

# **Observations on the Spent Convictions Bill 2012**

June 2012

**IHRC**

AN COIMISIÚN UM CHEARTA AN DUINE  
IRISH HUMAN RIGHTS COMMISSION

## I. INTRODUCTION

1. The Irish Human Rights Commission (IHRC) is Ireland's National Human Rights Institution, set up by the Irish Government under the Human Rights Commission Acts 2000 and 2001 and functioning in accordance with the United Nations Paris Principles. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in the law and practice of the State. One of the functions of the IHRC is to examine legislative proposals and to report its views on the implications of such proposals for human rights, having regard to the Constitution and international human rights treaties to which Ireland is a party.<sup>1</sup> The IHRC is mandated to make recommendations to the Government as it deems appropriate in relation to the measures which the IHRC considers should be taken to strengthen, protect and promote human rights in the State.<sup>2</sup>

2. The Heads of the Criminal Justice (Spent Convictions) Bill 2007 ("2007 Bill") were referred to the IHRC by the then Minister for Justice, Equality and Law Reform in January 2009. The Criminal Justice (Spent Convictions) Bill 2012 was introduced in May 2012. While it has not been referred to the IHRC, the Commission is providing its views pursuant to Section 8 of the Human Rights Commission Act. The IHRC regrets that the legislation was not referred to it on this occasion.

3. The IHRC welcomes the introduction of a process by which a person can have a previous conviction regarded as 'spent'. The primary purpose of the present Bill relates to alleviating barriers to employment however its provisions will impact on education, licensing, insurance and travel, among other areas. The IHRC considers that this legislation provides an opportunity for Ireland to introduce a system which reflects the realities of discrimination faced by former offenders and the need for positive steps to assist rehabilitation and reintegration – including as a proven means to prevent reoffending.

4. The introduction of a 'spent convictions' procedure is thus welcome. The IHRC notes that such legislation requires the correct balance to be struck between an individual's right to respect for private life and freedom from discrimination in access to employment and the broader societal interest of public safety and the prevention of disorder and crime with due regard also for victims of crime.

5. In applying the relevant human rights law and standards to the present Bill, the IHRC has identified a number of areas of concern. These are; the definitions used in the Bill, the relationship between this proposed legislation and the National Vetting Bureau Bill 2011, the period of rehabilitation, the sentencing threshold, the definition of 'relevant work' and the issue of applications and appeals. The IHRC sets out its recommendations on these areas below.

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<sup>1</sup> Section 8(b) of the Human Rights Commission Act 2000.

<sup>2</sup> Section 8(d) of the Human Rights Commission Act 2000.

## II. NATIONAL AND INTERNATIONAL STANDARDS

6. The requirement to disclose a criminal record in all circumstances can raise issues relating to an individual's right to respect for private life and the right to work and earn a livelihood. The European Court of Human Rights (ECtHR) has found that while States may have a legitimate interest to exclude offenders from certain professions, any such exclusion must be proportionate and pursue a legitimate aim.<sup>3</sup> The IHRC notes that the present legislation does not expressly seek to exclude any individual from certain types of employment. However, the legislation is likely to only have a very limited beneficial effect in relation to the rehabilitation of offenders as it does not impact on a number of circumstances where prior convictions are required to be disclosed at present. Issues of proportionality and legitimacy thus apply when considering the present legislation.

7. As noted in the IHRC Observations on the National Vetting Bureau Bill 2011 ("Vetting Bill"), the importance of developing a spent convictions scheme to aid rehabilitation and reintegration is implied in a number of international instruments. Under Article 10(3) of the International Convention on Civil and Political Rights (ICCPR) the State is obliged to seek the reformation and social rehabilitation of prisoners. In 2004, the UN Sub-Commission on the Promotion and Protection of Human Rights, in a resolution concerning discrimination against convicted persons who have served their sentence urged States "to examine their treatment of convicted persons after they have served their punishment and to cease any official or unofficial practices of discrimination".<sup>4</sup>

8. The IHRC refers to its previous outline of the national, European and international standards that are relevant to the issue of Spent Convictions in its 2009 Observations on the Heads of the Bill. These include:

- The right to privacy under Article 40.3 of the Constitution, as a qualified right, subject to the test of proportionality.<sup>5</sup>
- The right to work or earn a livelihood under Article 40.3 of the Constitution.<sup>6</sup>
- The right to respect for private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which has been given express effect in Irish law by way of the European Convention on Human Rights Act 2003, and the relevant consideration of any restriction being justified on the basis that it is necessary in a democratic society in the interests of national security, public safety or for the prevention of disorder.
- Article 14 of the ECHR, which prohibits discrimination in the enjoyment of any Convention right.

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<sup>3</sup> *Thlimmenos v. Greece*, Judgement of 6 April 2000, (2001) 31 EHRR 411, para 47.

<sup>4</sup> Sub-Commission on Human Rights Resolution 2004/28.

<sup>5</sup> *Kennedy v. Ireland* [1987] IR 587; *Heaney v. Ireland* [1994] 3 IR 593.

<sup>6</sup> See *Murphy v. Stewart* [1973] IR 97 and *The State (Voza) v Floinn* [1957] IR 227.

- Article 6 of the International Covenant on Economic, Social and Cultural Rights taken together with Article 2(2), which upholds the right to work without discrimination of any kind.
- Article 1 of the Revised European Social Charter protects the right to work and prohibits discrimination in the enjoyment of the right to work on any ground including social origin or other status.<sup>7</sup>

9. In particular, the IHRC recalls that the requirement to disclose a criminal record when it is no longer of relevance could amount to an infringement of the right to work or earn a livelihood protected by Article 40.3 of the Irish Constitution. The issue of discrimination against certain classes of convicted persons was considered by the Supreme Court in the case of *Cox v. Ireland*,<sup>8</sup> where a blanket exclusion from civil service employment for a period of seven years of all persons convicted of membership of an illegal organisation, under section 34 of the Offences Against the State Act 1939, was found to be too broad. The Supreme Court firstly addressed the impact of such a statutory exclusion on the rights of the prescribed category of convicted persons, stating:

It is clear that the provisions of s. 34 of the Act of 1939 ... potentially constitute an attack, firstly, on the unenumerated constitutional right of that person to earn a living and, secondly, on certain property rights protected by the Constitution, such as the right to a pension, gratuity or other emolument already earned, or the right to the advantages of a subsisting contract of employment.<sup>9</sup>

In general terms, blanket provisions are more likely to offend human rights standards as they are insufficiently tailored to ensure that the means pursued are proportionate to the person's individual situation, even where a legitimate aim is being pursued by the State.

10. In *Cox*, the Supreme Court proceeded to establish standards as to the circumstances in which such interferences can be justified. The Court recognised that the State is entitled to ensure that, as far as practicable, persons who commit crimes threatening the peace, order and authority of the State are not involved in carrying out the functions of the State. However, the Court considered that in pursuing these objectives the State must in its laws, as far as practicable, continue to protect the constitutional rights of the citizens. Applying the proportionality test, the Court found that section 34 of the Offences Against the State Act 1939 was impermissibly wide and indiscriminate.<sup>10</sup>

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<sup>7</sup> Article E of the Revised Social Charter provides that "enjoyment of the rights set forth in the Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status".

<sup>8</sup> *Cox v. Ireland* [1992] 2 IR 503.

<sup>9</sup> *Ibid.*, at 522.

<sup>10</sup> *Ibid.*, at 523-524.

### III CONSIDERATION IN LIGHT OF THE NATIONAL VETTING BUREAU BILL 2011

11. The IHRC considers that the present Bill can not be considered in the abstract. The Commission recalls its Observations on the Heads of the National Vetting Bureau Bill 2011 (“Vetting Bill”).<sup>11</sup> As noted in its observations on that piece of legislation, the IHRC views the issues of employment vetting and ‘spent convictions’ as being interlinked and non-divisible in the context of the human rights standards at issue. The IHRC particularly notes that in pursuing the objectives of protecting the peace, order and authority of the State, the State must in its laws, as far as practicable, continue to protect the constitutional rights of the individual. Legislation must not be overly broad in its pursuit of a legitimate purpose.<sup>12</sup>

12. Once the procedure envisaged under the Vetting Bill is established, it appears that all convictions, whether ‘spent’ or not, will be obtainable via the vetting process by employers in the broad range of categories of employment identified in that Bill. While the provisions of section 11 of the Bill are noted, it does not appear that there will be a separation of ‘spent’ convictions from other convictions, when the information is requested through an employer or other body, rather than the person themselves. The Vetting Bill therefore has the potential effect of negating some of the impact of the present Spent Convictions legislation.

13. The IHRC recalls the Council of Europe Recommendation on the Criminal Records and the Rehabilitation of Convicted Persons considered that:

...a crime policy aimed at crime prevention and the social integration of offenders should be pursued in member States...and **considering that any other use of criminal records (other than assisting the judiciary to dispose of individual cases) may jeopardize 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.<sup>13</sup>

In adopting the Recommendation the Committee of Ministers considered that the use of criminal records may jeopardise the convicted person’s chances of social reintegration and should therefore be restricted to the utmost. The broad application of the Vetting legislation must therefore be considered in light of the present Bill.

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<sup>11</sup> IHRC *Observations on the National Vetting Bureau Bill 2011*, September 2011.

<sup>12</sup> *Cox v Ireland* (1992) 2 IR 563, per Finlay CJ.

<sup>13</sup> Recommendation No. R (84) 10. Emphasis Added. A Research Study by the UK Home Office in 2001 found that two thirds of prisoners in the UK were serving sentences of less than one year and, of this number, over a half of those persons were reconvicted within 2 years. *Building Bridges to Employment for Offenders*, Home Office Research Study 226, 2001. This indicates that the likelihood of recidivism increases with each sentence served. It is also significant that the same findings point to employment as the single greatest factor in reducing re-offending.

## **Education**

14. The IHRC notes that up to 230 higher level courses within the 2012 CAO process require Garda Vetting. These courses in medicine, health, social work and education are stated by the CAO to “require students to undertake placements that will bring them into contact with children or vulnerable adults and in which they will assume positions of trust.”<sup>14</sup> The CAO website states that:

To ensure the protection of the public, and justify public trust and confidence, the HEIs are committed to ensuring that only suitable candidates are allowed to undertake these programmes.

The HEIs use the Garda Central Vetting Unit (GCVU) vetting service to assess the suitability of such applicants, and in some cases, may also require applicants to provide an enhanced disclosure by the completion of an affidavit. Therefore, offers on the following programmes are conditional and could subsequently be withdrawn if applicants do not meet the Garda Vetting requirements of the HEI.<sup>15</sup>

15. The IHRC notes that courses that require vetting are in a very broad range of areas including Industrial Design, Pharmacy, Irish Music and Dance, and Arts with Human Rights are included on the list of courses requiring vetting. The IHRC has serious concerns regarding the proportionality and pursuit of a legitimate aim in restricting a person’s ability to undertake a college course for the reason that it is in a field that might potentially bring them into contact with a child or a person in a vulnerable situation if they were to subsequently obtain a job in that area.

16. The IHRC notes that in response to a question on the matter in the Dáil, the Minister for Justice stated that:

Certain courses offered by the Higher Education Institutions through the Central Applications Office (CAO) require students to undertake placements that bring them into contact with children or vulnerable adults. Before a student can undertake such a placement, he or she must be vetted by the Garda Central Vetting Unit.<sup>16</sup>

However, the IHRC notes that the vetting in relation to these courses is required *prior* to any placement being potentially undertaken. A more proportionate approach would seem to be vetting if and when a relevant placement was due to take place.

17. Spent Convictions legislation will be of no assistance to persons applying for this range of higher education courses as it appears convictions will never be ‘spent’ for the purposes of Garda Vetting. A restriction on access to education for persons

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<sup>14</sup> CAO website, accessed 21 May 2012.

<sup>15</sup> CAO website, accessed 21 May 2012.

<sup>16</sup> Dáil Written Answers, Reply by Minister Alan Shatter, 1 December 2011.

previously convicted of a minor offence may fall foul of the requirements on the State that restrictions to the Right to Private and Family Life be proportionate and in pursuit of a legitimate aim.

### **Employment**

18. The IHRC recalls the mandatory requirement in the Vetting Bill that persons applying for employment positions “governed by the Public Service Management Act (civil/public servants)”, private security staff, taxi licence operatives – are subject to the vetting disclosure requirements. The IHRC recalls its recommendations in relation to the Vetting Bill that :

In the view of the IHRC, the scope of this mandatory vetting provision appears to be disproportionate insofar as the nature of the employment position is not clearly linked to services which may bring persons into contact with children and vulnerable adults. The IHRC **recommends** that the legislation explicitly define any mandatory vetting requirement with reference to employment positions which may involve actual contact with the persons purported to be protected within the provisions of the Bill. The current formulation is overly broad and may not meet the requirements of necessity and proportionality.

19. While the present Spent Convictions legislation has a narrower focus than the 2007 Heads of Bill in the range of Civil and Public Service positions included within its provisions, it must be recalled that the operation of the Vetting Bill will in effect negate any benefit obtained from the Spent Convictions legislation. As a result of the overly broad remit of the Vetting Bill, a Spent Conviction will be automatically notified to a Civil or Public Service employer through the vetting process.

### **Data Protection Issues**

20. In this regard, the IHRC further notes that the Council of Europe Committee of Ministers Recommendation Regulating the Use of Personal Data, in the Section on policing, provides, *inter alia*:

Principle 7 – length of storage and updating of data

7.1 Measures should be taken so that personal data for police purposes are deleted if they are no longer necessary for the purposes for which they were stored. For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; **spent convictions**; amnesties; the age of the data subject, particular categories of data.<sup>17</sup>

21. The IHRC further recalls its observations in relation to the use of data obtained under any future vetting scheme:

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<sup>17</sup> Recommendation No. R (87) 15. Emphasis added.

In light of the seriousness of a determination made under the proposed legislation that a person may cause harm to children or vulnerable adults and the impact that public disclosure of such a finding may have on a person's private and family life, the prohibition of disclosure of information relating to vetting should be clearly highlighted in the Bill. A separate Head might be considered for this. In particular, the role of the liaison person and the persons to whom they may further disclose the information – and the obligations on those third parties – must be clearly set out in the legislation. The storage and onward transmission of vetting determination should also be clearly provided for in the Bill. The IHRC **recommends** that the views of the Data Protection Commissioner be sought in relation to this legislation.<sup>18</sup>

22. The IHRC considers that the impact of the availability of data via the vetting process of a person's spent convictions may further negate the benefit of the present legislation and that sufficient safeguards on the storage, transmission and utilisation must be put in place.

### ***Recommendations***

23. The IHRC **recommends** that the operation in practice of the two pieces of legislation (Spent Convictions Bill and Vetting Bill) and their impact on people subject to their provisions must be considered. Furthermore, their interrelationship should be clearly specified in each piece of legislation. There is a concern that while a conviction may be declared 'spent' for the purposes of the Spent Convictions Bill, its existence will still be available to a wide range of potential education institutions and employers by way of the operation of the Vetting Bill. This may, in practice, further weaken the purpose of the Spent Convictions legislation, and result in discrimination in practice against persons convicted of minor offences – particularly those not seeking to work directly with children or persons in vulnerable situations.

## **IV ANALYSIS AND RECOMMENDATIONS ON SPECIFIC PROVISIONS OF THE LEGISLATION**

### **1. The purpose of the Bill: Preventing Discrimination**

24. The Explanatory Memorandum provides that the purpose of the Bill is to "to assist the rehabilitation of offenders, who often experience difficulties securing employment as a result of having a conviction." Thus, it is primarily a Bill aimed at removing discrimination in employment for persons who have had a conviction. The Commission recognises that in relation to serious offences, and in relation to employment that will include contact with children or direct contact with people in vulnerable situations, there must be the highest levels of protection. However, the Bill's stated purpose of removing employment barriers for persons with previous convictions do not appear to be met by the present Bill. The present Bill must be accompanied by a corresponding strengthening of equality legislation.

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<sup>18</sup> Observations on the Heads of the National Vetting Bureau Bill 2011, September 2011.



25. It is important that people who have been convicted of a minor offence are able to obtain employment in order to aid rehabilitation and reduce risks of reoffending. There are serious challenges in obtaining employment for those who have come into contact with the justice system. A November 2011 United Kingdom Ministry of Justice and Department for Work and Pensions showed that:

- 26% of the 4.9 million open claims for out-of-work benefits as at 1 December 2010 in England and Wales were made by offenders who had received at least one caution or conviction between 2000 and 2010.
- 33 % of the 1.2 million total Jobseeker's Allowance claims open on 1 December 2010 in England and Wales were made by offenders.
- Two years after being released from prison in 2008, 47% of offenders were on out-of-work benefits.<sup>19</sup>

26. Discrimination on the basis of previous convictions is a real issue with serious impacts on former offenders. A 2002 survey conducted by the National Economic and Social Forum found that only 52% of the employers surveyed said they would consider employing ex-offenders.<sup>20</sup> A Law Society of Ireland Report on a proposed rehabilitation of offenders bill, quoted research carried out by the Small Firms Association in 2007, indicating that an average of 76% of companies were unwilling to hire ex-offenders.<sup>21</sup>

27. Once a criminal conviction is imposed it follows the individual for life and may inhibit their access to education or employment, their ability to obtain licenses and insurance and housing and may place restrictions on their travel. The IHRC has previously recommended that the grounds of discrimination in the Employment Equality Act 1998 should be extended to include discrimination on the basis of a criminal conviction. The IHRC recommended that this should be accompanied by a restructuring of the vetting system, as recommended by the Data Protection Commissioner,<sup>22</sup> and that a system to expunge previous convictions after a fixed period of time should be considered.<sup>23</sup>

28. The IHRC notes in this regard that under Section 3(1) of the Australian Human Rights Act, discrimination is defined as:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

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<sup>19</sup> *Offending, employment and benefits – emerging findings from the data linkage project*, Ministry of Justice and Department for Work and Pensions, November 2011.

<sup>20</sup> National Economic and Social Forum, *Re-integration of Prisoners, Forum Report No. 22*, Government Publications, Dublin, 2002, p. 92.

<sup>21</sup> *The Disclosure of Criminal Convictions: A report by the Spent Convictions Group - May 2009, Proposals on a Rehabilitation of Offenders Bill*, p.12.

<sup>22</sup> *See Fifteenth Annual Report of the Data Protection Commissioner*, Office of the Data Protection Commission, Laois, 2003.

<sup>23</sup> IHRC Submission, *Extending the Scope of Employment Equality Legislation*, IHRC, Dublin, 2005.

- (b) any other distinction, exclusion or preference that:
- (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
  - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

29. Under the Australian Human Rights Commission Act 1986, the Australian Commission can handle complaints about discrimination in employment or occupation on the basis of criminal record. The Australian Commission's 2012 Report *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record* is relevant in regard to the requirements and procedures in that jurisdiction in relation to non-discrimination on the basis of criminal record. It is unrealistic to expect that in an age where information is so freely disseminated, that it would not be possible for a prospective employer to discover a spent conviction from sources other than the person themselves. For instance, the proceedings of District Courts are now published on the internet through newspaper and other media sources. In this regard, for the intention of the legislation to be fulfilled, it is clear that the added protection, such as expanding the scope of the Employment Equality Acts 1998-2008 may be necessary. Further, the protections available under the proposed EU Regulation and Directive on Data Protection need to be available to individuals in the context of the current Bill.

30. The IHRC **recommends** that in conjunction with the Spent Convictions Bill, a broad prohibition on discrimination on grounds of criminal conviction must be introduced into Irish Legislation. In the absence of a prohibition on such discrimination the impact of the present legislation is in question. Such provision would also allow the future Human Rights and Equality Commission to consider cases of discrimination based on criminal record.

## **2. Definition of "Vulnerable Person"**

31. The Bill's definition of a "Vulnerable Person" should be reconsidered. The following categories of people are considered 'vulnerable' for the purposes of the legislation:

- people suffering from a 'disorder of the mind' as a result of mental illness or dementia,
- people with intellectual or
- physical disabilities or
- people suffering from a 'physical impairment' as a result of illness, injury or age,

which is "of such a nature or degree (i) as to restrict the capacity of the person to guard himself or herself against exploitation or abuse, whether physical, sexual or emotional, by another person, or (ii) results in the person requiring assistance with the activities of daily living including dressing, eating, walking, washing or bathing."

32. This definition is extremely broad, and the classification of all persons in these broad categories as “vulnerable” should be reconsidered. Retention of this provision would introduce into Irish law a new definition of a class of people that may not be in keeping with modern approaches to disability. The Commission recommends that the above definitions be reformulated to reflect Irish law and the Convention on the Rights of Persons with Disabilities (“Disability Convention”), which Ireland has the stated intention of ratifying. The IHRC also questions the inclusion of a category of persons suffering ‘physical impairment’ as a result of age, distinct from illness or injury.

33. The IHRC recalls that the Disability Act 2005 provides the following definition:

“disability”, in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment;

While the Disability Convention does not include a definition of disability, Article 1 is instructive. It provides that “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

34. Consideration may be given to reframing the definition in the present legislation by way of the services provided to individuals. For example, the Scottish Protection of Vulnerable Persons Act 2007 defines a “protected adult” by reference to their receipt of a relevant social or community service.<sup>24</sup> The United Kingdom Safeguarding Vulnerable Groups Act 2006 (Section 59), takes a similar approach. Focussing on the services provided in defining a person in a vulnerable situation in the present legislation, as is already set out in Part 2 of the Bill would assist in keeping all definitions in line with both international standards and the purpose of the Bill in relation to the employment of persons in positions that might result in access to people in vulnerable situations. Insofar as Part 2 of the Bill sufficiently defines the contexts in which people may be vulnerable, the IHRC **recommends** that the definition of a “vulnerable person” in the Bill be reconsidered.

### **3. Scope of the Application of the Bill**

#### ***Multiple Convictions***

35. The IHRC queries the rationale behind the restriction of the present Bill to persons with no more than 2 convictions (Section 2 (2)(e)). The purpose of the Bill is to provide rehabilitation to those who receive minor criminal convictions. A provision limiting the number of convictions that can be considered spent is disproportionate to the aim of the Bill and it is unclear what purpose it serves. The legislation should not be punitive in effect. All convictions within the scope of the

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<sup>24</sup> Protection of Vulnerable Groups (Scotland) Act 2007, S. 94.

Bill should be subject to the possibility of becoming ‘spent’. This is particularly so in relation to multiple convictions arising from the one incident. The IHRC **recommends** that no limitation be placed on the number of convictions per person, and that multiple convictions arising from one incident be regarded as one conviction for the purposes of the legislation.

#### ***Outside the State***

36. The IHRC questions the provision requiring that a conviction cannot be considered ‘spent’ outside of the jurisdiction of the State. If a conviction is regarded as ‘spent’ under Irish law, it is unclear why a person would not be entitled to have such conviction considered ‘spent’ outside the jurisdiction. The impact of a criminal conviction on a person’s ability to travel to certain countries is well recognised. If this provision were removed, the authorities in another State would still be in a position to seek information from individuals as to whether they were convicted at any time in another jurisdiction. Irish law should prevail, however and for the purposes of Irish law the individual’s conviction for a minor offence would be expunged from the public record.

37. The legislation should explicitly refer to convictions obtained outside of the State as being included for the purposes of the present legislation.

#### ***Requests regarding spent convictions***

38. The IHRC considers that the legislation should expressly preclude requests for information on convictions that become spent under the Act being sought by potential employers, insurance companies or others who may seek to circumvent the legislation through explicit requests for such information. While it is noted that the present legislation entitles a person not to reveal such information, it does not place any restriction on *requests* for such information.

### **4. Rehabilitation Period**

39. The IHRC notes that it is particularly important that an offender can obtain employment and access education as soon as possible upon completion of their sentence. This is particularly important in promoting reintegration and rehabilitation and mitigating the risk of re-offending.

#### ***Recent Changes to UK Law on Spent Convictions***

40. The IHRC notes with interest that the United Kingdom, on 1 May 2012,<sup>25</sup> reformed its law in this area. Among the changes, it is of particular note that the following ‘rehabilitation’ periods are now applicable in the UK:

Fine:	12 months after the date of conviction
Custodial Sentence of 6 months or less:	24 months after completion
Custodial Sentence of 6-30 Months:	48 months after completion

<sup>25</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Compensation order:	Date on which payment is made in full
Community Rehabilitation Order:	12 months after the last day of effect of the Order.

These periods have been reduced from their previous levels of between 5 and 10 years under the Rehabilitation of Offenders Act 1974. The legislation further extends spent convictions to cover sentences of 30 months to 4 years, which may become spent after 7 years.

41. In relation to the legislative amendment, the UK Minister for Justice, Lord McNally stated that

First and foremost, criminals must be suitably punished for their crimes. But it is no good for anyone if they go to jail and come out and then can't get an honest job and so turn back to crime again. That is why we are bringing forward reforms which will give offenders who have served their sentence a fair chance of getting back on the straight and narrow, while ensuring safeguards are in place to protect the public.<sup>26</sup>

***Rehabilitation Periods Proposed in the Present Bill***

42. In the present Bill, a conviction will be considered “spent” after a period of seven years following a custodial sentence of nine to twelve months and after a period of five years following a custodial sentence of six months or less, on condition that the person had no further sentences imposed upon him or her during the relevant rehabilitation period. The Bill also provides for a period of 3-4 years in relation to a fine or community service order and 3 years for a non-custodial sentence.

43. In the view of the IHRC the proposed rehabilitation periods are too long and are 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. In particular, where a fine is the result of the conviction, it is far from clear why such an extended period for rehabilitation would apply, where the State itself considers the offence to be at the most minor end of the scale, and may relate to matters as not possessing a television license or non-payment of the household charge.

44. The proposed periods of rehabilitation are arguably disproportionate to the legitimate aims of public safety or preventing disorder or crime. The case of *Cox v. Ireland* is of relevance in considering the length of the rehabilitation period. As noted above, 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>27</sup> While the present Bill does not expressly exclude a convicted person from accessing any form of employment, the requirement to

<sup>26</sup> Ministry of Justice Press Release, *New reforms to help reduce reoffending*, 3 February 2012.

<sup>27</sup> *Cox v. Ireland* [1992] 2 IR 503.

disclose a criminal record for up to seven years following the conviction may greatly reduce the convicted person's chances of securing employment.

45. The IHRC recalls that the Law Society's report on a proposed Rehabilitation Bill recommended that for non-custodial sentences the relevant period should be the duration of the sentence plus one year, and for sentences of less than two years it should be the duration of the sentence plus two years.<sup>28</sup>

46. The IHRC **recommends** that in line with the principle of proportionality and to maximise the possibility of rehabilitation of convicted persons, the proposed legislation should provide shorter periods of rehabilitation, proportionate to the sentence imposed. The recent changes to the relevant legislation in the UK could be instructive in this regard.

## 5. Sentencing Threshold

47. The Bill provides that a criminal conviction, which involves the imposition of a sentence for a term exceeding twelve months, will be excluded from the spent convictions scheme. In the view of the IHRC, consideration should be given to increasing the sentencing threshold in the Bill. While the IHRC welcomes that the Bill has been expanded from the previous limit of convictions up to 6 months included in the 2007 Heads of Bill, to convictions of 12 months or less, the IHRC considers that the present limitations remain overly restrictive and limit the potential benefit of the Bill. A more inclusive scheme could significantly aid the rehabilitation and reintegration of a broader range of offenders. The IHRC notes in this regard the recent changes to the legislation in the UK.

48. The IHRC notes that a 2009 report published by the Law Society of Ireland on a proposed Rehabilitation of Offenders Bill suggested that all convictions should be eligible to be considered under a spent convictions scheme.<sup>29</sup>

49. 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. However, in the view of the IHRC there are sufficient safeguards in place in the Bill to justify an increased sentencing threshold. These 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.

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<sup>28</sup> The Disclosure of Criminal Convictions - A report by the Spent Convictions Group • May 2009, Proposals on a Rehabilitation of Offenders Bill.

<sup>29</sup> The Disclosure of Criminal Convictions - A report by the Spent Convictions Group • May 2009, Proposals on a Rehabilitation of Offenders Bill.

50. The IHRC **recommends** that in order to aid the rehabilitation of a broader range of offenders consideration is given to extending the sentencing threshold in the Bill. If the sentencing threshold is extended, consideration could be given to establishing an application based system for serious offences that come within the revised sentencing threshold, whereby persons convicted of a serious offence would have to apply to a District Court judge to have their sentences considered spent. One of the factors to be considered in such a process would be the impact of the crime on any victims and their families.

## 6. The Definition of ‘Relevant Work’

51. A person who seeks employment in a profession that is categorised in the Bill as “relevant work” will be required to disclose their previous convictions even though, under the provisions of the Bill, they would otherwise have been considered spent. Schedule 3 of the Bill lists the categories of “relevant work”.

52. As noted above, it has been established in the Supreme Court and the ECtHR that in certain circumstances the State may legitimately exclude offenders from specified areas of employment.<sup>30</sup> However, any measures taken must have regard to the constitutional rights of the citizen and must be proportionate to the legitimate objective pursued.<sup>31</sup> In addition, the State is required to treat differently persons whose situations are significantly different.<sup>32</sup>

53. The Bill does not expressly exclude a convicted person from certain professions. Rather it excludes a person from the benefit of a spent convictions regime in relation to certain categories of employment. This places the discretion in the hands of the employer to make an informed decision as to the suitability of the candidate for the available position. In essence, however, 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.

54. The mandatory requirement to disclose a criminal record to a prospective employer might in circumstances amount to an interference with the right to private life under Article 8 of the ECHR, in which case for such interference to be justified, it should be in pursuit of a legitimate aim such as the protection of national security, public safety or the prevention of disorder or crime. Moreover, the interference should be proportionate to the legitimate aim sought to be achieved. As iterated above, a blanket requirement is more likely to result in violations of human rights principles.

55. The IHRC welcomes that the categories of employment requiring a declaration of a spent conviction have been refined since the 2007 Heads of Bill, for which the IHRC expressed concern at the broadness of the categories included.

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<sup>30</sup> *Cox v. Ireland* [1992] 2 IR 503, at 522-533 and *Thlimmenos v. Greece*, Judgment of 6 April 2000, (2001) 31 EHRR 411, at para. 47.

<sup>31</sup> *Cox v. Ireland* [1992] 2 IR 503, at 523.

<sup>32</sup> *Thlimmenos v. Greece*, Judgment of 6 April 2000, (2001) 31 EHRR 411, at para. 44.

However, the IHRC recalls again in this regard the application of the Vetting Bill. Under the Heads of that Bill, there is a mandatory requirement that persons applying for employment positions as defined in Head 5(1)(a) – that is, “governed by the Public Service Management Act (civil/public servants)”; private security staff; taxi licence operatives – are subject to the vetting disclosure requirements. As noted above, spent convictions will appear on any vetting assessment undertaken. Thus, while the Spent Convictions Bill on its face appears to have refined the scope of the requirement to provide information on spent convictions, the reality will be that any previous conviction – even if considered spent – will be available to a wide range of employers, including those within the Civil and Public Service, in light of the overly broad scope of the Vetting Bill.

56. The IHRC **recommends** that the Bill be reconsidered – particularly in light of the impact of the Vetting Bill - to ensure that the only categories of employment excluded from the legislative provisions are excluded for legitimate reasons on grounds which include the protection of national security or public safety, the prevention of disorder or crime and the protection of the health or rights and freedoms of others.

## **7. Applications and Appeals**

57. The IHRC notes that the present legislation proposes a self-administered system. As stated in the Explanatory Memorandum, “it is for the person with the conviction to decide if it is spent or not under the terms of the Bill. It is not an application-based system”. While the IHRC understands that such an approach is administratively the least burdensome, there should be consideration given to the introduction of some form of application for a broader range of persons. This ties in with the IHRC’s recommendations above relating to broadening the scope of the legislation.

58. One example of such a system is provided by Western Australia, the Spent Convictions Act 1988 applies to all convictions, irrespective of the length of sentence, except for a sentence of life imprisonment which can never be expunged. A serious offence, which is defined as imprisonment for more than one year or a fine of AUS\$15,000 or more, can become spent on application to a District Court judge. In making an order the judge will have regard to, *inter alia*, the length and kind of sentence imposed, whether the conviction prevents the applicant from engaging in a particular profession, the nature and seriousness of the offence and whether there is any public interest to be served in making the order.<sup>33</sup>

59. In the view of the IHRC, consideration should be given to providing for an application based system for persons convicted of more serious offences. The IHRC considers that this approach would be a more appropriate and proportionate response to persons convicted of serious offences rather than a blanket exclusion on all convictions involving the imposition of a sentence exceeding 12 months.

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<sup>33</sup> Section 6 of the Western Australia Spent Convictions Act 1988.



60. In addition, the Bill as it currently stands is quite complex in relation to what is covered and what is excluded, and so its implications may not be immediately apparent to a lay person. In this regard it should be ensured that there is an accessible and easily understandable guide to the spent convictions regime accompanying the legislation.

## **V CONCLUSION AND SUMMARY OF RECOMMENDATIONS**

61. The IHRC considers that the present legislation is so restrictively drawn as to be of extremely limited application. The legislation will introduce a system whereby a person who has received a sentence of 12 months or less or a fine or community service order will be able to have that sentence considered 'spent' after a period of between 3 and 7 years. The benefit of having a conviction declared 'spent' is that a person will not be obliged to declare it, albeit this is restricted to limited circumstances as outlined in the Bill. A person may only have two convictions declared spent. The legislation will not remove the conviction from a person's record and thus will arise in the context of vetting.

62. The absence of a spent convictions scheme, or indeed the introduction of an overly restrictive scheme, amounts to any conviction having a permanent impact on the life of the person and suggests a society in which paying one's debt to society is a lifelong undertaking. While any scheme must include sufficient protections for society and victims of crime, it must function in such a way as to allow former offenders to integrate into society, thereby also reducing risks of re-offending and mitigating future risk to society at large and potential victims.

63. The IHRC considers particularly relevant the recent amendments to legislation in the UK to reduce relevant periods for minor sentences from 5-10 years to 1-4 years, and the extension of the legislation to include sentences up to 4 years in duration.

### **Summary of Recommendations**

#### ***Impact of the Vetting Bureau Bill***

- The IHRC **recommends** that the operation in practice of the two pieces of legislation (Spent Convictions Bill and Vetting Bill) and their impact on people subject to their provisions must be considered. Furthermore, their interrelationship should be clearly specified in each piece of legislation. There is a concern that while a conviction may be declared 'spent' for the purposes of the Spent Convictions Bill, its existence will still be available to a wide range of potential education institutions and employers by way of the operation of the Vetting Bill. This may, in practice, further weaken the purpose of the Spent Convictions legislation, and result in discrimination in practice against persons convicted of minor offences – particularly those not

seeking to work directly with children or persons in vulnerable situations.

#### ***Prohibition of Discrimination***

- The IHRC **recommends** that in conjunction with the Spent Convictions Bill, a broad prohibition on discrimination on grounds of criminal conviction must be introduced into Irish Legislation. In the absence of a prohibition on such discrimination the impact of the present legislation is in question. Such provision would also allow the future Human Rights and Equality Commission to consider cases of discrimination based on criminal record.

#### ***Definition of “Vulnerable Person”***

- Consideration may be given to reframing the definition in the present legislation by way of the services provided to individuals and in light of current Irish and international standards. Focussing on the services provided in defining a person in a vulnerable situation in the present legislation would assist in keeping all definitions in line with both international standards and the purpose of the Bill in relation to the employment of persons in positions that might result in access to people in vulnerable situations. The IHRC **recommends** that the definition of a “vulnerable person” in the Bill be reconsidered.

#### ***Restriction on the Number of Convictions to be considered Spent***

- The IHRC **recommends** that no limitation be placed on the number of convictions per person and that multiple convictions arising from one incident should be considered as one conviction for the purposes of the legislation.

#### ***Convictions outside of the State***

- The legislation should explicitly refer to convictions obtained outside of the State as being included for the purposes of the present legislation.
- In relation to the provision requiring that a conviction cannot be considered ‘spent’ outside of the jurisdiction of the State, Irish law should prevail.

#### ***Requests regarding spent convictions***

- The IHRC considers that the legislation should expressly preclude requests for information on convictions that become spent under the Act being sought by potential employers, insurance companies or others who may seek to circumvent the legislation through explicit requests for such information.

#### ***Rehabilitation Periods***

- The IHRC **recommends** that in line with the principle of proportionality and to maximise the possibility of rehabilitation of

convicted persons, the proposed legislation should provide shorter periods of rehabilitation, proportionate to the sentence imposed. The recent changes to the relevant legislation in the UK could be considered in this regard.

#### ***Sentencing Threshold***

- The IHRC **recommends** that in order to aid the rehabilitation of a broader range of offenders consideration is given to extending the sentencing threshold in the Bill. If the sentencing threshold is extended, consideration could be given to establishing an application based system for serious offences that come within the revised sentencing threshold, whereby persons convicted of a serious offence would have to apply to a District Court judge to have their sentences considered spent. One of the factors to be considered in such a process would be the impact of the crime on any victims and their families.

#### ***Definition of 'Relevant Work'***

- The IHRC **recommends** that the Bill be reconsidered – particularly in light of the impact of the Vetting Bill - to ensure that the only categories of employment excluded from the legislative provisions are excluded for legitimate reasons on grounds which include the protection of national security or public safety, the prevention of disorder or crime and the protection of the health or rights and freedoms of others.

#### ***Application and Appeals***

- In the view of the IHRC, consideration should be given to providing for an application based system for persons convicted of more serious offences. The IHRC considers that this approach would be a more appropriate and proportionate response to persons convicted of serious offences rather than a blanket exclusion on all convictions involving the imposition of a sentence exceeding 12 months.