Discrimination in Employment on the Basis of Criminal Record

Submission to the Human Rights and Equal Opportunity Commission Inquiry into Discrimination in Employment on the Basis of Criminal Record

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1. EXECUTIVE SUMMARY

1.1 Introduction

This submission is made by the PILCH Homeless Persons' Legal Clinic ('the Clinic') in response to the Human Rights and Equal Opportunity Commission's ('HREOC') Discussion Paper entitled *Discrimination in Employment on the Basis of Criminal Record*.

The Discussion Paper invited responses to a series of questions and sought comments on other aspects of the issue of discrimination in employment on the basis of criminal record. In the course of responding to some of the questions raised by HREOC, this submission also:

- considers the possible rationale for laws prohibiting discrimination of this kind;
- analyses the current law relating to criminal records discrimination;
- compares the existing Australian laws with international human rights standards and Australia's obligations in relation to these standards;
- compares the relevant Australian laws with equivalent laws in foreign jurisdictions; and
- suggests some possible reforms to Australian laws.

A summary of the Clinic's conclusions is set out below.

1.2 Conclusions

The current law in relation to criminal records discrimination:-

- lacks a sound philosophical basis;
- fails to comply with Australia's international human rights obligations;
- is found in a mix of interacting state and federal statutes and regulations, police policies and the common law (dealing with such topics as equal opportunity, spent convictions, privacy and the workplace) which, in combination, is complex and inaccessible to members of the public;
- varies significantly from state to state; and
- is fundamentally flawed at the federal level.

In light of these conclusions, the Clinic makes the following recommendations for reform.

1.3 Recommendations

Recommendation 1

The federal law prohibiting criminal records discrimination (currently contained in a combination of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Human Rights and Equal Opportunity Commission Regulations* (Cth)) should be set out solely in the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Recommendation 2

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) should be amended to explicitly provide that the prohibition on discrimination applies during the recruitment stage in the area of employment.

Recommendation 3

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) should be amended to prohibit the asking of questions in relation to the existence of a criminal record unless an exemption has been granted by HREOC.

Recommendation 4

The 'inherent requirements defence' should be repealed and replaced with:

- specific enumerated exceptions to the prohibition on discrimination on the basis of 'criminal record'; and
- a provision pursuant to which an employer may apply to HREOC for an exemption from the prohibition on discrimination on the basis of 'criminal record' in its particular workplace.

Recommendation 5

Where specific exemptions to the broad prohibition on criminal records discrimination are to be provided, those exemptions should be carefully restricted to areas related to the offence so that, while potential victims of re-offending are properly protected, the ex-offender is not precluded from gaining employment.

Recommendation 6

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) should be amended to provide effective remedies such as the payment of compensation and reinstatement of employment, plus the imposition of fines, in the event that a complaint of discrimination is upheld.

Recommendation 7

The federal spent conviction scheme contained in Part VIIC of the *Crimes Act 1914* (Cth) should be reviewed and amended to make it consistent with the amended *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Recommendation 8

The common law relating to disclosure obligations of employees and candidates should be replaced with legislation which clearly spells out the rights and obligations of employers and employees.

2. INTRODUCTION

2.1 Background

In December 2004, HREOC released a Discussion Paper entitled *Discrimination in Employment on the Basis of Criminal Record* ('the Discussion Paper'). The Discussion Paper posed the following questions and invited responses from interested stakeholders:

- what impact might a criminal record have in the area of employment;
- what do discrimination laws say about taking a person's criminal record into account;
- what does a criminal record include;
- when might a criminal record be relevant; and
- what must employees disclose when asked.

The Discussion Paper also invited comment about employers making decisions concerning actual or prospective employees on the basis of criminal record and any other aspects of the issue of discrimination in employment on the basis of criminal record.

This submission briefly examines and discusses:

- the theoretical underpinning of these laws;
- the adequacy of the relative legislative regimes;
- the applicable common law; and
- some comparable laws in foreign jurisdictions.

This submission also attempts to answer some of the specific questions posed by the Discussion Paper and proposes several reforms.

The focus of this submission (following that of the Discussion Paper) is discrimination in employment. This should not be taken as suggesting that there is no legitimate need to extend the operation of these anti-discrimination laws to contexts outside employment, such as accommodation and the provision of goods and services, in much the same way as other anti-discrimination laws operate.

2.2 The PILCH Homeless Persons' Legal Clinic

The Public Interest Law Clearing House ('PILCH') is an independent, not-for-profit organisation. Its members are a diverse range of private law firms, the Victorian Bar, corporate legal departments, community legal centres, university law faculties and others.

One scheme operated by PILCH is the Homeless Persons' Legal Clinic. The Clinic was established as a joint project of PILCH and the Council to Homeless Persons. The Clinic provides free legal advice and advocacy in civil, administrative and summary criminal law to people who are homeless or at risk of homelessness. In its role as legal adviser and advocate, it has, on many occasions, witnessed the practical consequences of its clients experiencing discrimination on the grounds of criminal record.

The Clinic is funded on a recurrent basis by the Victorian Department of Justice through the Community Legal Sector Project Fund administered by Victoria Legal Aid. This funding is supplemented by fundraising and donations. The Clinic does not receive any money from the Commonwealth of Australia.

Volunteer lawyers from Allens Arthur Robinson, Baker McKenzie, Blake Dawson Waldron, Clayton Utz, Hunt & Hunt, Mallesons Stephen Jaques, Minter Ellison, the National Australia Bank Legal Department and Phillips Fox provide the Clinic's legal services. These services are offered on a weekly basis at 10 outreach locations that are already accessed by homeless people for basic needs (such as soup kitchens and crisis accommodation facilities) and social and family services.

3. THE RATIONALE FOR CRIMINAL RECORDS DISCRIMINATION LAWS

Before commencing our analysis of criminal records discrimination laws, we consider that it is helpful to first consider the rationale for these laws, and then assess how these laws measure up against their objectives.

3.1 The Classical Philosophical Foundation

Criminal law and the criminal justice system generally rest on a 'classical' philosophical foundation; one that in contemporary terms tends to emphasise 'just desserts'. According to this view, the response of the criminal justice system ought to be focused primarily on the criminal act. The rule of law demands that each violation of the law be treated in the same way; that is, like cases should be treated alike. The emphasis is on equality in legal proceedings (everyone is equal in the eyes of the law) and equality in punishment of offenders (similar crimes are punished in the same way). The uniformity of the law is guaranteed by set penalties for particular offences. The punishment is thus meant to fit the crime. For the sake of equality, penalties should be fixed prior to sentencing and be administered in a way which reflects the actual offence that has been committed.

This philosophy also means that once offenders have been punished, they are deemed to have 'paid their debt' to society. On release, no offender should be further penalised by suffering discrimination in employment, education, welfare or any other institution. They have paid their 'just desserts' and the justice slate has been wiped clean. Any discrimination experienced by the ex-offender constitutes unfair and additional punishment beyond what was intended in the original sentence. So, here lies the principal justification for laws prohibiting discrimination on the grounds of criminal record.

3.2 Positivism

An alternative philosophy is positivism. One of the hallmarks of the positivist approach is the notion that the activities and behaviours of individuals are primarily shaped by factors and forces outside the immediate control of the individual. On this view, behaviour is a reflection of certain influences on the person, whether biological, psychological, or social in nature. It is believed that there are huge differences in the nature and character of offenders. These differences can be measured and classified and should be reflected in the sentencing process. Rather than seeing people in terms of equal capacities, or equal rights, the positivist view emphasises difference, focusing on the nature and characteristics of the offender rather than on the criminal act.

This analysis seeks to identify the specific conditions leading to criminality in a particular case. This means that great emphasis is placed on the classification of offenders; for example, dangerous/non-dangerous and mentally ill/not mentally ill. This also translates at an institutional level into arguments in favour of indeterminate sentences; that is, the length of time in custody should not depend solely on the nature of the criminal act committed, but should take into account the diagnosis and classification of the offender and the type of treatment appropriate to the specific individual.

According to this view, non-discriminatory policy in relation to employment is one attempt to alleviate the social harms associated with contemporary punishment systems.

3.3 Discussion

Whichever of these two principal philosophical views is adopted, it is plain that both support broad-ranging prohibitions of discrimination on the grounds of criminal record. Both approaches would allow discrimination only in carefully defined circumstances. Both point out that allowing this discrimination carries a very high risk of it becoming counter-productive, not just to the affected individuals, but to the community at large. At least at a theoretical level, it does not seem controversial to say that there should be comprehensive laws prohibiting criminal record discrimination. In light of this it is perhaps not surprising that international human rights obligations accepted by Australia (see below) require the prohibition of such discrimination and guarantee all persons equal and effective protection from discrimination.

Again at a theoretical level, the only controversy appears to be the nature and extent of any exceptions to this broad prohibition – when should such discrimination be legitimised?

In this context we witness a balancing of different interests. On one hand we have:

- the entitlement of offenders who have 'done their time' to 'a clean slate'; and
- the need to remove barriers facing ex-offenders who are seeking to re-integrate themselves into the community (with the added social benefit of reducing rates of recidivism).

On the other hand, we have:

- employers demanding the right to be able to select the candidates they believe are best suited to their enterprises; and
- community demands for safety (in particular, protection from the risk of further criminal activity by repeat offenders).

The task of balancing these competing interests is complicated by two factors.

First, it is well-established that many offenders are at risk of recidivism. Approximately 60 per cent of prisoners have already spent time in prison[1]. Is this because they are inherently criminal, bad, pathological, ill or damaged? If so, discrimination in employment might be seen as a social good. However, the reality is that the combination of prison time and lack of adequate post-release transitional programs means that most ex-prisoners suffer difficulties settling back into mainstream community life. The pains of imprisonment alone (for example, isolation, brutalisation and tarnished reputation) will impact on the future prospects of an offender. Discriminatory environments will exacerbate the difficulties these ex-offenders face. Discrimination leading to unemployment, for instance, will greatly increase ex-offenders' difficulties in finding rental accommodation and, therefore, their ability to make a new life outside the prison environment. This can lead or contribute to homelessness, poor health, poverty, and ultimately reinforce, at a very real level, the necessity of re-offending in order to survive.

[1] Office of the Correctional Services Commissioner, *Statistical Overview of the Victorian Prison System: 1995/96 to 2000/01*.

Second, extreme cases, in particular the repeat sexual predator, are sometimes used as the benchmark by which to judge other cases. This ignores the reality that the vast majority of offenders are simply ordinary people who find themselves in difficult situations and who wish to get on with their lives as best they can. They have no desire, inclination or intention to re-offend and, given appropriate support, are unlikely to do so.

Ex-offenders require pro-active post-release support, rather than prohibitive measures that restrict options and life chances. The special difficulties faced by ex-prisoners ought to be central to any discussion of discrimination and employment. Except in unusual or exceptional circumstances, those who have paid the debt for their crimes should not be further punished through exclusionary employment practices.

This is not to deny that there are some offences and offenders warranting particular attention from the point of view of community safety. This is particularly so, for example, with respect to predatory child sex offenders. In such cases, the issue of discriminatory employment needs to be framed not so much in terms of prohibition (that is, do not hire), but in terms of employment solely in areas not related to the offence and where children are fully protected from contact (that is, work only in those non-related areas). In other words, employment opportunities, and restrictions, need to be framed in relation to the nature of the offence/offender and not be of broad scope. Restrictions in these cases are understandable, but should be formally established under legislation which has been subject to public debate and scrutiny.

There are also other complications that need to be addressed. For instance, for **restriction** not to be transformed into **prohibition**, there is a need for privacy safeguards on information about ex-offenders. This is notwithstanding the need for such information to be made available to constituted authorities; for example, school authorities undertaking employee checks as part of child protection strategies.

Where does this discussion leave us? In summary:

- the philosophical foundation of our criminal justice system mandates comprehensive prohibitions on criminal record discrimination;
- the need for exemptions to this prohibition must first be demonstrated clearly and then, when framing the exemption, the nature of the offender (and his/her offences) and propensity for re-offending should be carefully taken into account and, in this regard, extreme cases (like predatory child sex offenders) should not be used to set the benchmarks; and
- the difficulties faced by ex-offenders ought to be central to any discussion of discrimination and employment, not just for their benefit, but for the public good (given the public's interest in these people being successfully re-integrated into the community and the rates of recidivism reduced).

Now we will look more closely at the effect of discrimination on the basis of criminal records. Then we will examine Australia's international human rights obligations and study the current state of Australia law and see how it measures up to these standards.

4. THE EFFECT OF DISCRIMINATION ON THE BASIS OF CRIMINAL RECORD

Discrimination against people who have a criminal record is a widespread problem across Australia, often forming a barrier to employment, accommodation, health care and other basic goods and services.[2] Where the goal with offenders must always be rehabilitation and integration back into the community, such discrimination is causally linked to a number of serious social problems which hamper these goals. If an offender is discriminated in the field of employment, for instance, this will often create difficulties for them in being able to access private rental accommodation, leading to homelessness, poverty and often recidivism as the only means of survival. Further, according to the World Health Organization, 'discrimination… often lies at the root of poor health status',[3] a finding consistent with the emerging consensus that discrimination is a major causal factor of social exclusion and ill health among people experiencing homelessness and unemployment.[4]

Case study: discrimination by a real estate agent against a homeless ex-prisoner

Kelvin was released from prison and lived for a short period with his girlfriend. He was referred to our service by police after his relationship broke down and he became homeless.

Kelvin stayed in our service for six weeks, during which time he investigated private rental with my support. He was apprehensive as he believed he had no hope of finding private rental. At one real estate agent I accompanied him to the front door and he went in to make an enquiry. Shortly after he came out saying, 'I told you they won't even listen to my enquiry' as he was only able to give them a brief window of the past and his prison story. Next day I wrote a letter to the management but no answer was received, despite follow up calls.

During his time with us, Kelvin was an excellent tenant, rigid in keeping his unit clean and in paying rent. The real issue was discrimination by the real estate agent towards homeless people and ex-prisoners. In fact, if one reflects upon a prison existence, many prisoners have pretty good living and house skills which can be carried into civilian life.

John Clonan, Support Worker, Salvation Army[5]

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[2] See generally, Department of Human Services (Vic), *Charter of Rights and Enhances Complaints Mechanism: Report and Consumer Consultations* (2004); Philip Lynch and Bella Stagoll, 'Promoting Equality: Homelessness and Discrimination' (2002) 7 *Deakin Law Review* 295-321.

[3] World Health Organization, *Health and Freedom from Discrimination: WHO's Contribution to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001) 6.

[4] Lisa Waller, 'Living with Hepatitis C: From Self-Loathing to Advocacy' (2004) 180 *Medical Journal of Australia* 293; S Zickmund, E Y Ho, M Masuda et al, 'They Treated Me Like a Leper: Stigmatization and the Quality of Life of Patients with Hepatitis C' (2003) 18 *Journal of General International Medicine* 835. See also Alison McClelland and Fiona Macdonald, 'The Social Consequences of Unemployment' (Business Council of Australia, July 1998) <http://www.bsl.org.au/pdfs/social.pdf> and Paula Braveman and Sophia Gruskin, 'Poverty, Equity, Human Rights and Health' (2003) 81(7) *Bulletin of the World Health Organisation* 539.

[5] PILCH Homeless Persons' Legal Clinic, *Submission Regarding Discrimination on the Ground of Social Status* (September 2002) 15-16.

Employment, as one of the major steps in re-integration into society, is an area where discrimination on the basis of a criminal record creates a serious social issue. As the Federal Privacy Commissioner has noted:

> [u]se of information about an older minor criminal conviction, which in itself is not a reliable indicator of future behaviour, can seriously disadvantage people in getting on with their lives.[6]

Adequate and effective protection from discrimination in this area can, on the other hand, enable people with a criminal record to access employment on an equal footing with the rest of the community. Social inclusion through employment and, therefore, participation in civil, political, social, cultural and economic life, can reduce and resolve marginalisation, disadvantage and poverty, all of which are causal factors and risk indicators of criminal activity.[7] This, in turn, is likely to promote rehabilitation, integration and participation.

Unfortunately, experience indicates that despite the fact that in the vast majority of instances the past record will not be relevant to the employment, employers often experience a knee-jerk reaction on discovering that an employee or potential employee has a criminal record, refusing to employ them or terminating them from a position they already occupy. The cost of this for society at both an economic and personal level, as well as for the ex-offenders themselves, is more than can be afforded.

[6] *Federal Privacy Handbook: A Guide to Federal Privacy Law and Practice*, 45-520.

[7] See, for example, Jenny Mouzos, 'Homicidal Encounters: A Study of Homicide in Australia 1989–1999' (Research and Public Policy Series Paper No 28, Australian Institute of Criminology, 2000) 39–40.

5. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

5.1 The Human Right to Non-Discrimination

Making any differentiation between job applicants or employees on the basis of their criminal record will amount to discriminatory conduct contrary to federal legislation.[8] As such, the appearance is created of a country complying with its international obligations to codify the right to equality and non-discrimination. However this appearance is deceptive.

Despite the fact that the International Court of Justice recognises 'the right to equality' as a binding customary norm of international law from which countries are unable to derogate [9], in the area of discrimination on the grounds of a criminal record that guarantee of equality is, for most, a long way from reality. This might be explicable, although still a derogation from expected standards, if the right to equality was merely a rule of customary international law which had developed as a result of a common agreement among countries without Australia indicating any express agreement to adhere to such a standard of conduct. However, by virtue of ratification of the *International Covenant on Civil and Political Rights* ('*ICCPR*')[10] and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[11], the Australian Government has given explicit approval for the customary norm of equality by agreeing that:

> [a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any ground.[12]

Although 'discrimination' is not defined in the *ICCPR*, the United Nations Human Rights Committee has defined it as:

> … any distinction, exclusion, restriction or preference … which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by all persons, on an equal footing, of all rights and freedoms.[13]

The norm of non-discrimination is also enshrined in article 2(1) of the *ICCPR* and article 2(2) of *ICESCR* which provide:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any

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[8] *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* s 3(1) and *Human Rights and Equal Opportunity Commission Regulations 1989 (Cth)* reg 4(b)(ii).

[9] *Namibia Case* [1971] ICJ Rep 16 (Ammoun J); see also *Barcelona Traction, Light and Power Company Limited Case (Belium v Spain) Second Phase* [1970] ICJ Rep 3, 34.

[10] Opened for signature 19 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976 and for Australia 13 August 1980).

[11] Opened for signature 16 December 1966, 993 UNTS 2 (entered into force generally 3 January 1976 and for Australia 10 March 1976).

[12] *ICCPR* art 26.

[13] Human Rights Committee, *General Comment 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (2001) 136.

kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International jurisprudence establishes that the term 'other status' refers to a definable group of people linked by their common status, which would clearly include their status as having a 'criminal record'.[14]

5.2 Implementation of the Human Right to Non-Discrimination

The implementation of the norm of non-discrimination has three key facets in relation to people with a criminal record.[15]

First, the right to freedom from discrimination imposes an immediate obligation on Australian governments to *respect* the right to non-discrimination on the basis of criminal record; that is, to themselves abstain from discrimination on the basis of a person's criminal record.

Second, the right to freedom from discrimination imposes an immediate obligation on Australian governments to effectively *protect* people from discrimination on the basis of criminal record; that is, to ensure that their legislation prohibits unwarranted discrimination against people because of their criminal record and provides 'effective remedies' in the case of violations. To this end, federal, state and territory equal opportunity and anti-discrimination laws should be amended and enforced to prohibit discrimination on the ground of criminal record and provide redress where such discrimination occurs.

Third, the right imposes a further substantive obligation on governments to *fulfil* the right to non-discrimination; that is, to take positive steps to address the special needs of people with a criminal record so as to enable them to realise all of their rights and freedoms.[16] These steps should include legislative, educative, financial, social and administrative measures that are developed and implemented using the maximum of available governmental resources. Such steps should include developing and implementing policies and programs to ensure that people with a criminal record are afforded opportunities to obtain adequate housing, employment and the other requirements of an adequate standard of living.

While legislation has been enacted at a Commonwealth level purporting to provide such equality, it fails to ensure that Australia's obligations pursuant to the *ICCPR* are met. Articles 2(2) and 2(3) of the *ICCPR* treaty require that legislation providing for equal opportunity must be enforceable by 'effective remedies'. At the federal level, this is far from the case. Moreover, in four states (Victoria, New South Wales, South Australia and Queensland) anti-discrimination legislation does not extend to discrimination on the basis of a criminal record at all.[17] Further, the legislation in the five jurisdictions (the Commonwealth, Tasmania, Western

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[14] See generally, S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials* (2nd ed, 2004) 689.

[15] 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691.

[16] Human Rights Committee, *General Comment 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.5 (2001) 136.

[17] See, for instance, the *Equal Opportunity Act 1995 (Vic)* where at section 6 the only attributes on the basis of which discrimination is prohibited are age, breastfeeding, gender identity, impairment, industrial activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity and sex.

Australia, Northern Territory and the ACT) which do attempt to restrict discrimination on the grounds of a criminal record, contain exceptions that, in practice, severely compromise the standards set by the legislation.

Although spent convictions regimes existing around Australia have the potential to supplement the protection provided to offenders by extinguishing a person's criminal record, the nature of that protection is limited as it only applies to certain offences and where the specified crime-free periods have elapsed. In all other instances, the regimes do nothing to prevent discrimination. If the Australian Government's commitments to international human rights are to have real consequences in Australian society, law reform in this area is urgently required.

6. ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA

6.1 Introduction

Although Australia is a long way from ensuring that those with a criminal record are equal within society, there is no shortage of legislation operating across the country purporting to prohibit discrimination. At the Commonwealth level, legislation prohibits discrimination on a number of grounds, including criminal record. Given the absence of an intention to cover the field in this area,[18] state and territory governments are also empowered to introduce similar local legislation (although, as discussed above, not all states have shown such a commitment to eradicating discrimination on this basis)[19]. In order to understand the true extent of protection afforded at the federal level and in Tasmanian, Western Australia, the Northern Territory and the ACT (where this type of discrimination is the subject of legislation), it is necessary to understand how that legislation operates in practice.

6.2 The Federal Scheme

Individual pieces of legislation have been enacted at a federal level which prohibit discrimination on the grounds of age, race, sex and disability.[20] However, there is no legislation dealing specifically with discrimination on the grounds of criminal record. Instead, by virtue of the operation of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth), a 'criminal record' is declared to be an attribute on the basis of which any distinction, exclusion or preference which nullifies or impairs 'equality of opportunity or treatment in employment or occupation' will be taken to be discrimination for the purposes of the Act.

Concerns have been raised that 'equality… in employment or occupation' does not extend to prohibiting discrimination in recruitment before an employment relationship arises. Fortunately, the High Court has determined that anti-discrimination legislation should be interpreted liberally[21] and, because of this, it is now widely thought the phrase 'equality… in employment' encompasses the recruitment phase. This unnecessary uncertainty could be rectified by a simple legislative amendment.

There is an important exemption to the prohibition on this type of discrimination – a distinction made on the basis of a criminal record will not amount to unlawful discrimination where the distinction is based on the 'inherent requirements of the job.'[22]

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[18] Section 109 of the *Constitution (Cth)*. *S*ee *Telstra Corporation Limited v Worthing* (1997) 197 CLR 61, 76-7 for a discussion of the tests to determine whether the Commonwealth intended to cover the field in a particular area; see also *Viskauskas v Niland* (1983) 153 CLR 280 for a discussion of this section as applicable in the context of anti-discrimination legislation.

[19] Victoria, New South Wales, South Australia and Queensland are the states which do not prohibit discrimination on this basis; see the *Equal Opportunity Act 1996* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (SA) and the *Anti-Discrimination Act 1977* (NSW).

[20] See the *Sex Discrimination Act 1984* (Cth), the *Age Discrimination Act 2004* (Cth), the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992 (Cth)*.

[21] *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 185 (Dawson J).

[22] See s 3(1)(c) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Where a potential or existing employee considers that these provisions have been breached, a written complaint can be made to the Human Rights and Equal Opportunity Commissioner who has the power to investigate and conciliate the complaint.[23] If conciliation is unsuccessful, the Commissioner can report the breach to the Commonwealth Attorney General who can, in turn, table a report in Federal Parliament. This is the limit of the Commissioner's power – neither the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) nor the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) provide the Commissioner with the ability to award compensation or other redress for the injury or losses suffered by the complainant.

6.3 Tasmania and the Northern Territory

Legislation in Tasmania and the Northern Territory also prohibits discrimination on the basis of criminal record.

The *Anti-Discrimination Act 1998* (Tas) and *Anti-Discrimination Act 1992* (NT) list discrimination on the ground of an 'irrelevant criminal record' as an attribute on the basis of which discrimination is unlawful.[24]

Both jurisdictions define 'criminal record' in general terms, including 'a record relating to arrest, interrogation or criminal proceedings' where, among other things, a charge has not been laid or the person's conviction was quashed or set aside. 'Irrelevant' is defined to include 'the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation where the discrimination arises.'[25] Both pieces of legislation list 'work' as an area where discrimination in prohibited,[26] with the Northern Territory expressly including recruitment within the definition of work.[27]

In Tasmania there are exceptions from these provisions where the 'work' involves children,[28] and in both jurisdictions the Anti-Discrimination Commissioners have the power to grant an exemption on application by an employer.[29] There is also an exemption in the Northern Territory on the basis of the 'inherent requirements of the job'.[30] Similar provisions have been enacted in both jurisdictions governing the powers of the relevant Anti-Discrimination Commissioners once a complaint is made – they are able to investigate, conciliate and ensure that sanctions are imposed when the complaint is made out.[31]

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[23] Sections 31(b)(i) and (ii) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

[24] Sections 14, 15 and 16 of the *Anti-Discrimination Act 1998* (Tas), and sections 19 and 20 of the *Anti-Discrimination Act 1992* (NT).

[25] Section 3 of the *Anti-Discrimination Act 1998* (Tas), and section 4 of the *Anti-Discrimination Act 1992* (NT).

[26] Section 22(1) of the *Anti-Discrimination Act 1998* (Tas) and section 20 of the *Anti-Discrimination Act 1992* (NT).

[27] Section 20 of the *Anti-Discrimination Act 1992* (NT) which lists work as an area where discrimination is illegal, and section 3(1) for the definition of 'work'.

[28] Section 50 of the *Anti-Discrimination Act 1998* (Tas).

[29] Section 56(2) of the *Anti-Discrimination Act 1998* (Tas) and section 59 of the *Anti-Discrimination Act 1992* (NT).

[30] Section 35(1) of the *Anti-Discrimination Act 1992* (NT).

[31] Section 89 of the *Anti-Discrimination Act 1998* (Tas), and section 88 of the *Anti-Discrimination Act 1992* (NT). Note that in Tasmania, it is the Anti Discrimination Tribunal rather than the Commissioner who makes orders where a breach of the Act is established.

6.4 ACT and Western Australia

In both the ACT and Western Australia, protection from discrimination on the basis of a criminal record is predominantly provided through spent convictions regimes, supplemented by anti-discrimination legislation.

In the ACT, the *Discrimination Act 1991* (ACT) includes a spent conviction as a basis on which it is illegal to discriminate, with the term 'spent conviction' defined under section 12 of the *Spent Convictions Act 2000* (ACT). Sanctions against discriminatory conduct are provided by way of the *Discrimination Act 1991 (ACT)*[32].

Western Australia also relies on spent convictions legislation, in this case the *Spent Convictions Act 1998* (WA), to prevent discrimination on the basis of a criminal record. After setting out the relevant ways in which a conviction becomes spent,[33] section 18 of the *Spent Convictions Act 1998* (WA) provides that it is unlawful for an employer to discriminate on the grounds of a spent conviction in relation to determining who should be offered employment, and the relevant terms and conditions of employment. A person alleging a contravention of this section can lodge a complaint under the *Equal Opportunity Act 1994* (WA) as if it were a contravention of that Act.

In these jurisdictions, discrimination on the basis of a criminal record which is not 'spent' is not prohibited.

At least at the federal level and within Tasmania, the Northern Territory, Western Australia and the ACT, there is recognition that a criminal record should not (with some significant exceptions) give an employer grounds on which to discriminate unlawfully against an employee or potential employee. The fact that this legislation differs from jurisdiction to jurisdiction (and is non-existent in other jurisdictions) is undesirable. The importance of uniformity across Australia in the context of other forms of discrimination has long been recognised. There is no logical reason for this uniformity not to apply to criminal records discrimination.

6.5 A Critique of Current Anti-Discrimination Legislation

Before we embark on a consideration of the content of this legislation, we suggest that some thought be given to the fact that in the federal scheme the prohibition on this type of discrimination is constructed in a convoluted and obscure way (via complex definitions in a combination of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth)) which is largely inaccessible to members of the public. This, itself, is a problem requiring reform.

(a) Exemptions

The first means by which legislation covering discrimination in employment on the grounds of a criminal record fails to set a standard of non-discrimination is through limitations placed on

[32] Sections 99, 100 and 102 of the *Discrimination Act 1991* (ACT).

[33] Sections 9 and 11 *of the Spent Convictions Act 1998* (WA).

the coverage of the legislation. The Centre for Employment and Labour Relations Law at the University of Melbourne has noted:

> [a]n employer might believe that [information concerning a person's criminal record]… is relevant in assessing the suitability of a candidate to work in the employer's organisation. For example, the owner of a retail outlet might hold the view that a person convicted of theft from a shop would be an unsuitable sales assistant. A provider of child-care services may believe that someone convicted of a sex offence is an unsuitable candidate for a position as a child-care worker.[34]

In some instances a criminal record will be relevant to the position a person is seeking. However, it is important to ensure that the anti-discriminatory objectives of the legislation are met. Only where the nature of the offence indicates a real likelihood of re-offending, or the employer is otherwise able to establish a genuine need for an employee not to have a criminal conviction, should a criminal record be relevant to the employment. This, however, is not the position which has been adopted in any jurisdiction where a criminal record or spent conviction is a protected attribute. Instead, with exceptions made to the legislation on the assumption that a criminal record will often be relevant to the employment, the current legislative framework makes it impossible to provide a norm of non-discrimination in employment and for Australia to meet its international obligations.

Exceptions to the standard of non-discrimination provided in jurisdictions listing a criminal record as a protected attribute generally fall into two categories. The first applies to positions concerning the care of children. In most jurisdictions, exemptions exist to the non-discriminatory norm on this basis.[35] From a public safety perspective, the rationale behind this exception is clear, with the need to ensure the safety of children a matter of great public concern.

Of greater concern is the second category of exceptions which exists in the Commonwealth, Tasmanian and Northern Territory legislation. In each of these jurisdictions, the legislation allows an employer to determine (at least initially) whether the criminal record will be relevant to the employment through either an 'inherent requirements of the job' exception (the Commonwealth and the Northern Territory) or, in Tasmania, via the prohibition on discrimination being limited to an 'irrelevant criminal record'.[36] In all three jurisdictions, the employer is provided with an avenue by which a criminal record can be taken into account legitimately. In these instances, the only method for an employee to assert a right to equality is for the employee to bring a complaint before HREOC or the relevant body in their local jurisdiction to test the employer's decision. Where Australia's commitment is to ensure equality in employment, it is problematic for an onus to be placed on those who have suffered discrimination to take such action before their rights will be upheld.

Fortunately, the 'inherent requirements of the job' exception – at least in the manner in which it has been interpreted to date – does not appear to provide employers with the ability to

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[34] Anna Chapman and Joo-Cheong Tham, 'Working Paper No 22: The Legal Regulation of Information in Australian Labour Markets: Disclosure to Employers of Information about Employees' (Centre for Employment and Labour Relations, The University of Melbourne, April 2001) 9-10.

[35] See, for example, section 50 of the *Anti-Discrimination Act 1998* (Tas).

discriminate between those who do and do not have a criminal record without a strong justification for doing so. As Justice Cooper noted in the *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'*:

> [t]he Act is to be construed bearing in mind the statutory objectives stated… One of those objectives is to eliminate, as far as possible, discrimination…[37]

In 1993 when the Act was first introduced, it was considered that the 'inherent requirements of the job' exception meant that:

> i) the discrimination can only apply to a particular job. Blanket discrimination is not permitted [and]… ii) the discrimination must be necessary and not merely a desirable characteristic or condition of the performance of the job.[38]

Judicial interpretation of the exception has been strict, with the High Court in the leading decision of *Qantas v Christie* considering that an inherent requirement is something which is essential to the position in question.[39] In that same case, Justice Gaudron provided a more practical guide to the exception's application, finding that:

> [a] practical method of determining whether or not a requirement is an inherent requirement… is to ask whether the position would essentially be the same if that requirement were dispensed with.[40]

The standards set by these tests and their subsequent application clearly suggests that there needs to be a close link between the criminal record and the job before the discrimination will be lawful and, therefore, any departures from the standard of equality should be, at least in theory, rare.[41]

However, the cases concerning the application of this exception indicate it is not only in unusual circumstances that employers use this exception as a basis for not employing ex-offenders. Instead, because the only way for an employee to test reliance on that exception is to bring a formal claim, the employer can make a decision that a criminal record will be relevant and often not be challenged as its legitimacy. The decision of the Northern Territory Commissioner in *Hosking v Fraser T/A Central Recruiting*[42] provides an example. In that case, a complainant challenged a claim that ascertaining whether a job applicant had a criminal record was relevant to a nursing position in a remote Aboriginal community based on the need for the community to be free of 'criminal elements'. According to the Commissioner, there was no evidence that being free of a criminal record was an inherent requirement of such a nursing position. While the desire to protect the community from unscrupulous people was 'admirable', the absence of a criminal record was not an inherent requirement of the

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[36] See the definition of discrimination in section 3(c) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), section 35 of the *Anti-Discrimination Act 1992* (NT) and the definition of 'irrelevant criminal record' in section 3 of the *Anti-Discrimination Act 1998* (Tas).

[37] (1996) 70 FCR 76, 90 (Cooper J)

[38] Brian C Williamson, 'Discrimination on the Ground of Criminal Record' (1993) 31(3) *Law Society Journal* 44, 44.

[39] (1998) 193 CLR 280 (Brennan CJ).

[40] (1998) 193 CLR 280 (Gaudron J).

[41] See, for example, *Commonwealth of Australia v The Human Rights and Equal Opportunity Commission and 'X'* (1999) 200 CLR 177.

[42] (1996) EOC 92-859.

position justifying a departure from the standard of non-discrimination.[43] Although no cases have been decided pursuant to the Tasmanian provisions regarding 'irrelevant criminal records', the discretion is again initially provided to the employer to determine whether the 'circumstances relating to the offence' are relevant to the requirements of the position and hence whether the criminal record is relevant.[44] In all of these instances, the employer is able to determine initially when the employee's right not to be discriminated against should be dispensed with. Far from setting a standard of non-discrimination, the exceptions create a situation where the only way employees can ensure they are not being discriminated against is to bring claims before HREOC or the local Anti-Discrimination Commissioners.

(b) Ineffective Sanctions – The Federal Scheme

Pursuant to section 3(1)(c) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the Commissioner is empowered to investigate and conciliate complaints and make non-binding recommendations. When a complaint is upheld and conciliation fails, the Commissioner is only able to make a report to the Commonwealth Attorney General who can then table a report in Parliament. The decision in *Christensen v Adelaide Casino Pty Ltd* demonstrates that unless an employer fears the possible negative publicity consequent upon having a report in which they are named tabled in Federal Parliament, this sanction is effectively meaningless.[45] In that case, a discrimination complaint on the grounds of criminal record was upheld, but the employee was left without any remedy when the employer elected not to act on the Commissioner's recommendations. Not only does this type of outcome empower employers to discriminate on the basis of a criminal record, it undermines the capacity of HREOC to effectively conciliate and sends a message to the public that HREOC itself is a 'paper tiger'.[46] This can only diminish the prestige of HREOC and undermine the respect shown to the 'law' it enforces. While the other jurisdictions in which discrimination on the basis of a criminal record is prohibited to some extent counter the effect of this 'paper tiger' by empowering their Commissioners to impose real sanctions, this hardly overcomes the messages conveyed at a federal level.

[43] (1996) EOC 92-859, 92-860.

[44] See sections 14, 15 and 16 of the *Anti-Discrimination Act 1998* (Tas).

[45] See HREOC Report No 20 (2002).

[46] Marie-Claire Foley and Anne Mainsbridge, 'The Human Rights and Equal Opportunity Commission Act' (1998) 50(8) *Australian Company Secretary* 383, 384.

7. SPENT CONVICTIONS REGIMES: AN ALTERNATIVE SOURCE OF PROTECTION?

Protections enacted by way of anti-discrimination laws are not the only means by which Australia's moral and legal obligations in respect of the right to equality and non-discrimination can be met. To a certain extent, the spent convictions regimes in operation around Australia also achieve this goal by limiting what will constitute a 'criminal record' and thereby the information which could be used by an employer as the basis of discrimination. According to President Curd in the Queensland Supreme Court:

> [i]t is reasonable to think that this power [to regard a conviction as spent] has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received.[47]

In Western Australia and the ACT, the legislature has evinced an intention that their spent convictions regimes act as a means of protection against discrimination on the grounds of a criminal record by also enacting provisions whereby discrimination on the grounds of a spent conviction is prohibited.[48] However, there are also flaws with these schemes which prevent them from operating as an effective means of ensuring equality.

In every state, either legislation or police policy dictates that with the passing of a certain length of time, the majority of convictions will be treated as spent.[49] While the way in which these provisions operate differs between jurisdictions,[50] the consequences of a conviction becoming spent is the same in all jurisdictions except Queensland. Pursuant to the relevant provisions or policy, except in certain prescribed circumstances, no obligation is imposed on job applicants or employees to disclose the existence of a spent conviction.[51] Moreover, in some jurisdictions, questions about whether an applicant or employee has a criminal history are deemed not to apply to a spent conviction.[52] In Queensland the situation is different. Instead of the disclosure obligation being removed, there is an obligation imposed on an employer or prospective employer to disregard a spent conviction.[53] This means the person with the record is still obliged to disclose, notwithstanding the fact that the conviction has become spent. In practice, this provides little protection against discrimination.

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[47] *R v Hoch* [2001] QCA 63, quoting from Thomas and White JJ in *R v Briese; Ex Parte Attorney General* [1998] 1 QdR 487.

[48] See the *Discrimination Act 1991* (ACT) and the *Spent Convictions Act 2000* (ACT); and the *Spent Convictions Act 1998* (WA).

[49] Usually 5 years where offence occurred as a juvenile, and 10 years otherwise; see for example section 3(1) of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

[50] For instance, compare the situation in New South Wales where the conviction becomes automatically spent after the expiration of the relevant crime-free period (section 8(1) of the *Criminal Records Act 1991* (NSW)) with the situation in Western Australia where an application has to be made either to the Commissioner of Police or the Court to have the conviction/s treated as spent (see section 7 of the *Spent Convictions Act 1988* (WA)).

[51] See, for example, section 16 of the *Spent Convictions Act 2000* (ACT).

[52] See, for example, section 11(b) of the *Criminal Records* (*Spent Convictions) Act 1992* (NT).

[53] See section 9 of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

Although the spent convictions regimes are undoubtedly of benefit to past offenders, they are no substitute for effective anti-discrimination laws. The very nature of the spent convictions regimes means that discrimination can only be prevented where the relevant crime-free period has expired. In every other instance the regime does nothing to prevent a job applicant or employee from being discriminated against on the basis of their criminal record.

Further, these schemes appear to be based on a raft of assumptions regarding the relevance of a criminal record, arguably without any basis for doing so. In most jurisdictions, exceptions are made to the spent convictions regime noting that certain convictions are incapable of becoming spent.[54] While most jurisdictions consider sexual offences incapable of becoming spent, some jurisdictions also provide that convictions where custodial sentences of certain lengths were imposed also fall into this category.[55] There is no apparent justification for this, and this lack of analysis is reflected in the lack of consistency between the various schemes. It is not clear why a conviction leading to a custodial sentence of a particular length is such that it is never capable of becoming spent. In the absence of a justification, suspicions might arise that the exception was implemented merely to meet a perceived public (or police) expectation, rather than because there was evidence to suggest a real need for these convictions to be disclosed. The huge disparities in the length of the custodial sentence making the conviction incapable of becoming spent (6 months in New South Wales versus 30 months in Queensland) provides support for the suspicion that this exception is an arbitrary political attempt to meet a perceived public expectation.[56]

Of perhaps even greater concern is the situation in Victoria and South Australia where the spent convictions regimes are contained only in police policy relating to the circumstances in and content of police record disclosure.[57] Here the effectiveness and integrity of the regimes, and thus how well they protect past offenders, is entirely dependent on the accuracy and care taken by the police in administering their policies. Where a past offender considers that the relevant policy has not been complied with, there is no avenue for challenging the police or seeking compensation or redress other than a complaint to the Ombudsman.

In summary, spent convictions regimes are incomplete and, in some cases, flawed. They cannot be relied on as a basis for avoiding discrimination in employment on the grounds of a criminal record.

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[54] See, for example, section 11 of the *Spent Convictions Act 2000* (ACT).

[55] See, for example, section 6 of the *Criminal Records (Spent Convictions) Act 1992* (NT).

[56] See section 3(2)(b) of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) compared with section 7(1) of the *Criminal Records Act 1991* (NSW).

[57] The Victoria Police's *Information Release Policy* and the South Australian Police Policy; although note that the *Spent Convictions Bill 2004* (SA) has been introduced into the South Australian Parliament and is awaiting assent in the Legislative Assembly.

8. AN EMPLOYEE'S DISCLOSURE OBLIGATIONS

8.1 Introduction

The current state of the law hardly enshrines a standard of equality in employment where an employee with a criminal record is concerned. Consequently, the law discourages employees or potential employees from making disclosures. There has been some recognition at common law that this is an acceptable option. Thus, there is strong authority for the proposition that there is no duty on an employee to disclose his or her own past faults.'[58] However, with the emerging view that employees are 'bound to render faithful and loyal service to [employers] and not to do anything inconsistent with the continuance of confidence between them,'[59] questions arise as to whether an employee or potential employee can refuse to disclose such past conduct.

8.2 Implied Duties

The position under the most often invoked of these duties, those of 'mutual trust and confidence' and 'good faith', is not clear, both with regard to when and in what circumstances these duties arise and also what they will oblige an employee or potential employee to do. Moreover, when consideration is given to the possible remedies open to a potential employee or employee who fails to disclose a criminal record and is either not employed or has their employment terminated when the record is subsequently discovered, it is clear that those with a criminal record will not be able to protect themselves from discrimination either by denying the existence of such a record or failing to disclose it.

In determining whether there is an obligation to disclose a criminal record pursuant to the duties implied in the employment contract, consideration must first be turned to when such duties arise. More specifically, do they apply during recruitment prior to entry into an employment contract? In relation to the implied duty of good faith the position is clear. This duty is said to amount to an undertaking by both parties to act with good faith in fulfilling their obligations pursuant to their contract. At the point of recruitment there is no contract between the employer and potential employee and, therefore, no disclosure obligation arises pursuant to this duty.

The situation is less clear in relation to the duty of mutual trust and confidence. This duty 'constitutes judicial recognition… that the employment contract is not just about economic exchanges but also social or personal relations'.[60] As Brodie notes, the duty is about maintaining the 'social or personal relationship' between employer and employee, a relationship that in the majority of instances will commence prior to entry into the contract formalising that relationship. As such, any disclosure obligations owed pursuant to the duty of mutual trust and confidence could well be owed by a potential employee at the point of recruitment.

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[58] *Concut v Worrell* (2000) 176 ALR 693, 701 (Gleeson CJ, Gaudron and Gummow JJ).

[59] *Concut v Worrell* (2000) 176 ALR 693, 704 (Kirby J), quoting from *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359, 370.

[60] Douglas Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30 *ILJ* 84, 99.

The Courts have indicated that once the contract governing the employment relationship has been entered into, the duties of mutual trust and confidence and good faith will, in some form, place obligations on both employer and employee.[61] Determining exactly what those obligations are, and particularly whether they will oblige the employee to disclose a criminal record, either voluntarily or when asked, will be important. Unfortunately, the situation regarding both duties is equally unclear.

There is no clear test to be applied for determining what conduct will be in breach of the duty of good faith. In order to determine whether death threats made against an employer were in breach of the duty of good faith, the New South Wales Court of Appeal in *Battacharya v Director-General of the Department of Education and Training*[62] applied the High Court's decision in *Blyth Chemicals Ltd v Bushnell*[63] and asked whether there was actual repugnance between the ongoing relationship of the parties and the conduct, focusing on whether the threats were destructive of the necessary confidence between the parties.[64] However, in *Concut Pty Ltd v Worrell*, a High Court decision of the same year, this test was not applied by the Court to reach the conclusion that the misappropriation of an employer's resources was a breach of the duty of good faith[65]. The status of the test applied in the *Battacharya Case* is, therefore, questionable at best. Even if that test were to be accepted, its application will be entirely dependent on the relationship between the parties and whether the conduct in question will be of a nature such as to destroy the confidence inherent within it. The test, if applicable, fails to provide a clear guide for employees as to whether they will be obliged to disclose a past criminal record on the basis of the duty of good faith they owe their employer.

The situation regarding the obligations imposed pursuant to the implied duty of mutual trust and confidence is no better. Judicial debate in Australia is still concerned with whether the duty is to be implied into employment contracts in Australia[66] and thus little consideration has been given to the actual obligations such a duty imposes. Assuming the duty applies, it is necessary to turn to jurisprudence from the United Kingdom to determine whether a criminal record must be disclosed in order to maintain mutual trust and confidence in an employment relationship. There are, to begin with, conflicting views as to whether the duty will place employees (or employers for that matter) under positive duties. In *Scally v Southern Health & Social Services Board*,[67] a positive duty to disclose information detrimental to the employer was implied. Contrastingly, in *University of Nottingham v Eyett (No. 1)*,[68] such an obligation was expressly rejected. In *Bank of Credit and Commerce International SA v Ali*,[69] the House of Lords determined that there was no obligation pursuant to the duty of mutual trust and confidence to disclose past wrongdoings. The applicability of these cases to the Australian employment relationship is yet to be considered. However, Justice Kirby in *Concut v Worrell*

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[61] See, for example, *Concut v Worrell* (2000) 176 ALR 693, 706 (Kirby J).

[62] [2000] NSWCA 74.

[63] (1933) 49 CLR 66

[64] [2000] NSWCA 74, [25].

[65] *Concut v Worrell* (2000) 176 ALR 693, 701 (Gleeson CJ, Gaudron and Gummow JJ).

[66] *Intico (Vic) Pty Ltd v Walmsley* [2004] VSCA 90; see also *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99; *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144.

[67] [1992] 1 AC 294

[68] [1999] 2 All ER 437.

[69] [2001] 1 All ER 961.

held that 'acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal.'[70] In light of this, it would be a brave employee who argued that non-disclosure in response to a specific question did not break one or other of these implied duties.

8.3 Employee Remedies

With so much uncertainty surrounding what duties are to be implied into the employment contract, when those duties arise and what are the obligations imposed on the parties pursuant to them, it is likely that employees and potential employees will err on the side of caution and not disclose details of a criminal record to an employer or potential employer. Where the record is subsequently discovered, the potential employee may be denied employment and the existing employee may have his or her employment terminated. Unless the complainant is already in employment and never lied about the existence of a criminal record, the remedies available to redress any discrimination suffered are extremely limited.

The employee who is in employment when the criminal record is discovered and has not lied about its existence is in a strong position when it comes to seeking redress if their employment has been terminated on the basis of their criminal record. Here, where the employee meets the requirements of the *Workplace Relations Act* 1996 (Cth), the employee will be able to access the Australian Industrial Relations Commission's ('AIRC') unfair dismissal jurisdiction[71] and seek either reinstatement or compensation.[72] However, where the employee has not only failed to disclose a past criminal record, but also dishonestly denied its existence, the situation is not so clear. As in *Hall v New South Wales Thoroughbred Racing Board*,[73] the employer in this instance will argue that the dismissal was effected on the basis of the employee's dishonesty (not criminal record) and, depending on the circumstances, the AIRC might accept this was the reason for the termination and, therefore, hold that the termination was not harsh, unjust or unreasonable.

Where the employee does not meet the requirements for gaining access to the AIRC's (or a state equivalent) unfair dismissal jurisdiction, or where a potential employee's record is discovered during the recruitment process and they are never employed, the only means of seeking a remedy for discrimination is to lodge a complaint under the anti-discrimination provisions applicable in the relevant jurisdiction. As discussed above, only in Tasmania, the Northern Territory, Western Australia and the ACT will there be any avenue of redress. Otherwise, the applicant or employee can only make a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and *Human Rights and Equal Opportunity Commission Regulations 1989 (Cth)* which, as previously noted, is likely to prove an ineffective course of action.

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[70] (2000) 176 ALR 693, per Kirby J at 707.

[71] See section 170CB and CBA of the *Workplace Relations Act 1996 (Cth)* for the applications and exclusions from application of an action for unfair dismissal.

[72] See section 170CH for remedies on arbitration.

[73] HREOC Report No. 19 (2002).

What does this mean for employees or potential employees with criminal records? Essentially, it demonstrates that there is very little an employee or potential employee can do to protect themselves from discrimination on the grounds of their criminal record. Despite Australia's international commitment to ensuring that 'all people… are entitled without discrimination to the equal protection of the law,'[74] it is clear that in respect of employment, those with a criminal record are far from equal. Anti-discrimination provisions have been enacted at both a Commonwealth and state level purporting to provide the equality to which Australia has committed itself, yet a careful analysis illustrates that these provisions are far from effective. Exemptions from the non-discriminatory norm provided on the basis of the ''inherent requirements of the job', leaves it to employers to determine, at least initially, whether the employee's rights to be free from discrimination are upheld. Moreover, where the complainant brings a claim to HREOC and is able to establish that there were no such inherent requirements or any other defence to justify the discrimination, HREOC has no power to make orders which will have any effect in terms of compensating the victim, punishing the offender or deterring potential offenders. Although some states and territories have implemented anti-discrimination legislation aiming to protect against discrimination on the grounds of a criminal record, the applicability of similar exemptions effectively provides the employer with a discretion to determine the relevance of a criminal record and hence whether discrimination will take place. Employees or potential employees are not able to protect themselves from discrimination by failing to disclose the record because, in the majority of instances, there are no sanctions an employee can obtain against an employer to remedy any discrimination, including termination, if the criminal record is subsequently discovered. If Australia intends to meet its fundamental human rights commitments to prohibit discrimination, protect people from discrimination, and provide redress where discrimination occurs, reforms are urgently required in this area.

[74] See article 26 of the *International Covenant on Civil and Political Rights*.

9. STRATEGIES TO ADDRESS DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF CRIMINAL RECORD

9.1 Drawing on State experiences

For equality in employment to exist in a meaningful way in so far as criminal record discrimination is concerned, reforms must be made to federal anti-discrimination legislation. State legislation already highlights some ways in which changes can be made to ensure that those with a criminal record are not disadvantaged when it comes to seeking employment. Most importantly, appropriate remedies need to be introduced. Further, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) should be amended (or new legislation at a Commonwealth level enacted) to provide that the only grounds for taking an employee's criminal record into account are where approval has been given by HREOC or where carefully crafted provisions specifically authorise the employer to do so. We also recommend that legislation in all state and territory jurisdictions be enacted or amended to mirror the recommended changes at the Commonwealth level.

9.2 An International Perspective

In searching for solutions to the lack of protection provided where a criminal record is causing discrimination in employment, one place where solutions to the Australian legal vacuum might be found is in legislation enacted in other jurisdictions. Unfortunately, a brief review of legislation existing in this area in some overseas jurisdictions indicates that answers to the Australian situation are unlikely to be found.

At an international level, there has been an acknowledgment that discrimination in this area is problematic. In response to a question as to the measures planned by the European Union to remedy the 'acute problems' faced by past offenders in 'reintegrating back into the labour market', the European Commission noted a number of ways in which ex-offender difficulties with gaining access to the labour market may be aided by EC policy, but noted that it would not deal with this issue directly as it considered it not 'of particular relevance to the right of free movement.'[75] A similar issue was raised during a meeting of the Conference of Non-Governmental Organisations in Consultative Relationship with the United Nations in Geneva in August 2003 where individual states were asked to 'examine their treatment of former convicts with respect to their integration back into society.'[76] Notwithstanding these concerns, a brief review of legislation in the area of anti-discrimination around the globe indicates that very little positive action has been taken to protect against the discrimination suffered in employment by ex-offenders. As such, none of the international provisions examined provide any suitable model for Australian legislation.

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[75] *Official Journal of the European Communities*, question from Stephen Hughes, 2000/c219E/190 (written question E-2362/99). It should be noted however that the European Commission has considered discrimination on other bases such as race and sex of sufficient concern to the free movement of trade to implement policies and programmes in these areas: see for instance Council Directive 76/207/EEC of 9 February 1976 dealing with equality treatment between men and women as regards to access to employment, vocational training and promotion and working conditions.

[76] See <www.ncocongo.org/ngonew/sub-com-hr-47.htm>.

Despite evidence of international awareness of the issues prevalent with regard to employment and ex-offenders, many countries have failed to put into place any means of protecting against discrimination on this basis. For instance, in South Africa and Sweden, discrimination on the basis of a criminal record is not prohibited.[77] Other countries have enacted spent convictions regimes. Under the *Criminal Records (Clean Slates) Act 2004* (NZ), the *Rehabilitation of Offenders Act 1974* (UK), the *Bundeszwentralregister* in Germany and a Police Policy in Denmark, the elapsing of a certain period of time means that a conviction will be treated as spent.[78] In the UK, the consequence of this is that the offender is not obliged to disclose spent convictions when applying for jobs.[79] In New Zealand, a person whose convictions have become spent is 'deemed to have no criminal record for the purpose of any questions asked…'[80] In Germany, a conviction becoming spent is taken to mean that the person is 'no longer previously convicted,'[81] and any discrimination on the basis of such a conviction is illegal.[82] In Denmark, after the passing of the requisite length of time, the police will not disclose the existence of a criminal conviction. There are, at least in New Zealand, the United Kingdom and Denmark, exceptions to this legislation such that certain convictions are incapable of becoming spent and certain convictions must be disclosed notwithstanding the fact they are spent.[83] In all four jurisdictions, the very nature of the legislation – the fact that it will only prevent discrimination after the relevant crime free period has elapsed – means that its ability to protect against discrimination on the grounds of a criminal record is limited.

In Canada and the United States, anti-discrimination legislation prohibits, at least in some provinces and states, discrimination in employment on the basis of a criminal record.[84] While the situations in these jurisdictions is more analogous to the Australia position, both fail to provide a model which Australia could adopt to better the protection from discrimination on the basis of this attribute. In Canada, at a federal level and in some of the provinces, the relevant anti-discrimination provisions list a criminal record as an attribute on the basis of which it is illegal to discriminate.[85] Most provinces also have spent convictions regimes in operation. Although, unlike Australia, both the provincial and federal anti-discrimination provisions empower the imposition of remedies where a contravention is established, similar exemptions

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[77] In South Africa, see *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*; in Sweden see *Prohibition on Discrimination Act 2003*.

[78] See section 7(1) of the *Criminal Records (Clean Slate) Act 2004* (NZ), section 5 of the *Rehabilitation of Offenders Act 1974* (UK),the *Bundeszwentralregister* generally for Germany and the Danish Police spent convictions policy available at <http://www.politi.dk/Indholdpaaengelsk/oversigtUK.htm>.

[79] Sections 4(1)(b) and 4(2)(b) of the *Rehabilitation of Offenders Act 1974* (UK).

[80] Sections 2(a) and 14 of the *Criminal Records (Clean Slate) Act 2004* (NZ).

[81] Translated from the German word 'vorbestraft'.

[82] See *Bundeszwentralregister* paragraph 53, absatz 1.

[83] See section 19(3)(a) of the *Criminal Records (Clean Slate) Act 2004* (NZ); section 7(2) of the *Rehabilitation of Offenders Act 1974* (UK) and the Danish Police Policy available at <http://www.politi.dk/Indholdpaaengelsk/oversigtUK.htm>.

[84] See, for example, section 3(1) of the *Canadian Human Rights Act* and *Massachusetts General Laws*, Chapter 151B, section 4(9).

[85] See section 3(1) of the *Canadian Human Rights Act;* section 13 of the *Human Rights Code* (British Columbia); section 18.2 of the *Quebec Charter of Human Rights and Freedoms*, section 6(1) of the *Human Rights Act* (Prince Edward Island); section 5 of the *Human Rights Code* (Ontario); section 7(1) of the *Human Rights Act* (North West Territories); compare with the *Human Rights, Citizenship and Multiculturalism Act* (Alberta) and the *Human Rights Code* (Manitoba) which don't prohibit discrimination on the basis of a criminal record.

apply as in Australia with respect to discrimination being allowed where necessitated by the 'inherent requirements of the job'. This situation also prevails in New York, Pennsylvania and Massachusetts, where, to varying extents, legislation prohibits discrimination on the basis of a criminal record.[86] New York and Massachusetts also prohibit asking questions about certain convictions,[87] while in Pennsylvania an employer is able to consider a criminal conviction where it relates to the applicant's suitability for the position, but must notify the applicant in writing if the decision not to hire is based in whole or in part on criminal history record information.[88]

A majority of countries around the world have ratified the United Nation's *ICCPR* obliging them to protect, respect and fulfil the right to equality and non-discrimination. Even where countries have not explicitly indicated their approval of the right of non-discrimination by ratifying the *ICCPR*, the right to equality as recognised by the International Court of Justice in the *Namibia Case* is applicable by virtue of being a customary rule of international law. This cursory examination of provisions applicable around the globe suggests these obligations are not being met at an international level. If Australia wishes to create a standard of best practice and give real and practical effect to its international commitments, it is unlikely to find a model for reform in any of the jurisdictions discussed above.

[86] See *New York Executive Law 296 ('Unlawful Discriminatory Practices)* at 15 and 16; *Massachusetts General Laws*, Chapter 151B section 4(9) and *Pennsylvania Statutes*, Volume 18, section 9125.

[87] See *New York Executive Law 296 ('Unlawful Discriminatory Practices)* at 16, and *Massachusetts General Laws*, Chapter 151B section 4(9).

[88] *Pennsylvania Statutes*, Volume 18, section 9125 (b) and (c).

10. REFORMS AND RECOMMENDATIONS

By enacting a set of uniform amendments to the primary pieces of anti-discrimination legislation across Australia,[89] significant improvements could be made to the protection afforded to those with a criminal record and Australia could comply with its international obligations.

A number of things must change in order to achieve this.

First, all jurisdictions should list 'criminal record' as an attribute on the basis of which discrimination is prohibited.

Second, in no jurisdiction should the onus for ensuring that there is no discrimination be placed on the employee by allowing the employer to determine (at least initially) whether a criminal record is relevant based on the 'inherent requirements of the job' and then leaving it to the employee to bring a claim to demonstrate this is not the case. The 'inherent requirements' defence should be removed in jurisdictions where it is currently applicable and instead provisions enacted which mirror the exemptions currently existing in Tasmania and the Northern Territory where an employer who considers that a criminal record is relevant must apply to the relevant anti-discrimination tribunal for an exemption to the non-discrimination norm.[90]

Third, provisions also need to be included prohibiting an employer asking questions of an employee or future employee with regard to their criminal record. Unless an exemption has been granted by the relevant anti-discrimination tribunal, the criminal record should be deemed irrelevant and the employee or potential employee not be required to provide any details about its existence. This is by no means saying that a criminal record will never be relevant to an employment situation; as Justice Street noted in *Davis v Western Suburbs Hospital*, it was not the object of one of the predecessors to the current *Human Rights and Equal Opportunity Commission Act 1986* (Cth) 'to deprive an employer of the right to decide what his [sic] needs are.'[91] However, instead of employees having to make complaints before it can be established that they should not have been discriminated against, it should be the employers who must bring cases to demonstrate that there is a reason for discrimination.

On their own, these changes would go far in providing protection against discrimination for employees and potential employees with criminal records. Yet, in order for the legislation – at least at a Commonwealth level – to be more than a 'paper tiger,' it must also provide a credible threat for employers who conduct themselves contrary to the non-discrimination norm. As discussed above, the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) only empowers HREOC to conciliate a complaint and table a report to the Attorney General if this fails. For the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) to

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[89] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), *Anti-Discrimination Act 1998* (Tas), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1977* (NSW), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1991* (Qld), *Equal Opportunity Act 1984* (SA) and *Equal Opportunity Act 1995* (Vic).

[90] Section 56(2) of the *Anti-Discrimination Act 1998* (Tas) and section 59(3)(b) of the *Anti-Discrimination Act 1992* (NT).

[91] (1941) 42 SR (NSW) 26, 31.

function in any meaningful way to prevent this type of discrimination, remedies through the jurisdiction of the Federal Court must be provided.

Through enacting legislation across all Australian jurisdictions mirroring the provisions discussed above, not only will protection from this kind of discrimination be better provided, the problems associated with using the spent convictions regimes as an alternative means of protecting against discrimination would be avoided.

Similarly with regard to duties implied into the employment contract and the question of whether they require disclosure of a past criminal conviction. As the suggested legislation would deem a criminal record to be irrelevant except to the extent that the relevant anti-discrimination tribunal has determined otherwise, the legislation itself would indicate that there is no duty of disclosure. The content of the implied duties could (and perhaps should) also be clarified by legislation.

One foreseeable concern to arise as a result of these recommendations is the issue of public safety and whether it is in the public interest that certain convictions are always disclosed. Currently there are exemptions to the spent convictions and anti-discrimination regimes both within Australia and internationally which are seemingly justified by the requirement of public safety in relation to the care of children. It is important, however, that when implementing exceptions such as these, there are demonstrable grounds for their creation and they travel no further than required to meet their legitimate objectives.

11. CONCLUSION

By ratifying various international conventions, Australia has committed itself to ensuring that discrimination is avoided within our society. While great headway has been made towards achieving this goal in some areas, concern remains regarding the sufficiency of the protection provided from discrimination on the basis of a criminal record in the field of employment. Although there are provisions attempting to prevent discrimination on this basis at both a Commonwealth and state level, the examination detailed in this submission indicates that this protection is far from sufficient. In order for Australia to meet its international obligations, changes must be made to the relevant anti-discrimination provisions to ensure there is proper protection provided against discrimination on this basis. Identical amendments to the anti-discrimination provisions in operation all over Australia to include a criminal record as a basis on which it is illegal to discriminate, and provisions that an application must be made to the relevant Anti-Discrimination Commission to depart from the norm of non-discrimination, must be implemented before Australia will fulfil its obligations under the *ICCPR* and the *ICESCR*.