



Law Society of Ireland

The Disclosure of Criminal Convictions

Proposals on a Rehabilitation of Offenders Bill

A report by the Spent Convictions Group • May 2009





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INTRODUCTION AND EXECUTIVE SUMMARY

The Spent Convictions Group was established with a view to formulating a submission to Government on the complex issue of expunging criminal convictions.

The Group is comprised of representatives from:

- Ballymun Community Law Centre
- Ballymun Local Drugs Task Force
- Business in the Community
- Northside Community Law Centre
- Northside Partnership
- Human Rights Committee of the Law Society

The issue of spent convictions is an area that has been considered in various reports in recent years, but it was felt that there has not been adequate or sufficient public debate and consultation on this issue, which is a matter that is clearly in the public interest. It raises issues such as the rehabilitation of offenders, the resettlement of offenders into society, the reduction of recidivism and overall crime rates, and the productive and efficient use of resources, that is labour, in our economy. The Group feels that this is an area that warrants further public debate and consideration, particularly in light of the potential far-reaching benefits of such legislation both for former offenders and for society in general.

The Law Society of Ireland, through its Human Rights Committee, is committed to raising awareness among the Society, the profession and the public on issues of human rights and to promoting and supporting human rights law in general. It is hoped that this Report will add to the knowledge of practitioners, the public and the Government on the issue of the rehabilitation of offenders and will be used to bring new concepts and ideas to bear on the development of legislation in this area. It will also be an invaluable resource to researchers, law reformers, members of the legislature, executive and judiciary and NGOs both in Ireland and abroad.

This report would not have been possible but for the tireless work of the members of the Spent Convictions Group who gave so generously of their time and expertise to produce this publication. The Group would like to pay particular tribute to the researcher on this project, Ms. Bronagh Maher BL, who brought the project to completion, not only successfully within the timescale envisaged but also with consideration, sensitivity and characteristic good humour that added greatly to the final publication.

SUMMARY OF RECOMMENDATIONS

1. Spent convictions legislation for adult offenders should be introduced in this jurisdiction.
2. The spent convictions scheme should be available to all offenders, irrespective of the crime committed or the sentence imposed.¹
3. The following conviction-free periods² should apply:-

Adult offenders

Type of sentence	Duration of conviction free period
Non-custodial sentences	Duration of sentence plus one year
Custodial sentence of less than 2 years	Duration of sentence plus two years
Custodial sentence of more than 2 years	Duration of sentence plus four years
Suspended sentence of less than 2 years	Duration of sentence plus two years
Suspended sentence of more than 2 years	Duration of sentence plus four years

Young offenders (under the age of 18 years)

Type of sentence	Duration of conviction free period
Non-custodial sentences	Duration of sentence
Custodial sentence of less than 2 years	Duration of sentence plus one year
Custodial sentence of more than 2 years	Duration of sentence plus two years
Suspended sentence of less than 2 years	Duration of sentence plus one year
Suspended sentence of more than 2 years	Duration of sentence plus two years

4. The sentencing judge should retain a discretion to apply the conviction-free periods applicable under the adult scheme when sentencing a young offender where the justice of the case so requires.

¹ Murder is the one offence that would not come within the scheme by virtue of the fact that it carries a mandatory life sentence. Conviction-free periods are calculated from the date upon which the sentence imposed is due to expire.

5. As part of the sentencing process, the court should explain to the offender at what stage he shall be entitled to apply to the central authority to have the conviction in question declared spent.
5. The scheme should be application-based for all offenders and a central authority should be established to deal with applications.
6. The central authority would have the power to decide what effect an intervening conviction, that is a conviction for an offence committed during the conviction-free period, should have on the running of that period.
7. The scheme should not apply in the context of sentencing, criminal proceedings (where all previous convictions will be disclosed under the appropriate evidential rules) and in the context of certain civil matters where the welfare of children is in issue.
8. Certain jobs, professions and posts should be exempted from the scheme. An expert body should be established to examine whether exemptions are appropriate and to review exemptions on a regular basis. Employers would have an opportunity to consult this expert body where there is uncertainty as to whether the scheme applies.
9. The civil service and public service should not be excluded from the scheme unless the position involves the interest of national security.
10. Section 258 of the *Children Act 2001* should be repealed and juvenile offenders should be dealt with in the same legislation establishing the adult spent convictions scheme.
11. There ought to be criminal sanctions for those who unlawfully disclose a spent conviction otherwise than in the course of their duties.
12. The issue of extending the grounds of discrimination contained in the *Employment Equality Act 1998* to include the ground of discrimination on the

basis of criminal record should be given serious consideration and should be the subject of further research. The effectiveness of the proposed scheme is largely contingent upon such legislation being introduced.

13. The need for supports, both within prisons and post-release, to assist the reintegration of prisoners and to assist prisoners in availing of the spent conviction scheme, should be addressed.

PART I: INTRODUCTION TO SPENT CONVICTIONS

1. Introduction

The Spent Convictions Group was established with a view to formulating a submission to Government on the complex issue of expungement of criminal convictions. This is an area that has been considered in various reports in recent years,³ but it is felt that there has not been adequate or sufficient public debate and consultation on this issue, which is a matter that is clearly in the public interest. It raises issues such as the rehabilitation of offenders, the resettlement of offenders into society, the reduction of recidivism and overall crime rates, and the productive and efficient use of resources, that is labour, in our economy. The Group therefore feels that further and detailed consideration ought to be given to this topic, in light of its potentially far-reaching positive effects in these areas.

2. Why do we need spent convictions legislation?

“The spectre of a criminal justice system based on a grim determinism about human behaviour, and an even grimmer acceptance that punishment does little to change people, might provide some reason for the exclusion of bad character evidence.”⁴

While the above quote relates to the exclusionary rule against bad character evidence in criminal proceedings, it is equally applicable in the context of the introduction of a spent convictions scheme. The principal rationale underlying spent conviction regimes is that past behaviour is of limited value in predicting current or future conduct, and that there comes a point in time when previous convictions bear no relevance to decision-making processes. Such schemes recognise the fallibility of the human condition and introduce an element of “legal forgiveness” into the criminal

³ *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* Report Commissioned by Department of Justice, Equality and Law Reform 2004, *Reintegration of Prisoners* National Economic and Social Forum Report No 22 January 2002, *Consultation Paper on Court Poor Box* LRC CP 31-2004, *Report on Spent Convictions* LRC 84-2007

⁴ Redmayne, “The Relevance of Bad Character” [2002] CLJ 684, 705

justice system, recognising that ex-offenders are capable of rehabilitation and reform and of leading law-abiding lives.

The 1972 Gardiner Committee Report, which preceded the introduction of the *Rehabilitation of Offenders Act 1974* in the United Kingdom, considered that:

“...for rehabilitation to be complete, society too has to accept that they are now respectable citizens, and no longer hold their past against them... the question is whether, when a man has demonstrably done all he can do to rehabilitate himself, and enough time has passed to establish his sincerity, is it not in society’s interest to accept him for what he is now and, so long as he does not offend again, to ensure that he is liable to have his present pulled out from under his feet by his past.”⁵

In the absence of a spent convictions regime, an ex-offender is required to suffer the consequences of an offence indefinitely, irrespective of the nature of the offence or the penalty initially imposed by the criminal justice system. The existence of a criminal record can affect the ex-offender in a number of ways, including access to accommodation, entry to certain professions such as law, medicine or accountancy, applications for various licences such as a PSV (public service vehicle) driver’s licence, a firearms licence, or gaming licence, applications for insurance cover and general employment prospects. The difficulty experienced by offenders in settling back into mainstream society has contributed to the fact that we have one of the highest recidivism rates in Europe.⁶

The prejudice engendered by a criminal record is, however, most evident in the context of employment prospects. A recent survey conducted by the National Economic and Social Forum showed that only 52% of the employers surveyed would

⁵ Gardiner Committee *Living it Down-The Problem of Old Convictions* (Stevens & Son, 1972) at page 5. The *Rehabilitation of Offenders Act 1974* was extended to Northern Ireland by the *Rehabilitation of Offenders (Northern Ireland) Order 1978*

⁶ *Reintegration of Prisoners* Forum Report No 22 National Economic and Social Forum January 2002, Foreword. The results of the first major study of prisoner re-offending carried out by UCD Institute of Criminology show that 27.4% of released prisoners were serving a new prison sentence within one year; this rose to 39.2% after two years, 45.1% after three years, and 49.2% after four years.

consider employing someone with a criminal record.⁷ A survey conducted by the Small Firms Association suggested that an average of 76% of companies were unwilling to employ ex-offenders, with the distribution sector registering the highest percentage at 87%.⁸ It has become common practice for employers to enquire about previous convictions and this has become a significant, in some cases insurmountable, barrier to gaining employment for ex-offenders. A recent Home Office Report noted that employers who routinely ask for information on previous convictions as part of the recruitment process tend to use it in a blanket discriminatory way rather than to inform their assessment of the general suitability of candidates and any risk they may present in the work place.⁹ This is symptomatic of the increasingly risk-averse culture of contemporary society.

The Law Reform Commission has recently published a comprehensive report on the issue of spent convictions, including a draft Bill.¹⁰ The Commission has recommended that there be a spent convictions scheme for adult offenders in this jurisdiction. The proposed scheme, however, applies only to sentences of imprisonment of less than six months' duration, and sex offences and all offences required to be tried in the Central Criminal Court are excluded from the scheme. It is submitted that the scheme proposed by the Law Reform Commission is overly restrictive and limited in scope and would do little to advance the overall rehabilitative policy of our criminal justice system. The specific recommendations of the Commission are considered in more detail below.¹¹ The Spent Convictions Group is of the view that a broader, more encompassing scheme is preferable and would do more to promote the resettlement and reintegration of offenders into society, which is imperative if recidivism rates are to be reduced, thereby benefiting society as a whole.

⁷ *Reintegration of Prisoners* Forum Report No 22 National Economic and Social Forum January 2002, para 6.27. This figure increased to 63% if certain relevant supports were provided, indicating the importance of supports in any rehabilitative scheme.

⁸ Sherlock, "Employing ex-offenders" *Running Your Business The SFA Magazine* Vol 13 No 9 November 2007, page 36. The same article referred to research carried out by the Chartered Institute of Personnel and Development (CIPD), which showed that nearly eight out of ten employers said their experience of employing ex-offenders was no different to that of employing anyone else.

⁹ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 22

¹⁰ *Report on Spent Convictions* LRC 84-2007

¹¹ See Part III

Consideration of a scheme of this nature requires a careful balancing of an ex-offender's right to privacy and right to earn a livelihood against society's interest in protecting vulnerable groups, and also the public interest in freedom of speech and expression. In contemporary society, there is a perception that the interests of convicted offenders "are fundamentally opposed to those of the public."¹² At a time when there is an increasing rate of lethal violence in our community,¹³ together with the growing publicity attached to sex offences, particularly against minors, there may be a certain degree of public hostility to any scheme which would allow an offender to "forget" his past by removing the obligation to disclose previous convictions after a certain period of time. In recent years there has correctly been an increasing emphasis on victims' rights,¹⁴ and many would point to the needs of the victims of crime, many of whom view the legal system as "unduly solicitous of the needs and interests of those guilty of crime".¹⁵

However, the introduction of a spent convictions scheme does not involve the sacrificing of one group's rights in favour of another's; it involves a balancing of those rights, so that all competing interests are taken into account. A spent convictions scheme would in fact benefit victims, as a sub-category of the general public, in the long term as it would contribute to a reduction in recidivism rates and provide an incentive to ex-offenders to remain conviction free.¹⁶ The Australian Law Reform Commission pointed out in its 1987 Report that the object of any spent convictions scheme is to make the offender's transition back into the community

¹² Garland, *The Culture of Control: crime and social order in contemporary society* OUP, Oxford, 2001, pp 180-181

¹³ O'Donnell (2005) *Violence and social change in the Republic of Ireland* International Journal of the Sociology of Law, 33/2: pp 101-117

¹⁴ As evidenced by the introduction of section 5 of the *Criminal Justice Act 1993* which provides: "In determining the sentence to be imposed on a person for an offence to which this section applies, a court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed." This section gave rise to the introduction of victim impact statements at sentencing stage. The establishment of Victim Support, a voluntary organisation which provides support, comfort and counselling to people who have been the victims of crime, was a further positive development in terms of protecting the rights of victims.

¹⁵ Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, 10

¹⁶ It should also be noted that victims and offenders do not represent discrete groups; there is in fact a great deal of overlap between them.

easier; a hostile public reaction to a scheme designed for this purpose would not make that transition any easier.¹⁷

The aim in introducing a spent convictions scheme should be to strike a balance between the interests and rights of ex-offenders on the one hand and the interests and rights of the general public and, in particular, of victims of crime on the other. To this end, the scheme should be meaningful and effective in advancing and promoting the resettlement of offenders into society, subject to sufficient safeguards to meet concerns relating to public safety.

3. Theoretical background

(i) Facilitating re-integration and reducing marginalisation and exclusion

The risk-averse attitude of contemporary society is in marked contrast to the ‘penal welfare’ approach of the 1960s and early 1970s, which witnessed the introduction of spent convictions schemes in the United Kingdom and the United States. Such laws were promoted on the basis of their rehabilitative potential; it was felt that measures which concealed criminal records would assist in breaking the cycle of ‘labelling’ and exclusion which was often the experience of ex-offenders.¹⁸ The theoretical basis of spent conviction regimes is that, where an individual has exhibited a genuine desire to lead a law-abiding life, efforts should be made to facilitate that individual’s reintegration into society. Marginalisation and exclusion are often the result of the prejudice engendered in society by a criminal record. Access to employment is a key element to reintegration, and the inability to gain employment due to the existence of a criminal record may itself act as a criminogenic force, compelling offenders to revert to crime out of economic necessity. As Louks, Lyner and Sullivan observe, there is a:

¹⁷ Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, 28

¹⁸ See *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* Report Commissioned by Department of Justice, Equality and Law Reform 2004, xv

“...tendency to refuse employment to people with a criminal record, often irrespective of whether the offence relates to the post in question. Lack of employment inhibits the re-integration of ex-offenders into society, which in turn, may perpetuate the cycle of offending.”¹⁹

The effect of the disclosure of a criminal record was also averted to by Kilcommins:

“In addition to creating a further tier of disadvantage, the law on the duty to disclose previous criminal information is open to the criticism that it may *cause* rather than inhibit criminal behaviour. Labelling individuals as ex-offenders can have the unintended consequence of unduly prolonging the stigma associated with criminal conviction. In so far as it can affect a person’s self-definition, it can act as a self-fulfilling prophecy.”²⁰

Similarly, the National Development Plan (2000-2006) recognised the fact that a criminal record may act to exacerbate the multiple disadvantages already experienced by offenders, and act as a further force of exclusion and marginalisation, observing:

“Research into the causal factors of crime conclusively demonstrates that offenders...generally come from the most disadvantaged backgrounds in society and, typically, that they are unemployed, unqualified, addicted and likely to re-offend. The label of having been in prison becomes a further layer of disadvantage in the community. Offenders...experience multiple disadvantages which accumulate leading to economic and social exclusion and to an extreme form of marginalisation from the labour market.”²¹

(ii) *Rehabilitation and Punishment Theory*

The rationale for spent convictions schemes is that a criminal record is of limited value and relevance in predicting an individual’s current or future behaviour. The

¹⁹ Louks, Lyner and Sullivan *The Employment of People with Criminal Records in the EU* European Journal on Criminal Policy and Research Issue 6, 1998 at 195

²⁰ Kilcommins, “The duty to disclose previous criminal information in Irish insurance law” (2002) 37 *Ir Jur* (ns) 167 at 183

²¹ National Development Plan 2000-2006 (PN 7780) (Dublin, 1999) page 194

common law is committed to a certain view of human agency, which denies the predictability of human behaviour.²² The law views the individual as autonomous, self-directed, and as having free will; it is hostile to any argument that human action is subject to causal laws and that an individual's actions on a given occasion can be predicted by what he has done on previous occasions.²³

The primary objective of a spent convictions scheme is to contribute to the rehabilitation of offenders, which is one of the essential aims of our criminal justice system. As Duff observes:

“The proper aim of a system of law which addresses its citizens as rational agents is to bring them not merely to obey its requirements, but to accept those requirements as being properly justified; and the proper aim of a criminal conviction is to communicate and to justify to the defendant an appropriate judgment on his past conduct, and thus to bring him to recognise and accept his duty to obey the law.”²⁴

A refusal to acknowledge that an ex-offender has been reformed and rehabilitated by removing the obligation to disclose his previous convictions, amounts to a recognition of the failure of our own criminal justice system to achieve one of its principal aims. The ex-offender should not suffer, by virtue of the duty to disclose, for the system's failure. Furthermore, the fact that an ex-offender is obliged to suffer the detrimental consequences of his criminal record indefinitely is inconsistent with the Hegelian theory that punishment serves to annul past crimes.²⁵ According to theories of punishment, punishment may annul crime by redressing a balance which crime disturbs and punishment restores, based on the kind of social contract to which rational beings would agree. Alternatively, punishment as a communicative process may enable, or force, the criminal to expiate or atone for his crime.²⁶ In light of either

²² This is the basis of the common law exclusionary rule against bad character evidence that renders evidence of previous convictions inadmissible in criminal proceedings, subject to exceptions.

²³ Acorn, “Similar Fact Evidence and the Principle of Inductive Reasoning – Makin Sense” (1991) 11 OJLS 63, 68

²⁴ Duff, *Trials and Punishment* (Cambridge University Press, 1986), 185

²⁵ Duff, *Trials and Punishment* (Cambridge University Press, 1986), 258

²⁶ Duff, *Trials and Punishment* (Cambridge University Press, 1986), 204

theory, once the punishment has been carried out, the balance is restored, or the crime expiated, and therefore that crime should have no further implications for that individual. Current Irish law does not recognise a point at which an adult offender's debt to society has been repaid.²⁷ Once an offender has been duly punished by our criminal justice system, the question remains as to whether society should have the right to go on punishing that individual indefinitely for the same offence. As noted by the Law Reform Commission:

“While proportionality is a key principle of sentencing in the Irish courts, it is clear that this policy does not extend beyond the court room and into the society in which the offender is expected to function. A life long criminal record is not a proportionate response to most offences and thus it can be argued that the law should be employed to make sure an element of proportionality is injected into society's response to offending behaviour.”²⁸

An opposing view would suggest that the offender must take responsibility for his own actions; if he makes the rational choice to commit a crime, he should not then be entitled to rely upon a presumption of trust from society. Once an offender chooses to attempt to utility-maximise through crime, he forfeits all presumptions of trust from society. This view, however, focuses on the proximal conditions of crime, that is, the fact that the crime was committed, and the calculated, rational choices open to offenders, rather than considering the distal conditions, that is the causal factors leading to the commission of the crime. It fails to recognise crime as a social problem connected to broader social and psychological influences.²⁹ It represents an overly harsh treatment of the non-persistent offender and does not acknowledge that some form of positive action may be required to counteract the social conditions that led to the commission of the crime in the first instance. The creation of an incentive to lead a law-abiding life by requiring ex-offenders to earn their right to non-disclosure by remaining conviction-free for a prescribed period could be an important element of such positive action.

²⁷ *Report on Spent Convictions* LRC 84-2007, 8

²⁸ *Report on Spent Convictions* LRC 84-2007, 31

²⁹ As discussed in *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* Report Commissioned by Department of Justice, Equality and Law Reform 2004, xxvii

4. Practical implications for the ex-offender

“Punishment for a crime does not necessarily end with the completion of the sentence; the stigma of a criminal record may follow people for years after they have ‘paid’ for their offence.”³⁰

(i) Access to employment

The fact that an ex-offender is obliged to disclose his criminal record indefinitely amounts to a life sentence for that offender, irrespective of the nature of the offence committed or the sentence imposed, and subjects him to permanent stigmatisation. In particular, the duty to disclose a criminal conviction has a negative effect on employment prospects. It has become increasingly common for employers to enquire about criminal records in the application process. Research in New Zealand shows that the number of employers who requested information about criminal records increased from 13,000 in 1996 to 36,500 in the first half of 2000.³¹ As noted above, only 52% of Irish employers would consider employing someone with a criminal record.³² Society therefore deprives itself of the opportunity to enlist the talents, skills, and energies of individuals in whose development it has a vested interest.

The inability to access employment contributes to the continuum of exclusion, acting as a criminogenic force. In the United Kingdom, it has been estimated that only ten per cent of prisoners enter employment upon release.³³ The Law Reform Commission noted that unemployed ex-offenders are almost twice as likely to re-offend as those who are in full time or even part time employment.³⁴ Referring to access to employment as one of the collateral consequences of a criminal conviction, Margaret Colgate Love observes, “This web of ‘invisible punishment’ can frustrate the chances

³⁰ Louks, Lyner and Sullivan, *The Employment of People with Criminal Records in the EU* European Journal on Criminal Policy and Research Issue 6, 1998, 195

³¹ MacKinnon and Wells, “Criminal Records and employment: a case for legislative change” 2001 (19) *New Zealand Universities Law Review* pp 287-308 at 291

³² *Reintegration of Prisoners* Forum Report No 22 National Economic and Social Forum January 2002, para 6.27

³³ *Building Bridges to Employment for prisoners* Home Office Research Study 226 September 2001, foreword

³⁴ *Report on Spent Convictions* LRC 84-2007, 25

of successful offender reentry, and thereby actually increase risk to public safety.”³⁵

In a similar vein, MacKinnon and Wells comment:

“Conviction for a criminal record involves a sentence – custodial or otherwise. Completion of this sentence is the punishment that society, through its agent (the court), deems appropriate. Continued employment discrimination against ex-offenders could arguably be regarded as a de facto life sentence given the fact that it has the potential for preventing such a person from earning a living commensurate with his or her skills and talents. It may also lead to a greater tendency amongst such persons to reoffend, a phenomenon contrary to the best interests of society. Thus, a failure of such individuals to find meaningful and rewarding employment brings into sharp relief the tension between rehabilitation and ‘labour market’ choice.”³⁶

A recent Home Office review of the *Rehabilitation of Offenders Act 1974* reported that employment can reduce re-offending by between a third and a half.³⁷ As the Report noted, “Resettlement is a key element of crime reduction, and employment a key element of resettlement.”³⁸ One of the main objectives of any spent convictions scheme should be to reduce re-offending by developing the best mechanism to enable people with previous convictions to access employment opportunities while maintaining the protection of the public. The Report also notes that, while a person with a previous conviction has a legitimate interest in obtaining employment, this must be balanced with the equally legitimate interests of prospective employers in obtaining the information they require to make informed recruitment decisions and to avoid employing those who may harm fellow employees, clients, or property or business interests.³⁹ It was concluded that the scheme must allow for previous conviction information to be made available to employers where there is a significant

³⁵ Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide” available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>

³⁶ MacKinnon and Wells, “Criminal Records and employment: a case for legislative change” 2001 (19) *New Zealand Universities Law Review* pp 287-308 at 301

³⁷ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, foreword

³⁸ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 5

³⁹ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 27

risk of further offending and noted that the high risk period is immediately upon completion of the sentence.⁴⁰

One of the implications of not having a spent convictions scheme is that ex-offenders may be tempted to lie about their past when seeking employment. Statistics in the United Kingdom show that one in three men has at least one criminal conviction by the age of thirty, yet a 2001 study commissioned by the Joseph Rowntree Foundation analysed 22,000 job applications in which less than one per cent had declared a criminal conviction. The implication therefore is that around 7,000 applicants would, if successful in obtaining the position applied for, be liable to dismissal and prosecution for obtaining by deception if their pasts were to come to light.⁴¹

The stigma of criminal record is perhaps greatest for those convicted of sex crime, and it is likely that the majority of employers would be most reluctant to employ ex-offenders falling within this category. This is perhaps partly based on the inherent seriousness of the crime itself, and partly on a view that such offenders are predisposed to committing sex crimes and pose too great a risk to fellow employees and to the public. However, research indicates that sex offenders are in fact the least likely to re-offend of all offenders,⁴² and therefore, on the basis of statistics alone, may raise fewer concerns in relation to public safety than other categories of offender. Sex offenders are often required to undergo a rehabilitative programme as part of their sentence, although all too frequently these programmes are unavailable due to lack of resources in prisons. Where, however, a sex offender has been successfully rehabilitated, he should not have to suffer continued marginalisation and exclusion from society due to his inability to access employment in areas that do not involve the care and supervision of children or vulnerable adults.

⁴⁰ The Report therefore recommended that the disclosure period should be the period of the sentence, plus an additional “buffer” period of one or two years, depending on whether the sentence was custodial in nature.

⁴¹ Broadhead, “Denying the Past” (2001) 151 NLJ 1566

⁴² Recidivism rates are highest for property offenders (49% imprisoned within 36 months of release) and lowest for sex offenders (18% imprisoned within 36 months of release); see discussion of headline results of research undertaken by UCD Institute of Criminology discussed in Holden, “Time and Again” *UCD Connections* Issue 12 2007, pages 6-7

(ii) *Compounding disadvantage*

For the very many people with a previous criminal conviction who do not pose a risk of particular harm, there is clear evidence that their record is only one of the many barriers to gaining employment; the vast majority of offenders suffer from other disadvantages such as homelessness, lack of education, and substance addiction. This emphasises the need for supports to be available to offenders both during their sentence and upon release, to facilitate their reintegration. As noted by O’Donnell:

“Too often, discharged offenders find themselves without suitable accommodation or work, unsupervised and unsupported. After a period when they are stripped of their responsibility, they are suddenly confronted again with the problem of organising their lives. In this context, a relapse into drug and alcohol misuse and crime is a significant risk.”⁴³

5. The International Dimension

In its 2002 review of the *Rehabilitation of Offenders Act 1974*, the Home Office examined twenty-one different jurisdictions in relation to the existence of spent convictions legislation, and only Ireland and Slovenia emerged as having no system in place in respect of adult offenders. In 1984, the Committee of Ministers of the Council of Europe considered that:

“...a crime policy aimed at crime prevention and the social integration of offenders should be pursued and developed in Member States...and considering that any other use of criminal records (other than in assisting the judiciary to dispose of individual cases) may jeopardise the convicted person’s chances of social integration, and should therefore be restricted to the utmost, the Committee of Members...recommends that the governments of Member States review their legislation and their practices relating to criminal records.”⁴⁴

⁴³ O’ Donnell, “The Re-integration of Prisoners” (2002) Vol 50 Administration, No 2 (Summer 2002) 80 at 87

⁴⁴ Council of Europe Recommendation No R (84)10 on *Criminal Records and Rehabilitation of Convicted Persons*

The State must also be mindful of its obligation to ensure the human rights of its citizens are protected, and to comply with the European Convention on Human Rights.⁴⁵ As noted by Dr Maureen Gaffney, speaking on behalf of the National Economic and Social Forum to the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights in February 2003:

“While it will be complicated and there will be no neat edges, that should not stop us tackling something which is a matter of fundamental human rights.”⁴⁶

The human rights of ex-offenders are discussed further below.⁴⁷

6. Legislative precedent

Section 258 of the Children Act 2001 provides:

- 258.** (1) Where a person has been found guilty of an offence whether before or after the commencement of this section, and-
- (a) the offence was committed before the person attained the age of 18 years,
 - (b) the offence is not an offence required to be tried by the Central Criminal Court,
 - (c) a period of not less than 3 years has elapsed since the finding of guilt, and
 - (d) the person has not been dealt with for an offence in that 3-year period,
- then, after the end of the 3-year period or, where the period ended before the commencement of this section, after the commencement of this section, the provisions of *subsection (4)* shall apply to the finding of guilt.

Subsection 4 goes on to provide that a person to whom the section applies shall be treated for all purposes in law as a person who has not committed the offence and that no evidence shall be admissible in any proceedings before a judicial authority to

⁴⁵ See *European Convention on Human Rights Act 2003*

⁴⁷ See Part I, section 8

prove that such person has committed an offence. The person shall not be obliged in any circumstances to disclose his criminal record.

Therefore, our legislature has already recognised the merit of a spent convictions scheme in respect of juvenile offenders and there ought therefore be no principled objection to extending the system to adult offenders. It is well established that crime is associated with youth and that people tend to “outgrow” offending behaviour. The overwhelming majority of people who appear before the Irish courts are males between the ages of 18 and 25. It would seem arbitrary to differentiate between this category of offender and those under the age of 18 years.

As Robinson observes:

“[I]t is ironic that a youth who commits the offence of say manslaughter one week before they turn 18 can thus avail of the scheme of rehabilitation, whereas a youth who commits a breach of the peace at age 18 plus one week cannot. This appears both arbitrary and undesirable, and bucks the international trend.”⁴⁸

7. Objections to spent convictions legislation

The Law Reform Commission examined in detail in its Report⁴⁹ the objections to spent convictions legislation, which may be summarised as follows.

(i) “Statutory Lie”

The first ground of objection is that spent convictions legislation endorses what could be termed a “statutory lie” and amounts to a distortion of the public record. In fact, in most spent conviction regimes the record is never actually deleted, and records remain available for sentencing and investigative purposes. The consequence of spent

⁴⁸ Robinson, “Wiping the Slate Clean” Gazette, Law Society of Ireland October 2006 at 30
⁴⁹ *Report on Spent Convictions* LRC 84-2007 pp 19-29

convictions provisions upon a criminal record is such that the effect of the record is limited as regards the circumstances in which a person will be required to disclose the existence of the record and as regards the category of persons who have access to the record; it does not result in the offence being “wiped off” the record.⁵⁰ The public record is therefore not altered in any way.

Discussing the effect of the pardon system in Canada in the case of *Re Therrien*,⁵¹ the Supreme Court of Canada observed,

“In and of themselves, these provisions do not persuade me that the pardon can operate to retroactively wipe out the conviction. Rather, they are an expression of the fact that it still exists, combined with a *desire to minimise its future consequences*.”⁵² (emphasis added)

Under the pardon system, the judicial record of conviction is kept “separate and apart” from other criminal records, and is not destroyed. Section 5(a)(ii) of the *Criminal Records Act 1985* provides that the conviction should no longer adversely reflect on the applicant’s character, implying that it still exists. The legislation does not make the past go away but rather expunges the consequences for the future.⁵³

(ii) Public Safety

The second objection raises the issue of public safety and the desire to protect society, particularly its vulnerable members, from dangerous individuals. Most existing spent convictions schemes address these concerns by excluding certain offences such as violent or sexual offences, or by excluding employment in certain areas or professions from the application of the scheme. The interests of the public are further protected by removing the barrier to employment that a criminal record may represent. Ex-offenders in full-time employment are less likely to re-offend than those who are not.

⁵⁰ *Report on Spent Convictions* LRC 84-2007, 24

⁵¹ *Re Therrien* [2001] 2 SCR 3

⁵² *Re Therrien* [2001] 2 SCR 3, at paragraph 116 per Gonthier J

⁵³ See *Re Therrien* [2001] 2 SCR 3, at paragraph 127 per Gonthier J

By imposing an obligation on the offender to return to law-abiding behaviour for a certain minimum period in order to demonstrate a genuine desire to change, spent conviction regimes provide an incentive to offenders to rehabilitate.

(iii) *Freedom of expression and freedom of information*

Critics of spent conviction schemes further argue that such schemes interfere with freedom of information and freedom of expression and argue that curtailment of employers' right to ask certain questions can only be justified where there are justifiable reasons in the public interest. It is submitted that the rationale underlying spent convictions schemes, that is removing the obligation to disclose, thereby facilitating reintegration into mainstream society and in turn reducing recidivism rates, constitutes a justifiable reason in the public interest. Society's interest in freedom of expression and freedom of information must be balanced against the individual's right to privacy.⁵⁴ The disproportionate effect of spent convictions policies must also be considered; it is a fact that a criminal record affects some people more severely than others. Research indicates that people from marginalized and disadvantaged backgrounds suffer greater hardships, particularly in the employment context, as a result of having a criminal record.⁵⁵

(iv) *Disproportionate effect on employers*

Opponents of these schemes also point to the disproportionate effect of the legislation on employers, and point to the particular nature of the employment relationship as one of mutual trust and confidence. Furthermore, employers have a duty to protect both the property and the fellow employees of the firm, and spent convictions schemes disproportionately affect employers by transferring the costs of recidivism and social risks to private employers. It has been argued that employers should be allowed to calculate and manage the risk presented by the particular applicant, and that education

⁵⁴ The right to privacy and the obligation to disclose previous convictions in the context of insurance contracts was examined by the Irish courts in *Aro Road Land Vehicles Ltd v Insurance Corporation of Ireland* [1986] IR 403

⁵⁵ See references quoted at n 61 *Report on Spent Convictions* LRC 84-2007, 28

is the key to dealing with discrimination in this context.⁵⁶ It is notable that the Law Reform Commission does not directly address this objection in its response section, perhaps because it is the most difficult to deal with. However, provided the regime introduced includes sufficient safeguards to ensure in so far as possible that the offender has demonstrated a genuine desire to lead a law-abiding life, then the concerns of most employers should be met. As noted in the Home Office review, it is not possible to eliminate risk entirely if we are to take a chance on significantly improving the rehabilitation prospects of ex-offenders.⁵⁷

(v) *Delayed effect*

Many argue that the schemes are ineffective in the objective they seek to achieve, as the benefits to ex-offenders do not take effect for a considerable period of time after the sentence imposed has been completed. Expungement is not available at the time the offender needs it most, which is immediately after release when the rehabilitative effect of immediate employment would be greatest. The Commission answers this objection by stating that the schemes:

“...aim to re-integrate offenders back into society after a sufficient amount of time has passed during which that person has demonstrated that past misdemeanours are no longer reflective of their character and that they deserve to put the past behind them.”⁵⁸

The Commission argues that wiping the slate clean cannot take place where there has, as yet, been no evidence of the individual’s rehabilitation. It is also acknowledged that employment upon release is a vital feature of any rehabilitative process. Perhaps this gap in the protection afforded by spent convictions legislation could be filled by extending the grounds of discrimination provided for in the *Employment Equality Act*

⁵⁶ See for example Greenslade, “Eyes Open Policy: employment of a person with a criminal record” *New Zealand Law Journal*, November 1986

⁵⁷ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 30

⁵⁸ *Report on Spent Convictions* LRC 84-2007, 29

1998, to include discrimination on the grounds of criminal record, thus affording the ex-offender some measure of protection while he waits for his conviction to become spent. The revision of the grounds of discrimination in the 1998 Act is a matter beyond the remit of this paper but it is submitted that this is a matter that should be further researched and considered.⁵⁹

8. The Right to Privacy & Proportionate Interference

The right to privacy has been recognised as one of the unenumerated personal rights that the State guarantees to protect pursuant to Article 40.3 of the Constitution:⁶⁰

“The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

However, the right to privacy cannot be absolute. In *Kennedy and Arnold v Attorney General*, Hamilton P referred to the right to privacy as a right that had to be protected from “...deliberate, conscious and unjustified interference...”, stating:

“I emphasise the words ‘deliberate, consciously and unjustifiably’ because an individual must accept the risk of accidental interference with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference.”⁶¹

The right to privacy is explicitly protected by Article 8 of the European Convention on Human Rights, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

⁵⁹ See *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* Report Commissioned by Department of Justice, Equality and Law Reform 2004

⁶⁰ The right to individual privacy was first recognised by the High Court in *Kennedy and Arnold v Attorney General* [1987] IR 587

⁶¹ *Kennedy and Arnold v Attorney General* [1987] IR 587 at 593

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.”⁶²

Article 14 of the ECHR further provides that:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

It is arguable that an individual’s status as an ex-offender could fall within the category of “or other status” in Article 14, and therefore an ex-offender should be entitled to enjoy his right to privacy under the Convention without discrimination.

The disclosure of criminal records raises issues in relation to the right to privacy, particularly in the context of the vetting of candidates in relation to sensitive posts, positions or professions. It is clear, however, that both the constitutional right to privacy and the right under Article 8 are not absolute rights. Interference with the constitutional right to privacy may be justified on the basis of the exigencies of the common good, such as the desire to protect vulnerable members of society from known sex offenders. Similarly, interference with the right enshrined in the ECHR will in most cases be for a legitimate aim since it will be directed at the prevention of crime, the protection of morals and the protection of the rights of others. Such interference, however, must be proportionate to that legitimate aim. Blanket policies of disclosure or disclosure of material that is plainly irrelevant in the circumstances may amount to a breach of Article 8 ECHR or Article 40.3 of the Constitution.

⁶² The ECHR became part of domestic law upon the commencement of the *European Convention on Human Rights Act 2003*

In this regard, it is noted that in the United Kingdom three levels of checks are offered to registered organisations and a check may only be carried out with the written consent of the person applying for the position. The level of check carried out will depend upon the position applied for.

Basic Level Check Relates to any type of employment. Only details of unspent convictions will be disclosed. Certificate issues to the person the subject of the check.

Intermediate Level Check Positions involving regular contact with persons under 18 years of age or for excepted occupations under the *Rehabilitation of Offenders Act 1974*. Reveals details of spent and unspent convictions. Certificate issues to the individual and the registered organisation.

High Level Check Relates to work including work with those under 18 years of age, all excepted occupations under the 1974 Act, judicial appointments, and gaming and lottery licences. Reveals details of all spent and unspent convictions, all cautions, warnings and reprimands and acquittals, inconclusive police investigations, uncorroborated allegations and other police matters. Certificate issues to individual and registered organisation.

In light of the different type of checks applicable to the different types of employment or positions, in most cases the different levels of interference, depending on the nature of the job applied for, will usually be a proportionate interference. The disclosure of information which has not resulted in a criminal conviction under the High Level Check, however, could arguably amount to a breach of Article 6(2) of the ECHR, which provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The *Report of the Working Group on Garda Vetting* (2004) and the *Report of the Joint Oireachtas Committee on Child Protection* (2006) recommended reforms of the Irish system along the lines of those in place in the United Kingdom. It is submitted that such a reform is necessary in order to ensure that the interference with the individual's right to privacy inherent in the vetting system is proportionate in all cases and takes into account individual circumstances and the nature of the position applied for.

The right of an individual to work is recognised as a human right by a number of treaties including the ICESCR and the revised European Social Charter, and any interference with that right must be measured against the standards of reasonableness. Policies and practices whereby the existence of a criminal record excludes individuals from employment, either in law or in practice must be reasonable in the range of their application.⁶³

9. Other Constitutional Rights

It could further be argued that the requirement to disclose old criminal convictions amounts to an infringement of the right to earn a livelihood and the right to one's good name, both rights also protected by Article 40.3 of the Constitution. Any interference with these rights would again have to be justified on the basis of the exigencies of the common good, and the test of proportionality would be applied. The public interest in protecting vulnerable members of society and ensuring that those who occupy special positions of trust is likely to amount to such a justification, but the extent of the information to be disclosed in the particular circumstances would have to be examined to ensure that the interference with these constitutional rights is proportionate.

⁶³ As discussed in Irish Human Rights Commission, *Extending the Scope of Employment Equality Legislation* May 2005, page 6, accessible via www.ihrc.ie

PART II: MODELS IN OTHER JURISDICTIONS

1. Introduction

Both the Law Reform Commission and the report commissioned by the Department of Justice, Equality and Law Reform have set out in detail the various provisions which apply in other jurisdictions and it is therefore not proposed do so here.⁶⁴ Instead, some common essential features of the schemes will be summarised with a view to offering guidance for an appropriate scheme in this jurisdiction.

As noted in Part I, the United Kingdom was one of the first jurisdictions to introduce spent convictions legislation, arising out of the ‘penal welfare’ ethos which prevailed in the late 1960s and early 1970s.⁶⁵ However, in subsequent years, society has become increasingly risk-averse; arguments emphasising the rehabilitative potential of such schemes have lost favour and greater priority is now given to public safety concerns. For example, in the 1980s both the Australian Law Reform Commission and the New Zealand Penal Review Group recommended that expungement laws should apply to all offenders. When legislation was finally enacted in Australia in 1990, however, it was limited to offenders who were sentenced to prison sentences of less than 30 months.⁶⁶ The New Zealand *Criminal Records (Clean Slate) Act 2004* provides that any sentence which attracts a sentence of imprisonment is not eligible for expungement. There has also been a stark reduction in the length of prison sentence that fall within the ambit of spent conviction schemes. While many of the earlier schemes excluded sentences in excess of 30 months,⁶⁷ later schemes were limited to sentences of less than six months.⁶⁸ This is despite the fact that there has been an increase in imprisonment rates and the average prison sentence length⁶⁹ in recent years. Similar developments have occurred in the United States, where it has

⁶⁴ See *Report on Spent Convictions* LRC 84-2007 Chapter 2; *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* UCC Report Commissioned by Department of Justice, Equality and Law Reform 2004

⁶⁵ *Rehabilitation of Offenders Act 1974*

⁶⁶ Pt VIIC of the Crimes Act 1914 (Cth)

⁶⁷ For example, United Kingdom in 1974 and Queensland in 1986.

⁶⁸ New South Wales in 1991, Northern Territories in 1992, Australian Capital Territory in 2001.

⁶⁹ Referred to in the Home Office Review as “sentence inflation”; *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 6. Whereas 3,537 offenders were sentenced to custody for over 30 months in 1974, the number had risen to over 11,000 by the year 2000.

been suggested that the “legislative trend is to make expungement laws less effective in concealing criminal histories and expungement more difficult for offenders to obtain.”⁷⁰ One commentator notes,

“A few states enacted comprehensive statutory restoration schemes in the 1970s, but in the intervening years these schemes have been riddled with exceptions and in some cases dismantled altogether...Authority for courts to expunge or seal adult felony convictions, where it exists at all, is narrowly drawn to exclude many offences.”⁷¹

These developments are in stark contrast to the recommendations proposed in the recent Home Office review⁷² of the *Rehabilitation of Offenders Act 1974*, legislation which formed the model for many subsequent spent convictions schemes, including the Private Members Bill tabled by Deputy Barry Andrews prior to the dissolution of the last Dáil. The report concluded that the British scheme is no longer considered to be wholly effective and is not achieving the right balance between resettlement and protection. The review recommended that the burden of the requirement to disclose previous convictions be minimised, while maintaining the requirement to disclose where there may be a particular risk of harm. To this end, it was recommended that the 30-month cap on sentences to which the legislation applies be removed, which would mean that all offenders who have served their sentence would have the opportunity to have their convictions deemed spent. This would be subject to a new judicial discretion to disapply the disclosure periods in cases where the sentencer decides that there is a particular risk of significant harm.

A key focus of the review was to remove the barrier to employment that a criminal record presents by devising disclosure periods that are specifically related to the likely risk presented by the ex-offender. Adopting the concept of proportionality, the review stated that disclosure periods should be substantially reduced to be proportionate to

⁷⁰ Mayfield, “Revisiting Expungement: concealing information in the information age” (1997) *Utah Law Review* p 1085

⁷¹ *Relief from the collateral consequences of a Criminal Conviction: A State by State Resource Guide*, Margaret Colgate Love July 2005 available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>

⁷² *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002

the level of risk, with the scope of the scheme extended to *all* offenders who have completed their sentence. The report concluded that the applicable disclosure period should be the period of the sentence plus an additional ‘buffer period’ of one year in respect of non-custodial sentences, and the sentence plus a buffer period of two years in respect of custodial sentences. These much shortened disclosure periods⁷³ were clearly the most controversial aspect of the proposed reforms and attracted some criticism on the basis of the failure to differentiate between shorter custodial sentences in relation to minor offences, and longer sentences in respect of more serious crimes. The British government ultimately accepted that, in the interests of proportionality, it would be preferable to differentiate between custodial sentences of less than four years, which would attract a two-year buffer period, and sentences of four years or more, to which a buffer period of four years would apply.

Ex-prisoners in Northern Ireland have been a consistent voice in the campaign for reform of the law in this area. This is partly due to the fact that a significant proportion of the prison population in Northern Ireland is comprised of politically motivated offenders. While the circumstances leading to their committal to prison may be different to other categories of offender, the consequences of a criminal record are the same. It has been observed that discrimination is ironically legitimised by the *Rehabilitation of Offenders Order 1978* which bars discrimination but only for those sentenced to less than 30 months, after a ten-year rehabilitation period and not in a wide range of exempted occupations. The effect of this is to make discrimination outside these parameters legal and apparently proper.⁷⁴

It is notable, therefore that, while other jurisdictions have adopted a more restrictive approach to spent convictions, most notably New Zealand, in recent times, the United Kingdom has taken the view that its existing system is overly restrictive and has indicated that it may extend its scheme so as to apply to *all* offenders, with no exclusions in respect of particular types of offence such as sexual offences.

⁷³ Under the 1974 Act, the rehabilitation period in respect of an offence attracting a sentence of between six months and thirty months was ten years; in respect of a sentence of less than six months, the disclosure period was seven years.

⁷⁴ As discussed in Gormally, “Conversion from War to Peace: Re-integration of Ex-prisoners in Northern Ireland” (2001) Bonn International Centre for Conversion page 21 available at <http://www.bicc.de/publications/papers/paper18/paper18.pdf>

2. Summary of the approach in other jurisdictions

Most common law jurisdictions that have introduced spent convictions legislation do not apply an unlimited system that applies to all offenders in respect of all offences. The schemes are generally limited by one or both of two general factors: the offence committed or the sentence imposed for the offence.

(i) Offence-based limitation

Where limitations are imposed on offence-based criteria, it is usually provided that certain serious offences will never be deemed spent, and therefore an offender would always be obliged to disclose a conviction where that conviction is for an excluded offence. Excluded offences usually include such offences as murder, manslaughter, sexual offences, offences against children and other serious offences against the person. As stated above, the underlying rationale for spent convictions schemes is that, after a certain period of time has elapsed, certain convictions can be considered to be irrelevant. The Law Reform Commission is of the view that “very serious offences, particularly those which involve a loss of life, are difficult to categorise in this way and are thus not considered appropriate for expungement.”⁷⁵ Excluding certain offences from the application of the scheme is based on the harm caused by the offence in question, the likelihood of re-offending and the implications that could be drawn about the character and disposition of the offender by virtue of the fact that he has committed this type of offence.

Section 258 of the *Children Act 2001* provides that the section shall not apply to offences which are required to be tried in the Central Criminal Court, thereby imposing an offence-based limitation on the operation of the system in respect of juveniles.

⁷⁵ *Report on Spent Convictions* LRC 84-2007, 50

Examples of other jurisdictions which impose an offence-based limitation are the Northern Territory,⁷⁶ Australian Capital Territory⁷⁷ and New Zealand.⁷⁸ Some US states restrict judicial restoration to first offenders or misdemeanants, and serious or violent offences are almost always ineligible for this relief.⁷⁹

(ii) Sentence-based limitation

Sentence-based spent convictions schemes only apply to offences which attract a penalty below a certain threshold; any offences attracting a sentence of imprisonment exceeding the threshold will not be eligible for expungement. The basis for imposing this form of limitation is that the sentence imposed by the court can be viewed as an indicator of the level of seriousness of the offence, and the sentence imposed can be considered to be proportionate to the offence in question.

Section 258 of the *Children Act 2001* imposes no sentence-based limitation.

The majority of jurisdictions impose a sentence-based limitation on the application of their schemes, with Canada and Western Australia⁸⁰ being notable exceptions.

(iii) The rehabilitation period/disclosure period

Under section 258 of the *Children Act 2001*, a person must not have been convicted or dealt with in relation to an offence for three years before the conviction can be considered expunged. In the United Kingdom, where the offender is sentenced to imprisonment for a period exceeding six months but less than thirty months, the rehabilitation period is ten years from the date of conviction. Where the sentence is

⁷⁶ *Criminal Record (Spent Convictions) Act 1992* excludes sexual offences and certain other prescribed offences.

⁷⁷ *Spent Convictions Act 2000* excludes sexual offences and certain prescribed offences.

⁷⁸ *Criminal Records (Clean Slate) Act 2004* excludes certain prescribed offences, which are mainly sexual offences

⁷⁹ Margaret Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide" available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>

⁸⁰ Western Australia excludes offences attracting a sentence of life imprisonment from its scheme

less than six months, the limitation period is seven years from the date of conviction. Part VIIC of the *Crimes Act 1914* in Australia provides that an offence to which the scheme applies is eligible for expungement after ten years from the date of conviction. New South Wales, the Northern Territory, and the Australian Capital Territory apply similar ten-year periods. New Zealand applies a seven-year period from the date of conviction in respect of sentences that do not attract a custodial sentence.

Western Australia and Canada do not operate automatic spent convictions systems and instead require that an offender apply to the relevant authority to have his conviction deemed spent. Section 11(1) of the *Spent Convictions Act 1988* (Western Australia) provides that the prescribed period for a conviction is ten years plus any period of imprisonment relevant to that conviction. In Canada, section 4 of the *Criminal Records Act 1985* provides that an individual must wait three years before applying for a pardon in the case of a summary offence or five years in the case of an indictable offence. The qualifying periods run from the expiration of the sentence, which is in contrast to most schemes where the period runs from the date of conviction.

(iv) Exclusions from protection of scheme

Most common law schemes provide that full disclosure will be required in relation to sensitive posts, positions and professions. It will usually be the case that, where a job involves working with or supervising children or vulnerable people, there will be a requirement that full disclosure be made of all criminal convictions, including spent convictions. Applicants to the medical and legal professions are often required to make full disclosure of all convictions, spent and unspent, on the basis that the level of trust and dependency involved is greater and the interests of people in vulnerable positions are likely to be at stake. There is an issue as to nomenclature here. To describe a conviction as “spent” does not suggest that it is expunged or erased for all

purposes, but merely indicates that the circumstances in which disclosure of the conviction will be required are limited.⁸¹

The United Kingdom, Australia, New South Wales, the Northern Territory, the Australian Capital Territory, New Zealand, and Canada all provide for exclusions from the spent convictions schemes in respect of applicants for certain positions, usually positions involving working with vulnerable members of society and positions of trust. All of these jurisdictions also provide that proceedings before a court are exempt from the application of the scheme.

(v) *Effect of intervening convictions*

Many jurisdictions provide that minor offences that do not attract a sentence of imprisonment or road traffic offences will not interrupt the conviction-free period.⁸² Where a more serious offence is committed during the rehabilitation period, it will have the effect that the rehabilitation period is reset and the ex-offender has to start the conviction-free period again. In some cases, the running time will be reset and neither offence will become spent until the rehabilitation period for the later offence has been completed.⁸³ In the United Kingdom, if the intervening conviction attracts a sentence in excess of thirty months and is therefore ineligible to become spent under the Act, neither conviction shall ever become spent.

In Canada, under section 7 of the *Criminal Records Act 1985*, a pardon can be revoked if a person is subsequently convicted of a summary offence and a pardon will cease to have effect if a person is subsequently convicted of an indictable offence or

⁸¹ The Home Office recommended that the term “spent” no longer be used in the context of the *Rehabilitation of Offenders* legislation: *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, para 1.29

⁸² The British *Rehabilitation of Offenders Act 1974* provides that summary offences will not interrupt the rehabilitation period. In New South Wales, only offences attracting a sentence of imprisonment affect the running of the period, and road traffic offences are specifically disregarded. For further see discussion in *Report on Spent Convictions* LRC 84-2007, pp 65-66

⁸³ Section 8 *Criminal Records (Clean Slate) Act 2004* New Zealand

an offence which is punishable either summarily or on indictment. In the United States, expunged convictions ordinarily revive in the event of a subsequent offence.⁸⁴

(vi) Automatic or Application-based scheme?

Most jurisdictions operate their spent convictions schemes on an automatic basis, so that the individual is not required to apply to court or to a designated body to have their conviction declared spent. It was felt by the Gardiner Committee in 1972 that the need for an application would be an unnecessary complication in the process and would also serve to unnecessarily highlight the fact of conviction when the purpose of the scheme was in fact to allow the individual to put their past behind them.⁸⁵

The schemes in both Canada and Western Australia require the ex-offender to apply to have his conviction deemed spent.⁸⁶ In Canada, ex-offenders seeking to have their conviction “pardoned” must apply to the National Parole Board, which will take a view as to whether the conviction should “no longer reflect adversely on the applicant’s character”.⁸⁷ The ex-offender must wait three years before applying for a pardon in respect of a summary offence, or five years in the case of an indictable offence. These qualifying periods run from the expiration of the sentence. Factors to which the Board will have regard include:

- Conduct of the applicant since the conviction was recorded.
- Nature of the infraction.
- Information provided by law enforcement agencies about suspected or alleged behaviour.
- Representations on behalf of the applicant.

The Board has a discretion whether or not to grant a pardon. In the event that a pardon is refused, the applicant may reapply after a period of time. A pardon may be

⁸⁴ Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide” page 9, available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>

⁸⁵ *Living it Down-The Problem of Old Convictions* (Stevens & Son, 1972)

⁸⁶ Some civil law schemes, such as France and Greece also provide for an application to a central authority for a criminal record to be deleted.

⁸⁷ Section 5 *Criminal Records Act 1985*

revoked if a person is subsequently convicted of a summary offence and will cease to have effect if a person is subsequently convicted of an indictable offence or an offence punishable either summarily or on indictment. Under the *Criminal Records Act 1985*, a person if asked, is *not* entitled to deny the existence of a criminal record; an individual is entitled to say that he has been convicted of a criminal offence for which a pardon has been granted.

In Western Australia, the application must be made to a judge or the Commissioner of Police in order to have a conviction declared spent. Where the offence is a serious offence, defined as an offence attracting a sentence of imprisonment of more than one year or a fine of \$15,000 or more, the application must be made to a judge. The judge may have regard to the following factors:

- Length and kind of sentence imposed.
- Length of time since the conviction was imposed.
- All the circumstances of the applicant including the nature and seriousness of the offence.
- Whether there is public interest to be served in not making the order.⁸⁸

In respect of other offences that do not fall into the definition of serious offence, the application is made to the Commissioner for Police who does not have a discretion to refuse the application if the requirements of the Act are met.

In her comprehensive review of US jurisdictions, Margaret Colgate Love observes the power to grant a pardon in respect of a previous conviction is most often exercised in those states where there is an independent board of appointed officials. Governors may be reluctant to exercise their right to pardon for fear that it may prove to be a politically costly mistake. In those states where an independent board administers pardons, it is usually by means of a public hearing, though some states provide for applications to be dealt with in writing.⁸⁹ It is noted, however, that even in the nine

⁸⁸ The factors to which the judge may have regard are listed in section 6(4) *Spent Convictions Act 1988*

⁸⁹ See for example the process in Arkansas, Connecticut (in respect of minor offences), Georgia, New Hampshire discussed in Margaret Colgate Love, "Relief from the Collateral

states that administer the pardon power in a regular manner and issue a number of pardons each year, relatively few people in fact apply for a pardon:

“The relative paucity of applications could be attributable to the time and expense involved, the uncertain prospect of success, doubts about the efficacy of a pardon, or some combination of these factors.”⁹⁰

⁹⁰ Consequences of a Criminal Conviction: A State-by-State Resource Guide” page 9, available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>
Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide” page 9, available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>

JURISDICTION	EXCLUDED SENTENCES	EXCLUDED OFFENCES*	CONVICTION-FREE PERIOD	OTHER COMMENTS
UNITED KINGDOM	Sentences exceeding 30 months	None	10 years for sentences in excess of 6 months; 7 years for sentences of less than 6 months; 5 years for fines or community service orders. Time periods run from date of conviction.	
AUSTRALIA	Sentences exceeding 30 months	None	10 years from date of conviction	Law enforcement agencies, courts, tribunals excluded. Persons seeking employment involving care of minors may be asked about previous convictions to ascertain whether they have been convicted of a designated offence
NEW SOUTH WALES	Sentences exceeding 6 months	None	10 years from date of conviction	Court proceedings exempt. Admission as legal practitioners, judges, police officers, teachers and others exempt.
WESTERN AUSTRALIA	Life imprisonment	Regulations designate certain offences that must be disclosed, including sexual offences, most offences against the person and offences against children.	10 years plus any period of imprisonment	Distinction between serious offences, where application is made to judge, and lesser offences where application is made to Commissioner of Police.
NORTHERN TERRITORIES	Sentences exceeding 6 months	Sexual offences; prescribed offences	10 years from date of conviction	Proceedings before courts and tribunals exempt. Exclusions for sensitive posts, positions & professions
AUSTRALIAN CAPITAL TERRITORY	Sentences exceeding 6 months	Sexual offences; prescribed offences	10 years from date of conviction	Court proceedings exempt. Sensitive posts, positions & professions excluded
NEW ZEALAND	All sentences of imprisonment	Prescribed offences, mainly sexual offences	7 years from date of conviction	Court proceedings excluded; employment involving children or vulnerable adults excluded
CANADA	None	None	3 years for summary offences; 5 years for indictable offences; Time periods run from expiration of sentence	Application to National Parole Board required in all cases.

*This heading refers to specific categories of offences that are expressly excluded from schemes, for example, sexual offences. In most jurisdictions, most serious offences may in fact be excluded from the scheme by virtue of the imposition of a sentencing threshold.

PART III: PROPOSALS TO DATE

1. The Law Reform Commission Report on Spent Convictions

As noted in Part I, the Law Reform Commission has recently published a comprehensive report on spent convictions, together with a draft Bill setting out the recommendations of the Commission.⁹¹ It is proposed in this section to critically assess the scheme as proposed by the Commission.

The principal recommendations of the Commission can be summarised as follows:

- A suitable spent convictions scheme should be introduced for adult offenders in this jurisdiction.
- A limited spent convictions scheme should be introduced for adult offenders, building on the scheme already provided for in respect of under-18 offenders in section 258 *Children Act 2001* and comparable schemes in other jurisdictions.
- The proposed scheme should be a hybrid model which specifically excludes any offence tried in the Central Criminal Court and all sexual offences from its application and applies a sentencing threshold of six months imprisonment.
- A conviction-free period of seven years should apply in the case of all sentences of imprisonment of six months or less, and a period of five years for all offences that attract a non-custodial sentence.
- A conviction for any offence during the conviction-free period should interrupt the running of the period and require that a new period should be started from the date of conviction for the second offence. Dismissals without conviction under section 1(1) of the *Probation of Offenders Act 1907* and offences in respect of which fixed charge penalties for road traffic offences have been paid should not interrupt the running of the crime-free period.

⁹¹ *Report on Spent Convictions* LRC 84-2007

- The scheme should operate on an automatic basis.
- The scheme should not apply in the context of sentencing and in the context of certain civil matters where the welfare of children is in issue.
- Certain jobs, professions and posts should be exempted from the scheme.
- All previous convictions should continue to be disclosed in the context of criminal proceedings under the appropriate evidential rules governing such matters, including spent convictions.

One regrettable feature of the Law Reform Commission Report is that a Consultation Paper on Spent Convictions did not precede it, as is the usual course in respect of Commission recommendations. It is noted that a chapter in the Commission's *Consultation Paper on the Court Poor Box*⁹², was devoted to the question of the need for a statutory jurisdiction for spent convictions, and the Commission has relied upon this as initiating the consultation process. It is submitted, however, that many interested parties may have overlooked the inclusion of this important topic in the consultation paper and may have been unaware that the topic was under consideration by the Commission. As this is clearly a subject that involves issues of public safety and the public interest, a more transparent, engaging consultation process is required.

(i) The exclusion of certain offences from the proposed scheme

The Commission was of the view that the nature and seriousness of certain offences give rise to legitimate public safety concerns and that these concerns cannot be easily addressed by the provisions of spent convictions schemes. Section 258 of the *Children Act 2001* provides that offences which are required to be tried by the Central Criminal Court are excluded, thereby excluding most serious offences against the

⁹² *Consultation Paper on the Court Poor Box* LRC CP 31-2004

person, and therefore the Commission recommended that a similar exclusion should apply in the context of a scheme for adult offenders.

The Commission noted that, as a general rule in other jurisdictions, sexual offences are excluded from the protection of the scheme. Due to the grave harm that is caused to victims of such crimes, coupled with the risks posed to public safety and particularly the safety of vulnerable members of society, the Commission concluded that sexual offences should not be deemed suitable for expungement. The provisions contained in the *Sex Offenders Act 2001* in respect of notification were also relied upon as a basis for this recommendation. Section 8(3) of the *Sex Offenders Act 2001* requires an offender to comply with the notification obligation⁹³ for an “indefinite” period if the sentence imposed is one of imprisonment for life or a term of more than two years. The notification obligation applies for ten years if the sentence is more than six months but not more than two years, seven years if the sentence is a term of six months or less, and five years if the sentence imposed is suspended or non-custodial.⁹⁴

The Commission argued that any proposed scheme that would allow for the expungement of a sexual offence for which an individual was sentenced to two years or more would be very difficult to reconcile with the 2001 Act. This is not necessarily the case. The notification provisions in the *Sex Offenders Act 2001* are essentially a matter of law enforcement, to allow police authorities to monitor the whereabouts of convicted sex offenders and reduce the opportunity for re-offending. The spent convictions scheme, on the other hand, relates to the duty to disclose a previous conviction, specifically in the employment context. It is submitted that there is nothing inconsistent in requiring a sex offender to notify the Garda Síochána of certain information, while not requiring that same person to disclose the existence of a spent conviction to an employer. As the Commission itself noted, “there is a great

⁹³ The notification requirement obliges a person convicted of a sexual offence to notify An Garda Síochána of their name and address, of any change to their name and address, and of any intention to leave the State for any period.

⁹⁴ The time periods for offenders under 18 years of age at the time of the commission of the offence are reduced to five years, 3 ½ years and 2 ½ years respectively.

difference between ceasing the requirement to register as a sex offender and wiping the slate clean for sex offenders.⁹⁵

The underlying rationale of a spent convictions scheme is that, as time progresses, the relevance of past offences to making decisions about the offender decreases, regardless of the offence that has been committed. Therefore, there must be strong and persuasive reasons to justify the exclusion of any particular class of offence. In general terms, it could be said that the less serious the offence, the more likely it is that, after a period of time, it will cease to be relevant. Conversely, the more serious the offence, the longer it is likely to remain relevant to decision making.⁹⁶ In discussing the question of whether to exclude serious offences, the Australian Law Reform Commission in 1987 observed that the issue of public acceptability of the scheme must be addressed and that any proposed scheme which met with a hostile public reaction would be unlikely to facilitate the ex-offender's reintegration into the community.⁹⁷

The Australian Law Reform Commission noted that there were two available approaches; exclude serious offences from the scheme altogether or include them, but deal with them in a particular way that meets community concerns about serious offences. It was argued that to exclude a conviction simply on the basis of the kind of offence would be unfair; there is a significant difference between some domestic killings and a homicide committed in cold blood by a professional assassin for financial gain.⁹⁸

(ii) *Setting a sentencing threshold*

Most of the common law jurisdictions, with the exception of Canada and Western Australia,⁹⁹ impose a sentencing threshold beyond which a conviction may not be

⁹⁵ *Report on Spent Convictions* LRC 84-2007, 76

⁹⁶ Australian Law Reform Commission *Report on Spent Convictions* (1987) ALRC 37, p 28

⁹⁷ Australian Law Reform Commission *Report on Spent Convictions* (1987) ALRC 37, p 28

⁹⁸ Australian Law Reform Commission *Report on Spent Convictions* (1987) ALRC 37, p 29

⁹⁹ The Home Office review of the *Rehabilitation of Offenders Act 1974* also recommended that the 30-month sentencing threshold be removed, and this recommendation was accepted by Government, though it has not been acted upon to date: *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002.

expunged. The Commission is of the view that, although it had already recommended that certain offences be excluded from the scheme, this measure alone is not adequate to protect the public from potentially dangerous offenders. To exclude certain offences, without additionally imposing a sentencing threshold, could lead to injustice:

“By excluding certain offences without a consideration of the circumstances of the commission of the offence, there is a danger that offences which are not suitable for expungement would slip through the net. There is an equal danger that offences which should be considered suitable for expungement will not be considered where there is a blanket ban on certain offences being eligible for expungement. The Commission considers that the appropriate method for redressing this balance is by using the sentence imposed by the court as a trigger for eligibility for expungement.”¹⁰⁰

In deciding upon an appropriate sentence in a particular case, the court will have regard to the circumstances of the offender and of the offence and thus reach a proportionate decision taking account of all relevant elements. The seriousness of the offence, its degree of harmfulness, the culpability of the offender, and the offender’s criminal history are all relevant factors. By using the sentence as the trigger for the application of the scheme, the concept of proportionality is thereby introduced into the scheme.

In relation to the sentencing threshold to be applied, the Commission considered information on the types of offenders in the prison system and the duration of prison sentences in this jurisdiction. The Commission noted that, while Ireland has one of the highest rates of prison entry in Europe, the average prison sentence is just over three months, which is significantly shorter than the European average. Referring to 2003 statistics, 59% of prisoners were sentenced to periods of imprisonment of less than six months.¹⁰¹

¹⁰⁰ *Report on Spent Convictions* LRC 84-2007, 77

¹⁰¹ Seymour and Costello, *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody*, Irish Penal Reform Trust and the Community Foundation for Ireland, 2003. See discussion at *Report on Spent Convictions* LRC 84-2007, 78-79

Due to the fact that 28% of committals in 2003 were for road traffic offences,¹⁰² and a significant minority of committals every year relate to fine default,¹⁰³ the Commission concluded that less serious offences are attracting prison sentences and it would therefore be unduly harsh to rule out expungement for any offence which attracts a term of imprisonment, as is the case in New Zealand. The Commission recommends that a sentencing threshold of six months' imprisonment would be an appropriate cut-off point for expungement purposes.

The Commission accepts that its proposed scheme may appear to be quite limited in scope when compared to the regimes already in existence in other jurisdictions, but considers that "sentencing practices in Ireland indicate that the six-month threshold will, in reality, capture a wide range of offences within its scope and will, therefore, have a similar range of application as many relevant international comparators."¹⁰⁴ It is also observed that the proposed scheme, applying a sentencing threshold of six months, will have an effect on sentencing practice in that, where the court considers a particular offence suitable for expungement, a sentence of six months or less will be imposed.

It is submitted that, by excluding offences which must be tried in the Central Criminal Court, and by imposing a sentencing threshold of six months, the scheme proposed by the Commission is unduly restrictive and will do little to promote and advance the underlying policies of any spent conviction scheme, that is, to provide an incentive for rehabilitation by affording protection from disclosure, thereby reducing recidivism rates and ensuring society and the economy can avail of the skills and energies of reformed offenders. Any scheme in this jurisdiction should not exclude those in greatest need of its protection; offenders who have committed offences other than traffic offences or fine default are more likely to suffer prejudice by virtue of their criminal record, and therefore be excluded from employment opportunities,

¹⁰² *Annual Report of the Irish Prison Service 2003*

¹⁰³ O'Donnell, (1997) "Crime, punishment and poverty" *Irish Criminal Law Journal*, 7: 134-151. Sub-Committee on Crime and Punishment of the Joint Committee on Justice, Equality, Defence and Women's Rights (2000) *Alternatives to Fines and the Uses of Prison*, Dublin: Houses of the Oireachtas.

¹⁰⁴ *Report on Spent Convictions LRC 84-2007*, 80

irrespective of whether or not the offence committed bears any real relevance to the position applied for. The serious offender who has indicated his genuine commitment to leading a law-abiding life by remaining conviction-free for a prolonged period should be equally as deserving of the scheme's protection as the petty offender who has the misfortune of being given a sentence of imprisonment. In this regard, it is to be noted that those who serve short prison sentences currently receive least in the way of rehabilitation and resettlement programmes;¹⁰⁵ the longer the term in prison the more likely it is that the offender will have accessed these services. It is not acceptable to argue that the proposed scheme will capture a large number of offenders; the real question ought to be whether the scheme affords protection and an incentive to rehabilitate to those most in need of it, thus rendering the scheme meaningful and effective.

(iii) *What conviction-free period should apply?*

The Commission notes that the rehabilitation or conviction-free periods that apply in other common law jurisdictions range from three years for summary offences in Canada to ten years in the United Kingdom for offences that attract a penalty of six months or more. The required period under section 258 *Children Act 2001* is three years, and the Commission is of the view that the conviction-free period for adult offenders should be at least double the juvenile requirement. A seven-year conviction free period was therefore recommended in respect of offences where a custodial sentence of less than six months is imposed. In the context of a non-custodial sanction, a conviction-free period of five years should apply commencing from the date of conviction.

The question arises as to the date upon which the rehabilitation period should commence. Most common law jurisdictions provide that the conviction-free period shall start to run from the date of conviction. Canada, however, provides that the period shall commence from the date upon which the sentence expires. The latter

¹⁰⁵ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 29

may be the appropriate approach in a scheme where no sentencing threshold is imposed, as is the case in Canada. Otherwise, an offender who receives a sentence of ten years in respect of a particular offence may have his conviction spent on the same date upon which his sentence was due to expire. Arguably, this will not afford society a sufficient opportunity to assess whether the offender is truly rehabilitated, as it is unquestionably the case that the risk of re-offending is minimised while an offender is under supervision in the community, and particularly while he is in custody.

In its review of the *Rehabilitation of Offenders Act 1974*, the Home Office recommended that the rehabilitation period in respect of offences attracting a custodial sentence should be the period of the sentence plus an additional “buffer” period of two years. Following consultation after the publication of the review, this recommendation was altered to the effect that the period in respect of custodial sentences of less than four years would be the period of the sentence plus an additional two years, and in respect of custodial sentences in excess of four years, the conviction-free period would be the period of the sentence plus four years. The review based its recommendation on the risk of re-offending post-release:

“Identifying the period when the interests of protection are paramount requires some consideration of the risks of reconviction. The rate of increase of reconviction is at its highest in the couple of years following conviction in the case of non-custodial sentences, and within a couple of years of release in the case of custodial sentences.”¹⁰⁶

A notable feature of the reforms proposed by the Home Office was the introduction of a new judicial discretion to exclude certain individual offenders from the protection of the scheme. This was proposed on the basis that there must be arrangements in place to protect the public in cases that present a particular risk of harm. In an individual case, there may be identifiable factors that point to a long term continuing risk, and sentencing and supervision arrangements may not be available or appropriate. Where the judge exercises his discretion to disapply the scheme, the ex-offender will continue to be obliged to disclose the conviction unless and until he makes a

¹⁰⁶ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 28

successful application to the court for an order that disclosure is no longer required. Individuals for whom the normal disclosure periods were disapplied would have an incentive to address the causes of their offending behaviour and to do whatever may be necessary to demonstrate that they no longer present a significant risk of particular harm.¹⁰⁷

In Canada, the qualifying period in respect of indictable offences is five years from the expiration of the sentence, a period almost commensurate with the four-year period in respect of serious offences now proposed in the United Kingdom.

(iv) *Effect of intervening offences*

The Commission noted that under section 258 of the *Children Act 2001*, a period of three years is required during which the person must not have been dealt with in any way for an offence. This provision is unusual in that, in most common law jurisdictions, the intervening offence would not necessarily interrupt the running of the crime-free period, depending on the gravity of the offence committed. It was concluded that, on the basis that over 90% of criminal offences in this jurisdiction are dealt with before the District Court, it would be untenable to recommend that a summary offence should not interrupt the running of the conviction-free period.

It was also felt that all road traffic offences should not be excluded given that some offences extend to those connected with road deaths. The Commission recommended that a conviction for any offence during the conviction-free period should interrupt the running of the period and require that a new period should commence from the date of conviction of the second offence; therefore neither offence can be eligible for expungement until the conviction-free period for the second offence is completed. Dismissals without conviction under section 1(1) of the *Probation of Offenders Act 1907* and offences in respect of which fixed charge penalties for road traffic offences have been paid should not interrupt the running of the crime-free period. This

¹⁰⁷ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, pp 15-17

provision would only apply where there has been one intervening offence only; where there are numerous intervening offences, there has been no conviction-free period and the scheme should not apply.

The entire purpose of the rehabilitation period is to afford the offender an opportunity to demonstrate that he is capable of leading a law-abiding life. Any offence, irrespective of the nature of the offence, committed during the rehabilitation period refutes the suggestion that the offender has been rehabilitated and therefore arguably should stop the period from running in the offender's favour.¹⁰⁸ The question remains as to whether the commission of an intervening offence should prevent the offender from availing of the protection of the scheme, or whether it should have the effect of resetting the conviction-free period in respect of the earlier offence, so that neither offence would be eligible to be declared spent until the conviction-free period in respect of both offences had run.

(v) *Automatic or application-based scheme?*

The Commission took the view that any proposed scheme should be uncomplicated, and easy to administer and understand for ex-offenders, recruiters and the general public. Section 258 of the *Children Act 2001* operates on an automatic basis.

It was acknowledged that there was some merit in a system that requires the ex-offender to take an active part in the expungement process by demonstrating that expungement is appropriate and has been earned by the ex-offender. The offender would be required to positively establish before an independent body that it is appropriate and just in his individual case that his conviction be declared spent. An application scheme would therefore act as a filtering mechanism for those offenders or types of convictions that are deemed unsuitable to being declared spent.

¹⁰⁸ With the exception, perhaps, of road traffic offences which attract fixed charge penalties, which arguably do not suggest that the offender has not committed to leading a law-abiding life.

The Private Members Bill introduced in Dáil Éireann in 2007, the *Rehabilitation of Offenders Bill 2007*,¹⁰⁹ provided for an application to “a judge of the court imposing the original sentence for the conviction to be spent.”¹¹⁰ The Commission was of the view that it would be inappropriate to require ex-offenders to apply to the District Court to have their convictions expunged, as it may result in the equivalent of a “retrial” before the court. The Gardiner Committee¹¹¹ concluded that an application-based system would draw unnecessary attention to the existence of the criminal record and may defeat the entire purpose of the provisions, that is, allowing offenders to live down their past by eliminating the requirement to disclose criminal convictions in certain circumstances. It was concluded by the Commission that the disadvantages of an application-based system outweighed the advantages.

It was noted that the systems in place in Western Australia and Canada are a great deal more inclusive than the scheme proposed by the Commission in that the Canadian system places no restriction on the type of sentence that may be pardoned, while the Western Australian system only excludes sentences of life imprisonment. The Commission concluded, “The application-based elements of the Canadian and Western Australian schemes are a necessary filtering mechanism in schemes that place no limit on the type of sentence that can be expunged.”¹¹²

In Canada, it has been noted that only a fraction of offenders have applied to have their convictions pardoned under the *Criminal Records Act 1985*. Many offenders have been deterred by the fear that the process will inadvertently disclose their record, and there have been complaints about the costs and delays occasioned by the scheme.¹¹³ Another criticism of application-based schemes is that many people who ought by any standard to have the benefit of a spent conviction scheme might lack the determination, resolve and resources to pursue their claims through a tribunal.¹¹⁴

¹⁰⁹ The Bill lapsed on the calling of the 2007 General Election

¹¹⁰ Section 2(1)

¹¹¹ *Living it Down-The Problem of Old Convictions* (Stevens & Son, 1972)

¹¹² *Report on Spent Convictions* LRC 84-2007, 86

¹¹³ See discussion in Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, 32

¹¹⁴ Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, 33. This has been found to be the case in the United States where ex-offenders have to apply to have their right to vote restored; the process itself deters many ex-offenders from applying.

The requirement that the offender apply to a central authority to have his conviction declared spent would meet much of the community disquiet that is likely to be engendered by proposals to introduce a spent convictions scheme. As the Australian Law Reform Commission observed:

“A tribunal system, assessing offenders on a case by case basis, is the surest way of balancing community interests with the offender’s interests, and is particularly effective in dealing with questions about convictions for more serious offences.”¹¹⁵

Any central authority established for the purpose of hearing applications would have the benefit of hearing representations by and on behalf of the ex-offender, and would have information available to it relating to any rehabilitation programmes pursued by the ex-offender. The tribunal could also take into account the nature and circumstances of the offence, the sentence imposed, the length of time that has passed since conviction, the circumstances of the offender, the effect of the conviction in terms of access to employment, and the public interest in deciding whether to declare a conviction spent. This would place the tribunal in the best position to determine whether the ex-offender has in fact been rehabilitated. The fact that the ex-offender employs his energies and resources in making the application is a further indication of his genuine intent to lead a law-abiding life and to put his past behind him.

There is a view that the possible costs associated with appearing before the tribunal, and the possibility of the commission of the offence coming to the attention of the public again when in fact the ex-offender is striving to put his past behind him, may be off-putting for ex-offenders and dissuade them from applying to be relieved of the obligation to disclose. However, it would not be necessary to retain legal representation to appear before the central authority, and a well-motivated offender may view the potential exposure to publicity as a necessary step in the process of living down his past. The advantages of being relieved of the obligation to disclose previous convictions are likely to outweigh these possible disadvantages associated with the application procedure.

¹¹⁵ Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, 33

(vi) Exclusions from the scheme

A. Sentencing

The Commission recommended that the proposed scheme should not apply in the context of sentencing. If spent convictions were not disclosed to the court, there would be a risk of prejudicial speculation on the part of the sentencing judge, resulting in a disproportionate effect on other offenders with no previous convictions who appear before the court. The judge would be required to engage in a guessing game to determine whether the individual before him does in fact have previous convictions before imposing sentence. Every person who appeared before the court would be under suspicion of having previous convictions with the result that some individuals may receive an unjustifiably harsh sentence.¹¹⁶

The Gardiner Committee felt that the court should have available to it the whole of an offender's past record if that court is to come to any sensible conclusion as regards sentencing; the absence of a piece of old information could have the effect of completely distorting the picture in relation to the offender.¹¹⁷ Similarly, the Commission considered that the previous conviction might provide vital information the court requires in order to impose a fair and proportionate sentence on that particular offender.¹¹⁸

It is arguable that a very old conviction may have little relevance in sentencing for a subsequent offence, particularly as the offender will have had to remain conviction-free for a long period in order to have the original offence declared spent. Persistent offenders will not be entitled to avail of the protection of the scheme, and it is persistent offending that is most likely to influence sentencing decisions. On the other hand, revealing what might otherwise be considered a spent conviction to a judge may not produce the same prejudice to the accused as would disclosure of that conviction

¹¹⁶ *Report on Spent Convictions* LRC 84-2007, 22

¹¹⁷ *Living it Down-The Problem of Old Convictions* (Stevens & Son, 1972)

¹¹⁸ *Report on Spent Convictions* LRC 84-2007, 72

to an employer. Judges are accustomed to weighing evidence and assessing relevance, whereas employers have a limited understanding of the law and research indicates that it is the mere existence of a criminal record, regardless of the nature of the offence, that influences most employers.¹¹⁹

Most common law jurisdictions exclude court proceedings from the application of the scheme, so that the sentencing judge will have access to all previous convictions, spent and unspent.

B. Criminal proceedings

Currently the exclusionary rule against bad character evidence means that evidence of previous convictions will not be admissible in criminal proceedings unless the probative value of the evidence outweighs its prejudicial effect. This test of admissibility has been developed in the case law over time and means that evidence of previous convictions will only be admissible in exceptional circumstances, such as where the evidence is similar fact evidence, or where the defendant claims to be of good character or attacks the character of a prosecution witness. It is submitted that the current evidential rules will continue to afford adequate protection to the accused and protect the interests of justice.

C. Civil proceedings

The Commission recommended that certain civil matters where the welfare or guardianship of children is in issue should be excluded from the scheme. In the United Kingdom, the general rule is that no question can be asked in civil proceedings that might lead to a spent conviction being revealed, and if such questions are asked they need not be answered. This rule does not apply, however, to civil proceedings relating to children, such as adoption, guardianship or custody, in which case the

¹¹⁹ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 26

spent conviction may only be revealed where the court is satisfied that justice cannot be done unless evidence of spent convictions is admitted.¹²⁰

D. Exclusion of sensitive positions, posts and professions

The Commission noted that:

“...a balance must be struck between, on the one hand, the main purpose of spent convictions schemes which is to ensure that a criminal conviction should not, in appropriate cases, attach to a person for life thus inhibiting employment potential and, on the other, ensuring that vulnerable members of society are adequately protected by a recruitment process which ensures that persons unsuitable for certain posts or positions are unable to obtain such employment.”¹²¹

In most common law jurisdictions, full disclosure of all convictions is usually required in relation to sensitive posts, positions and professions. Where the job involves working with or supervising children or vulnerable people, or where the interests of national security are at stake, there will generally be a requirement that full disclosure is made. Full disclosure will often be required in relation to access to the medical and legal professions on the basis that there is a higher than normal level of trust and dependency involved, and the interests of people in vulnerable positions are likely to be at stake. In these circumstances, full disclosure will have to be made and the information should be used to make an informed assessment of the applicant’s suitability for the post or profession. Only relevant and serious convictions will bar entry to the profession or post.

In the United Kingdom, the *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975* provides a list of exempted professions and posts under the 1974 Act, and the Commission recommended that a similar list of exemptions be provided for here. Thus, section 5 of the proposed Bill provides:

¹²⁰ Practice Direction (1975) 21 Cr App R 260

¹²¹ *Report on Spent Convictions* LRC 84-2007, 107

5. (1) Nothing in *section 4* shall affect the obligation of a rehabilitated person or of any person to disclose any conviction, including a spent conviction, where an individual seeks employment or any position or office in an “excluded employment” within the meaning of *subsection (2)*.
- (2) “Excluded employment” means-
- (a) any office, profession, occupation or employment involving the care for, supervision of or teaching of any person under 18 years of age, or of any person who, by virtue of their limited mental capacity, is a vulnerable person,
 - (b) any office, profession, occupation or employment in the provision of health care,
 - (c) membership of the judiciary, barrister, solicitor, court clerk, court registrar or any employee of the Courts Service,
 - (d) civil servant, public servant, or any office within the meaning of the Ethics in Public Office Act 1995,
 - (e) traffic warden,
 - (f) employment as a member of the Defence Forces,
 - (g) employment as a prison officer, as a member of the probation service, or membership of a prison visiting committee,
 - (h) employment as a member of An Garda Síochána (including reserve membership)
 - (i) accountant or dealer in securities, and
 - (j) director, controller, or manager of a financial institution or of any financial service provider which is regulated by the Financial Regulator.

At present, there are no exclusions in respect of sensitive posts or professions under section 258 of the *Children Act 2001*. Under the vetting system currently in place in this jurisdiction, a person seeking employment with a designated body must agree to submit to a vetting process in order to be eligible for the position. The list of designated bodies entitled to use the Garda Central Vetting Unit (part of the Garda Criminal Records Office) is currently being expanded. At present the GCVU provides vetting services for:

the Health Service Executive in relation to candidates for employment in the health service and in external agencies funded by the HSE who would have substantial unsupervised access to children and vulnerable adults; in relation to candidates for employment in children's residential centres;¹²² in relation to Irish persons applying for positions in the United Kingdom which would give them substantial access to children; and the Adoption Board in relation to prospective parents.

The fact of a conviction is recorded on the PULSE system¹²³ and the record remains on PULSE indefinitely. In relation to offences committed while under the age of 18 years, a flagging system ensures that such offences are not disclosed in the same way as other offences. On receipt of a vetting request, an inquiry must be made as to whether the offence is in fact spent under section 258 of the *Children Act 2001*. If the conviction is considered spent, the record of the conviction will not be disclosed to the designated body.

The Commission recommended that section 258 of the *Children Act 2001* be amended so that certain exemptions in respect of sensitive professions and posts to the application of the Act would apply under the section 258(4)(d). Section 258(4)(d) of the 2001 Act provides that the Minister for Justice may, by Order, exclude or modify the application of the 2001 Act. To date, no such exclusions or modifications have been made.

2. Private Members Bills: Rehabilitation of Offenders Bill 2007/Spent Convictions Bill 2007

(i) Some notable features of the Rehabilitation of Offenders Bill 2007

This Private Member's Bill was introduced by Deputy Barry Andrews on 22nd March 2007, but lapsed when the 2007 General Election was called. The provisions in the

¹²² For the purposes of section 65(5)(b)(ii) and section 66 of the *Child Care Act 1991*
¹²³ Police Using Leading Technology Effectively

Bill were closely modelled on the British *Rehabilitation of Offenders Act 1974*, which, as outlined above, has been the subject of substantial review by the Home Office.¹²⁴

The list of “excluded employments” in the Bill was considerably narrower than that proposed in the Law Reform Commission Bill, referring only to any office, profession, occupation or employment involving the care and supervision of minors or children, employment as a member of the Defence Forces, and employment as a member of An Garda Síochána. The Bill also provided that the Minister could determine further categories of employment to be excluded from the Bill. The Law Reform Commission was of the view that it would be better from the point of view of transparency and principles of better regulation, and to allay any possible constitutional objections, that the exemptions to the scheme be contained in the primary legislation rather than in subsequent secondary legislation.¹²⁵

As well as excluding sentences in excess of thirty months from the proposed scheme, the Bill excluded a sentence in relation to any offence against a minor or child, a sentence for an offence under the *Child Trafficking and Pornography Act 1998*, and a sentence for a sexual offence.

The rehabilitation periods provided for in the Bill were as follows:-

Sentence exceeding 6 months but less than 30 months	10 years
Sentence not exceeding 6 months	7 years
Suspended sentence	5 years
Disqualification, penalty, fine, prohibition	7 years

¹²⁴ The Home Office website indicates that the Home Office were still seeking comments on the review of the *Rehabilitation of Offenders Act 1974* as at 15th March 2006, and that a Core Group and Advisory Group were being established to deal with the review. The aim was to produce a consultation paper to be issued in summer 2007. The paper has not issued to date. It is notable that the review in England did not stop with the 2002 Home Office Report, *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002. See www.homeoffice.gov.uk

¹²⁵ *Report on Spent Convictions* LRC 84-2007, 109-110

Treating a suspended sentence differently to an immediate custodial sentence could, under this proposed scheme, produce the anomalous result that a person receiving a three year suspended sentence will be required to remain conviction-free for a lesser period than someone receiving a three month sentence. The question also arises as to what happens should the suspended sentence be activated; will it then be subject to the five year rehabilitation period, or the longer seven or ten year period, depending on the length of the sentence?

The most notable feature about the rehabilitation periods proposed in the Bill is that they were reckonable from the date of the completion of the sentence, as opposed to from the date of conviction. The term “completion of sentence” would need clarification. Is this the date of release from prison, or the date upon which the sentence was due to expire had it been fully served? While the periods provided for in the Private Member’s Bill were similar to those currently in force in the United Kingdom, the ex-offender would in fact have to wait considerably longer in this jurisdiction for his conviction to become spent as, in the United Kingdom, the period runs from the date of conviction.

Section 2 of the Bill set out the conditions that would have to be complied with in order for a conviction to be deemed spent. The Bill provided that the individual must not have imposed on him in respect of his conviction an excluded sentence, he must have complied with all conditions of the sentence, and he must not have had a sentence imposed upon him in respect of *any* offence during the rehabilitation period. Therefore, the conviction for any offence during the rehabilitation period, whether it was a serious offence, minor offence or road traffic offence, would interrupt the period and prevent the individual from availing of the protection of the scheme.

Section 2 of the Bill also provided that the individual would be obliged to make an application “to a judge of the court imposing the original sentence” for the conviction to be spent. In light of the exclusion of sentences in excess of thirty months, the majority of these applications would be made to District Court or Circuit Court judges.

The *Rehabilitation of Offenders Bill* and the Law Reform Commission *Spent Convictions Bill* both contain similar provisions in that section 3 of the Bill provides that no person convicted of fraud, deceit and an offence of dishonesty in respect of an insurance claim shall be excused from admitting same on any insurance proposal or form. There is no such exclusion in the British scheme, so that in the United Kingdom spent convictions do not have to be disclosed on insurance applications.

Section 4 of the *Rehabilitation of Offenders Bill* dealt with concurrent and consecutive sentences, providing that, in the case of consecutive sentences, the rehabilitation period should be calculated as if the sentence imposed in respect of each of the offences were or had been a sentence equal to the aggregate of those sentences. In the case of partly concurrent sentences, the rehabilitation period should be calculated as if the sentence imposed in respect of each of the offences were or had been equal to the aggregate of those sentences after making such deduction as is necessary to ensure that no period of time is counted more than once. There is no similar provision in the Law Reform Commission Bill; presumably the rehabilitation period in respect of each individual conviction or sentence will be dealt with separately, so that the convictions may become spent at different times if different rehabilitation periods apply.

By virtue of section 5(2), criminal proceedings and any proceedings relating to the guardianship, wardship, custody, care or control of, or access to, any minor or child, or to the provision by any person of accommodation, care or schooling for minors or children, were expressly excluded from the scheme. Furthermore, section 5(4) provided that if, at any stage in any proceedings before a court, tribunal or judicial authority, the authority was satisfied that justice could not be done except by admitting evidence relating to a person's spent sentence, the authority could admit such evidence. A similar provision is contained in section 6(3) of the Law Reform Commission's proposed Bill and equates to the position in the United Kingdom.

Section 6 of the Bill dealt with defamation proceedings in almost identical terms to the British *Rehabilitation of Offenders Act 1974*. No similar provision was contained in the Law Reform Commission Bill.

(ii) *Spent Convictions Bill 2007*

Barry Andrews TD introduced this Private Member's Bill on 25th October 2007. It is identical to the Bill as proposed by the Law Reform Commission and represents a much narrower scheme to that originally proposed by Deputy Andrews.

PART IV: THE PROPOSALS OF THE SPENT CONVICTIONS GROUP

1. General

In light of the practical implications for an offender of having a criminal record, as discussed above in Part I, in particular in relation to access to employment, the Group is of the view that there is a need for legislation providing that the duty to disclose criminal convictions would be removed after a prescribed number of years. In devising an appropriate legislative scheme, the rationale underlying such schemes should be borne in mind, which is that past behaviour is not an adequate predictor of future behaviour, and that a criminal record may bear little or no relevance to decision-making after the elapse of time. Furthermore, the significant contribution such a scheme could make to the rehabilitation of offenders and reduction of recidivism rates by providing an incentive for offenders to lead law-abiding lives, should be a paramount consideration. In a just and fair society, an ex-offender should not be required to suffer the disproportionate negative consequences of a conviction indefinitely when he has paid his debt to society by serving the sentence imposed upon him by the court and has gone on to lead a law-abiding life. It is important to note that persistent recidivists will not be entitled to avail of the scheme; the scheme is designed to benefit those who, having committed an offence or offences, have been successfully rehabilitated and are unlikely to offend in the future.

2. The scope of the scheme

The publication of the Law Reform Commission Report and the tabling of the Private Member's Bill before Government are viewed as welcome developments by the Group. However, the schemes proposed by the Law Reform Commission and the *Rehabilitation of Offenders Bill 2007* are felt to be too narrow in scope in that they apply a sentencing threshold resulting in the exclusion of more serious offences from the scheme.¹²⁶ In this regard, it is noted that the *Rehabilitation of Offenders Act 1974* in the United Kingdom, which applies a sentencing threshold of thirty months, has

¹²⁶ In its submission, the Irish Council of Civil Liberties was of the view that the Law Reform Commission's proposals in this area are too narrowly focused and may not have a significant impact overall.

been criticised as being ill-conceived, over-complex, cumbersome, anachronistic and ineffective in its primary aim to enable ex-offenders who have “gone straight” to put their past behind them.¹²⁷ The recent Home Office Review of the 1974 Act has recommended that the sentencing threshold be removed so that the legislation would apply to all ex-offenders.

The Group proposes that the scheme should apply to all offenders, including those who have committed serious offences or sexual offences.¹²⁸ It is accepted that these offences may give rise to legitimate public safety concerns but it is submitted that these concerns can be met by introducing other safeguards to the scheme. It is important that the scheme is meaningful and effective in providing an incentive for rehabilitation by affording protection from disclosure, thereby reducing recidivism rates and ensuring society and the economy can avail of the skills and energies of reformed offenders. It is submitted that these benefits to society as a whole would not accrue where any proposed scheme is overly restrictive and limited by excluding certain offences entirely from it. As noted above in Part III, those most likely to experience prejudice and discrimination as a result of their previous convictions are offenders who have committed more serious crimes, as opposed to the fine defaulter or road traffic offender. Furthermore, the longer the term spent in prison, the more likely it is that the offender will have accessed some form of rehabilitative programme during his sentence. The fact that an offender is serving a short sentence is one of the most common reasons given for excluding inmates from such programmes.¹²⁹

Seeking to draw a line between those offences capable of being declared spent and those that are not is not a scientific exercise and setting a sentencing threshold would appear arbitrary and unfair, particularly in light of the significantly different consequences for offenders falling on either side of that line. Research would suggest that such a scheme can operate effectively without compromising public safety. A recent study into recidivism rates of ex-offenders in the United States found that the risks presented by ex-offenders “weaken dramatically and quickly over time so that the risk of new offences among those who last offended six or seven years ago begins

¹²⁷ Broadhead, “Denying the Past” (2001) 151 NLJ 1566

¹²⁸ This view was endorsed by the submission to the Group of the Irish Penal Reform Trust

¹²⁹ *Building Bridges to Employment for Prisoners* Home Office Research Study 226 September 2001, foreword

to approximate (but not to match) the risk of new offences among persons with no criminal record.”¹³⁰ This trend applied to both violent and non-violent offenders: there was little to distinguish statistically between groups of violent and non-violent offenders.

Inclusion of sex offences in scheme

It is acknowledged that the inclusion of sex offences in the scheme is likely to lead to controversy, particularly as most jurisdictions, with the notable exceptions of Canada and the United Kingdom, exclude such offences. As observed by Dr Maureen Gaffney:

“The issue of expungement is a complex one and it will not be easy to find ways to balance the right of the community to be protected against the right of individuals to put their past behind them with appropriate rehabilitation and proof of good intentions. However, serious thought will have to be given to what category of crimes will require a long time scale and perhaps will never be expunged. We will have to face this. I would imagine that, with regard to categories such as recidivist paedophiles, it would be hard to make a case that their records should be expunged. While it will be complicated and there will be no neat edges, that should not stop us tackling something which is a matter of fundamental human rights.”¹³¹

While public acceptability of the scheme is a vitally important consideration, and public hostility to the scheme is unlikely to facilitate reintegration, it is felt that to exclude all sex offenders from the scheme in all circumstances is overly restrictive. It would exclude from the scheme ex-offenders who have successfully pursued rehabilitative programmes and gone on to lead law-abiding lives, presenting no greater risk to the public than the non-offender. Research both in this jurisdiction and abroad refutes the commonly held belief that recidivism rates amongst sex offenders

¹³⁰ Kurleycheck, Blame and Bushway, “Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?” (2006) 5(3) *Criminology and Public Policy* 483

¹³¹ Speaking on behalf of National Economic and Social Forum to the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights in February 2003. A full transcript of the meeting is available at www.oireachtas.ie

are higher than in respect of other types of offender.¹³² It would therefore be unjust and arbitrary, and lacking any rational basis, to exclude all sex offenders from the scheme in all cases.¹³³

Sufficient safeguards in respect of occupations involving the care and supervision of children and vulnerable adults must be put in place to meet the public safety concerns in this area. Spent convictions schemes are not designed to benefit the “recidivist paedophile” referred to by Dr Gaffney; persistent offenders will not be entitled to avail of the scheme as they will not have demonstrated their commitment to rehabilitation by remaining conviction-free for a prescribed period. In addition to the exclusion of certain sensitive posts and positions, the proposed application process would act as a filtering mechanism to ensure that the duty to disclose would continue to apply to those ex-offenders who continue to pose a risk to public safety. Sex offenders would have to remain conviction-free for a period of two or four years following the expiration of their sentence, depending upon the length of the sentence itself. They would also have to satisfy the authority hearing the application that they have pursued relevant rehabilitation programmes and made genuine efforts to lead law-abiding lives.

There would appear to be an innate prejudice against sex offenders, no doubt attributable to the heinous nature of the crime, which leads to an assumption that sex offenders are predisposed to commit such crimes and are incapable of rehabilitation. The Law Reform Commission observed that the exclusion of certain offences is based on the harm caused by the offence, the likelihood of re-offending and the implications that could be drawn about the character and predispositions of the offender by the very commission of the offence.¹³⁴

¹³² See discussion of results of research conducted by UCD Institute of Criminology in Holden, “Time and Again” *UCD Connections* Issue 12 2007, pages 6-7; Hood et al “Sex Offenders Emerging from Long Term Imprisonment: A Study of Their Long Term Reconviction Rates and of Parole Board Members Judgments of their Risk” (2002) 42 *British Journal of Criminology* 371; Diana Mahoney “Treating sex offenders can be effective” *Clinical Psychiatry News* Issue 5 May 2006, extract available at <http://www.researchandmarkets.com/reports/529338>

¹³³ The Irish Penal Reform Trust noted in its submission to the Group that to treat sex offenders differently to other offenders in the absence of evidence of higher recidivism rates amongst sex offenders is akin to a form of “penal apartheid”.

¹³⁴ *Report on Spent Convictions* LRC 84-2007, 50

This view is not supported by the research relating to sex offenders. As shown by the headline results of research by the UCD Institute of Criminology into the rates of recidivism, contrary to prevailing opinion, sex offenders are actually *less* likely to reoffend than some other groups. The findings show that recidivism is highest among males, younger persons, the unemployed and those with prison experience; it is lowest, however, for sex offenders, with 18% reoffending within thirty six months.¹³⁵ Studies of the rates of recidivism amongst sex offenders in the United States have produced similar results.¹³⁶ In the United Kingdom, Hood et al found that nine out of ten sex offenders who were considered by the Parole Board to pose a high risk did not reoffend within four years of release.¹³⁷

Therefore there is no rational basis for excluding sex offenders from the scheme on the basis of the likelihood of reoffending. Public safety concerns can be safeguarded by providing for the exclusion of certain sensitive occupations from the scheme, so that full disclosure of relevant offences would *always* be required in specified cases, and by requiring that sex offenders *apply* to an authority to have their convictions declared spent, rather than convictions becoming spent *automatically* after the elapse of time. These proposals are discussed in more detail below. It is noteworthy that, at present, between 10% and 20% of those offenders eligible to apply to participate in the sex offenders programme (participation in which is entirely optional) apply each year.¹³⁸ The requirement to satisfy an authority that you have pursued appropriate programmes and been successfully rehabilitated may provide an incentive for sex offenders to avail of the programmes which are offered during their prison sentence

¹³⁵ See discussion of results in Holden, "Time and Again" *UCD Connections* Issue 12 2007, pages 6-7. It has also been noted elsewhere that sex offenders have a different profile to the general profile of prisoners; 70% are over the age of thirty compared to 27% in the general prison population, they are far less likely to re-offend in the future, they straddle the entire spectrum of social classes and about half of prisoners sentenced for sexual offences come from rural areas: *The Reintegration of Ex-Prisoners and Offenders 2003* available at <http://www.pobal.ie/media/Publications/LDSIP/TheIntegrationofEx-prisonersandOffenders03.pdf>

¹³⁶ Reported recidivism rates for sex offences in the United States typically range from 5% to 20%, among the lowest of all types of crimes. A U.S. Bureau of Justice Statistics study found that 5.3% of more than 9,700 incarcerated sex offenders were rearrested for another sex crime within 3 years of their 1994 release from prison. In contrast, 68% of those incarcerated for nonsexual offences were rearrested during the same time period; Diana Mahoney "Treating sex offenders can be effective" *Clinical Psychiatry News* Issue 5 May 2006, extract available at <http://www.researchandmarkets.com/reports/529338>

¹³⁷ Hood et al "Sex Offenders Emerging from Long Term Imprisonment: A Study of Their Long Term Reconviction Rates and of Parole Board Members Judgments of their Risk" (2002) 42 *British Journal of Criminology* 371.

¹³⁸ Minister for Justice, Equality and Law Reform, Dáil Debates 17th October 2002

and improve the participation rate, which is worryingly low at present. It is certainly true that there is an inadequacy in terms of the supports and programmes available to sex offenders both during imprisonment and upon release, but this failure on the part of the State to provide such services should not provide a reason for further discrimination against such offenders by forming the basis for their exclusion from the disclosure scheme.

Exclusion of murder and treason

It is to be noted that the two offences that will automatically be excluded from the scheme are murder and treason, both of which attract a mandatory life sentence. By virtue of the nature of a life sentence, it is not possible that such a sentence could ever be declared spent. Even if the convicted person is no longer in prison, the mandatory life sentence remains active and can be enforced if the convicted person breaches a condition of their release on licence. The sentence therefore never expires and cannot be declared spent.

3. The conviction-free period

There is no scientific basis upon which an appropriate conviction-free period can be arrived at. Many jurisdictions provide for a ten-year period, though there is no evident rationale as to why this period was chosen.¹³⁹ In reviewing the rehabilitation periods applicable under the *Rehabilitation of Offenders Act 1974*, the Home Office based its recommendation on the risk of reconviction post-release, noting that the rate of increase of reconviction is at its highest in the two years following conviction in the case of non-custodial sentences and within two years of release in the case of custodial sentences. The review sought to devise disclosure periods that were

¹³⁹ The United Kingdom provides for a ten-year period in respect of offences attracting a sentence of between six months and thirty months. Other jurisdictions providing for a ten-year conviction free period include Australia, New South Wales, Northern Territories, and the Australian Capital Territory.

specifically related to and proportionate to the level of risk presented by the ex-offender.

In order for the public to have confidence in the spent convictions scheme, it is necessary that the offender be afforded a sufficient opportunity to demonstrate his commitment to leading a law-abiding life. The period should therefore be of such a length as to reassure the public that the offender has been truly rehabilitated. The conviction-free period should cover a period of time which the offender has spent in the community, where the opportunities to re-offend present themselves, and not be limited to the duration of the sentence.

It is submitted that the proposed scheme should provide for conviction-free periods similar to those proposed in the Home Office review, as there is some rationale to support the recommendations therein, namely the high rate of increase in reoffending in the two years following release. The Group therefore recommends that the following conviction-free periods ought to apply:-

Type of sentence	Duration of conviction-free period
Non-custodial sentences ¹⁴⁰	Duration of sentence plus one year
Custodial sentence of less than 2 years	Duration of sentence plus two years
Custodial sentence of more than 2 years	Duration of sentence plus four years

Therefore, where an individual is convicted and sentenced to three years' imprisonment, he will have to remain conviction-free for a period of seven years in total, incorporating time spent in custody and time spent in the community. This should afford an ex-offender an adequate opportunity to demonstrate his commitment to leading a law-abiding life.

The Group considered what conviction-free period should apply where a suspended sentence is imposed. In the United Kingdom, the Home Office recommended in its

¹⁴⁰ For example, compensation orders, community service orders, binding over to keep the peace. In the case of a compensation order, the statutory conviction-free period would run from the date upon which the compensation is paid. The one year conviction-free period should also apply in situations where the Probation Act is applied.

review of the 1974 Act that suspended sentences should be treated in the same manner as custodial sentences. The fundamental feature governing suspended sentences is that such a sentence should never be imposed unless the court is satisfied that imprisonment is merited in the first place. A suspended sentence is in effect a custodial sentence which may well be activated and served if the offender breaches a condition attaching to the sentence. In deciding whether to suspend a sentence, the sentencing court will have regard to a number of factors including: the prospect of rehabilitation; personal deterrence provided by the threat of activation of a suspended sentence; the perceived seriousness and intrinsic character of the particular offence; factors personal to the offender, including mitigating circumstances. The personal mitigating factors may include prior convictions, youth, advanced age, illness, and the fact of steady continuing employment or good prospects of education or employment.¹⁴¹ As a suspended sentence will only be imposed in circumstances where the court is of the view that the offence warrants a custodial sentence, the Group recommends that suspended sentences should be treated in the same manner as custodial sentences, and the same conviction-free period should apply as applies to custodial sentences.

To avoid ambiguity and confusion as to the date upon which a conviction shall become spent, it is submitted that the sentencing judge should explain at the time of sentencing when the offender will no longer be obliged to disclose the conviction, subject to the exclusions from the scheme. In the event of temporary or early release from prison, the statutory conviction-free period shall not begin to run until the date upon which the sentence imposed was due to expire. In many cases, this will mean that the ex-offender will serve a longer conviction-free period in the community than the prescribed two or four years.

In relation to consecutive or concurrent sentences, the Group recommends that the scheme should contain a similar provision to that proposed in the *Rehabilitation of Offenders Bill 2007*. Therefore, where a person is sentenced in respect of two or more offences and the sentences of imprisonment imposed are consecutive, then the rehabilitation period shall be calculated as if the sentence imposed in respect of each

¹⁴¹ As discussed in *Long v Mayger* [2004] WASCA 41 at 26, 27

of the offences were or had been a sentence equal to the aggregate of those sentences. Therefore, even where the sentence in respect of both offences is less than four years, a conviction-free period of four years may apply as the sentences are aggregated. This is a reflection of the serious circumstances in which consecutive sentences are imposed. In the case of partly concurrent sentences, the conviction-free period shall be calculated as if the sentence imposed in respect of each of the offences were or had been a sentence equal to the aggregate of those sentences after making such deduction as is necessary to ensure no period of time is counted more than once. Therefore, where the two offences for which the person is convicted attract differing two-year and four-year periods, the sentence in respect of either offence will not become spent until the longer period has expired.

4. Application-based scheme

As the Group has recommended that the scheme should apply to *all* offenders, it is necessary that adequate safeguards are provided for in the scheme in order to meet the legitimate concerns for public safety that are to be balanced against the interests of ex-offenders. The Group is of the view that the best way to ensure that these concerns are adequately considered and dealt with is to require that each ex-offender apply to a central authority, such as a criminal records tribunal, to be released from his obligation to disclose his conviction. The ex-offender would therefore be required to take an active role in the process and demonstrate that he has been rehabilitated and earned the right to the protection of the scheme.

Providing for an application-based scheme gives greater scope for the individual consideration of ex-offenders and whether they pose a risk to public safety. It would allow the tribunal to hear relevant submissions from the ex-offender and the providers of any programmes the ex-offender pursued both during custody and post-release. It could also provide the victim with an opportunity to resist the application.¹⁴² Such a tribunal could become a valuable source of information in its own right in relation to rates of recidivism and the effect of rehabilitative programmes. The application process would act as a filtering mechanism for those offenders or types of offences

¹⁴² The victim has the right to resist the petition in Utah.

that are deemed unsuitable to being declared spent. Such a filtering mechanism is required in a scheme that places no limit on the type of sentence that can be spent. An application-based scheme would also ensure that ex-offenders are fully aware of when they are no longer required to disclose a previous conviction; in schemes operating on an automatic basis, there is likely to be a degree of confusion amongst ex-offenders in this regard.

The Group considered the possibility of a two-tiered scheme, whereby minor or less serious offences would be capable of becoming spent automatically, while an application would be required in respect of more serious offences. This raised the question as to which offences should be capable of becoming spent automatically; it was felt by the Group that drawing this line might be arbitrary; it is preferable to require application to a tribunal in all cases. A full oral hearing, however, may not be required in respect of each and every conviction and the tribunal could have a discretion to decide whether an individual application required an oral hearing or whether the application might be dealt with on the basis of written submissions only, and the extent of submissions required.¹⁴³ It might be the case that in respect of very minor offences, a simple application form would suffice to allow the tribunal to establish whether the requirements of the legislation have been met. It is not proposed to deal with the detailed administrative workings of the tribunal here; this is something that can be clarified when the scheme is established and the precise workings of the tribunal may evolve over time.

It is accepted that there are likely to be objections to this proposal on the basis of the costs of establishing and running such a central authority. However, the cost implications would be outweighed by the contribution a meaningful and effective spent convictions scheme would make to reducing recidivism rates and the benefit to the economy in removing barriers to employment for ex-offenders. In practical

¹⁴³ The pardon system in many states in the United States does not require a full public hearing in all cases. In Connecticut, for example, a hearing is not required for minor offences. Similarly, in Georgia, pardons are considered on the basis of a paper record only, though the Board has power to conduct public hearings. See Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide”, page 2, available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>

terms, there would also be savings to the State in not having to maintain unemployed ex-offenders on benefit, besides the costs of re-offending.¹⁴⁴

It is recommended that, in the event of an unsuccessful application to the criminal records tribunal, an ex-offender should have a right of appeal to the District Court. He should also have the opportunity to apply at a later stage, for example, after further rehabilitative programmes or training programmes have been completed. The tribunal should give reasons for its refusal of the application and would have the authority to issue directions as the necessary steps to be taken before a further application can be made.

In its submission to the Group, the Irish Penal Reform Trust noted the importance of ensuring that ex-offenders are fully informed as to their right to apply, and that they be given easy access to the scheme. It is therefore envisaged that the application procedure would be administrative in nature and legal representation would not be required. The IPRT further observed that it may be possible to provide that application be made to existing bodies such as the Parole Board (in the case of an ex-prisoner) or the Probation Service (in the case of an offender who has not served a custodial sentence). This may prove a more viable alternative to the establishment of an entirely new central authority, but the primary proposal of the Group is that the removal of the requirement to disclose should not operate on an automatic basis, but should require an application to an authority given power to hear such applications.

5. Intervening Convictions

The Group discussed at length the issue of whether any conviction, irrespective of how trivial or minor, should stop the conviction-free period from running. It was agreed that minor offences such as road traffic offences attracting a fixed penalty and non-payment of a television licence should not prevent an individual from availing of the scheme. However, it was felt that to devise a comprehensive list of minor offences which would not affect the running of the conviction-free period would be too onerous and cumbersome a task, and it would be preferable if the central authority

¹⁴⁴ Broadhead, "Denying the Past" (2001) 151 NLJ 1566

retained a discretion to disregard very minor subsequent offences in deciding whether to declare a conviction spent. The tribunal would be in the best position to assess the impact of an intervening conviction, in particular whether it negatives the contention that the individual has been rehabilitated. Where the tribunal deems it appropriate to take the intervening conviction into account, the commission of the offence will cause the period to reset so that neither conviction becomes spent until the later conviction is eligible to be declared spent. It is envisaged that only very minor offences will not affect the running of the conviction-free period as the commission of an offence refutes the suggestion that the individual has become law-abiding and flouts the rehabilitative purpose of the scheme.

6. Revival of spent convictions

The Group considered the question of whether the commission of a subsequent offence, after a previous conviction has been declared spent, should have the effect of reviving spent convictions, as is the case in Canada and most states in the USA. It is arguable that the commission of the subsequent offence disproves the contention that the ex-offender has been rehabilitated and he should therefore not be entitled to avail of the scheme. On the other hand, where an individual has remained conviction-free for the prescribed period and been successful in his application to the central authority in having his conviction declared spent, it should not be possible to revise that particular decision. Providing for automatic revival could give rise to injustice, where for example the subsequent offence was non-payment of a television licence. It might be necessary to differentiate between offences leading to automatic revival and those minor offences that *may* revive spent convictions.¹⁴⁵ Drawing the line between these two categories of offences may prove difficult and arbitrary and could lead to confusion amongst ex-offenders as to whether their previous spent convictions have in fact revived.

¹⁴⁵ In Canada, under section 7 of the *Criminal Records Act 1985*, a pardon can be revoked if a person is subsequently convicted of a summary offence and a pardon will cease to have effect if a person is subsequently convicted of an indictable offence or an offence which is punishable either summarily or on indictment.

In the event that the person applies to the central authority to have the second conviction declared spent, the authority could have regard to the fact that there was a previous spent conviction, and refuse to declare the second conviction spent on the basis that the individual has failed in the long-term to establish that he can remain committed to a law-abiding life and failed to demonstrate that he has been fully rehabilitated. The offender would therefore have to disclose the existence of the second conviction indefinitely.

7. Young Offenders

As noted above, section 258 of the *Children Act 2001* provides for an automatic spent convictions scheme in respect of offenders under the age of 18 years. The section excludes offences that are required to be tried in the Central Criminal Court, and provides that a period of not less than three years must have elapsed since the finding of guilt. The person must not have been dealt with for an offence within that three-year period. It is difficult at present to comment on the operation or effectiveness of the provisions in respect of young offenders as they only came into force in May 2003, and as three years must elapse after the commission of the offence before it is considered spent, it is only since May 2006 that the impact of the provisions may have become evident. In light of the Group's recommendations in relation to an application-based scheme, and the conviction-free periods to be applied in respect of adult offenders, there may be a need to amend section 258 of the 2001 Act so that the schemes in respect of young offenders and adult offenders are not contradictory.

This raises the question as to whether different considerations apply to young offenders. It is well established that crime is associated with youth and that people tend to "grow out" of offending behaviour. Many young offenders commit crimes due to immaturity and peer pressure and go on to lead law-abiding lives. Young offenders may also experience particular difficulty entering the job market, as they are simply not "job ready". Many will be entering the job market for the first time with

no previous experience to demonstrate relevant attributes an employer may be seeking such as reliability.¹⁴⁶

The scheme proposed in respect of adult offenders does not exclude any offences and there is therefore no logic in excluding offences to be tried in the Central Criminal Court where they are committed by minors. All young offenders, irrespective of the offence committed, should be entitled to avail of the scheme, for the same reasons put forward above in respect of adult offenders.

Most other jurisdictions provide for a shorter conviction-free period for young offenders, in recognition of the different considerations that apply to them. Under the British *Rehabilitation of Offenders Act 1974*, for example, the rehabilitation period is halved in respect of offenders under the age of eighteen years. The Home Office recommended in its review of the 1974 Act that no buffer period should apply to young offenders who receive non-custodial sentences, in light of the enhanced supervision available to young offenders within community sentences.¹⁴⁷ For non-custodial sentences where no time period attached – fines or Community Punishment Orders – a buffer period of one year would apply. The review considered that a two year buffer period (the same as that applying to adult offenders) would be appropriate where a custodial sentence exceeding 24 months is imposed, to reflect the seriousness of the offence. Shorter custodial sentences would attract a buffer period of one year.

Applying the current three-year conviction-free period to young offenders would mean that young offenders would be treated more harshly than adult offenders under the proposed scheme. For example, it is proposed that an adult offender receiving a non-custodial sentence should be required to remain conviction free for the duration of the sentence plus an additional period of one year, whereas under the current scheme, a young offender would have to wait three years from the date of conviction before the conviction becomes spent.

¹⁴⁶ As discussed in *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 39

¹⁴⁷ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office 2002, 40

The Group recommends that no additional period should apply in respect of non-custodial sentences where the offence is committed by a minor. The offender would therefore be required to remain conviction-free for the duration of the sentence only. In respect of custodial sentences, the Group recommends that the buffer periods be halved in respect of young offenders. The following periods would therefore apply:-

Type of sentence	Duration of conviction-free period
Non-custodial sentences	Duration of sentence
Custodial sentence of less than 2 years	Duration of sentence plus 1 year
Custodial sentence of more than 2 years	Duration of sentence plus 2 years

Similar to the adult scheme, young offenders would be required to apply to the tribunal in all cases to have their convictions declared spent.

The Group also recommends that the sentencing judge should have a discretion to apply the periods applicable under the adult offenders' scheme where the circumstances of the case and the serious nature of the offence require that the young offender should be treated as an adult and required to remain conviction-free for a lengthier period.¹⁴⁸

There are currently no exclusions from the provisions of section 258 in respect of sensitive posts, positions or professions. The Law Reform Commission recommended that the section be amended so as to introduce exemptions in the existing regime. The Group would also recommend that there be exclusions from the scheme as it relates to offenders under the age of eighteen to ensure that vulnerable members of society are protected. The same exclusions that apply in relation to adult offenders should apply to young offenders.

In light of the recommendations of the Group which considerably alter the existing scheme in respect of young offenders, it is proposed that section 258 of the *Children Act 2001* be repealed and that young offenders be dealt with in the same legislation

¹⁴⁸ A sentencing judge has a similar discretion to sentence a young person between the ages of 15 and 17 to prison if the sentencing court certifies that he is so unruly or depraved a character that he is not fit to be detained in a place of detention which would otherwise have been the appropriate place of custody for a person within that age group: section 102(3) *Children Act 1908*

establishing the scheme for adult offenders. It would be more accessible and logical if all spent convictions provisions were contained within the one enactment.

7. Exclusions from the Scheme

A. Criminal proceedings

The Group recommends that all previous convictions, including spent convictions, should continue to be treated in accordance with the ordinary rules of evidence; that is, evidence of previous convictions may only be adduced in chief against the accused where the probative value of the evidence outweighs its prejudicial effect, where the accused has put his own good character in issue, or in a situation where evidence may be adduced in cross examination of the accused under the provisions of the *Criminal Justice (Evidence) Act 1924*. It is submitted that the current evidential rules afford sufficient protection to the interests of the accused. All previous convictions should also be admissible at sentencing stage, so that the sentencing judge can have as full a picture as possible of the offender before him. Judges are accustomed to weighing evidence and assessing its relevance and are therefore less likely to be prejudiced by evidence of past convictions than a lay member of the public, such as employers.

B. Civil proceedings

The Group recommends that evidence of all previous convictions, including spent convictions, should be admissible in certain civil proceedings where the welfare or guardianship of children is in issue. Therefore, the protection of the scheme would not be available to an ex-offender in the event that questions were asked relating to previous convictions in the course of any proceedings relating to the adoption, custody, guardianship, care or control of, or access to, any person under the age of 18 years. The interests of the child should be paramount in such cases. In any event, as such proceedings are usually *in camera*, the ex-offender should not suffer from public disclosure of the conviction.

C. Exclusion of sensitive positions, posts and professions

The Group agrees with the general premise that full disclosure ought to be made where an ex-offender is applying for a position where the interests of national security may be at stake or where the position involves working with or supervising vulnerable members of society such as children or persons with limited mental capacity.¹⁴⁹ However, it is important that the exclusions to the scheme are not overly broad, which it is felt is the case in relation to the Law Reform Commission's draft Bill. In the United States, it has been observed that the "schemes have been riddled with exceptions and in some cases dismantled altogether."¹⁵⁰ As stated by the Australian Law Reform Commission:

"The underlying rationale for the spent convictions scheme requires that, before there can be an exemption for a particular class of decision maker, the relevance of the spent conviction to the decision making process, and the public interest in allowing its consideration, must be clearly demonstrated."¹⁵¹

Considering section 5 of the draft Bill, the Group agrees with the definition of "excluded employment" at section 5(2)(a), with the inclusion of 'persons of fragile health' in the category of vulnerable persons. In relation to section 5(2)(b) which relates to the provision of health care, it is felt that the term "provision" would have to be clarified. The question arises as to whether clerical assistants who have no contact with patients would be included within this category and therefore have to disclose all convictions. Similarly the terms "employment in the Courts Service", "employment in the Defence Forces" and "employment as a member of An Garda Siochána" may be too widely drafted and may capture administrative staff, cleaners, or manual

¹⁴⁹ Section 26 of the *Sex Offenders Act 2001* provides that a person who fails to inform an employer of a sex offence conviction where the position involves having unsupervised access to, or contact with, a child or children or a mentally impaired person or persons shall be guilty of an offence. This provision offers some degree of protection to vulnerable members of society.

¹⁵⁰ See Margaret Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide", page 2, available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>.

¹⁵¹ Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, paragraph 40

workers who would have no access to sensitive information. It is also unclear why traffic wardens should be excluded from the scheme as a specific category.

The Group also considered the question as to whether there is a justification for the exclusion of the legal profession from the scheme. This exclusion is based on the relationship of trust between a legal professional and his client, and the fact that legal professionals may be dealing with vulnerable members of society. Solicitors are also required to deal with clients' monies in the course of their business. The legal profession, as officers of the court and participants in the administration of justice, must be held in esteem by the general public, and it is necessary that they be seen to uphold and abide by the law they are practising. It is important to note that the disclosure requirements do not act as a bar on entry to the profession, but are designed to ensure that informed decisions might be made in relation to the suitability of candidates. The Group was concerned, however, that potential entrants to the profession might be unfairly discriminated against on the basis of an irrelevant previous conviction. It is submitted that this situation may be avoided by the expansion of the grounds of discrimination in the *Employment Equality Act 1998* to include discrimination on the grounds of criminal record. This would ensure that employers and regulatory bodies such as the Bar Council and Law Society could not unfairly discriminate against applicants. This is discussed further below.

The Group is of the view that there is no justification for the exclusion of the civil service from the scheme. At the launch of the Commission's Report, Mr Justice Haugh wondered why the civil service should exclude reformed persons, who would be "entrusted to private enterprise" only.¹⁵² The National Economic and Social Forum also questioned why the private sector should employ someone that the State sector has decided is not to be considered for employment under any circumstance.¹⁵³ The position as proposed by the Law Reform Commission is in marked contrast to that in Canada, where the *Criminal Records Act 1985* provides protection against discrimination in employment on the basis of a pardoned conviction, for public employees only. Section 8 contains a general prohibition on the use or authorisation

¹⁵² Irish Times report Wednesday 1st August 2007

¹⁵³ *Re-integration of Prisoners* Forum Report No 22 National Economic and Social Forum January 2002 para 6.26

of the use of an application form that requires the applicant to disclose a pardoned conviction in relation to employment in:-

- Federal government departments
- Employment in any Crown Corporation, or enrolment in the Canadian Forces
- “Employment on or in connection with the operation of any work, undertaking, or business within the legislative authority of Parliament.”

There is an element of hypocrisy and contradiction in a government accepting spent convictions legislation supporting the thesis that an offender is capable of leading a law-abiding life and making a meaningful contribution to the economy, and yet refusing to employ those who are targeted by the scheme. It is certainly true that many positions in the public service may involve the interests of national security and therefore may require full disclosure, but there are also a significant number of positions where this is not the case. There are a number of employment opportunities within the civil and public service where employees would have no access to sensitive information in the course of their work. Therefore, to exclude all civil servants and public servants from the scheme is overly broad and this exclusion should be restricted to those civil servants having access to sensitive information, and positions where the interests of national security are concerned. If the recommendations of the Working Group on Garda Vetting and the Joint Oireachtas Committee on Child Protection¹⁵⁴ are implemented so that different levels of checks are introduced in this jurisdiction, it may be appropriate that a basis level check would apply in respect of all positions in the civil or public service. This check would not disclose spent convictions. A high level or enhanced level check might be applicable to positions involving national security; such a check would disclose all convictions, spent and unspent, as well as “soft” information such as inconclusive police investigations.

The question also arises as to whether all convictions need be disclosed, or only certain designated offences that are of particular relevance to the position applied for (for example, violent or sexual offences in relation to positions involving the care and supervision of vulnerable persons, or firearms offences in relation to positions in the

¹⁵⁴ *Report of the Working Group on Garda Vetting (2004); Report of the Joint Oireachtas Committee on Child Protection (2006).*

Defence Forces). In discussing whether particular offences should be excluded from the scheme, the Australian Law Reform Commission decided, “Allowing particular decision makers to be exempted from the scheme, in relation to *specified classes* of conviction is preferable to providing a blanket exemption for ‘serious’ offences.”¹⁵⁵ It was also recommended that any claim for an exemption from the scheme by a particular decision maker should be scrutinised by an expert body to ensure that the exemption could be justified on the grounds that the conviction is relevant to the decision-making process and there is a public interest in allowing its consideration. Each exemption should also be subject to a “sunset” clause, which would provide that the exemption would only have effect for five years after coming into operation. This would ensure that the exemptions are reviewed on a regular basis and subjected to close scrutiny to assess whether the rationale underlying the exemption still applies.

The Group recommends that an expert body be established to assist in the interpretation of the ‘excluded employment’ provisions by employers, and to review the exemptions on a regular basis, pursuant to ‘sunset’ clauses in the legislation. This expert body could be linked to the criminal records tribunal. It is also recommended that only designated offences in respect of each exclusion should be the subject of disclosure, so that only relevant offences need be disclosed. Employers or ex-offenders who are unsure whether a particular position falls within the category of “excluded employment” would have the opportunity of consulting the expert group to clarify the position.

The Group would therefore recommend a similar provision in relation to excluded employment to that proposed in section 5 of the Law Reform Commission’s draft Bill, with a number of amendments as follows:-

“Excluded employment” means-

- (a) any office, profession, occupation or employment involving the care for, supervision of or teaching of any person under 18 years of age, or of any person who, by virtue of their limited mental capacity or fragile health, is a vulnerable person,

¹⁵⁵ Australian Law Reform Commission, *Report on Spent Convictions* (1987) ALRC 37, 35 (emphasis added)

- (b) any office, profession, occupation or employment in the provision of health care,
- (c) membership of the judiciary, barrister, solicitor, court clerk, court registrar or any employee of the Courts Service,
- (d) firearms dealer,
- (e) employment as a member of the Defence Forces,
- (f) employment as a prison officer, as a member of the probation service, or membership of a prison visiting committee,
- (g) employment as a member of An Garda Síochána (including reserve membership)
- (h) accountant or dealer in securities, and
- (i) director, controller or manager of a financial institution or of any financial service provider which is regulated by the Financial Regulator.

The Group's recommendations in this regard are contingent upon the review of the grounds of discrimination contained in the *Employment Equality Act 1998* to include the ground of discrimination on the basis of criminal record. Otherwise there will be a serious gap in the effectiveness and application of the scheme and the extent of the exclusions from the scheme may undermine its rehabilitative potential.

8. Criminal Sanctions for Disclosure

The Group recommends that there be criminal sanctions for those who unlawfully disclose a spent conviction otherwise than in the course of their duties, as is the case in the United Kingdom under the *Rehabilitation of Offenders Act 1974*.¹⁵⁶ The *Data Protection Act 1988* provides for penalties in the event of unauthorised disclosure by a data processor or disclosure of personal data obtained without authority. Section 31 as amended provides for a penalty of €3,000 on summary conviction or €100,000 on

¹⁵⁶ Section 9 of the 1974 Act provides that any person guilty of an offence under that section shall be liable on summary conviction to a fine not exceeding £200stg. A person who obtains specified information from any official record by means of any fraud, dishonesty or bribe shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £400stg or to imprisonment for a term not exceeding six months, or both.

indictment.¹⁵⁷ It is submitted that similar penalties should apply under the spent convictions legislation.

9. The Need for Anti-Discrimination Legislation

As noted above, many jurisdictions adopt a hybrid approach to the issue of the disclosure of previous convictions, incorporating spent convictions and discriminatory provisions. The Department of Justice, Equality and Law Reform commissioned a report in 2004 in relation to reviewing the grounds of discrimination in the *Employment Equality Act 1998*, and one of the potential additional grounds considered was that of criminal record. The report surveyed the approach in a number of other jurisdictions but did not make any firm recommendations as regards amending the 1998 Act. The National Economic and Social Forum recommended that the 1998 Act be amended to include protection against discrimination on the grounds of criminal record.¹⁵⁸ Wells and MacKinnon formulated their objection to anti-discrimination legislation in this area in the following terms:

“There is a certain elegant logic in arguing that the normal forbidden grounds for discrimination entail at least some degree either of involuntary character (age, gender and race) or normal behaviour (marital status, family status). A criminal record, on the other hand, is obtained as a direct consequence of aberrant, socially unacceptable behaviour and the criminal should suffer the consequences of his or her actions. All this is reasonable.”¹⁵⁹

However, once an ex-offender has served his sentence he has repaid his debt to society and he should not therefore have to suffer the ancillary informal consequences of conviction indefinitely, particularly where he has demonstrated a genuine desire to return to a law-abiding life by remaining conviction-free for a long period. Subjecting ex-offenders to discrimination on the basis of their criminal record amounts to an

¹⁵⁷ As amended by section 19 of the *Data Protection (Amendment) Act 2003*

¹⁵⁸ *Reintegration of Prisoners* Forum Report No 22 January 2002, 12

¹⁵⁹ MacKinnon and Wells, “Criminal Records and employment: a case for legislative change” 2001 (19) *New Zealand Universities Law Review* pp 287-308, 300

additional punishment that has not been formally sanctioned by society through its agent the court.

The Law Reform Commission concluded in its report that the issue of discrimination and the amendment of the *Employment Equality Act 1998* is one that requires separate analysis. The subject of discrimination in terms of old criminal convictions encompasses a great deal more than discrimination in the context of employment; it includes access to services, accommodation, insurance and many other aspects of modern living.¹⁶⁰ For similar reasons to those set forth by the Law Reform Commission, it is not proposed to deal comprehensively here with the issue of the expansion of the grounds of discrimination in the 1998 Act. The Group is of the view that such an expansion should be seriously considered, as it would serve to complement and reinforce any spent convictions scheme that might be introduced.

There are two important areas in which anti-discrimination legislation could support a spent convictions scheme and ensure that it operated in a meaningful and effective manner. Firstly, it has been noted that one of the objections to such schemes is that they are ineffective in the objective they seek to achieve as the benefits to ex-offenders do not take effect for a considerable time after the sentence imposed has been completed. Therefore, the protection of the scheme is not generally available at the time when offenders need it most, which is immediately upon release from prison when the rehabilitative effect of immediate employment would be greatest. The prohibition of discrimination on the ground of criminal record would afford some measure of protection to ex-offenders while they earned their right to protection from disclosure during the requisite conviction-free period.

Anti-discrimination laws would also assist those applying for jobs falling within the categories of “excluded employment”. Exemptions relating to sensitive posts, positions and professions do not operate as an automatic bar on entry but facilitate informed decision-making on the part of employers or regulatory bodies. However, where full disclosure is made, employers should only be entitled to refuse employment where there are reasonable grounds for doing so; anti-discrimination

¹⁶⁰ *Report on Spent Convictions* LRC 84-2007, 74

laws would ensure that employers' decisions are justified and reasonable in individual cases.

It is noted that the Irish Human Rights Commission recommended in 2005 that the grounds of discrimination in the 1998 Act should be extended to include discrimination on the basis of criminal conviction, while also recommending that the vetting system be restructured, and that the expungement of previous convictions after a fixed period of time should be considered.¹⁶¹

10. The Need for Supports and Information

The success of a spent convictions scheme will be largely dependent on the supports and information made available to ex-offenders both during imprisonment and upon release. It has already been observed in Part I that a criminal record is frequently an additional layer to a multitude of disadvantages experienced by ex-offenders. As stated in a Department of Education and Science White Paper:

“Research has consistently shown that offenders generally come from the most marginalised groupings in society and typically are at high risk of being unemployed, unqualified, addicted, experiencing multiple disadvantage and finding it exceptionally difficult to re-integrate into the labour market... A key priority for the education sector in this context will be to enhance the relevance and diversity of provision within the prison education service and to strengthen the linkages between in-prison provision and that available for prisoners on release, in collaboration with other agencies.”¹⁶²

Similarly, the National Economic and Social Forum stated, “it is unrealistic to expect that people will leave prison and start to lead a socially included, crime free existence without any supports being put in place for them before they complete their

¹⁶¹ As discussed in Irish Human Rights Commission, *Extending the Scope of Employment Equality Legislation* May 2005, page 6, accessible via www.ihrc.ie

¹⁶² Department of Education and Science, *Learning for Life: White Paper on Adult Education* (PN 8840), (Dublin, 2000) pp 175 – 176

sentence.”¹⁶³ It is vital therefore that services and supports are put in place both within prisons and in the community in order to facilitate ex-offenders in their reintegration into society and also to assist them in availing of the proposed spent convictions scheme. The issue of sentence planning is vital in this regard.

Schemes in other jurisdictions have been criticised as being inaccessible and are frequently not well understood by either ex-offenders or employers.¹⁶⁴ In Britain, there is some evidence that employers are under the impression that they may not employ anyone with an unspent conviction.¹⁶⁵ Education of employers and ex-offenders in relation to the operation of the scheme is therefore indispensable to ensure that the scheme operates in the manner intended. In its submission to the Group, the Irish Penal Reform Trust endorsed the Group’s view as to the need for protection against discrimination on the grounds of criminal conviction, and further pointed to the need for integrated sentence management from the point of conviction which would map out a programme of rehabilitation for each convicted person aiming ultimately towards successfully reintegration into society on release.

¹⁶³ *Reintegration of Prisoners* Forum Report No 22 January 2002, page 69

¹⁶⁴ See Margaret Colgate Love, “Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide” available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>. A review of the Canadian *Human Rights Act 1985* observed in its 2000 Report that “a number of convicted Canadians do not know about or have access to the pardon process”: *Promoting Equality: A New Vision* page 103 available at <http://canada.justice.gc.ca/chrc/en>

¹⁶⁵ See *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* Report Commissioned by Department of Justice, Equality and Law Reform 2004, 132

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APPENDIX I: LIST OF SUBMISSIONS RECEIVED

Free Legal Advice Centre
UCD Institute of Criminology
Irish Penal Reform Trust
Commission for Aviation Regulation

Note on Submissions Received

The Group received a number of submissions from private individuals who had been sent to institutions as young children and as a result had been left with a criminal conviction. These submissions were discussed by members of the Spent Convictions Group at the meeting on 12th December 2007. The Group was in agreement that it is a great injustice that many children who were sent to these institutions have been left with a criminal record, and that this is a matter that ought to be addressed by the Government, and the justice system.

However, the Group concluded that the purpose of this report is to address the requirement to disclose criminal convictions within the context of the rehabilitation of offenders. As the Group's primary focus is on those offenders who have been justly given criminal records for their past behaviour and their reintegration into society, it was felt that these particular cases were beyond the remit of this project.