ANCD POSITION PAPER

Pre-employment criminal record checks

August 2013

Executive Summary

- The use of criminal record checks to vet potential employees has expanded dramatically in Australia in recent years, with a 600 per cent increase in checks processed through Crim Trac between 2000-01 and 2010-11.

- While there are some legitimate reasons to perform criminal record checks before making offers of employment, the practice can have disproportionate effects on the employment opportunities and lives of people with criminal records.

- Those with alcohol or other drug problems who have a criminal record can benefit greatly from being employed. Employment can aid social integration and rehabilitation from alcohol or other drug problems, and help people meet their treatment aims.

- People with alcohol or drug use problems or histories may, however, face multiple barriers in obtaining work. For those who also have a criminal record, the use of pre-employment criminal record checks is an additional and significant barrier.

- There are some cases where criminal record checks need to be undertaken for legal reasons. Employers may also regard undertaking pre-employment criminal record checks as part of meeting their legal obligations to ensure the safety of their workforce and the public, even though there is no evidence that routinely screening job applicants with criminal record checks improves safety. Some employers may simply use criminal record checks to screen out job applicants they judge to be undesirable.

- Although these uses of criminal record checks are not illegal and are even encouraged by certain features of the legal situation, they can result in discriminatory practices, and have detrimental consequences for people with criminal records, and for society.
• Australia has Federal legislation against criminal record-based discrimination in employment and is party to an international agreement to work towards its removal. Despite this, there are indications that pre-employment criminal record checks are being used inappropriately, such as to automatically exclude job applicants from consideration for employment.

• There are also problems with the way criminal record checks are presented. They sometimes include dismissed charges, or findings of guilt where no further action was taken or no conviction was recorded. The breadth of offence categories also means criminal record checks are easily misinterpreted.

• Taking into account the rights and the interests of employers, the public, and people with criminal records, the Australian National Council on Drugs (ANCD) believes there are significant reasons to limit the use of pre-employment criminal record checks. These include:
  ◦ that a criminal record is not necessarily a good indicator of a person’s value as an employee;
  ◦ that judging a person’s worth as an employee based on their having a criminal record is not just a problematic inference, it is often discriminatory;
  ◦ that such discrimination can exacerbate other disadvantages faced by some population groups;
  ◦ that pre-employment criminal record checks can unjustly extend punishment in ways inconsistent with the rehabilitative aims of the justice system;
  ◦ that in some instances pre-employment criminal record checks violate privacy unnecessarily; and
  ◦ that the use of pre-employment criminal record checks disadvantages a significant number of people in the labour force, preventing these individuals from being productive members of society. This can lead to further societal costs, since unemployment increases the risk of recidivism and continued harmful alcohol or drug use.

• Although there are measures in place in Australia to prevent criminal records from having disproportionate effects on people’s lives, these measures are limited. Privacy law and anti-discrimination measures appear to offer little protection in practice. Australia’s spent conviction legislation, which enables removal of less serious offences from criminal records after a waiting period, still involves a long waiting period (usually 10 years) even for minor offences.

• Where the practice of vetting potential employees with criminal record checks constitutes an additional barrier to employment for people with alcohol or drug use problems, Australia loses the opportunity to intervene in the mutually reinforcing relationships between harmful substance use, unemployment, and criminal activity. We believe this to be to the detriment of people with criminal records who have alcohol or drug use problems, and society.
Recommendations

1. Reduce the unnecessary use of criminal record checks to vet potential employees, by:
   a. Introducing measures to reverse the perception among employers and the general public that criminal record checks are needed as a routine part of offering employment;
   b. Discontinuing the involvement of police departments with criminal record checks and replacing it with that of an appropriate body (e.g. a suitable non-profit organisation);
   c. Encouraging an employer-pays system for criminal record checks;
   d. Promoting better knowledge among employers and employer bodies of the requirements of workplace safety and other employment-related legislation and how or whether conducting criminal record checks will actually meet those obligations; the Australian Human Rights Commission’s Guidelines surrounding best practice in the use of criminal record checks; and employers’ legal obligations regarding destruction of criminal record checks and non-disclosure.

2. Investigate how a system in which a criminal record check will only show past convictions that are relevant to the position at issue could be developed and instituted; including the potential to exclude offences that are unlikely to be relevant to any job.

3. Investigate legal options to reduce the waiting time for convictions to become spent for minor offences, including instituting variable waiting periods.

4. Significantly reduce the waiting time for any convictions processed through Alcohol or Drug Courts, or convictions leading to the undertaking and completion of alcohol or other drug treatment, to become spent.

5. Ensure that where employers do use pre-employment criminal record checks there are consultation processes for applicants to explain the context of any recorded offences.

6. Ensure that findings of guilt where no further action was taken or no conviction was recorded, acquittals, dismissed charges, and pending charges do not appear on criminal record checks in any jurisdiction, except where this is appropriate (such as in working with children checks).

7. Further consider legislative protections against criminal-record based discrimination on Commonwealth and on State and Territory levels.

8. Build the evidence base about the costs and benefits of the use of criminal record checks, and its impacts on different stakeholders, including impacts on people with alcohol or drug use histories or problems.
Pre-employment criminal record checks

The use of criminal record checks to vet potential employees has expanded dramatically in Australia in recent years. While there are some legitimate reasons for criminal records to be sought, the practice can have disproportionate effects on the employment opportunities and lives of persons with criminal records. There are issues of particular concern for people with a criminal record who have alcohol or drug related problems. For instance, employment can aid social integration and rehabilitation from such problems, while unemployment is a predictor of both increased drug use and recidivism. The use of pre-employment criminal record checks can increase barriers to employment for people with alcohol or drug problems or histories, and as such significantly limit attempts to address such problems and change their lives.

The Australian National Council on Drugs (ANCD) has prepared this position paper to consider the costs and benefits of the increasing prevalence of the practice of undertaking pre-employment criminal record checks, including its effects for people with alcohol or drug use histories or problems who have criminal records, for employers, and for society. The paper first overviews the current situation in Australia surrounding employment-related criminal record checks, and then examines reasons to restrict their use, and limitations of the protections currently in place to achieve this aim.

The issue: Alcohol and drug use, crime, and unemployment

There are several known associations between harmful drug and alcohol use, crime, and unemployment. Evidence relating to unemployment and criminal activity indicates that they stand in a complex relationship. While many studies have found a correlation (e.g. Fergusson et al. 1997; Aaltonen et al. 2011; Borland and Hunter 2000), other studies have not demonstrated a connection. Definitions and measures of unemployment and of crime have differed, complicating any systematic review of results. Researchers taking a broad view of the existing evidence base, however, posit that unemployment does increase the risk of criminal behaviour (this effect is related in complex ways to many other factors, including demographic variables such as gender, and situational variables such as the job market) (Altindag 2012; Kapuscinski et al. 1998; Fergusson et al. 1997). This may be due to criminal activity providing an alternate source of income, but may also relate to the socially excluding and destabilising effects of unemployment. There is also a well-known link between alcohol or drug use and crime. A high proportion of arrests are likely to be alcohol- or drug-related; according to a recent estimate developed by Australian Institute of Criminology researchers, 52 per cent of arrests can be attributed to alcohol or other drug use (Payne and Gaffney 2012). Thus, both unemployment and alcohol or drug use may causally contribute to crime.

Unemployment has itself been correlated with alcohol abuse and drug use (Forcier 1988; French et al. 2001). Heavy or dependent drug use in particular is associated with higher unemployment rates (French et al. 2001; DeSimone 2002). Again, the causal relationship is not clear, and differences in levels and patterns of use and the type of substance used have an impact on the relationship. Data suggests, however, that employment can be a stabilising influence on a person’s life. Various studies have associated employment with reduced injecting drug use, longer-term heroin abstinence, drug use relapse prevention, and increased enrolment in treatment programs (Richardson et al. 2010). It
may thus aid a person in alcohol or other drug treatment to meet their treatment aims; indeed it is not uncommon for alcohol and other drug treatment services to encourage and assist clients into employment as part of, or in support of their treatment. Further, being employed can help to reduce the harms associated with drug use, as well as drug use itself (Richardson et al. 2012).

For these reasons reducing barriers to employment for people with criminal records, particularly those with alcohol or drug problems or histories, can have benefits for them and for society. It has long been recognised that employment assistance for people exiting prison can have important benefits, including reducing the likelihood of recidivism (Thompson and Cummings 2010; Pogorzelski et al. 2005). Having previously been charged or incarcerated, however, does make it more difficult to obtain and retain employment (Bowles and Florakis 2012) and increases the risk of social exclusion (Smith and Stewart 1997). Having a criminal record is recognised as a factor which makes finding work more difficult by Centrelink’s Job Seeker Classification Instrument (Department of Education Employment and Workplace Relations 2012). If all else is equal, employers prefer to hire someone with no criminal record (Human Rights and Equal Opportunity Commission 2004). In addition, ex-offenders and ex-prisoners are more likely than the general population to face other barriers to employment, including lower education levels, disrupted work histories, and health problems (Graffam et al. 2004).

Where the practice of vetting potential employees with criminal record checks constitutes an additional barrier to employment for people with harmful substance use problems, Australia loses the opportunity to intervene in the mutually reinforcing relationships between harmful substance use, unemployment, and criminal activity. Reducing barriers to unemployment for people with criminal records could help to improve the health and wellbeing of this group of people and their contribution to society.

Example: Dismissal on the basis of a criminal record check

“Dimitri had a history of drink driving and had even spent a short time in jail because of it. He had never been charged or found guilty of dishonesty offences. He secured employment as a cleaner in a large suburban shopping complex. After working for three weeks his employers learned of his criminal history and terminated the employment. He was told his services were no longer required because of his prison record. Dimitri was devastated, having competently run his own cleaning business in the past.” (Noble and Marchetti 2005)

Criminal record checks and employment in Australia

The use of criminal record checks to vet potential employees has recently increased exponentially in Australia, and is becoming a common aspect of recruitment procedures. In 2010-11 Crim Trac, whose systems connect criminal records from different jurisdictions, processed 2.9 million checks for public sector agencies, private sector entities and volunteer organisations. This is an increase of over 600 per cent from 425,000 checks processed ten years earlier in 2000-01.¹ Agencies using Crim Trac’s services for employment-related checks rose from 14 in 2000-01 to 100 in 2010-11 (Crim Trac

¹ Though it should be noted that these figures include checks related to citizenship applications, employment-related checks are the primary driver of this increase.
2011; CrimTrac Agency 2001). Information about checks processed through police departments is not available for all jurisdictions, but data from some jurisdictions is presented below (Table 1).

<table>
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<th>Year</th>
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Sources: Noble and Marchetti (2005); private communications with jurisdictional police departments. In 2004 there was a move from a state-based to a National Police Certificate.

The figures may also exclude some criminal record checks requested through the Australian Federal Police and commercial companies which offer background checking services. Such companies have also proliferated in recent years (Naylor et al. 2008). While most undertake the check through CrimTrac, they may also offer media searches and other background information on particular individuals which may relate to past offences.

The cost of obtaining a criminal record check differs by jurisdiction (Table 2). This cost may be covered by the individual or the organisation, depending on the circumstances and area of employment.

<table>
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<th>Jurisdiction</th>
<th>Cost (2012)</th>
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Source: State and Territory police department websites

A criminal record check may include pending charges, court appearances, traffic infringements, convictions, findings of guilt without conviction (such as good behaviour bonds), and findings of guilt where no further action was taken. Exactly what appears on the check will depend on the purpose of the check, the requesting agency, the types of offences, and whether convictions have become ‘spent’. Laws and regulations relating to each of these variables differ by jurisdiction; for instance formal findings of guilt with no recorded conviction or no further action taken, charges awaiting hearing, charges that were dismissed, and traffic infringements may or may not be included depending on location (Human Rights and Equal Opportunity Commission 2004).
The consequences of criminal record checks

Although some protections exist for people with criminal records (discussed below) there are reasons to believe that their increasing use by employers has significant and disproportionate effects on people with criminal records, including those with alcohol or drug problems or histories. Although no direct measures of how many people in Australia have criminal records are available, over 30,000 adults exit prisons every year (Innes 2007); and in 2010-11 alone, 371,040 individuals were proceeded against by police (excluding traffic violations) (Australian Bureau of Statistics 2012). Notably, 15 per cent of these (over 55,000 people) had a primary offence that was drug related. Further, over 70,000 people were charged with a public disorder offence and over 60,000 with theft; disorder and property offences have been identified as some of the most likely offences to be attributable to alcohol or drug use (Australian Bureau of Statistics 2012; Payne and Gaffney 2012).

There has been little systematic research undertaken in Australia on the effects of criminal record checks on employment. International research provides some information on employment difficulties experienced by ex-prisoners. In the United Kingdom one study identified employer discrimination as the major barrier to employment for ex-prisoners (Graffam et al. 2004). Research in the USA revealed that only 12 –20 per cent of employers say they would consider hiring an ex-prisoner (Graffam et al. 2004).

In terms of Australian research, one study of an Indigenous community investigated the relation between a recent arrest (in the previous five years) and employment status. Overall those with a recent arrest, most commonly on drink driving or public drunkenness charges, were 15 per cent less likely to be employed (Borland and Hunter 2000).

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Example: The consequences of a criminal record

A court case in Adelaide in 2010 dealt with the case of CGW, who at 20 years of age was arrested at a music festival and found to be in possession of around 95 ecstasy tablets.

Charged with trafficking, CGW explained that he had bought the tablets on behalf of a group of friends who had pooled their money. While the maximum penalty for the offence was 10 years and/or a fine of $10,000, the judge took into account that there was no intention of selling the drugs, and that CGW had subsequently shown remorse and distanced himself from friends who took drugs. Imposing a $1,000 fine and suspended sentence with good behaviour bond, Judge Soulio commented:

“It appears that the consequences of supplying drugs to others, even in a social context, is not properly understood by many young people. Given the seriousness of the charge, there must be a conviction recorded. That conviction may well, as one of your referees has indicated, preclude you or any offender in a similar position from certain categories of employment. It may preclude you, who have an interest in playing basketball, from coaching youth or children’s teams. It may preclude you from travelling to certain countries. The consequences are far-reaching.” (District Court, Criminal Jurisdiction R V CGW No. DCCRM-08-1458 2010)

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This publication aims to include each individual only once irrespective of the number of offences or incidents per individual during the counting period. See the explanatory notes for information on the possibility of double-counting (Australian Bureau of Statistics 2012).
Some less formalised research undertaken in Victoria is also instructive. A survey of the effects of criminal record checks on people with a history of substance use problems and a criminal record has been undertaken by the Association of Participating Service Users (APSU) (Association of Participating Service Users 2011). While the selection procedures used and the sample size of just ten participants prohibit generalisation of results, they certainly warrant further investigation. The survey report states that “[a]ll respondents found their criminal record a significant barrier to employment opportunities, with nearly all providing case-studies of job rejection and dismissal on the basis of their criminal record.”

Effects of criminal record checks found in the survey included: self-exclusion from applying for particular jobs or kinds of work; experiences of discrimination and rejection; limitations on educational opportunities; personal and financial stress; and an overall low possibility of disputing discriminatory treatment. In addition, those who did gain employment despite their record had found further promotions or other work opportunities closed to them as a result. The majority of participants were not given a chance to explain or contextualise the circumstances of the offence; though those who were given this chance reported that it increased positive reactions among employers. The participants also discussed the psychological effects of this barrier to employment, noting feelings of being unable to leave their past behind, despite efforts to do so. Notably, “[t]wo participants also disclosed that they had considered returning to drugs and illegal activity as a way to cope and to gain financial security” (Association of Participating Service Users 2011).

These results are echoed in research

Example: Effects of criminal record discrimination in employment

“Sam, aged 38, was employed on a permanent full time basis as a yards person with a car dealership which had a written equal opportunity policy that made discrimination on the basis of a person’s criminal history unacceptable. [...] He worked for just under three months when he was unexpectedly dismissed.

During the recruitment process for this job, Sam was required to fill out an employment application form which asked, among other things, ‘Have you been convicted of a serious offence in the past 10 years?’ No guidance was given regarding what might constitute a ‘serious’ offence. Not believing that his previous convictions were sufficiently related to the inherent requirements of this job, Sam answered ‘no’. He did, however, consent to a criminal check, which revealed his criminal history. He also told his boss that his criminal history would reveal a number of burglaries. In response, his boss told him that he was doing a good job, so not to worry. [...]”

About one week before Sam’s probationary period was due to end, he was dismissed on the basis of the results of his criminal record check, which had taken a long time to be processed for disclosure. His criminal record revealed a series of convictions relating to approximately 60 offences of burglary. Sam was not asked questions about his criminal history or given an opportunity to explain himself. [...]”

In describing the impact of this treatment on his morale, Sam explained that all his offences were drug related. His last conviction had resulted in a two year jail sentence, from which he was released about 14 months prior to the termination. He had stopped using heroin in 2002, whilst he was in jail. He had then been on the methadone program and had ‘stayed clean’ until he found himself in deep depression over the termination. He felt that he had tried to do the right thing and change his life around but this termination of employment had really ‘knocked’ him down. ‘I really tried to make things work this time but now I wonder what’s the point. Being treated like this just makes you feel like you’re worthless.” (Noble and Marchetti 2005)
undertaken by the Fitzroy Legal Service in association with Job Watch in Victoria, which involved interviews with nine service organisations who work with people with criminal records. The research revealed that discrimination on the basis of criminal record was commonly experienced, as was avoiding discrimination by self-exclusion, and that employment was the main area in which discrimination was experienced (Noble and Marchetti 2005).

Further effects of concern identified through ANCD consultations, and from anecdotal and other sources, include:

- Barring of parents from volunteering in schools or on school excursions, often due to old or minor offences.
- Barriers to undertaking some volunteer or charity work.
- Barriers to applying for work which involves foreign travel or work in prisons.
- Barriers to obtaining some professional licenses, memberships, or qualifications, which may themselves be necessary for obtaining employment. Obtaining the necessary licenses and membership in some cases involves being of ‘good fame and character’ or being judged a ‘fit and proper’ person for a profession; the Australian Corporations Act 2001 also bars persons convicted of some kinds of offences from managing corporations (Human Rights and Equal Opportunity Commission 2004).
- Difficulties for individuals in managing the cost burden imposed by criminal record checks.
- Difficulties managing the cost burden imposed by criminal record checks at the organisational and sector levels. Literature relating to the aged care sector, for example, reveals that this may be a particular problem within sectors where criminal record checks are necessary, but most services are provided by not-for-profit organisations. In 2009, estimates of the annual cost of criminal record checks to this sector ranged from $5 million to $30 million (Nurses Pay for Safety in Aged Care 2007; Aged & Community Services Tasmania 2007; Productivity Commission 2009).
- Employment services agencies may be reticent to recommend people with criminal records for any position that requires a check (rather than just positions that require the person to have no criminal record), in the expectation that this will automatically exclude the person from the position. This may relate to a wish to protect clients from difficult situations as well as reflecting how employers use criminal record checks.
- In some Australian jurisdictions, criminal record checks can include findings of guilt where no conviction was recorded, or findings of guilt where no further action was taken. Where a court finds that the person is guilty of charges laid but no further action is taken, this typically indicates that the guilty finding is mitigated by circumstance to an extent that any further action would be inappropriate. In such cases it is very unlikely that the finding would have any relevance to a person’s employability. In addition, court decisions not to record a conviction where there is a guilty finding are partly based on considerations surrounding the impact of a conviction record on a person’s future, including their employment prospects (Noble and Marchetti 2005).
Given the broad use of criminal record checks it is likely that problems related to their use will continue to expand. In addition, legislation relating to checks required for working with vulnerable people is likely to be adopted in more jurisdictions in coming years, and may make the situation for people with past convictions or charges even more difficult, as well as adding to costs.

**Why do employers use criminal record checks?**

There are several factors which appear to be driving the increasing use of criminal record checks to vet potential employees. First, it should be noted that whilst some large organisations and government employers may have equal opportunity hiring policies, employers also have a general right of discretion in hiring. This arises from their rights to protect their interests and property, and freedom of contract. Most employers are free if they wish to employ persons with particular kinds of values, character, health, or even looks. In this sense using criminal record checks can be considered an extension of other ways in which employers make hiring decisions. That is, most employers can use this method to ‘screen’ employees, just as they can use other methods.

Second, economic and risk considerations—from an employer perspective—may encourage the use of criminal record checks. Employers generally wish to avoid hiring individuals who constitute a risk for them. A criminal record can be regarded by employers as evidence bearing on a person’s risk status, or more generally mark a person out as a less desirable employee. A study undertaken in Baltimore, USA, of employers’ views about hiring ex-prisoners reported concerns with people skills, customer comfort, co-worker comfort, lack of training, issues with post-prison adjustment, and possible employee turnover (Giguere and Dundes 2002). Employers may be concerned about lost productivity and lost investment in training an employee if they re-offend (Lam and Harcourt 2003), or that the person might offend against the company (Graffam et al. 2004). An Australian survey of attitudes among a number of stakeholders found that ex-offenders and ex-prisoners were considered by employers to be less likely than the general population to be successful candidates for employment.

**Example: Non-convictions recorded on criminal record checks**

“When Natalie was 17 years old she was charged with assault and possessing/trafficking a drug of dependence. When she was 21 years old she was charged with burglary and theft, including theft of a motor vehicle. On all occasions she pleaded guilty hoping that no conviction would be recorded against her. She was found guilty of each charge and received sentences including bonds, fines and community work, all without [a recorded] conviction.

Natalie made some positive changes in her life and decided to study youth work. She sought placements for her practicum component and was required to undergo criminal record checks. Natalie felt that she had moved on with her life and was surprised that the offences, especially the offences that occurred when she was 17 years old, were revealed on the check when no convictions had been recorded. As a consequence of these disclosures, Natalie was refused a placement in a juvenile justice centre and was told that she could not be placed there because she might ‘bump into someone she knew’! Natalie felt that the assessment of her suitability was based on the limited information appearing on her criminal record check, and she was denied the opportunity to explain the circumstances of the offence, which would have put a very different complexion on things.” (Noble and Marchetti 2005)
workforce to exhibit personal characteristics and skills relevant to employability. Areas in which they were expected to perform ‘below par’ included honesty, having a good work history, having a healthy lifestyle, being motivated to excel, adhering to work practices/rules, loyalty to the organisation, and relating well to the public (Graffam et al. 2004).

Third, there are legal considerations and employer obligations that encourage the use of criminal record checks (Naylor et al. 2008). Employers are legally obliged to ensure the safety of their workforce (including from other workers), and their customers or clients. They may also have obligations to protect their financial assets (for example, for insurance reasons). At the same time, employers can be held legally accountable for the actions of their employees in some situations (through ‘vicarious liability’), and there is case law that raises the possibility of employers being held liable for negligence if an employee causes problems or damage, or commits a crime, and the employer has not conducted a check (Naylor et al. 2008; Sugarman 2003). Employers may be encouraged to regard performing blanket pre-employment criminal record checking as a way to meet legal and other obligations—even though there is no evidence to indicate that employers could expect an overall improvement in workplace safety from the practice.

Lastly, in some cases employers are legally compelled to perform criminal record checks, such as by mandatory checks for working in specific professions (Naylor et al. 2008).

**How do employers use criminal record checks?**

While there are legitimate reasons to undertake pre-employment criminal record checks, employers may currently use pre-employment criminal record checks in ways that are inappropriate. In particular, criminal record checks are used to exclude anyone with a record from employment. While the discussion in the previous section may partly explain why this occurs, it is important that only previous charges related to the inherent requirements of a job should be considered relevant to a job application, and that applicants are given a chance to discuss the contents of a check. The latter is particularly important because the way some charges are categorised on a check makes them open to misinterpretation. For example, charges relating to putting up promotional posters, and committing arson, could both be listed on a check as ‘property damage’. Charges may therefore appear to be more serious than they are.

In 2012 the Australian Human Rights Commission (AHRC; previously the Human Rights and Equal Opportunity Commission) released guidelines for employers on how to use criminal record checks in their hiring processes. These guidelines were developed in response to a growing number of complaints of employment discrimination on the basis of criminal record, and apparent confusion among employers and employees about their rights and responsibilities (Australian Human Rights Commission 2012b). Their principles include that a “criminal record should not generally be an absolute bar to employment of a person”. In assessing whether a person’s criminal history should impact on a decision to hire them, employers are instructed to consider the relevance of the offences to the ‘inherent requirements’ of the job. This terminology derives from legislation surrounding employment discrimination which is discussed further below. In addition, best practice involves providing the applicant with an opportunity to explain any further details about their
criminal record before a decision is made.

There are indications that many employers do not follow such practices: that criminal history is not infrequently used as an excluding factor; that the contents of check are often misunderstood; and that candidates may not be given the opportunity to discuss details of their criminal record. To prevent this from occurring, strategies to educate employers on how to understand information on a check, best practice in dealing with applicants with a criminal record, and principles of non-discrimination are needed. Further dissemination of the AHRC guidelines could be one such strategy.

More insidiously, however, finding out that a person has a criminal record can have a kind of ‘credentialing’ or ‘labelling’ effect, leading a potential employer to perceive the person differently—even if that employer is aiming to treat the person fairly. Criminal records can be viewed not just negatively, but as ‘alien’ to the employer’s experience (Naylor et al. 2008). Fear, stigma, and discrimination against people with criminal records, and indeed against people with alcohol or drug use problems or histories, may play a role.

Information from the Australian survey of the attitudes of a number of stakeholder groups to employment for ex-offenders and ex-prisoners demonstrates how a criminal record check may direct assumptions about a person’s potential value as an employee. The survey presented respondents with a number of case examples and asked them to rank each examples’ employment prospects. Examples included people with alcohol- or drug-related problems or histories, as well as other factors (for instance “single

Example: Human Rights Commission conciliation powers
A recent high-profile case was Mr CG v State of New South Wales (Rail Corporation of New South Wales). Mr CG, who was employed at RailCorp, applied internally for a market analyst position. RailCorp reportedly considered Mr CG to be the best candidate for the job, but did not offer him the position due to his criminal record, which listed two drink-driving convictions. Although the market analyst position did not involve the use of vehicles or machinery, RailCorp explained their decision by saying that Mr CG may not be able to ‘comply with their alcohol policy and other priorities’. The Human Rights Commission’s report judged that this amounted to discrimination on the basis of criminal record, as the drink-driving convictions did not conflict with the inherent requirements of the job. However, while the Commission is empowered to conciliate, investigate, and make recommendations concerning complaints received, they have no power to enforce their recommendations, and RailCorp reportedly does not accept their judgement (Australian Human Rights Commission 2012a).

Example: Employment discrimination and drug use
“Mary was employed as a chef ... She had been experiencing bouts of intense fatigue as a result of hepatitis C ... [She] was confident that she was a valued employee as she was often given positive feedback by her manager ... She decided she would disclose her hepatitis C status to her employer ... She was subsequently sacked ... [A friend], who had ... become manager at the restaurant, told her that one of the reasons given to other staff for her dismissal was that she was a drug addict ... [Mary stated]: ‘Nothing in my demeanour or conduct could have been read as someone affected by drugs as I was not using. The only way he could have come to this conclusion is because I have hep C. For the first time I became very paranoid about my illness and have not disclosed to anyone I work with in my new job ... I believe that my employer made an assumption that because I had hep C I was an IV user ... While this was true in the past, it’s not the case now’.” (Australian Injecting and Illicit Drug Users League (AIVL) 2011)
conviction heroin possession/use”; “brain damage (drug and alcohol caused)”; “hearing impairment”; “wheelchair”). The chance of someone with a single conviction for heroin possession/use obtaining employment was rated slightly lower than someone with a single conviction for a non-violent crime, higher than someone with depression, and similarly to someone with vision impairment. Someone with multiple convictions for petty theft related to drug use was rated as having a lower chance of finding employment than a person suffering from hallucinations. And someone on a methadone program was rated as having a lower chance of finding employment than someone with limited speech resulting from brain damage (Graffam et al. 2004).3

Interestingly, employers who had some contact with ex-offenders or ex-prisoners were more likely than others to indicate they would employ people with criminal records. This result replicates the findings of other studies in Australia and overseas (Giguere and Dundes 2002; Graffam et al. 2004). This indicates the potential value of education and awareness building among employers and employer bodies, not only on aspects of best practice in using criminal record checks, but on issues of stigma and discrimination.

Balancing Rights

The use of pre-employment criminal record checks invokes questions of how to appropriately balance the rights of employers, the public, and people with criminal records. The rights of employers relevant here include rights to freedom of contract and of property, including a right to deploy their resources as they wish. The rights of the public include reasonable expectations of safety in interacting with businesses and their employees. The rights of people with criminal records include rights not to be discriminated against, and to privacy. Since both discrimination and lack of privacy can have significant consequences for a person’s life, the right to autonomy (to direct the course of one’s life and identity, within reasonable bounds) can also be violated by inappropriate use of criminal records. These different rights can clash in a number of ways relevant to the use of criminal record checks to vet potential employees.

There are certainly situations where it is legitimate to exclude someone from employment on the basis of criminal record. Laws excluding people with records of offences against vulnerable persons from working in positions involving contact with those groups are an example. It may also be reasonable, for example, for a financial institution to exclude someone with a history of fraud or embezzlement from employment, or for a person with numerous reckless-driving charges to be denied a public vehicle operator’s license. In these latter cases, however, it is necessary to take the particular circumstances of the conviction and the particular job into account.

Reasons to limit the use of criminal records

Taking into account the rights and the interests of these different groups, there are significant

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3 For research into discrimination against injecting drug users, including in employment, see Australian Injecting and Illicit Drug Users League (AIVL) (2011).
reasons to limit the use of pre-employment criminal record checks.

First, a criminal record is not necessarily, or even often, a good indicator of a person’s value as an employee. Surprisingly high rates of people do acquire convictions, especially when young, for minor (including drug- or alcohol-related) offences. While some reoffend, criminological research shows that the majority of people with convictions cease offending as they mature. In addition, a conviction for a minor offence is often unlikely to have much relation to job performance (Lam and Harcourt 2003). Other issues with the way that criminal record checks are presented make them an even less valid measure: they may include records of charges on which a person was acquitted, or advised to plead guilty in order to avoid having a conviction recorded; and given the breadth of some offence categories, charges or findings of guilt may sound far more serious than they really were. Conversely, the absence of a criminal record does not ensure that a person has committed no crimes, nor that they are trustworthy. As Naylor and colleagues (2008) put it, criminal record checks as a measure of future employee value are both “too narrow and too broad”. They are too broad because they exclude from consideration for employment many people who may in fact be valuable employees; and too narrow because they do not pick out all those employees who may prove untrustworthy. Performing pre-employment criminal record checks will often fail to meet the aims for which they are undertaken.

Second, judging a person’s worth as an employee based on their having a criminal record is not just a problematic inference, it is discriminatory. A decision to exclude someone from employment due to having a record constitutes making a judgement about a person based on their membership in a group. Being discriminated against is in itself a harm, and one which our society does attempt to prohibit (Sugarman 2003).

Third, where the use of a criminal record check is discriminatory, it can become a surrogate for other forms of discrimination (Rose and Martin 2008). There are ‘conviction biases’ against many minorities, so that persons from these minorities are more likely to have criminal records (Lam and Harcourt 2003). In Australia, Indigenous persons are overrepresented in the justice and correctional systems, and also have lower overall rates of employment and education. If more Indigenous persons have criminal records, and this makes them less likely to be employed, then the use of criminal record checks contributes to cycles of disadvantage, making both further convictions and future unemployment more likely (see Borland and Hunter 2000; Human Rights and Equal Opportunity Commission 2004; Pager 2003). Some similar points can be made regarding discrimination against other marginalised groups, including people who use drugs (Australian Injecting and Illicit Drug Users League (AIVL) 2011).

Fourth, it is arguable that after an offender has served a sentence they have been punished for their crime, and should have the same legal status as others. Using a criminal record for employment decisions can be considered an unjust extension of punishment; both in commonsense and in legal terms, we may regard it as unfair for a person’s past errors to set their future, regardless of how that person may have changed. People with criminal records denied employment do report feelings of humiliation and enforced marginalisation (Human Rights and Equal Opportunity Commission 2004). These consequences are at odds with the rehabilitative aims of the justice system.

Fifth, some of the ways in which pre-employment criminal record checks are used may be
considered to involve an invasion of privacy. In liberal democracies persons are thought to have a right to privacy, which has been analysed as a right to have some control over who has what information about oneself (Rachels 1975). The right to privacy relates to democratic ideals under which persons should have the freedom to self-constitute, and difference should be tolerated (subject to limitations, for instance that no harm is done to others). Although a person’s value as an employee can legitimately be construed as related to their character, making employer attempts to assess this valid, it is also arguable that employers should have limited rights to access at least some ‘private’ information. Criminal record checks could be considered to infringe on privacy where they reveal information about a person that is not relevant to their capacity for the job for which they are applying. This could even have other detrimental consequences; for example, charges relating to prostitution or solicitation appearing on a routine pre-employment criminal record check could not only affect someone’s chances of obtaining employment, but make them vulnerable to harassment.

Sixth and finally, it is important to recognise that the increasing use of pre-employment criminal record checks has negative consequences for society as a whole, and for employers, as well as for the individuals affected (Innes 2007). The number of people who are charged with an offence each year is quite high, at over 370,000 in 2010-11. Making it more difficult for people with criminal records to gain employment therefore disadvantages a significant number of people in the labour force, and can prevent these individuals from being productive members of society. If unemployment raises the risk of recidivism, as research has indicated, this could also lead to further costs to society (Lam and Harcourt 2003). As unemployment also increases measures of social exclusion, it is arguable that barriers to employment for groups of people also reduces overall social cohesion (in Naylor et al. 2008).

Furthermore, with regard to people with alcohol or drug problems or histories, unemployment can present a risk factor for the continuation of harmful substance use. Addressing such use may itself be the focus of great personal effort for this group of people, and it is particularly important not to unnecessarily increase the difficulties experienced in trying to address alcohol or drug problems. Continued harmful substance use among these individuals also comes with further social and economic costs that are borne by the whole community. Excluding this group from employment is also of particular concern in the alcohol and other drugs sector given the level, and value, of peer involvement with or employment at service organisations and related bodies.

Privacy and anti-discrimination laws

Protections for people with criminal records in Australia include privacy and anti-discrimination legislation and regulations, and spent conviction schemes. Criminal record checks are governed by privacy laws, but can be requested by the individual on record, or by other parties with the individual’s consent. While there is no general obligation to disclose a criminal record to a potential employer in Australia,\(^4\) it is legal for employers to ask for such information at an interview, and to offer employment conditional on a criminal record check. Although there is no obligation to disclose

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\(^4\) There are statutory obligations to disclose criminal records for some professions, for instance teachers, health practitioners, lawyers, security guards, pawnbrokers, taxi and bus drivers, aged care workers, and anyone working with children.
a criminal record if the employer does not ask and where the conviction has no relevance to the inherent requirements of a job, and no obligation to disclose spent convictions, in practice non-disclosure can lead to later dismissal (on the basis of this non-disclosure rather than criminal history itself) (Human Rights and Equal Opportunity Commission 2004). In situations where an individual seeks employment, their consent to a criminal record check is likely in any case to be non-negotiable. Privacy legislation offers little protection in practice.

Anti-discrimination laws which prohibit discrimination on the basis of irrelevant criminal record apply on a Commonwealth level, and on a jurisdictional level in Tasmania and the Northern Territory. Australia is party to the International Labour Organisation Convention 1958, which states that signatory countries are to pursue laws to eliminate discrimination with respect to employment. The Australian Human Rights Commission Act 1986 considers employment discrimination a breach of human rights, and having a criminal record was specifically included as a ground of employment discrimination in 1989. The Act does make provision for exclusion from employment where the past offence is relevant to the inherent requirements of the position (Human Rights and Equal Opportunity Commission 2004), as does the existing state legislation.

Under the Commonwealth Act, any person can make a complaint regarding employment discrimination to the AHRC. However, the Act does not make discrimination on the basis of criminal record illegal, and the powers of the AHRC in responding to complaints are currently limited. The AHRC may investigate and attempt to conciliate situations, and table reports to parliament with recommendations; but employers have no obligation to comply with recommendations.

A draft Human Rights and Anti Discrimination Bill 2012, which consolidates anti-discrimination protections, was referred to the Senate Legal and Constitutional Affairs Committee in late 2012. The Bill would make discrimination on the basis of some attributes which have previously been dealt with under the AHRC complaints process—including industrial history and political opinion—into unlawful discrimination (bringing them into line with discrimination on the basis of attributes such as race or gender). The Bill does not include having a criminal record as an attribute to be protected against discrimination (Australian Government Attorney-General's Department 2012). Only Tasmania and the Northern Territory currently have legislation that makes other legal options available to people discriminated against in employment due to a criminal record that is irrelevant to the inherent requirements of the job (with exemptions for working with children and other vulnerable groups). These may include orders to pay compensation or to re-employ a person.

Example: Not having a criminal record as an ‘inherent requirement’

In one case where a complaint was made to the Australian Human Rights Commission, the complainant stated that their application to join the police was rejected on the basis of drink driving offences approximately ten years prior to their application. The complainant had in one case served two days in prison. The police stated that the offences and imprisonment automatically disqualified the applicant from working for the police, because having the respect, trust and confidence of the community is an inherent requirement of such work. The Commission declined the complaint, on the basis that the high level of integrity expected by police officers does justify the claim that not having a criminal record is an inherent requirement of a job with the police force. (Human Rights and Equal Opportunity Commission 2004)
However, it is not clear how effective such laws are in addressing employment discrimination on the basis of criminal record, and the laws have not yet been tested in the high court. In practice, given the broad discretion in hiring that employers have, it can be very difficult to prove that any discrimination has taken place, or to utilise existing anti-discrimination laws. Applying the exemption surrounding the inherent requirements of a job is also difficult, as it is often unclear what these requirements are and whether or not particular offences are relevant to them. Whilst lack of transparency in the AHRC complaints process may exacerbate lack of clarity on how relevance is to be assessed, case law provides some guidance, and the AHRC has summarised this into five principles. These include that the link between the inherent requirements of a job and someone’s criminal record must be ‘tight’ rather than merely ‘logical’, and that this exception needs to be interpreted strictly so as not to defeat the purpose of anti-discrimination provisions (see Australian Human Rights Commission 2012b). Of note, according to the AHRC’s 2004 discussion paper, employers argued that not having a record was an inherent requirement of the position in just under half of complaints received by the Commission during 2001-03 (Human Rights and Equal Opportunity Commission 2004). While this may be true in some cases, it is unlikely to be an inherent requirement of many jobs given the above principles.

This may reflect the extent to which employers misunderstand how they may use criminal record checks. And, taken in conjunction with the Commission’s limited powers in responding to complaints, the current legal status of employment discrimination on the basis of criminal record in most jurisdictions, and the unknown number of people who experience but do not report such discrimination, it is difficult to avoid the conclusion that current anti-discrimination measures are not effective with regard to employment discrimination on the basis of criminal record.

**Spent conviction schemes**

Spent conviction schemes aim to limit what information is disclosed to potential employers (and others) by allowing convictions to be removed from a person’s record after a waiting period. Spent conviction legislation was introduced on the Commonwealth level in 1990, and there is also State or Territory legislation in all jurisdictions other than Victoria, where spent convictions are governed instead by regulatory guidelines. The rationale for this legislation is that “[u]se 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”, and that it may support rehabilitative aims (Federal Privacy Commissioner cited in Naylor 2011). A spent conviction will not be disclosed through a criminal record check, and a person with a spent conviction may treat any question about criminal records from employers as a question about unspent convictions (Lam and Harcourt 2003). There are also legal sanctions against other persons revealing information on any spent conviction in most jurisdictions.

Currently the most usual length of time for a conviction to become spent is 10 years, or 2-5 years for juvenile offences. In all jurisdictions other than Western Australia only ‘less serious’ offences can become spent, where less serious offences are differently defined per jurisdiction (Human Rights...
and Equal Opportunity Commission 2004). There are also differences in which convictions can become spent, the start date for the waiting period, the effect of any subsequent convictions on the spending of a conviction, and the processes involved in classifying the conviction as spent.

In response to difficulties arising from jurisdictional differences, a model uniform *Spent Convictions Bill* was developed by the Standing Council on Law and Justice (previously the Standing Committee of Attorneys-General). Development of the *Bill* followed a review and consultation on spent convictions undertaken by the Standing Committee over the previous decade (Standing Committee of Attorneys-General 2004). It has been adopted so far only in South Australia. It sets the waiting periods at 10 years for adult offences and 5 years for juvenile offences, and restricts the spending of convictions to convictions resulting in sentences of 12 months or less for adults, or 24 months or less for juveniles (*Spent Convictions Bill* 2009). There are exceptions to spent conviction rules in both forthcoming and existing legislation which mean that some kinds of convictions can never become spent, such as sexual offences. Some convictions relevant to particular jobs are also excepted when a criminal record check is for a particular kind of work, as occurs in working with children checks (Human Rights and Equal Opportunity Commission 2004).

While the rationale for such a scheme is strong, it is not clear that the model uniform *Spent Convictions Bill* which awaits adoption in all jurisdictions other than South Australia will address the problems identified in this paper any better than previous legislation. It is worth noting that the use of criminal record checks is now much more prevalent than it was even at the beginning of the review and consultation process by the Standing Committee. One issue which remains in the model legislation, for instance, is that even less serious offences remain on a person’s record for ten years. This is despite a statement in the discussion paper by the Standing Committee of Attorneys-General that “[a]n appropriate waiting period should reflect the period after which a conviction can no longer reasonably be regarded as an accurate indication of a past offender’s future conduct”, and that a single waiting period thus has an element of arbitrariness (Standing Committee of Attorneys-General 2004). An alternative is to institute variable waiting periods, which tie the waiting period to the severity of an offence. These have been instituted in the United Kingdom,

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**Example: The Second Step program**

The Second Step program is a supported employment program for people with drug problems or criminal histories. It was set up by the Toll Group, a large employer able to offer a variety of employment roles, in 2001. The program is offered as a solution to the issue that employment can play a positive role for people with drug problems or criminal histories, but is often less available to them than to the general population.

Toll works with partner organisations, including alcohol and other drug treatment services and other NGOs, to identify suitable candidates for Second Step. Candidates are then offered 12 months of full time work (or equivalent part time work), during which time they continue to access support from partner organisations as well as from a workplace mentor or supervisor.

A candidate may benefit from the placement by gaining the many stabilising influences of employment and a regular income, as well as work experience, skills, and a work reference. The Second Step Program Guide states that “[i]n practice the majority of people who have begun the Second Step have been offered a position within the business at the conclusion of their program.[...] Since the program began no more than 5% of the participants have returned to their previous lifestyle.” (Toll Second Step)
where waiting periods vary between six months and ten years, and any charges that result in Drug Treatment and Testing Orders can be spent after five years.

The reasons given for adopting a single waiting period in the Standing Committee’s paper were greater simplicity and ease of administration (Standing Committee of Attorneys-General 2004). Given the significant effects on people’s lives of having a criminal record, the ANCD does not consider these reasons ultimately compelling. There may be ways to simplify the system for processing criminal record checks that would also resolve these issues, such as reducing waiting periods for any charges resulting in no or a short custodial sentence. At present, Australia’s spent conviction schemes simply divide convictions into those which can be spent (less serious) and those which cannot (more serious). It would be possible to introduce further divisions with shorter waiting periods for very minor offences, or even to remove past minor convictions from someone’s record more quickly when it is for the purpose of an employment-related check (excepting where the check relates to working with children or vulnerable people).

In addition, the Bill treats ‘findings of guilt’ as convictions for its purposes, so that both findings of guilt and convictions can be spent after the waiting period. This means, however, that the Bill will not remove from records information on findings of guilt where no further action was taken, or no conviction was recorded (until after the waiting period). This is highly problematic: these situations occur when the court judges that a finding is one for which a person should not be punished under law, or which should impact on his or her future. Their inclusion on checks results in the undermining of courts’ intentions in these regards.

Possibilities for reform

In sum, pre-employment criminal record checks may have little value for employers in the majority of cases, and have negative effects for people with criminal records, including those with alcohol or drug problems or histories, and for employers and society. The recommendations of this paper aim to address the increasing use of pre-employment criminal record checks via several routes.

The perception that performing a criminal record check is an appropriate routine aspect of all employment application processes needs to be addressed. One measure to consider in this regard is shifting the cost burden of checks onto organisations (this would also resolve problems of managing the cost of checks for individuals). Such a step would likely be very effective in reducing the use of checks as simply another screening measure; that is in the situations where the information on the check is least likely to have real value for the employer in making their hiring decisions. In sectors where many services are provided by not-for-profit entities, including the alcohol and other drug sector, further investigation of the cost burden and its effects, and the best ways to distribute costs, would also be appropriate.

It would also be useful to detach criminal record checks from the involvement of police. This has already occurred in Western Australia, where a National Police Certificate is obtained from Crim Trac via Australia Post outlets, rather than police stations. Encouraging this separation between criminal record checks and police in other jurisdictions would be beneficial in clarifying the status of
performing a criminal record check as distinct from law enforcement processes. It may also encourage employer payments for checks, since employers could deal directly with Crim Trac to process checks in bulk.

Changing the perception that criminal record checks are routinely appropriate, as well as improving employer practices surrounding them, could also be aided by increasing awareness among employers of what real value criminal record checks have for their purposes, and the AHRC’s guidelines for best practice. It is also important that those requesting criminal record checks follow the proper procedures for storing and destroying this information.

More generally, and especially given forthcoming legislation for checks for working with vulnerable people, there is a need for further information on the effects of the increasing use of criminal record checks, both on individuals and on particular sectors, including the alcohol and other drug sector. In addition to issues of cost for a sector where many services are underfunded, it should be noted that a proportion of people working in this sector have had personal experience of alcohol- or drug-related problems—and that there may well be a higher proportion of people with criminal records related to their past use working in this area than in other areas. The involvement of people with this first-hand experience is of great value to the sector, enabling staff to connect with clients and better understand their perspectives and needs. It is vitally important for the effectiveness of the sector that criminal record checking procedures do not prevent such involvement.

The negative effects of pre-employment criminal record checks that have been discussed could also be addressed by other reforms within criminal record check processes. One option worthy of further investigation is to make it possible for criminal record checks only to identify and report offences that are relevant to the inherent requirements of a specific job. The working with children check is an example of how such a system might be developed. This would also place the burden on employers clearly to define the inherent requirements of a position, and enforce clarity on when the ‘inherent requirements’ exemption can be invoked. We note that the AHRC has argued against such a system, on the basis that the many generalisations it would require about kinds of employment and kinds of offences could mitigate attempts to ensure that the situations surrounding specific jobs, and specific offences on criminal records, are taken into account on a case-by-case basis (Human Rights and Equal Opportunity Commission 2004). While the ANCD supports the Commission’s recommendations, and their aim to develop such a case-focused system, however, we believe that such a case-focused system could be pursued in conjunction with introducing such changes into criminal record check procedures. The ANCD is also strongly in support of the Commission’s position on the importance of ensuring that there is a consultation process in place for applicants to explain the context of any offence.

In addition, there are some kinds of charges which are unlikely to be relevant to any job, and which people may have other reasons for wishing to keep private (such as charges relating to prostitution or solicitation, as noted above). Excluding some kinds of charges, such as these, from employment-related checks is one option that might be considered in reforming Australia’s criminal record check systems.

With regard to these points about reform of record checking processes, creating scope for further review of spent conviction legislation would be valuable, particularly since the commonality of use of
criminal record checks has increased so much in such a short time, while the recent review was being undertaken. This would enable further consideration of changes such as the use of variable waiting periods or shorter waiting periods for removing some kinds of offences from criminal record checks.
References


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