

SENTENCES WITHOUT CONVICTION: PROTECTING AN OFFENDER FROM UNWARRANTED DISCRIMINATION IN EMPLOYMENT

REBECCA BRADFIELD*

In all Australian jurisdictions, courts have discretion to impose a sentence without recording a conviction. Legislation sets out factors relevant to the exercise of the court's discretion and in Tasmania, Victoria and Queensland, the court is directed (among other matters) to have regard to the economic or social consequences for an offender of recording a conviction, including its impact on the offender's employment prospects. Non-conviction sentences have been criticised for failing to achieve this objective, with some commentators proposing their abolition. This article examines the discretion to sentence without conviction, in relation to adult offenders in Tasmania, Victoria and Queensland and considers whether non-conviction sentences are able to protect an offender from unwarranted discrimination in employment. It argues that the employment protections to those who are not formally convicted are largely illusory in some contexts, and advances legislative recommendations that provide a more coherent approach to give effect to the judicial intent of not recording a conviction.

I INTRODUCTION

Sanctions at the lower end of the sentencing scale tend to be overlooked in commentary on the criminal justice system, and yet they have potentially serious implications for citizens. Recording a conviction as part of the sanction imposed by a court is one such sentencing option that may have serious and long-lasting consequences for an offender. The growing regulation of employment and the trend for employers to require prospective employees to provide a criminal record check, either as a legally mandated check or as part of the employer's own risk management process, means that a criminal record is increasingly a barrier to employment. This can have a serious impact on the prospects of a sizable proportion of the population. There were close to half a million people in

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Australia found guilty of a criminal offence in 2011–12¹ and it is estimated that one in six Australians has a criminal record.²

Traditionally, a conviction provided the basis for the court's power to impose a sentence. At common law, there was no power for the court to impose a sentence without a conviction, with the common law bond being the 'nearest equivalent' to a non-conviction sentence.³ Historically, the consequences of a conviction were severe as, under the doctrines of forfeiture and attainder, a convicted person forfeited their property to the sovereign and had their civil rights and capacities extinguished.⁴ In modern times, it is now a finding of guilt (and not a conviction) that provides the jurisdictional basis for imposing a sentence and under the statutory sentencing regimes in Tasmania, Victoria and Queensland, a conviction is (in some cases) prohibited or optional.⁵ In addition, while the legal consequences that attach to a conviction are less severe, a conviction still has an immediate effect on an offender's legal and social status and may be of long-term detriment to an offender. Consequences that attach to a conviction include loss of office, licence or right, and restrictions on employment and travel opportunities.⁶

In all Australian jurisdictions, courts have discretion to impose a sentence without recording a conviction.⁷ This allows them to have regard to the circumstances of the individual case, and to decline to record a conviction (if appropriate) to allow an offender to avoid the adverse consequences of a conviction. Legislation sets out the factors relevant to the exercise of the court's discretion and, in Tasmania, Victoria and Queensland, the court is specifically directed to have regard to the impact that a conviction would have on the offender's economic or social wellbeing or employment prospects.⁸ This is clearly aimed at shielding an offender from the employment consequences of a recorded conviction in an appropriate case. A question however, that arises is the extent to which there is any

1 There were 490 469 people found guilty in Australian courts (higher courts, Magistrates' Courts and Children's Courts) in 2011–12: Australian Bureau of Statistics, *Criminal Courts, Australia (Table 1)*, 4513.0 — *Criminal Courts, Australia, 2011–2012* (26 March 2014) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02011-12?OpenDocument>>.

2 Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 288 [11.4.5].

3 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 82 [1.250]. The common law bond allowed the court to 'release a convicted offender after binding him over to appear for sentence when called on and to be of good behaviour in the meantime': Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 181 [7.104]. See also Richard Fox and Arie Freiberg, 'Sentences Without Convictions: From Status to Contract in Sentencing' (1989) 13 *Criminal Law Journal* 297.

4 Freiberg, above n 3, 300; Edney and Bagaric, above n 2, 288 [11.4.4].

5 *Sentencing Act 1991* (Vic) s 7; *Sentencing Act 1997* (Tas) s 7; *Penalties and Sentences Act 1992* (Qld) ss 16, 22, 29, 34, 43A–43B, 44, 90, 100, 111, 143, 152.

6 See Freiberg, above n 3, 85 [1.260]; Sentencing Advisory Council (Tas), 'Non-conviction Sentences: "Not Recording a Conviction" as a Sentencing Option' (Final Report No 3, August 2014) ch 3.

7 *Sentencing Act 1991* (Vic) s 7; *Sentencing Act 1997* (Tas) s 7; *Sentencing Act 1995* (WA) ss 45(1)(a)–(b); *Criminal Law (Sentencing) Act 1988* (SA) s 16; *Penalties and Sentences Act 1992* (Qld) s 12; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10; *Sentencing Act* (NT) s 7; *Crimes (Sentencing) Act 2005* (ACT) s 17; *Crimes Act 1914* (Cth) s 19B(1).

8 *Sentencing Act 1991* (Vic) s 8(1)(c); *Sentencing Act 1997* (Tas) s 9(c); *Penalties and Sentences Act 1992* (Qld) s 12(2)(c).

practical difference for an offender between a finding of guilt without a conviction recorded and a recorded conviction, particularly in view of the increased use of criminal history information as part of the employment process. In the context of employment, the distinction between guilt and conviction relies on the nature of legislative provisions that impose restrictions on employment following criminal offending, the information that is disclosed in a criminal record check in a particular jurisdiction, and the statutory protections that are afforded by privacy, discrimination and spent conviction laws.

This article begins by examining the relationship between criminal offending and employment. It then examines the framework for the exercise of the court's discretion by focusing on the position in Tasmania, Victoria and Queensland given that the legislation in these jurisdictions specifically directs the court to have regard to the employment consequences for an offender that would result from recording a conviction.⁹ The article also considers the question of whether a non-conviction sentence has any practical purpose. In view of the shift in focus from conviction to guilt, some commentators assert that the distinction between the two concepts has been almost totally removed and that the 'distinction between not guilty, guilty and conviction should be collapsed into the first two only'.¹⁰ That approach contrasts with the position of the Sentencing Advisory Council (Tas), which recommended the retention of the discretion and its enlargement to allow the court to impose a fine without recording a conviction.¹¹ This article argues that the discretion to impose a sentence without recording a conviction is a valuable sentencing option that can be justified within a broader theoretical framework and suggests that legislative amendment is necessary to ensure that the distinction between guilt and conviction is maintained.

II CRIMINAL OFFENDING AND EMPLOYMENT

The stigmatising effects of a conviction and the reality that a criminal record can detrimentally affect a person's prospect of obtaining employment are reflected in the modern employment context. Employment arrangements have seen an increase in regulation and licensing for many occupations.¹² Legislators have used a person's criminal history as a threshold requirement for employment and related registrations and licences on the basis that prior offending indicates a person's unsuitability for certain types of employment.¹³ This has been achieved by the

9 It is noted that the relevance of a conviction for the future prospects of an offender, including employment prospects, is a factor that is taken into account in other jurisdictions, even if it is not specifically mentioned in the legislation. See, eg, *R v Mauger* [2012] NSWCCA 51 (30 March 2012); *R v CV* (2013) 233 A Crim R 67; *Lumby v Cooper* [2008] ACTSC 53 (16 June 2008); *Hemming v Neave* (1989) 51 SASR 427; *Carnese v The Queen* [2009] NTCCA 8 (5 June 2009).

10 Edney and Bagaric, above n 2, 288 [11.4.4].

11 Sentencing Advisory Council (Tas), above n 6, 85 [4.3.3].

12 See Sentencing Advisory Council (Tas), above n 6, 27–9 [3.4.2]; Freiberg, above n 3, 637 [9.280].

13 Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171, 177; See Sentencing Advisory Council (Tas), above n 6, 27 [3.4.2]; app 3, tables 2–3.

express exclusion of people with convictions from a category of employment¹⁴ or a threshold hurdle for establishing that an applicant is a 'fit and proper person' or is of 'good character'.¹⁵

The Sentencing Advisory Council (Tas) identified 80 Tasmanian statutes where a person's criminal history was relevant to the registration or ability to obtain a licence or permit, which may be relevant to a person's ability to work within a particular occupation.¹⁶ Legislation may also require the vacation of positions on statutorily created boards, tribunals, trusts, and government or semi-government authorities.¹⁷ Even if police checks are not mandated by the legal regulation of an occupation or the relevant licencing procedure, background checking (including criminal history checks) is increasingly a feature of the employment process. Employers are entitled to enquire about an applicant's criminal history as part of the recruitment process (even if not mandated to do so) and may require the prospective employee to undergo a police check.¹⁸ Although a person's consent is required to obtain a criminal history check, the unequal bargaining position at the recruitment stage makes it difficult to refuse if the applicant wants to be considered for the position.¹⁹

There has been an increase in the number of criminal record checks being conducted in Australia by employers. In 2009–10, CrimTrac processed around 2.7 million criminal history checks,²⁰ and in 2012–13, Tasmania Police issued 45 055 police record checks to Tasmanian applicants and a further 76 653 Tasmanian records were released to interstate applicants.²¹ Edney and Bargaric observe that a report by Job Watch showed 'that the number of [police] checks in Victoria alone increased from 3459 in 1993 to 221 236 a little more than a decade later'.²² This rise has been linked to broader societal concerns about security and risk management.²³ In the employment context, it appears to have been influenced by principles of contract law (the implied duty of good faith and the duty to reasonably ensure the safety of workers), occupational health and safety laws,

14 See, eg, *Conveyancing Act 2004* (Tas) s 5; *Sex Work Act 1994* (Vic) s 37(1)(b); *Corporations Act 2001* (Cth) s 206B. See also Sentencing Advisory Council (Tas), above n 6, 27–9; Freiberg, above n 3, 637–8 [9.280]–[9.285].

15 See, eg, *Travel Agents Act 1987* (Tas) s 21(2)(d); *Architects Act 1929* (Tas) s 12; *Motor Vehicle Traders Act 2011* (Tas) s 7; *Estate Agents Act 1980* (Vic) s 21(4)(b); *Meat Industry Act 1993* (Vic) s 16. See also Sentencing Advisory Council (Tas), above n 6, 27–9 [3.4.2].

16 Sentencing Advisory Council (Tas), above n 6, 64 [4.2.1.2].

17 Ibid. See also Freiberg, above n 3, 637 [9.280].

18 Naylor, Paterson and Pittard, above n 13, 172.

19 Ibid 174–5; Moira Paterson, 'Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison' (2011) *New Zealand Law Review* 69, 80.

20 Bronwyn Naylor, 'Criminal Record and Rehabilitation in Australia' (2011) 3(1) *European Journal of Probation* 79, 81, citing CrimTrac, 'Annual Report 2009/2010' (Annual Report, CrimTrac, 14 September 2010) 58. This is an increase from the first years of operation (2000–3) where less than 0.5 million checks (on average) were processed each year.

21 Sentencing Advisory Council (Tas), above n 6, 26 [3.4].

22 Edney and Bargaric, above n 2, 288 [11.4.5].

23 Naylor, Paterson and Pittard, above n 13, 173.

and the laws of negligence that encourage employers to take a cautious approach to recruitment.²⁴

Research that has examined the use of criminal record checks by employers suggests that employers are hesitant to employ a person with a criminal record because of concerns about reliability and perceptions about how customers may react.²⁵ Employers are ‘concerned about the risk of reoffending specifically, but also that an offender will be an unreliable or challenging employee’.²⁶ Employers are ‘less inclined to employ someone where they have a criminal record’,²⁷ with employers rating ex-offenders as ‘less likely to obtain employment than people with a chronic illness, physical disabilities or communication difficulties’.²⁸ In a survey of Australian employers (and corrective services stakeholders) that examined the employability of disadvantaged groups, ‘[o]nly applicants with intellectual or psychiatric disabilities were rated lower’ than ex-offenders.²⁹ Research in the context of discrimination law also indicates that discrimination on the basis of criminal record is not uncommon. In 2012, the Australian Human Rights Commission reported that:

In recent years there have been a significant number of complaints to the Australian Human Rights Commission from people alleging discrimination in employment on the basis of criminal record. The complaints indicate that there is a great deal of misunderstanding by employers and people with criminal records about discrimination on the basis of criminal record.³⁰

As a result, it appears that the increased reliance on police checks for employment purposes increases the scope for information contained in criminal records to be used to the detriment of offenders. This occurs either by limiting employment opportunities, or by deterring offenders from seeking work because of the associated embarrassment and shame of disclosing their record.³¹

24 This is explored in detail, *ibid* 175–7. See also Georgina Heydon et al, ‘Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers’ Counsel’ (2011) 32 *Adelaide Law Review* 205, 208–10.

25 See Bronwyn Naylor, ‘Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia’ (2005) 30 *Alternative Law Journal* 174, 176; Human Rights and Equal Opportunity Commission, ‘Discrimination in Employment on the Basis of Criminal Record’ (Discussion Paper, Human Rights and Equal Opportunity Commission, December 2004) 7.

26 Naylor, ‘Criminal Record and Rehabilitation in Australia’, above n 20, 81.

27 Naylor, ‘Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia’, above n 25, 176.

28 Naylor, ‘Criminal Record and Rehabilitation in Australia’, above n 20, 81, citing Joe Graffam et al, ‘Attitudes of Employers, Corrective Services Workers, Employment Support Workers, and Prisoners and Offenders Towards Employing Ex-Prisoners and Ex-Offenders (Report, Criminology Research Council, April 2004) 26.

29 *Ibid*.

30 Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012), 7 <<https://www.humanrights.gov.au/publications/human-rights-record>>.

31 Heydon et al, above n 24, 206–7.

Difficulties experienced by ex-offenders in obtaining access to employment are detrimental for the future prospects and wellbeing of the individual offender.³² Employment disadvantage is also a concern for the community more generally, as reducing barriers to employment for ex-offenders has been identified as an important factor in rehabilitation. Research has shown that the two key factors in reducing reoffending are access to accommodation and employment.³³ A study conducted in the United Kingdom showed that ‘employment can reduce recidivism by between a third and a half’.³⁴ Employment is central to successful rehabilitation because it ‘brings income and structure, but also a connection to society, self-esteem, and a community of peers reinforcing “legitimate” norms and values’.³⁵ Clearly, as well as benefiting the individual, access to employment offers benefits to the community by adding to the pool of labour and skills that are available for employers and makes the community safer by reducing reoffending.³⁶

III THE STATUTORY FRAMEWORK FOR NON-CONVICTION SENTENCES

Statute governs the exercise of the court’s discretion as to whether or not to record a conviction in two ways:

- (1) by limiting the range of sentencing orders that can be made by a court without a conviction being recorded; and
- (2) by specifying criteria that the court needs to consider in exercising its discretion to record (or not to record) a conviction.

A Orders That Can Be Made Without a Conviction Being Recorded

In Tasmania, under the *Sentencing Act 1997* (Tas) s 7, a conviction is:

- (a) mandatory for imprisonment, a suspended sentence of imprisonment, community service orders, fines or discharge;³⁷
- (b) optional for probation orders, rehabilitation program orders (for family violence offences) and conditional adjournments of proceedings; and

32 See Edney and Bargaric, above n 2, 288–9 [11.4.5].

33 Naylor, ‘Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia’, above n 25, 174. See also Bronwyn Naylor, ‘Living Down the Past: Why a Criminal Record Should Not Be a Barrier to Successful Employment’ (2012) 18 *Employment Law Bulletin* 115, 116.

34 Naylor, Paterson and Pittard, above n 13, 188–9, citing Home Office of the United Kingdom, ‘Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act’ (Report, Home Office of the United Kingdom, July 2002) 75.

35 Naylor, ‘Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia’, above n 25, 174.

36 Heydon et al, above n 24, 206; Home Office of the United Kingdom, above n 34, 2.

37 See also *Justices Act 1959* (Tas) s 74BA(1).

- (c) prohibited for a dismissal of the charge.

In Victoria and Queensland, there is a broader range of sentencing orders that can be made without a conviction being recorded. In Victoria, the court has discretion to impose a fine or a community correction order without recording a conviction.³⁸ Similarly, in Queensland, a fine, probation and community service order can be made without the court recording a conviction.³⁹ However, as is the case in Tasmania, if the court imposes a sentence of imprisonment or suspended imprisonment, a conviction must be recorded.⁴⁰ In Victoria, a conviction must also be recorded if the court makes a mental hospital security order or a drug treatment order.⁴¹ In Queensland, a conviction must be recorded if the court imposes an intensive correction order or an indefinite sentence.⁴²

B Exercise of the Court's Discretion Whether or not to Record a Conviction

The sentencing legislation sets out the factors that are relevant to the discretion as to whether to record a conviction. Section 9 of the *Sentencing Act 1997* (Tas) provides:

In exercising its discretion whether or not to record a conviction, a court must have regard to all the circumstances of the case including:

- (a) the nature and circumstances of the offence; and
- (b) the offender's antecedents and character; and
- (c) the impact that a conviction would have on the offender's economic or social wellbeing or employment prospects.

This is the same as the equivalent Victorian provision,⁴³ and substantially the same as the provision in Queensland.⁴⁴ The Tasmanian provision clearly creates a broad discretion as the court is not limited to considering the matters listed in the provision — it must take account of all the circumstances of the case.⁴⁵ Further, while a court must have regard to all the factors listed, there is no requirement for any one factor to be given more weight.⁴⁶

38 *Sentencing Act 1991* (Vic) s 7(1). See also Freiberg, above n 3, 81–3 [1.250].

39 See Mackenzie G, *Summary Offences Law and Practice Queensland* (Looseleaf, Lawbook Co, Sydney), [9.705].

40 *Ibid* [9.705]; *Sentencing Act 1997* (Tas) ss 7(a)–(b).

41 *Sentencing Act 1991* (Vic) s 7(1).

42 *Penalties and Sentences Act 1992* (Qld) ss 111, 163.

43 *Sentencing Act 1991* (Vic) s 8(1).

44 *Penalties and Sentences Act 1992* (Qld) s 12(2).

45 See generally *R v Brown* [1994] 2 Qd R 182; *ZXY v Tasmania Police* [2008] TASSC 55; *Blake v Adams* [2013] TASSC 44.

46 *R v Brown* [1994] 2 Qd R 182, 185 (Macrossan CJ), 193 (Lee J); *ZXY v Tasmania Police* [2008] TASSC 55, 35 (Porter J); *Blake v Adams* [2013] TASSC 44, 29 (Porter J).

In exercising its discretion as to whether or not to record a conviction, the court is required to balance the competing sentencing objectives of rehabilitation on the one hand against the requirements of punishment, denunciation and deterrence on the other.⁴⁷ Case authority has identified a tension between the community interest in recording a conviction (and having the information available) and the benefit to the offender of not recording a conviction (and having the information concealed), as highlighted by the Queensland Court of Criminal Appeal:

the effect of such an order is capable of considerable effect in the community. Persons who may have an interest in knowing the truth in such matters include potential employers, insurers, and various government departments including the Immigration Department. ... For present purposes it is enough to note that the making of an order [to proceed without conviction] has considerable ramifications of a public nature, and the courts need to be aware of this potential effect.

... On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power 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. This potential oppression may stand in the way of rehabilitation ...⁴⁸

The court needs to 'weigh up the public interest, and the need for an official record to be made of the commission of the offence, against the beneficial nature to the offender of a conviction not being recorded'.⁴⁹ These comments indicate that the judicial approach to balancing the competing interests of the community and the offender is based on the assumption that a non-conviction order will not be disclosed (and that this will benefit the offender). This approach is supported by the results of a survey of sentences imposed by the Supreme Court of Tasmania between 2008 and 1 November 2013, where the Sentencing Advisory Council (Tas) identified the likely impact on future employment (from disclosure) and rehabilitation as factors that were often associated with the exercise of the discretion in favour of not recording a conviction.⁵⁰

In some cases, the decision as to whether or not to record a conviction has been based on the misconception that a finding of guilt without a conviction will not be disclosed to employers.⁵¹ For example, in *Director of Public Prosecutions (Tas) v*

47 *R v Cay, Gersch and Schell; Ex parte A-G (Qld)* (2005) 158 A Crim R 488, 52 (Keane JA); *ZXY v Tasmania Police* [2008] TASSC 55, 41–42 (Porter J); *DPP v NOP* [2011] TASSCA 15, 22, 27, 42 (Evans J); *Higgins v McCulloch* [2013] TASSC 49, 33, 45 (Tennent J); *R v CV* [2013] ACTCA 22, 29.

48 *R v Briese; Ex parte A-G (Qld)* [1998] 1 Qd R 487, 491.

49 *A-G (Tas) v Smith* [2002] TASSC 10, [26] (Crawford J).

50 Sentencing Advisory Council (Tas), above n 6, 12 [2.3].

51 In Tasmania, there are a number of categories of employment where findings of guilt without conviction are disclosed to employers. These are contained in the *Annulled Convictions Act 2003* (Tas) sch 1 and include working with children sch 1 pt 6. See also Sentencing Advisory Council (Tas), above n 6, 18 [2.5.2].

NOP,⁵² a case involving the rape of six year old by a youth aged 15 with a mental age of 10, Evans J expressed the view that a recorded conviction was appropriate as future employers had:

a legitimate interest in knowing about the respondent's criminal conduct ... It may be that the respondent can find employment as a gardener or labourer in a crèche or school. To my mind, the need for potential employers in areas such as these to be in a position to know of the respondent's criminal conduct outweighs the adverse impact of recording convictions on his employment prospects. With respect, for this reason alone, I consider that it was an error not to record the convictions.⁵³

Despite Evans J's concern that not recording a conviction would result in non-disclosure of the accused's offending behaviour in the context of employment for manual work in proximity to children, a finding of guilt without a conviction would have been disclosed to obtain such employment. In other cases, the exercise of discretion in favour of not recording a conviction was supported by the court, (even if employers would receive information about a finding of guilt without a conviction recorded), on the basis that employers would be able to appropriately evaluate the distinction between conviction and guilt.⁵⁴

There are jurisdictional variations in relation to the rate of use of non-conviction sentences. In the Victorian Magistrates' Court, from 2009–10 and 2012–13, a majority of offenders (60%) received a conviction.⁵⁵ The relevant percentages for convictions were 20.3% for those who entered into an adjourned undertaking, 63.6% for those who were fined and 83.6% for those who received a community-based order.⁵⁶ In the Tasmanian Magistrates' Court, non-conviction sentences were used less frequently, with convictions recorded in relation to 92% of changes finalised in 2013–14.⁵⁷ Convictions were recorded for 25% of charges where a conditional adjournment was imposed and for 93% of cases where a probation order was imposed.⁵⁸ The difference between the jurisdictions can be explained, in part, on the basis that the discretion to impose a sentence without conviction is more limited in Tasmania, as there is currently no power for a Tasmanian court to impose a fine without recording a conviction.⁵⁹

52 [2011] TASCCA 15.

53 Ibid [27]. See also *R v CV* [2013] ATCCA 22, [31].

54 See *DPP v Kose* [2006] VSCA 119, 16 (Warren CJ).

55 Freiberg, above n 3, 88 [1.265].

56 Sentencing Advisory Council (Vic), 'Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria' (Report, May 2014) 32 [2.6.3].

57 Sentencing Advisory Council (Tas), above n 6, 11 [2.3].

58 Ibid.

59 The Sentencing Advisory Council (Tas) has recommended that the discretion to not record a conviction under the *Sentencing Act 1997* (Tas) s 7 should be amended to allow for a fine to be imposed without a conviction recorded; Ibid Recommendation 30, 88 [4.3.3].

IV DOES THE DISCRETION TO ‘NOT RECORD A CONVICTION’ SHIELD AN OFFENDER FROM ADVERSE EMPLOYMENT CONSEQUENCES?

The increased focus, in the employment context, on a person’s criminal past would seem to strengthen the case for the existence of the discretion of the court to not record a conviction. The assumption of the court, in many cases, is that the exercise of discretion to not record a conviction assists the offender in avoiding adverse employment repercussions that would otherwise result from a recorded conviction. This exercise of this discretion however, would seem to depend on a number of factors, including: whether legislation that restricts occupational registration or licensing based on criminal offending does so only on the basis of a recorded conviction (whether or not employers or regulatory bodies receive information about the finding of guilt without conviction) and, if they do, whether they differentiate between findings of guilt and recorded convictions.

A criticism of non-conviction sentences is that, contrary to the intent of the discretion, the order has little practical effect on an offender’s employment prospects, on the basis that there is little discernible difference between a conviction and a finding of guilt without recording a conviction. Edney and Bagaric write that:

Notions of status have ... changed considerably. This is most notable in the impact of convictions on employment. Previously employers would often screen prospective employees by ascertaining if they had previously been convicted of a criminal offence. Now it is far more common to inquire into the broader issue of whether the prospective employee has been found guilty of a criminal offence — irrespective of whether or not they have been convicted.⁶⁰

Accordingly, it is argued that the dichotomy between conviction/non-conviction has lost its significance and should be abolished. It is argued that the discretion as to whether or not to record a conviction lacks ‘proper justification and [is] merely the product of tradition and historical imperatives’.⁶¹ Non-conviction sentences are said to waste considerable court resources, given the time involved in making the decision about whether to record a conviction (as well as appeals against the decision), with little practical benefit for the offender (or the community).⁶² Instead, Edney and Bagaric propose that ‘employment deprivations, where appropriate, should be incorporated into the overall sanction meted out by courts to wrongdoers’ and that ‘courts should have in their sentencing armoury the power

60 Edney and Bagaric, above n 2, 288 [11.4.4].

61 Ibid.

62 Ibid.

to prevent people working for designated periods of time.⁶³ The proposal is that once any period of disqualification has ended, there should be no employment restrictions subject to the employer's ability 'to exclude offenders from positions if they can demonstrate a link between the offence and the proposed position, or if the employment setting would provide the wrongdoer with an enhanced opportunity to reoffend'.⁶⁴

The strength of this criticism depends on whether there is any practical distinction between a finding of guilt without a conviction and a recorded conviction for employment purposes. This involves an examination of licensing and registration laws relevant to employment, the information that is released in a criminal history check and the ability of employers to make use of criminal history information obtained from other sources. However, even if it is found that the distinction between conviction and guilt has been blurred in the modern context, it should be questioned whether the abolition of the distinction is the most appropriate way of responding.

A Statutes that Impose Restrictions on Employment or Licensing

Numerous statutes provide that positions on statutorily created boards, tribunals, trusts and government or semi-government authorities are vacated following a conviction of a specified type.⁶⁵ These provisions may be specified to apply automatically or at the discretion of a government official (usually the Minister or the Governor). These statutes typically only apply following a conviction and are generally not activated by a finding of guilt without conviction. For example, the Sentencing Advisory Council (Tas) found that '[o]f the 81 Tasmanian statutes that provide for the removal from a position on a government body or an appointment to office by government, only four statutes provide that a finding of guilt is sufficient'.⁶⁶ In this context, there is a clear distinction between a recorded conviction and a finding of guilt without conviction with a benefit to the offender of receiving a non-conviction sentence.

The rise of occupational regulation, and the associated grant of licences or permits relevant to employment, has meant that criminal offending may operate to

63 Ibid 289. This approach is used in Spain, in conjunction with administrative disqualifications that bar some ex-offenders from some positions (such as prison and police officers, firemen, Central Bank of Spain officials). In Spain, a court may impose an occupational disqualification for some occupations (civil servant, professor, judge) as part of the sentence; Elena Larrauri and James Jacobs, 'A Spanish Window on European Law and Policy on Employment Discrimination Based on Criminal Record' in Tom Daems, Dirk van Zyl Smit and Sonja Snacken (eds), *European Penology?* (Hart Publishing, 2013) 293, 297.

64 Edney and Bagaric, above n 2, 289.

65 For an overview of the Tasmanian statutes, see Sentencing Advisory Council (Tas), above n 6, 26 [3.4.1] and app 3, table 1. Similar provisions exist in other states see, eg, *Victoria State Emergency Service Act 2005* (Vic) s 14; *South Bank Corporation Act 1989* (Qld) s 10, sch 1, pt 1, cl 2, 3.

66 Sentencing Advisory Council (Tasmania), above n 6, 64 [4.2.1.2] n 582. It was noted that in three of the Acts, guilt alone was sufficient because it related to health, education and the legal profession.

automatically bar a person from a particular occupation or licence or may provide the basis for the exercise of a discretionary judgment to deny a person the relevant registration or licence. In the Victorian context, Freiberg has observed that '[t]he existence of a conviction, or the unfitness it reveals, is repeatedly identified in legislation as a principal factor justifying withdrawal or refusal of licence or registration by the regulating authority, or dismissal from office.'⁶⁷ Some statutes operate only on conviction. For example, a person convicted of an indictable offence and sentenced to more than three years imprisonment is ineligible to be licensed as a conveyancer in Tasmania.⁶⁸ Similarly, a person convicted for an offence of dishonesty or fraud punishable by imprisonment for at least three months is disqualified from managing corporations.⁶⁹

There is, however, a tendency for statutes that regulate occupational registration or issue licences or permits relevant to employment to also apply to findings of guilt without conviction. The Sentencing Advisory Council (Tas) found that a finding of guilt was sufficient for 78% of the statutes where a person's criminal history was relevant to the grant of registration, licence or permit. This was either expressly mentioned in the statute or potentially incorporated within a more general character test (such as a 'fit and proper person' test).⁷⁰ In Victoria, while some statutory provisions apply only for a recorded conviction,⁷¹ generally both guilt and conviction are relevant for occupational registration.⁷² Further, some legislation makes a distinction between recorded convictions and findings of guilt without conviction for the purposes of granting a licence. For example, under the *Private Security Act 2004* (Vic), a distinction is made between a recorded conviction for a disqualifying offence (which is relevant for 10 years) and a finding of guilt without a conviction recorded (which is relevant for only five years).⁷³ In Queensland, similarly some statutes focus on recorded convictions.⁷⁴ However, there are also exemptions that would allow a regulatory authority to have regard

67 Freiberg, above n 3, 637 [9.280].

68 *Conveyancing Act 2004* (Tas) s 5.

69 *Corporations Act 2001* (Cth) s 206B. See also *Cooperatives Act 1999* (Tas) s 213.

70 Sentencing Advisory Council (Tas), above n 6, 64 [4.2.1.2].

71 See, eg, *Building Act 1993* (Vic) s 221S.

72 See, eg, *Motor Car Traders Act 1986* (Vic) ss 3(6), 13(4)(l), (5); *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 6(2)(a); *Casino Control Act 1991* (Vic) ss 52(1)(b), 53(1); *Legal Profession Act 2004* (Vic); *Sex Work Act 1994* (Vic) s 37(1)(b); *Private Security Act 2004* (Vic) ss 25(2)(e)(ii), 26(1)(c); *Legal Profession Act 2004* (Vic) sch 1 cl 6(1) (definition of 'conviction'); *Conveyancers Act 2006* (Vic) s 5(i); *Education and Training Reform Act 2006* (Vic) 1.1.3(4) (definition of 'national criminal history check'); *Accident Towing Services Act 2007* (Vic) s 3(2); *Occupational Licensing National Law Act 2010* (Vic) sch cl 4 (definition of 'criminal history').

73 *Private Security Act 2004* (Vic) ss 13 (definition of 'prohibited person'), 25(2)(e)(i)–(ii), 26(2)(e)(i)–(ii).

74 Legislation that restricts a criminal record to recorded convictions includes: *Wine Industry Act 1994* (Qld) sch 2 (definition of 'criminal history'); *Property Occupations Act 2014* (Qld) sch 2 (definition of 'conviction'); *Professional Engineers Act 2002* (Qld) s 11; *Debt Collectors (Field Agents and Collection Agents) Act 2014* (Qld) s 105, sch 2 (definition of 'conviction'); *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) s 159, sch 3 (definition of 'conviction').

to convictions without a conviction recorded for some types of registration or licensing.⁷⁵

In view of the divergent approaches in different legislation and jurisdictions, it is incorrect to say that a finding of guilt without conviction has little practical benefit for offenders. This may be true for some offenders, but not all offenders, as the potential employment benefit to the offender of receiving a non-conviction sentence is dependant on the category of registration or licensing.

B Criminal History Records

A key issue in the employment context is the information that is disclosed in an offender's criminal history record. A person may be requested to provide a criminal history record by an employer or licensing authority due to a mandatory legal requirement, or as part of an employer's recruitment process. If a person needs to obtain a National Police Check that sets out their criminal record for employment, occupation-related licensing, registration, voluntary work or personal information, they must complete a 'Consent to check and release a National Police Certificate'. It is the information about the offender that is divulged in this check that is likely to have real and long-lasting consequences for that offender — regardless of whether or not a conviction is recorded.

A significant constraint on the information that is disclosed in a National Police Check is the requirements of the spent conviction legislation, which has been enacted in all Australian jurisdictions (other than Victoria). This legislation allows for certain convictions to be spent through the lapse of time and imposes limits on the obligation of an offender to disclose a spent conviction.⁷⁶ There are jurisdictional differences in the legislation and an overview of the law in each

75 In Queensland, the distinction is made between a conviction with a recorded conviction and a conviction without recording a conviction. See *Penalties and Sentences Act 1992* (Qld) s 12. In Queensland, convictions with or without a recorded conviction are relevant to obtaining a blue card to work with children, and a yellow card for working with people with disabilities, for teacher registration, and for registration as a health practitioner. They are also relevant in the following Acts: *Tourism Services Act 2003* (Qld) sch 2 (definition of 'conviction'); *Veterinary Surgeons Act 1936* (Qld) sch 2 (definition of 'conviction'); *Police Service Administration Act 1990* (Qld) s 1.4 (definition of 'conviction'); *Security Providers Act 1993* (Qld) s 11(4)(c); *Transport Operators (Passenger Transport) Act 1994* (Qld) sch 3 (definition of 'conviction'); *Tobacco and Other Smoking Products Act 1998* (Qld) sch (definition of 'conviction'); *Explosives Act 1999* (Qld) sch 2 (definition of 'conviction'); *Prostitution Act 1999* (Qld) sch 4 (definition of 'conviction'); *Radiation Safety Act 1999* (Qld) sch 2 (definition of 'conviction'); *Animal Care and Protection Act 2001* (Qld) sch (definition of 'conviction'); *Private Employment Agents Act 2005* (Qld) s 39(3); *Corrective Services Act 2006* (Qld) sch 4 (definition of 'conviction'); *Food Act 2006* (Qld) sch 3 (definition of 'conviction'); *Legal Profession Act 2007* (Qld) s 11(1); *Families Responsibilities Commission Act 2008* (Qld) sch (definition of 'conviction'); *Public Service Act 2008* (Qld) s 181(4).

76 Naylor, Paterson and Pittard, above n 13, 180; See *Crimes Act 1914* (Cth) ss 85ZV, 85ZW; *Spent Convictions Act 1988* (WA) ss 25, 27; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 4, 5; *Criminal Records Act 1991* (NSW) s 12; *Criminal Records (Spent Convictions) Act 1992* (NT) s 11; *Spent Convictions Act 2000* (ACT) s 16; *Annulled Convictions Act 2003* (Tas) s 9; *Spent Convictions Act 2009* (SA) s 20.

jurisdiction is set out in the Appendix to this article.⁷⁷ The legislation provides for exemptions in some employment or licencing categories, where spent convictions still need to be disclosed.⁷⁸ In Victoria, while there is no legislation that allows convictions to be spent, police apply a policy of annulment.⁷⁹ This has the same effect as the legislative provisions, with the result that a National Police Check will not disclose offences committed as an adult, if a period of 10 years has elapsed since the last offending, or if a period of five years has elapsed, if the individual was a child when the person was found guilty. Again, these restrictions on disclosure are subject to exemptions for some employment categories.⁸⁰ Therefore, subject to exceptions for some categories of employment, a National Police Check will not disclose minor offending that has been annulled through the lapse of time.

Despite there being similarities in the spent conviction legislation and policy in relation to the disclosure of minor past offending, there are differences across the jurisdictions as to the circumstances in which findings of guilt without conviction are disclosed in a National Police Check. This is a result of the different legislative frameworks. Further, this means that the realisation of the judicial intent of shielding the offender from the adverse employment consequences, by the imposition of a non-conviction sentence, differs between jurisdictions.

1 *Victoria*

In Victoria, despite the statement in s 8(2) of the *Sentencing Act 1991* (Vic) that a finding of guilt is not to be equated with a conviction (subject to limited exemptions), no distinction is made between a recorded conviction and a finding of guilt without a conviction in the information that is released in a National Police Check. Victoria Police's *Information Release Policy* provides that criminal history information is released 'on the basis of findings of guilt' and that '[i]t is important to note that a finding of guilt without a conviction is still a finding of guilt and will be released'.⁸¹ This policy has been criticised for failing to reflect the objectives of providing the court with discretion to not record a conviction. Fitzroy Legal Service and Job Watch have stated that 'the daily exercise of judicial discretion to not impose convictions is routinely and systematically undermined in Victoria by the contradictory philosophy underpinning the Police Records

77 See also Freiberg, above n 3, 662–5 [9.370]; Sentencing Advisory Council (Tas), above n 6, 15–6 [2.4]; Naylor, Paterson and Pittard, above n 13, 179–81. For a discussion of the rationale for spent conviction schemes and the interrelationship of the schemes to broader sentencing principles see Moira Paterson and Bronwyn Naylor, 'Australian Spent Conviction Reform: A Contextual Analysis' (2011) 34 *University of New South Wales Law Journal* 938.

78 Sentencing Advisory Council (Tas), above n 6, app 10 for exemptions; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A.

79 Victoria Police, *National Police Certificates Information Release Policy* (November 2014) <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=38447>.

80 Ibid.

81 Ibid.

Information Release Policy'.⁸² Release of both recorded convictions and findings of guilt without conviction is only limited by annulment through lapse of time in cases where the release policy provides that the offences can be annulled.⁸³

2 Tasmania

In Tasmania, the disclosure of findings of guilt without conviction in a National Police Record Check depends on an interpretation of the relationship between the *Sentencing Act 1997* (Tas) s 10 and the provisions of the *Annulled Convictions Act 2003* (Tas). The *Sentencing Act 1997* (Tas) s 10 provides that '[e]xcept as otherwise provided by this Act or any other enactment, a finding of guilt without the recording of a conviction is not to be taken to be a conviction for any purpose'. The *Annulled Convictions Act 2003* (Tas) s 3(2) provides that '[f]or the purposes of this Act, where a court finds a person guilty of an offence but does not proceed to record a conviction, the finding is to be regarded as a conviction'.

One view is that the inclusion of findings of guilt within the *Annulled Convictions Act 2003* (Tas) means that findings of guilt are disclosed in a National Police Record Check, unless annulled. Until November 2013, this was the position of Tasmania Police who took the view that information was released 'in accordance with the *Annulled Convictions Act 2003* based on a finding of guilt'.⁸⁴ Since November 2013, Tasmania Police have adopted a different interpretation as a result of a 'comprehensive review and refinement of its information release policies'.⁸⁵ Now, Tasmania Police release information in accordance with the *Annulled Conviction Act 2003* (Tas) 'on the basis of the accepted definition of conviction',⁸⁶ which is a conviction that has been recorded in accordance with the *Sentencing Act 1997*

82 Fitzroy Legal Service and Job Watch, *Criminal Records in Victoria: Proposals for Reform* (2005) Job Watch, 13 <<http://www.jobwatch.org.au/images/stories/pdf/144623ervpr0706.pdf?phpMyAdmin=K7dCAZKKTaSFueO0byX8IIVcMse>>. See also Naylor, 'Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia', above n 26, 178–9; Paterson and Naylor, above n 77, 954.

83 Circumstances where a record that is over 10 years old may be released where the record check is for: child-screening unit or teaching, assisted reproductive treatment, health professionals, prisons or police force, casino or gaming licence, prostitution service provider's licence, operator accreditation pursuant to the *Bus Safety Act 2009* (Vic), private security licence, taxi services commission and firearms licence. Old offences will also be disclosed if the record includes a serious offence of violence or a sex offence and record check is for the purposes of employment or voluntary work with children or in other exceptional circumstances where the release of the information is in the interest of crime prevention or the administration of justice: Victoria Police, *National Police Certificates Information Release Policy* (November 2014) http://www.police.vic.gov.au/content.asp?a=internetBriddingPage&Media_ID=38447 >.

84 Tasmania Police, *Frequently Asked Questions* (2013) <<http://www.police.dev.ionata.com/services-online/police-history-record-checks/frequently-asked-questions/>>.

85 Tasmania Police, *Release Guidelines* (23 January 2015) <<http://www.police.tas.gov.au/services-online/police-history-record-checks/release-guidelines>>.

86 Ibid.

(Tas) s 7.⁸⁷ This acknowledges the distinction between guilt and conviction in the *Sentencing Act 1997* (Tas) and offers greater protection to offenders who receive non-conviction sentences than is provided to offenders in Victoria.

However, Tasmania Police have taken the view that the provisions of the *Annulled Convictions Act 2003* (Tas) continue to apply to findings of guilt without conviction in some circumstances. This is where findings of guilt are disclosed in a criminal record check in relation to the categories of appointment, post, status or privilege contained in sch 1 that are exempt from the provisions of the Act. This means that the type of check that is requested will dictate whether only convictions are shown or whether findings of guilt are also included.

In Tasmania, if a person requests a National Police Record Check, the information disclosed will reflect the purpose stated on the application form. There are two options:

Option 1 — sch 1 record

A sch 1 check is exempt from the provisions of the *Annulled Convictions Act 2003* (Tas) and so discloses annulled convictions.⁸⁸ It also discloses details of all findings of guilt including youth justice offences.⁸⁹ This type of check is required for the occupations or licences that involve positions considered to involve special responsibility, such as those that involve contact with children, law enforcement, and the handling of drugs and firearms.⁹⁰

Option 2 — annulled record

The second option requires the non-disclosure of annulled records information. This means that minor convictions that have met the necessary requirements (satisfying the required time period without reoffending) do not appear on the record. Sexual offences and convictions that receive more than six months imprisonment are not able to be annulled and will appear on the record.

87 Sentencing Advisory Council (Tas), above n 6, 51 [4.1.2.2], citing information provided to the Sentencing Advisory Council (Tas) by Tasmania Police, 11 February 2014. The precise meaning of conviction is difficult to identify because its meaning shifts depending on the context in which it is used: Freiberg, above n 3, 84–8 [1.255]–[1.260]; Sentencing Advisory Council (Tas), above n 6, 4–5 [1.4.2]; Edney and Bagaric, above n 2, 282–3 [11.4.1].

88 Sentencing Advisory Council (Tas), above n 6, 16 [2.4].

89 Tasmania Police, above n 84; *Annulled Convictions Act 2003* (Tas) s 3(2).

90 Schedule 1 checks are required for childcare, adoption/foster parent, scout volunteer, liquor licence, legal/judicial appointment, firearms licence, fire service, *Poisons Act 1971* (Tas), child related health, justice of the peace, bookmaker, stipendiary steward, security/crowd control, prisons/corrective services, police/law enforcement, teaching/non-teaching education staff, youth justice, gaming licence, driver/public passenger licence, Poppy Advisory and Control Board, school-crossing patrol officer, or authorised officer (*Traffic Act 1925* (Tas)): Tasmania Police, *Consent to Check and Release a National Police Certificate* < <http://www.police.tas.gov.au/services-online/police-history-record-checks>>.

Significantly, an annulled record does not disclose findings of guilt and this option applies for other categories of employment or licensing.⁹¹

Accordingly, the Tasmanian position aligns more closely to the judicial objective of limiting adverse consequences for future employment and other detrimental impacts arising from a conviction by limiting disclosure of a finding of guilt. However, offenders who receive a non-conviction sentence and who are required to obtain a police check for employment or licensing purposes that fall within the exemptions in sch 1 of the *Annulled Convictions Act 2003* (Tas) will still have this order disclosed. Schedule 1 contains quite a broad category of exemptions and extends to relatively unskilled occupations such as taxi driving and cleaning in schools, thereby potentially reducing the employment opportunities of ex-offenders.⁹²

3 Queensland

In Queensland, there is greater restriction on the disclosure of finding of guilt without a recorded conviction in a National Criminal Record Check. The *Penalties and Sentences Act 1992* (Qld) s 12(3) provides that:

Except as otherwise expressly provided by this or another Act —

- (a) a conviction without recording the conviction is taken not to be a conviction for any purpose; and
- (b) the conviction must not be entered in any records except —
 - (i) in the records of the court before which the offender was convicted; and
 - (ii) in the offender’s criminal history but only for the purposes of sub-s (4)(b).⁹³

There is no equivalent of *Penalties and Sentences Act 1992* (Qld) s 12(3) in Victoria or Tasmania. Section 12(3) has the effect that a conviction without a conviction recorded ‘is not generally disclosed to interested third parties other than under a legislative authority’⁹⁴ and that a National Police Record Check only contains information about recorded convictions. The Queensland Police website advises that:

91 An annulled record check applies for aged care, church group, visa, health (other than child related), rental/housing, general employment, racing industry (other than bookmaker or stipendiary steward), adult disabled care, student, or other employment or industry: *Ibid*.

92 See, eg, Naylor, ‘Criminal Record and Rehabilitation in Australia’, above n 20, 86–7.

93 The purposes contained in the *Penalties and Sentences Act 1992* (Qld) s 12(4)(b) are: appeals against sentence, proceedings for variation or contravention of sentence, proceedings against the offender for a subsequent offence and subsequent proceedings against the offender for the same offence.

94 Letter from Marc Walker, Acting Manager, Police Information Service, Queensland Police Service to Rebecca Bradfield, 1 September 2014.

A Police Certificate contains a certification that the person to whom it relates either has no ‘disclosable’ convictions or has a ‘disclosable’ conviction that is detailed in the Certificate. A ‘disclosable’ conviction is one that is recorded by the court and has not been rehabilitated or spent under the *Criminal Law (Rehabilitation of Offenders) Act 1986* [(Qld)] and, in the case of Commonwealth convictions, the *Crimes Act 1914* [(Cth)], and does not breach the confidentiality provisions of the *Youth Justice Act 1992* [(Qld)].⁹⁵

However, despite the distinction drawn between a recorded conviction and a conviction that is not recorded for the purposes of a National Police Record Check, there is not a significant difference between the Tasmanian and Queensland positions as there are still circumstances where non-conviction sentences need to be disclosed for employment or licensing purposes. This is where an organisation is able to receive a full criminal history under a legislative authority, which includes disclosure for the purposes of occupations or licences that are considered to involve special responsibility.⁹⁶

C Information Obtained About Criminal Offending From Other Sources

Employers do not always ask a potential employee to provide a criminal record check from the police. An employer may simply ask the applicant whether they have committed any offences. This type of question does not make a distinction between findings of guilt without conviction and recorded convictions. Further, it is difficult for a prospective employee to refuse to answer a question in a job interview about past offending.⁹⁷ There is a danger that applicants may not understand the information that is being sought by an employer’s question and

95 Queensland Police, *Police Certificate (Australia-Wide Criminal History)* (25 August 2014) <[https://www.police.qld.gov.au/corporatedocs/purchase/Police-Certificate-\(Australia-Wide-Criminal-History\).htm](https://www.police.qld.gov.au/corporatedocs/purchase/Police-Certificate-(Australia-Wide-Criminal-History).htm)>.

96 Disclosure of a full criminal history is authorised for the purposes of obtaining a blue card to work with children; a yellow card for working with people with disabilities; for teacher registration; for registration as a health practitioner; under the *Radiation Safety Act 1999* (Qld) ss 51(6), 103B(8), sch 2 (definition of ‘conviction’); *Security Providers Act 1993* (Qld) ss 11(4)(d)–(e), sch 2 (definition of ‘conviction’); *Legal Profession Act 2007* (Qld) s 11(1); *Animal Care and Protection Act 2001* (Qld) sch (definition of ‘conviction’); *Corrective Services Act 2006* (Qld) sch 4 (definition of ‘conviction’); *Explosives Act 1999* (Qld) sch 2 (definition of ‘conviction’); *Prostitution Act 1999* (Qld) sch 4 (definition of ‘conviction’); *Police Service Administration Act 1990* (Qld) s 1.4 (definition of ‘conviction’); *Private Employment Agents Act 2005* (Qld) s 39(3); *Public Service Act 2008* (Qld) s 181(4); *Transport Operations (Passenger Transport) Act 1994* (Qld) sch 3 (definition of ‘conviction’); *Veterinary Surgeons Act 1936* (Qld) sch 2 (definition of ‘conviction’); *Tobacco and Other Smoking Products Act 1998* (Qld) sch (definition of ‘conviction’); *Food Act 2006* (Qld) sch 3 (definition of ‘conviction’); and in relation to gambling and wagering (for example, casinos, keno, and lotteries): Sentencing Advisory Council (Tas), above n 6, 203 app 10. It is noted that unlike Tasmania, the exemptions for disclosure are created in the relevant legislation and the exemptions contained in the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A do not apply to convictions without a recorded conviction pursuant to any law.

97 Australian Human Rights Commission, above n 30, 20–2, 25–6.

may provide incorrect information.⁹⁸ For example, an offender may believe that it is not necessary to disclose a finding of guilt without conviction if an employer asks about their criminal history. This dishonesty may provide a legitimate basis for refusing to recruit a person, or for dismissal on the grounds of dishonesty.⁹⁹

Employers may also undertake independent research about a prospective employer using the internet, as technology makes it much more difficult for an offender to ‘live down the past’.¹⁰⁰ In the past, an offender could expect that knowledge of his or her criminal history would diminish over time — it would be ‘rare for a criminal record to continue to haunt an individual’.¹⁰¹ Now, with the arrival of the internet, there is a large volume of searchable information, publically available from legitimate sources such as news reports and court judgments and questionable sources such as CrimeNet.¹⁰² Access to this information does not make any distinction between a finding of guilt without recording a conviction or the recording of a conviction — all information is accessible and this ‘increase[s] the risk that a finding of guilt will forever stigmatise a person and put their rehabilitation ... at risk’.¹⁰³

The right of an employer to conduct independent research is constrained by privacy laws (depending on the type of workplace). There are restrictions pursuant to the Australian Privacy Principles (APPs) placed on the collection of criminal records information. Australian Privacy Principle 3 provides that ‘sensitive information’ (which includes an individual’s criminal record) cannot be collected without the individual’s consent, unless an exemption applies.¹⁰⁴ The APPs replaced the National Privacy Principles (NPPs) from 12 March 2014.¹⁰⁵ In relation to the equivalent privacy principle under the NPPs, Paterson states that the restriction on collection of sensitive information ‘means that employers who are

98 Fitzroy Legal Service and Job Watch, above n 82, 20; Human Rights and Equal Opportunity Commission, ‘Discrimination in Employment on the Basis of Criminal Record’ (Discussion Paper, December 2004) 31–2 [6.4].

99 Australian Human Rights Commission, above n 30, 21; Human Rights and Equal Opportunity Commission, above n 98, 6–7 [2.1].

100 Paul Chadwick, ‘Controlled Disclosure of Criminal Record Data: Report to the Attorney-General Pursuant to Section 63(3) of the *Information Privacy Act 2000*’ (Report No 02.06, Office of the Victorian Privacy Commissioner, June 2006) 4 [22].

101 Paterson and Naylor, above n 77, 939.

102 CrimeNet <<http://www.crimenet.org>> operates from California and contains ‘a database of tens of thousands of mostly Australian criminal records with emphasis on records relating to fraud, paedophilia, sex-related crimes and crimes of violence’. See also *ibid*.

103 Chadwick, above n 100, 4 [22].

104 *Privacy Act 1988* (Cth) sch 1 cl 3. Exemptions apply if the collection of the sensitive information is required or authorised by law; if a permitted general situation exists; if a permitted health situation exists; if the APP entity is an enforcement body and the collection is reasonably necessary for or related to the entity’s functions or activities; if the APP entity is a non-profit organisation and the sensitive information relates to the activities and members of the organisation, or to individuals who have regular contact with the organisation in connection with its activities: *Privacy Act 1988* (Cth) sch 1 cl 3 sub-cl 3.4.

105 Office of the Australian Information Commissioner, *Australian Privacy Principles* <<http://www.oaic.gov.au/privacy/privacy-act/australian-privacy-principles>>.

bound by the NPPs are precluded from¹⁰⁶ conducting ‘informal (non-consensual) criminal records searches such as via the Internet’.¹⁰⁷ The APPs generally apply to private sector organisations with a turnover of \$3 million or more.¹⁰⁸ There is also privacy legislation in the state jurisdictions that regulates the collection, use and disclosure of personal information by government agencies.¹⁰⁹ However, there are limitations with privacy protection as this does not generally apply to small businesses.

There are some legal constraints on the use of criminal records by employers in making employment decisions. Industrial law operates to protect people with a criminal record from unfair dismissal from employment.¹¹⁰ There is also protection for potential employees who are discriminated against on the grounds of their criminal record. Anti-discrimination laws offer some protection, as it is unlawful to discriminate on the grounds of irrelevant criminal records. Tasmania is one of only three jurisdictions in Australia to include ‘criminal record’ as a statutory ground of discrimination.¹¹¹ The *Australian Human Rights Commission Act 1986* (Cth) applies throughout Australia and it defines discrimination to include discrimination on the ground of criminal records,¹¹² subject to the exception that criminal records can be taken into account where it means that

106 Moira Paterson, ‘Restrictions on Employers’ Handling of Criminal Records Information: Privacy and Confidentiality Issues’ (2012) 18 *Employment Law Bulletin* 120, 121.

107 Paterson, above n 19, 79. See also Australian Human Rights Commission, above n 30, 11–12.

108 Office of the Australian Information Commissioner, above n 105. In addition, the APPs apply to some businesses with a turnover of less than \$3 million, including private sector health service providers, such as complementary therapists, gyms and weight loss clinics; child care centres; private schools and private tertiary educational institutions; businesses that sell or purchase personal information; credit reporting bodies; contracted service providers for a Commonwealth contract; employee associations under the *Fair Work (Registered Organisations) Act 2009* (Cth); and businesses that have opted-in: Office of the Australian Information Commissioner, *Who is Covered by Privacy* <<http://www.oaic.gov.au/privacy/who-is-covered-by-privacy>>.

109 See, eg, *Personal Information Protection Act 2004* (Tas); *Privacy and Data Protection Act 2014* (Vic); *Right to Information Act 2009* (Qld).

110 Australian Human Rights Commission, above n 30, 12; See also Marilyn Pittard, ‘Discrimination Law: Constraints on Criminal Record Checks in Recruitment’ (2012) 18 *Employment Law Bulletin* 124, 127.

111 *Anti-Discrimination Act 1998* (Tas) s 16(q). ‘[I]rrelevant criminal record’ includes where ‘the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises’: *Anti-Discrimination Act 1998* (Tas) s 3 (definition of ‘irrelevant criminal record’). Section 50 allows for discrimination on the basis of irrelevant criminal record ‘in relation to the education, training or care of children if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of [the] children’. See also *Anti-Discrimination Act 1992* (NT) s 19(q); *Australian Human Rights Commission Act 1986* (Cth); Australian Human Rights Commission, above n 30, 8–10.

112 Naylor, ‘Criminal Record and Rehabilitation in Australia’, above n 20, 89 n 37 explains that ‘[t]his is achieved by having the ILO Convention 111 incorporated as a schedule to the Human Rights Commission Act; ILO 111 article 1(1)(a) defines ‘discrimination’ in employment as ‘[a]ny distinction, exclusion or preference made on the basis of ... [criminal record] ... which has the effect of nullifying or impairing equality of opportunity or treatment in employment’. The *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(iii) extends the definition of discrimination to include criminal record. See also Naylor, Paterson and Pittard, above n 13, 181–4; Australian Human Rights Commission, above n 30, 8–9.

a person is unable to carry out the ‘inherent requirements of the job’.¹¹³ It would thus seem that discrimination protection is limited, as there may be difficulties establishing that the person’s lack of success in obtaining employment was due to discrimination on the basis of their irrelevant criminal record, as opposed to some other legitimate reason. It also requires the ex-offender to pursue the discrimination claim.

D Summary

As this analysis has shown, the extent to which the discretion to ‘not record a conviction’ shields an offender from the adverse employment consequences of a conviction differs between jurisdictions and between occupational categories.

Statute makes a distinction between guilt and conviction in relation to positions on government boards and bodies and for some categories of employment. However, there are a number of regulated occupations where a finding of guilt without conviction is relevant to the granting of registration.

In relation to the information that is disclosed in a criminal history check, the criticism that non-conviction sentences serve no useful purpose for an offender in the employment context has some validity in Victoria, where the release policy of Victoria Police makes no distinction between a recorded conviction and a finding of guilt without conviction. In a National Police Check, an employer will receive information about all findings of guilt (whether or not a conviction was recorded) and the utility of the order to the offender will depend on the employer’s ability to make a distinction between guilt and conviction. In jurisdictions (such as Tasmania and Queensland) where there is more limited disclosure of findings of guilt without conviction, the criticism has less validity. However, even in these jurisdictions, there are still problems with the range of exemptions that apply to the disclosure of findings of guilt without conviction.

Further, the protections that are offered to an offender outside of the formal police check process are limited and may not effectively operate to prevent an employer from taking into account information about findings of guilt without conviction obtained from other sources.

V HOW SHOULD EX-OFFENDERS BE PROTECTED FROM ADVERSE EMPLOYMENT CONSEQUENCES?

It can be seen that the current arrangements have limitations in their ability to shield an offender from adverse employment consequences that follow from being

¹¹³ *Australian Human Rights Commission Act 1986* (Cth) s 3(b)(ii) (definition of ‘discrimination’). It is noted that under the HREOC process, ‘while certain conduct may be found to constitute discrimination by the Commission, the HREOC Act does not make the conduct unlawful’: Human Rights and Equal Opportunity Commission, above n 98, 11 [3.2]. For more information on the process see generally Australian Human Rights Commission, above n 30; Pittard, above n 110.

found guilty of a criminal offence. In view of the connection between employment and rehabilitation, the issue as to the most appropriate way for the legal system to respond remains to be addressed. In considering the law's response to the employment difficulties experienced by ex-offenders, this article focuses on the mechanism of non-conviction sentences. However, it is recognised that the means of protecting offenders from the adverse consequences of a criminal conviction operate within a broader framework that includes both legal (for example, spent conviction legislation, privacy, discrimination and employment law) and support services directed at assisting ex-offenders to access employment.¹¹⁴

One approach could be the abolition of non-conviction sentences and the adoption of an approach, such as that advocated by Edney and Bagaric, that removes the distinction between guilt and conviction. Edney and Bagaric acknowledge that workplace discrimination based on criminal offending is unfair, but argue that the distinction between guilt and conviction is not the appropriate mechanism to provide protection to offenders. Instead, the authors suggest that the court should have the discretion to prohibit employment at the sentencing stage, as part of the sanction imposed by the court. It was asserted that '[t]he basic principle should be ... that once people have completed their sanction they should be eligible for all forms of employment'. This is said to be subject to the ability of employers to take into account offending that is relevant to the employment context (either because of a link between prior offending and the employment context, or because the employment setting would provide an opportunity to reoffend).¹¹⁵

An alternative approach is suggested in this article that reflects the approach adopted by the Sentencing Advisory Council (Tas).¹¹⁶ Similar to the approach of Edney and Bagaric, this approach recognises the need to limit adverse ongoing consequences for offenders and to provide employment opportunities for offenders. However, this approach does not accept that there is no place in the modern criminal justice system for non-conviction sentences. Instead, it is argued that non-conviction sentences have the potential to be a valuable sentencing tool, as they reaffirm the distinction between guilt and conviction and provide greater protection for offenders in relation to the need to disclose a finding of guilt without conviction and the ability of employers to take them into account.

Non-conviction sentences are not redundant and can be justified within the theoretical frameworks of both retributive and utilitarian approaches to punishment. The Sentencing Advisory Council (Tas) examined the relationship between non-conviction sentences and the principles of punishment and sentencing aims and purposes. It considered that, from a retributive standpoint, a finding of guilt without conviction allows the court to impose a sentence that is

114 See, eg, WISE Employment, *An Overview of WISE's Programs for Ex-offenders in Australia* (2012) <http://www.wiseemployment.com.au/uploads/publications/An_overview_of_WISEs_programs_for_ex-offenders_in_Australia.pdf>; ACSO, *Employment with Conviction: Criminal Justice Recruitment Service for Job Seekers and Employers* <<http://www.acso.org.au/what-we-do/through-gate/employment-conviction>>.

115 Edney and Bagaric, above n 2, 289.

116 Sentencing Advisory Council (Tas), above n 6, 53–4 [4.1.3].

proportionate to the offence, as well as to exercise mercy in appropriate cases.¹¹⁷ In addition, from a utilitarian viewpoint, '[by] relieving the offender of the stigma of a conviction, and the associated barriers to employment ... non-conviction sentences facilitate the aims of community safety and individual rehabilitation'.¹¹⁸ The Sentencing Advisory Council (Tas) concluded that:

Regardless of other sanctions imposed by the court, the recording of a conviction remains an act of significant punishment — both as a symbolic mark of censure and because of the consequences that attach to a conviction. The power of a court to impose a sentencing order without conviction (whether as a mandatory or discretionary requirement) allows the courts to take account of the circumstances of the particular case and impose a sentence that is appropriate for the offence and the offender. At the sentencing stage, the distinction between conviction and non-conviction allows the court to impose a proportionate sentence directed to the rehabilitation of the offender. This can make a difference for the individual offender and, importantly, it can also be justified within a broader theoretical framework.¹¹⁹

This accords with the view of judges on the significance of a conviction.¹²⁰

A non-conviction sentence has a valuable role to play in the rehabilitation of offenders and the protection of the community, provided the intent of the order is realised. This requires a reinforcement of the separation of guilt and conviction, which can be achieved in three ways:

- (1) by further limiting the disclosure of findings of guilt without conviction in a criminal history check;
- (2) by limiting the relevance of findings of guilt without conviction to occupational registration and the grant of permits or licences that may be relevant to a person's ability to work in a particular area; and
- (3) by creating a regulatory framework that governs the need for offenders to disclose a non-conviction sentence and the ability of an employer or regulatory authority to take account of a finding of guilt without conviction.

A Limiting Disclosure of Findings of Guilt Without Conviction in a Criminal History Check

A model to strengthen the distinction between guilt and conviction in the employment context has recently been recommended by the Sentencing Advisory

117 Ibid 49 [4.1.1.1].

118 Ibid 49 [4.1.1.2].

119 Ibid 53 [4.1.3].

120 *R v McInerney* (1986) 42 SASR 111, 124 (Cox J).

Council (Tas).¹²¹ The Council's view was that non-conviction sentences should only be made available in exceptional circumstances and that the consequences that attach to a finding of guilt where a conviction is not imposed should differ from those that follow from a recorded conviction.¹²² In the employment context, exceptions to the general rule that findings of guilt should not be disclosed were recommended for the following four categories:

- (1) Registration and employment for teachers and for persons working with vulnerable persons;
- (2) Registration for health practitioners under the *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas);
- (3) Appointment as a judicial officer or employment or consultancy with a Justice Agency,¹²³ and
- (4) The operation of the *Legal Profession Act 2007* (Tas).¹²⁴

These recommendations are consistent with the approach in South Australia, where recent changes to the *Spent Convictions Act 2009* (SA) have greatly restricted the circumstances in which a non-conviction sentence will be disclosed. In the employment context, non-conviction outcomes are only disclosed in relation to seeking employment with a justice agency and in relation to four specified organisations that are authorised to receive information about all convictions and non-convictions.¹²⁵ These are in relation to working with children and vulnerable persons, registration for health practitioners and teachers.¹²⁶ The South Australian amendments reflect the view that, to allow a finding of guilt where a conviction was not imposed to appear on a police check, circumvents the desire of the court that a conviction not be recorded. Instead, it was thought appropriate that 'if a

121 Sentencing Advisory Council (Tas), above n 6, 55–70 [4.2.1].

122 Ibid 55–63 [4.2.1.1].

123 The *Annulled Convictions Act 2003* (Tas) s 3 (definition of 'Justice Agency') defines 'Justice Agency' as: '(a) the Australian Federal Police; (b) the police force or service of a State; (c) the Australian Crime Commission established by s 7 of the *Australian Crime Commission Act 2002* (Cth); (d) the CrimTrac Agency established on 1 July 2000 as an Executive Agency by the Governor-General of the Commonwealth under s 65 of the *Public Service Act 1999* (Cth); (e) the Australian Customs Service established by s 4 of the *Customs Administration Act 1985* (Cth); (f) the Attorney-General for the Commonwealth or a State; (g) the Director of Public Prosecutions for the Commonwealth or a State; (h) a person employed in a Government Department or Agency of the Commonwealth or a State, or in a council, and whose primary duties include the prosecution of offences or assisting with the prosecution of offences; (i) the Director of Corrective Services and the equivalent entity in another State; (j) the Parole Board and the equivalent entity in another State; (k) the Registrar or administrator of a Commonwealth or State court; (l) the Secretary of the responsible Department in relation to the *Youth Justice Act 1997* and any entity that is responsible for the administration of discrete youth justice legislation in another State; [or] (m) a prescribed body or person'.

124 Sentencing Advisory Council (Tas), above n 6, 61 Recommendation 5.

125 *Spent Convictions Act 2009* (SA) ss 10, 13, sch 1 cls 1–2, 5–7, 9.

126 South Australia Police, *National Police Certificate Frequently Asked Questions* (1 July 2014) <<https://www.police.sa.gov.au/services-and-events/apply-for-a-police-record-check>>. Note also that the *Spent Convictions Act 2009* (SA) ss 13(3)–(3a), sch 1 cl 9A, as amended by *Statutes Amendment (Assessment of Relevant History) Act 2013* (SA) provides that screening units are excluded from disclosure restrictions on findings of guilt without conviction. However, the exclusion does 'not apply unless the prescribed screening unit is satisfied that there are good reasons for the exclusion to have effect under [the] Act': *Spent Convictions Act 2009* (SA) sch 1 cl 9A(2).

court declares that no conviction be recorded against an individual, then this will actually be the case'.¹²⁷

B Restrict the Range of Statutory Provisions that Allow Consideration of Findings of Guilt Without Conviction for Employment or Licensing Purposes

It is also necessary to restrict the range of statutory provisions that allow for consideration of findings of guilt for employment or licensing purposes. Currently, the trend appears to be for legislation to provide that findings of guilt without a recorded conviction are relevant for many licences and permits. It is argued that findings of guilt without conviction should not be disclosed unless an exemption (such as working with vulnerable people, teaching, the legal profession, appointment as a judicial officer or employment or consultancy with a Justice Agency) applies. This was the position of the Sentencing Advisory Council (Tas), which expressed the view that 'findings of guilt without conviction should not routinely be disclosed or considered relevant to an offender's suitability for employment or registration/licensing (either expressly or as part of discretionary judgment based on character) unless one of the exemptions applies'.¹²⁸ This would require a review of the statutory provisions that apply on a finding of guilt, such as those undertaken by the Sentencing Advisory Council (Tas) to identify provisions that require amendment to implement this approach.

C Creating a Regulatory Framework

In addition to limiting disclosure in a criminal records check, there needs to be clarification of the rights and obligations of offenders and employers, regulators and licensing authorities in relation to non-conviction sentences. It is argued that legislative protection is required to ensure that it is made clear (subject to the limited exceptions above) that:

- (a) a person is not required to disclose a finding of guilt without conviction;
- (b) it does not form part of the person's official criminal record;
- (c) it is not relevant to any legislative provision that refers to a conviction or a person's character (such as an assessment that the person is a fit and proper person); and
- (d) it should not be taken into account by an employer/regulator authority in making a decision in relation to employment and associated licensing.

This needs to be supported by the creation of offences of improper disclosure and the unauthorised taking into account a finding of guilt without conviction. An

¹²⁷ South Australia, *Parliamentary Debates*, House of Assembly, 13 November 2012, 3644 (John Rau).

¹²⁸ Sentencing Advisory Council (Tas), above n 6, 64 [4.2.1.2].

appropriate model for this legislation exists in the annulled and spent conviction legislation, and findings of guilt without conviction could be dealt with in separate legislation or provided for in the context of the existing spent conviction legislation.¹²⁹ This would enhance the existing protections contained in privacy and anti-discrimination laws.

VI CONCLUSION

Non-conviction sentences are directed at protecting an offender (in appropriate cases) from the adverse employment consequences that follow from a conviction. The court is required to make an assessment of the appropriate balance between the public interest in having access to information about a person's criminal past and weigh it against the beneficial nature of the order for the offender. This discretion can be supported on the grounds of rehabilitation and proportionality. However, concerns have been raised that increased reliance by employers on criminal history checks and information about criminal offending means that the practical benefit to the offender is greatly diminished. This is undesirable, and it is argued that there needs to be greater limitations on the disclosure of a finding of guilt in a criminal record check. In addition, legislative protection is necessary to preclude an employer or regulator from taking into account a finding of guilt without conviction, subject to limited exceptions (such as for those working with vulnerable people or involved in the administration of justice).

It is argued that this approach is preferable to the approach suggested by Edney and Bagaric because it removes from employers (in appropriate cases) information about criminal offending. In view of the studies that have shown the reluctance of employers to recruit ex-offenders, it is problematic to allow employers to make the assessment of whether offending is relevant to the employment context in all cases.¹³⁰ This is not, however, to suggest that non-conviction sentences should be viewed in isolation, but rather as part of a broader framework to address criminal offending and employment.

129 Ibid 55–70 [4.2.1]. The Sentencing Advisory Council (Tas) recommended that the framework of the *Annulled Convictions Act 2003* (Tas) be used with findings of guilt without conviction being immediately annulled and the name of the legislation being changed to reflect its expanded operation: at 70 Recommendations 14 and 15.

130 A detailed consideration of these issues is beyond the scope of this article. However, it is noted that commentators have critiqued these areas in the context of criminal offending, see generally Paterson and Naylor, above n 77; Naylor, 'Do Not Pass Go: The Impact of Criminal Record Checks on Employment in Australia', above n 25; Paterson, above n 19; Naylor, Paterson and Pittard, above n 13; Pittard, above n 110; Chadwick, above n 100; Law Reform Commission, *Spent Convictions*, Report No 37 (1987); Fitzroy Legal Service and Job Watch, above n 82; Law Reform Commission of Western Australia, *The Problem of Old Convictions*, Report No 80 (1986) 24 [3.29–3.30]; Paterson, above n 19.

Appendix: Overview of Spent Conviction Legislation in Australia¹³¹

	ACT	Cth	NSW	NT	Qld	SA	Tas	WA
Legislation	<i>Spent Convictions Act 2000</i> (ACT)	<i>Crimes Act 1914</i> (Cth) Part VIIIC	<i>Criminal Records Act 1991</i> (NSW)	<i>Criminal Records (Spent Convictions) Act</i> (NT)	<i>Criminal Law (Rehabilitation of Offenders) Act 1986</i> (Qld)	<i>Spent Conviction Act 2009</i> (SA)	<i>Annulled Convictions Act 2003</i> (Tas)	<i>Spent Conviction Act 1988</i> (WA)
Waiting period	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (adult) 3 years (child)	10 years (adult) 5 years (child)	10 years (adult indictable) 5 years (other offences)	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (most adult offences) 3 years (offences involving certain cannabis offences)
Offences capable of being spent	6 month sentence or less (subject to exemptions for sexual offences, body corporate and prescribed convictions)	30 months sentence or less	6 month sentence or less (subject to exemptions for sexual offences, body corporate and prescribed convictions)	6 month sentence or less (subject to exemptions for sexual offences, body corporate and prescribed convictions)	30 months or less	12 month sentence or less (adult) 24 month sentence or less (child) Only eligible sexual offences can be spent	6 month sentence or less (subject to exemptions for sexual offences and prescribed convictions)	Serious convictions: sentence 1 year or less or a fine less than \$15,000 Lesser convictions: sentence 1 year or less

¹³¹ This table is adapted from the table in Paterson and Naylor, above n 77, Appendix.