COLLATERAL DAMAGE: UNFAIR DISMISSAL AS AN INVISIBLE PUNISHMENT FOR EMPLOYEES' CRIMINAL RECORDS

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Employment law maintains that employees have a right to a personal life, and that an employee's behaviour outside of work should not have ramifications for them at work, unless the behaviour is related to their employment. However, the conduct of employees outside work is increasingly the subject of employer scrutiny, and this extends to employees' criminal records. Existing research concerning the impact of criminal records on employment focuses on criminal record discrimination in relation to recruitment, and has not explored the role of unfair dismissal laws in protecting current employees against dismissal for a criminal record. This article argues that unfair dismissal decisions concerning employees' criminal records should adopt a framework that is centred on preventing 'collateral consequences'; invisible punishments beyond those already imposed by the criminal justice system. This framework requires a relevant connection between the criminal record and an employee's employment, based on the inherent requirements of the employee's job. Furthermore, tribunals and courts should be required to explicitly articulate this connection, rather than simply assuming that one exists.

I INTRODUCTION

Employment law in Australia and New Zealand maintains that employees have a right to a personal life, and that an employee's behaviour outside of work should not have ramifications for them at work, unless the behaviour is related to their employment.[1] This doctrine has also extended to criminal

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[1] *Rose v Telstra Corporation Ltd* [1998] AIRC 1592, 20; *Smith v The Christchurch Press Co Ltd* (2001) 1 NZLR 407, 413 [25].

conduct by employees not related to their work.[2] However, as observed by the Australian Fair Work Commission (FWC), '[t]he conduct of employees outside of work hours has increasingly become the subject of potential scrutiny by employers'.[3] This was evident in employers' responses to employee participation in unlawful anti-lockdown protests during 2021. For example, in Sydney, a teacher at the Kings School was suspended following his participation in an unlawful anti-lockdown rally. The principal of the school indicated that, whilst people 'were free to hold their own views, it did not extend to their behaviour and conduct'.[4] The school also reported the teacher to the police for his involvement in the rally.[5]

Commentary concerning the impact of a criminal record on employment primarily focuses on criminal record discrimination in relation to recruitment.[6] However, an employer's right to take disciplinary action against a *current* employee for criminal conduct that occurs outside of work has not been canvassed extensively in the literature.[7] This article will therefore focus on that issue.

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[2] *Hussein v Westpac Banking Corporation* (1995) 59 IR 103, 107; *Hospital Employees' Federation of Australia v Western Hospital* [1991] 4 VIR 319, 324; *Wilson v Nestle Australia Ltd* [2010] FWA 4744, [40]; *Deeth v Milly Hill Pty Ltd* [2015] FWC 6422, [29].

[3] *Puszka v Wilkes* [2019] FWC 1132, [60].

[4] ABC News, 'King's School Staff Member Who Attended Anti-Lockdown Protest Reported to Police, Suspended', *ABC News* (Web Page, 27 July 2021) <https://www.abc.net.au/news/2021-07-27/school-worker-who-went-to-lockdown-protest-reported/100327996>.

[5] Jordan Baker Fitzsimmons Caitlin, 'The King's School Reports Teacher for Attending Lockdown Protest', *The Sydney Morning Herald* (Web Page, 27 July 2021) <https://www.smh.com.au/national/nsw/the-king-s-school-reports-teacher-for-attending-lockdown-protest-20210727-p58dew.html>.

[6] See, eg, Rosalind Croucher, 'Righting the Relic: Towards Effective Protections for Criminal Record Discrimination' (2018) 48 *Law Society of NSW Journal* 73; Natalie Wells and Therese MacDermott, 'Taking a Fresh Look at Criminal Record Discrimination' (2021) 33(3) *Australian Journal of Labour Law* 270.

[7] The issue of the effect of a criminal record on a current employee in Australia is briefly canvassed in Marilyn J Pittard, 'Criminalisation, Social Exclusion and Access to Employment' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 474, 476, 492–3. However, Pittard's research does not analyse tribunal decisions relating to dismissal for a criminal record. See also Benjamin Levin, 'Criminal Employment Law' (2018) 39(6) *Cardozo Law Review* 2265, 2285–2294 for a discussion of this issue in the USA.

Anti-discrimination laws and spent convictions legislation in Australia and New Zealand are inadequate to protect current employees from the adverse consequences of a criminal record acquired during, or discovered during, employment. Protection against criminal record discrimination is not uniform in Australia.[8] Employment-related discrimination on the basis of a criminal record is not prohibited at all in New Zealand under the *Human Rights Act 1993* (NZ), nor is it an identified ground of discrimination that would permit a dismissed employee to bring a personal grievance action under the *Employment Relations Act 2000* (NZ). In Australia, the Australian Human Rights Commission (AHRC) can investigate complaints, conciliate, and make recommendations regarding employment-related discrimination based on an irrelevant criminal record.[9] However, protections against criminal record discrimination under the *Australian Human Rights Commission Act 1986* (Cth) do not lead to enforceable remedies,[10] and employers may not comply with recommendations of the Australian Human Rights Commission about employment-related discrimination.[11]

Spent convictions legislation in New Zealand and Australia provides some protection against the requirement for employees to disclose certain prior

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[8] Discrimination on the basis of an irrelevant criminal record is unlawful in Tasmania, the Northern Territory and the Australian Capital Territory. See: *Anti-Discrimination Act 1998* (Tas) ss 3, 16(q), 22(1)(a); *Anti-Discrimination Act 1991* (NT) s 19(q); *Discrimination Act 1991* (ACT) s 7(1)(k), 10. In Western Australia and Victoria, it is unlawful to discriminate against a person based on a spent conviction: *Spent Convictions Act 1988* (WA); *Equal Opportunity Act 2010* (Vic) s 6(pb) pt 4 div 1–2. Queensland, South Australia and NSW do not provide any protection against discrimination on the basis of a criminal record or spent conviction. See also: Charlotte Linklater-Steele et al, *Reforming Criminal Record Discrimination in Queensland* (Report, University of Queensland Pro-Bono Centre, 3 February 2022); Wells and MacDermott (n 6) 275–6.

[9] *Australian Human Rights Commission Act 1986* (Cth) (‘*AHRC Act’*) ss 3 (definition of discrimination); 31(b), 32(1)(b), 35; *Australian Human Rights Commission Regulations 2019* (Cth) reg 6(iii).

[10] *Australian Human Rights Commission Act 1986* (Cth) s 10A(2); See also Wells and McDermott (n 6) 276.

[11] For an example of a case in which the employer declined to follow the recommendations of the Australian Human Rights Commission in relation compensation, see *AW v Data#3 Ltd* [2016] AusHRC 105. See also Pittard (n 7) 490.

offences.[12] Spent convictions legislation primarily protects prospective employees at the time of recruitment, by preventing a potential employee's spent conviction being taken into account when assessing their character. The legislation aims to 'limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour'.[13] However, the Australian spent convictions legislation is inconsistent and confusing.[14] Furthermore, spent convictions legislation

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[12] *Criminal Records (Clean Slate) Act 2004* (NZ); *Crimes Act 1914* (Cth) pt VIIC; *Criminal Records Act 1991* (NSW); *Spent Convictions Act 2000* (ACT); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld); *Criminal Record (Spent Convictions) Act 1992* (NT); *Spent Convictions Act 1988* (WA); *Spent Convictions Act 2009* (SA); *Spent Convictions Act 2021* (Vic).

[13] *Criminal Records Act 1991* (NSW) s 3(1). See also *Spent Convictions Act 2000* (ACT) s 3(1); *Spent Convictions Act 2009* (SA), Long Title.

[14] The spent convictions legislation attempts to achieve its aims by not requiring a person to disclose a spent conviction: *Crimes Act 1914* (Cth) ss 85ZV, 85ZW(a); *Criminal Records Act 1991* (NSW) s 12(a); *Spent Convictions Act 2000* (ACT) s 16(a); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ss 6, 8; *Criminal Record (Spent Convictions) Act 1992* (NT) s 11(a); *Spent Convictions Act 1988* (WA) s 27(2); *Annulled Convictions Act 2003* (Tas) ss 9(1)(a)-(b); *Spent Convictions Act 2009* (SA) s 10(b); *Spent Convictions Act 2021* (Vic) s20(1)(b). It stipulates that questions about a person's criminal history are taken only to include convictions which are not spent: *Criminal Records Act 1991* (NSW) s 12(b); *Spent Convictions Act 2000* (ACT) s 16(b); *Criminal Record (Spent Convictions) Act 1992* (NT) s 11(b); *Spent Convictions Act 1988* (WA) s27(1); *Annulled Convictions Act 2003* (Tas) s 9(1)(c); *Spent Convictions Act 2009* (SA) s 10(a), or prohibits questions about a person's spent convictions: *Spent Convictions Act 2021* (Vic) s 20(1)(c). The legislation also prevents spent convictions being disclosed by other persons, for example in a criminal record check: *Crimes Act 1914* (Cth) s 85ZW(b); *Criminal Records Act 1991* (NSW) s 13; *Spent Convictions Act 2000* (ACT) s 17(1); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 6; *Criminal Record (Spent Convictions) Act 1992* (NT) s 12; *Spent Convictions Act 1988* (WA) s25(2); *Annulled Convictions Act 2003* (Tas) s 11; *Spent Convictions Act 2009* (SA) ss 11, 12; *Spent Convictions Act 2021* (Vic) s 23. However, these protections are not uniform. For example, whilst the legislation varies according to jurisdiction, a conviction is generally considered 'spent' after a 'waiting period', usually 10 years: *Crimes Act 1914* (Cth) s 85ZL; *Criminal Records Act 1991* (NSW) s 9(1); *Spent Convictions Act 2000* (ACT) ss 12(1), 13(1)(b); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3; *Criminal Record (Spent Convictions) Act 1992* (NT) s 6(2)(b); *Spent Convictions Act 1988* (WA) s11(1)(a); *Annulled Convictions Act 2003* (Tas) s 6(2)(a); *Spent Convictions Act 2009* (SA) s 7(1)(b); *Spent Convictions Act 2021* (Vic) s 9(1)(b). Shorter periods apply in relation to offences committed by minors. See: *Crimes Act 1914* (Cth) s 85ZL; *Criminal Records Act 1991* (NSW) s 10; *Spent Convictions Act 2000* (ACT) s 13(1)(b);

fails to provide adequate protections for employees in the digital age, where an employee's record may be discovered by informal means, such

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Criminal Record (Spent Convictions) Act 1992 (NT) s 6(2)(a); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3; *Spent Convictions Act 2009* (SA) s 7(1)(a); *Annulled Convictions Act 2003* (Tas) s 6(2)(b); *Spent Convictions Act 2021* (Vic) s 9(1)(a). In some jurisdictions, the waiting period is measured from the date of the conviction for the offence: *Crimes Act 1914* (Cth) s 85ZL; *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3. However, other jurisdictions require a 'crime-free' period of 10 years for a conviction to be spent. This means that, if the person re-offends during the waiting period, this re-sets the clock on the 10 year waiting period: *Criminal Records Act 1991* (NSW) s 9(1); *Spent Convictions Act 2000* (ACT) ss 12(1), 13; *Criminal Record (Spent Convictions) Act 1992* (NT) ss 6(2)(c), 6(2)(d); *Spent Convictions Act 1988* (WA) s 11(4); *Annulled Convictions Act 2003* (Tas) s 6(4); *Spent Convictions Act 2009* (SA) s 7(2); *Spent Convictions Act 2021* (Vic) s 10. Another inconsistency relates to the jurisdictional reach of the legislation. Generally, the spent convictions legislation relates to convictions for offences in all jurisdictions. That is, it does not just protect against disclosure of convictions in the relevant jurisdiction of the legislation: *Crimes Act 1914* (Cth) s 85ZV; *Criminal Records Act 1991* (NSW) s 7(2); *Spent Convictions Act 2000* (ACT) s 9(1); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1); *Criminal Record (Spent Convictions) Act 1992* (NT) s 3(1); *Annulled Convictions Act 2003* (Tas) s 4; *Spent Convictions Act 2009* (SA) s 6(1); *Spent Convictions Act 2021* (Vic) ss 7, 8. However, in Western Australia, the spent convictions legislation relates only to means a conviction for an offence against the law Western Australia or of a foreign country: *Spent Convictions Act 1988* (WA) s 3(1). The legislation is also not consistent in terms of the types of offences for which convictions can be spent. For example, in some jurisdictions, all convictions can be spent, subject to certain exceptions: *Criminal Records Act 1991* (NSW) s 9 pt 3 div 2; *Spent Convictions Act 2000* (ACT) s 11, 19. In other jurisdictions, the determination of whether a criminal conviction can be spent is determined by the length of the custodial sentence imposed for the conviction: *Crimes Act 1914* (Cth) s 85ZM(2); *Criminal Record (Spent Convictions) Act 1992* (NT) s 6, pt 3, div 2; *Spent Convictions Act 2009* (SA) ss 3(1), 5(1); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1); *Spent Convictions Act 2021* (Vic) ss 3, 8(a). Another approach is to impose different conditions for 'serious' and 'minor' offences in relation to whether a conviction can be spent: *Annulled Convictions Act 2003* (Tas) ss 3, 6; *Spent Convictions Act 1988* (WA) ss 6, 7. There is also inconsistency in relation to exceptions for sexual offences. Not all jurisdictions prevent convictions for sexual offences from being spent: *Criminal Records Act 1991* (NSW) s 7(1)(b); *Spent Convictions Act 2000* (ACT) s 11(2)(b); *Criminal Record (Spent Convictions) Act 1992* (NT) s 5(a); *Annulled Convictions Act 2003* (Tas) s 3; *Spent Convictions Act 1988* (WA) sch 3; *Spent Convictions Act 2021* (Vic) ss 3, 8(a). For an overview of this legislation in Australia, see Wells and MacDermott (n 6) 283–5; Pittard (n 7) 491.

as social media.[15] Finally, where an employee's conviction is not spent, and they are required by a prospective employer to disclose their criminal record, a dishonest response that is subsequently discovered by their employer may be grounds for termination of employment at common law.[16] It is therefore important that other avenues of redress for employees are explored, in particular, unfair dismissal. In this article, we analyse unfair dismissal decisions in Australia and New Zealand where the operative reason for the employee's dismissal was a criminal record relating to conduct outside of work, and find that this body of law lacks coherence. We argue that this body of law could be made more coherent and fair if courts and tribunals exercising civil jurisdiction in unfair dismissal matters adopted a framework that is centred on preventing collateral consequences– what we term a collateral consequences framework. An examination of the law in Australia and New Zealand has been chosen for this study due to the many shared principles and features in the employment law space, as well as the fact that when it comes to unfair dismissals both jurisdictions take into account the same 'substantive and procedural circumstances'.[17] Additionally, this is relevant when taking into account the workforce mobility between Australia and New Zealand.

A collateral consequences framework posits that the impact of criminal stigma is problematic as it can lead to consequences that create an invisible punishment that has the effect of sentencing and punishment *beyond* that imposed by the criminal justice system,[18] imposing a 'second tier of "justice"'.[19] Applied to unfair dismissal, a collateral consequences framework requires a clear connection between the employment and the

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[15] Fraser Gollogly, 'The Blemish on the Clean Slate Act: Is There a Right to Be Forgotten in New Zealand?' (2019) 25 *Auckland University Law Review* 129, 133, 146; Wells and MacDermott (n 6), 288; Elizabeth Westrope, 'Employment Discrimination on The Basis of Criminal History: Why an Anti-Discrimination Statute Is a Necessary Remedy' (2018) 108 *Journal of Criminal Law and Criminology* 367, 373–6; Pittard, (n 7), 477, 492–3.

[16] Carolyn Sappideen et al, *Macken's Law of Employment* (LawBook Co, 9th ed, 2022) 123. See also Wells and MacDermott (n 6) 272; Australian Human Rights and Equal Opportunity Commission, *Discrimination on the Basis of a Criminal Record* (Discussion Paper, December 2004) 7.

[17] Paul Harpur, 'Work Choices: An International Comparison' (2006) 6(1) *QUT Law and Justice Journal* 89.

[18] Marti Rovira, 'The Stigma of a Criminal Record in the Labour Market in Spain: An Experimental Study' (2019) 11(1) *European Journal of Probation* 14, 15.

[19] Pittard (n 7) 476.

employee's criminal record. It necessitates a more disciplined focus concerning whether an employee's criminal conduct relates to the inherent requirements of their work, and requires decision makers to enunciate *how* the criminal record relates to the employment. In the absence of a relevant connection between the employment and the criminal record, courts and tribunals should find that an employer lacks a valid reason to terminate the employee's employment, rendering the dismissal unfair. Using a collateral consequences framework, tenuous connections such as concerns for the safety of other employees, or concerns about the employer's reputation, do not automatically provide that connection.

This article will first define what is meant by 'criminal record'. It will then outline the collateral consequences framework. We will examine the existing tribunal and court decisions in Australia and New Zealand. Finally, we will explain how the application of the collateral consequences framework could assist in making the law more coherent, concluding that civil tribunals and courts in unfair dismissal jurisdictions need to be mindful that their decisions do not impose collateral consequences on employees, additional to the penalties imposed by the criminal justice system.

A *Defining 'criminal record'*

As discussed above, research relating to the impact of a criminal record on an employee's employment focuses on discrimination on the basis of a criminal record. In the context of Australia's discrimination laws, an employee's criminal record is generally understood to include not only convictions for criminal offences, but 'charges which were not proven, investigations, findings of guilt with non-conviction and convictions that were later quashed or pardoned'.[20] This article will employ this broader meaning of 'criminal record'. This definition is adopted because it has been demonstrated that an employee's criminal record, broadly defined, can have collateral consequences even if the employee is not convicted of a criminal offence.[21]

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[20] Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (Report, 2012) 8.

[21] See, eg, Benjamin D Geffen, 'The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests without Convictions' (2017) 20(2) *University of Pennsylvania Journal of Law and Social Change* 81.

II Collateral Consequences and Invisible Punishment

Collateral consequences are the consequences that arise indirectly from a criminal record.[22] These are not the direct consequences that stem from formal punishment imposed by the state through the courts and sentencing, but rather the outcomes that arise for convicted offenders based on the fact that they have a conviction, and from other 'civil' sanctions.[23] They are the disadvantages that individuals with a criminal record continue to face as a result of their conviction and/or the 'offender' label that they carry with them for life.[24] These can stem from formal civil measures that impose restrictions on employment, for example. However, they may take more informal forms, stemming from social norms or moral censure. What is clear is that criminal records are used to distinguish and exclude.[25] The continued stigmatisation of people with criminal convictions that leads to these collateral consequences are problematic as they form a sort of 'invisible punishment' that in many ways extends the effects of formal sentencing and punishment beyond the criminal justice system well into the civil sphere.[26]

The types of collateral consequences and the reach of these on an individual's life extends to the social, economic and political spheres.[27] There are a range of measures both formal and informal that may constitute a collateral consequence. For example, formal legal restrictions around eligibility for types of employment,[28] social welfare, voting, or housing are

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[22] Michael Pinard, 'An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals' (2006) 86 *Boston University Law Review* 623, 634.

[23] Jeremy Travis, 'Invisible Punishment: An Instrument of Social Exclusion' in Marc Mauer and Meda Chesney-Lind (eds), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002) 15, 15–6.

[24] Margaret Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction: Going on the Record of an Offender* (Springer, 2018) 204, 204.

[25] Ibid.

[26] Rovira (n 18) 15.

[27] Pinard (n 22) 635; Pittard (n 7) 482–7.

[28] For example, in Australia, restrictions apply in employment that involves working with children, and prior convictions must be declared as part of the process of obtaining a 'working with children check'. This is governed by state and territory legislation. One example that outlines the types of convictions that restrict employment in spaces involving children is the *Child Protection (Working with Children) Act 2012* (NSW); in particular, Schedule 2 of the Act outlines 'disqualifying offences'.

considered formal measures.[29] These measures are not part of the formal punishment given by the criminal courts but operate separately as civil or administrative measures.[30] Much of the collateral consequences discourse looks at these civil measures that impose legal restrictions on convicted offenders as they reintegrate into society. However, there are also informal measures that can lead to collateral consequences, stemming from family, financial insecurity, stigma,[31] and broader issues around social acceptance and reintegration. The invisible, more informal, forms of collateral consequences shaped by social norms or moral censure are perhaps the most problematic as they are harder to identify – as is the case with employers taking disciplinary measures against employees on the basis of a criminal record.

In terms of employment, collateral consequences have typically been considered in relation to the barriers they create for convicted offenders seeking employment opportunities. It is in relation to recruitment processes that criminal records are seen to have the most documented negative outcome for individuals.[32] The most obvious issue arises where there are legal restrictions in relation to hiring processes, whereby convicted offenders cannot work in particular types of employment.[33] This is the

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[29] Zachary Hoskins, 'Criminalization and the Collateral Consequences of Conviction' (2018) 12 *Criminal Law and Philosophy* 625, ('Criminalization') 627.

[30] Ibid 628.

[31] Hoskins, 'Criminalization' (n 29) 626.

[32] Nicholas Park and Grant Tietjen, '"It's Not a Conversation Starter." Or Is It?: Stigma Management Strategies of the Formerly Incarcerated in Personal and Occupational Settings' (2021) 10(3) *Journal of Qualitative Criminal Justice & Criminology* 7.

[33] Hoskins (n 29) 628. Common examples of these restrictions in Australia include child related work. See *Child Protection (Working with Children) Act 2012* (NSW). The spent convictions legislation (discussed above) does not apply to this type of work. This means that an employee's criminal record must be disclosed, even if the conviction would otherwise be considered 'spent'. In relation to child-related work, see exceptions to the spent convictions legislation in: *Criminal Records (Clean Slate) Act 2004* (NZ) s 19; *Crimes Act 1914* (Cth) ss 85ZZGA-85ZZGG; *Criminal Records Act 1991* (NSW) s 15(1A); *Spent Convictions Act 2000* (ACT) s 19(1); *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 9A; *Criminal Record (Spent Convictions) Act 1992* (NT) ss15A(1) and (2); *Annulled Convictions Act 2003* (Tas) sch 1, pt 6; *Spent Convictions Act 2009* (SA) sch 1, s 6; *Spent Convictions Act 2021* (Vic) s 22. In jurisdictions where discrimination on the basis of an irrelevant criminal record is unlawful, there are also exceptions for child-

predominant focus where criminal records are discussed in the employment context – that is, finding employment that will aid reintegration into society. For the most part, these criminal records relate to serious offences where a sentence of imprisonment was imposed and served. However, discrimination on the basis of criminal records also arises in cases of less serious offences. For example, in a study by Uggen et al, they noted the negative effect of misdemeanours on a criminal record within the recruitment process.[34] This is a key point to note, as it is not always the most serious criminal records that can lead to collateral consequences. Furthermore, what is not extensively explored is the collateral consequences of a criminal record obtained or disclosed *during* employment, in the form of employer disciplinary action that further punishes employees.

Travis discusses collateral consequences as a type of 'invisible punishment'.[35] He characterises this as the outcomes or harms that emerge from collateral consequences, particularly those civil sanctions that place restrictions on people with criminal convictions seeking employment, housing, or voting.[36] They are additional forms of punishment that are hidden in a sense that they are often overlooked as they are not part of the formal criminal punishment.[37] Collateral consequences that serve as a secondary, invisible punishment to the individual also emerge from informal sources, as noted earlier, from stigmatisation of offenders, as well as lost opportunities for employment and development.[38] These are also considered 'foreseeable side effects' of conviction and punishment and are hidden because they are not part of official, state policies; and notably these effects can extend beyond the offender to also affect their families and

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related work, see, eg, *Anti-Discrimination Act 1988* (Tas) s 50; *Anti-Discrimination Act 1992* (NT) s 37.

[34] Christopher Uggen, Jeff Manza and Melissa Thompson, 'Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders' (2006) 605(1) *The Annals of the American Academy of Political and Social Science* 281, cited in Rovira (n 18) 23.

[35] Travis (n 23) 15–6.

[36] Ibid.

[37] Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford University Press, 2019) 628, 33 ('*Beyond Punishment?*').

[38] Christopher Bennett, 'Invisible Punishment Is Wrong–but Why? The Normative Basis of Criticism of Collateral Consequences of Criminal Conviction' (2017) 56(4) *The Howard Journal of Crime and Justice* 480, 484.

communities.[39] In the employment space, this is particularly important to consider, as stigmatisation and these side effects that Bennett speaks of that may emerge from employers taking independent actions against their employees not only affects their employment status and future opportunities, but also their livelihood and ability to support their family.

Due to the invisible and informal nature of collateral consequences, it is important to recognise the way that criminal matters, like criminal records, have intersecting effects in the civil sphere, like employment. It is naïve to assume that once convicted and a sentence served under the purview of the criminal law, that punishment for an individual ends there.[40] The stigma and 'deviant' label,[41] once attached to people with criminal records, can hinder their reintegration into society and follow them around.[42] As theorised by Goffman, once an individual is labelled a deviant they may develop a 'spoiled identity' that is difficult to shake off, and which subsequently affects access to opportunities (i.e. gaining employment), as well as social connections.[43] There is a 'moral censure' that appears to be applied when it comes to criminal records.[44] It is therefore important to consider the way that collateral consequences are a reality, particularly the most informal and insidious kind occurring within the employment context through disciplinary actions and censure carried out by employers.

There are limited opportunities for potential collateral consequences to be considered in the criminal justice system.[45] Where they are acknowledged they are often explained as being a separate matter, unrelated to the criminal process and therefore a matter for civil laws and regulations.[46] This separation between criminal and civil perpetuates rather than resolves the issue of how best to address collateral consequences by pushing them further into the informal space – into the shadow of the legal system. In the employment context, as Levin observes, it permits employers –private

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[39] Ibid.
[40] Pinard (n 22) 643–4.
[41] Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity. New York: Simon and Schusser* (New York: Simon and Schusser, 1963), cited in Park and Tietjen (n 32) 3.
[42] See, generally, Pinard (n 22).
[43] Goffman (n 41), cited in cited in Park and Tietjen (n 32) 3.
[44] Andrew Henley, 'Abolishing the Stigma of Punishments Served' (2015) 102(1) *Criminal Justice Matters* 57, 58.
[45] Pinard (n 22) 629-630.
[46] Ibid 631.

actors— to become 'part of the punitive apparatus, extending the effects of [criminal] punishment without formal checks'.[47] There needs to be greater consciousness of these collateral consequences by civil courts and tribunals when it comes to employment matters, and particularly in relation to unfair dismissal.

As Bennett argues, we have a responsibility towards offenders 'as fellow participants in a collective democratic enterprise' to ensure that they are not subject to invisible punishment, like that from collateral consequences.[48] In the context of employment, this of course means considering the effects of limited access and opportunities for employment but also, where employers step into a role as judge and jury to take separate non-state sanctioned action against their employees. It is important to consider the spaces where this occurs, due to a lack of oversight and protection within the employment space. This is particularly problematic where employees' criminal records have an impact on their employment, despite the criminal record having no relevant connection to their employment. For this reason, we argue that a framework that is centred on collateral consequences can work to avoid unfair dismissals where employees' criminal records are raised.

III CRIMINAL RECORDS AND DISMISSAL

The following analysis concerns dismissal for a criminal record that relates to conduct outside of work. Our analysis is limited to this type of criminal record because it is clear that criminal conduct committed in the course of an employee's duties is serious and wilful misconduct at common law, justifying summary dismissal.[49] This doctrine extends to criminal conduct committed against third parties in the course of employment.[50] Criminal wrongdoing at work also justifies dismissal under unfair dismissal legislation.[51]

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[47] Levin (n 71) 2313.
[48] Bennett (n 38) 483.
[49] *WD and HO Wills v Jamieson* [1957] AR (NSW) 547, 551.
[50] *Griffin v London Bank of Australia Ltd* (1919) 19 SR (NSW) 154.
[51] *McIndoe v BHP Coal Pty Ltd* [2000] AIRC 569, confirmed on appeal in *McIndoe v BHP Coal Pty Ltd* [2001] AIRC 191. This case was decided under the unfair dismissal provisions of the then *Workplace Relations Act 1996* (Cth), pt VIA div 3 sub-div B, the predecessor to the current unfair dismissal provisions of the *Fair Work Act 2009* (Cth), pt 3-2.

The more contentious issue is whether criminal conduct *outside* of work constitutes serious and wilful misconduct at common law, and in the case of unfair dismissal laws, whether it is unfair to dismiss an employee for a criminal record relating to out of work behaviour. These two issues overlap to some extent.

In Australia, under the federal unfair dismissal regime, in determining whether a dismissal is 'harsh, unjust or unreasonable', the Fair Work Commission must consider a number of matters, including 'whether there was a valid reason for the dismissal related to the person's capacity or conduct'.[52] The test for whether an employer has a valid reason for a dismissal, is whether the reason is 'sound, defensible and well-founded'.[53] An employee's conduct does not have to amount to serious misconduct at common law in order to constitute a valid reason for a dismissal.[54] However, in determining whether there is a valid reason for a dismissal, the Commission considers whether the employee's conduct is incompatible with their duties as an employee, and this is often assessed against the common law standard of whether the employee has engaged in serious misconduct. In relation to out of hours conduct by an employee, this principle is clearly expressed in the case of *Rose v Telstra Corporation Ltd*, which provides that, in order for the conduct to constitute a valid reason for a dismissal:

- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.[55]

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[52] *Fair Work Act 2009* (Cth) s 387(a).
[53] *Selvachandran v Peteron Plastics* (1995) 62 IR 371, 373.
[54] *Annetta v Ansett Australia Ltd* (2000) 98 IR 233; *Potter v WorkCover Corporation* (2004) 133 IR 458; *Selvachandran v Peteron Plastics* (n 49).
[55] *Rose v Telstra Corporation Ltd* (n 1) 13–4.

In New Zealand, the general test for whether an employee's conduct outside of work justifies dismissal is set out in *Smith v The Christchurch Press Company Ltd.*[56] The New Zealand Court of Appeal found that out of hours conduct could amount to misconduct at common law, entitling an employer to dismiss an employee for serious misconduct, providing that there was a sufficient relationship between the conduct and the employment.[57] While the Court acknowledged that there are limited situations in which an employer can be said to have a legitimate interest in an employee's conduct outside of work, it stated that the relevant connection to employment may occur where there is damage to the employer's business, where the conduct is incompatible with the employee's duties, where the conduct impacts on the employer's duties to other employees, or where for any other reason it impacts on the relationship of trust and confidence between the employer and the employee.[58]

In New Zealand, the test in *Smith v The Christchurch Press Company Ltd* finds its way into disputes concerning the fairness of an employee's dismissal or other disciplinary action based on their criminal record.[59] Unfair dismissal disputes in New Zealand are dealt with under the *Employment Relations Act 2000* (NZ). This legislation provides employees with the right to pursue a remedy for a 'personal grievance'.[60] The definition of personal grievance includes that the employee has been unjustifiably dismissed.[61] In determining a personal grievance, the Employment Relations Authority applies an objective test of 'whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal…occurred'.[62]

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[56] *Smith v The Christchurch Press Co Ltd* (n 2).
[57] Ibid 412 [17].
[58] Ibid 413 [25].
[59] See, eg, *Craigie v Air New Zealand Ltd* [2006] ERNZ 147; *Te Huia v Commissioner of Police* [2018] NZERA Wellington 90; *Hallwright v Forsyth Barr Ltd* [2013] NZERA Auckland 79.
[60] *Employment Relations Act 2000* (NZ) s 102.
[61] Ibid s 103(1)(a).
[62] Ibid s 103A(2).

The traditional position is that an out of work criminal record, of itself, does not justify dismissal of an employee.[63] For example, in *HEF v Western Hospital*, the Industrial Relations Commission of Victoria observed that:

> The conviction of an individual for a criminal offence does not necessarily have any effect upon that person's employment. The question of the relevance of a conviction or an employee's alleged misbehaviour to the employee's work should be considered in terms of whether or not the employee has breached an express or implied term of his or her contract of employment. Whether events occurring outside the actual performance of work will be relevant to the employment relationship will vary from case to case…. The contractual right of an employer to dismiss an employee summarily on the ground of serious and wilful misconduct is a right which is limited to cases where the misconduct has a relevant connection with the performance of his or her work as an employee.[64]

IV Making the 'relevant connection' to employment

A *Where there is a relationship between the employee's duties and the criminal record*

In some situations, there is a clear link between the employee's criminal record, and the duties they are required to perform as an employee. One of the most cited decisions concerning dismissal for criminal conduct outside of work is *Hussein v Westpac Banking Corporation.*[65] Hussein was employed by Westpac as a migrant services officer. His job entailed liaising with the Greek and Turkish communities in a culturally diverse area of Victoria, to attempt to 'increase Westpac's business within the Greek and Turkish communities'.[66] He pled guilty to offences relating to fraudulent use of a credit card that he held with another bank. The use of this credit card was not related to his work. Westpac dismissed him. The Industrial Relations Court of Australia found that there was a relevant connection between Hussein's criminal record and his work at Westpac, providing a valid reason for his dismissal. Part of Hussein's duties involved assisting

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[63] *Deeth v Milly Hill Pty Ltd* (n 2) [29]; *HEF v Western Hospital* (1991) 4 VIR 310, 324; *Hussein v Westpac Banking Corporation* (n 2) 107; *Strangio v Sydney Trains* [2023] FWC 730 [20]; *Wilson v Nestle Australia Ltd* (n 2) [40].
[64] *HEF v Western Hospital* (n 63) 324.
[65] *Hussein v Westpac Banking Corporation* (n 2).
[66] Ibid 108.

members of the community with their banking transactions. These duties meant that Hussein held a 'position of responsibility and trust' and Westpac was entitled to conclude that it could not trust him.[67] The Court distinguished these facts from a drink driving offence which, it observed 'would not be relevant to the employment of many people. However, it would be of critical relevance to a truck or taxi driver'.[68] This oft-cited case indicates that courts and tribunals should seek a relevant connection between the employee's criminal record and the work they perform. However, as will be discussed below, the decisions demonstrate that courts and tribunals do not consistently apply this principle.

B *Where the criminal conduct occurs in relation to other employees*

Case law establishes that, even where criminal conduct occurs outside of an employee's working hours, if it involves other employees or is sufficiently proximate to work, this may justify the employee's dismissal. For example, in *Coward v Gunns Veneer Pty Ltd*, Coward stole the radio aerial from another employee's car.[69] The employer discovered the theft and terminated his employment. Coward argued that his conduct did not have a relevant connection to his employment because it occurred when he was off duty, and the car was not parked in the employer's premises. The Federal Court of Australia rejected these arguments, observing that 'stealing from a fellow employee is highly disruptive of good morale in the workplace and is conduct which an employer is entitled to treat very seriously'.[70]

Decisions in this category often involve assaults on other employees.[71] Even where the assault occurs outside of work, it can be connected to the employment because it affects 'the management and conduct' of the employer's business.[72]

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[67] Ibid.
[68] Ibid 107.
[69] *Coward v Gunns Veneer Pty Ltd* (Federal Court of Australia, Hobart District Registry, Heerey J, 5 June 1998).
[70] Ibid 3.
[71] *Dobson v Qantas Airways Ltd* [2010] FWA 6431; *R v Railways Appeal Board; Ex parte Haran* [1969] WAR 13; *Transfield Pty Ltd re Dismissal of Union Delegate* [1974] AR (NSW) 596.
[72] *R v Railways Appeal Board; Ex Parte Haran* (n 71) 15. See also *Civil Service Association of Western Australia Inc v Director General of Department for*

C *Where the connection is both employee's ability to do their job and protection of employer's reputation*

In some cases, the relevant connection between the employee's criminal conduct and their employment appears to relate to the employee's ability to do their job, coupled with concerns about the employer's reputation.

For example, in *Hunt v Coomealla Health Aboriginal Corporation,* Hunt was employed as a trainee health practitioner for the Coomella Health Aboriginal Corporation.[73] His duties included running a weekly men's group addressing issues of domestic violence in the Aboriginal community, and working with victims of domestic violence. Hunt was summarily dismissed by the Corporation after he was charged with assaulting his partner. He claimed that the dismissal was unfair because the assault had occurred outside of work.

The Fair Work Commission found that there was a valid reason for Hunt's dismissal based on the connection between the criminal conduct and Hunt's duties. The relevant connection was that 'Hunt's own credibility in relation to the issue of domestic violence [had] been severely compromised' and it was likely that victims of domestic violence who used the Corporation's services would not feel comfortable dealing with Hunt.[74] The Commission also found that the relevant connection between Hunt's out of work criminal conduct and his employment related to the Corporation's concerns about its reputation in the community. The Commission accepted the Corporation's submission that, had it not dismissed Hunt, 'its credibility would have been impaired…. and… its relationships with partner organisations would have been adversely affected'.[75]

Similarly, in the New Zealand case of *Mussen v New Zealand Clerical Workers' Union* Mussen, a union organiser employed by the Clerical Workers' Union, was dismissed for misconduct when she was arrested for being involved in graffitiing a business premises in protest over the introduction of the *Employment Contracts Bill*.[76] The conduct did not occur

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Community Development [2002] WASCA 241; *Farquharson v Qantas Airways Ltd* [2006] AIRC 488.

[73] *Hunt v Coomealla Health Aboriginal Corporation* [2018] FWC 3743.

[74] Ibid [23].

[75] Ibid [22].

[76] *Mussen v New Zealand Clerical Workers' Union* (New Zealand Employment Court, Palmer J, 27–9 August 1991).

while she was at work performing her duties as a union organiser. However, the Employment Relations Court dismissed Mussen's unfair dismissal claim against the Union, finding that there was a relevant connection between the arrest and her employment, even though the conduct occurred out of hours. It found that her actions were likely to damage trust and confidence in the Union, and in her as a union organiser.

D *Where there is concern for the safety of other employees*

In some cases, the relevant connection between the out of work criminal record and the employment relates to concerns for the safety of other employees.

In *Wilson v Nestle Australia Ltd*, Wilson was employed as long-term casual by Nestle.[77] His employment was terminated when Nestle discovered he had been charged with offences related to stalking and harassment, and the making and possession of child pornography. He was subsequently convicted, and his appeal against these convictions was unsuccessful. The offences did not relate to other employees of Nestle. However, in response to Wilson's claim that he had been unfairly dismissed, Nestle also relied on evidence of Wilson's inappropriate workplace behaviour in relation to women. Fair Work Australia's decision makes clear that Wilson's criminal record *alone* constituted a valid reason for the dismissal.[78] The relevant connection to Wilson's work appears to be the gender balance of the Nestle workforce, and a concern for the safety of female employees.[79]

In *Deeth v Milly Hill Pty Ltd,* Deeth, an apprentice butcher, was dismissed from employment when his employer learned that he had been charged with being an accessory after the fact to murder.[80] The Fair Work Commission found that there was a relevant connection between the charge and Deeth's work, which appears to be related to a concern for the safety of other employees. The Commission observed that:

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[77] *Wilson v Nestle Australia Ltd* (n 2).
[78] Ibid [40]. The Commission ultimately found that the dismissal was unfair because Wilson had not been afforded procedural fairness. He was awarded 10 days' pay as compensation.
[79] Ibid [41]. Leave to appeal this decision was refused by the Full Bench of Fair Work Australia in *Employee W v Employer N* [2010] FWAFB 7802.
[80] *Deeth v Milly Hill Pty Ltd* (n 2).

> The offence with which he was charged was not a violence offence, but the offence to which he was charged as an accessory certainly was. This, taken together with:
>
> • the fact that Mr Deeth had, while at work, threatened aggression a few weeks before being charged; and
>
> • the fact that Mr Deeth's work involves the use of sharp knives is sufficient to persuade me that both employees and customers of Milly Hill could legitimately have been concerned.[81]

It is worth noting here that Deeth was not charged with a violent offence, but with being the accessory after the fact to a violent offence, and also that the evidence about Deeth's 'threatened aggression' related to a telephone call overheard by another employee, rather than Deeth's aggression towards staff or customers.[82] The connection between the charge and the concern about employee and customer safety is tenuous in this case. While employers in Australia and New Zealand have statutory obligations to ensure, so far as is reasonably practicable, the health and safety of workers,[83] research demonstrates that 'individuals with criminal records are statistically unlikely to commit crimes while on the job'.[84]

In other decisions where the issue of the employer's liability for risk to others is argued as the reason connecting the employee's criminal record to their employment, such arguments are given short shrift by the Fair Work Commission. In *Wise v Mildura Aboriginal Corporation Inc*, Wise was employed as a driver.[85] At the time of his dismissal, his job was to transport

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[81] Ibid [30]. As in the case of *Wilson v Nestle Australia Ltd*, the Commission here ultimately finds that the dismissal was unfair, because Deeth was not afforded procedural fairness.

[82] Ibid [14].

[83] *Health and Safety at Work Act 2015* (NZ) s 36; *Work Health and Safety Act 2011* (Cth) s 19; *Work Health and Safety Act 2011* (NSW) s 19; *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 19; *Work Health and Safety Act 2011* (ACT) s 19; *Work Health and Safety Act 2011* (Qld) s 19*; Work Health and Safety Act 2012* (SA) s 19; *Work Health and Safety Act 2012* (Tas) s 19*; Work Health and Safety Act 2020* (WA) s 19; *Occupational Health and Safety Act 2004* (Vic) ss 21–3.

[84] Westrope (n 15) 392, citing Michael Carlin and Ellen Frick, 'Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII in Discrimination Against Persons with Criminal Records' (2013) 12 *Seattle Journal for Social Justice* 109, 112.

[85] *Wise v Mildura Aboriginal Corporation Inc* [2013] FWC 6177.

patients to and from medical appointments. He had commenced work with the Corporation in 2007, and was dismissed in 2013 when a police record check revealed that, in 2012, he had been charged with possession of ecstasy and unlawful possession of explosives. He was fined an aggregate of $350 for both matters with no conviction recorded. In response to Wise's unfair dismissal claim, the Corporation contended that his criminal record meant that he presented an 'unacceptable risk' because his duties involved transporting patients.[86] The risk identified by the employer was the possibility that the Corporation might be exposed to liability should a patient suffer an overdose while being transported by Wise, and his prior criminal record then become public knowledge. The Commission relied on the test in *Rose v Telstra Corporation Ltd*,[87] and found that there was no relevant connection between Wise's criminal record and his employment.[88]

E *Public sector employment- a different standard?*

In the case of public sector employment, legislation and codes of conduct usually provide a right for the relevant authority to discipline an employee who commits a criminal offence. This includes dismissal.[89] Public sector employees are often held to a higher standard in relation to their conduct outside of work, because of the necessity for public confidence in the sector.[90] However, a decision by a public sector employer to dismiss an employee because of a criminal record related to out of hours conduct may still be challenged under the relevant laws affecting dismissal of public

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[86] Ibid [62].
[87] *Rose v Telstra Corporation Ltd* (n 1).
[88] *Wise v Mildura Aboriginal Corporation Inc* (n 85) [67]–[68], [72].
[89] Sarah Hook and Sandy Noakes, 'Employer Control of Employee Behaviour through Social Media' (2019) 1(1) *Law, Technology and Humans* 141, 153. See, eg, the Australian Public Service ('APS') Code of Conduct, contained in *Public Service Act 1999* (Cth) s 13(11)(b), which requires an employee of the Australian Public Service to 'at all times behave in a way that upholds the integrity and good reputation of the employee's Agency and the APS'. Section 15(1)(a) of the *Public Service Act 1999* (Cth) provides for the termination of employment of an APS employee who breaches the Code of Conduct. See also *Government Sector Employment Act 2013* (NSW) s 69(4)(a), which provides for the termination of a NSW government employee for misconduct. 'Misconduct' is defined as extending to a conviction or finding of guilt for a serious offence. 'Serious offence' means an offence punishable by imprisonment for life or for 12 months or more. The subject matter of the misconduct the NSW government employee may relate to conduct that happened while the employee was not on duty: ibid, s 69(1)(d).
[90] Hook and Noakes, ibid.

sector employees.[91] Unfortunately, decisions on this issue lack coherence, as it is not clear whether there needs to be a connection between the nature of the public sector employee's employment and the criminal record, or whether the criminal record alone is sufficient to justify dismissal.

Some of these public service matters establish that there must still be a relevant connection between nature of the employment and the employee's criminal record to justify the dismissal.[92] Some decisions also clearly articulate that relevant connection. Examples include prison and police officers dismissed due to criminal records relating to out of hours conduct. In these cases, the relevant connection between the criminal record and the employment is explicitly stated as the need for such employees to model pro-social behaviour,[93] and the undermining of public confidence in law enforcement where police officers commit criminal offences.[94]

In other decisions involving public sector employees, the requirement for a connection between the employment and the criminal record is not directly stated by the relevant court or tribunal. However, it is clear that it is a factor considered to reach the decision that the dismissal was valid. Examples include the dismissal of a tax office employees for convictions relating to failure to lodge personal tax returns[95] and for social security fraud.[96]

However, in some cases there appears to be little, if any, connection between the employment and the criminal record. These decisions include the dismissal of a fleet inspector with the Roads and Maritime Services for a conviction relating to the possession of child pornography on his personal computer,[97] the dismissal of financial analyst with the NSW Police for an assault offence,[98] and the dismissal of a taxation office employee for a

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[91] In Australia, these laws include, eg, *Public Service Act 1999* (Cth), s 33; *Fair Work Act 2009* (Cth), Part 3-2; *Industrial Relations Act 1996* (NSW); *Fair Work Act 1994* (SA); *Industrial Relations Act 1979* (WA); *Industrial Relations Act 2016* (Qld). In New Zealand, public sector unfair dismissal matters are dealt with under the *Employment Relations Act 2000* (NZ).

[92] *Corrective Services NSW v Silling* [2012] NSWIRComm 118, [42].

[93] *Corrective Services NSW v Danwer* (2013) 235 IR 216, 230 [51].

[94] *Te Huia v Commissioner of Police* [2018] NZERA Wellington 90, [29].

[95] *Kathuria v Australia Taxation Office* [2015] FWC 8553.

[96] *Murray v Attorney-General in respect of the Chief Executive of the Inland Revenue Department* [2002] ERNZ 184.

[97] *Hansen v Secretary of the Department of Transport* (2016) 255 IR 40.

[98] *Klazidis v Commissioner of Police* [2016] NSWIRComm 1014.

conviction for sex offences against a person under the age of 16.[99] In each of these decisions, the relevant tribunal or court upheld the validity of the dismissal. In two of these cases, *Hansen v Secretary of the Department of Transport*[100] and *Klazidis v Commissioner of Police,*[101] the mere fact of the criminal record was held to be sufficient grounds for the dismissal given the seriousness of the offence.[102] In both cases, the Industrial Relations Commission of NSW expressly rejected the employee's argument that there must be a relevant connection between the nature of the employment and the offence.[103] In the third case, *Cooper v Australian Taxation Office,*[104] the Australian Fair Work Commission observes that 'a conviction for a criminal offence is not, of itself, sufficient to warrant termination. It depends on the circumstances'.[105] However, in reaching its finding that the dismissal was for a valid reason,[106] there is scant consideration of the relationship between the employee's employment and the offence, other than that Cooper was required to supervise other employees.[107] The need to maintain the reputation of the Australian Public Service and public confidence in it appears to have been the decisive factor in the finding that the dismissal was for a valid reason.[108]

F *Where the connection relates only to the employer's reputation*

It appears that the relevant connection to employment may also be established on the basis that the employee's criminal record damages, or has the potential to damage, the employer's reputation. This was a consideration in *Hunt v Coomealla Health Aboriginal Corporation,*[109] and in *Mussen v New Zealand Clerical Workers' Union.*[110] However, in these

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[99] *Cooper v Australian Taxation Office* [2014] FWC 7551. The employee's leave to appeal this decision was dismissed in *Cooper v Australian Tax Office* [2015] FWCFB 868.
[100] *Hansen v Secretary of the Department of Transport* (2016) 255 IR 40.
[101] *Klazidis v Commissioner of Police* [2016] NSWIRComm 1014.
[102] *Hansen v Secretary of the Department of Transport* (2016) 255 IR 40 51 at [47]; *Klazidis v Commissioner of Police* [2016] NSWIRComm 1014 [90].
[103] Ibid.
[104] *Cooper v Australian Taxation Office* [2014] FWC 7551.
[105] Ibid [54].
[106] Ibid [56].
[107] Ibid [55].
[108] Ibid [52].
[109] *Hunt v Coomealla Health Aboriginal Corporation* [2018] FWC 3743.
[110] *Mussen v New Zealand Clerical Workers' Union* (New Zealand Employment Court, Palmer J, 27–9 August 1991).

decisions, the tribunals appear to consider this as an *additional* factor, rather than the dominant or stand-alone factor.

In some instances, the protection of the employer's reputation appears to be the dominant—and in sometimes the only—matter connecting the out of hours criminal record to the employment.

An employer may rely on damage to its reputation as justifying a dismissal for an employee's criminal record because the employment is governed by a code of conduct that specifies that they can be disciplined for out-of-hours criminal conduct. A common example of this is professional football codes. Reliance on these codes has been used to support the suspension of players on full pay pending the outcome of criminal proceedings for serious criminal offences.[111] Such codes of conduct are said to be justified because:

> The employment conditions of a player are not simply to play football, but in addition to be an ambassador for his employer's club, the (relevant football code), the sponsors and the licensees. These diverse roles are reflected in the policies and agreements that bind the players.[112]

The connection to the employer's reputation is also important where the employee is the public face of the employer. In *Wakim v Bluestar Global Logistics*, Wakim was the National Sales and Marketing Manager for Bluestar.[113] He was dismissed following his conviction in relation to sexual abuse of a child. His unfair dismissal application against Bluestar was dismissed by the Australian Fair Work Commission. In reaching the conclusion that there was a valid reason for the dismissal, the Commission indicates that the relevant connection between Wakim's criminal record and his employment related to the impact on the reputation of Bluestar. Wakim is described as a 'public figure' who had been involved in numerous high profile community causes throughout his career, and who had been awarded an Order of Australia.[114] There was considerable publicity relating to Wakim's criminal proceedings, and this publicity 'identified him by name, contained his picture, described details of the offence, and in at least

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[111] *De Belin v Australian Rugby League Commission Ltd* [2019] FCA 688.
[112] Glen Bartlett and Regan Sterry, 'Regulating the Private Conduct of Employees' (2012) 7(1) *Australian and New Zealand Sports Law Journal* 91, 103. See also Levin (n 7) 2285–2294 for a discussion of this issue in the USA.
[113] *Wakim v Bluestar Global Logistics* [2016] FWC 6992.
[114] Ibid [5].

one case referred to his employment with a logistics company'.[115] The Commission observes that, had Bluestar continued to employ Wakim, 'there would undoubtedly have been ongoing damage to Bluestar's reputation and its interests as a business and an employer'.[116]

A similar decision from New Zealand is *Hallwright v Forsyth Barr Ltd.*[117] The employee, Hallwright, was dismissed for serious misconduct from his position as a senior investment analyst with Forsyth Barr, following his conviction for causing grievous bodily harm with reckless disregard. The conviction arose from an altercation with another motorist and did not occur while Hallwright was at work. However, in dismissing Hallwright's personal grievance claim against his employer, the Employment Relations Authority noted the public-facing role played by Hallwright at Forsyth Barr,[118] the high profile of the company,[119] and the fact that the criminal proceedings against Hallright had attracted considerable media attention.[120] It found that Forsyth Barr had reasonable grounds for concluding that Hallwright's out of hours conduct was serious misconduct justifying dismissal.[121] This conclusion was based on the potential damage to Forsyth Barr's reputation caused by its association with Hallwright,[122] and the incompatibility of Hallwright's duties and the conviction.[123] The Authority found that the senior nature of Hallwright's position meant that 'his own reputation, integrity and behaviour were relevant to overall perceptions of the way [Forthsyth Barr] conducted its business.[124]

Not all employees with a criminal record are as high profile as Wakim or Hallright. However, it appears that this may not matter if the employer can show that the employee's criminal record is inconsistent with a particular corporate image that the employer wishes to foster or protect. For example, in *Kolodjashnij v Lion Nathan,* the employer, a brewer, had a Responsible Drinking Policy for employees as part of its strategy to promote

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[115] Ibid [33].
[116] Ibid [35].
[117] *Hallwright v Forsyth Barr Ltd* [2013] NZERA Auckland 79.
[118] Ibid [8].
[119] Ibid [7].
[120] Ibid [6], [14], [30], [53].
[121] Ibid [64].
[122] Ibid [46]–[56].
[123] Ibid [57]–[61].
[124] Ibid [61].

responsible drinking in the community.[125] Kolodjashnij was dismissed when he was charged with high-range drink driving. This was inconsistent with the employer's Responsible Drinking Policy, which was expressed to apply both at and outside of work. The Fair Work Commission rejected the employee's unfair dismissal claim, finding that there was a direct connection between the employee's criminal record and the corporate image that the employer was attempting to protect, and that the Responsible Drinking Policy constituted a lawful and reasonable direction to employees:

> A policy aimed at restraining employees from committing criminal offences outside work hours may not always be seen to be something that is a legitimate interest of the employer. A policy directed at restraining employees from engaging in criminal conduct which could have a deleterious impact on the employer's legitimate business interests has a sufficient nexus with the employment to be a reasonable imposition on an employee.[126]

Kolodjashnij was not the public face of Lion Nathan; he was a process worker. However, the employer's policy and its ability to relate it directly to a corporate image that it was trying to protect, was held to be sufficient to provide a connection between the criminal record and the employment.

In *Deeth v Milly Hill Pty Ltd*,[127] the reputation of the employer also appears to have been a dominant factor in the Commission's determination that the criminal charge connected to the employment. While, as noted above, concern for employee safety was cited as a relevant factor, the Commission observes that it was of 'particular significance' that the Milly Hill butchery was in a small community, and that the [alleged] crime had been given 'significant publicity in the local media'.[128]

The decisions that rely on damage to the employer's reputation *alone* as the relevant connection between the employee's criminal record and the employment assume that employees are obliged to protect their employer's reputation at all times, even when they are not at work. This may be the case in relation to employees like Wakim and Hallright, who hold senior

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[125] *Kolodjashnij v Lion Nathan* [2009] AIRC 893, confirmed on appeal in *Kolodjashnij v J Boag and Son Brewing Pty Ltd* [2010] FWAFB 3258.
[126] Ibid [52].
[127] *Deeth v Milly Hill Pty Ltd* [2015] FWC 6422.
[128] Ibid [31].

and public-facing positions in an organisation. It is also an argument commonly made about the off-duty criminal records of professional athletes, who are paid to enhance the image of their organisation, and are usually bound by a code of conduct requiring them not to bring their code into disrepute.[129] However, this position is not justified in decisions like *Kolodjashnij* and *Deeth*, involving employees who are clearly not remunerated to be the public face of their employers. These decisions impose an unjustifiable invisible punishment on such employees that extends beyond their criminal record and into the civil sphere. In the US context, Levin has argued that allowing employers to control employee behaviour in these circumstances empowers employers to 'punish privately, either in addition to, or instead of, the state'.[130]

V SOLUTION? ADOPT A COLLATERAL CONSEQUENCES FRAMEWORK

In order to avoid inconsistent and unfair results in these decisions, the relevant unfair dismissal tribunals should adopt a collateral consequences framework. Such a framework would require a relevant connection between the criminal record and the employee's employment, and this relevant connection should be based on the inherent requirements of the employee's job.[131] Furthermore, tribunals and courts should be *required to explicitly articulate this connection*, rather than simply assuming that one exists. This is important to ensure that individuals with criminal records are not faced with an invisible punishment administered by their employer in dismissing them, and by civil tribunals reinforcing this invisible punishment when the criminal record does not relate to the inherent requirements of the job.

Further, the inherent requirements cannot simply be that the employer needs to trust its employees, and that a criminal record automatically results in a destruction of that trust. As observed by the Australian Human Rights Commission, '[i]t may be assumed that virtually all employers will wish to have trust and confidence in their employees'.[132] It defeats the purpose of legislation protecting employees against unfair dismissal if an

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[129] Bartlett and Sterry (n 112).
[130] Levin (n 7) 2293.
[131] An inherent requirement is something that is essential to the position. See *Hail Creek Coal Pty Ltd v CFMEU* (2004) 143 IR 354, [124], citing *X v The Commonwealth* (1999) 200 CLR 177, [102] (Gummow & Haynes JJ).
[132] *ST v Endeavour Energy* [2012] AusHRC 57 [51].

employer can simply rely on an employee's criminal record for out of work conduct to assert that it no longer trusts the employee.

A more nuanced approach—where the relevant tribunals explicitly make the link between the criminal record and the inherent requirements of the employee's work—can be found in the recent decision of the Australian Fair Work Commission in *Sydney Trains v Bobrenitsky*[133] and in the New Zealand case of *Craigie v Air New Zealand Ltd*.[134]

In *Sydney Trains v Bobrenitsky* the Fair Work Commission reiterated the requirement that there be a relevant connection between the employee's work and the criminal record in order for the criminal record to constitute a valid reason for a dismissal. Bobrenitsky, a train driver, was dismissed from his employment after being convicted of a high-range drink driving offence, and sentenced to a two year community corrections order.[135] The offence occurred while Bobrenitsky was not at work. At trial, applying the test in *Rose v Telstra Corporation Ltd*, the Fair Work Commission found that the employee's conduct 'lacked the relevant connection to his employment' and therefore did not constitute a valid reason for his dismissal.[136] It did not occur while the employee was at work, or on call. Whilst the offence had resulted in the employee losing his driver's licence, the employee did not need this licence to perform his duties as a train driver.[137] In addition, there was no evidence that the incident had caused damage to the employer's reputation, and the employer conceded that any risk of such damage was, at best, hypothetical.[138]

This decision was overturned on appeal. The Full Bench of the Fair Work Commission found that there *was* a relevant connection between the criminal record and employment. However, this did not relate to the drink driving conviction itself. Rather, it related to the factual matrix surrounding Bobrenitsky being charged with high range drink driving and then reporting for work. Bobrenitsky was charged with high-range drink driving on 16 August 2020. He attended work and drove a train early in the morning of 17 August 2020. He did not report the high-range drink driving charge to Sydney Trains, nor did he take any steps to ensure that there was

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[133] *Sydney Trains v Bobrenitsky* [2022] FWCFB 32.
[134] *Craigie v Air New Zealand Ltd* [2006] ERNZ 147.
[135] *Bobrenitsky v Sydney Trains* [2021] FWC 3792, [14].
[136] Ibid [57].
[137] Ibid [59].
[138] Ibid [60].

no alcohol in his system at the time he drove a train on 17 August, instead relying on his own assessment as to whether there might have been alcohol in his system. On two previous occasions during his employment with Sydney Trains, Bobrenitsky had been prevented from driving a train as he had failed mandatory random blood alcohol tests at work. The Full Bench observed that this demonstrated that he lacked judgement in assessing whether he was fit to operate a train. However, when he reported for work on 17 August, he 'did not know whether he still had alcohol in his system and chose to attend work regardless and not to self-report immediately, despite knowing that he had been charged with a high range drink-driving offence less than 24 hours previously'.[139]

The decision in *Craigie v Air New Zealand Ltd* delineates between a criminal record that may have the relevant connection to the employee's employment, and criminal conduct that does not.[140] Air New Zealand dismissed Craigie, a pilot, for a criminal record relating to out of hours conduct. In 1996, Craigie had committed an assault on his estranged partner and her new partner, who was also an Air New Zealand pilot, at a private residence. He was placed on a good behaviour bond and no conviction was recorded. In 2001, whilst on an overnight tour of duty, he visited his estranged partner and his children. During this visit, he assaulted his former partner's new partner. He was charged and convicted of assault in 2002 ('the assault offences'). During 2001, he was also investigated and prosecuted by the Civil Aviation Authority for flying his privately-owned aircraft without a certificate of airworthiness or flight permit ('the CAA offences'). He was convicted and fined for these offences.

The New Zealand Employment Court found that the assault offences did not constitute serious misconduct justifying dismissal.[141] The Court acknowledged the authority of *Smith v The Christchurch Press Co Ltd* that conduct outside of work may justify dismissal if it brings the employer into disrepute.[142] However, there was no evidence that Craigie's conduct relating to the assault offences had brought Air New Zealand into disrepute. In relation to the fact that the 1996 assault involved another pilot, the Court observed that it had no apparent effect on Craigie's performance as a pilot as he was promoted after it occurred.[143] In addition, even though the 2001

[139] *Sydney Trains v Bobrenitsky* [2022] FWCFB 32 [157].
[140] *Craigie v Air New Zealand Ltd* [2006] ERNZ 147.
[141] Ibid [67]–[73].
[142] *Smith v The Christchurch Press Co Ltd* (2001) 1 NZLR 407.
[143] *Craigie v Air New Zealand Ltd* [2006] ERNZ 147 [67].

assault occurred while Craigie was completing a tour of duty, 'it had no connection to his work at all'.[144]

In contrast, however, the Court found that the CAA offences *did* have a relevant connection to Craigie's employment as a pilot, destroying the relationship of trust and confidence between Craigie and his employer and amounting to serious misconduct. The Court noted, in particular, Air New Zealand's concerns about the adverse findings made in the CAA offences hearing concerning Craigie's credibility. The relevant connection to Craigie's employment with Air New Zealand derived from the 'degree of responsibility held by pilots, and their considerable responsibility to act safely and in accordance with aviation regulations'.[145]

These two decisions implicitly draw on what we term a collateral consequences framework, because of the way in which they directly relate the behaviour outside of work to the inherent requirements of the employee's employment, and the connection is clearly explained in the judgments. In the *Bobrenitsky* decision, the criminal charge was only relevant because it demonstrated that the employee may have still had alcohol in his system at the time he performed work as a train driver, and he made no attempt to ensure that he did not have alcohol in his system. In *Craigie*, the CAA offences were relevant because, as a pilot, Craigie needed to act in accordance with aviation regulations. These were not invisible additional punishments resulting from these employees' criminal records. Rather, the tribunals correctly focused on the behaviour of the employees, and how it related to the inherent requirements of their positions.

VI Conclusion

This article demonstrates the ways in which the current approach to unfair dismissals in relation to an employee's criminal record concerning out of work conduct lacks coherence. In some cases, the relevant connection between the employee's employment and the criminal record is clear. This may be because there is a clear connection between the employee's duties and the criminal record, or because the criminal conduct relates to other employees. In other cases, the connection is tenuous, relating to concerns for the safety of other employees, or the impact on an employer's reputation. This has the potential to result in collateral consequences for

[144] Ibid [68].
[145] Ibid [79].

employees, that is, invisible punishment beyond that already imposed by the criminal justice system. In order to avoid inconsistent and unjust results in unfair dismissal decisions relating to criminal records, the relevant unfair dismissal tribunals should adopt a collateral consequences framework, centred on preventing collateral consequences for employees. As shown in *Sydney Trains v Bobrenitsky* and *Craigie v Air New Zealand Ltd* this is possible where tribunals directly relate the behaviour outside of work to the inherent requirements of the employee's employment and the tribunals have explicitly articulated this connection, rather than simply assuming that one exists.