



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

SPENT CONVICTIONS

(LRC 84-2007)

IRELAND

**Law Reform Commission
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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 82 Reports containing proposals for reform of the law; 11 Working Papers; 45 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie

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Full responsibility for the content of this publication, however, lies with the Commission.

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INTRODUCTION

1. This Report forms part of the Commission's *Second Programme of Law Reform 2000-2007*.¹ The Second Programme states that, in the wider context of the law of privacy,² the Commission would examine "privacy in the context of the criminal justice system: the longevity of criminal records and the expunging of certain offences from the record."³ This aspect of the Second Programme reflects the current position in Irish law that records of criminal convictions are permanent, but that there is a case for examining whether some convictions might be "expunged" from the record

A Spent Convictions, Expungement and Clean Slates

2. The Commission acknowledges that the word "expunged" may not convey with clarity the precise scope of this Report. As the detailed discussion in this Report indicates, the relevant literature and legislation in this area uses a variety of phrases to describe the nature of the issue. Some material refers to the problem of the permanency of old convictions, especially in terms of job prospects, and the need to encourage the rehabilitation of ex-offenders by introducing a law which allows them to decline to disclose old convictions. Other discussions focus on the need to ensure that a national database or official record of criminal convictions can be amended by the deletion, the expungement, of old convictions. The most graphic phrase used in this context is that the purpose is to give the ex-offender a "clean slate" by wiping away their criminal record. In the Commission's view, the first meaning – allowing a person to decline to reveal an old conviction – accurately reflects the issue for the ex-offender. The second meaning addresses another important aspect, society's interest in having an accurate database of criminal convictions in order to ensure reliable vetting of applicants for certain sensitive positions, including those involved in the supervision or care of children, vulnerable adults or in the

¹ Second Programme for Examination of Certain Branches of the Law with a view to their reform 2000-2007, approved by the Government in December 2000 under the *Law Reform Commission Act 1975*.

² Under the Commission's *First Programme of Law Reform*, which ran from 1977 to 1999, the Commission published a *Report on Privacy: Surveillance and the Interception of Communications* (LRC 57-1998).

³ Topic 10 of the *Second Programme of Law Reform 2000-2007*.

context of sensitive public positions, such as those connected with State security or the legal system. In the Commission's view, the third phrase – clean slate – provides a less accurate description because, as the analysis in this Report indicates, no State has introduced a law which completely wipes away all old criminal convictions: any legislation in this area is limited to one degree or another. While the Commission accepts that each of these phrases appears in the discussion of the issue being addressed here, and the Commission reflects that varied use, the phrase spent conviction has been chosen as the title for this Report on the basis that it conveys the main elements of the inquiry involved in this area of law.

3. In summary, therefore, the issue to be addressed is whether it is appropriate that, in some circumstances, the law should provide that an individual need not always disclose that they have an old conviction and that, in certain circumstances, relevant authorities who maintain a national criminal records database should be able to decline to disclose old convictions. As the Second Programme indicates, this is an important issue of privacy for the individual. As the detailed discussion in this Report also makes clear, the right to privacy should be considered in the context of society's interest to protect vulnerable groups and society's other competing public interests.

B Spent Convictions and the Court Poor Box

4. The Commission engaged in a preliminary examination of a spent convictions regime in its 2004 *Consultation Paper on the Court Poor Box*.⁴ The Court Poor Box is an informal disposition used in criminal cases which has the effect of dismissing a criminal charge. The Commission has pointed out that the Court Poor Box is used primarily – and should only be so used – in the context of trivial⁵ or otherwise minor offences, which are dealt with for the most part in the District Court. The Commission has also noted that the absence of a spent convictions regime for adult offenders appears to one factor connected with the extensive use of the Court Poor Box by some judges of the District Court. The Commission has also concluded that this may have also led to the inappropriate application of the Court Poor Box disposition in cases which were not trivial or minor in nature.⁶ Accordingly, in the Commission's *Report on the Court Poor Box: Probation of Offenders*,⁷ the Commission Report recommended that the Court Poor Box

⁴ LRC CP 31-2004, Chapter 5.

⁵ The word "trivial" is used in the *Probation of Offenders Act 1907*, with which the Court Poor Box disposition is often linked in practice.

⁶ See the Commission's *Report on the Court Poor Box: Probation of Offenders* LRC 75-2005, which followed from the 2004 *Consultation Paper on the Court Poor Box*.

⁷ LRC 75-2005.

be placed on a statutory basis, incorporating its positive features, and integrating it into a more extensive regime of non-custodial sanctions which would also replace the statutory dismissal power in section 1(1) of the *Probation of Offenders Act 1907*.

5. In the 2004 *Consultation Paper on the Court Poor Box* the Commission accepted that a spent convictions scheme would avoid the potential risk that a disposition such as the Court Poor Box could be used in inappropriate contexts. Nonetheless, in view of the complexity of the issues raised, the Commission concluded that it would proceed first to a final Report focusing on the Court Poor Box and then return to deal with spent convictions separately. Having published the 2005 *Report on the Court Poor Box: Probation of Offenders*,⁸ this Report completes the Commission's analysis of the area. As will be clear from the detailed analysis in this Report, the Commission's approach has been influenced by its examination of the Court Poor Box.

C Outline of the Report

6. In Chapter 1, the Commission examines the nature of a criminal conviction in Ireland, in particular its permanent nature for adult offenders. The Commission discusses the long term effects that a criminal record can have on an adult in terms of, for example, employment prospects, public service, entry to professions and foreign travel. The Commission also discusses the type of legislation introduced in other States which has alleviated some of these effects, particularly in terms of employment. The Commission also examines the limited spent conviction scheme introduced in the State by section 258 of the *Children Act 2001* in respect of offences committed by persons under 18 years of age. The Chapter discusses the general arguments for and against spent conviction laws. The Commission concludes with a final recommendation on the introduction of a spent conviction scheme for adult offenders in this jurisdiction.

7. In Chapter 2, the Commission discusses the various general approaches taken to the establishment of spent conviction schemes in other jurisdictions, including the United Kingdom, Australia, New Zealand and Canada, virtually all of which are based on the general model in the British *Rehabilitation of Offenders Act 1974*. These schemes are discussed under various detailed headings. The Commission concludes by recommending the introduction of a limited spent convictions scheme for adult offenders, which would build on the scheme already in place for under-18 offenders in section 258 of the *Children Act 2001* and in comparable schemes in other jurisdictions.

⁸ LRC 75-2005

8. In Chapter 3, the Commission sets out in detail the elements of the proposed spent convictions scheme, including: the types of offences which should be excluded, the sentencing threshold which should apply, the required conviction-free period before which a conviction can be considered eligible for expungement and whether an automatic or application-based system would be appropriate. The Commission also discusses the circumstances in which the protection of the spent convictions legislation should not apply, for example in criminal proceedings or in relation to certain civil matters.

9. In Chapter 4, the Commission discusses the connection between a spent convictions regime and the issue of vetting or disclosure of criminal convictions for certain purposes. The Commission examines the history of vetting in Ireland and its current operation. It then proceeds to examine how a vetting system operates in the context of a spent convictions regime, using the system in the United Kingdom by way of example. The Commission examines proposals for reform of the operation of the vetting regime and how this might fit with a proposed spent convictions system. The Commission discusses some specific issues concerning disclosure, in particular the effect of the registration requirements for sex offenders and disclosure in the context of court proceedings.

10. The Appendix to this Report contains a draft *Spent Convictions Bill* to give effect to the Commission's recommendations. The Commission notes here that this Bill does not include any provisions concerning vetting or disclosure. For the reasons set out in detail in Chapter 4, a spent convictions regime must be set against the background of the arrangements for vetting and disclosure but any legislative reform in this area is outside the ambit of this Report

CHAPTER 1 THE PROBLEM OF OLD CONVICTIONS

A Introduction

1.01 In this Chapter, the Commission examines the nature of a criminal conviction in Ireland, in particular its permanent nature for adult offenders. In Part B, the Commission discusses the long term effects that a criminal record can have on an adult in terms of, for example, employment prospects, public service, entry to professions and foreign travel.

1.02 In Part C, the Commission discusses the type of legislation introduced in other States which has alleviated some of these effects, particularly in terms of employment. These are sometimes referred to as 'spent conviction,' 'clean slate' or 'expungement' laws. The Commission also examines the limited spent conviction scheme introduced in the State by section 258 of the *Children Act 2001* in respect of offences committed by persons under 18 years of age.

1.03 In Part D, the Commission discusses the general arguments for and against spent conviction laws. In Part E, the Commission considers this debate in its specific setting in Ireland, having regard to the State's European and international obligations.

1.04 In Part F the Commission concludes with a review of the issues discussed in the Chapter and its final recommendation on the introduction of a spent conviction scheme for adult offenders in this jurisdiction.

B Nature and effect of a criminal record

1.05 In this Part, the Commission discusses the permanent nature of a criminal conviction on an adult offender, a person over 18 years of age. Under section 258 of the *Children Act 2001* - a spent conviction provision which the Commission discusses in detail later in this Report - offences committed by people under 18 years of age can be 'expunged' from the record or deemed to be 'spent,' subject to certain conditions. This Report is concerned with whether some form of 'spent conviction' law should be introduced for adult offenders. In this respect, the Commission is conscious that some convictions obviously involve extremely serious offences, such as murder and sexual offences. Others involve less serious matters, such as some public order offences and minor assaults. Some of the people

convicted will receive a lengthy prison sentence, while others will be required to pay a small fine.⁹ For the purpose of this Report, the crucial point is that, regardless of the offence or punishment, under current Irish law the conviction of an adult offender remains a matter of *permanent public record*. Indeed, as the Commission noted in its *Report on the Court Poor Box: Probation of Offenders*,¹⁰ this consequence – as well as the limited availability of non-custodial sentencing options - has led some judges to use the Court Poor Box or the *Probation of Offenders Act 1907* in circumstances which the Commission considered were inappropriate.¹¹ The Commission recommended in the *Report on the Court Poor Box: Probation of Offenders* that more non-custodial options should be available to sentencing judges dealing with minor offences.¹² This Report deals with the remaining issue as to whether a conviction should no longer be regarded in all circumstances as being permanent. Louks, Lyner and Sullivan note that:

“Punishment for a crime does not necessarily end with the completion of a sentence; the stigma of a criminal record may follow people for years after they have ‘paid’ for their offence.”¹³

1.06 From a practical point of view, the convicted person must disclose the existence of the conviction in a number of circumstances, notably when applying for a job. Regardless of the length of time since the conviction, or that the person has had no convictions since then, or that the offence has no relevance to the job being sought, Irish law requires disclosure of the conviction once the prospective employer asks the question: “have you been convicted of a criminal offence?” The Commission wishes to emphasise at this early stage that the disclosure of a criminal record – and the associated entitlement of some prospective employer to make vetting-type inquiries before employing a person – is entirely appropriate in some instances. We return to the issue of vetting and disclosure of criminal convictions later in this Report. At this stage, however, the Commission explores whether the

⁹ The *Annual Report of the Courts Service 2005*, available at www.courts.ie, indicates that the overwhelming majority of criminal trials involve minor offences. In 2005 the District Court, which is limited to dealing with minor offences, heard a total of 302,134 cases. By comparison, the Central Criminal Court, which tries the most serious criminal offences such as murder and rape, received 83 new cases in 2005.

¹⁰ LRC 75-2005.

¹¹ *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005), at paragraph 1.43.

¹² *Ibid.*, at paragraph 2.31.

¹³ Louks, Lyner and Sullivan, *The Employment of People with Criminal Records in the European Union*, *European Journal on Criminal Policy and Research*, Issue 6, 195, 1998.

current position, in which all criminal convictions remain permanently on a person's "record" is appropriate.

1.07 Much of the debate internationally about whether reform is required to deal with the permanency of criminal records centres on the negative effect that disclosure can have on employment prospects, but a criminal conviction can also affect a person's life in numerous other ways. A person who applies for entry to certain professions such as the law, medicine or accountancy, must disclose whether they have a criminal conviction. This is also the case where a person applies for various licences, such as a PSV (public service vehicle) driver's licence, a firearms licence or a gaming licence. It also applies in the context of an insurance policy, at least where a traditional proposal form is involved.¹⁴ The implications of disclosure in these situations are similar: entry to the profession is denied, the licence is refused or insurance cover is declined. The consequences may be even more serious where the person fails to disclose the conviction but its existence emerges at a later date. In this case, an employee may be dismissed or a person may be excluded from a profession. The Commission notes that, in some instances, this may be appropriate,¹⁵ but the issue for this Report is whether, for example, these consequences should apply equally to a person convicted of murder 10 years previously as to a person convicted of a minor public order offence 10 years previously. In the case of a contract of insurance based on a proposal form (where all material risks must be disclosed), if the insured has not disclosed a conviction the insurer is entitled to rescind the policy and decline to make any payment where a claim is made. In the 1972 Gardiner Committee Report *Living it Down – The Problem of Old Convictions*,¹⁶ it was also pointed out that individuals may

¹⁴ See generally Kilcommins, "The duty to disclose previous criminal convictions in Irish insurance law," (2002) 37 *Ir Jur (ns)* 167.

¹⁵ In the Canadian case *Re Therrien* [2001] 2 SCR 3, the applicant had been convicted in 1970 of giving unlawful assistance to the Quebec separatist movement, but had been pardoned in 1987. After his conviction, he qualified as a lawyer. Between 1989 and 1996, he applied a number of times to be a judge. On two separate occasions when he disclosed his conviction and pardon, he was not appointed as a judge because of his conviction. When he later applied to be appointed a judge, but did not disclose his conviction and pardon, he was appointed. When his conviction later emerged, he was removed from office. The Supreme Court of Canada dismissed his application to overturn his removal from office, holding that it was not in breach of the concept of judicial independence that his conduct prior to appointment be investigated.

¹⁶ *Living it Down – The Problem of Old Convictions* (Stevens & Sons, 1972) was the Report of a Committee established jointly by Justice, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders (NACRO). The Committee was chaired by the former Lord Chancellor, Lord Gardiner. The Report's recommendations were, in large measure, implemented by the enactment of the British *Rehabilitation of Offenders Act 1974*, which has become a model for spent convictions legislation in many other common law jurisdictions.

be disinclined to appear as witnesses in court for fear that a previous conviction would emerge under cross-examination.

1.08 It is clear, therefore, a criminal conviction has numerous collateral consequences for the convicted person. It could be argued that these constitute continuing punishments, which remain long after the principal punishment for the offence has been completed. In that respect, current Irish law does not recognise a point at which an adult offender's debt to society has been paid.¹⁷ The sentence imposed by a court - whether a fine, community service or definite term of imprisonment - will be completed at some point, but the conviction and, in particular, the requirement to disclose it, never lapses.

1.09 The current position in Irish law thus appears to reflect a view that a conviction involves not merely immediate punishment, but also has certain consequential effects which, historically, might be described under the general heading of 'forfeiture.' Historically, of course, the law imposed harsh punishments on offenders. Until the early 19th century, capital punishment was a common punishment, and consequential forfeiture to the Crown of any land and other property often followed. By the early 19th century, the death penalty was abolished for most serious offences (felonies), and transportation became for a time the preferred punishment for convicted felons until this was replaced by penal servitude in the mid 19th century. The *Forfeiture (Ireland) Act 1870* continued to provide that all property and chattels owned by a convicted felon were forfeited to the Crown, and felons were also prohibited from entering into contracts or from exercising other rights such as voting. By the early 20th century, the majority of these prohibitions were repealed, but the 1870 Act was only repealed in full by the *Criminal Law Act 1997*, which abolished the historical distinction between felonies and misdemeanours. It can at least be argued that the permanency of a criminal record reflects the consequential views expressed in the *Forfeiture (Ireland) Act 1870*.

1.10 It has been pointed out by various commentators that, at least historically, the introduction of a particular form of lawful punishment may be connected with conditions in the labour market at that point.¹⁸ Rusche and Kirscheimer argue that when labour was scarce punishments such as transportation and galley slavery that made use of convict labour were popular. They note that, at a time when labour was scarce, "it would be

¹⁷ In Chapter 2, below, the Commission discusses the 'clean slate' provision in section 258 of the *Children Act 2001* which applies to offenders under 18 years of age.

¹⁸ See generally McCullagh, "Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland," (1992) 2 *Irish Journal of Sociology* 1.

economically ‘senseless’ cruelty to keep destroying criminals.”¹⁹ Rather than execute people, it made more sense to put them in prison and to use their labour in prison industries. Conversely, when labour was plentiful, punishment which destroyed labour, such as execution and mutilation, were used. While the early 21st century presents a remarkably different setting from the early 19th century, the links between the employment market and crime remain a significant consideration. In a market with virtually full employment and where vacancies are difficult to fill, employers may be more prepared to employ a person who discloses a criminal conviction. Conversely, if jobs are scarce and there are more applicants than vacancies, it is more likely that those with criminal records will lose out.

1.11 In summary, while the forfeitures that were a formal feature of the law in the 19th century are no longer in place, it remains the case that, for adult offenders a criminal conviction, once imposed, remains on record for life. The Commission now turns to examine schemes which have been developed in other jurisdictions to deal with this.

C Spent Conviction Schemes

(1) Existing spent conviction schemes

1.12 The laws used in different States to limit the permanent consequences of a criminal conviction have been given various titles, such as ‘spent conviction,’ ‘clean slate,’ ‘expungement,’ or ‘rehabilitation’ laws. The British law in this area, the *Rehabilitation of Offenders Act 1974*, emphasises that its purpose is to assist the reintegration of offenders into society, particularly by assisting them to get jobs. The 1972 Gardiner Report *Living it Down – The Problem of Old Convictions*,²⁰ which led to the enactment of the 1974 Act, noted that offenders who did not get jobs were more likely to re-offend. It is also worth noting that the Home Office’s 2002 review of the 1974 Act was called *Breaking the Circle*. In general, where such legislative schemes are introduced, they provide that, *for certain offences and subject to certain conditions*, a person is not required to disclose the existence of their criminal conviction. In virtually all such laws, there are a number of common elements. Thus, certain offences - such as murder and sexual offences - are often excluded, so that these always remain on the person’s “record” permanently and are never “spent.” There is also often a “qualifying” time period - usually a sliding scale related to the sentence imposed – so that if the person commits any other offence in that time frame the conviction will not be “expunged” or deleted from the record.

¹⁹ See Rusche and Kirscheimer, *Punishment and Social Structure*, Russell and Russell, New York 1968 cited in McCullagh, *op cit* at 4.

²⁰ See fn.8, above.

Such laws often include special “disclosure” rules, so that if a person is applying for a particularly sensitive job, such as working with children, even a conviction that is, for all other purposes “expunged” or “spent” can be disclosed to the prospective employer by a “vetting” or “disclosure” agency. In some States, the legislation is further underpinned by an anti-discrimination provision which might provide, for example, that – subject to whatever exclusions and limitations apply - a prospective employer may not unreasonably discriminate against a person with a “spent” criminal conviction.

(2) *Civil Law Approach*

1.13 Spent conviction schemes are a relatively recent innovation in common law jurisdictions,²¹ but by contrast civil law regimes have traditionally tackled the issue of old convictions through anti-discrimination provisions in their Constitution or their Civil Code. For example, the Portuguese Constitution provides a general prohibition on discrimination regarding ‘social condition’ or ‘other condition or personal or social circumstance’ or ‘on any other ground whatsoever’. Similar provisions exist in Spain, and Article 73 of the Spanish General Law for the Penitentiary System also provides that those who have completed their sentences fully regain their rights as citizens and that “under no circumstances can criminal records serve as a motive for social or judicial discrimination.” Directives issued pursuant to Articles 118 of the Spanish Penal Code state that criminal records can be erased after 6 months for non-serious offences and after 2 years for serious offences. In circumstances where a prison sentence was imposed, 3 years must have elapsed that sentences was served. In Italy, Article 179 of the Penal Code provides that rehabilitation will be deemed to have occurred 5 years after the principal punishment has been completed.

1.14 In Germany, the Federal Public Prosecution Office maintains two registers. Details are kept on the Central Federal Register (Bundeszentralregister) for between 5 and 20 years depending on the severity of the sentence and, in relation to sex offenders, details are kept on the register for 20 years. Those sentenced to life imprisonment may never have their details deleted. As regards juvenile offenders, details are recorded in the Educational Register (Erziehungsregister). Juveniles receiving prison sentences are also recorded in the Central Federal Register. An entry in the Educational Register is deleted when the person is 24 years old.

1.15 In Greece, a Code of Criminal Procedure regulates the maintenance of criminal records. An individual’s criminal record is

²¹ Britain was the first common law jurisdiction to introduce spent convictions legislation in 1974 (extended to Northern Ireland in 1978), followed by Australian states in the 1980s and most recently by New Zealand in 2004. Canada, being a mix of both civil and common law, introduced similar measures in 1985.

automatically deleted in full when that person dies or reaches 80 years of age. Otherwise, Greek law provides for criminal records to be deleted after three years on completion of a sentence of less than 6 months; after five years on completion of a sentence of less than 12 months and after eight years for a sentence of more than 12 months. In relation to juvenile offenders, most records for minor offences are deleted when they reach 17 years, but for more serious offences, records are to be deleted five years after the completion of a sentence of less than 12 months or eight years for a sentence of more than 12 months, on condition that they have not re-offended. Greek law also provides that an individual may apply to the President for a pardon which would delete their criminal record. A small number of people use this procedure annually.

1.16 In Belgium, the Code of Criminal Procedure regulates criminal records under which custodial and other sentences of less than six months are spent after three years. An individual may also apply for details of a prison sentence of up to five years to be spent after three years, or for a prison sentence of over five years to be spent after ten years. These periods are doubled in relation to repeat offenders.

1.17 In France, details of a criminal record may be removed from the database as result of an amnesty or by rehabilitation. There is a blanket amnesty after every presidential election in France for offenders who have received certain sentences with the result that certain offenders serve no sentence at all. This is a highly criticised aspect of the French system, and in recent years it has not been applied, for example, to road traffic offences. Rehabilitation, that is the deletion of the criminal record, can be automatic or can be obtained by court order. Automatic rehabilitation is dependent upon the offender having a clean record for a certain period according to the type of sentence received. The period varies from three years for a fine to ten years for a custodial sentence and time starts to run on completion of the sentence. A court can grant judicial rehabilitation on request from the offender after three to five years however this period is increased if the offender does not complete a sentence or commits other offences. In this case, the court has discretion to grant the rehabilitation or not. Records for young offenders who have committed minor offences are erased when the individual reaches 18 years.

1.18 A common feature of the civil law approach to criminal records is an anti-discrimination provision which prohibits discrimination generally on the ground of 'social condition' or 'any other ground whatsoever'. Another common feature is a prohibition on offenders holding jobs in the certain areas, professions and in the public service, despite the existence of anti-

discrimination measures in most civil codes or constitutions.²² Finally, many have a two-tier system of deletion of criminal records: automatic deletion is provided once certain conditions have been met, but most also provide for an application procedure in which an offender can apply to have the criminal record deleted.

(3) Common Law Approach

1.19 Spent conviction schemes in common law jurisdictions are a relatively recent innovation. The problem of old convictions was first examined in the UK in the 1972 Report of the Gardiner Committee *Living it Down: The Problem of Old Convictions*,²³ which led to the introduction of the *Rehabilitation of Offenders Act 1974*. A comprehensive review of the 1974 Act was published by the Home Office in 2002, *Breaking the Cycle: a report of the review of the Rehabilitation of Offenders Act 1974*, which recommended a number of significant reforms of the 1974 Act.²⁴

1.20 In 1978, the essential terms of the 1974 Act were extended to Northern Ireland by the *Rehabilitation of Offenders (Northern Ireland) Order 1978*. The 1974 Act has also been the basis for similar reforms in other common law jurisdictions. In 1987, the Law Reform Commission of Australia published a *Report on Criminal Records* and most of the recommendations in the Report were implemented in the *Crimes Legislation Amendment Act 1989* which introduced Commonwealth protection in relation to spent convictions. Subsequent to this, the States and Territories of Australia began to enact their own spent convictions legislation.²⁵ Western Australia enacted the *Spent Convictions Act 1988*; Queensland enacted the *Criminal Law (Rehabilitation of Offenders) Act 1986*; New South Wales enacted the *Criminal Records Act 1991*; the Northern Territories enacted the *Anti-Discrimination Act 1992* and the Australian Capital Territory enacted the *Spent Convictions Act 2000*. In Canada, the *Canadian Human Rights Act 1985* introduced protection for ex-offenders in the anti-discrimination context as well as provisions regarding the deletion of criminal records in the *Criminal Records Act 1985*. New Zealand enacted expungement legislation in the form of the *Criminal Records (Clean Slate)*

²² See Tableau comparative de certain régimes d'incapacités (1978) (France) which is cited in Louks et al The Employment of People with Criminal Records in the European Union, *European Journal on Criminal Policy and Research*, 1998 at 198 as containing over 100 circumstances which prohibit ex-offenders from various types of work.

²³ See fn.8, above.

²⁴ This Report is examined in greater detail in chapter 3 below.

²⁵ Some States or Territories introduced protection to ex-offenders by means of anti-discrimination legislation rather than explicit spent convictions legislation. This distinction is examined in detail in Chapter 2 below.

Act 2004. Expungement schemes have also been operational in many states in the United States since the 1980s.

1.21 A number of common features exist in the spent conviction schemes in the various common law jurisdictions. These features are examined by the Commission in greater detail in Chapter 2 but, for present purposes, it is sufficient to note that most are limited in the sense that certain offences, usually the most serious offences against the person, are generally not eligible for expungement. Others are limited in that only offences which attract a penalty below a certain threshold are eligible for expungement. By contrast, most of the civil law jurisdictions - with the exception of Germany - place no restriction on the length of sentence that can be erased.²⁶ Most of the common law schemes also contain certain exclusions in the public interest, which means that a criminal record can be disclosed where the offender seeks employment or office in specified sensitive posts or positions, for example working with children or vulnerable people. Civil law regimes also provide for the exclusion of offenders from certain employment and professions.

(4) *Spent conviction provisions in Ireland*

1.22 Ireland is in a small minority at a European and, indeed, an international level insofar as it is one of the few States that does not have some form of spent convictions or clean slate scheme in place for adult offenders. In the British Home Office's 2002 review of the *Rehabilitation of Offenders Act 1974 Breaking the Circle* it noted that, of 21 countries examined, only Ireland and Slovenia had no system in place for the deletion of the criminal records of adult offenders.²⁷ As already noted, section 258 of the *Children Act 2001* sets out a spent convictions scheme for offences committed by persons under 18 years of age.

(a) *Spent convictions for persons under 18 years*

1.23 Section 258 of the *Children Act 2001* is based on similar provisions in the British *Rehabilitation of Offenders Act 1974* and the *Rehabilitation of Offenders (Northern Ireland) Order 1978*. Section 258 of the 2001 Act creates a limited spent conviction or clean slate scheme for offences committed by persons under the age of 18 years and came into effect in 2002.²⁸ It provides that an individual convicted of an offence while

²⁶ The German system does not allow for the deletion of life sentences and only allows for the deletion of sentences for sexual offences after 20 years. Most of the other civil law regimes examined provide no such limitation in terms of sentence imposed or offence committed.

²⁷ See *Breaking the Circle- a report of the review of the Rehabilitation of Offenders Act 1974*, Home Office, 2002 at pages 65-72.

²⁸ *Children Act 2001 (Commencement) Order 2002* (SI No 151 of 2002).

under the age of 18 years is not required to answer any questions in relation to that offence, provided that 3 years have elapsed since the date of the conviction and that, during that time, the individual has not been dealt with for any other offence.

1.24 The effect of section 258 of the 2001 Act is that an individual who comes within its terms is not required to disclose the criminal conviction under any circumstances even if asked to do so. It is significant that this is fully retrospective, so that it applies whether the offence occurred before or after the coming into force of the 2001 Act. Thus, if a person committed an offence in 1975 when he or she was under 18 years of age, and was not convicted of an offence within 3 years after 1975, that conviction is (since the 2001 Act came into force in 2002) considered spent. The only limitation in this regard is contained in section 258 (1)(c) of the 2001 Act, which provides that the offence may not become spent if it is one which is (or was) required to be tried by the Central Criminal Court (that is, the High Court exercising its jurisdiction in connection with indictable offences). This excludes a number of the most serious offences from the ambit of the 2001 Act, notably murder, rape and other serious sexual assaults, all of which must be tried in the Central Criminal Court. Nonetheless, it should be noted that the scheme in the 2001 Act is, at least on its face, more inclusive and far-reaching than comparable schemes in other common law regimes insofar as there are no other exclusions from its scope. It should be noted, however, that section 258(4)(d) of the 2001 Act provides that the Minister for Justice may, by Order, exclude or modify the application of the 2001 Act. To date, no such exclusions or modifications have been made. Thus, under the current arrangements, there is, for example, no requirement to disclose the existence of a criminal record when seeking employment in sensitive areas such as healthcare or positions involving the supervision of children. Such exclusions are significant features of most spent convictions schemes and the Irish system, which of course applies only to offences committed when the offender was under 18 years of age, is unusual in this regard. The detailed provisions of the Irish system are discussed in greater detail and compared to the systems in operation in other jurisdictions in Chapter 2 below.

D The Spent Convictions Debate

(1) Theoretical Background

1.25 Spent conviction or clean slate provisions in common law jurisdictions have their source in the policy debates surrounding rehabilitation which emerged in the 1960s. Wiping the slate clean can be viewed as the next logical step in the rehabilitation process. Once an individual has demonstrated the desire to return to a law-abiding life, spent conviction or clean slate policies cement this process by allowing the past

misdemeanours of that person to be set aside thus ensuring that re-integration into society can be completed without the need to disclose the existence of the criminal record in all circumstances. The effects of disclosure of a criminal record on the prospects of an individual seeking employment are well documented. Louks et al note that there is a:

“...tendency to refuse employment to people with a criminal record, often irrespective of whether the offence relates to the post in question. Lack of employment inhibits the re-integration of ex-offenders into society, which in turn, may perpetuate the cycle of offending.”²⁹

A key goal underlying most spent conviction or clean slate policies is the re-integration of the person with a view to employment, which is recognised as a fundamental element of the rehabilitation process.

(2) Labelling Theory

1.26 Funk and Polsby argue that exponents of expungement can be connected with labelling theorists, a school of thought that emerged in the 1960s and championed by the sociologist Howard Becker.³⁰ Labelling theory views individuals from the point of view of the label or status that society, namely, the criminal justice system and the community at large, has imposed on them. Labelling theory argues that the labels applied to individuals influence their behaviour and, in particular, that the application of negative or stigmatising labels such as ‘criminal’, ‘offender’ or ‘deviant’ actually promotes deviant behaviour and thus becomes a self-fulfilling prophecy in which individuals engage in the behaviour that society now expects of them. Thus labelling theorists argue that it is possible to prevent social deviance using a limited social shaming reaction by the criminal justice system and society at large, and replacing the labelling system with a more measured response. Emphasis is placed on rehabilitation of offenders through altering relevant labels and, thus, the spent conviction or clean slate laws derive from this. It is argued that spent conviction or clean slate provisions which remove the label of ‘criminal or offender’ from an individual greatly increase the chances of successful rehabilitation of that person into society. Other policies linked to rehabilitation and labelling theory include restorative justice, reparation, victim-offender mediation and restitution, all of which attempt to restore the status quo in terms of the effect of the offence on both the victim and the perpetrator.

²⁹ See Louks et al, *The Employment of People with Criminal Records in the European Union*, *European Journal on Criminal Policy and Research*, Issue 6, 1998 at 195.

³⁰ See Funk and Polsby *The Problem of Lemons and Why We Must Retain Juvenile Criminal Records*, *Cato Law Journal*, Vol 18, No. 1 (Spring/Summer 1998) at 76.

(3) 'Labelling' and spent conviction schemes

1.27 In the context of labelling theory, spent conviction or clean slate legislation reflects a move by the criminal justice system to alter a prior label placed on an individual in an attempt to alter the status of that person for the better. They are a natural progression in rehabilitation that allows an offender to rehabilitate and reform through re-integration into society. In reality, such statutes deal with the after-effect of the labelling process rather than dealing with the actual process of labelling by the criminal justice system and society in general. In order to come within the remit of such statutes, an individual must first have been labelled a criminal or an offender by the criminal justice system. It is important to note that unlike the policy behind labelling theory, the statutes require individuals to *earn* the protection of the legislation by, for example, remaining conviction-free for a long period of time.

1.28 The operation of such legislation in terms of its theoretical background in labelling theory can be clearly demonstrated when the links between unemployment and crime are examined. It has been consistently reported and documented that one of the principal causes of re-offending and recidivism is the lack of opportunity for employment. Kilcommins agrees that³¹:

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

The important issue of the link between unemployment and crime is examined in greater detail in paragraph xx below.

(4) Rationale of spent conviction schemes

1.29 The rationale for spent convictions legislation begins with an acknowledgment that a criminal record is not necessarily a good predictor of an individual’s current or future behaviour. It is said that such legislation acknowledges the fallibility of the human condition and admits a certain amount of ‘legal forgiveness’ in respect of a person’s momentary lapses of judgement. A person may commit an offence in a moment of madness and suffer the consequences when the matter is dealt with before the courts, but spent conviction or clean slate laws question whether there may need for that

³¹ Kilcommins, “The duty to disclose previous criminal information in Irish insurance law” (2002) 37 *Ir Jur (ns)* 167 at 183.

person to suffer the consequences of that offence indefinitely.³² It is well established that crime is associated with youth and that people tend to “grow out” of offending behaviour. The overwhelming majority of people who appear before the criminal courts in Ireland are males between the ages of 18 and 25 years. By the time those people reach 30 years of age, the majority have grown out of offending behaviour and have at least made attempts to settle down and lead law-abiding lifestyles. For example, in 1972 when the Gardiner Committee reported on the problem of old convictions, it was estimated that almost one third of the male population in the UK had a criminal conviction of some variety.³³ However, the disclosure of a criminal record can be a real barrier to ex-offenders who want to lead law-abiding and productive lives.

1.30 The Law Reform Commission of Australia, in a *Report on Spent Convictions* in 1989, considered that the rationale underlying any spent convictions scheme should be that an old conviction, followed by a substantial period of good behaviour, has little if any value as an indicator of how the former offender will behave in the future.³⁴ Thus, the Commission considered that old offences are irrelevant to most decision-making exercises and the older a conviction becomes, the less relevance it has in predicting the person’s future conduct. Hence the Commission’s approach to the problem of old convictions was firmly based on the limited predictive value and hence the limited relevance of such old convictions.

1.31 The 1972 Report of the Gardiner Committee which led to the introduction of the British *Rehabilitation of Offenders Act 1974* argued that people should be considered to be ‘rehabilitated’ if they offend once, or a few times, pay the penalty which the courts impose on them, and then settle down and become hard-working and respectable citizens.”³⁵

However, the Report also considered that:

“...for rehabilitation to be complete, society too has to accept that they are now respectable citizens, and no longer hold their past against them... The question is whether, when a man has demonstrably done all he can do to rehabilitate himself, and enough time has passed to establish his sincerity, is it not in

³² See generally Kilcommins and O’Donnell “Wiping the Slate Clean: Rehabilitating Offenders and Protecting the Public” (2003) 51(3) Administration 73.

³³ Gardiner Committee *Living it Down- The Problem of Old Convictions* (1972), fn.8, above.

³⁴ See Australian Law Reform Commission *Report on Spent Convictions* (1989) ALRC 37 at page 12.

³⁵ Gardiner Committee *Living it Down – The Problem of Old Convictions* at page 5.

society's interest to accept him for what he is now and, so long as he does not offend again, to ensure that he is liable to have his present pulled out from under his feet by his past.”³⁶

1.32 In the 2002 Report of the Home Office (*Breaking the Cycle*) which reviewed the operation of the *Rehabilitation of Offenders Act 1974*, it was agreed that the original objectives of the 1974 Act as set out by the 1972 Gardiner Committee Report were still valid.³⁷ These objectives were stated to be the re-settlement of offenders, particularly in the employment context and in this regard, the Committee felt that the law introduced should

“...restore the offender to a position in society no less favourable than that of one who has not offended.”

1.33 In New Zealand, which is the latest common law jurisdiction to enact spent convictions or clean slate legislation,³⁸ the reason given for the introduction of the provision is to allow individuals with less serious convictions who have been conviction-free for at least 7 years to put their past behind them. At the time of enactment, the Ministry of Justice estimated that the legislation would help up to 500,000 New Zealanders, the overwhelming majority of whom committed a relatively minor offence in their youth and are now law-abiding citizens.

1.34 In Canada, where a system of pardons operates with similar effect to a spent convictions scheme, the underlying rationale is that a pardon is taken as evidence that the conviction in question should no longer reflect negatively on the person's character.³⁹ A pardon thus allows people who have been convicted of a criminal offence but have completed their sentence and demonstrated that they are law abiding citizens, to have their criminal record kept separate and apart from other criminal records.

1.35 The Explanatory Memorandum to the provision in the *Children Bill 1999* which became section 258 of the *Children Act 2001* described it as providing a “limited clean slate” in respect of offences committed by children.

³⁶ Gardiner Committee *Living it Down – The Problem of Old Convictions* at page 5.

³⁷ The long title of the *Rehabilitation of Offenders Act 1974* reads as follows:

“An Act to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years, to penalise the unauthorised disclosure of their previous convictions...”

³⁸ The *Criminal Records (Clean Slate) Act 2004* came into effect on 29 November 2004.

³⁹ The Canadian *Criminal Records Act 1985* is described in the long title as “An Act to provide for the relief of persons who have been convicted of offences and have subsequently rehabilitated themselves.” Section 5 (a)(ii) of the Act provides that “the conviction in respect of which the pardon is granted should no longer reflect adversely on the applicant's character.”

(a) Conclusion

1.36 It is clear that spent convictions or clean slate legislation has its foundations in policies which emphasise the individual's current behaviour and is less concerned with past infractions that generally have very little relevance to the individual's current position. Such statutes look to a person's future rather than their past and seek to guide decision maker to view that individual in the same light.

(5) Objections to Spent Conviction Schemes

1.37 Critics of spent convictions legislation generally base their objections on two principal grounds, the moral issues raised by legislation which conceals a person's past and the public safety issues arising out of such concealment. Other issues such as freedom of information and free speech are also mentioned in this context.

(a) The moral objection

1.38 The principal argument put forward against such legislation is that it perpetrates a 'statutory lie' which tries to rewrite history in order to pretend that the offending behaviour never took place. This is known as the *moral objection* to spent convictions or clean slate policies. It has been argued that "[t]he consequences of wrong-doing cannot be legislated away."⁴⁰ Mayfield goes even further and states that "[expungement] at its roots... is an institutionalised lie."⁴¹

1.39 Greenslade argues that there is nothing wrong or adverse about a criminal conviction remaining on record indefinitely. After all, an offence did take place, a conviction was imposed and punishment was handed down by a court. These facts are merely recorded as factual events and matters of public knowledge and as such remain on the record. To remove or delete such matters from the record would be to distort the public record and amount to an attempt to alter the past which is both impossible and undesirable.

1.40 Critics argue that spent convictions statutes encourage and indeed enforce dishonesty in a rather perverse fashion insofar as offenders who have committed a wrong against society are permitted to lie about their previous behaviour whereas people who expose the former individual by revealing the truth are often liable to criminal prosecution. When the Australian Law Reform Commission considered the issue of spent convictions in its 1989 Report, it specifically recommended against the

⁴⁰ Greenslade B "Eyes open policy: employment of a person with a criminal record", *New Zealand Law Journal*, November 1986 at 386.

⁴¹ Mayfield M "Revisiting Expungement: Concealing Information in an Information Age" 1997 *Utah Law Review* 1057.

introduction of criminal penalties for the wrongful disclosure of a criminal record. The Commission instead recommended that a comprehensive information storage and disclosure policy be developed by all record holders and secondary information holders to the effect that information about an individual's criminal record could only be disclosed under strict conditions and to authorised personnel. By contrast, the British *Rehabilitation of Offenders Act 1974* provides that it is a criminal offence for persons to wrongfully disclose information about the spent conviction of a person.

1.41 For commentators such as O'Hern, a society which not only approves of dishonesty but encourages it is a society of questionable moral substance.⁴² Greenslade argues that real rehabilitation requires the individual to be able to face, not conceal past errors and that the community needs to offer an informed tolerance of past errors where these are no longer being repeated and that only education based on acknowledgement, not legislation enforcing suppression, can achieve that goal.⁴³

(b) Public safety argument

1.42 A number of fundamental and practical concerns have also been raised about spent convictions or clean slate regimes. At the heart of the expungement debate is the classic battle between two important yet seemingly conflicting values.⁴⁴ Expungement statutes attempt to strike a balance between the goal of helping to re-integrate offenders into society and the workplace and the goal of protecting the public, particularly its vulnerable members, from dangerous individuals. Mayfield would argue that expungement statutes tip the balance in favour of the former category at the expense of the latter:

“...a statute that disproportionately favours offender re-integration may unnecessarily place the public's safety at risk.”

1.43 The concern here is that important information about an individual's character and past is concealed by spent convictions legislation and critics argue that this lacuna leaves the public at a disadvantage to the individual with the criminal record. The most obvious concern is for vulnerable members of society such as children and vulnerable adults who are at greater risk than others. Another significant consideration of objectors to spent convictions policies is the extent to which criminal intelligence

⁴² O'Hern, “Expungement: Lies That Can Hurt You In and Out of Court, (1988) 27 *Washburn Law Journal* 574 cited in Mayfield *ibid*.

⁴³ Greenslade, “Eyes open policy: employment of a person with a criminal record”, *New Zealand Law Journal*, November 1986 386 at 388.

⁴⁴ Mayfield, “Revisiting Expungement: Concealing Information in an Information Age” 1997 *Utah Law Review* 1057 at 1060.

information and activities may be compromised by the concealment of information about a person's past.

(c) *Freedom of information and free expression argument*

1.44 Related to above concern is the anti-discrimination aspect of clean spent convictions policy with which a number of critics take issue with. Where a statute stipulates that it is illegal to discriminate against an individual on the basis of a prior criminal record, the necessary implication is that people, whether it be during the recruitment process or on application to join a particular profession, are now further restricted in the type of questions that they can now ask of the potential employee or member of the profession. Spent convictions statutes also generally prohibit the unauthorised disclosure of information about an individual's criminal record with some jurisdictions going so far as to impose criminal sanctions on individuals who wrongfully disclose or publish such information.⁴⁵ These provisions constitute a serious curtailment of an individual's right to freedom of information and free speech in relation to matters of public record and critics argue that such a curtailment can only be permitted where there are justifiable reasons in the public interest.

(d) *Spent convictions provisions disproportionately affect some categories of persons*

1.45 Greenslade argues that spent convictions provisions are particularly harsh on employers and while agreeing that employers share, along with the rest of society, a responsibility to create an environment which encourages and permits the rehabilitation of a person convicted of a criminal offence, a discretion should also be left with an employer about whether to employ a particular offender, which in turn requires an 'eyes open' policy as to the person's past offending. Many of Greenslade's criticisms are grounded in the nature of the relationship that exists between employer and employee, namely, a relationship based on trust. This suggests that asking a prospective employee about convictions provides the employee with an opportunity to give information and, if necessary, an explanation which then permits the employer to calculate and manage the risk, if it is accepted, of employing the offender. This enquiry, Greenslade argues, allows a fair and reasoned approach, whereas legislative concealment of criminal records by spent convictions schemes damage the trusting nature of the employer-employee relationship. The prohibition on

⁴⁵ See section 17 of the New Zealand *Criminal Record (Clean Slate) Act 2004*. A similar provision applies in the British *Rehabilitation of Offenders Act 1974*.

allowing questions about convictions damages that basis even before the relationship is even attempted.⁴⁶

1.46 Greenslade also argues that spent convictions policy disproportionately affects employers insofar as the costs of recidivism and the social risks involved in such schemes are being transferred on to private employers with a general failure to consider that the employer is serving the general public and has a right to know something of the character of the person with whom they deal. For example, an employer has a duty to protect both the property and fellow employees of the firm. In volunteering to engage a person with a criminal record, an employer needs to be able to calculate and responsibly accept the degree of risk to that enterprise and those fellow workers. An employer must therefore be permitted the corresponding right to knowledge which enables the risk to be calculated. The basis of this claimed general right is that the risk in employing a past offender must be accepted both voluntarily and with knowledge.

1.47 Greenslade also argues that the objectionable hardship which those with a criminal record face arises out of the failure of the public to distinguish between one or more past bad actions and an incorrigibly bad person. This supports the argument that it is education, not anti-discrimination legislation that should be preferred insofar as the public and in particular employers should be educated as to how to interpret and what value to give to past offences as a predictive tool for future behaviour. In essence, Greenslade argues that it is unfair to expect the public and particularly employers to engage in the decision-making process where the policy is to hide old convictions and there is concealment policy as regards a person's past.

1.48 Funk and Polsby argue that spent convictions legislation which permits an offender to deny past convictions in court disproportionately affects other offenders with no previous convictions who appear before the courts.⁴⁷ The logic is thus; where the legislation permits persons to conceal prior offences before the court, the judge is required to engage in a guessing game to determine whether that person does in fact have previous convictions before imposing sentence. The effect of this is that every person who appears before the court is placed under suspicion of having previous convictions even though they may not have previous convictions, and consequently, could receive a harsher sentence because of this. Funk and Polsby's proposition is that the mistrust and uncertainty created by a

⁴⁶ Greenslade, "Eyes open policy: employment of a person with a criminal record", *New Zealand Law Journal*, November 1986 386 at 387.

⁴⁷ Funk and Polsby, "The Problem of Lemons and Why We Must Retain Juvenile Criminal Records," *Cato Law Journal*, Vol 18, No. 1 (Spring/Summer 1998) at 76.

legislature which allows the concealment of fact impacts disproportionately on persons from particular areas, backgrounds and races.⁴⁸

(e) *Spent convictions provisions do not provide a clean start*

1.49 Mayfield makes the point that spent convictions or expungement provisions are ineffective in the objective they are set to achieve for the simple reason that the benefits to ex-offenders do not take effect for a considerable time after the sentence imposed has been completed. Most expungement provisions require a minimum period of years to have elapsed before an offence will be considered for expungement. This period can be anything up to 10 years. Mayfield argues that expungement is generally not available at the time when offenders need it most that is immediately upon release from prison when the rehabilitative effect of immediate employment would be greatest.⁴⁹ It is well documented that unemployment upon release is the most often cited reason for re-offending.⁵⁰

(6) *Do spent convictions schemes address the concerns of critics?*

1.50 In light of the foregoing, it is appropriate to examine how, if at all, the main features of spent convictions or clean slate schemes which operate in other jurisdictions address the issues and concerns posed by critics of such policies. A detailed examination of the various aspects and composition of the spent convictions schemes in operation in comparable jurisdictions can be found in Chapter 2 below. For present purposes, it is sufficient to focus on the fundamental features of such schemes in the context of establishing underlying principals and concerns.

(a) *Moral objection and the public safety argument*

(i) *Destruction of criminal records*

1.51 An important feature of most spent convictions schemes is that the criminal record in question, that is the record of the offence having taken place and been tried before the criminal courts, is generally never *deleted* from the record. There are a number of very good reasons for this. First, the fact of a criminal offence having been committed is a matter of public record and any attempts to alter the public record to the effect that certain events did not occur when in fact they did, would be harmful and contrary to the public interest.

⁴⁸ Funk and Polsby, "The Problem of Lemons and Why We Must Retain Juvenile Criminal Records," *Cato Law Journal*, Vol 18, No. 1 (Spring/Summer 1998) at 82.

⁴⁹ Mayfield, "Revisiting Expungement: Concealing Information in an Information Age" 1997 *Utah Law Review* 1057 at 1063.

⁵⁰ See *Building bridges to employment for prisoners*, Home Office Research Study 226, September 2001 where it is estimated that only 10% of prisoners enter employment upon release from prison.

1.52 Spent convictions legislation should not and indeed does not attempt to re-write history by pretending that certain events did not happen. Indeed, the 1972 Report of the Gardiner Committee, which led to the introduction of the British *Rehabilitation of Offenders Act 1974* (extended to Northern Ireland in 1978) expressed serious objections to the practice in some jurisdictions of sealing up or destroying criminal records.⁵¹ The Committee felt that a court in particular should have available to it the whole of an offenders past record if that court is to come to any sensible conclusion as regards sentencing such a person and the absence of a piece of old information could have the effect of completely distorting the picture in relation to that offender. It is reasonable to expect that a court should have access to a person's criminal history where it is relevant as to require otherwise would seriously compromise the decision-making process and thus the informed judgment of the court. This is a second reason why criminal records are never and should never be deleted from the public record. A further reason is that community interests such public safety are also enhanced by having such records available to the Gardaí and to other authorities working in the public interest whose work would be seriously compromised if certain information was not available to them.

1.53 It is certainly in the above regard that the term 'expungement or clean slate' is most misleading. The consequence of expungement on a criminal record is such that the *effect* of the criminal record is limited as regards the circumstances in which a person will be required to disclose the existence of the record and as regards the categories of persons that have access to the record. In this respect, the Commission emphasises that expungement does not result in the offence being wiped from the record.

1.54 Thus it can be argued that the moral concerns raised by Mayfield et al in relation to the distortion of the public record are unfounded. Spent convictions or clean slate schemes do not necessitate the alteration of the public record, instead such provisions merely limit the information that can be released from the public record. The limited clean slate scheme which operates in this jurisdiction for juvenile offenders under the *Children Act 2001* does not provide for the deletion of the individual's criminal record. The effect of the legislation is that the individual in question is entitled to interpret any question in relation to previous convictions as referring to unspent convictions only, that is, that spent convictions need not be disclosed. Therefore, while the record of the conviction remains, the requirement to disclose the record is limited.

⁵¹ *Living it Down - The Problem of Old Convictions*, fn.8, above.

(ii) Protection of the public by limitation of the application of spent convictions schemes

1.55 Many spent convictions schemes are limited in nature in so far as certain offences are excluded from their ambit. This ensures that offenders who commit the most serious offences and especially sexual offences, will not benefit from the protection of the legislation.⁵² The significance of the Sex Offenders Register in this context is examined in greater detail in Chapter 4 below.⁵³

1.56 Additionally and more significant in this context, is that the protection of most such schemes is lost when a person is seeking employment in a particular sector, profession or in a particular office. For example, a person seeking to be employed as a teacher in a school will be required to disclose the existence of any criminal conviction regardless of the fact that that conviction may be irrelevant to the position in question or that the offence would be considered ‘spent’ for other purposes. If that same individual was applying for a job in a retail outlet, there would be no requirement to disclose the conviction. The requirement for disclosure in such circumstances is based on public safety concerns and the need to ensure that a greater level of vigilance and care exists as regards the most vulnerable members of society.

1.57 The provisions under which a person is not entitled to rely on the protection of spent convictions legislation are generally known as ‘exclusions’. These exclusions address many of the public safety concerns raised by critics of such schemes. Exclusions to the schemes are generally introduced by Ministerial Order with a corresponding provision in the primary legislation to the effect that the Minister may make such orders as s/he sees fit.⁵⁴ For the most part, exclusions exist where the job or position in question involves placing the person in a position of trust and care in relation to other individuals eg doctors, nurses, teachers, child care assistants and many others. The exclusion is generally premised on there being an element of vulnerability in the relationship although exclusions often exist in relation to state jobs or offices where the priority is the protection of national security. Certain professions, particularly those where the interests of the public are at stake such as the legal profession and the medical profession also come within the exclusions.

⁵² Section 258(1)(b) of the *Children Act 2001* provides that the Act may not apply to offences which are required to be tried by the Central Criminal Court thereby excluding the application of the Act to the most serious offences.

⁵³ The Sex Offenders Register was established by the *Sex Offenders Act 2001*.

⁵⁴ Section 258 (4)(d) of the *Children Act 2001* provides that the Minister may modify or restrict the protection of the Act by Order. However, no such Orders have been introduced to date (July 2007).

1.58 Exclusions to the application of spent convictions provisions allow the protection of the relevant legislation to be limited in the interests of vulnerable members of society thus tipping the balance in favour public protection at a cost to rehabilitated offenders. Any cost to the rehabilitated offender can be justified in this context in the interests of safety and protection of the public interest. If anything, the existence of spent convictions legislation encourages greater vigilance by recruiters who are required to look more carefully at each applicant and their background before making the decision to employ an individual. Thus it could be argued that such provisions actually enhance the level of protection offered to vulnerable people and sensitive posts or offices by injecting a considerable amount of thought and investigation into the recruitment process which might otherwise be lacking in such safety measures. The issue of vetting people for suitability for certain posts is dealt with in Chapter 4 below.

(b) Protection of the public by the employment ex-offenders

1.59 It is well documented that one of the key elements of successful re-integration of offenders into society is employment. Unemployed ex-offenders are almost twice as likely to re-offend than those who are in full or even part-time employment.⁵⁵ Ex-offenders, particularly those who have served time in prison, regularly encounter major difficulties when attempting to re-enter the labour force upon release which difficulty in turn leads directly back into a criminal lifestyle.⁵⁶ The cycle of offending and re-offending is a vicious one. The problem is exasperated where the individual finds themselves homeless as well as unemployed upon release.⁵⁷ All of the

⁵⁵ See generally *Building bridges to employment for offenders*, Home Office Research Study 226, September 2001; *The economic and social costs of crime*, Home Office Research Study 217, 2000; *Working their way out of offending: an evaluation of two probation employment scheme*, Home Office Research Study 218, December 2000; McCullagh "Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland" (1992) Vol 2 *Irish Journal of Sociology* 1; O'Donnell "The Re-integration of Prisoners" (2002) Vol 50 *Administration*, no.2 (Summer 2002).

⁵⁶ Data from England and Wales show that of the 63,000 prisoners discharged in 1996, the majority were convicted again within 2 years with a significant proportion being returned to custody: see Kershaw C, Goodman J and White S "Re-convictions of Offenders Sentenced or Discharged from Prison in 1995" England and Wales, Home Office Statistical Bulletin 19/1999. In 2002, an Irish study found that most first-time prisoners will never return to prison but noted that in relation to prisoners who had served more than one prison sentence, the likelihood of future imprisonment increases with every sentence served: O'Donnell "The Re-integration of Prisoners" (2002) Vol 50 *Administration*, no.2 (Summer 2002).

⁵⁷ Seymour M and Costello L, *A Study of the Number, Profile and Progression Routes of Homeless Persons Before The Court And In Custody*, Government of Ireland 2005.

above factors lead to the legal and social marginalisation of offenders and in particular, ex-prisoners.

1.60 A small minority of people appear before the criminal courts on a regular basis and are repeatedly convicted of offences. However, the majority of people who appear before the criminal courts on a daily basis do not re-offend and never come to the attention of the authorities again. A minority of individual will re-offend time and time again and appear before the courts on a regular basis. Spent convictions legislation is not primarily concerned with such individuals. In order to gain the protection of such legislation, the cycle of re-offending must be broken and the individual must remain conviction-free for a considerable period of time. For those who offend once and never appear before the courts again, the nature of the offence in question, the length of time that has elapsed since the offence was committed, the fact that the individual has led an otherwise blameless life since the offence and many other indicators of good character are of no relevance under current Irish law. Significantly, studies have shown that these factors are also of no relevance to potential employers as evidence would suggest that employers routinely ask prospective employees whether or not they have a criminal record.

1.61 The 2004 Report by the Department of Justice Equality and Law Reform on *Extending the Scope of Employment Equality Legislation* refers to a study carried out by the Irish Business Employers Confederation in 2002 which indicated that only 52% of employers would consider employing an individual with a criminal record.⁵⁸ A Report by the Home Office in the UK has also indicated that a majority of employers will immediately rule out an individual who admits to having a criminal record.⁵⁹ Thus there are virtually no limits on a person's power to discriminate against another on the ground of a criminal record no matter how unfair or unreasonable that discrimination is. Significantly, that Report found that employment can reduce re-offending by between one third and one half.

1.62 The reluctance to accept ex-offenders and particularly ex-prisoners back into society has the knock-on effect of creating more crime in the community. Ex-offenders who are unemployed re-offend, thereby creating more crime. By ensuring that ex-offenders have greater access to employment opportunities and by encouraging employers to take on ex-offenders, levels of crime in the community can be greatly reduced which is of benefit to ex-offenders and member of the public alike.

⁵⁸ The 2004 Report, *Extending the Scope of Employment Equality Legislation* was commissioned by the Department of Justice, Equality and Law Reform and researched and prepared by the Law Department, University College Cork.

⁵⁹ *Breaking the Cycle – a Report on the review of the Rehabilitation of Offenders Act 1974*, Home Office 2002.

(c) ***Freedom of information and expression and disproportionate effect***

1.63 Difficult and important issues have been raised by critics of spent convictions schemes, particularly in relation to the effect of such legislation on employers. The issues of freedom of information and free speech are also relevant to this debate. Critics of spent convictions policies argue that such provisions operate as a limitation on free speech and freedom of information and that certain elements of society, namely employers are disproportionately affected by such policies. As regards a citizen's right to information that is a matter of public record, it is important to bear in mind that criminal record information is not freely available to the public. Such information is only available via official channels to the courts and the Gardaí. Of course, newspaper reports and law reports may also contain information about the conviction of a person for an offence. It is also very important to bear in mind that the public's right to know must be balanced against the individual's right to privacy. The requirement to disclose the fact of having a criminal record, no matter how old or minor the offence in question must be viewed in the context of an individual's right to privacy. A right to privacy has been recognised by the Irish courts and in terms of a criminal record, the courts have held that a conviction of 20 years standing is of no relevance to the duty to disclose in terms of the insurance contract.⁶⁰

1.64 As regards the disproportionate affect of spent convictions policies, it must also be borne in mind that having a criminal record affects some people more severely than others. It is well documented that people from marginalised and disadvantaged backgrounds suffer greater hardships, particularly in the employment context, as a result of having a criminal record.⁶¹

(d) ***Spent convictions policy as a delayed reaction to offending behaviour***

1.65 Spent convictions or clean slate provisions do not take effect immediately upon the completion of a sentence. The schemes generally require an offender to meet certain criteria before an offence can be considered eligible for expungement and thus the protection of the legislation. An individual's right to the shield of the legislation must be

⁶⁰ *Aro Road Land Vehicles Ltd v Insurance Corporation of Ireland* [1986] IR 403 at 414. For commentary on this case and others in the context of the duty to disclose previous criminal convictions in insurance law, see Kilcommins "The duty to disclose previous criminal information in Irish insurance law" (2002) 37 *Ir Jur* (ns) 167 and H Ellis "Disclosure and Good Faith in Insurance Contracts" (1990) 8 *ILT* 45.

⁶¹ See generally O'Donnell "Crime, Punishment and Poverty" (1997) 7 *Irish Criminal Law Journal* 134-151 and O'Donnell "The Reintegration of Prisoners" (2002) Vol 50 *Administration* No.2 (Summer 2002).

earned by a return to law-abiding behaviour of a minimum duration in order to demonstrate good faith and a desire to change. In this regard, expungement provisions can be said to offer an incentive to offenders to lead law-abiding lives. A spent convictions scheme that would allow the immediate expungement of an offence would fail to take adequate account of the safety needs of the community.

1.66 It could be argued that critics of spent convictions policies such as Mayfield misinterpret their aims. They aim to re-integrate offenders back into society after a sufficient amount of time has passed during which that person has demonstrated that past misdemeanours are no longer reflective of their character and that they deserve to put the past behind them. Undoubtedly, it is the time immediately after a person's release from incarceration that is most important in ensuring that that person does not return to a life of crime thereby becoming entrapped in a vicious circle of offending and re-offending. It is also true that employment upon release is a vital feature of any rehabilitative process. Recent government measures that aim to encourage the employment of ex-prisoners are discussed in Part E below. It is arguable at least that wiping the slate clean is the next logical step in the process of rehabilitation but this cannot take place where there has, as yet, been no evidence of the individual's rehabilitation. When evidence of rehabilitation is clear, for example by the offender remaining conviction-free for a specified period, it is appropriate that such provisions should take effect from this point and allow certain concessions to the individual in terms of the requirement to disclose the criminal record.

E The spent convictions debate in Ireland

(1) Introduction

1.67 Those working with offenders have long recognised that permanent stigmatisation of a person with a criminal record can be damaging, costly and counter-productive. The introduction of a limited clean slate for offenders under 18 years of age in section 258 of the *Children Act 2001* has led to calls for similar measures to be introduced for adult offenders. Robinson notes that the result of the operation of section 258 of the *Children Act 2001* is that:

“it is ironic that a youth who commits the offence of say, manslaughter one week before they turn 18 can thus avail of the scheme of rehabilitation, whereas a youth who breaches the peace at ages 18 plus one week, cannot. This appears both arbitrary and undesirable and bucks the international trend.”⁶²

⁶² Robinson, “Wiping the Slate Clean” *Gazette, Law Society of Ireland* October 2006 at 30.

1.68 While there is no doubt that the law does treat adult and juvenile offenders differently for certain purposes, when that difference refers to something as fundamental as the ability of the law to ‘forgive’ certain infractions, it is arguable that the same logic that applies to the limited clean slate scheme for children can be applied to one for adults. The scheme in the 2001 Act is based on the premise that a young person who commits an offence should be permitted, at some point, to put their past behind them and move on with a law-abiding life unhindered by the requirement to disclose their past offences. The same is true of adult offenders and while such offenders cannot point to the foolishness of youth as a reason for the commission of offences, it is also important to bear in mind that most of the offences committed in this county are by males aged 18-25 years. It is well documented that people grow out of offending behaviour and the offenders of today are likely to settle down to lead law-abiding lives by the time they reach 30 years of age. Is it fair that the law prohibits those persons from a return to law abiding behaviour without the need to disclose certain criminal convictions when a person in a similar situation who is a just one year younger may? Robinson argues that the current situation is unfair, arbitrary and one which requires redress by the enactment of similar legislation for adults:

“International best practice, current trends and academic thinking would appear to suggest that the absence of a system of deleting criminal records after a passage of time is something that needs to be addressed.”⁶³

1.69 Take, for example, a young adult who is charged with an offence under section 4 of the *Criminal Justice (Public Order) Act 1994* of being intoxicated in a public place. This offence is classified as a minor one since it is defined as a summary offence which can only be tried in the District Court. Where the young adult in this case is convicted found guilty and sentenced accordingly, a record is made of the conviction. The conviction stays on record on an indefinite basis which results in a permanent blight on the reputation of that individual and a life long requirement to disclose, in any context, this previous criminal behaviour. Disclosure of this criminal record can have serious consequences for the young adult in terms of employment prospects, promotion prospects, entry into professions, applications for visas, applications for insurance and many other aspects of everyday modern life.

1.70 Given the less serious nature of the offence in question, it would be difficult to deny that the consequences of the conviction in this case far outweigh any harm done by the commission of the offence. By appearing

⁶³ Robinson, “Wiping the Slate Clean” *Gazette, Law Society of Ireland* October 2006 at 31.

before the court charged with the criminal offence, the offender has already been punished by the criminal justice system. Should society have the right to go on punishing that individual indefinitely for the same offence? While proportionality is a key principle of sentencing in the Irish courts, it is clear that this policy does not extend beyond the court room and into the society in which the offender is expected to function. A life long criminal record is not a proportionate response to most offences and thus it can be argued that the law should be employed to ensure that an element of proportionality is injected into society's response to offending behaviour.

1.71 The courts have not directly considered the issue of the lifelong criminal record, but the Commission in its *Consultation Paper on the Court Poor Box*⁶⁴ noted that one of the principal reasons for the application of the poor box penalty in many cases was the desire to avoid imposing a criminal convictions on an individual the effects of which would often outweigh the gravity of the offence in question. Particularly where young people appeared before the court charged with relatively minor offences, the courts were generally anxious that the young person would not be stigmatised by a criminal record for the rest of their life which would have serious implications for them in terms of career choices and opportunities to travel.

(2) Consideration of the problem of old convictions by the Irish courts

(a) Criminal convictions in terms of the duty to disclose in insurance contracts

1.72 The issue of disclosure of an old conviction was examined by the Supreme Court in *Aro Road and Land Vehicles Ltd v Insurance Corporation of Ireland*⁶⁵; in terms of the duty to disclose in a contract of insurance and the duty of utmost good faith which arises under such contract. In this case, the only information sought by the underwriters was the names and addresses of the consignor and consignees of the goods to be insured and the nature and the value of the goods. The plaintiff was given no opportunity to provide the defendants with additional information and neither was he provided with any information other than the extent of the cover provided by the insurance company. The final consignment of goods was hijacked and set alight and the plaintiffs sought indemnity for their loss under the terms of the insurance contract. The defendants, in turn, sought to repudiate the contract on the ground that the plaintiff had failed to disclose the fact that the managing director of the company had been convicted on 10 counts of receiving stolen goods in 1962 and was sentenced to 21 months imprisonment.

⁶⁴ See Law Reform Commission *Consultation Paper on the Court Poor Box* LRC CP 31-2004, Chapter 5.

⁶⁵ [1986] IR 403.

1.73 The High Court held that the insurer was entitled to avoid the policy in question and to repudiate liability and in this regard, the court deferred to expert testimony which stated that a reasonable and prudent underwriter would regard the matter of previous convictions as material and would have regarded the non-disclosure of such a criminal record as a good reason for refusing to underwrite the risk. However, the Supreme Court held that the High Court had erred in substituting the view of an underwriter for the view of the court in determining what a reasonable underwriter was entitled to have disclosed. The Supreme Court held that convictions of almost 20 years standing could remain unrevealed.

1.74 This statement of the law is of great significance in terms of the debate on spent convictions. In effect, the Supreme Court has recognised a point at which a previous criminal conviction is no longer of relevance to the issue of the character of that person. This recognition is the basic premise from which spent convictions schemes operate and thus it is significant that the Supreme Court has acknowledged that it is legitimate to stop taking account of such matters once a significant amount of time has elapsed since the commission of the offence.

(b) Criminal convictions and employment

1.75 As regards employment, the issue of the relevance of a criminal conviction to the position or job applied for is an important one. Section 34 of the *Offences Against the State Act 1939* prohibited a person who had been convicted of certain scheduled offences from holding a job in the public service for a period of 7 years after the conviction. In *Cox v Ireland*,⁶⁶ the plaintiff argued that the provisions of the 1939 Act breached his right to a fair trial under Article 38 of the Constitution insofar as the Act imposed a continuous and disproportionate penalty. The plaintiff also argued that the provision was unfairly discriminatory contrary to Articles 40 and 43 of the Constitution. In the High Court, Barr J held that the penalties imposed under the Act were patently unfair and capricious in nature amounting to an unreasonable and unjustified interference with the plaintiffs personal rights guaranteed under Articles 40.3 and a denial of equality before the law contrary to Article 40. Accordingly, the court held the provisions of the 1939 Act to be unconstitutional.

1.76 On appeal, the Supreme Court upheld the decision of the High Court. The Court concluded that the provisions of the 1939 Act could potentially constitute an attack on the unenumerated personal right to earn a livelihood of a person to whom the section applied. One of the factors which influenced the decision of the Court was the lack of opportunity for a defendant to escape the mandatory disqualifications and forfeitures

⁶⁶ [1992] 2 I.R. 503.

contained in the 1939 Act even in circumstances where the defendant could, for example, show that his intention or motive in committing the offence or the circumstances under which it was committed were such that the onerous penalties were unwarranted. The Court noted that the State has a right to protect its citizens and the stability of the State by ensuring that persons who carry out the offences in question are excluded from involvement in carrying out the functions of the State, but that the State also has a duty, as far as practicable, to protect the constitutional rights of its citizens. In this case, the Court held that the provisions of the 1939 Act did not adequately provide such protection insofar as they were impermissibly wide and indiscriminate.

1.77 In the Commission's view, the rationale of the Court in *Cox* is relevant to the debate on the longevity of criminal convictions. Effectively, the Court held that a provision which disqualified an individual from employment in the public service for 7 years as a result of conviction under the 1939 Act was too wide and indiscriminate and infringed the personal right to earn a livelihood. It could be argued that the same considerations should be applied in relation to the issue of the life-long criminal record by which a person may be permanently disqualified from taking up a post or entering a profession. The decision of the Supreme Court could ground an argument that Irish law currently fails to protect adequately the personal right to earn a livelihood insofar as conviction for a criminal offence carries with it continuous and disproportionate penalties which are unjustified and unsubstantiated by any considerations of public safety.

1.78 In light of the foregoing, it is arguable that the current state of Irish law as regards the longevity of criminal records of adult offenders breaches the personal rights of the individual affected by such measures and in particular the right to earn a livelihood. Given the clear evidence that the employment prospects of an individual with a criminal conviction are severely impacted by the fact of that conviction and the fact that the nature of the offence in question or the circumstances surrounding that offence have no bearing on the longevity of the record, it could be argued that current Irish practice in relation to the retention of criminal records is too wide and indiscriminate.

(3) *European and International Dimension*

1.79 The Commission has already highlighted Ireland's position in Europe as one of the few remaining jurisdiction that does not have some form of spent convictions measure in place for adult offenders. In 1984, the Committee of Ministers of the Council of Europe in Recommendation No. R (84) 10 on the *Criminal Record and Rehabilitation of Convicted Persons* considered that:

“...a crime policy aimed at crime prevention and the social integration of offenders should be pursued and developed in

Member States... and considering that any other use of criminal records (other than in assisting the judiciary to dispose of individual cases) may jeopardise the convicted person's chances of social integration, and should therefore be restricted to the utmost, the Committee of Members... recommends that the governments of Member States review their legislation and their practices relating to criminal records."⁶⁷

This is a clear statement that criminal records should only be considered useful in certain limited circumstances, principally in court proceedings, and that disclosure outside this context should be considered very carefully. Importantly, the Report also recognises the clear links between the criminal record and problems of social re-integration.

1.80 In 2004, the European Commission considered the creation of a European criminal record system.⁶⁸ The Ministers of Justice and Home Affairs of the European Union decided that information about all criminal convictions in the European Union would be referred directly to the Ministry of Justice of the convict's country of nationality within the EU.⁶⁹ Therefore the decision was made to concentrate the criminal record of the EU national in the country of nationality rather than in a central European criminal registry. The moves towards greater co-operation on the issue of criminal convictions across border came about in the aftermath of the infamous Belgian-French Fourniret case.⁷⁰ The case highlighted the deficiencies in information exchange on criminal convictions across European borders.

1.81 The issues posed by the retention of criminal records have therefore featured heavily on the European stage in recent times. Further European and international obligations on the State specifically relate to the treatment of offenders in prison but are particularly relevant to the spent convictions debate. Rule 61 of the United Nations Standard Minimum Rules for the treatment of prisoners adopted in 1955 by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, states that:

⁶⁷ Council of Europe Recommendation No. R(84)10 on *Criminal Records and Rehabilitation of Convicted Persons*.

⁶⁸ See Grijpink "Criminal Records in the European Union- The Challenge of Large-scale Information Exchange", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 14/1, 1-19, 2006.

⁶⁹ Council of the European Union Press Release, 2626th Council Meeting, Justice and Home Affairs, Brussels, December 2004 (14894/04)

⁷⁰ The Fourniret case involved a French forest warden who, in 2004, confessed to 9 murders on both sides of the Franco-Belgian border. The 62 year old was given a job at a school despite a rape conviction in France because the authorities in Belgium were unaware of his criminal record.

“The treatment of prisoners should emphasise not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted whenever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners.”⁷¹

1.82 These rules carry significant moral authority around the world. The European Prison Rules, set out in the Council of Europe’s Committee of Ministers Recommendation No. R (87) 3, places an even stronger emphasis on reintegration. One of the basic principles set out in Rule 3 is that

“the purpose of the treatment of persons in custody is shall be as such to sustain their health and self-respect and, so far as the length of the sentence permits, to develop their sense of responsibility and encourage those attitudes and skills that will assist them to return to society with the best chance of leading law abiding and self-supporting lives after their release.”⁷²

1.83 Similar duties were expressed in the WHO (Europe) Health in Prisons Project,⁷³ paragraph 21 of which states;

“Motivating and assisting prisoners to re-enter society should be seen as the primary purpose of prisons, enabling them to become forward looking, person-centred institutions, in which prisoners are required to take active responsibility for their crimes and for action directed towards restitution or rehabilitation.”

1.84 A Council of Europe Report in 2006 entitled *Social Re-Integration of Prisoners*⁷⁴ noted that in many Member States prison does not have the desired effect of good integration. The Council of Europe Assembly recommended taking measures during and after imprisonment concerning, in particular, the setting up of social reintegration counselling and the use of alternatives to custodial sentences. The Assembly also noted that a good prison policy aimed at the social re-integration of prisoners is an important factor when it comes to assessing the functioning of democracy in Council of Europe member states. Even though the purpose of a prison sentence is to punish offenders and put them where they can do no harm while preparing them for subsequent release and re-integration into society,

⁷¹ Rule 61, United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted in 1955 by the First Congress on the Prevention of Crime and the Treatment of Offenders.

⁷² Council of Europe Committee of Ministers Recommendation No. R(87)(3) on European Prison Rules.

⁷³ 1998, paragraph 21.

⁷⁴ 7 February 2006.

the Assembly noted that in a large number of member states, imprisonment does not achieve the second objective as a large number of former prisoners re-offend within 5 years of their release. There is little doubt therefore that released prisoners are at high risk of re-offending. Data from England and Wales show that of 63,000 prisoners discharged in 1995 the majority were convicted again within 2 years, with a significant proportion of them being returned to custody.⁷⁵ A Research Study by the UK Home Office in 2001 found that two thirds of prisoners in the UK were serving sentences of the less than one year and of this number, over a half of those people were reconvicted within 2 years.⁷⁶ This indicates that the likelihood of future imprisonment increases with every sentence served although it is also significant that the same findings point to employment as the single greatest factor in reducing re-offending.

1.85 The 2006 Council of Europe Report also commented that having spent many years in prison, an offender can become de-socialised and that very often ties with family, friends and the rest of society can be destroyed. The Report recommends that prison policy should be geared towards enabling prisoners to lead socially responsible lives when released and preparing them for this during their imprisonment. The Report advocates that prisoners needs be evaluated and co-operation with local business organised so that prisoners can work outside prisons and acquire real work experience which can only be done properly with the help of social workers and with the co-operation of firms and their managers and their employees.⁷⁷

1.86 The Commission considers that the issue of retention of criminal convictions is of even greater significance in light of recent European moves on cross border co-operation in relation to criminal records. The Commission now moves on to discuss the retention of criminal records in the Irish context and against the background of the Irish criminal justice system

(4) Retention of criminal records in the Irish context

(a) Duty under the Data Protection Acts 1988

1.87 Under section 4 of the *Data Protection Act 1998*, as amended, an individual has the right to obtain a copy of any information relating to them

⁷⁵ Kershaw, Goodman and White, "*Reconvictions of Offenders Sentenced or Discharged from Prison in 1995*" Home Office Statistical Bulletin 19/99, 1999.

⁷⁶ *Building Bridges to Employment for Offenders*, Home Office Research Study 226, 2001.

⁷⁷ See *Building Bridges to Employment for Offenders*, Home Office Research Study 226, 2001 where it is estimated that only 10% of ex-prisoners enter employment upon release from prison. See also *Working their way out of Offending: An evaluation of two employment probation schemes* Home Office Research Study 218, 2000.

kept on a computer system or a structured manual filing system by any person or organisation. Section 2(1)(c)(iv) of the 1998 Act provides that information should be kept for no longer than is necessary for the purpose for which it has been retained. The Data Protection Commissioner has commented on the lack of clear guidance for data controllers, in this case the Gardaí, as to how long criminal record information should be retained. In a case investigated by the Data Protection Commissioner (Case Study 13/96), an individual intending to emigrate had requested a statement of character from the Gardaí under section 4 of the *Data Protection Act 1998* and, in reply, the individual found that a record existed of a prosecution where section 1(1) of the *Probation of Offenders Act 1907* had been applied to the individual by the District Court: this disposal amounts to a dismissal of the charge.⁷⁸ The situation was remedied and the Gardaí supplied a statement of character with a correct statement about the application of the 1907 Act, but the individual in question contacted the office of the Data Protection Commissioner expressing concern about the retention of the old record which related to a minor offence. The Data Protection Commissioner in his investigation of the matter (Case Study 13/96) stated:

“There is, as I mentioned, a requirement in the Data Protection Act that information shall not be kept for longer than is necessary for the purpose for which it was obtained. *The indefinite retention of information about minor convictions – or, as in this case, information about a conviction which has legally ceased to exist – does not appear to accord with the spirit of that requirement.* But since Irish legislation makes no provision for “spent” convictions, the Gardaí have no guidance on how long they should retain such records. The issue that arises here comes down to the balancing of law enforcement needs with the privacy interests of the individual, taking account of the realities of information technology. This is a balance to be decided by the legislature. I believe it is in keeping with the spirit of the Data Protection Act for me to raise this issue in my Report, and recommend that it be given consideration by the appropriate authorities.”⁷⁹

1.88 The Commission acknowledges the concerns of the Data Protection Commissioner in relation to the indefinite retention of criminal record information and the Commission agrees that the current position of indefinite retention of criminal records runs counter to the underlying aims of the *Data Protection Act 1988*. In Chapter 4 below, the Commission discusses issues of data protection in terms of the vetting service provided by the Gardaí in the Garda Central Vetting Unit.

⁷⁸ See generally *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005).

⁷⁹ Case Study 13/96, Data Protection Commissioner (emphasis added).

(b) Recent measures to assist ex-offenders

1.89 The debate surrounding spent convictions legislation has been ongoing in this jurisdiction for a number of years and was further sparked by the introduction of a limited clean slate scheme for persons under 18 years of age by section 258 of the *Children Act 2001*. Kilcommins argues that the expungement provisions in other EU countries as well as common law jurisdictions such as Canada and Australia can provide a model for reform in this jurisdiction.⁸⁰ Reform along these lines, he notes, would alleviate some of the harshness created by the current anomalous state of the law in this country. Kilcommins further notes that the current rules on disclosure are at variance with other proposals and policies which attempt to re-integrate offenders back into society given the potential of the rules requiring disclosure in all circumstances to act as a ‘criminogenic force’ and to prolong the marginalisation of ex-offenders. In this respect, Kilcommins invokes the evidence which indicates that offenders who are excluded from the labour force are far more likely to re-offend thereby significantly contributing to the factors which cause crime in the community. The exclusion of a certain category of individual from the labour force has therefore, a double impact on society insofar as that society is also deprived of the skills and contributions of a significant sector of the population many of whom are, or have the potential to be, valuable members of society.⁸¹

1.90 The Department of Justice, Equality and Law Reform⁸² recently commissioned a report entitled *Extending the Scope of Employment Equality Legislation* which examined the case for expanding the grounds for discrimination under the *Employment Equality Act 1998* under four main heads namely, socio-economic status, trade union membership, political opinion and criminal conviction/ex-offender/ex-prisoner. The Report includes a wide-ranging review of the various types of schemes in operation in comparable common law jurisdictions, including the United Kingdom, Australia, New Zealand and Canada as well as an examination of similar schemes in the United States. The increased emphasis on public safety and, in particular, the protection of children is noted in the Report and is the basis for the assertion that spent convictions schemes are becoming more

⁸⁰ Kilcommins, “The duty to disclose previous criminal convictions in Irish insurance law,” (2002), 37 *Ir Jur (ns)* 167 at 180.

⁸¹ See generally, Kilcommins and O’Donnell, “Wiping the Slate Clean: Rehabilitating Offenders and Protecting the Public” (2003) vol 51 *Administration* no. 3 (Autumn 2003). See also *The Economic and Social Costs of Crime*, Home Office Research Study 217 (2000).

⁸² The 2004 Report was commissioned by the Department of Justice, Equality and Law Reform and researched and prepared by the Law Department, University College Cork.

restrictive where they are in force.⁸³ The Report, while making no specific recommendations, highlights the issue of the retention of criminal records and the problems posed by such criminal records in terms of discrimination in the employment sphere.

1.91 Incremental movements have taken place in recent times to assist ex-offenders to re-enter the job market and which encourage employers to rethink their policies in respect of the recruitment of ex-offenders. It was recently reported⁸⁴ that the Irish Government is to provide tax relief to employers who employ prisoners as part of a new Government drive to get former prisoners into the work force. Under the new re-integration scheme, released prisoners will also be given tax credits in an effort to make returning to the workplace more attractive. The scheme was agreed between the Revenue Commissioners, the Irish Prison Service, the Department of Finance and the Department of Social and Family Affairs.

1.92 Released prisoners will be granted an extra tax credit of €3,810 in the first three years that the scheme will run. Each individual will be entitled to a further allowance of €1,270 per child in the first year with the benefits gradually decreasing over the 3 year period of the scheme. A variety of secondary benefits are also available for the duration of the scheme such as medical cards, fuel allowance and up to 75% of their rent supplement. Employers who agree to employ released prisoners will be informed of the criminal record of their new employees. The incentive operates by allowing employers to make a double deduction of the employee's income from their company's taxable income for up to 3 years provided that the employee remains with them for that period.

1.93 The Irish Prison Service has also recently developed a range of measures with local authorities aimed at enabling released prisoners to secure housing. The provisions also assist short-term prisoners in the retention of their housing rights while in prison. Those serving longer sentences can apply to be included on housing waiting lists 9 months before their scheduled release date.

1.94 It has been recognised by the National Social and Economic Forum, the Probation Service and other agencies that the provision of accommodation for ex-prisoners is another key ingredient of the re-integration process. Ex-prisoners who find themselves homeless on release

⁸³ This point can be readily demonstrated when one considers that the latest jurisdiction to introduce clean slate legislation, New Zealand (in 2004), has restricted its application to offences which did not attract a sentence of imprisonment. This can be compared to the comparable provision in the British *Rehabilitation of Offenders Act 1974*, which allows offence which have attracted a prison sentence of up to 30 months to be expunged.

⁸⁴ See *The Irish Times*, 24 February 2006.

from prisoner have no means by which to secure basic social welfare payments since no fixed address can be given to the relevant authorities. . A recent Report by the Probation Service entitled *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Courts and in Custody*⁸⁵ focused on the extent of homelessness among the prison population and recommended a series of supports for prisoners on release to help secure housing and employment on release as a means of escaping chronic recidivism. The Report found that 52% of prisoners were homeless at some point in their lives and, significantly, 25% of those interviewed on committal to prison were homeless. This serves to reinforce the reality that certain ex-offenders suffer greater prejudice than others in the job market and this further barrier to re-integration stems from the disadvantaged background of that individual. Re-offending within a very short time is a real danger in such cases. O'Donnell made the following observations in relation to ex-offenders who are also ex-prisoners:

“Too often, discharged offenders find themselves without suitable accommodation or work, unsupervised and unsupported. After a period when they are stripped of their responsibility, they are suddenly confronted again with the problem of organising their lives. In this context, a relapse into drug and alcohol misuse and crime is a significant risk.”⁸⁶

1.95 Thus while O'Donnell focuses on the difficulties facing prisoners upon release, the same factors and issues can be said to affect most ex-offenders in some way. The fact of having a criminal record cannot fail to adversely affect a person's life in some way whether in terms of access to professions, travel prospects or in terms of everyday employment. Those most affected by the requirement to disclose are from more disadvantaged backgrounds generally where poverty, lack of education and substance or alcohol abuse feature heavily among the demographic.⁸⁷ Since the employment prospects of people from this background may already be

⁸⁵ Mairéad Seymour and Liza Costello *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody* Government of Ireland 2003.

⁸⁶ O'Donnell “The Re-integration of Prisoners” (2002) Vol. 50 *Administration*, no.2 (Summer 2002) 80 at 87.

⁸⁷ See *Learning for Life: White Paper on Adult Education*, Department of Education and Science (PN 8840), Dublin 2000 at 175 which noted the problems of exclusion experienced by ex-offenders and noted that many offenders find it exceptionally difficult to reintegrate into the labour market. The White Paper also indicated that it would be a key priority for the education sector to enhance the relevance and provision within the prison education service and to strengthen the links between in-prison provision and that available for prisoners on release in collaboration with other agencies.

severely curtailed by these issues, the addition of the requirement to disclose a criminal record when seeking employment adds an additional layer of disadvantage that must be overcome before post-offence re-integration into society is complete.⁸⁸ This trend is particularly relevant to ex-prisoners who often have fewer marketable skills than the general population.⁸⁹ While an individual may overcome the numerous disadvantages of poverty, an incomplete education and even overcome a substance abuse problem, the current absence of a spent conviction regime for adult offenders stands as an additional barrier between that person and a full return to normal life by imposing the requirement to disclose a previous criminal conviction.

(c) ***Report of the National Economic and Social Forum on the Re-Integration of Prisoners (2002)***⁹⁰

1.96 The National Economic and Social Forum (NESF), in its 2002 Report entitled *Re-integration of Prisoners*, made the following observations about the Irish prison population:

“...the majority of our prisoners have the most disadvantaged backgrounds in our society, leave prison lacking the skills and resources needed to find a job and accommodation... [T]hose prisoners who are from disadvantaged backgrounds, are at high risk or marginalisation on release back into mainstream society, and are repeat offenders or at risk of re-offending.”⁹¹

1.97 The 2002 NESF Report recommended that:

“...legislative changes and a system should be introduced to allow criminal records to be expunged after a period of time, depending on the seriousness of the offence, the length of time since the offence and not re-offending in the interim period.”⁹²

⁸⁸ The National Development Plan (2000-2006) contained the following statement:

“Offenders... experience multiple disadvantages which accumulate leading to economic and social exclusion and an extreme form of marginalisation from the labour market.”

⁸⁹ See generally, O’Mahony *Mountjoy Prison: a sociological and criminological profile* Government Publications, Dublin 1997.

⁹⁰ *Re-integration of Prisoners*, Forum Report No. 22, National Economic and Social Forum, January 2002.

⁹¹ *Ibid* at paragraph 6.23.

⁹² *Ibid* at paragraph 6.25. The NESF Report also noted at paragraph 6.26 that persons with criminal records are barred from employment in civil and public services. The Report questions why the private sector should employ someone that the State sector has not considered suitable for employment under any circumstances.

The 2002 Report also recommended that the *Employment Equality Act 1998* be amended to include protection against discrimination on the grounds of a criminal record commenting that “once a person has completed a sentence s/he should not continue to experience discrimination for that crime.”⁹³ The Report also found that

“...too often prisoners were discharged without suitable accommodation or work, unsupervised and unsupported.”⁹⁴

This was acknowledged as a substantial barrier to gaining employment on release, particularly in times of high unemployment. This difficulty is faced by all ex-offenders regardless of whether time has been spent in prison, although it is clear the ex-prisoner faces a number of additional hardships.

1.98 Dr Maureen Gaffney, speaking on behalf of NESF to the Joint Oireachtas Committee on Justice, Equality, Defence and Women’s Rights in February 2003, commented:

“The issue of expungement is a complex one and it will not be easy to find ways to balance the right of the community to be protected against the right of individuals to put their past behind them with appropriate rehabilitation and proof of good intentions. However, serious thought will have to be given to what category of crimes will require a long time scale and perhaps never will be expunged. We will have to face this. I would imagine that with regard to categories such as recidivist paedophiles, it would be hard to make a case that their records should be expunged. While it will be complicated and that there will be no neat edges, that should not stop us tackling something which is a matter of fundamental human rights.”⁹⁵

1.99 The Commission considers that important issues have been raised by these recent discussions concerning the indefinite retention of criminal records in Ireland. The Commission agrees that complex and difficult considerations exist in relation to criminal records, involving the need to weigh the rights of ex-offenders to privacy and to put their past behind them with concerns about public safety and the rights of employers to have the full facts about a person before recruiting that person.

⁹³ *Re-integration of Prisoners*, Forum Report No. 22, National Economic and Social Forum, January 2002 at 6.23.

⁹⁴ *Ibid* at 3.33.

⁹⁵ A full transcript of the Meeting of the Joint Oireachtas Committee is available at www.oireachtas.ie

(d) Work of non-governmental agencies seeking employment for ex-offenders

1.100 Numerous non-governmental agencies work with rehabilitated offenders in this jurisdiction and, recently, there have been calls by such agencies for a system of spent convictions which they argue is vital for the re-integration of ex-offenders into society. PACE (Prisoners Aid Through Community Effort) is an organisation that works in partnership with various agencies, such as the Probation Service, FÁS, and the Vocational Education Committees, to invest in resettlement and training services for offenders and ex-offenders. The aims of PACE are to provide safe, supported accommodation, training and education and personal and social development programmes for ex-prisoners and ex-offenders. PACE also seeks to prevent recidivism and enable individuals to move forward with their lives post-conviction.

1.101 The PACE Training for Employment Project is an educational and vocational training project for individuals who are either on day release or who are released and living in the community. In a paper delivered in November 2006 at the 9th Annual Conference of the Association for Criminal Justice Research and Development Ltd (formerly the Irish Association for the Study of Delinquency Ltd) on the Re-integration of Offenders, the Director of PACE stated:

“When addressing the issue of reintegration it is important to be aware of the legislative situation that we are currently working in and the impact this has on the lives of ex-prisoners. It is not prohibited to discriminate against someone regarding employment, housing or the provision of any goods or services, because they have a criminal record. There is a bar on anyone with a criminal record working in the civil or public service. There is no means by which anyone with a record – a caution, an arrest record, or a criminal record can be “expunged”: it’s a life long tattoo.”

The organisation called for legislative re-integration which allows criminal records to be expunged after a reasonable period of time and which covers all persons with a criminal record.

1.102 The Ballymun Community Law Group has developed the Bridge to Workplace programme which successfully places ex-offenders and particularly ex-prisoners in employment. The Programme has worked with young offenders who have benefited from the limited clean slate provisions in section 258 of the *Children Act 2001*, and programme organisers note that the system has been very successful in boosting the employment prospects of young ex-offenders. In 2005, Business in the Community Ireland (BITCI) called for further research into the expungement of criminal records

of former offenders to facilitate their move into other employment. The Linkage Programme, which is managed by BITCI, has successfully worked with former offenders, placing 1,600 people in training and employment since its establishment in 2000. In terms of the employment opportunities on offer, IBEC, the Small Firms Association and approximately 500 independent companies all work in conjunction with Business in the Community and the Linkage Programme. The organisation comments that:

“[w]hile the fact of a sentence does not constitute a legal barrier to obtaining a job, it appears to constitute a de facto one which may interfere with an individual’s right to earn a livelihood, right to personal self-determination, right to privacy and right to a good name.”

1.103 The profile of individuals that comes in contact with the Linkage Programme is also significant: they are generally between 16-25 years of age, and offending behaviour can be related to some or all of the following: they come from marginalised, excluded and under-resources sections of cities and towns; they are most likely to be poorly educated and unemployed; and many suffer from alcohol abuse, drug abuse, loneliness, homelessness, family breakdown and stigmatisation due to political attitude to offenders.⁹⁶ Ruhama, an Irish organisation which provides support services to marginalised women, particularly women working in prostitution, has also called for the introduction of legislation which would allow for the deletion of criminal records after a period of time so as enhance employment prospects of marginalised individuals.

F Conclusion and recommendation

1.104 The Commission recognises that the issue of the re-integration of ex-offenders and ex-prisoners has come to the forefront of the debate on criminal justice policy and social inclusion in recent times, with an increasing recognition of the important links between unemployment and recidivism. In light of the persuasive evidence that offending behaviour is influenced by unemployment, and considering the success of employment programmes working to re-establish ex-offenders in the workplace, the Commission has concluded that employment is central to the rehabilitation

⁹⁶ The profile of individuals coming into contact with the PACE project was markedly similar to that of the Linkage Project. In a conference paper delivered by the Director of PACE in November 2006 to the 9th Annual Conference of the Association for Criminal Justice Research and Development Ltd (formerly the Irish Association for the Study of Delinquency Ltd) on the Re-integration of Offenders, it was noted that most of the individuals using the services of PACE were young males, under-educated, from the lowest socio-economic class and that over 60% had an alcohol or drug problem. Homelessness featured heavily among typical users of PACE while mental health issues were also a significant element.

and reintegration of ex-offenders back into the community and, in particular, back into the workforce. The Commission also considers that the employment of ex-offenders has benefits for the community both in terms of a reduction in recidivism and in terms of the skills and contribution of a significant element of the population to the labour market.

1.105 The Commission agrees that an individual's past behaviour is not necessarily a good indicator of a person's current or future intentions and considers that an old criminal conviction is not necessarily relevant to all decision-making exercises regarding that person. The Commission notes that the clean slate regime for persons under 18 years under section 258 of the *Children Act 2001* already recognises this. The Commission also agrees that there are some circumstances when a past conviction is relevant to the decision-making process, usually in circumstances where the interests of vulnerable people are at issue. The Commission considers that the objections raised by the critics of spent convictions schemes do not outweigh the positive aspects of the introduction of such measures, whether in terms of re-integration of ex-offenders or in terms of public safety. The Commission considers that the safety of the public can be adequately ensured where a spent convictions scheme is in operation by limiting such schemes to exclude dangerous offenders and by requiring greater vigilance on the part of recruiters, particularly in relation to sensitive posts.

1.106 The Commission is of the opinion that society and the legal system has an important role to play in ensuring that valuable members of society are not excluded or marginalised because of the existence of an old and irrelevant criminal record and that legislative measures should be employed to ensure that such exclusion does not take place. One method of ensuring that such exclusion does not take place is to enact legislation which recognises that, in appropriate cases, an old criminal conviction can be considered irrelevant and its effects should be extinguished. In this regard, the Commission is mindful of Ireland's international obligations, in particular the recommendations of the Council of Europe on the retention of criminal records and the marginalisation of ex-offenders, particularly in the labour market. The Commission has concluded that the introduction of suitable spent conviction legislation would meet the dual goals of offender rehabilitation and public protection.

1.107 The Commission recommends that suitable spent conviction legislation should be introduced for adult offenders in this jurisdiction.

CHAPTER 2 MODELS IN OTHER JURISDICTIONS

A Introduction

2.01 In Chapter 1, the Commission considered the principles that lie behind a spent conviction (or clean slate) scheme and recommended that suitable scheme for adult offenders should be introduced in this jurisdiction. In this Chapter, the Commission goes on to consider in detail the schemes in place in other comparable common law jurisdictions.

2.02 In Part B, the Commission discusses the various general approaches taken to the establishment of such schemes in other jurisdictions. In Part C, the Commission examines the detailed elements of the schemes in place in the United Kingdom, Australia, New Zealand and Canada, and virtually all of them owe a great deal to the general model in the British *Rehabilitation of Offenders Act 1974*. While detailed differences exist between the various legislative schemes, they share a number of common features and these are examined in Part C. These include sentence limitation provisions, the exclusion of certain offences, requirements that a certain length of time must elapse since the offence was committed, exclusions for sensitive posts and the effect of convictions during the intervening period. In Part C, the Commission also examines whether any system should operate on an automatic basis or whether an application has to be made to the relevant authority before the offence can be expunged.

2.03 In Part D, the Commission sets out its conclusions and recommendations arising from its examination of the systems in place in other jurisdictions.

B Basis of spent conviction schemes

2.04 There are three principal ways in which the law affords protection to persons with criminal records. The first is through human rights or anti-discrimination law which prohibits unreasonable discrimination against a person on the basis of a criminal record. The second is through the enactment of clean slate/expungement/spent convictions legislation which deems certain old convictions to be irrelevant after a certain period of time thus allowing the person the subject of the record the discretion not to disclose the record in most situations. The third is a combination of the first two, in which a spent convictions scheme is specifically legislated for with a

separate but complementary measure in anti-discrimination laws to the effect that it is unlawful to discriminate unreasonably against the person the subject of the record. Each of these options is considered in more detail below.

(1) *Anti-discrimination approach*

2.05 The first option, involving an anti-discrimination approach, operates by rendering it unlawful for an individual to be unreasonably discriminated against on the grounds of a criminal conviction. This means that when an individual is, for example, applying for a job, seeking a service or looking for accommodation, it would be unlawful to deny the person that job, service or accommodation on the basis that he or she has a criminal record where it is unreasonable to do so. Importantly, this anti-discrimination approach would mean that an individual would be required to disclose the existence of the criminal conviction if asked. Such provisions offer no protection as regards the disclosure of the record, but employers or other service providers would be prohibited from asking the individual whether or not they have a criminal record (except in relation to certain specified sensitive posts).

2.06 There will be circumstances in which it would be reasonable to treat an individual differently on the basis of the criminal record, where for example, a convicted sex offender was seeking employment in a school. It would be necessary to have in place specific guidelines as to the circumstances in which discrimination would be lawful and those guidelines would need to be very detailed and inclusive. Such guidelines would be necessary in the public interest and particularly for the protection of vulnerable members of society. The development of such guidelines would involve an exercise in deciding on the relevance of certain convictions for the purposes of certain circumstances or jobs, for example, the relevance of a conviction for assaulting a minor where the job involves looking after children or the relevance of a conviction for theft where the job involves handling money. Many jobs would require the employee to be placed in a particular position of trust and could thus be excluded from the protection of the anti-discrimination rules.

2.07 An anti-discrimination type approach has been adopted in Canada although a separate provision which allows offenders to apply for a 'pardon' also exists. The Canadian position is dealt with in greater detail below. In Australia, the federal spent convictions scheme is supported by a provision in the *Federal Human Rights and Equal Opportunity Commission Act 1986* which provides protection for all Australian people from unfair discrimination in relation to their dealings with Federal, State, local government bodies and private employers with the effect that it is unlawful to unreasonably discriminate against an individual on the basis of a criminal record. Some Australian States and Territories provide for similar anti-

discrimination measures. A similar anti-discrimination approach is adopted in New Zealand in addition to the clean slate regime in place under the 2004 Act.

2.08 The Constitutions and Civil Codes of some civil law jurisdictions such as Spain and Portugal contain broad anti-discrimination measures which can be interpreted as referring to discrimination on the grounds of criminal conviction or ex-offender/prisoner status. In Spain, a separate provision exists for the deletion of criminal records under certain conditions after a specific period of time has elapsed.

2.09 The obvious drawback of an anti-discrimination approach would be the difficulty in formulating the exceptions: employers, for instance, could argue that all positions of employment require employers to put a great deal of trust in their employees and employers should be fully aware of all the facts so that an informed decision regarding the recruitment can be made. This argument could be put forward in relation to any criminal offence since persons convicted of criminal offences are no longer permitted to describe themselves as being of 'good character' and it could be argued that being of good character was a prerequisite to the development of the employer-employee relationship.

2.10 In order to adopt this anti-discrimination approach in Ireland, the *Employment Equality Act 1998* would have to be amended so that the grounds of discrimination under the 1998 Act could be expanded to include previous criminal conviction as a ground of prohibited discrimination.

(2) *Limited spent convictions scheme*

2.11 The second option would be to operate a limited spent convictions scheme which would allow for the expungement of certain records after a period of time has elapsed. Such schemes could be limited by one of two general factors: the offence committed or the sentence received for the offence. Most of the spent convictions schemes in operation in the common law jurisdictions discussed in detail in this Chapter limit their application by a combination of both offence and sentence restrictions.

(a) *Offence-based limitation*

2.12 Where a spent convictions scheme is limited by offence-based criteria, it is invariably the case that certain serious offences would never be eligible for deletion. The effect is that an offender would always have to disclose the existence of a criminal record where the conviction is for an excluded offence. The offences excluded are generally of the most serious variety such as murder, manslaughter, sexual offences, offences against children and other serious offences against the person. Certain serious offences against the State are generally also excluded. The rationale for the exclusion of these offences is based on their nature and seriousness. A

conviction for murder could never come within the ambit of a spent convictions scheme in this State, since murder attracts a mandatory life sentence. Thus, even if the convicted person is no longer in prison, the mandatory life sentence remains active and can be enforced if the convicted person breaches a condition of their release on licence (the equivalent of parole). Given that the life sentence hangs over the convicted person for life, expungement of the conviction would simply not be possible. Of course, this is not the only reason that a conviction for murder could not be expunged. The underlying rationale for the existence of spent convictions schemes is that, after a significant period of time has elapsed, certain convictions can be considered to be irrelevant. Very serious offences, particularly those which involve loss of life, are difficult to categorise in this way and are thus not considered appropriate for expungement.

2.13 This approach is based on considerations of the harm caused by the offence, the likelihood of re-offending and the implications that could be drawn about character and predispositions of the offender by the very commission of the offence. For similar reasons, sexual offences are almost always excluded from the ambit of such schemes. Another consideration in relation to the exclusion of sexual offences is the recent introduction of reporting-type obligations for sex offenders. In this jurisdiction, such obligations were introduced by the *Sex Offenders Act 2001*, which states that any individual convicted of a sexual offence for which a sentence of 2 years or more was imposed by the court, must remain subject to the reporting obligations indefinitely.⁹⁷ Ultimately, these reporting obligations may form the basis for a formal Sex Offenders Register.

2.14 Section 258 of the *Children Act 2001*, which provides for a limited clean slate scheme for persons under 18 years in this jurisdiction, imposes a sentence-based limitation on the application of the scheme, albeit in an indirect manner. Offences which must be tried by the Central Criminal Court, notably murder and serious sexual offences, are excluded from the protection of section 258 of the 2001 Act. This approach means that a line is drawn in the 2001 Act between offences that may be wiped from the record and those offences that may not.

⁹⁷ Section 7(1) of the *Sex Offenders Act 2001* states that a person will be subject to the requirements of the Act if he or she is convicted of a sexual offence. Section 7(2) further states that a person will be subject to the Act if, at the commencement of the Act, the sentence to be imposed on that person in respect of the offence has yet to be determined or the sentence has been imposed on the person and the person is serving the sentence in prison, or the sentence is still in force or current. However, section 3 of the Act sets out certain exceptions whereby individuals convicted of sexual offences in certain circumstances will not be subject to the registration requirements of the Act.

(b) Sentence-based limitation

2.15 A sentence-based spent convictions scheme requires that only offences which attract a penalty below a certain threshold will be eligible for expungement. Most spent convictions schemes operate on this basis and provide that sentences of imprisonment beyond a specified number of months or years are excluded. The rationale for operating a system on this basis is that the sentence imposed by the court should be regarded as a yardstick by which to measure the seriousness of the offence and this judgement of the court can reliably be considered to be proportionate to the offence in question. Thus an expungement scheme which adopts the proportionate judgement of the court - which would have taken matters such as the circumstances of the offence and the offender into account in passing sentence as a starting point for expungement - could also be said to be proportionate. In other words, the system relies on the judgement of the court in sentencing to determine the next step in the process, that is, wiping the slate clean.

2.16 In Australia, proposals for expungement laws put forward by the Australian Law Reform Commission recommended that all offences should be eligible for expungement,⁹⁸ however when legislation was enacted in Australia in the 1990s, it was limited to offenders who were sentenced to imprisonment for less than 30 months. Some states, such as New South Wales, have since further restricted the scheme to offenders sentenced to less than 6 months imprisonment. In the British *Rehabilitation of Offenders Act 1974*, (and the equivalent *Rehabilitation of Offenders (Northern Ireland) Order 1978*) any sentence of more than 30 months imprisonment is ineligible for expungement.

2.17 Significantly, the scheme for under-18 offenders in this jurisdiction in section 258 of the *Children Act 2001* imposes no such sentence based limitation, which is very unusual in this regard. Section 25(4)(d) of the 2001 Act states that the Minister for Justice, Equality and Law Reform may make Regulations which have the effect of excluding the application of the 2001 Act, but no such Regulations have been made to date (July 2007). The same limitations apply to juvenile offenders under the British 1974 Act (and the Northern Ireland 1978 Order) as apply to adult offenders, that is, that sentences of more than 30 months may not be expunged.

⁹⁸ Both the Australian Law Reform Commission and the New Zealand Penal Review Group recommended the introduction of spent convictions scheme on this basis in the 1980s.

(c) *Hybrid schemes*

2.18 The protection offered to persons with old convictions in various jurisdictions often involves a combination of the features of these models. In other words, there may be a spent convictions scheme in place which is limited in terms of sentence received and the offence committed and there may also be anti-discrimination legislation in place which prohibits discrimination on the grounds of a criminal record. The federal system in Australia, for example, contains all of these features. In jurisdictions where spent convictions legislation is in place, it tends to be limited by the offence committed and the sentence imposed. The system in the British 1974 Act is an example of this approach and it is the most common system.

2.19 There are good reasons why such hybrid schemes are popular. For instance, a scheme which is limited by the exclusion of certain offences only could be problematic and contrary to the interests of public safety. First, it would be necessary to specifically exclude certain offences from the application of the scheme and thus would involve an examination of all the offences on the statute book in terms of certain criteria in order to determine whether that offence should be eligible for expungement. This would be a cumbersome at best and near impossible at worst and each time a new offence was created or reformed by legislation, a similar examination would have to be carried out. More importantly, by excluding the application of a spent convictions scheme on the basis of the offence in question alone, the circumstances of the commission of the offence or the offender cannot be given adequate consideration. Aggravating or mitigating factors in relation to the commission of any offence are very important to a full understanding of the offence and indeed, the offender in question. For example, where a person is charged with assault, it would be a very significant matter if that assault involved a weapon and a scheme which does not exclude assault offences may be too wide and potentially allow dangerous individuals the benefit of a spent conviction or it may be under-inclusive and rule out an offender who assaults someone in circumstances where self defence may be raised even if not accepted or available in law. A scheme which excludes offences without a consideration of any of the above factors could not be considered to be proportionate.

2.20 The reasons put forward as to why an offence-based scheme should not be adopted also support a sentence-based scheme. Sentence-based schemes allow the circumstances of the offenders and the offence to have an impact on whether the offence is suitable for expungement, thus ensuring a proportionate and fair clean slate system. With this in mind, it is important and telling that most jurisdictions that have a spent convictions scheme in place also exclude certain offences from its application. Those offences excluded are usually sexual offences and the most serious offence against the person, notably homicide.

2.21 In some jurisdictions such as Australia, spent convictions measures are reinforced by provisions in equality legislation which make it unlawful to discriminate against an individual on the basis of a criminal record. This offers extra protection to persons with criminal records insofar as the spent convictions scheme will relieve them of the requirement to disclose in certain circumstances, the anti-discrimination legislation means that discrimination cannot take place in a direct or indirect form for example where the employer suspects that a person may have a criminal record which is protected by spent convictions legislation and does not give them the job on this basis.

C Models in other jurisdictions

2.22 As mentioned in the Introduction to this Chapter, the Commission examines in this Part the detailed features of the spent convictions schemes operating in comparable jurisdictions. These features are: the basis of the scheme in terms of the sentence threshold or offences excluded, exclusions from the application of the scheme in terms of sensitive posts and particular employment; the length of time which must have elapsed since the offence was committed; the effect of conviction for offences during the intervening period and whether the system operates on an automatic basis or whether an application has to be made to the relevant authority before the offence can be expunged.

(1) Sentence threshold and offences excluded

(a) United Kingdom

2.23 The *Rehabilitation of Offenders Act 1974* introduced a system of spent convictions in England and Wales and in Scotland. The *Rehabilitation of Offenders (Northern Ireland) Order 1978* extended the essential elements of this scheme to Northern Ireland. The 1974 Act was introduced on foot of the 1972 Report of the Gardiner Committee, *Living it Down - The Problem of Old Convictions*⁹⁹ which recommended the introduction of a spent convictions jurisdiction. Section 5 of the *Rehabilitation of Offenders Act 1974* states that the following are excluded from its application:

- i) a sentence of imprisonment for life
- ii) a sentence of imprisonment or corrective training for a term exceeding 30 months

⁹⁹ *Living it Down – The Problem of Old Convictions* (Stevens & Sons, 1972) was the Report of a Committee established jointly by Justice, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders (NACRO). The Committee was chaired by the former Lord Chancellor, Lord Gardiner.

- iii) a sentence of preventative detention
- iv) a sentence of life or a sentence of more than 30 months imposed on a minor.

The 1974 Act specifically states that any other offence is an offence subject to rehabilitation under the Act. The term “rehabilitation” is used in this context to describe the circumstances under which an offence will be expunged or considered spent. Thus the 1974 Act excludes sentences for which a sentence of 30 months or more was imposed and no provision is made for the exclusion of specific offences from the application of the Act.

2.24 A comprehensive review of the 1974 Act was carried out by the Home Office in 2002 in a Report entitled *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act 1974*, which recommended that the 30 month sentence limit be removed and that all sentences, except those of life imprisonment, should be eligible for deletion. The review looked at ways to ensure that the burden to disclose a criminal conviction is minimised for the very many ex-offenders who simply want the chance of lawful employment while maintaining a requirement to disclose where there may be a particular risk of harm. The Report recommended that the current 30 month cut-off be removed so that the scheme would apply to all offenders who have served their sentence.

2.25 The British Government, in its response to the review, accepted this recommendation but no move has been made to date to implement these recommendations. This may have been influenced by the public outcry which emerged after the murder in 2003 by Ian Huntley of two school children, Holly Wells and Jessica Chapman. Ian Huntley had obtained a job in a primary school despite the existence of police information regarding allegations of rape and statutory rape. While he had never actually been convicted of an offence, a great deal of police information existed in relation to the allegations and thus the problem in this case related the lack of formal *information sharing and vetting concerning so called “soft information”* between different police forces rather than the concealment of a criminal record. The Huntley case led to the 2004 *Report of the Bichard Inquiry*, which made significant recommendations on vetting and disclosure and are examined in Chapter 4.

(b) Australia

(i) Commonwealth

2.26 Following the Law Reform Commission’s 1987 *Report on Spent Convictions*, the Commonwealth of Australia adopted measures to introduce a spent convictions regime in the *Crimes Legislation Amendment Act 1989*. The 1989 Act inserted a new Part VIIC into the *Crimes Act 1914* and provides (in terms that mirror the British 1974 Act) that only offences which

attract a prison sentence of less than 30 months should be eligible for expungement. This scheme applies throughout Australia in respect of Commonwealth and territorial laws.

(ii) New South Wales

2.27 Section 7 of the New South Wales *Criminal Records Act 1991* specifies that any offence which attracts a penalty of more than 6 months imprisonment shall not be eligible for expungement. This is clearly more restrictive than the provisions of the 1989 Commonwealth statute and the schemes in place in other States in Australia.

(iii) Western Australia

2.28 The Western Australia *Spent Convictions Act 1988* provides that an offence which attracted a sentence of life imprisonment can never be eligible for expungement while all other sentences may be expunged after a specified conviction-free period has passed since the commission of the offence.

(iv) Northern Territories

2.29 Under section 5 of the Northern Territories *Criminal Record (Spent Convictions) Act 1992*, only offences which attract a sentence of less than 6 months are eligible for expungement. It also provides that sexual offences cannot be expunged, thus excluding all sexual offences from the scope of the Act. Certain other prescribed offences are also excluded from the application of the Act.

(v) Australian Capital Territory

2.30 Section 11 of the Australian Capital Territory *Spent Convictions Act 2000* provides that offences which attract a sentence of 6 months or more, sexual offences and certain other prescribed offences are excluded from the application of the spent convictions scheme.

(c) New Zealand

2.31 The New Zealand *Criminal Records (Clean Slate) Act 2004* provides that any offence which attracts a sentence of imprisonment is not eligible for expungement under the clean slate scheme introduced by the Act. Section 4 of the 2004 Act prescribes the offences which are specifically excluded from the Act and these are mainly sexual offences. The Act also provides that an offence for which a person has been detained in hospital due to his/her mental condition instead of being sentenced can never become spent.

(d) Canada

2.32 Canada, influenced by its Civil Law (French) heritage, does not operate an automatic national spent convictions scheme such as those in the

common law jurisdictions already discussed. Under section 3(1) of the Federal *Criminal Records Act 1985*, ex-offenders must apply to the National Parole Board in order to have their conviction pardoned. The 1985 Act does not provide for any exclusion from the application of the scheme in terms of the offence committed or the sentence served. Section 5 of the 1985 Act provides that a pardon granted by the National Parole Board is taken as evidence of the fact that the conviction “should no longer reflect adversely on the applicant’s character.”

(e) Overview

2.33 It is clear from the foregoing that spent conviction schemes differ greatly in terms of application. The sentence limits vary from excluding life sentences only (Western Australia) to excluding all sentences of imprisonment (New Zealand). What is clear is that the more recent legislation is more restrictive than older legislation, which is clear from the comparison between the British 1974 Act and the New Zealand 2004 Act. The Australian States that have enacted legislation in recent years have also taken a more restrictive view than the original Commonwealth approach; the 6 months sentence cut-off point in the Australian Capital Territory may be compared with the 30 month sentence cut-off point of the Commonwealth scheme. The 2002 Home Office Review of the operation of the British *Rehabilitation of Offenders Act 1974*, which recommended a more inclusive option by abolishing the 30 months cut-off point to include all offenders except those serving life sentences, conflicts with this trend, but it is important to note that the changes proposed by the 2002 Review have not been implemented.

2.34 In terms of the types of offences excluded, most jurisdictions provide for the specific exclusion of sexual offences in any spent convictions scheme. The Canadian federal scheme does not exclude sexual offences. However, since that system is based on an individual application to the National Parole Board rather than an automatic system, there is greater scope for the individual consideration of offenders and whether they pose a risk to public safety. In Britain, the exclusion of sexual offences is indirect. Since 1997, persons convicted of a sexual offence must disclose the existence of the conviction when seeking employment and certain persons whose details are recorded on a “banned list” are prohibited from working with children or vulnerable adults in any circumstances.¹⁰⁰ The additional restrictions introduced in 2006 in the wake of the Bichard Inquiry into the Ian Huntley case are discussed in detail in Chapter 4.

2.35 It is also important to consider that many clean slate schemes contain sentencing thresholds while also excluding certain offences from the

¹⁰⁰ *Sex Offenders Act 1997*.

application of the scheme. A system established on this basis adds a double layer of protection; first by removing from the ambit of the scheme certain offences that are deemed so serious that they can never be considered for expungement and second by putting in place a sentence limitation by which offences which attract certain penalties are also considered too serious to be eligible for expungement. If a convicted person's offence is not specifically excluded, the sentence imposed by the court may make it ineligible for consideration under the clean slate scheme if that sentence is outside the sentencing cut-off point in place. This method relies to a great extent on the sentencing structure in place in the jurisdiction in question and any sentence cut-off point should be considered in light of the sentencing practice in the specific jurisdiction.

(2) Length of time which must have elapsed before an offence can be considered spent (the rehabilitation period)

(a) Ireland

2.36 The spent convictions scheme in place for persons under 18 in section 258 of the *Children Act 2001* provides that a person must not have been convicted of or dealt with in relation to an offence for 3 years before the conviction can be considered expunged. The term "dealt with" is quite broad and appears likely to include where a person has been given a caution, or has been dealt with under the *Probation of Offenders Act 1907*¹⁰¹. The 2001 Act does not impose different rehabilitation periods for different offences and it seems that a conviction-free period of 3 years is required regardless of the offence committed or the sentence handed down by the court.

(b) United Kingdom

2.37 Section 5(2) Table A of the *Rehabilitation of Offenders Act 1974* (replicated in the *Rehabilitation of Offenders (Northern Ireland) Order 1978*) specifies the necessary "rehabilitation period" that the offender must complete before the conviction in question can be expunged. In this context "rehabilitation period" means the necessary time during which the offender must remain conviction-free in order for the conviction to be eligible for expungement. Certain convictions or infractions will not affect the running of the rehabilitation period, and this issue is dealt with in more detail below. In relation to custody or detention of more than 6 months but not exceeding 30 months, the rehabilitation period is 10 years from the date of conviction.

¹⁰¹ Section 1(1) of the *Probation of Offenders Act 1907* allows the District Court to conclude that an individual is guilty of a summary offence without proceeding to impose a conviction for that offence on the basis of the age, antecedents, personal circumstances of the offender and the trivial nature of the offence. The 1907 Act is considered in detail in the Commission's *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005).

A sentence of imprisonment for less than 6 months becomes spent after 7 years from the date of conviction.

2.38 Convictions which attract fines or community service order are spent after 5 years from the date of conviction and an absolute discharge is considered spent after 6 months from the date of conviction. Finally, in relation to probation, supervision, care order, conditional discharge or binding over, the conviction becomes spent after 1 year from date of conviction or until the order expires, whichever is longer. Section 6(2) of the 1974 Act provides that where more than one sentence is imposed in respect of a conviction, for example a fine and community service, and if the periods of rehabilitation for the two offences differ, the rehabilitation period applicable to the conviction shall be the longer of the two periods.

(i) Changes recommended by the 2002 Home Office Review

2.39 The Home Office 2002 Review of the 1974 Act, *Breaking the Circle*, proposed to continue to use the sentence handed down by the court as a trigger for the rehabilitation period which should apply. The Review recommended that the new rehabilitation periods should be the length of the sentence handed down by the court plus an additional buffer period to be determined by the sentence imposed. This approach would place the principle of proportionality at the heart of the scheme. The Review concluded that the buffer periods to be added to the period of sentence to form the disclosure period should be one year for non-custodial sentences and 2 years for custodial sentences.

2.40 The proposed new scheme would also place greater emphasis on the completion of the sentence handed down by the court. For example, where a conviction attracts a fine and that fine remains unpaid, the proposed scheme would be that a sentence imposed in respect of the non-payment of a fine should trigger a new disclosure period. No such provision exists under the current system in the 1974 Act.

(c) Australia

(i) Commonwealth

2.41 Under Part VIIC of the *Crimes Act 1914* an offence becomes eligible for expungement after 10 years from the date of conviction. This requirement applies to all offences that are eligible for expungement under the scheme.

(ii) New South Wales

2.42 Under section 9 of the *Criminal Records Act 1991* a sentence which is eligible for expungement under the scheme may be expunged 10 years from the date of the conviction. An individual may apply to the Police Commissioner of New South Wales to have criminal information destroyed.

The Commissioner will usually only destroy this information if the conviction is very old and minor, an old juvenile offence, a discharge without conviction which is more than 15 years old and - where no further offences have been committed since - the person has been acquitted or had the conviction quashed on appeal, or the charges have been withdrawn or dismissed.

(iii) Western Australia

2.43 Section 6 of the *Spent Convictions Act 1988* provides that in the case of a serious offence (defined as carrying one year or more imprisonment or a fine of \$15,000 or more), an application must be made to a judge to have a conviction declared spent. A judge may take into account the factors listed in section 6(4) of the 1988 Act such as length and kind of sentence imposed, length of time since the conviction was imposed and all the circumstances of the applicant including nature and seriousness of the offence and whether there is public interest to be served in not making the order, in deciding whether or not to make an order.

2.44 Where lesser offences are concerned (defined as one which is not a serious offence as defined above and not a sentence of life imprisonment), applications are made to the Commissioner of Police who does not have discretion to refuse the order if it conforms with the Act.

2.45 Section 39 of the *Sentencing Act 1995* also allows offenders to have a spent convictions order imposed in certain circumstances; where the court considers it unlikely that the offender will commit the same offence again and having regard to the trivial nature of the offence, or the previous good character of the offender, the court considers that the offender should be relieved immediately of the adverse effect of the conviction.

(iv) Northern Territory

2.46 Section 5 of the *Criminal Records (Spent Convictions) Act 1992* provides that a period of 10 years conviction-free must have passed before a conviction can be considered spent.

(v) Australian Capital Territory

2.47 A conviction becomes spent on the completion of a conviction-free period of 10 years under section 13 of the *Spent Convictions Act 2000*.

(d) New Zealand

2.48 The period after which eligible offences may be expunged under the *Criminal Records (Clean Slate) Act 2004* is 7 years from the date of conviction. In addition to the 7 year waiting period before a conviction can become spent, any fine, reparation, or costs ordered by the courts must be paid in full. Section 10 of the 2004 Act provides that an individual may apply to the District Court for an order that the rehabilitation period need not

be completed or that a conviction be disregarded where the last sentence imposed on the individual was a custodial sentence and the offence has subsequently been abolished. This in effect means that offences which were committed under legislation that has been repealed are eligible for expungement.

(e) Canada

2.49 Section 4 of the *Criminal Records Act 1985* provides that an individual must wait 3 years before applying for a pardon in the case of a summary offence or 5 years in the case of an indictable offence. These qualifying periods run from the date of expiration of sentence. Therefore, the sentence including any imprisonment, probation or payment of a fine must have been completed before an application for pardon will be considered.

(3) Exclusions from protection of scheme

(a) Introduction

2.50 Since a person's criminal convictions are not actually deleted from the record under a spent convictions scheme, it operates instead by curtailing the range of individuals to whom the conviction must be disclosed. Where no spent convictions scheme exists, a person with a criminal record is required to disclose the fact that they have a criminal record in all circumstances. Where a spent convictions scheme is in place, the general rule is that a spent conviction need not be disclosed. When a person is asked whether they have a criminal record, this question is understood to refer to unspent convictions only and thus offences which have become spent under the spent convictions scheme need not be disclosed in most circumstances.

2.51 There are circumstances, however, where an individual should be required to disclose the existence of a criminal conviction even if that conviction would otherwise be considered spent. These are often set out in the primary legislation or, in the case of the British 1974 Act and the Northern Ireland 1978 Order, in secondary legislation such as a Ministerial Order authorised by the primary legislation. Section 258 of the *Children Act 2001*, which was modelled on the British and Northern Ireland legislation, also provides for the specification of such disclosure requirements by means of Ministerial Order,¹⁰² which has the potential effect of restricting the apparent effect of the primary legislation in important respects. Full disclosure is usually required in relation to sensitive posts, positions, and professions. Generally speaking, in relation to any job which involves working with or supervising children or vulnerable people, there will be a

¹⁰² Section 258(4)(d) of the *Children Act 2001* provides that the Minister for Justice, Equality and Law Reform may modify or restrict the scope of section 258 by Order. However, to date (July 2007) no such Order has been made.

requirement that full disclosure of all criminal convictions, including spent convictions, be made. Similarly, applicants to the medical and legal professions will be required to make full disclosure on the basis that the level of trust and dependency involved is greater and the interests of people in vulnerable positions are likely to be at stake. Such disclosure requirements are commonly known as “exclusions” from a spent convictions scheme. Most spent convictions schemes in the common law jurisdictions discussed here have some form of exclusion in place. The Commission now turns to examine these in more detail.

(b) United Kingdom

2.52 Section 4(4) of the *Rehabilitation of Offenders Act 1974* (replicated in the *Rehabilitation of Offenders (Northern Ireland) Order 1978*) provides that the Secretary of State may by order:

“(a) make such provision as seems to him appropriate for excluding or modifying the application... in relation to questions put in such circumstances as may be specified in the order;

(b) provide for such exceptions from the provisions... as seem to him appropriate, in such cases or classes of cases, and in relation to convictions of such a description, as may be specified in the order.

2.53 The *Rehabilitation of Offenders Act 1974 (Exceptions) Orders 1975 and 1986* introduced a range of exclusions from the spent convictions scheme established by the 1974 Act. Under these orders, applicants to certain positions, offices and professions are required to reveal all criminal convictions even those otherwise considered spent under the 1974 Act. For example, doctors, lawyers, dentists, nurses, accountants, teachers, social workers, child minders and any person who has substantial unsupervised access to persons under 18 years of age must reveal all convictions. These exceptions offer protection to more vulnerable members of society and, by targeting persons who are placed in particular positions of trust in the community such as doctors, the aim is to balance the important objective of protecting the public with the offender’s right to privacy. It is important to note that having a previous criminal conviction is not an automatic bar to entering any of the above professions or to taking up certain posts. The information provided is used to make an informed assessment of the applicant’s suitability for the post or profession.

2.54 Section 6 of the 1974 Act provides that a question posed by a potential employer regarding previous criminal convictions is understood to refer to “unspent” convictions only. Therefore, a potential employee is only obliged to inform the employer of offences which have not become spent under the 1974 Act or which are excluded from the protection of the

legislation by reason of the sensitive nature of the post or office. Under the *Police Act 1997*, every employer is now entitled to request a Basic Level Check and Criminal Conviction Certificate in relation to any potential employee. This level of check will only provide details of current convictions and will not reveal any spent convictions. Registered employers are entitled to request an Intermediate Level Check for potential employees under which all convictions, including spent convictions, are revealed. This higher level check is available to anyone seeking a position involving regular contact with persons under 18 years of age or occupations excepted under the 1974 Act. A High Level Enhanced check is available to registered employers and for those seeking judicial appointments, lottery or gaming licences, and all criminal information will be revealed including spent convictions, cautions, acquittals, inconclusive investigations and other criminal intelligence information. The issue of police checks and vetting is examined in detail in Chapter 4 below.

2.55 Under the scheme established by the 1974 Act, applicants for insurance or life assurance are entitled to interpret any question regarding previous criminal convictions as referring to unspent convictions only. This is the case even if the conviction is relevant to the risk which the insurer will underwrite. Section 4(1)(a) of the *Rehabilitation of Offenders Act 1974* states that

“no evidence shall be admissible in any proceedings before a judicial authority... to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction.”

However, section 7(3) of 1974 Act states that previous convictions, including spent convictions, can be cited in criminal proceedings where:

“justice cannot be done in the case except by admitting or requiring evidence relating to a person’s spent convictions or to circumstances ancillary thereto.”

2.56 After the enactment of the 1974 Act, a Practice Direction was issued which advised that spent convictions should not be referred to in court except in very special circumstances. As regards civil proceedings in general, the Practice Direction echoed section 7(3) of the 1974 Act by stating that no question should be asked with might lead to a spent conviction being revealed and if such questions are asked they need not be answered. This general rule does not apply, however, to civil proceedings relating to children, such as adoption, guardianship or custody, where the Practice Direction follows the approach in criminal proceedings, that spent convictions may be revealed where the court is satisfied that justice cannot be done unless evidence of spent convictions is admitted.

(c) Australia

(i) Commonwealth

2.57 Exclusions are dealt with in Part VIIC, Division 6, of the *Crimes Act 1914*, and law enforcement agencies, courts and tribunals are excluded from the application of the spent convictions scheme. This means that spent convictions may be disclosed in a court of law. Persons seeking employment in relation to the care, instruction or supervision of minors may be asked about previous convictions to ascertain whether that person has been convicted of a designated offence. A designated offence for the purposes of the Act is either a sexual offence or any another offence against the person where the victim was a minor. A Commonwealth authority which assesses appointees to a designated position such as one where the duties involve access to national security information is also exempted from the provisions of the Act. The protection of the Act is afforded throughout Australia in respect of commonwealth and territory laws.

(ii) New South Wales

2.58 The *Criminal Record Regulations 2004*, made under the *Criminal Records Act 1991*, provide that certain offices and professions are exempt from the spent convictions scheme in the 1991 Act. In common with the Commonwealth provisions, law enforcement agencies making criminal record information available to other law enforcement agencies are also excluded from the ambit of the scheme. Certain posts, positions and offices, such as applicants for admission as legal practitioners, are excluded from the consequences of a conviction being spent. Judges, police officers, prison officers, teachers and teacher aides, any child related employment and employment in the fire services where the conviction is for arson, are also exempt from the spent conviction scheme established by the Act. Proceedings before a court are exempt from the application of the Act as are applications for gaming and firearms licences.

(iii) Western Australia

2.59 Schedule 3 of the *Spent Convictions Act 1988* contains a list of exceptions similar to those listed in the British 1974 Act by which persons applying for particular posts, offices or professions must disclose having a spent conviction. The *Spent Convictions Regulations 1992* add some exceptions to the list. As with provisions elsewhere, the exceptions are designed to protect children and vulnerable people and so include any employment with children, employment in the police services and other applications for licences similar to those in New South Wales, discussed above. Certain offences designated in the Regulations must be disclosed and these include all sexual offences, most offences against the person and offences against children.

(iv) Northern Territory

2.60 Section 15 of the *Criminal Records (Spent Convictions) Act 1992* contains exclusions from the application of the spent conviction scheme. The exclusions are similar to those already mentioned in other States and include positions involving the supervision or care of children as well as police and personnel working in criminal authorities. Certain licence applications also require full disclosure from applicants. Proceedings before courts and tribunals are also exempt from the application of the Act. Section 19 of the 1992 Act contains a provision whereby regulations may be made for further exclusions from the Act.

(v) Australian Capital Territory

2.61 Section 19 of the *Spent Convictions Act 2000* provides that spent convictions do not apply to certain appointments and positions, for example, the appointment of judges, police officers, teachers, child care providers or anyone employed in the supervision of children. Proceedings before the court are also exempt. Applicants for certain licences are also required to make full disclosure. Part V of the *Discrimination Act 1991* provides that certain agencies and professions may be granted exceptions where it is reasonable to do so.

(d) New Zealand

2.62 Under section 19 of the *Criminal Records (Clean Slate) Act 2004*, a conviction can continue to be disclosed in any civil or criminal proceedings before a court. Some other exceptions are included in section 19 of the 2004 Act by which a conviction can continue to be disclosed, for example, when seeking employment with involving children or vulnerable adults, and for positions that involve the national security of New Zealand. Furthermore, a range of offences primarily sexual offences are excluded from the application of the scheme under section 4 of the 2004 Act.

(e) Canada

2.63 Sections 6.2 and 6.3 of the *Criminal Records Act 1985* provide two exceptions to the general prohibition on disclosure in respect of identification of a person by a police force and in respect of records of sexual offences where employment is being sought concerning children or vulnerable groups. Spent convictions legislation in a number of States and Territories require disclosure of a conviction where it is relevant to the job or office in question. Under the 1985 Act an individual, if asked, is *not* entitled to deny the existence of a criminal record. An individual is entitled to say that he or she has been convicted of a criminal offence for which a pardon has been granted. The 1985 Act does not affect the usual rules with respect of the presentation of such evidence in court.

(4) Effect of intervening convictions

(a) United Kingdom

2.64 Section 6(4), (5) and (6) of the *Rehabilitation of Offenders Act 1974* (replicated in the *Rehabilitation of Offenders (Northern Ireland) Order 1978*) govern the area of intervening offences during the rehabilitation period. Section 6(6)(a) of the 1974 Act states that any offence which is not triable on indictment shall be disregarded as regards the running of the rehabilitation period. Thus, where an individual commits a summary offence which can only be tried by a Magistrates' Court, that offence will not affect the running of the rehabilitation period. The rehabilitation period for each offence expires separately. However, if the offence is one of a more serious nature, namely, one that could be tried in the Crown Court, then neither offence will become spent until the rehabilitation periods for both offences are over. If the second conviction leads to a prison sentence of over 30 months, then neither offence will ever become spent.

2.65 Once a conviction becomes spent, it remains spent and cannot be revived. If a person commits further offences at a later period, a further rehabilitation period, commensurate with the offence, will begin.

(b) Australia

(i) Commonwealth

2.66 Section 85ZX of the *Crimes Act 1914* provides that a person convicted of a summary offence during the rehabilitation period must wait until the end of the waiting period for the later offence before either conviction can become spent. The same applies to a person who is convicted of an indictable offence during the waiting period.

(ii) New South Wales

2.67 If an individual is convicted of an offence punishable by imprisonment during the crime-free period, the period resets and he or she has to start the conviction-free period again. However, section 11(2) and (3) of the *Criminal Records Act 1991* provide that a conviction for a traffic offence during the conviction-free period is to be disregarded as regards the running of the conviction-free period.

(iii) Western Australia

2.68 The waiting period under the *Spent Convictions Act 1988* will reset if a person is convicted of an offence during the conviction-free period. Minor punishments or convictions where no punishment was imposed will not affect be sufficient to interrupt the running time of the conviction-free period.

(iv) Northern Territory

2.69 Section 6 of the *Spent Convictions Act 1992* provides that traffic offences do not affect the running of the conviction-free period.

(v) Australian Capital Territory

2.70 Minor offences do not affect the running of the conviction-free period under the *Spent Convictions Act 2000*. Under section 13, convictions for traffic offences are treated separately from other offences for the purposes of the conviction-free period.

(c) New Zealand

2.71 Under section 8 of the *Criminal Records (Clean Slate) Act 2004*, if a further offence is committed during the rehabilitation period of another offence, the running time will reset and neither offence will become spent until the rehabilitation period for the later offence has been completed.

(d) Canada

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

(5) Automatic system or application required?

2.73 Most of the spent convictions schemes examined are automatic in the sense that the offences in question become spent after the required period has passed without the need for an application by the individual in question. The 1972 Report of the Gardiner Committee, *Living it Down – The Problem of Old Convictions*, which led to the enactment of the *Rehabilitation of Offenders Act 1974*, recommended that a spent convictions scheme should be automatic. This was because the need for an application would be an unnecessary complication in the process and it was also felt that it would defeat the purpose of a spent convictions scheme if the person who was seeking to put their past behind them was required to make an application to a court or tribunal or bureaucratic body thereby unnecessarily highlighting the fact of the conviction. Thus, the *Rehabilitation of Offenders Act 1974* operates by deeming a conviction automatically spent once the requirements of the Act have been met.

2.74 The position in Canada is different and ex-offenders seeking to have their convictions ‘pardoned’ must apply to the National Parole Board. A pardon granted by the National Parole Board is taken as evidence of the fact that the conviction “should no longer reflect adversely on the applicant’s character” as provided in section 5 of the *Criminal Records Act 1985*. Under section 4 of the 1985 Act, an individual must wait 3 years before applying

for a pardon in the case of a summary offence or 5 years in the case of an indictable offence. Where a pardon is granted, the judicial record of the conviction is to be kept separate and apart from other criminal records. The record of the conviction shall not be disclosed except with the prior approval of the Solicitor General of Canada.¹⁰³ In considering whether or not to grant a pardon, the National Parole Board will look at the conduct of the applicant since the conviction was recorded, that is, whether the applicant's behaviour is consistent with and demonstrates a law-abiding lifestyle. The Board will also examine the nature of the infraction and any information provided by law enforcement agencies about suspected or alleged behaviour and the Board will take representations by or on behalf of the applicant. The Board has discretion whether or not to grant a pardon however an applicant may reapply after a period of time. A pardon can be revoked if a person is subsequently convicted of a summary offence and a *pardon will cease to have effect* if a person is subsequently convicted of an indictable offence or an offence which is punishable either summarily or on indictment.

2.75 Part 2 of the Western Australia *Spent Convictions Act 1988*¹⁰⁴ provides that an application must be made to a judge or the Commissioner of Police in order for a conviction to be declared spent. The application must be made to a judge in the case of a serious offence defined in section 9 of the 1988 Act as a sentence of imprisonment of more than 1 year or a fine of \$15,000 or more. A judge may take into account the factors listed in section 6(4) of the 1988 Act such as length and kind of sentence imposed, length of time since the conviction was imposed and all the circumstances of the applicant including nature and seriousness of the offence and whether there is public interest to be served in not making the order, in deciding whether or not to make an order. In the case of a less serious offence which is defined as one which is not serious as defined above, the application is made to the Commissioner of Police who does not have discretion to refuse the application if the requirements of the Act are met.

2.76 The limited clean slate scheme for those under 18 in this jurisdiction in section 258 of the *Children Act 2001*, modelled on the 1974 Act, operates on an automatic basis and there is no requirement that the individual apply to court to have the conviction declared spent. The Commission notes that the scheme proposed in the Private Members Bill introduced in Dáil Éireann in 2007, the *Rehabilitation of Offenders Bill 2007* (which lapsed on the calling of the 2007 General Election), involved a requirement to apply to the District Court to seek an order that a conviction

¹⁰³ Subject to the exceptions in sections 6.2 and 6.3 of the *Criminal Records Act 1985*.

¹⁰⁴ The Act came into effect in 1992.

was spent, and that such application would be on notice to the Garda Síochána. The Commission considers this matter in detail in Chapter 3.¹⁰⁵

(6) *Non-recognition of spent convictions legislation in other States*

2.77 It is important to bear in mind that any spent convictions scheme in this jurisdiction would, in current circumstances, apply only within the State. This is particularly significant in the context of travelling abroad where the destination State requests a criminal record check of the individual seeking entry into the country. Spent convictions legislation can have no application in this context unless a reciprocal agreement is in place between this jurisdiction and the destination jurisdiction. A conviction recognised as spent in this jurisdiction may not be recognised as spent in another country or there may be no spent convictions legislation in that country. In effect, all convictions will be disclosed in a request for travel or emigration purposes.

D Conclusions and recommendation

2.78 The Commission notes that a general pattern can be established from an examination of the various spent convictions schemes in operation in the jurisdictions surveyed. First, the schemes are based on the premise that old convictions need not be disclosed in many circumstances as they are deemed irrelevant to decision-making about the person involved. All of the schemes contain exceptions to this rule, all premised on concerns for public safety and the protection of the vulnerable. Thus, serious offences against the person and sexual offences are generally excluded from the protection of such schemes.

2.79 The Commission also noted that sentencing thresholds exist in most of the schemes examined. While the earliest schemes (notably, the British 1974 Act) tend to have higher thresholds of 30 months, the more recent schemes have either lowered the threshold to 6 months (the Australian Capital Territory 2000 Act) or have excluded any conviction which attracts a custodial sentence (New Zealand 2004 Act). All of the schemes provide a minimum period for which a person must be conviction-free before the protection of the spent convictions scheme is offered. This time period can range from 10 years to 3 years. The most recent scheme, introduced in New Zealand in 2004, provides that 7 conviction-free years must have elapsed before an offence will become spent. However, most schemes also provide that certain less serious offences do not interrupt the running of the crime-free period. Finally most of the schemes, with the exceptions of Canada and Western Australia, are automatic insofar as no application is required for the conviction to become spent. It is worth noting that some of the systems in

¹⁰⁵ See paragraph 3.41, below.

place in civil law jurisdictions such as France and Greece also provide for an application to a central authority for a criminal record to be deleted.

2.80 The Commission considers that there are some positive aspects of the spent convictions schemes in place in other jurisdictions while other aspects of the schemes would be unsuitable in the context of any proposed system in this jurisdiction. The Commission considers that the positive aspects of the spent convictions or clean slate regimes in place in these jurisdictions as well as the guidance provided by the scheme already in place in this State for under-18 offenders in section 258 of the *Children Act 2001* provide a sufficient basis on which to establish a scheme for adult offenders in this jurisdiction.

2.81 *The Commission recommends the introduction of a limited spent convictions scheme for adult offenders, which would build on the scheme already in place for under-18 offenders in section 258 of the Children Act 2001 and in comparable schemes in other jurisdictions.*

CHAPTER 3 PROPOSALS FOR REFORM

A Introduction

3.01 The Commission has recommended the introduction of a limited spent convictions scheme for adult offenders along the lines of the schemes in operation in other common law jurisdictions. The Commission considers that elements of the spent convictions legislation in other comparable jurisdiction could be combined to form a scheme which would be appropriate in this jurisdiction and which would fit with the scheme in place for under-18 offenders in section 258 of the *Children Act 2001*.

3.02 In Part B of this Chapter, the Commission discusses the rationale and underlying principles which it considers should guide any proposed spent convictions scheme for adult offenders. In Part C, the Commission sets out in detail the elements of the proposed scheme, including: the types of offences which should be excluded, the sentencing threshold which should apply, the required conviction-free period before which a conviction can be considered eligible for expungement and whether an automatic or application-based system would be appropriate. The Commission also discusses the circumstances in which the protection of the spent convictions legislation should not apply, for example in criminal proceedings or in relation to certain civil matters.

B Rationale for spent convictions scheme

3.03 In Chapter 1, the Commission examined the rationale underlying the spent convictions schemes in place in other jurisdictions. The Commission analysed in detail the arguments for and against the introduction of a spent conviction law for adult offenders with particular emphasis on the core values underlying the concept of ‘wiping the slate clean’. The Commission notes that established spent convictions schemes reflect an understanding that it is inappropriate to retain all criminal convictions for all time in all circumstances. The Commission agrees that the retention of all criminal records is inappropriate and considers that a previous criminal record should not be considered as an indicator of a person’s current or future behaviour in every context. Thus, the Commission recognises the limited predictive value of old criminal convictions in relation to the future conduct of individuals. The Commission also recognises that

there must come a point when a person becomes entitled to put their past behind them. The Commission considers that proportionality, which is key to the sentencing of offenders, should remain an important element in the post-conviction reintegration process. The Commission is of the opinion that the requirement to disclose the fact of having a criminal conviction at any time in every circumstance is a disproportionate response to most offending behaviour. The Commission considers therefore that it is appropriate that legislation should restrict the circumstances in which a criminal conviction is required to be disclosed and in particular in relation to less serious offences.

3.04 The Commission acknowledges however that there can be *some* predictive value in an old conviction, particularly where that conviction is for an offence which is serious in nature or which indicates a particular propensity on the part of the individual in question. The Commission is aware that there are circumstances in which any criminal conviction could be relevant to the decision making process, regardless of the length of time that has elapsed since the commission of the offence or the nature of the offence in question. In terms of sentencing offenders for example, the Commission considers that it would be inappropriate to disregard a previous conviction in that context since a previous conviction may provide the vital information that the court requires in order to impose a fair and proportionate sentence on that particular offender. In relation to sensitive areas of employment such as childcare and the care of vulnerable people, and in relation to posts where the national security of the State is a concern, the Commission is of the view that all criminal convictions should be disclosed in that context. In Part C below, the Commission discusses in detail the circumstances in which it considers the protection of spent convictions legislation should not apply.

3.05 In general, however, the Commission considers that any spent convictions or clean slate scheme established in this jurisdiction must have, as a key underlying value, an acknowledgement that an old conviction for a less serious offence is not necessarily an indicator of an individual's present or future behaviour. The Commission considers it vital that an individual's character should not be indelibly blighted by an old conviction and that a past infraction should not reflect on the character of an individual in a permanent manner.

3.06 *The Commission recommends that the underlying value of the spent convictions scheme should be an acknowledgement that a criminal record is not necessarily an indicator of the current or future behaviour of an individual. The Commission recommends that the spent convictions scheme should reflect that the law recognises a point at which an individual is entitled to put their past behind them.*

C Details of aspects of proposed spent convictions scheme

(1) Establishment of proposed spent convictions scheme

3.07 In line with the system already in place in this jurisdiction for under-18 offenders in section 258 of the *Children Act 2001*, the Commission recommends that the proposed spent convictions scheme for adult offenders should be introduced in a legislative scheme which sets out the detailed elements of the proposed scheme including the sentencing threshold, the required conviction-free period, the types of offences excluded from the scheme and the circumstances in which the non-disclosure aspects of the legislation would not apply.

3.08 In Chapter 2, the Commission examined in detail the spent convictions schemes in place in other comparable civil and common law jurisdictions. The Commission noted that there were a number of possible models on which spent convictions legislation could be based, including: a model that applied a sentencing threshold only and did not exclude any specific offences (UK); a model that applied no sentencing threshold but excluded particular offences from the application of the scheme (Canada); and a hybrid model that applied a sentencing threshold while also excluding certain offences (New Zealand). The Commission also noted that many of the jurisdictions where spent convictions schemes are in place had enacted anti-discrimination legislation to the effect that it was unlawful to discriminate against an individual on the basis of a spent conviction. The Canadian system, the Commonwealth Australian system, many of the Australian States and territories and all of the civil law regimes examined contained similar anti-discrimination provisions.

3.09 The Commission recommends that the proposed spent convictions scheme for adult offenders should be based on a hybrid model. In this way, a sentencing threshold would exist beyond which any conviction would not be eligible for expungement. In addition, certain specific offences would be excluded from the protection of the scheme thereby ensuring that only those convictions considered suitable for expungement both in terms of sentence imposed and the type of offence in question, would be eligible for expungement under the scheme. These detailed elements of the proposed scheme are discussed in detail below. The issue of discrimination is a more complex one and has been the subject of a recent Report by the Department of Justice, Equality and Law Reform in which the Department examined the possibility of extending the scope of employment equality legislation to include, among other grounds, a previous criminal conviction.¹⁰⁶

¹⁰⁶ *Extending the Scope of Employment Equality Legislation* (2004) a report commissioned by the Department of Justice, Equality and Law Reform and researched by the Faculty of Law, University College Cork.

3.10 The Commission recognises the close connection between the issue of discrimination and spent convictions but the Commission also recognises that the issue of discrimination in terms of an old criminal conviction encompasses a great deal more than discrimination in the context of employment. For a thorough examination of the issue of discrimination in terms of old criminal convictions to take place, there would need to be an analysis of the impact of a criminal conviction on access to services, accommodation, employment, insurance and many other aspects of modern living. While the Commission has touched on the issue of criminal convictions and access to employment in the context of the spent convictions debate, the Commission considers that the issue of discrimination on the basis of an old criminal conviction is separate and distinct from the issue of whether a spent convictions regime should exist for adult offenders in this jurisdiction. The Commission has concluded that the issue of discrimination and, in particular, the amendment of equality legislation to insert a new ground of discrimination namely, criminal conviction, is one which warrants separate analysis which is inappropriate in the context of this Report. The Commission therefore makes no recommendation on the amendment of equality legislation to include previous criminal conviction as a prohibited ground of discrimination.

3.11 *The Commission recommends that the proposed spent convictions scheme for adult offenders should be based on a hybrid model which specifically excludes certain offences from its application and which applies a sentencing threshold. The Commission makes no recommendation on the amendment of equality legislation to include previous criminal convictions as a prohibited ground of discrimination.*

(2) *Offences excluded from the application of the proposed scheme*

3.12 In Chapter 2, the Commission considered the detailed elements of the spent convictions schemes in place in other jurisdictions including which offences if any were excluded from the application of the schemes and whether or not a sentencing threshold applied. In the context of excluding particular offences from the protection of spent convictions legislation, the Commission notes that none of the jurisdictions examined excluded a list of offences and where exclusions did exist, the related almost exclusively to sexual offences. For example, in New Zealand, the latest common law jurisdiction to introduce spent convictions legislation, only defined sexual offences are specifically excluded from the application of the Act.¹⁰⁷ Similarly in Canada, sexual offences are specifically excluded from the protection of the spent convictions legislation. However, the Commission also notes that while no other specific exclusions exist in terms of particular offences, the scheme in place in New Zealand excludes all offences for

¹⁰⁷ See the *Criminal Records (Clean Slate) Act 2004*.

which a sentence of imprisonment was imposed. The sentencing threshold in New Zealand therefore is very low. By contrast, in the UK, only offences which attract a prison sentence of over 30 months are ineligible for expungement. No specific offences are excluded from the application of the spent convictions scheme in the UK.

3.13 The Commission has concluded that the nature and seriousness of certain offences give rise to legitimate public safety concerns and that these concerns cannot easily be addressed by the provisions of spent convictions schemes. Thus, the Commission considers that it is appropriate to exclude certain offences from the application of the proposed spent convictions scheme. Under section 258(1)(b) of the *Children Act 2001*, the spent convictions scheme established by that Act provides that offences which are required to be tried by the Central Criminal Court are excluded. Thus, the most serious offences against the person are excluded from the protection of the Act. The Commission is of the opinion that a similar provision would be appropriate in relation to the proposed scheme for adults. The Commission recommends therefore that the proposed spent convictions scheme for adult offenders should exclude any offence which is required to be tried by the Central Criminal Court.

3.14 The Commission notes that, as a general rule in other jurisdictions, sexual offences are excluded from the protection of spent convictions schemes. Most sexual offences are already effectively excluded from the application of the scheme for juvenile offenders under the *Children Act 2001* by virtue of the fact that offences that are required to be tried by the Central Criminal Court are ineligible for expungement, although no specific provision exists to that effect in the legislation. The Commission believes that the same should be the case in relation to the proposed scheme for adult offenders in this jurisdiction. There are two reasons for this. First, the Commission considers that the grave harm that is caused to the victims of such crimes coupled with the risks posed to public safety and particularly the safety of vulnerable members of society require that such offences should not be deemed suitable for expungement. The second consideration is that since the introduction of the registration requirements in the *Sex Offenders Act 2001* (mirroring comparable provisions in the British *Sex Offenders Act 2001*) it would not be possible to deem many sexual offences to be spent since the offender in question may be under a requirement to notify for life under the 2001 Act.

3.15 Section 8(3) of the 2001 Act requires a sex offender to comply with the notification obligation for an “indefinite” period if the sentence imposed is one of imprisonment for life or for a term of more than 2 years. The notification obligation is 10 years if the sentence is more than 6 months but not more than 2 years, 7 years if the sentence imposed is a term of 6 months or less, and 5 years if the sentence imposed is suspended or is non-

custodial. The time periods for offenders under 18 years of age at the time of the commission of the offence are reduced to 5 years, 3½ years and 2½ years, respectively, in respect of the three latter sentences.

3.16 In this jurisdiction therefore, an offender who is sentenced to imprisonment for 2 years or more must continue to notify indefinitely. Any proposed spent convictions scheme which would allow for the expungement of a sexual offence for which an individual was sentenced to 2 years or more would, in the Commission's view, be very difficult to reconcile with the 2001 Act.

3.17 The position in Britain is similar. The *Sex Offenders Act 1997*¹⁰⁸ requires certain convicted and cautioned offenders to register their new addresses with their local police force with 14 days of being released from custody or on moving home. Registration requirements apply to offenders who have been convicted or cautioned of a specified offence,¹⁰⁹ persons found not guilty by reason of insanity, person unfit to plead but who have been found to have done the act charged and other persons who are still in the criminal justice process.¹¹⁰ As is the case under the Irish 2001 Act (which was based on the 1997 Act), the requirement to register and notify apply for a period of time that varies according to the seriousness of the offence, but is a lifetime requirement for a person sentenced to 30 months or more.¹¹¹

3.18 The Commission is aware that not all sex offenders are required to comply for life with the notification requirements of the 2001 Act and that those sentenced to less than 6 months imprisonment must comply for 7 years while those given a suspended or non-custodial sentence must comply for 5 years.¹¹² However, the Commission does not consider that this should ground an argument that sexual offences should be eligible for expungement after the other requirements of the legislation have been met. The Commission considers that there is a great difference between ceasing the requirement to register as a sex offender and wiping the slate clean for sex offenders. The Commission considers that all sexual offences are of such a

¹⁰⁸ The 1997 Act applies to England and Wales, and Scotland.

¹⁰⁹ These specified offences are contained in Schedule 1 of the *Sex Offenders Act 1997* and include all sexual offences including indecent assault and offences of possessing indecent material in relation to children.

¹¹⁰ Section 1 of the *Sex Offenders Act 1997* sets out the categories of persons subject to the registration requirements of the Act.

¹¹¹ The notification requirements are set out in section 2 of the *Sex Offenders Act 1997*.

¹¹² The Commission is aware of the proposed amendments to the 2001 Act in the *General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006* which is discussed in detail in Chapter 4 below.

serious nature that it would be inappropriate to expunge such offences under any circumstances and the Commission therefore recommends that sexual offences should be excluded from the application of the proposed spent convictions scheme.

3.19 *The Commission recommends that any offence which must be tried in the Central Criminal Court and all sexual offences should be excluded from the application of the proposed spent convictions scheme.*

(3) Sentencing threshold

3.20 The Commission has noted in Chapter 2 that most of the common law jurisdictions examined (with the exception of Western Australia and Canada) impose a sentencing threshold beyond which a conviction may not be expunged. The Commission is of the view that the proposed spent convictions scheme should allow for the expungement of criminal convictions up to a certain sentencing threshold only. In others words, offences which attract a sentence of more that the prescribed maximum should not be eligible for expungement. .

3.21 The Commission considers that there are a number of important reasons as to why sentence-based limitations should be in place in spent convictions schemes. First, the Commission is of the opinion that certain offences should not be eligible for expungement. While the Commission has already recommended that certain categories of offences should be excluded from the application of the proposed spent convictions scheme, the Commission considers that this measure alone is inadequate to fully protect the public from potentially dangerous offenders. The Commission has also concluded that it would be difficult and undesirable to attempt to compile a list of all the offences to be excluded from the application of the proposed spent convictions scheme. By excluding certain offences without a consideration of the circumstances of the commission of the offence, there is a danger that offences which are not suitable for expungement would slip through the net. There is an equal danger that offences which should be considered suitable for expungement will not be considered where there is a blanket ban on certain offences being eligible for expungement. The Commission considers that the appropriate method of redressing this balance is by using the the sentence imposed by the court as a trigger for eligibility for expungement. The courts when sentencing the offender for a particular offence will have taken into account the circumstances of the offender and the offence and thus reached a proportionate sentencing decision having regard to all the relevant elements of the case. Thus the Commission considers that the sentence handed down by the court should dictate whether a particular conviction is suitable for expungement.

3.22 As to the sentence threshold which may be appropriate in this jurisdiction, the Commission has considered a number of very important

factors. The Commission considered recent information on the types of offenders in our prisons and the duration of prison sentences in this country. A 2003 Report by the Irish Penal Reform Trust found that Ireland has one of the highest rates of prison entry in the Council of Europe states (299 per 100,000 inhabitants) compared to an average of 288 per 100,000 inhabitants of other Council of Europe States.¹¹³ The Report suggested that this can be explained by Ireland's over reliance on short terms of imprisonment. The average prison sentence in Ireland is just over 3 months, which is significantly shorter than the European average. The Report found that of those prisoners committed under sentence in 2003, 38% were sentenced to periods of less than three months, 21% were committed under sentence for three to six months and 27% were committed for a period of six months up to one year.¹¹⁴

3.23 Prison statistics indicate that significant proportions of individuals are sentenced to custody for relatively minor offences. The *Annual Report of the Irish Prison Service 2003* also states that of the total committals under sentence, 28% were for road traffic offences. Furthermore, Courts Service statistics for 2004 suggest that immediate imprisonment was more likely than probation and community service combined in both Limerick and Dublin for all road traffic and larceny offences.¹¹⁵ The Irish Penal Reform Trust Report questions whether prison is really an appropriate sanction for such offenders given that the majority of road traffic offences are of a relatively minor nature. The Report also indicated that homeless people were over-represented in the prison population and far more likely to end up in custody than others. The Report noted that:

“the most common charges made against identified homeless persons in the District Courts were minor in nature, namely, intoxication in a public place (30%), threatening/abusive/insulting behaviour (24%), theft (21%), failing to appear (bail) 15% and failure to comply with a Garda directive(13%).¹¹⁶

¹¹³ Seymour and Costello, *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody*, Irish Penal Reform Trust and the Community Foundation for Ireland, 2003.

¹¹⁴ See Annual Report of the Irish Prison Service for 2003.

¹¹⁵ The Annual Report of the Irish Prison Service for 2005 indicates a slight change in these statistics with the number of sentences of less than 1 years duration falling by 7% while there was a significant increase in prison sentences ranging from 1-2 years and 2-3 years. However, the Report also indicates that there are still a large number of committals to prison for sentences of less than 3 months, particularly in the area of road traffic offences. Again, fine defaulters accounted for a large number of the short term committals to prison. s

¹¹⁶ Seymour and Costello *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody* (2003).

These figures are in line with those outlined in Chapter 1 of this Report concerning the effect of criminal convictions on certain people, especially those who are also ex-prisoners who experience multiple disadvantage in terms of homelessness, joblessness and often, addiction difficulties.

3.24 The 2003 Irish Penal Reform Trust Report also emphasised that fine defaulters do not generally pose a risk to society and do not require imprisonment or rehabilitation as acknowledged by the *Report of the Expert Group on the Probation & Welfare Service 1999*. This is evident from the very fact that the trial judge has decided the matter is minor enough to attract a fine rather than a prison sentence in the first instance. Despite this, O'Donnell notes that almost one quarter of committals to prison in 2001 related to fine default.¹¹⁷ In almost half of the cases, less than €381 (£300) was owed and the majority were committed for non-payment of fine in relation to a single offence.

3.25 From the foregoing, the Commission can conclude that the majority of people sentenced to terms of imprisonment in this jurisdiction are sentenced for short periods indicating that prison may be an over-used sanction. It also indicates that less serious offences are attracting prison sentences and this includes a number of fine defaulters. Thus, the Commission considers that it would be unduly harsh to rule out expungement for any offence which attracts a term of imprisonment. The Commission notes that the latest common law jurisdiction to introduce a spent convictions scheme, New Zealand, has adopted this approach, but the Commission is aware that sentencing practice in that jurisdiction is somewhat different to the situation in Ireland. Importantly, New Zealand makes greater use of restorative justice methods thereby offering offenders a second chance very early on in the criminal process and ensuring that prison is seen as a sentence of last resort only. There have been numerous recommendations in this jurisdiction that prison should be used sparingly and as a last resort only, but the statistics mentioned already would indicate that this approach has not been adopted. The Commission notes that one of the reasons for over-use of prison is the lack of alternative community sanctions and has already recommended in its *Report on the Court Poor Box: Probation of Offenders*¹¹⁸ that more non-custodial options should be available to sentencing judges dealing with minor offences.

3.26 Against this background, the Commission considers that a sentencing threshold of 6 months imprisonment would be an appropriate cut-off point for expungement purposes. Thus any offence which is not an

¹¹⁷ O'Sullivan and O'Donnell "Imprisonment and the Crime Rate in Ireland," (2003) Vol. 34 *Economic and Social Review*, No. 1 (Spring 2003) at 33.

¹¹⁸ LRC 75-2005.

offence specifically excluded under the proposed scheme and which attracts a sentence of 6 months imprisonment or less should be eligible for expungement. The Commission is aware that, by comparison with some other spent conviction models, such as the British *Rehabilitation of Offenders Act 1974* (extended to Northern Ireland by the *Rehabilitation of Offenders (Northern Ireland) Order 1978*), its proposed scheme may appear to be quite limited in scope. However, the Commission considers that sentencing practices in Ireland indicate that the 6 month threshold will, in reality, capture a wide range of offences within its scope and will, therefore, have a similar range of application as many relevant international comparators. In addition, the Commission reiterates that its focus on a spent convictions regime originally derived from its examination of the Court Poor Box, an informal disposition in criminal cases which has the effect of a dismissal, and which the Commission notes is used primarily – and should only be so used – in the context of trivial¹¹⁹ or otherwise minor offences, which are dealt with for the most part in the District Court.¹²⁰ The Commission has already noted that the absence of a spent convictions regime for adult offenders appears to one factor connected to the extensive use of the Court Poor Box by some judges of the District Court. The Commission has concluded that this may have also led to the inappropriate application of the Court Poor Box disposition in cases which were not trivial or minor in nature.¹²¹ The Commission’s proposed spent convictions scheme would avoid any such difficulties in the future.

3.27 Sentencing practice in this jurisdiction indicates that sentences of imprisonment for greater than 6 months are handed down in more serious cases while many less serious offences can attract penalties up to 6 months. The Commission considers that any offence which attracts a sentence of imprisonment of greater than 6 months imprisonment is a serious offence and should not be considered eligible for expungement.

3.28 The 6 month threshold also reflects the Commission’s view that imprisonment should be considered as a measure of last resort only where the offence in question is serious in nature and the circumstances of the particular offender and offence so warrant. The Commission is aware from

¹¹⁹ The word “trivial” is used in the *Probation of Offenders Act 1907*, with which the Court Poor Box disposition is often linked in practice.

¹²⁰ See the Commission’s *Consultation Paper on the Court Poor Box* (LRC CP 31-2004), Chapter 5 of which explored the possibility of a spent convictions regime against the background of the use of the Court Poor Box disposition.

¹²¹ See the Commission’s *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005). The Report recommended that the Court Poor Box be placed on a statutory basis, incorporating its positive features, and integrating with a more extensive regime of non-custodial sanctions which would also replace the statutory dismissal power in section 1(1) of the *Probation of Offenders Act 1907*.

published statistics that, for various reasons, imprisonment is not currently being used as a measure of last resort and offences which could be more suitably punished by use of non-custodial sanctions are, in some cases, receiving prison sentences. However, the view of the Commission remains that offences which attract a prison sentence of 6 months or less should be considered suitable for expungement while offences which attract a sentence of greater than 6 months imprisonment are of a serious nature and thus not suitable for expungement. The Commission considers that, assuming a spent convictions regime is introduced, the courts will have regard to this 6 month cut-off point and where the court considers a particular offence suitable for expungement, a sentence of 6 months or less will be imposed. Conversely, where the court considers that an offence is serious in nature and one unsuitable for expungement, a sentence of greater than 6 months will be imposed. The Commission concludes therefore that 6 months is an appropriate sentencing threshold to apply in this jurisdiction and therefore recommends that only offences which attract a sentence of 6 months imprisonment or less should be eligible for expungement under the proposed spent convictions scheme.

3.29 The Commission considers that offences which attract non-custodial sentences should be eligible for expungement under the scheme proposed. Fines, community service, probation orders and all other non-custodial sanction imposed on conviction for an offence should, in the Commission's view, be eligible for expungement. The Commission is aware that under the *Criminal Justice (Community Service) Act 1983*, a sentence of community service may only be imposed on an individual in lieu of a sentence of imprisonment. However, the Commission has previously recommended in its *Report on the Court Poor Box: Probation of Offenders* that community service orders should be adopted as a sentence in its own right and should be available as a non-custodial option in all cases and not just as an alternative to custody. In line with this previous recommendation, therefore, the Commission recommends that a sentence involving a community service order should be eligible for expungement under the proposed scheme. It should be noted that where a non-custodial sanction is imposed in respect of offences which must be tried in the Central Criminal Court or in respect of sexual offences would not be eligible for expungement.

3.30 *The Commission recommends that convictions which result in sentences of imprisonment of greater than 6 months should be ineligible for expungement under the proposed spent convictions regime. The Commission also recommends that offences which attract non-custodial sanctions should be eligible for expungement.*

(4) Required conviction-free period

3.31 The Commission has considered the appropriate length of the conviction-free period which a person must abide by before a conviction can be eligible for expungement. This requirement is known as the rehabilitation period in the British *Rehabilitation of Offenders Act 1974* and the conviction-free period which must be observed varies greatly between the different jurisdictions examined in Chapter 2. The Commission has notes that the conviction-free periods which apply in other common law jurisdictions range from 10 years in the UK for offences which attract a penalty of 6 months or more, to 3 years for summary offences in Canada.

3.32 In the UK, offences which attract a penalty of less than 6 months attract a conviction-free requirement of 7 years. The Commission also notes the changes which have been proposed to the conviction-free periods in the 2002 Home Office Review *Breaking the Circle* where it was recommended that the sentence imposed by the court should act as a trigger for the appropriate conviction-free period with buffer periods added to address concerns of public safety. Thus, the Review recommended that the appropriate conviction-free period for a sentence of between 6 and 30 months imprisonment should be the length of the sentence plus an additional buffer period of 2 years. If an offender received a sentence of one year under this proposal, the conviction should be eligible for expungement 3 years from the date of conviction provided the sentence had been served by the offender. The Report recommended that the 10 years waiting period was too long and that greater emphasis be placed on completion of sentences by offenders. However, the recommendations in the 2002 Review have not been implemented to date.

3.33 The Commission notes that the required period under the under-18 scheme in section 258(1)(d) of the *Children Act 2001* is 3 years during which “the person has not been dealt with in any way for an offence.” The Commission notes that of the jurisdictions examined in Chapter 2, the required conviction-free period for juvenile offenders is approximately half the adult requirement. The Commission considers that a conviction-free period of a number of years is an appropriate starting point for a consideration of the period of time at which a conviction for an adult offender should be eligible for expungement. It is also significant that recent legislation has adopted a “second chance” approach to certain offences. The *Road Traffic Act 2006* introduces fixed penalty notices for certain driving offences. Under section 5(2) of the 2006 Act, an individual convicted of certain offences in the preceding 5 years may be subject to a fixed charge penalty notice rather than a prosecution in relation to a second offence in that period. In effect, the 2006 Act imposes a conviction-free period which an individual must comply with in order to gain the benefit of the legislation.

3.34 The Commission recommends that the conviction-free period for adult offenders should be at least double the juvenile requirement. The Commission also notes that the system in the UK imposes a 7 year rehabilitation period in relation to offences that attract a prison sentence of less than 6 months. The Commission has concluded that a 7 year conviction-free period is appropriate in the case of adult offenders receiving a prison sentence of 6 months or less in this jurisdiction. The conviction-free period should from run the date of conviction. The Commission also considers that a different conviction-free period should apply where a non-custodial sentence is imposed. In the context of any non-custodial sanction, the Commission has concluded that a conviction-free period of 5 years should apply which should begin to run from the date of conviction.

3.35 *The Commission recommends that a conviction-free period of 7 years should apply in the case of all sentences of imprisonment of 6 months or less, and a period of 5 years for all offence that attract a non-custodial sentence. The Commission recommends that the conviction-free period should begin to run from the date of conviction.*

(5) Effect of intervening offences

3.36 Under section 258(1)(d) of the *Children Act 2001* a period of 3 years is required during which the person has not been dealt with in any way for an offence. Section 258(2) of the 2001 Act provides that the provisions of the section shall not apply unless the person has served a period of detention or otherwise complied with any court order imposed on him or her in respect of the finding of guilt. However, section 258(3) provides that this does not prevent the application of its provisions to a person who:

“(a) failed to pay a fine or other sum adjudged to be paid by, or imposed on, the person on a finding of guilt or breach of a condition of a recognisance to keep the peace or to be of good behaviour, or
(b) breached any condition or requirement applicable in relation to an order of a court which renders a person to whom it applies liable to be dealt with for the offence in respect of which the order was made.”

3.37 The effect of these provisions is that if a person is dealt with by way of a dismissal under the *Probation of Offenders Act 1907* or by way of a caution, the running of the conviction-free period is affected and must restart from the date of being dealt with for the second offence. In most of the jurisdictions surveyed in Chapter 2, an intervening offence would not necessarily interrupt the running of the crime-free period. Thus, the provisions in the *Children Act 2001* are unusual.

3.38 The Commission is aware that over 90% of criminal offences in this jurisdiction are dealt with before the District Court, the court of

summary jurisdiction which is charged with dealing with less serious offences. Thus, it would be untenable to recommend that a summary offence should not interrupt the running of the conviction-free period. The Commission also notes that other jurisdiction specifically exclude traffic offences which are deemed not to interrupt the running of the crime-free period. Again, the Commission considers that it would be unwise to exclude all traffic offences from this category given that some offences extend to those connected with road deaths. The Commission considers that road traffic offences in respect of which fixed charge penalties (sometimes, but inaccurately, referred to as “on the spot fines”) have been paid should not interrupt the running of the conviction-free period. However, where a person is found guilty of a road traffic offence in court, the Commission considers that such convictions should affect the running of the conviction-free period. The Commission considers that all offences during the conviction-free period for which a conviction is imposed should affect the running of the conviction-free period.

3.39 The Commission has also concluded that charges that are dismissed under section 1(1) of the *Probation of Offenders Act 1907*, which amount to acquittals, should not affect the running of the conviction-free period. Where an intervening offence is committed and a conviction imposed, neither offence can be eligible for expungement until the conviction-free period for the second offence is completed. This provision should only apply where there is one intervening offence or incident only; where there are numerous intervening offences, there has obviously been no conviction-free period and thus the provisions of the spent convictions regime should not be applied.

3.40 *The Commission recommends that a conviction for any offence during the conviction-free (rehabilitation) period should interrupt the running of the conviction-free (rehabilitation) period and require that a new period should be started from the date of conviction for the second offence. The Commission recommends that dismissals without conviction under section 1(1) of the Probation of Offenders Act 1907 and offences in respect of which fixed charge penalties for road traffic offences have been paid should not interrupt the running of the crime-free period.*

(6) Automatic spent convictions scheme

3.41 The Commission considers that any proposed spent convictions scheme should be uncomplicated, and easy to administer and understand for ex-offenders, recruiters and the general public. The scheme for under-18 offenders in section 258 of the *Children Act 2001* operates on an automatic basis by which a conviction which is eligible for expungement under the scheme becomes spent automatically after the requirements of the Act have been met. Thus, no application is required for the conviction to be

considered spent under the 2001 Act. The Commission notes that the scheme proposed in the Private Members Bill introduced in Dáil Éireann in 2007, the *Rehabilitation of Offenders Bill 2007* (which lapsed on the calling of the 2007 General Election), involved a requirement to apply to the District Court to seek an order that a conviction was spent, and that such application would be on notice to the Garda Síochána.

3.42 The Commission has examined the operation of the systems in Canada and Western Australia where application to a central authority and judge respectively is necessary in order to have a conviction declared spent. In Canada, ex-offenders must apply to the National Parole Board in order to seek to have their conviction expunged while the Western Australian system requires an application to a judge or the Commissioner of Police (in the case of less serious offences) in order to have a conviction expunged. While the Commission considers that there is some merit in a system which requires the ex-offender to take an active part in the expungement process by demonstrating that expungement is appropriate and has been earned by the ex-offender, the Commission also considers that there would be some disadvantages to establishing an application-based system. Some advantageous aspects of an application-based system are that an ex-offender is required to positively establish, before an independent body, that expungement of the conviction is appropriate and just in the circumstances. In this regard, an application-based system constitutes a filtering mechanism for those offenders or types of convictions that are unsuitable for expungement.

3.43 An application-based spent convictions scheme would require the establishment of a central authority in order to process and evaluate applications for expungement from ex-offenders. The Commission has also evaluated the possibility of establishing a spent convictions scheme which requires an application to the District Court, as proposed in the Private Members Bill introduced in Dáil Éireann in 2007, the *Rehabilitation of Offenders Bill 2007*, in order for an offence to be expunged. After consideration, however, the Commission has concluded that it would be inappropriate to require ex-offenders to apply to the District Court to have their convictions expunged. Firstly, the Commission is concerned that a requirement to apply to a court for expungement of a conviction may result in the equivalent of a “re-trial” before the court. In this regard, the Commission agrees with the views of the Gardiner Committee¹²² that an application-based system would draw unnecessary attention to the existence of the criminal record and may defeat the entire purpose of the provisions, which is to allow ex-offenders to live down their past and eliminating the

¹²² *Living it Down – The Problem of Old Conviction* (Stevens & Son, 1972) (discussed in Chapter 1), which led to the British *Rehabilitation of Offenders Act 1974*.

requirement to disclose the existence of the criminal record in certain circumstances. This is particularly true where the scheme requires an application to a court in order to have a record expunged since it would be necessary to file court papers in order to apply to have the conviction expunged. Individuals may also consider it necessary to seek legal advice prior to the filing of such papers which would further draw attention to the existence of the criminal record. The Commission concludes therefore that the disadvantages of an application-based system are outweighed by any advantages which may be derived from requiring ex-offenders to make an application to have a conviction expunged.

3.44 The Commission is also aware that the spent conviction systems in place in Western Australia and Canada are a great deal more inclusive than the system being proposed by the Commission in this jurisdiction insofar as the Commission proposes that no offence which attracts a sentence of more than 6 months imprisonment should be eligible for expungement. The Commission notes that the Canadian system places no restriction on the type of sentence that is eligible for expungement while the Western Australian system only excludes sentences of life imprisonment. The Commission concludes therefore that the application-based elements of the Canadian and Western Australian schemes are a necessary filtering mechanism in schemes that place no limit on the type of sentence that can be expunged. The Canadian and Western Australian systems are, at least potentially, a great deal more inclusive than the scheme proposed by the Commission. The Commission has already recommended that the proposed scheme in this jurisdiction should apply to less serious offences only, that is, offences which attract a sentence of 6 months imprisonment or less and thus the Commission considers that such an application-based filtering mechanism would not be necessary or appropriate in this jurisdiction.

3.45 The Commission further considers that an uncomplicated system is essential if maximum benefit is to be derived from the scheme for holders of criminal records. The Commission also considers it significant that the system in place for under-18 offenders in this jurisdiction in section 258 of the *Children Act 2001* is operated on an automatic basis. The Commission believes therefore that an automatic system of expungement rather than an application-based system is the most effective and efficient manner in which to operate a spent convictions scheme.

3.46 *The Commission recommends that the proposed spent convictions scheme for adult offenders should operate on an automatic basis by which convictions become spent automatically after the requirements of the scheme have been met.*

(7) Exclusions

3.47 The Commission has already recommended that the proposed spent convictions scheme should not apply in all circumstances. The Commission considers that, in relation to sentencing offenders, all previous criminal convictions should be disclosed to the court, even if such offences would otherwise be considered spent under the spent convictions legislation. The Commission also considers that all previous convictions should be disclosed in the context of certain civil matters before the court. For instance, where proceedings involve the welfare or guardianship of children, all previous convictions should be disclosed to the court. The Commission is aware that under section 258 of the *Children Act 2001*, an individual is not required to answer any questions in relation to a conviction that is considered spent under the scheme in place. The Commission recommends an amendment of the 2001 Act to the effect that all previous convictions should be disclosed where the sentencing of offenders is in issue and in the context of certain civil matters as outlined above.

3.48 The issue of exclusions from the proposed spent conviction scheme in terms of other circumstances in which a previous conviction is required to be disclosed is discussed in detail in Chapter 4 below.

3.49 *The Commission recommends that the proposed spent convictions scheme should not apply in the context of sentencing and in the context of certain civil matters where the welfare of children is in issue. The Commission also recommends that the scheme in place for offenders under the age of 18 in section 258 of the Children Act 2001 should be amended to reflect this.*

CHAPTER 4 VETTING/DISCLOSURE OF CRIMINAL RECORDS

A Introduction

4.01 In this chapter, the Commission discusses the connection between a spent convictions regime and the issue of vetting or disclosure of criminal convictions for certain purposes.

4.02 In Part B, the Commission examines the history of vetting in Ireland and its current operation. In Part C, the Commission examines how a vetting system operates in the context of a spent convictions regime, using the system in the United Kingdom by way of example. In Part D, the Commission examines the proposals for reform of the operation of the vetting regime and how this might fit with a proposed spent convictions system. In particular, the Commission examines the different levels of vetting which might correspond to the specific list of exemptions from a spent convictions scheme in terms of particular professions, offices and employment in certain sensitive posts. In Part E, the Commission discusses some specific issues concerning disclosure, in particular the effect of the registration requirements for sex offenders and disclosure in the context of court proceedings.

B Vetting in Ireland

4.03 For the purposes of this Report, vetting describes a process in which an individual submits to having a background check carried out on them by official authorities in an effort to establish their suitability for certain jobs, professions, offices and voluntary positions. The purpose of vetting is to minimise potential risk from contact between individuals whose behaviour could be detrimental to the safety and wellbeing of, for example, vulnerable members of society, such as children, older people or people with special needs, or safety in a wider national setting. Vetting is therefore closely linked with the system of recording criminal convictions which are deemed to be particularly relevant in establishing a person's suitability for certain sensitive posts. In general, positions which involve substantial unsupervised access to children and certain jobs where the interests of national security are at stake require that the applicant submits to the vetting process.

(1) History of vetting in Ireland

4.04 The Garda Central Vetting Unit (GSVU) is part of the Garda Criminal Records Office which has been in existence in this country since the 1970s. The Garda Criminal Records Office evolved from the Criminal Registries of the 19th century which were established under various pieces of legislation, including the *Habitual Criminal Act 1869*, the *Prevention of Crimes Act 1871*, the *Prevention of Crimes Act (Amendment) 1876* and the *Prevention of Crimes Act 1878*.¹²³ The existence of a Criminal Registry thus stems from this 19th century legislation, which was aimed primarily at the identification and control of recidivist “habitual criminals.” The *Habitual Criminal Act 1869* created a standard Register to record personal details and convictions of confined prisoners, and management of the Register was delegated to the Commissioner of Police in Dublin. The *Prevention of Crimes Act 1871* extended the scope of the Register to include measurements of confined persons and also allowed for certain categories of prisoners to be photographed. The *Prevention of Crimes Act (Amendment) 1876* provided for certain restrictions on the category of prisoners to be registered and photographed in prison. The Office of the Registrar of Criminals was also established by the 1876 Act. The *Prevention of Crimes Act 1878* extended the use to which criminal record information could be put, including monitoring of releases on licence and providing for increased sentences for second and subsequent offenders. Under the 1878 Act, previous convictions could also be used in certain summary offences as proof of character.

4.05 Until 1972, two major Criminal Records Offices existed in Ireland, the Dublin Criminal Registry and the Criminal Records Office, Dublin Castle. The precise legal basis for the establishment of the Dublin Criminal Registry is difficult to trace. It appears that from the 1840s, convictions were being recorded by court officials in accordance with regulations and maintained in a standard format. It is believed that this Register evolved from an intelligence need in relation to convicted persons living in the Dublin area and for the management of court outcomes in that area. The functional management of the Habitual Criminal Registry - later renamed the Dublin Criminal Register - was devolved to the Garda Commissioner in 1929. A Criminal Records Office existed within Dublin Metropolitan Police Area and was maintained at Dublin Castle until 1928 when the Dublin Metropolitan Police was amalgamated with An Garda Síochána. The Criminal Records Office continued to exist within the Dublin Metropolitan Area until 1972 as a separate unit. Traditionally, the Dublin Metropolitan Police Area had always kept a separate register of criminals

¹²³ The *Report of the Working Group on Garda Vetting* (Department of Justice, 2004) contains an excellent overview of the historical origins of vetting in Ireland.

and the Dublin Criminal Registry remained in operation until the two offices were amalgamated in 1972 to form the Garda Criminal Records Office.

4.06 In the 1950s, most regional Criminal Records Offices - where they existed, for example, in Sligo - were closed. The Criminal Records Office in Cork remained open until 1999.

4.07 The records of the Criminal Records Office and Dublin Criminal Register were merged in 1999 in preparation for the introduction of the Garda PULSE¹²⁴ system. The PULSE system is the computerised system used by the Gardai to record criminal convictions and court outcomes. Criminal records are now entered under a PULSE Person Identifier, which tracks the progress of an individual's criminal offence from arrest stage through the court system and any subsequent conviction. Currently, entries on the PULSE system are permanent and there is no provision for the removal of a person's details from the system once they have been entered. The introduction of a spent conviction scheme for adult offenders would have a significant impact on the PULSE system of recording criminal offences. The manner in which the PULSE system has operated in the context of the limited spent convictions scheme for juveniles under the *Children Act 2001* is examined below.

(2) Current operation of vetting in Ireland

4.08 The Garda Central Vetting Unit (GCVU), which is part of the Garda Criminal Records Office and began operations in 2002, has been established on an administrative basis but not yet under statute.¹²⁵ In other jurisdictions where vetting systems are in place, the vetting authority has been established under statute.¹²⁶ The 2004 *Report of the Working Group on Garda Vetting*¹²⁷ recommended that, in light of the unsatisfactory statutory basis for the holding of criminal records – and the related issue of vetting – a clear statutory framework should be put in place. The CCVU, combined with the Garda Central Records Office (GCRO), could be described as a “criminal history system.”

4.09 At present, the GCVU discloses information to designated agencies, in accordance with agreed procedures, on foot of requests for “criminal history checks” in respect of people seeking full-time employment

¹²⁴ PULSE is an acronym for Police Using Leading Technology Effectively.

¹²⁵ The GCVU is based in Nenagh, Co. Tipperary where all applications for Garda vetting checks are processed.

¹²⁶ For example, the Criminal Records Bureau in the UK was established by the Police Act 1997. In New Zealand a criminal record checking system is established under the Privacy Act 1993.

¹²⁷ Department of Justice, 2004, available at www.justice.ie

involving substantial access to children and vulnerable adults. The Commission understands that the list of designated agencies entitled to use the GCVU is currently being expanded, along with the work of the GCVU. Among others, the GCVU provides vetting services for: the Health Service Executive (HSE, as successor to the Health Boards, with whom formal agreements had been made with An Garda Síochána) in relation to candidates for employment in the health service and in external agencies funded by the HSE who would have substantial unsupervised access to children and vulnerable adults; in relation to candidates for employment in children's residential centres (for the purposes of section 61(5)(b)(ii) and section 66 of the *Child Care Act 1991*); in relation to Irish persons applying for positions in the United Kingdom which would give them substantial access to children; and the Adoption Board in relation to prospective adoptive parents.

4.10 In addition, the Public Appointments Commission (PAC, as successor to the Civil Service Commission) is required by the *Local Government Act 1941* and sections 16 and 17 of the *Civil Service Commission Act 1956* to consider the question of character before making a decision on a candidate's suitability for employment in the public service. The Gardaí provide "security vetting" which involves a check for both criminal and subversive traces. The PAC corresponds directly with local Garda District Officers about a candidate and, where there is no unfavourable record, the PAQC receives a direct response to this effect. Where there is an unfavourable record, the file is redirected to compile a suitable reply.

4.11 Under the current vetting system operated by the GCVU, a person seeking to work as a carer in a hospital must agree to submit to the vetting process in order to be eligible for the position. If he or she does not agree, the designated body is not entitled to request such a search but, equally, the person is no longer eligible for the position. Where consent is given, details of the person, such as name and address including previous addresses, are sent to the GCVU, and the GCRO Criminal Registry System and the PULSE system are searched. Where the person involved lives or lived outside Ireland, requests are made from relevant police services for locally held convictions. The results of the search are then returned to the designated body which requested the information. The GCVU currently discloses all convictions recorded against an individual, except where section 1(1) of the *Probation of Offenders Act 1907* has been applied by the District Court (as this amounts to an acquittal).¹²⁸ It is important to note that the decision as to

¹²⁸ See generally the Commission's *Report on the Court Poor Box: Probation of Offenders* (LRC 75-2005).

whether to employ the person in question in light of the information provided by the GCVU remains with the registered body.

(a) Impact of section 258 of the Children Act 2001 on vetting procedures

4.12 As previously discussed, section 258 of the *Children Act 2001* creates a limited spent convictions scheme in respect of convictions of persons under 18 years of age, and this has had implications for PULSE, GCRO and the Garda Central Vetting Unit. Since section 258 of the 2001 Act only came into force in May 2003, and because it provides that 3 years must elapse after the commission of an offence before it is considered spent, it is only since May 2006 that its provisions have become an issue in terms of vetting. It is notable that section 258 applies to offences committed before it came into force as well as offences committed since then. This means that a person who committed an offence in 1980 while under the age of 18 years is not required to disclose this conviction since section 258 of the 2001 Act came into force. Should that individual be required to submit to the vetting process at any stage, the fact that the old conviction is now considered spent under the 2001 Act will have a significant impact on the outcome of the vetting process.

4.13 The Commission understands that the current practice in relation to the recording of criminal convictions is that the member in charge of the case records the court outcome. If the case results in a conviction, this conviction is recorded on PULSE and the record remains on PULSE indefinitely. If all the conditions laid down in section 258 of the 2001 Act are met and the conviction is to be considered spent, it is vital that this information is recorded on the PULSE system. The current practice in the GCVU is that, in relation to offences committed before a person reached 18 years of age, a flagging system ensures that such offences are not disclosed in the same way as other offences. On receipt of a vetting request from a designated agency, an inquiry must be made to determine whether the offence is in fact spent under section 258 of the 2001 Act. If the conviction is considered spent under section 258, the record of the conviction will not be disclosed to the designated body.

4.14 It is important to note that the spent convictions scheme in the 2001 Act does not provide for any exemptions from the scheme, for example, to provide for the disclosure of all criminal convictions even those otherwise considered spent under the terms of the Act, in relation to certain sensitive professions, offices or posts. The Commission has already recommended in Chapter 3 that section 258 of the *Children Act 2001* should be amended to the effect that the requirement to disclose should remain where the sentencing of offenders is in issue or in relation to certain civil matters where the welfare of children is in question. The Commission also

considers that certain exemptions to the application of the Act should be introduced under section 258(4)(d) of the 2001 Act in relation to certain sensitive professions and posts. The issue of exemptions from spent convictions legislation is considered in detail in Part D below.

(3) Conclusion and recommendation

4.15 The Commission is aware that significant reforms in the manner in which the vetting process operates in this jurisdiction have been proposed in the 2004 *Report of the Working Group on Garda Vetting* and the 2006 *Report of the Joint Oireachtas Committee on Child Protection*. These proposals are examined in detail in Part E below. For present purposes, the Commission considers that the current vetting process is deficient insofar as it is not operated on a statutory basis and entirely concurs with the views in those Reports that the vetting system be placed on a clear statutory footing.

4.16 *The Commission recommends that the vetting regime currently in place in this jurisdiction should be placed on a statutory footing.*

C Vetting in the context of a spent convictions regime

(1) Introduction

4.17 In the context of any proposed spent convictions scheme, it is imperative that it should take adequate account of the important function of vetting of certain individuals. State authorities, bodies and many other service providers have a duty to the individuals that they employ and care for to recruit new employees using a safe and secure system which adequately protects the needs of all. These duties are all the more important when the authority or service provider has responsibility for the care of children or vulnerable adults. The *Report of the Working Group on Garda Vetting* (2004)¹²⁹ noted that:

“There are many organisations providing services to children. Some are statutory, some are voluntary and/or not-for-profit organisations; others are private, for profit, organisations. Whatever the motivation or service provided, there is an obligation on any organisation involved with children to provide them with the highest possible standard of care in order to promote their well-being and safeguard them from harm. Organisations may also be legally responsible for their failure to provide adequate care and safeguards for the children in their care.”

¹²⁹ *Report of the Working Group on Garda Vetting*, Department of Justice, 2004, available at www.justice.ie

4.18 Similar considerations apply to the needs of other vulnerable members of society such as those with special needs and older people. Vulnerable adults include dependent individuals who may lack the intellectual capacity to safeguard and protect themselves from physical or emotional violence, injury or abuse, neglect, maltreatment or exploitation, including sexual abuse.

4.19 There are other circumstances where the vetting of individuals is particularly important. Where the interests of national security are involved concern, it is vital that a thorough background check is carried out. The Commission considers that this requirement should exist in addition to the system already in place under the auspices of the Public Appointments Commission. Similarly, the Commission considers that certain professions involving particular positions of trust over the interests of another should be subject to the vetting process. The Commission considers that persons providing financial services and advice, and entrants to the legal profession could be subject to the vetting process. The Commission discusses the proposed exemptions to the vetting process in detail in Part D below.

(2) *Vetting in the United Kingdom in the context of a spent convictions regime*

4.20 The vetting system that operates in the United Kingdom is somewhat different to the regime currently in place in Ireland. It is important to note that the *Report of the Working Group on Garda Vetting* (2004) and the *Report the Joint Oireachtas Committee on Child Protection* (2006) recommended reforms of the Irish system along the lines of those in place in the United Kingdom.

4.21 Under the *Police Act 1997*, a centralised procedure for criminal record checks was established in England and Wales which is operated by the Criminal Records Bureau (CRB). A similar scheme operates in Scotland and Northern Ireland. CRB disclosures give employers information about an individual's criminal records history, which informs their assessments about the individual's suitability to work with children or vulnerable adults. The service offers three levels of checks to registered organisations and a check may only be carried out with the written consent of the person applying for the position. The level of check carried out will depend on the position for which the individual has applied for.

- a 'Basic Level Check and Criminal Conviction Certificate' can be applied for any type of employment however only details of unspent convictions will be revealed. The certificate is issued to the person who is the subject of the check.
- an 'Intermediate Level Check and Criminal Record Certificate' is available to those seeking positions which involve regular contact with persons under 18 years of age or for occupations excepted

under the *Rehabilitation of Offenders Act 1974*. This check reveals *details of all spent and unspent convictions* as well as reprimands, cautions and warnings. The certificate in this case is issued to the individual and the registered organisation.

- a ‘High Level Check and Enhanced Criminal Record Certificate’ which is available for persons seeking to work including work with those under 18 years of ages, all excepted occupations under the 1974 Act, judicial appointments, and gaming and lottery licences. The check reveals *details of all spent and unspent convictions*, all cautions, warnings and reprimands and all acquittals, inconclusive police investigations, uncorroborated allegations and other police matters. The certificate is issued to the registered organisation and the individual.

4.22 In terms of the Intermediate and Higher level checks, it is significant to note that *all convictions* whether spent or unspent are disclosed to the applicant for the check. This means that for the purposes of seeking employment in the areas specified as requiring intermediate or higher level checks, the provisions of the *Rehabilitation of Offenders Act 1974* do not apply. A requirement of full disclosure of all criminal convictions exists in these specified circumstances.

4.23 The CRB has an extensive code of practice in place which informs all of its dealings with registered organisations and the individuals who are the subject of the checks. In addition to the records held by the CRB, three separate lists operating under different legislative schemes exclude certain individuals from taking up certain posts or from contact with certain groups. List 99 is a list of those in respect of whom directions under section 142 of the *Education Act 2002* have been made; the Protection of Children Act (POCA) List is maintained under the *Protection of Children Act 1999* and the Protection of Vulnerable Adults (POVA) List is maintained under Part 7 of the *Care Standards Act 2000*. Disqualification orders made by a court under Part 2 of the *Criminal Justice and Court Services Act 2000* also bar individuals from working with children.

4.24 Further significant changes to safeguard the interests of children and vulnerable groups were introduced by the *Vulnerable Groups Act 2006*, which came into force in November 2006, and incorporates many of the protection measures already in place in relation to the protection of children and vulnerable people. The 2006 Act resulted from the 2004 *Report of the Bichard Inquiry*,¹³⁰ which dealt with the failures in the existing vetting system that came to light in the Ian Huntley case. In 2003, Huntley was convicted of the murder of two children, Holly Wells and Jessica Chapman,

¹³⁰ See paragraph 2.25 above, and the Commission’s *Consultation Paper on the Court Poor Box* (LRC CP31-2004), Chapter 5.

who attended the school where he was employed as a caretaker. The 2004 Report highlighted that inconsistencies existed between police authorities in the disclosure of police information, that inconsistent decisions were made by employers on the basis of CRB disclosure information and, most significantly, inconsistencies existed between List 99, the POCA list and POVA list which led to confusion and the overlooking and removal of vital information. The 2006 Act aims to centralise this process so as to ensure that all of the necessary information is contained in a single system for ease of access and reference. .

4.25 The *Vulnerable Groups Act 2006* also makes some changes to the manner in which vetting is carried out by the CRB and provides the legislative framework for a new vetting and barring scheme for people who work with children and vulnerable adults. The purpose of the new scheme is to minimise the risk of harm posed to children and vulnerable adults by those that might seek to harm them through their work whether it is paid or voluntary work. The 2006 Act provides for the creation of two “barred lists”, one for those persons barred from engaging in regulated activity in relation to children and another for recording those persons barred from engaging in regulated activity with vulnerable adults. A “regulated activity” for the purposes of the 2006 Act includes a range of specified activities that provide an opportunity for close contact with children or vulnerable adults, and other activities in key settings such as schools and care homes which provide an opportunity for contact and key positions of responsibility.

4.26 The 2006 Act also provides that Regulations may be made in relation to individuals on the barred lists and certain other “controlled activities,” which includes support work in general health settings, further education settings and adult social care settings. It also covers work which gives a person the opportunity for access to sensitive records about children and vulnerable adults, including education and social services records. The category “controlled activity” appears to allow regulation over activities that would fall outside the “regulated activity” category but which would nonetheless be considered harmful to children or vulnerable adults.

4.27 The 2006 Act also establishes an Independent Barring Board whose function is to maintain the children's barred list and adults' barred list and make decisions about whether an individual should be included in one or both barred lists. There are a number of ways in which an individual could find themselves on the barred lists. Receiving a caution or conviction for certain specified offences listed in the 2006 Act will result in automatic inclusion on one or both of the barred lists. An order of a foreign court or inclusion on a barred list in a foreign country will also result in automatic inclusion on one or both of the barred lists maintained under the 2006 Act. In such cases of automatic inclusion on the barred list, the individual is not granted a right of appeal or a right to make representations in relation to their

inclusion on the list. Other factors are specified in the 2006 Act which can result in inclusion on the barred lists, but a right of appeal does exist in such cases. These include, for example, conduct which harms a child or conduct which harms a vulnerable adult, or conduct involving child pornography which can result in inclusion on both lists. In addition, where there is evidence that an individual presents a risk of harm to either a child or a vulnerable adult, he or she may be considered for inclusion on the list. These provisions in effect allow “soft information”, that is, allegations, suspicions or rumours, to be used to ground a decision to bar an individual from having any substantial unsupervised contact with children and vulnerable adults.

4.28 The 2006 Act requires that those individuals who engage in regulated or controlled activities in relation to children or vulnerable adults or who provide services to such persons should make an application to the Secretary of State to be “subject to monitoring.” In other words, individuals currently working in the specified areas or planning to work in the areas must make themselves known to the Secretary of State who, using the CRB, will then search the Police National Computer for cautions and convictions and make enquiries of local police forces to obtain other relevant information. Where the Secretary of State's enquiries reveal that a person satisfies one of the criteria that lead to automatic inclusion in a barred list, he will refer the matter to the Independent Barring Board (IBB) so that the person can be included in the relevant barred list. The Secretary of State will also pass details of relevant cautions and convictions together with all information received from local police forces to the IBB, which the IBB can then consider in relation for inclusion in a barred list. Where a person is included in a barred list, s/he is no longer permitted to engage in regulated activity with children or vulnerable adults or both.

4.29 At appropriate intervals, the Secretary of State must repeat the searches and enquiries referred to above. If new information comes to light about a person who is subject to monitoring, the Secretary of State will give the information to the IBB as outlined above. The IBB may also have cause to consider including a person in a barred list on the basis of referrals from employers, local authorities, professional bodies and supervisory authorities. An employer may register to be notified if an employee ceases to be subject to monitoring and will be notified by the Criminal Records Bureau in such a case. This frequent updating of information and subsequent passing on of new information to the relevant body or employer incorporates one of the most important recommendations of the *Report of the Bichard Inquiry*.

4.30 Finally, sections 18 to 20 of the 2006 Act provide for new offences where persons allow others to engage in regulated activities while barred (whether knowingly or recklessly).

D Proposals for reform of the vetting system in Ireland

(1) Introduction

4.31 The system of Garda vetting in place in this jurisdiction currently is unsatisfactory for a number of reasons. Most fundamentally, the vetting system has no statutory basis and the Commission, in support of recommendations previously made by the 2004 *Report of the Working Group on Garda Vetting* and the 2006 *Report of the Oireachtas Committee on Child Protection*, has already recommended that this situation be remedied.

4.32 The Commission has already notes the comments of the Data Protection Commissioner in relation to the misuse of the vetting system by employers who are not entitled to its services at present.¹³¹ It should be noted that only certain designated agencies and bodies are entitled to the disclosure and vetting procedures provided by the GCVU. Recruiters in everyday employment where the interests of vulnerable people or in the interests of national security are not at stake are not entitled to such disclosure. While every employer is entitled to ask potential employees whether they have been convicted of a criminal offences, they are not entitled to have this confirmed or disputed by the GCVU.

4.33 In recent years, however, section 4 of the *Data Protection Act 1988* has being used as a means of vetting potential employees. Section 4 of the 1988 Act requires ‘data controllers’ to supply copies of ‘data’ to persons the subject of that data. The Commission understands that a practice developed in the mid 1990s by which employers obliged prospective employees to make such requests to the Garda Commissioner for details of any previous convictions and to supply such details to the company. The practice is referred to the by Data Protection Commissioner as ‘enforced subject access’. The Data Commissioner had advised An Garda Síochána to cease supplying details in such cases. The Commission understands that, since this direction was made, employers have begun to advise prospective employees to make section 4 requests without any indication of their purpose. It is not possible to refuse such requests and this has led to a significant increase in the workload of the GCVU in recent years.

4.34 The *Data Protection Act 1988*, as amended by the *Data Protection (Amendment) Act 2003*, impacts on the work of the GCRO and the GCVU in another way. In addition to the requirement to have all data accurate, up-to-date and fair, section 4(2) of the 1988 Act deals with security measures for personal data, and an obligation is placed on the data controller to ensure that necessary security measures are taken to ensure that unauthorised or unlawful possession, destruction, loss or damage does not

¹³¹ See paragraph 1.87, above.

occur. The 1998 Act, as amended, also places an obligation on data controllers to retain information only for no longer than is necessary to satisfy its particular purpose. This places further duties on the GCVU which are all the more onerous given the lack of statutory basis for the vetting service.

(2) *Report of the Working Group on Garda Vetting*

4.35 The *Report of the Working Group on Garda Vetting (2004)* made significant recommendations in relation to the vetting process in Ireland. First, the Report recommended that *all organisations* recruiting and selecting persons having substantial unsupervised access to children and vulnerable adults should be entitled to avail of the vetting services of the Garda Central Vetting Unit. This would involve a significant impact on the workload of the vetting unit. At the time of publication of the 2004 report, the GCVU processed over 900 vetting requests per year. This figure would be significantly increased with an expansion of the entitlement to Garda vetting to all organisations that recruit and select persons who would have substantial unsupervised access to children and vulnerable adults. The Commission understands that this proposal has begun to be implemented and the number of bodies designated for vetting purposes has been increased in recent times.

4.36 The Working Group also recommended that levels of vetting should be in place which would facilitate the use of more extensive searches and background checks where the situation in question warranted it. It was recommended that a three tier system (similar to the system in place in the United Kingdom) should operate, representing three levels of recruitment and selection vetting:

- a standard level of vetting should apply to public service jobs and non-public jobs which are not covered by the special vetting provisions;
- a special level of vetting should be applicable to posts involving substantial unsupervised access to children and vulnerable adults;
- a security level of vetting in the interests of national security.

4.37 The Report also recommended that vetting services should allow for the disclosure of both “hard” facts - such as conviction information - and also “soft” information - such as allegations, all past criminal prosecutions whether successful or not, and all prosecutions pending. The Working Group acknowledged that a careful balancing of rights and obligations was needed, and noted that a considerable onus would be placed on recipient organisations to use the information provided, particularly ‘soft’ information, in an appropriate manner. To this end, the Working Group recommended that legislation should be introduced in respect of vetting to provide for:

“the maintenance of a national criminal records system within An Garda Síochána; the disclosure of not just ‘hard’ facts but also ‘softer’ information; indemnification against disclosure ; and access to information about – and proof of – criminal convictions for the purpose of litigation.”

4.38 The 2004 Report also recommended that the *Protection of Persons Reporting Child Abuse Act 1998* should be amended so as to offer protection for persons reporting the abuse of vulnerable adults, such as those with certain intellectual or physical disabilities, and not just the abuse of children.

4.39 Many of the recommendations of the Report of the Working Group have been implemented in practice by the GCVU on an incremental basis. The recommendations involved a major expansion of the operation of the GCVU and consequently a need to employ and train more staff to deal with the increased volume of applications for vetting. However, to date no legislation has been enacted to put the GCVU and the vetting process on a statutory footing and no provision has been made in statute for the provision of soft information to applicants for vetting by the GCVU.

(3) *Report of the Joint Oireachtas Committee on Child Protection (2006)*

4.40 The 2006 *Report of the Joint Oireachtas Committee on Child Protection (2006)* also made significant recommendations in relation to the vetting process in Ireland. The Committee found two major flaws in the current vetting arrangements. The first is that the system operates on a voluntary basis, which does not usually present a difficulty in the employment context but can outside of this context, and the second is that the system is designed to identify risk by reference to previous criminal convictions only and thus does not take account of ‘soft’ information which may exist in relation to the individual, that is, information arising from previous investigations or inquiries or the experiences of others who have dealt with the individual in question, which gives rise to concern, but which was not or would not be a sufficient evidential basis for prosecution and conviction. The Committee noted that efforts have been made in other jurisdictions to incorporate soft information into the vetting process,¹³² and considers it desirable that similar efforts should be made in this jurisdiction. This is line with the 2004 Report of the Working Group on Garda Vetting.

¹³² The Enhanced Criminal Record Check under the British *Police Act 1997* incorporates all information on police record about an individual including allegations, investigations, complaints, rumours and any other available information. However, the Criminal Records Bureau when providing an Enhanced Level Check has discretion in relation to the information released and is not under an obligation to disclose *all* information relating to the person the subject of the check.

4.41 The Committee did not consider that the constitutional protection of the good name of the citizen to be an insurmountable obstacle to achieving this aim. The Committee highlighted that in other contexts, for example, the regulation of medical practitioners, the State has established procedures for assessing the ability of individuals to practise certain occupations which require particular characteristics or competence. The operation of such procedures can lead to findings adverse to a particular individual and to the publication of those findings to the detriment of that individual and his good name. The Committee considered that the Constitution did not prohibit this, instead requiring that the good name of the individual be protected from unjust attack and, in the case of injustice done, that the State, by its laws, should vindicate the good name of the citizen. The Committee found no injustice in putting in place the means to assess the suitability of individuals to engage in occupations or become involved in situations where they may have unsupervised access to children, and providing the means for publishing that assessment.

4.42 The Committee recommended the development of proposals to put in place the necessary statutory and institutional framework to incorporate the provision of soft information, where appropriate in the context of the vetting process. The Committee also recommended that consideration be given to establishing a statutory framework including provision for a register of persons unsuitable for employment with children, based on “soft” as well as “hard” information, especially information arising out of previous employment. The Committee also recommended that a statutory obligation should be imposed on child-care organisations to vet employees and volunteers as well as an obligation to report dismissal or other disciplinary proceedings related to allegations of harming a child or inappropriate behaviour towards a child. The Committee also recommended the disqualification from working with children of persons found unsuitable for such work, and the creation of an offence of working with children while disqualified from so doing.

(4) *Impact of the Registration of Sex Offenders on Vetting practice*

4.43 The impact of the enactment of the registration provisions in the *Sex Offenders Act 2001* must also be considered in light of moves to protect children and other vulnerable groups in society. Section 8 of the *Sex Offenders Act 2001* details the periods for which a person may be required to register as a sex offender. Section 8(3) of the 2001 Act requires a sex offender to comply with the notification obligation for an “indefinite” period if the sentence imposed is one of imprisonment for life or for a term of more than 2 years. The notification obligation is 10 years if the sentence is more than 6 months but not more than 2 years, 7 years if the sentence imposed is a term of 6 months or less, and 5 years if the sentence imposed is suspended or is non-custodial.

4.44 In this jurisdiction, therefore, an individual sentenced to imprisonment for 2 years or more will have his or her details recorded indefinitely. This in effect means that the convicted individual is required to notify the Gardaí of the address at which they are residing for any period of more than 7 days. Such individuals are also required to notify the Gardaí if they are leaving the country even for a short period of time. The purpose underpinning the 2001 Act is to monitor the movements of convicted persons considered to pose a continuing danger in an effort to reduce the opportunity for re-offending.

4.45 The *Report of the Joint Oireachtas Committee on Child Protection* (2006) recommended important changes to the manner in which the 2001 Act operates. The Committee noted that the term ‘Sex Offenders Register,’ which is often used in connection with the 2001 Act, is in fact a misnomer insofar as no central register of sex offenders exists. Rather, the information is stored in the Garda station to which the sex offender has reported and this information is then passed on if that individual subsequently moves to another area. It was intended that the obligation to notify the Gardaí of names and addresses would result in a “mark” of some type appearing beside the offender's name on a computerised criminal record. This would have been available to members of the An Garda Síochána. However, because the necessary software could not be used by the Gardaí, it was decided to proceed instead with a manual record. The Committee noted the problems with the current arrangements in place (through the Garda Sexual Assault Unit and the GCVU) for the management and dissemination of information notified to the Gardaí. The Committee expressed serious concerns that the absence of a system of computerised recording of this information presents an obstacle to its proper management.

4.46 The Committee also noted the serious risks posed by the free movement of people across borders to the maintenance of adequate records of convicted sex offenders and indeed other types of offenders residing in the jurisdiction. The Committee noted that cross-border co-operation and information sharing between the various agencies in the relevant countries was vital to ensure the integrity of record-keeping systems. In this regard it is important to note that the Irish and United Kingdom governments recently signed a Memorandum of Understanding on Information Sharing Arrangements Relating to Sex Offenders. Systems are in place currently between the GCVU and the CRB in the UK to provide information about Irish individuals living in the UK in the context of disclosure requests lodged in the UK. On the introduction of a spent convictions scheme in this jurisdiction, information sharing operations would need to be formalised and reviewed in order to take adequate account of the systems in place in the jurisdictions receiving the information. The Commission has already discussed in Chapter 2 the non-application of spent convictions legislation

across borders unless reciprocal agreements are in place between particular jurisdictions.

4.47 The Committee was of the opinion that the information contained in the sex offenders register should be more widely available than it currently is, without making such information freely available. The Committee was mainly concerned with recruiters who are not entitled to Garda vetting under the current arrangements. One possible solution suggested by the Committee was to adopt an approach modelled on the law relating to freedom of information. Such a model would operate on the assumption that individuals are entitled to apply for access to information where they have a genuine and legitimate interest in such access, but also on the assumption that the individuals to whom the information relates have certain rights, including privacy rights, that may inhibit or prevent disclosure. The suggested mechanism for reconciling any disputes that might arise between these interests would be an independent statutory body operating within the confines of a legislative scheme, which sets out the applicable principles, but leaves the application of those principles in any specific case to the discretion of the independent statutory body.

(a) Monitoring of sex offenders in the UK

4.48 The position in England and Wales in relation to the monitoring of sex offender is similar to the measures in place in Ireland. Registration requirements were introduced in that jurisdiction under the *Sex Offenders Act 1997*.¹³³ The 1997 Act requires certain convicted and cautioned offenders to register their new addresses with their local police force within 14 days of being released from custody or on moving home. Registration requirements apply to offenders who have been convicted or cautioned of a specified offence,¹³⁴ persons found not guilty by reason of insanity, person unfit to plead but who have been found to have done the act charged and other persons who are still in the criminal justice process.¹³⁵ As with the system under the 2001 Act in this jurisdiction (modelled on the 1997 Act), the requirement to register and notify lasts for a period of time that varies according to the seriousness of the offence, but is a lifetime requirement for anyone sentenced to 30 months or over.¹³⁶ The new regime introduced by

¹³³ The 1997 Act applies England and Wales, and in Scotland.

¹³⁴ These specified offences are contained in Schedule 1 of the *Sex Offenders Act 1997* and include all sexual offences including indecent assault and offences of possessing indecent material in relation to children.

¹³⁵ Section 1 of the *Sex Offenders Act 1997* sets out the categories of persons subject to the registration requirements of the Act.

¹³⁶ The notification requirements are set out in section 2 of the *Sex Offenders Act 1997*.

the *Safeguarding of Vulnerable Groups Act 2006* in the UK discussed above is also significant in this regard.

(5) Discussion and recommendation

4.49 The Commission considers that a spent convictions scheme can be compatible with an efficient and safe vetting system. The Commission considers that the proposals in the 2004 *Report of the Working Group on Garda Vetting* in relation to the creation of a vetting system containing different levels of vetting should be examined and proposals for legislation establishing the vetting unit on a statutory basis should be considered. As regards the level of disclosure required, that is, the proposed three tier system, the Commission considers that further discussion and consultation should take place with affected groups and with intended data controllers in order to establish clearly how any new system would work on a day-to-day basis. The Commission notes that changes in the vetting process would have a significant impact on the GCVU as well as on individuals who retain information relating to others including employers, the State and other agencies. This is a particularly important consideration where there is a proposal to allow the sharing and disclosure of soft information. The provisions of the *Data Protection Act 1988* as it applies to data controllers including the safe and secure retention of information and the proper use of information obtained in particular contexts also require consideration. The Commission also notes the wording of the proposed constitutional amendment in relation to the rights of children, which arose from the 2006 *Report of the Oireachtas Committee on the Constitution*. In particular, the proposed Article 42A.5.1^o appears to envisage the collection of “soft” information, as it states:

“Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.”

4.50 The Commission considers that in relation to higher and security level vetting applications it could be considered justifiable to release such information about an individual where it is considered necessary and appropriate to the application and the position in question. However the Commission considers that very significant human rights and issues of privacy arise in this context that require careful consideration and examination. The Commission considers that important issues have been raised by the Data Protection Commissioner, the 2004 Report of the Working Group on Garda Vetting and the 2006 Report of the Joint Oireachtas Committee on Child Protection. In the context of this Report, which is focused primarily on a proposed spent convictions scheme, the Commission considers that it would not be appropriate to make specific

recommendations on this aspect of vetting. For present purposes, the Commission confines itself to recommendations on matters directly related to the establishment of a spent convictions scheme for adult offenders in this jurisdiction. Issues relating to levels of vetting and the disclosure of “soft” information are, the Commission has concluded, beyond the scope of this Report.

4.51 The Commission considers that there is a need to re-examine the manner in which the *Sex Offenders Act 2001* is operated and, in particular, agrees with the views expressed by the Oireachtas Committee on Child Protection that there is an urgent need to computerise the sex offender’s records which are currently being processed manually. The Commission considers it vital that information recorded under the 2001 Act concerning sex offenders should be shared with the GCVU on a systematic basis so as to ensure that the GCVU has the most recent information in relation to each individual the subject of vetting checks. The Commission acknowledges the proposed changes to the manner in which the 2001 Act operates contained in the *Draft Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006*, published in 2006 by the Department of Justice, Equality and Law Reform. Part 7 of the Draft Scheme proposes to introduce an amendment to the *Sex Offenders Act 2001* including a prohibition on sex offenders working with children or those with intellectual disability. The Draft Scheme also proposes to impose a duty on the sentencing court to consider including such a prohibition at time of sentencing. It also proposes ongoing assessment of individuals who come within the scope of the 2001 Act for suitability in certain employment by responsible persons under the 2001 Act. The responsible persons under the 2001 Act are the Commissioner of An Garda Síochána and the Director of the Probation Service.

4.52 *The Commission supports the recommendation of the Oireachtas Committee on Child Protection that the records maintained under the Sex Offenders Act 2001 should be automated and shared with the Garda Central Vetting Unit (GCVU) on a systematic basis so as to ensure that the GCVU has up to date information in relation to each individual who is subject to vetting checks.*

E Purpose of exemptions from spent convictions schemes

(1) Introduction

4.53 Spent convictions schemes allow a person, having been convicted of a criminal offence in the past, to have the existence of that conviction erased in certain circumstances. The circumstances in which an individual will be required to disclose the existence of the criminal conviction are where the interests of vulnerable members of society are at risk or where

national security is a concern. These are, in effect, exemptions from spent convictions schemes and, where an exemption is in place, an individual will be required to make full disclosure of all criminal convictions when asked to do so. In a number of the spent convictions schemes examined by the Commission in this Report, such as the British *Rehabilitation of Offenders Act 1974*, exemptions are set out in secondary legislation such as a Ministerial Order made after the enactment of the primary spent convictions legislation. In relation to occupations or professions where an individual is placed in a particular position of trust in relation to another for example, medical professionals, lawyers, teachers and many others, there is a requirement of full disclosure in relation to all criminal convictions. Employment in area which involves substantial unsupervised access to children or vulnerable people would also require that full disclosure should be made. These exemptions are not, however, an automatic bar on entry into those specified exempted jobs or professions and, in general, only relevant and serious convictions will bar entry to the profession or post.

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

4.55 Furthermore, individuals with criminal convictions of a certain nature, for example, sex offenders, should not be deemed suitable for employment in particular areas. In this regard, the Commission has already recommended that certain offences should be excluded from the application of the proposed spent convictions scheme with the result that convictions for specified offences such as murder or sexual offences would always have to be disclosed and would never considered spent under the terms of the Act.

4.56 The Commission now turns to consider the exemptions which are in place under the British *Rehabilitation of Offenders Act 1974* and other comparable jurisdictions.

(2) Exemptions in the UK

4.57 The *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975*¹³⁷ provides that offenders must disclose all criminal convictions when applying for certain posts, professions and jobs including the medical, legal and accounting professions, jobs which involve working with vulnerable people including vulnerable adults and children, certain regulated

¹³⁷ A comparable Order was made under the *Rehabilitation of Offenders (Northern Ireland) Order 1978*.

occupations, for example, firearms dealers and certain jobs where national security may be at risk. The rationale behind the exceptions is to protect the public, and in particular, the most vulnerable members of society. The effect is that any convicted person applying for a job or seeking entry to the excluded professions, jobs or posts must declare the existence of all convictions, even those which would otherwise be treated as spent under the 1974 Act.

4.58 The following is a list of the exemptions professions and posts under the 1974 Act: accountant, nurse and midwife, chiropractor, optician, dealer in securities, osteopath, dentist, dental hygienist or dental auxiliary, pharmaceutical chemist, director, controller *etc* of insurance company or building society, police constable, member of prison board of visitors, prison officer, firearms dealer, probation officer, judicial appointment, Justices' chief executive, Justices' clerk and assistant, solicitor, barrister, managers or trustee of unit trust, medical practitioner, teacher, veterinary surgeon and traffic warden.

4.59 Other excepted occupations include: any office or employment where the question about spent convictions is asked for the purpose of safeguarding national security - for example, if an individual wishes to be employed as an officer of the Crown. The following types of work in health and social services is also exempted: where the work involves access to people over 65, people suffering from serious illness or mental disorder, alcoholics or drug addicts, those with a physical or intellectual disability, or where the work is concerned with the provision of care, recreation or leisure facilities, schooling, social services, supervision or training, to people under 18 years. Applications for certain certificates or licences, for example, those for firearms, explosives or gaming require that spent convictions must be disclosed and allow the licensing authority to take them into account.

4.60 These exceptions offer protection to more vulnerable members of society and, by targeting persons who are placed in particular positions of trust in the community, for example doctors, the 1974 Act aims to balance the important objective of protecting the public with the offender's right to privacy. It is important to note that having a previous criminal conviction is not an automatic bar to entering any of the above professions or to taking up certain posts. The information provided is merely used to make an informed assessment of the applicant's suitability for the post or profession.

4.61 In relation to all other positions not exempted under the British 1974 Act, a question posed by a potential employer regarding previous criminal convictions is understood to refer to 'unspent' convictions only. Therefore, a potential employee is only obliged to inform the employer of offences which have not become spent under the 1974 Act.

(3) Disclosure of spent convictions in court proceedings

(a) UK position

4.62 Under the *Rehabilitation of Offenders Act 1974* (extended to Northern Ireland by the *Rehabilitation of Offenders (Northern Ireland) Order 1978*) previous convictions can be cited in criminal proceedings, even if they are spent. The enactment of the 1974 Act, a Practice Direction was issued which advised that spent convictions should not be referred to in court except in very special circumstances. As regards civil proceedings in general, the Practice Direction echoed section 7(3) of the 1974 Act by stating that no question should be asked with might lead to a spent conviction being revealed and if such questions are asked they need not be answered. This general rule does not apply, however, to civil proceedings relating to children, such as adoption, guardianship or custody, where the Practice Direction follows the approach in criminal proceedings, that spent convictions may be revealed where the court is satisfied that justice cannot be done unless evidence of spent convictions is admitted.

(b) Other jurisdictions

4.63 The position is similar in other jurisdictions where spent convictions legislation is in place. In New Zealand, section 19 of the *Criminal Records (Clean Slate) Act 2004* provides that a conviction can continue to be disclosed in any civil or criminal proceedings before a court. In Australia (Commonwealth), exclusions are dealt with in Division 6 of the *Crimes Legislation Amendment Act 1989* and include law enforcement agencies, courts or tribunals. In New South Wales, the spent convictions scheme does not apply in proceedings before a court, but section 16 (2) of the *Criminal Records Act 1991* provides that “a court before which evidence of a spent conviction is admitted must, in appropriate circumstances, take such steps as are reasonably available to it to prevent or minimise publication of that evidence. In Western Australia, under section 19(b) of the *Criminal Records (Clean Slate) Act 2000*, a person’s spent conviction may be revealed if it is relevant to any criminal or civil proceedings before a court or tribunal (including sentencing) or before the Parole Board. In Canada, under the *Criminal Records Act 1985*, an individual if asked, is *not* entitled to deny the existence of a criminal record. An individual is entitled to say that he or she has been convicted of a criminal offence for which a pardon has been granted. The section does not affect the usual rules with respect of the presentation of such evidence in court.

4.64 The Commission considers that exemptions from the proposed spent convictions scheme for adult offenders in this jurisdiction should be comparable to those in place in the United Kingdom. The Commission considers that it would be preferable from the point of view of transparency and principles of better regulation (and to allay any possible constitutional

objections) that these exemptions should be contained in the primary legislation establishing the scheme rather than in subsequent secondary legislation.¹³⁸ The Commission has already recommended that the protection of the spent convictions legislation should not apply in the context of sentencing offenders and in certain civil matters where the welfare of children is at issue. The Commission considers that similar exemptions should be introduced in the scheme for under-18 offenders under the *Children Act 2001*. The Commission also considers that the 2001 Act should be amended to the effect that the protection of the legislation should not apply in the context of sentencing offenders and in civil matters where the welfare of children is at stake. The Commission now turns to set out the recommendations arising from this analysis.

(4) Recommendations

4.65 *The Commission recommends that certain jobs, professions and posts should be exempted from the proposed spent convictions scheme, comparable to those in place under the British Rehabilitation of Offenders Act 1974. The Commission recommends that such provisions should be introduced in primary legislation establishing the spent convictions scheme, rather than in secondary legislation. The Commission further recommends that the same exemptions should be introduced in the existing regime for under-18 offenders in section 258 of the Children Act 2001.*

4.66 *The Commission recommends that all previous convictions should continue to be disclosed in the context of criminal proceedings under the appropriate evidential rules governing such matters, including convictions that would otherwise be considered spent under the proposed spent convictions scheme. The Commission also recommends that all previous criminal convictions should be disclosed in the context of certain civil matters, in particular where the welfare of children is in issue. The Commission recommends that section 258 of the Children Act 2001 should be amended to similar effect.*

¹³⁸ The Commission notes, for example, that the workplace smoking ban, including the relevant exemptions, are contained in primary legislation, section 47 of the *Public Health (Tobacco) Act 2002*, as inserted by section 16 of the *Public Health (Tobacco)(Amendment) Act 2004*. See Byrne and Binchy, *Annual Review of Irish Law 2004* (Thomson Round Hall, 2005), p.445, which refers to the advice of the Attorney General in this respect.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

The recommendations in this Report may be summarised as follows:

5.01 The Commission recommends that suitable spent conviction legislation should be introduced for adult offenders in this jurisdiction [paragraph 1.107].

5.02 The Commission recommends the introduction of a limited spent convictions scheme for adult offenders, which would build on the scheme already in place for under-18 offenders in section 258 of the Children Act 2001 and in comparable schemes in other jurisdictions [paragraph 2.81].

5.03 The Commission recommends that the underlying value of the spent convictions scheme should be an acknowledgement that a criminal record is not necessarily an indicator of the current or future behaviour of an individual. The Commission recommends that the spent convictions scheme should reflect that the law recognises a point at which an individual is entitled to put their past behind them [paragraph 3.06]

5.04 The Commission recommends that the proposed spent convictions scheme for adult offenders should be based on a hybrid model which specifically excludes certain offences from its application and which applies a sentencing threshold. The Commission makes no recommendation on the amendment of equality legislation to include previous criminal convictions as a prohibited ground of discrimination [paragraph 3.11].

5.05 The Commission recommends that any offence which must be tried in the Central Criminal Court and all sexual offences should be excluded from the application of the proposed spent convictions scheme [paragraph 3.19].

5.06 The Commission recommends that convictions which result in sentences of imprisonment of greater than 6 months should be ineligible for expungement under the proposed spent convictions regime. The Commission also recommends that offences which attract non-custodial sanctions should be eligible for expungement [paragraph 3.30].

5.07 The Commission recommends that a conviction-free period of 7 years should apply in the case of all sentences of imprisonment of 6 months or less, and a period of 5 years for all offence that attract a non-custodial

sentence. The Commission recommends that the conviction-free period should begin to run from the date of conviction [paragraph 3.35].

5.08 The Commission recommends that a conviction for any offence during the conviction-free (rehabilitation) period should interrupt the running of the conviction-free (rehabilitation) period and require that a new period should be started from the date of conviction for the second offence. The Commission recommends that dismissals without conviction under section 1(1) of the *Probation of Offenders Act 1907* and offences in respect of which fixed charge penalties for road traffic offences have been paid should not interrupt the running of the crime-free period [paragraph 3.40].

5.09 The Commission recommends that the proposed spent convictions scheme for adult offenders should operate on an automatic basis by which convictions become spent automatically after the requirements of the scheme have been met [paragraph 3.46].

5.10 The Commission recommends that the proposed spent convictions scheme should not apply in the context of sentencing and in the context of certain civil matters where the welfare of children is in issue. The Commission also recommends that the scheme in place for offenders under the age of 18 in section 258 of the *Children Act 2001* should be amended to reflect this [paragraph 3.49].

5.11 The Commission recommends that the vetting regime currently in place in this jurisdiction should be placed on a statutory footing [paragraph 4.16].

5.12 The Commission supports the recommendation of the Oireachtas Committee on Child Protection that the records maintained under the Sex Offenders Act 2001 should be automated and shared with the Garda Central Vetting Unit (GCVU) on a systematic basis so as to ensure that the GCVU has up to date information in relation to each individual who is subject to vetting checks [paragraph 4.52].

5.13 The Commission recommends that certain jobs, professions and posts should be exempted from the proposed spent convictions scheme, comparable to those in place under the British *Rehabilitation of Offenders Act 1974*. The Commission recommends that such provisions should be introduced in primary legislation establishing the spent convictions scheme, rather than in secondary legislation. The Commission further recommends that the same exemptions should be introduced in the existing regime for under-18 offenders in section 258 of the *Children Act 2001* [paragraph 4.65].

5.14 The Commission recommends that all previous convictions should continue to be disclosed in the context of criminal proceedings under the appropriate evidential rules governing such matters, including convictions that would otherwise be considered spent under the proposed

spent convictions scheme. The Commission also recommends that all previous criminal convictions should be disclosed in the context of certain civil matters, in particular where the welfare of children is in issue. The Commission recommends that section 258 of the *Children Act 2001* should be amended to similar effect [paragraph 4.66]

DRAFT SPENT CONVICTIONS BILL 2007

ARRANGEMENT OF SECTIONS

Section

1. Short title and commencement
2. Interpretation
3. Rehabilitated person and spent conviction
4. General effect of spent conviction
5. Exceptions to general effect of spent conviction for excluded employment
6. Disclosure of spent conviction and other restrictions

ACTS REFERRED TO

Child Care Act 1991
1991, No.17
Ethics in Public Office Act 1995
1995, No.22
Probation of Offenders Act 1907
7 Edw. 7, c.17
Sex Offenders Act 2001
2001, No.18

DRAFT SPENT CONVICTIONS BILL 2007

BILL

Entitled

AN ACT TO PROVIDE THAT CERTAIN CONVICTIONS MAY BE REGARDED AS SPENT FOR CERTAIN PURPOSES WHERE THE CONVICTED PERSON HAS NOT BEEN CONVICTED OF ANY OTHER OFFENCE WITHIN SPECIFIED PERIODS OF YEARS, AND TO PROVIDE FOR RELATED MATTERS

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Short title and commencement

1.—(1) This Act may be cited as the Spent Convictions Act 2007.

(2) This Act comes into force on such day or days as the Minister may by order appoint.

Interpretation

2. —In this Act, unless the context otherwise requires—

“circumstances ancillary to a conviction” has the meaning assigned by *section 4(5)*;

“court” means any court exercising jurisdiction in civil or criminal matters;

“excluded employment” has the meaning assigned by *section 5(2)*;

“excluded sentence” has the meaning assigned by *section 3(3)*;

“Minister” means the Minister for Justice, Equality and Law Reform;

“rehabilitated person” has the meaning assigned by *section 3*;

“relevant rehabilitation period” has the meaning assigned by *section 3(4)*;

“sentence” means—

- (a) any custodial order made by a court in connection with a criminal conviction providing for the deprivation of a person’s liberty for a period of time imposed by a court, and includes any such sentence which is suspended, whether in whole or in part,
- (b) any other non-custodial order made by a court in connection with a criminal conviction, including any disqualification, penalty, fine, prohibition or order postponing sentence;

“sexual offence” has the meaning assigned by the Sex Offenders Act 2001;

“spent conviction” has the meaning assigned by *section 3*.

Rehabilitated person and spent conviction

3. —(1) Subject to the conditions in *subsection (2)* and the other provisions of this Act, where an individual, in this Act referred to as a “rehabilitated person,” has been convicted of an offence or offences, whether before or after the commencement of this Act, the conviction of the rehabilitated person shall be referred to as a “spent conviction” and shall have the effects referred to in *section 4*.

(2) The conditions referred to in *subsection (1)* are that—

- (a) the conviction did not involve the imposition by the court of an “excluded sentence” within the meaning of *subsection (3)*,
- (b) the rehabilitated person did not have a sentence imposed upon him or her in respect of any offence during the “relevant rehabilitation period” within the meaning of *subsection (4)*, and
- (c) the rehabilitated person has complied with all conditions of the sentence.

(3) An “excluded sentence” means —

- (a) a sentence imposed in respect of any offence triable by the Central Criminal Court,
- (b) a sentence imposed in respect of a sexual offence, and
- (c) a sentence for a term exceeding 6 months.

(4) “Relevant rehabilitation period” means—

- (a) in respect of a custodial sentence for a term not exceeding 6 months, a period of 7 years from the date of conviction, and

(b) in respect of any non-custodial order, including disqualification, penalty, fine or prohibition, a period of 5 years from the date of conviction or when such order ceased to have effect, whichever is the earlier.

(5) For the purposes of *subsection (4)*, the relevant rehabilitation period is interrupted by a subsequent conviction for any offence during the 7 year period or the 5 year period, as the case may be, and a new relevant rehabilitation period shall be deemed to begin from the date of any such conviction, but this shall not apply in the case of a dismissal under section 1(1) of the Probation of Offenders Act 1907.

Explanatory note

Section 3 implements the recommendations in paragraphs 3.19, 3.30, 3.35, 3.40 and 3.46.

General effect of spent conviction

4. —(1) Subject to *section 3* and the other provisions of this Act, a rehabilitated person shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction and, notwithstanding the provisions of any other enactment or rule of law to the contrary, no evidence shall be admissible in any proceedings before a court to prove that a rehabilitated person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction.

(2) Subject to *section 3* and the other provisions of this Act, where a question seeking information about an individual's previous convictions, offences, conduct or circumstances is put to him or her or to any other person otherwise than in proceedings before a court—

- (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly, and
- (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent sentence in the answer to the question.

(3) A person convicted of fraud, deceit and an offence of dishonesty in respect of an insurance claim shall not be excused by *subsection (2)* from admitting any such conviction on any insurance proposal or form.

(4) Subject to *section 3* and the other provisions of this Act,

(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him or her to disclose a spent conviction or any circumstances ancillary to a spent conviction, and

(b) subject to the provisions of *section 5* concerning any “excluded employment,” a spent conviction, or any failure to disclose a spent conviction, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him or her in any way in any occupation or employment.

(5) For the purposes of this Act, “circumstances ancillary to a conviction” means —

(a) the offence or offences which were the subject of that conviction,

(b) the conduct constituting that offence or those offences, and

(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.

Explanatory note

Section 4 implements the recommendations in paragraph 3.49.

Exceptions to general effect of spent conviction for excluded employment

5. —(1) Nothing in *section 4* shall affect the obligation of a rehabilitated person or of any person to disclose any conviction, including a spent conviction, where an individual seeks employment or any position or office in an “excluded employment” within the meaning of *subsection (2)*.

(2) “Excluded employment” means —

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

- (b) any office, profession, occupation or employment in the provision of health care,
- (c) membership of the judiciary, barrister, solicitor, court clerk, court registrar or any employee of the Courts Service,
- (d) civil servant, public servant, or of any office within the meaning of the Ethics in Public Office Act 1995,
- (d) firearms dealer,
- (e) traffic warden,
- (f) employment as a member of the Defence Forces,
- (g) employment as a prison officer, as a member of the probation service, or membership of a prison visiting committee,
- (h) employment as a member of An Garda Síochána (including reserve membership),
- (i) accountant or dealer in securities, and
- (j) director, controller or manager of a financial institution or of any financial service provider which is regulated by the Financial Regulator.

Explanatory note

Section 5 implements the recommendations in paragraph 4.65.

Disclosure of spent conviction and other restrictions

6. —(1) Nothing in this Act shall affect—

- (a) the right of the President to grant a pardon or commute a sentence in accordance with the provisions of the Constitution,
- (b) the enforcement by any process or proceedings of any fine or other sum adjudged to be paid by or imposed on a spent conviction,
- (c) the issue of any process for the purpose of proceedings in respect of any breach of a condition or requirement applicable to a sentence imposed in respect of a spent conviction, or
- (d) the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which extends beyond the rehabilitation period applicable to the conviction in accordance with *section 3*.

(2) Nothing in this Act shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's spent conviction or to circumstances ancillary thereto—

- (a) in any criminal proceedings before a court (including any appeal or reference in a criminal matter),

- (b) in any proceedings relating to adoption or to the guardianship, custody, care or control of, or access to, any person under the age of 18 years, including proceedings under the Child Care Act 1991, or to the provision by any person of accommodation, care or schooling for any person under the age of 18 years,
- (c) in any proceedings in which a rehabilitated person is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he or she consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of *section 4(1)*.

(3) If at any stage in any proceedings before a court the court is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent conviction or to circumstances ancillary thereto, the court may admit or, as the case may be, require the evidence in question notwithstanding the provisions of *section 4*, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.

Explanatory note

Section 6 implements the recommendations in paragraph 4.66.