

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

Submission by the Irish Human  
Rights and Equality Commission

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**Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas**  
Irish Human Rights and Equality Commission

# **Response to the Public Consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016**

The Irish Human Rights and Equality Commission

November 2020

16 – 22 Green Street, Dublin 7, D07 CR20 T (01) 858 9601 | F (01) 858 9609 | E [info@ihrec.ie](mailto:info@ihrec.ie) |  
[www.ihrec.ie](http://www.ihrec.ie)

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# 1. Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the Irish Human Rights and Equality Commission Act 2014 (the 'IHREC Act, 2014'). The Commission has a statutory mandate to keep under review, the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government to strengthen, protect and uphold human rights and equality in the State.<sup>1</sup>

The Commission welcomes the opportunity to engage in the public consultation on the Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 (the '2016 Act') and the Criminal Justice (Rehabilitative Periods) Bill 2018 (the '2018 Bill').<sup>2</sup>

The prospect of rehabilitation is inextricably linked to human dignity and promoting equality. Legislative and policy reform in this area requires the correct balance to be struck between an individual's right to respect for private life and freedom from discrimination and the broader societal interest of public safety and the prevention of disorder and crime with regard also for victims of crime

The Commission believes the 2016 Act, and proposed reform under the 2018 Bill, do not go far enough. Meaningful reform of the 2016 Act is key to ensuring that individuals can move beyond previous convictions in order to reintegrate into society. The Commission envisages an inclusive spent convictions policy underpinned by Ireland's human rights and equality obligations. This submission identifies a number of key issues and recommendations that must be addressed to bring this about.

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<sup>1</sup> Section 10(2) (b) and (d) of the Irish Human Rights and Equality Commission Act, 2014 (the 'IHREC Act, 2014').

<sup>2</sup> The former Irish Human Rights Commission (the 'IHRC') and the former Equality Authority (the 'EA') both called for reform in the area of spent convictions and the treatment of convicted persons. See IHRC, *Extending the Scope of Employment Equality Legislation*, May 2005; IHRC, *Observations on the Spent Convictions Bill 2012*, June 2012; The Equality Authority, *Review of Discriminatory Grounds covered by the Employment Equality Act 1998*, Dublin 2002.

## 2. Relevant Human Rights and Equality Framework

The principle aim underpinning a spent convictions scheme is to support rehabilitation and reintegration of a convicted person.<sup>3</sup> Core international treaties have recognised that rehabilitation and reintegration fall within the human rights framework. Article 10 (3) of the International Covenant for Civil and Political Rights ('ICCPR') places an obligation on States to seek the reformation and social rehabilitation of prisoners. Furthermore, the United Nations Human Rights Committee has stated that, "*no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner*".<sup>4</sup>

According to Council of Europe standards, the use of information on criminal records outside of criminal proceedings must be as limited as possible, so not to compromise the chances of social rehabilitation of the convicted person and should therefore be restricted "*to the utmost*".<sup>5</sup> Also, the European Court of Human Rights ('ECtHR') has linked the concept of human dignity to the prospect of rehabilitation, holding that this includes "*meaningful*" access to employment, education and vocational training.<sup>6</sup>

The obligation to disclose, or the retention of previous convictions, engages a person's right to private life. The ECtHR has recognised that as a conviction "*...recedes into the past, it becomes a part of a person's private life which must be respected*".<sup>7</sup> States

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<sup>3</sup> The Department's consultation document 'Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 Public Consultation, October 2020, states "[t]he need for a spent conviction regime is rooted in the principles of rehabilitative justice and the generally accepted acknowledgement that, after a certain period and having successfully completed their sentence, individuals deserve a 'second chance'."

<sup>4</sup> UN Human Rights Committee, General Comment No. 21 on Article 10 (Human Treatment of Persons Deprived of Their Liberty), 10 April 1992.

<sup>5</sup> This is underscored in the Council of Europe (1984), Committee of Ministers, *Recommendation on the Criminal Record and Rehabilitation of Convicted Persons*, No. R (84)10, 21 June 1984, fourth preamble recital. See also *Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings*, 24 July 2008 referenced in Recital 11 of Framework Decision 2009/315/JHA and the *Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decision 2008/675/JHA*, 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings COM (2014) 312 final.

<sup>6</sup> *Murray .v. the Netherlands*, Application No 10511/10, Judgment of the European Court of Human Rights (ECtHR), 26 April 2016, at para 110.

<sup>7</sup> *MM v. United Kingdom*, Application no 24029/07, ECtHR Judgment, 13 November 2012 at para 188.

must ensure adequate safeguards are in place to prevent against unjustified interference in the disclosure, or sharing of a person's conviction history, particularly given the potentially devastating consequences of disclosure to a third party.<sup>8</sup> These safeguards include, for example, specified and reasonable time limits for the retention of data, a specified timeframe for the expiry of this data that is proportionate to the seriousness of the crime, a possibility to apply to have the data destroyed and in certain circumstances (for more serious crimes), a possibility to have the conviction expunged by an independent board, or court.<sup>9</sup>

People with previous convictions also face discriminatory treatment because of their conviction history.<sup>10</sup> The Irish courts have recognised that unjustified less favourable treatment because of a person's previous conviction will amount to unlawful discrimination.<sup>11</sup>

Particular groups are more likely to be excluded under the current legislative scheme than others.<sup>12</sup> In this regard, research has identified that high rates of offending and

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<sup>8</sup> *Ibid*, at para 200. In this case the ECtHR recognised the importance of safeguards in the context of disclosure of a criminal conviction to a prospective employer, stating, “[t]he Court considers that the obligation on the authorities responsible for retaining and disclosing criminal record data to secure respect for private life is particularly important, given the nature of the data held and the potentially devastating consequences of their disclosure...As Lord Neuberger indicated, even where the criminal record certificate records a conviction or caution for a relatively minor, or questionably relevant, offence, a prospective employer may well feel it safer to reject the applicant (see paragraph 108 above; see also the views expressed in the Divisional Court in *R (Pinnington)*, at paragraph 87 above). The Court agrees with Lord Neuberger that it is realistic to assume that, in the majority of cases, an adverse criminal record certificate will represent something close to a “killer blow” to the hopes of a person who aspires to any post which falls within the scope of disclosure requirements (see paragraph 111 above).”

<sup>9</sup> See *Gardel v. France*, ECtHR Judgment, Application no 16428/05, 17 December 2009. Also see *T & Anor v. Secretary of State for the Home Department* [2014] UKSC 35.

<sup>10</sup> *Supra*fn 2. Also, see House of the Oireachtas, *Joint Committee on Justice and Equality Report on Spent Convictions*, 32/JAE/44, October 2019, pages 20-21. In addition, it is of note that a recent CSO study found that over half (59.7) of offenders included in the study were not at work or education up to May 2019, Central Statistics Office (CSO), *Offenders 2016 – Employment, Education and other Outcomes 2016-2019*, 5 October 2020.

<sup>11</sup> *Cox .v Ireland*(1992) 2 IR 503.

<sup>12</sup> Indirect discrimination occurs where an apparently neutral provision would put a person (by reason of their status) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

reoffending can be linked to homelessness,<sup>13</sup> a person's socio economic status,<sup>14</sup> and drug and alcohol addiction.<sup>15</sup>

In addition, structural discrimination can lead to over-representation of certain groups within the criminal justice system including, for example; men,<sup>16</sup> people with mental health conditions,<sup>17</sup> people with intellectual disabilities,<sup>18</sup> and minority ethnic groups,<sup>19</sup> including members of the Traveller community.<sup>20</sup> This disadvantage is further compounded as research shows that the rate of recidivism in Ireland is high once a person enters the prison system.<sup>21</sup>

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<sup>13</sup> Claire Hickey, Focus Ireland and PACE, *Crime and Homelessness*, 2002.

<sup>14</sup> Donovan, Ann Marie, *The geography of prisoner reintegration*, Drugnet Ireland, Issue 28, Winter 2008, pp. 18-19. O'Donnell, I., Teljeur, C., Hughes H., Baumer E., and A. Kelly (2007) 'Punishment, social deprivation and the geography of reintegration', Irish Criminal Law Journal, 17(4): 3-9.

<sup>15</sup> Gulati G et. al (2019) *The prevalence of major mental illness, substance misuse and homelessness in Irish prisoner: systematic review and meta-analyses*, Irish Journal of Psychological Medicine (2019) 36, 35-45, College of Psychiatrists Ireland 2018.

<sup>16</sup> IPS, Irish Prison Population daily statistics – statistical information-

<https://www.irishprisons.ie/information-centre/statistics-information/2015-daily-prisoner-population/2020-prison-populations/>.

<sup>17</sup> Gulati G et. al (2019) *The prevalence of major mental illness, substance misuse and homelessness in Irish prisons: systematic review and meta-analysis*, Irish Journal of Psychological Medicine.

<sup>18</sup> Gulati, G. et al. (2018) *Intellectual disability in Irish prisoners: Systematic review of prevalence*. International Journal of Prisoner Health, 14(3).

<sup>19</sup> OHCHR (2015) *Minorities in the Criminal Justice System: Contribution of the UN Network on Racial Discrimination and Protection of Minorities to the Eight Session of the Forum on Minority Issues*.

[https://www.ohchr.org/Documents/HRBodies/HRCouncil/MinorityIssues/Session8/UN\\_Network\\_Joint\\_Submission.docx](https://www.ohchr.org/Documents/HRBodies/HRCouncil/MinorityIssues/Session8/UN_Network_Joint_Submission.docx). Raynor, P. and Lewis, S. (2011) *Risk-Need Assessment, Sentencing and Minority Ethnic Offenders in Britain*. *British Journal of Social Work*, 41, 1357-1371 -It has been found in the UK,

that sentences for minority ethnic offenders is more severe than equivalent white majority offenders. This may not result from a conscious prejudice, but rather stereotyping of minority communities on the part of criminal justice system or lack of personal familiarity with the social and cultural contexts of the offenders. Also see Dhami, M. K. (2013). *Sentencing guidelines in England and Wales: Missed opportunities*. *Law & Contemp. Probs.*, 76, 289 - When applying sentences, there is a degree of discretion around the consideration of aggravating and mitigating factors. It has been found in research in England, Wales and the US that actual sentencing behaviour can diverge based on factors such as the defendant's and sentencer's sex, race, age which can lead to unfairness in sentencing It has been found in the UK, that sentences for minority ethnic offenders is more severe than equivalent white majority offenders.

<sup>20</sup> Lator, T. (2017) *Travellers in Prison Initiative: Ethnic Identifiers in Irish Prisons*. Dublin: SSGT.

<https://www.ssgt.ie/wp-content/uploads/2017/11/TPI-Ethnic-Identifiers-in-Irish-Prisons-Book.pdf>.

<sup>21</sup> CSO (2020) *Prison Re-Offending Statistics 2011-2017*.

<https://www.cso.ie/en/releasesandpublications/ep/p-pros/prisonre-offendingstatistics2011-2017/>.

The CSO report finds that of prisoners released in 2017, 40% re-offended within one year of release  
Prison Re-Offending

### 3. Limitations of the 2016 Act: Human Rights and Equality Concerns

Noting the above, the Commission has identified the following human rights and equality concerns in respect of the 2016 Act, and the proposed 2018 Bill.

#### Issue 1: Discrimination on the ground of criminal conviction

As identified above, discrimination is a real issue, with serious impacts on former offenders. The former Irish Human Rights Commission and the former Equality Authority recommended that the grounds of discrimination in the Employment Equality Act 1998-2018 (the 'EEA') should be extended to include discrimination on the basis of a criminal conviction. The Commission's Your Rights service has received reports from members of the public that illustrate the real life impact of having to disclose their previous convictions to third parties,<sup>22</sup> including the withdrawal of employment offers, exclusion from third level education, loss of housing and refusal of insurance policies.

The 2018 Bill proposes to amend the EEA to prohibit an employer from discriminating by reason of a spent conviction. While equality legislation should be amended to address this form of discrimination, the 2018 Bill does not go far enough. First, the proposed reform only prohibits discrimination in respect of a spent conviction, which is too limited and does not address the more general discrimination faced by ex-offenders. Second, the proposal does not address other forms of discrimination, such as access to education, housing and other services, including insurance. Discrimination on the ground of criminal conviction should also extend to the Equal Status Acts 2000-2018. In the absence of a prohibition on such discrimination, the impact of any reform in this area is in question.

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<sup>22</sup> The Commission's Your Rights service provides information to members of the public on human rights and equality law.



**The Commission recommends that reform of the current legislative scheme should include amendments to the equality legislation, to include a broad prohibition on discrimination on the ground of criminal conviction.**

## Issue 2: The sentencing length limits for spent convictions

Currently, the maximum length of a custodial sentence that can become spent is 12 months or less. For a non-custodial sentence, the upper limit is 24 months, or less. A sentence of any length above these relatively short durations can never be considered spent under the 2016 Act.

The 2018 Bill proposes to increase the ceiling for those sentences eligible to become spent from 12 months to 24 months in the case of custodial sentence, and from 24 months to 48 months for non-custodial sentences. Although an extension in applicability under the scheme is welcome, such limitations remain overly restrictive. The Law Society of Ireland has previously recommended that all convictions should be eligible to be considered under a spent conviction scheme.<sup>23</sup>

The exclusion of offenders who have received higher sentences does not align with the purpose of the 2016 Act which is, *“to assist the rehabilitation of offenders, who often experience difficulties securing employment as a result of having a conviction”*.<sup>24</sup> Moreover, the ECtHR has recognised that the rehabilitative process is linked with human dignity and extends to all prisoners, including those serving indeterminate life sentences.<sup>25</sup>

Measures taken to seek the rehabilitation and reintegration of convicted persons must be balanced against the broader societal interests of public safety and the prevention of disorder and crime, as well as due regard for victims. There appear to be sufficient safeguards in place in the 2016 Act to justify an increased sentencing threshold. These

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<sup>23</sup> Law Society of Ireland, *The Disclosure of Criminal Convictions – A report by the Spent Convictions Group*, May 2009, *Proposals on a Rehabilitation of Offenders Bill*, May 2009.

<https://www.lawsociety.ie/globalassets/documents/committees/hr/spentconvictionreport09.pdf>

<sup>24</sup> Explanatory Memorandum, *the Spent Convictions Bill 2012*.

<https://www.oireachtas.ie/en/bills/bill/2012/34/?tab=documents>

<sup>25</sup> *Supra* fn. 9.

safeguards include: a period of rehabilitation prior to the possibility of non-disclosure; a requirement to disclose in all circumstances if the person seeks a position in certain categories of employment, including employment involving the care, supervision or teaching of vulnerable persons including children; and a requirement to disclose in criminal proceedings and other identified procedures, such as those relating to adoption or fostering.

A regime that includes increased sentencing thresholds could deal with more serious offences by way of a review mechanism. Under this procedure, a person would apply to an independent board, or court to have his/her conviction considered spent.<sup>26</sup> This procedure would allow for an individualised risk assessment, and include such considerations as:

- the nature of the offence;
- the circumstances in which the person committed it;
- age of person when it was committed;
- the time that has lapsed since the person committed the offence;
- its relevance to the judgment to be made by the person making the request.<sup>27</sup>
- the impact of the crime on any victims and their families.<sup>28</sup>

Given that the purpose of the application is to erase/expunge a person's conviction history, any such procedure could be in private, and/or, incorporate the necessary and appropriate reporting restrictions. However, any such considerations must also have due regard to, and be balanced against the rights of the victim or victims.

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<sup>26</sup> In Canada, the Parole Board of Canada is the federal agency responsible for ordering, refusing to order and revoking record suspensions for convictions. Separately, In Western Australia serious convictions can only be spent on application to a District Court judge. Scotland has also recently introduced a system of review for more serious offences.

<sup>27</sup> *T & Anor v Secretary of State for the Home Department* [2014] UKSC 35.

<sup>28</sup> *Supra* fn 2.

**The Commission recommends that a more inclusive spent convictions scheme (with higher sentencing thresholds) would significantly aid the rehabilitation and reintegration of a broader range of offenders.**

**The Commission further recommends that the expungement of more serious offences (captured within an increased sentencing threshold regime) should be considered on an individualised basis of risk, by an independent board, or court.**

### Issue 3: The number of convictions that can be considered spent

The 2016 Act places a limit so that only one conviction can ever become spent. As such, the 2016 Act offers no assistance to people who committed more than one offence (other than minor motoring/public order offences) in the past, no matter how far in the past such offences were committed. It is likely that this limitation has the disproportionate effect of excluding specific groups that may have accumulated multiple offences because of disability (for example, drug and alcohol addiction or, mental health conditions), socioeconomic status, homelessness, etc. Whilst the 2018 Bill seeks to raise the limit on the number of (non-motoring and minor public order) convictions eligible to be spent from one to two, the rationale for any such limitation must be questioned and all convictions within the scope of the 2016 Act should be subject to the possibility of becoming “spent”.

**The Commission recommends that no limitation is placed on the number of convictions per person.**

**The Commission recommends that the Minister takes steps to address the potential discriminatory impact of the current scheme on certain groups, and that a comprehensive equality impact assessment is carried out on the current 2016 Act, and on any proposed reform.**

### Issue 4: The principle of proportionality and spent convictions

The 2016 Act sets the rehabilitative period after which a conviction becomes spent at a blanket 7 years for all convictions, without distinction and with no proportionality between the length of sentence and the rehabilitative period that follows. The 2018 Bill

would introduce the principle of proportionality to the relationship between the length of the sentence and the length of the rehabilitative period, before the conviction becomes spent.

The rehabilitative period provided for under the 2016 Act is too long and inconsistent with the Council of Europe Recommendation that member states provide for an automatic period of rehabilitation after a “*reasonably short period of time*”. A shorter rehabilitation period would maximise the possibility of rehabilitation and reintegration into society.

Moreover, the current periods of rehabilitation are arguably disproportionate to the legitimate aims of public safety, or preventing disorder or crime.<sup>29</sup> In line with the principle of proportionality and to maximise the aim of rehabilitation, the Minister should consider applying shorter periods proportionate to the sentence imposed, and that approaches in the UK and other jurisdictions might be instructive in this regard.<sup>30</sup> The Law Society recommended that for non-custodial sentences, the relevant period should be the duration of the sentence plus one year, and for custodial sentences of less than two years it should be the duration of the sentence plus two years.<sup>31</sup>

The lengthy rehabilitation period touches on a separate but concerning issue regarding data retention. The retention of a person’s conviction records for a period of 7 years (or indefinitely, where a person is excluded from the scheme), particularly for relatively minor offences, is likely to be inconsistent with the State’s obligations under GDPR and the European Convention of Human Rights (the ‘ECHR’).<sup>32</sup>

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<sup>29</sup> *Cox v. Ireland* [1992] 2 IR 503 is of relevance in considering the length of the rehabilitation period. The Court held that a blanket exclusion from civil service employment for a seven year period of all persons convicted of membership of an illegal organisation was too wide and indiscriminate.

<sup>30</sup> *Supra* fn 2.

<sup>31</sup> *Supra* fn 31.

<sup>32</sup> Article 5(1) (c) of the GDPR provides that data processing shall be... “adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’)”. Also, in *Gaughran v. the United Kingdom*, (Application no. 45245/15), ECtHR Judgment, 13 June 2020, which concerned the indefinite retention of DNA and fingerprint evidence, the ECtHR found that this amounted to an unjustified interference of the applicant’s right to private life, finding “...that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair

**The Commission recommends that in line with the principle of proportionality and to maximise the possibility of rehabilitation of persons with previous convictions, the proposed legislation should provide shorter periods of rehabilitation that are proportionate to the offence and the sentence imposed.**

**The Commission further recommends that the Minister review the 2016 Act's wider impact on the retention and storage of previous convictions for lengthy periods (including indefinite retention) to ensure compliance with the GDPR and the ECHR.**

### Issue 5: Incorporating a Youth Justice Perspective

The 2016 Act contains no recognition of the disproportionate impact of a conviction on the prospects on a young person and their resulting additional rehabilitative needs. The 2018 Bill proposes to bring recognition to the specific rehabilitative needs of young people to the spent conviction system, by providing that young adults between the ages of 18 and 24 have a limit of three eligible convictions to be spent and would face proportionally shorter rehabilitative periods before their convictions are spent.

The Minister recognises that the spent convictions system disproportionately impacts on young people. However, whilst the proposed amendments are welcome, many young offenders will remain excluded from the scheme given the limitations as addressed above.

**As above, the Commission recommends that there should be no limitation is placed on the number of convictions per person.**

**Also, the Commission recommends that the sentence threshold should be increased and for serious offences there should be a review mechanism to apply to have the**

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balance between the competing public and private interests. The Court recalls its finding that the State retained a slightly wider margin of appreciation in respect of the retention of fingerprints and photographs (see paragraphs 84 above). However, that widened margin is not sufficient for it to conclude that the retention of such data could be proportionate in the circumstances, which include the lack of any relevant safeguards including the absence of any real review."

**conviction expunged by a board or, independent court that is based on the individual risk assessment of the offender.**

## Issue 6: The Victim's Perspective

The importance of the victim's rights within any spent conviction scheme must be recognised. The EU Victims Directive<sup>33</sup> recognises that restorative justice can be of great benefit to victims of crime. However, States must ensure that the appropriate safeguards are in place to protect against secondary and repeat victimisation, intimidation and retaliation.

The Victims' Directive requires that where restorative justice services are available, safeguards are put in place to protect against secondary and repeat victimisation to ensure that victims have access to "*safe and competent restorative justice services*" and to ensure that restorative justice schemes are only used if it is "*in the interest of the victim*", as required under Article 12 of the Victims' Directive.<sup>34</sup>

Relevant factors for consideration include:

- the nature and severity of the crime,
- the ensuing degree of trauma,
- the repeat violation of a victim's physical, sexual, or psychological integrity,
- power imbalances, and the age, maturity or intellectual capacity of the victim.<sup>35</sup>

**The Commission recommends that reform to the spent convictions scheme must incorporate the safeguards of the Victims' Directive as necessary.**

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<sup>33</sup>Directive 2012/29/EU of the European Parliament and Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision (the 'EU Victims Directive'). The EU Victims Directive was transposed into Irish law on 16 November 2015.

<sup>34</sup>IHREC, Legislative Observations on the Criminal Justice (Victims of Crime) Bill 2016, February 2017. <https://www.ihrec.ie/app/uploads/2017/02/Observations-on-the-Criminal-Justice-Victims-of-Crime-Bill-2016.pdf>

<sup>35</sup> Article 12 of the EU Victims Directive: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32012L0029>

**The Commission refers to its recommendation to establish a mechanism for the expungement of serious offences on application to an independent board, or court. In this respect, the Commission recommends that this process be informed and guided by principles enshrined by the EU Victims' Directive, and in particular Article 12.**

### Issue 7: 'Specified Work'

Under the 2016 Act, a person who seeks employment in a profession that is categorised as "specified work" must disclose their previous convictions even though under the 2016 Act, they would otherwise have been considered spent.<sup>36</sup>

Whilst in certain circumstances the State may legitimately exclude offenders from specified areas of employment, any measures must have regard to an individual's constitutional rights and must be proportionate to the legitimate objective pursued.<sup>37</sup>

The 2016 Act does not expressly exclude individuals from certain professions because they have previous convictions. Instead, it excludes a person from the benefit of a spent convictions regime in relation to certain categories of employment. Thus placing the discretion in the hands of the employer to make an informed decision as to the suitability of the candidate for the available position. However, in essence, it may present the employer with the opportunity to discriminate against a convicted person, regardless of whether there is a reasonable and objective justification for such discrimination.

The mandatory and blanket requirement to disclose a criminal record to a prospective employer (without any regard to relevant factors such as the seriousness of the offence, or the time that has passed since the offences was committed) might, in circumstances, amount to an unjustified interference with that person's right to private life. For example, the obligation to disclose a minor public order conviction which occurred 15 years ago (and which would otherwise be spent) for a position as clerical

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<sup>36</sup> Schedule 2 of the 2016 Act lists the categories of "Specified Work".

<sup>37</sup> *Cox .v Ireland* (1992) 2 IR 503 and *Thlimmenos v. Greece* of 6 April 2000 (2001) 31 EHRR 411, at para 47.

officer with the Central Bank would likely amount to an unjustified interference with an individual's private life.

The Commission recommends that the categories of "specified work" listed under the 2016 Act are reviewed to ensure that the only categories of employment excluded from the scheme are excluded for legitimate reasons on grounds which include the protection of national security or public safety, or the prevention of disorder or crime.

### Issue 8: Convictions outside the State

The 2016 Act provides that only domestic convictions are eligible to become spent.<sup>38</sup> Accordingly, individuals who have been convicted of offences in another jurisdiction are excluded, and must disclose their conviction even though it is spent under Irish law. This is likely to place people whose nationality is other than Irish, in a less favourable position compared to an Irish national and could amount to unlawful discrimination. Arguably, this also breaches the State's obligations under EU law, to remove barriers of free movement to EU nationals when seeking employment, housing and other services in the State.<sup>39</sup>

**The Commission recommends that s. 4(1) of the 2016 Act be amended to ensure compliance with the principle of equality and EU law.**

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<sup>38</sup> S.4 (1) of the 2016 Act defines "conviction" as "conviction by a court" and in turn defines "court" to mean "any court in the State."

<sup>39</sup> Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers - <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32014L0054>



## 4. Conclusion and Recommendations

In applying relevant human rights and equality law and standards to the review of the 2016 Act and the proposed 2018 Bill, the Commission has identified a number of areas of serious concern. In summary, the restricted nature of the spent convictions scheme may amount, in a particular case, to either, or both, discrimination and/or unjustified interference with a person's private life. Also, the restricted nature of the current scheme has the likely effect of disproportionately excluding specific groups, on grounds including; disability, gender, ethnicity, socio-economic status, and homelessness.

The Commission's recommendations are as follows:

### Issue 1: Discrimination on the ground of criminal conviction:

- The Commission recommends that reform to the 2016 Act should include amendments to the equality legislation, to include a broad prohibition on discrimination on the ground of criminal conviction.

### Issue 2: The sentencing length limits for spent convictions:

- The Commission recommends that a more inclusive spent convictions scheme (with higher sentencing thresholds) would significantly aid the rehabilitation and reintegration of a broader range of offenders.
- The Commission further recommends that the expungement of more serious offences (captured within an extended sentencing regime) should be considered on an individual basis of risk by an independent board, or court.

### Issue 3: The number of convictions that can be considered spent:

- The Commission recommends that no limitation is placed on the number of convictions per person.
- The Commission recommends that the Minister ensure that reform in this area address the discriminatory impact on certain groups, and that a comprehensive

equality impact assessment be carried out on the current 2016 Act, and on any proposed reform.

#### Issue 4: The principle of proportionality and spent convictions:

- The Commission recommends that in line with the principle of proportionality and to maximise the possibility of rehabilitation of persons with previous convictions, the proposed legislation should provide shorter periods of rehabilitation that are proportionate to the offence and sentence imposed.
- The Commission further recommends that the Minister review the 2016 Act's wider impact on the retention and storage of conviction records (which can be held indefinitely) to ensure compliance with the GDPR and the ECHR.

#### Issue 5: Incorporating a Youth Justice Perspective:

- The Commission recommends that there should be no limitation placed on the number of convictions per person.
- The Commission recommends that the sentence threshold should be extended and for more serious offences (captured within an extended sentencing regime), there should be a review mechanism to apply to have the conviction expunged by an independent board or court that is based on an individual risk assessment of the offender.

#### Issue 6: The Victims Perspective:

- The Commission recommends that reform to the spent convictions scheme must incorporate the safeguards of the Victims' Directive, as necessary.
- The Commission refers to its recommendation to establish a mechanism for the expungement of serious offences on application to an independent board, or court. In this respect, the Commission recommends that this process be informed and guided by the principles enshrined by the EU Victims' Directive, and in particular, Article 12.

### Issue 7: "Specified work":

- The Commission recommends that the categories of "specified work" listed under the 2016 Act are reviewed to ensure that only categories of employment currently excluded are excluded for legitimate reasons on grounds which include, the protection of national security or public safety, or the prevention of disorder or crime.

### Issue 8: Convictions outside the State:

- The Commission recommends that s. 4(1) of the 2016 Act is amended to ensure compliance with the principle of equality and EU law.



**16 – 22 Sráid na Faiche,  
Baile Átha Cliath, D07 CR20**  
16 – 22 Green Street,  
Dublin, D07 CR20

**Idirlíon/Web** [www.ihrec.ie](http://www.ihrec.ie)

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