

**BEYOND THE PRISON WALLS:**

**The role of a criminal record check in balancing risk management and reintegration through employment**

**Is there a critical role for society in the reintegration of ex-offenders?**

A thesis submitted in fulfilment of the requirements for the degree of  
Doctor of Philosophy

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## **Abstract**

The role of rehabilitating ex-offenders has traditionally been understood as belonging firmly within the administration of corrections and as such governed by the state. This thesis is undertaken within the area of criminal justice studies and examines what happens beyond the realms of corrections, through the utilisation of the criminal record, specifically in relation to employment. It brings into focus the reintegration of ex-offenders into the community and the impact of their criminal record on their reception by non-government institutions, employers and the community. To this end, this thesis uses theories of governmentality and the discourse of failure as outlined by Michel Foucault. These theories are applied to the analyses of the governing of ex-offenders by non-government organisations, institutions and employers within society. Furthermore, a Foucauldian genealogical approach is taken in relation to the disjointed and, at some stages, simultaneous development of facets of the criminal record within Victoria.

Quantitative and qualitative Victorian data are considered in relation to the construction and development of the criminal record. This approach is utilised to gain a purchase on the particular ways in which the criminal record is constructed and used by prospective employers as a form of risk assessment for the possible future behaviour of ex-offenders.

This form of risk assessment used by prospective employers will be considered against the forms of risk assessments performed by Corrections in relation to reoffending. Specifically, an in-depth analysis will be undertaken of the Victorian Intervention Screening Assessment Tool (VISAT), to illustrate how risk assessment tools have a tendency to reduce an immense level of information into simplistic and predetermined formats. Furthermore, the growing practice of criminal record checks will be analysed for its impact on the employment options of ex-offenders. This will be presented through a critical analysis of various forms of data, including employment advertisements, employment statistics of offenders and future industry indications.

Through this multi-dimensional analysis of texts relating to criminal records and Corrections data, this thesis examines the role played by non-government institutions

as distinct from the role of Government itself in thwarting stated aims of rehabilitation. Finally, recommendations will be made which are aimed at improving this problematic condition.

The research findings support the conclusions that the criminal record is a complex, multifaceted inscription and as such, its reduction to a simplistic predetermined form – the National Police Certificate – makes it an inappropriate risk assessment tool for prospective employers. Furthermore, this research has found that the way the criminal record is used significantly impacts on the reintegration of ex-offenders. It is argued that the inability of ex-offenders to become gainfully employed and regain full active citizenship, subsequent to participation in rehabilitation programs and correctional intervention contributes to the high rate of recidivism. It is therefore concluded that society has a critical role to play in the successful reintegration of ex-offenders and the lowering of recidivism rates.

# Table of Contents

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<b>ABSTRACT</b>	ii
<b>LIST OF FIGURES</b>	viii
<b>ACKNOWLEDGEMENTS</b>	xii
<b>CHAPTER 1 INTRODUCTION</b>	<b>1</b>
1.1 Is there a critical role for society in the rehabilitation and reintegration of ex-offenders?	1
1.2 Aims of thesis	5
1.3 Why criminal records and employment?	6
1.4 Chapter outlines and summaries	9
1.5 Conclusion	12
<b>CHAPTER 2 THEORETICAL FRAMEWORK &amp; THE VICTORIAN LOCALE</b>	<b>14</b>
2.1 Introduction	14
2.2 Governmentality	15
2.2.1 Foucault and Governmentality	15
2.2.2 Governing recidivism	16
2.3 Rehabilitation	18
2.3.1 Conceptualisations of rehabilitation	18
2.3.2 Rehabilitation as conceptualised in Corrections Victoria	20
2.4 Discourse of failure	22
2.4.1 A paradox of the prison system	22
2.4.2 Discourse of failure and the criminal record	23
2.5 Risk Management	24
2.5.1 Risk management and calculation	24
2.5.2 Risk management and its tools	26
2.6 Conclusion of Theoretical Frameworks	26
2.7 Introduction to Australia - Victoria	27
2.7.1 Australia - Victoria and recidivism	27
2.7.2 Victoria and rehabilitation	28
2.8 Victorian Criminal Records	29

2.8.1	Law enforcement purpose of the criminal record	30
2.8.2	Societal purposes of the criminal record	30
<b>2.9</b>	<b>Victorian legislative framework</b>	<b>31</b>
2.9.1	Structure of the criminal record	31
2.9.2	Spent Conviction Scheme	32
2.9.3	Anti-discrimination Legislation	33
<b>2.10</b>	<b>Administration of the Criminal Record by Police</b>	<b>35</b>
2.10.1	Consent to check and release national police record	35
2.10.2	National Police Certificate - Information Release Policy	37
2.10.3	National Police Certificate	38
<b>2.11</b>	<b>Ex-offenders and employment</b>	<b>40</b>
2.11.1	Self-Exclusion	44
2.11.2	Employment Opportunities for Ex-offenders	46
2.11.3	Employment status of Offenders	47
<b>2.12</b>	<b>Conclusion</b>	<b>48</b>
<b>CHAPTER 3</b>	<b>SOURCES &amp; METHODOLOGY</b>	<b>50</b>
<b>3.1</b>	<b>Introduction</b>	<b>50</b>
<b>3.2</b>	<b>Application of critical discourse analysis</b>	<b>51</b>
3.2.1	Use of critical discourse analysis to establish power relations	51
3.2.2	Use of critical discourse analysis and formative materiality	52
3.2.3	Assumptions, truth claims, standardisation and simplification	53
3.2.4	Commonsense assumptions, public discourse and publicly available information	54
3.2.5	Analytics of government	56
3.2.6	Approach to the Criminal Record	57
3.2.7	Primarily text-based sources	57
<b>3.3</b>	<b>Sources</b>	<b>58</b>
3.3.1	Academic literature, Empirical Research and Official Documents	59
3.3.2	Societal sources of literature	59
<b>3.4</b>	<b>Method - Structure of the analysis</b>	<b>62</b>
3.4.1	Introduction	62
3.4.2	Stage 1 - Ex-offender - Chapter 4	63
3.4.3	Stage 2 - Offender - Chapter 5	63
3.4.4	Stage 3 - Offender to Ex-offender - Chapter 6	66
<b>3.5</b>	<b>Analytical Themes</b>	<b>68</b>
3.5.1	Risk Management	69
3.5.2	Rehabilitation and Reintegration Discourse	70
3.5.3	Information Management	72
<b>3.6</b>	<b>Conclusion</b>	<b>73</b>
<b>CHAPTER 4</b>	<b>DISCOURSE, SOCIETY &amp; EMPLOYMENT</b>	<b>74</b>
<b>4.1</b>	<b>Introduction</b>	<b>74</b>
<b>4.2</b>	<b>Employment and Reintegration</b>	<b>75</b>
<b>4.3</b>	<b>Ability to use criminal record information at will by employers</b>	<b>76</b>

4.3.1	Employment Process	77
4.3.2	Advertisements 1993 & 2010	78
4.3.3	Saturday Age - employment advertisements 1993	79
4.3.4	Saturday Age - employment advertisements 2010	80
<b>4.4</b>	<b>Criminal record a disqualifier from gainful employment</b>	<b>82</b>
<b>4.5</b>	<b>Media and public discourse</b>	<b>83</b>
4.5.1	Why the increased need for criminal record checks	84
4.5.2	A fearful and punitive society	85
4.5.3	Fear of litigation	86
4.5.4	Mass media, public opinion and exclusion of ex-offenders	88
4.5.5	Extended detention and supervision orders in Victoria	93
<b>4.6</b>	<b>Conclusion</b>	<b>96</b>
<b>CHAPTER 5</b>	<b>CORRECTIONS VICTORIA AND THE VISAT</b>	<b>98</b>
<b>5.1</b>	<b>Introduction</b>	<b>98</b>
<b>5.2</b>	<b>Corrections Victoria</b>	<b>99</b>
5.2.1	Introduction	99
5.2.2	Corrections Victoria current activities	100
5.2.3	Legislative Framework in Victoria for rehabilitation programs	101
5.2.4	‘What works’ literature and discourse	105
5.2.5	‘What works’ rehabilitation or risk management	106
5.2.6	Standard Guidelines for Corrections in Australia	108
<b>5.3</b>	<b>The VISAT and corresponding rehabilitation programs</b>	<b>111</b>
5.3.1	Development and implementation of the Victorian Intervention Screening Assessment Tool (VISAT)	113
5.3.2	The Victorian Intervention Screening Assessment Tool (VISAT)	114
5.3.3	Structure and utilisation of the VISAT	116
<b>5.4</b>	<b>Introduction to rehabilitation and VISAT modules</b>	<b>118</b>
5.4.1	Drugs and Alcohol	118
5.4.2	Sex Offenders	121
5.4.3	Cognitive Skills	124
5.4.4	Violent Offenders	126
<b>5.5</b>	<b>VISAT and Risk of Reoffending Calculations</b>	<b>130</b>
5.5.1	Introduction	130
5.5.2	VISAT Module 1 - Classification of Offences and Criminal History	130
5.5.3	VISAT Module 10 - General Risk of Reoffending	132
5.5.4	Impact of Risk Management Calculation	132
<b>5.6</b>	<b>Social, Contextual and Offence Related Information</b>	<b>134</b>
5.6.1	Introduction	134
5.6.2	VISAT Module 5 - Social Integration	134
5.6.3	VISAT Module 6 - Education and Employment	135
5.6.4	VISAT Module 7 - Family and Other Relationships	137
5.6.5	VISAT Module 8 - Physical and Mental Impairment	138
5.6.6	VISAT Modules and Information Management	138
<b>5.7</b>	<b>VISAT Standardising and Summarising of information</b>	<b>139</b>
5.7.1	Introduction	139
5.7.2	VISAT Module 11 - Criminogenic and Offence-related Risk and Needs	139
5.7.3	Summary of VISAT assessment	140

5.7.4	The VISAT does not only calculate risk, it has material effects	141
<b>5.8</b>	<b>Key themes identified through the analysis of the VISAT</b>	<b>143</b>
5.8.1	Information Management	143
5.8.2	Risk Management	144
5.8.3	Rehabilitation and reintegration discourse	144
<b>5.9</b>	<b>Conclusion</b>	<b>145</b>
<b>CHAPTER 6</b>	<b>THE CRIMINAL RECORD</b>	<b>147</b>
<b>6.1</b>	<b>Introduction</b>	<b>147</b>
<b>6.2</b>	<b>A Foucauldian approach to the analysis of the Victorian criminal record</b>	<b>147</b>
6.2.1	Why the genealogical approach	148
<b>6.3</b>	<b>Parallels between the VISAT and the criminal record for employment</b>	<b>150</b>
<b>6.4</b>	<b>Introduction to the Victorian criminal record</b>	<b>152</b>
<b>6.5</b>	<b>Introduction to the specific criminal record representations to be analysed</b>	<b>153</b>
6.5.1	Dockets	154
6.5.2	Central Records Cards - Name Cards	156
6.5.3	Introduction to the Results of Charge and Antecedent Form	159
6.5.4	Intelligence Cards	178
<b>6.6</b>	<b>Law Enforcement Assistance Program (LEAP)</b>	<b>186</b>
<b>6.7</b>	<b>CrimTrac</b>	<b>188</b>
<b>6.8</b>	<b>National Police Certificate</b>	<b>189</b>
<b>6.9</b>	<b>The function of the Victorian criminal record</b>	<b>189</b>
6.9.1	The Victorian criminal record and information management	189
6.9.2	The National Police Certificate as a risk assessment tool	192
<b>6.10</b>	<b>National Police Certificate is an inadequate risk assessment tool for employers</b>	<b>194</b>
6.10.1	National Police Certificate fails to inform of contextual information	194
6.10.2	National Police Certificate only discloses the statutory name of an offence	195
6.10.3	Factors that encourage non-offending not on a National Police Certificate	197
6.10.4	Successful completion of rehabilitation programs are not recorded on a National Police Certificate	197
<b>6.11</b>	<b>Conclusion</b>	<b>198</b>
<b>CHAPTER 7</b>	<b>DISCUSSION AND IMPLICATIONS</b>	<b>200</b>
<b>7.1</b>	<b>Introduction</b>	<b>200</b>
<b>7.2</b>	<b>Three main themes</b>	<b>202</b>
7.2.1	Risk management	202
7.2.2	Information management	205
7.2.3	Rehabilitation and the discourse of failure	209
<b>7.3</b>	<b>Introduction to implications for society</b>	<b>214</b>
7.3.1	Society	215
7.3.2	Victorian legislative concerns	224

<b>7.4 Conclusion</b>	<b>228</b>
<b>CHAPTER 8 CONCLUSION</b>	<b>230</b>
<b>8.1 Introduction</b>	<b>230</b>
<b>8.2 What this research has established</b>	<b>230</b>
8.2.1 What are the information management practices that contribute to the governance and control of offenders and ex-offenders?	230
8.2.2 How do risk management tools function behind and beyond the prison walls?	230
8.2.3 How has the discourse of rehabilitation and reintegration impacted on offenders and ex-offenders in the public sphere?	231
<b>8.3 Is there a critical role for society in the reintegration of ex-offenders?</b>	<b>232</b>
<b>8.4 Recommendations</b>	<b>232</b>
<b>8.5 Future research direction</b>	<b>233</b>
<b>Appendix 1</b>	<b>234</b>
<b>Bibliography</b>	<b>239</b>

### **List of Figures**

FIGURE 1 OFFENDING CYCLE AND INVESTIGATION .....	10
FIGURE 2 EMPLOYMENT ADVERTISEMENTS 1993 .....	79
FIGURE 4 1940S RESULTS OF CHARGE AND ANTECEDENT FORM (FRONT) .....	162
FIGURE 5 1940S RESULTS OF CHARGE AND ANTECEDENT REPORT (REVERSE) .....	163
FIGURE 6 1953 RESULTS OF CHARGE AND ANTECEDENT REPORT (REVERSE) .....	165
FIGURE 7 1958 RESULTS OF CHARGE AND ANTECEDENT REPORT (REVERSE) .....	166
FIGURE 8 1973 RESULTS OF CHARGE AND ANTECEDENT REPORT (REVERSE) .....	167
FIGURE 9 1979 RESULTS OF CHARGE AND ANTECEDENT FORM (FRONT) .....	170
FIGURE 10 1979 RESULTS OF CHARGE AND ANTECEDENT REPORT (REVERSE) .....	171
FIGURE 11 FOUR MAIN TYPES OF SOCIAL INFORMATION RECORDED .....	181
FIGURE 12 EXAMPLES OF SOCIAL INFORMATION RECORDED .....	184



## **Abbreviations**

ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
AHRC	Australian Human Rights Commission (Previously known as the Human Rights and Equal Opportunities Commission - HREOC)
CCO	Community Corrections Officer
CCS	Community Correctional Service
CIB	Criminal Information Bureau
CO	Criminal Offence
COATS	Community Offenders Advice and Treatment Service
CORE	Public Correctional Enterprise
IBR	Information Bureau Record
ILO	International Labour Organisation
LEAP	Law Enforcement Assistance Program
LSI-R	Level of Service Inventory –Revised
LSI-R: SV	Level of Service Inventory - Revised: Screening Version
MO	Modus Operandi
NSW	New South Wales
NT	Northern Territory
ORNI-R	Offender Risk Need Inventory – Revised
PRC	Professional Research Consultants Inc.
QLD	Queensland
SA	South Australia
SOLD	Survey Of Labour Demand
SOP	Sex Offender Program
TAS	Tasmania
VACRO	Victorian Association for the Care and Resettlement of Offenders
VIC	Victoria

VIP	Violence Intervention Program
VISAT	Victorian Intervention Screening Assessment Tool
VP	Victoria Police
WA	Western Australia
YTC	Youth Training Centre

## **Statement of Authorship**

I, Antoinette Mary Saliba, declare that:

- a)                   except where due acknowledgement has been made, this work is that of myself alone;
- b)                   this work has not been submitted previously, in whole or part, to qualify for any other academic award;
- c)                   the contents of the thesis is the result of work that has been carried out since the official commencement date of the approved research program;
- d)                   any editorial work, paid or unpaid, carried out by a third party is acknowledged.

Signed

Date: 28 of June 2012

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This thesis has been professionally proof read. I take full responsibility for any mistakes that exist.

For my mum, Giovanna Baptista and Lauren

# Chapter 1 Introduction

## *Honesty does not mitigate a criminal record*

*Mr P was employed as a community development worker for a needle exchange program on a casual basis. At his interview for the position Mr P declared his criminal history and had a discussion with his interviewers about it. Mr P also gave his consent for a police record check.*

*Mr P worked his designated shifts and at times replaced co-workers who were ill. He was always on time and carried out his duties as requested. 3 months later Mr P was invited to apply for a permanent part time position with the organisation on the basis of his excellent performance as a casual.*

*The next month Mr P applied for the permanent part time position and was interviewed by his direct supervisor and another manager. Mr P again disclosed his criminal history. He was commended for his honesty and was told the history would not be a barrier to his employment. Mr P signed his consent form again for a police record check. He was offered and accepted the position within one week of the interview.*

*After working for 3 weeks in his new position, Mr P was told that upper management wished to speak to him about his Police Check. Mr P organised letters of support and prepared himself for the interview. At the interview Mr P was told that his Police Check was 'not satisfactory'. Mr P then asked for a copy of the check so that he could explain the offences. Mr P was told that he would be given a copy at the end of the meeting and was then asked to wait outside. When Mr P was invited back in he was told that a decision about his employment would be made by the board of directors and was told he would be notified in a week. Mr P was given no opportunity to state his case. Three days later Mr P was notified that his employment had been terminated.*

*The date of finalisation for one of the offences on Mr P's record was the day after Mr P commenced work. It appears that his record was incorrectly interpreted and no consideration was given to the amount of time it might take to finalise charges. Support letters indicated that Mr P's job was part of the process of him turning his life around. Mr P had always been open with co-workers about his history (2011f).*

## **1.1 Is there a critical role for society in the rehabilitation and reintegration of ex-offenders?**

The use of the criminal record as a risk management tool by employers can have significant detrimental effects on the reintegration of ex-offenders. Employment is considered to be a significant contributor to an ex-offender not returning to offending behaviour. It is thus proposed that society has an essential active role to play in attempts to lower recidivism rates. This thesis seeks to test and challenge a

commonplace assumption within Australian society, which is that the responsibility of rehabilitating offenders lies squarely within the realm of Government through its correctional department situated within the criminal justice system and that society should play no active role in achieving that objective. The assumed role of corrections within Australia, which is to rehabilitate offenders, is not a practice followed in other nations. For example in the US, since the mid -1970s, 'rehabilitation has taken a back seat to a "get tough on crime" approach that sees punishment as prisons main function' (Benson, 2003, p. 46). This has led many community organisations, detached from the criminal justice system, such as 'Weed and Seed' to take the lead on rehabilitation and reintegration efforts in the US (US General Accounting Office, 2001). The assistance in the rehabilitation and reintegration of ex-offenders, demonstrated by such community organisations in the US, can also be found in Australia. For example, the Victorian Association for the Care and Resettlement of Offenders (VACRO) is a non-government funded organisation which assists ex-offenders and their families through the process of reintegration (VACRO, 2011).

The role of society in relation to the successful reintegration of ex-offenders has traditionally been given limited attention in Australia because academia and other research bodies have focused on corrections and the prison system to assess the success or failure of rehabilitative programs. The role of society has not been highlighted. According to the literature thus far, you could be forgiven for thinking that non-government institutions, organisations and employers do not have a vital or active role to play in rehabilitation or its extension, reintegration. They are simply not visible. Therefore without this attention by researchers, and without any assumption of the necessity for society to have a role in rehabilitation and reintegration, there can be no assessment of the extent to which society properly fulfils such a role.

The reception into the social realm of ex-offenders requires due consideration given the 'fact ... that 93% of all people sent to prison "re-enter" society at some point' (Bushway, 2006). This thesis aims to address this gap in the current research by explicitly considering the role of society in relation to the successful reintegration of ex-offenders. The analysis of an ex-offender's reception into society is critical when assessing the success or failure of rehabilitation programs. Rehabilitation programs have the ability to decrease the likelihood of an ex-offender returning to criminal behaviour within the social realm, but if the reception into society of ex-offenders is

not inclusive or fails to encourage full active citizenship, this can negate such positive rehabilitative developments.

Given that the term 'society' is used throughout this thesis it is only fitting to define that term from the outset. The definition of 'society' has raised some of the most contentious issues in sociology, especially given the increasing globalisation of modern social relations (Giddens, 2002). Nonetheless, the use of the term to identify general social structures and human grouping, as used within this thesis is supported by the following definition of society:

any self-perpetuating, human grouping functioning within a relatively bounded territory, possessing its own more or less distinctive culture, institutions and organisations (Jary & Jary, 2000, p. 581)

More specifically, in this thesis the term 'society' is intended to represent non-government institutions, organisations and employers.

A further term used throughout this thesis is 'governmental'. This term is used to identify and discuss practices, policies and processes that are implemented or continued in attempts to govern and control populations. This thesis discusses two forms of governing. The first is that exercised by traditional forms of Government. The Australian Government and the Victorian Government control and govern populations via the criminal justice system, Corrections Victoria and the legislature through the use of governmental power and techniques. The second type of governance discussed within this thesis is that which becomes apparent through the analysis of societal arrangements through a Foucauldian - governmentality framework (Foucault, 1979; Rose, O'Malley, & Valverde, 2006). This for example considers the governing practices used by employers to manage and control others, such as a population of ex-offenders (Burchell, Gordon, & Miller, 1991). This will be discussed further in section 2.2.

It is argued that rehabilitation facilitated through corrections should not be seen as the beginning and the end of the process aimed at lowering recidivism rates, but rather as one part of the process. A second part of this process occurs within the community, once an ex-offender attempts to reintegrate. The incompatibility of current



correctional-based rehabilitation programs and an offender's reception into society will be explored. This exploration will consider how the criminal record is used to inhibit the process of rehabilitating and reintegrating ex-offenders, specifically in relation to employment.

This thesis considers the reintegration of ex-offenders not at the standpoint of where the offender exits the correctional facility but rather at the point of entry into the community. It is at this very point, where a person re-engages with society, that the construction of an ex-offender or recidivist has real effects on both the community and the ex-offender. It is the conversion of an individual from offender to ex-offender that renders the criminal record a crucial tool for governing the future actions and achievements of ex-offenders. In the correctional world, having a criminal record is a given, it is a characteristic of all individuals within the system. Within the prison walls, the existence of that record has no consequences. Upon moving beyond those prison walls and re-entering society, the effects of a criminal record become all too apparent and relevant to the prospects of the released subject's social engagements. It is thus from this standpoint that the criminal record will be analysed. It is here that it becomes a tool that plays an active part in the ongoing, unofficial punishment and exclusion of ex-offenders from full active citizenship. This is particularly relevant in relation to employment, and the way the criminal record is used by employers, which is the specific focus of this thesis.

The inability of ex-offenders to reintegrate can also have ripple effects, such as increased recidivism rates, higher unemployment figures and inaccurate risk assessments being performed by employers. It is thus argued that for the effects of the criminal record to be fully understood, its components, development, construction, output and utilisation need to be made clear through systematic analysis.

This thesis concentrates on the means of governing a population of ex-offenders in the Australian State of Victoria in order to gain a purchase on the jurisdiction-specific ways in which a variety of conditions intersect. That said, this research does not assume a focus restricted to Victoria alone. For example, the thesis will draw upon international scholarship and international techniques of perceiving the ex-offender and the problem of reintegration. Whilst this thesis focuses on the Victorian situation, the problem is not limited to Victoria or even Australia. It is a recognised issue

throughout the western world, including for example the United States, New Zealand, Spain, Germany, France, the Netherlands, Canada and the United Kingdom (Larrauri, 2011; MacKinnon & Wells, 2001; Maruna, 2001; Morgenstern, 2011; Padfield, 2011; Pager, 2007; Ruddell & Winfree, 2006; Stoll & Bushway, 2008). International scholarship will be drawn upon to understand the way ex-offenders are governed within the social arena and offenders within a correctional environment.

The literature to be considered includes the ‘what works’ texts, which have not only played a role in the international realm, but have also been adopted by Corrections Victoria. The adoption of the ‘what works’ literature has offered Corrections Victoria a means of assessing the Victorian situation. This literature has greatly influenced the principles that underlie the position and direction of the correctional environment within Victoria. The international literature and research has become an inherent part of not only how the role of Corrections Victoria is explained and understood, but also how it positions itself and offers solutions to such problems as recidivism.

## **1.2 Aims of thesis**

The aim of this thesis is to answer the question:

- Is there a critical role for society in the reintegration of ex-offenders?

In answering this main question, three sub-questions have been developed to inform the investigation:

- How do risk management tools function both behind and beyond the prison walls?
- What are the information management practices that contribute to the governance and control of offenders and ex-offenders?
- How has the discourse of rehabilitation and reintegration impacted on offenders and ex-offenders in the public sphere?

These questions will be answered throughout this thesis so that a more in-depth understanding of the role society has to play in the rehabilitation and reintegration of ex-offenders can be achieved.

### **1.3 Why criminal records and employment?**

This thesis looks at the criminal record as it functions, how it exists and how it is taken-up by organisations. The request for a criminal record check has significantly increased over the last decade. The number of criminal history checks being conducted on Australians 'has increased six-fold in seven years to create a \$50 million business for governments as public and private enterprises seek to improve the security of their operations' (Ryan, 2009). This increase of the number of criminal record checks being conducted is not restricted to Australia – 'public policy seems to be moving inexorably towards making criminal records more widely available' worldwide (Jacobs, 2006, p. 419). Applications for 'conduct certificates' in the Netherlands went from 255,000 in 2005 to 460,000 in 2009 (Boone, 2011). In Germany, in excess of nine million criminal record disclosures are completed every year (Morgenstern, 2011). Criminal record checks have also sky rocketed in the UK from 1.4 million in 2002-2003 to in excess of 3.8 million in 2008-2009 (Padfield, 2011). The culture of prospective employers conducting criminal record checks has taken hold over the last few years and does not seem to be ebbing, emphasising the pressing need to investigate this phenomenon.

This momentous increase in the requirement for criminal record checks can be attributed to its utilisation as a risk assessment tool. The endeavour to investigate the impact of criminal records on an ex-offender's ability to reintegrate into society is largely motivated by a current emphasis on the criminal record, not just as a 'history' of past conduct, but rather as an assessment of 'probable' future conduct (Naylor, 2005; Stoll & Bushway, 2008). It is in the calculation of risk by community members and organisations, such as prospective employers that the criminal record is enlisted as not only a technology which outlines past conduct that has been addressed, but as a highly regarded predictive behavioural tool.

If criminal record checks have become standard procedure in Australia and more specifically Victoria, the population of ex-offenders will be significantly affected. In 2007-08, 2.6 million criminal record checks were conducted, 'vetting the equivalent of one in eight Australians, in comparison to only 425,000 CrimTrac checks being undertaken in 2000-01' (Ryan, 2009). In Victoria specifically, in 2009-10, 387,688 CrimTrac checks were submitted by Victorian accredited agencies for employment purposes and a further 201,839 were submitted by Victoria Police, making a total of

589,527 for Victoria alone (Dale, 2011). This significant increase illustrates how the culture of caution, risk assessments and exclusion has begun to emerge in Victoria, Australia and numerous other western countries, such as the USA, Canada, New Zealand and the UK (Fletcher, 2001; Kurlychek, Brame, & Bushway, 2007; Pager, 2007; Ruddell & Winfree, 2006; Wells & MacKinnon, 2001).

The employment of criminal record checks to assess a person's suitability to a particular position may be relevant when there is a direct correlation between a particular type of offence and the requirements of a particular position. However, the application of this vetting procedure to the majority of employment positions is arguably unnecessary and counter-productive. The practice of requiring a criminal record check for every employment position and from numerous candidates is costly. Further to this, it is a practice that has the ability to exclude ex-offenders from meaningful employment. Therefore inhibiting attempts by ex-offenders to rehabilitate and reintegrate into society. Importantly, as suggested by Pittard and cited in Ryan (2009, p. 3), "people with criminal records were less likely to offend if they had a job". It seems that while reintegration of ex-offenders is considered important and active steps are taken by corrections and aligned organisations to prepare and train ex-offenders to reintegrate into society so as to become fully active citizens, there is a form of exclusion being effected by external organisations.

The device, tool, technology or actor that is facilitating this exclusion is the criminal record. The criminal record as a document is assumed to take no active role, its existence is accepted and its employment arbitrary. The criminal record does not in itself cause any detriment to ex-offenders and is not intended to do so. However, due to its utilisation in particular ways and the particular functions it performs in society it can have significant implications for ex-offenders. Given the impact the criminal record can have as an inscription in the current day and age, understanding and appreciating the inscription itself is essential.

Consideration of the effects that a criminal record has or could have on an ex-offender's ability to reintegrate into society and halt the offending cycle is of paramount importance. However, to consider only its significant impact as a risk assessment tool, without scrutinising the device itself, does not allow for the tool to be understood. The appreciation of how the criminal record constructs a person's identity

that subsequently supersedes all other credentials is imperative to understanding how the accepted relationship between the criminal record and risk assessment came into existence. The importance of the credentials attributed to a person with a criminal record and its impact will be explored further in the following paragraph. Moreover, the construction of an ex-offender's identity via the criminal record will be explored throughout this thesis by giving consideration to the criminal record in its current form, how it has developed into its present state, in conjunction with how it has come to be held in such high regard by society.

Scholars such as Randall Collins (1979) and Nikolas Rose argue that it is impossible to actively participate in modern civil society without providing credentials to 'demonstrate identity in ways that inescapably link individuation and control' (1999, pp. 240-241). The modes of identification and individualisation are extensive, for example passports, drivers' licences, social insurance policies, bank cards, rewards cards, credit cards, store cards, vehicle registration numbers, health insurance cards, social security cards and social membership cards. Rose finds that:

Each card identifies the bearer with a virtual identity – a database record storing personal details – whilst at the same time allowing access to various privileges. Each access to such a privilege, for example the purchase of an item using a credit card, entails a further entry upon the database, a further accretion to the virtual identity. Access to other privileges, to mortgages, to credit purchase facilities, to accounts allowing use of telephone, electricity or gas, is dependent upon the provider checking these databases, through specialist intermediaries. Other databases, such as those of criminal records, may be linked into these circuits of information flow (1999, p. 241).

These circuits have inbuilt enabling or disabling switch points, which must be passed to allow an individual to access particular benefits. At these vital switch points the existence of a criminal record becomes disabling, especially in relation to employment. These networks of surveillance:

overcome the barriers of space and time involved in physical surveillance; they are not labour-intensive; they are of low visibility; they are of high durability; they have high transferability across domains; they are largely

involuntary or participated in as an uncalculated side effect of some other action; they are pre-emptive and preventative, denying access to benefits on the basis of what one might do rather than apprehending one after the act (Rose, 1999, p. 241)

It is this probability of future behaviour, this investment in risk assessments and this reliance on the perceived precision of data obtained that allows the criminal record to be such a powerful actor. Such a 'securitisation of identity' isolates the specific criteria for inclusion and in doing so also makes clear the precise conditions for exclusion at each intersecting point (Rose, 1999, p. 243).

The identification of the existence of a criminal record is unequivocally linked to excluding the person who possesses it. Furthermore, even if we consider probable secondary effects of a criminal record, its material effects for an ex-offender become even more obvious. For example, if an ex-offender fails to become gainfully employed because of his or her negative credentials (a criminal record), that person will inevitably be excluded from accessing further privileges such as credit, mortgages and other enabling facilities. This is why the criminal record needs to be analysed and understood, as its material effect on the active citizenship of ex-offenders is undeniable and extensive.

As in the case of Mr P, negative credentials in the form of a criminal record have an undeniable impact on his life, due to his identity as an ex-offender. This not only legitimises the investigation undertaken through this thesis, but necessitates such research in an effort to discover how the existence of a criminal record can frustrate the reintegration of an ex-offender and facilitate cycles of recidivism.

#### **1.4 Chapter outlines and summaries**

The analysis presented in this thesis is separated into three specific sections, each of which responds to aspects of the thesis question. The three sections also mirror components of the offending cycle. Figure 1, below, represents the offending cycle. The offending cycle commences with a criminal act, which is detected and prosecuted. Once the offender receives his or her sentence they enter the correctional system. During their time within the correctional system offenders are encouraged or mandated to participate in appropriate rehabilitative programs to address their

shortcomings. Upon release back into the community or the completion of a community based sanction, offenders attempt to reintegrate into society.

It is at this stage of reintegration that efforts to become gainfully employed are made by ex-offenders. Whilst ex-offenders may make legitimate attempts to rehabilitate and reintegrate into society via employment, their criminal record is used by social institutions and organisations as a tool to govern their opportunities and to exclude them from gainful employment. This inability to successfully reintegrate into society contributes to an ex-offender's return to criminal behaviour, at which point the offending cycle re-commences. What can also be drawn from Figure 1 are the three main parts of this investigation, which correspond with components of this cycle. The first main section will consider ex-offenders and employment, the second main section will consider rehabilitation and corrections, whilst the final section will analyse the criminal record.



**Figure 1 Offending Cycle and Investigation**

This thesis does not adopt a chronological order but rather uses the offending cycle to order the development of this investigation. The ordering of this investigation is aimed to maximise an understanding of the impact a criminal record has on an ex-offender's attempts to reintegrate into society and regain full active citizenship via employment. Therefore, the first part is primarily concerned with the current situation and an offender's reception into society. Specific attention will be given to how society responds to an ex-offender's attempt to reintegrate into the community through obtaining gainful employment and regaining the rights of full active citizenship. The second part considers the offender, behind the prison walls or under the supervision of corrections; here an offender's experience and opportunities within the correctional system are focused on. The third part is concerned with the device (the criminal record) that comes into play when an offender becomes an ex-offender. This refers to when an offender exits the correctional environment and enters society. The analysis considers the direct impact and consequences of the criminal record at this stage of the offending cycle. The positioning of these three main sections in relation to the offending cycle can be seen in Figure 1. Further to this, three specific themes will be used to illustrate key concepts which are evident in all three parts to show the complex connectivity which exists between the various parts of this investigation.

This investigation will employ three specific themes as key framing devices in the analysis of the data presented. These three themes are:

- Risk management
- Information management
- Rehabilitation and reintegration discourse

These themes will be used to illustrate how ideologies and approaches ingrained in the information presented travel with an offender through various aspects of the offending cycle to be analysed. These themes will allow for an exploration of how specific ideologies are present in the correctional realm and transfer with an ex-offender to the social realm. These ideologies and the approach to managing and governing both offenders and ex-offenders have significant implications for the rehabilitation and reintegration of these people.



In Chapter 2 of this thesis the theoretical and conceptual frameworks that have underpinned this investigation will be explored, both in relation to their theory and in relation to their application to this investigation. The Victorian context will then be explored. The information presented in relation to the Victorian context will allow for an understanding of the setting in which this investigation was undertaken. In Chapter 3 the method employed in the undertaking of this investigation and the sources utilised will be explained. This will allow for an appreciation of how sources were selected and used throughout this investigation. Chapter 4 will address the first main analysis of this investigation, being the current situation in regards to ex-offenders attempting to reintegrate and become gainfully employed. This will include an analysis of employment advertisements in the *Saturday Age* newspaper, comparing advertisements from 1993 – when criminal records became publicly available – to 2010, to illustrate current practices. Chapter 5 will be dedicated to the analysis of the second part of this investigation, which introduces four specific rehabilitation programs offered by Corrections Victoria and importantly the Victorian Intervention Screening Assessment Tool (VISAT). This will enable an understanding of how risk assessments and information management practices impact on the rehabilitation of offenders. Chapter 6 is focused on the third main part of this investigation, which is the criminal record in the Victorian context. This chapter will analyse how the Victorian criminal record came to take its current form through the employment of a genealogical approach, as proposed by Foucault. Chapter 6 aims to bring to the fore what the criminal record actually is, and how its contents and form is dependent on various conditions. In Chapter 7 of this thesis, a discussion involving the three main themes outlined above will be undertaken. This chapter will then offer possible ways of improving the current Victorian situation for ex-offenders and employers in relation to the use of a criminal record as a risk assessment tool. Finally in Chapter 8, key ideas, thoughts and conclusions gained through the completion of this investigation will be offered.

## **1.5 Conclusion**

The astonishing growth in the use of criminal record checking in Victoria and around the world may be an indication that employers are becoming more risk averse. However, little research has dealt with the impact that this risk avoidance behaviour may be having on reintegration and recidivism, specifically in relation to the use of

the criminal record as the tool for assessing risk. By responding to this concern we are able to address deeper and more wide-reaching questions about the role that society plays in the reintegration, and thus rehabilitation of ex-offenders. Critically, we must confront the responsibility that we all have in governing ex-offenders beyond the prison walls. In the following chapter, the theoretical and conceptual foundations and their application to this investigation will be explored. This will be undertaken in conjunction with an examination of the context and regulatory frameworks that exist in Victoria, thus allowing for a more in-depth understanding of the structures that have impacted upon and informed the research presented in the later chapters.

## **Chapter 2 Theoretical Framework & the Victorian Locale**

*Governing the possible field of action of others*

*Rhianna was charged and found guilty on several counts of obtaining property by deception. She was assured by her lawyer that if she pleaded guilty and the Court did not convict her, then the offences would not be recorded on a police check, which she might be required to undertake in the future. Rhianna pleaded guilty mindful of this and no conviction was recorded. She received a fine and a Community Based Order for 6 months to perform 70 hours of unpaid community work.*

*When Rhianna applied for work a short time later she was requested to undergo a police check. To her surprise the check revealed the guilty verdict. She was refused employment due to her record. Not only was Rhianna shocked because she did not think that a non-conviction would be recorded on her criminal record; she was upset because she did not feel that the charges were relevant to the job (Fitzroy Legal Service Inc, 2011i).*

### **2.1 Introduction**

In this chapter consideration will be given to the theoretical frameworks and concepts that have structured this investigation. These concepts play a key role in understanding the underlying mind-set that has enabled the practical realities that the criminal record facilitates within the community. The overarching concept and framework which is applied throughout this investigation is that of governmentality. Michel Foucault, a key contributor to penal theory developed the theory of governmentality to analyse how populations can be controlled and managed. This investigation will utilise such concepts to explore the way the criminal record is used in the social realm to manage ex-offenders. Furthermore, under this umbrella of governmentality, concepts and frameworks of rehabilitation in relation to the approach adopted by Corrections Victoria will be applied to gain a greater understanding of how offenders are managed within the criminal justice system. One of the most influential approaches within the area of corrections is that which is presented in the 'what works' literature and discourse. As part of the 'what works' approach, ideas of risk management are significant. Theories of risk management are also applied to this investigation on two fronts. First, in relation to the way Corrections Victoria applies ideas of risk management to both the management of offenders and the rehabilitation programs which are implemented. Second, risk management frameworks are used to facilitate a greater understanding of how the criminal record is used as a risk management tool by employers in the social realm.

The concepts associated with risk management are important in relation to how risk is conceived of and managed by corrections and society. The investigation is further developed through the utilisation of concepts associated with the discourse of failure, which will be instrumental in relation to understanding public discourse and mind-sets within society. Following the reflection on these key theoretical frameworks and their application to this thesis, consideration will turn to the Victorian context.

In section 2.7 and subsequent sections, the State of Victoria will be introduced and essential background and jurisdictional specific information will be provided. Information will be offered in regards to relevant legislation and policy, current practices in respect to criminal records and particulars in relation to Victorian ex-offenders and employment. This information is presented to facilitate a greater understanding of the environment and conditions which have rendered this investigation necessary.

## **2.2 Governmentality**

### **2.2.1 Foucault and Governmentality**

The term 'government' is routinely assumed to be a system of governing through the organisation of the State. While this definition is accurate, it only explains one dimension of the term. When the term government is applied in this narrow sense it limits the scope of possibilities when addressing social problems. Attempts to find solutions to social issues like crime, offending and recidivism are only seen to exist within the domain of governmental institutions, such as the criminal justice system. In this thesis however, the term government will be employed using the theory of governmentality developed by Michel Foucault, which refines and extends the concept. This form of analysis will be applied to critique the management of offenders within the realm of the criminal justice system and ex-offenders within the social realm. The term 'government' will be employed in the way offered by Mitchell Dean to explain what Michel Foucault referred to as the 'conduct of conduct' (1999, p. 10). In this sense:

Government is any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seek to shape conduct by working through our desires, aspirations, interests and beliefs, for definite but shifting ends and

with a diverse set of relatively unpredictable consequences, effects and outcomes (Dean, 1999, p. 11).

This definition is used to signify not only:

the legitimately constituted forms of political or economic subjection, but also modes of action, more or less considered, which were designed to act upon the possible actions of others such as employment. To govern, in this sense, is to structure the possible field of action of others (Dreyfus & Rabinow, 1983, p. 221; Hunt & Wickham, 1994).

This allows for an expanded analysis of the governing of ex-offenders, which is not isolated to the practices of the official correctional system or other arms of state operations. It allows for the analysis of non-government practices, techniques and technologies, such as the utilisation of criminal record checks by community organisations, social institutions, economic entities, including prospective employers and the like. These forms of 'government' are not limited to the government exercised by the state, but do, as stated above, 'structure the possible field of action of others' beyond the remit of the government (Dreyfus & Rabinow, 1983, p. 221; Hunt & Wickham, 1994).

### **2.2.2 Governing recidivism**

It is at this point that my analysis of the possible causes of recidivism and the role of the criminal record depart from that which is typical in the discourse on crime, offending and recidivism in general. This departure is facilitated by a broader reading of government and how it functions relative to a population of ex-offenders. The expansion in scope allows for the government which occurs external to official government bodies to come into focus and as such makes their role in the possible causes of recidivism apparent. My research reveals that the focus and understandings, both of particular bodies of academic scholarship and other forms of literature, place the problem of recidivism largely within discourses of what the government does or fails to do. Current concentration by academics, researchers and government bodies on the criminal system remains fixated on such things as rehabilitation programs, monitoring, supervision and the neutralising of risk by the criminal justice system, which is represented by offending behaviour and even more so by routine reoffending

behaviour, otherwise known as recidivism (Chitty & Harper, 2005; Holland & Pointon, 2007; Pearson, Lipton, Cleland, & Yee, 2002).

The assumptions which have been identified in the literature in relation to corrections need to be questioned as the continued high rates of recidivism make it clear that the issues are more complex than being presented through the current lens. Towards this end this analysis employs a different theoretical perspective that encompasses a proposition made by Foucault and taken up by a number of scholars in various ways within and beyond the sociology of crime and corrections (Garland, 1990; Hunt & Wickham, 1994; Rose et al., 2006; Rose & Valverde, 1998). This investigation is founded on Foucault's overarching argument that, if we are going to understand how power is exercised, our attention needs to shift away from the government, the state and the various state apparatuses (in this instance, corrections), as the assumed site where power, knowledge and control operate and hence the assumed site upon which we concentrate our critique (Burchell et al., 1991; Foucault, 1979; Hunt & Wickham, 1994). This requires that the assumptions which have been identified in the literature in relation to corrections need to be questioned as the continued high rates of recidivism make it clear that the issues are more extensive and complex than being presented through this limited lens.

An important consideration of my research is that if the function of the criminal record is to be understood, then we need to look beyond the government, its legislation, policy and the practices and procedures of its bodies. The term 'governing' is used in this research in a wider sense, and it is intended to apply to any organisation or community that deploys and acts upon the criminal record of the ex-offender to achieve a particular effect.

It is proposed that certainly efforts are being undertaken to 'structure the possible field of action' of offenders, within corrections (as outlined above). To provide a full analysis of the means by which the 'field of action' of offenders is structured, the concepts associated with a discourse of failure will be applied. Through the application of ideas associated with the discourse of failure, it is possible to observe how offenders, rehabilitation and the criminal justice system are consistently framed by the media and public discourse in terms of failure. For example, within this discourse the judiciary fails to hand down just sentences, the correctional system fails

to rehabilitate offenders and prisons fail to curb recidivism rates. This framing of the criminal justice system and associated entities in terms of failure have material implications on the management of both offender and ex-offender populations.

The specific means by which offenders are ‘invited’ to work on themselves as candidates for reintegration, and the knowledge claims through which these means come into being, will be a subject of analysis addressed by this investigation. But employers are also being called upon ‘to structure the possible field of action of others’ beyond the control of the government. This is done ‘elsewhere’, by which I mean within our free community, through the take-up and deployment of ‘the criminal record’ in a way that works counter to the ostensible government aim of reintegration. As outlined in the case study presented at the beginning of this chapter, society ‘invites’ ex-offenders to understand themselves as excluded from full active citizenship.

Those with a criminal record are, it would seem, caught in a contradictory ‘field of action’. On the one hand, government bodies, such as corrections, courts, and the like, invite offenders to participate in rehabilitation programs and take-up full active citizenship, thus improving their future prospects. On the other hand, social institutions including prospective employers are governing the role and prospects of ex-offenders within society, including their ability to be reintegrated. This can be considered as the final step towards successful rehabilitation. This ability to return to full active citizenship is of paramount importance to the success of rehabilitation and desistance from crime. As argued by Maruna (2011b, p. 106) ‘reintegration is a “two-way street” involving not just changes and adjustments on the part of the person returning ... but also on the part of the community and society welcoming him or her home’.

## **2.3 Rehabilitation**

### **2.3.1 Conceptualisations of rehabilitation**

Perceptions of the term ‘rehabilitation’ have shifted substantially over time. This shift reflects a change in the focus of rehabilitative programs from the treatment of the individual offender to the management of risks that the offender might pose to society.

Approximately 25 years ago rehabilitation was focused on an individual offender's well-being. Proponents of this historical perception of rehabilitation throughout the western world such as Clive R. Hollin, James McGuire and Juliet C. Hounsome (Clive R. Hollin et al., 2008) argue that a purely offender orientated agenda should be applied within a correctional environment aimed at primarily improving an ex-offender's ability to successfully reintegrate into the community. This concept of rehabilitation is further supported by Edgardo Rotman who argues that, 'rehabilitative aims demand a consideration of the offender's entire life, including his or her future. It thus incorporates a concept of justice that goes beyond the symmetrical reaction of retribution and inquiries into the subjective reality of the offender' (Kethineni & Falcone, 2007; Rotman, 1990, p. 2).

This historical perception of rehabilitation can generally be defined as a 'right to an opportunity to return to (or remain in) society with an improved chance of being a useful citizen and staying out of prison' (Rotman, 1990, p. 3). This definition necessitates governmental policies that embrace such things as educational opportunities, vocational training, psychological and psychiatric treatment and employment related programs that aim to achieve the 'elimination of hindrances to reinstatement in the community' (Rotman, 1990, p. 3). Thus, this historical view of rehabilitation is focused primarily on improving the offender's life as a whole through rehabilitative programs and interventions, resulting in his or her return to society with the ability and opportunity to claim full and active citizenship.

This idea of rehabilitation places an offender's needs at the centre of all treatment efforts. However, such perceptions of the primary focus of rehabilitation have since shifted. While the term 'rehabilitation' has not been eliminated from correctional agendas, it has been recast in a more actuarial fashion. Actuarial within this thesis is used to describe a reliance on the mathematics of aggregate statistics to classify, order and know populations. 'Expert systems adopt an "insurance-based" managerial order so that institutional decisions become increasingly dependent upon the production of risk knowledge' (O'Malley & Palmer, 1996, p. 139). Current perceptions of rehabilitation aim to manage and contain offenders of the most dangerous class. Accordingly, the word rehabilitation has been distorted in recent times from its original conceptions and motivations. According to Maruna (2011b, p. 103),



'rehabilitation' has 'become synonymous with cognitive therapy, changing offenders' thinking ... "treatment" with set levels of "dosage" tested in random control trials, something that comes in a "programme"'.

The recasting of the term 'rehabilitation' is indicative of a shift in its motivation and focus (Robinson, 2008). Rehabilitation efforts are now perceived as necessary to manage offenders and to minimise the risk they are seen to present to the community. This contrasts with the abovementioned historic understanding and illustrates a shift in the purpose of rehabilitation, from one that prioritised the offender's well-being over perceptions of risk to the community, to one which has community safety as its primary concern. This modern understanding of rehabilitation through an actuarial lens is common within the Victorian correctional arena.

### **2.3.2 Rehabilitation as conceptualised in Corrections Victoria**

Corrections Victoria casts rehabilitation as a risk management tool. Rehabilitation programs are only made available to offenders once actuarial calculations have been completed and the risk an offender presence to society has been determined. In many ways contemporary concepts of rehabilitation reduce the offender to a simplistic numeric or categorical component, a practice apparent for example in the Victorian Intervention Screening Assessment Tool (VISAT), which is utilised by Corrections Victoria. Current practices within corrections offer offenders rehabilitation programs to address specific risks they are calculated to present to the community. This conception of rehabilitation does not encompass the holistic and offender orientated treatment efforts of traditional ideas of rehabilitation. Rehabilitation programs are no longer offered by corrections to offenders to advance their personal development and future prospects.

It would seem that while the rhetoric of rehabilitation and reintegration continues to be used by the Victorian criminal justice system, the purpose of rehabilitation programs and the way such programs are accessed within Corrections Victoria has altered. Tools such as the VISAT are indicative of a move to an actuarial doctrine within the correctional arena. This actuarial doctrine focuses rehabilitation efforts in accordance with classifications of risk and criminogenic needs. The VISAT will be discussed in greater detail in section 2.5.

On the one hand traditional conceptions of rehabilitation mandated the consideration of an offender's past to assess their rehabilitative needs. This examination would expose deficiencies in an offender's life which required addressing through rehabilitative interventions. The deficiencies to be addressed were not isolated to those directly linked to criminal behaviour, but rather relevant to an offender's life as a whole. The aim was to equip an offender with the necessary skills to become an independent, law abiding, productive member of the community.

On the other hand current practices and conceptions of rehabilitation enlist tools such as the VISAT to assess offence specific rehabilitative needs and appropriate interventions. The VISAT is designed to break down or reduce the individual offender into a simplistic, condensed and predetermined depiction. The offender is thus represented via the VISAT as a compilation of risk factors to be managed, controlled and where possible eliminated.

The current purpose and scope of rehabilitative interventions is significantly different to that of a traditional model of rehabilitation. The change in purpose and scope has been accompanied by alternations to the rehabilitation programs offered and also the process by which rehabilitative needs are identified. The traditional idea of rehabilitating an offender as a whole, with the aim of integrating the individual into the community to regain full active citizenship does not correspond with the current practices of Corrections Victoria. Current practices focus on breaking down the offender, thus rendering them calculable and more importantly manageable.

The management of people who have committed offences via risk assessments, rehabilitation programs and other forms of control are assumed to only take place within the domain of corrections. This assumption is supported by current literature and discourse pertaining to the criminal justice system and offenders. It is precisely this assumption that the criminal justice system is the only place in which risk assessments, rehabilitation and control take place that I wish to question, for both its validity and for what it fails to encompass. The form of control exercised by government in the narrow sense, through its criminal justice arm is not the only form of government that applies to people who have committed offences. It is argued that while risks in relation to offenders are rightly identified in the criminal justice system through such tools as the VISAT, the literature fails to account for the further risk

assessments offenders are subjected to, once they graduate to ex-offenders and enter the new frontier of society.

Following Foucault and those scholars influenced by his work, I want to test the argument that while the work of producing the means of effective reintegration is seen as reserved for corrections and hence government, in fact such means of facilitating successful reintegration of ex-offenders encompasses practices beyond corrections. The governing of ex-offenders within the community has largely devolved from this traditional view of government to governing practices within the community, performed by non-government agencies, organisations and employers. The way in which populations are separated out and the 'criminal population' isolated for particular forms of management has gone largely unexamined.

This investigation's foundational conceptions of governmentality and rehabilitation will now be built upon by exploring a further concept offered by Foucault, that being the 'discourse of failure'. It must be noted that while Foucault's work has significantly contributed to the foundational elements of this research, only particular relevant theories have been drawn upon from his extensive body of literature.

## **2.4 Discourse of failure**

### **2.4.1 A paradox of the prison system**

A paradox exists when we consider the use of the term 'failure' in relation to the prison system. On the one hand, the prison system is conceived of as a failure, due to its persistent inability to curb recidivism rates. On the other hand, the prison system has been successful in achieving growth in infrastructure, increased personnel levels and increased levels of resource allocation for the development of rehabilitative programs.

Both presently and historically the prison system has failed to reduce the rates of recidivism. As contended by Foucault, 'the prison, in reality and visible effects, was denounced at once as a great failure of penal justice' as it was unsuccessful in lowering crime rates (Foucault, 1979, pp. 264-265). Foucault questions the validity of the prison system in place in the 1800s and its 'formulations which – figures apart – are today repeated almost unchanged' (Foucault, 1979, pp. 264-265). Although the prison system was originally denounced as a failure by governments and communities as a result of the continuing high rates of recidivism, it continues to operate and

develop in modern times (Foucault, 1979). This failure of the prison system to curb recidivism rates, while at the same time expanding, supports claims of a counter aspiration.

The failure of the prison system to reform offenders has enabled the success of a counter aspiration, that being bureaucratic enlargement. It is proposed that the continuing high rate of recidivism and the replicated failure in redressing those rates has in effect played a fundamental role in the continued expansion of the prison system. The maintenance of increasing numbers of recidivists within the prison system requires significant resourcing. Therefore, the high rate of recidivism that is reported supports demands for the continuing expansion of the prison system. The paradox which exists between the success and failure of the prison system is one which demonstrates the complexity and existence of more than overtly stated aspirations.

#### **2.4.2 Discourse of failure and the criminal record**

The criminal record is central to this tension between an assumed ‘failure’ to reintegrate offenders and the putative ‘success’ in separating out and keeping removed a criminal population. As an example of how this critique is pertinent to my own investigation, I turn to instances in the present where we may see ambiguity around that term ‘failure’. Alongside popular and political criticism of governments’ failure to combat recidivism, lay and political critics are quick to denounce anything resembling an approach that might be perceived as being soft-on-crime (Hogg & Brown, 1998).

In this context, that which once might have indicated ‘failure’ on the part of the prison system – such as more prisoners spending more time in jail – is just as likely to be celebrated as a sign of the ‘success’ of government. More prisoners, in other words, is seen as a sign of a government taking a hard line against crime. This ambiguity surrounding the term ‘failure’, as evident in the paradox discussed in section 2.4.1, can also be seen in the public arena via media reports. For example media reports in 1999, which criticised former NSW Premier Bob Carr for ‘applauding the increase in numbers of prisoners in NSW’ led to his subsequent issuing of a press release to ‘commemorate NSW prisons reaching record capacity’ in which he said ‘The NSW Government will not tolerate crime. Serious offenders are going to jail and they are

spending longer in jail. I make no apologies' (Hill, 1999, p. 7). These statements by Carr characterise higher rates of incarceration as successfully improving community safety by imprisoning offenders and removing them from society. Media reports like this demonstrate how the discourse of failure can be used to achieve counter-aspirations such as the perception of community safety, rather than an assumed objective such as the rehabilitation of offenders.

Towards this end, the criminal record is vital as it travels beyond the walls of the correctional facility and indeed beyond the arms of government and becomes enmeshed in other forms of governance in a way that impacts strongly on an ex-offender's ability to successfully reintegrate into society. This is particularly relevant in the context of gaining employment. This discourse of failure in relation to rehabilitation has driven the idea that the criminal record is not a 'record' of past conduct that has duly been overcome by rehabilitation, but rather an assessment of probable future conduct: 'rehabilitation' and 'corrections' are only ever identified in relation to 'failure'.

In line with the demand for actuarial measurements of reoffending, 'risk management' becomes a powerful concept and plays a key role in the employment of risk assessment tools, such as the VISAT and the criminal record.

## **2.5 Risk Management**

### **2.5.1 Risk management and calculation**

The concepts associated with risk management models are based on actuarial calculations. This actuarial element is common to correctional tools like the VISAT to manage any calculated risk of reoffending. It is also applicable to the predictive utilisation of a criminal record by prospective employers in evading the security risk assumed to be present in the employment of ex-offenders (Backman, 2011).

As argued by Mitchell Dean:

Risk is a way – or rather, a set of different ways – of ordering reality, of rendering it into a calculable form. It is a way of representing events in a certain form so they might be made governable in particular ways, with particular techniques and for particular goals (1999, p. 177).

This concept of risk management emerged in the mid-1980s and has steadily increased in standing over time (Beck, 1992). It was at this point that rehabilitation began to be recast. According to criminologist Pat O'Malley, this signified a 'move away from a focus on reforming offenders towards preventing crime and managing behaviour using predictive techniques' (2010, p. 1). Thus it would seem that ideas of rehabilitation have moved away from ideas of reform, being superseded by ideas of management, although the term 'rehabilitation' is routinely applied to any or all these ideas.

In the Victorian criminal justice system, the VISAT is one of the devices that render the previous behaviour of offenders calculable, transforming a person's history into a simplified and condensed form. This allows their independent factors to be made governable in certain ways, with the employment of specific programs and interventions for particular goals such as rehabilitation or the mitigation of risk (Pat O'Malley, 2010, p. 2). This line of argument and the work that assessment tools like the VISAT do is indicative of a society no longer focused on individuals but on collectively determined populations to be controlled. Scholar, Nikolas Rose (1999, pp. 235-236) argues that this is a representation of the amalgamation of a:

“new penology” which is markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness.

This simplification of the complex situation of many offenders and their individual needs illustrates a strategic move towards a more achievable goal, that being one of management and the targeting of classes which are considered to represent the greatest risk to social order (Robinson, 2008). Criminology scholars Malcolm Feeley and Jonathan Simon (1992, p. 452) support such contentions and argue that this new penology appears concerned with being 'managerial and transformative.... It seeks to regulate levels of deviance, not intervene or respond to individual deviants or social malformations'. Or as Rose puts it, this new penology is 'actuarial in character, seeking to map out distributions of conduct across populations and to arrange strategies to maximize efficiency of the population as a whole' (1999, p. 236). This theory offered by Feeley and Simon corresponds with the explanatory notes offered in

the VISAT administration manual, which identifies this tool as based on actuarial principles.

### **2.5.2 Risk management and its tools**

The VISAT, which will be explored in greater detail later in this investigation, is offered as a measurement tool so that supervision, monitoring and rehabilitative interventions can be appropriately directed to high and medium risk offenders. This tool ‘tends to statistical methods to identify correlations between pre-existing conditions and criminal action and to treat these conditions as “risk factors” that have become the focus of programs positioned under the rhetoric of rehabilitation’ (Pat O’Malley, 2010, p. 2). There is no reference in the VISAT Manual to concern over the rehabilitation or application of interventions, for the benefit of all who enter the criminal justice system. Instead, attention is paid to a particular class of offenders, resulting in targeted rehabilitation to manage those who pose the greatest risk to social order. Although the rhetoric of rehabilitation and reintegration is advanced, the tools invoked are actuarially focused, thereby creating a hybrid in which a variety of objectives may be met. Primarily, however, the objective is risk management. This concept of managing the perceived risks offenders present is not isolated to corrections or the VISAT as a risk measuring tool. Concepts of risk management and risk measurement in relation to ex-offenders also operate beyond the criminal justice system.

In broader society, the criminal record has become a risk management tool for prospective employers. Rather than employers considering applicants on their merits, with both negative and positive credentials being given equal weight, the existence of a criminal record as a negative credential is given greater consideration, due to the perception that ex-offenders represent an unjustifiable risk.

## **2.6 Conclusion of Theoretical Frameworks**

The previous four concepts and theoretical frameworks have been presented to facilitate a greater understanding of the foundations of this investigation. The overarching concept of governmentality allows for ideas of control and management to be examined beyond corrections and within the community. The concepts associated with rehabilitation as outlined above allow for an understanding of how shifts in the motivation and aim of rehabilitation have become aligned with an actuarial approach. This actuarial approach is adopted by Corrections Victoria in

managing risks that are deemed present in offenders. Furthermore, discourse associated with failure in relation to the criminal justice system influences societal perceptions and in turn the material implications for offenders.

This current situation is one which sees people like Rhianna (in the opening case study of the chapter) being excluded in Victoria from gainful employment based on the existence of a criminal record. The foundations for this thesis have been laid, and it is now necessary to explore the Victorian context to understand the environment in which this investigation takes place. This will be done in the following sections through the exploration of relevant background, legislative and policy information. The information provided will enable a greater understanding of the situation faced by offenders and ex-offenders in Victoria and will therefore contribute significantly to understanding the research presented.

## **2.7 Introduction to Australia - Victoria**

This research was undertaken in the Australian State of Victoria under a Victorian legal framework. While this context has particular characteristics not present in other Australian jurisdictions, there are some conditions common to all Australian states. One of these conditions common throughout all Australian jurisdictions is the presence of high rates of recidivism. An attempt to address these through the implementation of rehabilitative programs is also a common feature of each Australian jurisdiction. Rehabilitation programs are made accessible to offenders based upon the results obtained through the completion of actuarial assessments within a correctional environment.

### **2.7.1 Australia - Victoria and recidivism**

The general definition of recidivism as offered by the Australian Institute of Criminology (AIC), based on the use of the term in criminal justice literature is 'repetitious criminal activity ... synonymous with terms such as repeat offending and reoffending' (Payne, 2007, p. vii). Furthermore, this definition identifies a person who participates in repeat offending behaviour as a 'recidivist offender' (Payne, 2007, p. Vii). The issues caused by recidivist offenders have necessitated significant levels of research in Australia and overseas.

Recidivism research in Australia and abroad has been substantial given the perceived devastating impact recidivism has on crime rates within any given jurisdiction. Over a



period of ten years between 1995 and 2004, there have been approximately 416 studies conducted within Australia alone in relation to recidivism. 62 of those were conducted in Victoria (Payne, 2007, p. 53). Studies established that the majority (55%) of prisoners in custody in Victoria at 30 June 2008 had served a sentence in an adult prison prior to the current episode (Australian Bureau of Statistics, 2008). Furthermore, studies reported that ‘two in every three prisoners will have been previously imprisoned’ (Payne, 2007, p. Xi). These reported high rates of recidivism and forecasts such as ‘one in four prisoners will be reconvicted within three months of being released from prison’ (Payne, 2007, p. xi), have been cited by Corrections Victoria as instrumental in the development and implementation of new frameworks and programs, such as the ‘Reducing Reoffending Framework’ (Auditor General Victoria, 2003 - 2004).

### **2.7.2 Victoria and rehabilitation**

Corrections Victoria (in common with a number of jurisdictions) identifies specific bodies of literature as the knowledge basis of a number of recent programs, the aim of which is the rehabilitation and reintegration of the ex-offender and the reduction of recidivism (Jenny Cann, 2005). Rehabilitation programs offered within and external to prisons and implemented by Corrections Victoria are based on a body of scholarship known generically as ‘What Works’ (Layton MacKenzie & Hickman, 1998; Sherman et al., 1998).

The primarily rehabilitative interventions offered by Corrections Victoria are the Cognitive Skills Program, Violence Intervention Program, Sex Offender Program and the Drug and Alcohol Program. These keep company with other services, such as psychological counselling, educational and employment related programs. The Victorian criminal justice system has implemented these programs based on research and criminological evidence of ‘what works’ in relation to rehabilitating offenders and reducing the rate of recidivism (Auditor General Victoria, 2003 - 2004; Birgden & McLachlan, 2004).

The international ‘what works’ principles have become increasingly influential in relation to managing rehabilitative interventions and are championed as being based on an explicit model of the causes of crime (Debidin & Lovbakka, 2005; Howells, Heseltine, Sarre, Davey, & Day, 2004; Sherman et al., 1998). These principles make

claims on risk classification that target criminogenic needs. They focus on being responsive and purport to be an effective treatment method based on cognitive-behavioural techniques (Debidin & Lovbakka, 2005, p. 43). Proponents of these principles argue that they aim to reduce reoffending behaviour through interventions conducted within correctional institutions. It is believed that only when an intervention is concluded that the 'full potential impact on behaviour can be expected' (Debidin & Lovbakka, 2005, p. 43).

Throughout the literature three common assumptions are apparent. First that the corrections facility offers a gauge by which crime can be measured, and the instrument by which it can be combated or exacerbated. Therefore, it must always be in the foreground of all active critiques of criminological concerns. Second, the government is understood as the sole determining agent responsible for the success or failure of reintegration and hence recidivism. Finally, it is assumed that there is a 'trajectory of reintegration', an 'aim' to reintegrate the ex-offender back into the community. This is not brought into question (Pager, 2007, pp. 23-24).

Through the analysis presented in this thesis it will be argued that corrections and the government are not the sole governing bodies in relation to the rehabilitation and reintegration of an ex-offender. It is argued that there is an ongoing governing of ex-offenders which takes place in the public domain by reference to their criminal past and employs the criminal record as its primary predictive tool of future behaviour. This allows an ex-offender to be cast as the 'other', thereby excluding them from full active citizenship via employment. It is this dimension 'outside the prison walls' that has been overlooked by government and more specifically correctional policy. It is therefore fitting that attention is now given to the criminal record, whose effect lies beyond the prison walls. The criminal record will be considered generally and specifically in relation to Victoria and the National Police Certificate for employment purposes.

## **2.8 Victorian Criminal Records**

The Victorian criminal record was introduced in the form of a Docket in 1932. It was designed to achieve law enforcement objectives and to assist in the administration of the criminal justice system. This will be explored in the following section. Since 1993, Victorian criminal records have been made available for release in a particular

form to the public for other societal interests such as employment screening, licensing, visa applications and the like. This secondary purpose will be explored in section 2.9.2.

### **2.8.1 Law enforcement purpose of the criminal record**

Victoria Police manages criminal records for the primary purpose of administration in law enforcement and the criminal justice system. Prior to the early 1990s, police record checks were only available to government departments where security was a concern, such as the Adult Parole Board, Child Protection, and Corrections Victoria (Patterson, 2011). The records police maintain for these purposes are extensive and include all court attendances and outcomes, information about current criminal investigations, photographs, fingerprints, DNA records, aliases, security and medical information as well as details on known associates (Commissioner for Law Enforcement Data Security, 2006-2007).

These data are stored in various databases, one of which is Victoria's Law Enforcement Assistance Program (LEAP). Information held about individuals by Victoria Police is accessible by various government bodies to varying degrees and in a range of formats. For example, what is accessible to Victorian Police officers differs from that available to corrections officers for their operations, and from that available to the Victorian courts (*Criminal Justice Legislation (Miscellaneous Amendments Act 2002 (Vic)*, *Police Regulations Act 1958 (Vic)*).

The fact that each of these types of data file constitutes a 'criminal record' even though they are not identical in content or format demonstrates that there are multiple types of criminal records within the criminal justice system itself. This multiplicity of criminal records is extended further with their introduction to the public domain to be used for a variety of purposes.

### **2.8.2 Societal purposes of the criminal record**

In the early 1990s, changes to the storage and accessibility of criminal records significantly impacted on the utilisation of criminal records in Victoria. In 1992 a database system was introduced into Victoria Police administration, based on a popular US database system which was adjusted to the Victorian context and named LEAP (see above). This database was fully operational state-wide in 1993 and significantly altered the way criminal related information was managed (Victoria

Police, 2003). The system also increased the level of efficiency at which information could be accessed, allowing the introduction of a new service to society by Victoria Police. This new service provided criminal record checks to members of the public, including prospective employers (Patterson, 2011). The service came at a prescribed fee, reviewed annually and forming a new avenue of revenue-raising for government (Victoria Police, 2004). Today it has become common practice for an employer to request a criminal record check.

## **2.9 Victorian legislative framework**

### **2.9.1 Structure of the criminal record**

The contemporary criminal record is legally defined as ‘a written history detailing a person’s past criminal convictions’ (Soanes & Stevenson, 2008). While the definition suggests a fixed form, the contemporary criminal record does not exist as such. The criminal record is diffused and spread throughout various databases and sites of control. The Victorian Commissioner for Law Enforcement Data Security, found that there are over ‘217 law enforcement data systems or repositories from a total [of] 430 Victoria Police electronic information system[s]’ (Commissioner for Law Enforcement Data Security, 2007, p. 12).

The criminal record also exists in the context of a variety of legislation and policy and guideline determinants as to what is recorded and disclosed by whom and to whom. Legislation and policy only have material effects within the jurisdictions which created them. Australia has a multi-tiered system of government whereby powers are divided between the federation and individual states, including Victoria. Whilst the federal government administers a limited national criminal justice system, each state also administers its own criminal justice system. This arrangement mandates legislation being created in relation to criminal record information management and disclosure in each jurisdiction. An individual’s criminal record that crosses jurisdictional boundaries must function under an array of legislative frameworks and government policies (Payne, 2007, p. 33). Therefore, the criminal record itself varies from one jurisdiction to another. Put simply, this individual’s criminal record here is not the same, in form or function as that individual’s criminal record there. Nor does the criminal record of an individual remain immutable as it moves from one locale to another within a single jurisdiction; the criminal record is constantly changing in form

and content in line with its environmental conditions and context. Attention will now be given to spent conviction schemes which function in various jurisdictions throughout Australia, but not in all.

### **2.9.2 Spent Conviction Scheme**

A spent conviction scheme aims to limit disclosure of past offences after a prescribed length of time. Once an offence becomes spent, which only occurs after a stipulated period of time, the person who committed the offence is no longer legally required to disclose the commission of the offence to employers and the like. There are exceptions to this scheme based on such things as category of offence or length of sentence imposed. Thus, if a person's offence type is considered of a very serious nature or they have served an extensive period of time in prison, the subject's criminal history will not be protected from disclosure under this scheme. Various jurisdictions within Australia refer to such a scheme in different ways. Victoria for example has no legislated spent conviction scheme. A legislated form of a spent conviction scheme exists on a national level and in all Australian states and territories, with the exclusion of Victoria (*Annualled Convictions Act 2003* (Tas), *Crimes Act 1914* (Cth), *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), *Criminal Records (Spent Convictions) Act 1992* (NT), *Criminal Records Act 1991* (NSW), *Spent Convictions Act 2000* (ACT), *Spent Convictions Act 2009* (SA), *Spent Conviction Act 1988* (WA)).

In Victoria, restrictions on criminal record information disclosure is governed, not by legislation, but by the National Police Certificates - Information Release Policy, which is an internally implemented policy by Victoria Police (Victoria Police, 2011e). Under this policy, for an adult, 'if 10 years have elapsed since the last finding of guilt, then only the offence(s) that resulted in a custodial sentence of longer than 30 months will be released' (Victoria Police, 2011e).

Again, there are various exceptions to this policy. One of these exceptions states that, 'in other exceptional circumstances where the release of information is in the interest of crime prevention or the administration of justice' (Victoria Police, 2011e) a person's criminal history will be released regardless of the type of offence or time that

has lapsed since its commission. This is an exception which allows discretionary judgements to be made by an officer acting on behalf of Victoria Police.

This ability to apply discretion in releasing information can be seen as a ‘safety net’ for disclosing information that ‘should’ qualify to be considered as spent, as there are no specifics in relation to what is meant by ‘interest of crime prevention’ or ‘the administration of justice’. The spent conviction scheme policy allows for no form of appeal.

A further form of legislative protection of information offered to ex-offenders in some jurisdictions is anti-discrimination legislation.

### **2.9.3 Anti-discrimination Legislation**

Anti-discrimination legislation addresses discrimination on grounds which are determined as unlawful, for example sex, religion and disability. The international principle identified in the International Labour Organisation (ILO) Convention 111, which is aimed at allowing people to be free from various forms of discrimination is realised through the *Australian Human Rights Commission Act 1986* (Cth). This legislation only provides some protection to people with a criminal record from discrimination on a federal level. The Commission’s powers in relation to addressing discrimination in employment on the ground of criminal record ‘are contained in Part II – Division 4 (sections 30, 31 and 32) of the AHRC Act and the *Australian Human Rights Commission Regulations 1989* (Cth) regulation 4’ (Human Rights and Equal Opportunity Commission, 2005, p. 10). While this legislation acknowledges and attempts to address discrimination in employment based upon the existence of a criminal record, its limited powers make it something of ‘a toothless tiger’ (Victorian Aboriginal Legal Service Co-operative Limited, 2005). This legislation fails to equip the Commission, now known as the Australian Human Rights Commission (AHRC) with any powers to enforce a legal remedy. This lack of enforcement power is evident in the case of *Campbell v. Black and White Cabs Pty Ltd*, 2012, AusHRC 50. In this case, it was found that unlawful discrimination on the basis of a criminal record had occurred against Mr Campbell. Although the AHRC has reached this decision, Black and White Cabs Pty Ltd has decided the company will not undertake the suggested

action made by the AHRC, which was to reinstate Mr Campbell. The judgement and the recommendation by the AHRC cannot be enforced.

A complaint of discrimination based on a criminal record can be made to the Australian Human Rights Commission, who can attempt to engage the complainant and the defendant in a conciliation process. If this is not successful, the last step is to submit a report to the federal Attorney-General for tabling in Parliament. It has been acknowledged by the Commission that on two occasions discrimination based on a criminal record have been proven, but recommendations made by the Commission have been disregarded by the employer (Human Rights and Equal Opportunity Commission, 2005; Naylor, 2011). In this respect it differs from discrimination on grounds of age, disability, race or sex where legal remedies and the option of court proceedings are enforceable under the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth).

Anti-discrimination legislation also exists under State and Territory legislative regimes. In relation to criminal records, only Tasmania and the Northern Territory have anti-discrimination legislation identifying ‘irrelevant criminal record’ as grounds of unlawful discrimination *Northern Territory Anti-Discrimination Act 1996* (NT), *Tasmania Anti-Discrimination Act 1998* (TAS)). The Australian Capital Territory similarly identifies spent convictions as grounds for unlawful discrimination (*Australian Capital Territory Discrimination Act 1991* (ACT)), but Victoria and the other states have failed to legislate and give protection to people who are discriminated against as a result of an irrelevant criminal record.

In Victoria the restriction or release of criminal record information is governed by Victoria Police’s internal policies as stated in section 2.9.2. The most significant of these is the National Police Certificate - Information Release Policy and the application form, entitled, ‘Consent to check and release national police record’. These two documents are of paramount importance and have considerable impact on an ex-offender, when attempting to become gainfully employed in Victoria. In the following section, the directions and implications of the internal policy and application forms 820A - 820B will be explored.

## **2.10 Administration of the Criminal Record by Police**

### **2.10.1 Consent to check and release national police record**

In 2007, a person could complete the Victoria Police (VP) form 820A entitled 'Consent to check and release national police record' to access their criminal history. Of particular interest is section 4 of this form, headed 'Statement of consent and indemnity'. Under this section a person consents to having their criminal record sent directly to a third party, for example another individual, organisation, or a current or prospective employer. This gave rise to serious privacy concerns (Victoria Police, 2007). This option allowed for a third party to view the criminal record prior to the subject of the check and also gave the third party the ability to keep the original document and do with it what they pleased. These issues of privacy and third party access were addressed in 2009 with the introduction of Victoria Police (VP) form 820B. This form could only be submitted online by the subject of the check and the results could only be returned to that person directly. If a third party such as an employer or prospective employer was willing to make payment for the police criminal history check, they were nonetheless required to acknowledge and agree, by signature and contact details, to the following statement, 'to ensure the protection of privacy and the provision of natural justice, I authorise Victoria Police to deliver the certificate only to the applicant's residential or nominated postal address' (Victoria Police, 2009a).

The subject of the check was also required to agree by providing a signature to the following:

... I consent to a check of the records of Victoria Police and other Australian police forces and to the release (as specified in policy at [www.police.vic.gov.au/...](http://www.police.vic.gov.au/...)) of any convictions, findings of guilt, either with or without conviction, any matters still outstanding against me and any other matters deemed to be relevant which are recorded against my name. If applicable, I hereby authorise Victoria Police to obtain information from the Roads Corporation which relates to my identity and which is kept by the Roads Corporation. In consideration of Victoria Police releasing any details of any convictions and other information recorded against my name, I hereby indemnify the State of Victoria, its servants and agents including all members of Victoria Police against all actions, suits, proceedings, causes of action,



costs, claims and demands whatsoever which may be brought or made against it or them by anybody or person by reasons of or arising out of the release of any details of any findings of guilt, convictions and other information recorded against my name or purporting to either relate to or concern me (Victoria Police, 2009b).

These statements have serious implications for the subject of the police criminal record check. First, the subject must consent to the release of specific types of information, in conjunction with what may be 'deemed to be relevant which are recorded against my name'. This statement to which a subject must agree is of particular interest on two fronts. First we might ask who deems the information 'relevant' and what the parameters of the information are. Secondly, the term 'recorded against my name' is of interest as this makes clear that what might be recorded against your name may not be your own record. The occurrence of such errors is acknowledged by Victoria Police in their frequently asked questions section, question 18 states: 'Some or all of the information on my National Police Certificate is incorrect and I would like a new certificate. How do I have this information corrected?' (Victoria Police, 2011c). Furthermore, the disclosure of incorrect information is also evident in Matthew's case presented at the commencement of chapter 7, in which a conviction was recorded on a National Police Certificate, when a finding of guilt without conviction was the determination of the court.

The form also includes clear and unquestionable indemnity statements. These statements are made in an attempt to remove responsibility from Victoria Police for their actions and their active disclosure of criminal record information which may not be accurate for various reasons, as outlined above. These indemnity statements require the subject of the check to sign the form. By doing so the subject acknowledges the waiving of their right to recourse against Victoria Police for the release of inaccurate information and any consequences. These statements are enabled by the fact that no impartial legislation exists in Victoria concerning the release of criminal record information. In place of such legislation are policies which have been designed, implemented and managed by Victoria Police. The indemnity statements made within the Victoria Police (VP) form 820A and subsequently 820B are

supported by the Victoria Police, National Police Certificate - Information Release Policy.

### **2.10.2 National Police Certificate - Information Release Policy**

The National Police Certificate - Information Release Policy outlines what information will be disclosed by Victoria Police on a National Police Certificate. According to this policy:

Victoria Police release criminal history information on the basis of findings of guilt, and may also release details of matters currently under investigation or awaiting court hearing. It is important to note that a finding of guilt without conviction is still a finding of guilt and will be released according to the information release policy (Victoria Police, 2011e).

This policy on a number of fronts raises issues for an ex-offender. There are two specific issues that will be analysed within this thesis, for their impact on a person's ability to reintegrate. The first of these, is that the Victorian Police Information Release Policy, allows for the disclosure of 'finding of guilt without conviction' (Victoria Police, 2011e). This policy is at odds with the spirit of the Victorian *Sentencing Act 1991*, section 8, which states:

- (1) In exercising its discretion whether or not to record a conviction, a court must have regard to all the circumstances of the case including—
  - (a) the nature of the offence; and
  - (b) the character and past history of the offender; and
  - (c) the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects.
- (2) Except as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose (*Sentencing Act 1991* (Vic)).

According to these sections, it is clear that the intent of the legislation is to take into account the future prospects of an individual and consider forward looking purposes, subsequent to the completion of their punishment. It is thus argued that this Victorian Information Release Policy, through the disclosure of non-convictions is at odds with this forward looking legislation. An illustration of the effects of this policy is evident in the following case study of Jason:

Jason was found guilty of possessing a drug of dependence (less than 8 grams of marijuana) when he was 23 years old. Jason pleaded guilty to the charge hopeful that no conviction would be recorded against him. He received a good behaviour bond without conviction. When undertaking tertiary studies in education, Jason was obligated to obtain a police check prior to his student placement. Upon graduation he was again required to disclose the offence prior to registration as a teacher. These checks revealed the guilty verdict, notwithstanding the non-conviction sentence, necessitating further explanation by Jason as to broader circumstances surrounding the offence (Fitzroy Legal Service Inc, 2011a).

Secondly, the Victorian release policy states that the following will also be released: ‘details of matters currently under investigation or awaiting court hearing’ (Victoria Police, 2011e). According to the Legal Dictionary for Australians ‘our legal system operates on the presumption that a person who is accused of a criminal offence is innocent until proven guilty according to the required standards of proof’ (Alderson, 2005, p. 181). Yet, in accordance with the release policy, it is deemed appropriate to disclose information of charges still pending. The release of such information has the ability to create a presumption of guilt, despite the fact that a court of law has not heard the matter or an investigation has not been completed.

In this section, the relevant Victoria Police policies have been outlined and discussed. In the following section the National Police Certificate online application form will be considered.

### **2.10.3 National Police Certificate**

The application form requesting a National Police Certificate requires the identification of the purpose of the request, which determines the information to be disclosed on the National Police Certificate. A criminal record check may be requested by an individual for a variety of reasons, but the application form stipulates that only one reason can be given per National Police Certificate, as this purpose will be instrumental in the construction of the certificate.

An applicant is given three options from which to choose the reason for the criminal record check. Option one is entitled ‘Employment, occupational licensing, visa or insurance purposes’ (Victoria Police, 2009b). Under this option there are 11 specific

tick boxes provided, for which an applicant is required to select only one if relevant. Option two is entitled 'Volunteer/authorised student placement/Family Day Care resident' (Victoria Police, 2009b). Under this option there are eight specific tick boxes, of which only one may be selected. If you select one of the tick boxes under option one, you cannot select any further ones from the remaining two options and vice versa. Option three is entitled 'Personal Use (not for release to other parties)' (Victoria Police, 2009b). Under this option there is only one box to tick and it is made clear that a National Police Certificate will not be provided, but rather only information held by Victoria Police (Victoria Police, 2009b). Once the application has been processed, the results of the check are returned to the applicant in the form of a National Police Certificate, on which the identified specific purpose of the check is recorded under the heading 'Reason for Check' (Victoria Police, 2011d).

This demonstrates how 'the criminal record' as it exists in the form of information held on databases such as LEAP differs significantly from 'the criminal record' released for employment purposes, which in turn differs from that received on request from ex-offenders for their personal information. The need to outline the specific purpose of the check sets the parameters for the information to be included (and excluded) from the criminal record. For example, whilst a LEAP criminal record would have various types of data, such as known associates, vehicle details, residential information and the like, this detailed information would go beyond the parameters of a criminal record released for employment purposes. Furthermore, if a person requests their own criminal record check only Victorian records will be released and national checks will not be carried out, thus constructing a another version of a criminal record (Victoria Police, 2009b). The transformable nature of the criminal record is therefore striking and raises a vital question in regards to how decisions are made in relation to what information is released on a National Police Certificate. The decisions as to what is included on a National Police Certificate are 'normally dependent on the Victoria Police Release Policy, but legislative requirements for specific areas, such as gaming applications, aged care and others, must be adhered to and override Victoria Police policy' (Patterson, 2011). This means that a National Police Certificate of one individual may take a variety of forms, depending on the purpose of the certificate and legislation in place.

It is argued here that the incompleteness and multiple representations of the criminal record are central to understanding the National Police Certificate's weakness as a risk assessment tool for employment purposes. The information presented was aimed at demonstrating how the criminal record is not a single document and is consistently being re-constructed depending on specific conditions and applications. Furthermore, it illustrates how the National Police Certificate can itself change in relation to the information it contains depending on the stated purpose of the check. The criminal record as presented on a National Police Certificate is therefore highly adaptable through the withholding, recasting or altering to some degree of its content, and no longer representing the criminal record as held by Victoria Police. This is central to this investigation. In the following section we will explore the relationship between the reintegration of ex-offenders and employment.

### **2.11 Ex-offenders and employment**

The control and power exercised through government is not the sole domain of the state, since there are various institutions and organisations that participate in the governing of offenders, ex-offenders and recidivists. It is in this area, the extension if you will, of formal government that concepts of governmentality apply, shadowing the application of control in regulating the lives of ex-offenders. These practices go beyond the remit of corrections and employ diverse forms of risk assessments, categorisations and technologies to differentiate populations and 'structure the possible field of action of others' (Dreyfus & Rabinow, 1983, p. 221 ; Hunt & Wickham, 1994). One of the tools used to govern ex-offenders beyond the remit of formal government is the criminal record.

The unwavering focus on what the state and its various outfits are doing or failing to do in relation to the reduction of crime rates, managing offenders and providing security to society at large has allowed for other forms of government and governing tools to go unanalysed for both their real effects and consequences. An individual offender, who in the majority of cases returns to the community at some point and attempts to gain full citizenship once he or she has exited the criminal justice system, is still governed not as an individual but rather as an ex-offender with his or her compilation of risk factors. As Deleuze suggests in Rose, 'we are not dealing with "individuals" but with "dividuals": not with subjects with a unique personality that is the expression of some inner fixed quality, but with elements, capacities,

potentialities' (Rose, 1999, p. 234). Deleuze suggests an important broader bureaucratic phenomenon of eliminating the 'in' in individual, this removal of the 'in' illustrates the removal of concerns of a person's inner being, and thus promotes ideas of standardisation and the simplification of individuals to the bare minimum. The nature of the modern bureaucracy is such that a depersonalisation of the subject occurs to the level of capacities - mere points in a system. This speaks to the fracturing of a human being into capacities and factors to be measured. Furthermore, this illustrates how once a person becomes any sort of 'offender', including an ex-'offender' they are no longer viewed as an individual to be assessed based on merit, but rather a risk to be managed whether through correctional tools like the VISAT or societal tools like the criminal record. The return to full active citizenship is never attainable and thus neither is the right to be judged on one's merit, as a criminal record will also keep these at arm's length.

Locally, academic Bronwyn Naylor argues that 'criminal record checks are becoming a way of life in Australia' (Naylor, 2005, p. 174). The increased significance associated with the criminal record in relation to determining an individual's 'moral standing' for employment purposes are evident through the vast increase of requests received by the Victorian Police. In 1992 – 1993, the 'Victorian Police received 3459 requests for a criminal record check for employment purposes. This had increased in 2009 - 10 to 387,688 CrimTrac checks being submitted by Victorian accredited agencies for employment purposes and a further 201,839 being submitted by Victoria Police, making a total of 589,527 for Victoria alone (Dale, 2011). This sharp increase in the requests for criminal record checks is not limited to Australia, but is found throughout the western world. UK researchers Hilary Metcalfe, Tracy Anderson and Heather Rolfe concluded:

That the use of criminal record information in recruitment, with criminal record information of any sort (the Basic Disclosure or other information) is being used for between 68 per cent and 71 per cent of vacancies (Metcalfe, Anderson, & Rolfe, 2001, p. 7).

It is contended in this thesis that although access to the criminal record is controlled by government, its use is largely ad hoc, utilised by social institutions and

organisations, especially in relation to employment, in an unstandardised, unregulated testing of ‘moral suitability’ and the like.

Any attempts to control the use of criminal record checks seems to emanate, not from the criminal justice system itself—ostensibly the body concerned most with overcoming barriers to reintegration—but indirectly from the Australian Human Rights Commission, and in the form of ‘advice’ in relation to preventing discrimination in relation to criminal records in employment situations. In its 2005 publication, ‘On the record: Guidelines for the prevention of discrimination in employment on the basis of criminal records’, in section 5.4, ‘Advertising job vacancies’, the following advice is given to prospective employers:

If an employer decides that a criminal record is relevant to a particular job, an employer should state this requirement clearly in job advertisements, information sent out to job applicants and recruitment briefs to agencies. Even if a criminal record is relevant, the advertisement and job information should also state, wherever possible, that the employer does not automatically bar people with a criminal record from applying (unless there is a particular requirement to do so under law). This encourages an open exchange of information at the early stages of the recruitment process rather than down the track. It also means that an applicant can decide whether or not to apply for the position (Human Rights and Equal Opportunity Commission, 2005).

Furthermore, advice is also offered by Standards Australia in the form of an employment screening handbook. Standards Australia is a non-government agency employed by the Commonwealth Government to meet Australia’s need for ‘contemporary, internationally aligned standards and related services ... that contributes to community demands for a safe and sustainable environment’ (Standards Australia, 2010).

This handbook offers organisations, institutions and employers advice and a base line in relation to managing recruitment processes and ongoing human resource management. It proposes that an extensive screening process is the best way to minimise and protect an organisation against potential risks (Standards Australia, 2007). It is suggested by Standards Australia that a national criminal record check should be conducted in relation to any position that requires the successful candidate

to be an 'entrusted person'. The meaning and scope of such a title is not defined in the document (Standards Australia, 2007, p. 19).

The handbook also advises the organisation to ensure that if the 'entrusted person' fails the criminal record check they should inform the individual as to the reasons for their rejection and any avenues of appeal. This is only to be done once the organisation has confirmed beyond a shadow of a doubt that there has 'been no breach of human rights, natural justice or discrimination legislation' (Standards Australia, 2007, p. 19). This is made clear to protect the organisation from any form of recourse by an applicant should they believe that they have been treated unfairly.

Two aspects of this handbook are especially striking. First, it suggests that it is good practice to declare 'the requirements for employment screening to applicants as part of the advertising/recruitment documentation' (Standards Australia, 2007, p. 20). This advice concurs with the advice offered by the Australian Human Rights Commission (AHRC), as outlined above. The acceptance of such advice by employers helps to explain the significant increase of criminal record checks within Australia and Victoria. By analysing of the extent to which this advice is heeded, and translating it into the inclusion of criminal record check requests in job advertisements, the impact of such advice can be better understood. This advice poses real and serious issues in relation to ex-offenders excluding themselves and thus not applying for employment, a point that will be explored in more detail in the following section.

The second striking aspect of this handbook is its authorship, in view of the particular attitudes expressed by one of the authors and the position he holds within the community. This handbook was prepared by three individuals, Mr Gavin Love from International Association of Emergency Managers, Dr Carl Gisbon from La Trobe University and of particular interest, Mr Guy Underwood, from RISQ Group (Standards Australia, 2007, p. 2). Mr Underwood is the chief executive officer of RISQ Group, an organisation that offers screening solutions. The pre-employment screening process has been 'recognised globally as an important risk management tool and a crucial component of the recruitment process' (RISQ Group, 2010). Prior to Mr Underwood's position at RISQ Group, he was the director of Hibis International, a company that consults on fraud resistance and employment screening. Mr Underwood has made clear that he sees the process of advertising employment as the perfect



opportunity to encourage ex-offenders to exclude themselves from applying. He has advocated this process on the grounds that it avoids the necessity for the employer to have to engage with people that have a criminal record, regardless of the content of that record (Long, 2004). This demonstrates that Mr Underwood has a business interest in promoting the use of pre-employment screening, especially in relation to criminal record information.

In the *Sydney Morning Herald* newspaper, Mr Underwood was quoted as saying that ‘in general, employers are likely to be most sensitive about a job seeker's criminal history and education.... Such background checks cannot be run without the candidate's consent but asking for the OK can be *all that is needed*<sup>1</sup> to make someone confess all or quietly withdraw their application’ (Long, 2004). This furthers the argument that a request for a criminal record check in an employment advertisement may be all that is needed to eliminate ex-offenders from the pool of candidates and that this may indeed be its purpose. The critical issue of self-exclusion by ex-offenders during the recruitment process will be considered in the following section.

### **2.11.1 Self-Exclusion**

In relation to the use of criminal record information for employment purposes, there have been various forms of advice, best practice and the like, being offered to employers to regulate this particular area where there is no firm legislation on which to rest decisions. Although it is only forms of advice that are being offered, there is the possibility of serious detrimental effects that can arise in relation to a problem currently identified as ‘self-exclusion’. The AHRC guidelines, while attempting to assist and encourage employers not to discriminate against people with a criminal record, may indeed exacerbate the issue of self-exclusion.

The term ‘self-exclusion’ refers to a situation in which a person with a criminal record actively avoids applying for employment positions as a result of being fearful that their criminal history will be used to discriminate against them (Fitzroy Legal Service Inc & Job Watch, 2005). Self-exclusion does not absolve employers from their responsibly to assist, or at least, not hinder the reintegration and rehabilitation of ex-offenders. The act of self-excluding does not occur without organisations crystallising

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<sup>1</sup> My emphasis

the importance and probability of a criminal record check. The occurrence of self-exclusion was also identified in the report, 'Criminal Records in Victoria: Proposals for Reform 2005' by Fitzroy Legal Service and Job Watch. They surveyed community organisations that advocate on behalf of or otherwise support people with criminal records. One of the survey questions was, 'Has any of your service users experienced discrimination (less favourable treatment) on the basis of a criminal history?' (Fitzroy Legal Service Inc & Job Watch, 2005). Youth Projects, one of the organisations surveyed, responded that their clients did not experience less favourable treatment but that this was as a result of their active self-exclusion from jobs requiring a criminal history check (Fitzroy Legal Service Inc & Job Watch, 2005). The representative reported that:

people feel they wouldn't be successful in the application process, which is another knock-back which undermines their self esteem and makes them think "no-one will give me a second chance". You don't want another rejection when you may have had several anyway (Fitzroy Legal Service Inc & Job Watch, 2005).

That is, Youth Projects understands its clients as pre-empting the possibility of discrimination by prospective employers.

My investigations into the criminal record as a tool for governing the conduct of ex-offenders in Victoria suggest that at one end of the spectrum, as part of the formal operations of the criminal justice system and in direct government response to the problem of recidivism, offenders are invited to self-govern. This is to be achieved by taking responsibility for their own rehabilitation and thus actively seeking out and taking part, for example, in voluntary programs designed to equip them with the life skills deemed necessary. These decisions are informed by scholarship such as 'what works' in relation to the successful reintegration of ex-offenders (Debidin & Lovbakka, 2005, p. 31).

At the other end of the spectrum, at a distance considerably removed from the remit of the criminal justice system, and from the formal regulation by government, ex-offenders are also 'invited' to self-govern. Through the uptake of the criminal record, largely by non-government agencies, communities and employers, ex-offenders are 'invited', though in indirect and de facto fashion, to self-govern – to self-exclude. As

suggested above, these processes have largely remained unacknowledged by scholarship and by government in seeking, through reintegration, to address the problem of recidivism. Now consideration will be given to current and future opportunities for ex-offenders in relation to employment.

### **2.11.2 Employment Opportunities for Ex-offenders**

The exploration of current employment opportunities and practices within Victoria are particularly relevant to understanding the significant negative impact a criminal record can have on an ex-offender's ability to become gainfully employed. According to the Australian Bureau of Statistics (ABS), the top ten industries that employ Victorians in descending order are: retail trade; health care and social assistance; manufacturing; construction, professional; scientific and technical services; education and training; accommodation and food services; transport; postal and warehousing; public administration and safety; financial and insurance services (Australian Bureau of Statistics, 2011a).

In five of these industries it would be commonplace to require a criminal record check, namely: health care and social assistance; education and training; transport; postal and warehousing; public administration and safety; and financial and insurance services. The majority of licences and positions relevant to these industries would require some level of security clearance as a result of legislation, policy or regulations. This is not to suggest that other industries do not also require criminal record checks to varying degrees or for specific positions.

Furthermore, two of the four sectors with the greatest level of a current or future skills shortage routinely require a criminal record check. According to the ABS 'A Picture of the Nation - 2006', The Department of Employment, Education and Workplace Relations conducted a survey, the 'Survey of Labour Demand (SOLD)' to gain an indication of hard-to-fill jobs. The top four occupations as of 2006, which continue to be hard to fill according to the SOLD Vacancy Report, are accountants, auditors and corporate treasurers; automotive tradespersons; computing professionals; and nurses' (Australian Bureau of Statistics, 2006). Criminal record checks are commonly required for positions related to finance and healthcare.

This indicates that criminal record checks are required for a large number of employment positions in Victoria, which is likely to impact on the employment opportunities of ex-offenders.

### **2.11.3 Employment status of Offenders**

According to the 'Statistical profile of the Victorian prison system 2005-06 to 2009-10', on reception at the 30<sup>th</sup> June 2006, 28.6% of a total of 3,905 incarcerated persons reported being employed prior to their imprisonment. Being employed in this context includes 'employee, employer, self-employed, and apprentice' (Corrections Victoria, 2010, p. 38). These findings were accompanied by 63.2% of this total incarcerated population reporting being unemployed (Corrections Victoria, 2010, p. 38). The remaining 8.2% reported being a pensioner, student or other (Corrections Victoria, 2010).

In comparison, the rate of reported employment at 30 June 2010, was 21.2 % out of a total of 4,537 incarcerated persons (Corrections Victoria, 2010, p. 38). This figure indicates a 7.4% percentage point decline, equating to approximately a 25% decline in reported employment prior to incarceration, whilst the figure of people incarcerated increased by 632. Furthermore, 67.3% reported being unemployed on reception to prison (Corrections Victoria, 2010, p. 38) . The remaining 11.5% reported being a pensioner, student or other (Corrections Victoria, 2010). This represents an increase in the reporting of unemployment over a period of four years and a decline of reported employment of 25 % over the same period, while the prison population increased. The low level of prisoners reporting employment prior to incarceration in Victoria indicates that many offenders are not gainfully employed and that there is a higher rate of unemployment amongst offenders than the general population.

In contrast research in the US has found that there is a high level of employment amongst felons prior to incarceration, although in most cases the employment positions held are within the 'secondary labour market' (Lynch & Sabol, 2001). Furthermore, findings of the Russell Sage studies (2007) conducted in the US, have reported a spike in employment subsequent to a period of incarceration amongst newly released felons. According to Criminologist David Weiman:

these studies seemingly imply that "prison does not matter". When properly interpreted in terms of their research design, they only show that variations in

inmates' prison conditions and experiences do not significantly affect their postrelease labour market outcome. After realizing a transitory employment and earnings gain upon their release from prison, former inmates fall back into the same labour market rut that contributed to their landing in prison in the first place (Weiman, 2007, p. 597).

The spike in employment identified through this research is not relevant to the bulk of people with a criminal record, as these findings are solely based on information about offenders who have been incarcerated, which is not the majority of offenders.

Research in both the US and Australia have consistently identified employment as having a positive impact on decreasing the likelihood of reoffending and assisting in the discontinuation of the offending cycle (see Figure 1) (Sampson & Laub, 1997; C Uggen, 2000; Visher, Winterfield, & Coggeshall, 2005; Weiman, 2007). Furthermore, research conducted by Uggen (1999) in the US indicates that high-quality jobs such as those in education, health and other professions are more likely to decrease re-offending than low quality jobs, such as employment positions in manufacturing and transportation (Harer, 1994; Sampson & Laub, 1997). In Victoria, these quality job industries require a criminal record check for most positions. This thesis presents the argument that the utilisation of criminal record checks by employers in an ad hoc way leads to the unnecessary exclusion of ex-offenders from gainful employment.

## **2.12 Conclusion**

This chapter has outlined the key theoretical frameworks to be practically applied to the data and arguments presented in this thesis. The overarching theoretical framework of governmentality has been explored as this approach has a key function in analysing the data presented. Theories and approaches that have furthered this investigation and complemented theories of governmentality within the criminal justice domain and beyond have also been presented. These theories relate to rehabilitation, risk management and the discourse of failure. Subsequently, the structure of the Victorian context has been presented. This information has been offered to facilitate an appreciation of the conditions which drove this investigation.

The following chapter will explain the method utilised and the sources of information drawn upon in this investigation. This will be followed by an outline of the three main sections of this thesis and consideration will be given to the three specific themes

identified in section 1.4 which traverse and interlock the three main sections of this investigation.

## Chapter 3 Sources & Methodology

### *The criminal record as a source of information*

*Ms M applied for part time employment as a disability support worker with an agency in country Victoria. Ms M was eminently qualified for the position and worked for DHS (Department of Human Services) at the time of her application. Ms M interviewed for the position and completed a consent form for a police check. Ms M eventually received correspondence from the agency informing her that all employment vacancies had been filled. Ms M had not been successful. Her police records check was enclosed. The check disclosed offences from 1987, 1992 and 2004.*

*The earlier offences in 1987 and 1992 (the 1992 offence related to the 1987 matters) were all 'without conviction' and occurred when Ms M was 18 years of age. An offence in 2004, also 'without conviction' related to a firearms offence of possessing ammunition without a licence. Ms M did not own a gun and had two old shotgun shells in her possession, which had previously belonged to her step-father. The cartridges were bundled up with other possessions given to Ms M by her mother who lived in Tasmania. (Police found the cartridges while searching the house on the suspicion that Ms M's brother, residing with her at the time, had been using drugs). Given the subsequent offence in 2004 all previous offences were disclosable. Ms M pleaded guilty to the 2004 offence, but now wonders whether this was the right course to have taken, given that mere findings of guilt are disclosable and that this offence triggered the disclosure of the earlier offences.*

*Note: the early offences had been disclosed when Ms M obtained employment with DHS. They considered her to be of good character at the time. When applying for work with the agency Ms M was not given the opportunity to explain her record (Fitzroy Legal Service Inc, 2011g).*

### **3.1 Introduction**

In this chapter the method of critical discourse analysis and its use within this thesis will be outlined. Critical discourse analysis enables texts to be analysed to account for their production, internal structure and the overall organisation. Critical discourse analysis is useful because it enables a critical dimension in its descriptive and theoretical accounts of texts (Dellinger, 1995). The methodology used within this thesis is primarily text based and takes material from a range of sites. The types of materials to be analysed include Dockets, Intelligence Cards, employment advertisements, policy documents and risk assessment tools. The sources utilised throughout this investigation will be described later in this chapter to explain how this publicly available information has contributed to this investigation. Further to this, an in-depth discussion of the structure and key themes that are apparent in all three

sections of this investigation will be offered. In the following sections various uses of critical discourse analysis will be explored.

### **3.2 Application of critical discourse analysis**

This thesis considers the accuracy and completeness of the information presented in a National Police Certificate, using critical discourse analysis. These texts will be analysed to bring to the fore the way this information impacts ex-offenders, by constituting him or her as an identity to be practised upon in relation to recidivism and reintegration. The particular effects and the limitations of those practices are duly explored as this analysis makes central the material impact criminal records are having on ex-offenders' ability to successfully reintegrate into society through the specific means of employment.

Consideration will be given to the way the range of contextual information held by Victoria Police and other organisations, which is not recorded against the subject, is excluded from a national criminal record check. It is thus argued that the information presented on a National Police Certificate is lacking in depth, rendering its usefulness minimal. The reality is that criminal records were not designed for the role that they have now assumed. Its role in the public domain as an indisputable, complete 'fact' of an ex-offender's past and probable future actions is therefore deeply problematic.

Critical discourse analysis will be employed in scrutinising these texts to allow for a more in-depth view of these inscriptions in relation to not only what they say but also what they fail to say and what they imply. The term 'inscription' is used throughout this thesis because of the duality of meaning associated with its definition that is implicit here. Inscription is defined as something written or engraved on a solid substance for preservation or public inspection while also being defined as an personal dedication, such as is found in books (Soanes & Stevenson, 2008). In this manner the term relates to the solidity and public place of the criminal record while simultaneously describing its specific or personal implications and descriptions.

#### **3.2.1 Use of critical discourse analysis to establish power relations**

The application of critical discourse analysis to the data enables investigation beyond description. As Van Dijk points out, critical science in this domain asks further questions such as those of 'responsibility, interests and ideology' (Van Dijk, 1986, p. 4). The starting point for this analysis is not the texts that represent the social issue of



having a criminal record or associated social problems. The starting point is their interlocking and accretion, which helps them exist, transform and have real and lasting effects. Furthermore, the criminal record, its construction and application will be analysed to seek through these texts ‘those in power, those who are responsible, and those who have the means and opportunity to solve such problems’ (Van Dijk, 1986, p. 4). In other words, an analysis will be undertaken of the main actors in the generation and use of criminal records to govern the actions of ex-offenders beyond the prison walls.

These inscriptions will be analysed for their interconnections and chains of cause and effect which are not always visible at first sight and require further probing for their effect (Fairclough, 1985, p. 747; Wodak & Meyer, 2001, p. 2). This method enables me to fully explore the inscriptions I have chosen to analyse for their informative qualities, their depth, the power relationships they facilitate and the truth or otherwise that they produce. This method in conjunction with the frameworks supported by proponents of ‘governmentality literature’ such as Michel Foucault will equip me with tools to analyse the depths and assumptions of these texts and also the conversion of these texts into material effects through the power they wield and the way they enable the truth claims they present to be solidified.

### **3.2.2 Use of critical discourse analysis and formative materiality**

Discourse analysis in the context of this thesis is associated with a formative materiality which is not necessarily attached to it in other contexts (Hunt & Wickham, 1994; Kendall & Wickham, 1999). As noted by Hunt and Wickham, discourses

have real effects; they are not just the way that social issues get talked and thought about. They structure the possibility of what gets talked and thought about. They structure the possibility of what gets included and excluded and of what gets done or remains undone (Hunt & Wickham, 1994, p. 8; Kendall & Wickham, 1999).

Hunt and Wickham draw as I do on Foucault's conceptualising of the discursive space as a system of configuration, which means not only the juxtaposition, coexistence, or interaction of diverse elements including institutions, techniques, social groups and

perceptual organisations, but also the relationship that is established between them in a well-determined form—by discursive practice (Foucault, 1972). These discursive relations ‘offer objects of which it can speak’, shaping relations that make it possible ‘to speak of this or that object, in order to deal with them, name them, analyse them, classify them, explain them, etc’ (Foucault, 1972, p. 46 & 72). In this thesis, I will attempt to extend the practice that Foucault proposes is ‘a matter of shaking this false self-evidence, of demonstrating its precariousness, of making visible’ not only its arbitrariness, but its ‘complex interconnection with a multiplicity of historical processes’ (Burchell et al., 1991, p. 75). In the following section discourse analysis will be considered in a broader sense.

### **3.2.3 Assumptions, truth claims, standardisation and simplification**

Discourse analysis is a broad term including a number of more specific methodological approaches, among them, ‘thick description’ which encompasses looking for cultural meanings within particular communicational contexts (Geertz, 1973, pp. 3-30). I choose not to conceive of my methodology under this term. My choice is determined, first, by the fact that the body of work to which I understand my research to be most closely theoretically aligned and to which I owe my greatest debt in building my own conceptual and methodological framework, does not itself use the term. That body of work is sometimes subsumed under the generic term ‘governmentality literature’ and has in recent times increasingly begun to overlap with that which is often generically termed ‘the sociology of translation’ (Burchell et al., 1991; Dean, 1999; Kendall & Wickham, 1999; Latour, 1986; Rose et al., 2006). In line with the methodological approach adopted by these bodies of scholarship, my aim is not to tease out the ambiguities, contradictions or cultural variances of understandings understood as latent in the text under consideration.

My interest is in identifying the means by which certain contemporary articulations, such as the National Police Certificate or a risk classification have been credited and solidified, and through the exclusion of ambiguities, contradictions and variances and ‘modalities’ of uncertainty (Latour & Woolgar, 1986), via ‘standardising’ (Bowker & Star, 1999) they become taken-for-granted ‘truth claims’ (Dreyfus & Rabinow, 1983). These ‘truth claims’ solidify the foundational principles that shape practices and upon which those practices rest their validity. These include standardised and taken-for-granted inscriptions of the ex-offender, issues of reintegration and the criminal record.

The ‘truth claims’ investigated throughout this thesis are that the National Police Certificate is an unquestionable, complete story. This is examined in conjunction with the truth claim that rehabilitation and reintegration is the sole responsibility of government through the operations of its correctional arm, these standardised practices and assumptions are examined with particular interest as proposed by Van Dijk (1986) for their obvious and latent interests and ideologies. In the following section the ‘public’ element of the sources utilised will be explored and the impact that such a status has on the investigation.

#### **3.2.4 Commonsense assumptions, public discourse and publicly available information**

My sources are those inscriptions that constitute the ‘public discourse’ of the problem of the ex-offender. But here too, some definition is required, given that the term covers both what is explicitly intended for a ‘general public’— public ‘statements’ (Foucault, 1972, pp. 17, 27, 45) — and what is publicly available.

Statements for a general public concerning an ex-offender by key institutional stakeholders carry identifiable ‘facts’ or ‘...items of knowledge [that] are simply taken for granted and utilised in the course of an argument whose main burden is the explicit demonstration of some other fact’ (Foucault, 1972, p. 17). But that which is taken for granted tends to merge ‘imperceptibly into a background of routine enquiry, skills and tacit knowledge’ (Latour & Woolgar, 1986, p. 76). For example, the ‘fact’ of the failure-of-the-prison-system becomes a taken-for-granted background in public statements about how to fix the problem of the ex-offender by, for example, expanding programs to build reintegration skills. Elsewhere of course, the ‘fact’ of the individual-with-the-criminal-record becomes a taken-for-granted backdrop in pre-employment screening. The spokesperson's public statements about how to fix the problem of the ex-offender encourages the utilising of the criminal record as an effective screening mechanism for eliminating them as candidates for employment.

‘Facts’ about the ex-offender are so firmly understood that they can be taken for granted. But these facts differ as we move from one discursive location to another. For example, what offences were committed, contextual information to the offences and antecedents may be established facts depending on the situation. This is exemplified by the transformative nature of the criminal record. The criminal record exists in various repositories. The information available from one repository to

another differs and thus alters the picture of ‘facts’ that is available and that is assumed to represent an ex-offender. Furthermore, this thesis utilises information which is publicly available on request, a decision made to illustrate the extensive amount of publicly available information. The utilisation of publicly available information demonstrates the broad nature of public discourse and how truth claims hinge on selecting only those forms of information which are implicit in acceptable ideologies.

These taken-for-granted facts, held in place through the power assigned to various forms of inscriptions, are what this thesis analyses. The criminal record in its final form is beset with unquestioned, implied assumptions. For example if a person has a criminal record, without consideration being given to its contents the existence of that record itself brings into question a subject’s moral standing, general nature and reputation within the community irrespective of its contents. This is evident through practices which will be explored later in this thesis and have been demonstrated through research conducted by Devah Pager in the US (Pager, 2007).

The facts presented on the criminal record are unquestioned by its users including employers. Furthermore the contextual information which is not presented is by definition considered to be of minimal relevance given that it is not included. The specific information in relation to offences is of limited concern to its users. It is the fact that the criminal record exists in a set form of inscription that is paramount. Its existence allows assumptions and taken-for-granted facts to be presented and acted upon. The method to be used in this thesis is one that considers the existence, content and what information is included and excluded from these inscriptions. Furthermore, the material implications of these inscriptions, not only on people with a criminal record but on society and the criminal justice system will be analysed.

Subsumed under ‘public discourse’ is also that which is publicly available, though it may be intended for very particular users. Bruno Latour and Steve Woolgar gesture to the ‘background of routine inquiry, skills and tacit knowledge’ (Latour & Woolgar, 1986). Those ‘background’ connections to taken for granted ‘facts’ include inscriptions of ‘routine practices’—a large and publicly available body of procedural guidelines, syllabuses, operations manuals, technologies, instructions and advice for those who practice on ‘the ex-offender’. The ‘ignoble’ or ‘mundane’ archives are

what are in focus (Armstrong, 1990; Foucault, 1979). These constitute knowledge in the form of 'savoir' (Foucault, 1972) and coalesce around 'how to' deal with 'the problem' of the ex-offender, which at the same time serves to constitute it. I have collected a large body of those sources, a number of which I intend to analyse throughout my thesis. My intention is to use them to open up to critical reflection certain identified commonplaces regarding the ex-offender.

Operating within a genealogical approach, I aim to 'dissipate what is familiar and accepted' (Foucault, 1981) by bringing to critical reflection the governmental processes which have come to be taken for granted and solidified. In the following section consideration will be given to the approach apparent in the term 'analytics of government' (Dean, 1999).

### **3.2.5 Analytics of government**

This approach encompasses what Mitchell Dean has termed 'analytics of government'; that is, a study which is concerned with an 'analysis of the specific conditions under which particular entities emerge, exist and change' (Dean, 1999, p. 20). An analytics of government approach considers the conditions which facilitate the existence of 'regimes of practices', how they are upheld and how they are transformed (Dean, 1999, p. 21). I will be utilising this approach to question accepted practices and assumptions in this regard (Dean, 1999, p. 21). It is the practices of punishment, reintegration and the like that this thesis will be examining by employing this approach. This will enable a more evolved analysis which will be interpreted to facilitate a greater understanding of the material impact a criminal record has through its construction, take-up and dissemination for its subject, institutions and society at large.

The elements of the analytical approach which I am proposing to undertake include a regime of practices that contain such elements as visibility, knowledge, techniques and practices, and identities which are co-present along an axis which constitutes a line of continual transformation and variation 'and that each presupposes the others without being reduced to them' (Dean, 1999, p. 23). Thus an analytics of government approach tries to 'recover the intelligibility of practices through each of these dimensions, to give due weight to their independence, without falling into any kind of reductionism or determinism' (Dean, 1999, p. 23). In the following section the

approach associated with an ‘analytics of government’ will be considered in relation to the criminal record.

### **3.2.6 Approach to the Criminal Record**

This thesis utilises the above approach in analysing the governmental practices associated with the criminal record, ex-offenders, media representations, correctional knowledge and techniques to shape the regime of practices that form our reality. The analysis of practices to be undertaken is explicitly outlined below. Using a genealogical approach in examining the criminal record, the analysis will commence from its final undeniably fixed form which is obtained through a request for a criminal record check in Victoria. This inscription is scrutinised to gain an understanding of its content, its lack of contextual information and its accuracy in predicting future behaviour. Consideration will also be given to how the criminal record is used by employers to govern ex-offenders attempting to successfully reintegrate into society through gainful employment.

In the following section consideration will be given as to why text-based sources were chosen for this investigation.

### **3.2.7 Primarily text-based sources**

The decision to conduct a primarily text-based enquiry was not taken lightly. The benefits of conducting quantitative research or qualitative research in the form of surveys and the like were seriously considered, but it was decided that this would not necessarily render the research more informed. For example quantitative methods based upon an assumption of an existing social reality would enable the researcher to measure the degree, scope and level of the utilisation of the criminal record in the management of the recidivist (Minichiello, Aroni, Alexander, & Timewell, 1990). On the other hand the kind of qualitative methods commonly employed in detailed interviews, observation and description would allow the researcher to grasp the subjective impact such practices have on ex-offenders, employers and other key stakeholders (Minichiello et al., 1990).

I wish to employ a different kind of qualitative method which does not listen to or observe the experience or meanings of the ex-offender or employers. Neither does it search for a universal truth of those experiences. Rather it explores the discursive practices which continually redefine, classify and transform the ex-offender and the

criminal record as both subject and object of the justice system and society at large (Cousins & Hussain, 1984). Given the sensitive nature of criminal records in relation to privacy issues, gaining unrestricted access is not possible. Thus various forms of criminal records will be analysed that were obtained primarily through the archives of the Public Records of Victoria and the Victorian Police Museum. While these records are limited they suffice to provide qualitative information to analyse the origins and limited nature of the publicly received and formally recognised criminal record.

In the following section the specific types of publicly available sources available on request utilised throughout this investigation will be described in some detail, to explain how information from these sources was gained in conjunction with the role they individually and collectively play within the thesis. The following sections outline the categories of text-based sources followed by a description of the types of information gained through accessing those sources.

### **3.3 Sources**

My analysis will draw on information from a variety of sources including government policy and legislation, academic literature and information from government and non-government agencies. Non-traditional sources will also be utilised. But the purpose and hence method of analysis does not simply juxtapose and compare different ways of approaching the problem identity of the ex-offender. It does not seek simply to analyse what is represented and the variances and contradictions in those representations. It explores how these sites intersect and hold in place a standardised 'problem identity', that being an offender or ex-offender to be practised upon. The sources utilised through this investigation are those which render information accessible on a publicly available platform. This idea of publicly available information is at the heart of this thesis. It illustrates the vast amount of information available to the public on request, including the information made available through the request of a criminal record check. Furthermore, the utilisation of publicly available data solidifies the ideas embedded in concepts of public discourse analysis.

In the following section, the primary sources will be analysed for their individual characters and what they collectively bring to this investigation.

### **3.3.1 Academic literature, Empirical Research and Official Documents**

A wide range of academic literature has been engaged with throughout this thesis. International studies and empirical research in the area of criminal records such as that conducted by Devah Pager (2003) has been internationally influential and is important here. The research performed by Pager will be explained in greater detail later. Research by Bronwyn Naylor (2011), John Pratt (2007), Pat O'Malley (2010), Shawn Bushway (2006), Shadd Maruna (2011), and Christine Morgenstern (2011), among others has played a key role in the development of this investigation. The role such academic literature has played in this thesis is greater than that typical of a literature review in any thesis as it becomes part of the analysis. This literature has been utilised to identify key issues and themes presented in relation to criminal records, rehabilitation, reintegration and the media. These identified issues and themes have been applied to the data that has been gathered. The utilisation of these sources is considered imperative to supporting the analysis conducted in this thesis.

Further to this, official government documentation has also been examined, including legislation and policy that impacts on the use of criminal record information and rehabilitative efforts. These documents have been used because they are publicly available and therefore deemed a part of public discourse. They are also used to illustrate the gaps in some areas of legislation and, where relevant, their shortcomings. Again, official documentation in the form of reports and the like are researched for the information they render available to the public and in addition to this to analyse the current correctional stance and delivery of programs. A description of the other sources used in the analysis will be given in the following section.

### **3.3.2 Societal sources of literature**

These resources are neither academic literature nor official government documentation yet have an important role to play in informing social institutes and the community in general. These sources are published by community organisations such as Fitzroy Legal Service and Standards Australia. In addition to this, other non-traditional forms of literature are also used such as newspaper articles and advertisements in conjunction with other sources of such calibre. These include handbooks offering advice and case studies.

The value of these resources is often underestimated in general academic literature on the subject of the criminal justice system and more specifically criminal records. The



incorporation of such resources is, however, necessary here because it involves not overlooking the mundane, the ‘advice’ given for its impact on issues such as the use of criminal record information in relation to employment. While such sources lack the quality of peer reviewed academic literature their ability to inform and influence social perceptions, discourse and actions renders them very powerful inscriptions. Their level of influence through these less formal channels is simply less discernible due to the lower levels of scrutiny.

In the following four sections a description of the publicly accessible sources of primary data utilised in this investigation will be given. These sources illustrate the high volume of information which is not only available to the public but which has the ability to inform public discourse.

#### ***3.3.2.1 Public Records Office Victoria***

The Public Records Office Victoria was established under the *Public Records Act* 1973 (Vic). This office has been charged with the responsibility of maintaining and securing Victorian public records, ‘including the selection and disposal of public records not worthy of preservation’ (Public Records Office Victoria, 2011a). The Office holds records dating from the mid 1830s until today (Public Records Office Victoria, 2011a). In relation to this thesis the Public Records Office Victoria was utilised in accessing one primary source of information, ‘Dockets [Offender Histories] VPRS 9303’. This series contains information from the introduction of Dockets in 1932 until 1992. Given the extensive period of time this covers and the fact that the latest information was added only twenty years ago, the series is only partly open to the public. The potential risk of harm to named people of releasing this information is acknowledged. These Dockets and their contents, specifically Results of Charge and Antecedent Report documentation are examined in detail in Chapter 6 of this thesis.

In addition, access to information in relation to Central Name Index Cards was gained. This series was not transferred to the Public Records Office Victoria by Victoria Police, but some information about the contents of this series is available and will also be consider in Chapter 6 (Public Records Office Victoria, 2011b).

#### ***3.3.2.2 Victorian Police Museum***

The Victorian Police Museum holds a collection of information in relation to the work of the Victorian police force since its inception in 1853 (Haldane, 1995). The museum offers a unique and extensive archive available to researchers, which includes

‘photographs, documents and artefacts ... from 1853 to today’ (Victoria Police, 2011a). This primary source of information was utilised to access 873 Intelligence Cards found in series VPM982, which offered a wide range of information. This information will be analysed in detail in chapter 7 of this thesis.

### **3.3.2.3 Corrections Victoria**

Corrections Victoria is a service agency for the Victorian Government’s Department of Justice. It manages some 50 Community Correctional Service locations throughout Victoria and 11 public and two private prisons in Victoria (Moreland City Council, 2010). The Corrections Victoria Resource Centre maintains a ‘comprehensive collection of publications and other material concerning adult corrections and related areas - accessible to the public for study and information purposes’ (Moreland City Council, 2010). This was used to access one of the primary resources explored in detail in chapter 6 of this thesis. The resource accessed through Corrections Victoria is the Victorian Intervention Screening Assessment Tool (VISAT) and its corresponding user manual. These documents are of paramount importance to the arguments made throughout this thesis on a number of fronts and will be explored further later in this chapter.

### **3.3.2.4 Saturday Age**

The *Age* is a major Melbourne daily newspaper with a Saturday circulation of approximately 835,000 (Dick, 2011). This newspaper’s employment section has been used as one of the primary sources of information in relation to this thesis for two reasons. First, the *Saturday Age* employment section is renowned throughout Victoria for the high volume of job advertisements presented each Saturday. Up to at least 2008, more than 1.3 million people viewed the employment advertisements in the *Age* every weekend (Roy Morgan Research, 2008). Secondly, although online advertisements and application processes for employment positions are increasingly popular today, this was not the case in 1993. Accordingly, in chapter 8 of this thesis an evaluation is undertaken which compares job advertisement data gained from 1993 in the *Saturday Age* employment section and in 2010. It was decided that for continuity purposes the medium should remain the same. The starting date of 1993 was chosen because this was when computerised police records were introduced. Criminal record information also became available to the public on request at around this time.

The data gathered from these primary sources will be analysed according to the structure outlined in the following sections. This structure description will sketch the three main sections within this thesis.

### **3.4 Method - Structure of the analysis**

#### **3.4.1 Introduction**

The structure of this thesis is one which is based on the offending cycle. The first stage considers the current situation for an 'ex-offender' and what has driven my investigation. It analyses the response by society to ex-offenders endeavouring to build a law abiding lifestyle for which employment is paramount. It is argued that this is a critical point within the offending cycle which can facilitate either successful rehabilitation and reintegration or failure potentially resulting in recidivism. The ability for ex-offenders to becoming gainfully employed and regaining the rights of full active citizenship are considered of significance to the lowering of recidivism rates. In this thesis this stage within the offending cycle is studied by analysing one of the ways ex-offenders are discouraged and excluded from gainful employment. Further to this, an analysis will be conducted of how the media and public discourse shape the conditions, ideas and ways of governing which enable and promote the exclusion of ex-offenders.

The second stage to be analysed is 'the offender' which considers the earlier point in the offending cycle which occurs following conviction and sentence but prior to release. This exploration can be conceptualised as occurring from 'behind the prison walls'. At this point within the offending cycle the individual is still considered an offender and is yet to complete paying their debt to society for their wrongdoing. Consideration from this point facilitates an analysis of rehabilitative programs that take place within a correctional environment, both while incarcerated and also in the community under the supervision of corrections. This point in the cycle of offending is important as it represents the first efforts being made to address offending behaviour in an endeavour to lower the risk of reoffending in the future.

The third stage 'offender to ex-offender' analyses what occurs as the offender moves beyond corrections and re-enters the community. At this point the offender has paid his or her debt to society and becomes an ex-offender. This crossing over from offender to ex-offender with the rehabilitative efforts that have been undertaken is the point at which an ex-offender attempts to re-integrate into society. It is here that a

criminal record becomes relevant and can have significant implications for reintegration via employment. An exploration of the criminal record in form, function and development will be undertaken.

The following three sections provide a background to each stage of the offending cycle and explain how the relevant material will be analysed.

#### **3.4.2 Stage 1 - Ex-offender - Chapter 4**

Employment has been identified by numerous scholars as critical in explaining the desistance or cessation of offenders' participation in crime (C Uggen, 2000, p. 530). This recognition is common throughout Australia and liberal western democracies. For example former UK Home Secretary, Jack Straw announced publicly in 2001 that 'a job is the best help that any ex-offender can get to avoid returning to crime' (Fletcher, 2001, p. 871). While it is acknowledged that employment is of paramount importance in relation to ex-offenders reintegrating into society and living a law abiding lifestyle, scholarship suggests ex-offenders are routinely refused employment based upon the existence of their criminal record (Pager, 2007). At this stage of the investigation an analysis of employment advertisements in the *Saturday Age* will be undertaken. This analysis will consider newspaper employment advertisements that were published in the first Saturday of each month in 1993 and 2010. The aim of this analysis is to compare whether the stated requirement of a criminal record check was evident in 1993 or 2010 and if so to what extent. Further to this a variety of newspaper articles presented in the most prominent Melbourne newspapers will be analysed to ascertain how such representations impact on public discourse and government policy in relation to the criminal justice system. Also consideration will be given to the fear employers have in relation to employing ex-offenders and whether a criminal record check will render a fruitful assessment of prospective future offending behaviour.

#### **3.4.3 Stage 2 - Offender - Chapter 5**

In Victoria, the Victorian Intervention Screening Assessment Tool (VISAT) is 'intended to be the "keystone" of an integrated assessment system for Corrections in conjunction with existing reception, classification and clinical assessment systems' (Corrections Victoria, 2009c, p. 9). The VISAT is an integral part of this analysis for two reasons. The first is that it demonstrates how a calculation tool can deconstruct an individual offender's identity into a standardised format that can be used to assign the

offender's level of risk of reoffending and manage the offender's rehabilitation. The second is that it illustrates that whereas the criminal record is the risk assessment tool for governing ex-offenders when they enter the social realm, the VISAT is the parallel risk assessment tool within corrections. To put it simply, the VISAT is to Corrections Victoria what the criminal record is to social organisations and institutions.

The VISAT is an actuarial risk assessment tool. This type of risk assessment tool is common throughout Australia. For example the Level of Service Inventory–Revised (LSI-R), is employed in New South Wales (NSW) and the Australian Capital Territory (ACT), and the Offender Risk Need Inventory – Revised (ORNI-R) is the risk assessment tool operating in Queensland. These tools as with other recidivism prediction tools are designed to accurately predict the likelihood or risk level of an offender participating in criminal behaviour in the future. The employment of these risk assessment tools is not restricted to Australia; they are employed throughout the western world, constituting a globalised program of actuarial assessments in relation to recidivism. These tools also assist in targeting resources to those offenders believed to present the greatest risk of reoffending. For example, Canada has developed and implemented the General Recidivism and Violent Recidivism Scales of Nuffield (Brown, Amand, & Zamble, 2009) and the Level of Supervision Inventory (Bonta, 1996). The USA federal prison system utilises the Salient Factor Score (Hoffman, 1994; Maurutto & Hannah-Moffat, 2006).

All these correctional assessment tools are based upon the calculation of risk. Risk is routinely classified into two categories, comprising static and dynamic risk factors. Static risk factors include criminal history and age of first offence, which are deemed not amenable to treatment or are only subject to change over a lengthy period of time. Dynamic risk factors such as education level, substance abuse and criminal attitude are considered to be modifiable, thus becoming the target of rehabilitative interventions (Brown et al., 2009, p. 25).

The literature indicates that a variety of measures 'are positively and reliably related to the probability of criminal recidivism' (Zamble & Quinsey, 1998, p. 1). Although the research conducted in relation to risk factors has not produced a unanimously supported array of predictors, consensus has been established in relation to a selection of commonly available predictors. These are present to varying degrees in the VISAT

amongst other less commonly used indicators (Zamble & Quinsey, 1998, p. 1). These common predictors are age, number of prior arrests, first arrest, criminal versatility (variety of offending), alcohol abuse and low level education (Zamble & Quinsey, 1998, pp. 1-2). It is claimed that combining a range of predictors will allow for a far more accurate assessment of the probability of reoffending, thus allowing the production of a superior result than chance could achieve, although still not more accurate than a probable outcome (Zamble & Quinsey, 1998, pp. 1-2).

The analysis of the offender stage will focus on texts that are within the domain of Corrections Victoria. It will consider the theories surrounding recidivism rates and their calculation, given that reducing recidivism has been identified as a key endeavour of Corrections Victoria. This responsibility has been assumed to be squarely in their domain through governmental and societal expectation. The aim of lowering recidivism rates is assumed to be achievable through rehabilitation programs based on internationally recognised rehabilitative literature such as ‘what works’. These programs are widely supported and championed throughout Australia and more specifically in Victoria. The connection between these two bodies of text, the ‘what works’ literature and the literature provided by Corrections Victoria will also be analysed in relation to how they support each other. This support enables the assumptions that underpin them both. The analysis will endeavour to rediscover ‘the connections, encounters, supports, blockages, plays of force, strategies and so on which at a given moment establish what subsequently counts as being self-evident, universal and necessary’ (Burchell et al., 1991, p. 76).

Chapter 5 presents a detailed exploration of the VISAT in form and function. The depth of description of the content of the VISAT is necessary for a real understanding of the immense amount of information that is collected, and which is ultimately reduced to a mere high, medium or low risk assessment. To facilitate a greater understanding of the motivations and aims of the VISAT and its various modules, references to its corresponding user manual are made.

Barriers to employment which are identified in the VISAT and its corresponding user manual will also be considered. One of the barriers identified in the VISAT is ‘unrealistic expectations, lack of motivation to work, family responsibilities, no or limited work experience’ (Corrections Victoria, 2008c, p. 31). It must be noted that

under the curious term of ‘unrealistic expectations’, the existence of a criminal record is to be calculated by the assessor as a limitation to future employment prospects. The VISAT user manual explains the term ‘unrealistic expectations’ to include the offender seeking employment ‘requiring qualifications, skills, and experience they do not have, are unlikely to get or cannot fulfil. For many jobs, having a criminal record may disqualify an applicant from applying for the job, etc’ (Corrections Victoria, 2009c, p. 77). The VISAT and its user manual will be analysed for the level of acknowledgement given to ‘unrealistic expectations’ which includes the existence of a criminal record. Chapter 5 also presents information about rehabilitative programs which correspond with this assessment tool and to some extent depend on its determinations.

The VISAT is an assessment tool within the correctional realm that can have enabling or disabling material effects in relation to accessing particular rehabilitative programs. For example, it may be of significant benefit to a particular offender to participate in the Cognitive Skills Program, given his or her background, low education, negative past associate influences and the like. The Cognitive Skills Program is only available to offenders calculated to be of a high or moderate risk of reoffending. If Corrections Victoria completes the VISAT assessment and that offender is found to be low-risk of reoffending, he or she is immediately disqualified from progressing to the next step of gaining access to the program.

Subsequently, the focus of analysis will move from the realm of corrections to that of society. When an ex-offender re-enters society they take with them not only their exposure to rehabilitation programs, their past experience and lessons learned, but also an unrelenting text – the criminal record. The criminal record as a text will be analysed in relation to its content and completeness, the way it is used and its assumed authority by prospective employers. This will then be taken as the starting point for a more in-depth investigation into what the criminal record is and its development to the present day.

#### **3.4.4 Stage 3 - Offender to Ex-offender - Chapter 6**

Criminal records in the form of Dockets were introduced in 1932 by Victoria Police and a collection of these is currently held by the Public Records Office of Victoria. These dockets present examples of the rich contextual information held in an

individual's criminal record but not present in a National Police Certificate. These dockets have been analysed for the uniformity of information collected, the types of information considered to be of relevance, the assessments and assumptions made in relation to offenders by serving police officers and the level of knowledge that they included about individuals. These Dockets were the beginning of criminal records in Victoria. Another way to describe the behaviour of criminals was introduced with the Results of Charge and Antecedent Report. This report in its variously amended forms has been analysed for its ability to demonstrate a shift in focus from offence specific information to offender specific information, including character and social standing.

A further recorded shift has been the move from offender dockets to cards. Central Records cards were introduced to precede the creation of a Docket. This shift and the documents that demonstrate it have been analysed to see how the *offender* transformed into a *recidivist* and how documentation verified this qualification. While Central Records cards were held in Melbourne's Central Records Bureau, each district within Victoria maintained similar data, known as Collator Cards, which were introduced in the 1970s. Prior to the introduction of the Collator Cards each district was responsible for establishing their own system for intelligence purposes.

To explore the expansion of the criminal record in relation to relevant information and the construction of an offender's identity, over 850 'Intelligence Cards' from an outer Melbourne district were analysed for a variety of purposes. First, they were analysed for the offence specific information they report, the offence history information they contain, the social information that had been recorded, including mode of transport, association, family relationships, habits and offences. Secondly, they have been analysed for the recording style they demonstrate: forms, reference numbers, card utilisation and the inaccuracies and duplications made visible. Finally they were analysed in relation to how information transcended one boundary and moved into another domain, for example across various police departments and jurisdictions. These Intelligence Cards will be analysed to demonstrate the accrediting power such information is considered to possess.

The analysis of these forms of a criminal record also remains true to a genealogical approach as articulated by Foucault. The introduction of the Results of Charge and Antecedent Report does not signal the end of the Docket. Furthermore the



introduction of the Central Records Index Cards did not eliminate the existence of the Docket or the Results of Charge and Antecedent Report. This is also true for the Intelligence Cards and the Collator Cards. Given these myriad and co-existing forms of a criminal record, an analysis of how they construct and represent an offender will be undertaken simultaneously.

The analysis then turns to the ways in which computers have affected the structure, design and use of a criminal record. These texts will be considered in unison in an attempt to appreciate the criminal record as it stands today and the level of credence it is assumed to possess.

The above description of source materials provides an in-depth understanding of what the criminal record actually represents in its various forms. Thus the three essential segments of this investigation have now been considered in some detail. The remainder of the chapter is dedicated to exploring the main themes that provide a framework for each main part of the investigation.

### **3.5 Analytical Themes**

The three principle analytical themes identified through this investigation are risk management, rehabilitation and reintegration discourse and information management. These three specific themes are significant to this investigation as they demonstrate the continuity of particular systems, assumptions and ideologies across the borders of various stages of the investigation and their corresponding data sets. The significance of these themes lies in the fact that the ideologies and approaches which they contain inform the VISAT and are also apparent in the police records. These themes will be employed to explore the parallels that exist between the VISAT and Victorian criminal records in form and function. In addition to this, rehabilitation and reintegration discourse will be utilised to illustrate how discourse in relation to both the VISAT and the Victorian criminal record has the potential to significantly impact on the material experiences of (ex-)offenders within both the correctional environment and society. Each of the key themes will be outlined below in relation to how it emerged from the literature and how it will be employed in the analysis of the data sets presented above.

### **3.5.1 Risk Management**

The theme of risk management is crucial to this analysis. It presents a prime motivational factor for a number of practices both within the correctional environment and external to it. Criminologist Pat O'Malley's (2010) theory of the development of risk management and the utilisation of actuarial tools within the correctional environment has strongly influenced this investigation. As contended by O'Malley, corrections have always been interested in an offender's past but the reason for this interest has changed over time. Originally this background information informed an understanding of the individual offender and how best to address his or her needs in relation to reform, but this is no longer the case. According to O'Malley, 'the emerging risk techniques in crime control [are] also interested in offenders' pasts, but in a different way' (Pat O'Malley, 2010, p. 2). This investigation is interested in how this information is gathered, managed and utilised in a correctional environment, which will be analysed in its own right, but also to draw parallels between the risk management techniques evident within a correctional context and those evident in society. The concepts of risk management as presented by O'Malley, led to the emergence of techniques which

tended to use statistical methods to identify correlations between pre-existing conditions and criminal action and to treat these conditions as 'risk factors'... what was now of interest was to use such information to assign individuals to a certain risk pool: it was this risk-categorization rather than the individual that was of interest (Pat O'Malley, 2010, p. 2).

Literature such as O'Malley's strongly informed the inclusion of the theme of risk management in this investigation as it speaks to all three analytical parts of this thesis. First, it speaks to the use of employment advertisements and news media reports in relation to risk management. The examination will consider the impact of the unrelenting reiteration of the risks that offenders and ex-offenders present to society. Also, what is suggested by such presentations to mitigate these risks and serve the interests of the community will be considered. Second, it speaks to the use of actuarial classification tools such as the VISAT and how the high levels of information recorded by such tools is translated into a risk classification which is then applied to accessing rehabilitative programs. Third, it speaks to the criminal record which through its analysis in light of the VISAT can be conceived of as a risk assessment

tool to be employed in society, especially relevant to this thesis is its use in employment administration. This use of the criminal record as both a risk assessment tool and to exclude ex-offenders was apparent in the findings of a study conducted by Pager (2003) in the USA which will be explored later in this thesis. .

The promotion of risk management practices is advanced by highlighting the opposition of ‘ordinary people’ against the ‘other’, meaning offenders and ex-offenders. As proposed by Ron Levi (2000) and supported by O’Malley (2010) such ways of using risk to reduce crime are seen as extending punishment into an indefinite future subsequent to the offender’s release from incarceration and making intolerable the lives of ex-offenders and their loved ones with no proof of effectiveness. These ideas of extended punishment in the name of risk management are further illustrated by the introduction of extended detention and supervision orders in conjunction with increases in requests for criminal record checks for employment purposes.

### **3.5.2 Rehabilitation and Reintegration Discourse**

Rehabilitation and reintegration discourse has a primary role in the analysis conducted in each of the three main parts of this investigation. The definition and use of the term ‘rehabilitation’ has altered significantly over the last three decades through official and unofficial channels. Historically, rehabilitation was intended to restore a person’s reputation and allow them to reintegrate, regaining full citizenship (Forsyth, 1987). Subsequently, rehabilitation came to represent a fuller understanding of the individual offender and addressed that particular offender’s needs through reform and treatment with the aim of improving future prospects on return to society (Rotman, 1990). Recent literature makes clear that the aim of current rehabilitative regimes is to lower the risk of reoffending, otherwise known as the rate of recidivism, once an offender returns to the community (Auditor General Victoria, 2003 - 2004). This aim is said to be achievable through the use of actuarial tools such as the VISAT to make accurate risk assessments. The VISAT enables offenders to be classified and information to be enlisted in attempts to target rehabilitation programs at the categories of offenders who present the highest risk of reoffending (Maruna, 2011b; Pat O'Malley, 2010). This theme is woven throughout the three stages of the offending cycle under investigation in various ways outlined below.

In relation to the second stage ‘offender’ in Chapter 5 in which I analyse the VISAT and rehabilitative programs offered by Corrections Victoria, this theme is paramount.

It relates to how the assessments, categorisations and information made available through the completion of the VISAT translate via discourse on appropriate rehabilitative programs and targeting programs to the enlisting of particular categories of offenders as desirable for particular types of programs. This discourse is apparent through the ‘what works’ literature (Chitty & Harper, 2005). Rehabilitation discourse in conjunction with actuarial tools has seen the advent of targeted program delivery with the focus on lowering recidivism rates. This approach has relegated the benefit to the individual to a secondary importance.

In relation to the first and third stages of this investigation, the discourse of rehabilitation and reintegration has also had a significant impact, although it may be considered more covert. Research has indicated a significant increase in demand for criminal record checks throughout society in relation to numerous social engagements but of particular interest to employment (Larrauri, 2011; MacKinnon & Wells, 2001; Maruna, 2011a; Naylor, 2005; Padfield, 2011; Ruddell & Winfree, 2006; Stoll & Bushway, 2008) This increase in the requirement for criminal record checks has not come about by chance. It is argued that particular social conditions and discourses have encouraged this increased demand for criminal record checks. As argued by John Pratt and other academics, this increased desire for criminal record checks is indicative of the advancement of ideologies associated with ‘penal populism’ (Bottoms, 1977; Hall, 1979; Pratt, 2007):

the media can have the effect of both shaping, solidifying and directing public sentiment and opinion on crime and punishment, while simultaneously reflecting it back as the authentic voice(s) of ordinary people (Pratt, 2007, p. 4).

It is contended that public discourse and media representations associated with ‘penal populism’ encourage the use of the criminal record as a tool to increase divisions between ordinary citizens and the undesirable ex-offender. Media representations which encourage a ‘penal populism’ approach also consistently criticise the criminal justice system, corrections, rehabilitation and reintegration as failing to achieve their perceived objectives. The primary objective of the first main part of this investigation (Chapter 4) is to analyse public discourse and media representations of the criminal justice system that have encouraged the use of the criminal record as a risk assessment tool to exclude ex-offenders from gainful employment.

### **3.5.3 Information Management**

The third major theme which is present in all three main parts of this investigation is information management. Of all three themes identified this theme could be said to have the most significant consequences for ex-offenders. This theme was identified through the analysis of the VISAT. What was found to be most striking about this actuarial tool was its ability to reduce and compress high levels of qualitative information into a single word, a numeric representation or a single column on a graph. The reduction of forty-four pages of pure information to a single page summary clearly involves extensive culling, thus significantly reducing the quality of information it presented. I then took my considerations one step further and thought about the hundreds of these assessments completed with the same simplified and standardised summary page. It would seem that an individual would no longer be recognisable in the field of assessment summaries as all traces of individual and contextual information would have been removed. Observations about these practices of culling information, standardising and simplifying I then applied to criminal records and news media reports and found that similar practices were operating in those areas. This is evident through the criminal record and its summary – the National Police Certificate. Furthermore the assumptions which underpin news reports render them standardised and simplified as the depth of information presented is never equivalent to that available. These arguments and their corresponding analysis will be presented in due course.

While the main three themes have been outlined, another important sub-theme of information management is discretion. The ability to use discretion throughout various stages and processes in relation to what is recorded on a National Police Certificate: whether to request a National Police Certificate in relation to an employment position; what offences will be considered relevant; whether a person with a criminal record will be hired, and so on. Furthermore, in relation to the VISAT, there is also the ability to use discretion to override an actuarially calculated risk of reoffending. This can be achieved by a senior Corrections Officer reviewing all relevant information and making a decision to increase or decrease the calculated risk level. Society also has discretionary power in relation to public discourse. Ultimately it is in the hands of the individual to make a discretionary decision in relation to what they will believe and act on and what they will not.

### **3.6 Conclusion**

Critical discourse analysis has been discussed in terms of the significant role it will play in this investigation. This approach to the data sets gathered through publicly available sources is considered to be the most effective and relevant approach to this investigation. The logic behind the design and structure of this thesis has also been established, specifically the three stages within the offending cycle which form the three key areas of this investigation. Moreover, the three main themes to be utilised in analysing the parallels that exist between the VISAT and the Victorian criminal record have been explained together with the role they play in representing specific ideologies and approaches. Chapter 3 has not only introduced the key stages to be analysed and the common themes identified within those stages but has also established the way in which the analysis will progress through this thesis.

In the following chapter the first stage of analysis will be undertaken. Chapter 4 will consider the significant impact the media has on public discourse and government policy. Furthermore, data will be analysed which consider the current employment situation for ex-offenders and how this impacts on their ability to successfully reintegrate into society.

## **Chapter 4 Discourse, Society & Employment**

### *Criminal Records as a risk assessment tool for employers*

*Mark had a criminal history and had been to jail. He successfully secured employment in an auto-spares store. He was not asked anything in the job interview about his criminal history. After commencing the job he was given some forms to complete by his employer, in which he disclosed his history. Mark's employment was terminated (Fitzroy Legal Service Inc, 2011d)*

#### **4.1 Introduction**

Employment can have a positive impact on the lowering of recidivism and the successful reintegration of ex-offenders (Lockwood, Nally, Ho, & Knutson, 2012). This chapter will present an argument that employment of ex-offenders can serve as a tool to facilitate the cessation of criminal behaviour and allow them to become productive members of society. It will also be contended that public discourse and media presentations of crime and the criminal justice system should not be underestimated as they have important material effects. Public discourse routinely presents the criminal justice system as failing to protect the community from crime. Offenders and ex-offenders are perceived as the 'other' from which society needs protection. These perceptions are not favourable to the successful reintegration of ex-offenders. This chapter presents an analysis that will demonstrate the critical importance of understanding more precisely the development and implementation of the criminal record, both in its own right and in parallel with the VISAT as a form of information management. It will show the critical role the criminal record has gained within modern day society. The criminal record in the form of a National Police Certificate has become a tool for managing ex-offenders and the perceived risks they present, which is made starkly apparent through this chapter. Furthermore, this chapter will make clear the detrimental impact a criminal record currently has on the ability of ex-offenders to successfully reintegrate into society via gainful employment. In this chapter an analysis of quantitative and qualitative data will be offered in relation to the development of employment advertisements. This analysis is presented to illustrate how such developments in employer practices can actively negate the efforts of ex-offenders to become gainfully employed. Further to this, such exclusionary practices have the ability to stimulate cycles of offending, through the rejection of ex-offenders by the society. The analysis of the developments and

practices in relation to employment advertisements and the use of the National Police Certificate as a risk assessment tool which has a significantly negative impact on ex-offenders attempting to reintegrate will be followed by an analysis of public discourse. This analysis of public discourse through news media presentations will be undertaken to illustrate how such discourse has encouraged exclusionary practices of ex-offenders by society, leading to demands for criminal record checks to identify those to be excluded from gainful employment.

In this chapter the media's role in forming and reporting public opinion will also be analysed to illustrate how public discourse can facilitate the introduction of legislation, policy and practices which encourage the ongoing punishment and exclusion of ex-offenders. It is argued that such encouragement has enabled the National Police Certificate to be used to the detriment of reintegration efforts.

#### **4.2 Employment and Reintegration**

One of the key factors identified through research for the successful reintegration of ex-offenders and the reduction of reoffending rates is gainful employment (Lockwood et al., 2012; Matsuyama & Prell, 2010; Rose, Reschenberg, & Richards, 2010; Seiter & Kadela, 2003; Wheeler & Patterson, 2008). According to a comprehensive study conducted in the US by the Justice Policy Centre at the Urban Institute (2008), employment is an important predictor of an offender's successful re-entry into the community and the lowering of recidivism rates. La Vigne, Davies, Palmer and Halberstadt (2008) who summarise the imperative role of employment in determining the successful reintegration of ex-offenders into society, state that:

at its most basic level, employment provides former prisoners with a consistent source of funding for necessary food, shelter, clothing, transportation, and other basic amenities. It also increases feelings of self-efficacy and self-sufficiency, building confidence in released prisoners that they can support themselves without needing to resort to criminal activities or reliance on family members or "handouts," and providing a new social network that supports positive behaviors and serves as a protective factor against future criminal activity (La Vigne et al., 2008, p. 23).

Employment enables an ex-offender to construct meaningful, positive connections within society that are linked to the reinforcement of acceptable values and goals



(Naylor, 2005; R Sampson & Laub, 1997; Uggen & Staff, 2001). Studies conducted in the UK have found that gainful employment can reduce recidivism rates by 33-50%, although approximately 60% of ex-offenders were being refused employment as a result of having a criminal record (Home Office, 2002). These statistics illustrate how imperative the ability to become gainfully employed is to lowering recidivism rates, which is in the best interests of society. Other studies conducted in the US have not rendered such results. A study conducted by Visser et al. (2005) found that the investigated groups of community employment programs for ex-offenders did not reduce recidivism. However, the experimental design of this research, the small sample size of programs considered and the fact that the analysis did not include some of the most promising community employment programs that have emerged over the last decade weakens the reliability of the research results. Studies have rendered varying results, but employment is still considered a primary way of successfully reintegrating ex-offenders and lowering recidivism rates.

If an increase in the employment rates of ex-offenders is to be achieved, practices in relation to requirements specified in employment advertisements, recruitment processes and employee retention must be such that a criminal record does not lead to unquestioned exclusion or dismissal. Mark's case as outlined above is the type of a situation and outcome that circumvents legitimate efforts by ex-offenders to become productive members of society. This frustration of legitimate efforts at reintegration can lead to reoffending by ex-offenders. It is therefore necessary to explore under what conditions a criminal record check can be requested and where restrictions exist in Victoria in relation to such requests by employers.

### **4.3 Ability to use criminal record information at will by employers**

Criminal record checks may be requested by a prospective employer in Victoria at any stage of the recruitment process or even after a job has been filled, as illustrated by Mark's case. The ability of a prospective or current employer to request a criminal record check at any stage within the employment process is supported by Australian common law. The Australian common law system is based on the principle of legality. This principle is such that any actions are considered lawful 'unless there is an explicit law making them unlawful' (Naylor, 2011, p. 81). Put simply, as there is no law that prohibits the request for a criminal record check at any point within the

employment process in Victoria, the request is legal at any stage by virtue of this absence.

Given the lack of legislation in relation to the request of information by an employer, this principle allows an employer to request and consider any information they desire when making decisions in relation to employing or retaining an employee, including their criminal record (Naylor, 2011). This legality principle is further supported in the employment and criminal record context by the legal principle of freedom of contract. The principle states that ‘individuals are free to contract with each other as equal citizens, thus each able to address their own best interests’ (Naylor, 2011, p. 81). This equality of citizenship and the freedom to commence contracts on an equal footing would be unproblematic if an ex-offender were considered by employers as being equal to candidates without a criminal record. Given these principles, employers have a legal right to require an employee to have no criminal history without question. On the other hand, an employee or candidate has the right to take his or her labour elsewhere without issue (Naylor, 2011). These ideas of equality are favourable in theory, but in practice it positions an ex-offender consistently at a disadvantage because they have a negative credential that is not favourable to many employers. This right of employers to request that criminal record information be supplied at any stage of the employment process and its implications will be considered in the following section.

#### **4.3.1 Employment Process**

Evidence has been presented in section 1.3 which illustrates the substantial increase in the number of criminal record checks requested. The stage of the employment process at which these checks are being requested is not uniform. As in Mark’s case, a criminal record check may be requested subsequent to the completion of the selection process when employment has commenced. Alternatively, a criminal record check may be requested when a person has been short-listed for a position. A person may also be asked to provide a criminal record check during the interview stage or even during the completion of an application form.

It is proposed that the further into the employment process the check is requested, the higher the likelihood of a person being able to explain the contents of their criminal record. This is because the latter parts of the employment process typically involve increased contact with the prospective employer in the form of interviews. Also, the

further into the employment process that the criminal record check is requested, the greater the likelihood of the employer making enquiries about the context of any offence contained on a National Police Certificate. These enquiries would be more likely because the employer would have already invested time and money in relation to that particular candidate, but this is not always the practice of employers in this position.

The analysis to be presented in the following sections endeavours to establish the number of criminal record checks being requested at the earliest possible point in the employment process, that being the job advertisement. Given that the job advertisement is the first point that a candidate makes contact with an employment position it is highly influential and pertinent. The inclusion of a request for a criminal record check for an employment position at this early stage can have significant implications for people with a criminal record. Importantly, it has the highest likelihood of eliminating people with a criminal record for two primary reasons. First is that if the request of a criminal record check is made at this very early stage, even if a person with a criminal record applies it will most likely result in their exclusion from proceeding further into the employment process. It is argued that given the applicant with a criminal record would have limited or even no contact with the employer directly through an interview or otherwise, it would be highly unlikely that any other information would be taken into account except the existence of a basic criminal record. There would be no opportunity to offer contextual information in relation to that candidates criminal record or allow for enquires to be made by the prospective employer. This would be a consequence of an employer not having invested any time or money in relation to that specific candidate. Second, an advertisement stating the requirement of a criminal record check is likely to result in an ex-offender self-excluding as outlined in section 2.11.1 of this thesis, whether this effect is intentional as suggested by Guy Underwood (Hughes, 2003) or otherwise.

#### **4.3.2 Advertisements 1993 & 2010**

The *Saturday Age* newspaper is well known for its high level of employment advertisements in Victoria. A study of *Saturday Age* employment advertisements has been undertaken for the years 1993 and 2010. This study aimed to compare the inclusion of requirements of criminal record checking in employment advertisements. The year 1993 was selected as this was the first year criminal records entered the

public domain through record checks. This ability to request criminal record information was facilitated by the introduction of LEAP as outlined in section 6.6 of this thesis, thus allowing for criminal records to be efficiently accessed and made available upon legitimate request, including employment purposes. The access of criminal record information can only be fulfilled when accompanied by the written consent of the subject of the check.

The year 2010 was selected to represent the most recent year in which records were available at the time of analysis to reflect the most current practices in relation to the inclusion of the requirement of criminal record checking in employment advertisements. The first *Saturday Age* of each month was selected for both 1993 and 2010. Furthermore, this medium, by which I mean a printed newspaper, was preferred to facilitate a comparison between 1993 and 2010. While it is true that numerous employment advertisements are now available via the internet, this was not the case in 1993 and therefore for consistency and continuity the analysis focused only on printed newspapers. Now we will consider the contents of the 1993 advertisements presented in the *Saturday Age*.

#### 4.3.3 Saturday Age - employment advertisements 1993

In 1993, the following results were obtained:

<b>Month 1993</b>	<b>Criminal Record Check Indicated</b>	<b>No Indication of a Criminal Record Check</b>	<b>Total Advertisements</b>
January	0	2241	2241
February	0	2469	2469
March	0	2357	2357
April	0	2143	2143
May	0	2201	2201
June	0	2132	2132
July	0	2184	2184
August	0	2851	2851
September	0	2850	2850
October	0	2810	2810
November	0	2780	2780
December	0	2640	2640

**Figure 2 Employment advertisements 1993**

In 1993 there were a total of 29,658 employment positions advertised in the *Age* on the first Saturday of each month. In relation to the stated requirement in an advertisement for a criminal record check to be completed for a particular

employment position, there were no instances of such requirements. Out of these 29,658 jobs advertised not one advertisement mentioned the requirement for a criminal record check.

What was also apparent in these advertisements was that initial enquiries by an applicant in relation to employment positions were requested by telephone. Thus, interested parties were invited to contact a person to discuss the employment position and their suitability. In itself this is not surprising, given that information technology was not advanced enough to require applicants to complete online applications and make enquiries by email. This process could be considered candidate friendly, especially for applicants with a criminal record if such a check was deemed necessary. This ability for an interested party to communicate directly with a probable future employer may have a positive effect on the prospects of a person with a criminal record as it would give the prospective employer a personal angle to consider when making decisions rather than making judgements based solely on documentation submitted. This interaction would allow for the human element to be taken into account which is not present when assessments are made on information contained in documentation alone. This ability to have personal communication with a prospective employer was not as readily available in 2010, as a result of advancements in information technology. This will be considered in the following section.

#### **4.3.4 Saturday Age - employment advertisements 2010**

In 2010 the following results were obtained:

<b>Month 2010</b>	<b>Criminal Record Check Indicated</b>	<b>No Indication of a Criminal Record Check</b>	<b>Total Advertisements</b>
January	38	423	461
February	41	567	608
March	70	627	697
April	29	284	313
May	32	365	397
June	31	688	719
July	51	498	549
August	65	690	755
September	41	781	822
October	57	576	633
November	61	618	679
December	59	561	620

### **Figure 3 Employment advertisements 2010**

For the first Saturday of each month in 2010 the *Saturday Age* published a total of 7,253 positions advertised. Of these 7,253 jobs, 575 specifically stated the requirement for a criminal record check. This indicates that approximately eight percent of all employment advertisements analysed in 2010 had clearly identified the requirement of a criminal record check at the earliest stage of the employment process.

The eight percent of advertisements in 2010 which overtly state that a criminal record check is required does not account for the introduction of a request for a criminal record check at any further stage within the employment process. It is therefore unknown how many ex-offenders are excluded by virtue of their criminal record or self-exclude at later stages in the employment process.

While eight percent may not seem to be a large amount of advertisements overtly requesting criminal record checks, it is a substantial increase from the figures obtained for 1993. According to the statistical significance calculator of Professional Research Consultants Inc. (PRC) (2012), 8 percent is a statistically significant increase and has a comparative error rate of 0.6. In other words, there has been a significant increase in the number of advertised positions requiring criminal record checks in Victoria, Australia. If such checks can be shown to present an obstacle to employment for ex-offenders, then this significant increase in checks indicates that employers are now less likely to contribute to the reintegration of ex-offenders through offering them access to employment opportunities than they were in 1993.

What was also apparent in relation to the 2010 advertisements was the high number that directed interested parties to a website for information on a particular position, for application criteria or to complete an online application form. Email communication was the most commonly offered means of enquiry. This common practice discourages personal communication between an interested party and a prospective employer, thus leading to assessments of suitability initially relying on documentation and information that is mediated by information technology. One of the problems with being represented by documentation alone is that it can have a de-contextualising impact on the information presented. The practice of relying on documentation and inscriptions are akin to actuarial approaches to order and

governance, allowing a person to once again be easily reduced to dimensions of risk based on simplistic information.

In the following section research which supports the disqualifying consequence of the existence of a criminal record for an employment candidate will be presented.

#### **4.4 Criminal record a disqualifier from gainful employment**

The disqualifying impact of the existence of a criminal record is supported by research conducted by Devah Pager in the USA. Pager conducted one of the most substantial research projects reported to date in relation to the negative impact a criminal record can have on a person's employment prospects and subsequently their ability to successfully reintegrate into society. In this study Pager selected random employment opportunities advertised in local newspapers and an internet employment service site. It was found that 75% of employers for positions randomly selected requested specific information about a candidate's criminal history record through the completion of an application form (Pager, 2003). Furthermore, 27% of employers performed official background checks in relation to experimental subjects. The results indicated a decrease of 50% in the likelihood of proceeding to the next stage of the employment process (call backs) if a criminal record was identified, for white males with a criminal record, the figures were greater for African American males with a criminal record (Pager, 2003; Pager, 2007; Pager & Quillian, 2005).

The extent to which ex-offenders are considered employable was also researched by Joan Petersilia. Petersilia (1999) conducted a survey in five cities throughout the USA and found that 65% of employers who completed the survey were unwilling to employ ex-offenders under any circumstances. Further to this, research conducted in 2002 by Harry Holzer, Steven Raphael and Michael Stool, found that employers had minimal interest in employing ex-offenders even when weighted against other disadvantaged groups such as welfare recipients and those who have been unemployed for extensive periods of time (Holzer, Raphael, & Stoll, 2002). These research findings from the US are not alone as similar findings have been reported in the Australia. When Australian employers in conjunction with other correctional service stakeholders were asked to rank a variety of disadvantaged groups in relation to employability, people with a criminal record were considered to be less likely to become gainfully employed than people with chronic illness, communication

difficulties or physical disability (Graffam, Shinkfield, Lavelle, & Hardcastle, 2004). The only disadvantaged group to be ranked lower than people with a criminal record were people with psychiatric or intellectual impairment (Graffam et al., 2004).

It appears that research has established the unwillingness of numerous employers to employ people with a criminal record in both Australia and the US. This is not to say that all employers share this view of people with a criminal record and there are various programs which attempt to encourage employers to hire people with a criminal record, for example those funded by the US Department of Labour (Visher et al., 2005). Unfortunately though, the level of unemployment amongst ex-offenders remains high (Louks, Lyner, & Sullivan, 1998).

While people with a criminal record are considered as a security risk and therefore to a degree unwanted by employers (Backman, 2011), having a job is considered to be one of the most promising ways of lowering recidivism rates (Lockwood et al., 2012; Louks et al., 1998). The following sections will explore what is happening when ex-offenders attempt to become gainfully employed and what is the current position of employers in relation to hiring ex-offenders. Further to this, analyses of the discourse of failure in relation to rehabilitation and correctional programs will be undertaken.

#### **4.5 Media and public discourse**

This analysis will commence by considering the conditions and driving factors behind this increased use of record checking and the negative perspectives employers have of people with a criminal record. Mass media sources, namely newspapers, will be analysed to demonstrate the important role the media plays in perpetuating and maintaining populist truth claims within society. Tactics, practices and campaigns which the media promote and disseminate, such as law and order campaigns, penal populism, and the placement of the ex-offender as the 'other' to be feared will be presented and analysed. Consideration of the emotive language employed to generate panic and concern in conjunction with information which is immersed in bias and that succeeds in hampering reintegration of ex-offenders and fuelling fears regardless of rationality will also be undertaken.

As argued by David Garland, 'the crime victim is now, in a certain sense, a representative character whose experience is assumed to be common and collective, rather than individual and atypical' (Garland, 2001, p. 144). It is ideas such as this



that will be analysed for their ability to stimulate the fear of the ‘other’, primarily offenders and ex-offenders. An analysis of calls for a popular ‘commonsense’ approach that places the public at odds with institutions and establishments which present expert information within the criminal justice system will also be presented (Hogg & Brown, 1998). Examples of such calls are:

“three strikes”, “truth in sentencing”, “life means life”, and “zero tolerance”: whatever their strategic effect, these transparent slogans are emblems of the way in which popular commonsense should order the criminal justice system, rather than the opaque and muddled expertise of the criminal justice establishment (Pratt, 2007, p. 22).

Exploration of campaigns which consistently hold corrections and government as the focal point in relation to offenders, rehabilitation and rising crime rates will be considered. This analysis aims to identify the lack of consideration given to what have become ‘common’ practices and the role the public assumes in the ongoing punishment of ex-offenders and the ongoing practices which continually govern the actions of others and may equally contribute to high rates of recidivism.

In the following sections the current driving factors in relation to the use of criminal record information by employers, including practices encompassing employment advertisements, recruitment and retention of employees, will be analysed. These driving factors include the common condition of risk avoidance, ex-offender exclusion, political campaigns of law and order and mass media representation in relation to crime and criminals. These factors will be considered through examples in relation to suspended sentences and extended detention and supervision orders in Victoria. Further to this, an analysis of the discourse of failure in relation to rehabilitation and correctional programs will be undertaken.

#### **4.5.1 Why the increased need for criminal record checks**

The increase in criminal record checks taking place in Victoria, as evident through the statistics presented above, can to some degree be attributed to the introduction of legislative requirements or regulations. For example legislation and regulation that insists on employees having a clear criminal record applies within the criminal justice system and working with children and other vulnerable people. But the level of

criminal record checks being requested far exceeds that which can be attributed to these requirements.

According to researchers Hilary Metcalfe, Tracy Anderson and Heather Rolfe (2001, p. 4) 'the way that a criminal record is currently used in recruitment is largely discriminatory, with little realistic assessments of the implications of a criminal record on the ability to do the job (including the risks of reoffending at work)'. These propositions are further supported by the research of Bronwyn Naylor in relation to the utilisation of criminal record checks by employers in Australia. Naylor argues that 'there is an air of moral panic about the evident spiralling demand for police checks in the recruitment process reflecting fear and prejudice, popular punitiveness, and also perhaps fear of litigation on the part of employers' (Naylor, 2005, p. 174). These ideas and propositions will be explored further below.

#### **4.5.2 A fearful and punitive society**

The term 'society' as explained in section 1.1 is used to encompass a variety of social entities which include social institutions, organisations and employers. It is these social entities which are primarily responsible for the utilisation of criminal record information in an endeavour to exclude ex-offenders. As mentioned above, it is acknowledged that some occupations require an employee to have no criminal history through regulations or legislation, while other occupations may require that a person be 'of good character' or 'fit and proper'. These type of requirements may justify a request for a National Police Certificate but if a person is found to have committed offences in the past this does not automatically equate to being of 'bad character' (Naylor, 2011), although it may be interpreted as such by a prospective employer. This is evident in the following case study.

Le was a highly qualified company secretary, but after defrauding a company of one million dollars she served 3 years in jail. Following her release, Le found employment as the manager of hostel accommodation. Le was candid with her employer about the offence, and he was willing to give her a go. However, when the employer informed the government agency who funded the hostel about Le's appointment, the agency threatened to remove him as a house provider. With an annual turnover of some six million dollars the

employer felt obligated to accede to the funder's demands and terminate Le's employment.

Le now works as a personal care assistant, notwithstanding the fact that personal carers are currently required to undertake police checks. These checks do not specify categories of relevant offences in advance but rely on the discretion of employers to discern which offences are relevant (Fitzroy Legal Service Inc, 2011c).

In Le's case employer discretion over what offences are considered relevant is an important aspect to consider in Victoria given the lack of legislative guidance on such matters. It is what informs these discretionary decisions which will be considered in this section.

#### **4.5.3 Fear of litigation**

One such case concerned an employment agency referring an ex-offender to an employment position with a grazier on a farm in full knowledge that the candidate had a criminal history. That information was not passed on to the prospective employer. The employee subsequently offended against his employer. In this case the agency was found to be 50% responsible for the offending behaviour as they had owed the prospective employer a 'duty of care' and thus were required to inform him of the candidate's criminal history of which they were aware (*Monie v. Commonwealth* [2007] NSWCA 230). Furthermore, there have been cases in which an employer has been found liable for theft committed by an employee while carrying out their assigned duties. In one particular case a person engaged in providing personal care to a vulnerable person stole from that person's funds which resulted in the court finding the employer of the care giver liable for the funds which were stolen (*Ffrench v. Sestili* [2007] SASC 241).

Cases such as these are of reasonable concern to employers. These forms of litigation and finding of liability may account for employers' fear of employing a person with a criminal record (Hotzer, Raphael, & Stoll, 2004). Employers may also see the criminal record as a tool to identify a possibly 'untrustworthy employee who breaks rules, steals, or deals poorly with customers' (Hotzer et al., 2004, p. 41). While criminal record checking can be seen as an advantage, in regards to avoiding risk, there is still the issue that not all people without a criminal record are 'trustworthy' or

pose no risk to the organisation (Kethineni & Falcone, 2007). Furthermore, the ad hoc use of criminal record checking can also have negative implications for organisations, such as limiting the pool of candidates for an employment position. Research indicates that organisations which are unwilling to employ ex-offenders when the labour market is flourishing are still unwilling to hire people with criminal records when the labour market is tight, which can be to their detriment. According to Holzer, Raphael and Stoll, in a survey of 600 employers conducted in 2001:

over 40 percent of employers indicated that they would “probably” or “definitely” not be willing to hire an applicant with a criminal record for a job not requiring a college degree ... Comparisons with data from 1992-94 suggest little change in attitude over this decade, despite a much tighter labor market (in 1994, unemployment in the Los Angeles region was almost double the rate in 2001) (Hotzer et al., 2004, p. 41).

This research indicates that while criminal record checking may be perceived by employers as giving them an advantage in regards to hiring the ‘right’ person, it can definitely have a negative impact on finding the best employee for a position, as a result of the ad hoc use of criminal record checking (Hotzer et al., 2004).

A criminal record only contains information about people who have committed an offence and have been investigated or prosecuted by police. The absence of a criminal record does not guarantee that an employee is not capable or is unwilling to commit an offence within a workplace situation. If the absence of a criminal record did guarantee that an employee would not offend in the workplace such high levels of employee theft in the retail industry would not occur (Kethineni & Falcone, 2007). While a criminal record may be considered as a somewhat accurate risk assessment tool, the idea of its use in an ad hoc manner to eliminate risk is not only short sighted, it can potentially hinder efforts made by ex-offenders to successfully reintegrate into society. While fear of security breaches and legislative or policy requirement may account for the unwillingness of some prospective employers to hire ex-offenders, this does not account for the less observable driving forces which lead to the exclusion of ex-offenders from gainful employment (Backman, 2011; Kethineni & Falcone, 2007).

#### **4.5.4 Mass media, public opinion and exclusion of ex-offenders**

This thesis presents the argument that elements of society have become more punitive and that politically motivated law and order campaigns in conjunction with mass media representations of crime and people with criminal records have impacted significantly on the number of National Police Certificates being requested for employment purposes. It is proposed that the discretionary decision making of prospective employers resulting in the use of criminal record information to exclude ex-offenders from gainful employment is strongly influenced by public discourse. The phrase 'people with criminal records' is employed in the following sections to encompass current offenders and ex-offenders as both have this inscription attached to their identity and both are affected by media representations of crime and criminal justice issues.

The mass media is one of the primary sources of information accessible to the general public in most western countries, including employers (Pratt, 2007, p. 66). People get what they believe to be the facts in relation to crime and criminal activity from mass media news sources. As Nils Christie argues:

It is an essential finding that people do not meet people to the extent they once did. This means increased reliance on the media for describing what happens and what gives meaning to the occurrences. It also means greater dependence on the state to cope with these perceived dangers (Christie, 2004, p. 89).

These ideas in relation to the influence of the media on government policy are supported by academics such as Robert Watts, Judith Bessant and Carol Bacchi. The prevalence of populist responses to crime rather than responses based on research and empirical investigations is significant. As argued by John Pratt:

populist responses to crime are strongest and would seem to most likely influence policy when they are presaged around a common enemy, a group of criminals who seem utterly different from the rest of the population, and whose presence when it comes to light unites the rest of the community in outrage against them (Pratt, 2007, pp. 5-6).

Put simply, the media's presentation of crime, which encourages the public to sympathise with victims, allows for and stimulates a united front by 'ordinary people'

against those who are presented as the 'other', essentially those with a criminal record, including past and present offenders.

The ability of mass media representations to shape public opinions and government actions should not be underestimated. The media has the capacity to direct public sentiment and perceptions in relation to crime, punishment and people with a criminal record. While directing public opinion they are concurrently reflecting it back as original, unmediated voice(s) of the general public (Hall, 1979). The power that the news media wields is not based upon the fact that the information presented is complete, unbiased and accurate, but rather the information presented is often compressed into the most simplistic form possible and borders on entertainment (Hall, 1979; Pratt, 2007). A study conducted by the Sentencing Advisory Council Victoria in 2006 found that over 60% of people who participated in the study confirmed that:

their knowledge of sentencing was thus limited to very general information, primarily based on media reporting. Those who used the media as their main source of information acknowledged that the picture the media provide is not necessarily an accurate one. Indeed, some participants noted that the media's emphasis on sensationalism and controversial or violent cases can lead to a distorted view of risk of crime victimisation and the level of crime in the community, thus raising community levels of fear (Gelb, 2006 and 2008, p. 37)

Furthermore, this allows the media to predispose the public to 'commonsensical populist accounts and explanations at the expense of more elaborate, involved and thereby indigestible opinions of elitist experts' (Pratt, 2007).

Lines of argument and propositions which are not aligned with public opinion claims are presented as out of touch and lacking in substance, as the media routinely positions the 'public opinion', which it has contributed to forming, as the expert opinion. In a Melbourne *Herald-Sun* newspaper report entitled 'GUILTY YOUR HONOUR OFFICIAL SURVEY: Judges out of touch on sentencing', it was reported that 'almost two-thirds of Victorians believe judges are out of touch with what ordinary people think' (Wilkinson, 2011a). The aim of such statements is not to propose that ordinary people need to be better educated on judicial process but rather

that judicial practices need to change to satisfy the public. The news report further stated that ‘45.8 per cent did not agree that a judge was the best person to choose an appropriate sentence’ (Wilkinson, 2011a). Later in this article, Victoria's most senior judge, Chief Justice Marilyn Warren, was critical of the survey, stating that it was ‘simplistic, superficial and limited to gauging attitudes, not performance’ (Wilkinson, 2011a). Therefore it ‘will not contribute to informed public opinion, but rather there is a risk it will promote ill-informed opinions’, which seems to be achieved regularly through mass media news reports (Wilkinson, 2011a).

To further develop an understanding of the central role the media plays in both forming and representing public opinion, an analysis of selected newspaper articles will be undertaken in relation to issues which fall under the umbrella of law and order. In Victoria the two newspapers with the largest readership are the *Herald-Sun* and the *Age* a distant second (Audit Bureau of Circulations, 2010). These newspapers have an undeniable role in influencing public opinion and perceptions via news reports and entertainment media promoting a commonsense view of law and order debates (Hogg & Brown, 1998). In this context commonsense is:

‘what “we all know” already. It embodies tacit judgements and assumptions about the world that are harboured prior to the evidence being gathered. This is what makes it so resistant to debate or dialogue which questions, rather than shares, its starting points’ (Hogg & Brown, 1998, p. 19).

These specific conditions assist political law and order campaigns to flourish and for society to be in a constant state of fear in relation to crime and victimisation.

#### ***4.5.4.1 Victoria 2010 election campaign and suspended sentences***

The *Herald-Sun* and the *Age* on occasion have a news reporting style that facilitates strong political prominence of a ‘tough on crime’ agenda, especially during election campaigns, thus promoting more punitive policies and ideologies to be pursued by government. For example during the Victorian state election campaign 2010, one of the law and order issues most debated by political parties was suspended sentences. The debate concerned the abolition of suspended sentences as an option.

A survey of all articles found on the Factiva database, with the keywords: suspended sentence and Victoria, within the time frame: January 2010 – December 2010,

published in either the *Herald-Sun* or the *Age* was undertaken. This rendered approximately 130 published articles. These articles were then individually reviewed to eliminate any repetition of an article and articles reporting specific criminal cases for which an offender received a suspended sentence. Once the review was complete it was found that approximately 100 articles were published in either the *Herald-Sun* or the *Age* in relation to the suspended sentence debate. It is contended that this survey adequately represents the overall discourse in relation to suspended sentences, which took place in Victoria in 2010.

The print news media ran approximately 100 articles during 2010 that repeatedly called for government to take action towards removing suspended sentences. Other articles outlined what the particular political party promised to do in relation to eliminating suspended sentences and returning 'truth' to sentencing. Approximately 70% of the 100 print news media articles called for or outlined political plans to abolish suspended sentences. Headlines such as 'Suspended sentences, home detention to go under coalition' (Herald-Sun, 2010b) and 'Brumby in backflip on sentencing' (Sexton, 2010) were not uncommon in the lead up to the 2010 election. The Liberal/National Coalition leader, Mr Ted Baillieu, made statements identifying the Australian Labor Party, led by Mr John Brumby, as soft on crime. These statements made clear that if the Liberal/National Coalition was to win the election they would abolish suspended sentences. Ted Baillieu stated that:

Labor's suspended sentence policy was no punishment at all for criminals and showed the Brumby government was soft on crime. They pretend that an offender is serving a term of imprisonment, when in fact they are living free in the community. With ever-growing levels of violent crime and growing contempt for police and the law by street thugs, this soft-on-crime approach is the last thing Victoria needs (Australian Associated Press General News, 2010).

This statement was made about the Australian Labor Party's policy as the Liberal/National Coalition 'vowed to end suspended sentences and home detention if it wins this year's state election' (Australian Associated Press General News, 2010). The media's positioning of Labor's policy as 'soft on crime' ultimately resulted in Labor bending to the 'will of the people' and also declaring that they would abolish



this sentencing option if re-elected. As argued by Pratt, political parties can be compelled to shift policy boundaries to incorporate some elements of populism to stop voters defecting to their rival even if those policies are not considered to be the most productive option (Pratt, 2007). This so called 'backflip' was welcomed by victims of crime advocates who routinely find centre stage in such debates and encourage the public to see themselves as future victims.

Labor's new policy was presented as an illustration of the government's return to 'truth in sentencing', while acknowledging that such steps would also lead to higher levels of people being incarcerated. Previously Mr Brumby had stated "'When you look at suspended sentences, it's always been our view that it's appropriate that there's judicial discretion . . . It's not the politicians that should be making the decisions about these things, it's judges who are best placed to make those decisions'" (Australian Associated Press General News, 2010). These reasonable and well founded statements were then recanted, as evident in the article 'Brumby in backflip on sentencing' (Sexton, 2010) to satisfy the public's perceived demand for harsher punishments for offenders and an increase in community safety. This article outlining Mr Brumby's policy change on suspended sentences in the *Age* was accompanied by the results of a public opinion poll titled 'Sentencing shake-up', which reported that 72 % of 1429 voters agreed that suspended sentences should be scrapped for serious crimes (Sexton, 2010). The inclusion of this poll's results aims to solidify the public's position on suspended sentences and express support for the change in policy.

The presentation of the debate on suspended sentences through media news reports angered senior judge David Harper, who asserted:

some self-centred media outlets (aka the *Herald Sun*) gave little publicity to the work of the Sentencing Advisory Council, the state's expert authority on sentencing...so, media outlets like the *Herald Sun* turn to outraged victims or outraged victims' representatives or outraged members of the general public when they want a reaction to a sentence they can portray as lenient.... The contribution of an academic criminologist, no matter how eminent, would not fill any niche in this reporting (Wilkinson, 2011b).

These comments made by Judge Harper were presented as being ill spirited and not based on the 'facts'. This was evident towards the end of the article where the *Herald-Sun* writer made the following statement: 'The abolition of suspended sentences, now finally being fully implemented by the Coalition Government, was achieved after a *Herald Sun* campaign lasting more than 10 years' (Wilkinson, 2011b). This statement makes clear that the efforts and perspectives the newspaper has presented and the public opinion it claims to represent have had the desired impact on government policy through the resulting shifts in the government's planned course of action in relation to suspended sentencing.

As argued by David Garland, these mass media practices in relation to political campaigns encourage 'a heightened demand for security and the management of risk' which leads to the establishment of more intensive regimes of regulation, inspection and control resulting in our cultural civilities becoming increasingly less tolerant and inclusive (Garland, 2001, p. 194). This in turn promotes the use of punitive practices as desirable policy measures. Furthermore, governments are encouraged through the media to meet these social demands for increased levels of incarceration. The limiting of the ability for a court to impose a suspended sentence for particular offenders as exemplified through the introduction of the *Sentencing Further Amendment Act 2011* (Vic).

As detailed in the following section, more far-reaching legislation has recently been enacted in Victoria which enables courts to impose extended detention and supervision orders. These orders are specifically designed for sex offenders that have been deemed to be an unacceptable risk to community safety.

#### **4.5.5 Extended detention and supervision orders in Victoria**

The *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), which came into effect in January 2010, aims to:

enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and who present an unacceptable risk of harm to the community to be subject to ongoing detention or supervision. The secondary purpose of the SSO(DS)A is to facilitate the treatment and rehabilitation of such offenders (Department of Justice, 2010b)

The aims outlined in these statements are pursued in relation to the allocation of funding as exemplified in statements made by Corrections Minister Andrew McIntosh as outlined in section 5.2.2 and the availability of the Sex Offender Program for offenders as discussed in section 5.4.2. While such legislation may have commendable aims it flies in the face of such fundamental principles of sentencing as 'proportionality' and 'just desserts'. These principles of law demand that once a court hears a case they must hand down a sentence to an offender which is proportionate and just. The sentence imposed is intended to facilitate the return of that offender to full active citizenship on completion. Therefore the ex-offender re-enters society as the equal of other citizens. This equality of citizenship is gained as a result of their debt to society for their wrongdoing having been paid in full and therefore no further punishment being imposed.

This legislation allows for further punishment to be imposed in the name of mitigating risk. When this legislation was proposed it stimulated minimal debate within the community as it promoted the further limiting of offender, or more accurately, ex-offender rights (Stateline Victoria, 2007). According to former Supreme Court Judge Murray Kellam:

It is a fundamental shift in our sentencing process that somebody gets another sentence, if you like, at the end of their sentence, but that's a matter for the community and legislature to decide. My real concern about the way in which the extended supervision orders are operating in Victoria is that we're warehousing people. We currently have, I think, 11 people who are the subject of an order, who are not living in the community but, in fact, living at Ararat prison, and we're warehousing them and that's not in the community interest (Stateline Victoria, 2007).

This sanctioned ongoing punishment of sex offenders enabled by such legislation is a response to the perceived undesirable risk to community safety that such ex-offenders present. This risk level is calculated by the completion of risk assessments such as that outlined in section 5.4.2. The use of clinical risk assessments subsequent to the completion of a sentence can have unjustified punitive implications as they are not based on what an ex-offender has done, but rather might do. Extended detention and supervision orders are at one end of the spectrum of possibilities in relation to

ongoing punishment for ex-offenders. Similarly the use of criminal records as a risk assessment tool by prospective employers in estimating a prospective employee's future criminal actions is another form of ongoing punishment for past offences against society, for which the debt has been paid by the ex-offender.

The ideas of lesser entitlements to employment and other social engagements in conjunction with ongoing distrust and punishment of ex-offenders is highly prominent in popular tabloid news reports, which run arguments supporting what Naylor articulates as the 'view that a person who has broken the law should not (ever?) be entitled to as much as the person who - despite hardship - has never broken the law' (Naylor, 2005). As evident through the enactment of the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), the fact that a person has committed an offence and has received and completed a calculated sentence can be and is overridden by the demand for risk management and community safety.

The belief that community protection is facilitated by offender and ex-offender exclusion is exemplified through news headlines declaring that the 'Public must be protected' (Herald-Sun, 2010a) and that 'Perverts get freedom in secret Sex beasts anonymous' (Wilkinson, 2010b). The same articles refer to the detention centre for people on extended detention and supervision as residing in 'Ararat's "village of the damned."' (Herald-Sun, 2010a) This language promotes fear and concern in the reader who then demands further protection from ex-offenders. The idea of offender rights in headlines like 'EVIL SECRET EXCLUSIVE: 23 sex fiends live among us - and we're banned from telling you where' (Wilkinson, 2009) and 'MADNESS Notorious sex fiend on the run, Location protected by privacy 'rights', Court blocks us showing you his face' (Wilkinson, 2010a), aim to diminish the public belief that offenders and ex-offenders should have equal rights. In the same article, Crime Victims Support Association president Noel McNamara makes the following statements:

You can't have these types of offenders wandering around the countryside and us not being allowed to name them.

This was always going to happen sooner or later. The Government is a disgrace for allowing it to happen and the judiciary has to share the blame.

You just can't have a secret society with the criminals having all the rights and the victims -- and future victims -- not knowing where these people are going (Wilkinson, 2010a).

These emotive statements position the reader in the place of a possible future victim, thus escalating fear of victimisation by ex-offenders as people on extended detention and supervision orders are defined. It is evident therefore that an emotive demanding reporting style has the ability to personalise criminal activity and encourage the reader to associate themselves with the victims of crime in a way that can influence government actions.

#### **4.6 Conclusion**

This chapter has demonstrated that employment advertisements have become a vehicle for excluding ex-offenders from gainful employment. The analysis conducted in section 4.3 brings to the fore the way that employment advertisement practices has changed over time. In 1993 there was no evidence to suggest there was any requirement for a criminal record check during the job application process. However this practice had changed by 2010. In 2010 the analysis indicates that the practice of informing a candidate of the requirement for a criminal record check within an advertisement was evident in approximately eight percent of the total job advertisements analysed. These results illustrate how current employer practices encourage ex-offenders to self-exclude from the employment application process, regardless of their suitability for the job. The findings reported within this chapter support the argument that employers not only use a National Police Certificate to identify, manage and exclude offenders from employment positions, but also encourage ex-offenders to exclude themselves through the requirement of a criminal record check being included in a job advertisement. The inclusion of a requirement for a criminal record check in a job advertisement is fuelled by societal perceptions of ex-offenders and the risks they present to social order. These ideas are to a large degree promoted through the media and public discourse.

Popular media reports as presented in section 4.5 are repeatedly reporting an increasing crime rate and the demise of community safety. The dangers presented by offenders and ex-offenders are highlighted in articles about criminal justice issues (Hogg & Brown, 1998, p. 21). It is therefore not surprising that employers will look to

popular ways of protecting themselves from the perceived risks presented by ex-offenders. Therefore advice offered via the media in regards to managing the perceived risks ex-offenders present is held in high regard. As long as ex-offenders are presented in the public arena as a threat to social institutions and organisations, employers will seek to protect themselves from this 'danger'. A need to avoid the negative implications associated with employing an ex-offender stimulates the use of criminal record checks to eliminate ex-offenders from the candidate pool (Pratt, 2007).

The capacity of the media to ignite emotive responses in readers diminishes the impact information presented by experts in the criminal justice system has on facilitating informed public debate as evident through the change in policy made by the Australian Labor Party during the 2010 election campaign, outlined above (Pratt, 2007). In Australia the influence of the populist media on public opinion is powerful as a result of the fact that systematic empirical knowledge about the workings of Government agencies including the criminal justice system is minimal. This lack of public knowledge allows media sources to gain the status of experts on crime and the criminal justice system (Hogg & Brown, 1998). This ability of the mass media in its reporting to set the scene for public debates, issues and concerns also allows them to establish what may be perceived as best practice in dealing with these issues. For example to mitigate the risks associated with offenders and crime, conducting criminal record checks and excluding ex-offenders from social engagements including employment is seen as an acceptable measure (Hogg & Brown, 1998).

In the following chapter the second stage 'offender' will be explored and analysed. Consideration will be given to the 'what works' literature and discourse that has informed developments within corrections and has impacted on practices. This stage concentrates on the activities undertaken by Corrections Victoria, rehabilitation programs and the VISAT.

## Chapter 5 Corrections Victoria and the VISAT

### *Rehabilitation only applicable in Corrections*

*When Natalie was 17 years old she was charged with assault and possessing/trafficking a drug of dependence. When she was 21 years old she was charged with burglary and theft, including theft of a motor vehicle. On all occasions she pleaded guilty hopeful that no conviction would be recorded against her. She was found guilty of each charge and received sentences including bonds, fines and community work, all without conviction.*

*Natalie made some positive changes in her life and decided to study youth work. She sought placements for her practicum component and was required to undergo police checks. Natalie felt that she had moved on with her life and was surprised that the offences, especially the offences that occurred when she was 17 years old, were revealed on the check when no conviction had been recorded. As a consequence of these disclosures, Natalie was refused a placement in a juvenile centre and was told that she could not be placed there because she might 'bump into someone she knew'! Natalie felt that the assessment of her suitability was based on the limited information appearing on her police check, and she was denied the opportunity to explain the circumstances of the offences, which would have put a very different complexion on things (Fitzroy Legal Service Inc, 2011h).*

### **5.1 Introduction**

Now that due consideration has been given to the environment in which ex-offenders are seeking employment and the restrictive implications a criminal record can have in relation to successful reintegration, this chapter will consider the correctional environment in which offenders are managed and potentially rehabilitated. Corrections Victoria is the primary organisation or arm of government to be explored through this chapter. Its role as a governing body which typically proclaims 'community safety' as its primary objective will be explored, but this exploration will not occur from a community point of view (Department of Justice, 2010a). This exploration and analysis will consider the discourse that has given rise to correctional practices in general but more specifically practices which separate and manage the offender population. This management is undertaken according to an offender's perceived or calculated level of risk in relation to reoffending. Consideration as to the practical implications of such risk classifications will also be examined. This chapter presents the second stage of the analysis. It will begin by introducing Corrections Victoria as an organisation and then move on to an illustration of its current activities.

It will be demonstrated that these activities illustrate a politically driven discourse on correctional facilities and rehabilitation, with the main focus being containment and incarceration as opposed to rehabilitation and reintegration. The legislative framework that operates in Victoria in relation to rehabilitation will be outlined as it demonstrates the limited legislative consideration given to rehabilitation initiatives.

The lack of legislation on rehabilitation only gives correctional authorities greater power to form policy. These policies are based on discourse in relation to rehabilitation and reintegration and result in the current practices within this arena, including the use of assessment tools. In section 5.5, below, the most important form of discourse on rehabilitation programs and the application of actuarial assessment tools takes place in relation to the ‘what works’ literature. This literature has played a foundational role in program frameworks, content and targeted delivery through the utilisation of the VISAT. Subsequently, the investigation will analyse changes in the discourse on rehabilitation with consideration given to how this theme impacts on rehabilitation practices and the utilisation of the VISAT. At this stage four specific rehabilitation programs will be introduced in conjunction with their corresponding VISAT module. This will be followed by illuminating other contextual information gathered through the VISAT and the calculation of the general risk of reoffending. Finally consideration will be given to the construction of the assessment summary page and how it can cull information to an almost unrecognisable form.

## **5.2 Corrections Victoria**

### **5.2.1 Introduction**

Correction Victoria operates the state’s adult correctional system including Community Correctional Services and prisons (Department of Justice, 2010b). It came into existence in 2003 when the Office of Correctional Services Commissioner amalgamated with the Public Correctional Enterprise (CORE). Corrections Victoria states that ‘it ensures prisoners are safely and securely contained and aims to rehabilitate offenders by addressing the underlying causes of offending behaviour’ (Department of Justice, 2010b). While this rhetoric is stated, current activities of Corrections Victoria seem to be focusing more on ideas of containment rather than increasing resources for rehabilitative interventions.



### **5.2.2 Corrections Victoria current activities**

In May 2011, Corrections Minister Andrew McIntosh ‘officially opened the \$12.1 million expansion at Beechworth Correctional Centre’ (Minister for Corrections, 2011). This announcement was accompanied by further announcements about prisons undergoing expansion throughout Victoria and a further ‘\$2 million going towards developing a business case for the development of a new male prison’ (Minister for Corrections, 2011). These expenses were said to be required to modernise and expand Victoria’s correctional system and ‘to build secure prisons and invest in rehabilitation programs, which reduce reoffending’ (Minister for Corrections, 2011). The irony of these statements is clear. On the one hand the prison system is successfully expanding to cope with increasing prison populations and on the other hand rehabilitative programs that reduce reoffending are also invested in, which are intended to have the opposite effect and lower imprisonment rates. If the rehabilitative programs aimed at reducing reoffending are readily offered and are successful, why are such expansions taking place and furthermore, why is a business case being put forward to build another male prison? As proposed earlier in this thesis the prison system’s failure to rehabilitate offenders reinforces the need to expand the prison system; in line with arguments offered by Foucault, the prison system is a success in its own right. These proposed expansions are accompanied by continued claims of further rehabilitative efforts. This media release did not focus on the negatives of an ever expanding prison system but rather on the benefits of such projects to the community, as stated in the title ‘Prison projects bring jobs to regional Victoria’. The arguments put forward by the Corrections Minister, Andrew McIntosh are that:

These types of projects create hundreds of regional jobs and allow the prison system to deal with projected increased demand. They also help boost local business both during and after construction. In regional areas particularly, prisons are very much part of the community. People work here or they have friends and family who work in the prison (Minister for Corrections, 2011).

It is thus argued by the Minister that the expansion of the prison system is in the best interests of the community as it produces employment opportunities for people without a criminal record. Ex-offenders are unable to gain employment in these facilities so there is no silver lining for offenders or ex-offenders. It would seem that

the prison system is failing to rehabilitate offenders and is only preparing for 'projected increased demand' for prison beds (Minister for Corrections, 2011). Considering that rehabilitation programs do not seem to be the prime focus of the current Victorian correctional agenda, some exploration of the legislative frameworks and foundations for the requirements of rehabilitation in Victoria is required.

### **5.2.3 Legislative Framework in Victoria for rehabilitation programs**

The legislative frameworks under which rehabilitative programs are designed and implemented throughout Australia are diverse. This is due to the structure of the Australian legal system, as outlined in some detail in section 2.9 of this thesis. As with all legislative powers in relation to welfare, police, courts and corrections in Australia, uniformity at a national level is hindered by each state and territory having autonomy in relation to creating legislation to govern its population on such issues (Heseltine, Day, & Sarre, 2011, p. 4). This leads to significant disparities between jurisdictions in relation to legislation that addresses rehabilitation efforts and the level of guidance provided to the correctional service within any given jurisdiction. This neglect in Australia to legislate and provide guidance regarding the structure, values and rationale of rehabilitative practices may be the consequence of 'the contemporary drive of Australian legislatures to push community safety as the paramount consideration in sentencing, compared with those whose rehabilitative zeal guided prison reforms in generations past' (Heseltine, Day, et al., 2011, p. 4; Sarre, 2005).

In the way of guidance on a national scale, corrections once again are offered only 'advice' in relation to best practice in terms of managing offenders, assessments and rehabilitation. *Standard Guidelines for Corrections in Australia* (Australian Government, 2004) outlines what the federal government considers to be the 'best practice' in relation to managing offenders, whether in a correctional facility or in the community. In section 5.2.6, consideration will be given to what 'advice' is offered to Australian states and territories in relation to rehabilitative endeavours and aims but in the meantime we will continue to consider the lack of a robust legislative framework in Victoria.

Currently only Victoria has made a commitment to 'therapeutic jurisprudence' in their Department of Justice undertakings, based on the 'advice' offered in the *Standard Guidelines for Corrections in Australia* (Heseltine, Day, et al., 2011, p. 4). This undertaking is aimed at assuring magistrates and judges that rehabilitative

recommendations will be adhered to once the offender enters the correctional system, however it is not enforceable like robust legislation (Heseltine, Sarre, & Day, 2011, p. 4). The policy position taken by the Department of Justice in relation to adhering to the rehabilitative directions given by the judiciary can be equated with the policy put in place by Victoria Police in relation to the disclosure of criminal record information, which once again relies on policy and lacks the durability of legislation.

In Victoria there is limited legislation that is focused on rehabilitation. The *Sentencing Act 1991* (Vic), has a broad and basic reference to rehabilitative ideology. In section 5(1)(c) it is stated that one of the aims of sentences may be to ‘establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated’ (*Sentencing Act 1991* (Vic)). The insertion of these statements into the *Sentencing Act 1991*(Vic) does not mandate rehabilitative objectives, but rather creates a platform for rehabilitative conditions to be implemented (Heseltine, Day, et al., 2011, p. 10). Furthermore, the *Sentencing Act 1991*(Vic) does make reference to the possibility of an offender being considered for a Community Based Order and the program conditions that can be attached to such Orders. In relation to these Orders the *Sentencing Act 1991* (Vic) states as follows:

**38. Program conditions**

- (1) Program conditions of a community-based order are—
- ...(d) that the offender undergoes assessment and treatment for alcohol or drug addiction or submits to medical psychological or psychiatric assessment and treatment as directed by the Regional Manager. For persons to be eligible for reintegration programs, they must abide by the conditions laid down, among others...

**18S. Program conditions**

- (1) The court may attach to a combined custody and treatment order
- (a) A condition that the offender during the period of the order submit to testing for alcohol or drug use as specified in the order; or
- (b) Other condition relevant to the offender’s drug or alcohol addiction or usage that the court considers necessary or desirable.
- (2) A court is not required to attach any program conditions to a combined custody and treatment order.

(3) A court must not impose any more program conditions than are necessary to achieve the purpose or purposes for which the order is made. For persons to be eligible for a drug treatment order, they must abide by the conditions...

#### **18ZG. Program conditions**

(1) The program conditions that may be attached to a drug treatment order are that, while the treatment and supervision part of the order operates, the offender—

- (a) Must submit to drug or alcohol testing as specified in the order; and
- (b) Must submit to detoxification or other treatment specified in the order (whether or not residential in nature); and
- (c) Must attend vocational, educational, employment or other programs as specified in the order; and
- (d) Must submit to medical, psychiatric or psychological treatment as specified in the order...

(2) The Drug Court must attach to a drug treatment order at least one program condition but must not attach any more program conditions than it considers necessary to achieve the purposes for which the order is made.

(3) An offender must comply with all of the program conditions attached to the drug treatment order (*Sentencing Act 1991* (Vic)).

These conditions and program options are made available to Victorian courts through this legislation. Typically, before a court imposes any variety of Community Based Order, an initial assessment is completed by a Community Corrections Officer about the individual's suitability for such an order and program conditions which may be beneficial to the rehabilitation of that particular offender. The tool utilised for such assessments is the VISAT.

A recent study conducted by Bonta (1996) of risk assessment tools like the VISAT and treatment options, classified the development of risk assessment tools into generations of development. Accordingly, first generation risk assessment tools were considered to be based upon traditional subjective assessments (Brown & Pratt, 2000). Second generational risk assessment tools attempted to go 'beyond intuition strategies and to quantify the relationship between risk factors and outcomes' (Brown

& Pratt, 2000, p. 94). Finally, the most recently developed third generation risk assessment tool, of which the VISAT is an example, is described by Bonta as a modern attempt to bring together measures of offending risk with a linked set of assessments of treatment needs (Bonta, 1996). The focus of current strategies is to not only identify risk factors, but also manage them (Brown & Pratt, 2000).

The VISAT as a risk assessment tool is first used at the court stage, where only particular modules are completed the remaining modules are completed if or when the offender enters the correctional environment. Module 10 of the VISAT is completed in an endeavour to get a risk assessment in relation to the general risk of reoffending. Furthermore, specific modules are completed to identify specific criminogenic needs. The results of this assessment combined with other information form the basis from which the Corrections Officer makes recommendations to the court about the offender's eligibility and willingness to undertake an order. The Corrections Officer also suggests appropriate program conditions. While this advice is offered to the court the ultimate decision remains with the presiding magistrate or judge.

The only other Victorian legislation which refers to rehabilitative aims is the *Corrections Act 1986* (Vic). This reference is a limited one. Section 57 of the Act focuses on the rehabilitation and transition permit system. Section (57) (B) entitled Rehabilitation and transition permit, states as follows:

- (1) The Secretary may issue a rehabilitation and transition permit to a prisoner for any of the following purposes—
  - (a) a purpose related to the physical fitness or education of the prisoner;
  - (b) to take part in a program approved by the Secretary that is designed to facilitate the maintenance of the prisoner's family ties;
  - (c) in the case of a prisoner residing at a transition centre, to undertake activities provided for in the prisoner's transitional activity plan;
  - (d) to look for or carry out work, including (but not limited to) unpaid community work;
  - (e) to take part in a program approved by the Secretary that is designed to facilitate—
    - (i) the rehabilitation of the prisoner; or
    - (ii) the prisoner's re-integration into the community; or

(iii) the preparation of the prisoner for release (*Corrections Act 1986* (Vic)).

Prisoner rights are also outlined in this legislation. One right of particular interest is enshrined in section (47) (A) of the *Corrections Act 1986* (Vic), which states the following:

(o) the right to take part in educational programmes in the prison (*Corrections Act 1986* (Vic))

This ‘right’ is particularly interesting because it is not accompanied by conditions of risk classification or a definition of what is considered to be ‘educational programs’. The meaning of ‘educational programs’ is thus open to interpretation. It can be argued that the Alcohol and Drug Programs, the Violence Intervention Program, the Sex Offender Program and the Cognitive Skills Program, among others are educational to varying degrees and as such offenders have the right to access them, regardless of risk classification or other conditions placed on access.

#### **5.2.4 ‘What works’ literature and discourse**

The ‘what works’ literature and discourse has significantly impacted on current ideologies and practices within Australia’s correctional systems. In the following sections the impact this particular body of literature has had on the introduction of Australian standard guidelines in relation to correctional practices and rehabilitative programs will be explored. Furthermore, the translation of the recommendations made by Australian standard guidelines into Corrections Victoria ideology, aims and practices will be analysed.

The four specific programs identified above are well established under the ‘what works’ literature. This literature plays a key role in current discourse in relation to rehabilitation and the utilisation of actuarial tools while allowing some flexibility for the use of discretion. Given the limited legislation in relation to rehabilitation and reintegration within the Victorian context, discourse such as that offered through the ‘what works’ literature offers a solid cornerstone for the establishment of rehabilitative programs and introduction and utilisation of actuarial assessment tools to target specific categories of offenders in specific ways. In the following section the ‘what works’ literature and the way it has led the discourse on rehabilitation and

reintegration through the promotion of its guiding principles will be outlined. This will be followed by how these principles have influenced the advice offered by the Australian government to state correctional authorities.

### **5.2.5 ‘What works’ rehabilitation or risk management**

Over the last forty years correctional services in western societies have endured furious struggles between proponents of rehabilitation and proponents of punishment (Andrews & Bonta, 1998; Andrews, Bonta, & Hoge, 1990; Clive R. Hollin et al., 2008). Prior to the 1970s rehabilitative efforts through a welfare model were widely supported. In 1974 an influential review of the effectiveness of prison rehabilitation programs was published by American sociologist, Robert Martinson, who essentially declared that ‘nothing works’. This review expedited the demise of rehabilitative efforts within the criminal justice system (Andrews et al., 1990). The conclusions of the ‘nothing works’ doctrine had serious implications for correctional agendas and resource allocation. The ‘proven’ failure to rehabilitate offenders was the ideal backdrop for law and order campaigns, harsher penalties and calls for ‘just deserts’ (Clive R. Hollin, 2000; Clive R. Hollin et al., 2008) in the western world. Government funding subsequently then shifted in the 1970s and 1980s into primary crime prevention and deterrence objectives. However, a small number of researchers made their disapproval of Martinson’s findings and evaluation clear, namely, Ted Palmer, Paul Gendreau, Don Andrews and Robert Ross. Their arguments gained acceptance and Martinson recanted his position that ‘nothing works’ based on errors identified in his earlier review. The differing arguments, coupled with Martinson’s recant, paved the way for what is now known as the ‘what works’ literature.

Corrections Victoria (in line with a number of jurisdictions) recognises and names specific bodies of literature as the knowledge base according to which it has put into practice a number of recent programs. The aim of these programs is the reduction of recidivism rates (Auditor General Victoria, 2003 - 2004): ‘A correctional system responsive to offender need requires an effective offender management system. Case management processes are currently being revised to meet ‘what works’ principles in Victoria on every level’ (Heseltine, Day, et al., 2011). This ‘what works’ approach is based on five key principles, the risk principle, the needs principle, the responsivity principle, the integrity principle and the principle of professional discretion (Andrews & Bonta, 1998). When appropriately implemented these principles are said to enhance

the success of a rehabilitative program in reducing the risk of reoffending. An in-depth explanation of each of the five key principles will now be presented for a variety of reasons. First, an understanding of these principles translates into the ability to see the significant impact the ‘what works’ literature and discourse has had on informing the design and function of the VISAT. Second, the risk principle and the responsivity principle impact strongly on the requirements for the selection of individuals and categories of offenders to participate in particular programs. Third, the integrity and professional principle impact on rehabilitative program delivery and evaluation.

The following is a summary of the key features of each of these principles:

1. **The risk principle:** Published research identifies variables associated with the possibility of an individual reoffending. These risk principles include those not amenable to intervention (static risk factors), and those that may change over a period of time (dynamic risk factors). Static risk factors include age of onset of crime, offence history, past prison terms served and gender. Research suggests that higher risk offenders will gain the most from rehabilitation interventions and that the intensiveness of services delivered should be proportional to the level of risk. Thus offenders who pose a high risk of reoffending require more in-depth and lengthier programs.
2. **The needs principle:** The term ‘criminogenic needs’ refers to risk factors that are dynamic or amenable to change through rehabilitative forms of intervention. The needs principle suggests interventions should target needs of this sort as they are most directly related to recidivism. Examples of criminogenic needs that form important targets for intervention are drug and alcohol use, anger and violence problems and beliefs or attitudes that support offending.
3. **The responsivity principle:** The responsivity principle focuses on issues or program characteristics that influence the offender’s ability to learn in a therapeutic situation. Treatment is a learning experience and individual factors that interfere with or facilitate learning are termed responsivity factors. These factors can also be understood as contextual variables which may influence



treatment results. These variables make a difference to the skills, strategies or identities that individuals develop and to the support available when changes are made. Factors such as age, ethnicity, gender, disability and socioeconomic status can be considered key responsibility factors although not directly amenable to change.

4. **The integrity principle:** In contrast to the demands made by the responsibility principle to individualise interventions, an important component of quality assurance is to emphasise the need for program integrity. Program integrity refers to the extent to which an intervention program is delivered in practice as intended in theory and design.
5. **Professional discretion:** The principle of professional discretion allows for professionals to make decisions on characteristics and situations not covered by the previous principles. It makes sense to build scope for professional judgment into any rehabilitation scheme rather than rely upon rigid administration of static principles which may be impacted upon by dynamic factors (Andrews & Bonta, 1998; Day, Howells, & Rickwood, 2004).

The foundational ‘what works’ principles have been outlined above. The adoption of these principles into the Australian context will be considered through the ‘advice’ offered to the state correctional authorities in relation to ‘best practice’ through the development of *Standard Guidelines for Corrections in Australia* (Australian Government, 2004).

#### **5.2.6 Standard Guidelines for Corrections in Australia**

While the term ‘rehabilitation’ has changed in meaning in various ways over time and has become interchangeable with ideas of reform, therapy and treatment as outlined earlier in this thesis, the term still holds the promise of positive change through a range of rehabilitative programs. Therefore, rehabilitation remains on the agenda to some degree, as does the belief in an offender’s ability to make positive changes and lead a law-abiding lifestyle. However, as the case of Natalie in the opening of this chapter shows, social organisations, community institutions or prospective employers may not always share this belief.

According to the 'advice' offered in 'Standard Guidelines for Corrections in Australia' (Australian Government, 2004), correctional processes, both institutional and community based should offer offenders opportunities for rehabilitation.

In relation to a community correctional setting the national guiding principles in relation to rehabilitation are stated as follows:

5. The management of offenders should be based on an assessment of the security risk they present, their risk of reoffending, and be tailored to address their individual criminogenic and other needs.

6. Offenders should be able to expect continuity of interventions, opportunities for rehabilitation, ... (Australian Government, 2004, p. 6).

Victoria's adherence to these principles is apparent through the implementation of the VISAT within corrections, aimed at both establishing criminogenic needs to be addressed through rehabilitative programs and also to establish an offender's risk of reoffending, determined as low, medium or high; the higher the assessed risk of reoffending, the greater the need for rehabilitative interventions.

In relation to how rehabilitation programs should be developed and implemented, community based corrections are offered the following advice:

### **5. Offender Programmes**

Structured programmes should be made available to offenders on an individual or group basis through community based correctional agencies which are considered relevant to their criminogenic needs, responsivity, abilities, and cultural background ... and should assist them to live in the community without further offending.

5.1 Mandated offenders should be provided with programmes and services that encourage the development of skills and abilities to lead law-abiding lives.

5.2 Programmes and services should be based on an assessment of each offender's risk of reoffending, and of his/her criminogenic needs. Where

possible, programmes and services should be in the most appropriate form of intervention to address these factors... (Australian Government, 2004, p. 10).

These guidelines and advice adhere to ideologies associated with the ‘what works’ approach in conjunction with the implementation of actuarial risk assessment tools.

In regards to a prison setting rehabilitative efforts are designed to adhere to the following advice:

### **Rehabilitation Programmes and Education**

3.6 Prisoners should be provided with access to programmes and services, including education, vocational training (and employment), that enable them to develop appropriate skills and abilities to lead law abiding lives when they return to the community.

3.10 Programmes and services should be provided to address criminogenic needs and should be based on best practice...(Australian Government, 2004, p. 23)

Victoria’s undertaking to heed this ‘advice’ and apply the ‘what works’ approach is apparent in Victoria’s *Offender Management Framework - Achieving the Balance 2006* (Corrections Victoria, 2008a, p. 5). This framework was developed with the following aims:

- Promote and maintain a safe and secure community
- Motivate offenders to engage in and continue with programs and services
- Identify and monitor offenders’ risks and needs
- Coordinate and prioritise offender access to appropriate programs, services and activities, based on the identification of risk and need (Corrections Victoria, 2008a, p. 5)

The main ideas behind the ‘what works’ approach and its foundational components, in conjunction with the recommendations made by the Australian federal government have been considered. This approach and the corresponding national guidelines are presented as necessary to facilitate positive rehabilitative outcomes and reduce the

rate of reoffending. The advice offered through the Australian guidelines is based on the adherence to the 'what works' literature and discourse. This illustrates how powerful literature and discourse can have a significant impact on practices associated with offenders accessing rehabilitative programs. It is argued that this discourse and literature is foundational to the conditions which make the VISAT the key assessment tool and also assist in determining what programs should be available, how they should operate and who should have access to these programs based on their risk level opposed to their needs. This discourse and its impact on offenders in relation to risk assessments and access to programs is not isolated to a correctional environment. As will be presented later in this thesis, public discourse can also inform the establishment and utilisation of risk assessments tools such as the criminal record, which can determine who has access to employment and what type of employment. We will turn our attention to therapeutic programs offered in Victoria, where the 'what works' literature and its accompanying discourse is active through rehabilitative programs and the like. This makes clear that rehabilitation remains the sole domain of Corrections Victoria. Reintegration, as the extension of rehabilitation is, however, not considered in light of a social setting beyond the prison walls and beyond the remit of corrections.

The four Victorian rehabilitative programs that will be looked at in the following sections have been chosen for particular reasons. First, eligibility to participate in these programs is specifically based on a risk classification. The risk classification for two of these programs must be either moderate or high based on the VISAT. This will be discussed in more detail in relation to the particular programs. Second, the program must be directly relevant to the offender's criminogenic needs as established through the completion of the VISAT. Subsequent to this the offender must also be assessed by program intake workers to determine their suitability for the program. Before continuing onto the analysis of the particular rehabilitative programs and their corresponding VISAT modules, an outline of the development and introduction of the VISAT will be undertaken to facilitate a greater understanding of the tool itself and its foundations in the 'what works' principles.

### **5.3 The VISAT and corresponding rehabilitation programs**

Risk assessments as previously mentioned are commonplace throughout Australian correctional systems and are also used internationally, including in the USA criminal

justice system. The ideology, aims and execution of such risk assessments within the Victorian correctional context will be considered through the analysis of the VISAT. The role of the VISAT in Corrections Victoria is significant in various ways. Primarily the VISAT is analysed here for its ability to construct rich representations of offender identity through the gathering of information. It will also be considered for its ability to manage this representation, through various calculations and deductions.

This analysis will look at the development and implementation of the VISAT and its correspondence with the 'what works' literature and discourse. Further to this an analysis of the structure of the VISAT will be undertaken. This will be followed by an analysis of four particular modules of the VISAT in relation to their corresponding rehabilitative programs. This is a key aspect of this part of the investigation, given that the 'what works' literature, under the umbrella of rehabilitation and reintegration discourse has played a vital role in the limiting or encouraging of access to particular programs. It is access and participation in these rehabilitation programs that encourages an offender to seek a law-abiding lifestyle once engagement with corrections ceases. Furthermore it is the positive impact of participating in rehabilitation programs which is not accounted for in a National Police Certificate.

The analysis of the relationship between VISAT modules and rehabilitative programs will be followed by an examination of a further two modules which together are used to calculate general risk of reoffending. The analysis of these two modules is undertaken to illustrate how the 'what works' principle in relation to risk and targeted programs is applied. They are analysed to explore how static numeric representation and simplified forms of information are relied upon to classify offenders and manage the risk they are calculated to present. Also discussed will be how risk is calculated and whether discretion is applicable to the determination of risk.

Subsequently four modules of the VISAT will be considered in light of the requirement for contextual information such as social integration, physical and mental health, family and other relationships and also education and employment. The contextual information is considered important for one particular reason. The fact that contextual information is included in the VISAT as a tool in itself illustrates that it is

worth recording but in addition it is evident through the way information is managed that this contextual information is subsequently removed. Thus an analysis of the last module and the summary of the VISAT will also address the theme of information management and findings will demonstrate how the high level of detail that is contained within the VISAT is managed, processed, simplified and standardised.

This theme of information management present in the VISAT is comparable to the contextual information evident in a criminal record, which will be explored in the following chapter. Importantly, the criminal record also serves as a risk assessment tool operating beyond the prison walls in broader society. However, before we consider these comparisons further an explanation of the development and introduction of the VISAT will be provided for a greater understanding of the correctional assessment tool.

### **5.3.1 Development and implementation of the Victorian Intervention Screening Assessment Tool (VISAT)**

In November 2000, Corrections Victoria put forward a business plan for the development and implementation of a rehabilitation framework to reduce reoffending:

central to this was the development of an evidence-based tool to accurately identify the needs of sentenced prisoners, their risk of reoffending and to improve prisoner classification and planning decisions. As well as being used in prisons, this evidence-based tool would also be used by Community Correctional Services to assess offenders (Auditor General Victoria, 2003 - 2004, p. 27).

This business plan was approved, with a two-year timeframe accepted for the development and implementation of the assessment tool. According to the Auditor General's report, in mid-2002, Corrections Victoria employed a contractor to develop a 'Victorian-specific tool for assessing the needs of prisoners and their risk of reoffending' (Auditor General Victoria, 2003 - 2004, p. 3). They were given the option to adapt an existing assessment tool or develop an entirely new tool to meet Victoria's needs for a 'fixed fee of \$495,659.00' (Auditor General Victoria, 2003 - 2004, p. 28). Given that the contractor did not meet the specified time frame for each stage of development, it was acknowledged that a nine month delay had been incurred

by August 2003. Thus, in September 2002 an interim measure was put in place: the temporary utilisation of the Canadian developed assessment tool –‘the Level of Service Inventory-Revised Screening Version (LSI-R: SV). This interim measure was discontinued once the VISAT was introduced and operational.

The team charged with developing the VISAT consisted of four Australian academics with expertise in various fields including criminology, penology, psychology, measurement systems and health. A director of a privately owned and managed Melbourne based psychological counselling organisation, known as Caraniche was also engaged (Corrections Victoria, 2009c).

### **5.3.2 The Victorian Intervention Screening Assessment Tool (VISAT)**

The Victorian assessment tool ‘provides standardised measures of a variety of actuarial and psycho-social factors that reflect different aspects of offending’ (Corrections Victoria, 2009c, p. 6). The compilation of assessment tasks and the development of the modules are targeted at measuring the risk of reoffending and criminogenic needs based on the ‘conception that offending is not the product of individual pathology but rather arises from a range of factors that are common across offenders’ (Corrections Victoria, 2009c, p. 6). The idea that criminogenic needs are not based on an individual’s pathology suggests that standardised ways of dealing with particular factors is achievable and that they are dynamic factors which are amenable to change. The VISAT is organised into two sections: the first is focused on criminological factors and the second on psychosocial factors. Particular modules are considered to relate to dynamic factors, while others are considered to relate to static factors which are not amenable to intervention (Corrections Victoria, 2009c, p. 12).

The VISAT is designed to be administered in a structured interview environment and offers advice to the assessor on follow-up cues, in conjunction with follow-up questions. Furthermore, it is stated that the information obtained through the completion of the VISAT is to be utilised in the making of case management decisions (Corrections Victoria, 2009c, p. 12). The VISAT, through its robust structure attempts to eliminate to the largest extent possible any prospect of the assessor’s individual character or perspective impacting on the assessment outcome.

This in turn increases its versatility and the ability for the actuarial tool to be utilised at various stages within the criminal justice system without difficulty.

The VISAT is also presented as a simple, straightforward, accurate assessment of the risk of reoffending, calculating and categorising offenders according to their risk level and criminogenic needs. Subsequent to this in-depth information collection process, the results are standardised and cut down to a singular level of risk and specific categories of need. An offender is simplified into factors and risk, thus removing all the contextual data implicit in the collection of information. This simplification and standardisation allows for the offender to be represented in a manageable and uncomplicated form.

This process of standardisation and the removal of contextual information in effect deems such individual information insignificant, which is not necessarily the case. The idea of simplification and standardisation is also apparent in relation to the version of the Victorian criminal record considered suitable to enter the public domain and is often utilised for employment purposes. The extensive level of information contained in the criminal record held by Victoria Police is by no means accurately represented on a National Police Certificate, which is the document Victoria Police releases as a subject's true and complete criminal record. The simplification and reduction of extensive levels of criminal record information to a standardised National Police Certificate will be analysed to a greater extent in the next chapter.

The issues that arise from such processes of standardisation are not acknowledged within the VISAT or the VISAT Manual. There is no warning that through the process of standardisation vital information may have been lost and this may unfortunately render this simple representation inaccurate. This lack of acknowledgement in both the VISAT and the National Police Certificate of the issues associated with simplification in effect allows for such processes of culling and compressing information to remain unquestioned. It would seem that the simplification – complexity relationship is a one-way street, thereby enabling the assumption that something as complex as the criminal record held by Victoria Police or the VISAT can completely and accurately be represented by a singular



classification or a single page inscription. This research contends that the reverse is in fact the case. Standardised classifications are represented simply, but their complexity becomes apparent when you delve below the surface. The acceptance of information that is presented as straightforward and uncomplicated without question facilitates the dismissal of the complexity of its original forms from the various depositories of fragments of information. If we take the outcome of the VISAT as complete, are we not dismissing the variable histories of its subjects and removing the individual from the equation?

### **5.3.3 Structure and utilisation of the VISAT**

The VISAT can be utilised at three particular points within the criminal justice system. First, as outlined in section 5.2.3 the VISAT can be used by a Community Corrections Officer during the court process on request by a Magistrate or Judge. Second, it can be utilised once a Community Based Order has been given to an offender and is being managed by Community Corrections for assessment. Third, the VISAT can be utilised on reception to prison for assessment purposes.

The VISAT aims to facilitate the identification of criminogenic needs and dynamic risk factors, such as issues of violence, drug and alcohol abuse, sexual offending and cognitive skill levels all considered to be paramount in addressing the risk of reoffending (Birgden & McLachlan, 2004). Beyond criminogenic needs, the VISAT aims to facilitate the identification of areas of disadvantage and other issues that may require addressing. These factors are considered to be subordinate in priority to the identified criminogenic needs as they are not considered to be directly related to offending behaviours and therefore are not considered as important for corrections to address. The information gathered in relation to these social circumstances and antecedents, which include social integration, education and employment, family and other relationships, physical and mental needs, attitudes and beliefs, are used as background information and could be contributing factors to a subject's offending, although deemed to be not directly linked. Where possible these are addressed by the supervising officer, though attempts being made to link an offender with appropriate organisations to address these issues.

The identification of criminogenic needs and other areas of deficiency are accompanied by qualifying calculations in relation to the impact level of each factor on the offender. Furthermore the tool is utilised to calculate an offender's risk level in relation to reoffending. This risk level is calculated based on static risk factors which results in either a high, medium or low risk outcome. The determined risk level can then be used to either encourage participation in a particular program or to disqualify an offender from accessing a particular rehabilitative program. This same risk level within a community correctional setting determines the level of supervision by the Community Corrections Officer that is mandated, for example a high risk offender may be required to attend the Community Corrections office twice a week while a low risk offender may be required to attend only once a fortnight.

The collection and collation of social circumstances and antecedent information, while not playing a primary role, does serve to construct the identity of the offender. This allows for classifications in relation to each factor that is considered as part of the individual's make-up, not just their criminal behaviours. In a sense it constructs the individual in relation to various standardised questions which only permit one of a range of standardised answers. These answers are allocated a predetermined numeric representation which classifies the individual for each particular section of the VISAT. Each section within the VISAT corresponds to a particular risk factor or antecedent of the individual offender to be measured and assessed. The individual offender through their record is then reduced and simplified to a bar graph on the back of the inscription which outlines the numeric representation for each specified section within the VISAT. The offender is thus constructed and deconstructed into particular factors through the completion of this tool and as such is represented to Corrections Victoria in a particular predetermined form. This idea of construction and deconstruction is also apparent in relation to the criminal record. Information from various sources, for various purposes and encompassing wide ranging forms of information are deposited into the criminal record in a broad sense, but yet when a request for a National Police Certificate is received the subject is deconstructed into standardised offences and outcomes. In the following section an introduction to the rehabilitation programs and the corresponding VISAT modules will be provided.

## **5.4 Introduction to rehabilitation and VISAT modules**

The VISAT has particular implications for accessing programs. The findings attained through the administering of the VISAT can have enabling or disabling implications for accessing rehabilitation programs. This analysis will consider particular rehabilitative programs and their corresponding module in the VISAT. The VISAT establishes the criminogenic needs and the level of that need in relation to rehabilitative programs. It is also responsible for providing a general risk of reoffending. These two outcomes are then combined to form the basis of decisions regarding access to rehabilitation programs

The first program is the Drug and Alcohol Program, second is the Cognitive Skills Program, third is the Violence Intervention Program (VIP) and the fourth is the Sex Offender Program (SOP) (Heseltine, Sarre, et al., 2011). A more comprehensive description of each of these programs is provided in **Error! Reference source not found..** These programs are offered in both a prison and community environment to varying degrees. Other rehabilitation programs are also offered in prison and in the community, but they are not intensive and are not considered primary types of rehabilitative interventions. The four specific programs mentioned above can be highly intensive and are based on the ‘what works’ principles and require a high level of resources. The less substantial programs offered to offenders include psychological services, domestic violence programs, literacy and numeracy programs, employment programs and a range of other services and are subject to varying accessibility and resource allocation.

### **5.4.1 Drugs and Alcohol**

The positive relationship between substance use and/or abuse and criminal behaviour has long been recognised (Corrections Victoria, 2008a; Dowden & Brown, 2002). Drug and alcohol issues causing significant negative impacts within the community are also one of the most noteworthy issues in the criminal justice environment. In June 2007, ‘approximately 57% of sentenced prisoners in Victoria self-reported that their offences were either committed under the influence of drugs and/or alcohol, or committed to support a drug and/or alcohol habit’ (Corrections Victoria, 2008a, p. 6). This makes clear that drug and alcohol issues require addressing within the correctional system in an attempt to rehabilitate offenders. Furthermore, 48% of offenders being supervised by Community Correctional Services (CCS) in June 2007

were referred for alcohol or drug dependence treatment (Corrections Victoria, 2008a). For a more detailed outline of the design of drug and alcohol programs in Victoria, see **Error! Reference source not found.** In the following section consideration will be given to the relationship between the VISAT and access to drug and alcohol rehabilitation programs.

#### ***5.4.1.1 VISAT Module 4 - Substance Abuse and Offending***

Module 4, titled 'Drugs and alcohol', focuses on substance use and/or abuse. It is argued in the 'VISAT administration manual' that 'substance use predicts general criminality among most offender populations. It is associated with increased risk for general violence and it has been linked to risk for sexual violence' (Corrections Victoria, 2009c, p. 14). The aim of this module is to identify offenders who have difficulties with alcohol and drug use in terms of physical/psychological health and in relation to offending behaviour, thus enabling accurate assessments of their needs for 'risk reduction and harm reduction management and/or intervention' (Corrections Victoria, 2009c, p. 14). This module is to be administered if any indication of drug or alcohol use was present in the previous modules or if any other indication of substance use was identified.

Module 4 contains seven sub-sections, one of which is a table titled 'Use of drugs'. This table identifies seventeen commonly used drugs. The assessor is to question the offender in relation to each of these drugs and tick or make an alphabetical representation which corresponds with the interviewee's response. The table contains numerous prompts for the assessor to enquire further to attempt to elicit as much detail as possible.

This drug table is followed by three questions in relation to whether the offender has ever ceased using drugs for over a week, how difficult this was and what was their motivation for doing so (Corrections Victoria, 2008c, p. 18). Two of these three questions have predetermined answers in which the offender is asked to choose the best fit. Only the motivation question allows the offender to respond substantively. The implication of this ability to respond more liberally allows the offender to be honest and offer contextual and individual information, but how will this be interpreted into a standardised format? A score of 0-1 in relation to 'drug harm' is a

low needs finding, a score of 2-3 is a medium needs result and any result of 4 and above is a high needs finding.

The subsequent sub-section is titled 'Previous drug program involvement'. The assessor is prompted to ascertain whether the offender has ever taken part in a drug treatment program, if the program was completed and if not, why not (Corrections Victoria, 2008c, p. 18). A score of 0-2 in relation to 'drug treatment' is a low needs finding, a score of 3-6 is a medium needs result and any result of 7 and above is a high needs result. This section is followed by three calculation tables, the first titled 'Scoring of drug-related harm', the second titled 'Scoring of drug treatment needs' and the third titled 'Use of alcohol' (Corrections Victoria, 2008c, pp. 19-21). In each of these tables calculations are made in relation to needs for treatment or some form of intervention. Each table prompts the assessor to pose a range of questions which only allow preset answers that have a numeric representation. The assessor is also told what information should and should not be taken into consideration when allocating a score in relation to a particular question. The module and the calculation of level of needs in relation to specific aspects of drug or alcohol use are then considered in light of a person's result of general risk of reoffending. These findings will then determine whether further assessments and possible rehabilitative program participation is required.

#### ***5.4.1.2 Drug and Alcohol Program and Module 4 of the VISAT***

The relationship that exists between alcohol and drug dependence programs offered by Corrections Victoria and the corresponding module within the VISAT has material effects. The inclusion of drugs and alcohol as a module within the VISAT is not considered to be based on the needs of the offender in relation to personal benefit, but rather lowering the risk of recidivism as it is considered to be a common precursor to offending behaviour. Given that the 'what works' literature and discourse is based on a risk reduction approach, addressing drug and alcohol use through a harm minimisation framework is considered imperative.

This module can be considered as the first 'switch point' (see section 1.3) controlling access to alcohol and drug dependence rehabilitation programs. If alcohol and drug dependence is considered to be a factor in offending through the calculation attached to this module, this 'switch point' will be enabling and a further assessment will be

completed as explained in 4.9.1.1. If the calculation indicates that it is not a factor in offending, it is a disabling ‘switch point’.

Further to this, module 4 gathers high levels of detail and contextual information through the utilisation of free-text sections. However the calculation tables at the end of the module convert both the contextual information and other qualitative answers into numeric representations. Once this process of converting information into numeric representations is complete, the next step of standardisation and simplification occurs which is the calculation of the various numeric representations into one number.

The complete section is first filled in with high levels of information and then reduced to three total numbers for the calculation tables as outlined in the previous section. Now attention will be given to sex offenders, who require a risk assessment level but not the ‘general risk level’ ascertained through the completion of the VISAT; rather a risk assessment level specific to sexual offending.

#### **5.4.2 Sex Offenders**

The management and rehabilitation of sex offenders has been given significant attention in recent times given the important and detrimental effects such offences have on victims and the fabric of society, This was highlighted in greater detail in relation to public discourse in Chapter 4, above (Heseltine, Sarre, et al., 2011). The management of sex offenders in custody and also within a community setting is challenging. Sex offenders have a variety of possible issues and thus ‘numerous theoretical models have been proposed to explain sexual offending’ (Heseltine, Day, et al., 2011, p. 13). While there may be various theoretical frameworks being offered in relation to the many aspects of sexual offending, there seems to be agreement that ‘the behaviour is learned and, as such is amenable to change’ (Heseltine, Day, et al., 2011). Evidence has been presented that moderate to high risk offenders have been positively impacted upon by sex offender programs (see **Error! Reference source not found.**), thus reducing rates of recidivism (Olver, Wong, & Nicholaichuk, 2009).

A recent study conducted in Victoria reported a ‘lower sexual recidivism rate for Sex Offender Program completers (4%) than for non-completers (20%)’ (Owen et al., 2008). Sex offender treatment programs aim to provide insight into the cycle of offending, increase victim empathy, challenge cognitive misrepresentations, address

deviant arousal patterns, develop intimacy and relationship skills, enhance problem solving skills and design an individualised relapse prevention plan (Heseltine, Day, et al., 2011). These aims are pursued through behaviour and cognitive-behavioural strategies which are aligned with the ‘what works’ principles.

#### ***5.4.2.1 VISAT Module 3 - Sexual offending***

Module 3 enquires into sexual offending as risk factors. Sexual offending is considered to be a likely risk marker that ‘reflects the presence of sexual deviation and attitudes that support or condone sexual violence. It probably is associated with the likelihood, frequency and imminence of future sexual violence’ (Corrections Victoria, 2009c, p. 14). The sexual offending module is administered because a history of sexual offending was indicated in module 1 or there was an indication that ‘sexual connotations were described as a factor in the offender’s criminal behaviour’ (Corrections Victoria, 2009c, p. 14).

The primary aim of this module is to identify a sexual offender in order to assess their need for risk management through treatment, supervision or placement (Corrections Victoria, 2009c, p. 14). As the VISAT is a screening assessment tool for general risk of reoffending, further investigation in relation to risk factors may be required through the administration of a clinical assessment or further assessment tools (Corrections Victoria, 2009c, p. 14).

Under the first of four sub-sections, ‘Extent of sexual offending’ the assessor is directed to ask five questions with the responses being recorded in predominantly numeric or yes/no form. The assessor is referred to ‘section four of the Manual for definitions of violence, weapons, injury, sexual offences and Appendix A for counting rules’ (Corrections Victoria, 2008c, p. 9). The interviewee is asked questions such as how many times have you been found guilty of a sexual offence and how many times have you been in prison for a sexual offence (Corrections Victoria, 2008c, p. 9 & 13). Module 3 considers sexual elements to an offence pertinent: ‘Offences with a sexual element include abduction, stalking, or harassment of another person with whom the offender had or wished to have a sexual relationship, or stealing or taking something about which the offender had sexual feelings’ (Corrections Victoria, 2008c, p. 13). A further question is whether the person being assessed physically

injured anyone, requiring a yes/no answer and a subsequent space is provided to write the types of injuries sustained (Corrections Victoria, 2008c, p. 9 & 13).

The next sub-section in this module considers 'Acute risk factors' for sexual offending, thus considering the possible triggers of sexual offending for this person. Next the assessor is prompted to enquire into whether any of these offences had taken place while the interviewee was under the influence of drugs or alcohol. (Corrections Victoria, 2008c, p. 10 & 14) Four possible responses are presented with the assessor required to tick the correct response box. The final question under this sub-heading asks how the person felt at the time of committing these or this offence, the assessor is given prompts to possible responses: 'depressed, anxious, angry?' (Corrections Victoria, 2008c, p. 10 & 14). Then the assessor is required to ascertain how the person feels now. The following sub-section is titled 'Previous program involvement'.

This sub-section is employed to establish whether the person has previously attempted treatment, if it was completed and if not, why not. (Corrections Victoria, 2008c, p. 10 & 14). The assessor is directed to record details of programs including type of program, location(s) and date(s) started and finished (Corrections Victoria, 2008c, p. 10 & 14).

The final section in this module is the 'Scoring of sexual offending'. In this section a table is presented with three columns. The first column is the questions the assessor is to ask, the second is the score to be recorded in relation to feasible answers and the last is the score of this particular offender. In relation to the calculation of sexual offending there are eight questions to be answered, one of which is 'does this person's current offence(s) involve sexual motivation or prohibited sexual behaviour?' (Corrections Victoria, 2008c, p. 15) The last question is 'current mood state associated with sexual offending?' (Corrections Victoria, 2008c, p. 11 & 15) If the current mood is associated with past offending, a score of 1 is to be recorded, if not, 0 is to be recorded. The appropriate scoring table is to be completed by the assessor based on the answers rendered by the interviewee during the completion of the module. In this module the maximum score a person can receive is 11 and the minimum score is zero.



#### ***5.4.2.2 Sex Offender Program and Module 3 of the VISAT***

The connection between participation or further assessments in relation to the SOP and module 3 of the VISAT is significant. First of all it must be noted that any indication of a sexual element or an acknowledgement of the current mood being similar to that when offending took place will result in a scoring on the sex offender scoring table for this module. Not unlike the alcohol and drug module, contextual information and qualitative data is transformed into numeric representations on this calculation table which will be then further processed into one final number to represent the entire module. Even if a score of only one is recorded, the offender must be referred to a specialist clinician trained in sex offending and the completion of particular actuarial tool, known as STATIC -99. The VISAT still remains the first assessment tool to be utilised and the calculation of general risk of reoffending is still applicable to other facets of the imposed sanction such as supervision and access to other rehabilitative programs, but a further tool is used to calculate risk in relation to sexual reoffending. This illustrates that the information gathered through such a tool is not all that is collected and more information is collected in another repository, not unlike the situation in relation to criminal record information which is recorded in numerous repositories and various forms. Once again the completion of this module can either have an enabling or disabling impact in relation to accessing rehabilitation programs. Now the focus will move to two programs which do rely heavily on the risk classification according to the VISAT. The first to be considered is the Cognitive Skills Program.

#### **5.4.3 Cognitive Skills**

The Cognitive Skills program has developed and been implemented over the past two decades and has become a central feature in rehabilitative programs in Canada, UK, USA and Australia (Heseltine, Day, et al., 2011) . In 1985, Robert Ross and Elizabeth Fabiano (1985) first put forth the idea that offending behaviour may be associated with poor cognitive skills including issues with interpersonal problem solving, moral reasoning, cognitive style, self-control, victim awareness and perspective taking. This program aims to address cognitive issues by employing behaviour treatment methods to increase the likelihood of pro-social decision making, problem solving, moral reasoning and self-regulation skills (Heseltine, Day, et al., 2011, p. 23). While this particular type of therapeutic program has gained popularity there have been limited evaluations of its effectiveness carried out to date. It is argued however that

recidivism rates are lower amongst offenders that complete this program compared to those who do not (C. Hollin & Palmer, 2009). Furthermore, Cognitive Skills programs are also associated with having a short-term positive impact on institutional behaviour (Clarke, Simmonds, & Wydall, 2007). For more information on this program see **Error! Reference source not found.**

#### ***5.4.3.1 VISAT Module 9 - Attitudes and Beliefs***

The aim of this module is to ascertain whether the offender possesses ‘any attitudes or beliefs that may give rise to or support his/her offending’ (Corrections Victoria, 2008c, p. 41). The validity of this module is based on the conception that ‘the endorsement of criminal attitudes and beliefs is a significant indicator of future reoffending. According to some social-psychological theories, certain attitudes may influence the decisions made by individuals who are considering criminal behaviour, reducing the perceived likelihood or severity of harm to self and others’ (Corrections Victoria, 2009c, p. 16). The source of information for the completion of this module is solely in the domain of the assessor.

The assessor is instructed to respond to the subsequent eight questions based on ‘the person’s responses to the assessment’ (Corrections Victoria, 2008c, p. 41). The assessor is to make judgements on whether they believe that the person holds any of the eight beliefs or attitudes presented in this module. The responses must be yes/no or unknown (Corrections Victoria, 2008c, p. 41). If the assessor believes that an attitude or belief is present they must provide an example of its expression (Corrections Victoria, 2008c, p. 41). Some of the questions the assessor is required to respond to include ‘Does the person justify their offending or externalise responsibility; does the person minimise or deny the impact of their offending on victims and others’ (Corrections Victoria, 2008c, p. 41). Another example is ‘does this person show hostility to the assessor or general failure to co-operate with the assessment’ (Corrections Victoria, 2008c, p. 41). This module of the assessment is based on the perceptions of the assessor alone which differentiates it from previous modules.

#### ***5.4.3.2 Cognitive Skills Program and Module 9 of the VISAT***

The Cognitive Skills Program offered by Corrections Victoria and module 9 within the VISAT are irrefutably linked. This rehabilitative program is heavily based on the ‘what works’ literature and discourse. It could be argued that such a program would be beneficial to any offender wishing to participate, regardless of the type of offence

they have committed. However in accordance with ideas of risk management and key principles outlined in the ‘what works’ literature, this program is not available to a majority of offenders. The information collected through module 9 of the VISAT may be considered important in ascertaining an individual’s suitability and the level of benefit they may gain. However this information is not considered pertinent to whether an offender will be engaged in the program. Engagement in this program is not based on an offence specific assessment but rather solely on the calculation of general risk of reoffending. The priority in relation to the delivery of this program is the reduction of risk and as such only high-moderate risk offenders have the opportunity to progress to the next level of assessment.

Another program based on the ‘what works’ principles and is offered in Victoria is the Violence Intervention Program (VIP)(see **Error! Reference source not found.**). This program is also profoundly dependant of the calculated risk of reoffending in accordance with the VISAT.

#### **5.4.4 Violent Offenders**

Violent offenders are specifically targeted by rehabilitative efforts for the nature of their offending and the harm caused to the community (Lorion, 2000). In some Australian jurisdictions approximately 50% of prisoners are violent offenders and their rate of recidivism is high (Australian Bureau of Statistics, 2009b). According to research conducted in Canada and New Zealand, rates of violent reoffending in the same or in a similar fashion also is significantly high in those jurisdictions (Dowden, Blanchette, & Serin, 1999; Nadusu, 2009). Given these high rates, interventions which aim to reduce the risk of this category of reoffending are of paramount importance. Violent offenders often have emotional regulation issues in conjunction with a variety of other issues that contribute to their violent behaviour (Heseltine, Day, et al., 2011). According to contemporary research it appears that ‘the role of aggression-related cognitions appears to be important in not only understanding violence but also in its therapeutic management’ (Heseltine, Day, et al., 2011, p. 17). These efforts to rehabilitate or reform offenders are aimed specifically at offenders who present a high to moderate risk of reoffending. These programs are considered to be of significant value and are necessary given the fact that some research has indicated that ‘without rehabilitation, sanctions and incarceration alone may result in increased rates of reoffending’ (Chen & Shapiro, 2007; Heseltine, Sarre, et al., 2011).

In recent years the increased focus on high to moderate risk offenders can be attributed to possibly two distinct motivational models. The first considers the economic cost and quantifies targeted service outcomes. This approach of economic evaluations has emerged in many social science fields, including corrections (Corrections Victoria, 2009b). Corrections Victoria has implemented a cost-benefit approach to various aspects of their business, including prison resourcing, rehabilitation program resourcing coupled with targeted delivery, and community correctional service resourcing and service delivery (Corrections Victoria, 2009a). The considerations applicable to this approach are outlined in the *Corrections Regulations: Regulatory Impact Statement* (2009a), which also acknowledges that such an approach is complex and has limited utility within a correctional environment because 'it is not possible to quantify and assign monetary values to many of the costs and public benefits of viable options' (Corrections Victoria, 2009a, p. 13).

The motivation for targeting programs to moderate and high risk offenders is not only based on economic efficiency and a cost-benefit analysis. The second possible motive for focusing on moderate and high risk offenders, especially violent offenders can be attributed to political pressure, media attention and advocacy from victim representatives in relation to 'dangerous' offenders (Austin, 2006; Byrne, Byrne, Hillman, & Stanley, 2001; Heseltine, Day, et al., 2011, p. 18). These influences have resulted in high priority being given to intensive programs for violent offenders, within both a community and prison environment. This has occurred in most Australian jurisdictions, including Victoria. Now the focus will turn to module 2 of the VISAT which considers violence offending.

#### **5.4.4.1 VISAT Module 2 - Violence Offending**

Module 2, entitled 'Violence offending' enquires into violence offending as risk factors. Violence is considered a possible 'risk marker for the presence of personality disorder or antisocial attitudes' (Corrections Victoria, 2009c, p. 14). The violence offending module is administered because a history of violent offending was indicated in module 1 or there was an indication that violence was described as a factor in the offender's criminal behaviour (Corrections Victoria, 2009c, p. 14).

The primary aim of this module is to identify violent offenders in order to assess their need for risk management through treatment, supervision or placement (Corrections Victoria, 2009c, p. 14). As the VISAT is a screening assessment tool for general risk

of reoffending, further investigation in relation to this risk factor may be required through the administration of a clinical assessment or other assessment tools (Corrections Victoria, 2009c, p. 14). The assessment of violence is not isolated to actuarial measures but includes the intended level of violence the person was prepared to perform.

Under the first of four sub-sections 'Extent of violent offending' the assessor is directed to ask five questions with the responses being recorded in predominantly numeric or yes/no forms. The assessor is referred to 'section four of the Manual for definitions of violence, weapons, injury, and Appendix A for counting rules' (Corrections Victoria, 2008c, p. 9). The interviewee is asked questions such as 'how many times have you been found guilty of a violent offence?', and 'how many times have you been in prison for a violent offence?' (Corrections Victoria, 2008c, p. 9 & 13). This module also considers the threat of violence and weapon use. Another question in this module is whether the person being assessed physically injured anyone, requiring a yes/no answer. A space is provided after to write the types of injuries caused (Corrections Victoria, 2008c, p. 9 & 13).

The next sub-section in this module considers 'Acute risk factors' for violent offending, which are the possible triggers of violence offending for this person. Following this the assessor is prompted to enquire into whether any of these offences had taken place while the interviewee was under the influence of alcohol or drugs (Corrections Victoria, 2008c, p. 10 & 14). Four possible responses are presented with the assessor required to tick the correct response box. The final question under this sub-heading asks how the person felt at the time of committing the offence(s) and the assessor is given prompts to possible responses: 'depressed, anxious, angry?' (Corrections Victoria, 2008c, p. 10 & 14). The assessor is then required to ascertain how the person feels now.

The next sub-section is titled 'Previous program involvement'. This sub-section is employed to establish whether the person has previously attempted treatment, if it was completed and if not, why not (Corrections Victoria, 2008c, p. 10 & 14). The final section in this module is the 'Scoring of violent offending'. Here a table is presented with three columns. The first column contains the questions the assessor is to pose, the second is the score to be recorded in relation to answers given and the last is the

score of this particular offender. In relation to the violent offending calculation there are nine questions to be answered (Corrections Victoria, 2008c, p. 11). The first question, for example, asks, 'Does this person's current offence(s) involve actual violence to others or the threat of violence to others'? (Corrections Victoria, 2008c, p. 11) Feasible answers in relation to this question are 'no', resulting in zero points being allocated for this question, 'the threat of violence only', which is to be given a score of one point and 'actual violence', where a score of two points is ascribed (Corrections Victoria, 2008c, p. 11). The last question in this assessment table is 'current mood state associated with past violence offending?' (Corrections Victoria, 2008c, p. 11 & 15) If the current mood is associated with past offending a score of one is to be recorded, if not, zero is to be recorded. The maximum score possible for a person in module 2 'Violence offending' is fourteen and the minimum is zero.

#### ***5.4.4.2 Violence Intervention Program and Module 2 of the VISAT***

The Violence Intervention Program (VIP) (see **Error! Reference source not found.**) offered by Corrections Victoria and module 2 in the VISAT has been explored. Attention must be given to the meaning and material effects of the existence of this relationship. Module 2 of the VISAT is not unlike module 3 in relation to sexual offending as they both contain a reasonable amount of free-text space and also enquire into an offender's mental state at the time the offending behaviour took place. This enables high levels of contextual information to be recorded. This qualitative information is then processed into numeric representations to be calculated. Furthermore, mood state is recorded in relation to time of offending and compared to current mood. If they are found to be similar or if the offender continues to have contact with violent associates a calculated score of 1 or above is guaranteed. If an offender receives a score of 1 or above they are to be referred for further assessment by clinical experts in relation to participation in the Violence Intervention Program but this referral is mitigated if the offender is calculated as having a low-risk of reoffending.

Once again the determination of risk is either enabling or disabling for an offender in relation to accessing rehabilitative programs. As illustrated through this chapter rehabilitative discourse such as the 'what works' literature and the Australian guidelines for corrections have played a significant role in the development of correctional programs and risk assessment tools. They have material effects on

offender's access to rehabilitation, acting as 'switch points' in the offender's journey towards social reintegration. Now attention will be given to how the VISAT performs as a risk management tool through its perceived ability to calculate an offender's general risk of reoffending, as evident in modules 1 and 10. This is in accordance with the 'what works' risk principle.

## **5.5 VISAT and Risk of Reoffending Calculations**

### **5.5.1 Introduction**

In the following three sections consideration will be given to modules 1 and 10 of the VISAT. These are instrumental in calculating the risk of reoffending for a particular offender. As identified in the 'what works' literature, calculated risk plays a significant role in either including or excluding offenders from particular rehabilitative programs. It is also used in the development of supervision regimes within the community.

### **5.5.2 VISAT Module 1 - Classification of Offences and Criminal History**

The first module of the VISAT is entitled 'Current offence and criminal history'. The aim of this module is to gain information on the key features of the offence(s) the individual has been found guilty of in the current episode of offending. Past offences or the criminal history of the individual are also considered paramount to this module. It is intended that this module will render the nature and type of offence(s) committed by this particular person in the past and in the present episode appreciable. The assessor is encouraged on numerous occasions to prompt and probe the interviewee for actuarial information such as 'what offences were you found guilty of ... how many counts?' (Corrections Victoria, 2008c, p. 3). But further to this the assessor is directed to enquire into the perceptions of the offender in relation to the offence, the victim, the environment and even if there 'were any sexual thoughts or feelings associated with these offences' (Corrections Victoria, 2008c, p. 3).

The assessor is then directed under a further sub-heading, 'Planning and motivation (antecedents)', to prompt and probe the offender to explain his or her thoughts when committing the offence such as perceived outcomes, expectations, the length of time the offence was considered prior to its commission and the aim of committing the offence (Corrections Victoria, 2008c, pp. 3-4). For example, was the motivation to gain money and if so, for what purpose. Recommended answers specified to the assessor include drugs, alcohol, gambling and debts. Alternatively the intention may

have been to hurt or frighten someone (Corrections Victoria, 2008c, p. 4). Another possibility suggested to the assessor is ‘was the offender bored or looking for something exciting?’ (Corrections Victoria, 2008c, p. 4). The assessor is further prompted to inquire into whether ‘disinhibition’ was a factor in the offending through the influence of drugs, alcohol or peers, and if so, what level and role did they play (Corrections Victoria, 2008c, p. 4).

Under another sub-section the offender is asked to consider the impact of his or her offending on themselves and others. The offender is asked to explain ‘what happened as a result of the offence(s)?’ (Corrections Victoria, 2008c, p. 4). Prompts and probes incorporated for the assessor to use include questions in relation to the personal impact of living arrangements and the custody of any children (Corrections Victoria, 2008c, p. 4). Further to this the impact on the offender’s family is considered and finally ‘how does the offender think it affected the victim(s)?’ (Corrections Victoria, 2008c, p. 4) The assessor is then asked to validate the information gathered thus far by indicating what sources of information were available and checked in relation to current offence details other than the offender’s statements. The five options given to the assessor are ‘Police records, Prisoner indent [ prison records], Court records, Pre-sentence report and self-report’ (Corrections Victoria, 2008c, p. 4).

Subsequent to this is a sub-section entitled ‘Juvenile, adult and interstate criminal history’. This sub-section concentrates on offences that supplement the criminal history records already held by Corrections Victoria on this person. The assessor is directed to enquire into all possible instances in which a person may have been found guilty of an offence, thereby enabling a wider scope for the gathering of offence information. Crude numerically recorded information is then compiled which will form the basis for the static risk assessment in module 10. For example, ‘record age of first offence’, ‘number of times received Children’s Court orders’, ‘number of times sentenced to a Youth Training Centre’, ‘number of times the person has breached a Youth Parole or a Children’s Court Order’ (Corrections Victoria, 2008c, p. 5). This same line of questioning continues in relation to an adult correctional history and in relation to interstate or international offending (Corrections Victoria, 2008c, p. 6).

The module ends by providing the assessor with a lined section entitled ‘Module notes’. This is designed to encourage the assessor to include any relevant information



which was not addressed by a specific question in module 1 (Corrections Victoria, 2009c, p. 54).

### **5.5.3 VISAT Module 10 - General Risk of Reoffending**

Module 10, 'General risk of reoffending' is the statistical risk assessment completed by calculation software. The software estimates the probability that an offender will return to Corrections Victoria within a twelve month period (Corrections Victoria, 2009c, p. 93). The information which is required to make this assessment is primarily numeric or a singular alphabetical representation and data is obtained through the answers to the following questions from module 1: the offender's age, sex, number of parole breaches, number of Community Correctional Services (CCS) Order breaches, whether the person has been in the custody of a Youth Training Centre (YTC) and finally the number of sentenced prison terms served (Corrections Victoria, 2009c, p. 92). The risk calculator then returns a result of either high risk, medium risk or low risk of general reoffending. The expected distribution of risk results is low – 50% of assessments, medium – 40% of assessments and high – 10% of assessments (Corrections Victoria, 2009c, p. 114).

As no system of risk prediction is perfect, provisions allow for a calculated risk classification to be overridden by a senior officer. The reasons must be specified (Corrections Victoria, 2009c, p. 114). If the assessor believes that the general risk of reoffending calculated by the VISAT is inappropriate they may request that it is review by a superior and may indicate what risk level they believe should be ascribed. The indication of superior approval or otherwise is then inscribed (Corrections Victoria, 2008c, p. 43). This classification forms the basis for the management, supervision and intervention level that an offender will receive.

### **5.5.4 Impact of Risk Management Calculation**

According to the results of modules 1 and 10, the offender is rendered calculable and a risk level of reoffending is allocated. This risk assessment is based on static risk as outlined in the 'what works' risk principle and is deemed not amenable to intervention. So the information gained through module 1 is then uploaded into the calculation software in the following format:

- Age: 20
- Sex: M

- Number of parole breaches: 0
- Number of CCS order breaches: 1
- Person has been in custody of an YTC: N
- Number of sentenced prison terms served: 1

Result: High Risk

This illustrates how distant a risk classification is from the level of detail required through the administration of each of the VISAT modules. This result in which an offender has a 50% chance of being found to be low risk, 40% chance of being found to be moderate risk and 10% chance of being found to be of high risk also indicates the material disabling implication this would have for approximately 50% of the offender population for access to the Cognitive Skills Program, the Violence Intervention Program and the level of support received by corrections in relation to supervision and other rehabilitative interventions. While this risk assessment will not impede the offender's movement to further assessments in relation to accessing the drug and alcohol program or the sex offender program, it must be noted that moving forward does not guarantee acceptance into the program. High risk offenders will retain priority over low risk offenders, who are said to make up 50% of the offender population.

In the calculation of risk of reoffending through the VISAT, only static information is considered, as outlined above. This is one of the limitations of the VISAT compared to the Level of Service Inventory –Revised (or LSI-R) which considers dynamic risk factors that are amenable to change in the calculation of risk of re-offending, such as 'marital status, education level and completion of certain programs' (Austin, 2006, p. 62). Given that 'dynamic factors are generally the more powerful predictors, as they reflect the person's current social and economic environment', the VISAT may render more accurate results of risk of re-offending, by including such factors into the calculation (Austin, 2006). Research has shown that tools such as the VISAT, which rely solely on static risk factors can result in around 70 percent accuracy and 'bearing in mind that 50% accuracy would be the equivalent of tossing a coin, this suggests very high rates of both false positives and false negatives' (Smith, 2006, p. 102). Although the VISAT does not use dynamic risk information in its calculation of risk

of re-offending, such information is collected and considered in regards to assessing criminogenic needs.

The VISAT collects social, contextual and offence related information which can contribute further to this analysis.

## **5.6 Social, Contextual and Offence Related Information**

### **5.6.1 Introduction**

The VISAT is not only used to help identify an offender's risk of reoffending. It is also utilised to ascertain appropriate rehabilitative programs and interventions. The VISAT performs a further function: to construct an offender's identity. This entails offence related or offence specific information and also social information such as an offender's level of social integration, relationships, upbringing, physical and psychological health, education and employment history. In the following four sections, four particular modules in the VISAT will be presented to illustrate the different categories of information gathered by the VISAT. The collection of such high levels of social and contextual information throughout the VISAT is not applied to decisions in relation to risk assessments or rehabilitation programs. It is contended that such information is considered imperative to constructing a complete representation of the offender's identity; that social and contextual information are essential components of any assessment. The first module to be outlined is module 5 - Social Integration.

### **5.6.2 VISAT Module 5 - Social Integration**

This module, entitled 'Social integration', considers how an offender fares in relation to a range of social factors. The aim of this module is to assess 'how well this person is integrated into the community and whether referral to a specialised correctional transitional support program is required' (Corrections Victoria, 2009c, p. 15). This module consists of five sub-sections and a scoring table, as social information is also rendered calculable in the VISAT. It considers and evaluates such things as accommodation, income, social support and identity documentation. In relation to accommodation there is a set of questions for offenders in the community and another set for offenders in custody. Questions in relation to accommodation attempt to ascertain the level of stability this accommodation provides through establishing ownership or control of the property, the length of time the offender has resided there, the type of dwelling it is and where it is located (Corrections Victoria, 2008c, p. 23).

Questions to be asked of a person in custody focus primarily on past community based accommodation and where the offender plans to reside on release (Corrections Victoria, 2008c, p. 24).

The subsequent sub-section, entitled 'Income', attempts to establish an offender's primary source of income while in the community. In this section the assessor poses five options and the interviewee selects the most appropriate. The assessor is then prompted to ask the offender whether they 'experience financial problems because of spending on: alcohol, drugs, gambling, debts, or other', under the term 'other' the assessor is prompted to probe into whether financial difficulty is experienced as a result of health problems, housing, or child support' and inscribe it onto the form (Corrections Victoria, 2008c, p. 25).

Subsequently consideration turns to social support. The assessor enquires into whether the offender lives independently or requires support from family and/or friends to acquire clothes, food and/or money (Corrections Victoria, 2008c, p. 26). Once again three possible answers are provided and the offender is invited to choose the most appropriate answer. The assessor is also required to establish whether this offender is linked in with any 'social support agencies' and if so, details are taken about the agency and support rendered (Corrections Victoria, 2008c, p. 26).

The final sub-section prior to the scoring table is entitled 'Documentation'. In this section the offender is asked to declare what forms of identification he/she possesses. Six documents have been deemed paramount and inscribed for selection: current driver's licence, licence suspended/disqualified, bank account, credit card, Medicare card, birth certificate, Citizenship papers or passport (Corrections Victoria, 2008c, p. 26).

The scoring table of social integration entails six questions whose possible answers have corresponding numeric value. A score is allocated to the particular offender for each question giving a grand total ranging from zero to ten (Corrections Victoria, 2008c, p. 27). Zero indicates a high level of social integration and ten indicates a very low level.

### **5.6.3 VISAT Module 6 - Education and Employment**

Module 6 is entitled 'Education and employment'. It is acknowledged by Corrections Victoria that 'employment difficulties are associated with risk of criminality' and this module aims to 'determine the extent of this person's educational or vocational needs and what should be done to address these needs' (Corrections Victoria, 2009c, p. 15). This module attempts to ascertain whether the answer is to be found in education or vocational training or whether there are other structural issues that need to be addressed. There are three sub-sections within this module that the assessor must administer prior to completing the calculation table. The first sub-section considers the basic skills and education level of an interviewee. Once again the majority of the answers available are predetermined and the two that require a written answer are in relation to highest year level completed and whether the person has any trade qualification. These qualifications must be recorded (Corrections Victoria, 2008c, p. 29). The next sub-section focuses on an offender's employment history.

The assessor enquires into whether the interviewee is employed or whether they were employed prior to being arrested, if so what type of employment where they engaged in (Corrections Victoria, 2008c, p. 30). If a person responds in the negative the assessor is prompted to query the interviewee in relation to what they were doing in place of employment. Recommended answers include a 'student, receiving benefits or a pension, engaged in home duties or a full time carer' (Corrections Victoria, 2008c, p. 30). Once again the interviewee chooses the most appropriate response, or specifies a different answer (Corrections Victoria, 2008c, p. 30).

The final two questions in this section are of particular interest as they relate to an interviewee's ability to maintain employment and the impact of their criminality on their ability to be employed. The first question is 'Have you ever been sacked from a job or left because of a dispute with your employer?' (Corrections Victoria, 2008c, p. 30). If yes, the assessor is to probe the interviewee to the circumstances of the retrenchment. The second question is 'Was the offence for which you were arrested connected in any way with your work?' (Corrections Victoria, 2008c, p. 30). If yes, the assessor must enquire into the connection.

The final sub-section is the 'Scoring of education and employment'. The calculation table consists of five questions with possible answers being allocated a numeric value.

Some of the questions posed are ‘How well educated is this person? Is this person employed now/when arrested?’ (Corrections Victoria, 2008c, p. 32) Also, ‘does this person experience other barriers to work or education?’ (Corrections Victoria, 2008c, p. 32) The scores obtained from each question are added together providing an assessed level of need. The higher the numeric value, the higher the assessed need. This building of the offender’s identity continues in module 7 and is considered in the following section.

#### **5.6.4 VISAT Module 7 - Family and Other Relationships**

Module 7, entitled ‘Family and other relationships’ aims to assess the ‘nature and extent of support the person receives from his or her family and friends, and the nature and extent of relationships that support offending’ (Corrections Victoria, 2009c, p. 14). This module assists in establishing whether the interviewee receives pro-social or anti-social modelling. This is considered important by Corrections Victoria as it is believed that ‘the relationship between family and other relationships is significant in risk research. As a risk factor it is often referred to as Criminal Peers or Criminal Associates’ (Corrections Victoria, 2009c, p. 14).

This module is divided into three sub-sections, the first looks at who the interviewee has most contact with, the relationships that exist with immediate family and how family and friends assist in diverting the offender from crime (Corrections Victoria, 2008c, p. 34). The second sub-section considers how many members of the interviewee’s immediate family and/or friends have a criminal record or engage in offending and how this encourages the person to offend (Corrections Victoria, 2008c, pp. 34-35). Throughout the two previously discussed sub-sections a combination of best fit and free form answers are ascribed, but as with the previous modules prompts and probes are relied upon throughout.

The final sub-section is the calculation table. It consists of three questions. The first looks at the level of contact the person has with family and/or friends. High levels of contact are considered favourable for this question, resulting in a score of zero (Corrections Victoria, 2008c, p. 36). The second question considers the level of pro-social support the interviewee enjoys and the final question enquires into the level of anti-social influences in the person’s life (Corrections Victoria, 2008c, p. 23). The

addition of the numeric values deduced from each question provides the calculated level of need in relation to family and friends and their pro-social support.

In the following module an offender's level of physical or mental impairment is investigated. This is imperative on two fronts. First, impairment is a key feature in the construction of an offender's identity in a holistic manner. Second, it makes clear what can be expected of that offender in relation to the physical commitments of employment, community work or prison duties.

#### **5.6.5 VISAT Module 8 - Physical and Mental Impairment**

Module 8 of the VISAT, entitled 'Physical and mental impairment' is targeted towards 'determining whether the individual could function adequately in risk reduction programs, the level of supportive services needed (e.g., mental health counselling, psychiatric consultation) and the need for more thorough physical and mental health assessment by a doctor, psychiatrist or psychologist' (Corrections Victoria, 2009c, pp. 15-16). The validity for this module is based on epidemiological research in several countries which indicates that major mental illnesses, those that seriously impair cognition and affect, are associated with an increased risk for offending and violence (Corrections Victoria, 2009c, pp. 15-16). The module comprises five sub-sections.

The first sub-section requires yes/no answers in relation to intellectual disability. The second sub-section is primarily comprised of questions requiring yes/no answers in relation to mental health with prompts to provide details in relation to two questions about the offender's perceived mental health issues and whether the interviewee is currently engaged in treatment. (Corrections Victoria, 2008c, p. 37). The third sub-section enquires into the existence of acquired brain injury, requiring yes/no answers. The next sub-section considers an offender's physical capacity, also requiring yes/no answers as well as written details in relation to positive responses.

Finally, there is the assessment component entitled 'Assessment of physical and mental impairment'. This assessment has four questions, three requiring a yes/no or not applicable answer only. The final question asks the assessor to inscribe their general perceptions in relation to the interviewee and whether they require further assessment in relation to this module. This assessment module has no scoring system

because where an impairment is recorded the supervising officer will refer the matter on to another office (Corrections Victoria, 2008c, p. 39).

### **5.6.6 VISAT Modules and Information Management**

These four particular modules within the VISAT are primarily concerned with recording social, contextual or personal information. This investigation will focus on why these modules are included and what their function is in the VISAT. The fact that such modules exist demonstrates the value of recording such categories of information and how relevant they are to understanding an offender as a person. Furthermore it allows for contextual information which may be pertinent to issues surrounding offending behaviour such as a lack of community engagement to be identified and recorded. These high levels of contextual information are also apparent in the Victorian criminal record but both these representations of a person's identity undergo processes in an endeavour to make them more manageable. These processes can limit the value of the information they present. In the following section we will look at this process in relation to the VISAT.

## **5.7 VISAT Standardising and Summarising of information**

### **5.7.1 Introduction**

The preceding sections have established how the VISAT records high levels of detailed qualitative information and how it is converted into numeric representations. In modules 2 and 3, these are then calculated into a single numeric representation. The following sections of this chapter will analyse how information is compressed and reduced into the simplest bare bones representative forms.

### **5.7.2 VISAT Module 11 - Criminogenic and Offence-related Risk and Needs**

The final module in this assessment is module 11 – criminogenic and offence-related risks and needs. 'This module summarises previous modules that assessed criminogenic variables associated with the offender's current and past offending. These variables constitute priority areas for risk management' (Corrections Victoria, 2009c, pp. 16-17). The module consists of two tables, the first focuses on offence-specific factors identifying nine risk factors that require a yes/no or unknown response. Some of the risk factors considered are criminal associates, drugs and/or alcohol, mental disorder, mood states, financial pressures, social or family pressures, pro-criminal or anti-social attitudes and inability or unwillingness to think about the consequences of his or her actions (Corrections Victoria, 2008c, p. 44). The final



column prompts the question ‘how does this influence this person’s offending’? (Corrections Victoria, 2008c, p. 44) A short response can then be inscribed in relation to the appropriate risk factor. These factors are considered paramount to decisions on risk management and treatment targets (Corrections Victoria, 2008c, p. 44).

The second table follows the same structure but the focus is on possible offence-related factors and offenders’ social needs. Some of the offender needs considered are socially isolated or dependent on others, inadequate or unstable income, unstable accommodation or homelessness, illiterate or language difficulties, lack of identity documentation, inadequate education, lack of job skills or work experience, lack of pro-social family or associates and physical or mental barriers to undertaking rehabilitation programs (Corrections Victoria, 2008c, p. 45). These offence-related risks and needs require addressing if the person’s likelihood of reoffending is to be reduced in the medium to long term; these risks and needs are to be targeted through support and assistance (Corrections Victoria, 2008c, pp. 44-45).

This module is primarily concerned with offence-specific factors but offence-related facts are considered only to the extent that they influence offending behaviour. The enquiries into such needs and factors are not pursued as a result of concern for the individual offender but rather concern in relation to managing the risk the particular offender is seen as presenting.

### **5.7.3 Summary of VISAT assessment**

The back-cover of the VISAT contains a summary of assessment. ‘The VISAT summary of assessment provides space to record and score the offender’s responses to interview items. The form summaries the conversion of raw scores to scaled scores that represent need levels as defined by Corrections Victoria for each risk and need domain measured by the VISAT’ (Corrections Victoria, 2009c, p. 17). The summary indicates the general risk of reoffending, whether a risk category override was sought and where approved, what this new level of risk was (Corrections Victoria, 2008c, p. 47).

It indicates whether the person is a violent offender based on the assessment in module 2, under which is stated that ‘for VISAT-Long administrators, if score is 1 or more, the offender must be referred to the Violence Intervention Program’ (Corrections Victoria, 2008c, p. 47).

The summary also indicates whether the offender is a sexual offender based on the score attained in module 3, under which it states that ‘for VISAT-Long administrators, if score is 1 or more, offender must be referred to the Sex Offender Program’ (Corrections Victoria, 2008c, p. 47).

The remainder of the page is a bar graph indicating the scores attained in modules 4, 5, 6 and 7. If a score from any of the calculated modules falls beneath the first black solid line they are deemed to be low level needs. If the score is above the first solid black line but beneath the second one, they have been assessed as of medium level need. If the score is above the second black solid line, the offender has high need level in relation to that module. In completing the graph the assessor is required to highlight up to the attained score for each assessment module outcome. In effect the summary represents an offender as a compilation of factors and risk. Now that the process of constructing and deconstructing the offender is complete, consideration is given to the way in which this tool impacts on offenders.

#### **5.7.4 The VISAT does not only calculate risk, it has material effects**

The summary of the VISAT states an offender’s general risk of re-offending that is based on static risk factors such as age and gender, and does not take into account the results of rehabilitation efforts as it is not considered relevant to the risk assessment calculation module, as outlined in sections 5.5.3 and 5.5.4. This assessment outcome is thus unchanged regardless of the stage within the criminal justice process at which the risk assessment is completed. Whether the assessment is completed at the court assessment stage, during community supervision, whilst incarcerated or when an application for parole is made, the statically based risk assessment would render the same results (Brown et al., 2009; Byrne et al., 2001; Ward & Brown, 2004). As such these assessments are similar to criminal records in that they rely solely on static factors. This chapter has demonstrated that the VISAT is a lengthy, in-depth document. However, significant contextual information presented in the modules is not considered in the calculation of general risk of re-offending nor is it represented on the summary page.

The summary at the end of the VISAT does not reflect the information presented in each module. For example, a person may be classified as a violent offender, thereby requiring a clinical referral to participate in the Violence Intervention Program as a result of having scored one in that particular module. However the fact that the

offender was found guilty of aggravated burglary 15 years ago and was only in the possession of an imitation firearm would not be represented. The contextual information which may be present in module 2 will not be present in the summary. Therefore the culling of contextual information results in an incomplete and distorted representation of that particular offender. All that is contained in the summary is that the subject must be referred to the Violence Intervention Program; it is reasonable to infer that this person has demonstrated violent behaviour.

Essentially the summary page of the VISAT attempts to render high levels of qualitative information into a single word, a numeric representation or a single column on a graph. As stated earlier, reducing 44 pages of pure information to a single page summary represents significant culling that drastically reduces the level of information presented to a Corrections Officer to allow for a complete picture to be formed and informed judgements to be made in relation to an offender's needs and background (Ward & Brown, 2004). This is also true in relation to criminal records, as no background information is provided about a person's criminal behaviour. This contention is supported by a study conducted by the Victorian Sentencing Advisory Council (Gelb, 2006 and 2008). The study found that:

research on public opinion on crime and justice has reached a number of consistent conclusions: In the abstract, the public thinks sentences are too lenient; in the abstract, people tend to think about violent and repeat offenders when reporting that sentencing is too lenient; and people have very little accurate knowledge of crime and the criminal justice system (Gelb, 2006 and 2008, p. 3).

Whilst people are more punitive in terms of their attitude when they do not have the material to arrive at a more complete picture of an offender's profile, research indicates that 'when people are given more information, their levels of punitiveness drop dramatically' (Gelb, 2006 and 2008, p. 4). This study suggests that increased levels of information, including contextual information allows for and facilitates less punitive judgements and more holistic assessments.

The VISAT as discussed in section 5.5.4, only uses static data to calculate the risk classification of an offender. The high level of contextual, social and dynamic risk factor information that is collected through the completion of the VISAT is not used

to calculate the risk level, but rather to identify criminogenic needs that require addressing. As proposed in section 5.5.4, the inclusion of information in relation to an offender's social reality and dynamic risk factors, such as marital status, employment status and level of education into the VISAT risk calculation software would render more accurate results (Austin, 2006; Smith, 2006).

The analysis of the VISAT has enabled the identification of key themes which have significant implications for understanding the development, utilisation and processes associated with this risk assessment tool. These themes are not only applicable to the VISAT but are identified throughout the analysis of other data presented in this thesis. Therefore the management of information in the VISAT is of significant consequence.

## **5.8 Key themes identified through the analysis of the VISAT**

### **5.8.1 Information Management**

The way information is managed once gathered through the VISAT is of great importance. As evident throughout the above description and analysis of the VISAT, information is gathered in a predetermined format that aims to accrue as much detail as possible. The process is one that illustrates the building of an identity from one module to the next. Each module is considered to be an element or risk factor specific to an offender and is inscribed in detail. Once inscribed, the process of weighing the information commences through various calculation tables. These calculation tables are designed to transform the detailed information provided by the offender or other sources into a numeric representation. This numeric representation is attained through the application of predetermined values assigned to various responses. This is evident in the above section 5.4.2.1 amongst others. It is the calculation of these various numeric representations that render a risk factor or module of concern or otherwise.

A further predetermined numeric representation will inform the assessor whether this particular factor is a high risk, need or otherwise. The final numeric value of each module or risk factor is then recorded as a representation of the information reported throughout the entire module. It is clear through the above analysis that each module has various sections with a variety of questions and forms of responses including free text descriptions. It is highly unlikely that the VISAT has the capacity through its calculation tables and the final numeric representation to account accurately and precisely for all the information reported and recorded in each module. It is thus

proposed that this process of rendering detailed qualitative information quantitatively calculable is not effective in accurately representing an offender in relation to any particular area of investigation. The requirement for final numeric representations for each calculable module is a result of actuarial risk assessments being common practice throughout correctional systems. The execution of the VISAT has the ability to simplify, standardise and render calculable a human life. This is evident in the 'summary of assessment' at the end of the VISAT, outlined in section 5.7.3. This type of information actively eliminates contextual information, anomalies associated with individuals' experience and any details that cannot be represented numerically. This form of information management is undertaken so that an offender can be calculable for risk management purposes.

### **5.8.2 Risk Management**

The primary objective of the VISAT is to gather as much detail as possible through its various modules that is then compressed and processed into numeric representations for the purpose of risk management. The moulding of an offender's identity is the process by which an offender becomes calculable for risk management purposes. Once qualitative information is transformed into numeric representations for each risk factor, these representations are plotted on to an appropriate graph or table for future reference. Module 10 of the VISAT as outlined in section 5.5 of this chapter illustrates how static information which has been recorded throughout module 1 is inputted into a calculation tool to ascertain a risk level of reoffending.

This risk level is one of the foundational elements in determining the access to rehabilitation programs that an offender will be offered, the level of supervision the offender will experience and also the level of support the offender will receive. The management of risk presented by an offender is the primary concern of Corrections Victoria. It is thus contended that the determined risk level can have either enabling or disabling material effects on an offender's ability to access rehabilitation programs and assistance with efforts to cease offending behaviour. The ideology which is fundamental to the utilisation of such actuarial risk assessment tools and the aim of corrections to manage the risk presented by a particular offender is motivated by the current and prominent discourse in relation to rehabilitation and reintegration.

### **5.8.3 Rehabilitation and reintegration discourse**

Risk management is a key element in rehabilitation and reintegration discourse. The VISAT and correctional practices in relation to rehabilitation programs and interventions geared towards reintegration are strongly influenced by such discourse. This is clearly evident through the filtering through of international 'what works' literature and discourse to the Australian context, where it has significant elements of risk management as outlined in 5.2.5. In turn, this discourse has shaped the practices of Corrections Victoria as outlined in section 5.2.6. The utilisation of actuarial risk assessment tools such as the VISAT and the practices associated with rehabilitation programs can be considered a direct response to the discourse which has occurred about and within corrections. While the VISAT and the rehabilitation programs implemented by Corrections Victoria can be considered as the outcome, the discourse associated with rehabilitation and reintegration can be seen to have framed and encouraged these outcomes.

## **5.9 Conclusion**

The presentation of information in this chapter and the subsequent analysis has established that international and national literature and discourse, especially in relation to 'what works' encourages specific material effects. The effects are the implementation of an actuarial risk assessment tool, targeted rehabilitation programs based on risk assessments and the managerial practices of Corrections Victoria. This analysis has also illustrated how information is gathered, processed, transformed and simplified through the utilisation of the VISAT. This transformation of detailed qualitative information into numeric representations shows how through the process of information management crucial contextual information can be displaced and rendered insignificant. Furthermore this chapter has shown how risk assessment tools can have enabling or disabling implications for offenders in relation to rehabilitation programs and interventions. This marks the end of the analysis of the 'offender' stage within the offending cycle for this investigation. The research will now move onto the next stage of the offending cycle which is 'offender to ex-offender'.

The realm of corrections is not unlike the social realm in relation to the way rehabilitation and reintegration discourse has material implications. Parallels can be drawn in relation to how information is collected, managed and transformed within both corrections and society. It can also be argued that summary information is used

in the social realm as it is in the correctional environment to make risk assessments which can have enabling or disabling material effects. It is these parallels which will be addressed in the following chapter through the analysis of the Victorian criminal record.

## Chapter 6 The Criminal Record

### *National Police Certificate a case of bare bones*

*Jim was found guilty eight years ago after being picked up by the police for urinating in a public place. This was described as 'Behave in Offensive Manner Public Place'. When the matter was heard 'no conviction' was recorded and Jim was fined \$150.*

*Jim is now an older man and applied to volunteer at a charity in his local area. When his criminal record check was completed, his application was rejected. Jim suspected he was being viewed as a 'flasher' as a consequence of his record, though no one had discussed this with him.*

*Jim has no other criminal priors.*

*On Jim's behalf we applied for police records relating to his offence so that the true nature of the offending could be made clear from the outset the next time he applied for a position doing charity work.*

*Later Jim discussed this issue with one of the coordinators at another charity where he had been volunteering for a lengthy period of time. The coordinator there agreed that had she not known Jim and seen the further information, she would indeed have assumed he was a 'flasher' and would not have given him permission to volunteer with their organisation (Fitzroy Legal Service Inc, 2011b).*

### **6.1 Introduction**

The Victorian criminal record is used as a risk assessment tool in relation to employment just as the VISAT is used within corrections for managing and governing offenders. This chapter presents support for the argument that the Victorian criminal record, like the VISAT, actively governs the field of action of others (Dreyfus & Rabinow, 1983). It investigates how the criminal record has come to be used in this way. In this chapter data will be presented and analysed that demonstrates how developments to the criminal record have facilitated its use as a risk assessment tool aimed at governing ex-offenders in relation to employment. These data will be analysed employing a genealogical approach (Burchell et al., 1991; Dean, 1999; Foucault, 1977b).

### **6.2 A Foucauldian approach to the analysis of the Victorian criminal record**

In this chapter the Victorian criminal record will be analysed using two particular Foucauldian approaches. The first approach and method of analysis will be in relation to the development of the Victorian criminal record. The history of the Victorian criminal record will be analysed using what Foucault termed a 'genealogical'



approach. This approach is one which embraces and operates ‘on a field of entangled and confused parchments, on documents that have been scratched over and recopied many times’ (Foucault, 1977b, p. 139). The focus of this approach is not on the construction of a lineal history or a search for origins. This approach is one that acknowledges the entangled nature of history with various actors, objects and aims intersecting and impacting on the construction of the past and the object’s existence in the present. Genealogy depends on the accumulation of source material which is analysed with a sensitivity to discreet and apparently insignificant truths (Foucault, 1977a, 1977b).

This methodology will be applied in regards to ‘subjects becoming objects of knowledge and of domination: asylums, prisons, and so on...’ (Foucault, 1993, p. 203; Kendall & Wickham, 1999). This understanding of power and governance through knowledge of the subject is in line with the second Foucauldian framework to be utilised, namely governmentality, as outlined in section 2.2. This framework will be used to investigate how the Victorian criminal record has developed into a tool which has various parallels with the VISAT and like the VISAT actively governs the possible field of action of others, in this case ex-offenders who are seeking employment (Dreyfus & Rabinow, 1983; Rabinow, 1997).

### **6.2.1 Why the genealogical approach**

A genealogical approach has been adopted to analyse the various representations of the criminal record for three reasons. First, the criminal record representations to be analysed are a rich selection of documents that are akin to a genealogical investigation. The criminal record representations to be analysed are entangled, co-exist and embody various changes. As articulated by Foucault they are ‘documents that have been scratched over and recopied many times’ (Foucault, 1977b, p. 139). The various documents discussed here such as Dockets, Central Records Cards, Results of Charge and Antecedent Reports and Intelligence Cards are not being analysed for the way each has developed from the other over time; instead each is being analysed in its own right. The focus of the analysis is to explore the changes and developments of each individual representation for what it reveals about the function of the criminal record and how each representation is situated in an ever-increasing web of knowledge on the subject.

Second, a genealogical approach enables the analysis of these rich sources of information in relation to the discrete changes to each representation that have occurred. These changes and developments may not be considered significant to an analysis focused on the origins and lineal development of the criminal record in Victoria, but are important to a genealogical investigation concerned with exploring the development of the purpose and functioning of the introduction and changes to these inscriptions. These alternations to various depictions of the criminal record are relevant to the construction of the truth they create (Foucault, 1977a, 1977b).

Third, a genealogical approach will be applied to the data gathered to explore how subjects such as offenders become objects of knowledge via the criminal record (Foucault, 1993). It is this gathering of extensive levels of information through various criminal record representations which render offenders knowable. It is knowledge that allows offenders to be governed and managed through the criminal justice system with tools like the criminal record and the VISAT. The problem lies not in the way these tools are used in managing offenders within the criminal justice system but rather how the criminal record is used by society to exclude ex-offenders from gainful employment. It is thus proposed that the criminal record is used by employers as a risk assessment tool in a similar way to how the VISAT is used within corrections to manage and govern the possible field of action of others (Dreyfus & Rabinow, 1983).

This chapter will analyse the various documents and information collected by Victoria Police that establish a subject's criminal record and identity. These documents will be analysed using a genealogical approach as outlined above to illuminate the development of the criminal record over time. These specific forms and inscriptions represent the mundane but significant role various police records have had in the construction of the present criminal record. On initial inspection these documents may seem of little or no consequence. However these 'discreet and apparently insignificant truths' reveal the aims and the intersection of various ambitions which create conditions for the accumulation of knowledge and power (Foucault 1972).

The findings and analysis presented in this chapter illustrate how the criminal record has developed within the Victorian jurisdiction. Furthermore the findings offered demonstrate how different types of criminal records have evolved in relation to the types of information considered significant and which are thus embedded in criminal

record inscriptions. The investigation of such developments in the criminal record facilitates a greater understanding of the record in content and form. However, these findings also aim to make clear that Victoria Police have for decades acknowledged the necessity of social and contextual information that is not afforded to employers through the request for a National Police Certificate. It is because employers are now obtaining National Police Certificates for prospective employees that the implications of the limited form of such certificates needs questioning. The following findings and analyses aim to show how the current practices in relation to the content and use of such certificates by employers in society requires revision. While a National Police Certificate may be regarded as a risk management tool that is taken into account by an employer, what the Certificate fails to reveal must also be taken into account. The role of employers and broader society is important not only in the management of risk but it is also critical to the successful reintegration of ex-offenders through being afforded gainful employment.

Before the main analysis is presented, the following section will illustrate the parallels that can be drawn between the VISAT and the criminal record as risk assessment tools used to govern the possible field of action of others. These parallels will be discussed to illustrate how both the VISAT and the criminal record as risk assessment tools govern offenders and ex-offenders respectively. It is this governance of ex-offenders in society via a criminal record that requires enquiry, however, its form and function is akin to that which occurs within Corrections Victoria through the use of the VISAT. These risk assessment tools require investigation for the impact and material effects they have on offenders and ex-offenders.

### **6.3 Parallels between the VISAT and the criminal record for employment**

There are three parallels which can be drawn between the VISAT and the Victorian criminal record. They make clear how the criminal record functions as a risk assessment tool to the same ends as the VISAT, which is to govern a population and its possible actions.

The first parallel to be drawn is that each segment of a subject's criminal record covered in this chapter, the Docket, Central Records Cards, the Results of Charge and Antecedent Report, Intelligence Cards and the Law Enforcement Assistance Program (LEAP) can be likened to the various modules in the VISAT. The abovementioned

segments of a subject's criminal record represent the various types of information that together construct an offender's identity. These segments together form the complete Victorian criminal record in the same way compilation of modules constitutes the VISAT. Both these compilations of information come to represent an offender in a particular way.

The second parallel to be drawn is in relation to the way that information is managed. The information collected in the VISAT and the information contained in the criminal record as held by Victoria Police are both processed and compressed. The VISAT is standardised and simplified into a single page summary of information which is presented as a complete, simple and manageable representation of the facts. This standardisation and compression of information is also apparent in the Victorian criminal record through the construction of the National Police Certificate. As we will see in this chapter the National Police Certificate is the summarised and standardised format that is used to represent a subject's criminal record in Victoria and is available to the public for various purposes. This availability to the public is relevant to the third parallel.

Corrections Victoria uses the VISAT as a tool to assess on the basis of their belief that it is an accurate risk assessment tool in relation to the probability of future offending behaviour. The use of this tool by corrections is similar to the utilisation of the National Police Certificate as a form of risk assessment by social organisations, institutions and prospective employers. If an individual applicant has no criminal record they could be perceived as more trustworthy than a candidate with a criminal record, which may influence the hiring outcome (Backman, 2011; Hotzer et al., 2004). It is therefore proposed that for a person with a criminal record to be given the best opportunity to become gainfully employed, further enquiries need to be undertaken and contextual information must be made available to employers. The situation of Jim's case, as outlined above, where further enquiry resulted in the initial risk assessment being revised, leading to a positive outcome for an ex-offender, is unfortunately the exception rather than the rule (Hotzer et al., 2004).

As illustrated through other case studies in this thesis and the research conducted by Pager, employers do not typically pursue explanations from a person with a criminal record (Hotzer et al., 2004; Pager & Quillian, 2005; Pager & Western, 2005). Pager's research found that in 50% of white male cases and 87% of African American cases

applicants with a criminal history did not receive a call back once the existence of such a history was known to the employer (Pager & Western, 2005). It is therefore apparent that the existence of a criminal record does impact on the employment opportunities of a person.

As argued throughout this thesis the risk assessment undertaken by an employer hinges on the limited information presented in a National Police Certificate. In the following section findings will be presented that show how limited the criminal history information presented to employers really is in comparison to the large amounts of social and contextual information considered important to providing a full understanding of an offender and their offending behaviour.

#### **6.4 Introduction to the Victorian criminal record**

The Victorian criminal record in an organised form came into existence in 1932 through the introduction of the Docket, which was held by the Melbourne Central Information Bureau. This introduction marked the beginning of criminal records that functioned as a dossier of an offender held by Victoria Police for law enforcement purposes.

The criminal record is not a single document. Select sections or types of information are routinely offered as a criminal record but to truly appreciate the depth, detail and array of information that makes up a criminal record, a variety of texts require analysis in concert. In this chapter a set of sample inscriptions will be offered to demonstrate the fullness of a criminal record. These detailed texts are then compared to the National Police Certificate used by employers to assess job applicants and workers. The documents that will be analysed demonstrate the lack of information and the problematic sketch a National Police Certificate provides as a true representation of a criminal record. These documents are not offered to show a clear and unproblematic chronology of the criminal record in Victoria to the present day, but rather its depths and segmentation.

What this investigation makes clear is that in practice the criminal record as a written history detailing a person's past convictions is ill-defined, or rather variously defined and mutable (Latour, 1986, p. 3). Thus, it is clear that the criminal record held by Victoria Police does not have one fixed and unproblematic format which in all instances contains the same types of information. These characteristics of multiplicity,

distribution and variation in relation to the Victorian criminal record sit oddly against the definitive work it is asked to do in constituting the ex-offender. The National Police Certificate, in acting as a ‘check’ in relation to applications for employment and in other contexts, does so without the acknowledgement of the limitations of this one particular representation of the criminal record. The National Police Certificate serves as a definitive standard and immutable ‘fact’ of the identity of the ex-offender. However this research identifies the mutable, variously defined and segmented nature of the Victorian criminal record and this contradicts the defining work it performs in constructing an ex-offender’s identity and assessing the risk they pose to an employer. This contradiction is an important focal point of this thesis.

Furthermore, it is worth noting that the ‘written history’ that constitutes the criminal record in its various permutations and combinations cannot simply be explained as something determined by an ex-offender’s biography—‘the person’s past’. That past is shaped by the jurisdiction-specific coalescence of legislation, policies, guidelines and their translation into institutional procedures which together provide the scope for inclusion or exclusion of information (Victoria Police, 2011f). The history of their coalescence is, in this sense, an important part of the history of the inscription that is the criminal record. This means that there is no single, complete or pure criminal record, but rather that a criminal record is determined by context and conditions and as such continually undergoes alteration. This reality is not apparent in the final printout known as a National Police Certificate, which is presented as a clear, unproblematic account of the truth. In other words the various conditions, repositories, variations and segments of the criminal record held by Victoria Police and the assorted processes the criminal record is subjected to in the course of constructing an offender’s identity is invisible on a National Police Certificate. An important part of my research involves an attempt to recover those contingent relationships that constitute the criminal record but which remain largely invisible to its various users, such as employers.

## **6.5 Introduction to the specific criminal record representations to be analysed**

The Victorian criminal record is a combination and compilation of various inscriptions held in a number of repositories with different types and levels of information. With this in mind, data on specific representations of the criminal record

will be presented and analysed to demonstrate the discreet changes that have had significant impacts on the scope, depth and utility of the Victorian criminal record and how these developments are not reflected on a National Police Certificate. The inscriptions to be analysed are Dockets, Central Records Cards, Results of Charge and Antecedent Report and Intelligence Cards. The first representation of the criminal record to be explored is Dockets.

### **6.5.1 Dockets**

The introduction of the 'Docket' in Victoria in 1932 was the first form of a criminal dossier that was formally established. Dockets are files in which various documents are stored on an individual's contact with police as a result of criminal activity or crime related enquires. The system of Dockets commenced when the Information Bureau was established as Victoria Police's central information processing and storage area. When this system came into operation it was mandated that every person charged with a criminal offence in Victoria became the subject of a Docket and any subsequent documented information regarding that individual was filed in it (Victoria Public Records Office, 2009a).

Dockets generally included the following documentation:

- 'Minutes Sheet'

This records all instances where a person is arrested or summoned regarding a criminal matter. Information such as date of arrest/summons, the informant's (arresting officer's) details, the matter over which the person was arrested and/or summoned, and the person's current address is inscribed for each entry. Other information inscribed on the Minute Sheet included the person's date of birth, a physical description, their occupation, any alias names used, descriptions of scars, marks and tattoos, references to photographs and photo books, the person's fingerprint classification and crime reports reference numbers.

- 'Criminal History Sheet'

This recorded the results of all Victorian court appearances and some interstate court results. In each instance details of the court, date of

hearing, the charges faced, the outcome and the sanction imposed were recorded.

- Results of Charge and Antecedent Forms

This form was completed each time a person was arrested in relation to an offence.

- Fingerprint specimens

Fingerprints were taken when a person was arrested.

- Photographs (Mug Shots)

Photographs were taken when the person was arrested.

- Newspaper clippings

Clippings which referred to an offender or their offending behaviour were collected for all offenders once their existence was known to police.

- Police Gazette clippings

Clippings in relation to the subject of the Docket published in the Police Gazette were also collected (Victoria Public Records Office, 2009a).

Dockets were numbered and stored according to an annual single number system. For example if a Docket was created in 1953, and it was the 31<sup>st</sup> Docket to be created that year, the Docket number would be 31/1953. 'There was no register of dockets as such. Information Bureau staff referred to a list of numbers and crossed the next number off the list as they allocated it to a new docket' (Victoria Public Records Office, 2009b). 'It is unclear how staff in the Information Bureau identified a docket relating to a particular person prior to 1945' (Victoria Public Records Office, 2009a). The Docket as a particular representation of the Victorian criminal record will be analysed for the discreet, but significant relationship that existed between Dockets and the 'Name Cards' that were introduced in 1945.



### **6.5.2 Central Records Cards - Name Cards**

The use of dockets altered substantially in 1945 when 'Name Cards' were introduced, although this introduction did not mark the end of the use of dockets. The relationship that existed between the utilisation of the Docket and the Name Cards were twofold. As outlined in section 6.2.1, a genealogical approach has been applied to this relationship to bring into focus the significance of the relationship between these inscriptions that co-existed and illustrated a move towards particular ideologies and ways of constructing an offender's identity. The introduction of Central Records Cards was a Victoria Police administrative decision based on the fact that a number of offenders who were prescribed a docket never reoffended. This meant that the concept of a Docket as a dossier that can be added to never eventuated in many cases as no further information became available on such individuals. It was thus deemed appropriate to introduce these cards to reduce the amount of information requiring storage and in turn simplify processes of retrieving information (Victoria Public Records Office, 2009a).

After the introduction of Name Cards in 1945, it was established that a person would not have a Docket established in their name until they had committed enough offences to 'qualify' for the larger format. On average a card could hold information relating to a maximum of three or four offences. Thus, forms in relation to charges were still completed including the Results of Charge and Antecedent Report. Records for those whose offending only qualified for a card were organised and filed in various sections of the Central Information Bureau according to the type of form. The form would have an identification number which corresponded to a specific individual's card; the same number would also be inscribed on the card for retrieval purposes. If an offender filled up his card, thus qualifying for a Docket, all documentation would be collected from the relevant filing systems and placed in a single file (Victoria Public Records Office, 2009a).

The offender would still possess a card, but only as an index card for reference to his or her Docket. It is therefore apparent that only recidivists would qualify for a Docket, which allowed the piecing together of various forms of information, from various sources to create what was perceived to be a comprehensive and complete representation of an offender's identity. The practice of creating Name Cards

continued until 1989, at which stage Central Name Index Cards were replaced by a Computer Names Index (Victoria Public Records Office, 2009a).

This new system became available to all police stations and police officers and a large scale data entry project was conducted, inputting the 'names of all offenders ever recorded in the manual system and their card or docket reference' (Victoria Public Records Office, 2009a). From this time forth, cards were still created for first-time offenders, but once an individual offender graduated to a Docket, the offender would be totally removed from the name card system and an entry on the Computer Names Index would remain, referring to the Docket information (Victoria Public Records Office, 2009a). In 1993 Victoria Police introduced LEAP (Law Enforcement Assistance Program), which started a new era of creating criminal records and consequently criminal identities.

#### ***6.5.2.1 What does the relationship between the Dockets and Name Cards demonstrate?***

The relationship between Dockets and Name Cards is of particular interest when analysed employing a genealogical approach. The analysis of these two representations of the criminal record in concert illustrates a further categorisation of people who committed offences. As stated in section 6.5.1 the construction of a Docket was undertaken for all offenders regardless of the number of offences committed prior to the introduction of Name Cards in 1945. Each offender was seen as being of equal concern and was expected to continue to commit offences at the same rate. In 1945 it was acknowledged that this was not necessarily the case.

The introduction of Name Cards was identified as a purely administrative decision based on the fact that numerous Dockets that were created for first time offenders were never used again as a result of the particular individual not offending again. A genealogical investigation requires an analysis of what this change signalled rather than just an acceptance of the fact that this was purely an administrative decision. The relationship that was established between Dockets and Name Cards in 1945 illustrates a further categorisation of offenders and consequently the labelling and construction of an offender's identity.

After 1945 a Docket was no longer assigned to all offenders, thereby separating out the offending population. As outlined in section 6.5.2, an offender who committed up to approximately three offences was only eligible to possess a Name Card. The possession of a Name Card meant that while all the routine documentation in relation to the investigation and prosecution of a person who committed an offence was completed, they were filed in accordance with the type of form or inscription they represented. For example, all Reports of Charge and Antecedent Forms would be filed together for offenders who only possessed a card. The same would be true in relation to fingerprints, photos, Minute Sheets and Criminal History Sheets. This dispersal of information in various repositories in accordance with the type of information they represented was the typical state of affairs for criminal records at this time. The significance of this situation is what the possession of a Docket came to indicate and how this change impacted on an offender's identity.

A person who had filled up his or her Name Card entered a newly established category of offender according to this criminal record system and process. The filling up of a Name Card initiated a process of gathering all the forms, records and reports held in the various repositories within the Melbourne Central Information Bureau in accordance with the type of information held and compiling them into a Docket.

The compiling of all information into a Docket, while seeming to be just an efficient administrative decision also enabled the identification of recidivists; this administrative change allowed the category of a recidivist to be constructed. An offender who was identified and labelled a recidivist was, as a consequence assigned a higher level of risk in relation to reoffending. This identification and categorisation of an offender as a recidivist warranted the collections of various types of criminal records and information into the one repository, the Docket. This demonstrates a shift in ideology and the objectification of the subject of the Docket for risk management purposes. This objectification of the subject demands the accumulation of information and knowledge of the recidivist aimed at knowing and managing the risk the individual offender presents. This must be in a more focused form than it would be for that of offenders who are only the subject of a Name Card. This demand for information to be collated is conceptualised by Foucault in relation to knowledge and

power. The increase in knowledge and concentration of information about a subject renders that subject knowable and manageable (Foucault, 1979).

The next section will build on this analysis of Name Cards and Dockets for what they highlight in relation to the development of the criminal record and particular ideologies. Section 6.5.3 presents an analysis of what was called a Results of Charge and Antecedent Form.

### **6.5.3 Introduction to the Results of Charge and Antecedent Form**

The Results of Charge and Antecedent Form was introduced to Victoria Police in 1943. This form became operational as a result of an ‘amendment to Standing Orders no. 145 ... “Final Result of Charge Form” cancelled and the following substituted: - “Result of Charge and Antecedent Form No. 97”’ (Victoria Police, 1943, p. 606). The introduction of the Antecedent form marked the birth of a new dimension to criminal records. Previously there was a preoccupation with offence specific information and only physically descriptive information was recorded for detection purposes. This form is of particular interest as the introduction of the antecedent report marked the beginning of a shift in focus from the offence to the offender. A Results of Charge and Antecedent Form was completed each time a person was charged with an offence. As stated at the bottom of the original Results of Charge and Antecedent Form:

A separate form must be returned for each person charged, whether convicted or acquitted, and whether adult or child. Brief report as to Antecedents to be shown on reverse of this Form’ (PROV, VPRS 9303/P1, Unit 24, 430/1934).

Antecedents are typically understood to encompass preceding circumstances to an event such as the commission of an offence. Antecedents include such things as characteristics, occurrences and background information. In short, antecedents are a compilation of components of a person’s earlier life. Antecedents are what might have impacted on the pertinent behaviour. There are many levels of explanation for particular behaviours offered. These explanations include genetic, psychological and social theories. As explained by Clive Hollin ‘regardless of whether the antecedents are said to be inside the person or in the environment (or a combination of the two) human action is a function of its antecedent conditions. Such antecedent conditions may be unique to the individual, nonetheless it is these conditions that determine

behaviour' (Clive Hollin, 2006, p. 124). It is this link between antecedents and behaviour which the introduction of this form acknowledged. The introduction of this form once again may be considered of limited significance in the chronological historical development of the Victorian criminal record, but when analysed using a genealogical approach the discreet introduction of this form signalled an important ideological development. This development facilitated new ways of knowing an offender and building an identity which were not present prior to the introduction of this form.

The introduction of this report illustrates the recognition by the Victorian Police Department of the value of various forms of social, psychological, historical and behavioural information which were not previously recognised as pertinent and therefore not recorded. This document can be paralleled with a section of the VISAT as it renders particular characteristics of an offender recorded and considered. Furthermore it makes clear the diffused nature of the criminal record in that it has various representations located in different places and forms. In the following section the emergence and development of the Results of Charge and Antecedent report will be charted.

In the following four sections an analysis of the development of the Results of Charge and Antecedent Form will be undertaken with specific aspects being focused upon in each section. The developments of this form that are to be analysed span approximately four decades. In the following section an overview of the development of the Results of Charge and Antecedent Form will be provided with specific attention being given to the way the structure of the form signalled developments in ideology. Furthermore information will be presented which illustrates how the Results of Charge and Antecedent Reports were 'documents that have been scratched over and recopied many times' (Foucault, 1977b, p. 139).

#### ***6.5.3.1 Overview of the changes to the structure of the Results of Charge and Antecedent Form***

The structure of the Results of Charge and Antecedent Form underwent various discreet but significant changes from its introduction in 1943 to the 1980s. These changes and amendments over time illustrate gradual moves towards the complete amalgamation of offence specific and offender specific information.

The Results of Charge and Antecedent Form introduced in 1943 was categorised into sections and alphabetically labelled a-f.

- A) Offence, providing a simple description of the offence for which a person was charged.
- B) Sentence, indicating the outcome of the court hearing.
- C) Property disposed of to, completed in relation to property offences.
- D) Particulars of arrest or summons, indicating whom affected, date, time and place of arrest or summons.
- E) Address given, outlining the offender's living arrangements including whether the address is correct, ownership of the property and type of accommodation.
- F) Remarks, including any known Police photographs and the contemporary likeness to the offender's physical appearance (PROV, VPRS 9303/P1, Unit24, 407/1934).

Other information was also recorded such as Information Bureau Record (IBR) name and number, other documentary references, method of committing offence and court details (PROV, VPRS 9303/P1, Unit24, 409/1934). Followed is an image of the front of a 1940s Results of Charge and Antecedent Form:

VICTORIA POLICE (97) 16189

**RESULT OF CHARGE AND ANTECEDENT FORM**

Victoria Dock C.I.B. Station C.I. Branch. District  
/ / 1952.

I.B.R. No. I.B.R. Name

The above-named was sentenced as set out hereunder:-

Court	Date	Offence (a)	Sentence (b)
South Melbourne	12.5.52	Unlawful Possession	1 month imprisonment
			(NOTICE OF APPEAL GIVEN.)

Value of property stolen: Nil.

Method of committing crime: Offender was in possession of a 56lb carton of butter and could give no explanation as to where he got it.

*He had been working on the S. Esplanade at 5 South Abney where similar butter was being discharged.*

Property disposed of to (c) Recovered in possession.

Convicted in name of:

Particulars of arrest or summons (d) Arrested on the 52. by Detective and Constable

Convictions proved by: Admitted in Court.

With whom convicted:

Names of police present at conviction Det. Sgt. Det. and Const.

Also personally known to: Sen. Constable

Address given (e) Street Collingwood.

Correspondence reference No. /52.

Remarks (f)

Detective Constable  
Officer in Charge of Case

1437  
1755

(a) State the offence in full, e.g., Larceny from a Bank of £300; Larceny from a shop doorway.  
(b) If prisoner has the option of paying a fine state if paid or whether time was allowed for payment.  
(c) Give name, address, state if given, sold, or pawned, or if found in offender's possession.  
(d) Show by whom effected, with date, time and place of arrest or summons.  
(e) State whether address is correct, and whether the house is his own, his parents', a flat, a room in a boarding or lodging house.  
(f) Value of any known Police photographs as to likeness to be stated.

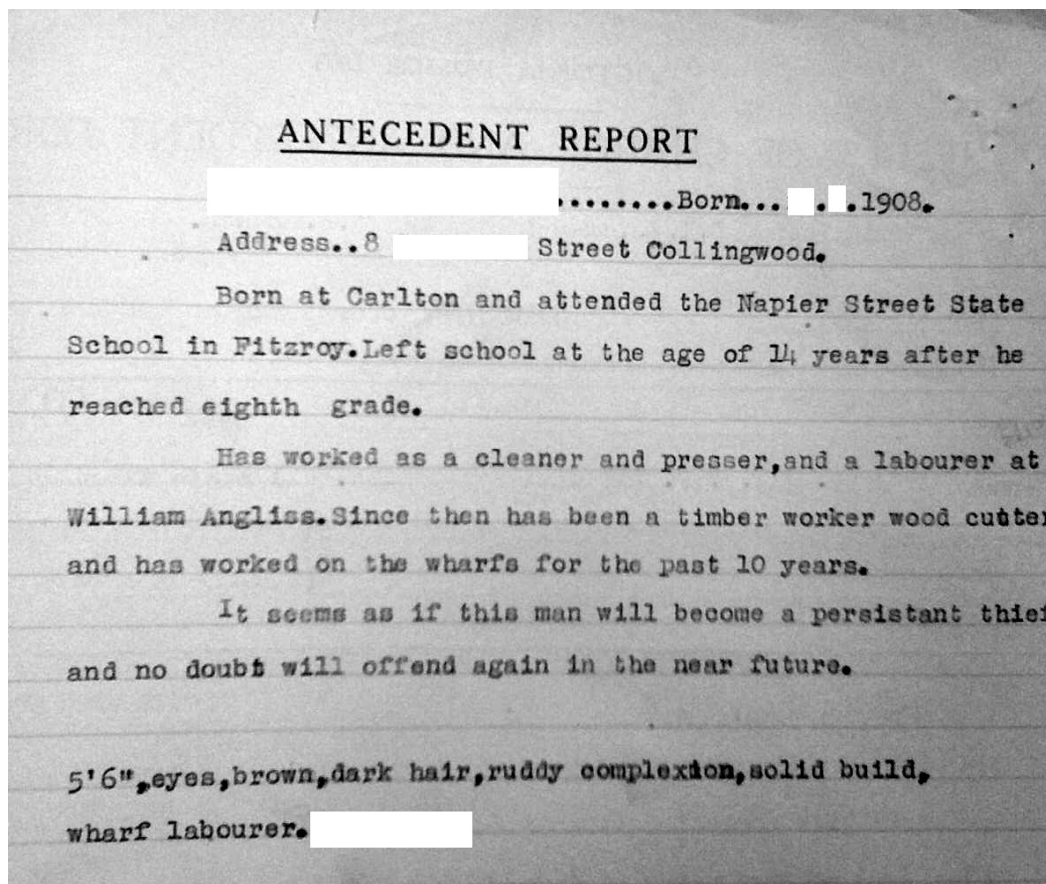
A separate form must be returned for each person charged, whether convicted or acquitted, and whether adult or child.  
Brief report as to Antecedents to be shown on the reverse of this Form.

P.544/1.49.-5871

**Figure 4 1940s Results of Charge and Antecedent Form (Front)**

While the front of the 1940's Results of Charge form had remained similar to the form that preceded it, the inscription on the reverse of the form signalled the introduction of the antecedent component. This reverse side is an addition to previously inscribed information; it is here that the recording of a further dimension

of the offender is recognised and conceptualised. The following image illustrates how a 1940s antecedent report was structured:



**Figure 5 1940s Results of Charge and Antecedent Report (Reverse)**

Information inscribed on the reverse under the title 'Antecedent Report' included place of birth, birth date, education, upbringing, residence, occupation, drinking habits, mental intelligence and physical characteristics. The 'police officer's opinion of the person's background and character' determined what was inscribed under this heading (Public Records Office Victoria, 1995). As illustrated in the above image no direction to the inscriber is apparent. Some examples of the information inscribed on this section of the form are:

He is a married man with three children and resides in a rented house...he has worked on the water-front since 1940 (PROV, VPRS 9303/P1, Unit24, 455/1934).



He is a heavy drinker and associates with reputed thieves... although he drinks to excess he is a good worker and works almost continually on the wharf (PROV, VPRS 9303/P1, Unit12, 1732/1933).

The structure of the Results of Charge and Antecedent Report was revised in 1953. The new Results of Charge and Antecedent Report only endured minor changes to the front of the form such as the inclusion of 'checked by' as a form of quality control and for accountability purposes. The Antecedent Report on the reverse underwent substantial change (PROV, VPRS 9303/P1, Unit12, 1732/1933). Rather than having a free text section in which the officer completing the form would be given the opportunity to include information they personally deemed pertinent, it became more prescribed.

The revised antecedent report of 1953 had evolved into a questionnaire. It contained 19 specific questions that the officer completing the form was required to address. These were:

1. Age
2. Date of birth
3. Place of birth
4. Home life, upbringing and environment
5. Character and standing of parents
6. Character whilst at school
7. Standard of education – degree of intelligence, whether mentally normal or not
8. Particulars of employment
9. Record of service in Navy, Army or Air Force – conduct whilst member
10. Marital status
11. Types of offences committed
12. Extenuating circumstances
13. Aggravating circumstances
14. Associates
15. Who was principal offender
16. Any other relevant information

17. Property disposed of to (c)
18. Is offender a holder of a D.R. licence issued by the Transport Registration Body;
19. If so, state badge No. (If any) (PROV, VPRS 9303/P1, Unit23, 91/1934).

These questions are not solely related to the particular offence or the person's offending history; there are questions which attempt to ascertain the character of the person, mental capacity, upbringing, associates, marital status, education and employment information.

The following image illustrates the substantial structural changes made to the 1953 Antecedent Report:

<b>ANTECEDENT REPORT</b>		
1	Age	49 years
2	Date of birth	1908.
3	Place of birth	Warrington
4	Home life, upbringing and environment	Good.
5	Character and standing of parents	Good
6	Character whilst at school	average.
7	Standard of Education— Degree of Intelligence Whether mentally normal or not	Merit Certificate. average not.
8	Particulars of employment	Working as Warf labourer, been there for 15 yrs. before that 15 yrs. with William ANGLI as a labourer.
9	Record of service in Navy, Army or Air Force— Conduct whilst member	No service. -
10	Marital status	married.
11	Types of offences committed	Larceny, breakings, wilful damage and assault
12	Extenuating circumstances	nil
13	Aggravating circumstances	nil
14	Associates	not known
15	Who was principal offender	defendant alone.
16	Any other relevant information	nil
17	Property disposed of to (c)	no property concerned
18	Is offender a holder of a D.R. Licence issued by the Transport Regulation Board?	no.
19	If so, state badge No. (If any)	-

NOTE—Please see Standing Orders Amendment No. 93—P.O. 7/4/55

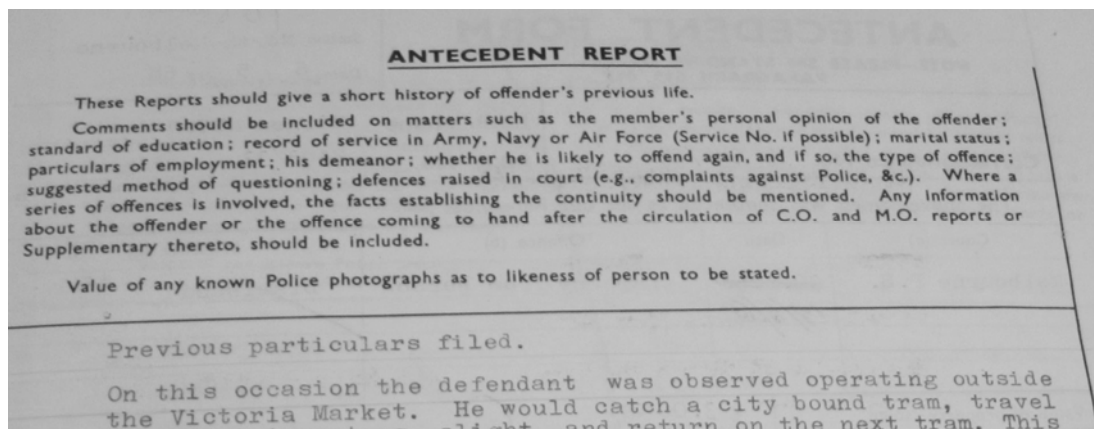
**Figure 6 1953 Results of Charge and Antecedent Report (Reverse)**

As seen through these instructions the scope of information required had significantly increased. The initial Antecedent Report had a free text section with very limited instructions to the officer completing the report. The 1953 revision saw a very structured antecedent report being implemented with very limited space for the officer completing the report to input personal opinions.

In 1958 the structure and design of the Antecedent Report underwent further change. It returned to a free text section with specific instructions at the top of the page. These instructions were as follows:

These Reports should give a short history of offender's previous life.

Comments should be included on matters such as the member's personal opinion of the offender; standard of education; record of service in Army, Navy or Air Force (Service No. if possible); marital status; particulars of employment; his demeanour; whether he is likely to offend again, and if so, the type of offence; suggested method of questioning; defences raised in court (e.g., complaints against police, & c.). Where a series of offences is involved, the facts establishing the continuity should be mentioned. Any information about the offender or the offence coming to hand after the circulation of C.O. and M.O. reports or Supplementary thereto, should be included (PROV, VPRS 9303/P1, Unit16, 2419/1933).



**Figure 7 1958 Results of Charge and Antecedent Report (Reverse)**

The Antecedent Report continued to be structured in this fashion until a further revision in 1973. Although, during the interim years some officers included their own headings and sub-headings in the free text section, these headings and sub-headings

were dependent on the officer completing the report, examples of these are employment, forms of entertainment, family, questioning, general, court appearance, education, marital status, shooters licence no., motor car registration no., motor driving licence number (PROV, VPRS 9303/P1, Unit16, 2423/1933, 2433/1933).

In 1973, while the Antecedent Report continued to have a free text section there was the addition of four specific questions, these being: 'shooters licence or permit no., motor driving licence no., motor car registration no., was motor car used in commission of offence' (PROV, VPRS 9303/P1, Unit17, 2670/1933). This specific information allowed the Antecedent Report to extend the range and type of information kept on an offender's records. Furthermore, this demonstrates the linking in of supplementary information about the licensing and use of a motor vehicle by an offender.

**ANTECEDENT REPORT**

These Reports should give a short history of offender's previous life.

Comments should be included on matters such as the member's personal opinion of the offender; standard of education; record of service in Army, Navy or Air Force (Service No. if possible); marital status; particulars of employment; his demeanor; whether he is likely to offend again, and if so, the type of offence; suggested method of questioning; defences raised in court (e.g., complaints against Police, &c.). Where a series of offences is involved, the facts establishing the continuity should be mentioned. Any information about the offender or the offence coming to hand after the circulation of C.O. and M.O. reports or Supplementary thereto, should be included.

Value of any known Police photographs as to likeness of person to be stated.

---

Shooter Licence or Permit No. . . . .

Motor Driving Licence No.

Motor Car Registration No.

Was motor car used in commission of offence?

---

This offender is a very well known S.P. Bookmaker and  
and has other priors dating back to 1933. He will be  
brought before the court again for S.P. Bookmaking  
for he has a very good business and he cannot give it  
up.

**Figure 8 1973 Results of Charge and Antecedent Report (Reverse)**

Once again in 1979 the Results of Charge and Antecedent Form (210) underwent significant revision. This revision saw the enmeshing of social information and that of the offence itself. These distinct sections were becoming intertwined, marking the full amalgamation of acts, behaviours, demeanour and characteristics to the identity of an offender. The social and personal information was no longer held in a particular

section in isolation; its necessity and value in relation to ‘knowing’ the offender and the construction of an offender’s identity became unquestionable. This information was found to be paramount to predicting future offending and also to managing an offender. The Results of Charge and Antecedent Form (210) requested personal and social information throughout the form. Some of the personal information required on the front page included nationality, country of origin, arrived in Australia - date, by plane or ship (tick boxes provided), type of premises (lives in) and status - owner, tenant (tick boxes provided), associates, complainants name and address (in full) (PROV, VPRS 9303/P1, Unit18, 2697/1933). On the reverse, at the top of the page, under the heading ‘PLEASE NOTE’ the following is stated:

Full accurate and complete details are essential. A separate form to be used for each person charged irrespective of result. Attach list of additional relevant matters if space is insufficient. Relevant S.O. (Standing Orders) references. Para. 615 to 617 inclusive (PROV, VPRS 9303/P1, Unit18, 2697/1933).

The reverse does not resemble the previous Antecedent Report at all. The new version contains a table under the heading ‘details of licences’. This table is followed by a one word question under the heading ‘armed service details’. Subsequently a section entitled ‘marital status’ is evident. This section allows one of six possible responses to be indicated via ticking a box.(PROV, VPRS 9303/P1, Unit18, 2697/1933). The next heading was ‘education’, once again followed by five statements with tick boxes, and under this heading there is also ‘occupation, status or qualification’ (PROV, VPRS 9303/P1, Unit18, 2697/1933). This is followed by a peculiar question, that being ‘frequents’; this refers to places that the offender visits (PROV, VPRS 9303/P1, Unit18, 2697/1933). These headings are followed by the heading ‘additional particulars’. The officer completing the form is instructed to include the following information, ‘living habits, wears spectacles, takes drugs, smokes, drinks to excess, special skills, demeanour, attitude, etc. Also nicknames or aliases not recorded on IBR’ were to be recorded in this section (PROV, VPRS 9303/P1, Unit18, 2697/1933). Three examples of what information was recorded in this free text area are:

He has had employment at various hospitals as a hospital assistant... On each occasion that a question was asked... it had to be repeated on a number of

occasions before registering with him (PROV, VPRS 9303/P1, Unit17, 2587/1933).

Boards in a house... wears a brown pair of spectacles, smokes cigarettes, drinks beer at... was a painter and decorator. Co-operative attitude towards police (PROV, VPRS 9303/P1, Unit23, 91/1934).

Worked most of his life as labourer... learnt bakers trade while in Pentridge and worked in this field for a few years prior to retirement... had lung condition for the past few years... drinks mainly beer, smokes any kind of cigarette. Lives alone and appears to have very few if any friends. Follows Fitzroy Football Club and attends each game at the ground. Easy to question gave explanation of being affected by medication he was... leading to the offence (PROV, VPRS 9303/P1, Unit18, 2697/1933).

Following this the officer is asked to record the offender's 'solicitor's name' and record 'defences raised/complaints/allegations made' (PROV, VPRS 9303/P1, Unit17, 2670/1933). A move is then made back to the offender's personal life at this point and officers are asked to record the 'name, address and relationship' under the heading 'employer/close relative/close friend' (PROV, VPRS 9303/P1, Unit17, 2670/1933). The remainder of the form looks at whether the offender has breached court Orders in the past and whether the form was checked by the appropriate authorities (PROV, VPRS 9303/P1, Unit17, 2670/1933).

The following two images illustrate the significant changes that the 1979 Results of Charge and Antecedent Report introduced.

**VICTORIA POLICE**  
**RESULT OF CHARGE**  
**AND**

Form No. 210  
District **13**  
Station **POLICE**  
Date **24 / 12 / 84**

I.B.R. Name. [Redacted]  
 Correspondence No. (I.B.R.) [Redacted] 185 185  
 Nationality **AUSTRALIAN**  
 Country of Origin [Redacted]  
 Date of Birth [Redacted] / [Redacted] / 15  
 I.B. Ref. or Dkt. No. [Redacted] / 33  
 If Alien. Passport No. [Redacted]  
 Arrived Australia **1-1** Plane  Ship

Court (Specify)	Date	Offence Briefly (e.g. Theft from Motor Vehicle)	RESULT (e.g. \$20 def. 10 days imp.) (Insert Details of Licence Suspensions etc.)
<b>FRAHRAN M.C.</b>	<b>1/85</b>	<b>THEFT (Shopsteal)</b>	<b>1/16/85</b>

Charged under name of [Redacted] (Staple additional list if space insufficient)  
 Identical with I.B.R. name and admits previous record. Yes  No   
 Photographed on this occasion Yes  No  If so, Station photo Ref. [Redacted]  
 Photograph (References) No. [Redacted] Likeness: Very Good  Good  Fair  Poor   
 Address Given **8 [Redacted] MALVERN**  
 Address - Correct  Incorrect  Type of Premises [Redacted]  
 Status - Owner  Tenant  Boarder  Other (Specify) [Redacted] Phone [Redacted]  
 ARRESTED OR SUMMONSED BY Name [Redacted] Rank **SGT** No. [Redacted] Station **MALVERN**  
 Date [Redacted] Time **2.10** a.m./p.m. Place **Malvern Police Station**  
 CO-OFFENDERS (Name and I.B.R. Ref.) **Nil**  
 S.O. 435 complied with Yes   
 METHOD OF COMMITTING CRIME **Entered store, selected book and then placed book down the front of his shirt and immediately left the store. Apprehended outside the store, offered to pay for book.**  
 PROPERTY DISPOSED OF TO **Recovered**  
 PROPERTY VALUE \$ **5.95**  
 COMPLAINANTS NAME AND ADDRESS (in full) as per C.O. & M.O. submitted on [Redacted] / [Redacted] / 84 **Malvern**  
 (State age of victim if violent or sex offence is applicable)  
 ASSOCIATES  
 Name **Not known** Address [Redacted] I.B. Ref. No. [Redacted]  
 PRESENT AT COURT HEARING OR KNOWN TO FOLLOWING MEMBERS  

Name	Rank	No.	At Court/known to (Specify)
[Redacted]	<b>SGT</b>	[Redacted]	<b>At court/known to</b>

 LEGEND:  Insert "X" where applicable. 15249/79-PL-S

**Figure 9 1979 Results of Charge and Antecedent Form (Front)**

**PLEASE NOTE**

Full, accurate and complete details are essential. A separate form to be used for each person charged irrespective of result. Attach list of additional relevant matters if space is insufficient. Relevant S.O. references. Para. 615 to 617 inclusive.

**DETAILS OF LICENCES:** (Send report to T.R.B. if holder of T.R.B. Licence)

	No.	Expiry Date	Other Details e.g. Endorsements T.R.B. etc.		
M/Car	NIL	/ /			
M/Cycle		/ /			
Other (Specify) e.g. (Shooters) (Bankcard) etc.	NIL	/ /			

Owns/Drives following Motor Vehicles	No.	Make	Type	Year	Colour
	NIL				

**ARMED SERVICE DETAILS:** Service No. [redacted] Rank Held **PRIVATE**  
Branch/Unit [redacted] Service No. [redacted] Length of Service **5 years**

**MARITAL STATUS:**  Single  Married  De facto  Divorced  Separated  Widow(er)

**EDUCATION:**  Primary  Secondary  Technical  University  Other (specify)

Occupation **Jeweller, presently unemployed** Status or Qualifications **Nil**

Frequents **MALVERN and PRAHRAN areas**

**ADDITIONAL PARTICULARS:** e.g. Living habits, wears spectacles, takes drugs, smokes, drinks to excess, special skills, demeanour, attitude, etc. Nicknames or Aliases not recorded at I.B.R.  
**Lives alone at the above address.**  
**Slightly deaf.**

SOLICITOR'S NAME \_\_\_\_\_  
DEFENCES RAISED/COMPLAINTS/ALLEGATIONS MADE \_\_\_\_\_

**EMPLOYER/CLOSE RELATIVE/CLOSE FRIEND**

Name	Address	Relationship
[redacted]	17 First Ave. MURRUMBEENA	WIFE

Any breach of Probation/Parole/Bond, etc. committed? **nil**  
If so, (specify) \_\_\_\_\_

Has Breach been reported? Yes  No  When... / / To whom? \_\_\_\_\_  
By whom Name \_\_\_\_\_ Rank \_\_\_\_\_ No. \_\_\_\_\_

(Officer in Charge of Case) Name **K.A. NORMAN** Rank **SCT** (Details checked by OTC Station/Prosecutor) Name **E. YEATS** Rank **No. Sergeant 16381**

(Don't write "See previous antecedents" unless para. 616(5) (a) (ii) applies.)  
N.B. Use Form 210 on matters dealt with summarily.  
Use Forms 210A and 206, not Form 210 where person charged is committed for trial.  
Forms 210 or 210A are not required where Minor Offence Reports 220B etc. are applicable.

F. D. Atkinson, Government Printer, Melbourne

**Figure 10 1979 Results of Charge and Antecedent Report (Reverse)**

As seen in this section the Results of Charge and Antecedent Form underwent numerous changes from its introduction in 1943 through to 1979. These structural changes illustrate how the form evolved in relation to 'knowing' an offender. Furthermore, these changes in design also reflected attempts to predict an offender's future actions in an endeavour to implement appropriate and effective risk management techniques. In the following section consideration will be given to how the Results of Charge and Antecedent Report changed in ways that facilitated the



collection of social and personal information. This allows for the calculation of contextual information into risk equations. Further, this extension in the scope of relevant information illustrates the linking in of social information into official criminal records.

#### ***6.5.3.2 Analysis of the changes which facilitated the collection of social and personal information***

The introduction of the Antecedent Report into the Results of Charge form as evident in Figure 5, above, illustrates the emergence of ideas that antecedents as outlined in section 6.5.3 are of relevance to criminal activity and offensive behaviour. While the existence of this section demonstrates a further dimension of an offender to be investigated and recorded, what particular information was to be recorded seems unclear. This form demonstrates an attempt to know an offender and construct them as a complete identity.

This shift in focus illustrates a need for more than bare bones information, thus the criminal record increased in relation to the level of detail and amount of information recorded for a fuller understanding of an offender. Offence related information alone would no longer suffice. The officer completing the newly introduced Antecedent Report was given limited instruction. The only instruction recorded on the form is 'brief report as to Antecedents to be shown on the reverse of this form'. This instruction can be seen in Figure 4, above. This limited direction to officers completing the forms resulted in many forms having limited and unpredictable information. The limited nature of information being recorded under the heading Antecedent Report resulted in the changes of 1953.

The Antecedent Report of 1953 as illustrated in Figure 6, above shows a substantial change to the level of instruction given to officers completing the report and also a more established idea of what social and personal information is considered pertinent to knowing an offender. This form made clear what was to be recorded and requested specific information in a very restrictive and prescriptive format. Officers were expected to collect information in relation to the offender's mental capacity, family status, upbringing, level of education and marital status. These types of questions indicate a clear aim to know the offender as a complete identity.

The revisions of 1958 to the Antecedent Report as demonstrated in Figure 7 show a return to a free text section for officers completing the form to input details identified in the instructive paragraph. This instructive paragraph makes clear that not only the specific information previously requested is to be collected, but further information such as ‘defences raised in court (e.g., complaints against Police, & c.) and series of offences’ must be collected too. In 1973 a further revision illustrates a desire to link records of information to establish a more complete representation of an offender’s identity. This is illustrated in Figure 8, which requests specific reference numbers to an offender’s other records, thus allowing them to be linked into an offender’s criminal record.

Up to this stage each alteration of the Results of Charge and Antecedent Report illustrated the inclusion and accumulation of greater amounts of social and personal information, but the 1979 changes as illustrated in Figure 9 and Figure 10 demonstrate something even more profound. The 1979 changes reflect a reassembly of offence specific and social information in a new way. There was no longer a distinction or separation between social, personal, motivational or offence specific information. This signalled the complete acceptance of all these types of information on an equal footing. This will be elaborated in the following section which presents an analysis of how discretionary power used by officers completing these forms altered over time.

#### ***6.5.3.3 Analysis of how discretionary power of officers completing these reports altered***

The Results of Charge and Antecedent Report is indicative of what Foucault referred to as a document that has been scratched over and recopied many times (Foucault, 1977b, p. 139). The initial Antecedent Report introduced in 1943 allowed officers completing the form to inscribe any information they considered to be relevant or noteworthy.

The alterations of 1953 removed this power from officers completing the report by reformatting the Antecedent Report into a questionnaire with 19 specific questions. This removal of discretionary power illustrates a more uniform approach to Antecedent Reports. Further to this it illustrates how institutionally Victoria Police had selected specific areas of an offender’s identity to be sourced. This change

resulted in numerous questions being given a yes or no response or being answered in limited detail.

It would seem that the 1958 revision, as illustrated in Figure 7, gave back discretionary power to officers completing the form but with a directive paragraph to guide their decision-making. What is particularly interesting is the way officers completing the form are repeatedly being called upon to make evaluations and judgements based upon their professional opinions. For example, officers are asked to record on the Antecedent Report 'the member's personal opinion of the offender; his demeanour; whether he is likely to offend again, and if so, the type of offence; suggested method of questioning and value of any known Police photographs as to likeness of person to be stated'. These questions and requests for opinions illustrate an ideological move towards Police Officers being perceived as experts in the area and having the knowledge to predict an offender's future behaviour.

In addition to this the officer is enlisted as an agent to calculate the risk of reoffending using the form in a way that is not unlike the VISAT module 10. The officer completing the report is encouraged to predict 'whether he is likely to offend again, and if so, the type of offence' (PROV, VPRS 9303/P1, Unit16, 2419/1933). All these instructions are subjective to the officer completing the report and thus are giving the offender particular characteristics and informing his identity according to opinions, which is an example of institutional shaping of an offender's identity at the behest of the officers in control. It also illustrates the introduction of a more risk-based assessment for future criminal activity. It is at this point that we can most clearly see the actuarial regime of risk management come into play. The risk is to be founded on the offender's perceived characteristics at any given moment in time, by a particular officer. These opinions are then layers added to an offender's identity. Three examples of information and/or opinions included in this Antecedent Report are:

He served an apprenticeship in the making of Felt Hats and worked at this trade for a number of years... He is unmarried... He has a long list of prior convictions for all types of offences and it appears he will be a persistent offender. He is co-operative during questioning (PROV, VPRS 9303/P1, Unit10, 1483/1933).

Went to Christian Brothers School.... Left school at age of 13 and went to work as a labourer.... Married living apart from wife... then children all grown up.... No military service... is a hopeless person and will offend again (PROV, VPRS 9303/P1, Unit14, 2183/1933).

Offender has long list of priors and the last few years they have been restricted to vagrancy and drinking charges (See Prior Sheets). The defendant is the vagrant type and frequents the Collingwood and Fitzroy areas in the known places. He will continue to commit these offences (PROV, VPRS 9303/P1, Unit115, 2265/1933).

The changes that occurred in 1979 to the Results of Charge and Antecedent Form indicate a winding back to some degree of a Police Officer's discretionary power when completing the form. As illustrated in Figure 9 and Figure 10, police were still required to input 'additional particulars', but it would seem that professional opinions and predictions were no longer required. In the following section the Results of Charge and Antecedent Report will be considered in relation to how they demonstrate a particular approach to risk management.

#### ***6.5.3.4 An analysis of how these changes demonstrate a particular risk management approach***

The Results of Charge and Antecedent Form 1953 introduced elements of a risk management approach. This is demonstrated through the introduction of questions such as 'extenuating circumstances and aggravating circumstances' (PROV, VPRS 9303/P1, Unit19, 3061/1933). These questions aim to identify specific factors or conditions that can increase the risk of reoffending in the future. Further to this these factors can explain to some degree the circumstances that gave rise to this particular occurrence of criminal behaviour. This approach in relation to risk management seemed to have evolved substantially by the 1958 amendments as illustrated in Figure 7. The 1958 Antecedent Report called on Police Officers completing the report to become a risk assessment tool themselves, based upon their professional experience. Officers were asked to give personal opinion, assess and report the offender's demeanour and report whether the offender was likely to offend again. The officer was also encouraged to predict the type of offence the subject would commit in the future. The requests for assessments to be made by officers completing the

Antecedent Reports illustrate an increased focus on an offender's possible future behaviour, which are of prime concern to all risk management approaches.

The changes which occurred in 1979 to the Results of Charge and Antecedent Report illustrate a move to a more structured and uniform type. These changes illustrate a limiting of the level of professional opinion to be recorded on the form and the level of risk assessments to be completed by officers. The 1979 Results of Charge and Antecedent Report demonstrates how ideology had once again shifted and officers were no longer charged with completing risk assessments through the Antecedent Report.

#### ***6.5.3.5 Summary of Results of Charge and Antecedent Form analysis***

The Antecedent Reports presented span a period of approximately four decades. These reports from their conception underwent substantial change. The developments illustrate the evolving nature of what was deemed relevant to criminal records. The initial report demonstrates a limited scope of what was to be considered relevant in the way of social information. Officers completing this form were given no real direction as to what antecedents were to be recorded. Their only instruction was to record the antecedents. Thus, whilst recognition of the relevance of antecedents was acknowledged, it did nothing more than that. The subsequent revision of the report in 1953 changed in format and became very prescriptive. This illustrated that institutionally the Victorian Police were becoming ever more aware of the relevance of antecedents and went so far as to create 19 specific questions for officers to address. This level of prescription makes clear the institutional demand for social information. However, attempts to elicit more information to be inscribed through this format were unsuccessful, as officers tended to only answer the questions with single word responses, thus giving no detail and very limited opinion. Thus the revision of 1958 was deemed necessary.

This Antecedent Report, while directing officers as to what social information was pertinent, also called on officers to give their professional opinions, based on their experience. These opinions were used to determine and inscribe an offender's character on to their record in conjunction with making risk assessments as to future offending. These assessments were to establish what the offender has done, who the offender is and what he/she will do in the future. Thus the form encompassed the

offender's established history but also determined and made judgements about future actions. At this point in time we see ideas of risk assessments coming into play in relation to future activity. Although this structure was held in place during the 1973 revision it saw the addition of specific questions in relation to licensing and vehicle use. This added dimension illustrates the linking of other sources of data, thereby extending the web of information and adding a further layer to an offender's criminal record.

Finally, the 1979 revision of the Results of Charge and Antecedent Form saw the further embedding and solidifying of social information into an offender's criminal record. Its layout showed that there was no longer separation between the antecedents and the information required in relation to a specific offence. The line that had previously been present between the 'Results of Charge' on the front and the 'Antecedent Report' on the reverse was no longer apparent. Both categories of information became intertwined and no longer easily distinguishable, leading to the complete amalgamation of both categories of information and the structuring of the offender and the offence as one. This alteration illustrates that finally social information was no longer regarded as secondary to offence information, demonstrating an institutional recognition that knowing the offender and the offender's identity was just as important as the information regarding the criminal act itself.

The Results of Charge and Antecedent Form is only one example of social and contextual information in relation to an offender's identity and the commission of criminal acts being considered of importance. A further example is the Intelligence Cards maintained by larger district police stations throughout Victoria. The Intelligence Cards that will be analysed in this thesis are the ones maintained by one particular outer suburban jurisdiction. These Intelligence Cards existed and were functional in parallel with Antecedent Reports, Dockets and the name cards held by the Information Bureau mentioned earlier. Thus, as has been the case throughout this analysis, it is useful to employ a genealogical approach as it enables the researcher to consider what these Intelligence Cards reflect in relation to changes in ideology, power relations, knowledge and managing a population of offenders. This analysis will be based upon the mundane, discreet and information gathering practices that these Intelligence Cards present (Foucault, 1977b, 1979).

#### **6.5.4 Intelligence Cards**

Through the Victorian Police Museum I gained access to a collection of 873 Intelligence Cards. These Intelligence Cards contained information about people residing in or who had committed offences in the Ferntree Gully district of Victoria. The dates of birth recorded on this series range from 1882 - 1954 (Victoria Police Museum, VPM982).

These Intelligence Cards contained various types of information. Most Intelligence Cards had Docket numbers recorded. Docket numbers recorded ranged from 1933 - 1967. In relation to the identification of the gender of the subject of an Intelligence Card, the vast majority of approximately 828 cards had a male's information recorded on it. Out of the remaining 45 Intelligence Cards, 34 cards had a female's information recorded on it, five had no indication of the gender of the subject, four had both a male's and female's information recorded on it and two cards had the information of two different males recorded.

This illustrates that males were the prime offenders but what is of most interest is that some cards had more than one person's information recorded on it. This is of particular interest and concern given that two separate identities have been amalgamated into one through these Intelligence Cards. It would be expected that each individual identity would be entitled to only having their own information recorded against their name. Having information of another offender on one's card can lead to confusion and incorrect data being recorded against a person who is not the prime focus of a particular Intelligence Card.

For example one Intelligence Card records date of birth as '1946 & 1948', two names are recorded, 'petty thieves' in relation to past offences and the report says, 'lives with parents', their father is recorded as 'working for FTG Shire' and a further comment is made which states 'takes bottles etc from yards...possible future offenders' (Victoria Police Museum, VPM982.3, M44). The fact that these two siblings are given one Intelligence Card can result in confusion and the attribution of particular characteristics or criminal behaviour to an innocent sibling in the future as this would result in two individuals being represented with one criminal record.

Numerous Intelligence Cards had headings recorded at the top of the cards. These headings labelled offenders in relation to the types of offences they had committed or were believed to have been involved with. These headings are especially striking as they do not state the offence type, for example 'theft', but rather characterise and personalise the offence to the subject of the card for example 'thief'. Approximately 16% of cards contained headings. This identified the subject as a particular type of person or being identified as holding a particular identity (Victoria Police Museum, VPM982). For example, the following are commonly used headings on cards:

- Suspect
- Thief\*\*False Pretender
- Pervert
- Assault & Robbery \*\*Thief
- Attd. Murder \*\*\*Mental
- Thief\*\*Carnal Knowledge
- Vagrant\*\*Suspect
- Suspect\*\*Associate
- Car Stripper \*\*Thief
- Juvenile Thief
- Complainant
- House Breaker - Thief
- Pervert\*\*Thief (Victoria Police Museum; VPM982; N10, N4, A8, A34, A39, K18, L35, T26, W90, M58, S4, S10, S102).

These headings are giving the subjects of these cards a quite specific identity as not only offenders or suspects but also as specific types of offenders.

On the cards there were two types of offences recorded. First there were historical offences which had been dealt with at some time in the past. These offences were dated prior to the most recent offence details entered on the card. The second type of offences recorded were current offences or the most recent offence recorded on the card. Regularly these offences did not have any resolution recorded against them.



There were also approximately 411 current offences recorded. 55% of which were property offences, 11% of which were fraud related offences, a further 11% were public order offences, 7% were sexual offences, 7% were driving related offences, 6% were violent offences and the remaining 3% were a range of offences which did not fit into the previously mentioned categories (Victoria Police Museum, VPM982). This data makes clear that most of the current offences committed and recorded on these Intelligence Cards were property related offences.

This fact is also supported by the data of past offences recorded on the Intelligence Cards which also indicate property offences as the main category of offending. There were approximately 406 past offences recorded. 53% were property related offences, 14% of which were driving related offences, a further 9% were fraud related offences, 9% were sexual offences, 6% were public order offences, 5% were violent offences and the remaining 4% were a range of offences which did not fit into the previously mentioned categories (Victoria Police Museum, VPM982). Further to this 119 court outcomes were recorded on various cards in this series.

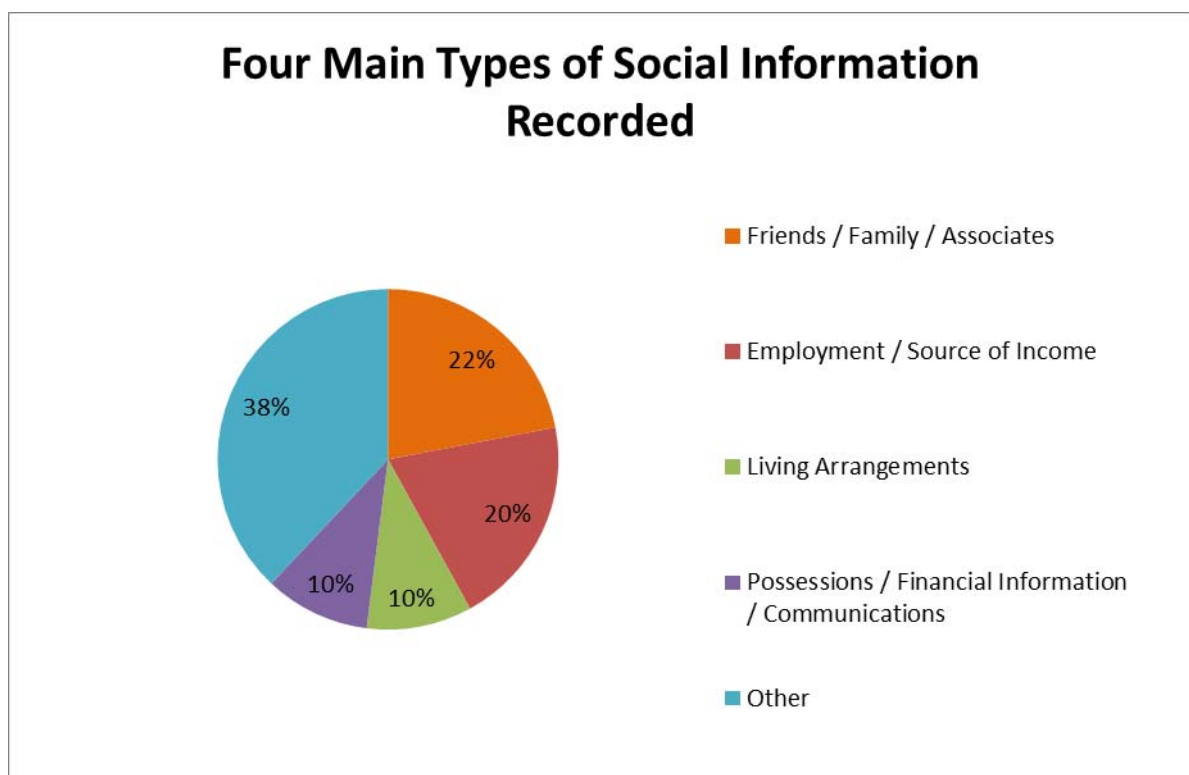
The information presented in this data set is mundane and typical as it is consistent with current day crime statistics. This consistency with present day crime statistics and offending patterns is evident in reports released by the Australian Bureau of Statistics. According to Australian statistics, males still far exceed females in relation to the commission of offences (Australian Bureau of Statistics, 2011b). Furthermore, the number of property offences committed in Victoria continues to far exceed the number of offences committed against persons (Victoria Police, 2011b). This supports the proposition that these Intelligence Cards are representative of a typical, expected and mundane data set. This typical data set, while presenting expected offence related information also presents information which is not typically presented in statistical representations of crime and offending behaviour.

#### ***6.5.4.1 Social, personal and contextual information inscribed on Intelligence Cards***

While the information previously mentioned is interesting and does give some context to the contents of the Intelligence Cards, the most interesting fact is the amount of social information recorded. As with the Results of Charge and Antecedent Report,

the importance placed on social information in this era further illustrates the high regard contextual information held.

On 84% of cards, social information in some form was held. Some cards had numerous instances of social information, while others had less, most likely depending on what the recording officer knew at the time. In total, approximately 1231 individual pieces of social information were recorded (Victoria Police Museum, VPM982). The five main types of social information recorded on the 84% of cards identified were as follows:



**Figure 11 Four main types of social information recorded**

As demonstrated above, 22% of cards had information recorded about friends, family and associates. 20% of cards had information recorded about employment and source of income. A further 10% had information recorded about living arrangements. This was accompanied by 10% of cards having information about possessions, financial information and communications recorded. Finally, 38% of cards had a variety of other information recorded.

Further to this, 9% contained information about places the subject visited and recreational activities, 8% contained information about marital status, relationship status or sexuality, 6% held information about children of the subject; 3% contained information about physical characteristics of the subject while a further 3% contained information about complainants and/or victims. A further 3% contained information categorised as other as it did not fit into any other mentioned category but is regarded as social information. Two percent contained information about character and demeanour and a further 2% contained information about applications made for various types of licences (Victoria Police Museum, VPM982).

Some examples of the social information recorded include:

<b>Category of Social Information</b>	<b>Quotes</b>	<b>References</b>
Friends / Family / Associates	‘Associates drinkers and vagrants’	(Victoria Police Museum, VPM982.3, S60)
	‘...was in company of...’	(Victoria Police Museum, VPM982.3, M91)
	‘...brother-in-law of...’	(Victoria Police Museum, VPM982.3, S10)
	‘...associate of...’	(Victoria Police Museum, VPM982.3, T16)
	‘Book for consorting...’	(Victoria Police Museum, VPM982.3, M4)
	‘Ex-London orphan adopted with sister... Foster father dies following car accident...’	(Victoria Police Museum, VPM982.3, G46)
	‘wife suffers disseminated scleroses’	(Victoria Police Museum, VPM982.3, G23)
Living Arrangements	‘lives with wife and child... drinks at Daisy Reddish’s Hotel’	(Victoria Police Museum, VPM982.3, N16)
	‘Lives with parents and brother...’	(Victoria Police Museum, VPM982.3, N27)
	‘Lives with De-facto...and children’	(Victoria Police Museum, VPM982.3, B3)
Possessions / Financial	‘Car being re-possessed, suspect	(Victoria Police Museum,

Information / Communication	<p>for breaking’</p> <p>‘Has BK Ford 1946 no. GNN - # ... re-possest’</p> <p>‘Has car re-possest...drink’s [sic] at Shaw’s and Vass’s’</p> <p>‘Passed valueless cheque...claimed not intending to defraud and will pay amount’</p> <p>‘Bankrupt in business...denies larceny of Petrol - NFA’</p>	<p>VPM982.3, W82)</p> <p>(Victoria Police Museum, VPM982.3, O35)</p> <p>(Victoria Police Museum, VPM982.3, K10)</p> <p>(Victoria Police Museum, VPM982.3, M95)</p> <p>(Victoria Police Museum, VPM982.3, Mc39)</p>
Employment / Source of Income	<p>‘Apprentice Mechanic’</p> <p>‘Salesman’</p> <p>‘Is a Pensioner’</p> <p>‘Applicant for work Fibremakers’</p>	<p>(Victoria Police Museum, VPM982.3, N14)</p> <p>(Victoria Police Museum, VPM982.3, O35)</p> <p>(Victoria Police Museum, VPM982.3, N24)</p> <p>(Victoria Police Museum, VPM982.3, Mc42)</p>
Places Frequently Visited / Recreational Activities	<p>‘Drinks at Club Hotel’</p> <p>‘Drinks Vassallo’s Hotel’</p> <p>‘Drinks at Shaw’s’</p> <p>‘Seen at Club Hotel’</p> <p>‘Plays football - Box Hill’</p>	<p>(Victoria Police Museum, VPM982.3, O32)</p> <p>(Victoria Police Museum, VPM982.3, T75)</p> <p>(Victoria Police Museum, VPM982.3, Mc22)</p> <p>(Victoria Police Museum, VPM982.3, T45)</p> <p>(Victoria Police Museum, VPM982.3, G57)</p>
Applications made for various licences	<p>‘Process server’s application’</p> <p>‘Applicant for driver’s licence, but failed to disclose priors’</p> <p>‘Applicant for collector’s licence’</p>	<p>(Victoria Police Museum, VPM982.3, S51)</p> <p>(Victoria Police Museum, VPM982.3, M41)</p> <p>(Victoria Police Museum, VPM982.3, W5)</p>

	‘Applicant for second-hand dealer’s licence’	(Victoria Police Museum, VPM982.3, Mc37)
	‘Applicant for Taxi licence’	(Victoria Police Museum, VPM982.3, K52)
Other	‘Loitering...claims to be getting sump oil’	(Victoria Police Museum, VPM982.3, S41)
	‘Has been in Royal Park. Contacts Alcoholics Anonymous’	(Victoria Police Museum, VPM982.3, W42)
	‘After running away from home used horse...illegally use’	(Victoria Police Museum, VPM982.3, T72)
	‘Escapee from mental hospital...alleged breaker and arsonist’	(Victoria Police Museum, VPM982.3, M86)
	‘Alleged milk thief’	(Victoria Police Museum, VPM982.3, M104)
	‘Take bottles from yards. Possible future offenders’ (two brothers on one Intelligence Card)	(Victoria Police Museum, VPM982.3, M44)
	‘Car stolen from outside Royal Hotel’	(Victoria Police Museum, VPM982.3, T68)
	‘Habitual drunk’	(Victoria Police Museum, VPM982.3, L35)
	‘Had car without permission of Father’	(Victoria Police Museum, VPM982.3, T49)

**Figure 12 Examples of social information recorded**

The examples of social information presented above can be considered as having afforded police officers some insight into the life of a subject. This information contextualises offending behaviour in ways that are not evident on a National Police Certificate. Each category of social information and the particular records of individual subjects have the ability to contribute in a valuable way to risk assessments in relation to reoffending, not only for the criminal justice system but also for

employers. The value of social information when making risk assessments about an individual with a criminal record will be explored further in the discussion chapter.

These Intelligence Cards also showed that they were located within a web of information by the fact that 71% of cards contained references to either a Docket or an IBR file (Victoria Police Museum, VPM982). There were also other links contained in the cards such as Criminal Information Bureau (CIB) report numbers, Criminal Offence (CO) and Modus Operandi (MO) report numbers, vehicle registration numbers, licence numbers, Daily Circular references, Police Gazette references, photo supplements references and references for interstate records to name a few.

This chapter has illustrated that there is nothing simple about the construction of a Victorian criminal record as held by Victoria Police. There are numerous sites where information is deposited that can contribute to the construction of an offender's identity. As evident through the data presented an individual offender could be the subject of a number of CO and MO reports, dependant on the number of offences committed. In addition detailed information about the offence the individual committed including contextual and social information would be recorded on a Results of Charge and Antecedent Forms for each instance of criminal behaviour. The identity of an offender would be further enriched by intelligence information such as that contained on Intelligence Cards. These high levels of information considered necessary by Victoria Police in relation to offending behaviour, have the ability to not only contextualise a person's criminal history but also to contribute pertinent information about a person's likelihood of reoffending, information that is not available on a National Police Certificate. It is therefore evident that an offender's identity and all recorded information in its various repositories cannot be accurately reduced to a single document known as the National Police Certificate, which is the only form of a criminal record accessible to employers.

Attention will now be given to one of a range of Victoria Police's databases in relation to criminal records and its variant forms of information. This particular database known as the Law Enforcement Assistance Program (LEAP) has been selected for analysis for two particular reasons. First, it was the earliest database to

come into operation in Victoria which rendered criminal history information easily accessible and facilitated the introduction of this information into the public arena for private purposes such as employment (Victoria Police, 2003). Second, LEAP was selected for analysis as it is the largest database of criminal record information in Victoria and continues to be operational (Commissioner for Law Enforcement Data Security, 2007).

## **6.6 Law Enforcement Assistance Program (LEAP)**

In 1987, then Victoria Police command came to the realisation that the Information Bureau was not able to continue to effectively maintain, manage and process Criminal Offence and Modus Operandi reports through the paper-based system that was in place. This was as a result of the increase in crime rates and reports (Victoria Police, 2003, p. 23). In 1988, an international investigation of policing databases was undertaken by then Deputy Commissioner Noel Newnham, resulting in the implementation of a database system known as the Police Operational Support System Elementary (POSSE). This software was in use by 95 police forces in the USA (Victoria Police, 2003, p. 23). In 1992, this database system was adjusted to the Victorian context and was renamed LEAP. This database was fully operational state-wide in 1993 and significantly altered the way criminal related information was managed (Victoria Police, 2003). While the system has undergone significant enhancements since its inception, it continues to be in operation. In 1993, this increase in efficiency and accessibility of information resulted in Victorian criminal records being made publically available upon request. The impact of this public accessibility will be covered in more detail in the following chapter.

In 2007, Victoria Police were still making the transition from paper based records to wholly electronic systems although a significant number of records were still kept in document form (Commissioner for Law Enforcement Data Security, 2007). Accordingly, there is a 'patchwork of law enforcement data repositories, varying in sophistication' (Commissioner for Law Enforcement Data Security, 2007, p. 12). An investigation by the Commissioner for Law Enforcement Data Security has 'identified 217 law enforcement data system or repositories from a total [of] 430 Victoria Police electronic information system[s]' (Commissioner for Law Enforcement Data Security, 2007, p. 12). The three largest such databases are LEAP, the Traffic Incident System (TIS) and the investigation and intelligence management system, Interpose

(Commissioner for Law Enforcement Data Security, 2007). Interpose is reported as having 2.3 million records in relation to individuals; TIS holds 195,000 records in relation to individuals and, LEAP had, in July 2007, 4.51 million records in relation to individuals (Commissioner for Law Enforcement Data Security, 2007). This high level of records held by Victoria Police through the LEAP database includes duplicate records and records in relation to victims, missing persons, people charged and/or convicted of offences, witnesses, people involved in a traffic accident, including anyone who has applied for a police check to name but a few (Commissioner for Law Enforcement Data Security, 2007).

The large amount of information held in LEAP in relation to people who have committed offences includes but is not limited to medical information, associates, family members, crime related information, aliases, psychiatric issues, physical description, references to document based records or records held in other repositories such as offence summaries, residential information, issues in relation to interviewing or contact with police and active investigation (Commissioner for Law Enforcement Data Security, 2007). Further to this, access to this information is also available to varying degrees to third parties for their purposes or business operations. At 30 June 2010, access to information was available to the following parties: Australian Crime Commission, Australian Customs Service, Australian Federal Police, Responsible Alcohol Victoria, Tenix for the Sheriff's Office Victoria, Tenix for the Traffic Camera Office, Department of Primary Industries, Emergency Services Telecommunications Authority, G4S for the Melbourne Custody Centre, New South Wales Police Service, Office of Police Integrity, Corrections Victoria, roads and transport authority VicRoads and CrimTrac, among others (Commissioner for Law Enforcement Data Security, 2010). The role of CrimTrac will be explored further in the following section.

LEAP is currently in the process of being replaced but the present system will continue to be operational until at least 2014. The replacement database being established is LINK; its development commenced in 2006 and yet to be completed (Commissioner for Law Enforcement Data Security, 2010) This new database is estimated to cost \$161 million to develop and implement over a period of at least two years. This replacement is argued to be necessary as a result of the inability for LEAP to hold such high levels of information and also due to the high number of breaches in



information security (Commissioner for Law Enforcement Data Security, 2010; Jenkins & Nolan, 2011). As outlined, LEAP is integral to the management of criminal record information and holds an immense amount of data, yet this immense amount of information is reduced to a bare bones summary resulting in the removal of all contextual information when Victoria Police issue a National Police Certificate. This illustrates that a regime of information has been created and is not being utilised for publicly available criminal records. The National Police Certificate contains criminal record information recorded in all Australian jurisdictions. While Victoria may be the state issuing the National Police Certificate, information must be gathered from all Australian jurisdictions. The gathering of criminal record information from the various jurisdictions is facilitated through a national organisation called CrimTrac.

The role CrimTrac plays in relation to the issuing of a National Police Certificate will be covered in the following section. It is the amalgamation of information gathered through CrimTrac and that which is held by Victoria Police for criminal record checking purposes that create the final publicly available criminal record, the National Police Certificate.

## **6.7 CrimTrac**

In 2000 the information sharing agency, CrimTrac was established. This agency's role is to facilitate the effective and efficient sharing of law enforcement information between the various state and territory police forces (CrimTrac, 2010). This primary objective encompasses criminal record information for law enforcement purposes and also to facilitate the completion of national police checks. The 'checking of police history of potential employees on behalf of employers, such as government agencies, and non-government organisations' is one of this agency's key roles (CrimTrac, 2011). In accordance with this role 'CrimTrac facilitates about 2.9 million national police checks a year through a decentralised process involving all Australian police services evaluating relevant police records with a view to determining the type and extent of the police information that can be released' (CrimTrac, 2011). Although CrimTrac has access to such high levels of information Australia wide, crossing the borders of various jurisdictions, the decision in relation to what is to be contained on a National Police Certificate is dependent on the applicable legislation and/or policies within a particular jurisdiction. What is disclosed on a Victorian issued National

Police Certificate and the relevant policies and legislation (or more accurately lack of legislation) was explored in detail in Chapter 2 of this thesis.

Now that the high levels of information contained in a criminal record through its various repositories have been analysed, consideration will be given to that final document, the National Police Certificate. The Certificate is intended to represent all the previously discussed information in this chapter in a summarised form and to be dispersed into the public domain for use as a risk assessment tool by social institutions, organisations and prospective employers.

## **6.8 National Police Certificate**

Today, the final criminal record as a document to be circulated in public in Victoria is known as a National Police Certificate. As outlined in Chapter 2 of this thesis, this certificate contains findings of guilt in relation to a criminal offence and matters currently under investigation or awaiting court hearing (see section 2.10) (Victoria Police, 2011e). This is the only type of formal legal documentation that an employer may request of an employee in relation to contact with the criminal justice system in Victoria. It is thus argued in light of the information presented in this chapter that what is recorded on a National Police Certificate and constitutes a criminal record in the public arena is nothing more than the bare bones of a criminal record. The limited information present on a publicly available criminal record brings into question its utility as an accurate risk assessment tool for prospective employers. The removal of contextual information in the process of simplification and standardisation of a criminal record for entry into the public domain can have significant implications for the subject of a certificate in relation to various social engagements, including employment.

## **6.9 The function of the Victorian criminal record**

### **6.9.1 The Victorian criminal record and information management**

Information management is of paramount importance in relation to criminal records. The above analysis of the development of the Victorian criminal record was undertaken to illustrate how the management of information altered over time. Historically social information and an offender's experiences were not considered to be of interest or consequence and the primary focus was offence related information. The gathering of information commenced with the introduction of the Docket as a

repository for the compilation of various types of offence related information. The Docket illustrates how the building of an offender's identity began to take shape through the ideology that the construction of a Docket could be conceptualised as a representation of an offender within the criminal justice system to be added to as an offender returned to the criminal justice system through further offending.

These ideas of 'knowing' an offender were further developed through the introduction of the Results of Charge and Antecedent Form. The introduction of the Antecedents Report is indicative of the realisation that there was more to 'knowing' an offender than offence related information. The Antecedent Report as outlined in section 6.5.3, above, was initially separate to offence related information through its placement on the reverse of the Results of Charge information. The social information considered of interest initially was unclear and so limited instruction was given to officers completing the report on what information to gather. This underwent significant alteration to an over prescriptive format which was subsequently altered to a less prescriptive format. These changes illustrate an endeavour to elicit quality social information. The alterations of 1979 are of great significance as they signalled the complete enmeshing of social and offence related information. As such social information was no longer considered secondary in importance to offence related information but rather they were held in equal regard.

The belief that social information was of significant value and should be held in the same esteem as offence related information is also evident through the utilisation of Intelligence Cards, as explored in section 6.5.4. While these cards recorded offence related information, the level of social or contextual information recorded was extensive. Social and contextual information in various forms and to varying degrees was inscribed to allow for an in-depth understanding of an offender. This facilitated the construction of a holistic representation of an offender's identity. Furthermore, these cards make clear that there was adequate room for human error and misrepresentation. This had consequences by constructing an ill informed offender identity.

The introduction of computer technology in 1987 also had important implications for the management of criminal record information. The introduction of the LEAP database which continues to be operational allowed for offender and crime related information to become readily accessible to approved personnel for law enforcement

purposes. The introduction of this system proved to be fruitful in the execution of Victorian police duties and signalled more efficient ways of knowing the offender in various ways and dimensions. The management of information was further enhanced through the introduction of other more advanced databases and information systems, as explored in section 6.6.

These advancements and the various repositories of information have gone a long way towards knowing the offender, understanding their history and antecedents and facilitating the law enforcement capabilities of Victoria Police. These facts have been presented to make clear the immense levels of offence specific, social, contextual and other forms of information considered pertinent to understanding and constructing accurately an offender's identity by Victoria Police. This collection of high levels of information is akin to that collected through the completion of the various modules within the VISAT. It illustrates an attempt and need to know the offender through various lenses for accurate offender management. The argument presented within this thesis is not that such high levels of information should not be recorded for law enforcement purposes or for Corrections Victoria through their various repositories. The argument presented is that such high and extensive levels of information are in fact required to understand an offender and their offending behaviour which is not apparent in a correctional risk assessment or in a National Police Certificate used for employment purposes.

The information held by Victoria Police throughout their various repositories is extensive and represents an offender in a more holistic way but it is extensively culled, leaving only the bare bones of the full and contextualised criminal record. These bare bones only contain the statutory name of the offence and the court outcome. The issue with such a simplistic and standardised representation of an offender when viewed by an employer is that it fails to represent the offences within a context but rather renders the information provided as the complete story. The National Police Certificate with its limited information is still held in high regard. In some cases it is the only tool used for a risk assessment that will determine an applicant's suitability for employment. It may therefore be argued that the National Police Certificate is an unsatisfactory representation of a person's criminal history and as such may not be appropriate as a risk assessment tool in relation to an applicant's future offending behaviour.

### **6.9.2 The National Police Certificate as a risk assessment tool**

As we have seen the Victorian criminal record began in the form of a Docket in 1932 for law enforcement purposes. Its development over time has led to the inscription of social, contextual and other types of information, as outlined in section 6.5.3. The amalgamation of offence and social information by Victoria Police throughout its development supports the argument that social and contextual information is of consequence and is required to understand and know an offender. The issue with the development of the Victorian criminal record is that it entered the public arena subsequent to 1993 and without the inclusion of social information has material implications for ex-offenders.

The Victorian criminal record, as represented through a National Police Certificate fails to provide adequate information for a risk assessment, but yet is routinely used in such a way. As is the case with the VISAT, static information such as statutory names of offences are used to gain a purchase on the likelihood of an applicant offending in the future. The National Police Certificate, like module 10 within the VISAT, fails to take account of changes in the person's life such as marriage or family and increased stabilisation of accommodation which can have a positive effect on the discontinuing of offending behaviour (R. Sampson & Laub, 1993). Furthermore there is no consideration evident in such a risk assessment on the positive impact rehabilitation programs and the like can have or have had on negating the risk a person is presumed to currently present. Take, for example, Sam's case:

Sam, aged 38, was employed on a permanent full time basis as a yards person with a car dealership which had a written equal opportunity policy that made discrimination on the basis of a person's criminal history unacceptable. His employment duties included keeping the yard and cars clean, keeping the cars fuelled up, putting new number plates on the customers' cars, running cars to and from a service, booking in new cars, cleaning the coffee machine, etc. All his duties were to be performed during standard business hours in the presence of other staff. He did not directly handle any cash. He worked for just under 3 months when he was unexpectedly dismissed.

During the recruitment process for this job, Sam was required to fill out an employment application form which asked, among other things, 'Have you been convicted of a serious offence in the past 10 years?' This question

required a perception call and a yes or no answer, but no guidance was given regarding what might constitute a 'serious offence'. Not believing that his previous convictions were sufficiently related to the inherent requirements of this job, Sam answered 'no'. He did, however, consent to a criminal check, which revealed his criminal history. He told his boss that his criminal history would reveal a number of burglaries. In response his boss told him that he was doing a good job and not to worry.

Throughout most of his probationary period Sam felt that his employer had been very positive about his employment. He had even been invited to his boss' house for a Christmas dinner.

About one week before Sam's probationary period was due to end, he was dismissed on the basis of the results of his police check, which had taken a long time to be processed for disclosure. His criminal record revealed a series of convictions relating to approximately 60 offences of burglary. Sam was not asked questions about his criminal history or given an opportunity to explain himself. There was no attempt to explore possible alternatives to a termination of employment (including, for example, varying any of his duties).

In describing the impact of this treatment on his morale, Sam explained that all his offences were drug related. His last conviction had resulted in a two year jail sentence from which he was released about 14 months prior to the termination. He had stopped using heroin in 2002, whilst he was in jail. He had then been on the methadone program and had "stayed clean" until he found himself in deep depression over the termination. He felt that he had tried to do the right thing and change his life around but this termination of employment had really 'knocked' him down. 'I really tried to make things work this time but now I wonder what's the point. Being treated like this just makes you feel like you're worthless' (Fitzroy Legal Service Inc, 2011j).

As illustrated, Sam was not given the chance to put the contextual information back into his criminal record, which only had negative consequences. Sam's attempts to reintegrate into the community via employment were not supported by society and his inability to successfully reintegrate may lead to a return to offending behaviour. It is the point of reintegration which is considered to be a vital point in breaking the cycle

of offending. It is therefore argued in this case that the limited information provided on a National Police Certificate fails to reflect the contextual reality of the individual's offending behaviour and can unfairly diminish the employment opportunities of ex-offenders. While this contextual and social information has become embedded in the criminal records held by Victoria Police as evident throughout this chapter, this has not been transposed into the publicly available criminal record. Furthermore, the National Police Certificate fails to report the rehabilitative efforts an individual has undertaken subsequent to their offending behaviour to address their criminogenic issues. Consideration of such information is essential to making an informed risk assessment in relation to an ex-offender reoffending in the future.

## **6.10 National Police Certificate is an inadequate risk assessment tool for employers**

### **6.10.1 National Police Certificate fails to inform of contextual information**

The National Police Certificate is an inadequate risk assessment tool for employers for four primary reasons. First, the National Police Certificate fails to account for or disclose contextual information in relation to the offending behaviour. For example, Victoria Police hold records outlining the particulars of the offending episode, which an employer is not privy to via a criminal record check. This contextual information in relation to an offence can have a significant impact on how an offender is perceived by an employer. Second, a National Police Certificate only discloses the statutory name of the offence, which can be quite alien to an employer and removes the human element and particular circumstances of an event. For example a charge of 'theft of a motor vehicle' is indexed as a moderately serious offence, but the circumstances surrounding the offending behaviour are imperative to understanding the actions of an ex-offender and the risk the individual poses in relation to reoffending in the future (Australian Bureau of Statistics, 2009a). Third, a National Police Certificate does not inform an employer of a candidate's positive current circumstances that may promote non-offending behaviour, for example marriage and stable accommodation. Finally, a National Police Certificate fails to disclose rehabilitation programs and treatment options completed to address specific criminogenic issues.

A hypothetical case study offered by Standards Australia in their *Employment Screening Handbook* brings the importance of contextual information to the fore. In a

case study Standards Australia provides, they explain how one of the candidates shortlisted for a position at an organisation returned a positive criminal record check, with the offence 'theft of motor vehicle'. The employer in this scenario queried the applicant and an explanation was offered. The candidate explained that the offence related to a property dispute with his wife during divorce proceedings four years previously (Standards Australia, 2007, p. 47). This explanation was confirmed and the candidate secured the employment position (Standards Australia, 2007, p. 47). The request and supply of this contextual information enabled the employer to relate to the ex-offender and not perceive him as 'the other', a criminal.

**6.10.2 National Police Certificate only discloses the statutory name of an offence**  
Consideration will now be given to section 17 of the *Summary Offences Act 1966*, that declares that it is an offence to use 'Obscene, indecent, threatening language and behaviour etc in public' (*Summary Offences Act, 1966 (Vic)*). The reflection on this section of the Victorian legislation is conducted to offer evidence that contextual information in relation to a particular offence is paramount to an employer making an informed decision about the suitability of a candidate for an employment position. An offence under section 17 of the *Summary Offences Act 1966*, classified as 'offensive behaviour in a public place' can be committed under a wide range of circumstances. Furthermore it must be noted that the denotation of offensive behaviour is fluid and subject to change based on the evolution of societal standards over time. What may be considered publicly offensive behaviour in one era may not be viewed as such in another era. A further consideration which is applicable to this section of the legislation is the role discretion plays in a person being charged with such an offense. In all cases where a person is charged with 'offensive behaviour in a public place', such a charge is based on a discretionary judgement by a Police Officer that the actions of the accused are offensive to current public standards of behaviour. The many circumstances which may result in a person being charged with offensive behaviour are not explored or alluded to on a National Police Certificate. This fact limits the utility of a National Police Certificate as an accurate risk assessment tool for employers in its own right.

In Victoria it is common for protesters to be charged with 'offensive behaviour in a public place' while participating in a protest if their behaviour or language is viewed as indecent or threatening by a Victorian Police Officer. (Fitzroy Legal Service Inc.,



2012). This is only one example of possible circumstances that may lead to a person having a criminal record. Three particular cases will now be offered to demonstrate the substantial variation in behaviours that have resulted in the same criminal offence being recorded on a National Police Certificate, that being ‘offensive behaviour in a public place’.

In *Inglis v. Fish* [1961] VR 607, a man attended a public toilet containing cubicles for both males and females. The accused man entered one of the male cubicles and, through a hole in the wall, looked into the female part of the toilets and observed women therein. Another man had observed the behaviour by crouching down and looking under the door of the cubicle the accused man was occupying. These events lead to the accused man being charged with offensive behaviour in public.

In *Ferguson v. Walkley and Another* [2008] 17 VR 647, the respondent police constables, W and S, attended a hotel in Hamilton after 10 pm in response to a call that a patron, F, was refusing to leave the premises. F, who was intoxicated, refused the publican’s further request that he leave the premises and told W to ‘fuck off’. Soon thereafter, F left the hotel premises and, pausing in the street, began bellowing insults at the police using language and gestures. That outburst led to about 20 people assembling outside the hotel. The respondents attempted, unsuccessfully, to mollify F who, after about five minutes, left the scene.

In *Nelson v. Mathieson* [2003] VSC 451, a person was charged with offensive behaviour in a public place for ‘chroming’ (the inhalation of volatile substances, generally paint and solvents, for the purposes of intoxication).

As evident through the three case studies presented above, the charge of ‘offensive behaviour in a public place’ can apply to a wide variety of behaviours and actions and in an extensive range of circumstances. The statutory charge of offensive behaviour in a public place as represented on a National Police Certificate fails to disclose any of this contextual information which is relevant to an employer assessing the risk a person may pose to an employer. For example, a candidate charged with offensive

behaviour in a public place for ‘chroming’ as in the case of *Nelson v. Mathieson* [2003] VSC 451, should not be considered as a risk in relation to customer service employment positions, as the behaviour was not committed against another person even through the statutory name of the offence as recorded on a National Police Certificate may suggest such a risk. Furthermore in the case of *Inglis v. Fish* [1961] VR 607, the crime committed by the accused was looking through a hole. The likelihood of the circumstances present for the commission of this offence reoccurring is improbable. The two cases just discussed are very different to each other and the case of *Ferguson v. Walkley and Another* [2008]17 VR 647, in which the accused was intoxicated and became abusive after being asked to leave the hotel. A contributing factor to this occurrence was intoxication which is not likely to be the case during the hours of employment.

#### **6.10.3 Factors that encourage non-offending not on a National Police Certificate**

There are other factors which may also contribute to and/or mitigate against the risk an ex-offender may pose to an employer that are not recorded on a National Police Certificate. For example a person is less likely to reoffend as they age (Bushway & Morrison Piehl, 2007; C Uggem, 2000). It is therefore suggested that enquires into a candidate’s age in comparison to their age when they participated in offending behaviour would add relevant information as to the likelihood of reoffending not offered on a National Police Certificate. Further to this, research has identified that particular dynamic situations can influence the likelihood of a person reoffending. For males the four primary factors that impact independently on reoffending are education/employment, alcohol/drugs, accommodation and attitudes/orientation (Ringland, 2011, p. 9). On the other hand the main three independent factors that impact on the likelihood of a female reoffender are education/employment, companions and attitudes/orientation (Ringland, 2011, p. 9).

#### **6.10.4 Successful completion of rehabilitation programs are not recorded on a National Police Certificate**

The National Police Certificate is also an inadequate risk assessment tool for employers because it fails to provide any information about rehabilitation programs undertaken and completed, as discussed in Chapter 5. Nor does it provide information on other treatment that may have been undertaken to prevent the risk of reoffending, for example, participating in a methadone program to address heroin addiction or seeking and participating in psychological counselling.

It is therefore proposed that the National Police Certificate fails as an adequate risk assessment tool for employers in determining the risk of reoffending that a candidate presents to an organisation. Risk assessment tools such as the VISAT and others used by correctional organisations are found only to render average results (Ringland, 2011, p. 11). If tools such as the VISAT, with the high level of research and expertise used in their construction can only render a fair result, how can human resources staff make an accurate risk assessment about a candidate with a criminal record reoffending based solely on a National Police Certificate? Given that the assessment tools used by Corrections Victoria encompass a rigorous and detailed collection of information about the likelihood of reoffending, much more than that presented to an employer in a National Police Certificate, it is reasonable to assume that the Certificate in its own right cannot provide an accurate or even fair result.

The use of the National Police Certificate to govern the possible field of action of ex-offenders based upon Foucault's theory of governmentality, as discussed in section 2.2 can only provide unfavourable and restrictive outcomes for ex-offenders. The failure of the National Police Certificate to offer the contextual information outlined above can only hinder rehabilitation and the reintegration of ex-offenders. This inability for ex-offenders to regain full active citizenship through the governing of their prospects via the National Police Certificate as a risk assessment tool, as discussed in section 2.5, can only increase the likelihood of reoffending, leading to the reinforcement of the offending cycle. It would seem that if efforts made by ex-offenders to rehabilitate and reintegrate into society, as discussed in section 2.3, are to be successful, the National Police Certificate cannot be a one stop shop for employers performing risk assessments on a candidate's offending, whether it be past, present or future.

### **6.11 Conclusion**

This chapter has argued that the Victorian criminal record has evolved since 1932 to an array of texts which are held simultaneously in various repositories and taking different forms. The pinnacle of these developments is the recognition that social, contextual and other information is to be held in the same esteem as offence related information. This recognition has not been translated into the construction of a criminal record for public access. The National Police Certificate only provides basic information compared with what is inscribed in a Victorian criminal record. This

culling of information into such a standardised and compressed form as represented on a National Police Certificate is detrimental to ex-offenders attempting to become gainfully employed. As mentioned in section 6.8, the National Police Certificate is the only formal, official document that an employer may request in relation to an employee's contact with the criminal justice system. Therefore, what is not included on the certificate is not made known to an employer. It is contended that such processes render a National Police Certificate inadequate as a risk assessment tool for employers.

In the following chapter a discussion of the key aspects of this investigation will be undertaken through the analysis of the three main themes identified in section 3.5. Furthermore, implications for stakeholders and the general public in Victoria will be explored.

## **Chapter 7 Discussion and Implications**

### *Relevant and Irrelevant offences, legislation required*

*Matthew failed to pay a restaurant bill and was charged with obtaining goods by deception. At the court hearing Matthew specifically addressed the Magistrate on the issue of a non-conviction disposition because he had concerns about the impact of a conviction on his employment prospects. Matthew was found guilty and received a fine without conviction.*

*Unfortunately for Matthew the offence mistakenly appeared as a conviction on a police check undertaken by his employer within three months of the commencement of his employment. Matthew pointed out this error to his employer, but he was not given time to correct the entry. Matthew was dismissed. Matthew lodged a complaint with the Victorian Ombudsman (Police Complaints). The Victorian Police admitted the mistake. The employer refused to withdraw the termination arguing that it was lawful because it fell within the three-month probationary period.*

*Matthew was told by the Ombudsman that to sue the Police for their error would be a drawn out affair, and could be costly. Although Matthew also knew two other people who had suffered as a result of incorrect police checks, he just wanted to get on with his life and gave up the fight.*

*Matthew felt that the offence was irrelevant to his employment because it was trivial, irrelevant to his role in the work place and no conviction had been recorded (Fitzroy Legal Service Inc, 2011e).*

### **7.1 Introduction**

In this chapter, the results presented in the previous three chapters will be brought together and discussed using the three key analytical themes introduced in Chapter 3 of this thesis as the framework. These analytical themes are risk management, rehabilitation and reintegration discourse and information management, as outlined in section 3.4. Each of these themes has a significant presence throughout each of the three stages of the offending cycle which has informed the structure of this investigation.

This examination commenced with an analysis of the issues, environment and legislative landscape which impacts on an ex-offender's ability to successfully rehabilitate and reintegrate into society via employment. This thesis needed to start from this point of the 'ex-offender' to expose and make central the obstacles, problems, and experiences faced by ex-offenders in the 'real world' when making a legitimate effort to become a productive member of society. This analysis was conducted from two different angles to illustrate the significant and disabling effects of current practice (see section 4.3 and 4.5). Once the 'real world' issues in relation to ex-offenders becoming gainfully employed was explored in detail and an appreciation and understanding of the implications of current practices was gained, further investigation became necessary. In a Foucauldian fashion, a tracing back from the end point, the achievement, the current state of affairs was undertaken. A genealogical approach was used to discover the various mundane, contingent and not so overt factors which have contributed to the predicament faced by ex-offenders when attempting to reintegrate into society via employment. Risk assessments and information management such as that evident through the analysis of the VISAT (Chapter 5) followed by the analysis of the criminal record (Chapter 6) have a significant impact on current day discourse and practices.

The three stages which have been examined are 'ex-offender', as presented in Chapter 4, through an analysis of media representations and public discourse in conjunction with the governing of an ex-offender via the National Police Certificate as an exclusionary tool in regards to employment. The second stage 'offender' was analysed in Chapter 5. In this chapter, consideration was given to the correctional environment, including fundamental principles, risk assessment tools and rehabilitation programs. The third stage 'offender to ex-offender' as presented in Chapter 6, focused on the transition from incarceration to society and the transition between the status of offender to ex-offender. This chapter analysed the construction of the Victorian criminal record and the coming to life of the criminal record as a risk assessment tool to govern ex-offenders' prospects in relation to employment.

The discussion in this chapter, framed using the three analytical themes identified above, will be followed by an examination of the primary implications for society and ex-offenders. This investigation has brought to the fore significant consequences of the use of the National Police Certificate by employers as a risk assessment tool.

Finally, conclusions will be offered in the following chapter in relation to the key findings of this investigation and as such will respond to the questions that rendered this investigation necessary.

## **7.2 Three main themes**

### **7.2.1 Risk management**

As discussed in section 2.5, risk management frameworks focus on the management of populations in accordance with the risk they are calculated to present to social order (Pat O'Malley, 2010). Risk management theories and practices are actuarial and centre on tools which are able to render a population calculable and therefore susceptible to techniques of management (Dean, 1999). As identified by Rose (2006), this 'new penology' is not primarily concerned with individuals and rehabilitation for an offender's personal benefit within a correctional setting, but rather with the ability to predict and manage their future behaviour. Furthermore it aims to classify individuals into groups sorted by dangerousness to be controlled (Rose et al., 2006). The greater a danger a group is perceived to present, the greater the targeting of management techniques to regulate levels of deviance (Feeley & Simon, 1992). Risk management practices within a correctional setting are undertaken in accordance with the results obtained via risk management tools such as the VISAT in Victoria. On the other hand, within a social setting, evidence has been presented that the criminal record is used in the same fashion by employers. In the following section, risk management and the role of the media will be discussed.

#### ***7.2.1.1 Risk management, employment and the media***

The mass media's use of headlines such as 'Offender wins VCAT appeal for licence to work with children: Child molester outrage' (Tatnell, 2011) and 'Fears sex offender coaching children' (Russell, 2010) ignite fear of people with a criminal history and position them as the 'other' from which society needs protection. Protection of children from harm is held in high regard in Australia, 'hence concerted measures against sex offenders, particularly child sex offenders are a staple of mass media news presentations' (Pratt, 2007, p. 6). Therefore, articles that represent sex offenders in employment situations are emotive and incite the exclusion of all ex-offenders regardless of the particulars of their offending behaviour. The association of offenders and crime in the media with people who have criminal records can only have exclusionary and negative implications for ex-offenders attempting to reintegrate into

society, especially in relation to employment. It is at this point that a request for a National Police Certificate as a risk management tool has the ability to identify ex-offenders and facilitate an employer's capacity to mitigate perceived risks by excluding such a category of candidates from gainful employment. This association and subsequent practices allows for the creation of a self-fulfilling prophecy as the likelihood of an ex-offender returning to crime as a result of being disenfranchised from legitimate social engagements is escalated.

The ideologies and practices promoted through media representations that rely on 'commonsense' assumptions as articulated by Hogg and Brown (2002; 1998) and discussed in section 4.5.4 are aimed at maintaining negative perceptions of ex-offenders and the criminal justice system. News reports and media representations are said to inform public opinion while also reporting public opinion. This dual role the media has assumed has significant implications for the quality of information being reported as well as about public perceptions and debate. Media reports capitalise on 'commonsense' assumptions by positioning those assumptions as foundational to arguments put forward through news articles. In this manner, debunking these continually reinforced assumptions is not an easy task (Carrington & Hogg, 2002; Hogg & Brown, 1998). For example the assumption that offender rehabilitation and ex-offender reintegration is the sole responsibility of the criminal justice system and that society has no responsibility or active role in such processes is the primary assumption addressed in this thesis. This central and dominant assumption within criminal justice debates reinforce the view that crime problems are essentially criminal justice problems' and that it is the role of the government to manage offenders and ex-offenders, including people on extended detention and supervision orders.

Although the criminal justice system is consistently seen as failing in this endeavour to manage offenders and ex-offenders in the community, social organisations and the like rely on populist solutions such as excluding ex-offenders to solve the problem. One of the tools used to exclude ex-offenders is the criminal record in employment contexts. The criminal record is the tool employed by social organisations and the like to mitigate the risks ex-offenders are perceived to present. Further to this assumption there is a belief that can be seen as having a reciprocal relationship. That belief is that



rehabilitation efforts and programs fail, thus requiring social institutions to maintain barriers of exclusion in relation to ex-offenders through the use of criminal record information. The use of criminal record information as a risk management tool will be built upon in the following section. A discussion of how Corrections Victoria conceptualises risk management and executes risk assessments utilising such tools as the VISAT will take place below.

#### ***7.2.1.2 Risk management and Corrections Victoria***

In the 1980s, theories of a ‘new penology’ took hold. These theories focused on risk management in dealing with offenders rather than treatment and rehabilitation. The acceptance of theories of risk management as a possibly more effective way of managing offenders and lowering recidivism rates saw the introduction of actuarial tools into correctional environments. Corrections Victoria rely heavily on the calculations of actuarial tools such as the VISAT to inform the appropriateness of rehabilitative programs as well as the approach to offender management (Rose et al., 2006). Risk management is conceptualised by Corrections Victoria through the implementation of actuarial tools which are based upon key principles identified in the ‘what works’ literature, as outlined in section 5.2.4 and 5.2.5. Corrections Victoria is primarily concerned with the management of one particular form of risk, that being the risk of reoffending (Department of Justice, 2010a). The foundational principles as outlined in section 5.2.5 which inform the development of rehabilitative programs, target categories of offenders perceived to present the greatest risk to society through further offending in the future. The research indicates that individuals who are calculated as being of a high risk of reoffending are given the greatest attention and are encouraged or required to participate in rehabilitative programs deemed to be of benefit to minimising the risk they present through the completion of the VISAT.

The VISAT, as analysed in Chapter 5, illustrates how risk management ideology within penology has filtered down from the ‘what works’ literature, as discussed in section 5.2.4, to the ‘Standard Guidelines for Corrections in Australia’, as presented in section 5.2.6, and then to Corrections Victoria. This is exemplified by the construction and implementation of a calculation tool, the VISAT, which is aimed at predicting the risk an individual presents of reoffending.

The VISAT, as an actuarial assessment tool, aims at predicting the risk an offender presents to society through reoffending. This tool, like others of its calibre, is found to generate barely satisfactory results. Actuarial tools such as the VISAT are developed by a collaborative team of researchers and experts in the field over an extensive period of time. The fact that such tools are reported to only generate barely satisfactory results is a testament to the obscurity and complexity of predicting the likelihood of a person reoffending in the future. It is therefore contended that a person employed within the human resources department of any organisation or institution would be less likely to be able to predict the likelihood of an employee offending or posing a security risk to the organisation, using an application form and a National Police Certificate (Backman, 2011; Naylor, 2011). It would be highly unlikely that human resources personnel would be able to make any conclusive determinations in relation to the risk an ex-offender presents to their organisation. The access, interpretation and management of information are critical to conducting risk assessments within both a social and correctional environment. Therefore in the following section a discussion focused on information management will be undertaken.

### **7.2.2 Information management**

Information management, as discussed in section 3.5.3, is a significant aspect of this investigation. The holding of information about an offender in a correctional environment or on an ex-offender within society is a core requirement to making risk assessments and managing and establishing the possible field of action of others (Dreyfus & Rabinow, 1983). The gathering of information for various purposes can have significant implications depending on how the information gathered is summarised, simplified, manipulated and used. In the following three sections the information gathering practices, processes implemented in their management and the way information is used will be discussed. The first to be considered is information management in relation to Corrections Victoria, with specific attention given to the way the VISAT collects, manages, simplifies and uses information.

#### ***7.2.2.1 Corrections Victoria and information management***

Information management has significant implications for offenders within a correctional environment. As considered in section 5.3 and following sub-sections, the VISAT is the primary information gathering tool and is used to determine an

offender's risk of reoffending and classify them according to the risk they are calculated to present to society. Further to this the information gathered is used to decide the most appropriate rehabilitation programs for a specific offender to be required to participate in.

The VISAT has been developed to gather a wide range of information. The types of information gathered are not only offence specific but also include social information such as education, employment history, accommodation details and information on relationships of the offender. Furthermore information in relation to drug and alcohol issues and other physical or psychological conditions is collected. The collection of such high levels of information can be understood as attempts to know the offender in a holistic way. High levels of knowledge facilitate the governing of offenders by corrections in ways considered to be most effective. As discussed in section 5.7 and following sub-sections, the collection of such information is not of concern, but what is of concern is the way these highly descriptive and detailed records are reduced and simplified into a summary format. The summarised version of the VISAT, analysed in section 5.7.4, removes all the detailed information collected throughout the lengthy document and leaves only a single word, a numeric representation or a single column on a graph to represent an offender in relation to a particular module. The practice of collecting large amounts of data only to then cull them into inadequate representations is of concern. These inadequate representations are then used to manage an offender through supervision, to refer them to rehabilitative programs and to govern their time within the criminal justice system. Unfortunately this practice of collecting extensive quantities of information and then reducing them to inadequate representations does not only occur by Corrections Victoria in relation to the VISAT. These practices can also be seen in relation to the management of criminal record information.

#### ***7.2.2.2 Victoria Police and information management***

As considered in Chapter 6, the Victorian criminal record has significantly evolved since the introduction of Dockets in 1932. Victorian criminal records were initially developed for law enforcement purposes with limited social and contextual information considered pertinent to police investigations. The introduction of the Antecedent Report in 1943 signalled a change in ideology and saw the inclusion of social and contextual information into criminal records. This recognition of the value of social information resulted in the expansion of the types of information recorded.

For example, Figure 11 reports the results of the study of 873 Intelligences Cards illustrating the high levels and most popular types of social information recorded. Figure 12 demonstrates the wide range of information recorded on Intelligence Cards. The inclusion of social and contextual information on criminal records did not cease, but continued to expand as evident through section 6.6.

While the practice of collecting high levels of crime related and social information on an offender for law enforcement purposes has continued, these high levels of information have not been converted into the criminal record made available to the public on request since 1993. The National Police Certificate, as analysed in sections 2.10 and 6.10, fails to disclose any social, contextual or other form of information. All that is recorded on a National Police Certificate is the statutory name of an offence/s for which the person has been found guilty and details of matters currently under investigation or awaiting court hearing.

It is argued that criminal record information held by Victoria Police for law enforcement purposes is like the VISAT with its various modules. In both these cases, high levels of detailed offence specific, social and contextual information are recorded. This information is then managed in a way that culls large amounts of data through the processes of summarising, simplifying and standardising. At the end of these processes all that is left is an inadequate representation of the original information collected. In relation to criminal records, this inadequate representation, as discussed in section 6.10, is known as the National Police Certificate. The summary at the end of the VISAT is used to govern offenders and make assessments in the correctional realm. This has material effects, for example access to particular rehabilitation program or being placed under a specific supervision regime. The National Police Certificate also has material effects; it is used to govern ex-offenders in society through the limiting of their employment prospects, as evident in section 4.4.

The way information is managed, manipulated, summarised, simplified and standardised has considerable consequences for conducting risk assessments, knowing an offender or ex-offender and finally having the knowledge and power to govern the conduct of others whether in a correctional or social environment (Dreyfus & Rabinow, 1983; Foucault, 1983). In the following section, information gathering and

use practices within the public arena will be considered with specific attention being given to the use of information by the media and employers.

### ***7.2.2.3 Media and the public information management***

As analysed in Chapter 4, current practices in Victoria in relation to the information presented in the media about ex-offenders, crime and the criminal justice system have significant implications for the production of public perceptions and the opinions or demands for change reported back through the media. Section 4.5 considers how the media presents limited and biased levels of information to notify the public. Research has found that current societal practices in line with surges in technology have facilitated the rise of the mass media as the primary source of information in relation to events and incidents not only on a national or international basis, but also on the local level given the limited person-to-person contact that takes place in modern society (Pratt, 2007). The presentation of information by the mass media in a compressed, simplified form, bordering on entertainment has significant implications in relation to producing an ill informed social body, that, like employers, conducts risk assessments based on perceptions promoted through the media (Hall, 1979; Pratt, 2007). In section 4.5.4.1, an example is provided in relation to how powerful the media can be in relation to influencing government policy on the basis of representing the 'expert' public opinion which they assist in constructing (Pratt, 2007).

The public opinions constructed with the assistance of mass media position the criminal justice system as failing and offenders or ex-offenders as the 'other' from which ordinary people need protection. This response to ex-offenders in the community encourages demands for information in relation to a person's criminal activity (Pratt, 2007). Given the power afforded to employers to request information, including National Police Certificates, at any stage through the employment process, as discussed in section 4.3 and its sub-sections, the construction of such social sentiments and public opinions can have significant implications for ex-offenders attempting to become gainfully employed.

In Victoria, as discussed in section 4.3 and 4.4, the National Police Certificate is used as a source of information to govern ex-offenders and disqualify them from gainful employment. The information presented on a National Police Certificate is limited and is open to interpretation. This is evident through the analysis of offensive

behaviour conducted in section 6.10. Furthermore, the lack of contextual information and social information in relation to offences recorded on a National Police Certificate leads to potentially unreliable risk assessments being made by employers. As shown through the evidence presented in section 4.3 and sub-sections, employers are using National Police Certificate requests to identify ex-offenders and exclude them from employment. Furthermore it is evident that the practice of including a request for a National Police Certificate in employment advertisements has changed significantly from 1993. Accordingly in 2010 approximately eight percent of advertisements considered in this investigation included a request for criminal record information compared with 0% in 1993. This significant change in practices from 1993 to 2010 illustrates a greater demand for criminal history information which can only have detrimental implications for ex-offenders. First, the request for a criminal record check by an employer in an advertisement can lead to an ex-offender self-excluding, as discussed in section 2.11.1. Alternatively as a result of the limited and decontextualized nature of National Police Certificates, ex-offenders can be disqualified as candidates in the employment process simply for possessing such a credential or record and being perceived as an unnecessary risk. This perception is fuelled by media reports which describe offenders and ex-offenders as dangerous and an active threat to ordinary citizens. In the following section rehabilitation and the discourse of failure will be considered. This discussion will build upon the two themes previous discussed.

### **7.2.3 Rehabilitation and the discourse of failure**

The ideologies on which rehabilitation efforts are based have changed substantially over time. The concept of rehabilitation, which considers an offender as a whole and attempts to treat their shortcomings in an attempt to restore them to full active citizenship has given way to rehabilitation with an alternate aim (Rotman, 1990). Offenders are now categorised, separated out and reduced to components in accordance with their criminogenic needs and assessed risk level (Forsyth, 1987). As discussed in section 2.3 and following sub-sections, this disassembling of an offender's identity is aimed at addressing specific risks and lowering a particular offender's likelihood of reoffending upon release via rehabilitative programs. It is commonly assumed that rehabilitation takes place within the correctional environment and society has no active role. While corrections aims to lower the risk an offender poses

to society through offender management plans and rehabilitative programs, the criminal justice system is consistently referred to in relation to its perceived failure to rehabilitate offenders and lower crime rates, which are regularly exaggerated through media reports (Pratt, 2007). As discussed in section 2.4 and following sub-sections, the discourse of failure in relation to the criminal justice system has significant implications for ex-offenders (Foucault, 1979). If the criminal justice system is consistently described through public discourse as failing to rehabilitate offenders, the existence of a criminal record does not just flag a person's past offending. The person with a criminal record will be perceived as a candidate who will offend in the future as it would be assumed that rehabilitative interventions and treatment have failed, like the criminal justice system as a whole. Therefore an ex-offender will always be perceived as an unnecessary risk by employers. In the following section government and Corrections Victoria will be discussed in relation to rehabilitation programs and the discourse of failure.

#### ***7.2.3.1 Government and Corrections Victoria***

Corrections Victoria attempts to address the risk an offender is perceived to present through the creation and maintenance of rehabilitation programs. As discussed in section 5.4 and following sub-sections, Corrections Victoria offers rehabilitation programs informed and designed in accordance with the internationally renowned 'what works' principles. Corrections Victoria offers various programs but the four main programs offered are the Drug and Alcohol Program, discussed in section 5.4.1, the Sex Offender Program (SOP), section 5.4.2, the Cognitive Skills Program, section 5.4.3, and the Violence Intervention Program (VIP), section 5.4.4. These programs are consistently cast as failing to curb the rate of recidivism by the media and via public discourse through the use of techniques associated with the discourse of failure as offered by Foucault (Foucault, 1979)

As stated in section 2.7.1, the Victorian criminal justice system as with criminal justice systems in most western liberal democracies has high rates of recidivism. This is supported by the findings of the Australian Institute of Criminology who report that 55% of prisoners in custody at June 2008 had served a sentence in an adult prison prior to the current episode (Australian Bureau of Statistics, 2008, p. 8). This very high rate of recidivism is largely interpreted as a 'failure' of the criminal justice system itself, and, more specifically of the corrections facility or prison. Public

understandings of ‘failure’—failure of the prison system and failure of government—are evident in the following media report:

More than one in three Victorian prisoners will return to jail within two years of release, prompting state Opposition claims that the Bracks Government programs have failed to combat repeat offending (Dubecki, 2003, p. 8).

This kind of understanding of the problem of recidivism as ‘failure of government’ is both long-standing and widespread throughout Australia and other western liberal democracies. It is acknowledged, for example, in a 1973 US report which states, ‘...the prison, the reformatory and the jail have achieved only a shocking record of failure. There is overwhelming evidence that these institutions create crime rather than prevent it’ (National Advisory Commission on Criminal Justice Standards and Goals, 1973). Thirty years on we see a reiteration of the problem, understood again as a failure of government. In 2007 the late US Senator, Edward Kennedy stated that ‘for far too long the criminal justice system has failed to adequately address recidivism, and that failure has imposed a large financial and social cost upon the nation’ (Congress, 2007).

The term ‘failure’ is not employed explicitly by Corrections Victoria, but its failure is nevertheless acknowledged in drawing attention to high levels of recidivism and imprisonment rates, as expressed in the following:

The Victorian prison population rose by 50 per cent between 1994 and 2003, reaching 3796 prisoners at October 2003. A significant contributing factor to this trend has been an increasing rate of prisoner reoffending. Currently, almost 43 per cent of prisoners reoffend and return to prison or corrective services within 2 years of being released (Auditor General Victoria, 2003 - 2004, p. 3).

While it has been indirectly acknowledged that the current course of action by corrections was failing to correct offenders it was proposed that building on the system would render more favourable outcomes. Corrections Victoria has envisaged that the proposed developments would ‘build a cohesive corrections system that introduces programs of rehabilitation and diversion as well as infrastructure in order to break the costly cycle of prisoner reoffending, to create a safer community and,



where possible, to keep less serious offenders out of prison' (Auditor General Victoria, 2003 - 2004, p. 3). The implementation of such enhancements has been identified by corrections as the solution to its recognised failure to correct the behaviour of ex-offenders.

While there is a consensus that prison – as a correctional facility – does not correct offenders in its own right, there is within corrections and within scholarship on corrections an accepted belief that building on the prison system through, for example, an increase in rehabilitative programs, better targeted programs, more accurate risk assessments, an expansion of re-integrative support and increase in surveillance will facilitate the success of the prison system. This in turn will lead to effective reintegration of prisoners into society. If the 'failure' of the prison system and hence of government is understood as the site of the problem, then laying bare and making up for its assumed shortcomings is the way to a solution. This strategy of addressing recidivism is supported and implemented by Corrections Victoria.

While governments attempt to address or find solutions to social problems like crime, offending and recidivism, the possibilities are limited within a scope of governmental institutions and organisations such as the criminal justice system. As focus and concentration remains fixed on rehabilitation programs, monitoring, supervision and the neutralising of risk presented by offending behaviour and even more so by routine reoffending behaviour, otherwise known as recidivism, limited attention is given to the government of ex-offenders that occurs beyond the prison walls. When programs 'fail' to rehabilitate and curb recidivism the focus remains on adding to the system or programs to improve results. It is regularly argued that the system often fails due to inadequate resources, deficiencies in policy direction or correctional staff training (Auditor General Victoria, 2003 - 2004).

It is thus apparent that 'failure' acts as a shared, taken-for granted and pivotal 'fact', or what sociologists of translation would call an 'obligatory point of passage' (Latour, 2005; Law, 2004), through which academic scholarship, legislation, policy and institutional practice, as well as public understandings have come to make sense to one another—come to be discursively bound—and the means by which, for example, academic scholarship gets translated into practice. That is, it is not just the means by which they 'speak' to one another or 'represent' themselves to each other. It becomes

the means by which representation is translated into practice and the means by which practice grounds its validity, with real, material effects upon the population.

### *7.2.3.2 The media and employers*

The coupling of ideas of failure and the criminal justice system have wide ranging implication. When one considered the impact that public's perceptions in relation to suspended sentencing (see section 4.5.4.1) have had in Victoria on government policy, legislation, the judiciary, correctional facilities and offenders, it is evident that failure in this context is a powerful concept that requires solutions either facilitated by government or otherwise. In relation to rehabilitation, while the solution offered by professionals and researchers is the use of better, more intensive and targeted rehabilitation programs, these solutions are not enough to dispel the air of failure that has engulfed the criminal justice system and subsequently rehabilitative efforts (Maruna, 2011a). The success of rehabilitation is what society needs to recognise to facilitate the successful reintegration of ex-offenders, not its failure (Maruna, 2011a). This distrust and lack of confidence in the criminal justice system can have unquestionable effects, not only on offenders, but also ex-offenders and society at large. The promotion and maintenance of 'commonsense' assumptions by the media reinforce the perception that the judiciary is failing to deliver just and proportionate sentences, while police are failing to maintain community safety and corrections are failing to rehabilitate offenders (Carrington & Hogg, 2002; Hogg & Brown, 1998; Pratt, 2007). These populist perceptions lead to substantially detrimental material effects for ex-offenders attempting to reintegrate.

The fact that Corrections Victoria is perceived to fail in the rehabilitation of offenders with its only success being in imprisoning them, results in an escalation of distrust and exclusion of ex-offenders: they will always be perceived as offenders in waiting. Such individuals are not seen as people who have learned from their mistakes, undertaken programs which have equipped them with appropriate pro-social skills and are not deemed capable of shedding their status as an offender and regaining full active citizenship to which they have a right (Auditor General Victoria, 2003 - 2004). As argued by Naylor (Naylor, 2011, p. 82) the staple feature of the media being constant discourse of failure in relation to the correctional scene 'reduces levels of trust in government and agencies of the criminal justice system to "get it right"'. The perceived failure of rehabilitation is what makes the criminal record such a powerful

and determinant tool in Victoria in relation to employment. An offender may have served their sentence but without the belief that rehabilitation can and does occur by social organisations, institutions and prospective employers, the criminal record is enough to prove that a person was, is and most likely will always be an offender and therefore deserving of punishment and exclusion.

It is at this point that the criminal record is utilised by prospective employers to detect and exclude those offenders they believe may have served their time, but will most likely offend again in the future, a point regularly made by crime victim support advocates. This illustrates how ongoing punishment through social exclusion can be seen as a response to the perceived failure of the judiciary to deliver just and proportionate sentences. Thus the community facilitates its own punishment through exclusion, even if not justly deserved. Furthermore this lack of faith in the criminal justice system and the government's ability to protect the community from the 'other' has led to social organisations such as employers using their discretionary decision making powers to govern ex-offenders through the application of the criminal record, in an attempt to mitigate perceived risk (Naylor, 2011).

While government and society may have reasons for their actions, assumptions and ideologies, these practices may not be in the best interests of promoting a more inclusive and receptive society. The examples of media coverage, political campaigns and criminal justice issues such as suspended sentences (see section 4.5.4.1) and extended detention and supervision orders (see section 4.5.5) have been provided and analysed to illustrate the power and influence the media, public discussion and the discourse of failure can have in producing material effects for ex-offenders, not unlike the criminal record. It is thus contended that a 'commonsense' approach, as described by Hogg and Brown (1998), mixed with the presentation of limited factual information can stimulate the use of risk assessment tools such as a criminal record in an unproductive manner. In the following sections, implications for society in relation to the use of criminal record information will be discussed.

### **7.3 Introduction to implications for society**

The results obtained through this investigation take a combination of forms. The first part of the analysis considered newspaper articles about criminal justice issues and key stakeholders, distributed through the mass media. Chapter 4 also presented an analysis of employment advertisements accompanied by qualifying literature. In

Chapter 5, an analysis of the VISAT and qualifying literature, including Corrections Victoria manuals and international principles were presented. In Chapter 6 historical forms of Victorian criminal records were considered, including Dockets, Results of Charge and Antecedent Reports and Intelligence Cards which were analysed to demonstrate how information management practices in Victoria, including the types of information recorded, had evolved.

The interpretation of these results has been undertaken employing a combination of two methods, both aspects of critical discourse analysis and the frameworks employed in the construction of governmentality literature, originating from the works of Michel Foucault. The tools and insight these methods have allowed me to develop will be applied to my understanding of the implications of current practices within Victoria for ex-offenders and society.

### **7.3.1 Society**

In this thesis the term society has been used to account for a number of social conditions, primarily social institutions and organisations. The further dimension to society which was considered in detail in Chapter 4 of this thesis was society as representative of the general public. These two elements of society, while not clearly defined, do have the ability to become interchangeable to varying degrees, as a person who is a member of the general public can still have a key role in an institution or organisation that makes decisions about employment. It is this crossing point that makes what is presented to the general public via the media so important on two fronts.

First, as demonstrated in Chapter 4, it can facilitate more punitive legislation and policy to be implemented by government in relation to criminal justice issues, such as the criminal record or suspended sentences (see section 4.5.4.1). This is an illustration of one form of government impacted upon by the media. The second form of government influenced by the media is that which occurs within the community through social organisations, institutions and the like.

The media presentations which inform and appear to represent public opinion have the very real ability to impact upon discretionary requests for criminal record checks and discretionary decisions in relation to the relevance of a National Police Certificate's contents. This use of discretion to request a criminal record check is

evident in the findings reported in section 4.2. These findings make clear that criminal record checks are being requested in job advertisements. This is then further compounded by the discretionary decision of whether to employ a person with a criminal record or not. The findings reported in section 4.4 and the information provided in section 2.11.2 and 2.11.3 suggest that discretion is used to exclude ex-offenders from gainful employment.

In section 7.3.1.1, the general public will be considered from the standpoint presented in Chapter 4. It will endeavour to propose a possible way the general public's foundational assumptions – which are generated, presented and reinforced through such common-sense approaches to law and order issues facilitated by the mass media – can be addressed (Hogg & Brown, 1998). These proposed ways of addressing current ideologies and practices are based upon the findings presented in Chapter 4 in relation to the limited informed public debate that occurs and the impact the media can have on government policy and practices. Section 7.3.1.2, below, will consider how the attitudes and perceptions of employers and prospective employers can be impacted upon in a way that will encourage them to use their discretionary power in the use of criminal record information to the advantage of ex-offenders attempting to reintegrate. The need for employers to use these powers to govern the conduct and future prospects of ex-offenders in a more inclusive rather than exclusive manner is supported by the findings presented in Chapter 4, and supported by recommendations made to employers by Standards Australia. Further to this, consideration will be given to alternatives to the use of criminal record checks to mitigate perceived risks to social organisation and institutions. Risk aversion is an expected practice of any social body but as evident through the findings of this investigation, current practices are focused on governing the perceived risks presented by ex-offenders, based on the limited information presented on a National Police Certificate, which, as evident in Chapter 6, is an inadequate risk assessment tool.

The findings presented through this thesis are based on an analysis using a Foucauldian governmentality approach. While the government of offenders within a correctional environment is clear and expected, this thesis brings into focus the government of ex-offenders that occurs beyond corrections, by society. This demonstrates how ex-offenders are governed and their possible field of action limited, especially in relation to employment (Dreyfus & Rabinow, 1983). The limiting of

employment opportunities via the criminal record as a risk management tool illustrates the ability to manage and govern the conduct of ‘others’ in a way that can have significant material implications. In the following sections the implications which have been identified through this research will be discussed with particular attention given to the way ex-offenders are governed within society.

#### ***7.3.1.1 General Public***

As discussed in detail in Chapter 4, the reciprocal relationship between the media and the general public can have significant implications for public perceptions of crime and criminal justice issues (Sparks, 2000). These perceptions of offenders being treated more favourably than they deserve and that the safety and security of ‘ordinary people’ is disregarded, builds not only anxiety and anger towards authorities within the criminal justice system, but also encourages the community to protect themselves from the threats presented as perpetually imminent (Pratt, 2007). It is at this point that social institutions and organisations attempt to protect themselves by identifying and governing the possible conduct of ex-offenders through the use of a National Police Certificate. This can only have negative implications for the reintegration of ex-offenders. This is evident through the findings presented in Chapter 4. The request for criminal record checks in employment advertisements to discourage ex-offenders from applying, the use of discretion to disqualify ex-offenders from the employment process and the defining through mass media of ex-offenders as the ‘other’ from which society needs protection, all have considerable detrimental implications for the prospects of reintegration. Based on these findings it is suggested that changes to social practices and ideologies need to occur.

It is thus proposed that the profile of the criminal justice system needs to change. The failures of the criminal justice system cannot be all that is made public. If the underlying commonsense assumptions, which feed and give validity to arguments aimed at further damaging the reputation of the criminal justice system and all that it entails are to be combated, the public needs to be better informed (Hogg & Brown, 1998). Changing the fundamental assumptions that have structured public discourse about the criminal justice system is not an easy task but this does not mean attempts should not be made (Hogg & Brown, 1998).

Based on the findings presented in Chapter 4 of this thesis, it is proposed that the way forward is not to ignore what already appears within the media and public debate, but rather for positive steps to be taken by government and experts within the criminal justice system to have a more dynamic role in public debate. This may slowly increase the level of informed public discourse taking place. The idea of an 'active role' is not fulfilled by providing public access to information upon request but rather by taking the information to the public. This can be achieved through the dissemination of press releases about criminal justice issues, rehabilitative programs, initiatives that have had favourable local and/or international results and explaining more comprehensively the introduction of new policies and practices.

For example in relation to the debate over suspended sentences, discussed in section 4.5.4.1, information needs to be presented by the criminal justice system to the public about how such sentencing works, what the conditions of such a sentence are, what happens if they reoffend during a suspended sentence and why it is highly favourable for an offender not to reoffend during a suspended sentence. It could, therefore, be argued that suspended sentences can result in increased community safety whilst mitigating the costs of incarceration. Furthermore, information as to why such sentences should be available to the judiciary and why they are in the best position to make such sentencing decisions needs to be explained. For example the fact that they are privy to the contextual information of each individual case and receive far more than the simplified and standardised version presented in the news media (Pratt, 2007).

Arguably, society may have become less tolerant, but its ability to be accurately informed and presented with a balanced view on issues within the criminal justice system can only have positive long term effects. In a sense this role of government, the criminal justice system and experts within the area is vital to overcoming the simplification that takes place when issues in relation to the criminal justice system are presented through the mass media (Pratt, 2007). The insertion of contextual information in relation to the actual workings, aims and processes in place within the criminal justice system, especially in relation to rehabilitation is not unlike that which has been discussed in relation to criminal records. Contextual information cannot be considered as extra information that can be discarded, but rather it must be given due reflection in relation to all presentations and decisions, whether it be in regards to the

charges declared on a National Police Certificate or criminal justice occurrences reported in the news media or otherwise.

In the following section consideration will be given to how the current practices of employers in relation to hiring people with a criminal record can be enhanced.

### ***7.3.1.2 Prospective employers and the employment process***

The findings presented in this thesis support the proposal that criminal records are being used as risk assessment tools by employers. This use of criminal records to govern the future prospects of ex-offenders within society and to aid in self protection from the 'other' leads to the exclusion of ex-offenders from employment. This ability to govern the conduct and prospects of ex-offenders who are attempting to reintegrate into society through exclusionary practices illustrates the power wielded by the 'other form of government', which is informed by public discourse and the news media. This power to separate out people considered to have a criminal identity from those 'ordinary people' who do not through the use of police checks has far-reaching implications (Pratt, 2007).

As the findings reported in Chapter 6 make clear, the level of information contained on a National Police Certificate is minimal in comparison to a criminal record held by Victoria Police. The level of thinning a criminal record endures when a National Police Certificate is issued as discussed in 6.9.2, makes it an unreliable tool for employers to conduct risk assessment upon. It is therefore proposed that requests for National Police Certificates should not be made on an ad hoc basis and should not be considered an accurate assessment of the probable risk a candidate presents. This proposition, based on the findings of this research is supported by Standards Australia, who state that 'decisions of this nature should not be based on instinct or a 'we're doing it because everyone else is' compulsion' (Standards Australia, 2007). The current Victorian situation in relation to the use of National Police Certificates as risk assessment tools needs addressing. Two propositions will follow which identify how employers can use their discretionary power to govern ex-offenders in a more inclusive, just and merit based manner.

The suggestions to follow address current governing practices by employers, based on discretionary decision making, which lead to the exclusion of ex-offenders. In relation to criminal records and employment in Victoria, discretion is a powerful tool



available to employers in relation to governing ex-offenders (see section 4.3) through their inclusion or exclusion from employment opportunities. Prospective employers have the ability to make discretionary decisions on a number of fronts in the employment process as identified in section 4.3.1, in the absence of definitive legislation and protection for people with a criminal record. The following are discretionary decisions in the absence of legislative requirements. First, it is a discretionary decision whether to request a candidate to supply a National Police Certificate. Second, it is a discretionary decision as to whether the existence of a criminal record will result in automatic exclusion from the employment opportunity. Third, it is a discretionary decision as to what entries on a National Police Certificate will be considered relevant. Fourth, it is a discretionary decision as to whether enquiries will be made into the contents and context of recorded entries on the National Police Certificate by a prospective employer and finally, it is a discretionary decision whether to employ an ex-offender or not. It is thus apparent that discretion is a powerful and consistent tool which can result in the inclusion or exclusion of an ex-offender seeking employment. Each of these switch points between the inclusion and exclusion paths will be considered in turn, with advice as to what considerations and practices should be included at each point.

This advice is offered to address the findings of this investigation. These findings are that the criminal record is being used as a risk assessment tool, like the VISAT (see section 5.8.2). Those ex-offenders are governed by social institutions and organisations through the use of a National Police Certificate as a risk assessment tool (see section 4.5.1). Furthermore, that the National Police Certificate is an inadequate risk assessment tool (see section 6.10). The advice to follow in relation to discretionary decision making practices is to a large degree supported by the advice offered by both the Australian Human Rights Commission and Standards Australia in the 'Employment Screening Handbook'.

1. The decision to request a candidate to supply a National Police Certificate should not be done in an ad hoc fashion as mentioned above. When an employment position becomes available within an organisation, due deliberation should be given to the role and duties implicit within that role. This does not mean consideration of something that might occur or could

occur, but rather that will regularly occur. If any of those regular duties definitely or probably render the organisation susceptible to criminal behaviour then requesting a candidate to supply a National Police Certificate could be considered justified, otherwise such requests should be avoided.

2. The decision to automatically disqualify a candidate based on the existence of a criminal record is not recommended under any circumstance where it is not required by legislation. Employers are implored to recognise that the situation in relation to criminal records is not black and white, but rather contains all shades of grey. A person with a criminal record who has paid their debt to society should have regained full citizenship and with that the full rights to be judged on their merits and not on their criminal history. Further to this, it is in an employer's best interests to employ the candidate best qualified and skilled for an employment position. In the case of a person with a criminal record, this may assist additionally in their full reintegration into society, increasing feelings of community membership and decreasing the likelihood of reoffending.
3. The decision as to what entries on a National Police Certificate will be considered relevant should be made in conjunction with whether a National Police Certificate should be solicited. It is recommended that whatever offences are deemed relevant should be done with specific consideration to what probable offences can be committed in the execution of routine duties of a particular employment position. For example a position requiring an employee to complete administrative or customer service tasks should not consider drink driving, driving whilst disqualified or minor drug possession offences as relevant to the core duties of that particular position, whereas they may be considered relevant to a courier employment position.
4. The judgment as to whether enquiries will be made into the contents of the National Police Certificate by a prospective employer is recommended in all situations in which that Certificate is returned containing an offence history. It is recommended that a National Police Certificate not be requested until a short-list has been determined of the most suitable candidates for a position.

The reason for waiting until this stage of the employment process is to allow each candidate to progress to that stage without bias or self-exclusion occurring (see section 2.11.1). Furthermore, it allows the employer to focus on a minimal number of candidates, thus lowering the cost of conducting criminal record checks. It is recommended that if a candidate's criminal record check is returned with offences recorded, a meeting to discuss the offences should be arranged, giving the candidate the opportunity to reinstate the contextual information that had been removed during the process of creating a National Police Certificate, as discussed in Chapter 6. This contextual information will allow for a prospective employer to make a more informed decision as to the character and likelihood of the candidate reoffending, whilst also affording an ex-offender the opportunity to explain their past behaviour.

This is an important part of the employment process if a decision to undertake criminal record checks is made by an employer, as illustrated through various case studies present throughout this thesis. One particular case study makes clear the vital role that contextual information can play, that is the case of Jim, outlined in the beginning of Chapter 6. In this case Jim was found guilty of 'behave in offensive manner in a public place'. Discussions and the reinstatement of contextual information in this case established that the charge related to the offence of urinating in a public place, although as admitted by the coordinator of the charity who employed Jim as a volunteer, it was assumed on first sight of his National Police Certificate that it was related to 'flashing' in public (Fitzroy Legal Service Inc, 2011b). In this case, if further enquires were not made, an unjust and ill informed decision would have been made in relation to Jim's suitability for the position to which he applied.

5. It is suggested that the ultimate decision whether to employ an ex-offender or not should not be based on irrelevant offence information and that the prospective employer should make every effort to be well informed in relation to the context of offences reported. Further to this it is advised that the decision whether to employ an ex-offender or otherwise should be based primarily on merit, as with all other applicants, while consideration of the relevant criminal history information is taken into account. In the following section suggestions will be offered to employers in relation to limiting the

number of discretionary requests for National Police Certificates for employment positions.

### ***7.3.1.3 Employers and Employees***

While a social institution or organisation is expected to be risk averse, the following advice is offered to encourage employers to govern in a way which does not focus on ex-offenders specifically via a National Police Certificate. This form of governance and risk management practice leads to the exclusion of ex-offenders from gainful employment. It is thus suggested to employers to govern and mitigate risk through the workplace environment, practices, policies and procedures. This can be accomplished by an employer conducting a review of the organisation's main business, customers, stakeholders, processes and procedures. Once a review is conducted an employer should identify potential areas of risk in relation to an employee offending against the organisation or while representing it. This risk identification would be a good way to attempt to mitigate the risks presented to an organisation by any employee, regardless of their criminal record. This will reduce the need to use discretion and request National Police Certificates. This risk identification and its alleviation through the implementation of processes and procedures would allow for a more risk management savvy organisation. This would facilitate the reduction of the threat presented by any employee, regardless of the existence of a criminal record.

For example, a study conducted by Richard Hollinger and Jason Davis in the US, found that losses from employee theft reached \$32.2 billion in 2000, furthermore, employee theft alone 'accounted for 46% of retail inventory shrinkage while shoplifting amounts to 30.8% of loss by retailers. Employee theft and shoplifting together accounted for the largest source of property crime committed annually in the United States' (Kethineni & Falcone, 2007, p. 41). In relation to this identified organisational risk of theft, the best answer is not necessarily conducting criminal record checks, which are unlikely to negate such high levels of employee thefts. Instead it is recommended to alter the environment through surveillance equipment in warehouses, employee bags being stored prior to entering the area where inventory is held, employees being required to cross-check other employees' inventory calculations and reports and other such measures. These measures will remove the emphasis from particular employees and their criminal records and place more robust

process, procedures and environmental elements into focus. This will not only lower the risks presented by an ex-offender to an organisation, but also negate the risks presented by employees without a criminal record who still have the capacity to offend against their employers.

### **7.3.2 Victorian legislative concerns**

Legislation can be considered to be one of the most robust ways of implementing change in any jurisdiction. Legislation has the ability to mitigate to varying degrees discretionary decision making and where the legislation is not adhered to it results in punishment. In this section of the thesis consideration will be given to the types of legislation that have been implemented in various states of Australia other than Victoria, for how they can improve the Victorian situation.

#### ***7.3.2.1 Anti-Discrimination Legislation***

Anti-discrimination legislation makes discrimination based upon particular attributes unlawful. As outlined in section 2.9.3, anti-discrimination legislation differs from state to state in Australia. Currently in Victoria, there is no anti-discrimination legislation specifically relating to the utilisation of criminal record information, which does exist to varying degrees in Tasmania - 'irrelevant criminal record', the Northern Territory (NT) - 'irrelevant criminal record' and the Australian Capital Territory (ACT) - 'spent convictions'. In relation to unlawful discrimination based upon a criminal record, it must be proven that the criminal record is irrelevant to the 'inherent requirements of the job', an inherent requirement is defined as essential to the position and not merely secondary (*Qantas Airways Limited v. Christie* (1998) 193 CLR 280). While the introduction of anti-discrimination legislation in Victoria in relation to 'irrelevant criminal records' was suggested in 2009, it did not eventuate. The introduction of such legislation would signal a step in the right direction but it would not have a drastically positive impact for two reasons. First, as recognised by the courts, the 'inherent requirements' exception can lead to the neutralisation of anti-discrimination legislation. The Full Federal Court of Australia described the purpose and operation of the HREOC Act as follows:

Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by

virtue of membership of a particular group... These considerations must be reflected in any construction of the definition of 'discrimination'... because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the [Human Rights and Equal Opportunity Commission] Act to promote equality of opportunity in employment will be frustrated (*Commonwealth v. Bradley* (1999) 95 FCR 218, 237 (Black CJ)).

The fact that employers have discretionary powers in relation to determining what is to be considered an inherent requirement of an employment position can have naturalising implications in relation to pursuing an employer for acting contrary to anti-discrimination legislation. This line of argument has been successfully claimed by employers in a number of cases (Human Rights and Equal Opportunity Commission, 2005).

The second reason is also linked to the discretionary powers of employers. When an employer offers an explanation as to why a candidate was not successful in obtaining a particular employment position, anti-discrimination legislation becomes relevant. If anti-discrimination legislation relating to 'irrelevant criminal records' is active in that jurisdiction and the recorded offences are irrelevant to the employment position, the employer has the discretion and ability to disclose an alternative factor or factors which lead to the decision, for which the ex-offender has no recourse.

It is thus suggested that whilst anti-discrimination legislation in relation to 'irrelevant criminal record' in principle is desirable, in practice it will not strongly impact on the employment levels of people with a criminal record. In the following section the introduction of a spent conviction scheme enshrined in legislation will be considered.

#### ***7.3.2.2 Spent conviction scheme***

Spent conviction schemes as outlined in section 2.9.2 of this thesis allows for minor offences to become 'spent' after a prescribed period of time. In Australia the common length of time for an adult offender is ten crime free years (Australian Law Reforms Commission, 1987). Typically a spent conviction scheme will include any offence that resulted in a sentence of less than 30 months imprisonment or in a non-custodial

sentence (Naylor, 2011). The logic behind the introduction of such a scheme is that the:

Use of information about an old minor criminal conviction, which in itself is not a reliable indicator of future behaviour, can seriously disadvantage people in getting on with their lives: obtaining employment or promotion, applying for insurance, credit or occupational licence, or seeking registration and membership of organisations (Federal Privacy Commissioner, 2002).

This scheme allows for an individual to legally deny their past offences once they have become spent and, furthermore, restricts enquires and the consideration of such offences by prospective employers and alike (Federal Privacy Commissioner, 2002). No legislative spent conviction scheme exists in Victoria. In Victoria, what exists is a Victoria Police internal policy on the disclosure of criminal record information (Victoria Police, 2011e).

The Victorian Information Release Policy states that Victoria Police will generally not release convictions after ten crime-free years, for which penalties were less than a maximum of 30 month incarceration (Victoria Police, 2011e). Subsequent to this statement, an array of conditions, which would facilitate the disclosure of theoretically spent convictions are outlined, including a general clause, 'in other exceptional circumstances where the release of information is in the interest of crime prevention or the administration of justice' (Victoria Police, 2011e). As argued by Naylor:

A person with a single minor offence, over ten years ago, would therefore be able to answer 'no' if asked about criminal conviction in most states, but in Victoria would not know whether police would regard that particular conviction as 'spent' (Naylor, 2011, p. 91).

Given the current situation in Victoria, a spent conviction scheme would be desirable. This would allow for a greater understanding of conditions for past offences to become spent and specifying the exclusions to offences becoming spent. Through the enactment of the scheme it would formulate a more robust framework and allow ex-offenders who meet the specific conditions for their past offences to become spent to legally deny them with confidence. Further to this, it is recommended that ex-

offenders be given the opportunity to query the status of offences which they believe should have become spent. Including this as a purpose for a Victorian criminal record check would afford an ex-offender the certainty in relation to their status as a person with a criminal history which may be disclosed for employment and other non-law enforcement purposes.

An enacted spent conviction scheme is desirable, but as proposed by Shadd Maruna:

rehabilitation processes that require almost a decade or more of ‘crime-free’ behaviour before forgiving an individual for his or her crimes are just and fair, but they miss the point of rehabilitation (2011a, p. 97).

In the following section new legislation will be proposed which is not aimed at eliminating an ex-offender’s criminal history, as achieved to some extent through a spent conviction scheme. But rather offering a possible way criminal record information can be used, without total disregard for rehabilitative and reintegration efforts.

#### ***7.3.2.3 Restriction of the release of non-convictions***

As discussed in section 2.10.2, the Victorian Police Information Release Policy about what is disclosed on a National Police Certificate is at odds with possible judicial decisions. The judiciary has the sentencing option to find a person guilty of an offence but to record a non-conviction in relation to that particular offence (*Sentencing Act 1991* (Vic)). This sentencing option as outlined in the Act is aimed to negate future undue hardship and punishment in relation to employment and other social engagements that may require a criminal record check. The judicial decision is to take into account a number of factors such as:

SECT 8 (a) the nature of the offence; and

(b) the character and past history of the offender; and

(c) the impact of the recording of a conviction on the offender's economic or social well-being or on his or her employment prospects (*Sentencing Act 1991* (Vic)).

These specific requirements establish that the decision made by the judiciary is to be an informed decision, not an ad hoc decision. It requires that the judiciary give due



consideration to all information presented and available, including contextual information and consequential information of recording a conviction. The introduction of such legislation by the Victorian legislature is strongly supported by the findings of Chapter 6, which make clear the significant role contextual information plays in understanding a person's past offending behaviour and the likelihood of reoffending, especially in relation to employment.

Given these legislative requirements and the fact that this information is not considered again at any future stage, it is argued that the decision made by the judiciary should be one given due respect and be adhered to. The current Victorian Police Information Release Policy flies in the face of such informed considerations and the decision to disclose findings of guilt, not conviction is one which is ad hoc, giving no consideration at all to contextual information or possible consequences but rather is only a standardised, simplistic response to any record of guilt (Victoria Police, 2011e). The implications of such disregard of judicial decisions can have significant consequences to employment. This is manifestly clear in the case of Matthew, presented at the commencement of this chapter. The fact remains that his finding of guilt, even though initially recorded incorrectly as a conviction, would nevertheless have been released in Victoria. This is what ultimately resulted in his dismissal by his employer.

#### **7.4 Conclusion**

In this chapter a discussion of the key findings of this investigation has taken place. The negative impact media representations have on public perceptions, including employers has been considered. Furthermore, how information is managed and used in relation to conducting risk assessments has been discussed. What this investigation has argued is that ex-offenders attempting to reintegrate into society through employment are subject to the exclusionary and governing practices implemented and managed by employers, within the social sphere. These societal practices require addressing if recidivism rates are to be lowered.

This chapter has considered the findings of this thesis and offered advice in regards to addressing the obstacles, practices and issues which encourage the exclusion of ex-offenders from gainful employment. It has highlighted the limited role a National Police Certificate should have and suggested alternatives to governing the future

conduct of ex-offenders through such a risk assessment tool. An alternate focus on workplace environments, practices, processes and policy to govern and mitigate risks to employers has been presented. Furthermore, the introduction of legislation that would allow for due regard to be given to contextual information as considered by the judiciary to govern what is recorded on a National Police Certificate has been discussed. In the following chapter, conclusions addressing the thesis question and sub-questions based on the research, findings and discussion will be offered.

# Chapter 8 Conclusion

## 8.1 Introduction

This thesis aims to contribute theoretically and practically to knowledge concerning the criminal justice system and the governing of ex/offenders within both the correctional and social environment. Particular attention has been given to three key themes which are risk management, rehabilitation and reintegration discourse and information management. These themes have facilitated the analysis of particular risk management tools aimed at governing ex-offenders. These tools are the VISAT within the correctional environment and the National Police Certificate within the social realm. Data has been presented throughout this investigation aimed at responding to the thesis question through the answering of subordinate questions. In the following sections the subordinate thesis questions will be answered followed by the response to the thesis question.

## 8.2 What this research has established

### 8.2.1 What are the information management practices that contribute to the governance and control of offenders and ex-offenders?

The information management practices within both the correctional and social environment are ones which gather large amounts of information, for example the criminal record (see section 6.9.1) as held by Victoria Police for law-enforcement purposes and the VISAT (see section 5.8.1), a lengthy document containing large amounts of contextual, social and specific information. These dense repositories of information are processed and summarised, rendering them as simplified documents that represent the offender or ex-offender. These summarised and simplified representations of an ex-offender are the summary at the end of the VISAT and the National Police Certificate. As discussed in section 7.2.2, these limited forms of information are used to manage offenders within the correctional environment and to govern the possible field of action of ex-offenders in relation to employment.

### 8.2.2 How do risk management tools function behind and beyond the prison walls?

This thesis has considered how both offenders and ex-offenders are subject to risk management tools. Consideration has been given in Chapter 5 to the VISAT which is the offender risk management tool used by Corrections Victoria. This tool is designed

to gather large amounts of information about an offender. Particular facets of information as outlined in section 5.5 are used to determine the risk of a person reoffending in the future. This calculated risk level has material effects in relation to accessing rehabilitation programs and offender management plans. A person who is calculated to be of a high risk of reoffending is subject to more intensive forms of intervention in an attempt to mitigate the risk they are perceived to present to society (see section 5.4). The VISAT is to corrections what the National Police Certificate is to employers. This investigation has found that the VISAT is used in a correctional environment to govern the conduct of offenders. On the other hand, within the social realm the criminal record is used to govern the prospects and conduct of ex-offenders. The National Police Certificate is used as a risk assessment tool by employers, which leads to ex-offenders being excluded from gainful employment when attempting to reintegrate into society. This investigation has demonstrated that a National Police Certificate is an inadequate risk assessment tool (see section 6.10). As discussed in section 7.2.1, risk management techniques used within both a social and correctional environment have material implications for ex-offenders. Within a correctional environment they can facilitate access to programs, as well as disqualify offenders from rehabilitative programs. Within the social realm the criminal record as a risk assessment tool is used to disable ex-offenders from entering gainful employment and regaining full active citizenship.

### **8.2.3 How has the discourse of rehabilitation and reintegration impacted on offenders and ex-offenders in the public sphere?**

As evident through the analysis and findings reported in Chapter 4 and the discussion in section 7.2.3 rehabilitation and reintegration discourse has material effects on both offenders and ex-offenders. Public discourse is largely informed and promoted by the media and has the ability to stimulate change in government policy as evident in section 4.5.4.1. Furthermore, the findings of this investigation have shown that the media encourages ‘commonsense’ assumptions which lead to a more punitive society, and consider the criminal justice system with the discourse of failure as never succeeding in combating crime. Furthermore, the description in media reports of the criminal justice system consistently failing have fuelled demands by employers for criminal record checks to be required in an attempt to identify and protect themselves from the ‘other’, ex-offenders, who are perceived as presenting an unacceptable risk.

### **8.3 Is there a critical role for society in the reintegration of ex-offenders?**

Through the addressing of the above questions this investigation has found that there is a critical role for society in the reintegration of ex-offenders. Society has a critical role in giving ex-offenders the opportunity to reintegrate via gainful employment. If the rate of recidivism is to be lowered, ex-offenders must be given a reasonable opportunity to establish a vested interest in society and its protection. Furthermore, it has been proven that an ex-offender's criminal record in the form of a National Police Certificate is used by society to circumvent legitimate attempts by ex-offenders to reintegrate and regain full active citizenship, primarily through employment. Current employer practices in relation to employment advertisements identifying a requirement for a National Police Certificate have significant implications for ex-offenders. These practices aim to encourage ex-offenders to self-exclude from the employment process. The employment of a National Police Certificate as a risk assessment tool needs to be addressed if ex-offenders are to have a real chance at rehabilitation and reintegration. This investigation demonstrates that while corrections are given the responsibility to rehabilitate offenders, the process of governing does not stop there. Society also has a responsibility; it governs ex-offenders and, through this form of government, ex-offenders can either be encouraged to become productive members of society, via inclusionary practices, or remain the 'other' via current exclusionary practices, thereby increases the likelihood of future offending.

### **8.4 Recommendations**

In section 7.3 and following sub-sections, specific implications for society have been considered resulting in the following recommendations being made. First, as outlined in section 7.3.1.1, reliance on the mass media to present a balanced report in relation to criminal justice issues and events is ill advised. It is therefore recommended that the criminal justice system make every effort to actively inform the public about developments and issues within the criminal justice system.

Second, as discussed in section 7.3.1.2, it is recommended that employers better manage the way they execute discretionary power. Given the extensive levels of discretionary power afforded to employers in Victoria, it is critical to the successful reintegration of ex-offenders that discretionary power be used in a fair and non-exclusionary way in relation to ex-offenders. The inclusion of ex-offenders into the

social body will allow for the lowering of recidivism rates, as ex-offenders will have a vested interest in community safety.

Third, it is recommended that employers shift their focus from risk management through employees to risk management via environment and procedural design. As discussed in section 7.3.1.3, it is proposed that employers rely less on criminal record information as all employees are capable of offending against their employer and focus instead on putting in place processes, procedures and environment elements to limit the possibility of offences being committed against the organisation.

Fourth, it is proposed that legislation be enacted in Victoria, as outlined in section 7.3.2 and subsequent sub-sections, to manage the use of criminal record information. This exists already in a number of Australian states as anti-discrimination legislation, as discussed in section 7.3.2.1, and spent conviction schemes, as discussed in section 7.3.2.2.

Finally, it is recommended that new legislation be enacted to make the disclosure of offences for which a non-conviction was recorded unlawful. As outlined in section 7.3.2.3, this would allow for the spirit of the recording of a non-conviction by the judiciary to be upheld and furthermore would acknowledge the expertise of the judiciary in taking into account all relevant information, including social and contextual information.

## **8.5 Future research direction**

This investigation has utilised a particular methodology incorporating Foucauldian concepts of governmentality within a genealogical framework. This approach allows for the critical analysis of data with a particular focus on the mundane, which constructs assumptions and has significant implications. It is therefore proposed that in future such an approach to criminological investigations be considered.

It is also noted that future research into the development of an independent body to deal with criminal records for public purposes be conducted. While criminal record information for law enforcement purposes should remain with the police, the disclosure of criminal record information in the form of a National Police Certificate should be shifted to an independent body. Such a body will be responsible for not only distributing criminal records into the public arena, but also dealing with the social aspects of such activities, especially in relation to employment.

# Appendix 1

## Drug and Alcohol Program

Within the Victorian jurisdiction the ideologies associated with ‘harm minimisation’ are foundational to alcohol and drug dependence rehabilitative programs. The Victorian prison system offers a range of programs to offenders with varying durations.

The following outlines Victorian prison based programs and their duration:

- Alcohol and Driving Education - 12 hours
- Benzodiazepine Education Program - 12 hours
- Cannabis Education Program - 12 hours
- Culturally and Linguistically Diverse (CLD) Drug Education Program - 12 hours
- Prison Based Drug and Alcohol Program: Intensive - 130+ hours
- Alchemy: Alcohol Education and Reduction - 20 hours
- Understanding Substance Abuse and Dependence - 40 hours
- 13 Week Intensive Drug Treatment Program - 125 hours
- Alcohol and Other Drugs - 12 hours (Heseltine, Day, et al., 2011, p. 27)

These programs within the prison system are accompanied by other management strategies, which include urinalysis, pharmacotherapy and health services (Heseltine, Day, et al., 2011, p. 27). Typically, drug and alcohol programs that are less than 20 hours in duration are considered to be ‘psycho-educational’ programs and have limited cognitive behavioural components’(Heseltine, Day, et al., 2011, p. 29). Alternatively, programs that have a duration exceeding 100 hours addressing substance use typically utilise ‘motivational, cognitive behavioural, rational-emotive and/or mindfulness strategies’ which aim to promote understanding of patterns of use, ‘link substance use and criminal behaviour, foster attitude change, restructure beliefs and cognitive associations with substance use and crime’ (Heseltine, Day, et al., 2011,

p. 29). Access to more intensive programs requiring high levels of resource allocation are subject to risk assessment results being high - moderate based on the VISAT in conjunction with both the identification of drug and alcohol interventions as a criminogenic need and subject to the length of sentence imposed (Heseltine, Day, et al., 2011, pp. 29-30).

In a community setting, access to drug and alcohol programs is based on the results obtained through the completion of the VISAT in conjunction with Order conditions. If an offender has a drug and alcohol condition placed on their Order or is found to have a high criminogenic need in relation to drug and alcohol issues, it is the responsibility of the Community Corrections Officer managing that Order to facilitate a specialised drug and alcohol assessment. Specialised drug and alcohol assessments are completed by the Community Offenders Advice and Treatment Service (COATS). COATS operate under a harm minimisation model and are responsible for linking offenders to services within the community that are appropriate to their needs. COATS clinicians 'conduct a clinical drug assessment to determine the offender's alcohol and other drug treatment needs. An Individual Treatment Plan (ITP) is developed for the offender' (Corrections Victoria, 2008a, p. 9). This plan primarily focuses on addressing drug use behaviours, with consideration to links with offending behaviour being of primary concern. Based on this assessment, COATS will then purchase appropriate treatment services from a community based organisation in the offender's local area, funded by government.

Unlike other rehabilitative programs, the engagement with the treatment service is only limited by the duration of the Order. Attendance to the service provider is mandatory and is monitored by the managing Community Corrections Officer (CCO). There is no minimum or maximum time duration specified, the length of the treatment is subject to the ITP and the assessments made by the service provider in relation to the length of engagement required (Corrections Victoria, 2008a). While this rehabilitative program is available to offenders based on their criminogenic needs and is available to all VISAT risk levels, this is not the case for all rehabilitative programs.



## **Sex Offender Program (SOP)**

Sex Offender Programs offered in a prison environment are aimed at two specific levels. First of which is the high intensity program, which is primarily designed for offenders who are classified as having a high risk of reoffending. This program has a duration of 180 hours (Heseltine, Day, et al., 2011, p. 16). The second type of program offered is a moderate intensity program, which is aimed at offenders who pose a moderate risk of reoffending (Heseltine, Day, et al., 2011). This program has a reduced length of 120 hours. In a community setting, the Sex Offender Programs can vary between 144 hours over 9 months to approximately 300 hours. The maximum is determined by the length of the sentence. For an offender to access this program he or she needs to have a sexual element to the offence committed, and this criminogenic need is identified through the completion of the VISAT. Once criminogenic need is identified, the offender will be referred for assessment by a specialist clinician trained in sex offending who employs a particular actuarial tool, known as STATIC -99 (Heseltine, Day, et al., 2011, p. 15 & 66). This assessment will categorise the risk the subject poses in relation to sexual offending specifically. Although the VISAT will give a risk of general reoffending, this assessment is not relied upon as there are accepted limitations in predicting sexual reoffending, given the nature of the offending.

## **Cognitive Skills Program**

In Victoria, Cognitive Skills Programs are delivered both inside prisons and within the community. The focus of this program is on high to moderate risk offenders. In an institutional setting, the main program can be either 60 or 100 hours in duration. Ideally an intensive program should be at least 100 hours in length, but this goal is not always reached (Heseltine, Sarre, et al., 2011). Alternatively, in a community setting the program runs for approximately 50 hours, and involves two sessions a week for a period of 10-15 weeks (Corrections Victoria, 2008b). The sessions are typically facilitated by a Clinical Services staff member and a Community Corrections Officer. Furthermore, the Cognitive Skills Program is a group orientated program, which caters for 6-10 offenders of the same sex (Corrections Victoria, 2008b). The program aims to furnish its participants with problem solving skills applicable to everyday

situations, and also to improve communication skills, set personal goals and develop new ways of thinking when faced with challenging situations (Corrections Victoria, 2008b).

To be eligible to participate in this program, an offender must be assessed as posing a high to moderate risk of reoffending in accordance with the VISAT. If an offender is classified as a high or medium risk offender, they will then be referred to the program by their Community Corrections Officer. The offender in due course will undergo a clinical assessment to ascertain suitability for the program (Corrections Victoria, 2008b). If they are found suitable and have sufficient time remaining on their specific sentence, they are placed on a program's waiting list.

### **Violence Intervention Program (VIP)**

Violence Intervention Programs in Australia are based on cognitive behavioural strategies indicative of the 'what works' principles and as such target a range of criminogenic needs. The violent offender undertakes an offence specific clinical assessment to ascertain suitability for the program in conjunction with assessments of the offender's readiness and motivation level for change to unacceptable behaviours. This level of assessment for the Violence Intervention Program only takes place after psychometric assessments have been conducted to assess their risk and criminogenic needs.

The Violence Intervention Program delivered within the prison setting has a duration of 180 hours for a high risk offender and 120 hours for a moderate risk offender (Heseltine, Day, et al., 2011, pp. 65-66). Alternatively, in a community setting the program runs for 83 hours. Offenders are usually required to attend two sessions a week for approximately five months (Corrections Victoria, 2009d). The program is facilitated by trained professionals and is run in a group environment, which is typically made up of 10-12 offenders. The program aims to teach offenders why they use violence, what has led to their violent offending and how to avoid using violence behaviour in the future (Corrections Victoria, 2009d). If an offender is identified through the completion of the VISAT as having a criminogenic need in relation to violence but has a risk classification of 'low', thus the likelihood of reoffending is low, they do not qualify for this program or the Cognitive Skills Program outlined

above. Furthermore, if an offender is classified as at a high or moderate risk of reoffending, but does not have sufficient time remaining on their sentence to complete the program, they will also be disqualified from participation.

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