Preventing Discrimination against Health Practitioners

Submission to the Australian Health Workforce Ministerial Council on the Draft Health Practitioner Regulation National Law

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Part A - Executive Summary & Recommendations

1. Executive Summary

1. The inappropriate use of criminal histories is unlawful under laws that prohibit discrimination on the ground of criminal records and spent conviction regimes. Criminal histories can also be blunt and dangerous tools when attempting to predict future behaviour. In addition, inappropriate use of criminal histories can contribute to recidivism.

2. PILCH submits that these issues should be addressed by the Australian Health Workforce Ministerial Council ("**AHWMC**") before finalising the criminal history and criminal records checking provisions of the draft Health Practitioner Regulation National Law ("**Draft Law**").

3. The Draft Law allows and, arguably, mandates, the use of all criminal histories, regardless of their relevance to the employment or registration of health practitioners or the age of those histories. This position is inconsistent with Australia's obligations under international human rights law and domestic laws relating to discrimination on the ground of criminal records and spent convictions.

4. PILCH submits that the use of criminal histories in the Draft Law should be limited to relevant criminal histories (having regard to the nature of the person's duties and the health services to be provided) and should not include the use of spent convictions.

2. Recommendations

5. PILCH submits that the Draft Law be amended as follows:

Recommendation No. 1:

The Law should operate within the framework of existing criminal records discrimination laws and be consistent with those laws.

Recommendation No. 2:

Only relevant criminal histories should be taken into account by regulators operating under the Law.

Recommendation No. 3:

In providing guidance to regulators in relation to what might be a 'relevant' criminal history, the Law should identify different categories of offences and the weight to be accorded to each of them.

Recommendation No. 4:

The Law, when identifying different categories of offences (see recommendation 3), should consider the relevance of each those categories to each of the health services being regulated.

Recommendation No. 5:

The Law should incorporate a procedure for external and impartial review of decisions based on criminal histories.

Recommendation No. 6:

The Law's exclusion of spent conviction regimes should be removed.

Recommendation No. 7:

The definition of 'criminal history' in the Draft Law should be amended. The revised definition should refer only to recorded convictions and should exclude spent convictions.

Part B – About this Submission

3. Consultation

6. PILCH welcomes the opportunity to make this submission to the AHWMC in relation to the Draft Law. We commend the AHWMC for engaging in this consultation process.

4. About PILCH

7. PILCH is a leading Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through six schemes: the Public Interest Law Scheme; the Victorian Bar Legal Assistance Scheme; the Law Institute of Victoria Legal Assistance Scheme; PilchConnect; the Homeless Persons' Legal Clinic (**HPLC**); and, the Seniors Rights Legal Clinic.

8. PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify matters of public interest requiring legal assistance;
- seek redress in matters of public interest for those who are disadvantaged or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and,
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

9. PILCH seeks to meet these objectives by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

10. In 2007-2008, PILCH facilitated pro bono assistance for over 2,000 individuals and organisations and provided hundreds of others with legal information and referrals. PILCH also encouraged and promoted pro bono work amongst Victorian lawyers, not just within private law firms, but also those working in government and corporate legal departments. In the last year, PILCH also made numerous law reform submissions on questions of public

interest. Much of this work assisted in securing human rights and access to justice for marginalised and disadvantaged members of the Australian community.

11. PILCH, through its HPLC, regularly assists individuals who have been discriminated against on the basis of their criminal history, and has witnessed first hand the deleterious effects of this form of discrimination. In so doing, PILCH has noted the connections between criminal histories, difficulties in obtaining and retaining employment, homelessness and recidivism.[1]

5. Scope and Structure of this Submission

12. This submission addresses those provisions of the Draft Law that deal with criminal histories and criminal record checks.

13. Criminal histories play a prominent role in the Law's registration schemes. An individual is only eligible for registration if he/she is a 'suitable person'[2]. When a National Board is deciding whether or not an individual is a suitable person to be registered as a health practitioner, it must have regard to whether or not the individual is a 'fit and proper person' for registration.[3] To facilitate this assessment, when an individual applies for registration, he/she is required to disclose his/her criminal history[4] and to authorise the National Board to check that criminal history.[5] Then, the National Board must check that history.[6] Clearly it is a requirement that an applicant's criminal history be taken into account by a National Board when determining whether or not that applicant is a suitable person for registration. Further, when the extensive definition of 'criminal history' and the exclusion of spent conviction regimes are taken into account, it seems that it is intended that all of an applicant's criminal history be considered (ie, all that history is deemed relevant). Additionally:

- registration standards can include provisions relating to the criminal history of applicants;[7]

[1] Studies have reported that employment reduces rates of recidivism by between one third and one half, but sixty percent of ex-offenders are refused jobs because of their criminal record: see B Naylor, M Paterson and M Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' [2008] *Melbourne University Law Review* 6, citing 'Breaking the Circle', a report issued by the Sentencing and Offences Unit of the UK Home Office (2002).

[2] Draft Law, s 69(1)(c).

[3] Ibid, s 72(1)(a).

[4] Ibid, s 94(3)(b).

[5] Ibid, s 94(3)(c).

[6] Ibid, s 96(1).

[7] Ibid, s 11(2)(b).

- each year, each applicant for renewal of registration is obliged to give to the National Board details of any change in the applicant's criminal history;[8]
- any application for restoration of registration must disclose the applicant's criminal history and authorise the National Board to check that history;[9]
- a registered health practitioner must, within 30 days of a 'relevant event', notify the National Board.[10] A 'relevant event' includes being charged with or convicted of, or being the subject of, a finding of guilt of an offence punishable by 12 months imprisonment or more;[11]
- a National Board may, at any time, ask CrimTrac or a police commissioner for a written report about a registered health practitioner's criminal history;[12]
- complaints can be made about a registered health practitioner if he/she is not a 'fit and proper person' which, by virtue of the combination of sections 69, 72 and 96 (see discussion below) includes someone who has a criminal history;[13] and,
- a National Board must keep information about checks carried out by that Board about a registered health practitioner's criminal history.[14]

14. Part C of this submission examines the obligations imposed on the Australian Government, under international human rights law and domestic law, to respect, protect and fulfil the rights to non-discrimination on the ground of criminal record. Part D summarises spent conviction laws. Part E examines how the Draft Law deals with criminal histories, criminal record checks and spent convictions, and analyses the adequacy of the Draft Law in these respects. Part F concludes by arguing that the Draft Law's treatment of criminal histories of health practitioners must be revised to ensure that it is consistent with Australia's obligations under international human rights law and domestic law.

[8] Ibid, s 124(b).

[9] Ibid, s 127(3)(b) and (c).

[10] Ibid, s 142(1).

[11] Ibid, s 142(3)(a).

[12] Ibid, s 147(1).

[13] Ibid, s 155(c).

[14] Ibid, s 276(g).

Part C – Criminal Records Discrimination

6. The Significance of Criminal History Information

15. The inappropriate use of criminal history information can adversely impact many members of our community. They affect individuals who have been convicted of the most heinous offences, individuals who have made minor mistakes (particularly in their youth) and who want no more than to put those mistakes behind them and resume normal, productive working lives, and individuals who fall somewhere between these 2 extremes. In other words, inappropriate use of criminal history information not only affects individuals that society might reasonably expect to be subject to greater scrutiny, but also individuals in the wider community who do not fall into the former category.

16. The inappropriate use of criminal history information is not an issue that impacts only a small number of people at the fringe of society; it affects a significant proportion of our community. For example, in Australia, over half a million individuals have charges finalised in courts every year.[15] Studies in Britain, the United States of America, Canada and New Zealand suggest somewhere between one quarter and one third of all males have a criminal record.[16]

17. The vast majority of people with criminal histories have been dealt with by courts without the imposition of custodial sentences.[17] Further, many of these have been dealt with without any convictions being recorded at all. This often occurs because a court, after considering all the evidence and submissions by the prosecution and defence, has decided, having regard to the nature of the acts committed and the character of the offender, that it is inappropriate to record a conviction, even though the charge may have been 'proven'. This most frequently occurs with young and first time offenders and in minor matters. Courts are also inclined not to impose convictions to ensure that the 'punishment' is proportionate to the crime committed and because, in the circumstances, the prospects of the offender's rehabilitation will be enhanced by a conviction not being recorded.

[15] See Naylor, Paterson and Pittard, above note 1, citing ABS data (Criminal Courts, Australia, 2005-2006, ADS Catalogue No. 4513.0, 2007).

[16] 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, at 237-238.

[17] Only approximately 30,000 adult offenders are returned to the Australian community from prison each year: Human Rights and Equal Opportunity Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2007), 5.

18. PILCH considers that criminal histories can be blunt and dangerous tools when it comes to predicting future behaviour.[18] This is particularly true with regard to people who have been dealt with by courts without the imposition of convictions. Inappropriate use of criminal histories can contribute to recidivism (by, for example, adversely impacting employment prospects), which defeats the purpose of protecting members of the community from those who have engaged in some form of unlawful behaviour in the past.

19. PILCH recognises, however, that, in some circumstances, it is appropriate to discriminate against an individual on the basis of his/her particular criminal history, such as in cases where it is necessary to preserve community safety. For example, it may be appropriate for a National Board to discriminate against an applicant who wishes to be registered as a paediatrician, where he/she has a criminal conviction relating to a child sex offence.

20. In circumstances where there are conflicting interests, there needs to be a balancing of the competing interests. On the one hand, there are:

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

21. On the other hand, there are:

- community demands for safety (in particular, protection from risk of further criminal activity by repeat offenders);
- regulators who are obliged or entitled to screen those they regulate to ensure public safety; and,
- employers demanding the right to be able to select candidates they believe are best suited to their enterprises.

22. The task of balancing these different and competing interests is far from simple. The solution to this difficulty is not, however, to abandon the balancing exercise altogether and simply allow or require all forms of criminal record discrimination.

23. As discussed in Part E of this submission below, PILCH is deeply concerned that this is the cumulative effect of the provisions in the Draft Law that deal with criminal histories and criminal record checks.

[18] See Naylor, Paterson and Pittard, above note 1; Lam and Harcourt, above note 3, at 243.

7. Criminal Records Discrimination Law

24. International Law recognises the inappropriateness of discrimination in employment and occupation. The International Court of Justice recognises 'the right to equality' as a binding customary norm of International Law from which countries are unable to derogate.[19] By virtue of the ratification of the International Covenant on Civil and Political Rights[20] (**ICCPR**), the International Covenant on Economic Social and Cultural Rights[21] (**ICESCR**) and the International Labour Organisation's Convention Concerning Discrimination in respect of Employment and Occupation,[22] the Australian Government has given explicit approval for the customary norm of equality by agreeing that

> [a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee all persons equal and effective protection against discrimination on any ground.[23]

25. The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (**HREOC Act**), which covers all employers and employees in all States and Territories, implements some of these international obligations. Relevantly, for present purposes, the HREOC Act makes it unlawful to discriminate in employment or occupation on the basis of criminal record.[24] Laws in the Northern Territory[25] and Tasmania[26] also prohibit discrimination on the basis of criminal records. These laws can be enforced with orders in the nature of injunctions and for payment of compensation.

26. In addition, the Australian Human Rights Commission's *Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* provide a 'best practice' model for determining when criminal record checks are or are not appropriate. They require that an employer, as a first step, identifies whether or not certain convictions or

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[19] Namibia Case [1971] ICJ Rep 16 (Ammoun J).

[20] International Covenant on Civil and Political Rights, Dec. 16, 1966 (entered into force Mar. 23, 1976), 999 UNTS 171.

[21] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 (*entered into force* Jan. 3, 1976), 993 UNTS 3.

[22] See *Human Rights and Equal Opportunity Commission Act 1986*, Sch.

[23] ICCPR, art 26.

[24] See the definition of 'discrimination' in section 3(1) and regulation 4(a)(iii) of the *Human Rights and Equal Opportunity Commission Regulations 1989*. Under section 31 of the HREOC Act, the Australian Human Rights Commission has the authority to investigate any act or practice and to try to resolve any complaint of discrimination by conciliation. If such a complaint cannot be resolved by conciliation, the AHRC can prepare a report (with recommendations) to the Attorney General for tabling in Federal Parliament.

[25] See *Anti-Discrimination Act 1992* (NT).

[26] See *Anti-Discrimination Act 1998* (Tas).

offences are relevant to the 'inherent requirements of the job', so that there is a significant correlation between the offences and the position. Although it is recognised that a wide variety of offences may be relevant to medical practice and each individual's case should be considered on its merits, a balancing exercise is required.

27. These laws and guidelines reflect some of the basic philosophical foundations of our criminal justice system. These foundations include principles such as:

- 'the punishment should fit the crime';
- double jeopardy (ie, offenders should not be punished twice for the one offence);
- once offenders have been punished, they are deemed to have 'paid their debt' to society (and should not be further penalised by, for example, suffering discrimination in employment, education, welfare or any other institution); and,
- sentencing should take into account a range of factors beyond punishment and have regard to (among other things) the nature of the act committed and the circumstances, character and potential for rehabilitation of the offender.

It is these basic principles that explain the existence of laws restricting criminal record discrimination.

8. When can Criminal Records Discrimination be Justified?

28. Not every differential treatment will be characterised in law as a form of discrimination. In certain circumstances, the rights to non-discrimination and equality may be limited, namely where it is reasonable and proportionate to do so.

29. The UN Committee on Economic, Social and Cultural Rights (**CESCR**), the UN treaty body responsible for monitoring States Parties' compliance with ICESCR, has recently explained when the rights to non-discrimination and equality may be lawfully limited. In its *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, CESCR explained that

> [d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless

> every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.[27]

30. The UN Human Rights Committee (**HRC**), the treaty body responsible for monitoring States Parties' compliance with the ICCPR, has explained that, where limitations or restrictions are made, 'States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right'[28]. The HRC has also noted that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective' and if the differentiation is in accordance with the ICCPR.[29] Where a protected ground of discrimination substantially affects a person's ability to perform a task, or affects some other legitimate interest, such as community safety, it would not amount to discrimination in law to deny a person employment on that ground.

31. In addition, explicit legislative limitations to the rights to non-discrimination and equality may apply. For example, under the *Equal Opportunity Act 1995* (Vic), an employer may refuse to accommodate an employee's parental responsibilities if it is reasonable to do so.[30] Similarly, sex discrimination in employment can be justified on the basis of 'genuine occupational requirements'.[31] More relevantly to this submission, under the HREOC Act, it is lawful to deny a person employment on the basis of a criminal record, if the person cannot carry out the 'inherent requirements' of the position.[32]

32. PILCH acknowledges that exceptions to criminal record discrimination laws are needed and are very important. There are some offences and types of offenders who warrant particular attention from the point of view of community safety. This is particularly so, for example, with respect to certain sex offenders. Restrictions in relation to such offenders are not only understandable, but necessary.

33. However, PILCH submits that any restriction on the right to non-discrimination on the ground of criminal record should operate within the framework of, and be consistent with,

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[27] CESCR, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009), at para 13.

[28] HRC, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), at para 6.

[29] HRC, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1989).

[30] *Equal Opportunity Act 1995* (Vic), s 14A.

[31] Ibid, s 17.

[32] HREOC Act, s 3.

Australia's obligations under international human right law and domestic laws on criminal records discrimination, spent conviction, mandatory reporting and working with children. Consistent with these laws, when criminal histories are to be taken into account in the new regulatory regimes created by the Law, use of that information should be appropriately limited such that only relevant criminal histories are considered and spent conviction regimes are respected. No such limitations appear in the Draft Law (see discussion in Part E below).

Part D - Spent Convictions

9. Introduction

34. Anti-discrimination laws are not the only means by which Australia's moral and legal obligations with respect to the rights to non-discrimination and equality are met. The spent conviction regimes in operation in Australia also aim to achieve this goal. They do this by limiting what will constitute a 'criminal record' and, thereby, the information that can be used by regulatory authorities, employers and others as the basis of discrimination. According to the Queensland Supreme Court:

> It is reasonable to think this power [to regard a conviction as spent] has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received.[33]

10. Spent Conviction Regimes – State and Federal

35. All States and Territories have spent conviction regimes. Most of these are embodied in legislation.[34] The Victorian and South Australian schemes are contained in police policies and practices. There is also a comprehensive spent conviction regime operating at the federal level.[35] These schemes entitle a person not to disclose spent convictions when asked to disclose their criminal history.

36. There are numerous exceptions built into spent conviction regimes.[36] Usually, these relate to serious crimes that have attracted sentences for long periods and sex offences, particularly in the context of people working with children.

37. Some jurisdictions also bolster the effectiveness of their spent conviction regimes by making it unlawful to discriminate against someone on the basis of a spent conviction.[37]

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[33] *R v Hoch* [2001] QCA 63.

[34] *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).

[35] *Crimes Act 1914* (Cth).

[36] The nature of these exceptions varies between jurisdictions. See Lam and Harcourt, above note 3, at 246 (discussing these varying exceptions).

[37] See *Spent Convictions Act 1998* (WA); *Discrimination Act 1991* (ACT).

11. Rationale Behind Spent Conviction Regimes

38. Although the terms of these regimes vary from jurisdiction to jurisdiction, their essential feature is the same – after a period of time, a criminal record of a person is varied so as to 'wipe the slate clean'.[38] This is an attempt to preclude ongoing punishment after service of a sentence and facilitate rehabilitation of ex-offenders.

39. These schemes are also an acknowledgment that criminal records are not necessarily good predictors of an individual's current or future behaviour.[39]

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40. As discussed in Part E below, PILCH is deeply concerned that the Draft Law's treatment of spent convictions is inconsistent with the laws described in this Section.

[38] See Naylor, Paterson and Pittard, above note 1.

[39] See ibid.

Part E – Comments on the Draft Law

12. Treatment of Criminal Histories Under the Draft Law

41. It will be recalled that criminal histories play a prominent role in the Draft Law's registration schemes. In Section 5 of this Submission it was explained that an individual is only eligible for registration as a health practitioner if he/she is a 'suitable person' in accordance with the terms of the Draft Law.[40] In deciding whether or not an individual is a suitable person for registration, a National Board must have regard to whether or not the individual is a 'fit and proper person' for registration.[41] In order to facilitate this assessment, an individual health practitioner must, when applying for registration, disclose his/her criminal history[42] and authorise the National Board to check that criminal history.[43] The National Board is then obliged to check that history.[44] As previously discussed, it is clearly a requirement that an applicant's criminal history be taken into account by a National Board when determining whether or not that applicant is a suitable person for registration as a health practitioner. Further, when the extensive definition of 'criminal history' and the exclusion of spent conviction regimes are taken into account, it seems that it is intended that <u>all</u> of an applicant's criminal history must be considered (ie, all that history is deemed relevant).

42. Additionally, it will be recalled that:

- registration standards can include provisions relating to the criminal histories of applicants;[45]
- each year each applicant for renewal of registration is obliged to give to the National Board details of any change in the applicant's criminal history;[46]
- any application for restoration of registration must disclose the applicant's criminal history and authorise the National Board to check that history;[47]
- a registered health practitioner must, within 30 days of a 'relevant event', notify the National Board.[48] A 'relevant event' includes being charged with or

[40] Draft Law, s 69(1)(c).

[41] Ibid, s 72(1)(a).

[42] Ibid, s 94(3)(b).

[43] Ibid, s 94(3)(c).

[44] Ibid, s 96(1).

[45] Ibid, s 11(2)(b).

[46] Ibid, s 124(b).

[47] Ibid, ss 127(3)(b) and (c).

convicted of or being the subject of a finding of guilt of an offence punishable by 12 months imprisonment or more;[49]

- a National Board may, at any time, ask CrimTrac or a police commissioner for a written report about a registered health practitioner's criminal history;[50]
- complaints can be made about a registered health practitioner if he/she is not a 'fit and proper person' which, by virtue of the combination of sections 69, 72 and 96 includes someone who has a criminal history;[51] and,
- a National Board must keep information about checks carried out by that Board about a registered health practitioner's criminal history.[52]

43. What is most troubling about these extensive provisions is that the definition of 'criminal history' in the Draft Law is extremely broad. It is defined to mean all of the following:

- every conviction of the person for an offence, wherever and whenever committed;
- every plea of guilty or finding of guilt by a court of any offence, wherever and whenever committed, whether or not a conviction is actually recorded for the offence; and,
- every charge made against the person for an offence, wherever and whenever the charge was laid.

44. So, the criminal history that can be used to deny a person registration (or restoration of registration) and which must be disclosed on an annual basis and which can form the basis of a complaint that a registered health practitioner is not a fit and proper person to be registered, includes:

- any unproven charges (despite the presumption of innocence);
- any findings of guilt, even where a court has determined that, in light of all the circumstances (including the applicant's character and potential for rehabilitation), it is not appropriate to impose a conviction; and

[48] Ibid, s 142(1).

[49] Ibid, s 142(3)(a).

[50] Ibid, s 147(1).

[51] Ibid, s 155(c).

[52] Ibid, s 276(g).

- any convictions, even for the most trivial offences (including those which have no logical connection to the individual's practice as a health practitioner).

45. These charges, findings of guilt and convictions are not limited to any timeframe; they include matters dealt with by courts at any time in an applicant's past. The obligations imposed on applicants to disclose their criminal histories are not limited in any way by any spent conviction regime.[53] Nor is any request by a National Board to CrimTrac or a police commissioner.[54]

46. In summary, the Draft Law has completely disregarded the philosophical, moral and legal foundations of the criminal records discrimination and spent conviction regimes that currently operate across Australia.

47. It might be argued that the Draft Law does not mandate any form of criminal record discrimination (because it does not expressly prohibit registration of any applicant with any particular criminal history). However, PILCH considers this view to be not only simplistic, but also legally incorrect. The combined effect of sections 69, 72 and 96, in conjunction with the broad definition of 'criminal history' and the exclusion of the spent conviction regimes, is that National Boards are required to take into account all an applicant's criminal history when determining whether that applicant is suitable for registration.

48. PILCH's concern is that the Draft Law fails to give any express direction to any National Board (or any other institution given powers under the Law - in particular, the Ministerial Council) as to how they should use or not use criminal history information. There is no suggestion that only relevant criminal histories be taken into account. On the contrary, the Draft Law appears to establish a legislative presumption that all criminal histories (including unproven charges, convictions on trivial matters many years ago and even non-convictions on trivial matters many years ago) are relevant and can be used to justify rejection of an application for registration (or renewal of registration). Nor is there any attempt to require a National Board to consider the actual requirements of any particular health service to determine whether any particular criminal histories are relevant to services of that nature.

49. A review of the existing State based regulatory regimes indicates that the Draft Law travels far beyond the current requirements of those regimes in relation to the disclosure of criminal histories, criminal record checking and the regulators' consideration of the implications of any criminal records brought to their attention a result of those disclosures or checks. The rationale behind such a dramatic expansion in criminal record checking is not immediately apparent. PILCH submits that this expansion is inconsistent with

[53] Ibid, ss 94(4), 96(4), 127(4) and 147(4).

[54] Ibid, s 96(4).

Australia's international human rights obligations, existing criminal records discrimination laws and spent conviction regimes.

50. PILCH is particularly concerned that the Draft Law fails to balance the rights of health practitioners to non-discrimination on the ground of criminal record against other interests such as community safety. In PILCH's view, the *Working with Children Act 2005* (Vic) (**Working with Children Act**) provides an example of legislation that carefully balances competing interests, namely, the protection of children and the rights of those with a criminal record, and provides a useful model for consideration in revising the impugned provisions of the Draft Law.

51. The Working with Children Act balances competing interests by setting out a process that applies in determining whether or not a person is suitable to work with children. It delineates various categories of criminal offences, so that:

- individuals on the sex offender register are automatically issued with a negative notice (which precludes them working with children) and have no appeal rights;
- individuals found guilty as adults of serious sexual offences involving children (but who are not on the sex offender register) automatically receive a negative notice, but may appeal to the Victorian Civil and Administrative Tribunal (**VCAT**);
- individuals with other serious sexual, violent or drug-related offences must be issued with a negative notice, unless the decision-maker is satisfied that a positive notice would not pose an 'unjustifiable risk to the safety of children', and the individual may appeal to VCAT; and,
- individuals with various other offences must be issued with positive notices, unless the decision-maker is satisfied that it is inappropriate to do so, in which case the individual may appeal to VCAT.

52. The Working with Children Act combines the need for decision-makers to have flexibility and discretion in considering the circumstances of the offences, with clear guidance on when and how that discretion should be used. This includes the option of external and impartial merits review (in most cases), which promotes transparency and uniformity in decision-making.

53. In the Working with Children Act's Second Reading speech, Mr Rob Hulls, the Attorney-General of Victoria, noted that 'there are widely divergent views in the community about who this bill should cover, what should bar a person from working with children and how a person with a criminal record should be treated', and that the Victorian Government had

consulted extensively to ensure that the Working with Children Act carefully balanced various community interests.

54. PILCH considers that the Working with Children Act is consistent with Australian human rights law and international standards, because it limits discrimination to circumstances where a person's criminal record is directly relevant to their employment. The same, however, cannot be said of the Draft Law. For this reason, the Working with Children Act may provide a useful model in revising the impugned provisions of the Draft Law.

55. In PILCH's view, the definition of 'criminal history' needs to be amended to ensure that National Boards do not have limitless discretions to weigh various criminal offences, without any legislative guidance. PILCH submits that, similarly to the Working with Children Act, the Law should:

- carefully delineate which offences are most relevant to the health services being regulated;
- provide a framework in which National Boards are to exercise their discretions with regard to criminal histories; and,
- provide for external and impartial merits reviews of decisions in relation to the use of criminal histories.

56. Last, PILCH is extremely concerned by the Draft Law's exclusion of spent conviction regimes at both the State and Federal level (see sections 94(4), 96(4), 127(4) and 147(4)). PILCH submits this is unnecessary and dangerous. PILCH further submits that this exclusion cannot be justified in any manner consistent with the principles that provide the foundation of our criminal justice system and Australia's obligations under international human rights law.

Recommendation No. 1:

The Law should operate within the framework of existing criminal records discrimination laws and be consistent with those laws.

Recommendation No. 2:

Only relevant criminal histories should be taken into account by regulators operating under the Law.

Recommendation No. 3:

In providing guidance to regulators in relation to what might be a 'relevant' criminal history, the Law should identify different categories of offences and the weight to be accorded to each of them.

Recommendation No. 4:

The Law, when identifying different categories of offences (see recommendation 3), should consider the relevance of each those categories to each of the health services being regulated.

Recommendation No. 5:

The Law should incorporate a procedure for external and impartial review of decisions based on criminal histories.

Recommendation No. 6:

The Law's exclusion of spent conviction regimes should be removed.

Recommendation No. 7:

The definition of 'criminal history' in the Draft Law should be amended. The revised definition should refer only to recorded convictions and should exclude spent convictions.

Part F – Conclusions

57. Australia's criminal records discrimination laws and spent conviction regimes (notwithstanding their imperfections) attempt to implement Australia's international human rights obligations and reflect some of the basic principles underlying our criminal justice and equal opportunity systems. These laws strive to strike a balance between the competing interests of regulators, employers and members of the public on the one hand, and ex-offenders who are endeavouring to rehabilitate themselves and re-integrate into the community (with the added social benefit of reducing rates of recidivism) on the other. This balancing exercise is a complicated one. PILCH submits that this exercise is best left to the criminal records discrimination laws and spent conviction regimes where all relevant interests and factors have been taken into account. The Law should not attempt to modify, let alone exclude operation of, these laws.

58. PILCH acknowledges that criminal histories will sometimes be relevant to a regulator's decision in circumstances contemplated by the Draft Law. PILCH does not submit that criminal record checks should not be undertaken by the regulators in this regime. However, such checks should be conducted in accordance with existing laws and the results of those checks should be used subject to existing laws. Those existing laws should not be excluded from these processes.