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Criminal Records and Rehabilitation in Australia

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Abstract

Resettlement of former offenders and their ongoing desistance from further offending should be a priority for any community, but in many countries criminal records are increasingly accessed in employment and other decision making. The criminal record then becomes an indelible brand, undermining rehabilitation and making reoffending more likely. Common law-based countries such as the UK and Australia demonstrate this phenomenon more clearly than some mainland European countries, and political and cultural factors are clearly relevant. This paper addresses the scope in Australia for rehabilitation processes that might contribute to the desistance process.

Keywords: Criminal record - Spent convictions – Desistance - Rehabilitation

Introduction

> 'For the record I see Black and Whitefella law as both punitive. Eye for an eye, tooth for a tooth. Kill, and in either system it's get out of town if you can. But under Blackfella law, crimes down from capital, a period of exile, spear in the leg...Exile ends, Wound heals. Better now Jack? Yes, I'm better now Uncle. Warm yourself at the fire old son. .. And I'd be accepted back in the fold.
> Whitefella way: the Convict Stain endures, lingers, and your past Shadows, Stalks your present, and Stymies, Jinks your future**.'**[1]

It is obvious that both offenders and the broader community benefit if offenders can resettle and successfully desist from further offending. The widespread use of criminal record checks as a risk management tool, however, undermines offender rehabilitation and makes reoffending more likely. The use of criminal record checks appears to vary across jurisdictions, influenced by history, politics and culture. This paper is one of an EJProb

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[1] (Uncle) Jack Charles/John Romeril, 2010, 'Jack Charles v The Crown'. Jack Charles is an Aboriginal Elder and actor: http://www.ilbijerri.org.au/jack-charles.html.

Special Issue outlining the nature and accessibility of the 'criminal record' in various jurisdictions, and identifying the possibilities for counteracting the power of the perpetual criminal record through forms of the reintegration rituals rewarding desistance proposed in the recent work of Shadd Maruna (2001, 2011). This paper addresses the current situation in Australia; comparisons can be drawn with France (Herzog-Evans, 2011b), Germany (Morgenstern, 2011), Spain (Larrauri, 2011), the Netherlands (Boone, 2011) and the United Kingdom (Padfield, 2011). Not surprisingly Australia and the United Kingdom have similar philosophies and practices, and I will argue that Australia's historical and legal origins offer no generous philosophy of resocialization, by contrast with for example France, Germany, Spain and the Netherlands, and can provide only indirect mechanisms for rewarding desistance. The Australian experience also illustrates the limitations of common law principles to protect offender interests in the absence of human rights legislation. This contrasts with more recent UK developments (Padfield 2011).

For a country settled by white colonisers for the warehousing of convicts, Australia is remarkably reluctant to forgive. The criminal justice system espouses the conventional criminological goals of deterrence, retribution, rehabilitation and community protection, but in practice rehabilitation is rarely part of the public discourse. Australia's recent history has been, as is well known, as a land colonised against the will of the original inhabitants as a recipient for English convicts. Much has been written about the impact of colonisation on the Indigenous inhabitants (Cuneen, 2001; Royal Commission into Aboriginal Deaths in Custody, 1991: ch10). I will return to this issue later.

The experience of the transported convicts has also been analysed, both the horrors of the long sea voyage and the violence of the regimes over the period. The great distance from the motherland meant that there was considerable discretion in the ways the convict settlements operated. Historians in fact suggest that despite the deprivations the early settlement at Sydney Cove was at times a more generous environment to serve a sentence than the UK.
The transportation program had several purposes; not only did it reduce the pressure on the prisons and hulks and remove convicts from the community consciousness. It also aimed to build the British Empire, and convicts were expected to provide labour for that purpose. Governor Lachlan Macquarie, appointed Governor of the new settlement in 1810, considered that transportation itself was the punishment; those who survived the journey could then 'work hard and re-establish their lives' (Bull, 2010: 6).

Convicts showing responsible behaviour could obtain a ticket-of-leave allowing them to work wherever they wished. Governor Macquarie in effect provided an early form of officially documented 'rehabilitation' to sustain the growth of the new colony:

> 'In New South Wales, certificates of freedom were issued to convicts who were pardoned or who had served their terms. This was necessary in a convict society where sometimes emancipists needed to prove they were free. The certificate established that the holder was "restored to all the rights and privileges of free society' (Bull, 2010: 6).

This early pragmatic approach to convict labour was not, however, sustained. The policy of emancipation, and perceived lack of focus on the punitive intent of transportation, brought Governor Macquarie into conflict with influential conservative elements of the local society which 'sought to restrict civil rights and judicial privileges to itself' and which – importantly

– had 'influential friends in English political circles'. [2] A Commission of Inquiry was set up and Macquarie resigned in 1821, returning to the UK to defend his administration. From that time punishment and deterrence were prioritised in the running of the new colony (Finnane, 1997: 8-12). In Australia today a range of principles and ideologies militate against any forgiving, let alone forgetting, of criminal convictions. This will be the focus of the majority of this paper. There is little scope for formal recognition of desistance, but some forms of restorative justice can be seen to offer a type of reintegrative ritual which will be discussed briefly later in the paper.

This paper also has a focus on the impact of criminal records on access to employment specifically. Employment is recognized as a key factor in sustaining desistance from crime, not only as an income source but also as a source of structure, social contact, and self-worth (for example Graffam et al, 2004: 1). Criminal history information is increasingly sought by employers in Australia. The national criminal records agency, CrimTrac, processed around 2.7 million criminal history checks in 2009-2010 (Crim Trac 2010: 58), a particularly striking number given that the total population of Australia is only around 20million people. This is a substantial increase on its first years of operation (2000-2003) which averaged less than 0.5million checks per year. The agency notes its growing business in its latest Annual Report, as criminal history checks are 'increasingly sought by public sector agencies, private sector entities and volunteer organisations as a prudent employment or engagement screening measure' (Crim Trac 2010: 57).

Research also suggests that employers are very wary about employing ex-offenders (see for example Pager, 2007). They are concerned about the risk of reoffending specifically, but also that an offender will be an unreliable or challenging employee. When Australian employers (together with other corrective services stakeholders) were asked to rate the employability of a range of disadvantaged groups, ex-offenders were rated less likely to obtain employment than people with a chronic illness, physical disabilities or communication difficulties. Only applicants with intellectual or psychiatric disabilities were rated lower (Graffam et al., 2004). At the same time, targeted employment programs for offenders have been reasonably successful, results replicated in the UK and Europe (for example Graffam et al., 2005; CIPD, 2007; Wirth, 2007).

Australia has no national human rights charter, and its Constitution is a procedural document rather than a statement of fundamental principles or values. The common law therefore represents the starting point for discussing access to and use of criminal records, and the opportunities for supporting offenders' reintegration. The Australian common law system begins from the principle that actions are lawful unless there is an explicit law making them unlawful (the principle of legality). In the context of criminal records, and employment specifically, this means that, in the absence of any legal restriction, an employer can ask for and take account of any information they choose when making a decision.

The legality principle is bolstered in the employment context by the principle of freedom of contract, that is that individuals are free to contract with each other as equal citizens each able to address their own best interests. An employer can require that an employee have no criminal history; an employee can comply or take his or her labour elsewhere. This

[2] Macquarie University, 'Lachlan Macquarie' http://www.lib.mq.edu.au/lmr/biography.html

theoretical assumption of equality of bargaining power is of course largely unrealistic in the modern market place. There are specific laws regulating how employers access and use criminal record information, which will be discussed below, but no laws denying employers the right to take account of such information. This legal framework, coupled with a punitive political environment, high levels of fear of crime, and prioritization of community protection, mean that the default position is one of ever-increasing demand for access to criminal history information.

At the same time, the tabloid media showcases violent crime, the 'otherness' of criminals, and concomitantly the alleged 'softness' of the criminal justice and prison systems.[3] These stories do 'name and shame', unless specific suppression orders apply,[4] and the press mounts new campaigns whenever a particularly high profile offender is nearing their prison release date. Media narratives are most commonly about public outrage and physical risk; paedophiles and other violent offenders are more likely to appear on page 1 than corporate fraudsters. News values also privilege stories about failures of the state and state institutions: police, courts, prisons, parole. This is a staple feature of the Australian correctional scene. One could speculate that this constant media discourse reduces levels of trust in government and agencies of the criminal justice system to 'get it right', whether in sentencing or release and rehabilitation of offenders. It may also be one factor in the decision of so many employers to double check such decisions by asking for criminal history information.[5]

1) Criminal records in Australia

Criminal matters are dealt with by individual states in Australia, and also by the federal (national) government. Criminal records are therefore held by police in each jurisdiction. Criminal records generally include convictions and penalties, as well as court appearances, findings of guilt without conviction, good behaviour bonds, charges, matters awaiting hearing or under investigation, and police investigations (HREOC, 2004: 15).[6] The full range of criminal history information, including police intelligence, will be drawn on by police in the course of investigations. Such information may also be referred to by police and courts when considering applications for bail. In sentencing, the court will rely on the prosecutors (the police for minor matters and the prosecution service in more serious matters) for relevant information about previous convictions.[7]

Courts also maintain records of cases and outcomes, which may be searchable by the public subject to permission of the Court. They do not, however, maintain consolidated records for

[3] A recent tabloid newspaper gave an entire front page to a story headed 'Outrageous privileges', revealing that a much-reviled longterm prisoner had been permitted conjugal visits: *Herald-Sun* 25 October 2010.

[4] For example under the *Serious Sex Offenders Monitoring Act 2005* (Vic) s.42. A case being heard in November 2010 before Australia's highest court challenges the constitutionality of court orders suppressing the names of two sex offenders under Victoria's *Serious Sex Offenders Monitoring Act 2005*.The applicant is a journalist who has spent years naming sex offenders and then fighting contempt and other charges, and has spent time in prison for his efforts: 'Hinch has his day in the High Court' *Age* 1 November 2010.

[5] This scepticism is not necessarily a negative feature of Australian society; in another form it demands accountability of government agencies and holds them to high standards of probity and transparency of decision making.

[6] Given the number of jurisdictions, this paper will refer to criminal record, privacy and related regimes selectively. The HREOC Discussion Paper provides a comprehensive overview of several of these regimes.

[7] *Evidence Act 2008* s. 178; *Criminal Procedure Act 2009* (Vic) s.245.

individual offenders (HREOC, 2004: 46).[8] Open access to the courts is seen as a fundamental principle of the criminal justice system; it is regularly stated that 'justice must not only be done, but be seen to be done' (Spigelman, 1999). Courts are therefore open to the public (other than in the rare cases where sensitive or confidential matters require temporary exclusion of the public) and the media is expected to keep the community informed of the work of the justice system. This is the origin of the claim that criminal records are – or should be – public documents.

The increasing role of the internet cannot be ignored here. Anyone can collect, store and make available criminal history information gleaned from the media, published judgments, and any other public information. This is subject to limited restrictions (e.g. spent convictions legislation which penalise release of spent convictions. A Google search of 'criminal records' brings up any number of private providers of a tantalising range of criminal history information, of unknown veracity. However internet-based services are notoriously difficult to prosecute, and are often based outside the Australian legal jurisdiction. One significant player in the Australian context is CrimeNet, a private commercial provider of mostly Australian criminal history information based on any public records available. The Australian listed company sold its business to a US company of the same name in 2005. [9] CrimeNet claims that 'We work within the law' and that it has systems in place to ensure compliance with 'spent convictions' schemes, but asserts on its webpage:

> 'Details of criminal convictions are public records in most Western democracies and it is a generally accepted principle of privacy rights that this information should always be accessible.'[10]

The closest Australian governments have come to managing this issue has been to propose an offence of unlawfully disclosing a spent conviction in the course of carrying on a business of providing criminal history information. [11]

2) Access to criminal records

General access

Separate state statutes govern what is held and how it may be accessed. There is no provision for general release outside the justice system requirements. First, a person can obtain a copy of his or her criminal history information. There is provision for this under the various release policies and statutes. This access is also required under the various Australian Freedom of Information regimes embodying the principle that a citizen has a right to be provided with government information relating to themselves.[12] This right includes the right to have the information amended if inaccurate.[13]

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[8] In Queensland, for example, a person can apply for a copy of a Court Brief where this has information about him or herself or relating to a right (eg) to criminal injury compensation. The copy will exclude confidential or privileged material: http://www.police.qld.gov.au/services/purchase/q9.htm. In Victoria anyone can apply to see the Register of Court orders: *Magistrates Court Act 1989* (Vic) s.18(3).

[9] See discussion in Loddon Campaspe Community Legal Centre *Submission to the Draft Model Spent Convictions Bill Consultation Paper* January 2009, 23ff.

[10] http://www.crimenet.org/

[11] Draft Model Spent Convictions Bill 2008 s.13

[12] For example, *Freedom of Information Act 1982* (Vic) s.13.

[13] For example, *Freedom of Information Act 1982* (Vic) s.39.

There is then limited provision for others to access this information. As a starting point, criminal history information falls into the category of 'personal information' which is protected by Australian privacy laws.[14] Privacy laws have been controversial but have become more widespread in Australian jurisdictions, with the first (national) legislation passed in 1988. Under these laws no person (unless authorised by statute) can access personal information without the subject person's consent. This important protective framework is largely rendered irrelevant in the employment situation. A would-be employee has little choice but to provide their consent if they wish to be considered for the position. The process is that a person applies to their state police for a National Police Certificate (NPC). The state police carry out a check in all jurisdictions, but can only include information that can be released according to the different requirements of each state. The National Police Certificate is co-ordinated by a national agency, CrimTrac. CrimTrac keeps the 'National Names Index' which identifies people known to the police, and the jurisdictions in which they have records, and this allows CrimTrac to search in the relevant jurisdictions when an application is made. CrimTrac reports that around 27% of the 2.7million checks it carried out in 2009-2010 produced findings requiring further attention by state police.[15]

This provision for access is not unlimited. The information disclosed on the NPC will depend on 'the purpose of the check, the agency requesting it, the types of offences, the spent conviction legislation and the required level of disclosure in the relevant legislation.'[16] In Victoria criminal history information held by the police can only be released for purposes of employment, occupational licence, visa, insurance, voluntary work, or for personal use. In NSW criminal history information can be provided for purposes of 'employment, visa, adoption and general licensing'.[17] The NPC is provided in paper form developed after 'forensic consultation' and with a number of security features to demonstrate authenticity, to prevent amendment, and even to prevent photocopying.[18]

What is disclosed

In Victoria release of criminal history information is governed by the Victoria Police Information Release Policy, a policy produced by the police with no separate legal status. The Policy states that information is released on the basis of 'findings of guilt' and not 'conviction'. This means that disclosure includes not only convictions, but also minor matters where the court decided to reach a finding of guilt without recording a conviction, and good behaviour bonds, that is, cases which were adjourned for a period to enable the offender to demonstrate their good behaviour. These are disclosed despite being sentencing options which are intended to assist an offender by *not* leaving them with a formal criminal record.

[14] Criminal records are in fact classified as 'sensitive' personal information: *Privacy Act 1998* (Cth) s.6. See also *Information Privacy Act 2000* (Vic); *Privacy and Personal Information Protection Act 1998* (NSW); *Information Privacy Act 2009* (Qld)

[15] CrimTrac *Annual Report 2009-2010*: 57.

[16] CrimTrac *Guide to National Criminal History Checking Services* March 2004, cited in HREOC, 2004: 15.

[17] NSW: http://www.police.nsw.gov.au/about_us/structure/specialist_operations/forensic_services/criminal_records_section; Victoria: http://www.police.vic.gov.au/content.asp?Document_ID=692. Details of the proposed employment may be required, and whether there is to be any contact with children. Victoria Police state that they currently provide around 300,000 checks/year.

[18] http://www.police.vic.gov.au/content.asp?Document_ID=274.

The Policy states that details of matters 'currently under investigation or awaiting court hearing' will also be released.[19]

In NSW the agency provides Standard Disclosure for 'general employment, visa, adoption and general licensing purposes' and Full Disclosure 'for purposes exempt from the NSW Criminal Records Act 1991, including employment as a teacher or teacher's aide overseas'.[20] Full Disclosure includes disclosure of spent convictions.[21] As already mentioned, Australian privacy laws protect personal information (such as a criminal history) from release to third parties without the owner's consent. Any employer request for criminal history information therefore requires the applicant to obtain their criminal history information themselves and provide this to the employer.

In Victoria this was until recently effected by the employer asking the would-be employee to sign a consent form authorising release of the information to the employer. However since November 2008 the process has been changed to ensure that only the subject of the criminal information can have access to that information from the Police. The practical reality is of course that if the subject person wishes to obtain the employment they do not have a choice but to respond to the request. However the amended procedure means that they have control over what the employer sees, as they receive it first. They can decide whether or not to continue with the application, without the criminal history information itself having been disclosed to other parties. If they decide to proceed they can prepare supporting or other material to assist the employer to contextualise the record. This is not the case in other jurisdictions, where consent to release of information can include release directly to the employer, probably still the most common approach.

The release processes do attempt to protect the ex-offender, and include reminders to employers that the information is protected and that they should use and store it appropriately, but such helpful suggestions are not directly enforceable.[22] The NSW police check cautions any recipient organisation not to disclose it further without the subject's consent.[23] The Victoria Police information to employers specifically reminds employers not to treat a criminal record as determinative. It should 'form only one part of the assessment process for the applicant's suitability for employment/voluntary purposes', and the employer should consider such matters as the nature of the offence, scope of the history, and period of time since offending. However, ' [a]fter taking these points into consideration as part of an overall decision making process, the suitability of the applicant remains with the organisation' (Victoria Police, 2009).[24]

Courts and tribunals have from time to time recognised the prejudicial nature of criminal history information, for instance in decisions that an employee has no obligation to volunteer the information (HREOC, 2004: 28). An employer's entitlement to ask has not, however,

[19] http://www.police.vic.gov.au/content.asp?Document_ID=692. Some minor convictions will generally not be released after the passage of 10 years (adult offences) or 5 years (for juvenile offences): see the discussion below of 'spent convictions'.

[20] http://www.police.nsw.gov.au/__data/assets/pdf_file/0014/15134/P800.pdf

[21] Spent convictions schemes are discussed further below.

[22] Breach would have to be pursued under privacy legislation.

[23] http://www.police.nsw.gov.au/__data/assets/pdf_file/0013/28111/Information_Sheet_No._1_Aug_2010.pdf

[24] See further Guidelines provided by the Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis Of Criminal Record*, 2005.

been denied, and an employee's failure to answer truthfully can justify dismissal, not on the basis of the criminal record but of dishonesty. One employer commented to the HREOC:

> 'On most occasions, the nature of the applicant's criminal record is not relevant to the position for which they have applied. However, it needs to be recognised that trust is an essential element of any successful employer-employee relationship and it is expected that an applicant be honest and "up-front"' (HREOC, 2004: 9).

There have been Australian court decisions that an employment agency was liable in negligence when it failed to pass on information about an employee's criminal history of which it was aware, [25]and that employers can be liable for an employee's fraud. [26] Such findings, not surprisingly, provide incentives to employers to obtain any relevant criminal history information when making a decision to employ, to minimise potential liability.

Specific access/ requirement to reveal

Some occupations now require all employees have a clear criminal history. Others simply specify that a criminal record check must be made, but do not explain what an employer should look for if a criminal history is revealed. Some professions identify the offences which should exclude. The Australian Corporations Act, for instance, specifies that a person is automatically disqualified from managing a corporation if he or she has been convicted of, for example, any offence affecting the making of corporate decisions, or that involves dishonesty and is punishable by at least three months imprisonment.[27] Occupations and professions requiring licensing or accreditation may require that an applicant be 'of good character' or 'fit and proper', requiring consideration both of any criminal convictions and also other evidence of bad character.[28] Courts have emphasised that the mere existence of a criminal record does not mean that a person is not of 'good character', and factors such as the passage of time and subsequent behaviour must all be taken in to account. [29]

A number of occupations previously open to relatively unskilled ex-offenders now require criminal history checks. In Victoria, as an illustration, a person cannot drive a bus or taxi unless accredited, and cannot be accredited if they have been convicted of any of a range of serious offences or traffic offences.[30] The would-be driver can however seek a rehearing before an administrative Tribunal, the Victorian Civil and Administrative Tribunal (VCAT). A recent, very controversial, case involved an applicant for a taxi licence, who had been found not guilty of killing his wife on the grounds of insanity over 15 years before. He was conditionally released into the community after five years and unconditionally after another six years. He had been refused accreditation when he applied for a taxi licence. In the light of the range of positive evidence as to mental health, risk and subsequent life events he was granted the licence on review. Newspaper headlines such as 'Killer Cabby on our Roads'

[25] *Monie v Commonwealth* [2007] NSWCA 230.
[26] *Ffrench v Sestili* [2007] SASC 241. For fuller discussion of issues of legal liability see Naylor et al, 2008: 175-177.
[27] *Corporations Act 2001* (Cth) s 206B.
[28] For example lawyers must be found 'a fit and proper person to be admitted to the legal profession': *Legal Profession Act 2004* (Vic) ss 1.2.6, 2.3.3; *Legal Practice Act 2003* (WA) s 39.
[29] *Z v DG, Dept of Transport* [2002] NSWADT 67
[30] *Transport (Compliance and Miscellaneous) Act* 1983 (Vic) Part VI Div IV. Three tiers of offending are defined, tier 1 requiring mandatory refusal, tier 2 presumptively refusal, and tier 3 the option of refusal of accreditation. Review of the decision is available under s. 136.

were predictable. In a related application by a tabloid newspaper to lift an order suppressing the applicant's name, VCAT observed that the newspaper :

> '… wishes consumers to be able to identify XFJ, if necessary circulating his image to assist in the process. It wishes to place the mark on Cain (according to the Bible the first killer in the human race) upon him despite describing him in the present proceeding as being in good psychiatric health and conceding that he has been convicted of no crime. … For XFJ what the Herald and Weekly Times contemplates doing could scarcely be more damaging for his rehabilitation as a useful citizen in our society.' [31]

The most highly politicised issues involve convictions for sex offending, and occupations involving work with children and other vulnerable people. The political triggers in Australia for increased criminal record checking have primarily come from publicised cases of sex offenders working with children, and more generally the media staple of naming and shaming sex offenders. Sex offenders are now subject to a range of extended sentencing and release provisions (not relevant to the present discussion) as well as forms of registration which preclude employment in many occupations. Sex Offender Registers are not open to the public in Australia, but registration entails residential and other restrictions.

The monitoring of people working with children is the most fully developed regime across Australia, with implications for much of the community, from teachers and child carers through volunteer helpers in schools, local sporting events and youth clubs. In fact the child care sector now has a relatively carefully structured regime for excluding people considered to present a risk to children by reason of their past behaviour. Anyone working, or volunteering to work, with children is required in most Australian states to have obtained a Working with Children Check (WCC) or equivalent.[32] When a person applies for a WCC in Victoria the Working with Children Check Unit at the state Department of Justice carries out a national police records check, and a check with any professional disciplinary body, assessing these according to the statutory criteria to reach a decision whether or not to issue a Check. The Victorian WCC legislation specifies Category 1 offences which will automatically preclude a WCC (primarily serious sex and child pornography offences), Category 2 offences which will preclude unless the Department Head is satisfied that there is 'no unjustifiable risk to the safety of children'(eg other sexual and violent offences, or drug trafficking), and Category 3 offences which will usually not preclude the issue of a Check but may in particular circumstances.[33]

If the Unit is considering refusing the application, the applicant can make a submission as to why they should pass the Check. Once a person has a Check they can seek employment; the Check is personal to them, not to the specific position of employment. However the person is expected to advise the Unit of any change in circumstances (including a new conviction). The Unit is also notified directly of any subsequent convictions or disciplinary findings by the police and professional bodies, and will notify the employer as necessary. The process is clearly intended to exclude people with inappropriate criminal histories, but it is not an

[31] *XFJ v Director of Public Transport* [2009] VCAT 96 para 55

[32] Victoria: 'Working with Children Check' under the *Working with Children Act 2005* (Vic); Qld: 'blue card' scheme under the *Commission for Young People and Children Act* 2000 (Qld); NSW: the 'Working with Children Check' under the *Children and Young People Act* 1998 (NSW); the 'Assessment Notice' under the *Working with Children (Criminal Record Checking) Act 2004* (WA).

[33] *Working with Children Act 2005* (Vic) ss12-14.

'information access' mechanism. Indeed it can be said to protect the individual from having to reveal his or her record, as the application is made by the individual, and if rejected is not otherwise publicised, although it is an offence to work in the area without a Check. Looked at another way, obtaining a Check can be said to function as a statement of a person's acceptability to work with children.

The WCC scheme has a clear set of criteria, there are mechanisms for the giving of reasons if a check is refused and for the applicant to provide further information in support of their application, and there are mechanisms for appeal. There is provision to obtain a reconsideration of the application even from the automatic refusal of a Working with Children Check due to the person having a conviction in the most serious category, Category 1.[34]

This review process is of particular relevance to the subject of this Special Issue (see Herzog-Evans, 2011a). A would-be childcare worker, or volunteer to help in children's sporting activities, who has been refused a WCC can apply to the VCAT for reconsideration of the application. The Tribunal convenes an adversarial process, where the respondent is the Department of Justice as the relevant agency. The Tribunal takes evidence from the applicant, psychological witnesses, family members, friends and others to make a determination, first, whether granting the Check 'would not pose an unjustifiable risk to the safety of children', taking account of the seriousness of the offence, the length of time that has elapsed, the offender's subsequent behaviour and so on, and second that it is satisfied in all the circumstances that 'it is in the public interest to do so'. [35] Matters of remorse, subsequent good works, and community involvement are all canvassed. Whilst these determinations are reported with pseudonyms, decisions to grant a WCC – which will then function as a public statement of the person's appropriateness to work with children – could be seen as a form of judicial rehabilitation for the offender/ applicant (see Herzog-Evans 2011a; Maruna, 2011).[36]

3) **Expunging techniques : desistance-supporting measures**

As noted in the introduction, criminal records are in principle available, and useable by employers. There are however three legal regimes in Australia which restrict access to a criminal history. Two potentially limit access – privacy and anti-discrimination laws – and so indirectly support desistance but do not have any effect on the existence of the record. The third – spent convictions schemes – allow particular convictions to be denied or hidden and thus fall squarely into the concept being discussed here. None however permit the deletion or expungement of a criminal record. The first two will be outlined. Neither are specifically addressed to the issue of criminal histories and both are in practice quite limited in their protection for people with a criminal record.

Privacy laws

It was noted earlier that Australian privacy laws protect personal information (such as a criminal history) from release to third parties without the owner's consent, but that an

[34] *Working with Children Act 2005* (Vic) s.26

[35] *Working with Children Act 2005* (Vic) s.26

[36] For two recent cases illustrating this process of 'redemption' see *SVP v Secretary to the Department of Justice (Occupational and Business Regulation)* [2010] VCAT 1496 (8 September 2010); *LGT v Secretary to Department of Justice (Occupational and Business Regulation)* [2010] VCAT 1109 (29 June 2010).

employer's request for consent to provide a criminal history is in practice non-negotiable. Privacy laws therefore do not offer significant protection for the ex-offender wishing to begin again.

Anti-discrimination laws

Anti-discrimination legislation characterises discrimination on particular grounds as unlawful. Common grounds include race, sex and religion. Anti-discrimination laws differ from state to state in Australia. Of most significance here, discrimination on the ground of criminal record is prohibited under the national *Australian Human Rights Commission Act 1986* (Cth).[37] A complaint can be made to the Australian Human Rights Commission, which can engage in a conciliation process.

However there is no enforceable legal remedy if conciliation is unsuccessful, unlike the option of court proceedings, available where there is a complaint of discrimination on the specific grounds of sex, age, disability or race.[38] The final remedy for criminal record discrimination is for the Commission to make a report to the federal Attorney-General, for tabling in Parliament. The Commission has noted that it reported findings of discrimination on the basis of criminal record in two cases to the Federal Parliament, and in both cases the Commission's recommendations were simply ignored by the employer (HREOC, 2004: 12).

Some state jurisdictions also specify criminal history, or 'irrelevant' criminal history, as a ground of unlawful discrimination.[39] In all cases, however, a criminal history will only be an unlawful factor if its contents did not relate to the 'inherent requirements of the job', that is, a requirement that is 'essential' to the position and not merely incidental.[40] The Courts have recognised the risk that the 'inherent requirements' exception could neutralise anti-discrimination laws:

> 'Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group… These considerations must be reflected in any construction of the definition of 'discrimination' … because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.'[41]

The Commission reports a small but regular number of complaints about discrimination on the ground of criminal record, most about discrimination at the recruitment stage.

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[37] This is achieved by having the ILO Convention 111 incorporated as a schedule to the Human Rights Commission Act; ILO 111 article 1(1)(a) defines 'discrimination' in employment as 'Any distinction, exclusion or preference made on the basis of …[criminal record] … which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. At the same time it provides for an exception for any distinction based on the 'inherent requirements' of the job: article 1(2). Regulations in 1989 extended the definition of discrimination to include criminal record: HREOC, 2004: 11.

[38] These categories of discrimination are separately prohibited under Commonwealth laws: *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975*, *and Sex Discrimination Act 1984*.

[39] Australian Capital Territory *Discrimination Act 1991* (ACT) 'spent convictions'; Northern Territory *Anti-Discrimination Act 1996* (NT) ('irrelevant criminal record'); Tasmania *Anti-Discrimination Act 1998* (Tas) ('irrelevant criminal record'). Inclusion of irrelevant criminal record was recommended in 2009 in Victoria but has not to date been accepted.

[40] *Qantas Airways v Christie* (1998) 192 CLR 280.

[41] *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 (Black CJ).

Around half of the employers in these cases argued that it was an inherent requirement of the job not to have a criminal record, and this seems to have been accepted in around two-thirds of the cases (HREOC, 2004: 42, 45).

Spent convictions laws

A regime of 'spent convictions' has been in place in most Australian jurisdictions since the 1990s. [42] The economic penal narrative in the terminology in most jurisdictions is notable; convictions may be 'spent', the offender having 'paid their dues', in contrast to the UK's language of rehabilitation in the *Rehabilitation of Offenders Act* (see Padfield, 2011). Australian schemes followed the recommendations of the Australian Law Reform Commission in 1986. Whilst a uniform national scheme was proposed, this did not occur given the usual rivalry between states and their unwillingness to agree on a single scheme. Different schemes therefore operate in each jurisdiction. Queensland and WA were first (1986 and 1988). The Commonwealth (national) scheme came into effect in 1990.[43] The rationale for the scheme was as follows:

> 'Use of information about an old minor criminal conviction, which in itself is not a reliable indicator of future behaviour, can seriously disadvantage people in getting on with their lives: obtaining employment or promotion, applying for insurance, credit or occupational licence, or seeking registration and membership of organisations. Recognising the hardship and injustice this can cause, the Federal Parliament passed a new law in June 1989 to prevent discrimination against a person on the basis of an old minor conviction.'[44]

The Commonwealth scheme allows individuals with minor convictions to disregard those convictions after a crime-free period of ten years (or five years for juvenile offenders).This means they do not need to reveal them and can legally 'lie' if asked about any conviction which is 'spent'.[45] Individuals and organisations are prohibited from taking these convictions into account (including asking about them), or disclosing them to anyone without the consent of the individual.The scheme covers any offence for which the person was sentenced to no more than 30 months imprisonment, or to a non-custodial sentence.

In a published guideline the Privacy Commissioner warned employers against asking wide-ranging questions about a criminal history:

> 'A question in broad terms, for example - "Are you the subject of any criminal charge or action before any court, or do you have now or in the past any recorded convictions, findings of guilt or pecuniary penalties against you?" is unacceptable, as the answer may involve disclosure of information on protected old convictions.'[46]

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[42] *Criminal Records Act 1991 (NSW); Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld); Spent Convictions Act 2000 (ACT); Criminal Records (Spent Convictions) Act 1992 (NT); Spent Convictions Act 1988 (WA); Annulled Convictions Act 2003 (Tas).*

[43] The scheme primarily covers convictions for Commonwealth offences, that is, offences relevant to the Constitutional powers of the Commonwealth government, such as taxation, immigration, and importation of illegal drugs.

[44] Federal Privacy Commissioner, *Compliance note 2/91: Information about old convictions*

[45] *Crimes Act 1914* (Cth) ss.85ZV, 85ZW.

[46] Federal Privacy Commissioner, *Old conviction information and Commonwealth authorities (compliance note 1/91)*. The Office of the Federal Privacy Commissioner has been integrated, along with federal Freedom of Information, into the new Office of the Australian Information Commissioner as at 1 November 2010as data

If someone believes the legislation has been breached they can complain to the Federal Privacy Commissioner, who can for example order reinstatement to a position or financial compensation. There are however a significant range of exemptions from the scheme; organisations can apply for an exemption and this request is also assessed by the Privacy Commissioner. Exemptions granted to date range from the obvious law enforcement, courts and intelligence requirements through libraries releasing information for research, to specific exemptions, such as those regarding violent offences, and sexual offences, for child care, elder care and prison management positions.

The other state schemes are broadly similar. All require a 10-year crime-free period for adult offending, and limit eligible convictions to those punished by not more than 6-12 months imprisonment (HREOC, 2004: 52). Several specify offences which are incapable of ever being spent such as sexual offences, some corporate offences and/or other 'prescribed offences'. It should be noted that, given the increasingly punitive character of Australian society, and what appears to be an associated increase overall in length of sentences, the eligibility cut-off of 6-12 months is probably now excluding more people than when the legislation was first passed. The calculation of the crime-free period begins from the date of conviction in the Commonwealth, Queensland and Tasmania, but from date of release (or end of sentence) in other jurisdictions (HREOC, 2004: 52).

There is no statutory scheme in Victoria or South Australia, where informal policies operate. The Victorian policy states that the police will generally not release convictions after 10 crime-free years, and with a maximum 30-month eligibility sentence, but also provides exemptions for serious sexual or violence offences and where the application relates to work involving children, together with a general exemption, 'in other exceptional circumstances where the release of information is in the interest of crime prevention or the administration of justice' (Victoria Police, 2010). A person with a single minor offence, over 10 years ago, would therefore be able to answer 'no' if asked about criminal conviction in most states, but in Victoria would not know whether police would regard that particular conviction as 'spent'.

Many employers, and employees, work across several jurisdictions, and the differences between schemes make it difficult for either group to be sure what convictions have to be disclosed. There is always a risk that an employee will believe (or hope) that an old conviction can be denied. If they are wrong, and the conviction is revealed at a subsequent date, they are at risk of being dismissed for apparent dishonesty, as noted earlier.

Such difficulties highlight the value of having at least an official finding that a conviction has been 'spent'. Whilst this is hardly the formalised positive recognition of a person's desistance and their welcome into full citizenship discussed by Maruna and others – a statement of forgiveness - it would give certainty to offenders about how much of their past is now officially 'forgotten'. One Australian state does provide for an ex-offender to apply for formal determination that an offence is 'spent'. In Western Australia the Commissioner of Police can grant a certificate for minor convictions, and in fact is required to do so if the statutory criteria are satisfied. For more serious offences an application can be made to the District Court, where the judge has a discretion whether to grant the certificate.[47]

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protection and access regimes continue to develop: http://www.oaic.gov.au/

[47] *Spent Convictions Act 1988* (WA), s 6.

Spent convictions have been on the national agenda for many years. It will be noted that the first recommendation for a uniform national law was made in 1986, and that two jurisdictions still have no formal spent convictions regime. The issue has recurred on the agenda of the national meetings of all Attorneys-General but has not moved far. Importantly, the tension between rehabilitation and retribution remains unresolved. A model Spent Convictions bill was proposed in 2009, but does not seem to have priority for any governments. This may reflect other political realities, including the unwillingness of individual states to give up their own schemes. But it may also demonstrate the continuing dominance of fear of crime, the focus on public safety, and also fear of being sued for negligence over 'wrongly' employing someone who turns out to be a risk. This is not a culture which prioritises reintegration.

One issue which continues to be controversial is the practice of Australian police checks including offences for which the court chose not to record a conviction. This 'non-conviction' disposition is available for the most minor offences, where recording a conviction is considered inappropriate given the offender's good character, and the potential negative impact of a conviction on future 'economic or social wellbeing or … employment prospects'.[48] The Victorian legislation specifically states that 'Except as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction must not be taken to be a conviction'.[49] Nonetheless the Victorian disclosure policy, for example, states

> 'Findings of guilt without conviction and findings of guilt resulting in a good behaviour bond are findings of guilt and will be released under this policy. '

In NSW, by contrast, minor offences where no conviction is recorded are treated as spent immediately.[50] This is a clear recognition of the need to facilitate reintegration, in similar terms to some of the European schemes discussed in the Special Issue.

4) **Rehabilitation rituals: desistance acknowledgement measures**

John Braithwaite wrote in 1989, 'Unfortunately, the way we respond to deviance, particularly crime, in the West, gives free play to degradation ceremonies of both a formal and informal kind to certify deviance, while providing almost no place in the culture for ceremonies to decertify deviance' (Braithwaite, 1989: 163). This still seems to be true in the Australian context. Judges may acknowledge good behaviour in the sentencing process, when articulating the aggravating and mitigating factors in the sentence calculus. But there are few other public forums for such recognition, and the sentencing context is not primarily rehabilitative.

One direction which should however be highlighted is the growth in restorative justice processes in this country. Australia has been a world leader in restorative justice programs, and many jurisdictions now include problem-solving courts - drug courts, family violence courts – in the mainstream justice system (Freiberg, 2007; King et al., 2009: ch9). These courts appear to fly under the radar of the tabloid press; perhaps by avoiding the 'othering' of the adversarial trial process they also avoid the more aggressive associated media reporting. The innovative Collingwood Neighbourhood Justice Centre for example, in inner-suburban

[48] *Sentencing Act 1991* (Vic) s.8(1).
[49] *Sentencing Act 1991* (Vic) s.8(2).
[50] *Criminal Records Act 1991* (NSW) s.8(2)). Similarly a release on a good behaviour bond is regarded as spent upon completion of the period of the bond (s.8(4)).

Melbourne, incorporates a court of summary jurisdiction with a range of other community and welfare services. It aims to address the underlying causes of offending, to assist in preventing crime, and to engage the community in the administration of justice. The sitting Magistrate hears relatively serious criminal matters and works collaboratively with a team including social workers, drug and alcohol clinicians, Indigenous justice workers, and mental health workers (King et al., 2009, 160-163).

These alternative, less adversarial, courts are characterised by a judicial role which is engaged and ongoing, where the judge or magistrate sets goals with the offender in relation to alcohol or drug use, in which the offender returns regularly to court to report on progress or difficulties and to be supported by the court and court staff in his or her efforts to desist. These are courts where the offender, if successful, can 'graduate' to the applause of the court (Popovic, 2003; King et al., 2009: ch9).

Returning to the opening comments of my paper, the Indigenous Australian people are over-represented in the criminal justice system, as indigenous peoples are in all colonised countries, and also suffer disproportionately from the disclosure of criminal history information. Most Australian jurisdictions have established Indigenous summary courts which draw on the power of Elders and reintegrative forms of community shaming (King et al, 2009:178-181). Whilst modern restorative justice models are traditionally sourced to the New Zealand adaptation of Maori cultural practices (Maxwell and Hayes, 2006), it would not be correct to say that these Australian Indigenous courts reflect Indigenous cultural practices (Marchetti and Daly, 2007: 420).

On the other hand it does appear – as suggested by Jack Charles in the quote with which the paper opened – that pre-colonial Indigenous practice may have included more reintegrative practices than the colonial justice system that usurped them (see Behrendt, 1995). This is certainly one of the aims of the Indigenous courts, that is, to link Indigenous offenders back to their communities and cultural values as a means to reduce offending. The Elder, from the offender's community, 'is able to trace almost every Offender's family to someone he knows (which in itself has a powerful effect, when he explains to the Offender how the person's relative would feel about the Offender's conduct)' (McAsey, 2005: 676). Importantly, as a regular court participant noted, 'that's not just a general statement that crime is bad, but it's a statement that says "I know you, I know what you're capable of, I believe in you.'[51] In Indigenous courts, and in the other alternative models outlined above, the ultimate penalties are still those available to the court for any offender, but the process and outcomes of the hearing can be very different. These courts may be the closest in Australia to offering a 'rehabilitative ritual'.

[51] 'Shepparton's Koori Court' The Law Report, ABC Radio National, February 2004.

Conclusion

There seems to be little scope in Australia currently for the more formal redemptive rituals proposed by Maruna (2001, 2011), and in operation in different ways in some of the civil law jurisdictions outlined in this Special Issue. A punitive history and sceptical political culture seem to make forgiveness difficult. The active role of the media would also make public rituals quite problematic for the former offender trying to create a new law-abiding persona.

Privacy and anti-discrimination laws offer some protection, especially in the workplace. Privacy laws are intended to be gatekeepers of criminal history information, and anti-discrimination laws articulate normative values and offer some limited remedies when a criminal history has been disclosed and used to discriminate. Spent conviction regimes are the closest to a mechanism for 'forgetting' an offending past, and it is a positive sign that a national Model Bill was in fact proposed. However these regimes only apply where the former offender has maintained his or her desistance for the substantial period of 10 years, by which time it may be thought that the usefulness of the scheme is greatly reduced. Working with Children Checks may parallel the good conduct certificates provided in some countries (see for example Boone, 2011). Tribunal appeal decisions can provide a form of judicial rehabilitation, for example the award of licences and Working with Children Checks on the basis that the applicant has demonstrated desistance and good character, and that their criminal history should no longer operate as a bar to their employment.

The steps being taken in problem solving courts demonstrate the potential for more constructive processes, and are well supported by research showing the power of positive affirmations of success for people endeavouring to develop a non criminal lifestyle. A useful lateral reform would be limiting release of criminal history information to offences that are clearly relevant to the specific work to be performed. A scheme such as the WCC program in Victoria would be a good model: it pays attention only to 'relevant' offending, applies explicit statutory criteria, has provision for explanatory submissions and appeal, and gives the person a measure of control over access to their information. Fulfilling employment is not only a sign of re-acceptance but also a vital means of ensuring that the person continues to identify with and feel part of that society. Legal and social mechanisms for enhancing access to employment, and minimising access to irrelevant information, are important steps towards rehabilitation.

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