

CRIMINALS, DATA PROTECTION, AND THE RIGHT TO A SECOND CHANCE

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In 2016 Ireland belatedly introduced legislation to allow for the expungement of adult criminal records and, in doing so, highlighted a changing technological and legal context which challenges the assumptions underlying rehabilitation laws. The potential impact of convictions on individuals' life chances has increased as mandatory vetting has become more widespread. Even where vetting is not required, internet search engines render criminal histories easily accessible to curious third parties. In the other direction, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have developed privacy and data protection principles which require states to limit the availability of information about old convictions. In this article we outline the limitations of the Irish legislation and use it as a case study to consider these wider issues, examining how it illustrates the growing importance of European privacy and data protection norms in national criminal justice and rehabilitation systems.

THINKING ABOUT EXPUNGEMENT

It could be said that the expungement of criminal records is a form of institutionalised dishonesty in that it involves concealing evidence of conduct that deserves to be remembered; that it allows offenders evade responsibility for their actions; that it prevents the parties to an employment contract creating a relationship based on good faith; and that it is contrary to victims' interests.¹

Contrariwise, there are several arguments in favour of giving convicted offenders an opportunity to wipe the slate clean and to re-engage with society as if they had never

¹ See eg M.A. Franklin and D. Johnsen, "Expunging Criminal Records: Concealment and Dishonesty in an Open Society" (1980) 9 *Hofstra Law Review* 733.

broken its laws. First of all, by erecting – and maintaining – barriers to full civic engagement the potential exists for the emergence of a criminal underclass: this is contrary to public safety. Secondly, by pushing to the margins a group of citizens that is already likely to be bearing the burden of multiple layers of disadvantage, society deprives itself of their skills and talents while absorbing the costs of their unproductivity: this is poor economic planning. Thirdly, if there is no chance of a fresh start the criminal record can continue to diminish life chances beyond the point where the bearer presents any meaningful risk: this is disproportionate punishment.²

It has always been challenging to find an appropriate balance between these competing (and not necessarily incompatible) priorities of resettling offenders through inclusion and protecting society through exclusion. A range of responses is possible and societies may incline towards different ends of the spectrum at different points in time. For example, the exclusionary tendency might be more pronounced when fear of crime is high, law and order are hot political topics, and confidence in the rehabilitative potential of the criminal justice system is low. The inclusionary impulse might be more evident when there is a low level of crime and a high level of trust. Similarly, the framing of the debate varies. In some cases the discussion is largely a utilitarian assessment of the effect of expungement on preventing reoffending, while in others there is an attempt to factor in the rights of the former offender.

In recent years, across the common law world, considerations of public protection have tended to dominate. Reviewing the situation in the US and UK in 2001, Garland identified a marked diminution in the rights of those whose lives have been marked by contact with the criminal justice system:

The assumption today is that there is no such thing as an “ex-offender” – only offenders who have been caught before and will strike again. “Criminal” individuals have few privacy rights that could ever trump the public’s uninterrupted right to know.³

² See eg E.B. Adams, E.Y. Chen, and R. Chapman, “Erasing the Mark of a Criminal Past: Ex-Offenders’ Expectations and Experiences with Record Clearance” (2017) 19(1) *Punishment & Society* 23.

³ D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001), pp.180–81.

Since then, this trend has continued and its impact has been compounded by the growth of the internet. Mandatory vetting rules have become widespread, increasing the number of occupations which require a criminal background check.⁴ For other occupations internet search engines provide easy access to media reports about arrests, trials and convictions, thereby undermining laws which relied on the practical obscurity of old proceedings.

More recently again, however, a widening understanding of privacy and data protection rights has begun to force a re-evaluation of national expungement practices. Both the European Court of Human Rights and the Court of Justice of the European Union have established principles that enable a former offender to limit the availability of information about old convictions where to do so would have a disproportionate effect on their right to private life.⁵

Developments in Ireland provide us with the opportunity to analyse these issues and to offer a perspective that may be of interest to comparativists. The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 introduced expungement of adult criminal records into Irish law. We begin by describing the legal context leading up to the 2016 Act. We outline its provisions, assessing how likely it is to benefit ex-offenders. We discuss how the 2016 Act was influenced by fundamental rights considerations, and consider how it illustrates the growing importance of European privacy and data protection norms in shaping and supplementing national expungement schemes. Finally, we examine the lessons of the Irish experience for the future of rehabilitation laws more generally.

DEVELOPMENT OF SPENT CONVICTIONS LAW IN IRELAND

Spent conviction legislation was unknown in Irish law until s. 258 of the Children Act 2001 introduced a three-year rehabilitation period for offences committed by children.

⁴ See e.g. E. Larrauri Pijoan, "Criminal Record Disclosure and the Right to Privacy" [2014] *Criminal Law Review* 723.

⁵ *MM v United Kingdom*, application 24029/07, judgment of 13 November 2012 and *Google Spain SL and Google Inc v Agencia Española de Protección de Datos and Mario Costeja González*, C-131/12, EU:C:2014:317, judgment of 13 May 2014. See e.g. E. Larrauri Pijoan, "Legal Protections against Criminal Background Checks in Europe" (2014) 16(1) *Punishment & Society* 50.

This provision – modelled on the UK's Rehabilitation of Offenders Act 1974 – automatically clears the record of offences committed before reaching the age of 18, provided that an individual does not commit any further offence within three years of the date of conviction. It excludes only a small category of extremely grave crimes such as murder and rape.⁶

The 2001 Act highlighted the lack of any rehabilitation law for adult offenders and contributed to an emerging consensus that some form of general spent convictions system was necessary. Over the next four years, reports from the National Economic and Social Forum (NESF),⁷ Equality Authority⁸ and the Irish Human Rights Commission (IHRC)⁹ all criticised the fact that Ireland was the only EU country which did not allow for some form of rehabilitation for adult offenders, arguing that this was both a human rights issue and a practical barrier to gaining employment on release from prison. In each case these reports argued for both expungement provisions and protection against discrimination on the grounds of a criminal record.

The issue was considered in more detail by the Law Reform Commission (LRC) in its *Report on Spent Convictions*¹⁰ which recommended that the model set out under the 2001 Act should be extended to adult offenders, but subject to significant restrictions. In particular, the LRC recommended that all convictions resulting in more than a six-month sentence should be excluded from the scheme, with all sexual offence convictions also excluded irrespective of the length of sentence imposed. Other convictions would be capable of being expunged following a conviction-free period of five years (for non-custodial sentences) or seven years (for custodial sentences). Following this period, the general rule would be that offences need no longer be disclosed in most contexts, with exceptions for certain forms of litigation (such as child care proceedings) and for certain classes of employment, professions and activities.

⁶ S.258(1)(b) of the Children Act 2001 excludes "offences required to be tried by the Central Criminal Court".

⁷ *Re-Integration of Prisoners* (Dublin: National Economic and Social Forum, 2002), paras 6.23-6.25.

⁸ *Review of Discriminatory Grounds Covered by the Employment Equality Act 1998* (Dublin: Equality Authority, 2002).

⁹ *Extending the Scope of Employment Equality Legislation* (Dublin: Irish Human Rights Commission, 2005), pp.6-10.

¹⁰ *Report on Spent Convictions* (Dublin: Law Reform Commission, 2007).

The LRC recommendations were initially accepted without demur by the main political parties. The draft Bill attached to the LRC Report was introduced as a private member's Bill in 2007, which was adopted by the government in 2008 but lapsed with the dissolution of parliament in 2011. Rather than persist with that Bill, the incoming Fine Gael/Labour coalition government instead introduced a new Criminal Justice (Spent Convictions) Bill 2012 which – while still largely based on the LRC Report – took a substantially different approach in several regards. The government described this as rejecting the “safe option” of following the LRC recommendations and instead took a “conscious decision to make the scheme accessible to the greatest number of ex-offenders, consistent with the protection of society at large.”¹¹

This was partly true; the changes were generally in a liberal direction. Compared with the LRC draft, the 2012 Bill increased the range of convictions which could become spent by raising the threshold for sentences from six to 12 months, reduced the length of time after which minor offences would be spent from five years to three years, and narrowed the categories of employment for which spent offences would still have to be disclosed. For example, the LRC draft would have excluded all civil service and public service jobs from the scope of the legislation, regardless of their nature – the 2012 Bill limited this to state positions which entail work with children or vulnerable adults, or which involve some other special element of trust or responsibility.

However, the 2012 Bill drastically narrowed the scope of the proposed system. Contrary to the LRC recommendations, it capped at two the number of convictions which could become spent. This was justified by the Minister for Justice and Equality, Alan Shatter, on the basis that “legislation cannot be to the benefit of the repeat offender with multiple convictions. This is not a charter for re-offending.”¹²

¹¹ Minister of State at the Department of Justice and Equality, Kathleen Lynch, 215(16) *Seanad Debates* 948, 13 June 2012. See also the comments of the Minister for Justice and Equality, Alan Shatter: “A somewhat unique feature of this legislation is that the changes being made to the original Law Reform Commission’s draft Bill are almost all in the direction of what some would say would make the Bill more liberal — if that is the correct word — in regard to most of its key provisions. It is my strong view that if legislation like this is to have any meaningful impact, it must err on the side of generosity to the offender who has paid his or her debt to society, has left criminality behind him and just wants to move on.” 215(16) *Seanad Debates* 931, 13 June 2012.

¹² 734(3) *Dáil Debates* 437, 7 June 2011.

The 2012 Bill moved quickly through the Oireachtas, and was set to be passed by the Dáil in 2013 when it was derailed as a result of the decision of the ECtHR in *MM v United Kingdom*¹³ and the subsequent judgment of the English Court of Appeal in *R (T & Others) v Chief Constable of Greater Manchester & Others*.¹⁴ These decisions – addressed in more detail below – confirmed that state disclosure of information on criminal records was capable of constituting an interference with the European Convention of Human Rights (ECHR) Article 8 right to respect for private life, highlighting an inconsistency in how old convictions would be treated by Irish law.

In parallel with the 2012 Bill, the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 introduced mandatory vetting for certain types of employment. Despite dealing with the same general area, the two pieces of legislation took very different approaches to old convictions. Mandatory vetting under the 2012 Act, as originally adopted, required the National Vetting Bureau to disclose *all* convictions, whether spent or not. The result was that even minor convictions from the distant past would still have been disclosed as part of vetting – contravening the requirements of relevance and proportionality set out by the ECtHR in the *MM* case.

The 2012 Bill was put on hold while the Department of Justice and Equality considered how to respond, and the eventual result was a substantial rewrite in January 2016. This addressed the *MM* case by amending the 2012 Act to provide for non-disclosure of spent convictions in the vetting process; but what it gave with one hand it took away with the other by further curtailing which convictions could become spent.

Under the revised Bill, only one offence could ever become spent (with exceptions for certain motoring and public order offences) and the qualifying period for an offence to become spent was raised to seven years for all offences, however minor. It is not clear what prompted these changes but the new Minister for Justice and Equality, Frances Fitzgerald, justified them with the statement that:

¹³ Application 24029/07, judgment of 13 November 2012.

¹⁴ [2013] 2 All E.R. 813. This was later appealed to the Supreme Court as *T & Anor v Secretary of State for the Home Department* [2014] UKSC 35.

... where a person has more than one such conviction, I believe the rights of the employer come into play. I do not believe it is safe to legislate for persons with multiple convictions for serious offences to be able to inform an employer they have no such convictions. I also do not believe that there would be public acceptance for such an approach.¹⁵

In any event, there was little time for debate on these amendments; a general election was called one week after they were introduced, and the Bill was passed without any further changes immediately before the Oireachtas was dissolved in February 2016.¹⁶

CRIMINAL JUSTICE (SPENT CONVICTIONS AND CERTAIN DISCLOSURES) ACT 2016

As is often the case with criminal justice initiatives in Ireland there was an element of legislative borrowing. The 2016 Act largely reflects the approach pioneered in Britain by the Rehabilitation of Offenders Act 1974,¹⁷ albeit with significant limitations.¹⁸ To summarise – the qualifying period for a conviction to become spent is seven years.¹⁹ There are exclusions for the most serious offences in that convictions for crimes which must be tried before the Central Criminal Court cannot become spent.²⁰ Most other sexual offences are also excluded, unless they were minor offences tried summarily before the District Court or unless they related to an offence against a child

¹⁵ 904(2) *Dáil Debates* 79, 27 January 2016. It should be noted that, contrary to the impression given by the minister, the single conviction rule applies to all convictions, not just those for serious offences. The minister also wrongly claimed that "[t]he Law Reform Commission recommended that spent convictions should be confined to a single conviction". The LRC Report did not recommend any limit on the number of convictions which could become spent.

¹⁶ The deference to public opinion to justify these restrictive amendments seems to have been misplaced. Between the LRC Report in 2007 and the passage of the Act in 2016 there was very little media interest in the issue and virtually no criticism of the principle of spent convictions or complaints of undue leniency. Indeed, in all Irish newspaper coverage mentioning spent convictions over this period – approximately 60 pieces in total – there were only two critical articles ("Some Sex Offenders to Have Conviction Erased under Law" *Irish Examiner*, 18 June 2012; "What about Victims?" *Irish Daily Mail* 5 May 2012).

¹⁷ As amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, ch.8.

¹⁸ The relevant Northern Irish legislation is the Rehabilitation of Offenders (Northern Ireland) Order 1978 and the Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979.

¹⁹ Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, s.5(2)(b).

²⁰ Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, ss.4(1) and 5(2)(c). These include murder, rape and aggravated sexual assault.

where there was a small age gap between offender and victim.²¹ There is also a cut-off based on the severity of the sentence imposed: convictions may only become spent if the sentence imposed was non-custodial, a term of immediate imprisonment of 12 months or less, or a suspended sentence of 24 months or less.²²

Only one offence may become spent. If a person has more than one conviction they are entirely excluded from the benefit of the legislation.²³ There is an exception for certain public order and road traffic offences which are disregarded in determining whether an offence has become spent.²⁴

The effect of a conviction being treated as spent is that a person no longer has to disclose it in most contexts, and it will not usually be disclosed as part of the vetting process required for work with children or vulnerable adults.²⁵ Significantly, however, the 2016 Act does not contain any anti-discrimination provision: it will remain open to employers, for example, to discriminate on the basis of a spent conviction.

Single conviction rule

The most significant aspect of the 2016 Act is that it draws an arbitrary cut-off at one conviction, taking too literally the saying that everyone is entitled to make *one* mistake. The rhetoric used by successive ministers to justify imposing such a limit – referring to “a pattern of multiple offences against other persons”²⁶ and giving the recidivist “a charter for re-offending”²⁷ does not reflect the reality for many who may find employment or community engagement jeopardised by a small number of historic minor offences. The reference to “offences against other persons” is particularly misleading as even “victimless” crimes – such as simple possession of drugs – will be counted to prevent convictions from becoming spent.

²¹ Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, Sch. 1, s.4(1), and s.5(2)(c).

²² Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, ss.4(1) and 5(2)(c).

²³ Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, s. 5(3). However, two or more convictions arising out of the same incident are treated as a single conviction under s.5(4) as long as the sentences imposed (whether concurrent or consecutive) do not breach the 12-month limit.

²⁴ Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, s.5(5).

²⁵ Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, ss.6-12 and s.21.

²⁶ Minister for Justice and Equality, Frances Fitzgerald, 904(2) *Dáil Debates* 8, 27 January 2016.

²⁷ Minister for Justice and Equality, Alan Shatter, 734(3) *Dáil Debates* 437, 7 June 2011.

Can we determine how many offenders will be excluded by this single conviction rule? The number is difficult to estimate but it seems likely that most offenders who receive custodial sentences will have acquired more than one conviction and therefore will be ineligible to have their convictions spent. The statistics available in Ireland are limited. Data relating to the number of previous prison sentences served by prisoners was published between 1922 and 1994 (but not thereafter); during those years it was usually the case that most had previously been imprisoned.²⁸ This is an underestimate of prior criminality, of course, as some of those who lacked a prison record would have been convicted before and given a non-custodial sentence – these would also be ineligible to have their convictions spent. International experience shows that the likelihood of future imprisonment increases with every sentence served.²⁹ If criminals are only given one chance the number of ex-prisoners who will benefit from the new law is likely to be modest.

Most first-time prisoners will never return to prison.³⁰ For some their crime is out of character and emerges from a very particular set of circumstances; they would have been law-abiding afterwards even if never imprisoned. For others the experience of custody is sufficiently chastening or shameful to ensure that there is no repetition. This means that it is those convicted on a second occasion for whom expungement provisions might be most effective in terms of deflection from a criminal career. But this group is ruled out of the Irish scheme.³¹

The exceptions for motoring and public order offences, which are disregarded when counting convictions, are less important than might appear given that most of these offences are now dealt with by fixed charge notices.³² However there remains the criticism – particularly for traffic offences – that these will result in the middle classes receiving preferential treatment. The result, as O'Flaherty put it, is that:

²⁸ I. O'Donnell, E. O'Sullivan, and D. Healy *Crime and Punishment in Ireland 1922 to 2003: A Statistical Sourcebook* (Dublin: Institute of Public Administration, 2005), table 3.2 at pp.156-63.

²⁹ I. O'Donnell, E.P. Baumer, and N. Hughes, "Recidivism in the Republic of Ireland" (2008) 8(2) *Criminology and Criminal Justice* 123.

³⁰ M. Tonry, "Unthought Thoughts: The Influence of Changing Sensibilities on Penal Policies" (2001) 3(1) *Punishment & Society* 167, 177-178.

³¹ Indeed, it might be argued that it is *third* chances which should be prioritised in terms of reducing recidivism and reintegrating offenders.

³² For example, in the case of public drunkenness, by the Intoxicating Liquor Act 2008.

... the legislation will benefit car owners with multiple speeding convictions, an offence which presents immediate and serious life danger to others. It will not benefit someone who has two shoplifting convictions, no matter how long ago those crimes were committed or under what personal circumstances.³³

Restriction to sentences of 12 months or less

The Irish government justified the choice of a 12 month cut-off for sentences to qualify for expungement as a relatively generous one, on the basis that this "covers approximately 85 per cent of all persons committed to prison each year".³⁴ However this claim is misleading – we have already seen that the single conviction rule means that significantly fewer *offenders* will be eligible even though each individual *offence* may qualify. The limit is also significantly lower than the neighbouring jurisdictions of Northern Ireland (30 months), Scotland (30 months), and England and Wales (48 months).³⁵

Indeed, the limits in the UK jurisdictions are themselves quite restrictive. Jacobs and Larrauri have described England and Wales as "exceptional" in Europe in precluding convictions carrying sentences exceeding four years from expungement.³⁶ In Germany, for example, all convictions (excluding certain life sentences, preventative detention orders, and mental hospital orders) can be removed from a certificate of conduct.³⁷ Similarly, in Spain it is possible to seal a conviction record for any crime, however serious.³⁸ In France, automatic legal rehabilitation is available for all but the

³³ M. O'Flaherty, "Bill Aims to Wipe the Slate Clean on Certain Convictions", *Irish Times*, 6 July 2015.

³⁴ Lucinda Creighton, 795(3) *Dáil Debates* 67, 7 March 2013. It is noteworthy that in recent years the majority of committals have involved fine defaulters.

³⁵ In 2015, the Scottish government concluded a public consultation exercise on proposed reforms to the 1974 Act which found broadly-based support (with the exception of the insurance industry) for extending the legislation to include sentences of up to 48 months, and perhaps beyond. Law reform in the area is expected to follow. See A. Platts and D. Griesbach, *Consultation On The Rehabilitation Of Offenders Act 1974: An Analysis Of Responses* (Scottish Government, 2015).

³⁶ J.B. Jacobs and E. Larrauri, "European Criminal Records & Ex-Offender Employment" *New York University Public Law and Legal Theory Working Paper*, 2015, available at http://lsr.nellco.org/nyu_plltwp/532 (accessed 10 February 2017).

³⁷ C. Morgenstern, "Judicial Rehabilitation in Germany: The Use of Criminal Records and the Removal of Recorded Convictions" (2011) 3(1) *European Journal of Probation* 20, 29-30.

³⁸ E. Larrauri, "Conviction Records in Spain: Obstacles to Reintegration of Offenders?" (2011) 3(1) *European Journal of Probation* 50, 58-59.

most serious offences (that is, for "*contraventions*" and "*délits*" but not "*crimes*").³⁹ Even in the case of "*crimes*", however, discretionary rehabilitation measures are still possible on application to court.⁴⁰ Given that sentences over 12 months will never become spent under the 2016 Act, it seems that Ireland is even more of an outlier when compared to other European jurisdictions.

Inconsistency in sentencing as bar to rehabilitation

A long-standing criticism of Irish criminal law is that it lacks formal sentencing guidelines, resulting in inconsistent outcomes.⁴¹ This may lessen in future, following recent judgments by the Court of Criminal Appeal which have begun the process of articulating sentencing standards.⁴² Nevertheless, because historic sentencing practices have been uneven, the application of the spent convictions legislation to ex-offenders will itself be uneven where similar crimes have attracted sentences above and below the cut-off point. The result is that disparities in sentencing will be exacerbated by being carried forward into eligibility for expungement.

This issue is particularly acute in relation to suspended sentences. Given the unstructured nature of sentencing in Ireland it is not entirely clear what judges intend when they impose a suspended sentence, but it appears to be seen as a sanction which is intermediate between community service and imprisonment.⁴³ The 2016 Act reflects this by treating suspended sentences as less serious than immediate custodial sentences – if a two-year sentence is suspended in full the conviction will be eligible to become spent.⁴⁴ But a three-year suspended sentence can never become spent, even

³⁹ M. Herzog-Evans, "Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance" (2011) 3(1) *European Journal of Probation* 4, 10-11.

⁴⁰ Herzog-Evans, "Judicial Rehabilitation in France", 12-16.

⁴¹ N Maguire, "Consistency in Sentencing" (2010) 2 *Judicial Studies Institute Journal* 14; C. Hamilton, "Sentencing in the District Court: 'Here Be Dragons'" (2005) 15(3) *Irish Criminal Law Journal* 9. I O'Donnell "A Comment on Sentencing" (2000) 10(3) *Irish Criminal Law Journal* 2.

⁴² See *DPP v Ryan* [2014] IECCA 11, *DPP v Fitzgibbon* [2014] IECCA 12 and the discussion in T. O'Malley, "A Quiet Revolution Occurred This Month: Sentencing Guidelines Were Introduced", *Irish Times*, 31 March 2014.

⁴³ See eg the discussion in *DPP (at the Suit of Garda Gary H Purtill) v John Murray* [2015] IEHC 782 where five possible purposes are suggested: "(a) it is a means of avoiding an immediate custodial sentence; (b) it serves as a denunciation of the accused's behaviour; (c) it is a controlling and rehabilitative device; (d) it has a deterrent effect on the individual offender; and (e) it can serve as part of a crime prevention strategy focused on particular types of crime".

⁴⁴ The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, s.4(1)(a) defines a suspended sentence of up to two years as "non-custodial".

if the individual concerned never sets foot in prison and the judicial intent was to indicate an offence that in the circumstances did not merit custody.

The problem of inconsistency also arises in relation to the court poor box, which gives judges discretion to direct that a defendant make a donation to charity in lieu of conviction.⁴⁵ In the absence of a spent convictions system, the poor box has been one of the main ways in which the Irish criminal justice system has mitigated the effect of a criminal record. Consequently, the use of the poor box has been common in the case of first-time offenders, especially in situations where a conviction would adversely affect chances of employment or prevent an offender from getting a visa to work abroad.⁴⁶

It is likely that the existence of this pressure relief valve was itself a reason why spent convictions legislation was so long in coming. The poor box has, however, been heavily criticised. Lacking any statutory basis or objective criteria for its use, it operates entirely at the discretion of the individual judge. Some judges use it heavily and others scarcely at all.⁴⁷ There is a public perception that it provides "one law for the rich and another for the poor", where those with the means to make a significant donation can avoid a conviction. These criticisms take on a new significance given the single conviction rule in the 2016 Act. In particular, defendants who were denied the opportunity to make a donation to the poor box to escape a conviction – perhaps because their local judge applied a blanket rule against its use – will feel understandably aggrieved that no subsequent conviction can become spent.

Exclusion of foreign convictions

A peculiarity of the 2016 Act is that only domestic convictions are eligible to become spent.⁴⁸ This rules out rehabilitation for someone with a conviction from abroad. But it is hard to see any justification for treating a conviction differently depending on

⁴⁵ In these cases the court applies s.1(1) of the Probation of Offenders Act 1907 so that no conviction is recorded. The money is collected by the court office and disbursed to the judge's preferred charities.

⁴⁶ *Consultation Paper on the Court Poor Box* (Dublin: Law Reform Commission, 2004), p.40.

⁴⁷ In 2016, €1.5m was paid into the poor box, up from €1.3m the previous year. Over a quarter of the total amount was collected in Tralee, Co. Kerry. (A. Lucey "Over €1.5m Paid into District Court's Poor Box in 2016", *Irish Times*, 21 August 2017).

⁴⁸ The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, s.4(1), defines "conviction" as "conviction by a court" and in turn defines "court" to mean "any court in the State".

whether it was recorded in Derry rather than Dublin, particularly where that conviction would have become spent in the jurisdiction where it was imposed. The Rehabilitation of Offenders Act 1974 addressed this point by treating foreign convictions in the same way as domestic convictions.⁴⁹ It is surprising that over 40 years later the 2016 Act failed to do so.⁵⁰ Indeed, there is a strong likelihood that this distinction is contrary to EU law as being indirectly discriminatory on the basis of nationality and as undermining the right to free movement of workers.

The restriction to domestic convictions seems to be the result of oversight rather than any deliberate decision; but even so it illustrates the argument we make below that rehabilitation law must now be assessed through a fundamental rights lens. It is unlikely that this mistake would have been made had the 2016 Act been drafted with a focus on the rights of the ex-offender.

TOWARDS A FUNDAMENTAL RIGHTS APPROACH TO EXPUNGEMENT

Convictions as public facts: the common law approach

Common law jurisdictions such as Ireland have historically not recognised a privacy right to conceal the fact of one's criminal convictions or to prevent another from revealing them. In these jurisdictions the principles of open justice and freedom of expression have been seen as requiring criminal proceedings and their outcomes to be presumptively public.⁵¹ Indeed, denunciation is one of the primary purposes of punishment. Even where a person has moved on from offending, the common law does not offer any mechanism to prevent damaging republication of information about their past convictions. The law of defamation prevents only false statements of fact; truth serves as a complete defence. Consequently, it is generally only juvenile offenders who can assert a right to have their identities protected.⁵²

⁴⁹ Rehabilitation of Offenders Act 1974, s.1(4).

⁵⁰ Especially as this point was flagged by the IHRC in its observations on the Bill: Irish Human Rights Commission, "Observations on the Spent Convictions Bill 2012", June 2012, available at http://www.ihrec.ie/download/pdf/ihrc_observations_on_spent_conviction_bill_2012_june_2012.pdf (accessed 10 February 2017).

⁵¹ See J. Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford: Oxford University Press, 2002), ch.5.

⁵² There are further, very limited, exceptions in particular jurisdictions. For example, in Ireland s.8 of the Criminal Law (Rape) Act 1981 grants anonymity to defendants accused of rape unless and until they are convicted.

This presumptive publicity was reflected in the discourse over the introduction of spent convictions legislation in Ireland. For the most part, the discussion from 2001 onwards assumed that the legislature was free to proceed on a purely pragmatic and utilitarian basis, unconstrained by any enforceable rights of former offenders.⁵³ For example, in 2007 the LRC accepted as a correct statement of the law the proposition that "[t]he issue... comes down to the balancing of law enforcement needs with the privacy interests of the individual, taking account of the realities of information technology. *This is a balance to be decided by the legislature.*"⁵⁴ Consequently, while the LRC took the view that indefinite retention of information about minor convictions violated the "spirit" and "underlying aims" of data protection, it did not see this as a violation of individual rights.

Convictions as confidential: continental and civil law perspectives

The common law position, however, was at odds with developments elsewhere in Europe. Jacobs and Larrauri describe the dominant legal culture in continental civil law jurisdictions as taking a fundamentally different approach: opposing punitive shaming; treating criminal records as presumptively confidential; and recognising privacy, dignity and honour rights which can be used to prevent disclosure of criminal records unless there is a public interest in doing so.⁵⁵

This approach was in turn reflected in Council of Europe and EU standards which have been protective of criminal histories. The grounding document of modern European data protection law, the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, took this approach from the outset by identifying data relating to criminal convictions as a special category which "may not be processed automatically unless domestic law

⁵³ In a notable exception, the IHRC argued that discrimination against former offenders might violate both the constitutional right to earn a living and the right to respect for private and family life under the ECHR: *Extending the Scope of Employment Equality Legislation* (Dublin: Irish Human Rights Commission, 2005), pp.8–9.

⁵⁴ *Report on Spent Convictions* (Dublin: Law Reform Commission, 2007), p.37 (emphasis added).

⁵⁵ J.B. Jacobs and E. Larrauri, "Are Criminal Convictions a Public Matter? The USA and Spain" (2012) 14(1) *Punishment & Society* 3.

provides adequate safeguards".⁵⁶ This approach was echoed in 1995 by the Data Protection Directive⁵⁷ and in 2016 by the General Data Protection Regulation.⁵⁸ Similarly, the 1984 Recommendation of the Committee of Ministers on the Criminal Record and Rehabilitation of Convicted Persons recommended that national laws should provide for "automatic rehabilitation after a reasonably short period of time" which should include "prohibition of any reference to the convictions of a rehabilitated person except on compelling grounds provided for in national law."⁵⁹

A clash of norms: impact of Article 8 ECHR on common law systems

These very different common law and European standards regarding the confidentiality of criminal records collided in 2012 with the judgment of the ECtHR in *MM v United Kingdom*⁶⁰ and subsequent UK cases continue to tease out the implications of *MM*. In this section we examine the most significant cases⁶¹ in this area and the principles they have established before assessing the 2016 Act against them.

MM v United Kingdom

Our starting point is the decision in *MM v United Kingdom*. That judgment considered a Northern Ireland practice which provided for blanket disclosure of police cautions as part of the background checking process, even where the cautions would otherwise have been spent and without any consideration of the gravity of the offence or the time which had elapsed. The ECtHR held that these disclosures implicated the right to respect for private life under Article 8 of the ECHR. Significantly, the court held that this was the case even though the fact of a conviction might be public:

⁵⁶ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108), Art 6.

⁵⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art 8(5).

⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Art 10.

⁵⁹ Committee of Ministers of the Council of Europe, Recommendation No. R (84) 10 on the Criminal Record and Rehabilitation of Convicted Persons, 21 June 1984.

⁶⁰ *MM v United Kingdom*, application 24029/07, judgment of 13 November 2012.

⁶¹ See also the decisions in *Re Gallagher* [2016] NICA 42 and *P(AP) v Scottish Ministers* [2017] CSOH 33.

... although data contained in the criminal record are, in one sense, public information, their systematic storing in central records means that they are available for disclosure long after the event when everyone other than the person concerned is likely to have forgotten about it, and all the more so where, as in the present case, the caution has occurred in private. Thus as the conviction or caution itself recedes into the past, it becomes a part of the person's private life which must be respected.⁶²

Once Article 8 was implicated, the Court held the lack of a clear legislative framework for the collection, storage and disclosure of criminal records, the lack of any criteria for determining whether "the data subject may be perceived as continuing to pose a risk such that the disclosure of the data to the employer is justified",⁶³ and the lack of any independent review of a decision to disclose data, cumulatively meant that the disclosure policy was not "in accordance with the law" as required by Article 8(2) and therefore violated the right to respect for private life.

The effect of this judgment is to displace the common law view of convictions as presumptively public and therefore outside the scope of any privacy rights. At a minimum, retention and disclosure of criminal records by the state must now be regulated by clear and accessible legislation which balances the need for disclosure in certain circumstances with adequate safeguards for the former offender to ensure that disclosure is not disproportionate. As the ECtHR put it in *MM*:

... the obligation on the authorities responsible for retaining and disclosing criminal record data to secure respect for private life is particularly important, given the nature of the data held and the potentially devastating consequences of their disclosure... [I]t is realistic to assume that, in the majority of cases, an adverse criminal record certificate will represent something close to a "killer blow" to the hopes of a person who aspires to any post which falls within the scope of disclosure requirements.⁶⁴

⁶² *MM v United Kingdom*, para. 188.

⁶³ *MM v United Kingdom*, para. 204.

⁶⁴ *MM v United Kingdom*, para. 199.

T & Anor v Secretary of State for the Home Department

In *T & Anor v Secretary of State for the Home Department*⁶⁵ the UK Supreme Court considered the application of *MM* in national law, and extended the scope of its reasoning from state disclosure of criminal records (in the context of vetting) to private employment relations also.

The first respondent, T, had received two police warnings⁶⁶ in 2002 (at the age of 11) for the theft of two bicycles and challenged their disclosure in an enhanced criminal record certificate (ECRC) which was required in 2010 when he applied for enrolment on a sports studies course involving work with children. The second respondent, JB, had received a caution for the theft of a packet of false fingernails from a shop in 2001 (at the age of 41) and challenged the disclosure of this caution in an ECRC required in 2009 to take part in a course to train as a care worker. Neither T nor JB had any other criminal record.

The scheme regarding disclosure of cautions in ECRCs was essentially identical to that challenged in *MM*, and the Supreme Court by a majority⁶⁷ held that it was not "in accordance with the law" for the same reasons.⁶⁸ In addition, the court unanimously held that, due to its indiscriminate nature, the disclosure scheme could not be regarded as necessary in a democratic society.

Necessity in this context includes an assessment of proportionality, which requires that the need to prevent reoffending be weighed against the "killer blow" of disclosure.⁶⁹ In *T*, Lord Wilson summarised the test as asking:

... first whether the objective behind the interference was sufficiently important to justify limiting the rights of [former offenders] under article 8; second whether the measures were rationally connected to the objective; third whether they went no further than was necessary to accomplish it; and fourth,

⁶⁵ *T & Anor v Secretary of State for the Home Department* [2014] UKSC 35.

⁶⁶ The youth equivalent of cautions.

⁶⁷ Lord Wilson dissenting on this point.

⁶⁸ *T & Anor*, [2014] UKSC 35, para.119.

⁶⁹ *MM v United Kingdom*, para.200.

standing back, whether they struck a fair balance between the rights of [former offenders] and the interests of the community.⁷⁰

In a much-quoted passage, Lord Wilson then identified a number of factors which should be taken into account in identifying which offences should be disclosed:

[Disclosure of criminal history] should be bounded by two sets of rules: rules which specify the type of request which should justify some disclosure and rules which identify the entries which should then be disclosed. The regime certainly contained rules of the former character. But there were none of the latter character. If the type of request was as specified, there had to be disclosure of everything in the kitchen sink. There was no attempt to separate the spent convictions and the cautions which should, and should not, then be disclosed by reference to any or all of the following: (a) the species of the offence; (b) the circumstances in which the person committed it; (c) his age when he committed it; (d) in the case of a conviction, the sentence imposed upon him; (e) his perpetration or otherwise of further offences; (f) the time that elapsed since he committed the offence; and (g) its relevance to the judgement to be made by the person making the request.⁷¹

Applying these factors, the Supreme Court held that the scheme failed the test of necessity as it was not based on any assessment of the risk of reoffending and went further than necessary to achieve the statutory objective by requiring "indiscriminate" disclosure. In the case of T, there was no rational relationship between the aim of protecting the safety of children and the warnings for dishonesty which had been given to him as a young child; in the case of JB, disclosing her eight-year-old caution for minor dishonesty was relevant but disproportionate to the aim of protecting people receiving care.⁷²

In addition, the Supreme Court upheld T's complaint that his Article 8 rights were violated by the fact that his cautions could not be treated as spent when applying for

⁷⁰ *T & Anor*, [2014] UKSC 35, para.39.

⁷¹ *T & Anor*, [2014] UKSC 35, para.41.

⁷² *T & Anor*, [2014] UKSC 35, para.121.

certain types of employment – so that he had to reveal them to prospective employers when asked. The court accepted that this situation was within the scope of Article 8. Although the hiring process was private and outside the criminal record disclosure scheme, there was nevertheless state involvement in that the law (indirectly) compelled job applicants to reveal their criminal history if asked. As noted by Lord Reed, if the applicant:

... lies about his past, a resultant contract of employment will be regarded as having been induced by a fraudulent misrepresentation. If the deceit is discovered, the employer is in principle entitled to have the contract set aside. A person who obtained employment by means of deceit is also in principle liable to prosecution.⁷³

The court examined whether this obligation to answer questions regarding one's criminal history was best analysed as being a breach of the state's negative obligations under Article 8 or a breach of the state's positive obligation to secure respect for private life even in the sphere of relations between individuals. In the end, however, it concluded that it was unnecessary to resolve the point – per Lord Reed:

The real issue, however it is presented, is whether the obligation imposed upon T by the law of the United Kingdom to disclose to any potential employer in his chosen career, for the remainder of his life, the fact that he had received two warnings for stealing a bicycle when he was a child of 11, or otherwise lose the opportunity of being employed, involves an interference with his right to private life which is unjustifiable under article 8(2).⁷⁴

The significance of this point is that it extends the *MM* reasoning from the relatively narrow set of areas where vetting or background checks are required, and applies it to questioning about criminal records in all forms of employment. If – as seems likely – it is followed by the ECtHR, it will oblige states to provide for parity of treatment in both contexts.

⁷³ *T & Anor*, [2014] UKSC 35, para.67.

⁷⁴ *T & Anor*, [2014] UKSC 35, para 127.

P & Others v Secretary of State for the Home Department

How individualised must the disclosure of criminal records be in order to be “in accordance with the law”? Is it permissible to favour administrative convenience by having only general rules governing disclosure? Or must there be some form of individual review/appeal mechanism to assess whether disclosure is proportionate in the circumstances of a particular case?

In *MM* the ECtHR touched on but did not give a definitive answer to these questions. In that case the Northern Ireland disclosure system was found not to be in accordance with the law given a number of structural shortcomings, which included the lack of any mechanism for independent review of decisions to disclose and the lack of any filtering system to ensure that the information being disclosed was relevant to the particular employment sought.⁷⁵ However the judgment was based on the cumulative effect of those and other shortcomings; while the ECtHR identified the lack of a review mechanism as problematic, it did not explicitly require that national law offer the possibility of an individualised review.⁷⁶

In *P & Others v Secretary of State for the Home Department*⁷⁷ the English Court of Appeal was squarely confronted with this issue. That case involved a number of claims challenging aspects of the revised disclosure scheme adopted in 2013 in response to *MM*. One claimant – P – challenged part of the scheme creating a single conviction rule. That rule meant that where an individual had two or more convictions they would always be disclosed in the context of applications for employment to work with children or vulnerable adults and in criminal records certificates, even though they would be spent for other purposes. Two other claimants – W and G – challenged a parallel serious offence rule, under which convictions for specified serious offences would be disclosed in the same way, notwithstanding that they would otherwise be spent.

⁷⁵ *MM v United Kingdom*, paras 204-206.

⁷⁶ *MM v United Kingdom*, para 206.

⁷⁷ *P & Others v Secretary of State for the Home Department* [2017] EWCA Civ 321.

These claimants argued that Article 8, as interpreted by the House of Lords in *T*, required at least the possibility of an individual assessment of whether convictions should be disclosed. They placed particular reliance on a passage in the majority judgment of Lord Reed in *T* concluding that: "in order for the interference to be 'in accordance with the law', there must be safeguards which have the effect of enabling the proportionality of the interference to be adequately examined".⁷⁸

In a judgment for a unanimous Court of Appeal, Leveson P. held that that "the right of individual review is not a prerequisite in every case".⁷⁹ In principle, rules of general application might be sufficiently precisely tailored to provide adequate safeguards of the type required by Lord Reed in *T*. Nevertheless, Leveson P. went on to hold that:

... the more tenuous the link or relationship between the offending and the public interest to be protected, the more likely that the scheme will tip over and fail this initial article 8 hurdle. It follows that there may be circumstances in which a mechanism for independent review is necessary for a scheme, or a particular rule, to be 'in accordance with the law'.⁸⁰

As regards the revised scheme, Leveson P. held that both the single conviction rule and the serious offence rule failed this initial hurdle and – without some form of independent review – did not provide adequate safeguards and therefore were not in accordance with the law. The single conviction rule was "indiscriminate" in that it applied "irrespective of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought".⁸¹ The serious offence rule, while "not totally indiscriminate" as it only applied to specified offences, was nevertheless "insufficiently calibrated so as to ensure that the proportionality of the interference is adequately examined" given that there was "no distinction based on the disposal in the case, the time which has

⁷⁸ *T & Anor*, [2014] UKSC 35, para.114.

⁷⁹ *P & Others*, [2017] EWCA Civ 321, para.40.

⁸⁰ *P & Others*, [2017] EWCA Civ 321, para.40.

⁸¹ *P & Others*, [2017] EWCA Civ 321, para.44.

elapsed since the offence took place or the relevance of the data to the employment sought".⁸²

Having decided that the system was not "in accordance with the law" the court did not, strictly speaking, have to consider the question of necessity. Nevertheless, the court also found that both the single conviction rule and the serious offence rule were disproportionate.

As regards the single conviction rule, Leveson P. accepted that "where a pattern of offending behaviour is demonstrated, it is entirely legitimate to conclude that such information should be available to potential employers" but went on to point out that "it is not a necessary inference that two convictions do represent a pattern of offending behaviour".⁸³ In the case of P, Leveson J. held her two convictions – for theft and failing to answer bail – were linked only by her mental health issues and did not reveal a pattern of any sort nor any increased risk to public safety, making the single conviction rule disproportionate as applied to her.⁸⁴

The serious offence rule was similarly found to be disproportionate by requiring disclosures of old offences which were irrelevant to any risk of re-offending. In the case of G, who sought work in a library, Leveson P. concluded that his decade old reprimand for consensual sexual experimentation as a 12 year old child did not "rationally demonstrate a risk to the public which required identification in a democratic society".⁸⁵ Similarly, the fact that W had been convicted of actual bodily harm in 1982, at the age of 16, was neither "relevant to the risk to the public, [nor] proportionate and necessary in a democratic society"⁸⁶ in circumstances where W sought to enrol in a course for teaching English as a second language over thirty years later.

⁸² *P & Others*, [2017] EWCA Civ 321, para.45.

⁸³ *P & Others*, [2017] EWCA Civ 321, para.78.

⁸⁴ *P & Others*, [2017] EWCA Civ 321, paras.78-79.

⁸⁵ *P & Others*, [2017] EWCA Civ 321, para.93.

⁸⁶ *P & Others*, [2017] EWCA Civ 321, para.103.

ASSESSING THE 2016 ACT

How does the 2016 Act fare in light of this jurisprudence? The Act does take on board significant points from *MM* and *T* in recognising that privacy issues arise in respect of convictions and accepting that spent convictions and vetting disclosures must be considered as part of an integrated whole.⁸⁷ However the subsequent decision in *P* highlights a number of ways in which the 2016 Act still does not go far enough to meet the requirements of Article 8.

In accordance with the law?

The key finding in *P* was that the two bright line rules – the single conviction rule and the serious offence rule – were so indiscriminate in their effect that the disclosure scheme was not in accordance with law in the absence of some mechanism for individual review. The 2016 Act parallels the English position in having two very similar bright line rules: a single conviction rule and a restriction to sentences of 12 months or less. These rules therefore share the problems identified by Leveson P. in *P* insofar as each applies to prevent a conviction from ever becoming spent:

... irrespective of the nature of the offence, the disposal in the case [*in the case of the single conviction rule*], the time which has elapsed since the offence took place or the relevance of the data to the employment sought.⁸⁸

The case against the bright line rules in the 2016 Act is strengthened by the fact that they are of wider application than their English equivalents. The single conviction and serious offence rules in *P* did not apply to all situations: multiple convictions and serious convictions could still become spent in respect of most forms of employment. It was only in relation to more sensitive situations – such as work with children and vulnerable adults – that these rules took effect. By contrast, the single conviction rule and restriction to sentences of 12 months or less under the 2016 Act apply to all forms

⁸⁷ In amending the Bill following those cases the Minister for Justice and Equality, Frances Fitzgerald, accepted that “there must be a degree of coherence between the legislation providing for spent convictions and any legislation providing for disclosure of criminal convictions for employment purposes. Put simply, any offences excluded from vetting disclosures because they are not relevant should also be spent convictions.” 245(10) *Seanad Debates* 607, 3 February 2016.

⁸⁸ *P & Others*, [2017] EWCA Civ 321, para.44.

of employment, whether or not there is any special sensitivity involved, making their impact more indiscriminate again.

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

Necessary in a democratic society?

Even assuming that the single conviction rule and the restriction to sentences of 12 months or less could be said to be in accordance with the law, it seems clear that these restrictions would not meet the test of necessity in a democratic society.

In assessing whether disclosure goes no further than necessary, the ECtHR in *MM* highlighted the need to consider "the relevance of conviction or caution data held in central records to the employment sought" and "the extent to which the data subject may be perceived as continuing to pose a risk".⁸⁹ The decisions in *T* and *P* have applied this by finding disclosure requirements to be unlawful where they either were not rationally related to a particular risk of reoffending, or were disproportionate to that risk. The 2016 Act does not, however, address these points – instead, it applies the single conviction rule and the restriction to sentence of 12 months or less as crude proxies for relevance and risk of future offending.

Although partially mitigated – by the different system for child offenders⁹⁰ and the exclusions for motoring and public order offences – these rules are certain to lead to outcomes where the requirement to disclose is entirely unconnected to a particular risk. The effect of the single conviction rule, for example, is that someone with two convictions for shoplifting at the age of 18 can never have those convictions treated as spent and must disclose them for the rest of their lifetime, even if the dishonesty involved is irrelevant to the particular job applied for. In this context the conclusion of

⁸⁹ *MM v United Kingdom*, para. 204.

⁹⁰ Under section 258 of the Children Act 2001.

Leveson P. in *P* would equally apply: the requirement to disclose would be "simply disproportionate (however wide the margin of appreciation) to the interference [with] private life, because it does not generate interests of public safety so as to make it arguably necessary in a democratic society".⁹¹

DATA PROTECTION AS SUPPLEMENT TO SPENT CONVICTION LAWS

The leading research on the privacy rights of ex-offenders has focused on Article 8 of the ECHR and the *MM* decision, with less attention given to the data protection issues that arise.⁹² Although there is an extensive literature on data protection in the criminal justice process, that work has primarily been on the handling of data by public institutions themselves – examining how the law constrains information gathering and sharing between police and judicial authorities.⁹³ Surprisingly little has been written on its application to the ex-offender – in particular, how data protection might interact with spent conviction and other rehabilitation laws. Even where the point has been considered, it has usually not been given any detailed treatment.⁹⁴

It is likely that this is because most European jurisdictions have long had some form of rehabilitation laws or constitutional rights to privacy regarding criminal records, so there has been less need for ex-offenders to assert data protection rights. However, data protection, despite being closely aligned to the right to privacy, is nevertheless a

⁹¹ *P & Others*, [2017] EWCA Civ 321, para.79.

⁹² See eg E. Larrauri Pijoan, "Criminal Record Disclosure and the Right to Privacy" [2014] *Criminal Law Review* 723; J. Grace, "Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the UK" (2014) 78(2) *The Journal of Criminal Law* 121.

⁹³ See eg P. De Hert, V. Papakonstantinou, and C. Riehle, "Data Protection in the Third Pillar: Cautious Pessimism" in M. Maik (ed.), *Crime, Rights and the EU: The Future of Police and Judicial Cooperation* (London: Justice, 2008); F. Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice* (Berlin: Springer, 2012); J.A. Cannataci, "Defying the Logic, Forgetting the Facts: The New European Proposal for Data Protection in the Police Sector" (2013) 4(2) *European Journal of Law and Technology*.

⁹⁴ In a Spanish context, for example, Larrauri and Jacobs have described the research as having merely touched on the issue: E. Larrauri and J.B. Jacobs, "A Spanish Window on European Law and Policy on Employment Discrimination Based on Criminal Record", *New York University Public Law and Legal Theory Working Paper*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945827, (2012), pp. 3, 13-14 (accessed 10 February 2017).

distinct concept which requires separate consideration, particularly because it applies to purely private action with no state involvement.⁹⁵

The restrictive nature of the 2016 Act provides an ideal case study. The single conviction rule and limitation to sentences of 12 months or less mean that many ex-offenders will never qualify to have their convictions spent. Even if a conviction is spent, the 2016 Act will not protect an ex-offender against discrimination by an employer or prospective employer who learns of the conviction. These limitations will prompt at least some ex-offenders to rely on data protection law instead. By analysing the Irish situation we can examine the intersection between those two sets of rules and identify some unresolved tensions between them.

Relationship between rehabilitation laws and data protection principles

A fundamental principle of data protection law is that data controllers may only process data which are "adequate, *relevant* and *not excessive* in relation to the purposes for which they are collected".⁹⁶ This will constrain employers and others in asking about or making decisions based on old criminal records. But what weight should be given to national rehabilitation laws in determining whether information about criminal records is irrelevant or excessive in a particular context? Surprisingly, this issue does not appear to have been considered in the literature or case law. But in principle, three approaches are possible.

First, data protection law could simply defer to the legislative judgment embodied in rehabilitation laws as to which convictions should be revealed. In the Irish context, for example, this would mean that data protection law would prohibit employers from asking about spent convictions, but would leave them free to ask about convictions within the last seven years or convictions which would never qualify to become spent, even if these date back twenty or thirty years. In effect, this approach would treat national rehabilitation law as a *lex specialis* within the *lex generalis* of data protection.

⁹⁵ See generally J. Kokott and C. Sobotta, "The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR" (2013) 3(4) *International Data Privacy Law* 222.

⁹⁶ Data Protection Acts 1988 and 2003, s.2 (emphasis added).

This approach would have the advantage of providing a bright line rule. Beyond that, however, there is nothing to be said for it. It would undermine the principle of supremacy by allowing national law to define down the content of the fundamental right to data protection recognised by EU law.⁹⁷ Similarly, it would breach the requirement that national data protection authorities be independent in their operation, by stripping them of the ability to make their own assessments of relevance and proportionality in individual cases.⁹⁸ It would also have the surprising result that the 2016 Act would significantly cut back the rights which ex-offenders had previously held.

A second possible approach, at the other end of the spectrum, might simply disregard national rehabilitation laws. In this approach, whether a conviction is spent would be immaterial in determining whether information about the conviction is relevant and proportionate in a particular context. This approach would have the benefit of promoting uniformity between different EU jurisdictions, avoiding anomalies based on the generosity or restrictiveness of a particular national system. But it seems equally untenable to say that the democratic judgment expressed in rehabilitation legislation is of no relevance whatsoever. At a minimum, the fact that a conviction is spent under national law reflects a societal understanding of rehabilitation and is strong evidence in favour of the argument that seeking information about the conviction would be excessive.

This leads us to argue for a pragmatic, if somewhat messy, third approach: whether a conviction is spent or not should be considered as a relevant but not decisive factor. It is one which employers, data protection authorities, and courts can take into account in deciding on an individual case but cannot be conclusive in either direction.⁹⁹

⁹⁷ See generally G. González-Fuster *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Vienna: Springer, 2014).

⁹⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 28(1) requires that national supervisory authorities "act with complete independence".

⁹⁹ This is consistent with the approach recommended by the Article 29 Data Protection Working Party in its "Guidelines on the Implementation of the Court of Justice of the European Union Judgment on 'Google Spain and Inc v Agencia Española De Protección De Datos (AEPD) and Mario Costeja González' C-131/12", 26 November 2014, discussed further below. The Article 29 Working Party is an advisory EU body made up of representatives from national and EU data protection authorities.

Data protection, spent convictions and employers: a guarantee against discrimination?

The principle that data controllers may only process data which are "adequate, relevant and not excessive" requires employers to limit the information they seek from job applicants to that which is proportionate to the particular role. As the Article 29 Data Protection Working Party has put it, this "would be very different for a security supervisor of the European Investment Bank than for one of the workers in the cafeteria in the same building".¹⁰⁰

This principle can serve as an indirect protection against discrimination by preventing employers from seeking information about convictions which are irrelevant because of their nature or age.¹⁰¹ Prior to the 2016 Act, it had already been pressed into service in Ireland as a makeshift for rehabilitation legislation, and guidance from the Data Protection Commissioner (DPC) confirmed that employers could seek only limited information about criminal records:

An employer is entitled to ask an employee to declare if they have any previous relevant criminal convictions which might impact of [*sic*] the desirability of them performing a particular task. However, an employer should only be concerned about convictions that relate to the particular job on offer.¹⁰²

This guidance is quite limited; it focuses on the *nature* of the conviction and does not address the point made in *MM* and *T* that the *age* of the conviction should be taken into account in determining whether disclosure is proportionate. But the principle it establishes is nevertheless significant. By confirming that data protection law applies in this context, it creates both a restriction on the questions which employers can ask and also a possible remedy for those discriminated against on the basis of information which an employer was not entitled to seek.

¹⁰⁰ Article 29 Data Protection Working Party, "Opinion 8/2001 on the processing of personal data in the employment context", 13 September 2001, p 19.

¹⁰¹ In this section we discuss discrimination by prospective employers, but the same reasoning would apply in other contexts such as discrimination in access to insurance, education, and other services.

¹⁰² Office of the Data Protection Commissioner, "Data Protection in the Workplace" available at https://www.dataprotection.ie/docs/Data_Protection_in_the_Workplace/1239.htm (accessed 10 February 2017).

The Data Protection Directive guarantees a right to compensation for "any person who has suffered damage as a result of an unlawful processing operation".¹⁰³ While there does not appear to be any case law on the point, it seems clear that this will entitle a person to sue for damages if they are refused employment on the basis of an irrelevant conviction.¹⁰⁴ Where individual ex-offenders do not have the resources to bring such a claim, once the General Data Protection Regulation (GDPR) comes into force in 2018, they will be able to mandate representative bodies to do so on their behalf (where Member State law permits this).¹⁰⁵ The GDPR also introduces the possibility of administrative fines of up to €20 million or 4 per cent of worldwide annual turnover for the illegal processing of information on individuals.¹⁰⁶

As awareness of these provisions grows, there will be a strong incentive for ex-offenders to assert data protection rights if the protections of national rehabilitation laws prove inadequate.

The "Google effect": de-listing search results to conceal old convictions

We have seen that the 2016 Act does not directly prohibit discrimination on the basis of spent convictions. Instead, in common with other European rehabilitation laws, it sets out to achieve the same result indirectly, by allowing ex-offenders to conceal the fact of their spent convictions.

This approach works only if employers do not have other sources of information. It has always been somewhat leaky – people are likely to remember the identities of

¹⁰³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art. 23(1). This is implemented in Irish law by the Data Protection Acts 1988 and 2003, s.7.

¹⁰⁴ In *Collins v FBD Insurance* [2013] IEHC 137, the plaintiff brought a claim against an insurance company which had used a private investigator to obtain information on a previous conviction in breach of the Data Protection Acts. The claim was unsuccessful because the plaintiff was unable to show any special damages (i.e. monetary or economic loss). However, the judgment accepted that the plaintiff would have been entitled to damages had he been able to show financial harm.

¹⁰⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. Representative actions are provided for in Art. 80. Under Art. 80, Member States must permit representative actions by non-profit organisations but have a discretion as to whether to allow those bodies to seek compensation on behalf of data subjects. Art. 82 confirms that the right to seek compensation extends to non-material harm such as distress.

¹⁰⁶ Administrative fines are provided for in Art. 83 of Regulation (EU) 2016/679.

offenders in their community, especially in countries with small populations and low residential mobility. But it becomes entirely ineffective if employers can search online against the names of job applicants.¹⁰⁷

As newspaper archives move to the internet, even old and minor convictions can be revealed via search engines.¹⁰⁸ One UK charity supporting ex-offenders describes this as a "Google effect" which often results in "employers using spent convictions to withdraw job offers or sacking employees many years later."¹⁰⁹ This undermines the legislative scheme, hindering rehabilitation and presenting applicants with a dilemma: if they rely on their statutory right not to disclose a conviction, will this make them appear dishonest in the eyes of the employer who finds out following an online search?

This problem is not confined to Europe. A study carried out in the US state of Illinois found that prior to the 1990s, criminal records were held locally and seldom accessed, and even if a person's record was involuntarily disclosed, they could avoid the associated stigma by moving across county lines. Today, by contrast, the internet ensures that "criminal justice records are more plentiful, accessible, and persistent" than ever; they have "hyper-visibility".¹¹⁰ One major consequence is that as time passes an ex-offender can no longer feel confident that his or her criminal past will become increasingly irrelevant. The influence of the record does not diminish and this

¹⁰⁷ H.K. Davison et al., "To Screen or Not to Screen? Using the Internet for Selection Decisions" (2012) 24(1) *Employee Responsibilities and Rights Journal* 1; C. Cooper, "You've Been Googled: What Employers Don't Want to See in Your Online Profile" *The Guardian*, 12 April 2011.

¹⁰⁸ Healy and O'Donnell point out that Irish local newspapers provide extensive coverage of quite trivial cases: D. Healy and I. O'Donnell, "Crime, Consequences and Court Reports" (2010) 20(1) *Irish Criminal Law Journal* 2. Ironically, the offences least likely to be discovered are those about which public concern is greatest such as crimes against children (which are tried in camera) and sexual offences (where the identity of the perpetrator is often concealed to protect the victim).

¹⁰⁹ C. Stacey, "The Google Effect – Criminal Records and the Right to Be Forgotten", paper presented at Privacy versus the Right to Know: Balancing Privacy and Access to Personal Information in the Internet Era (ICO Data Protection Policy Conference, Whitehall, London, 2015), available at <http://www.unlock.org.uk/unlock-speak-at-ico-policy-conference-the-google-effect-criminal-records-and-the-right-to-be-forgotten/> (accessed 10 February 2017).

¹¹⁰ S. Ispa-Landa and C.E. Loeffler, "Indefinite punishment and the criminal record: Stigma reports among expungement-seekers in Illinois" (2016) 54 (3) *Criminology* 387, 390.

poses a significant challenge to those so labelled when it comes to making a fresh start and attempting to live within the law.¹¹¹

Following the 2014 decision of the CJEU in *Google Spain*¹¹², the right to data protection under the Charter of Fundamental Rights includes a right to have search engines remove links to information about an individual where a search is carried out on their name. The right applies to information which is "inadequate, irrelevant or no longer relevant or excessive... in the light of the time that [has] elapsed."¹¹³ This is subject to a balancing test where there is a special interest in the public having access to the information, for example where the individual is a public figure.¹¹⁴ Individuals may contact the search engine directly to ask for de-listing of search results; if the search engine declines the request then the individual can bring the matter to the national data protection authority (DPA) for adjudication.¹¹⁵

This right – popularly known as the right to be forgotten but better described as a right to be delisted – has obvious implications for ex-offenders. In November 2014 the Article 29 Working Party issued guidelines as to how national DPAs should consider requests to have search results removed, with specific guidance on the issue of criminal records:

EU Member States may have different approaches as to the public availability of information about offenders and their offences. Specific legal provisions may exist which have an impact on the availability of such information over time. DPAs will handle such cases in accordance with the relevant national principles and approaches. As a rule, DPAs are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results

¹¹¹ This has serious economic implications given that one in three Americans has a criminal record. See E. Fetsch *No Bars: Unlocking the Economic Power of the Formerly Incarcerated* (Kansas City, MO: Ewing Marion Kauffman Foundation, 2016) p.2.

¹¹² Judgment of 13 May 2014, *Google Spain SL and Google Inc v Agencia Española de Protección de Datos and Mario Costeja González*, C-131/12, EU:C:2014:317.

¹¹³ *Google Spain*, para.93.

¹¹⁴ *Google Spain*, para.97.

¹¹⁵ See e.g. O. Lynskey, "Control over Personal Data in a Digital Age: *Google Spain v AEPD and Mario Costeja Gonzalez*" (2015) 78(3) *Modern Law Review* 522.

relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis.¹¹⁶

These guidelines note the importance of "Member State law and custom"¹¹⁷ and "relevant national principles"¹¹⁸ in applying the *Google Spain* principle but also confirm that in each instance the assessment must be carried out on a case-by-case basis. (This is consistent with our argument that national rehabilitation laws should be viewed as relevant but not determinative in assessing the content of European data protection rights.)

The effect of the Article 29 Working Party guidelines appears to be that search results for spent convictions will usually be delisted on request. Google – the dominant search engine¹¹⁹ – has confirmed that "[c]onsistent with local law governing the rehabilitation of offenders, we tend to weigh in favor of delisting content relating to a conviction that is spent".¹²⁰ However, this approach does not mean that spent convictions will always be delisted. The decision to delist still requires an individual analysis, taking into account other factors such as whether the conviction is relevant to an individual's profession,¹²¹ whether the search results have a disproportionately negative impact on the ex-offender,¹²² and whether the ex-offender was under 18 at the time of the conviction.¹²³

The right to be delisted is still at a nascent stage and its application has been difficult and controversial, with persistent criticism that it gives too little weight to the right to freedom of expression.¹²⁴ The media, relying on selective information from Google

¹¹⁶ Article 29 Data Protection Working Party, "Guidelines", p.20.

¹¹⁷ Article 29 Data Protection Working Party, "Guidelines", p.19.

¹¹⁸ Article 29 Data Protection Working Party, "Guidelines", p.20.

¹¹⁹ See eg S.van Loon, "The Power of Google: First Mover Advantage or Abuse of a Dominant Position?" in A. Lopez-Tarruella (ed.). *Google and the Law* (The Hague: TMC Asser Press, 2012).

¹²⁰ Google, "How Individual Privacy Impacts Search", 1 November 2015, available at <https://www.google.com/transparencyreport/removals/europeprivacy/faq/?hl=en> (accessed 10 February 2017).

¹²¹ Article 29 Data Protection Working Party, "Guidelines", p.16.

¹²² Article 29 Data Protection Working Party, "Guidelines", p.18.

¹²³ Article 29 Data Protection Working Party, "Guidelines", p.15.

¹²⁴ See e.g. S. Kulk and F.Z. Borgesius, "Google Spain v. González: Did the Court Forget about Freedom of Expression?" (2014) *European Journal of Risk Regulation* 389.

itself, has often portrayed the right as a boon for "fraudsters and pedophiles".¹²⁵ It is difficult to fully address these claims as there is little transparency in this area, but data accidentally released by Google for the period to March 2015 indicate that just under two per cent of requests to be delisted related to "serious crime". Of these requests, only 18 per cent (a total of 728 throughout Europe) were successful.¹²⁶ If anything, this would suggest a right which has been under- rather than over-used.

This right offers hope for ex-offenders who might otherwise face discrimination even though their convictions are spent, but it still presents a number of problems. There is little clarity as to how it operates in practice, with few cases on point so far.¹²⁷ In particular, it is not clear how much weight should be given to local rehabilitation laws. It would severely undermine the right if, for example, the single conviction rule under the 2016 Act meant that all Irish ex-offenders with more than one conviction were excluded. Indeed, by focusing on national rehabilitation laws the Article 29 Working Party guidelines overlook an important distinction: those laws primarily address the information which is available in confidence to a prospective employer, while the right to seek delisting requires us to consider the more invasive situation of the general public having access to the information.¹²⁸ The fact that disclosure to an employer might be justified does not mean that disclosure to the world will be proportionate.

The *Google Spain* principle also raises issues of equity, favouring the better educated who are aware of their rights and able to navigate the process of seeking to have

¹²⁵ J. Powles, "The Case That Won't Be Forgotten" (2015) 47 *Loyola University Chicago Law Journal* 583, 606-610. Interestingly, the Japanese Supreme Court rejected a man's attempt to have references to his arrest for child prostitution and child pornography removed from Google search results, finding that the nature of his crimes meant he had no right to be forgotten. J. McCurry, "Japanese Court Rules against Paedophile in 'Right to be Forgotten' Online Case, *The Guardian*, 2 February 2017.

¹²⁶ S. Tippmann and J. Powles, "Google Accidentally Reveals Data on 'Right to Be Forgotten' Requests", *Guardian*, 14 July 2015. Indeed, the figure of 18 per cent may be an overstatement. The article suggests that at least some of these requests to be delisted come from victims of crime and witnesses who have been named in media reports of trials. See also C.E., Carbone, "To Be Or Not To Be Forgotten: Balancing The Right To Know With The Right To Privacy In The Digital Age" (2015) 22 *Virginia Journal of Social Policy & The Law*, 525-60.

¹²⁷ There does not appear to be any reported judgment from either Ireland or the UK examining the right to delisting in a common law jurisdiction. There is one unreported Irish judgment – *Savage v Data Protection Commissioner and Google Ireland* (unreported, Circuit Court, Sheahan J., 11 October 2016) – but that does not address the issue of criminal records. For a summary of the limited case law from other European jurisdictions applying *Google Spain* see e.g. M.L. Jones, *Ctrl + Z: The Right to Be Forgotten* (NYU Press, 2016), ch.6.

¹²⁸ *Google Spain*, paras 80, 99.

search results delisted. Without support, those most in need of this remedy may not be able to access it.

Despite these concerns, it is likely that ex-offenders will be better protected by the *Google Spain* principle than by the legislation specifically addressing spent convictions. This unexpected good fortune (from the persistent offender's perspective at any rate!) again emphasises both the timidity of the Irish spent convictions legislation and the importance of the European context for criminal justice law, policy and practice.

IMPLICATIONS OF IRISH CASE

What lessons are there to be drawn from Ireland's recent experience? We believe that there are three. They relate to legislative drafting, the relevance of privacy and data protection rights to rehabilitation, and how even a delayed and minimalist initiative can establish an important principle. We turn to these wider implications briefly in conclusion.

Drafting

Irish politicians can afford to be bolder when it comes to thinking about second and third chances for offenders, especially in light of recent developments in European human rights law which have overtaken domestic legislative initiatives.

When designing a scheme for spent convictions there are several key considerations to keep in mind. If expungement is accepted in principle the first issue is where to set the eligibility threshold; in other words what kind of conviction or sentence is to be ruled out of any proposed scheme. The trend over time across a range of jurisdictions has been for the range of eligible offences to narrow and qualifying periods to remain static or even to lengthen. This has taken place against a background of increasing sentence lengths and rising prison populations. One consequence of this is that the proportion of likely beneficiaries of these laws has reduced significantly. We have seen that the threshold under the 2016 Act – the limitation to custodial sentences of 12 months or less – is considerably more restrictive than in Northern Ireland, Scotland, and England and Wales, and even more of an outlier compared to most continental European jurisdictions. Extending the length of sentences which can qualify will help to promote consistency of treatment in an increasingly mobile population.

Another issue concerns intervals. The longer an individual remains crime free the less likely it is that they will acquire a subsequent conviction. In a study of New Yorkers, it was estimated that after between five years (for those who committed a property crime) and eight years (for those who committed a crime of violence), persons with prior convictions posed no higher a risk of committing crime than other individuals of

the same age.¹²⁹ In light of this, the seven-year period specified in the Irish legislation seems reasonable though not generous.¹³⁰ It could be argued that if an individual has found a way to remain law abiding for this long the expungement of their conviction is probably of symbolic rather than practical value; it recognises rather than promotes rehabilitation.

We would also argue for the removal of the single conviction rule and the limitation to sentences of 12 months or less which, as the *P* case has illustrated, are liable to produce "simply disproportionate" consequences which are not even "arguably necessary in a democratic society".¹³¹ Such removal is probably required by the ECHR in any event – if the legislature does not act on this point then it is likely that these rules will be successfully challenged.

Increased role for data protection and fundamental rights in rehabilitation discussion

The 2016 Act illustrates the increasing significance of the privacy rights of the ex-offender in shaping spent convictions (and vetting) regimes and the way in which European norms have displaced common law principles. No longer is the legislature free to decide based purely on expedience; at a minimum, assessments of proportionality must be carried out. The impact of *MM* in particular has reframed the debate to include a fundamental rights dimension.

In addition, there is a growing role for data protection law in this area. Data protection has, in effect, established a parallel system for the rehabilitation of offenders in which data protection authorities and search engines are new arbiters of the rights of ex-offenders. The DPC guidance to employers may, practically speaking, be more significant in promoting rehabilitation than the 2016 Act, given the way it will prevent questioning about convictions which would not be considered spent. Similarly, the *Google Spain* right to be delisted has the potential to be more important than national rehabilitation laws which do not include any anti-discrimination provision. The right

¹²⁹ A. Blumstein and K. Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks" (2009) 47(2) *Criminology* 343.

¹³⁰ And it remains open to the criticism that it should include a sliding scale with shorter rehabilitation periods for less serious crimes.

¹³¹ *P & Others*, [2017] EWCA Civ 321, para 79.

to damages for breaches of data protection law offers a further possible remedy for ex-offenders who have been discriminated against, in a way which has yet to be fully explored.

Slow start better than no start

In a comparative analysis carried out more than a decade ago, Kilcommins and O'Donnell observed that Ireland: "continues to remain an anomaly in that it has not yet attempted to grapple with the issue of previous adult criminal records. In the past, particularly in the 1960s and 1970s when expungement laws were in vogue in the US and UK, this oversight could perhaps be explained in terms of a politics of neglect."¹³² They attributed this oversight to low levels of crime and incarceration, the absence of criminological research, and the lack of sustained political interest in criminal justice affairs. By the 1990s the rates of crime and imprisonment had increased sharply, there was a more fully developed understanding of the causes and correlates of crime and the same authors felt that:

The fact that the issue of expungement continues to be overlooked could be said to indicate a more disturbing politics of intention. A continued failure to legislate so as to rebalance re-integrative and public safety concerns could amount to tacit support for the de facto ancillary punishments that follow de jure criminal punishments. Curtailment of adult ex-offenders' rights of citizenry, of course, is not new. That it should continue in a blanket and indiscriminate manner for all ex-offenders in Ireland at the beginning of the 21st century appears, at best, anachronistic; at worst, calculated and wilful.¹³³

As this paper has shown, it would seem that the situation has been partially resolved. The 2016 Act is a minimal statement of what is required, which may not fully meet the requirements of Article 8, but it creates a legislative and administrative framework that can be expanded by a future government. To that extent it may be that its most important contribution is the principle it establishes. Action has been taken and, while

¹³² S. Kilcommins and I. O'Donnell, "Wiping the Slate Clean: Rehabilitating Offenders and Protecting the Public" (2003) 51(3) *Administration* 73.

¹³³ Kilcommins and O'Donnell, "Wiping the Slate Clean", 73, 85.

this has been widely welcomed, whether it will make any meaningful contribution to the reintegration of offenders remains doubtful.¹³⁴ The Irish legislation shows that it is still possible in this jurisdiction to imagine that there is such a thing as an "ex-offender" even if the legislative environment has been designed to ensure that he (or, more seldom, she) is of the low-risk, non-threatening variety.

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¹³⁴ An interesting and related development is the strategy adopted by the Department of Justice and Equality in May 2017, "in recognition of the positive impact that securing employment plays in reducing re-offending rates and creating safer communities." This is a joint initiative between the prison and probation services to create employment opportunities for people with criminal convictions. 'A New Way Forward' Social Enterprise Strategy 2017-2019. Available at http://www.irishprisons.ie/wp-content/uploads/documents_pdf/The-Dept-of-Justice-SE-strategy-Web.pdf (accessed 16 May 2017).