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Risk and rehabilitation in criminal records checking by employers: what employers are doing and why?

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The use of criminal record checking has dramatically increased over the last 10–15 years, leading to concerns that ex-offenders are disadvantaged in seeking employment and therefore at greater risk of engaging in reoffending.² In order to better understand why and how employers are using criminal record checks, a two-stage empirical research project was conducted involving a survey of and interviews with HR managers across a wide variety of industries. As indicated, a number of disadvantages to the wholesale use of criminal record checking in employment have been identified previously, such as obstructing the reintegration of ex-offenders and encouraging recidivism, limiting the labour pool, and exposing the organisation to discrimination claims and to the overreliance on a single type of risk assessment.³ This research, therefore, seeks to understand how these disadvantages are apparently outweighed from an employer's perspective by opposing factors in the recruitment process.

This article focuses on findings that address two key questions:

1. How do employers think about risk management in relation to ex-offenders?
2. To what extent are concerns about risk management mitigated by an appreciation of rehabilitation and reintegration efforts?

Findings

In partnership with several stakeholder organisations,⁴ the researchers conducted a survey of HR managers across a wide range of industries in order to quantify some of the central factors in their use of criminal records checking. The online survey was distributed in two phases:

- first, to a list of HR managers who had provided their email addresses to a data management company for research purposes; and
- second, to members of the Victorian Employers' Chamber of Commerce and Industry (VECCI).

The first part of the survey collected basic demographic data, as well as information about the respon-

dents' organisation, industry or sector, and work experience. The first section had eight questions in total.

The second part of the survey asked the respondents about various aspects of criminal records checking that covered the use of policy frameworks in their workplace, if and how checks are carried out, and their organisation's attitude towards criminal justice concerns, such as rehabilitation. Twelve questions were included in this second section, and those that are most relevant to this paper are described in more detail below.

A final page of the survey invited respondents to participate in an in-depth interview. A total of 20 interviews were subsequently conducted with respondents who provided their contact details for this purpose. The interview data are not discussed in this paper, but were greatly informative in providing explanations and examples of the responses collected in the survey.

The survey was conducted anonymously and the abovementioned contact details were not linked to an individual's survey responses.

There were 149 responses to the survey, of which 121 completed both sections.

Criminal record checking processes

In this part of the analysis, the findings from the survey that relate to the respondents' organisational approach to using criminal record checks are presented. This includes their decision as to whether or not to conduct checks, and the kind of regulations, policies or processes that might be governing the use of checks in that workplace.

Responses to an initial question about the prevalence of criminal record checks (N=121) indicate that 68.6% of the survey respondents do undertake some kind of criminal record check. This is broken up into various categories, with the largest percentage (31.4%, N=38) conducting checks only on new employees. In addition to the remaining options, 21.5% provided a text response in the "other" category, almost invariably indicating that they conducted checks on all employees, mostly at three year intervals.

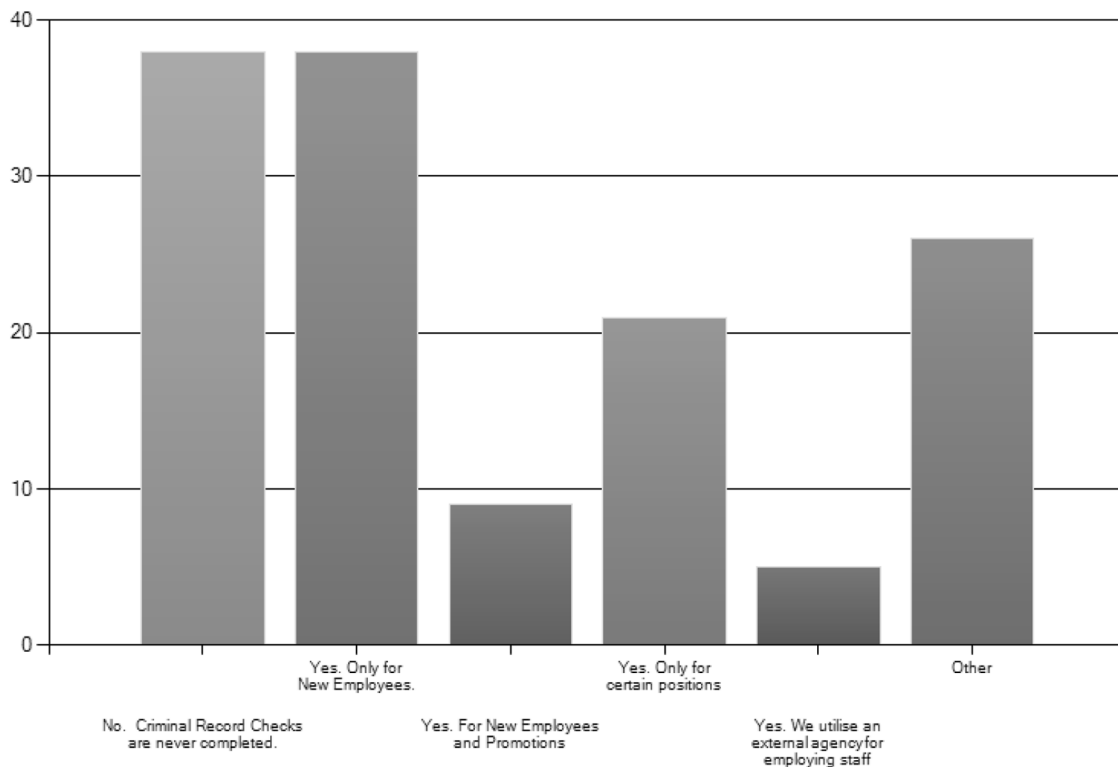
Almost one third of respondents (31.4%) indicated that their organisation does not conduct criminal record checks.

Figure 1 provides the relevant data. The question allowed respondents to select more than one response,

therefore, the collective percentage of respondents conducting all kinds of checks was calculated by subtracting the number who indicated no checking was conducted from the total.

Figure 1 (Survey Question 9) Prevalence of criminal record checking (N=121)

Does your organisation conduct criminal record checks? Please select all relevant responses.



Whether or not they conducted checks, respondents were asked to indicate which, if any, regulatory or administrative conditions applied to their organisation in relation to criminal record checking. This question was intended to provide data about the administrative processes that may regulate criminal record checking in organisations, and the extent to which decision-making was informed by policy, or recognised procedures.

For the purposes here, the most important aspect of these data is the number of responses to the first option on the list, which identified whether the respondent’s organisation had “Legislative Requirements (Regulations, Licensing, Acts)” in relation to criminal record checking. The results of the survey indicate that for 39.7% of respondents, a legislative or regulatory environment applies to their criminal record checking pro-

cess. This result will be discussed in the context of risk management in s 3 further on, but for the time being it is sufficient to note that this is a sizable proportion of the organisations represented by the survey results conducting checks directly or indirectly, non-voluntarily.

Moreover, after subtracting the 31.4% of respondents who do not conduct checks, it can be concluded that there remain approximately only 30% of respondents who conduct checks voluntarily. It should be recognised that it is possible to find instances where an industry requires employees to hold a licence or permit, and as a result, employers do not require a separate criminal record check of such employees. However, any such licence or permit, such as a legal practising certificate, would entail a criminal record check in any case. Thus, it can be surmised that the nearly 40% of respondents

who indicated that their organisation is subject to “Legislative Requirements (Regulations, Licensing, Acts)” in relation to criminal record checks, do indeed require employees to have undertaken a criminal record check at some stage. It has been assumed that these respondents would not therefore have responded to the first question by stating that they do not conduct checks at all, however, it is possible that they did. If the latter is the case, then it may be that the number of respondents who do not conduct checks (directly or indirectly) is smaller than the survey indicates, and that the number of organisations calculated to conduct checks voluntarily may be greater than the previously mentioned figure of approximately 30%.

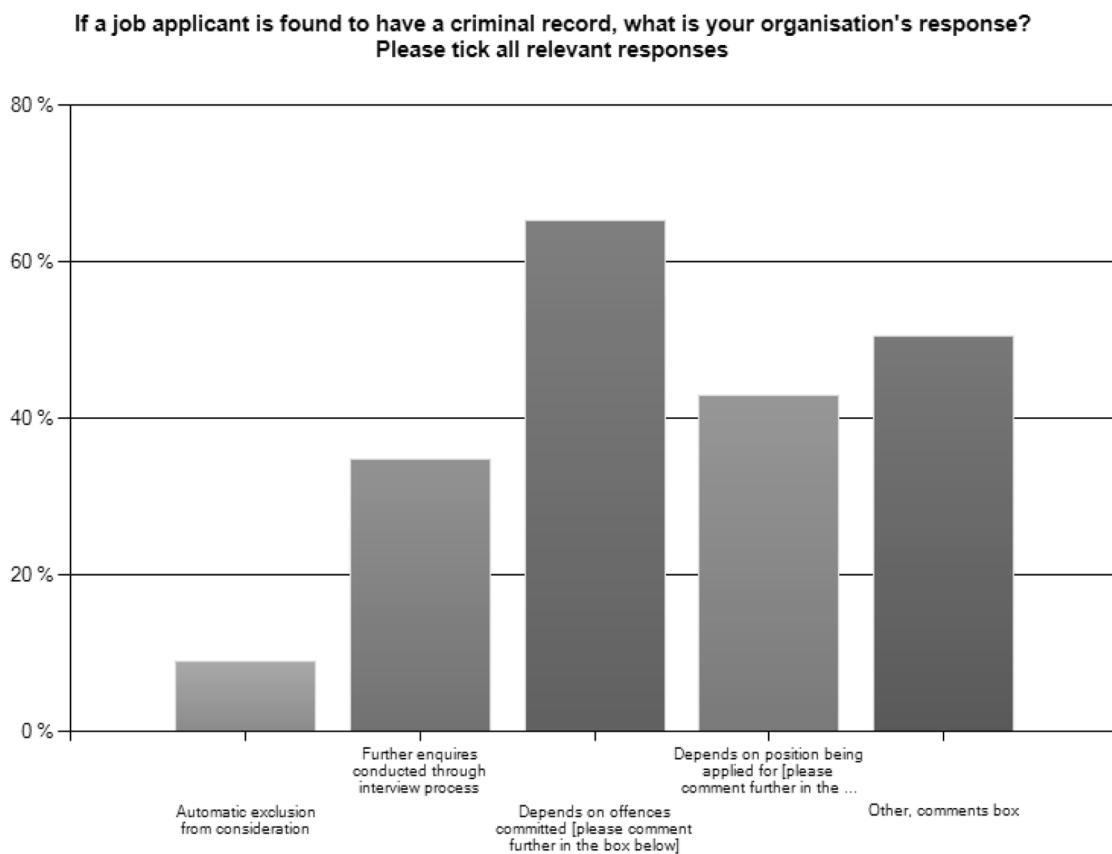
Organisational attitudes to ex-offenders

An important indicator of employer attitudes to ex-offenders in the workplace is supplied by the responses

to question 15 of the survey. Here, respondents were asked to indicate how their organisation would respond to a positive check returned by a job applicant.

The results indicated that most HR managers did not consider the criminal record to be a conclusive indicator of suitability and conducted further investigations. For a small minority (9.1%) of respondents, a positive check would result in that candidate being automatically excluded from the recruitment process. For the remainder of the respondents, however, organisational responses to a positive criminal record check could include making further enquiries through an interview (34.7%), taking the type of offence into consideration (65.3%), and taking the employment position into consideration (43%).

Figure 2: Organisational responses to ex-offenders in recruitment (N=121)



Respondents to this question were also invited to comment further in a free text box. The 61 comments received here were coded and analysed in relation to four categories:

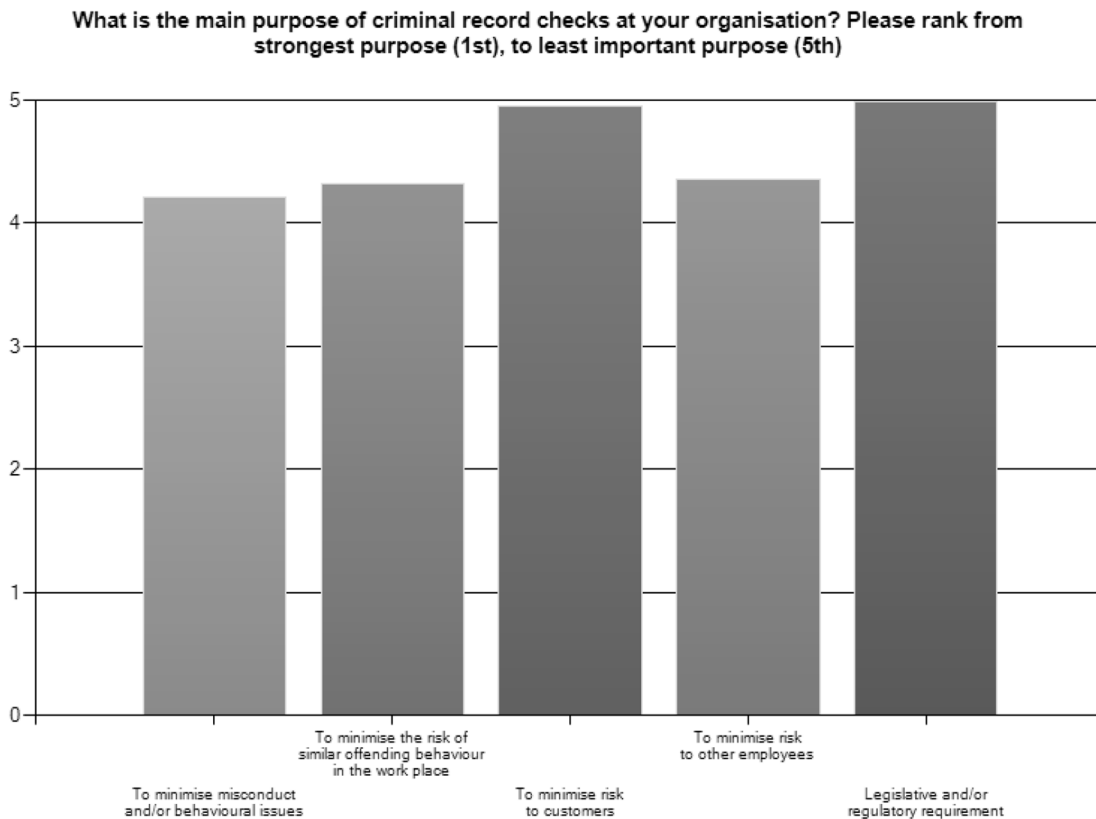
- position relevant;
- rehabilitation concerns;
- regulated environment; and
- workplace risk.

Of these categories, the most highly represented was the workplace risk category (N=38), followed by relevance of the offending to the position (N=29), regulated environment (N=13), and last, rehabilitation concerns (N=11). Seven responses were uncategoryed.

A subsequent question required respondents to identify the main purpose for their organisation to conduct criminal record checks and to rank these purposes in order of priority. Although the chart below indicates that

the difference in average rating for each category was not great, it can be observed that the purpose given the highest priority for conducting checks was legislative and/or regulatory requirements: 40% of respondents ranked this as their number one purpose for conducting checks. Minimising risk to customers was the next most important purpose for checks (34.8% of respondents ranked this as the most important purpose of checks).

Figure 3: Main purpose for conducting checks



Looking at the average score for each category across all rankings, minimising misconduct was scored lower on average (4.21) than minimising the more specific risk of similar offending behaviour in the workplace (4.32), or minimising risk to other employees (4.36). Minimising the risk to customers was scored higher again on average (4.95) and complying with regulations or legislation (4.99) scored the highest average ranking.

Organisational concerns about rehabilitation

Respondents were asked to give their opinion about whether or not their organisation considered the rehabilitation of ex-offenders to be important. The results

indicate that over half of the respondents did not know if this issue was important to their organisation, 28.1% responded positively and 19.8% responded that it was not important to their organisation.

In the next question, respondents who believed that their organisation did consider rehabilitation to be an important issue were asked how their organisation demonstrated this. Although only 34 respondents had earlier stated that their organisations considered the issue important, 83 responses were given to this question, of which 38 stated that it was not demonstrated at all, 26 said they were unsure of how it was demonstrated

and 19 gave specific examples of how it was demonstrated by their organisation.

Of these text responses, nine actually described risk management strategies, for example:

Undertaking investigation of a disclosable outcome from a Police Check and then making a decision whether to hire the candidate based on the charges/history. (from free text response to Question 18)

All the responses were coded for risk management, and/or reflecting a moral or individual concern, and/or relating to human rights. The 19 coded text responses covered the three categories roughly evenly, with the same number of responses coded for risk management as for human rights (N=10 in both cases).

Finally, there were two opportunities for respondents to express freely any general thoughts or feedback about criminal records checking. The first, in question 19, asked for any further comments about any aspect of checking criminal records in employment. There were 29 text responses collected and coded for either risk management or rehabilitation (or both). Seven responses remained uncoded.

Of the 29 responses, 15 were related to risk management, and 13 related to rehabilitation.

Question 20 gave respondents a second chance to comment, this time on the research field more broadly, but in fact the responses were of a very similar nature. The same coding schema was applied to these data but with an additional category of “process/costs” to cover those responses that commented on the application for a criminal record check itself, or the cost of the checks. There were also 29 responses to this question and the analysis results showed that six related to process/costs, 11 related to rehabilitation and 16 related to risk management. Two responses remained uncategorised.

Discussion and conclusion

In interpreting these results, it was useful to consider what might be driving the increase in criminal record checking by employers. The research aimed to identify the concerns for HR managers and how their responses to this survey provide a sense of the organisational pressures that affect criminal record checking.

Risk management

In this part of the analysis, findings from the survey that relate to the respondents’ expression of the risks to their organisation in employing ex-offenders will be presented, as well as the use of criminal record checks in addressing those perceived risks. To this extent, the intension is to answer the initial question posed above: how do employers think about risk management in relation to ex-offenders?

We saw in the above analysis that nearly 70% of the 121 respondents to the survey do conduct criminal record checks in their workplace, but that for nearly 40% of respondents (that is, more than half of those who conduct checks) their criminal record checking procedure is guided by regulations or legislation. This indicates that the high levels of checking identified by prior research may in fact be due more to the legal environment and industry level regulation than organisational strategy. This finding is further supported by the findings in relation to the reasons for conducting the checks where the highest priority was on average given to regulatory/legislative reasons over any other reason.

Nonetheless, reasons relating to risk management still rated highly, and it appears that, after the straightforward compliance issues, respondents ranked highest those categories that implied a direct impact on another person (risk to customers, risk to other employees), ahead of the actual risk of recidivism in the offending behaviour itself. This appears consistent with the findings of Hardcastle, Bartholomew and Graffam,⁵ that a key obstacle to reintegration of ex-offenders is discomfort with the personal proximity of ex-offenders to the respondent.

The findings relating to the organisational response to a positive check in the recruitment process indicate again that risk management is a key concern, with most of the respondents identifying the type of offence as the most likely factor in responding to an applicant with a positive criminal record check. This is pertinent given that the adjacent option was that the response would depend on the position being applied for. Respondents could choose more than one option, so the high level of responses for “offence-dependent” demonstrates a fairly clear concern with the potential impact of a type of offender on the workplace more broadly, rather than the relevance of the offence to the position. Automatic exclusion, which was selected by less than 10% of respondents, indicates a very high level of risk management in relation to the issue, and discussing the matter further in the interview can be consistent with the focus on “offence-dependent” decision-making, rather than position-relevance, though this will be discussed further on in relation to rehabilitation.

In the final part of the analysis, it was demonstrated that the overriding concern of HR managers was risk management, but that this did not preclude a concern for the human rights of the applicant, or the possibility of rehabilitation (see further on).

Rehabilitation

In addition to describing the decision-making process around criminal records checks, we have attempted to describe the extent to which concerns about risk management might be mitigated by an appreciation of rehabilitation and reintegration efforts for and by ex-offenders.

The fact that 31.4% of respondents' organisations do not conduct checks at all may indicate a concern for the rehabilitation of ex-offenders, in that these organisations have chosen not to risk the exclusion of that cohort on this basis. However, there are other possibilities: one respondent in the text comments said that in a small town, such checks are unnecessary, and others have noted that criminal record is an ineffective tool for risk management in their industry. Some organisations may feel that the relevant positions do not have any requirements that would necessitate or warrant such an intrusive practice as checking criminal records, or that they have not experienced problems that would be alleviated by checking employees' criminal records.

Further clarification can be found in the comments provided at the end of the survey, where exactly half of the 58 comments made in response to the two final questions were supportive of the notion of rehabilitation of ex-offenders. In some cases, this was simply an acknowledgement that people change over time, and indeed the "timing" of the offending was seen as an important factor in the decision-making process for many respondents. Other comments were more explicitly pro-rehabilitation, mentioning giving people a second chance, such as in this example:

I think we take the approach that if a person has made a few bad decisions that could present moderate risk should they re-offend we are prepared to give them a chance with special risk control mechanisms in place.
(from free text response to Question 20)

Very few respondents mentioned the term "human rights" and only one referred specifically to the Australian Human Rights Commission's (AHRC) position in relation to the relevance of a criminal record to the requirements of the position.

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Conclusion

The survey results have indicated that the overriding concern for HR managers in decision-making processes around criminal record checks for job applicants and employees is risk management. The opportunity for the rehabilitation of ex-offenders was prominent, but clearly secondary as an HR consideration, and did not figure highly as a concern for organisations at the executive level, from the HR perspective at least.

The motivation to conduct checks in the first place was found to be based for the majority of respondents on the regulatory or legislative environment which encouraged or mandated such checks. However, it is notable

that it was in fact a minority of employers in the research who undertook criminal record checks voluntarily and such a practice was not found to be widespread.

As mentioned, a majority of the respondents were motivated to conduct check due to a legislative or regulatory environment, but this was closely followed by respondents' concerns about risk minimisation, particularly where the risk might be related to their customers or staff. In other words, there was a strong sense of the duty of care towards staff and customers when employing ex-offenders.

By contrast, there was less evidence of a sense of a duty of care towards the applicant or employee with a criminal record. While the survey elicited a significant number of general comments about giving people a second chance and allowing for the vagaries of youth, there was virtually no express recognition of the human rights obligations towards ex-offenders, or the explicit guidelines of the AHRC that do not permit employment discrimination on the grounds of irrelevant criminal records. It is concerning that the legal and ethical ramifications of such discrimination are not on the radar for most of these 121 HR managers.

Perhaps this last oversight is due in part to lack of awareness — as one respondent put it:

I suspect that many people in positions that allow or compel them to make decisions on the basis of criminal records do so without due understanding of criminal records and the implications of the information they disclose, likely creating poor outcomes for those being judged on the basis of those records.



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Georgina has expertise in linguistics with a specialisation in interviewing methodologies. She has published research in criminal justice and forensic linguistics.

Footnotes

1. The author thanks the anonymous referee for their helpful comments. Research for this article was supported by an Australian Research Council Grant LP0990348. See: www.rmit.edu.au.
2. See, for example, B Naylor, M Patterson and M Pittard, "In the shadow of a criminal record: proposing a just model of criminal record employment checks" (2008) 32(1) *Melbourne University Law Review* 171.

3. See article by B Naylor this issue of *Employment Law Bulletin*. Also see, H Lam and M Harcourt, "The use of criminal record in employment decisions: the rights of ex-Offenders, employers and the public" (2003) 47 *Journal of Business Ethics* 237.
4. Corrections Victoria, Australian Human Rights Commission (AHRC, formerly HREOC), JobWatch, Fitzroy Legal Service, the Victorian Association for the Care and Resettlement of Offenders (VACRO), and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC).
5. Hardcastle, Lesley, Bartholomew, Terry and Graffam, Joe, "Legislative and community support for offender reintegration in Victoria" (2011) 16(1) *Deakin Law Review* 111–32.