



# Research papers on spent convictions

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# 1.Introduction

The following research papers provide an examination of spent convictions focusing on two separate topic areas.

The first paper by the Research and Data Analytics Unit of the Department of Justice and Equality summarises the legislative and policy approaches to spent convictions in several common and civil law jurisdictions, specifically New Zealand, Australia, England and Wales, Sweden and the Netherlands. This includes detailing the specific criteria required for a conviction to be spent, the associated vetting architecture and any recent changes to approaches in these jurisdictions.

The second paper by Dr. Katharina Swirak and Dr. Louise Forde of University College Cork is based on a rapid evidence review of academic literature on the theme of spent convictions. It covers a number of core themes including the impact of spent conviction regimes on reintegration into society, the importance of proportionality in any legislative criteria and differing approaches to the disclosure of criminal records and its impact.

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## 2. Legislative and policy approaches to spent convictions in common and civil law jurisdictions<sup>1</sup>

### Executive summary

A spent conviction, sometimes referred to as an expungement, is a conviction that, when it meets defined criteria, does not legally have to be disclosed in certain circumstances the most common of which is when an individual seeks new employment. The rationale for a spent conviction legislative regime is rooted in the principles of rehabilitative justice and the generally accepted acknowledgement that, after a certain period of a time, individuals deserve a 'second chance' and the opportunity to move on without disclosing a criminal conviction.

Internationally, jurisdictions have taken different approaches to spent convictions legislation and the supporting policy and vetting architecture (see table 1). It is important to note that: these jurisdictions were selected to provide both comparability and contrast to Ireland; they have differing levels of complexity with some recent reform initiatives, and that are of interest from a policy development perspective. The key areas covered in the comparative analysis include the primary legislation in place, criteria which allow convictions to become spent, how the legislation is applied in practice, exceptions to spent conviction regimes and the vetting architecture in place.

**Table 1. A summary of spent convictions legislation in common law jurisdictions**

	<b>New Zealand<sup>2</sup></b>	<b>Australia<sup>3</sup></b>	<b>England and Wales<sup>4</sup></b>
<b>Rehabilitation period</b>	7 years	Adult 10 years Minor 5 years	Adult 1-7 year <sup>5</sup> Minor 1-3.5 years
<b>Applicable to custodial or noncustodial sentences</b>	Non-custodial only	Non-custodial and custodial sentences of less than 30 months	Non-custodial and custodial sentences of less than 4 years

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<sup>1</sup> Authored by the Research and Data Analytics Unit, Department of Justice and Equality

<sup>2</sup> The primary legislation dealing with young people in conflict with the law system is the [Oranga Tamariki Act 1989](#)

<sup>3</sup> <https://www.afp.gov.au/what-we-do/services/criminal-records/spent-convictions-scheme>

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/299916/rehabilitation-of-offenders-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf)

<sup>5</sup> Rehabilitative limits vary according to the offence

<b>Applicable to multiple convictions<sup>6</sup></b>	Yes	Yes	Yes
<b>Exceptional offences</b>	Sexual offences	Sexual offences	Public protection sentences (sexual and violent crime)
<b>Automatically spent or application</b>	Automatic	Automatic but not in all states	Automatic

Statistics on spent conviction regimes can be difficult to obtain as convictions often become spent automatically after a certain period of time rather than on the basis of an application. As such, records as regards applications to have convictions spent are not usually compiled. One means by which this information may be extrapolated and approximated is by examining sentencing statistics and deducing the likely number to potentially benefit from having their conviction spent on the basis of the sentence they receive.

## 2.1 New Zealand

### 2.1.1. Legislation in place

The Criminal Records (Clean Slate) Act 2004<sup>7</sup> is the primary legislation governing spent convictions in New Zealand. The 2004 Act allows for the non-disclosure of certain criminal offences when a number of criteria are fulfilled<sup>8</sup> (see below). The primary purpose of this legislation, as is also the case in the other common law jurisdictions examined, is to better enable the rehabilitation of reformed offenders by removing barriers to securing access to employment which may be otherwise hindered by past offences.

Regarding minors the primary legislation dealing with young people in conflict with the law is the Oranga Tamariki Act 1989. Often, young people go through the Youth Court, and do not receive a criminal record. Instead of a conviction, they are given a "charge admitted" or "charge proven" finding; this allows the Youth Court to take certain actions, and to impose different actions (community service, etc). Often, a young person will receive what is known as a "s.282 discharge", which means that it will be as if the charge was never filed. However, for serious offences, it is possible that a young person will be transferred to the adult courts, where they can be convicted and sentenced as an adult; in this case, they will have a criminal record that requires disclosure at a later date. However, in general, a Youth Court order will not result in a criminal record, and generally this does not have to be disclosed to employers.

### 2.1.2 Criteria which allow a conviction to become spent

In New Zealand all of the following criteria must be met in order for a conviction to become spent:

- no convictions within the last seven years;
- never been sentenced to a custodial sentence (e.g. imprisonment, corrective training, borstal);

<sup>6</sup> Where a person receives multiple sentences for a particular conviction, the sentence with the longest rehabilitation period will apply

<sup>7</sup> <http://www.legislation.govt.nz/act/public/2004/0036/latest/DLM280840.html>

<sup>8</sup> <https://www.justice.govt.nz/criminal-records/clean-slate/>

- never been ordered by a Court during a criminal case to be detained in a hospital due to his/her mental condition, instead of being sentenced;
- not been convicted of a "specified offence" all of which relate to sexual offending against children and young people or the mentally impaired;<sup>9</sup>
- paid in full any fine, reparation or costs ordered by the Court in a criminal case;
- never been indefinitely disqualified from driving.

The clean slate legislation is automatic. It is therefore not necessary to apply to have convictions spent. The scheme automatically lapses as soon as a person re-offends.<sup>10</sup>

### 2.1.3 Circumstances in which the clean slate legislation does not apply

In some situations, the clean slate legislation is not applicable even if the aforementioned conditions are met.

These circumstances are:

- applications for certain jobs, including with the police, or as a prison or probation officer, or in a role involving the care and protection of children, or;
- if the information is necessary for the police or other law enforcement agencies to investigate and prosecute further offences that a person has committed;
- if a person's criminal record is relevant in any court proceedings, whether criminal or civil;
- when dealing with the law of another country. This means, for example, that if asked, a person must disclose their criminal record when applying for a visa to enter another country.

### 2.1.4 Vetting architecture<sup>11</sup>

*Criminal record check – Ministry of Justice<sup>12</sup>*

In New Zealand, criminal records are administered by the Ministry of Justice. If asked for a 'police clearance certificate' or similar a copy of the individual's criminal record can be provided. If the person in questions has no convictions, they will receive a letter stating that is the case. In the case of spent convictions, these will not appear on the copy of the criminal record as these are removed automatically. The best means by which an individual can establish if their convictions are spent is to request a copy of their own criminal record. This can be requested online via the Ministry of Justice website.<sup>13</sup>

Third parties can also apply for a copy of a person's criminal record but only with their written consent.

However, sometimes a full record<sup>14</sup>, including convictions that have been concealed may be required. For example, a full record may be required when:

- applying for some jobs (such as police, prison or probation roles);
- involved in court cases or tribunal hearings or;

<sup>9</sup> For a full list of specified offences see the interpretation of the Criminal Records (Clean Slate) Act 2004

<sup>10</sup> <https://communitylaw.org.nz/community-law-manual/chapter-32-the-criminal-courts/the-clean-slate-scheme/>

<sup>11</sup> <https://www.justice.govt.nz/criminal-records/police-clearance/>

<sup>12</sup> <https://www.justice.govt.nz/criminal-records/what-is-a-criminal-record/>

<sup>13</sup> <https://www.justice.govt.nz/criminal-records/>

<sup>14</sup> <https://www.justice.govt.nz/criminal-records/get-your-own/>



- travelling to certain countries.

In most cases it is illegal for anyone to ask or make an individual reveal their full record.

#### *Police vetting*<sup>15</sup>

Organisations providing services to vulnerable people (this includes children, older people and people with special needs) can ask the New Zealand Police to vet people who want to work or volunteer for them.

The difference between a Ministry of Justice criminal record check and police vetting is that the criminal record check only covers convictions. As well as a criminal record, police vetting can also include information on any contact with the police. Individuals cannot request vetting by the police for themselves.

## **2.2 England and Wales**

### **2.2.1 Legislation in place**

The Rehabilitation of Offenders Act 1974 is the primary piece of legislation concerning spent convictions in England and Wales<sup>16</sup>. The Act's purpose is to support the rehabilitation into employment of reformed offenders who have desisted from further criminal behaviour.

Under the Act, following a specified period of time, which varies according to the disposal administered or sentence passed, all cautions and convictions (except those resulting in prison sentences of over 30 months) are regarded as 'spent'. As a result, the offender is regarded as rehabilitated. For most purposes, the Act treats a rehabilitated person as if he or she had never committed an offence and, as such, they are not obliged to declare their caution(s) or conviction(s), for example, when applying for employment or insurance. This in turn helps to remove obstacles that may inhibit the rehabilitated person from becoming a fully functional member of society. The rehabilitation periods are linked to the disposal/sentence given rather than the type of offence committed, reflecting the seriousness of the specific offence committed by an individual.

Convictions become spent automatically. There is no requirement to make an application.

### **2.2.2 Reforms to the 1974 Act**

The provisions of the 1974 Act were amended by Section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The changes were implemented on 10 March 2014 and are applicable to England and Wales. In Northern Ireland, the Rehabilitation of Offenders NI Order 1978 still applies and remains unchanged<sup>17</sup>. The reforms sought to establish the right balance between enabling people with convictions to successfully resettle

<sup>15</sup> <https://www.police.govt.nz/advice-services/businesses-and-organisations/vetting>

<sup>16</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/216089/rehabilitation-offenders.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216089/rehabilitation-offenders.pdf)  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/216089/rehabilitation-offenders.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216089/rehabilitation-offenders.pdf)

<sup>17</sup> <https://www.niacro.co.uk/sites/default/files/projects/DisclosingConvictionsFAQs2015.pdf>



back into society while at the same time maintaining public safety. There appears to be no available information or evaluation on the impact of these reforms.

The amendments to the 1974 Act made by LASPO exclude UK Visas and Immigration from the Act, meaning that they are entitled to access an applicant's full list of convictions, cautions, reprimands or final warnings both 'spent' and 'unspent'.

The following tables provide an overview of how the reform of the 1974 Act impacted on rehabilitation periods for adults and juveniles. The changes introduced in 2014 meant that in many cases the time it takes for a conviction to become spent was reduced. It also meant in some instances convictions that were unable to become spent can now become spent, for example shorter prison sentences. However, there are some examples where the rehabilitation period has lengthened. This is particularly the case for:

1. Further convictions for summary offences – these will normally drag previously unspent convictions with them;
2. Youth rehabilitation orders (in some cases);
3. Detention and Training Orders for 12-14 year olds.

It is nonetheless important to realise that anything that was previously spent under the 1974 law has not become unspent under the 2014 reforms. As such, overall the reform of the 1974 had the effect of making the approach to spent convictions in England and Wales more liberal.<sup>18</sup>

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<sup>18</sup> <https://hub.unlock.org.uk/knowledgebase/detailedguideroa/>

**Table 2. Rehabilitation periods required for convictions to be spent (Adults)<sup>19</sup>**

Sentence when convicted		Time for conviction to be spent	
		1974 Act	2014 Reforms
Prison	Over 4 years	Never	Never
	+30 months to less than equal/to 4 years	Never	Sentence + 7 years
	+6 months to less than/equal to 30 months	10 years	Sentence + 4 years
	Less than or equal to 6 months	7 years	Sentence + 2 years
Sentence of detention (+6months to 30 months)		7 years	As prison sentences
Sentence of detention (6 months or less)		5 years	As prison sentences
Removal from her Majesty's service		7 years	1 year
Service detention <sup>20</sup>		5 years	1 year
Community order		5 years	1 year
Fine		5 years	1 year
Compensation order		Once paid in full	Once paid in full
Hospital order		Longer of 5/2 years after the order ceases to have effect	End of the order
Conditional discharge, care order etc.		Longer of 1 year after making of order, or 1 year after it ends	End of the order
Absolute discharge		6 months	Spent immediately
Disqualification		End of disqualification	End of disqualification
Relevant order		End of order	End of order
Conditional cautions		Once conditions end	Once conditions end
Caution, warning, reprimand		None	None

<sup>19</sup> <https://hub.unlock.org.uk/knowledgebase/spent-now-brief-guide-changes-roa/>

<sup>20</sup> Service detention relates to the armed forces

**Table 3. Rehabilitation periods required for convictions to be spent (under 18)<sup>21</sup>**

Sentence when convicted		Time for conviction to be spent	
		1974 Act	2014 Reforms
Prison	Over 4 years	Never	Never
	+30 and less than equal/to 4 years	Never	Sentence +3.5 years
	+6 months and less than/equal to 30 month	5 year	Sentence +2 years
	Less than or equal to 6 months	3.5 year	Sentence +18 months
Detention and training order (over 6 months)		5 years (15+ at conviction) or 1 year after the order ceases	As prison sentence
Detention and training order (6 months or less)		3.5 years (15+ at conviction) or 1 year after the order ceases	As prison sentence
Sentence of detention (over 6 months but not exceeding 30 months)		5 years	As prison sentence
Sentence of detention (6 months or under)		18 months	As prison sentence
Removal from her Majesty's service		3.5 years	6 months
Service detention		2.5 years	6 months
Community order		2.5 years	6 months
Youth rehabilitation order		Longer of 1 year/end of order	6 months
Fine		2.5 years	6 months
Compensation order		Once paid in full	Once paid in full
Hospital order		Longer of 5 years/2 years after the order ceases to have effect	End of the order
Conditional discharge, care order etc.		Longer of 1 year after making of order, or 1 year after it ends	End of the order
Absolute discharge		6 months	Spent immediately
Disqualification		End of disqualification	End of disqualification
Relevant order		End of the order	End of the order
Conditional cautions		Once conditions end	Once conditions end
Youth caution, warning, reprimand		None	None

<sup>21</sup> <http://hub.unlock.org.uk/knowledgebase/spentposter/>

### 2.2.3 Circumstances in which convictions cannot become spent

There are a number of circumstances in which convictions cannot become spent. These are as follows:

- Sentence of imprisonment for life;
- Sentence of imprisonment, youth custody, detention in a young offender institution or corrective training of over four years;
- Sentence of preventive detention;
- Sentence of detention at Her Majesty's Pleasure<sup>22</sup>;
- Sentence of custody for life;
- Public protection sentences.<sup>23</sup>

### 2.2.4 Vetting architecture

Police vetting in England and Wales is more complex than in other jurisdictions examined. There are three main types of check that can be carried out– basic, standard and enhanced. However, if employment is being sought overseas or if government security vetting is required, other types of checks need to be conducted.<sup>24</sup>

#### *Disclosure and Barring Service Disclosure (Basic disclosure)*

A Disclosure and Barring Service (DBS) disclosure will only show unspent convictions. The certificate is issued by Disclosure and Barring Service or Access NI. It is commonly used for employment positions covered by the 1974 Act. It is also used in other situations such as insurance claims where proof of unspent convictions may be required. The certificate includes all unspent convictions recorded on the Police National Computer (PNC), the Scottish Criminal History System and the Criminal Record Viewer (Northern Ireland Conviction System). An individual can apply on their own behalf or an organisation can apply with the person's consent. However, an individual cannot apply on their own behalf for either a standard or enhanced check.

#### *Standard criminal record certificate<sup>25</sup>*

Standard checks (officially known as Standard Criminal Record Certificates) are a type of criminal record check that can be used by employers when recruiting staff for jobs which are included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. They are issued by the Disclosure and Barring Service (DBS) using information from the PNC.

Employers recruiting for certain positions which are included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 can request standard checks. This includes for example, people wanting to be approved by the Security Industry Authority or anybody applying to become a solicitor or barrister.

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<sup>22</sup> The term is used to describe detention in prison for an indefinite length of time; a judge may rule that a person be "detained at Her Majesty's pleasure" for serious offences or based on a successful insanity defense.

<sup>23</sup> Imprisonment for public protection, detention for public protection, extended sentences of imprisonment or detention for public protection and extended determinate sentences for dangerous offenders.

<sup>24</sup> <https://hub.unlock.org.uk/information/criminal-record-checks-for-employment/>

<sup>25</sup> <https://hub.unlock.org.uk/knowledgebase/standard-certificate/>

A standard certificate will include both spent and unspent convictions, held on the PNC that are not eligible for filtering (see Filtering section below for more detail). For each conviction, it will include:

- the date of conviction;
- details of the court appearance;
- details of the offence committed;
- the date of offence;
- the sentence/disposal given.

An employer can only request a standard check if the role applied for is eligible. If the employer carries out less than 100 checks per year, they will use a registered body (acting as an umbrella body) to apply for the check on their behalf. An employer will need the individuals consent before they can apply for a standard check.

#### *Enhanced disclosure<sup>26</sup>*

Enhanced checks (officially known as Enhanced Criminal Record Certificates) are a type of criminal record check that can be used by employers when recruiting staff for jobs which are included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. They are issued by the Disclosure and Barring Service using information from the PNC.

Employers recruiting for certain positions which are included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, as well as those being “prescribed” in regulations made under s113B, Part V of the Police Act 1997 can request enhanced checks. The majority of these positions will include frequent or intensive contact with children or vulnerable adults, for example teachers, doctors or social workers.

An enhanced certificate will include both spent and unspent convictions held on the PNC which are not eligible for filtering (see Filtering section below for more detail), as well as information as to whether the person is included in a list of people barred from working in regulated activity in relation to children and /or adults (if eligible and requested).

For each conviction, it will include:

- the date of conviction;
- details of the court appearance;
- details of the offence committed;
- the date of the offence;
- the sentence/disposal given.

It also includes any relevant information held on local police records.

An employer can only request an enhanced check if the role applied for is eligible. If the employer carries out less than 100 checks per year, they will use a registered body (acting as an umbrella body) to apply for the check on their behalf. An employer requires the individuals consent before they can apply for an enhanced check.

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<sup>26</sup> <https://hub.unlock.org.uk/knowledgebase/enhanced-certificate/>

All cautions and convictions will be shown on a standard/enhanced check unless they are eligible for filtering. An enhanced check may also disclose any additional information held locally by the police (for example arrests and allegations).

Since May 2013, standard and enhanced checks no longer disclose all cautions and convictions. Following a Court of Appeal ruling, the Government introduced a process of 'filtering'. 'Filtering' is similar in its concept to the rehabilitation periods under the Rehabilitation of Offenders Act 1974. However, instead of establishing what is 'spent', essentially what doesn't get disclosed on a basic check, 'filtering' establishes what doesn't get disclosed on a standard or enhanced DBS check. Information that is filtered will be removed from a DBS check automatically the next time the individual applies for one but it is not 'removed' or 'wiped' from police records. In practice, it means that if a person is applying for a job or role that involves a DBS check, they are legally entitled to withhold the details of anything that would now be filtered<sup>27</sup>.

Filtering applies to the following:

- *Cautions* – Multiple cautions can be filtered, so long as the offences are eligible and the relevant time period has passed for each. Each caution is dealt with separately in terms of when it's filtered.
- *Convictions* – Only single convictions that didn't lead to a suspended or custodial sentences can be filtered, so long as the offence is eligible and the relevant time period has passed.

**Table 4. Eligibility for filtering**

Eligible for filtering	Not eligible for filtering
Common assault	Offences involving violence
Drunk and disorderly	Safeguarding offences
Many motoring offences	Sexual offences
Drug offences only involving possession	Drug offences that involve supply
Theft (where no violence is involved)	

**Table 5. Time periods for filtering**

Disposal	Under 18	18 or older
<b>Caution</b>	2 years	6 years
<b>Conviction</b>	5.5 years	11 years

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<sup>27</sup> [hub.unlock.org.uk](http://hub.unlock.org.uk)

## 2.3 Australia

### 2.3.1 Legislation in place

Legislation exists in all Australian States and Territories as well as the Commonwealth limiting the disclosure of certain older offences once a period of time passes during which a person has committed no further offences. This period is known as the 'waiting period' or 'crime-free period' and is generally 10 years where a person was dealt with as an adult and five years otherwise (three years in New South Wales)<sup>28</sup>.

The effect of a conviction being spent is:

- A person with a conviction, which has been spent, does not have to disclose that conviction to any person, including a Commonwealth authority, unless an exclusion applies.
- It is unlawful to access, disclose or take into account spent convictions of Commonwealth offences.

There is a degree of variation between states in Australia as to how spent conviction legislation operates, for example, in most states convictions become spent automatically but in the Northern Territory and Western Australia an application to the appropriate authority must be made. Similarly, waiting periods for convictions to become spent can vary between states.

**Table 6. Spent convictions legislation in Australia<sup>29</sup>**

Region	CHT	NSW	QLD	ACT	NT	WA	TAS
Act	Crimes Act 1914	Criminal Records Act 1991	Criminal Law (Rehabilitation of Offenders) Act 1986	Spent Convictions Act 2000	Criminal Records (Spent Convictions) Act 1992	Spent Convictions Act 1988	Annulled Convictions Act 2003

In Australia standard practice is for eligible convictions to become spent automatically. Western Australia and the Northern Territory are the exceptions in this regard. In Western Australia, convictions become spent upon application to district court judge who will exercise discretion (serious offence) and application to the Commissioner of Police (lesser offence). In the Northern Territory, for juvenile offenders convicted in an adult Court an application must be made to the Police Commissioner.<sup>30</sup>

<sup>28</sup> [https://www.afp.gov.au/what-we-do/services/criminal-records/spent-convictions-scheme#:~:text=A%20%22spent%20conviction%22%20is%20a,for%20juvenile%20offenders\)%3B%20and](https://www.afp.gov.au/what-we-do/services/criminal-records/spent-convictions-scheme#:~:text=A%20%22spent%20conviction%22%20is%20a,for%20juvenile%20offenders)%3B%20and)

<sup>29</sup> <https://humanrights.gov.au/our-work/human-rights-comparative-table-legislation-spent-convictions>

<sup>30</sup> <https://humanrights.gov.au/our-work/human-rights-comparative-table-legislation-spent-convictions>



### 2.3.2 Criteria that allow a conviction to become spent in the Commonwealth of Australia<sup>31</sup>

A "spent conviction" is a conviction of a Commonwealth, Territory, State or foreign offence that satisfies all of the following conditions:

- It is 10 years since the date of the conviction (or five years for juvenile offenders); and
- The individual was not sentenced to imprisonment or was not sentenced to imprisonment for more than 30 months; and
- The individual has not re-offended during the 10 years (five years for juvenile offenders) waiting period; and
- A statutory or prescribed exclusion does not apply for example those seeking to work with children or in law enforcement<sup>32</sup>.

Table 7 provides an overview across several other state and territory jurisdictions in Australia. There is good deal of commonality across states and territories in terms of the conditions in place that allow convictions to become spent. For example, it is common for exclusions regarding sexual offences to apply. It is also common to allow sentences of usually up to six months to become spent.

**Table 7. Convictions capable of becoming spent** <sup>33</sup>

Region	NSW	QLD	ACT	NT	WA	TAS
<b>Conviction capable of becoming spent</b>	6 month sentence or less subject to exceptions for sexual offence, body corporate and prescribed convictions	Sentence with no imprisonment .  30 month sentence or less.	6 month sentence or less subject to exceptions for sexual offence, body corporate and prescribed convictions	6 month sentence or less subject to exceptions for sexual offence, body corporate and prescribed convictions	Serious conviction sentence of more than 1 year or for an indeterminate period.  fine of \$15,000 or more.  By application. Lesser conviction sentence less than 1 year and not for an indeterminate period	6 month sentence or less subject to exceptions for sexual offence and prescribed convictions.

<sup>31</sup> [https://www.afp.gov.au/what-we-do/services/criminal-records/spent-convictions-scheme#:~:text=A%20%22spent%20conviction%22%20is%20a,for%20juvenile%20offenders\)%3B%20and](https://www.afp.gov.au/what-we-do/services/criminal-records/spent-convictions-scheme#:~:text=A%20%22spent%20conviction%22%20is%20a,for%20juvenile%20offenders)%3B%20and)

<sup>32</sup> <https://www.oaic.gov.au/privacy/your-privacy-rights/criminal-records/#exclusions>

<sup>33</sup> <https://humanrights.gov.au/our-work/human-rights-comparative-table-legislation-spent-convictions>

Table 8 provides an overview of the length of time it takes for convictions to become spent. There is a high degree of commonality between states and territories in Australia with waiting periods of 10 years for adults and usually five years for minors for convictions to become spent although the waiting period in some states is shorter for children, for example New South Wales.

**Table 8. Waiting period across states<sup>34</sup>**

Region	NSW	QLD	ACT	NT	WA	TAS
<b>Waiting period</b>	10 years (adult). 3 years (child). Certain convictions spent before this including:  A finding without conviction & order in Children's Court dismissing charge and cautioning are immediate. Good behaviour bond spent upon satisfactory completion of conditions.	10 years (adult indictable).  5 years (other offences/offenders).	10 years (adult). 5 years (child). Certain convictions spent before this include:  A finding without conviction & order in Children's Court dismissing charge and cautioning are immediate. Good behaviour bond spent upon satisfactory completion of conditions	10 years (adult). 5 years (child). Certain convictions spent before this include:  Conviction not recorded and person discharged is immediately spent. Where offence proved and no conviction, conviction spent subject to completion of certain conditions	10 years (adult). 2 years (child).	10 years (adult). 5 years (child).

<sup>34</sup> <https://humanrights.gov.au/our-work/human-rights-comparative-table-legislation-spent-convictions>

### 2.3.3 Commencement point for convictions to become spent<sup>35</sup>

The point from which the waiting period commences varies between States. At a Commonwealth level the commencement point is from the date of conviction. Table 9 shows that the starting point for the waiting period begins either on the date of conviction or at the period of imprisonment served.

**Table 9. Commencement point**

Region	NSW	QLD	ACT	NT	WA	TAS
Waiting period	At the end of the period of imprisonment served.	From the date of conviction.	At the end of the period of imprisonment served.	At the end of the period of imprisonment served.	At the end of the period for which the person is sentenced regardless of amount of time served.	From the date of conviction.

### 2.3.4 Circumstances in which convictions cannot be come spent<sup>36</sup>

There are exceptions (known as exclusions) to the non-disclosure of offences which may apply in some circumstances and might relate to either the reason a National Police Check (NPC) is being done, or the nature of an offence a person has committed. For example, State and Territory legislation generally allows that sex offences are never spent and are always released regardless of the age of the offence. Similarly, applicants who require a NPC for working with children may find that all offences they have committed regardless of how long ago those offences were are released on a certificate.

Applications for NPCs for the following purposes may disclose details of older convictions and/or findings of guilt as an exclusion may exist in the State or Territory where the offence occurred:—

- Working in Aged Care/working with the aged;
- Working with children/working as a teacher/teacher's aide;
- Working with or caring for the disabled;
- Hospital employment;
- Firearms permit applications;
- Firefighting/fire prevention;
- Immigration/Citizenship;
- Immigration Detention Centre employment;
- Some Government security clearances;
- Superannuation trustee;
- Some overseas employment;
- Taxi/Uber/Bus driver accreditation.

<sup>35</sup> <https://humanrights.gov.au/our-work/human-rights-comparative-table-legislation-spent-convictions>

<sup>36</sup> <https://www.afp.gov.au/what-we-do/services/criminal-records/spent-convictions-scheme#:~:text=Legislation%20exists%20in%20all%20Australian,has%20committed%20no%20further%20offences.&text=This%20legislation%20is%20commonly%20referred%20to%20as%20'spent%20convictions'%20legislation.>

The above list is not exhaustive and further exclusions may exist under Commonwealth, State or Territory legislation.

### 2.3.5 Vetting architecture

The Australian Federal Police (AFP) is responsible for the collection, collation and recording of court outcomes relating to criminal and traffic prosecutions. An NPC<sup>37</sup>, sometimes referred to as a 'police check', involves comparing an individual's details (such as name and date of birth) against a central index of names using a name matching algorithm to determine if the name and date of birth combination of that individual matches any others who have police history information. The name will then be vetted by police personnel to determine what information may be disclosed, subject to relevant spent conviction legislation and/or information release policies.

A NPC may be used to help screen and make informed decisions about individuals within the Australian community for many roles, including but not limited to:

- recruitment and job applications;
- volunteer and not for profit positions;
- working with children or vulnerable groups;
- licensing or registration schemes applications;
- work-related checks due to legislation or regulations;
- Australian permanent residence and citizenship;
- visa applications for some countries;
- employment overseas.

NPCs are only carried out with the consent of the person in question.

Upon completion of the screening a National Police Certificate<sup>38</sup> is furnished. This document lists an individual's disclosable court outcomes and pending charges (that is, where a person has been charged with an offence but has not yet been to court) sourced from the databases of all Australian police services.

Certain convictions, such as spent or juvenile convictions, may not be disclosed on a National Police Certificate in accordance with the legislation and policies of the various police services.

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<sup>37</sup> <https://www.afp.gov.au/what-we-do/services/criminal-records/frequently-asked-questions>

<sup>38</sup> <https://www.afp.gov.au/what-we-do/services/criminal-records/frequently-asked-questions>

## 2.4 Spent convictions in Sweden and the Netherlands<sup>39,40</sup>

The approach taken to past convictions in many civil law jurisdictions in the European Union is rather different to the approach prevailing in common law jurisdictions as such it is difficult to directly compare the two approaches. In civil law jurisdictions an individual's criminal record is a matter of personal privacy and the default position is that such information is not normally revealed to an employer unless this is legally required for that role. In the two jurisdictions that are examined, individuals can request their own records and may provide these to their employer if their employment they are seeking falls into a required category for example working with vulnerable persons or working in law enforcement.

## 2.5 Sweden

### 2.5.1 General approach to criminal record checks

In general in Sweden, criminal records have been a matter of personal privacy and the mandatory disclosure is only required for certain professions such as those involving the care of children or other vulnerable groups. What can be disclosed on the criminal record depends on which profession an applicant wishes to enter. For example, there are different levels of disclosure for teachers, carers for disabled children, and insurance intermediaries. Any individuals may however request their own criminal record certificates through "subject access". Subject access certificates disclose all of the information on an individual's record. Those who work with children outside of state funded activities where the state has a special responsibility may be asked to hand in their own criminal record certificate.

### 2.5.2 Vetting

#### *Subject access certificates*

While in theory it may seem that Sweden has a restrictive approach to criminal record checks with only certain professions requiring obligatory checks, it has been noted<sup>41</sup> that some employers have requested that prospective employees obtain their criminal record certificate using subject access rights, and then ask for the certificate to be submitted as part of the job application process. These forced checks, as they have been referred to, seem to circumvent such restrictions<sup>42</sup>. Since 2009, there have been two attempts to reform the criminal records disclosure system to prevent "forced checks". Neither has been successful.

### 2.5.3 Waiting periods for non-disclosure

Expungement in Sweden is referred to as "weeding". As soon as a conviction is "weeded", it is not disclosed on any document that could be provided to employers. Entries remain on a criminal record for as long as the "weeding" of any other entry has not occurred (with the exception that future fines do not impact on the "weeding" time of earlier sentences).

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<sup>39</sup> <http://www.unlock.org.uk/wp-content/uploads/Rehabilitation-Desistance-vs-Disclosure-Christopher-Stacey-WCMT-report-final.pdf>

<sup>40</sup> [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371\\_criminal\\_records\\_disclosure\\_appendix\\_B.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371_criminal_records_disclosure_appendix_B.pdf)

<sup>41</sup> <http://www.unlock.org.uk/wp-content/uploads/Rehabilitation-Desistance-vs-Disclosure-Christopher-Stacey-WCMT-report-final.pdf>

<sup>42</sup> [https://gupea.ub.gu.se/bitstream/2077/28834/1/gupea\\_2077\\_28834\\_1.pdf](https://gupea.ub.gu.se/bitstream/2077/28834/1/gupea_2077_28834_1.pdf)

In his article *Rehabilitation & Desistance vs Disclosure*, Stacey provides the following table which shows the “weeding periods”, the length of time that must elapse before an entry on a criminal record can be removed.

**Table 10. Waiting periods for removal of information**

Sentence	Length of time before ‘weeding’ applies
Waiver of prosecution, under 18 years of age	Three years after the decision
Fines specified to a maximum amount Suspended sentence or probation (if under 18 at the time) Day fines	Five years after the judgment, decision or acceptance
Conversion sentences for fines	Ten years after the sentence has been enforced
Suspended sentence Probation Community service	Ten years after the judgment or decision
Imprisonment	Ten years after the sentence has been enforced

## 2.6 The Netherlands<sup>43</sup>

### 2.6.1 General approach to criminal record checks

Dutch law generally prohibits the provision of written information about criminal records. This is to prevent employers, or prospective employers, from requiring applicants to provide a copy of their criminal record.

An individual must apply to the Board of Procurators General to access their own “Judicial Documentation Data” and will be informed orally about what is included in that documentation. Judicial Documentation Data can also be accessed by categories of officials, but only for a specified purpose and/or in specific circumstances. For example, individuals and agencies, who already have access to criminal procedure data, where there is an important public interest in them also accessing Judicial Documentation Data such as police or prison officers.

### 2.6.2 Disclosure to employers<sup>44</sup>

As private employers cannot see criminal records, the Netherlands issues Conduct Certificates which applicants can show to prospective employers. The certificates include a statement to say that there are no objections to the applicant practising a certain profession or performing a certain role. The certificates are issued by the Minister of Justice, who assesses whether a certificate should be issued on objective and subjective criteria.

<sup>43</sup> [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371\\_criminal\\_records\\_disclosure\\_appendix\\_B.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371_criminal_records_disclosure_appendix_B.pdf)

<sup>44</sup> [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371\\_criminal\\_records\\_disclosure\\_appendix\\_B.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371_criminal_records_disclosure_appendix_B.pdf)

The objective assessment criteria include questions such as “What would the effects be if the act in question was repeated?” and “Is the applicant a risk to society?” Risk is assessed differently depending on the applicant’s desired role or profession. Any previous offences are also assessed according to whether they are an obstacle to the proper performance of a task or activity. For example, if a request is submitted for a Conduct Certificate for a task or activity in a “relation of dependence” (for example, caring or teaching) and there is Judicial Data on sexual offences, a Conduct Certificate is unlikely to be issued.

Generally, an applicant’s criminal record for the previous four years is observed when a Conduct Certificate is sought. If their record is clear, a Certificate is usually issued. If Judicial Data appear during the four year period, all data for the past 20 years will then be assessed to decide whether a Certificate can be issued. There are three exceptions to these rules:

1. If certain sexual offences have ever been committed by an individual, then their entire record can be examined, not just the past 20 years.
2. Certain jobs or roles require a longer initial observation period. For example, if a certificate is sought for firearms purposes, the observation period is eight years. It is five years for taxi and lorry drivers.
3. If the applicant has not committed any offences in the initial observation period, but issuing a Conduct Certificate would be “irresponsible” given the position it is requested for, it will still be refused. This only happens where, during the 20 year retrospective period, offences punishable by a maximum sentence of at least twelve years were committed, and the applicant was subject to a prison sentence or hospital order.

### **2.6.3 Removal of offences from the record<sup>45</sup>**

The current system of expunging convictions from criminal record certificates is, according to Boone as follows:

- Judicial data on minor offences is stored until five years after the case has been irrevocable settled, i.e. the conviction is no longer appealable. The “storage period” is 10 years if a prison sentence or community sentence was imposed after a minor offence.
- Judicial data on other criminal offences are kept for a thirty year “storage period” after the criminal sentence has become irrevocable.
- If a non-suspended prison sentence, youth detention or a hospital order of more than three years is enforced, this time is added to the length of the “storage period.”
- 10 years is added on to the “storage period” if the crime is penalized by a maximum prison sentence of eight years or more.

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<sup>45</sup> [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371\\_criminal\\_records\\_disclosure\\_appendix\\_B.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc371_criminal_records_disclosure_appendix_B.pdf)



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## 3. Spent Convictions Rapid Evidence Review<sup>46</sup>

### Executive Summary

Debates relating to disclosure of past criminal convictions are primarily concerned with achieving an appropriate balance between the interests of people with convictions in just and proportionate punishment and opportunities for effective reintegration, and the desire to ensure public safety through being able to access relevant information about past convictions.

The requirement to disclose past convictions can have a negative impact on an individual's ability to reintegrate effectively in society, in particular because this requirement can impede an individual's ability to access legitimate employment and other opportunities that can aid desistance processes.

Spent convictions regimes – in which a person with a conviction is no longer required to disclose that conviction once a specified period has elapsed – are therefore considered to have a number of benefits. They aim to minimise the unnecessary harms done to individuals and society at large in the aftermath of criminal convictions. They can play an important role in ensuring that persons with criminal histories have the opportunity to re-engage with society, and to move past their offences to assume a constructive role in society.

This paper is based on a rapid evidence review of academic literature on the theme of spent convictions. A number of core themes emerged from this review of the academic literature.

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<sup>46</sup> Authored by Dr. Katharina Swirak and Dr. Louise Forde of University College Cork

### **Criminal records disclosure and successful reintegration of justice involved persons**

- The obligation to disclose criminal records can present significant challenges for the process of reintegration into society for individuals with convictions. This can particularly impact a person's ability to access and sustain employment opportunities.
- Criminological research suggests that spent convictions regimes may be useful in removing stigma from people with convictions, and may facilitate the reintegrative process, ultimately contributing to desistance from crime and safer communities.
- Effective spent convictions regimes are important to assist individuals in reintegrating into society, and may have particular significance for those who came into conflict with the law as children, or as young adults.
- Despite a complex relationship between desistance and employment, accessing employment opportunities is considered a key factor in supporting desistance from crime, and a range of other positive outcomes for people with convictions.

### **Guiding principles for designing effective spent conviction regimes**

- The requirement to disclose convictions after the sentence has been served can be considered an 'indirect' form of punishment, principles relating to proportionality need to be taken into account in spent convictions regimes. Human rights principles also highlight the importance of proportionality in frameworks designed to regulate the management of spent convictions.
- Spent conviction regimes inherently reflect a preference for rehabilitation and are therefore congruent with criminal justice and reintegration approaches that prefer rehabilitation over deterrence and punishment

## Operationalising spent conviction regimes

- A wide variety of approaches is taken by different States in relation to the expungement of criminal records, or regimes by which convictions become 'spent'. States often set out specific time periods after which convictions become 'spent'. While spent convictions regimes often apply to minor offending or older offences, a number of countries set out exceptions to provisions detailing when convictions will become spent, e.g. in the case of sexual offences.
- The desirability of a legal framework which regulates employer use of criminal checks and which regulates the use of employer discretion in this area is repeatedly highlighted, in addition to the desirability of national spent convictions schemes.
- In developing a statutory framework around spent convictions, scholars have suggested alternatives that allow for disclosure of only information relevant to the employment opportunity in question, and systems of review for individuals affected.
- While spent convictions are a crucial component in thinking about supporting people who have been convicted of offences to reintegrate successfully into their community, and to access employment, the ease of access now provided to information published in the media about people's past convictions present a further challenge for individuals in this situation, and may merit further attention going forward.

### 3.1 Introduction and Overview

A spent conviction, sometimes referred to as an expungement, is a conviction that, when it meets certain criteria, does not legally have to be disclosed in certain circumstances, for example when a person is applying to return to education, for a new job or to be Garda vetted. The rationale for a spent conviction legislative regime is rooted in the principles of rehabilitative justice and the generally accepted acknowledgement that after a certain period of a time, individuals deserve a 'second chance' and the opportunity to move on without disclosing a criminal conviction,

Many countries have a history of developing systems to keep track of criminal convictions, and historically have taken different approaches to the disclosure of this information.<sup>47</sup> The key debates in this area circle around achieving the delicate balance between just and proportionate punishment, effective reintegration of persons with convictions, their right to privacy, while also ensuring public safety <sup>48</sup>.

In the Irish context, the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, introduced for the first time a comprehensive legislative framework for regulating spent convictions.<sup>49</sup> At the time, the introduction of the Act represented a significant milestone, particularly given that Ireland was the last EU member state to legislate in this area.<sup>50</sup> However, despite its short life time, the Act has been repeatedly criticised for not being far reaching enough to achieve effective rehabilitation for justice involved persons<sup>51</sup>. The issues raised, related amongst others to the limits on the number of convictions eligible to be spent,

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<sup>47</sup> See further Thomas, T. & Heberton, B., "Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228

<sup>48</sup> See Lam, H. and Harcourt, M. (2003) for a good discussion; The Use of Criminal Record in Employment Decisions: The Rights of Ex-Offenders, Employers and the Public, *Journal of Business Ethics* Vol. 47, No. 3 (Oct., 2003), pp. 237-252

<sup>49</sup> Government of Ireland, Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, Number 4 of 2016. See <http://www.irishstatutebook.ie/eli/2016/act/4/enacted/en/html>.

<sup>50</sup> This applies to adult offenders only, see: IPRT (2015: Footnote 1) *IPRT Briefing on Spent Convictions* [https://www.iprt.ie/site/assets/files/6466/iprt\\_briefing\\_on\\_spent\\_convictions\\_02022015.pdf](https://www.iprt.ie/site/assets/files/6466/iprt_briefing_on_spent_convictions_02022015.pdf). Section 258 of the *Children Act 2001* provides that offences committed by those under eighteen years of age can be expunged from the record once certain conditions are met.

<sup>51</sup> Irish Human Rights and Equality Commission (2012) Observations on the spent convictions bill 2012. See: [https://www.ihrec.ie/download/pdf/ihrc\\_observations\\_on\\_spent\\_conviction\\_bill\\_2012\\_june\\_2012.pdf](https://www.ihrec.ie/download/pdf/ihrc_observations_on_spent_conviction_bill_2012_june_2012.pdf)

the stringent limits on types of and lengths of sentences eligible to be spent (particularly also for minor drug related offences), the lack of attention paid to the principle of proportionality between the length of a sentence and the length of the rehabilitative period before the conviction becomes spent and the lack of consideration for young adults.<sup>52</sup>

At the time of finalising this rapid evidence review (October 2020), the Criminal Justice (Rehabilitative Periods) Bill 2018, initiated by Senator Lynn Ruane in December 2018 and having gained significant cross party support in the Senead, was at Fourth Stage before the Senead and public consultations have commenced.. The Bill seeks to address some of the above mentioned shortfalls of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, and in particular proposed the following substantive amendments:

- a. Extension of the spent convictions sentence limit in custodial sentences from 12 months to 24 months.
- b. Extension of the spent convictions sentence limit in non-custodial sentences from 24 months to 48 months.
- c. Extension of section 14A of the National Vetting Bureau Act 2012 to include Circuit Court convictions, or convictions in other jurisdictions, to harmonise with the equivalent provisions of Spent Convictions Act 2016 (such that those convictions are treated as spent under National Vetting Bureau Act.)
- d. Removing the limit on the number of convictions eligible to be spent.
- e. 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 is introduced. In effect, less serious eligible offences would become spent sooner than more serious eligible offences. The Schedule outlines how proportionality will apply to offenders and offences.

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<sup>52</sup> McIntyre, T.J.; O'Donnell Ian (2017) Criminals, Data Protection and the Right to a Second Chance The Irish Jurist, 58 : 27-55, see:

[https://researchrepository.ucd.ie/bitstream/10197/9350/1/Spent\\_convictions\\_preprint.pdf](https://researchrepository.ucd.ie/bitstream/10197/9350/1/Spent_convictions_preprint.pdf)

- f. Setting an upper rehabilitative period limit of 3 years for personal possession offences under the Misuse of Drugs Act 1977. Allowing for 2<sup>nd</sup> and subsequent personal possession offences to become spent.
- g. Reducing the rehabilitative period for those under 18 from 3 years to 1 year (consequential on the young adult provisions set out in the schedule). The evidence from the research will inform the assessment of this issue. In addition, it would be useful to summarise the general evidential premise for specific approaches for this age group.

In light of these substantive amendments, this rapid evidence review of academic literature seeks to contribute knowledge for evidence based decision making in relation to these substantive amendments. The analytical process of distilling reviewed literature so address the content of these substantive amendments is described below in section 2 (rapid evidence review methodology).

### **3.2 Rapid Evidence Review Methodology**

This evidence review is based on a rapid review of academic literature relevant to spent conviction regimes. More specifically, the review included a systematic search of academic databases and included the following search terms: spent convictions; desistance and employment; expungement and employment; expungement and reintegration; expungement and re-entry; recidivism and employment; recidivism and expungement; recidivism and spent convictions; recidivism and clean slate legislation. The identified literature included the jurisdictions of England and Wales, Scotland, Australia, Canada, New Zealand, the US and where appropriate and where information was accessible in English, also other jurisdictions (France, Norway). The OneSearch engine of University College Cork Library was used to conduct the extensive search of above mentioned search terms. OneSearch was used, as it functions as a meta-search engine to all other relevant databases including Lexis Library, SocIndex, Ebsco, etc. From a first content reading of all results, a ‘purposive sampling’ strategy was used. While the analysed academic research for this paper references as part of its analysis different pieces of legislation and grey literature set in different jurisdictions, the analysis at hand solely focuses on academic literature. This was in line with the briefing note received by the authors, and reflects the fact that academic literature undergoes rigorous peer review processes which ensure a level of quality control. As a consequence, articles with no direct relevance were excluded, as were articles which had been updated by more recent research and therefore appeared to offer repetitive information. As a result, a

total of 103 relevant journal articles and book chapters were included for initial in-depth review.

Based on a 'research and analysis briefing template' received by the authors, a specific focus was then placed on analysing the academic literature so as to be able to answer questions directly relevant to the substantive amendments suggested by the Criminal Justice (Rehabilitative Periods) Bill 2018 (see section 1 above, points a-g). In particular these relate to the effects of extending spent conviction limits and of including multiple convictions admissible under spent conviction regimes; the principle of proportionality in spent conviction regimes, i.e. that less serious eligible offences can be spent earlier than more serious offences; more generous spent conviction regimes for drug related personal possession offences; more generous spent conviction regimes for young people (i.e. those under 18 years).

The first four substantive amendments listed above (a/b/c and d) are aimed to move the Irish spent conviction legislative framework towards a more rehabilitative and more generous spent convictions regime. The research evidence review has sought to consider academic research that explores the harmful effects of convictions beyond the duration of penalisation, be it through incarceration or various other sanctions (see section 3 below) as well as the relationship between employment, desistance and community safety (see section 4 below). Taken together, the evidence presented under these themes engages with the implications of a move towards more generous spent conviction regimes.

Next, the evidence review considers how other jurisdictions operationalise and 'fine-tune' different aspects of their spent conviction regimes, showing that nuanced approaches to spent conviction regimes seem sensible (see section 5 below). The review then moves on to consider the evidence on proportionality and spent convictions (substantive amendment e.), (see section 6 below). Subsequently, evidence that speaks to the suggested amendment aimed specifically at a more generous spent conviction framework for drug possession offences (substantive amendment f.) is reviewed in section 7 of this document. Section 8 considers the importance of a differentiated spent convictions framework for young adults (substantive amendment e). Some additional considerations in relation to the 'right to be forgotten' as well as human rights will be discussed in section 9. The final section of this evidence review will highlight literature which essentially argues that the adoption of generous spent conviction regimes is a political choice.



It is important to highlight that in an ideal scenario, an ‘evidence’ review of the effectiveness of different spent conviction regimes would include a longitudinal analysis of how different spent conviction regimes impact offending and reintegration careers. However, such research is not available internationally, nor in Ireland as spent conviction legislation is a very recent development and even in jurisdictions with more experience is usually not integrated and design into legislative design and implementation. However, as this review will show, a significant body of research exists that allows policy makers to infer how the different elements of the proposed Criminal Justice (Rehabilitative Periods) Bill 2018 fare in relation to rehabilitation and reintegration after criminal convictions. The approximated nature of this evidence does from a social science perspective, not diminish its quality and robustness.

### 3.3 Harmful effects of convictions beyond punishment

A plethora of research in the fields of criminology, sociology, social work and other related areas pays attention to the collateral consequences of punishment that people experience along the different stages of their involvement in the criminal justice process. Particularly in relation to rehabilitation and reintegration post-conviction, research acknowledges that harmful consequences of convictions can extend beyond the time period in which the allotted punishment is given effect, thereby adding an additional, invisible layer of punishment.<sup>53</sup> A variety of terms have been coined to describe these harms, including ‘double jeopardy’<sup>54</sup>, ‘double penalty’<sup>55</sup>, ‘invisible punishment’<sup>56</sup>, ‘collateral consequences’<sup>57</sup>, ‘civil death’<sup>58</sup> or specifically in relation to work, ‘employment penalty’<sup>59</sup>. While an assumption may

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<sup>53</sup> Henley, A., (2014) “Abolishing the stigma of punishments served” (2014) 97(1) *Criminal Justice Matters* 22 at p.22; Paterson, M. “Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison” (2011) Vol. 1 *New Zealand Law Review* 69 at p.70

<sup>54</sup> Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. Legis. & Pub. Pol’y 963, 988 n.124 (2013)

<sup>55</sup> Lahny, R. S. Clean slate: expanding expungements and pardons for non-violent federal offenders, in: *University of Cincinnati Law Review*, 09/2010, Volume 79, Issue 1

<sup>56</sup> Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible punishment: the collateral consequences of mass imprisonment* 15, 15–19 (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>57</sup> Yee, M.J., “Expungement Law: An Extraordinary Remedy for an Extraordinary Harm” *Georgetown Journal on Poverty Law & Policy*, 09/2017, Volume 25, Issue 1

<sup>58</sup> Jones, Danielle R.= When the Fallout of a Criminal Conviction Goes too Far: Challenging Collateral Consequences; *Stanford Journal of Civil Rights & Civil Liberties*, 06/2015, Volume 11, Issue 2

<sup>59</sup> Lahny, R. Clean slate: expanding expungements and pardons for non-violent federal offenders *University of Cincinnati Law Review*, 09/2010, Volume 79, Issue 1

be made that once a sentence is served the convicted person is free and has his or her rights restored, significant problems can be associated with the process of re-entry into society.<sup>60</sup> In addition to material consequences such as loss of employment, de-skilling and difficulties in gaining access to training, education and employment markets, the stigma of having committed an offence – particularly if that offence is a sexual offence – can remain long after the sentence has been completed.<sup>61</sup> Studies have highlighted that individuals who are required to disclose past convictions repeatedly often feel embarrassment and shame, and may be deterred from continuing to seek work in their chosen field.<sup>62</sup>

It is important to note that these harms do not apply equally to all people with convictions, and can particularly affect those from particular groups, such as ethnic minorities. A famous ‘pairing study’, conducted in different cities of the United States for example showed that white people with criminal records were more likely to be called back for jobs than black people with criminal records.<sup>63</sup> Travellers in the Irish context for example, also face particular challenges in the criminal justice system, particularly post-release, as support services tend to be designed for sedentary populations and in the context of more general stigmatisation and exclusion of Travellers in many different social contexts.<sup>64</sup>

Within Ireland, evidence suggests high recidivism rates amongst individuals who have previously served a prison sentence, and the increased likelihood that these individuals will have come from deprived areas and face a range of other disadvantages, including low levels of education.<sup>65</sup> At the heart of spent conviction legislation is therefore the desire to minimise the unnecessary harms done to individuals and society at large in the aftermath of

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<sup>60</sup> Fitzgerald O'Reilly, M., “Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland” (2014) 53(5) *The Howard Journal of Criminal Justice* 468 at p.469; Faraguna, A.L., “Wiping the slate...dirty: the inadequacies of expungement as a solution to the collateral consequences of federal convictions” (2017) 82(2) *Brooklyn Law Review* 961

<sup>61</sup> Fitzgerald O'Reilly, M., “Information Pertaining to Released Sex Offenders: To Disclose or Not to Disclose, that is the Question” (2018) 57(2) *The Howard Journal of Crime and Justice* 204 at p.205

<sup>62</sup> Heydon, G., Naylor, B., Paterson, M. & Pittard, M., “Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel” (2011) 32 *Adelaide Law Review* 205 at pp.206-207

<sup>63</sup> Pager, D. (2003) *The Mark of a Criminal Record*, Northwestern University

<sup>64</sup> IPRT (2014) *Travellers in the Irish Prison System- A Qualitative Study*, see: [https://www.iprt.ie/site/assets/files/6339/iprt\\_travellers\\_report\\_web.pdf](https://www.iprt.ie/site/assets/files/6339/iprt_travellers_report_web.pdf)

<sup>65</sup> Fitzgerald O'Reilly, M., “Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland” (2014) 53(5) *The Howard Journal of Criminal Justice* 468 at p.470

criminal convictions. It has been noted that in many jurisdictions, there has been a significant increase in disclosure about criminal histories.<sup>66</sup> Spent convictions regimes can be important to ensure that individuals with criminal histories have the opportunity to re-engage with society, and to move past their offences to assume a constructive role in society. On the other hand, the requirement to disclose criminal records can represent significant harm to ex-offenders and ultimately to society at large, due to the loss of reintegrative opportunities as well as economic opportunities specifically through blocked access to education, volunteering, training and employment opportunities.<sup>67</sup>

Scholars have commented that criminal convictions, particularly repeat criminal convictions, entail a level of social exclusion, and disrupt existing social ties.<sup>68</sup> In addition to multiple levels of social disadvantage faced before incarceration, many individuals who have served a prison sentence find themselves at a substantial disadvantage, due to lack of skills or because they have not completed formal education or training courses.<sup>69</sup> Research conducted by scholars in the UK and Australia has highlighted that criminal record checks, particularly through use of the Internet to track down information relating to convictions, as part of employment processes can add indirectly to the punishment experienced by those convicted of offences.<sup>70</sup> This is such well-established knowledge that it has been coined as 'criminal record stigma'.<sup>71</sup> As early as 1987, the Australian Law Reform Commission for example argued that "an old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator as to how the former offender will behave in the future. In such circumstances reliance on the old conviction will result in serious prejudice to the offender which will outweigh to a large extent its value as an indicator of future behaviour".<sup>72</sup>

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<sup>66</sup> Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171 at p.172

<sup>67</sup> Mc Aleese, S. Suspension, not expungement: Rationalizing misguided policy decisions around cannabis amnesty in Canada, *Canadian Public Administration*, 12/2019, Volume 62, Issue 4

<sup>68</sup> Farrall, S., Bottoms, A. & Shapland, J., "Social structures and desistance from crime" (2010) 7(6) *European Journal of Criminology* 546 at p.548

<sup>69</sup> Fitzgerald O'Reilly, M., "Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland" (2014) 53(5) *The Howard Journal of Criminal Justice* 468 at p.473

<sup>70</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at pp.938-939; Stacey, C., "Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records" (2017) 64(3) *Probation Journal* 269

<sup>71</sup> Parliament of Victoria Legislative Council, Legal and Social Issues Committee Inquiry into a legislated spent convictions scheme, A Controlled Disclosure of Criminal Record Information framework for Victoria, Victorian Government Printer, 2019, p. 12

<sup>72</sup> ALRC, Spent Convictions, Report No 37 (1987) xi-xii [3]

In addition, the availability of reports relating to convictions online can mean that individuals with a history of offending can continue to face judgment and experience negative consequences, even after convictions become spent under relevant legislative regimes.<sup>73</sup> This is particularly so in considering the impact on engagement in employment. It has been suggested that constraining and enabling macro-structures should be examined to build a country's capacity to support social inclusion and desistance processes. Farral et al. in their research on 'structural change' and desistance, analysed national and regional structural changes in the UK in the past 30 years, amongst others also changing employment landscapes. They argue that it would appear that 'changes in the economy have restructured the legitimate routes out of crime and – together with changes in the educational system – have additionally influenced the availability of and access to such routes. In this respect, changes in the economy may have altered the speed, nature and timing of ways out of troubled pasts'.<sup>74</sup>

The literature in this area highlights the difficulties that those with a history of involvement in offending have in accessing and sustaining employment, although post-release employment rates can vary from country to country.<sup>75</sup> In one Finnish study, it was found that the proportion of individuals who were able to find stable employment after they had been incarcerated for a period of time was relatively low, although those who were younger and who had more work experience prior to incarceration fared a little better.<sup>76</sup> This finding is attributed to the fact that the incarcerated population in Finland is heavily affected by socioeconomic differences. As a consequence, the study authors suggest that this contributes more significantly as explanatory factor for low employment rates post incarceration than the possession of a criminal record<sup>77</sup>. It also has to be stated here that criminal record checks operate on a 'tiered' basis in Finland.<sup>78</sup>

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<sup>73</sup> Stacey, C., "Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records" (2017) 64(3) *Probation Journal* 269 at p.270

<sup>74</sup> Farral, S., Bottoms, A. & Shapland, J., "Social structures and desistance from crime" (2010) 7(6) *European Journal of Criminology* 546 at p.555

<sup>75</sup> Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at pp.353-354

<sup>76</sup> Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at p.353 at p.362

<sup>77</sup> Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at p.353 at p.362

<sup>78</sup> In Finland, publicly accessible criminal records for employment purposes only include serious offences such as, sex offences, offences against children and violent crimes. Information on minor convictions is only required for criminal record checks for foreign visa applications. Separate legislation (Act on Checking the

In other contexts, it has been found that the requirement to disclose criminal convictions can act as a barrier to individuals with a conviction seeking access to labour markets. The necessity for criminal checks can also, in some cases, act as a barrier to accessing certain types of professional training.<sup>79</sup> Employer attitudes can also present a significant challenge for those seeking employment in this situation.<sup>80</sup> Employers can often be less inclined to employ someone with a criminal conviction, as compared to someone without such a record.<sup>81</sup> It has been highlighted that time spent in prison can also lead to reductions in human capital, including job skills, and can impact negatively on the development of psychosocial maturity.<sup>82</sup> Equally, the need to disclose previous convictions can have the effect of compounding other disadvantages based on other attributes the individual may have.<sup>83</sup>

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Criminal Background of Persons Working with Children, 2002) regulates mandatory criminal record checks for those working with children, see here:

<https://tem.fi/documents/1410877/2918735/Act+on+checking+the+criminal+background+of+persons+working+with+children/17b8de1e-f973-4fd7-bcab-7180052a8965/Act+on+checking+the+criminal+background+of+persons+working+with+children.pdf>

<sup>79</sup> Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171 at p.189

<sup>80</sup> Thomas, T. & Heberton, B., "Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228 at p.239; Fitzgerald O'Reilly, M., "Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland" (2014) 53(5) *The Howard Journal of Criminal Justice* 468 at p.476 *et seq.*

<sup>81</sup> Naylor, B., "Do Not Pass Go: The impact of criminal record checks on employment in Australia" (2005) 30(3) *Alternative Law Journal* 174 at p.176; Stacey, C., "Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records" (2017) 64(3) *Probation Journal* 269 at p.270; Reich, S.E., "An exception to the rule: Belief in redeemability, desistance signals, and the employer's decision to hire a job applicant with a criminal record" (2017) 56(2) *Journal of Offender Rehabilitation* 110 at p.110; Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171 at pp.186-187

<sup>82</sup> Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at p.353; Fitzgerald O'Reilly, M., "Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland" (2014) 53(5) *The Howard Journal of Criminal Justice* 468 at p.474

<sup>83</sup> Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.70

The issue of disclosures around criminal convictions can affect a significant number of people in any given jurisdiction.<sup>84</sup> It has been highlighted in jurisdictions such as England and Wales that a significant percentage of the working age population are estimated to have at least one criminal conviction.<sup>85</sup> In 2003-2004 in Australia, it was highlighted that over half a million people nationally had determinations relating to criminal cases handed down, the majority of which resulted in a finding of guilt.<sup>86</sup>

Pre-employment checks of an individual's criminal records are now common in many countries, and are relevant for a growing number of employers.<sup>87</sup> It has been highlighted that the need to disclose criminal records to potential employers can limit the employment opportunities for individuals who have been convicted of a crime; this is significant given that this cohort may face other limitations to accessing employment if they also have had lower levels of access to education, training and skills.<sup>88</sup>

Specifically in relation to, spent-convictions, sociological research has identified that criminal records which have to be disclosed for example when finding work, 'stick' to persons, make it difficult for the person to de-label themselves, therefore directly increasing the risk of recidivism. From this perspective, the 'criminal records system serves as a barrier to reciprocal communication between ex-arrestees and a legal system that represents them in ways that they may want to contest. This "wrongful representation" is a collateral effect of

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<sup>84</sup> Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171 at pp.192-193

<sup>85</sup> Thomas, T. & Heberton, B., "Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228 at p.234

<sup>86</sup> Naylor, B., "Do Not Pass Go: The impact of criminal record checks on employment in Australia" (2005) 30(3) *Alternative Law Journal* 174 at p.174

<sup>87</sup> Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.69-70; Heydon, G., Naylor, B., Paterson, M. & Pittard, M., "Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel" (2011) 32 *Adelaide Law Review* 205 at p.205

<sup>88</sup> Thomas, T. & Heberton, B., "Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228 at p.235; Farrall, S., Bottoms, A. & Shapland, J., "Social structures and desistance from crime" (2010) 7(6) *European Journal of Criminology* 546 at p.555 & p.561

having a criminal record that impedes the ability of ex-arrestees to manage or repair their relationship with the state that has punished them'.<sup>89</sup>

### 3.4 The relationship between employment, desistance and community safety

The most reliable body of evidence to assess the link between spent conviction regimes and community safety is the very large field of criminological research that demonstrates conclusively that employment is one of the key factors in desistance from crime.<sup>90</sup> Literature examining desistance processes highlights that individual pathways towards desistance need to be understood as a process involving ongoing struggles and setbacks, rather than as a simple process of change from being an offender to being a non-offender.<sup>91</sup> Equally, it has been highlighted that desistance processes need to be understood both in terms of subjective, internal factors relating to motivation to change, self-control and resilience, and identity formation, and of structural factors which include factors relating to access to the labour market, the development of stable relationships and living situations.<sup>92</sup> Importantly when considering the suitability of spent convictions schemes allowing convictions to become spent after a specified period of desistance from offending, a very significant and important finding from recidivism studies is that the likelihood of reoffending decreases with every month post-release. The famous US- wide 'Harer study', 'documented the monthly recidivism rate over a thirty-six month period and found that the rate dropped from twenty-nine per one thousand individuals recidivating in the first month to two per one thousand

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<sup>89</sup> Myrick, A. Facing Your Criminal Record: Expungement and the Collateral Problem of Wrongfully Represented Self *Law & Society Review*, 03/2013, Volume 47, Issue 1

<sup>90</sup> Maruna, S. (2001) Making Good: How Ex-Convicts Reform And Rebuild Their Lives;; Uggen, C. 2000. Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review*

<sup>91</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at p.2; Walker, K., Bowen, E. & Brown, S., "Psychological and criminological factors associated with desistance from violence: A review of the literature" (2012) 18(2) *Aggression and Violent Behaviour* 286 at p.295; Farrall, S., Bottoms, A. & Shapland, J., "Social structures and desistance from crime" (2010) 7(6) *European Journal of Criminology* 546 at p.550

<sup>92</sup> Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at p.350; Walker, K., Bowen, E. & Brown, S., "Psychological and criminological factors associated with desistance from violence: A review of the literature" (2012) 18(2) *Aggression and Violent Behaviour* 286



individuals recidivating in the thirty-sixth month.<sup>93</sup> Thus, there is a downhill slope from month one to month thirty-six signifying a decrease in the risk of recidivism as time passes'.<sup>94</sup>

Employment is often considered in the research literature to be a very important factor in understanding the desistance processes of individuals involved in offending.<sup>95</sup> While desistance from offending is a common, rather than a rare occurrence, employment has been established as one of the essential factors in people's successful desistance journeys.<sup>96</sup> A plethora of research has identified and demonstrated how work and employment help justice-involved persons in finding meaningful purpose in life post-release or post-offence more generally.<sup>97</sup> In the Canadian context for example, several studies demonstrate that 'employment, education and training opportunities, volunteering, and safe and suitable housing options' are critical for community reintegration for ex-offenders'.<sup>98</sup> In addition to life changes such as education and marriage, the maintenance of gainful employment is considered pivotal for successful reintegration.<sup>99</sup>

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<sup>93</sup> Harer, M.D. Federal Bureau of Prisons Office of Research & Evaluation, recidivism among federal prisoners released in 1987 2 (1994)

<sup>94</sup> Harer, M.D. Federal Bureau of Prisons Office of Research & Evaluation, recidivism among federal prisoners released in 1987 2 (1994) page 9;

<sup>95</sup> Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171

<sup>96</sup> Farrall, S., Bottoms, A. & Shapland, J., "Social structures and desistance from crime" (2010) 7(6) *European Journal of Criminology* 546 at pp.546-547

<sup>97</sup> Berg, M. T., & Huebner, B. (2011). Reentry and the ties that bind: An examination of social ties, employment, and recidivism. *Justice Quarterly*, 28, 382-410; Piquero, A. R., Brame, R., Mazerolle, P., & Haapanen, R. (2002). Crime in emerging adulthood. *Criminology*, 40, 137-169; Skardhamer, T., & Telle, K. (2012). Post-release employment and recidivism in Norway. *Journal of Quantitative Criminology*, 28, 629-649. For good overview, see: Ramakers et al 2017, Vol. 61(16) 1795–1818 Not Just Any Job Will Do: A Study on Employment Characteristics and Recidivism Risks After Release *International Journal of Offender Therapy and Comparative Criminology*

<sup>98</sup> McAleese, Samantha 2017. "Job search, suspended: Changes to Canada's pardon program and the impact on finding employment." In *After Prison: Navigating Employment and Reintegration*, edited by Rose Ricciardelli, and Adrienne M.F. Peters. Waterloo, ON: Wilfred Laurier University Press, pp. 83–104.

Murphy, Yoko. 2018. "Contextualizing opposition to pardons: Implications for pardon reform." *Criminology & Criminal Justice*, 1–18. Ricciardelli, Rose, and Adrienne Peters, eds. 2017. *After Prison: Navigating Employment and Reintegration*. Waterloo, ON: Wilfred Laurier University Press

<sup>99</sup> Stoll, M.A. & Bushway, S.D. *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 *Criminology* 371, 372 (2008); see also Jeremy Travis Et Al., Urban Inst., From Prison To Home: The Dimensions And Consequences Of Prisoner Reentry 1, 31 (2001); Shawn Bushway & Peter Reuter, *Labor Markets and Crime Risk Factors*, in *Preventing Crime: What Works, What Doesn't, What's Promising* 6-1, 6-

Employment can be a significant factor in preventing individuals from engaging in further offending behaviours.<sup>100</sup> Research has consistently shown, albeit not universally, that employment-related interventions are associated with the largest reductions in reoffending. For example, a study conducted on behalf of the UK Social Exclusion Unit (SEU) in 2002, identified that if persons find employment after conviction, then they are between 30 and 50% less likely to re-offend, with 68% of offenders indicating that having a job was the most important factor to stop them reoffending.<sup>101</sup> Another important study showed that people with criminal records were less likely to be rearrested and reconvicted if they were “provided with marginal employment opportunities” as compared with similarly situated people with prior convictions who were not employed. Uggen’s study from the mid-1970s remains one of the few large-scale experimental studies undertaken to test the ‘job-treatment effect’. In his study, he set out to test the impact of the ‘National Supported Work Demonstration Project’ across nine U.S. cities. Over 3,000 persons with an official arrest history were over two years (from 1975 to 1977) randomly assigned to the control (no job programme) or treatment group (minimum-wage jobs). Members of both groups reported work, crime and arrest information at nine-month intervals for up to three years. Uggen’s analysis showed very strongly that particularly older offenders were less likely to reoffend compared to those of comparable age who were not provided with these opportunities.<sup>102</sup>

However, aside from this, it has been highlighted that employment can have value in terms of the broader context of social integration, outside of measurements focused solely on recidivism rates.<sup>103</sup> Stable employment can bolster other factors that are important to desistance processes, including the development of positive relationships, stable routines

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1 (L.W. Sherman et al. *Also* Jeremy Travis Et Al., *Urban Inst.*, *From Prison To Home: The Dimensions And Consequences Of Prisoner Reentry* 1, 31 (2001); Shawn Bushway & Peter Reuter, *Labor Markets and Crime Risk Factors*, in *Preventing Crime: What Works, What Doesn't, What's Promising* 6-1, 6-1 (L.W. Sherman et al. eds., 1997).

<sup>100</sup> Thomas, T. & Heberton, B., “Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales” (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228 at p.234; Heydon, G., Naylor, B., Paterson, M. & Pittard, M., “Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel” (2011) 32 *Adelaide Law Review* 205 at p.206; Fitzgerald O'Reilly, M., “Opening Doors or Closing Them?: The Impact of Incarceration on the Education and Employability of Ex-Offenders in Ireland” (2014) 53(5) *The Howard Journal of Criminal Justice* 468

<sup>101</sup> Social Exclusion Unit (SEU). (2002). *Reducing reoffending by ex-inmates*. London: Office of the Deputy Prime Minister (SEU)

<sup>102</sup> Uggen, C. 2000. Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review* 67. Page 542.

<sup>103</sup> Aaltonen, M., “Post-release Employment of Desisting Inmates” (2016) 56(2) *British Journal of Criminology* 350 at p.365

and the development of self-respect.<sup>104</sup> Here, it is particularly important to consider studies that include the voices of those with lived experiences of incarceration. Maruna's ground-breaking study of gathering desistance narratives, showed how generativity is also helpful particularly in terms of rebuilding a coherent sense of self that is able to withstand the multiple difficulties that post-release life brings with it.<sup>105</sup> Other studies show how involvement in social networks post-release, amongst these employment, act as informal networks of social control and therefore as barriers to offending. In their research with 195 women in Maricopa County, Arizona, research participants were interviewed with a standardised interview instrument that also accounted for a variety of descriptive variables. The research showed how 'drug dealing activity was significantly inhibited by employment, involvement in a relationship with a significant other and children living with the participant. The participants who were employed were 29% less likely to engage in drug dealing. Employment also suppressed nondrug crime, but not significantly so'.<sup>106</sup>

Employment can also have a positive knock-on impact on mental health, thus bolstering other protective factors relevant to involvement in offending.<sup>107</sup> In addition to the material as well as psychological aspects of reintegrative employment, the symbolic power of employment should not be underestimated, as '...our society treats labour force participation as a prerequisite for full membership in the polity. Therefore, practical and symbolic consequences of exclusion from employment combine to underscore the internal exile of ex-offenders.'<sup>108</sup>

There exists a mixed body of evidence as to the exact theorisation and relationship between employment and desistance,<sup>109</sup> and whether it plays a part in triggering desistance, sustaining it, or whether it is a consequence of desistance.<sup>110</sup> Some scholarship also

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<sup>104</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.954

<sup>105</sup> Maruna, S. (2001) *Making Good: How Ex-Convicts Reform And Rebuild Their Lives*; page 102.

<sup>106</sup> Griffin, Marie L;Armstrong, Gaylene S *Justice Quarterly* : JQ; Jun 2003; 20, 2; ProQuest pg. 227

<sup>107</sup> Thomas, T. & Heberton, B., "Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228 at p.234

<sup>108</sup> Demleitner, N.V. *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. (1999) page 157.

<sup>109</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at pp.1-2; Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at p.353

<sup>110</sup> See further Skardhamar, T. & Savolainen, J., "Changes in Criminal Offending around the Time of Job Entry: A Study of Employment and Desistance" (2014) 52(2) *Criminology* 263

questions whether employment can produce desistance.<sup>111</sup> Other scholars have theorised that within these processes, employment often follows on from internal factors which trigger desistance, and can play a role in strengthening and sustaining desistance.<sup>112</sup> One Norwegian study looking at the relationship between employment and the desistance process showed that study participants had shown more significant declines in criminal activity preceding their entry to employment than was evidenced in the post-employment period.<sup>113</sup> This finding may, however, be influenced by broader considerations, including the fact that Norway's strong welfare state provides strong supports independent of employment for persons with convictions. This complex relationship between employment and recidivism has also been highlighted in O'Donnell's recent evidence review on recidivism.<sup>114</sup>

Nonetheless, various studies of employment programmes provided to individuals previously involved in offending in the UK have found decreased recidivism rates amongst programme participants.<sup>115</sup> It is also important to remember that finding and retaining employment is one of the desired intermediated outcomes for successful reducing reoffending programmes.<sup>116</sup> Finally, it has also been suggested that the quality of employment can impact on the association between employment and recidivism.<sup>117</sup>

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<sup>111</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at pp.2-3

<sup>112</sup> Aaltonen, M., "Post-release Employment of Desisting Inmates" (2016) 56(2) *British Journal of Criminology* 350 at pp.350-351

<sup>113</sup> Skardhamar, T. & Savolainen, J., "Changes in Criminal Offending around the Time of Job Entry: A Study of Employment and Desistance" (2014) 52(2) *Criminology* 263 at p.286

<sup>114</sup> O'Donnell, I. 2020, An Evidence Review of Recidivism and Policy Responses, Department of Justice and Equality.

<sup>115</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at p.3

<sup>116</sup> Sapouna, M. Bisset, C., Conlong, A. and Matthews, B. 2015 What works to reduce reoffending: A Summary of the Evidence, The Scottish Government see: <https://www2.gov.scot/Publications/2015/03/7005>

<sup>117</sup> Ramakers et al 2017, Vol. 61(16) 1795–1818 Not Just Any Job Will Do: A Study on Employment Characteristics and Recidivism Risks After Release *International Journal of Offender Therapy and Comparative Criminology*

### 3.5 Fine-tuning spent convictions regimes

Countries take a wide variety of different approaches to either expungement of criminal records or developing systems where convictions become 'spent'.<sup>118</sup> Spent convictions regimes which set processes for minor offences to become spent are common.<sup>119</sup> In some cases, spent conviction regimes have been confined to older and to less serious forms of offending.<sup>120</sup> In relation to more serious offences, some countries allow for these convictions to become spent after a set period of time has passed.<sup>121</sup> It is also common for jurisdictions to set out specific periods of time which must have elapsed before a conviction can be considered to be 'spent', although approaches to this issue, too, can vary depending on whether a 'one-size-fits-all' or a situation-specific approach is adopted.<sup>122</sup>

In many countries, however, exceptions exist to the standard provisions setting out when convictions are likely to become 'spent'.<sup>123</sup> These exceptions reflect the desire to ensure that people with convictions for sexual crimes, for example, are not permitted to work with vulnerable groups such as children.<sup>124</sup> In England & Wales and Northern Ireland, which

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<sup>118</sup> Mujuzi, J.D., "Spent Convictions in Hong Kong" (2018) 44(3) *Commonwealth Law Bulletin* 519 at pp.519-520

<sup>119</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.949-951

<sup>120</sup> Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.83; Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171 at p.179

<sup>121</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.951

<sup>122</sup> Mujuzi, J.D., "Spent Convictions in Hong Kong" (2018) 44(3) *Commonwealth Law Bulletin* 519 at p.535; see further Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.84

<sup>123</sup> Thomas, T. & Heberton, B., "Dilemmas and consequences of prior criminal record: a criminological perspective from England and Wales" (2013) 26(2) *Criminal Justice Studies: A Critical Journal of Crime, Law and Society* 228 at pp. 237-238; Mujuzi, J.D., "Spent Convictions in Hong Kong" (2018) 44(3) *Commonwealth Law Bulletin* 519 at pp.540-546; Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.85

<sup>124</sup> Naylor, B., "Do Not Pass Go: The impact of criminal record checks on employment in Australia" (2005) 30(3) *Alternative Law Journal* 174 at p.175; Fitzgerald O'Reilly, M., "Information Pertaining to Released Sex Offenders: To Disclose or Not to Disclose, that is the Question" (2018) 57(2) *The Howard Journal of Crime and Justice* 204

require disclosure of convictions that would otherwise be considered 'spent' had they not been subject to exceptions relating to specific professions, the UK Supreme Court found that disclosures relating to reprimands (rather than the conviction) issued when the appellant concerned was a young person were incompatible with Article 8 of the ECHR. However, the UK Supreme Court further found (though there was a strong dissenting judgment) the exceptions schemes provided for did not breach the rights of adults who had been involved in minor offending, on the basis that they were a proportionate response to the legitimate aim involved in safeguarding the public and that the schemes had adequate safeguards built into them.<sup>125</sup> Exceptions for sexual offences have also been built into some models for spent convictions.<sup>126</sup> It has been highlighted that these exceptions tend to ignore research evidence that sex offending does not always carry a higher risk of recidivism than other types of offending.<sup>127</sup> The effect of a spent conviction, other than if it falls into one of the exceptions set out by law, is that there is no longer an obligation to disclose it, and potential employers may no longer take it into account in making assessments about the individual involved.<sup>128</sup>

Where there was a lack of systematic regulation of necessary disclosures relating to criminal records, the use of discretion can present challenges. The desirability of a legal framework which regulates employer use of criminal checks and which regulates the use of employer discretion in this area has been highlighted, in addition to the desirability of national spent convictions schemes.<sup>129</sup> It has also been suggested that there may also be a need to engage in providing employers with education and knowledge around the significance of criminal records, about the relevance and meaning of spent convictions schemes, and to provide clarity about the types of questions they can ask.<sup>130</sup>

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<sup>125</sup> Marshall, K.L., "Reformed Offenders, Criminal Record Disclosures and Employment: Case Note and Comment" (2019) 78(3) *The Cambridge Law Journal* 503

<sup>126</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at pp.951-953

<sup>127</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.952; Fitzgerald O'Reilly, M., "Information Pertaining to Released Sex Offenders: To Disclose or Not to Disclose, that is the Question" (2018) 57(2) *The Howard Journal of Crime and Justice* 204 at p.219

<sup>128</sup> Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.84

<sup>129</sup> Heydon, G., Naylor, B., Paterson, M. & Pittard, M., "Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel" (2011) 32 *Adelaide Law Review* 205 at pp.220-221

<sup>130</sup> Naylor, B., "Do Not Pass Go: The impact of criminal record checks on employment in Australia" (2005) 30(3) *Alternative Law Journal* 174 at p.179

It has been suggested that where exclusions to spent convictions schemes based on the category of offence are included, it may be useful to consider incorporating a discretionary procedure to allow individual cases to be given consideration, given the high level of variation amongst convicted people both with regard to moral culpability and with regard to future risk.<sup>131</sup> It has further been suggested that an alternative option may exist in imposing restrictions on the dissemination of criminal records so that a potential employer is only provided with details of the convictions which are relevant to the specific job that he may employ the individual for e.g. disclosing offences involving dishonesty in relation to jobs requiring responsibility for financial transactions, or disclosure of offences of a violent or sexual nature where the job involves care of vulnerable categories of people.<sup>132</sup>

It has been highlighted that in order to be effective, it may be useful for spent convictions legislation to entitle an individual to omit information about convictions that are spent to include specific reference to questions about “charges” and “contact with the criminal justice system” as well as in response to questions about convictions or criminal history.<sup>133</sup>

Other features which have been suggested in the context of reforming spent convictions legislation is to introduce an offence which would make a person with access to public convictions records criminally responsible to disclose information about a conviction if he or she knows, or ought reasonably to know, that the conviction was spent and disclosed the information without the consent of the individual concerned.<sup>134</sup>

Objections to spent convictions regimes are sometimes based on the fact that they limit access to information which employers and others in society feel that they have a right to access.<sup>135</sup> Studies of employers’ attitudes in this area have highlighted the fact that

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<sup>131</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.953

<sup>132</sup> Paterson, M. “Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison” (2011) Vol. 1 *New Zealand Law Review* 69 at pp.87-89

<sup>133</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.955

<sup>134</sup> Paterson, M. “Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison” (2011) Vol. 1 *New Zealand Law Review* 69 at p.86

<sup>135</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at pp.941-3

employers often want to know about a potential employee's criminal record.<sup>136</sup> In contrast, however, the importance of spent convictions regimes to reduce continuing indirect punishment and to enhance prospects for rehabilitation is emphasised within the available literature in this area.<sup>137</sup> While it has been noted that approaches based on explicitly prohibiting discrimination on the basis of an irrelevant criminal conviction has been adopted in some countries, reducing employers' access to records relating to criminal histories may be a "blunter tool" that has "the advantage of reducing some of the means for discrimination".<sup>138</sup>

### 3.6 Proportionality and spent conviction regimes

The important principle of proportionality in sentencing can also be considered in relation to spent conviction regimes. Justifications for spent convictions regimes often rely on the fact that they allow those with minor convictions, and those with more serious convictions which has been followed by a long period of good behaviour, to make a fresh start, and to ensure that convicted people are not burdened with the stigma attached to conviction indefinitely.<sup>139</sup> They are also based on the principle that the relevance of past offences to decision-making about the offender decreases with the increasing passage of time.<sup>140</sup> Aside from these considerations, however these regimes also reflect the principle that sentences should be proportionate to the seriousness of the harm caused by the offence.<sup>141</sup> The research literature does expand very little specifically on the different 'ranges of differentiation' between different spent conviction regimes, but seems to generally highlight its differentiated approach as one of its key strengths. In this vein, the result of social science research indicates that blanket provisions for all types of offence categories would not make sense,

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<sup>136</sup> Heydon, G., Naylor, B., Paterson, M. & Pittard, M., "Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel" (2011) 32 *Adelaide Law Review* 205 at p.219

<sup>137</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.9

<sup>138</sup> Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.71; see further Naylor, B., Paterson, M. and Pittard, M. 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32(1) *Melbourne University Law Review* 171 pp.181-184

<sup>139</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.940

<sup>140</sup> Paterson, M. "Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison" (2011) Vol. 1 *New Zealand Law Review* 69 at p.83

<sup>141</sup> Paterson, M. & Naylor, B., "Australian Spent Convictions Reform: A Contextual Analysis" (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.940



but that individuals with criminal records can be differentiated a priori on the basis of different elements of their criminal history and spent convictions therefore should be designed on the basis of conviction lengths/types.<sup>142</sup> An important recent study using a large scale Dutch data set of men convicted in 1977 and a matched group of previously unconvicted men, showed that, although the ‘risk of reconviction for offenders initially is high, most offenders eventually resemble nonoffenders in terms of their conviction risk.’ The study differentiates between age and amount of offences and concluded that ‘redemption time was shortest for older offenders and those with less extensive criminal histories.’ Older offenders with no prior crimes began to look like nonoffenders after 2-6 years’...while ‘offenders with four or more offenses either never resemble nonoffenders or only begin to do so after a minimum of 23 years.’<sup>143</sup>

### 3.7 Spent convictions, reintegration and drug offences

The provision of more generous access to spent convictions for minor drug offences, as proposed in substantive amendment f. above, appears to be in line with the ‘quiet revolution’ towards public health led rather than criminal justice led responses to drug related crimes and harms, particularly in relation to simple possession offences. An increasing number of jurisdictions have chosen to move towards decriminalisation and in some instances even legalisation of minor drug offences.<sup>144</sup> These moves are predicated on a rich body of evidence that has documented the vicious cycle between criminalisation, incarceration and drug use and better outcomes through health led approaches for individuals and communities affected by drug use.<sup>145</sup>

Globally, as well as in Ireland, poverty and problematic drug use are closely related.<sup>146</sup> In Ireland, 66% of people receiving treatment for opiate use in Ireland were unemployed and

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<sup>142</sup> Denver, M., Siwach, G. and Bushway, S. 2017. A new look at the employment and recidivism relationship through the lens of a criminal background check. *Criminology* Volume 55 Number 1 174–204.

<sup>143</sup> Bushway, Shawn D., Paul Nieuwbeerta, and Arjan Blokland. 2011. The predictive value of criminal background checks: Do age and criminal history affect time to redemption? *Criminology* 49:27–60.

<sup>144</sup> A Quiet Revolution: Drugs Decriminalisation Practices Across the Globe, Rosmarin & Eastwood, 2012 at page 32, see <https://www.drugsandalcohol.ie/18327/>

<sup>145</sup> European Monitoring Centre for Drugs and Drug Addiction (2012). *Social reintegration and employment: evidence and interventions for drug users in treatment*. p.41 and p.44

<sup>146</sup> Stevens, A. (2010). *Drugs, crime and public health: The political economy of drug policy*. Abingdon: Routledge. Avelardo Valdez,<sup>1</sup> Charles D. Kaplan,<sup>1</sup> and Russell L. Curtis, Jr (2007) *Aggressive Crime*,

10% were homeless.<sup>147</sup> Recent Irish research has documented amongst other findings how problematic drug use is associated with the experience of deep poverty, and the feeling of not having a stake in society, particularly also lacking employment.<sup>148</sup> Persons with problematic drug use habits, usually face additional barriers on their journeys to social reintegration, particularly when looking for employment.<sup>149</sup> They are faced with the double stigma of a criminal conviction<sup>150</sup> on top of the label of 'drug user'<sup>151</sup>. This is experienced in addition to difficulties along non-linear drug rehabilitation journeys.<sup>152</sup> The importance of employment as a factor for rehabilitation and social reintegration has been highlighted by numerous pieces of research. Some studies have shown through randomised control trials, how employment has a positive effect on recovery from drug use.<sup>153</sup> Specifically in relation to drug courts, research in some jurisdictions, including Canada and the United States points to increased chances of employment for those attending drug courts, indicating positive relationship between employment and ceasing of problematic drug use.<sup>154</sup> In the European context, lack of similar available research has been highlighted.<sup>155</sup> Equally, the limited

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Alcohol and Drug Use, and Concentrated Poverty in 24 U.S. Urban Areas. *The American Journal of Drug and Alcohol Abuse*, 33: 595–603

<sup>147</sup> Department of Health (2019). Working group to consider alternative approaches to the possession of drugs for personal use. Online. Available from: <https://health.gov.ie/wp-content/uploads/2019/08/Report-of-Working-Group-Alternatives-Possession-of-Drugs.pdf>

<sup>148</sup> Leonard, James and Windle, James (2020) 'I could have went down a different path': Talking to people who used drugs problematically and service providers about Irish drug policy alternatives. *International Journal of Drug Policy*, 84, p. 102891

<sup>149</sup> Holzer HJ, Raphael S, Stoll MA. Employment barriers facing exoffenders. Center for the Study of Urban Poverty Working Paper Series, 2003. 15

<sup>150</sup> Harris PM, Keller KS. Ex-offenders need not apply: the criminal background check in hiring decisions. *J Contemp Criminal Justice* 2005;21:6–30.

<sup>151</sup> Webster JM, Staton-Tindall M, Duvall JL, Garrity TF, Leukefeld CG. Measuring employment among substance-using offenders. *Subst Use Misuse* 2007;42:1187–1205.

<sup>152</sup> Wong CJ, Silverman K. Establishing and maintaining job skills and professional behaviors in chronically unemployed drug abusers. *Subst Use Misuse* 2007;42:1127–1140.

<sup>153</sup> J. Matthew Webster, Michele Staton-Tindall, Megan F. Dickson, John F. Wilson, and Carl G. Leukefeld (2014). Twelve-month employment intervention outcomes for drug-involved offenders *Am J Drug Alcohol Abuse*, 2014; 40(3): 200–205

<sup>154</sup> Cooper, C. S., Franklin, B. and Mease, T. (2010), Establishing drug treatment courts: strategies, experiences and preliminary outcomes. Volume one: overview and survey results. Prepared for the Drugs Summit: European, Latin American and Caribbean Mayors and Cities, 21–23 April 2010, Lugo, Spain. Organization of American States, Washington, DC.

<sup>155</sup> European Monitoring Centre for Drugs and Drug Addiction (2012). *Social reintegration and employment: evidence and interventions for drug users in treatment*. p.80

availability of evidence as to the effects of the regulation of criminal records specifically for drug users' access to employment, has been noted.<sup>156</sup>

### 3.8 Young adults, recidivism and spent convictions

Effective spent conviction regimes can be particularly important for individuals who came into conflict with the law as children, or as young adults. The age-crime curve has been well documented in life-course criminology, i.e. that the propensity to get involved in offending behaviour decreases with age<sup>157</sup> and that the impact of life events, such as access to education and work opportunities are age graded.<sup>158</sup> Gottfredson and Hirschi's seminal study from the 1980s showed conclusively through empirical data that even people with extensive criminal histories desist as they age.<sup>159</sup> Their study has since then been confirmed across many different contexts.<sup>160</sup> More recently, the new brain science and recidivism literature has also offered new evidence why every effort needs to be undertaken to support de-labelling processes for persons who have come into trouble with the law while young. It shows effectively how brain development helps to explain poor decision making, peer influences and risk-taking behaviours and how these behaviours cease from the early twenties onwards with increasing brain maturation.<sup>161</sup> Criminal records of young people

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<sup>156</sup> UKDPC (UK Drug Policy Commission) (2008a), Working towards recovery: getting problem drug users into jobs, UKDPC, London. Page 137.

<sup>157</sup> Tracy, P. et al., Delinquency careers in two birth cohorts 5 (1990); Sampson, R. J. and Laub, J.H. (2003) *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, *Criminology* 301-330

<sup>158</sup> Elder, Glen H. 1975. Age differentiation and the life course. *Annual Review of Sociology* 1:165–90; Laub, John H., and Robert J. Sampson. 1993. Turning points in the life course: Why change matters to the study of crime. *Criminology* 31:301–25; Uggen, Christopher. 2000. Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review* 67:529–46.

<sup>159</sup> Gottfredson, M.R. & Hirschi, T. (1986) *The True Value of Lambda Would Appear to be Zero: An Essay on Career Criminals, Criminal Careers, Selective Incapacitation, Cohort Studies, and Related Topics*, *Criminology* 213- 221

<sup>160</sup> Maruna, S. (2001) *Making Good: How Ex-Convicts Reform And Rebuild Their Lives*; page 20

<sup>161</sup> Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, and Miller/Jackson, and the Youth Discount*, 31 *LAW & INEQ.* 263, 264 (2013) (using the Supreme Court jurisprudence to argue for a formal method that he terms “the Youth Discount” to mitigate the sentences of juveniles because of their lessened culpability); Elizabeth S. Scott, “*Children are Different*”: *Constitutional Values and Justice Policy*, 11 *OHIO ST. J. CRIM. L.* 71, 72 (2013) (explaining that the recent Supreme Court cases support a developmental approach to juvenile justice policy).

therefore are likely to make 'unreliable inferences about the likelihood of reoffending that is not supported by criminologists' desistance research or brain development research.'<sup>162</sup>

It is noteworthy that both the type of records that can be kept about children's contact with the criminal justice system, and the length of time that they can be held for, has expanded in countries such as the UK.<sup>163</sup> The retention of criminal records relating to children can have a significant impact on their lives in later years. This can be so even in relation to minor offences, where disclosure may impact ability to travel, ability to access other opportunities such as employment and training, and may be considered relevant to later court proceedings.<sup>164</sup> It has been highlighted that where individuals fail to disclose a childhood conviction due to an honest but mistaken belief that it is not necessary under the relevant legal framework, it can lead to serious consequences, including dismissal from current employment.<sup>165</sup> In countries where there is an obligation to disclose reprimands or final warnings received as a minor, this can have significant consequences for a young person in their future lives.<sup>166</sup>

Uggen's seminal study, investigating whether work provided a turning point in the life course of people with convictions, concluded that employment works as a strong predictor of self-reported recidivism. With regards to age, Uggen's study concluded that those aged 27 or older were 'less likely to report crime and arrest when provided with marginal employment opportunities than when such opportunities are not provided'.<sup>167</sup> This finding is important for considering the length of spent conviction timeframes for young people, as it most likely

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<sup>162</sup> Radice, J. (2018) The Juvenile Record Myth, *Georgetown Law Journal*, Vol. 106, No. 2; 2018: page 418.

<sup>163</sup> Williams, C., 'The Growth and Permanency of Criminal Records with Particular Reference to Juveniles' (2011) 84(2) *Police Journal* 171

<sup>164</sup> Williams, C., 'The Growth and Permanency of Criminal Records with Particular Reference to Juveniles' (2011) 84(2) *Police Journal* 171 at p.172-3

<sup>165</sup> Heydon, G., Naylor, B., Paterson, M. & Pittard, M., "Lawyers on the Record: Criminal Records, Employment Decisions and Lawyers' Counsel" (2011) 32 *Adelaide Law Review* 205 at p.206

<sup>166</sup> Williams, C., 'The Growth and Permanency of Criminal Records with Particular Reference to Juveniles' (2011) 84(2) *Police Journal* 171 at p.180

<sup>167</sup> Uggen, C. 2000. Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review* 67. Page 542.

would be counterproductive if the requirement to indicate a criminal record would have any relevance past the age of 27 for offences committed earlier.<sup>168</sup>

Studies have indicated that involvement in developmentally normative gainful employment is useful in reducing offending behaviour amongst young people, and that this effect is strongest where the young person is also engaged in school.<sup>169</sup> Some research carried out in the Netherlands for example has shown evidence of reduced offending amongst juveniles during periods of employment.<sup>170</sup> Examples of employment programmes providing paid work for a specified time period for young people involved with Youth Offending Teams in the UK have been found to be useful in reducing levels of offending amongst participants.<sup>171</sup>

For young people, like adults, however, the quality of the employment that young people have access to may be significant. It has been highlighted that engagement in meaningful work where young people can appreciate the benefit of their work to the wider community, and the development of pro-social relationships with co-workers and supervisors can be important for young people involved in employment programmes.<sup>172</sup> The ability to earn money legitimately can reduce the need for young people to engage in illegal activities to provide a source of income.<sup>173</sup> The development of relationships with co-workers has been found, in the context of employment programmes for young people involved in Youth Offending Teams in the UK to provide alternative peer group networks for young people.<sup>174</sup>

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<sup>168</sup> Uggen, C. 2000. Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review* 67. Page 537

<sup>169</sup> Monahan, K.C., Steinberg, L. & Cauffman, E., "Age Differences in the Impact of Employment on Antisocial Behaviour" (2013) 84(3) *Child Development* 791 at pp.798-800

<sup>170</sup> Skardhamar, T. & Savolainen, J., "Changes in Criminal Offending around the Time of Job Entry: A Study of Employment and Desistance" (2014) 52(2) *Criminology* 263 at p.267

<sup>171</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at p.2

<sup>172</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at pp.5-10

<sup>173</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at p.11

<sup>174</sup> Oswald, R.J., "Exploring how employment schemes for young offenders aid desistance from crime" (2020) *Probation Journal* 1 at p.13

### 3.9 Human rights considerations in developing spent convictions regimes and ‘the right to be forgotten’

Considerations relating to human rights may also apply in the context of spent convictions, particularly in relation to an individual’s right to a private life.<sup>175</sup> It is worthy of note that the UK Supreme Court has found legislation that required disclosure on enhanced criminal record certificates of all convictions (including situations where the individual had accepted warnings or cautions in relation to minor offences) was incompatible with Article 8 of the European Convention on Human Rights, in that the relevant legislation at the time did not meet the requirement that the interference was ‘in accordance with law’ or that the interference was ‘necessary in a democratic society’.<sup>176</sup> Factors that may be considered in relation to an individual’s rights in relation to spent conviction legislation may include whether there is a clear legislative framework, whether there is an independent mechanism to allow for review of a decision to retain or disclose data, and the failure to draw distinctions based on the nature of the offence, the disposal in the case, the time elapsed since the offence and the relevance of the data to the employment sought.<sup>177</sup>

It has been suggested that since the continued ability to draw adverse judgments about someone based on an individual who has served the sentence lengthens the penalty imposed, the acceptability of this – and any correlating spent convictions framework – should be linked to the principles underlying the sentencing process.<sup>178</sup> In this vein, it has been highlighted that proportionate sentencing is consistent with human rights prohibitions on cruel, inhuman and degrading treatment or punishment.<sup>179</sup> Commentators in this area have

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<sup>175</sup> See Mujuzi, J.D., “Spent Convictions in Hong Kong” (2018) 44(3) *Commonwealth Law Bulletin* 519 at p.546

<sup>176</sup> Jackson, A., “Criminal Records, Enhanced Criminal Records Certificates and Disclosure of Spent Convictions: Impact of ECHR, Article 8” (2014) 78(6) *Journal of Criminal Law* 463 at pp.463-464; see further *R. (on the application of T) v Chief Constable of Greater Manchester* [2014] UKSC 35; [2015] A.C. 49; [2014] 6 WLUK 541 (SC)

<sup>177</sup> Jackson, A., “Criminal Records, Enhanced Criminal Records Certificates and Disclosure of Spent Convictions: Impact of ECHR, Article 8” (2014) 78(6) *Journal of Criminal Law* 463 at p.466

<sup>178</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.943 *et seq.*

<sup>179</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at pp.944-945

noted that “opaque, inflexible and indiscriminate statutory regimes for the collection and use of personal information” may be susceptible to legal challenge.<sup>180</sup>

In terms of proportionality, attention needs to be paid to the length of time which must expire before a conviction becomes spent; it has been argued that too long a period of “further incidental punishment” through the ability of potential employers and others to access information about the conviction may not meet considerations relating to proportionality, particularly where guidelines are excessively rigid, and may result in a reduced capacity for rehabilitation during this additional time period.<sup>181</sup> Some scholars have suggested that what is known about drivers of recidivism should be taken into account in designing a spent convictions regime; however, this should be done in conjunction with considering the potential of convicted people for rehabilitation and the benefits of promoting effective rehabilitation in order to address both rehabilitation and community safety.<sup>182</sup> While it is important to note that different approaches have been taken across jurisdictions to the eligibility period in which sentences become spent, it has also been suggested that the type of offence could be taken into account in deciding on the relevant period, as well as taking into account the original sentence length.<sup>183</sup>

While spent convictions are a crucial component in thinking about supporting people who have been convicted of offences to reintegrate successfully into their community and to access employment, the ease of access now provided to information published in the media about people’s past convictions present a further challenge for individuals in this situation.<sup>184</sup> While full discussion of this issue is beyond the scope of this paper, it is worth noting that a body of literature now exists considering the establishment and development of a ‘right to be forgotten’.<sup>185</sup> There are also mechanisms through which individuals can seek to be

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<sup>180</sup> Jackson, A., “Criminal Records, Enhanced Criminal Records Certificates and Disclosure of Spent Convictions: Impact of ECHR, Article 8” (2014) 78(6) *Journal of Criminal Law* 463 at p.466

<sup>181</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at p.953

<sup>182</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at pp.947-948

<sup>183</sup> Paterson, M. & Naylor, B., “Australian Spent Convictions Reform: A Contextual Analysis” (2011) 34(3) *The University of New South Wales Law Journal* 938 at pp.954-955

<sup>184</sup> Stacey, C., “Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records” (2017) 64(3) *Probation Journal* 269

<sup>185</sup> Stacey, C., “Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records” (2017) 64(3) *Probation Journal* 269; Fitzpatrick, P., Adde, L. & Moir, A., “High Court of England and Wales

‘delisted’.<sup>186</sup> Individuals with convictions have been successful in seeking to become delisted in court cases, where it the court considered that the spent conviction was ‘out of date, irrelevant, and of no sufficient legitimate interest’.<sup>187</sup> For now, it is worth noting that while an effective spent convictions regime is very important for individuals seeking to re-establish themselves after a conviction, the public accessibility of information about past offences online can have the potential to undermine the purpose of spent convictions legislation.<sup>188</sup>

### 3.10 Spent conviction regimes and the reintegrative state: a political choice

The criminological literature theorises spent convictions legislation as strategy of ‘judicial reintegration’ and the issuing of a ‘kind of a passport’, a process of formal, legal de-labelling in which the status of the (once-degraded) citizen is elevated and restored’.<sup>189</sup> Being given a ‘clean slate’ by the state can have powerful emotional reintegrative effects. In her analysis of French judicial rehabilitation, Herzog -Evans (2011), describes the emotional effects of the very formal process at Court, when justice involved persons are cleared of the duty of having to declare their serious offences on paperwork for employment and beyond. Judges and lawyers involved in the process retell the very moment of expungement of offences: ‘...the atmosphere in the court was poignant. Many ex-offenders have a trembling voice, and cry when the ruling is voiced. The effect resembles citizenship ceremonies. There is a shared feeling of extreme satisfaction, elation even, both for the Court (which is also ‘making good’ on such occasions) and the ex-offender. The sense of pride, of being welcomed (in this instance back) into the community (remember Braithwaite’s model too) is palpable and mirrored by the court’s obvious pleasure at having thus ruled’.<sup>190</sup> This more explicit expungement regime is of course very different from less ceremonial spent conviction regimes, yet it indicates the emotive and significant nature of being allowed to legally disidentify from one’s history.

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considers ‘right to be forgotten’ for the first time” (2018) 13(12) *Journal of Intellectual Property Law and Practice* 935

<sup>186</sup> Stacey, C., “Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records” (2017) 64(3) *Probation Journal* 269 at pp.271-273

<sup>187</sup> Fitzpatrick, P., Adde, L. & Moir, A., “High Court of England and Wales considers ‘right to be forgotten’ for the first time” (2018) 13(12) *Journal of Intellectual Property Law and Practice* 935 at p.937

<sup>188</sup> Stacey, C., “Rehabilitation in the internet age: The Google-effect and the disclosure of criminal records” (2017) 64(3) *Probation Journal* 269 at p.274

<sup>189</sup> McNeill, F. (2018:17) Rehabilitation, corrections and society: the 2017 ICPA Distinguished Scholar Lecture. *Advancing Corrections Journal*, 5, pp. 10-20

<sup>190</sup> Herzog-Evans, M. (2011: 135) Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance, *European Journal of Probation* Vol 3, Issue 1, 2011



State-of-the-art thinking on the role of the state in reducing above mentioned 'collateral consequences' of punishment, points to the central importance of the 'reintegrative state', which has as its goal 'to respond to the reality that all people with criminal convictions, whether they have served time, whether the convictions are minor or severe, whether there is one conviction or many, suffer a social, political, and economic stigma created or permitted by the state.'<sup>191</sup> This vision of the 'reintegrative state', then would generally encourage very comprehensive and generous spent conviction regimes.

The reintegrative state on the other hand has to facilitate the dual role of reintegrating people with one or more criminal convictions and while also protecting the public from potential future harm. Arguably, the reintegrative state can resolve this tension, by '...taking into account the research of criminologists who study which criminal records predict future criminal behaviour. This research finds that the vast majority of people with records stop committing crimes, that factors like age and employment matter, and that after six to ten years, most people with convictions are no more likely to commit a crime than those who have no criminal history.'<sup>192</sup>

Criminological research suggests that more generous spent conviction regimes, i.e. those extending to and including more serious types/frequent offences, might be useful in removing above mentioned stigma from justice involved persons, hence facilitating reintegration and as a consequence also public safety. For example, a qualitative study conducted from 2014 to 2016 with a representative sample of 53 expungement seekers in Pennsylvania, sought to understand the impact of expungement processes on justice involved persons. The study identified significant differences between people with minor versus those with extensive criminal records. Interestingly, those with more extensive criminal records reported that they sensed very strongly that the challenges they faced with successfully expunging their criminal records, did not acknowledge the significant personal transformations they had undergone in their lives. Those with more minor convictions on the other hand, felt that the experienced difficulties with gaining access to expungement, was to the 'system's' fault.<sup>193</sup> People with more serious criminal records took the responsibility of their convictions more seriously.

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<sup>191</sup> Radice, J. The reintegrative state *Emory Law Journal*, 09/2017, Volume 66, Issue 6

<sup>192</sup> Radice, J. (2017:1315) The reintegrative state *Emory Law Journal*, 09/2017, Volume 66, Issue 6

<sup>193</sup> Ispa-Landa, S. and Loeffler, C.E. (2016), Indefinite Punishment and the Criminal Record: Stigma Reports among expungements-seekers in Illinois, in: *Criminology* 8/2016, Volume 54, Issue 3



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