSW Children's Court are also eligible for assistance from Legal Aid, and are provided with advice and representation by a lawyer in their proceedings. Once a young person turns 18, these protective factors fall away. The *Crimes (Sentencing and Procedure) Act 1999 (NSW)*, which deals with adult offenders that are aged 18 and above, does not expressly consider age as a mitigating factor, other than in consideration of rehabilitation prospects, nor does it explicitly require consideration about maintaining connections to work and study.⁴⁹

Eligibility for Legal Aid is subject to a means and merit test in the adult jurisdiction, which results in many young people receiving no advice or assistance with representation in their proceedings. This is especially the case for offences that are deemed less serious and unlikely to result in a period of imprisonment. Once a young person turns 18, they are treated the same as all other adults in the legal and criminal justice systems and they are left to fend for themselves.⁵⁰ This gap in resources and service provision exists despite widespread

⁴⁶Van der Noordt M., et al. (2014). 'Health Effects of Employment: A Systematic Review of Prospective Studies' *Occupational and Environmental Medicine* 71(10).

⁴⁷T. Povenmire-Kirk & S. Yamamoto. (2009). 'Perceived barriers and protective factors of juvenile offenders on their developmental pathway to adulthood.' *Journal of Correctional Education*. 60(3), 201.

⁴⁸*Children (Criminal Proceedings) Act 1987 (NSW)*, s 6.

⁴⁹*Crimes (Sentencing Procedure) Act 1999 (NSW)* s 21A (3).

knowledge that young adults are inherently more vulnerable, more likely to engage in risk-taking behaviour and that their cognitive development is not yet complete.⁵¹

This is not to suggest that children who are involved in the criminal justice system do not experience discrimination and other issues in relation to their criminal record. On the contrary, because criminal matters involving children may be diverted under the *Young Offenders Act 1997* (NSW) or have their matters heard in the Children's, District or Supreme Courts, depending upon the type and nature of an alleged offence, children's convictions and children's criminal records are even more complex and the impact of a conviction may have even farther reaching consequences.⁵²

It is a common and enduring myth that criminal records are 'wiped' when a young person turns 18. Shopfront Youth Legal Centre has produced a fact sheet that helpfully summarises sentencing procedures and the recording of convictions against children aged 18 and below.⁵³ A number of concerns about sentencing procedures and criminal records in the children's jurisdiction were recently raised in the NSW Parliamentary Committee Inquiry into Youth Diversion.⁵⁴ Some of the concerns that were raised in that inquiry included comments that children who engage in sexting or sexual acts with other children of a similar age can end up with convictions for serious sexual offences that can never be spent, and that diversion by way of cautions made under the *Young Offenders Act 1997* may be disclosed in a criminal record check or when a young person seeks employment in certain occupations.⁵⁵ While it is beyond the scope of this report to address those concerns in full, the Youth Justice Coalition endorses the recommendations that were made to NSW Parliament in the final report of the 2018 Inquiry.

⁵⁰Services such as Shopfront Youth Legal Centre and Marrickville Legal Centre's Youth Legal Service attempt to fill this gap in service delivery, however neither services is sufficiently resourced to meet the demand.

⁵¹Sanci, L., Webb, M., & Hocking, J. (2018). 'Risk-taking behaviour in Adolescents.' *Australian Journal of General Practice* 47.

⁵²See Sanders, J, & Tang, A. (2017) 'Children's Convictions and Criminal Records' NSW Law Society paper for a comprehensive discussion of children's convictions.

⁵³The Shopfront Youth Legal Centre. (Updated 2018). *Convictions and Criminal Records*. Retrieved from <https://www.theshopfront.org/legal-information-for-youth-workers>.

⁵⁴Legislative Assembly of New South Wales, Law and Safety Committee. (September 2018.) *Report 2/56: The Adequacy of Youth Diversionary Programs in New South Wales*, 36-37.

⁵⁵The Shopfront Youth Legal Centre. (Updated 2018). *Convictions and Criminal Records*. Retrieved from <https://www.theshopfront.org/legal-information-for-youth-workers>.

Recommendations

- That the *Australian Criminal Intelligence Commission* (ACIC) require employers to identify the purpose and position information when requesting a criminal record check.
- That ACIC record and publish data on the purposes of criminal record checks that it provides – for example, employment, migration or other purposes.
- That a longitudinal study into the impacts of a criminal record on young Australian jobseekers be established.
- That s21A(3) of the *Crimes (Sentencing and Procedure Act) 1999* (NSW) be amended to explicitly include age as a mitigating factor for consideration in sentencing.
- That more funds and resources be allocated to youth-specific legal services.



MANDATORY CHECKS

THE WORKING WITH CHILDREN CHECK

Community awareness and concern about child protection has significantly increased in recent years. In 1997, the Wood Royal Commission's final report highlighted examples of people who had offended against children and continued to find employment in child-related sectors. This led to significant public outcry and calls for reform.⁵⁶ Since then, a number of political and legislative measures have been introduced that restrict people with a history of committing serious offences against children from seeking employment in child-related sectors.⁵⁷

Since 1998, it has been mandatory for anyone working with children in NSW to undergo a criminal record check prior to commencing employment.⁵⁸ In 2012, uniform laws requiring workers and volunteers in child related settings obtain a *Working with Children Check* (WWCC) were introduced. In NSW, the relevant laws are the *Child Protection (Working with Children) Act 2012* ('the Act') and the *Child Protection (Working with Children) Regulation 2013* ('the Regulations'). The WWCC must be renewed every five years following a review by the Office of the Children's Guardian (OCG).⁵⁹

WHO NEEDS A WORKING WITH CHILDREN CHECK?

Child-related work is defined in the Act and in the Regulations. Teachers, childcare workers, people working in residential care settings and people working in the child protection and welfare sectors are all performing *child-related work* and are required to hold a WWCC.⁶⁰ Occupations that provide services to large groups of children and young people are also deemed child-related work; including mental health workers, TAFE and university teaching staff, and workers providing transport services.⁶¹

In these occupations, an individual who is unable to obtain a WWCC cannot be lawfully employed. Refusal to employ an individual who cannot obtain a WWCC in child-related work would not constitute discrimination, as a WWCC is an inherent requirement of this type of role.⁶²

The situation becomes less clear when an employer requires a WWCC Clearance for a role that is not defined by the Act or the Regulations as *child-related work*. Increasingly, employers and other agencies engaging volunteers require a WWCC

⁵⁶Government of the State of New South Wales. (1997). *Final Report: Royal Commission into the New South Wales Police Service, Volume 4: The Paedophile Inquiry*.

⁵⁷Simpson, R. (1998). *Briefing Paper No 8/89: Initial responses to the Wood Royal Commission Report on Paedophilia*. NSW: New South Wales Parliamentary Library Research Service.

⁵⁸Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record; Child Protection (Prohibited Employment) Act 1998 (NSW); Commission for Children and Young People Act 1998 (NSW)*.

⁵⁹*Child Protection (Working with Children) Act 2012* (NSW) s 22.

⁶⁰*Child Protection (Working with Children) Act 2012* (NSW); *Child Protection (Working with Children) Regulation 2013* (NSW).

⁶¹*Child Protection (Working with Children) Regulation 2013* (NSW) Pt 2.

⁶²See pages 33-34 for commentary on inherent requirements.

in situations where it is not required by law, often to mitigate perceived risks or as a matter of policy. This often occurs in community based or not-for-profit settings and for roles where contact with children is minimal or incidental to a position.

In these circumstances, it has been argued that that overzealous or uninformed application of child protection principles by employers has inadvertently resulted in discrimination against workers and job applicants who do not pose any real or material risk to children's safety.⁶³

There is no restriction on an employer seeking that employees hold a WWCC Clearance, as the OCG only determines whether an individual is fit for the purpose of a clearance. They do not consider whether a clearance is required for a particular role. As such, many employers reject applicants who cannot obtain a WWCC clearance in situations where there is no actual risk of harm.

The OCG provides a flowchart to assist employers to determine when a WWCC is required for a particular role.⁶⁴ In some cases, exemptions to the legislation apply, allowing workers who come into contact with children only occasionally to not require a WWCC. This includes roles that are predominantly administrative or roles that are supervised when children are present.⁶⁵

Service providers may decide to implement policies requiring employees to hold a WWCC Clearance for roles that are not child-related. Without any legislative basis, it would appear that these employers implement WWCC Clearances in order to comply with organisational policies concerning child welfare or to appear to be a 'child-safe' employer.

Although often well-intentioned, these policies can lead to indirect discrimination against jobseekers with a criminal record in situations where an offending history does not relate to a role. Many employers are unaware that WWCCs can be refused on grounds that do not always directly relate to offences against children. For example, charges of drink driving, serious drug convictions, domestic violence and manslaughter may be taken into consideration by the OCG when determining or refusing a WWCC Clearance.⁶⁶ In NSW, spent convictions and unrecorded convictions may also be taken into account,⁶⁷ meaning that offences that are more than 10 years old may lead to refusal of a WWCC. The nuances of such decisions may not be apparent to many employers. Again, many potential applicants who are unable to obtain a WWCC may be deterred from applying for roles that are suited to them due to the extreme stigma associated with the inability to obtain a WWCC.

⁶³Tilbury, C. (2014) 'Working with Children Checks- time to step back?' *Australian Journal of Social Issues* 49(1), 94.

⁶⁴NSW Office of the Children's Guardian. *Child-Related Employers – Identifying Child-Related Roles*. Retrieved from <https://www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check/employer>

⁶⁵*Child Protection (Working with Children) Regulation 2013* (NSW) s 20.

⁶⁶Tilbury, C. (2014) 'Working with Children Checks- time to step back?' *Australian Journal of Social Issues* 49(1), 90-91.

⁶⁷*Ibid.*

Case study

Tyler had a conviction of assault on her juvenile record that was recorded when she was 15 years old. Four years later, she successfully applied for a traineeship in childcare. Unfortunately, Tyler encountered difficulty when she applied for her Working with Children Check; her juvenile record showed up and her application was flagged for a risk assessment. This caused Tyler stress, embarrassment and delayed the commencement of her traineeship.

Case study

Sally sought advice before applying for a role in a community food pantry. The job ad indicated that the position mostly involved sorting food donations and serving customers. It also required a WWCC, which Sally could not provide as she had previously been to prison. She contacted the employer, who confirmed that the role would be supervised and that contact with children would only be incidental. Despite this, the employer said that a WWCC was essential because that was the organisation's policy.

Case study

Neville was convicted of "Carnal knowledge" for having sex with his girlfriend in the 1970s. At the time, he was 16 and she was 15. The couple went on to marry and have 3 Children. More than 40 years later, Neville was required to obtain a WWCC in order to perform some maintenance work in NSW schools. To his surprise, his application was rejected because of the juvenile conviction.⁷³

Although Neville was able to appeal the refusal of his WWCC Clearance, his case highlights the arbitrary and often irrelevant nature of determinations to refuse a Clearance, which can lead to huge problems for people experiencing stigma and discrimination when applying for work.

Sexual offences recorded against juveniles in the NSW Children's Court may still disqualify a young person from eligibility for a WWCC Clearance.

Marrickville Legal Centre has received enquiries from people who have sought work in roles which did not involve direct or unsupervised contact with children, who have nonetheless been required to obtain a WWCC Clearance as a necessary precondition of their employment.

OBTAINING A WWCC CLEARANCE IN NSW

In NSW, the Office of the Children's Guardian (OCG) processes all of the requests for WWCC's. The OCG does not consider whether an individual requires a clearance for a specific role, only whether or not an applicant is fit to engage in "child-related work."⁶⁸ Refusal of a clearance does not consider an individual's unique circumstances, including the circumstances of the offence, progress made towards rehabilitation, or the time that has elapsed since offending. The OCG does not report on any of these subjective factors when issuing or rejecting a clearance.

Upon receiving application for a WWCC, the OCG commences a check of that individual's criminal history. This check is broader than an ordinary police check. Spent convictions, pending charges, dismissed and unheard charges, good behaviour bonds and juvenile records are all considered relevant for the purposes of a WWCC Clearance application.⁶⁹

A person can apply to NCAT for administrative review if their application for a Clearance has been refused, cancelled or where they are subject to an interim bar.⁷⁰ This avenue of review is not available to "disqualified persons" who have been convicted of certain offences or who have been charged with specified offences.⁷¹ This may result in permanent disqualification of people whose offending history is more than 20 or 30 years old, or people who were convicted of offences when they were children themselves. In this sense, mandatory disqualification of people whose offences are old or irrelevant to a particular job imposes a form of extrajudicial punishment upon an individual who is otherwise rehabilitated and not a risk to children or to the community.⁷²

Policies that mandate all applicants hold a WWCC Clearance were recently considered in the context of Australian social work students, who are increasingly required to provide evidence of a WWCC Clearance upon enrolment in their degree programs.⁷⁴ It would appear that social work departments are implementing these requirement in order to satisfy the possibility that a WWCC

⁶⁸Child Protection (Working with Children) Act 2012 (NSW) ss 6, 7.

⁶⁹NSW Office of the Children's Guardian. *Undertaking the Check*. Retrieved from <https://www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check/applicant/application-process/undertaking-the-check>.

⁷⁰Child Protection (Working with Children) Act 2012 (NSW), ss 27 and 28.

⁷¹Child Protection (Working with Children) Act 2012 (NSW), s 26.

⁷²Tilbury, C. (2014) 'Working with Children Checks- time to step back?' *Australian Journal of Social Issues* 49(1), 94.

⁷³Jacobsen, G. (2012, April 29). Young love comes back to haunt couple. *Sydney Morning Herald*, Retrieved from <https://www.smh.com.au/national/nsw/young-love-comes-back-to-haunt-couple-20120428-1xrh2.html>.

⁷⁴Young, P., Tibury, C., & Hemy, M. (2019). 'Child-related Criminal History Screening and Social Work Education in Australia.' *Australian Social Work*. 72(2), 179-187.

Clearance will be required for clinical placements undertaken in the course of a degree program.

The authors concluded that, although there is no legal requirement that prospective social work students hold a WWCC Clearance, prospective students who are unlikely to obtain a clearance may be discouraged from applying for enrolment in social work degree programs due to the shame, stigma and embarrassment associated with the failure to obtain a clearance.⁷⁵ They further observed that excluding people who have a record from social work courses is perhaps at odds with core social work values, which include belief in capacity for growth, change and rehabilitation.⁷⁶

Unless required by law, employers and course providers should be encouraged to consider the relevance of a criminal record to a role before requiring an employee provide a clearance. The OCG website provides employers with some guidance on this, including examples of positions where a Clearance is NOT required.⁷⁷

It is important to note that the WWCC is far from being a 'catch-all' and does not safeguard services from the risk that children will be harmed by employees or volunteers. Despite the rigour applied by the OCG in determining whether or not to issue a Clearance, individuals who may pose a risk to children but whose offences have not been reported, or indeed who have not yet committed an offence, are still able to obtain employment in child-related roles. As such, a WWCC Clearance should never be used as a substitute for sound policies that ensure staff are adequately supervised and trained in child protection principles.

THE NDIS WORKER SCREENING CHECK

Most employees who provide disability support care and services under the National Disability Insurance Scheme (NDIS) are required to complete a screening prior to commencing employment – the *NDIS Worker Screening Check (Worker Check)*. The process and regulations for applicants in NSW are laid out in the *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW) and the *National Disability Insurance Scheme (Practice Standards-Worker Screening) Rules 2018* (Cth). Only workers performing duties in a designated 'risk assessed role' are required to obtain a Worker Check. Risk assessed roles include key personnel, workers in roles delivering specified NDIS supports or specified NDIS services, or workers with more than incidental contact with people with disability.⁷⁸

⁷⁵Young, P., Tibury, C., & Hemy, M. (2019). 'Child-related Criminal History Screening and Social Work Education in Australia.' *Australian Social Work*. 72(2), 183.

⁷⁶Young, P., Tibury, C., & Hemy, M. (2019). 'Child-related Criminal History Screening and Social Work Education in Australia.' *Australian Social Work*. 72(2), 180.

⁷⁷Office of the Children's Guardian. (2019). 'Who needs a Working with Children Check' Retrieved from <https://www.kidsguardian.nsw.gov.au/child-safe-organisations/working-with-children-check/employer/who-needs-a-working-with-children-check>.

⁷⁸*National Disability Insurance Scheme (Practice Standards-Worker Screening) Rules 2018* (Cth) s 5.

“

Many organisations also now ask for a Working with Children Check, (WWCC), when the role advertised clearly is NOT working with children. This has further negatively impacted my job search for roles where I can use my skill set, as I am restricted in applying for a WWCC. Few organisations are willing to do a risk assessment and to negotiate this.”

Alex

Until a federal system for implementing the *NDIS Worker Screening Check* is rolled out, each State and Territory has an interim process in place. In NSW, applicants are required to undergo either a criminal record check, or obtain a WWCC Clearance.⁷⁹ In practice, a large number of employers and NDIS providers currently require applicants to consent to both checks prior to allowing a person to commence work.

One key point of difference between the WWCC Scheme and the NDIS Worker scheme is that NDIS employers must assess and document the reason when a role is identified as "risk assessed".⁸⁰ Only roles that are identified as risk assessed require a clearance.⁸¹ As such, the rules require employers to conduct the inherent requirements test and identify whether or not a Worker Check is mandatory for a particular role. This may curtail the practice of blanket criminal record checks in some organisations, however there is no restriction on Worker Checks where a role is not risk assessed. This means organisations and businesses are still able to insist that a role requires a check in situations where the law does not require it.

In all other respects, the Worker Check scheme appears to be very similar to the WWCC scheme. In fact, the Worker Check legislation expressly facilitates streamlining and alignment with the WWCC legislation.⁸² The Office of the Children's Guardian is currently permitted to share relevant information with an NDIS Screening agency for the purpose of producing a check.⁸³ The *Worker Check Act* also contains similar provisions relating to the collection of criminal history information and the processes for determining applications for clearance.⁸⁴ In addition to checking criminal record information, NDIS screening agencies may take spent convictions, apprehended violence orders, police and court information and reports of workplace misconduct into account when making a Worker Check decision.⁸⁵

Applicants and employees who are subject to a refusal, interim bar or suspension of their clearance can apply to the NSW Civil and Administrative Tribunal for an administrative review of the decision.⁸⁶ Though we note that applicants seeking review of an interim bar or suspension must wait six months from the decision before they can make an application for review.⁸⁷

⁷⁹NDIS Quality and Safeguards Commission, 'Worker Screening Requirements (NDIS Registered Providers)'. Retrieved from <https://www.ndiscommission.gov.au/providers/worker-screening>.

⁸⁰*National Disability Insurance Scheme (Practice Standards-Worker Screening) Rules 2018* (Cth) s 11.

⁸¹*Ibid*, s 13.

⁸²*National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW) s 17.

⁸³*Child Protection (Working with Children) Act 2012* (NSW) s 36AA.

⁸⁴*Ibid* s 28 – 35.

⁸⁵Disability Services Consulting, *Worker Screening: What Providers Need to Know*. (2018, October 22). Retrieved from <https://www.disabilityservicesconsulting.com.au/resources/what-we-know-ndis-worker-screening>.

⁸⁶*Ibid* s 41 (1).

⁸⁷*Ibid* s 42 (2).

It is not yet known whether disability services workers will need to obtain both a WWCC and a Worker Check if a role involves working with children who have a disability, though it is foreseeable that some employers will require both before offering employment. Such a requirement would be a costly duplication of services, both for individual applicants and for the government agencies charged with the duty of administering the checks.

We do not yet know to what extent the *NDIS Worker Screening Check* scheme will inadvertently discriminate against or exclude people with a criminal history, or the extent to which overly cautious employers that will require Worker Checks in situations that are not required by law. We do know that the *NDIS Worker Screening Check* scheme has similar legislative frameworks and functions to the WWCC scheme. On that basis, we anticipate cases of criminal records discrimination in the disability support sector are likely to rise exponentially in the coming years.

Recommendations

- That employers requiring WWCC Clearances or NDIS Worker Checks be required to demonstrate to the Office of the Children's Guardian or to the NDIS Commission that a check is relevant to the inherent requirements of a role in situations where a check or clearance is not otherwise required by law.
- That the *Anti-Discrimination Act 1977* (NSW) be amended to enable the Anti-Discrimination Board to have jurisdiction to hear discrimination complaints about employers and training providers requiring WWCC Clearances or NDIS Worker Checks when not required by law or in circumstances where there is no relevance.

OR

- That the *Civil and Administrative Tribunal Act 2013* (NSW) be amended to enable the NSW Civil and Administrative Tribunal (NCAT) to have jurisdiction to hear discrimination complaints in its Administrative & Equal Opportunity Division about employers and training providers requiring WWCC Clearances or NDIS Worker Checks when not required by law or in circumstances where there is no relevance.

Case study

KL v State of NSW

KL was convicted of a number of offences between 1983 and 1992 and spent a portion of this time serving short sentences of imprisonment. After 1992 KL sought treatment from drug and alcohol use and completed a Bachelor of Music Education and a Graduate Diploma in Education in 2006. KL applied for a role as a teacher with the NSW Department of Education and was rejected following a review of his criminal history. In 2007, KL complained to the Human Rights Commission, who found that he had been discriminated against, with the President commenting; "[I do] not accept that a person with Mr KL's criminal record is necessarily rendered incapable forever of fulfilling the inherent requirements of the job of a teacher."⁹⁰

OTHER MANDATORY CHECKS

There are a number of other employment situations in which licensing and registration bodies are required by law to screen an employee's criminal records when determining their suitability for employment. Workers in gaming and racing, healthcare workers, teachers and teachers' aides, NSW police, transport officers, security officers, taxi and Uber drivers, correctional services, the legal profession, and second-hand dealers are some of the professions that are required to disclose their criminal histories.⁸⁸ Teachers in NSW must also disclose any conviction that has ever been recorded against them, including convictions that have been spent.⁸⁹ In the course of applying for a teaching role within the NSW Department of Education, any court outcome in which a plea of guilt was entered in court is disclosed, no matter how old or how irrelevant the offence.

It is beyond the scope of this report to fully explore the relevance of mandatory checks for each of these fields of employment, or to consider the fairness of the processes applied in each case. It is also beyond the scope of this report to explore the extent to which mandatory criminal records checks deter otherwise suitable applicants from pursuing careers in each of these fields, especially those that require a lower skill level of skill or training. It is likely safe to conclude that a number of people experience unnecessary or excessive barriers to entering these occupations in situations where there is no risk, or a criminal record is not relevant.

⁸⁸*Criminal Records Act 1995* (NSW) s 15; Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 13.

⁸⁹*Criminal Records Act* (NSW) s 15(1).

⁹⁰Australian Human Rights Commission. (2010). *Mr KL v State of NSW (Department of Education): Report into discrimination in employment on the basis of criminal record*. AusHRC 42, 4.



IS THE RECORD RELEVANT? ASSESSING THE INHERENT REQUIREMENTS OF A JOB

Case study

Wayne's application for a job as a security officer was rejected after a record check revealed a five-year-old conviction for culpable driving. The position for which he had applied did not involve any driving whatsoever.⁹¹

The Australian Human Rights Commission Regulations define criminal records discrimination as:

- a. *Any distinction, exclusion or preference made on the ground of:*
 - (iii) *an irrelevant criminal record.*⁹²

Employers who do not wish to discriminate against potential employees under the Act cannot discriminate against an employee whose criminal record is irrelevant to the role. The Australian Human Rights Commission (AHRC) provides a useful set of guidelines to assist employers determine whether a criminal record prevents a person from being able to perform a job; this is called the 'inherent requirements test'.⁹³

In cases where an employer determines *on reasonable grounds* that a criminal record or a particular type of conviction prevents an individual from performing the inherent requirements of a role, discrimination would **not** be made out under the AHRC Act.⁹⁴

The AHRC recommends a number of steps that employers should take when determining the inherent requirements of a role, which may be summarised as follows:

1. The inherent requirements of a position and any necessary exemptions for eligibility should be determined prior to advertising a role.
2. Employers should identify essential tasks, circumstances and requirements of a role.
3. Employers should assess whether a criminal record is relevant to those tasks and requirements and if so, is that record restricted to certain types of offences?

If an employer concludes that a record is not relevant, they should not consider criminal record information as a part of the recruitment process. If a record is or may be relevant;

4. Employers should assess an individual criminal record against the inherent requirements of the job.⁹⁵

⁹¹Noble, P. and Marchetti, G. (2005) *Criminal Records in Victoria: Proposals for Reform*. Melbourne: Fitzroy legal Service and Jobs Watch, 20.

⁹²Australian Human Rights Commission Regulation 2019 (Cth) Pt 2 s 6 (a)(iii).

⁹³Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 14-15.

⁹⁴Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 14.

⁹⁵Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 14-15.

In order to comply with the requirements of the AHRC Act, an employer needs to demonstrate that they have considered the inherent requirements of the position *and* whether or not a criminal record will have an impact upon the inherent requirements of the role. For example, an individual with a history of theft and fraud related offences may not be able to apply for a role as an executive director of a corporation or a mortgage broker. This would be incompatible with the inherent requirements of the role and the requirements of the *Corporations Act*.^{96,97}

Some government departments and larger private employers have discreet human resources units that consider the inherent requirements of a role and whether or not an applicant with a criminal record may still be suitable for a position. These are commonly called probity or screening units. This process should occur in isolation from the main recruitment process, preventing interviewers and decision makers from being made aware of an applicant's record, which should prevent decision making influenced by the criminal record information and any bias that may arise from this knowledge. This process also allows an applicant to maintain their privacy by keeping the knowledge of the criminal record from potential supervisors and other people that they may be working with. Unfortunately, this process is only practical within larger organisations. Many private sector employers do not have the staff resources or adequate training on discrimination law to implement this process, so in many cases the inherent requirements test will not be carried out as rigorously as the AHRC Guidelines recommend.

“

I have felt fear, shame and despair during these times of trying to gain employment and re-establish my life. Ironically, these are some of the things I felt that led to offending in the first place.”

⁹⁶*Corporations Act 2001* (Cth) p 2D.6.

⁹⁷See *BE v Suncorp Group Ltd* [2018] AusHRC 121 for a recent case study and findings on the inherent requirements of a job. One of the issues raised in that case concerned whether certain types of offending that are deemed inconsistent with organisational values would reach the inherent requirements threshold.

DISCRIMINATION ON THE BASIS OF AN IRRELEVANT CRIMINAL RECORD IN NSW

Although all employers in NSW are required to comply with requirements of the AHRC Act,⁹⁸ there are no positive laws in NSW that explicitly require employers take proactive steps to prevent criminal records discrimination, nor does NSW have a Bill of Rights. As such, the AHRC guidelines on determining the inherent requirements of a role operate more as a set of firm recommendations than a legally binding obligation on employers.

The Northern Territory, Tasmania and the ACT have implemented anti-discrimination laws that expressly prohibit discrimination on the basis of an irrelevant criminal record.⁹⁹ This prohibition enforces a positive obligation on employers in these jurisdictions to adopt safeguards for the prevention of criminal records discrimination – a version of the inherent requirements test must be performed in these jurisdictions in order to avoid a finding that unlawful discrimination has occurred.¹⁰⁰

Recommendations

- That discrimination on the basis of irrelevant criminal record be prohibited in the NSW Anti-Discrimination Act
- That the Fair Work Act be amended to include irrelevant criminal records as a protected attribute.

⁹⁸See pages 36-38 for further commentary on complaints made under the AHRC Act.

⁹⁹*Anti-Discrimination Act 1998* (TAS) s 16(q); *Discrimination Act 1991* (ACT) s 7 (1)(l); *Anti-Discrimination Act 1996* (NT) s 19(q).

¹⁰⁰The Anti-Discrimination legislation in each of these jurisdictions provides recourse for complainants to a board or tribunal. The Anti-Discrimination Board in NSW has no such jurisdiction. See page 38 for further commentary.



As we have discussed earlier, many applicants with a criminal record do not feel empowered to make a complaint when a pre-employment criminal record check is unnecessary or discriminatory. It is much more likely that an applicant simply won't bother to apply for a role that requires a record check. Getting a foot in the door remains the biggest hurdle for the majority of applicants.

This chapter discusses the limited legal frameworks and remedies that are available where criminal records discrimination occurs in employment situations. We wish to emphasise that only a small portion of complaints are brought to light, given the stigma associated with having a criminal history and the widespread acceptance that employers are within their rights to reject this class of job applicants.

In situations where an individual experiences stigma, discrimination, unfavourable treatment or a breach of privacy in the course of their employment, the legal framework is difficult to navigate. The inherent power imbalance that exists between an employer and an employee is magnified when the employee is concerned that their record will prevent them from securing another job. Further, there are no dedicated community-based legal services in NSW that provide specialised advice or representation on criminal records discrimination; complainants who have sought assistance from Legal Aid and Community Legal Centres report that they are "passed around" or put into the "too hard basket". There is also a general ignorance within the community and the employment sector that criminal records discrimination is actually a form of discrimination, in comparison with the more widely understood concepts of race, age, disability, religion and gender discrimination.

The result of the combination of these factors is that complainants rarely feel empowered to take action against an employers for criminal record discrimination.

There are three main legal frameworks that apply in NSW that regulate criminal record checks for employment purposes and discrimination complaints. These are: anti-discrimination laws, information privacy laws and spent convictions laws.

ANTI-DISCRIMINATION LAWS

THE FAIR WORK ACT 2009 (Cth)

Most Australian workers have a right to complain to the Fair Work Commission if they have experienced workplace discrimination that results in adverse action being taken against them. The Fair Work Act 2009 (Cth) (FWA) provides that an employer must not take any adverse action against an individual due to any of the following attributes:

*Race, colour, sex, sexual orientation, age, physical/mental disability, marital status, family or carers responsibility, pregnancy, religion, political opinion, national extraction or social origin.*¹⁰¹

Notably, a criminal record, relevant or otherwise, is not included in this list of attributes that are protected by the FWA, which means that the Fair Work Commission does not have jurisdiction to deal with complaints about criminal records discrimination.

This is further entrenched in the FWA under a provision that protects against adverse action in states where the conduct is not unlawful under the Anti-Discrimination laws in the place where the action is taken.¹⁰²

With respect to NSW, the relevant law is the *Anti-Discrimination Act 1977* (NSW).

THE ANTI-DISCRIMINATION ACT 1977 (NSW)

Under the NSW *Anti-Discrimination Act 1977* (NSW)(ADA) it is unlawful for employers to discriminate against employees or job applicants on the basis of:

*'age including compulsory retirement, carers responsibilities, disability, homosexuality, marital status or domestic status, race, colour, nationality, descent, ethic, ethno-religious or natural origin, sex including pregnancy and breastfeeding, transgender status.'*¹⁰³

Protection against criminal records discrimination is also not legislated for in the NSW Anti-Discrimination Act. This means that a complainant may not complain or seek redress following workplace discrimination at the NSW Anti-Discrimination Board. Indeed, an individual with a criminal record who has experienced discrimination in any area of public life cannot complain to the NSW Anti-Discrimination Board, as the legislation doesn't mention or prohibit criminal records discrimination. This is an area of law that urgently needs reform.

With the Fair Work Commission and the NSW Anti-Discrimination Board unable to hear complaints about criminal records discrimination, the only recourse available to an individual in NSW is through the Australian Human Rights Commission.

THE AUSTRALIAN HUMAN RIGHTS COMMISSION ACT

Under the Australian Human Rights Commission Act 1986 (AHRC Act), the Human Rights Commission is able to accept and conciliate complaints about criminal records discrimination. The accompanying Human Rights Commission Regulations 2019 provides that any distinction, exclusion or preference

Case study

Jakob applied for a position with NSW Police. During the recruitment process, he consented to a criminal record check. Jakob's record revealed that 9 years earlier, he received a fine for a minor offence against a police officer and was told that because of this, NSW Police would not be employing him. Jakob sought to appeal the decision and some of the facts that led to him receiving the fine in the first place, but this was refused.

¹⁰¹Fair Work Act 2009 (Cth) s 351(1).

¹⁰²Fair Work Act 2009 (Cth) s 351(2).

¹⁰³Kerkyasharian, S. (2010, May). *Discrimination law in NSW: An introduction to the Anti-Discrimination Act 1977*. Speech delivered at the National Ethnic and Multicultural Broadcasters' Council (NEMBC) Conference, Canberra.

made on the grounds of an irrelevant criminal record constitutes discrimination for the purposes of the Act.¹⁰⁴

When accepting a complaint, the Commission is able to consider not only what exists on a criminal record, but also charges that were not proven, investigations, findings of guilt without conviction and convictions which were later quashed or pardoned. The Commission accepts complaints where a person is denied a position because an employer suspects that there might be a record, when there is not.¹⁰⁵

The Commission cannot accept complaints about criminal records discrimination where relevance to a role can be demonstrated, for example, where there is a legislative basis requiring a criminal check or the criminal record is relevant to the inherent requirements of the job. Once the Commission has accepted a complaint, it will attempt to settle the discrimination complaint by way of conciliation, which may lead to a number of outcomes including: reinstatement, apology, policy change or an agreement as to compensation.¹⁰⁶

In situations where a complaint cannot be conciliated because the parties do not agree, or for any other reason, the complaint may be terminated, the Commission's actions are limited to preparing a report with recommendations to the Attorney-General.¹⁰⁷ The Commission has no power to implement recommendations or force respondents to comply with those recommendations.¹⁰⁸

This stands in contrast to the process for other forms of workplace discrimination under the AHRC Act, including age, race, gender, intersex status and disability, which each have legislation enabling the Federal Court to hear complaints for review if conciliation is unsuccessful or if a respondent refuses to comply with directions.¹⁰⁹

The key difference between criminal records discrimination and the abovementioned forms of discrimination is that although recognised under the AHRC Act, Criminal Records discrimination is not unlawful, and therefore cannot be referred to the courts for judicial review.¹¹⁰ The Human Rights Commission has repeatedly commented that there is no

¹⁰⁴Australian Human Rights Commission Regulations 2019 s 6(a)(iii).

¹⁰⁵Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 8.

¹⁰⁶Australian Human Rights Commission Act 1986 (Cth) s 31.

¹⁰⁷Australian Human Rights Commission. (2012, December). *The complaint process for complaints about discrimination in employment based on religion, criminal record, trade union activity, sexual preference, political opinion and social origin*. Retrieved from https://www.humanrights.gov.au/sites/default/files/content/complaints_information/complaints_process/pdf/Unlawful%20Discrimination%20Complaint%20Process.pdf.

¹⁰⁸Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 8.

¹⁰⁹Australian Human Rights Commission. (2019). *Free and Equal: An Australian Conversation on Human Rights. Discussion paper: Priorities for federal discrimination law reform*. Sydney, 6.

¹¹⁰Croucher, R. (2018). 'Righting the relic: towards effective protections for criminal record discrimination.' *Law Society Journal* 48, 74.

justifiable reason for this more limited process to exist, and has called for a review of federal discrimination laws.¹¹¹ Without recourse to the Federal Court, there are no consequences for employers that choose to ignore recommendations made by the Human Rights Commission in Conciliation, as no enforceable action may be taken against them. It also leaves complainants at a dead-end.

Recommendations

- That the Fair Work Act be amended to include irrelevant criminal records as a protected attribute under s351.
- That the *NSW Anti-Discrimination Act 1977* be amended to prohibit discrimination on the basis of an irrelevant criminal record.
- That protection against criminal records discrimination be legislated at the federal level, enabling a pathway for complaints to the Federal Court.
- That anti-discrimination laws between the states, territories and at the federal level be harmonised wherever possible

INFORMATION PRIVACY LAWS

THE PRIVACY ACT 1988

There are some safeguards that prevent unlawful disclosure of criminal record information in the *Privacy Act 1988* (Cth) (The Privacy Act).¹¹³ Under the Privacy Act, criminal records are deemed 'sensitive information' and are subject to special protections and presumptions against disclosure.¹¹⁴

Large corporations, agencies, organisations and businesses are further required under the Privacy Act to comply with the Australian Privacy Principles, a set of enforceable guidelines under The Privacy Act that protect individual privacy and personal information.¹¹⁵ The Privacy Principles do not apply to an entity whose turnover is less than \$3 million annually, therefore most small businesses, which make up almost 95% of all Australian businesses, are not bound by the APP's.^{116,117}

¹¹¹Australian Human Rights Commission. (2019). *Free and Equal: An Australian Conversation on Human Rights. Discussion paper: Priorities for federal discrimination law reform.* Sydney, 9.

¹¹²*Mr CG v NSW (Railcorp NSW)* [2012] AustHRC 48.

¹¹³*Privacy Act 1998* (Cth).

¹¹⁴Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines* (2019) B.138.

¹¹⁵Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines* (2019) B.2, B.3.

¹¹⁶Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines* (2019) B.5.

¹¹⁷Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts Small business in the Australian economy July 2019*, (2019) 5.

Case study

*Mr CG v NSW (RailCorp NSW)*¹¹²

Mr CG was shortlisted for a market analyst position with RailCorp. He was then informed that because he had convictions for drink driving offences, he was ineligible for the position.

The AHRC found that the inherent requirements of the market analyst position did not require the applicant to drive or to have a clear driving record. The Commission found that RailCorp discriminated against Mr CG and made recommendations that Railcorp compensate Mr CG.

Following recommendations made by the Commission, Railcorp maintained its position and did not offer Mr CG employment or compensation. The Commission reported its findings to the Attorney-General.

This case study is a good example of the inherent requirements test – blanket policies that refuse employment for all roles against a certain type of offence are not always appropriate. Unfortunately, it also provides a good example of the limited powers of the Commission – despite its recommendations, Railcorp was not bound by them.

Case study

Jane had recently secured an entry-level position in a real estate agency. Her former partner found out about this and contacted her manager and told them that Jane had a criminal record involving drug trafficking. Although this was true, she was convicted more than 10 years ago, and the conviction did not show up on her criminal record check. The agency terminated Jane, stating that they could not risk their reputation by continuing to employ her.

We note that the ALRC has previously recommended that the small business exemption be removed.¹¹⁸

The Australian Privacy Principles that are most relevant to criminal records discrimination may be summarised as follows:

- Australian Privacy Principle 3 requires that consent be obtained from an individual before any criminal record information is collected. Collection of that information should also be reasonably necessary for one or more of an entity's functions or activities.¹¹⁹ Criminal record information can only be obtained by lawful means.¹²⁰
- Australian Privacy Principle 4 concerns unsolicited sensitive information – for example, inadvertent or accidental disclosures of criminal record information, or situations where a third party discloses criminal record information. In these situations, an entity must determine whether or not that information could have been obtained lawfully under APP.¹²¹ If they could not have, the entity must take all steps to destroy and de-identify that information.¹²²
- Australian Privacy Principle 6 applies to situations where criminal record information is disclosed unlawfully. It requires that information collected for one purpose cannot be used for any other purpose unless the individual consents or unless otherwise required by law.¹²³

When an applicant or an employee believes that a privacy law has been breached in relation to the collection or use of their criminal record information, they can complain to the Office of the Australian Information Commissioner (OAIC). The OAIC has broad powers to investigate and resolve complaints, and can make any of the following orders – that records be amended or destroyed, an apology be issued, policies be updated, staff training and compensation for financial and non-financial losses.¹²⁴ In serious cases, the OAIC may also seek a civil penalty order.

Complainants who are unsatisfied with how the OAIC has handled their complaint may seek review in the NSW Civil and Administrative Tribunal or to the Federal Court of Australia. In this respect, a complaint made under privacy laws is more likely to lead to a binding and enforceable outcome than a complaint made under discrimination laws.

There are concerns that existing privacy laws are insufficient, particularly in relation to employment issues.¹²⁵ The Australian

¹¹⁸Office of the Australian Information Commissioner, *Australian Privacy Principles Guidelines* (2019) B.5.

¹¹⁹*Privacy Act 1988* (Cth) Sch 1, Pt 2, s 3.3.

¹²⁰*Privacy Act 1988* (Cth) Sch 1, Pt 2, s 3.6.

¹²¹*Privacy Act 1988* (Cth) Sch 1, Pt 2, s 4.1.

¹²²*Privacy Act 1988* (Cth) Sch 1, Pt 2, s 4.3.

¹²³*Privacy Act 1988* (Cth) Sch 1, Pt 3, s 6.1.

¹²⁴Office of the Australian Information Commissioner, *How we investigate and resolve your complaint*. Retrieved from <https://www.oaic.gov.au/privacy/privacy-complaints/how-we-investigate-and-resolve-your-complaint/>

¹²⁵Paterson, Moira. (2011). 'Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison' *New Zealand Law Review* 69, 87.

Law Reform Commission has previously commented on the lack of existing action for breach of privacy in tort and made recommendations that a statutory cause of action for serious invasion of privacy be implemented.¹²⁶ While this would be likely to assist complainants in circumstances of negligent or unlawful breaches of privacy, it would not protect complainants who feel they have no choice but to consent to their personal information being accessed in the employment context.

“

Spent convictions allow you to get on with your life after you've done something stupid, generally in your youth, that's on your record.”¹²⁷

SPENT CONVICTION SCHEMES

Spent conviction schemes allow amendments to a criminal record after a certain period of time has passed without any further convictions. This is known as a “crime-free period.” When a conviction is deemed spent, it cannot be disclosed in a criminal record check, providing a person whose criminal history is in the past the opportunity of a clean slate.

In NSW, the *Criminal Records Act 1991* provides that a conviction may be deemed spent after a prescribed crime-free period has passed. The standard crime-free period is 10 years for adults, or three years for convictions recorded in the Children's Court.¹²⁸

An order made under section 10 of the *Crimes (Sentencing Procedure) Act 1999* provides that a person has been found guilty of an offence, but no conviction has been recorded. However, for the purposes of the *Criminal Records Act 1991*, an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* is regarded as a conviction under the *Criminal Records Act 1991*. An order under s 10 is spent immediately where the relevant charge was dismissed. Where an order under s 10 discharges the person under a conditional release order or requires the person to enter into an intervention program, the matter is spent upon completion of the order or program.¹²⁹

Unless an exemption applies, it is an offence under the *Criminal Records Act* to disclose information about a spent conviction without any lawful basis.¹³⁰

Some convictions can never be spent and will remain on an individual's criminal record for life. These include convictions leading to a prison sentence of more than six months, sexual offences and convictions against companies.¹³¹ This can also include certain convictions that are made in the Children's Court.

People seeking work in certain occupations are exempt from the operations of spent convictions schemes. These occupations are: judicial officers, magistrates, justices of the peace, police

¹²⁶Australian Law Reform Commission. (2008) 'For Your Information: Australian Privacy Law and Practice', Report 108. Rec 74-1.

¹²⁷Sadler, D. (2019, June 29). 'Victoria Reviews Spent Convictions' *The Saturday Paper*.

¹²⁸*Criminal Records Act 1991* (NSW) ss 9-10.

¹²⁹See page 25.

¹³⁰*Criminal Records Act 1991* (NSW) s 13.

¹³¹*Criminal Records Act 1991* (NSW) s 7.

Case study

Victoria was halfway through her studies to become a school teacher when she entered a guilty plea for possession of one ecstasy tablet. Victoria was convicted of the offence. That means Victoria has to advise all prospective employers, if asked, whether she had been "convicted" of an offence.

After 10 years most convictions are spent. However, employment in certain occupations does not allow a conviction to become spent. Unfortunately for Victoria, employment as a teacher is one of those professions where the rule about spent convictions does not apply. That means that Victoria is required to inform prospective teaching employers that she has a previous conviction, even if it was more than 10 years ago.

officers, corrective services staff, teachers and firefighters who have a history of arson related offences.¹³² For employment in these positions, a spent conviction will be disclosed regardless of relevance or how long ago the offence occurred.

Spent conviction laws also do not apply to people who are applying for a Working with Children Check or a NDIS Worker Screening.¹³³ As discussed, the exemptions to protections from disclosure for people seeking work in these fields may create circumstances where employers inadvertently or explicitly discriminate against people who do not pose any risk in their proposed fields of work. It also increased the likelihood that people are excluded from positions and occupations that they would otherwise be deemed suitable to enter. As more and more organisations require a WWCC or a NDIS Worker Screening Check, the opportunity of a clean slate that is otherwise offered by the spent convictions scheme has been somewhat eroded in recent years for people seeking work in those fields.

There is a danger that job applicants who believe that their conviction is spent may not understand what information that is being sought from them and what they are required to disclose. An example is where an offender may believe that it is not necessary to disclose a finding of guilt where a conviction was not recorded – that is, the conviction was immediately deemed 'spent' – and an employer asks about their criminal history. In NSW, teachers, nurses, childcare workers and disability support workers would all fall into this category. Even if the criminal history itself is not relevant to the inherent requirements of a role, the dishonesty may provide a legitimate basis for refusing to hire the individual, or for their dismissal on the grounds of dishonesty.¹³⁴

Another concern is that there is no consistency in spent convictions schemes between the states. Victoria, for example, has no spent convictions scheme at all, which means that all convictions recorded in that jurisdiction will show up for life. This is not only unfair for people that have been convicted of an offence in Victoria, but also creates inconsistencies when discrimination or privacy breach claims are initiated in the Federal Jurisdiction.

DISCLOSURE OF A SPENT CONVICTION

Unless one of the above exemptions applies, a job applicant is not required to disclose information about spent convictions to anyone. If an employer finds out about a spent conviction, they cannot take it into account when making an employment decision.¹³⁵ In a situation where an applicant inadvertently

¹³²*Criminal Records Act 1991* (NSW) s 15.

¹³³*Criminal Records Act 1991* (NSW) s 15.

¹³⁴Bradfield, R. (2015). 'Sentences without Conviction: Protecting an Offender from Unwarranted Discrimination in Employment'. *Monash Law Review* 41, 58.

¹³⁵Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 11.

¹³⁶Office of the Australian Information Commissioner, *Your Privacy Rights: Criminal Records*. Retrieved from <https://www.oaic.gov.au/privacy/your-privacy-rights/>

discloses their spent conviction in a job interview or does so because they believe it is required of them, privacy laws prevent the employer from using that disclosure in assessing the individual's eligibility.¹³⁶

Unsurprisingly, due to the confusion over different laws many applicants and employees either mistakenly disclose a spent conviction or fail to disclose convictions because they believe their conviction is spent. Marrickville Legal Centre's Youth Legal Service receives a number of requests from young people who have been to court for advice about what will show up on a criminal record check. Young people seeking this advice commonly report that they found the court process confusing, and that they did not feel like the outcome of their matter was fully explained to them.

Misunderstandings between employers and applicants often result in complaints of discrimination. Both parties would benefit from a clearer understanding of their rights and obligations in relation to the collection and use of criminal records and the law.

Recommendations

- That a dedicated legal advice and education service be established to provide assistance to employers and employees on criminal records discrimination and the law.
- That s21A(3) of the *Crimes (Sentencing and Procedure) Act 1999* (NSW) be amended to explicitly include age as a mitigating factor for consideration in sentencing.
- That s21A(3) of the *Crimes (Sentencing and Procedure) Act 1999* (NSW) be amended to include capacity to obtain or maintain employment as a mitigating factor for consideration in sentencing.

CALLS FOR REFORM AND MODELS FOR CHANGE

The Youth Justice Coalition acknowledges the work that has already been done in this field by the Australian Human Rights Commission, the Australian Law Reform Commission and by Community Legal Centres across Australia. We join them in seeking better legal protections for people whose criminal record causes them to experience stigma and discrimination when seeking employment. This section summarises and endorses some previous suggestions and reiterates the urgent need for reform as the number of criminal record checks performed across Australia continues to increase.

THE AUSTRALIAN LAW REFORM COMMISSION

In 1987, the Australian Law Reform Commission (ALRC) published a report that recommended a uniform spent convictions scheme be implemented and that discrimination on the basis of a criminal record be made unlawful.¹³⁷ Following the report, the possibility of a national spent conviction scheme received considerable attention, which was considered by a committee of all Australian Attorneys-General. Unfortunately, they were unable to agree on the precise details of a model law.¹³⁸ There have not been any significant efforts to consider or implement a uniform scheme since.

THE AUSTRALIAN HUMAN RIGHTS COMMISSION

In the second half of 2019, the AHRC commenced a national review of Human Rights laws and protections, which included a substantial discussion on discrimination laws at the state and federal levels. Included in its preliminary paper on discrimination laws, the AHRC proposed that complaints on the grounds of an irrelevant criminal record should be fully protected under federal discrimination laws, which would include a pathway to the courts for resolution of complaints.¹³⁹

Professor Rosalind Croucher, current President of the Australian Human Rights Commission, recently identified that the recommendations made by the ALRC in 1987 continue to be relevant to complaints that are made today.¹⁴⁰ Without specific legislation prohibiting criminal records, complainants are unable to go to court when they are discriminated against as a jobseeker. Professor Croucher highlights that Australia is a signatory to international conventions which aim to prevent discrimination on the basis of irrelevant criminal records, and that those conventions should be implemented in domestic law.

¹³⁷Australian Law Reform Commission (1987) *Report No 37: Spent Convictions*. Australian Government Publishing Service: Canberra.

¹³⁸Knowler, J. (1994). 'Living down the past - Spent convictions schemes in Australia' *Privacy Law & Policy Reporter* 1(6), 103.

¹³⁹Australian Human Rights Commission. (2019). *Free and Equal: An Australian Conversation on Human Rights. Discussion paper: Priorities for federal discrimination law reform*. Sydney, 11.

¹⁴⁰Croucher, R. (2018). 'Righting the relic: towards effective protections for criminal record discrimination' *Law Society Journal* 48, 73.

AHRC's publication *On the Record* has been referenced extensively throughout this report. The guidelines encourage a cultural shift in the practice of obtaining criminal record information and encourages employers to reconsider when and how they use criminal records information in their human resources policies. *On the Record* outlines the best practice for employers when determining the inherent requirements of a role, guidelines for assessing the relevance of a criminal role and procedures for the training of staff that are involved in the recruitment process.¹⁴¹ Although the guidelines in *On the Record* are optional and unenforceable, any employer that is serious about equal employment opportunity should be incorporating them into their employment and recruitment policies.

FITZROY LEGAL CENTRE AND JOBWATCH – PROPOSALS FOR REFORM IN VICTORIA

There is perhaps greater urgency for reform in Victoria than elsewhere in Australia, given the lack of a spent convictions scheme in that jurisdiction. In 2005, the Fitzroy Legal Centre and JobWatch Inc. called for law reform in response to increasing enquires about criminal records discrimination in employment.¹⁴² The report highlighted that the people most commonly affected were either discriminated against at the recruitment stage or were casual employees, which limited options for complaint or review.

The report recommended the implementation of federal and state laws prohibiting discrimination on the basis of an irrelevant criminal record, and endorsed the inherent requirements test in the narrow circumstances where absolutely required.¹⁴³ The report also made broad recommendations calling for the implementation of community education and advice services for both employers and job-seekers.¹⁴⁴

A MODEL FOR NSW: TASMANIA

In 1999, Tasmania's comprehensive *Anti-Discrimination Act* came into force. It includes a provision prohibiting discrimination on the basis of irrelevant criminal record.¹⁴⁵ The Act provides for limited exemptions to the rule in situations where it is reasonably necessary to protect the wellbeing of children, or in order to comply with another law of Tasmania or the Commonwealth.¹⁴⁶

¹⁴¹Australian Human Rights Commission. (2012). *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, 34.

¹⁴²Noble, P. and Marchetti, G. (2005) *Criminal Records in Victoria: Proposals for Reform*. Melbourne: Fitzroy legal Service and Jobs Watch.

¹⁴³Noble, P. and Marchetti, G. (2005) *Criminal Records in Victoria: Proposals for Reform*. Melbourne: Fitzroy legal Service and Jobs Watch, 51-53.

¹⁴⁴Noble, P. and Marchetti, G. (2005) *Criminal Records in Victoria: Proposals for Reform*. Melbourne: Fitzroy legal Service and Jobs Watch, 54-57.

¹⁴⁵*Anti-Discrimination Act 1998* (Tas) s 16(q).

¹⁴⁶*Anti-Discrimination Act 1998* (Tas) s 50; Chapman, A. (2000). 'Anti-Discrimination Act 1998 (Tas).' *Australian Journal of Labour Law* 13(2), 183.

Interpreted broadly, the Tasmanian legislation requires that whenever a criminal record check is performed, there must also be an inherent requirements assessment, unless the check is otherwise required by law. This means that the issues that arise in NSW in relation to *WWCC Checks* and *NDIS Worker Checks* would also arise in Tasmania. However, the requirement of 'reasonableness' for exceptions in relation to child safety under the Tasmanian Act is encouraging because it indicates an attempt at balancing the tension between child protection and equal opportunity principles.

FURTHER MODELS FOR NSW

In addition to Tasmania, the Northern Territory and the Australian Capital Territory also prohibit discrimination on the basis of an irrelevant criminal record.¹⁴⁷

In Western Australia it is unlawful to discriminate against a person on the basis of a spent conviction, in employment decisions.¹⁴⁸

New South Wales lacks a Bill of Rights or a Human Rights Act, which could guarantee further safeguards to ensure that legislation and government action does not adversely impact upon human rights, including the right to not be discriminated against. Queensland, Victoria and the ACT have all recently enacted Human Rights Acts, while NSW has yet to make any significant progress towards introducing a bill in parliament.¹⁴⁹

¹⁴⁷*Anti-Discrimination Act 1992* (NT) s19(q), *Discrimination Act 1991* (ACT) s7(l).

¹⁴⁸*Spent Convictions Act 1988* (WA) s 18.

¹⁴⁹Human Rights for NSW, 'What is a 'Human Rights Act'? Retrieved from <https://humanrightsforNSW.org/what-is-a-human-rights-act>.



CONCLUDING REMARKS

The principle that young people "should not be branded in adulthood by youthful mistakes"¹⁵⁰ is being eroded by requirements that criminal records are disclosed when seeking employment.

We anticipate that the problem will increase in the coming years as requests for criminal record checks continue to trend upward and the NSW Government increases its funding for police and law enforcement, but not for programs aimed at diversion and rehabilitation.¹⁵¹ The Covid-19 pandemic will also significantly impact youth unemployment in the coming years.

Young people who are already the most vulnerable and marginalised, Aboriginal and Torres Strait Islander young people in particular, are likely to experience the highest levels of exclusion and discrimination.

Past and present governments have recognised that criminal records create barriers to entering employment and have indicated an commitment to removing them. In 1973 Australia ratified the *International Labour Organisation Convention 111 Discrimination (Employment and Occupation) Convention* and the *Australia Human Rights Commission Act*, prohibiting discrimination on the basis of an irrelevant criminal record. There is an urgent need to for law reform at the state and federal levels to make these commitments legally binding and enforceable. This is our key recommendation. In 1973 Australia ratified the *International Labour Organisation Convention 111 Discrimination (Employment and Occupation) Convention* and the *Australia Human Rights Commission Act*, prohibiting discrimination on the basis of an irrelevant criminal record. There is an urgent need to law reform at the state and federal levels to make these commitments legally binding and enforceable. This is our key recommendation.

Employers in both the government and private sectors must also actively seek to avoid discrimination where a criminal record is not relevant. Increasing concerns about 'risk-management' should always be balanced against a concern for equal opportunity in employment. Blanket policies that require record checks or automatically refuse candidates who disclose a criminal record must be reconsidered. This is especially important for young workers, whose lack of experience may be overshadowed by their record.

¹⁵⁰Australian Law Reform Commission. (1997). Report No 84: *Seen and Heard: Priority for Children in the Legal Process*. Canberra.

¹⁵¹NSW Liberal Party Press Release. (2019, July 2). Retrieved from <https://nsw.liberal.org.au/candidates/gladys-berejiklian/news/articles/450-ADDITIONAL-POLICE-SET-TO-HIT-THE-BEAT>.







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