

BOOK REVIEW

James B Jacobs, *The Eternal Criminal Record* (Harvard University Press, 2015)

I INTRODUCTION

Criminal record checks are now standard for many jobs. This is probably the point at which most people think about a criminal record, and the point at which the possibility of having a criminal record — and therefore perhaps being rejected by an employer — comes to mind. In Australia, over 3.7 million criminal records were provided in 2013–14 by the national criminal record agency, CrimTrac.¹ The criminal record is now a routine form of ‘reference checking’. We also think about the role of a criminal record when we discuss sex offender registers, public naming of sexual and violent offenders, and the recent discussions about public registers of perpetrators of family violence.²

So what is a ‘criminal record’? How does it arise? Who looks after it? Who decides whether to release information to others? Should it be widely available to provide information about risk, or protected because of its power to lead to exclusion?

Professor James Jacobs addresses these questions in *The Eternal Criminal Record* — an exhaustive and fascinating study of the criminal record in the US — its creation in police and court processes; its dissemination; and the myriad consequences of its use. Professor Jacobs’ focus is on the role of the criminal record in the US, with its constitutionally protected practice of broad dissemination of criminal history information which, as he observes, makes the criminal record a ‘criminal biography’ and a ‘crucial marker of public identity’.³ He identifies the US approach to the criminal record as ‘US criminal record exceptionalism’ and gives striking insights into the constitutional and political drivers for this approach to the criminal record, whilst also offering a number of valuable comparisons with approaches to these issues in Europe.⁴

It is not possible to do justice to this detailed and wide-ranging discussion of the criminal record, but some points of particular relevance to Australia are highlighted in this review. Briefly, Professor Jacobs discusses how criminal records are compiled by different agencies and how the information is disseminated in Part I. In Part II, the issues surrounding whether a record should be created, whether it can and should be sealed, and how errors can be corrected are explored. Part III discusses the unique US approach to transparency of, and access to, criminal

1 CrimTrac, *Annual Report 2013–14*, 55.

2 See Rachel Olding and Jacob Saulwick, ‘Domestic Violence Register Could Lead to Increased Not Guilty Pleas, Privacy Experts Warn’ *The Sydney Morning Herald* (Sydney), 6 March 2015.

3 James B Jacobs, *The Eternal Criminal Record* (Harvard University Press, 2015) 301.

4 See *ibid* pt III.

record information, including a thoughtful overview of theories of punishment and the extent to which a public criminal record can be seen as part of punishment. Finally, Part IV considers the direct and collateral consequences of the criminal record in civil disqualifications such as exclusion from voting, in sentencing for subsequent offences, and in employment discrimination.

Whilst the European comparative discussion is less detailed, it highlights the contrast with aspects of the US approach to criminal records which are unique to that country. Comparative legal analyses can problematise what is otherwise taken for granted. In this case, the European approach, coming from what seems a diametrically opposite political philosophy to that of the US, also problematises for the Australian reader what we may take for granted in this area, making this a particularly valuable study.

II THE CRIMINAL RECORD IN THE US

The central difference identified by Professor Jacobs between the US and Europe is the approach to criminal history information — that is, all the information gathered by criminal justice agencies, from police investigations and surveillance through to court proceedings, court outcomes and sentencing. He emphasises that ‘[t]he First Amendment right to free speech and press ... provides very strong support for publicly accessible court records’ and would not usually be outweighed by protection of offender privacy or promoting offender rehabilitation.⁵ As he observes, ‘transparency of governmental operations and especially court proceedings is a hallmark of American democracy and deeply embedded in American political-legal culture. People have a right to know what is and has occurred in the courts.’⁶ Court documents and outcomes are therefore generally seen as public documents, being made available on the internet, through government agencies and commercial providers.

Professor Jacobs reviews a wide range of cases which overall tend to support the ‘right to know’ about criminal convictions over any privacy or reputational claims of offenders and ex-offenders. Police preparatory and investigative information has been more problematic, and Professor Jacobs notes that community attitudes are more ambivalent about the release of information, such as records of arrests, particularly where these have not resulted in charges or convictions.⁷ He highlights the problems when this information becomes generally available, rather than only available to law enforcement agencies, and the increasing difficulty of correcting or restricting such information once downloaded to the range of databases available.⁸ However, conviction information is publicly released in many states. For example, information about sex offenders, including names, photographs

5 Ibid 191.

6 Ibid 190.

7 Ibid 207.

8 Ibid 207–8.

and addresses, must be made available on publicly accessible databases under ‘Megan’s Law’ statutes.⁹

Much criminal history information is also collated and sold by commercial organisations. Professor Jacobs points to the coming of the internet as making the collection and the dissemination of criminal history information easier, and at the same time harder to control. This becomes relevant not only to the issue of how information is initially disseminated, but also how (and whether) it can be corrected and even withdrawn or expunged.

From this outline it is clear that the criminal history information which an employer, or potential landlord (or indeed potential date)¹⁰ might want to consider is extensive and readily accessible; it is also of variable quality and accuracy, and not necessarily easy to interpret by a layperson. Professor Jacobs highlights some of the problems endemic in this situation, in particular the risk that the information will be inaccurate (eg from errors in entry by the various agencies), that it will be partial (later information such as acquittals, or further charges, being omitted by busy or uninformed officials), or that it will misidentify people as offenders (eg due to identity theft).¹¹ Both the widespread availability of the information and its problematic accuracy, highlight the risk that people will use the information to make decisions about employment, student placements, accommodation (and more), based on prejudice, stigma, or misinformation.

Professor Jacobs notes the limited avenues for correcting errors, in the US context. In practice, the fact that the (incorrect) information has already been disseminated, probably on the internet, makes this difficult. Even a correction to include the fact that an arrest was never followed by a charge or conviction can be almost impossible to incorporate into the existing databases of government and commercial providers.

The disadvantages suffered by people with a criminal record are widely recognised. In employment for example, the existence of a criminal record can lead to blanket exclusion from consideration, or to exclusion at a later point in the process — research has confirmed the tendency of employers to automatically reject a person with a criminal record.¹² At the same time, the importance of employment in helping a person rehabilitate, and not reoffend, is also widely accepted. Without reliable employment, a person may well return to crime as their only way to survive financially. Employment not only provides income, but also the structure, discipline and sense of self-worth that support leaving a criminal past behind.

Given the recognised harshness of the discrimination people with a criminal record may experience, one approach in many countries is the ‘expunging’ or sealing of the record of less serious crimes, after a crime-free period.¹³ In Australia this is

9 Ibid 49.

10 Ibid 70.

11 See generally *ibid* ch 8.

12 Ibid 281.

13 See *ibid* ch 7.

achieved by ‘spent conviction’ schemes.¹⁴ All Australian jurisdictions, other than Victoria, have such schemes, and there are calls for the Victorian government to consider such legislation.¹⁵ Professor Jacobs points out the practical difficulty of this approach given the ubiquity and permanence of internet-based information, and also the moral problem of legislating to allow a person to ‘legally lie’ about their past.¹⁶ His primary criticism is however, that ‘expunging’ or sealing this information runs counter to the First Amendment requirement of transparency.

Professor Jacobs prefers an approach which maintains the access principle, and which also protects the employer’s freedom of contract — an approach which has gained popularity in a number of US states.¹⁷ The ‘Ban the Box’ movement has in recent years seen a number of government departments and private employers remove ‘the box’ on the job application form asking whether a person has a criminal record.¹⁸ This of course only delays the discussion, but gives a person with a criminal record the opportunity to be selected to the interview stage, at which point it is hoped the prospective employer will decide to give them a chance to explain, so that the employer can make a more accurate assessment of risk. Professor Jacobs points out the lack of evidence available to actually make an accurate assessment of the risk that any individual person’s criminal record poses, but accepts that it is appropriate that employers make that judgment. To address these concerns he recommends programs to make ex-offenders more ‘work ready’, and financial incentives to employers to give people a second chance, noting the evidence that such employers often report high levels of loyalty and appreciation from their ex-offender employees.¹⁹

III THE CRIMINAL RECORD IN EUROPE AND AUSTRALIA

The book’s European comparisons start from a very different premise. These comparisons are made in general terms and Professor Jacobs draws on features of different European jurisdictions, mainly but not solely Spain and Germany, so the comments here are generalisations. As outlined by Professor Jacobs, the public nature of the criminal hearing is similarly a fundamental principle (as court cases are open to the public), but the privacy and reputation of participants are also taken into account in decisions on information disclosure. The court judgment is usually given to the parties only, and reported decisions are anonymised.²⁰ A primary aim

14 See, eg, *Crimes Act 1914* (Cth) s 85ZV; *Criminal Records Act 1991* (NSW); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Spent Convictions Act 2000* (ACT); *Criminal Records (Spent Convictions) Act 1992* (NT); *Spent Convictions Act 1988* (WA); *Annulled Convictions Act 2003* (Tas); *Spent Convictions Act 2009* (SA).

15 Law Institute of Victoria, *Submission: Introduction of Spent Conviction Legislation in Victoria* (22 April 2015).

16 Jacobs, above n 3, 130.

17 *Ibid* 272.

18 *Ibid* 271–3.

19 *Ibid* 281, citing Jennifer Fahey, Cheryl Roberts and Len Engel, ‘Employment of Ex-Offenders: Employer Perspectives’ (Final Report, Crime and Justice Institute, 31 October 2006).

20 See generally *ibid* ch 9.

of criminal sentencing is rehabilitation. The criminal record is therefore regarded as information kept for criminal justice and government purposes; there is a presumption against release to, for instance, private employers, although there are provisions for release to employers and others in specific circumstances.

Employing the valuable comparative approach taken in this book, it appears that Australia is perhaps located between the US and Europe on a number of the measures discussed by Professor Jacobs. The public nature of criminal court proceedings is a fundamental value in all these jurisdictions; Australian court proceedings are also fully reported by the media, including names, unless there is a lawful reason to close or suppress the proceedings.

In Australian jurisdictions, the collated history of a person's contacts with the criminal justice system is however regarded as private information, in principle, in Australian jurisdictions. Court sentences imposed on individuals and recorded on their criminal record are similarly 'private information' under privacy laws, but can be released with the consent of the person involved.²¹ In the employment context, it is hardly likely that a person wanting a job will refuse this consent, making access to the information inevitable. It is nonetheless important that, in Australia, the person controls access to their information. In Victoria, recent changes mean that the criminal history information is provided by CrimTrac to the applicant, who can then decide whether they wish to pass it on to their employer.²²

Most Australian jurisdictions have spent convictions schemes, under which less serious offences are not released on a criminal record, and do not have to be reported by the person, after expiry of a crime-free period, usually ten years.²³ Such schemes obviously have the problem identified by Professor Jacobs, of encouraging people to lie about their past, but can still be seen as a valuable attempt to address the serious disadvantages of what is indeed otherwise an 'eternal criminal record'. They also embody the recognised reduction in risk once a person has been crime-free for a period, and the reality that most people 'age out' of criminal behaviour.²⁴ Other jurisdictions are looking at ways to fine-tune the requisite crime-free period to better reflect the different levels of risk of reoffending for different offences.²⁵

Two problems faced by all jurisdictions include the unregulated spread of information through the internet, and increased community concerns about particular groups. The existence of information on the internet, probably forever, makes spent conviction schemes less useful. Most schemes include prohibitions

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

22 See Victoria Police, *Procedure for Obtaining a National Police Certificate* (October 2014) <https://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=38446>.

23 See Moira Paterson and Bronwyn Naylor, 'Australian Spent Convictions Reform: A Contextual Analysis' (2011) 34 *University of New South Wales Law Journal* 938.

24 See Jacobs, above n 3, 53.

25 Bronwyn Naylor, 'Living down the Past: Why a Criminal Record Should Not Be a Barrier to Successful Employment' (2012) 18 *Employment Law Bulletin* 115, 116–17.

on taking account of a spent conviction, and on the release of spent conviction information, but the reality is that a person seeking information is likely to be able to find it with enough searching, freely or through commercial providers.

Fear of particular groups such as sex offenders have led to policies favouring greater release of information, even in jurisdictions which otherwise try to balance the competing interests and do not favour such public access, such as in Europe and Australia. In the US, as mentioned, this information has been routinely made available since the mid-1990s in the interests of community protection. Sex offender registers have been introduced in Australia, and the European countries discussed by Professor Jacobs also release information, and share information across countries, in relation to such offending. Domestic violence is also subject to publicity across many US states, a proposal currently under consideration in some Australian jurisdictions.²⁶

IV CONCLUSION

In *The Eternal Criminal Record*, Professor Jacobs frames his broad-ranging discussion in the US criminal justice ‘exceptionalism’ status and in its extraordinary levels of criminalisation and incarceration, as well as the priority it places on the free access to information over almost all other interests. Australia and Europe are moving in this direction where perceived risks are high, such as sex offending, and in Australia at least there is much support in some quarters for greater availability of information, to ‘name and shame’, usually on the grounds of community safety from ‘risk’. As Professor Jacobs points out, actual levels of risk are very difficult to assess, and the cost to individuals of release of this information is clearly vast. The point at which the harm to individuals is outweighed by the community benefit is highly contested.

Professor Jacobs proposes a range of ways of ameliorating the collateral consequences of information dissemination, with recommendations that begin with the First Amendment guarantee. This would not necessarily be the starting point in Australia, although access to information is an important element in the debate here. His recommendations are nonetheless of importance for Australia, and especially if Australia moves further along the path towards US disclosure. In particular, the overuse of criminal laws for minor offending should be tackled, and non-conviction options should be developed which will not appear on a criminal record. Blanket statutory disqualifications based on criminal records should be reviewed, and made more specific to actual risk from specific offences.

26 See Olding and Saulwick, above n 2; Mark Doman, ‘Family Violence Royal Commission: Abusive Partner Register Touted in Victoria in Bid to Stamp Out Repeat Offenders’, *ABC News* (online), 30 June 2015 <<http://www.abc.net.au/news/2015-06-30/domestic-violence-register-touted-in-victoria-royal-commission/6584492>>; Liz Foschia, ‘Abusive Partners Could Be Listed on Proposed NSW Domestic Violence Register’, *ABC News* (online), 6 March 2015 <<http://www.abc.net.au/news/2015-03-06/domestic-violence-offender-register-proposed-for-nsw/6285138>>.

Employers should be encouraged to be cautious in excluding someone on the basis of a criminal record, and assisted to evaluate and manage perceived risks.

Access to criminal history information is said to be important for community safety, but it is also important to recognise that the community's safety is enhanced when ex-offenders are given the chance to 'shed a negative (criminal) identity and (re-)assume a positive, non-criminal one'²⁷ by participating productively in the workforce. The *Eternal Criminal Record* explores some ways to support rehabilitation; at the same time it shows where greater disclosure may lead for Australia.

BRONWYN NAYLOR
Associate Professor, Faculty of Law,
Monash University

27 Peter Raynor and Gwen Robinson, *Rehabilitation, Crime and Justice* (Palgrave Macmillan, 2009) 10.