Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016

Public Consultation on Spent Convictions

Office of Senator Lynn Ruane

November 5th

2020

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Acknowledgements

I'd like to thank the Irish Penal Reform Trust and the Oireachtas Library and Research Service for their research support in progressing reform in this area and in preparing my submission.

I'd also like to thank all those who have contacted my office in recent years to express their support for spent convictions reform and for sharing so many personal experiences on the barriers an old minor conviction has posed for them.

I'd finally like to thank Sebastian McAteer, my assistant in the Seanad for his work on progressing reform and drafting this submission and our private members' bill.

Preface

I have always believed in the human ability to create change in the world, but also in our own lives. Change is not easy, especially when you have layers of complex psychosocial issues to contend with. I know this because I have experienced it at every stage of my young life.

I write my submission from my home in Tallaght West, where poverty is prevalent, addiction is a pain killer, and people are traumatised. It's a cocktail for poor outcomes, low life expectancy and risky behaviour. In its simplest terms, when people feel like they have nothing to live for and that their basic human needs are not met, they engage in the behaviour of survival, necessity and risk.

My first memory of breaking the law was as far back as eleven years old when I started shoplifting. In the space of a year, I was using drugs, and by the time I was thirteen, I was selling drugs and robbing cars and by all accounts, becoming a young offender statistic, borne out of my conditions.

Many of my friends became heroin users at the age of fourteen and many of my male friends were already frequent residents of Oberstown and St Patricks Detention Centre, later progressing to adult facilities. Many are now dead, long before they got an opportunity to live any differently, if that opportunity even existed. They and the thousands of people in Ireland who want to take their life back are at the heart of everything I do. This issue and my advocacy on it is for them.

I often sit and look at their letters to me from prison, and how they account for their sentences stands out to me.

Anto - 5 Months
Steo - 6 Months
Robbie - 7 Months
Jono - 18 Months
Philly - Remand
Dylan - 8 Months
(Names changed for anonymity)

And this list goes on and on.

Nearly every letter has a list of the young men in my community and that number of months associated with their prison sentence. At this young age, this is how they defined their existence. Each letter put a number on their freedom. None of them knew how this would stay with them for as long as they lived. None of them understood that if they survived into adulthood that six months on a sentence would ultimately result in a lifetime of barriers.

For the ones that did make it out of this situation in life, they are forever bound by the behaviours they developed from an experience they should never have had to live. I am now 36, and I have friends the same age and older who have battled against their own harsh lives to succeed. They have endured homelessness, addiction at its most chaotic, institutionalisation, they have entered University, some have PHDs, some have applied to the Army, some became parents and tried to get involved in their kid's sports teams. All of them have been denied the right to rehabilitation and integration, even though they no longer break the law. What was it all for? We are failing as a society to support people to succeed, and we are encouraging people not to bother trying. One childhood friend who got himself a PhD said to me. *"I am more depressed now after getting this high level of education than I was when I was in prison".* This is one hell of a statement to make. His own efforts, his grit and determination to do better as a man than he could do as a youth has resulted in a high level of awareness that he will be eternally punished.

I believe in every one of the people of my past and present. I also believe in everyone who contacts my office about the barriers they can't jump due to our spent conviction regime. They want to work, they want to study, and they want to create something new, some stability in their lives. We, as a state, can make that happen.

My efforts in this area are built on lived experience, my professional career in the addiction and community sector, but it is also grounded in sense and research. Reform of spent conviction laws benefits families and communities. It also has a crucial role in child poverty, as it is essential that people who have had convictions can enter decent employment. The narrow nature of laws compounds intergenerational poverty and contributes to recidivism rates.

I am hopeful that together we can lead on this and we can be a country of support and not a lifetime of punishment.

Lynn Ruane

Senator Lynn Ruane.

November 2020

Introduction

It is welcome that the Department of Justice has opened a consultation with the public and stakeholders on the vital issue of access to spent convictions and my office is grateful for the opportunity to contribute to it. I'd like to recognise the cooperation of the Department and its officials in our efforts to progress legislative reform in this area since the introduction of the Criminal Justice (Rehabilitative Periods) Bill in 2018, including the welcome support of Minister Helen McEntee and former Minister Charlie Flanagan.

It has been an intense but relatively short period between the introduction of the bill and the opening of formal Government consultation. I believe this to be a welcome indication of the now generally accepted importance of legal access to spent convictions in supporting the overall rehabilitative nature of our criminal justice system. I would also argue that it highlights the widespread disappointment in the general public over the inadequacies of our current laws and the strength of support for major change and substantive positive reform.

The issue of spent convictions reform is now the subject of an explicit commitment in the 2020 Programme for Government: Our Shared Future. It is a near certainty that change is coming and the law will be amended to expand access to spent convictions. It now falls to all of us as stakeholders engaged in this process to direct and decide the shape of reform and the ambition of its scope. We will all benefit from a rigorous interrogation of the multitude of issues that arise in this area; I would urge ambition and determination to address them as comprehensively as possible.

The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 has been an abject failure in achieving the ostensible aim of rehabilitating former offenders. Its provisions are so narrow that its introduction has been near solely symbolic. As we consider reforms and amendments to strengthen it, I would urge a full and holistic view of the issues at play and not to once again legislate narrowly; without providing real and tangible access to rehabilitation and reintegration for those with criminal pasts, as has been the case under the 2016 Act.

Ireland has an opportunity here to become a global leader in rehabilitative justice. The Department's own research has identified the importance of rehabilitation, reintegration and employment in reducing recidivism. As we enter a period of economic downturn arising from the COVID-19 pandemic, it is the responsibility of the State to ensure that former offenders do not experience even further barriers to education, employment and progression, at a time of uncertainty, instability and economic upheaval.

I have been an active advocate for reform in this area and I look forward to detailing my views as the policy development process continues. It's my hope that as part of this process, we can draw on the best of the international experiences, the excellent research conducted and most importantly, the views of those with lived experience of trying to reintegrate into society following a period of offending. It is their needs, desires and demands that must be our central guide and focus during this review.

Thank you.

General Principles

A spent conviction sometimes referred to as an expungement, is a conviction that, when it meets certain criteria, does not legally have to be disclosed in certain circumstances, e.g. when you are applying to return to education, for a new job or when being Garda vetted.

The need for a spent conviction regime is rooted in the principles of rehabilitative justice and the generally accepted acknowledgement that, after a certain period of a time, individuals deserve a 'second chance' and the opportunity to move on without the inevitable negative stigma involved in disclosing a criminal conviction, especially for young people where a criminal conviction can have a disproportionate impact on life prospects.

It is commonly accepted that society benefits hugely from the reintegration and rehabilitation of those with a conviction by reducing recidivism and a spent convictions regime should have these principles at its core.

Ireland first legislated to create a spent convictions regime in 2001, specifically for the rehabilitation of children. Under Section 258 of the Children's Act 2001, children do not have to disclose certain findings of guilt once they reach the age of 18; this provision is relatively generous and has had some success in achieving the rehabilitation of young offenders.

A similar system for adult offenders has long been proposed and discussed in the Irish context; Ireland was the last European country to legislate for such a regime with the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016. Unlike the scheme for young offenders, the 2016 Act has largely failed in its aims and does not fulfil the role that a spent convictions regime must play in rehabilitating former offenders.

Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016:

The Act originated from a landmark report published by the Law Reform Commission in 2007. A number of changes were made to their draft bill when introduced to the Oireachtas by Minister Alan Shatter in 2012 and by legislative amendment in the Seanad. (See Appendix I for further details)

It was continuously criticised by opposition members throughout its journey through the Houses as being too conservative; largely on similar lines as it has been criticised since its enactment.

The bill was signed into law by President Higgins on 11 February 2016 and the Act was commenced in full on 29 April 2016.

The main criticisms of the 2016 Act are:

1. The limit of twelve months on custodial sentences that are eligible to become spent largely excludes more serious offenders from qualifying under the Act.
2. The single conviction rule is an extraordinary barrier to real and substantive rehabilitation, as an individual with two convictions will never have either spent.
3. There is no proportionality established between the length of a sentence and the length of the rehabilitative period for which an individual must not offend to qualify, it is set at a blanket 7 years for all convictions.
4. There is no recognition of the additional rehabilitative needs of young people under the age of 25, despite the existence of relatively generous non-disclosure arrangements for juvenile offenders under the Children's Act 2001.
5. There is no incorporation of the 'relevance' principle, where a conviction would only be disclosed when relevant to the purpose for which the inquiry is made.
6. There is no recognition of foreign convictions that are transmitted to Ireland from other jurisdictions, so even minor misdemeanor style offences received abroad can never become spent.
7. There are no legal protections offered to prospective or current employees in the workplace if their spent convictions become known to their employers, despite having a qualifying conviction.
8. There is no independent mechanism by which someone may apply to have their conviction declared spent, no matter how narrowly they miss out on qualifying.
9. The provisions relating to the Garda vetting are extremely limited in scope, with many offences included in blanket exclusions without appropriate justification.

The Department of Justice laid the Act's post-enactment report before the Oireachtas in March 2017, in which it stated that 'slightly over 80% of all criminal convictions now become spent after 7 years'. This is questionable as the single conviction rule would likely exclude a significant number of people from qualifying.

In a survey of those with convictions conducted by the Irish Penal Reform Trust in February 2019, they found that only 9% of respondents had benefited from the 2016 Act.

Legal Context:

- The provisions of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 are so limited and narrow that many former offenders cannot and do not benefit from its provisions. A well-designed spent convictions regime must be accessible to former offenders to be effective; the 2016 Act fails to properly facilitate access and needs reform.

- The 2016 Act largely reflects traditional, Victorian-era common law perspectives on a criminal conviction generally being a matter of public record. Appropriate account is not made in balancing an individual's right to privacy, as established under Article 8 of the European Convention on Human Rights and to which Ireland has been a legal party to since 2003.

- This is an area in which European and domestic courts have actively intervened to protect privacy rights against this more traditional common law perspective, most notably by the European Court of Human Rights in MM v. United Kingdom in 2012. The court found the UK version of the Garda vetting system was disproportionately interfering in privacy rights with a blanket conviction disclosure requirement; a similar judgement was made by our own High Court in GS v. Commissioner for An Garda Síochána in 2017 by also citing Article 8 privacy rights.

- If challenged, it is likely the 2016 Act would be found not compliant with European human rights law on the same grounds. This concern was raised by the Oireachtas Justice and Equality Committee in their 2019 report; ensuring individual privacy rights are properly protected in any new legislation must therefore be a central consideration as we move towards reform.

Criminal Justice (Rehabilitative Periods) Bill

In December 2018, I introduced the *Criminal Justice (Rehabilitative Periods) Bill* to the Oireachtas. I brought it forward for a second stage debate with the support of the Civil Engagement Group in the Seanad in February 2019; it was accepted by the Government and then Minister for Justice and Equality Charlie Flanagan while also receiving unanimous cross-party support across the house.

I brought the bill forward for a committee stage debate in November 2019 where I tabled a number of amendments to expand its provisions; the Seanad unanimously agreed to all of them. The bill is now awaiting its fourth and final stage in the Seanad before it can progress to Dáil Eireann.

The bill, following its amendment by the Seanad, contains the following substantive provisions:

- It amends the Employment Equality Act to ensure employers cannot discriminate against prospective or current employees on the basis of a conviction that is spent.
- It removes the single conviction rule by allowing for no limit on the number of an individual's convictions that can become spent.
- It extends the length of custodial sentences eligible to become spent from 12 months to 24 months; it extends the length of non-custodial sentences eligible to become spent from 24 months to 48 months.
- It creates a proportional relationship between the length of a sentence and the length of the subsequent non-offending rehabilitative period, with a sliding scale table in its Schedule.
- It creates a distinct regime for young adults aged from 18-24 by giving them proportionally shorter rehabilitative periods.
- It creates a distinct regime for the treatment of simple drug possession offences under the Misuse of Drugs Act by setting the maximum rehabilitative period length for those offences at 3 years, and by allowing more of them to become spent under Garda vetting.
- It amends the Children's Act 2001 to shorten the rehabilitative period for a child convicted under the age of 18 from 3 years to 1 year, as a result of the aforementioned shorter periods now given to young adults.
- It allows Circuit Court convictions to become eligible to be spent under Garda vetting.
- It requires the Minister for Justice to review all spent conviction law within two years.

Policy Developments (2018-2020)

My bill has undergone significant changes as it has moved through the Oireachtas' policy and legislative processes in the two years since its introduction. The most significant changes have emanated from the cross-party Oireachtas Justice and Equality Committee who held a public hearing on my bill and spent convictions reform more generally in July 2019.

They made fourteen recommendations for important reform and strengthening of my bill and its proposals, these included:

1. An endorsement of my bill and an explicit call for it to be expanded further to better achieve its rehabilitative aims.
2. The extension of the upper limit on eligible custodial sentences to two years and on eligible non-custodial sentences to four years.
3. The removal of the limit on the number of convictions that are eligible to become spent, as recommended by the Irish Human Rights Commission.
4. The introduction of the principle of proportionality to the spent convictions regime.
5. The creation of an independent oversight committee to review Garda vetting decisions and to introduce the principle of relevance.
6. An amendment to the Employment Equality Act to protect employees from discrimination if they have a spent or irrelevant conviction.
7. An extension of anti-discrimination legislation to prevent people with spent convictions from, *inter alia*, being charged higher insurance premiums or excluded from educational courses;
8. An awareness-raising campaign by the State for employers to be informed of their responsibilities and their ability to use discretion when assessing the relevance of a conviction to the job at hand.
9. The support of the committee for the 'ban the box' campaign, so enquiries about criminal convictions are only made at the final stages of a job application process.
10. The collection of national-level data and statistics on conviction rates, rehabilitation and recidivism, including access to spent convictions.

The Working Group to Consider Alternative Approaches to the Possession of Drugs for Personal Use, jointly convened by the Ministers for Justice and Equality and Health, also published their final report in August 2019.

Their ancillary recommendations included a call for all Section 3 offences (personal use possession) under the Misuse of Drugs Acts to be eligible to become can be spent and the rehabilitative period for such offences be decreased from seven years to three years; this amendment was successfully made to the bill by the Seanad in November 2019.

The Programme for Government included an explicit commitment to "review the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 to broaden the range of convictions that are considered spent."

The Department of Justice consequently opened a public consultation relating to potential reform on 6 October 2020 and on 16 October published a detailed research report on spent convictions.

Consultation Observations:

It is extremely welcome and important that the Department of Justice have opened a public consultation on this issue before we progress legislative reform any further.

The publication of the Department's two research papers are an extremely welcome addition to the policy debate; I'd like to thank the Department's Research and Data Analytics Unit, Dr Katharina Swirak, Dr Louise Forde and the support of University College Cork for their respective roles in producing it.

I'd like to comment on a number of issues raised in the papers that would be useful to consider further as we progress policy reform in the Irish context.

Common law jurisdictions:

The Department's first paper on comparative approaches to this issue across a number of jurisdictions that also use a common law legal system such as the UK, New Zealand and Australia. This is logical as it is a system we share by virtue of their shared historical origins with the English legal system.

However, it must be noted that there is an important difference between the Irish and British systems and that used in New Zealand and Australia. At the time of writing, Ireland and the UK are bound to vindicate the European Convention on Human Rights in their laws whereas New Zealand and Australia are not. Furthermore, we are bound by the data collection and sharing principles of the EU's General Data Protection Regulation which has important implications for information held by the State in relation to convictions.

This is particularly important as there have been a number of high profile cases in the United Kingdom on the intersection between common law legislation on criminal record disclosures and the European Convention on Human Rights. Due to the similarities in our legal system with that of the UK, it is clear that the same tensions will arise here.

It's therefore important to note that European jurisdictions and in particular the UK may be more valuable to draw our policy and legislative inspiration from, rather than other common law jurisdictions without our European obligations. Such an approach would also guard against future findings of inconsistency with European human rights and data protection law and would future proof new legislation.

October Public Meeting:

I held a public meeting online with stakeholders, constituents and members of the public on 21 October 2020 to provide an update on the progression of my legislation and the Department's opening of the public consultation. In the open feedback session that followed, two main themes arose. Firstly, there is real frustration and anger out there with the limited application of the 2016 Act and the missed opportunity it represented for those with old convictions and those who work with them.

Secondly, a strong consensus arose on the importance of, even after the law is amended and expanded as has been proposed, that a system is put in place for an individual to apply to have their conviction(s) spent if it isn't eligible under the general scheme, especially for those who may miss out on qualifying very narrowly.

There is a concern that the black and white approach of setting eligibility for access to spent convictions solely by reference to sentence length and the number of conversions means that there will always be people who may narrowly miss out on having their conviction spent. All it takes is the difference between a 12 month and a 13 month sentence and your conviction can then never become spent.

A strong desire was articulated to create a system where an individual could make a case before an independent authority and who could then make an adjudication on a case-by-case basis. This would be a chance for someone who has rehabilitated to have an individual assessment of their circumstances and a fair chance to argue for their right to access a spent conviction. This is a desire that I share and one I hope we can see reflected in the eventual legislation.

Consultation framing:

Concerns have been raised with me regarding the Department's framing of the consultation, in particular certain structural issues that may have arisen in the design of the survey.

The survey will likely be the method by which the vast majority of those interested will interact with the consultation, so mechanisms by which certain questions are asked are vitally important.

I would like to articulate some of the concerns for the record, just so the Department can be conscious of their impact on how the survey may have been answered.

- Under Issue 2 *(The number of convictions that can be considered spent)* of the survey, a respondent is invited to state the number of convictions they think should be eligible to be considered spent. However, no option is given to select a view that the limit should be removed entirely. The removal of the limit has now been supported by the Oireachtas Justice and Equality Committee, the Irish Human Rights Commission and a unanimous decision of Seanad Éireann. The suggestion to select a numerical value may indicate to the respondent that they must select a numerical limit, without indicating that the option of no-limit is also under consideration and has widespread support. This must be kept in mind when analysing responses on this issue.

- Under Issue 4 *(Incorporating a Youth Justice perspective)* and Issue 5 *(The victim perspective)*, the opportunity is given for respondents to give their suggestions on views on those two specific issues in particular through a text box on the relevant survey pages. This is to be welcomed as this allows for a more tailored response to the issue; however, it does beg the question why the option to give such extra views were not included for Issues 1, 2 or 3. This is a concern that I share and I would ask the Department to be conscious of this selective seeking of views when analysing the results.

- In more general terms, the Department's publication of the *'Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016: Public Consultation'* document is a welcome statement of the issues under review. However, concerns have been raised with regard to the limited scope of the reform outlined. No mention is given of the Joint Oireachtas Committee on Justice

and Equality who held a public hearing on this exact issue in July 2019 and published a key and wide-ranging report in 2019. The report was agreed on a cross-party basis by elected representatives and is highly relevant to the issue being considered. I would ask that the Department ensure that its recommendations are given due attention and consideration; my understanding is that the committee's current iteration in the new Oireachtas has sent in a summary of that report and its recommendations to ensure they are reflected in the consultation.

- Finally, I really welcome the Department's publication of the spent conviction research papers, they are such a welcome addition to our policy discussions, in particular the rapid evidence review on spent convictions. In Chapter 3.1, an excellent overview is provided of the provisions of my 2018 private members' bill, as amended by the Seanad at committee stage. However, I do note that there is no mention made of perhaps the most substantive provision of my bill following that debate, which is unusual considering every single other provision in my bill is mentioned and explored. The excluded provision is the new Section 10 which amends the Employment Equality Act 1998 to protect current and prospective employees from discrimination by employers on the basis of a conviction that is spent. It is a concern that this crucial provision was excluded from consideration as part of the evidence review and I would appreciate if specific research could be conducted on it to rectify this situation as a result. This provision has received the explicit support of the Oireachtas Justice and Equality Committee and was inserted into the bill by a unanimous decision of Seanad Éireann; it must remain central to our discussions as we progress reform.

Spent Convictions Research Papers:

I'd like to briefly comment on some of the issues raised in the research papers, to draw them to the attention of the Justice Department as deserving of particular consideration:

- I note with interest the nuance and detail included in the UK's vetting architecture which allows for three levels of vetting style checks that can be conducted, based on the purposes of the vetting and the sensitivities thereof. This is a detailed and well-structured approach which could alleviate some of the concerns with our vetting regime and would merit consideration and potential transposition to the Irish context.

- I further note with interest the regime that exists in Western Australia which allows for an application to the District Court for a conviction to be considered spent. I appreciate that in their system that this provision is intended as a system instead of the automatic regime that we have in Ireland. However, it is worth considering whether we could draw from that court order system as an additional layer to add as an improvement to our spent conviction regime in Ireland, for convictions that otherwise aren't eligible to be spent and on which a specific determination is required to be made. I have included the relevant section of the cited legislation from Western Australia in Appendix III and believe that it warrants further consideration.

- I really welcome the high quality of the literature review. I also note with interest the strong links that are identified between employment and reductions in recidivism. I believe this even further strengthens the case for an amendment to the Employment Equality Act 1998 to ensure discrimination on the basis of a spent conviction is prohibited.

Recommendations:

1. New legislation in this area should use my Rehabilitative Periods Bill 2018 as its basis. However, the Oireachtas Justice and Equality Committee called for it to be expanded further to achieve its rehabilitative aims in 2019 and this is a call I support.

2. The Employment Equality Act 1998 must be amended to protect current and prospective employees from discrimination on the basis of a spent conviction or one irrelevant to the job at hand.

3. The 2016 Act must be amended to extend the upper limit of eligible custodial sentences to 48 months, in line with the UK's Rehabilitation of Offenders Act 1974.

4. The single conviction rule in the 2016 Act is a disproportionate interference in the private lives of former offenders. The limit must be removed altogether.

5. The Garda vetting regime must be overhauled in the following ways:
    - Different categories of vetting must be legislated for to replace the blanket system used for all purposes under the current Act.
    - The principle of relevance must be introduced to Garda vetting, so only convictions that are relevant to the purposes of the vetting are disclosed.
    - Statutory guidelines must be developed to aid the Garda in applying the 2016 Act.
    - Statutory guidelines must be developed for public and private employers on using their discretion when a conviction is returned on a vetting disclosure or discovered through other means e.g. internet searches;
    - Direction must also be given to 'ban the box' so enquiries about convictions are only made at the later stages of the recruitment process.

8. A system must be established for individuals to apply to have convictions that are not eligible under the 2016 Act declared spent. This could be done by way of an application to the District or Circuit Court or through an independent oversight authority, similar to the Parole Board.

9. Recognition must be made in our laws for foreign convictions; if a conviction received abroad would be eligible under our domestic laws, there must be a corresponding legal recognition.

10. A distinct treatment for drug offences must be legislated for; in line with the health-led approach to drug policy committed to by the 2020 Programme for Government. All drug offences must be eligible to become spent and drug offences must be removed from the list of excluded offences for the purposes of Garda vetting. Garda vetting.

Ancillary Recommendations:

1. The Minister for Justice should create a cross-governmental hiring programme across the civil service and all public bodies for former offenders, especially in areas where the experience of those with convictions would be valuable to the role.

2. The Minister for Justice should review all offences excluded from Garda vetting under Schedule 3 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 to ensure there is appropriate justification for the complete and blanket exclusion of each offence.

3. The Minister for Justice should review the list of public employers classified under Specified Work in Schedule 2 of the 2016 Act and to whom convictions must always be disclosed, especially in light of those bodies that may benefit from the experience of those with former convictions.

4. The Minister for Justice should consult with the Minister for Children, Equality, Disability, Integration and Youth to consider the intersections between spent convictions reform and Government commitment to introduce a new discrimination ground based on socio-economic status to equality legislation, due to the disproportionate concentration of criminal conivction histories in socially disadvantaged communities.

5. Due to the youth justice focus of the consultation and the likelihood that those in the 18-24 age bracket will face shorter proportionally rehabilitative periods, a consequential change is required to the Children's Act, which currently requires children to disclose a conviction for three years, even after they reach the age of 18. A requirement for juvenile offenders to disclose their convictions potentially until the age of 20 is a disproportionate interference in their rights under Article 42A of the Constitution, especially with all of the stigma and challenges to their prospects that comes with such a disclosure at such a critical juncture in their lives. The rehabilitative period should be removed for young offenders; their convictions should become spent as soon as they reach the age of 18.

6. The Minister for Justice must publish specific, clear and simple guidelines on convictions that are eligible to be spent. The current scheme is extremely unclear and unwieldy, with many former offenders unsure if their convictions qualify. Consideration should be given to the development of a specific website hosted by the Department where an individual may enter their details and be told whether their conviction is eligible and how long their rehabilitative period is; a bespoke hotline could also fulfil this important informative role.

7. The Minister for Justice must immediately increase the specific budgetary allocation to the Garda National Vetting Bureau and in particular, ringfence funding to support its application of spent conviction law. I have supported countless former offenders in contacting the bureau to have eligible spent convictions that were erroneously disclosed struck off their vetting disclosure where they should have never appeared in the first place. The bureau needs financial support and direction from the Department through guidelines on how spent conviction law must be applied and a bespoke complaints and resolution mechanism to resolve issues as they arise.

8. The Minister for Justice should consult with the Minister for Foreign Affairs to develop specific guidelines to support those with former convictions who are seeking a visa for international travel, work or business. The Minister for Foreign Affairs should also open discussions with counterparts in other jurisdictions to build corresponding policies on the treatment of convictions within our respective visa application process.

Concluding Remarks

It is exciting that this consultation is underway and that reform of access to spent convictions is on the horizon. I'd like to finish by urging the Minister for Justice and her Department to be as ambitious as possible in addressing the multitude of issues that arise in this important area.

I brought forward proposals in 2018 that have changed significantly over time, as I met with and heard from more stakeholders and heard more lived experience of former offenders. I would urge a similar level of flexibility and openness as the Department continues its consideration of the issue.

I'd like to finish by highlighting one final issue. In our spent conviction laws to date, we have traditionally relied on old common law ideas of public conviction histories in deciding access to spent convictions in Ireland.

This consultation represents an opportunity to move to a more human rights and data rights perspective on the issue, with greater influence drawn from our European counterparts, the European Convention on Human Rights and the EU's General Data Protection Regulation.

These perspectives better match our international human rights obligations and will allow us to better vindicate the privacy rights of former offenders here in Ireland. In more drastic terms, it will allow us to better insulate ourselves from legal challenge. In terms of the best case scenario, it will allow Ireland to become a global leader in rehabilitative justice.

Best of luck with your deliberations.

Senator Lynn Ruane.

Index of Appendices

I have attached a number of appendices containing useful information that will support the deliberations of the Department of Justice.

Appendix I

Briefing Paper, A Review of the Law Relating to Spent Convictions (14.8.18)
Daniel Hurley, Oireachtas Library and Research Service

Appendix II

Briefing Paper, Issues relating to the Criminal Justice (Rehabilitative Periods) Bill 2018 [PMB] (26.3.19)
Daniel Hurley, Oireachtas Library and Research Service

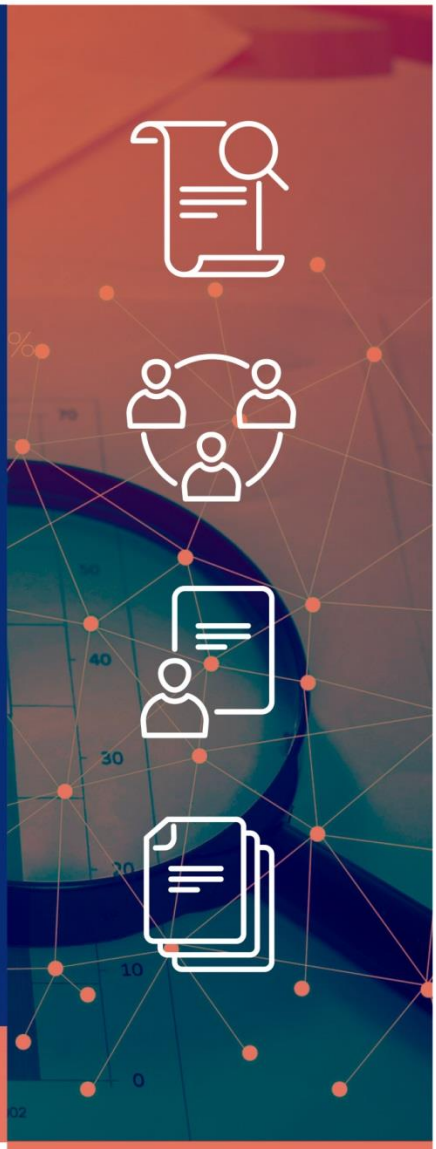
Appendix III

Spent Convictions Act 1988, Section 6 (Western Australia)

Oireachtas Library & Research Service
Seirbhís Leabharlainne & Taighde an Oireachtais
Houses of the Oireachtas
Tithe an Oireachtais

Briefing Paper

A Review of the Law Relating to Spent Convictions



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Tuesday, 14 August 2018
Enquiry Number: 2018/1074

Abstract

This briefing paper provides an analysis of the law on spent convictions. This paper considers the initial development of the law in the Irish parliamentary context, the operation of the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* since enactment, proposals for reform of the regime for spent convictions and comparative approaches to addressing spent convictions taken in other jurisdictions.

Contents

Introduction

This briefing paper provides an in-depth analysis of the law relating to spent convictions. The first section examines the initial policy and parliamentary debates that informed the development of the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* (the 2016 Act). The second section analyses the statistics relating to the operation and effectiveness of the 2016 Act since its enactment. The third section provides an overview of the various proposals for reform which have been put forward. The final section compares and contrasts the Irish regime for spent conviction to that of other jurisdictions.

At the outset it is important to distinguish between the different terminology that is used when discussing spent convictions as some overlap arises in the academic literature. Under the 2016 Act, where a conviction becomes **spent**, disclosure of the conviction can only be required in specific circumstances. By contrast to a situation where the criminal record is "**wiped clean**", the record of the conviction is not deleted. In circumstances where the record is "wiped clean" the conviction is usually removed from the record and the offender is treated as though no conviction was ever recorded. The term "**expunged**" has been used interchangeably by academics and politicians to cover circumstances where a conviction is deemed spent and where a conviction is deleted from the record.[1] For a conviction to become spent a person will normally be required to not have received any convictions for a set period after they have served their sentence. This conviction-free period is referred to in this paper as a "**rehabilitation period**."

The basis for spent convictions legislation is the belief that a reformed offender who has committed minor offences in the past should be afforded a reasonable opportunity to reintegrate into society. Given the extensive difficulties faced by individuals with convictions, particularly in terms of gaining employment, a spent convictions regime provides reformed offenders with a better opportunity to move on with their lives. The concept of spent convictions was first introduced into Irish law with the enactment of section 258 of the *Children Act 2001* (the 2001 Act). This provides for the non-disclosure of convictions for offences committed by children, provided the offender does not commit any further offence in a three year period.

The absence of an equivalent mechanism for adult offenders led to calls for reform to assist in the rehabilitation of adults by providing them a greater opportunity to leave their criminal

[1] For the purpose of this paper the term "expunged" shall not be referred to, save in relation to where it is part of quoted text. In these circumstances the term "expunged" should be read as having the meaning intended by the original author.

past behind. Reports by the National Economic and Social Forum (NESF)[2], the Equality Authority[3] and the Irish Human Rights Commission (IHRC)[4] all criticised the fact that Ireland did not have appropriate measures to assist adult ex-offenders in their rehabilitation and highlighted that Ireland was the only EU country not to have implemented some form of anti-discrimination or spent conviction regime to assist adult ex-offenders in terms of gaining employment.

[2] NESF, *Re-integration of Prisoners* (Dublin, 2002), paras 6.23-6.25. Available at: http://edepositireland.ie/handle/2262/72753.
[3] Equality Authority, *Review of Discriminatory Grounds Covered by the Employment Equality Act 1998* (Dublin, 2002).
[4] IHRC, *Extending the Scope of Employment Equality Legislation* (Dublin, 2005), pp.6-10. Available at: https://www.ihrec.ie/documents/submission-on-extending-the-scope-of-employment-equality-legislation/

Development of the Irish Regime for Spent Convictions

Prior to the enactment of the 2016 Act, there were a number of developments, both political and legal, that took place resulting in considerable alterations and delays to the legislation. This section tracks the development of the Irish legislation from the 2007 Law Reform Commission (LRC) Report on Spent Convictions[5], through to the enactment of the 2016 Act.

The 2007 LRC Report

In 2007 the LRC produced an extensive report into spent convictions, examining the benefits of introducing a spent convictions regime for adult offenders and considering how such a regime could be applied. Included in this report was a draft Bill which would go on to form the bases of the *Spent Convictions Bill 2007* [initially a PMB], the *Spent Convictions Bill 2011* [PMB] and the *Criminal Justice (Spent Convictions) Bill 2012*. The report contained a comprehensive comparative analysis of similar jurisdictions and set out a number of recommendations. The key recommendations of the report are set out in Textbox 1.

Textbox 1: Key Recommendations of the LRC

- The introduction of a limited spent convictions scheme building on the scheme available under section 238 of the 2001 Act and schemes already in place in comparable jurisdictions;
- That the scheme reflect the view that the law recognises that at a certain point a person is entitled to leave their past behind them;
- That the scheme be based on a hybrid model which excludes certain offences and applies a sentencing threshold;
- That any offence tried in the Central Criminal Court and all sexual offences should be excluded from the scheme;
- That custodial sentences of over 6 months should be excluded from the scheme;
- That non-custodial sentences should be eligible under the scheme;
- That a conviction-free period of 7 years should apply before a conviction resulting in a custodial sentence can be considered spent;
- That a conviction-free period of 5 years should apply before a conviction resulting in a non-custodial sentence can be considered spent;
- That a conviction for any offence during the conviction-free period would have the effect of restarting the clock for the purposes of the conviction-free period;
- Spent convictions would automatically be considered spent without requirements to apply to a central authority or the District Court;
- The scheme would not apply in the context of criminal sentencing or in civil proceedings related to the welfare of children; and
- That certain jobs and professions which involve working with children or vulnerable adults, involve a relationship of trust or involve the security of the State would be exempt from the scheme.

The Spent Convictions Bill 2007

The *Spent Convictions Bill 2007* (the 2007 Bill) was initially introduced as a PMB by then Minister of State, Deputy Barry Andrews. The 2007 Bill was later taken up by the government and presented as a Government Bill for its second stage debate. [6] The 2007 Bill drew extensively from the LRC Report. Speaking at the presentation of the Bill for second stage debate, Deputy Andrews acknowledged the research carried out by the LRC and noted:

> "The core message in the Bill concerns the need to facilitate the rehabilitation of convicted persons and to do so in a way that not only benefits the individuals concerned, but that takes account of the wider interests of society, especially the protection of vulnerable persons. In particular, the Bill will facilitate rehabilitation through the reintegration of convicted persons into the workforce, and will allow them to build new careers."

During the second stage debate the 2007 Bill was broadly supported by all parties. A few suggestions were put forward as potential avenues of consideration for when the Bill was to be considered at Committee stage. Noting the support of Fine Gael, Deputy Charles Flanagan suggested that the conviction free period of 7 years for a custodial sentence and 5 years for a non-custodial sentence were too long. He was also critical of the use of imprisonment as a means of punishing those who committed minor non-violent offences and suggested reform was needed in this area. While Deputy Pat Rabbitte welcomed the spirit of the Bill, he was critical of the Bill providing a blanket exclusion in relation to the disclosure requirements for employment with the Civil Service. He also suggested that more consideration was needed as to the range of offences to which the Bill would not apply, in particular whether all sex-offenders should be excluded from coming within the regime.

Deputy Aengus Ó Snodaigh suggested also suggested that the Bill could be improved, noting:

> "A more complex and proportionate regime than that contained in the Bill should be introduced. A scheme could be introduced whereby the duration of the rehabilitation period required would, depending on the length of sentence attached to the past conviction, vary. The current position is that the rehabilitation period in respect of a six-month sentence is seven years. Might it be possible to consider applying a ten-year rehabilitation period in respect of sentences of less than two years' duration? […]

[6] The Second Stage debate can be accessed here.

> A further age-related tier, linked to the length of the rehabilitation period required, could be introduced in order that account might be taken of the age of those between, for example, 18 and 20 and 20 and 25."

The Bill never made it to Committee Stage and ultimately lapsed with the dissolution of the 30th Dáil.

The Spent Convictions Bill 2011

On the 11th May, 2011, the *Spent Convictions Bill 2011* (the 2011 Bill) was introduced as a PMB by Deputy Dara Calleary. The Bill was a replica of the 2007 Bill introduced by Deputy Andrews. A number of TDs spoke of the importance of introducing this legislation and the Bill once again received broad support from across the Dáil chamber.[7] In the course of the Second Stage debate the then Minister for Justice and Equality, Deputy Alan Shatter indicated that a Government Bill on the matter would be forthcoming. Just as was the case with the 2007 Bill some issues were raised with the intention that they would be dealt with at Committee Stage or in the course of analysis of the Government's proposed Bill. These included:

- the 7 year conviction-free period being too long, (although Deputies Robert Troy and Seamus Kirk both pointed to the requirement being 10 years in some jurisdictions as evidence that the 7 year period could be viewed as relatively generous);
- the scheme only applying to custodial sentences of up to 6 months being too short, especially in light of the spent convictions legislation in the England and Wales at the time providing for custodial sentences of up to 30 months;
- the exclusion of the non-disclosure requirements for all jobs in the Civil Service was too broad; and
- that certain professions should also be included to the list of professions exempted from the non-disclosure requirements, such as the taxi industry and the private security industry.

There was universal acceptance from all the Deputies that convictions for sexual offences and serious offences such as for crimes reserved for hearing in the Central Criminal Court should always be disclosed. The 2011 Bill did not progress to Committee Stage as the Government published the *Criminal Justice (Spent Convictions) Bill 2012* (the 2012 Bill) on the 4th May, 2012.

[7] The Second Stage debate can be accessed here.

The Criminal Justice (Spent Convictions) Bill 2012

The 2012 Bill was a Government Bill and was first introduced in the Seanad by the then Minister for Justice and Equality, Deputy Alan Shatter.[8] While the Bill was based on the same 2007 LRC report as the Fianna Fail PMBs, there were a number of differences to this Bill which sought to address the concerns raised during the previous debates. Distinguishing the 2012 Bill from the draft Bill in the LRC report, the Minister stated:

> "A somewhat unique feature of this legislation is that the changes being made to the original Law Reform Commission's draft Bill are almost all in the direction of what some would say would make the Bill more liberal — if that is the correct word — in regard to most of its key provisions. It is my strong view that if legislation like this is to have any meaningful impact, it must err on the side of generosity to the offender who has paid his or her debt to society, has left criminality behind him and just wants to move on."[9]

Table 1 indicates some of the key differences between the LRC Draft Bill and the 2012 Bill.

Table 1: LRC Draft Bill v. 2012 Bill

	Position in the LRC Draft Bill	Position in the 2012 Bill
Duration of qualifying custodial sentence	6 months	12 months
Duration of qualifying non-custodial sentence	6 months	12 months
Relevant rehabilitation period	7 years for a custodial sentence and 5 years for a non-custodial sentence	See Schedule 2 of the 2012 Bill[10]: Custodial < 6 months = 5 years Custodial 6 - 9 months = 6 years Custodial 9 - 12 months = 7 years Non-custodial = 3 – 5 years
Maximum number of spent convictions	No limit	2

[8] The Bill Tracker page which includes the Bills Digest for this piece of legislation is available here.
[9] Deputy Alan Shatter, Second Stage Debate in the Seanad. The full debate is available here.
[10] Schedule 2 contains detailed tables indicating a more complex range and progression system based on multiple combinations of various sentencing options.

Range of excluded employment	See section 5 of draft Bill, (note the entire public service is excluded)	See Schedule 3 of the 2012 Bill, (note only certain sensitive positions in the public service are excluded)

The main issues that were raised during the second stage debate were:

- that the limit to 12 months for custodial sentences was still too narrow;
- whether the Bill could be expanded to include the wiping clean of the criminal record so that convictions would be deleted from the record; and
- concerns in relation to electronic disclosures defeating the purpose of the legislation where employers in the digital age would be capable of discovering a criminal conviction of their own accord despite a prospective employee not disclosing it when it became spent. In this regard, non-discrimination legislation was put forward as a potential solution.

A number of senators also gave personal accounts from members of the public who had suffered due to a lack of spent conviction legislation, where they had committed a relatively minor offence when young which had consequently meant they could not take up a job opportunity later in life.

At Committee Stage in the Seanad a number of amendments were raised. Among the most significant amendments to be accepted was Government amendment No. 22 which allowed for the insertion of section 2(4) of the Bill. This provided for situations where multiple sentences have been handed down by a court in respect of an offender on the same day. Such sentences for the purpose of this spent convictions regime are treated as a single conviction.[11] Schedule 2 which sets out the rehabilitative periods was also amended in Government amendment No. 33. The new Schedule 2 provided that custodial sentences of less than 6 months would have a 4 year rehabilitative period while, custodial sentences of between 6 months and 12 months would have a 5 year rehabilitative period. Similarly Government amendment No. 17 also changed the maximum length of a non-custodial sentence to which the legislation would apply from 12 months to 2 years. Another issue which was raised in amendment No. 25, was how convictions considered spent in other jurisdictions would be treated. The Minister of State, Deputy Kathleen Lynch noted that this issue could not be addressed in the legislation and that states do not generally recognise each others spent convictions regimes.

[11] The Seanad Committee Stage debate is available from here.

At Report and Final Stage[12] in the Seanad the main issue which was debated was whether limiting the legislation to custodial sentences of 12 months was appropriate with Senator Jillian Van Turnhout putting forward an amendment which would have allowed for custodial sentences of up to 24 months to be considered spent. In this respect she noted that the Courts Service do not distinguish between the number of sentences handed down which attract less than 2 years.[13] This was supported by Senator Averil Power on the basis that people convicted of drug related offences during a troubled time in their youth who have subsequently reformed, would be unlikely to fall with a 12 month custodial sentence category. The Minister for Justice and Equality, Alan Shatter addressed this proposed amendment by noting that originally the LRC had suggested a period of 6 months and expressed caution at extending the legislation too far where it was to be the first attempt by the State to legislate for spent convictions. He noted that there would be ample opportunity to observe the functioning of the legislation and to reform it should the need arise.

The Second Stage Dáil Debate on the 2012 Bill was first heard on the 7th of March, 2013, resuming on the 12th March, 2013 and the 14th March, 2013.[14] The issue of the regime being overly restrictive was raised by Deputy Niall Collins who noted that Fianna Fáil felt that the cut-off for custodial sentences should be increased from 12 months to 30 months citing proposed amendments put forward by the Irish Penal Reform Trust. The theme of the provisions of the Bill not going far enough to allow for the optimal balance between rehabilitation of offenders and protecting society, was raised by most of the Opposition TDs in the course of their speeches. Other issues which were raised was the potential to extend employment equality legislation to cover the issue of discrimination on the basis of spent convictions (Deputies Pádraig Mac Lochlainn and Dara Calleary) and whether the 2012 Bill itself could go beyond introducing non-disclose of spent convictions in the area of employment to areas such as applications for insurance (Deputies Olivia Mitchell and Tom Fleming). The relationship between Garda vetting applications and spent convictions was also discussed (Deputies Heather Humphreys and Paul J. Connaughton).

The 2012 Bill was referred to the Select Committee on Justice, Defence and Equality which debated the Bill on 20th March, 2013.[15] This was attended by Deputies Niall Collins and Pádraig Mac Lochlainn, and Minister of State, Deputy Alan Kelly. While no amendments were made a number of issues were raised relevant to the earlier debates. For example the 12 month period was again considered overly restrictive by both Deputy Collins and Mac

[12] The Report and Final Stage Debate in the Seanad can be accessed here.
[13] I.e. they do not specify whether the sentence was less than 12 months.
[14] The Second Stage Debates in the Dáil can be accessed here, here and here.
[15] The Select Committee debate can be accessed here.

Lochlainn. The issue of how to address spent convictions from other jurisdictions and how spent convictions here might be dealt with abroad was also considered. In relation to this aspect of the regime Deputy Kelly reiterated that mutual recognition of spent convictions would require reciprocal agreements with other countries which were yet to be agreed but would be sought after the legislation was enacted.

MM v. United Kingdom

Between 2012 and 2016 the main reason for the delay in passing the 2012 Bill arose from the findings of the European Court of Human Rights [ECtHR] in *MM v. United Kingdom*.[16] This decision dealt with mandatory vetting in Northern Ireland and the blanket disclosure of police cautions, even where they were deemed spent. The ECtHR held that the disclosure of this information interfered with the right to privacy under Article 8 of the European Convention on Human Rights [ECHR], displacing the common law view that convictions were regarded as public information. The ECtHR held that once Article 8 was brought into play there would be a need to have a clear legislative framework which provided for a mechanism of independent review of disclosures.

Following the decision in *MM*, the UK Supreme Court considered the issue of the disclosure of spent convictions in the context of private vetting in *T & Anor v. Secretary of State for the Home Department*.[17] Similar to *MM*, the disclosure regime in question required a blanket indiscriminate disclosure of previous convictions. In the case of T, the respondent had received two police warnings in 2002 (at the age of 11) for the theft of two bicycles. T challenged their disclosure in an enhanced criminal record certificate (ECRC), which was required in 2010 in his application to take part in a sports studies course involving work with children. The second respondent, JB, had received a caution for the theft of a packet of false fingernails from a shop in 2001 (at the age of 41) and challenged the disclosure of this caution in an ECRC required in 2009 for enrolment in a course to train as a care worker. Neither T nor JB had any other criminal record. The UK Supreme Court held that the disclosures in Mr T's case could not be considered necessary in a democratic society and hence were an unlawful interference with Article 8. Applying *MM*, Lord Reed held that:

[16] *MM v. United Kingdom* (Application No. 24029/07, judgment of 13th November, 2012).
[17] *T & Anor v. Secretary of State for the Home Department* [2014] UKSC 35.

> "Legislation which requires the indiscriminate disclosure by the state of personal data which it has collected and stored does not contain adequate safeguards against arbitrary interferences with article 8 rights."[18]

The Court also held that the disclosure of JB's caution was disproportionate to the legitimate aim of protecting vulnerable people. Both *MM* and *T & Anor* were followed in 2017 by the High Court in Ireland, in *GS v. Commissioner for An Garda Síochána*.[19] This case concerned the disclosure in 2013 of two orders striking out[20] two charges from 2010 and 2011 by the Garda Vetting Office. The orders related to a charge of unlawful possession of drugs[21] (mistaken identity) and a charge of criminal damage (vexatious claim by an ex-girlfriend).[22] The applicant brought a claim against the Commissioner of An Garda Síochána on the basis that the disclosure of the strike out orders was not in accordance with law and breached his right to privacy under Article 8 of the ECHR. Judge McDermott held in favour of the applicant, noting that the vetting regime, prior to the enactment of the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* (the 2012 Act), as amended, breached his right to privacy as it provided for blanket disclosure which did not satisfy the proportionality test.[23]

The result of the decisions in the UK was that it became clear that the 2012 Act, as enacted, would have been incompatible with Article 8 of the ECHR. The 2012 Act provided for mandatory disclosure of all convictions, regardless of whether they were spent or not. In order to address this, changes were made to the 2012 Bill leading to a substantial revision which included several amendments to the 2012 Act. The most contentious of these amendments was the amendment allowing for the rehabilitation period to revert back to 7 years for all offences. According to the then Minister for Justice and Equality, Deputy Francis Fitzgerald this was required to facilitate the inclusion of an amendment allowing for almost all road traffic convictions under the Road Traffic Acts to be treated as spent convictions after 7 years. A similar approach was taken in relation to certain public order offences. However, the changes also resulted in a reduction from 2 to 1, the number of spent convictions for all other offences which are allowed. These amendments were debated on 27th January,

[18] [2014] UKSC 35, at para. 113.
[19] *GS v. Commissioner for An Garda Síochána* [2017] IEHC 190.
[20] A District Court may strike out a criminal complaint, where the court is satisfied the case discloses no offence in law.
[21] Unlawful possession of drugs contrary to s.3 of the *Misuse of Drugs Act, 1977* as amended.
[22] Criminal damage contrary to s.2 of the *Criminal Damage Act, 1991*.
[23] The Court noted that the procedural flaws which led to the vetting being unjust and not in accordance with law, have been subsequently addressed with the new vetting procedure allowing for details on the record to be contested and corrected prior to a disclosure.

2016.[24] The Government's amendments were all accepted and the revised 2012 Bill formed the 2016 Act.

[24] This debate is accessible here.

The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016

The 2016 Act provides for a regime setting out when convictions can be regarded as spent, allowing the ex-offender to decline to disclose a previous conviction in certain circumstances. Excluded sentences which cannot result in a spent conviction are set out in section 4. These include a custodial sentence for a term of imprisonment greater than 12 months, offences which are tried in the Central Criminal Court[25] and sexual offences. The key provisions of the Act include:

- Section 4 contains a number of key definitions for the purpose of the regime and limits the regime to custodial sentences of 12 months and non-custodial sentences of 24 months;
- Section 5(2) sets out that 7 years must have passed before a conviction can be considered spent;
- Section 5(3) provides that no more than one conviction can be regarded as spent, save as set out in section 5(5);
- Section 5(4) provides that where multiple convictions arise out of the same incident having been dealt with on the same day by the sentencing court, they will be regarded as a single conviction;
- Section 5(5) provides that in relation to most road traffic offences,[26] an offence under section 37A of the *Intoxicating Liquor Act 1988* and offences under sections 4, 5, 6, 7, 8, 8A(4) or 9 of the *Criminal Justice (Public Order) Act 1994*, the single conviction rule does not apply;[27]
- Section 6 provides for the general effect of spent convictions;
- Section 7 provides for the effect of spent convictions in relation to court proceedings;
- Section 8 sets out limitations of section 6 in relation to Garda interviews, citizenship applications and insurance applications;
- Section 9 sets out that spent convictions cannot be regarded as spent by a person where a request is made to the person by a state, other than the State, pursuant to the law of that other state;
- Section 10 relates to disclosures for work and sets out that section 6 does not apply in relation to certain specified work;
- Section 11 sets out that the disclosure of spent convictions must be made in relation to applications for certain licences;

[25] These include aggravated sexual assault, rape, murder, genocide and treason.
[26] All offences except an offence under section 53 of the *Road Traffic Act 1961*.
[27] The exemption to the single conviction rule only applies to offences tried in the District Court.

- Section 12 provides that disclosures made by An Garda Síochána where a person requests a record of his convictions will set out any spent convictions separately from a person's other convictions;
- Part 3 sets out the amendments to the 2012 Act;
- Schedule 1 sets out the sexual offences which cannot become spent under the definition of excluded sentence; and
- Schedule 2 sets out the types of work within the public service which fall under the meaning of "specified work" for which disclosure is always required.

The operation and effectiveness of the 2016 Act

Unfortunately detailed statistical information which is necessary to evaluate the effectiveness of the 2016 Act is somewhat lacking. In order to assess whether the 2016 Act is meeting its stated aims of promoting rehabilitation and addressing recidivism, information is required on the number of convictions which have become spent. This information is not available due to the system operating automatically with no central authority responsible for recording convictions as they become spent. In a short post-enactment report which was laid before the Houses of the Oireachtas in March 2017 by the Department of Justice on the 2016 Act, the Department estimated that "slightly over 80% of all criminal convictions now become spent after 7 years."[28] This figure has been met with a degree of scepticism as the single conviction rule is likely to disqualify a significant number of people from the regime even though it may appear that the majority of convictions will be capable of being spent.[29]

[28] Department of Justice and Equality, *The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016*, (March, 2017) at p. 2. Available at http://opac.oireachtas.ie/AWData/Library3/Post-enactment_Report_-_Criminal_Justice_Spent_Convictions_and_Certain_Disclosures_Act_2016_124838.pdf.
[29] See McIntyre & O'Donnell, "Criminals, Data Protection and the Right to a Second Chance" *The Irish Jurist* (2017) Vol. 58(58), pp. 27-55, at 34.

Proposals for Reform

While the publication of the 2016 Act was greeted as positive development in Irish criminal justice policy, this was largely down to a sense that progress had finally been made in a area of law where reform was long overdue. This was highlighted by the fact that prior to the 2016 Act, Ireland was the only country in the EU with no regime for spent convictions. A number of proposals for reform have been made with suggestions being made by Members of the Oireachtas, academics and civil society.

Proposals by Members of the Oireachtas

The issue of adding drug offences to the list of offences for which a person can have multiple convictions considered spent was raised by Deputy Jonathan O'Brien in the Dáil on 16th February, 2017.[30] He noted that there has been a shift away from dealing with drug policy as a criminal justice issue towards a public health model. Focusing on possession based offences he stated:

> "Somebody who may have had a minor conviction for possession of drugs while in the throes of addiction but who has now gone through rehabilitation and is no longer addicted to and using drugs has a criminal record for the rest of his or her life. If we are serious about not only dealing with drug use as a public issue but also giving people a second opportunity, it is essential that people who have gone through the very tough process of rehabilitation are not labelled and stigmatised for the rest of their days."

In response to this, the then Minister for Justice and Equality, Deputy Francis Fitzgerald noted that she felt it would be appropriate for the Committee on Justice and Equality to examine this issue and noted that she would like to hear the views of the Minister for State with responsibility for drugs on this issue.

More recently the issue of reviewing the 2016 Act was considered by the Joint Committee on Justice and Equality in their Report on Penal Policy and Sentencing.[31] The report highlights the changes that were made from the more liberal regime that was originally envisaged in the 2012 Bill. The report considers the more extensive regime that is place in England and

[30] The Dáil debate can be accessed here.
[31] Houses of the Oireachtas Joint Committee on Justice and Equality, *Report on Justice and Equality*, (May, 2018) at pp. 41 - 44. This is available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2018/2018-05-10_report-on-penal-reform-and-sentencing_en.pdf.

Wales and takes on board submissions made which suggested that the 2016 Act was in need of urgent reform. The Joint Committee made the following recommendation in relation to spent convictions:

> "The issue of spent convictions must be examined urgently. Offenders should be afforded a second chance, and should not have to carry the stigma and negative consequences of a criminal record for the rest of their lives if they have moved away from offending behaviour. *The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* is extremely limited in its application and fails to support rehabilitation of more serious offenders.
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> …
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> The current position does not take into account in any way the circumstances that may have contributed to a person's offending behaviour at the time, which could have been youth, addictions, poverty or any range of other circumstances."[32]

Proposals from Academics

McIntyre[33] and O'Donnell[34] provide a comprehensive analysis of the Irish regime and the academic literature relating to spent convictions.[35] They examine the Irish regime in light of recent developments relating to the right to privacy. They note that there has been a shift away from the old common law position that an individual cannot assert privacy rights in respect of a previous conviction with the decisions in *MM* and *T & Anor*. In this respect they also highlight the decision of the English Court of Appeal in *P & Ors v. Secretary of State for the Home Department*.[36] In this case both a single conviction rule[37] and a serious conviction rule[38] were challenged on the basis that they amounted to an unreasonable interference with Article 8 of the ECHR. The Court unanimously held that these rules in the absence of an independent mechanism for review violated Article 8, with both of the rules being unnecessary in a democratic society and being disproportionate. The Court noted that a pattern of offending would be a relevant factor that could be disclosed to an employer,

[32] *Ibid*, at pp. 58 – 59.
[33] T.J. McIntyre is a Lecturer in Law UCD Sutherland School of Law, University College Dublin.
[34] Ian O'Donnell is a Professor of Criminology UCD Sutherland School of Law, University College Dublin.
[35] See Note 24.
[36] *P & Ors v. Secretary of State for the Home Department* [2017] EWCA Civ 321.
[37] This rule meant that where an individual had two or more convictions, they would always be disclosed in the context of applications for employment to work with children or vulnerable adults and in criminal records certificates, even though they would be spent for other purposes.
[38] This rule meant that where an individual had a conviction for a serious offence, they would always be disclosed in the context of applications for employment to work with children or vulnerable adults and in criminal records certificates, even though they would be spent for other purposes.

however, "it is not a necessary inference that two convictions do represent a pattern of offending behaviour."[39] Commenting on this decision, McIntyre and O'Donnell note that the 2016 Act provides for rules which are more indiscriminate than the rules which were found to be incompatible with Article 8 of the ECHR. They suggest:

> "For the 2016 Act to meet the test of legality set out in *P*, it seems likely that it would have to be amended to introduce either more nuanced rules for disclosure, or else some form of administrative review to permit an individual to show that the requirement to disclose old or irrelevant convictions is disproportionate in a particular case."[40]

Given the limited application of the 2016 Act, McIntyre and O'Donnell suggest that ex-offenders may turn to data protection law as a means of enforcing their right to privacy and to protect against discrimination on the basis of an old conviction.[41]

Another aspect of the 2016 Act which they are critical of is the failure to take account of individuals with convictions obtained abroad. They note that under the 2016 Act no provision is made for convictions obtained abroad to become spent in Ireland, despite the fact that they may be considered spent in the jurisdiction in which they were obtained. They note that in England and Wales all convictions obtained outside the jurisdiction are treated in the same way as domestic convictions.[42] They suggest that the failure to account for foreign convictions is likely to be considered "contrary to EU law as being indirectly discriminatory on the basis of nationality and as undermining the right to free movement of workers."[43]

Proposals from Civil Society

A number of organisations took an active role in campaigning for the introduction of spent convictions legislation.[44] At the forefront of these organisations is the Irish Penal Reform Trust [IPRT].[45] The IPRT campaigns for penal reforms aimed at modernising Irish prisons and the criminal justice system in a manner which is humane and just. The Joint Committee on Justice and Equality, prior to preparing their report, received oral and written submissions from the IPRT. In the opening statement of Ms Fíona Ní Chinnéide[46], the IPRT called for "a review of the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016*, which

[39] [2017] EWCA Civ 321, at para.93.
[40] Note 24, at 45.
[41] *Ibid*, at 46 - 49.
[42] *Rehabilitation of Offenders Act 1974*, section 1(4).
[43] *Ibid*, at 36.
[44] These included the Irish Human Rights and Equality Commission who provided observations on the 2007 Bill and the 2012 Bill. The observations on the 2007 Bill are available here. The observations on the 2012 Bill are available here.
[45] For more information of the work of the IPRT on spent convictions see http://www.iprt.ie/spent-convictions.
[46] Fíona Ní Chinnéide is the acting executive director of the IPRT.

is currently so limited that it fails to fulfil its rehabilitative purpose."[47] This position was expanded on by Ms Ní Chinnéide at her appearance before the Joint Committee as set out in the report of the Joint Committee, where it highlights that she was critical of the current position and quotes her as saying:

> "It presumes that one contact with the criminal justice system is enough for people to escape all these circumstances of disadvantage and marginalisation, which we know is not the case. We also know that people grow up, move away from crime and move on. We hear from people so often who are now in their late 20s, have got married and have kids. They want to move to Australia and they have moved away from the impulsive, low-self-regulated immature behaviour they engaged in when they were 18, 19 or 20 but these convictions pursue them 20, 30 or 40 years after the fact. If one has two separate convictions for shoplifting, for example, from 20 years ago, they are still on one's record indefinitely. We would strongly welcome a review of, and more attention being paid to, this issue."[48]

[47] Note 26, Annex 4, at p. 71.
[48] *Ibid*, at p. 43.

Comparative Approaches to Spent Convictions

A number of countries have implemented spent convictions legislation. This section compares and contrasts the regimes which apply in a number of other jurisdictions to the regime set out in the 2016 Act. As there is a considerable amount of literature comparing the regimes in Europe to that in England and Wales, the first part of this section will also contrast the Irish system directly to the system in England and Wales. The second part of this section will then examine some the jurisdictions set out in the LRC report. The final part of this section examines European regimes as set out in detail by Elena Larrauri Pijoan[49] in the context of her comparative study which compared the UK to continental Europe.[50]

Spent Convictions in England & Wales

The *Rehabilitation of Offenders Act 1974* (the 1974 Act) is the primary piece of legislation concerning spent convictions in England and Wales. The principal differences to the Irish regime include:

a) Custodial sentences of up to 4 years can become spent;
b) More than one qualifying sentence can become spent;
c) There are different rehabilitative period depending on the length of the sentence or the type of non-custodial provision that is used; and
d) Where there are multiple offences, the rehabilitative period resets with each new offence, meaning all the offences do no become spent until the rehabilitative period of the most recent offence or the longest remaining rehabilitative period has been completed.

Comparing the two regimes, Holmes[51] notes that the English regime is more liberal and provides offenders with a greater incentive to desist from offending.[52] While he welcomes the introduction of the Irish legislation he notes that, "it is unfortunate that the more liberal English approach was not adopted, as this recognises that people can commit a few offences before they go on to try to turn themselves around."[53]

The following sentences are exempt from the 1974 Act and can never become spent:

[49] Elena Larrauri Pijoan is a Professor of Criminal Law and Criminology, Universitat Pompeu Fabra, Barcelona; Visiting Fellow All Souls College (2013-2014), University of Oxford.
[50] Larrauri, "Criminal record disclosure and the right to privacy" (2014) *Criminal Law Review* 723.
[51] Matthew Holmes is a lecturer in DIT and a practising barrister.
[52] Holmes, "As Crimes Go By" (2016) *Law Society Gazette* Vol. 110(6), pp. 22-23.
[53] *Ibid*, at p. 23.

a. Sentence of imprisonment for life;

b. Sentence of imprisonment, youth custody, detention in a young offender institution or corrective training of over 4 years;

c. Sentence of preventive detention;

d. Sentence of detention during Her Majesty's pleasure or for life;

e. Sentence of custody for life;

f. Public protection sentences (imprisonment for public protection, detention for public protection, extended sentences of imprisonment or detention for public protection and extended determinate sentences for dangerous offenders).[54]

Table 2 (below) sets out the different rehabilitative periods which apply depending on the length of the sentence. These periods are in stark contrast to the position in Ireland which requires a rehabilitative period of 7 years for all sentences. For the purposes of the 1974 Act a custodial sentence includes a suspended sentence.

Table 2: Rehabilitation periods in England and Wales

Sentence/disposal	**Buffer period for adults. This applies from the end date of the sentence (including the licence period).**	**Buffer period for young people (under 18 at the time of conviction). This applies from the end date of the sentence (including the licence period).**
Custodial sentence of over 4 years, or a public protection sentence	Never spent	Never spent
Custodial sentence of over 30 months (2 ½ years) and up to and including 48 months (4 years)	7 years	3½ years
Custodial sentence of over 6 months and up to and including 30 months (2 ½ years)	4 years	2 years
Custodial sentence of 6 months or less	2 years	18 months
Community order or youth rehabilitation order	1 year	6 months
Fine	1 year	6 months

Source: UK Ministry of Justice

[54] See Ministry of Justice, *New Guidance on the Rehabilitation of Offenders Act 1974*. Available at: https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974

Spent Convictions in other Common Law Jurisdictions

During the debates on the 2012 Bill there were numerous comparisons made to the regimes set out in the LRC report. The LRC focused on common law regimes in New Zealand, Canada and Australia, noting that they all drew aspects from the 1974 Act.

New Zealand

The statutory basis for the regime in New Zealand is the *Criminal Record (Clean Slate) Act 2004*.[55] The key features of the scheme include:

- 7 year rehabilitation period for all offences;
- Only applies to non-custodial sentences;
- Convictions become automatically spent;
- Can apply in respect of multiple convictions;
- Does not apply to certain "specified offences" (mainly sexual offences); and
- You can apply to the District Court to have your convictions disregarded where the offences of which you were convicted, no longer exists or you received a non-custodial sentence for a specified offence.

Australia

Part VIIC of the Crimes Act 1914 is the legislation governing spent convictions for commonwealth and territorial offences.[56] The key features of the spent convictions regime include:

- 10 year rehabilitation period for all offences;
- Applies to non-custodial sentences and custodial sentences of up to 30 months;
- Does not apply to "designated offence" (mainly sexual offences and offences where the victim was a minor); and
- Can apply in respect of multiple convictions.

Different schemes apply in relation to the different territories of Australia. A Model Bill was published in 2008 seeking to harmonise the various territorial laws.[57] Table 3 sets out the rehabilitation period, and length of sentence to which these schemes apply.

[55] More information about the New Zealand regimes is available here.
[56] A commonwealth offence is an offence which comes within the law-making responsibilities of the Australian federal government. These include drug-trafficking, terrorism and social welfare fraud. A territorial offence relates to an offence which comes within the law-making responsibilities of the government of a specific Australian territory. These include the majority of criminal offences such as road traffic offences and public order offences.
[57] Moira Paterson and Bronwyn Naylor, "Australian Spent Convictions Reform: A Contextual Analysis" (2011) *University of New South Wales Law Journal*, Vol. 34, No. 3, 938.

Table 3: Spent conviction regimes across Australia

	Model Bill	Commonwealth, Northern Territory and Australian Capital Territory	New South Wales	Queensland	South Australia	Tasmania	Western Australia
Rehabilitation period	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (adult) 5 years (child)	10 years (adult) 2 years (child)
Covers all custodial sentences – Subject to the exception of sexual offences everywhere except Queensland and Western Australia	≤ 12 months (adult) ≤24 months (child)	≤ 6 months	≤ 6 months	≤ 30 months	≤ 12 months (adult) ≤ 24 months (child)	≤ 6 months	≤ 12 months ≥ 12 months by way of application to a District Court judge

Source: Paterson & Naylor, see note 51.

Spent Conviction Regimes in Europe

At the outset it is important to note that spent conviction regimes in most European countries address the issue from a privacy perspective, rather than the public safety perspective which features so strongly in common law jurisdictions. This section considers the analysis of Larrauri, who compares the regime in England and Wales under the 1974 Act to that of European regimes generally.[58] This section will also briefly consider the comparative analysis in the report of Sunita Mason[59] prepared for the UK Home Office in 2010,[60] which was referred to quite extensively during the debates on the 2012 Bill.

[58] Note 45.
[59] Sunita Mason was the Independent Advisor to the UK Home Office for Criminal Information Management.

The analysis of Larrauri examines the issue of criminal record checks in England and Wales in light of the decision in *MM*. She builds on a number of previous studies[61] carried out in different European countries to provide a European perspective on spent conviction regimes with which to compare the regime under the 1974 Act in England and Wales. She notes that widespread disclosure of criminal records undermines the basis of the 1974 Act in that it may hinder social reintegration. Examining the regime set out in the 1974 Act she notes that it operates from the basis that an employer is generally allowed to ask about a person's prior criminal background. By contrast the position in most European regimes is that it is presumed that a person cannot be asked about any prior convictions unless there is a law expressly providing for this.[62] She notes:

> "In most European countries all convictions become 'spent', 'cancelled', 'erased', 'sealed', 'expunged' by the mere passage of a certain period of time. This process is generally automatic and covers all convictions. However there are some exceptions of convictions that do not get spent like, for example, life sentences in Germany or the most serious crimes in France. Yet nowhere do the rules seem as restrictive as in the UK where, according to the (reformed) ROA [the *Rehabilitation of Offenders Act*], any conviction resulting in a prison sentence of four years or more will never be considered spent."[63]

Ultimately Larrauni considers the main difference between European spent conviction regimes and the regime under the 1974 Act to be one of breadth, with the UK regime providing for convictions to be considered spent in quite narrow circumstances while disclosure to employers are permissible in a considerably larger set of circumstances. Given that she considers the spent convictions regime in the UK to be restrictive in comparison to Europe, it is clear that the Irish regime under the 2016 Act would be seen as an outlier in Europe.

The comparative analysis in Appendix D of the 2010 report[64] by Mason is based on a 2009 study by KPMG which she claims provided a detailed breakdown of the various systems in

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[60] UK Home Office, *A Balanced Approach: Independent Review by Sunita Mason* (2010). Available at: http://webarchive.nationalarchives.gov.uk/20100408141053/http://police.homeoffice.gov.uk/publications/about-us/ind-review-crim/a-balanced-approach-12835.pdf?view=Binary

[61] These include: M. Boone, "Judicial rehabilitation in the Netherlands: Balancing between safety and privacy" (2011) 3(1) *European Journal of Probation* 63; M. Herzog-Evans, "Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance" (2011) 3(1) *European Journal of Probation* 4; C. Morgenstern, "Judicial rehabilitation in Germany-The use of criminal records and the removal of recorded convictions" (2011) 3(1) *European Journal of Probation* 20; N. Padfield, "Judicial Rehabilitation? A view from England" (2011) 3(1) *European Journal of Probation* 36.

[62] See note 45 at 726.

[63] *Ibid*, at 727.

[64] Note 54.

place across Europe.[65] Mason provides a tabular comparison of the regimes in 19 European countries. Of these 19 countries, Ireland is the only country which at the time contained no spent conviction regime. Her table indicates that in Bulgaria and Hungary the rehabilitation period varies depending on the age of the offender. Most of the countries also provide for the rehabilitation period to be staggered based on the seriousness of the offence and length of the sentence, as opposed to the 2016 Act which only provides for a 7 year period.

[65] Unfortunately a copy of this report could not be located. Given the date of the KPMG report is nearly 10 years old and the lack of information with which to verify the table, it is recommended that conclusions drawn from the analysis should be approached with caution. The updated situation in Ireland offers an example of how this information may no longer be accurate.

Conclusion

A number of important considerations arise out of the above analysis. These are as follows:

- The introduction of the 2016 Act represented significant progress in that it introduced for the first time a means for adult offenders to consider their convictions spent;
- The 2012 Bill was intended to provide for a more liberal regime. This was reworked in 2016 into a more conservative regime which aligns more closely with the 2007 LRC report;
- Post-enactment commentary on the 2016 Act has generally welcomed the enactment but has highlighted the need for review, with the regime considered to be overly restrictive in its application;
- The old common law perception of convictions as being a matter of public record has shifted with the development of data protection law and as a result of the findings of the ECtHR in *MM*;
- The 2016 Act is considerably more restrictive that the position in England and Wales under the 1974 Act, which is considered relatively restrictive by European standards; and
- There is insufficient information available in relation to regimes which take the age of adult offenders into account when setting thresholds for rehabilitation periods for conclusions to be drawn as to the benefits of introducing specific arrangements for adults aged 18 to 25.

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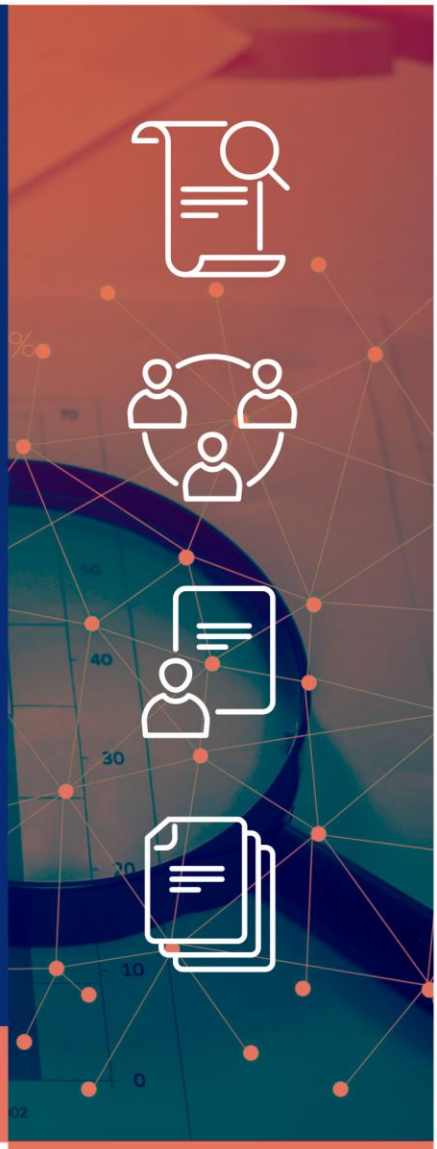
Briefing Paper

Issues relating to the *Criminal Justice (Rehabilitative Periods) Bill 2018* [PMB]

Enquiry No. 2019/279



Daniel Hurley, Parliamentary Researcher, Law

26th March 2019

Abstract

This briefing paper examines three issues relating to the *Criminal Justice (Rehabilitative Periods) Bill 2018* [PMB]. The first issue relates to constitutional challenge on the basis of age based discrimination. The second issue relates to the types of crimes which receive custodial sentences of between 12 and 24 months imprisonment. The third issue relates to the offences that are excluded under the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* and the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*.

Contents

Legal Disclaimer

Introduction

This paper examines three issues that have arisen in relation to the *Criminal Justice (Rehabilitative Periods) Bill 2018* [the Bill]. The first section examines whether it is constitutionally permissible to have different spent conviction schemes depending on the age of the offender. The second section sets out the types of offences which result in custodial sentences ranging in length between 12 and 24 months. The third section sets out the offences that are excluded for the purposes of the regimes operating under the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* and the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012*.

The constitutionality of age based discrimination

This section examines the issue of age based discrimination in legislation and whether such legislation is open to challenge on the basis of constitutionality. The right to equality is a personal right guaranteed under Article 40.1 of the Constitution. There have been a number of cases where legislation has been challenged on the basis of breaching the equality requirements under Article 40.1.[1] This section analyses some of these decisions which related to age based discrimination and considers the scope of the guarantee.

Article 40.1 of the Constitution provides that:

> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences if capacity, physical and moral, and of social function."

The standard of review that is applied in relation to whether the creation of different classes of persons is justifiable in legislation is the legitimate purpose test, which considers **whether the classification is for a legitimate purpose**, **whether it is relevant to that purpose** and **whether each class is being treated fairly**.[2]

The leading case in relation to whether age classifications are invalid in light of the guarantee to equality under Article 40.1 is *Re Article 26 and the Employment Equality Bill*.[3] In this case the Supreme Court considered whether age based discrimination was prohibited under the Constitution. The aim of the Bill was to prevent discrimination and promote equality between employed persons. While certain provisions of the Bill were declared unconstitutional and the Bill was never signed into law by the President, the Court made a number of significant findings in relation to age based discrimination.

Section 6 of the *Employment Equality Bill 1996* prohibited discrimination on the basis of age within the workplace, but qualified this by providing in section 6(3) that "treating a person aged 65 or over, or a person aged under 18, more or less favourably than another, whatever that other person's age, shall not be regarded as discrimination on the age ground." Section 33(1) also provided that nothing in that Part or Part III of the Bill prevented the taking of measures aimed at integrating persons over the age of 50 into employment. The Court expressly found that these provisions were not repugnant to the Constitution.[4] In reaching this conclusion the Court focused on the guarantee under Article 40.1 of the Constitution and noted:

> "**Article 40.1, as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances**. Even in the absence of the qualification contained in the second sentence, to interpret the Article in that manner would defeat its objectives. In the present context, it would mean that the State could not legislate so as to

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[1] For a more general and complete analysis of equality in Irish constitutional law, Gerard Hogan and Gerry Whyte provide a comprehensive and up to date analysis in Chapter 7.2 of *Kelly: The Irish Constitution* (2018, Bloomsbury Professional, 5th Edition).

[2] The test was initially set out by Barrington J in *Brennan v Attorney General* [1983] ILRM 449, at 480.

[3] *Re Article 26 and the Employment Equality Bill* [1997] IESC 6, [1997] 2 IR 321.

[4] [1997] 2 IR 321, the Court considers the age ground in depth at 341 - 350.

> prevent the exploitation of young people in the work place or, at the other end of the spectrum, to make special provision in the social welfare code for the elderly. The wide ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation. In particular, **classifications based on age cannot be regarded as, of themselves, constitutionally invalid**.[5] They must, however, be capable of justification on the grounds set out by Barrington J in Brennan v Attorney General [1983] ILRM 449."[6]

The Court went on to consider whether the distinctions in age could be justified on the basis of the social function which they purported to address. In this regard the Court stated that:

> "It may, of course, be argued that, in the case of s 6(3), the age limit could have been fixed at a higher age than 65 or a lower age than 18. Once, however, it was conceded that the protection against discrimination on the grounds of age cannot be unqualified, it becomes a matter for the Oireachtas to determine at what level the exemptions should begin to operate. Since the age limits chosen, of 18 and 65 respectively, reflect the thresholds at which a significant number of the population enter or leave the working place, their choice could not plausibly be characterised in the view of the court, as irrational or arbitrary.
>
> The Bill, in seeking to ensure that its objective of reducing discrimination on the ground of age does not adversely affect measures intended to alleviate the problem of the long-term unemployed, has, as already noted, removed such measures from the ambit of the Bill where they are designed to facilitate the integration into employment of persons over the age of 50. No doubt in this instance the age limit chosen does not correspond to any recognised threshold. Where, however, as here, the Oireachtas was dealing with a specific problem in ensuring that its legislative goal of equality of employment did not unnecessarily frustrate another objective of eliminating or reducing long-term unemployment, it was entitled, as a matter of social policy, to choose between fixing the relevant age at what was an appropriate level or employing another and more flexible, but it may be a less practicable, yardstick, such as the length of time an individual is registered as being one of the long-term unemployed. **While it is possible to argue that the Oireachtas has made the wrong choice, that cannot amount to a finding that the classification for which they have adopted is irrelevant to the objective intended to be achieved or unfair or irrational**."[7]

Director of Public Prosecution (Stratford) v O'Neill[8] offers an example of a case where legislation providing for differences in treatment based on age in relation to criminal procedure in the District Court has been upheld by the High Court. This case concerned a requirement that a District Judge consider, among other considerations, the "character and antecedents of a young person" in relation to determining whether an accused should be tried summarily where no such requirement existed in respect of defendants who were not young persons. Smyth J held that the provision:

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[5] No emphasis in the original.

[6] [1997] 2 IR 321 at 346.

[7] [1997] 2 IR 321 at 348 - 349. No emphasis in the original.

[8] *Director of Public Prosecution (Stratford) v O'Neill* [1998] 2 IR 383.

> "… far from infringing the principle of equality before the law has inbuilt in it constitutional concern to ensure that due regard to differences of capacity are observed."[9]

It appears from the above analysis that discrimination in relation to age can sustain constitutional challenge provided it satisfies the legitimate purpose test. The key issues to consider in assessing whether this test will be met in relation to the Bill, will be **whether the social rehabilitation of young persons is a justifiable purpose for a difference in treatment**, and **whether the differences in capacity between young persons aged between 18 and 24, and persons aged over 24 are sufficient to justify different treatment as set out in the Bill**.

[9] [1998] 2 IR 383, at 387.

Crimes resulting in custodial sentences of between 12 and 24 months

This section examines the types of crimes that can result in a custodial sentence of between 12 and 24 months.[10] The first part of this section sets out the different types of classifications that apply in respect of criminal offences in order to narrow the scope of this paper to those offences which could result in sentences of imprisonment of between 12 and 24 months. The second part focuses on the available statistical data in relation to sentences of imprisonment in the Circuit Criminal Court.

Classification of offences

There are three main types of offences:

- A summary offence, i.e. dealt with in the District Court by a judge without a jury;
- An offence triable on indictment, i.e. dealt with in the Circuit Criminal Court or Central Criminal Court with a judge and jury, or the Special Criminal Court with a panel of three judges; and
- Those which may be dealt with either summarily or on indictment.

Where an offence is dealt with summarily the maximum sentence which can arise is limited to 12 months imprisonment. Article 38.2 of the Constitution provides that summary offences are minor offences providing that:

> "Minor offences may be tried in courts of summary jurisdiction."

While there is no definition of minor offences in the Constitution, summary offences are identifiable in the statutory provision establishing the offence, where the following phrase is used:

> "a person committing an offence under this section shall be liable on summary conviction to …"

Where a statute creating an offence only states the maximum penalty for trial on indictment and does not include any reference to penalties for summary disposal, the matter will not be dealt with in the District Court except for the ordinary processing of the case up until it is sent forward to a higher court. If however, a person pleads guilty to an indictable offence[11] prior to being sent forward to the Circuit Criminal Court, Central Criminal Court or Special Criminal Court, they can be dealt with under the sentencing parameters of the District Court, i.e. a maximum sentence of imprisonment of 12 months.[12]

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[10] At the outset it should be noted that it is beyond the scope of this paper to provide a list of offences which can give rise to sentences of between 12 and 24 months due to the large volume of criminal legislation and offences that exist. Therefore this section focuses on the types of offences which could give rise to a sentence between 12 and 24 months.

[11] Section 13(1) of the *Criminal Procedure Act 1967* and section 20 of the *Criminal Law (Rape)(Amendment) Act 1990* excludes a number of extremely serious indictable offences from the regime under section 13(2)(a). These excluded offences include those which are only triable in the Central Criminal Court (infra at p. 12).

[12] See section 13(2)(a) of the *Criminal Procedure Act 1967*.

A person convicted of an offence on indictment will not necessarily receive a sentence of greater than 12 months as no indictable offence carries a mandatory minimum sentence of at least 12 months. Where mandatory minimum sentencing applies these offences carry mandatory minimum sentences of greater than 24 months and hence are not relevant to this paper.[13]

From the above analysis it can be said that the only offences that result in custodial sentences of between 12 and 24 months are indictable offences, although not all indictable offences will result in sentences of imprisonment that fall within this range.

[13] Among the offences carrying a mandatory minimum sentence are offences under section 15A and section 15B of the *Misuse of Drugs Act 1977*(10 years) and certain serious firearms offences (10 or 5 years depending on the offence).

Statistical data

This section analyses the available statistics in relation to sentencing with a focus on sentences of imprisonment that range between 12 and 24 months. This section examines statistics available in relation to the Circuit Criminal Court, as offences reserved for hearing in the Central Criminal Court are excluded from the spent convictions regime under section 4 of the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016*. At the outset it should be noted that statistics available in relation to criminal sentencing are very limited.[14]

The Courts Service

The first source of statistics which this paper considers is those statistics that are available from the Courts Service Annual Report for 2017.[15] Table 1 (below) is a reproduction of the information set out in the Annual Report in relation to convictions in the Circuit Criminal Court.

Table 1. Offences: Outcomes (following convictions) Circuit Criminal Court in 2017

	Convictions resulting in imprisonment	Other outcomes[16]	Total
Road Traffic	153	430	**583**
Drugs	204	985	**1,189**
Sexual	212	297	**509**
Firearms	108	373	**481**
Larceny/Fraud/Robbery	1,115	2,538	**3,653**
Assault	284	800	**1,084**
Child Abuse	1	12	**13**
Manslaughter	2	0	**2**
Other	445	1,206	**1,651**
Total	**2,524**	**6,551**	**9,075**

Source: The Courts Service, Annual Report 2017, at p. 82.

Unfortunately no breakdown is given in relation to sentence length for these offences. The Courts Service provides statistics on their website which provide a breakdown in relation to the length of

[14] For example the Irish Sentencing Information System was last updated in 2014 and only provides statistics in relation to sentencing from 2008. For more information about the Irish Sentencing Information System see http://www.irishsentencing.ie/.

[15] The Courts Service, *Annual Report 2017*, available at http://irishsentencing.ie/Courts.ie/library3.nsf/(WebFiles)/8000F0BA4F127EE7802582CD00338311/$FILE/Courts%20Service%20Annual%20Report%202017.pdf.

[16] Other outcomes is the sum of the figures under the following headings in the table in Annual Report: Taken into Consideration, Fine, Bond, Disqualification, Community Service, Probation, Suspended Sentences and Other.

sentence imposed by the Circuit Criminal Court for certain categories of offences. However, this data is only available in relation to the following years, 2008 to 2011. Furthermore the breakdown only categorises sentences of imprisonment as less than 2 years, between 2 and 5 years, between 5 and 10 years and for greater than 10 years. Table 2 (below) reproduces and collates this data.

Table 2. Circuit Court sentences of imprisonment of less than 2 years for 2008 to 2011

	2011	2010	2009	2008	Total
Road Traffic	55	55	59	75	**244**
Drugs	88	88	91	204	**471**
Sexual	22	19	22	N/A	**63**
Firearms	48	137	24	67	**276**
Larceny/Fraud/Robbery	348	206	245	349	**1,148**
Assault	106	58	157	199	**520**
Child Abuse	4	1	1	4	**10**
Manslaughter	3	0	0	2	**5**
Total	**674**	**564**	**599**	**900**	**2,737**

Source: The Courts Service

The Irish Prison Service

Statistical data in relation to prison sentences is also provided by the Irish Prison Service. They provide yearly statistics in relation to sentenced committals by sentence length. This data reflects sentences imposed by all courts and there is no distinction provided for as to whether the sentence was imposed by the Circuit Criminal Court, the Central Criminal Court or the Special Criminal Court. Table 3 (below) is a reproduction of the breakdown of sentenced committals to prison in 2017.

Table 3. Sentenced committals in 2017 by gender

	Female	Male	Total	%
Less than 3 months	616	2,088	2,704	**44.79**
3 to 6 months	117	1,195	1,312	**21.73**
6 to 12 months	85	799	884	**14.63**
1 to 2 years	**26**	**320**	**346**	**5.73**
2 to 3 years	8	291	299	**4.95**
3 to 5 years	8	268	276	**4.57**
5 to 10 years	3	164	167	**2.77**
10+ years	0	27	27	**0.45**
Life Sentence	0	22	22	**0.37**
Total	**863**	**5,174**	6,037	**100.00**

Source: Irish Prison Service

Unfortunately no data is available outlining the offences for which the 346 people were sentenced to between 1 and 2 years of imprisonment. It should also be noted that committals to prison may arise on foot of a breach of a suspended sentence and hence the figures in Table 3 do not represent the number of custodial sentences handed down for between 12 and 24 months.

Offences excluded from the spent convictions and vetting regimes

This section lists the excluded offences as set out under the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* [the 2012 Act] and the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016* [the 2016 Act].

National Vetting Bureau (Children and Vulnerable Persons) Act 2012

Section 14A of the 2012 Act sets out that excluded offences do not have to be disclosed in relation to a vetting application to the National Vetting Bureau and defines an excluded offence as:

> "(a) an offence specified in Schedule 3, or
>
> (b) an offence specified in Part 1 or 2 of Schedule 1 of the *Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016*. [These are set out in more detail below]"

Schedule 3 includes the following offences:

- offences relating to the contravening a safety order, a barring order, an interim barring order or a protection order under section 17 of the *Domestic Violence Act 1996* or section 33 of the *Domestic Violence Act 2018*;
- offences relating to forced marriage under section 38 of the *Domestic Violence Act 2018*);
- coercive control under section 39 of the *Domestic Violence Act 2018*;
- an offence under the *Non-Fatal Offences against the Person Act 1997*;[17]
- cruelty to children under section 246 of the *Children Act 2001*;
- reckless endangerment of children under section 176 of the *Criminal Justice Act 2006*;
- offences related to falsely using a title reserved for registered persons under the *Health and Social Care Professionals Act 2005* and offences of falsely representing a person as being appropriately registered under the *Health and Social Care Professionals Act 2005* (see section 80 of the *Health and Social Care Professionals Act 2005*);
- offences related to falsely using a title reserved for registered persons under the *Medical Practitioners Act 2007* and offences relating to falsely representing that a person is a registered medical professional under the *Medical Practitioners Act 2007* (see section 41 of the *Medical Practitioners Act 2007*);
- offences related to falsely using the title of registered nurse or midwife under the *Nurses and Midwives Act 2011* and offences relating to falsely representing that a person is a registered nurse or midwife under the *Nurses and Midwives Act 2011* (see section 44 of the *Nurses and Midwives Act 2011*);
- an offence relating to the improper use of the title of nurse or midwife under section 49 of the *Nurses Act 1985*;
- an offence relating to the improper use of the title of dentist, dental surgeon or dental practitioner by unregistered persons under section 50 of the *Dentists Act 1985*;

[17] These offences include assault, assault causing harm, causing serious harm, threats to kill or cause serious harm, syringe related offences, coercion, harassment, demands for payments of debts causing alarm, poisoning, endangerment, endangering traffic, false imprisonment and child abduction offences.

- an offence of practicing dentistry by unregistered persons under section 51 of the *Dentists Act 1985*;
- offences relating to holding oneself out as a registered pharmacist or druggist under section 32 of the *Pharmacy Act 2007*;
- offences relating to make false representations as to being a registered teacher under section 56 of the *Teaching Council Act 2001*;
- an offence under the *Firearms Act 1925*;[18]
- an offence under the *Firearms Act 1964*;[19]
- an offence under the *Firearms and Offensive Weapons Act 1990*;[20]
- sale of intoxicating liquor to a person under the age of 18 under section 31 of the *Intoxicating Liquor Act 1988*;
- provision of intoxicating liquor for persons under the age of 18 years under section 32 of the *Intoxicating Liquor Act 1998;*
- an offence under the *Misuse of Drugs Acts 1977 to 2015*, other than a first offence under section 3 of the *Misuse of Drugs Act 1977*;[21]
- riot under section 14 of the *Criminal Justice (Public Order) Act 1994*;
- violent disorder under section 15 of the *Criminal Justice (Public Order) Act 1994*;
- affray under section 16 of the *Criminal Justice (Public Order) Act 1994*;
- blackmail, extortion and demanding money with menaces under section 17 of the *Criminal Justice (Public Order) Act 1994*;
- assault with intent to cause bodily harm or commit indictable offence under section 18 of the *Criminal Justice (Public Order) Act 1994*; and
- assault or obstruction of peace officer under section 19 of the *Criminal Justice (Public Order) Act 1994*.

[18] These offences include offences relating to the unlawful possession, carriage and use of firearms, offences relating to failure to comply with conditions of a firearm certificate, offences relating to prohibited firearms or ammunition, giving false information in relation to an application for a firearm certificate, offences relating to the authorisation of pistol or rifle clubs or shooting ranges, facilitating or engaging in dynamic or practical shooting, failure to report the loss of a firearm or ammunition, offences relating to the restriction on the manufacture and sale of firearms, possession of firearms with the intent to endanger lives and offences relating to the importing or exporting of firearms, ammunition and prohibited weapons.

[19] These offences include possession of a firearm while taking a vehicle without authority, use of firearms to resist arrest or aid escape, possession of firearms or ammunition in suspicious circumstances and carrying a firearm with criminal intent.

[20] These offences include possession or sale of silencers, reckless discharge of a firearm, offences relating to possession of knives and other dangerous articles, possession of a realistic imitation firearm in a public place, trespassing with a knife, weapons of offence or other article, production of an article capable of inflicting serious injury and offences related to shortening the barrel of a rifle or a shotgun.

[21] These include offences relating to the possession of controlled drugs for sale or supply, possession of drugs with a value of €13,000, importation of controlled drugs in excess of a certain value, supply of controlled drugs into prisons or places of detention, offences relating to certain activities relating to opium, cultivation of opium poppy or cannabis plant without a licence and offences relating to forged or fraudulently altered prescriptions.

Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016

An excluded offence is defined under section 4 of the 2016 Act as:

> ""excluded sentence" means a sentence imposed by a court, other than the District Court
>
> (a) of imprisonment for a term of more than 12 months unless it is a sentence specified in *paragraph (a)* of the definition of "non-custodial sentence",
>
> (b) for an offence that is reserved by law to be tried by the Central Criminal Court, or
>
> (c) for a sexual offence"

The following offences are reserved by law to be tried by the Central Criminal Court:

- Murder, attempted murder, conspiracy to murder;
- Rape, aggravated sexual assault and attempted aggravated sexual assault under the *Criminal Law (Rape) (Amendment) Act 1990*;
- Treason, encouragement or concealing knowledge of treason;
- Piracy;
- Offences relating to the obstruction of government and obstruction of the President; and
- ICC Offences[22] under the *International Criminal Court Act 2006*.

Sexual offences are set out in Schedule 1 of the 2016 Act. Part 1 of Schedule 1 sets out circumstances in which certain offences under Part 2 will not be considered a sexual offence for the purpose of the 2016 Act, and are thus not excluded from the regime.[23] Part 2 lists the sexual offences which are excluded from the spent convictions regime. It should be noted that a significant number of these offences have been repealed and replaced; however, convictions for these offences would remain on the criminal record of an offender. These offences include:

- rape;
- sexual assault;
- aggravated sexual assault (see section 3 of the *Criminal Law (Rape) (Amendment) Act 1990*);
- rape under section 4 of the *Criminal Law (Rape)(Amendment) Act 1990*;[24]
- incest by males (section 1 of the *Punishment of Incest Act 1908*);
- incest by females over 17 years of age (section 2 of the *Punishment of Incest Act 1908*);
- defilement[25] of a child under 15 years of age (section 2 of the *Criminal Law (Sexual Offences) Act 2006*);

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[22] Section 9(1) of the 2006 Act defines ICC Offences as including genocide, crimes against humanity, war crimes and ancillary offences. Section 6 sets out that these offences can also be heard in the Special Criminal Court and before a court-martial, where the accused is the subject of military law.

[23] These relate to instances of sexual assault or incest where the victim is aged over 17 and the offender did not receive a punishment involving deprivation of liberty, offences relating to children where the victim is aged between 15 and 17 and the offender is not more than three years older than the victim, and in respect of the offence of defilement of a child under 17 if it was committed prior to the commencement of section 17 of the *Criminal Law (Sexual Offences) Act 2017* where the person who is convicted of the offence was at the date of the commission of the offence, not more than 24 months older than the child.

[24] Rape under section 4 refers to penetration of the anus or mouth by a penis or penetration of the vagina by any object held or manipulated by another person.

- defilement of a child under 17 years of age (section 3 of the *Criminal Law (Sexual Offences) Act 2006*);
- defilement of a girl under 15 years of age (section 1 of the *Criminal Law Amendment Act 1935*);
- defilement of a girl between 15 and 17 years of age (section 2 of the *Criminal Law Amendment Act 1935*);
- soliciting or importuning for purposes of commission of sexual offence (section 6 of the *Criminal Law (Sexual Offences) Act 1993*);
- buggery of persons under 17 years of age (section 3 of the *Criminal Law (Sexual Offences) Act 1993*);
- gross indecency[26] with males under 17 years of age (section 4 of the *Criminal Law (Sexual Offences) Act 1993*);
- gross indecency (section 11 of the *Criminal Law Amendment Act 1885*);
- sexual intercourse, buggery and gross indecency of mentally impaired persons (section 5 of the *Criminal Law (Sexual Offences) Act 1993*);
- defilement of mentally impaired females (section 4 of the *Criminal Law Amendment Act 1935*);
- child trafficking and taking, etc., child for sexual exploitation (section 3 of the *Child Trafficking and Pornography Act 1998*);
- allowing a child to be used for child pornography (section 4 of the *Child Trafficking and Pornography Act 1998*);
- organising etc. child prostitution or production of child pornography (section 4A of the *Child Trafficking and Pornography Act 1998*);
- producing, distributing, etc., child pornography (section 5 of the *Child Trafficking and Pornography Act 1998*);
- participation of child in a pornographic performance (section 5A of the *Child Trafficking and Pornography Act 1998*);
- possession of child pornography (section 6 of the *Child Trafficking and Pornography Act 1998*);
- an offence under the *Criminal Law (Human Trafficking) Act 2008* in so far as the offence is committed for the purposes of the sexual exploitation, within the meaning of that Act, of a person;
- causing or encouraging a sexual offence upon a child (pursuant to section 249 of the *Children Act 2001*);
- causing or encouraging a sexual offence upon a child (pursuant to section 17 of the *Children Act 1908*);
- procuring defilement of a woman by threats or fraud or administering drugs (section 3 of the *Criminal Law Amendment Act 1885*);

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[25] Defilement involves engaging in an unlawful sexual act.

[26] Gross indecency was the offence committed by men who engaged in sexual activity with other men.

- sexual offences committed outside the State in so far as it relates to an offence specified in the Schedule to that Act that is also specified in this Schedule to the extent that it is so specified (section 2 of the *Sexual Offences (Jurisdiction) Act 1996*);
- obtaining, providing etc. a child for purpose of sexual exploitation (section 3 of the *Criminal Law (Sexual Offences) Act 2017*);
- invitation etc. to sexual touching (section 4 of the *Criminal Law (Sexual Offences) Act 2017*);
- sexual activity in presence of a child (section 5 of the *Criminal Law (Sexual Offences) Act 2017*);
- causing a child to watch sexual activity (section 6 of the *Criminal Law (Sexual Offences) Act 2017*);
- meeting a child for purpose of sexual exploitation (section 7 of the *Criminal Law (Sexual Offences) Act 2017*);
- use of information and communication technology to facilitate sexual exploitation of a child (section 8 of the *Criminal Law (Sexual Offences) Act 2017*);
- engaging in a sexual act with a protected person (section 21 of the *Criminal Law (Sexual Offences) Act 2017*);
- an offence against a relevant person by a person in authority (section 22 of the *Criminal Law (Sexual Offences) Act 2017)*;
- an offence of attempting to commit any of the offences set out in Part 2;
- offences consisting of aiding, abetting, counselling, procuring or inciting the commission of any of the offences set out in Part 2; and
- an offence of conspiracy to commit any of the offences set out in Part 2.

Conclusion

A number of considerations arise from the above analysis:

- Article 40.1 of the Constitution provides for a guarantee of equality, which can be restricted in order to recognise differences of capacity;
- Age based differences of capacity can be reflected in legislation, provided that the rationale underpinning any differences of treatment based on age meet the legitimate purpose test;
- By extending the persons for whom the scheme for spent convictions is available to persons convicted of offences resulting in a sentence of between 12 and 24 months, this will means that persons convicted of indictable offences in the Circuit Criminal Court will now come under this regime; and
- The statistical data in relation to sentencing in the Circuit Criminal Court is insufficient to ascertain the volume and type of offences that are most likely to be capable of being considered spent under the Bill.

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Part 2 — Requirements for convictions to become spent

6. Serious convictions

(1) A serious conviction incurred by a person becomes spent if, on application being made by that person to a District Court judge, the judge makes an order declaring that the conviction is spent.

(2) An application under subsection (1) may not be made by a person in respect of a conviction —

(a) until the prescribed period for that conviction has expired; or

(b) if a judge has refused to make an order under that subsection in respect of the same conviction within the preceding 2 years.

(3) The provisions in Schedule 1 apply to an application under subsection (1) and the determination of the application.

(4) The making of an order under subsection (1) is at the discretion of the judge and that discretion shall be exercised having regard to —

(a) the length and kind of sentence imposed in respect of the conviction; and

(b) the length of time since the conviction was incurred; and

(c) whether the conviction prevents or may prevent the applicant from engaging in a particular profession, trade or business or in a particular employment; and

(d) all the circumstances of the applicant, including the circumstances of the applicant at the time of the commission of the offence and at the time of the application; and

(e) the nature and seriousness of the offence; and

(f) the circumstances surrounding the commission of the offence; and

(g) whether there is any public interest to be served in not making an order.

[Section 6 amended: No. 24 of 1989 s. 3.]

7. Lesser convictions

(1) A lesser conviction incurred by a person becomes spent when, on application being made in the prescribed form by that person to the Commissioner of Police, the Commissioner issues to the applicant a certificate that the conviction is spent.

(2) An application under subsection (1) may not be made by a person in respect of a conviction until the prescribed period for that conviction has expired.

(3) The Commissioner of Police does not have a discretion to issue or not issue a certificate under subsection (1) but must issue a certificate if the application conforms with this Act.

(4) When the Commissioner of Police issues a certificate under subsection (1) he shall also give to the person notice in the form referred to in section 33(2).

8. Convictions in other jurisdictions (Sch. 2)

(1) A conviction for an offence against Commonwealth law or the law of another State or of a Territory is spent if it comes within a clause of Schedule 2.

(2) Regulations may be made under section 33 amending Schedule 2 to make provision for or in relation to convictions by courts of the Commonwealth or of other States or of Territories.

9. Term used: serious conviction

For the purposes of this Act ***serious conviction*** means a conviction in respect of which the sentence imposed is —

(a) imprisonment for more than one year or for an indeterminate period; or

(b) a fine of $15 000 or more.