

## **The National Police Certificate is a significant barrier to employment for ex-offenders**

Antoinette M Saliba<sup>1</sup>

### **Abstract**

*Little investigation has been undertaken in relation to the impact of an ex-offender's reception into the community, especially in relation to employment, on their propensity to re-offend. This paper brings into focus the role of society, especially employers in potentially hindering the reintegration of ex-offenders. This role is considered in relation to the use of criminal records as risk assessment tools. A governmental framework is employed to examine the use of criminal records by employers in Victoria Australia, in line with current risk management approaches. Research findings support the contention that the increased use of National Police Certificates for employment purposes in Victoria places ex-offenders at a significant disadvantage.*

**Key Words:** National Police Certificate – Employment – Reintegration - Recidivism, Criminal Record - Ex-offender – Governmentality - Risk Management

### ***Rhianna's Story***

*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.*

---

<sup>1</sup> Dr Antoinette M Saliba, RMIT University, School of Global, Urban & Social Science, Australia. Email: [antoinette.saliba@rmit.edu.au](mailto:antoinette.saliba@rmit.edu.au)

*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, 2011).*

## **Introduction**

This paper will consider the effects that employers' use of criminal records as risk management tools can have on the reintegration efforts of ex-offenders in Victoria. The failure of ex-offenders to successfully reintegrate has a significant impact on the rate of recidivism. This paper argues that society, and specifically employers have a key role to play in lowering recidivism rates. The criminal record is seen as a barrier to reintegration and a device through which ex-offenders' social and economic exclusion is perpetuated. Ex-offenders' societal reception requires due consideration given the 'fact ... that 93% of all people sent to prison "re-enter" society at some point' (Bushway, 2006), and employment is considered a significant contributor to an ex-offender not returning to crime (Uggen, 2000).

This and two subsequent papers draw on PhD research which considers the role of the criminal record as a risk management tool in three particular ways: the use of criminal record information by employers in Victoria to assess and manage perceived risk, which leads to the exclusion of ex-offenders from gainful employment; comparing the criminal record with the Victorian Intervention Screening Assessment Tool (VISAT), used by Corrections Victoria to determine an offender's risk of re-offending; and the development of the criminal record in Victoria, particularly how the need for contextual information in these records is addressed and how the National Police Certificate fails to represent such details.

This paper brings into focus the imperative role of society in the successful reintegration of ex-offenders, which has traditionally been given limited attention because research has been focused on corrections and the prison system to assess the success or failure of rehabilitative programs and reintegration efforts. Without research attention or a perceived need 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. Thus, how employers govern and manage the risk ex-offenders are perceived to present is paramount. Usually risk management and governance is attributed to the correctional apparatus; this paper argues, however, that this role has entered the labour market sphere, whereby employers are playing a key role through the use of criminal record information in practices which are giving rise to social exclusion of ex-offenders, the continuance of cycles of offending and high recidivism rates.

The theoretical framework of governmentality is employed to frame the key considerations of this paper and the discussion of findings. The term 'governmental' is used to identify and discuss

practices, policies and processes that are implemented or continued in attempts to govern and control populations. This paper 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 paper is that which becomes apparent through the analysis of societal arrangements through a Foucauldian - governmentality framework (Foucault, 1979, Rose et al., 2006). This for example considers the governing practices used by employers to manage and control others, such as a population of ex-offenders (Burchell et al., 1991). In the following section background information provides not only jurisdictional specific information, but also a context for the research on which the paper draws and the findings presented here.

## **Background**

According to the 'National Prison Census', 30<sup>th</sup> June 1993, 36.4% of a total 2,272 people arrested/charged reported being employed prior to their contact with the criminal justice system, either as 'employee, employer, self-employed, [or] apprentice' (Australian Institute of Criminology, 1993). In comparison, the rate of reported employment at 30 June 2011 was 21.1 % of a total 4,737 incarcerated persons (Corrections Victoria, 2011). These figures indicate a 15.3% decline in reported pre-prison employment whilst the number of prisoners increased by 2,465. This significant decline in employment figures can be attributed, in part, to an increase in criminal record checks being conducted for employment positions.

One of the key factors identified through research for the successful reintegration of ex-offenders and the reduction of recidivism rates is gainful employment (Uggen, 2000, Social Exclusion Unit, 2002, Ross and Richards, 2003, Uggen et al., 2004). Employment enables an ex-offender to construct meaningful, positive social connections that are linked to the reinforcement of acceptable values and goals (Naylor, 2005). 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. A barrier to ex-offenders becoming gainfully employed is the use of criminal records as risk assessment tool by employers.

Criminal record checks have significantly increased in Australia over the last decade: 'six-fold in seven years ... as public and private enterprises seek to improve the security of their operations' (Ryan, 2009). This increase is not restricted to Australia – 'public policy seems to be moving inexorably towards making criminal records more widely available' worldwide (Jacobs, 2006). Applications for 'conduct certificates' in the Netherlands went from 255,000 in 2005 to 460,000 in 2009 (Boone, 2011). In Germany, over nine million criminal record disclosures are completed every year (Morgenstern, 2011). Criminal record checks have also risen in the UK from 1.4 million in 2002-2003 to more than 3.8 million in 2008-2009 (Padfield, 2011). The culture of risk management amongst employers invoked the criminal record as a risk assessment tool. This

practice has taken hold over the last few years and does not seem to be ebbing, emphasising the pressing need to investigate this phenomenon.

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 and Bushway, 2008). It is in the ostensible calculation of risk by employers due to the assumed need for protection that has seen the criminal record enlisted. It is regarded not only as a technology which outlines past conduct, it is also considered a predictor of future behaviour, as the substantial increase in requests for National Police Certificates exemplifies.

Criminal record checks have become standard procedure in Australia, and specifically Victoria, where the population of ex-offenders is 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, only 3,500 criminal record checks were requested for the first year the service was available, being 1993 (Chadwick, 2012). In comparison, 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 criminal record checks 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 other western countries, such as the USA, Canada, New Zealand and the UK (Fletcher, 2001, Wells and MacKinnon, 2001, Ruddell and Winfree, 2006, Kurlychek et al., 2007, Pager, 2007).

The use of criminal record checks to assess a person's suitability for a particular employment 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 for the majority of employment positions is arguably unnecessary and counter-productive. Further to this, it is a practice that has the capacity to exclude ex-offenders from meaningful employment, thus thwarting their attempts to reintegrate. Importantly, as Pittard found (in Ryan (2009), '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 agencies, such as Victorian Association for the Care and Resettlement of Offenders (VACRO) and Australian Community Support Organisation (ACSO), to prepare and support ex-offenders in the process of reintegration, a form of exclusion is being effected by external agencies.

The device, technology or tool 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 use arbitrary. The criminal record does not in itself cause any detriment to ex-offenders and is not intended to do so. However, 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 risk-orientated climate, appreciating the inscription itself is essential; this understanding is beyond the scope of this paper. Yet the need to consider and address the impact of societal actions on an ex-offender's efforts to reintegrate is essential if recidivism rates are to be lowered.

Recidivism, or 'repetitious criminal activity ... synonymous with terms such as repeat offending and reoffending' (Payne, 2007), has necessitated significant levels of research in Australia and overseas. Over the decade 1995 to 2004, approximately 416 studies on recidivism were conducted within Australia alone; sixty-two of those in Victoria (Payne, 2007). Over half of all prisoners 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). 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), 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). The issues of recidivism and, more recently, criminal record checking are evident in the United States, New Zealand, Spain, Germany, France, the Netherlands, Canada and the United Kingdom (Larrauri, 2011, Padfield, 2011, Ruddell and Winfree, 2006, Pager, 2007, MacKinnon and Wells, 2001, Maruna, 2001, Stoll and Bushway, 2008, Morgenstern, 2011).

At this point my analysis of the possible causes of recidivism and the role of the criminal record depart from that typical of the recidivism discourse 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, thus making apparent its role in the possible causes of recidivism.

### **Theoretical Framework - 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 paper, however, the term 'government' refers to Foucault's (1979) theory of governmentality, as it is used by Mitchell Dean to explain what Foucault referred to as the 'conduct of conduct' (1999).

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).

This definition is used to signify not only:

legitimately constituted forms of political or economic subjection, but also modes of action ... 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 and Rabinow, 1983).

The idea of structuring the 'possible field of actions of others' speaks directly to the use of criminal record checking by employers as a tool to govern and limit the scope of employment opportunities for ex-offenders (Dreyfus and Rabinow, 1983).

The assumption that Corrections Victoria is the sole body or organisation responsible for the successful reintegration of ex-offenders needs to be questioned. The continued high rates of recidivism make it clear that the issue of ex-offenders successfully reintegrating is of greater complexity than that being presented through the current lens. Towards this end this analysis employs a theoretical perspective that encompasses a proposition made by Foucault and taken up by a number of scholars within and beyond the sociology of crime and corrections (Garland, 1990, Hunt and Wickham, 1994, Rose and Valverde, 1998, Rose et al., 2006). 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 (Foucault, 1979, Burchell et al., 1991, Hunt and Wickham, 1994). The concepts of power, knowledge and control will frame the discussion from here. They will be used to analyse the role of employers, through their use of the criminal record, in the exclusion of ex-offenders from gainful employment.

This paper moves this focus to the government exercised by employers via the use of criminal record information as a risk management tool. The need to address our high rates of recidivism must account for the way employers are exercising governmental practices in an endeavour to manage the alleged risks which offenders and by extension ex-offenders present. The perception by employers of the unacceptable risks ex-offenders as employees present has led to the increased use of risk management processes, specifically through the use of criminal record checking to eliminate the hiring of such candidates.

The agenda of risk management is crucial to this analysis. The promotion of risk management practices is advanced by highlighting the opposition of 'ordinary people' against the 'other' (Ungar, 2001, Pratt, 2007), meaning offenders and ex-offenders. The proposal that risk avoidance initiatives can assist in the reduction of crime is in fact a broadening of punishment

into an indefinite future subsequent to the offender's release from incarceration. This extension of retribution has harmful implications for the lives of ex-offenders and their loved ones with no proof of effectiveness (Levi, 2000, O'Malley, 2010). A risk management agenda and the discretionary power sanctioned and exercised by Victorian employers have significant implications for ex-offenders attempting to reintegrate and become gainfully employed. Risk management ideology promotes practices based upon fear, even if such practices are not proven to be of benefit to an organisation and lead to discrimination against minorities (O'Malley, 2010). This impact is exemplified by the opening story of Rhianna's experience of exclusion from employment based upon her criminal record, despite her non-conviction.

### **Power**

Employers have the power to request a criminal record check from an employee or candidate in Victoria at any stage of the recruitment process or even after a job has been filled. 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). 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 legislative guidance in regards to demands for 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). 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. As evident in Rhianna's story, candidates with a criminal history are not considered by employers as those 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 being a criminal record, which is not considered to be a positive attribute by many employers.

To exacerbate this situation further, Victoria has no spent conviction scheme, no anti-discrimination legislation in relation to irrelevant criminal records, and therefore no form of legislative protection or recourse offered to ex-offenders who are excluded on the basis of their criminal history. Moreover, there is another form of exclusion which employers have the power to invoke through implicitly encouraging people to self-exclude via employment advertisements.

### **Knowledge**

In the early 1990s, changes to the storage and accessibility of criminal records significantly impacted on the utilisation of criminal records in Victoria. It enabled employers to gain a new

form of knowledge that being criminal record information, which allowed them to exert more control in regards to their employment practices. 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. 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. Given the lack of legislation in relation to criminal record checking as outlined above, the Victoria Police (2011) document the 'National Police Certificate - Information Release Policy' governs the disclosure of criminal record information in the public sphere.

This document 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, 2011).

This policy raises various issues for an ex-offender: two of these are analysed here for their impact on a person's ability to reintegrate. These identified issues fly in the face of legislative efforts to not cause undue punishment to an offender, and undermine a key principle which underpins the Australian legal system. The first of these, is that the Victorian Police Information Release Policy, allows for the disclosure of 'finding of guilt without conviction' (Victoria Police, 2011). 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 future consequences when sentencing an offender. The consideration of an offender's future prospects includes the impact of a conviction being recorded on an offender's employment prospects, subsequent to the completion of their imposed sentence. It is thus argued that this Victorian information release policy effectively discloses knowledge to employers that the court intended to remain unavailable. The disclosure of non-convictions impinges on the future prospects of an ex-offender, specifically in relation to employment. The indefinite punishment facilitated by this information release policy is in line with that identified by O'Malley (2010) in relation to risk management and discussed above. What is missing from risk assessment tools such as the criminal record and those used within a correctional environment, especially contextual information in the final representation of risk will be explored in a future paper.

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, 2011). 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). 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. It is therefore argued that the Victoria Police Information Release Policy disregards judicial decisions in relation to the recording of a conviction or non-conviction against a defendant. This disregard for judicial deliberation and determination undermines key principles of our legal system and creates a National Police Certificate that facilitates the diminishing of an ex-offender's employment opportunities.

### **Control**

Employer's decisions in relation to whether to employ a person with a criminal record or not has the ability to control an ex-offender's future employment prospects. The disqualifying impact of the existence of a criminal record is supported by research conducted by Devah Pager in the USA. Pager (2003) 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. Pager selected random employment opportunities advertised in local newspapers and an internet employment service site, and 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 (Pager, 2007, Pager, 2003).

Petersilia (1999) in the USA found that 65% of employers who completed the survey were unwilling to employ ex-offenders under any circumstances. Further, Holzer, Raphael and Stool (2002), 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. Similar findings have also been reported in 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 et al., 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 competently established the unwillingness of employers to employ people with a criminal record. This unwillingness must be addressed and managed, if recidivism rates are to be lowered. In the following section, the conversion of this unwillingness to employ ex-offenders into ex/offender employment rates will be considered.

### **Research Findings**

The *Saturday Age* newspaper is well known for its high level of employment advertisements in Victoria. A study of *Saturday Age* employment advertisements was undertaken for the years 1993 and 2010. This study aimed to compare the inclusion of requirements of criminal record checking in employment advertisements. 1993 was selected as this was the first year criminal records entered the public domain through the completion of a specific request form. This ability to request criminal record information was facilitated by the introduction of LEAP, 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, that being 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. The contents of the 1993 advertisements in the *Saturday Age* are now considered.

**Saturday Age Employment advertisements in 1993**

<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

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 is considered in the following section.

### **Saturday Age - Employment advertisements in 2010**

<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

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. Eight percent is a considerable figure when considered in relation to the entire employment process. If up to eight percent of candidates for a position are excluded at the advertising stage, followed by a further percentage being excluded based on the request for a criminal record at the application stage, subsequent to a further percentage being excluded at the interview stage and a further percentage being excluded at the short-list stage or the recently employed stage, this accounts for a high number of people with a criminal record being potentially excluded from employment.

### **Discussion**

Eight percent of employment advertisements requesting a criminal record check is a considerably high figure compared to 1993, at which stage no mention of a criminal record check as a requirement for employment was advertised. 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 application form online. Email communication was the most commonly offered means of enquiry. These common practices discourage 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. The lack of direct contact between a candidate and a prospective employer can have more negative implications for a person with a criminal record than a person without one.

A person with a criminal record would have to rely on documentation and inscriptions to represent them, which can be unfavourable. One of the problems with being represented by documentation alone is that it can have a de-contextualising impact on the information presented. These practices 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. Thus an ex-offender may be presented with an application form that asks about any involvement in the past with the criminal justice system. If the candidate answers in the affirmative, they may be disqualified. As such, this documentation does not disclose the context of the offence, just that the person has committed an offence in the past.

Alternatively there may be a length of time in a curriculum vitae which is devoid of employment details. Such a period of lack of employment may be due to incarceration and this could serve to eliminate a candidate from the process, not allowing for any explanation or contextual information to be provided to the prospective employer. Furthermore, there may be a requirement to supply a National Police Certificate, where the existence of a criminal record in itself – regardless of its contents – may result in an ex-offender’s exclusion from the candidate pool. It is proposed that such processes and reliance upon inscriptions and documentation, while expedient, only allows prospective employers to make initial assessments based upon documentation, depersonalising the process and depriving an ex-offender the chance to explain their criminal history. All that is left is documentation to provide representation of an individual, which is not always accurate.

The National Police Certificate is the tool being used to gain the knowledge to identify and exclude ex-offenders from employment. This exemplifies employers using their power to request criminal record checks from their employee, or employment candidates to gain knowledge about the person’s criminal history, as was the case in Rhianna’s experience. Gained knowledge is then used to determine the perceived risk<sup>2</sup> an employee or candidate presents to an organisation and in turn controls that person’s future success in relation to employment and by extension reintegration. The exclusion of ex-offenders from legitimate employment can have a significant impact on recidivism. Research conducted by Gabriel Tica and Maria Roth found that there was a connection between criminal acts and lack of employment (Tica and Roth, 2012). The ability for an employer to control an ex-offender’s employment prospects, through the use of criminal history knowledge is one scenario, but there is another way ex-offender’s employment opportunities can be diminished by an employer. That is through advertisements which encourage ex-offenders to self-exclude.

As identified earlier in this paper, there is another form of exclusion being invoked by employers through their ability to design and include whatever information they deem appropriate in job

---

<sup>2</sup> It is argued that employer perceptions in relation to the risks associated with employing ex-offenders are fuelled by ‘penal populism’ (Pratt, 2007), the dynamics of ‘moral panic’ and ‘risk society’ (Ungar, 2001). The examination of the impact of these phenomena is beyond the scope of this article.

advertisements. The inclusion of a requirement for a criminal record check as discussed in relation to the advertisement research completed for 1993 and 2010, has the power to control the actions of an ex-offender, through inducing 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 and Job Watch, 2005). Self-exclusion does not absolve employers from their ethical responsibility to assist, or at least not hinder, the reintegration and rehabilitation of ex-offenders (Lewis, 2005). The act of self-excluding does not occur without agencies crystallising 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 agencies 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 and Job Watch, 2005). Youth Projects, one of the agencies 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 and 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 and Job Watch, 2005).

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

The investigation 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 (Lewis, 2005). 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 and communities, 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. Furthermore, the lack of legislative restriction in relation to the access, content and use of criminal records in Victoria exacerbates the negative experiences of ex-offenders. It is thus suggested that legislation which supersedes current policies and practices needs to be introduced.

Victorian ex-offenders need to have legislative protection in relation to discrimination on the basis of an irrelevant criminal record, like that present in Tasmania, the *Tasmania Anti-Discrimination Act 1998* (TAS). Also, Victoria is the only State without a spent conviction scheme, which is needed to facilitate the ability for ex-offenders to withhold their criminal history after a prescribed period of time in specific circumstances.

Finally, but most importantly, legislation restricting the release of non-convictions and charges under investigation needs to be enacted. Whilst legislative change is needed, these changes will not in themselves increase the employment rate of ex-offenders. The employment of ex-offenders can only be increased through education, legislative change and the recognition that rehabilitation of offenders through correctional programs and treatment is achievable. Further to this, employers need to take a more inclusive approach to candidates with a criminal record, thus giving ex-offenders a real chance to reintegrate into society, thus lowering recidivism rates.

### **Conclusion**

This paper has demonstrated that the current Victorian situation in relation to the employment of ex-offenders needs to change if recidivism rates are to be lowered. It has been shown that since the commencement of criminal record checking as a public service in 1993, the demand for these checks by employers has substantially increased, which can be attributed to a risk management agenda. This agenda has led to the governing of the future employment prospects of ex-offenders in a negative way. Thus, recommendations have been made for legislative change in Victoria, which are intended to limit the governmental capacity societal organisations, such as employers have to control the future employment prospects of ex-offenders. The regulation of an employer's ability to access criminal record information is needed to discontinue current practices, which allow the illegitimate punishment and governing of ex-offenders well beyond the sentence imposed by the courts for their wrongdoing.

The exclusion of ex-offenders from meaningful employment through the ad hoc use of criminal record checking and also through the use of advertisements, which encourages ex-offenders to self-exclude have played a significant role in the diminishing of offenders reporting employment prior to their current contact with the criminal justice system. The figures presented in relation to 1993 and 2010, for job advertisements, reported levels of employment by offenders and also the increased demand for criminal record checking paints a clear picture. Ex-offenders today regularly experience disadvantage in regards to becoming gainfully employed, thus encouraging the continuation of the cycle of offending. Society also has a responsibility: it governs ex-offenders who, through this form of government, can be encouraged to become productive members of society, via inclusionary practices; or remain the 'other' via current exclusionary practices, which increase the likelihood of future offending.

## **Funding**

This work was supported by RMIT University, Higher Degree by Research Publications Grant 2012 [no number].

## **Acknowledgement**

I would like to acknowledge, Dr Effie Zafirakis and Ms Diana Johns as providing assistance with the editing of this article, at no charge. I would also like to give a sincere thanks to RMIT University's School of Graduate Research for the Grant that made the writing of this paper possible.

## **References**

Alderson, P. (2005) *Legal Dictionary for Australians*. Second ed. Sydney: Mcgraw-Hill Australia.

Auditor General Victoria (2003 - 2004) *Addressing the needs of Victorian prisoners*. Melbourne.

Australian Bureau of Statistics (2008) *Prisoners in Australia 2008*.

Australian Institute of Criminology (1993) *National Prison Census*. Canberra: Australian Institute of Criminology.

Boone, M. (2011) Judicial rehabilitation in the netherlands: balancing between safety and privacy. *European Journal of Probation*, 3, 63-78.

Burchell, G., Gordon, C. & Miller, P. (eds.) (1991) *The foucault effect - studies in governmentality*., USA: The University of Chicago Press.

Bushway, S. (2006) The problem of prisoner (re) entry. *Contemporary Sociology*, 35, 562-565.

Chadwick, V. (2012) Convictions a matter of record - but for how long? . *The age*, 8th april.

Corrections Victoria (2011) *Statistical profile of the Victorian prison system 2006-07 to 20010-2011*. In: Victoria, C. (ed.) 12th ed. Melbourne: Department of Justice.

Dale, R. (20 april 2011) *Re: request under foi act*. Type to saliba, a.

Dean, M. (1999) *Governmentality - power and rule in modern society*, London, Sage.

Dreyfus, H. & Rabinow, P. (1983) *Michel Foucault: beyond structuralism and hermeneutics*, Chicago, University of Chicago Press.

Fitzroy Legal Service Inc (2011) Case study - Rhianna. *Peer participators in fitzroy legal service criminal record law reform project*. Melbourne: Fitzroy Legal Service Inc.

Fitzroy Legal Service Inc & Job Watch (2005) Criminal records in Victoria: proposals for reform. Melbourne.

Fletcher, D. R. (2001) Ex-offenders, the labour market and new public administration. *Public Administration.*, 79, 20.

Foucault, M. (1979 ) *Discipline and punish*, Harmondsworth, Penguin.

Garland, D. (1990) Frameworks of inquiry in the sociology of punishment. *The British Journal of Sociology.*, 41, pp. 1 -15.

Graffam, J., Shinkfield, B., Lavelle, B. & Hardcastle, L. (2004) Attitudes of employers, corrective services workers, employment support workers, and prisoners and offenders towards employing ex-prisoners and ex-offenders.

Holzer, H., Raphael, S. & Stoll, M. (2002) Will employers hire ex-offenders - employer preferences, background checks and their determinants. *JCPR working papers*. Northwestern University/University of Chicago Joint Center for Poverty Research.

Home Office (2002) Breaking the circle: A report of the review of the Rehabilitation of Offenders Act. London.

Hunt, A. & Wickham, G. (1994) *Foucault and law: towards a sociology of law as governance.*, London, Pluto Press.

Jacobs, J. B. (2006) Mass incarceration and the proliferation of criminal records. *University of St. Thomas Law Journal*, 3, 387-420.

Kurlychek, M., Brame, R. & Bushway, S. (2007) Enduring risk? Old criminal records and predictions of future criminal involvement. *Crime and delinquency.*, 53, 19.

Larrauri, E. (2011) Conviction records in Spain: obstacles to reintegration of offenders? . *European Journal of Probation*, 3, 50-62.

Levi, R. (2000) The mutuality of risk and community: the adjudication of community notification statutes. *Economy and Society*, 29, 578-601.

- Lewis, S. (2005) Rehabilitation: headline or footnote in the new penal policy? *Probation Journal*, 52, 119-135.
- Mackinnon, J. & Wells, P. (2001) Criminal records and employment : a case for legislative change : the acceptable face of the employer's freedom of choice, or society on the horns of a dilemma? *New Zealand Universities Law Review*, 19, 177-196.
- Maruna, S. (2001) *Making good: how ex-convicts reform and rebuilt their lives*, Washington DC, American Psychological Association Books.
- Morgenstern, C. (2011) Judicial rehabilitation in Germany - the use of criminal records and the removal of recorded convictions. *European Journal of Probation*, 3, 20-35.
- Naylor, B. (2005) Do not pass go: the impact of criminal record checks on employment in Australia. *Alternative Law Journal*.
- Naylor, B. (2011) Criminal records and rehabilitation in Australia. *European Journal of Probation*, 3, 79-96.
- O'malley, P. (2010) *Crime and risk*, London, Sage.
- Padfield, N. (2011) Judicial rehabilitation? A view from england. *European Journal of Probation*, 3, 36-49.
- Pager, D. (2003) The mark of a criminal record. *American Journal of Sociology* 108, 937-975.
- Pager, D. (2007) *Marked: race, crime and finding work in an era of mass incarceration.* , Chicago, The University of Chicago Press.
- Patterson, P. ( 2011) *Re: Victoria police enquiry*. Type to saliba, a.
- Payne, J. (2007) Recidivism in Australia: findings and future research. *In: Criminology*, A. I. O. (ed.). Canberra: Australian Institute of Criminology.
- Petersilia, J. (1999) Parole and prison re-entry. *In: Tonry, M. & Petersilia, J. (eds.) Crime and justice: a review of the research*. Chicago: Univeresity of Chicago Press.
- Pratt, J. (2007) *Penal populism*, Milton Park, Routledge.
- Rose, O'Malley, P. & Valverde, M. (2006) Governmentality. *Annual Review of Law and Social Science*, 2, pp. 83 - 104.

- Rose, J. & Valverde, M. (1998) Governed by law? *Social and Legal Studies*, 7.
- Ross, J. & Richards, S. (2003) *Convict criminology*, Belmont, CA, Wadsworth/Thomas Learning.
- Ruddell, R. & Winfree, T. (2006) Setting aside criminal convictions in Canada: a successful approach to offender reintegration. *The Prison Journal*, 86, 17.
- Ryan, S. (2009) Criminal checks are big business. *The Australian*, 10 January, p.3.
- Social Exclusion Unit (2002) Reducing re-offending by ex-prisoners. Office of the Deputy Prime Minister Ed. London, UK.
- Stoll, M. & Bushway, S. (2008) The effect of criminal background checks on hiring ex-offenders. *Criminology and Public Policy*, 7, 371-404.
- Tica, G. & Roth, M. (2012) Are former male inmates excluded from social life? *European Journal of Probation* 4, 62-76.
- Uggen, C. (2000) Work as a turning point in the life course of criminals: a duration model of age, employment, and recidivism. *American Sociological Review*, 65, 17.
- Uggen, C., Manza, J. & Behrens, A. (2004) Less than the average citizen: stigma, role transition and civic reintegration of convicted felons. In: Maruna, S. & Immarigeon, R. (eds.) *After crime and punishment: pathways to offender reintegration*. Cullompton: Willan.
- Ungar, S. (2001) Moral panic versus the risk society: the implications of the changing sites of social anxiety. *The British Journal of Sociology*, 52, 271-291.
- Victoria Police (2003) Information system a leap forward. *Police Life*. Melbourne: Victoria Police.
- Victoria Police (2004) Police regulation (fees and charges) Regulations 2004. Melbourne.
- Victoria Police (2011) National police certificates - information release policy. In: Police, V. (ed.). Victoria.
- Wells, P. & Mackinnon, J. (2001) Criminal records and employment: a case for legislative change: the acceptable face of the employer's freedom of choice, or society on the horns of a dilemma? *New Zealand Universities Law Review*, 19, 20.