



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to Rehabilitation of Offenders
Reform Consultation**

March 2021

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.2.9 supports the proposal to reform legislation governing the rehabilitation of offenders in Northern Ireland.**
- 3.5 recommends that the proposed adoption of a two-part rehabilitation approach be further examined, taking into account the experience in Scotland, England and Wales.**
- 4.13 recommends the development of a significantly enhanced scope for rehabilitation alongside a review mechanism to ensure compliance with Article 8 ECHR.**
- 4.17 recommends that there is additional consideration regarding the spending of conflict-related convictions that pre-date the Good Friday Agreement (April 1998).**
- 4.18 recommends that the Department of Justice liaise with the ex-prisoners working group and other relevant stakeholders in respect of future developments on this legislation.**

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the following advice is submitted in response to the Department of Justice's consultation on "Rehabilitation of Offenders - a consultation on proposals to reform rehabilitation periods in Northern Ireland".

1.2 The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);¹
- UN International Covenant on Civil and Political Rights (UN ICCPR);² and
- UN International Covenant on Economic, Social and Cultural Rights (UN ICESCR).³

1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Standard Minimum Rules for the Treatment of Prisoners;⁴
- UN Human Rights Committee General Comment No 21 on Article 10 (Humane Treatment of Persons Deprived of Their Liberty);⁵ and
- CoE Recommendation No R (84) 10 of the Committee of Ministers to Member States on the Criminal Record and Rehabilitation of Convicted Persons'.⁶

¹ Ratified by the UK in 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Ratified by the UK in 1966.

³ Ratified by the UK in 1966.

⁴ A/RES/70/175 'United Nations Standard Minimum Rules for the Treatment of Prisoners', 8 January 2016.

⁵ UN Human Rights Committee 'General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)', 10 April 1992.

⁶ Council of Europe, 'Recommendation No. R(84) 10 of the Committee of ministers to member states on the criminal record and rehabilitation of convicted persons', June 1984.

- 1.4 The Commission welcomes the Department of Justice’s proposal to reform rehabilitation periods in Northern Ireland. The following submission responds to issues raised by the consultation document.

2.0 Human Rights Standards

Rehabilitation

2.1.1 The Commission recognises that the underlying purpose of this legislation is to promote the rehabilitation and reintegration of former offenders.⁷ This principle is recognised in international human rights law, most notably in Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR), which places an obligation on States to seek the reformation and social rehabilitation of prisoners. The General Comment of the Human Rights Committee on Article 10 further states that “no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner”.⁸ Moreover, under Article 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, “[t]he purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life”.

2.1.2 The European Court of Human Rights (ECtHR) affirmed in *Murray v the Netherlands* “that the principle of rehabilitation, that is, the reintegration into society of a convicted person, is reflected in international norms and has not only been recognised but has over time also gained increasing importance in the Court’s case-law under various provisions of the Convention.”⁹ In *Dickson v United Kingdom*, the ECtHR observed that there has been a general evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment.¹⁰ Later, in *Vinter v United Kingdom*, the ECtHR stated that “there is also now clear support in European and international law for the principle that all

⁷ Department of Justice, ‘Rehabilitation of Offenders – A consultation on proposals to reform rehabilitation periods in Northern Ireland’ (January 2021), at para 7.

⁸ UN Human Rights Committee, ‘General Comment No. 21 on Article 10 (Human Treatment of Persons Deprived of Their Liberty)’, 10 April 1992.

⁹ *Murray v The Netherlands* (2016) ECHR 408, at para 102.

¹⁰ *Dickson v United Kingdom* (2007) ECHR 1050, at para 70.

prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”¹¹ More recently, in *Khoroshenko v Russia*, the ECtHR referred to previous judgments “where it insisted that the emphasis on rehabilitation and reintegration has become a mandatory factor that member states need to take into account when designing their penal policies”.¹² Recommendation No. R(84) 10 of the Committee of Ministers to Member States on the Criminal Record and Rehabilitation of Convicted Persons recommends that member states “provide that rehabilitation implies prohibition of any reference to the conviction of a rehabilitated person except on compelling grounds provided for in national law”.¹³

Article 8 of the European Convention on Human Rights

2.2.1 Unspent convictions impact rehabilitation as they limit the ability of former offenders to leave their past behind them. Former offenders experience barriers to social inclusion, including limited access to employment, insurance, international travel, and issues linked to health and wellbeing.¹⁴ Access to employment opportunities is vital, as evidence shows that having a job is a major factor in preventing future offending.¹⁵ A study by the Ministry of Justice using data from prisons and probation services in England and Wales found that former offenders who obtained P45 employment in the twelve months after their release from prison had one-year reoffending rates that were 6-9 percentage points lower than similar offenders who did not find employment.¹⁶ Research by NIACRO found that inclusion of former offenders into society provides the best opportunity for a reduction in reoffending and criminal behaviour. This is supported by analysis conducted by the Northern Ireland Data Lab which found that NIACRO’s Jobtrack project, which was aimed at increasing the employability of people who had offended, had the effect of reducing reoffending by 24 per cent.¹⁷

¹¹ *Vinter v United Kingdom* (2013) ECHR 645, at para 114.

¹² *Khoroshenko v Russia* (2015) ECHR 637, at para 121.

¹³ Council of Europe, ‘Recommendation No. R(84) 10 of the Committee of ministers to member states on the criminal record and rehabilitation of convicted persons’ (June 1984), at para 13.

¹⁴ Review Panel on the Employers’ Guidance on Recruiting People with Conflict Related Convictions ‘2nd Report of the Review Panel on the Employers’ Guidance on Recruiting People with Conflict Related Convictions’ (May 2016), at para 7.3.

¹⁵ Ministry of Justice, ‘Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders (December 2010) at 32.

¹⁶ Ministry of Justice ‘Analysis of the impact of employment on re-offending following release from custody, using Propensity Score Matching’ (March 2013) at ii.

¹⁷ Northern Ireland Statistics and Research Agency, ‘Reoffending Analysis for a Sample of Offenders who Completed the NIACRO Jobtrack Programme During 2010/11’, (May 2015).

2.2.2 The UK Supreme Court has held that “it is not disputed” that the requirement to disclose details relating to one’s past engages the right to respect for private and family life.¹⁸ This right is protected under Article 8 of the European Convention on Human Rights (ECHR), which states that:¹⁹

1) everyone has the right to respect for his private and family life, his home and his correspondence.

2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

2.2.3 The primary purpose of Article 8 ECHR is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority.

2.2.4 Conditions upon which a State may interfere with the enjoyment of a protected right are set out in Article 8(2) ECHR. Limitations are allowed if they are “in accordance with the law” or “prescribed by law” and are “necessary in a democratic society” for the protection of one of the objectives set out in Article 8(2) ECHR.

2.2.5 In order to determine whether a particular infringement of Article 8 ECHR is necessary in a democratic society, the ECtHR balances the interests of the State against the right of the applicant. The ECtHR has clarified that “necessary” in this context does not have the flexibility of such expressions as “useful”, “reasonable”, or “desirable”, but implies the existence of a “pressing social need” for the interference in question.²⁰

2.2.6 The UK Supreme Court has considered the proportionality of the disclosure of criminal records in *R (T) v Chief Constable of Manchester*, which concerned an individual who was issued with two warnings as an 11 year

¹⁸ *In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants) R (on the application of P) (Appellant) v Secretary of State for the Home Department and others (Respondents)* [2019] UKSC 3, at para 12.

¹⁹ *R v Chief Constable ex p AB* [1999] QB 396 at 416; *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410 at para 25; *R (T) v Chief Constable of Manchester* [2015] AC 49, at para 27.

²⁰ *The Sunday Times v United Kingdom* (1979) 2 ECHR 245

old in respect of two stolen bicycles. Years later, after the warnings had been spent, T sought to enrol in a sports degree course at a college. Since the course involved contact with children, the college required an enhanced criminal record certificate. The warnings which T believed to have been spent were subsequently revealed in the enhanced criminal record certificate and the college advised T that his place on the course was at risk.

2.2.7 The UK Supreme Court found that the interference with T's private life was disproportionate because there was "no conceivable relevance" between the theft of the bicycles as a child and his proposed participation in sporting events with children.²¹

2.2.8 In the context of access to employment opportunities, the ECtHR recognised that "even where the criminal record certificate records a conviction or caution for a relatively minor, or questionably relevant, offence, a prospective employer may well feel it safer to reject the applicant".²² It further affirmed, "it is realistic to assume that, in the majority of cases, an adverse criminal record certificate will represent something close to a 'killer blow' to the hopes of a person who aspires to any post which falls within the scope of disclosure requirements".²³

2.2.9 In light of the above, the Commission supports the proposal to reform legislation governing the rehabilitation of offenders in Northern Ireland. The Commission outlines its recommendations below.

3.0 Adoption of a two-part rehabilitation period

3.1 The present blanket approach, which applies to fines, sentences of 6 months or less, and sentences between 6 and 30 months, lacks proportionality between the length of sentence and the rehabilitative period that follows. This also runs contrary to the Council of Europe's recommendation that member states "provide for an automatic rehabilitation after a reasonably short period of time and, if appropriate, in addition a possibility of rehabilitation at an earlier moment at the request of the person concerned".²⁴

²¹ *R (T) v Chief Constable of Manchester* [2014] UKSC 35, at para 41.

²² *MM v The United Kingdom* (2012) ECHR 1906, at para 200.

²³ *MM v The United Kingdom* (2012) ECHR 1906, at para 200.

²⁴ Council of Europe, 'Recommendation No. R(84) 10 of the Committee of ministers to member states on the criminal record and rehabilitation of convicted persons' (June 1984), at para 10.

- 3.2 Reforms to rehabilitation of offenders legislation in Scotland, England and Wales introduced two-part rehabilitation periods, typically made up of the length of an offender's sentence plus a buffer period.
- 3.3 While these reforms have overall been welcomed as long-overdue, Unlock, an independent charity advocating for the rights of people with criminal records in England and Wales, has raised a concern that the designated rehabilitation periods are arbitrary and not drawn from evidence.²⁵
- 3.4 Moreover, in 2020 the Ministry of Justice articulated that it is proposing to further limit the number of former offenders who will have to disclose prior convictions as part of basic checks for employment, by positively changing the rehabilitation periods governing the length of time before a conviction becomes spent.²⁶
- 3.5 In light of these considerations, the Commission recommends that the proposed adoption of a two-part rehabilitation approach be further examined, taking into account the experience in Scotland, England and Wales.**

4.0 Review of rehabilitation periods for offences not covered by the scheme

- 4.1 Presently, Article 6(1) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 prevents certain previous convictions from ever becoming 'spent'. Such sentences include imprisonment for life, imprisonment or corrective training for a term exceeding 30 months and preventive detention. Consequently, this provision prevents those that have served sentences identified within this law from ever becoming a rehabilitated person, irrespective of their circumstances.
- 4.2 The consultation paper specifies that measures to promote the rehabilitation and reintegration of former offenders must be balanced against the broader societal interests of public safety and the prevention of disorder and crime.

²⁵ Unlock 'The mark of Cain: Lifelong disclosure in England and Wales since 1974' (2020) at 6.

²⁶ Ministry of Justice 'A Smarter Approach to Sentencing' (September 2020), at para 257.

- 4.3 In connection with this point, it is worthy to note that the intention behind the rehabilitation of offenders regime at its time of original drafting was not to address public safety measures but rather “to help ex-offenders live down their past” by preventing life-long discrimination.²⁷ Further, the exclusion of longer sentences from the regime was not a conscious policy decision, but rather influenced by what was politically achievable at the time.²⁸ Moreover, we note that it is more than 40 years since the period of spent convictions has been reviewed and that reform has now taken place in England and Wales and Scotland with further reform being contemplated again in the former.
- 4.4 With respect to the need to disclose sentences exceeding 30 months, Ministry of Justice statistics show that reoffending proportions for those who received longer sentences is the lowest of all categories.²⁹ This seems to counter the need for former offenders with longer sentences to be subjected to lifelong disclosure requirements, based on the argument that they pose a higher risk of reoffending. In light of this we would recommend an approach which provides for a significantly enhanced scope for rehabilitation than currently provided alongside provision for review.
- 4.5 In *R (L) v Commissioner of Police of the Metropolis*, L was employed by an agency who provided staff for schools and was required to obtain an enhanced criminal record certificate which showed police intelligence concerning prior issues she had had with her teenage son. In assessing how this impacted her right to private life under Article 8, the court held that “it has been recognised that respect for private life comprises, to a certain degree, the right to establish and develop relationships with other human beings . . . Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life.”³⁰ The court further recognised that as information “recedes into the past, it becomes a part of the person’s private life which must be respected.”³¹
- 4.6 The Commission notes that the consultation document seeks views on whether custodial sentences of over 30 months, excluding serious sexual,

²⁷ Andrew Henley, ‘The rationale behind the Rehabilitation of Offenders Act 1974’ (2020).

²⁸ Andrew Henley, ‘The rationale behind the Rehabilitation of Offenders Act 1974’ (2020), at 2.

²⁹ Ministry of Justice, ‘Proven reoffending statistics: October to December 2018’ (October 2020), at Table C2a.

³⁰ *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, at para 24.

³¹ *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, at para 27.

violent or terrorist offences could be spent, but has not made any concrete proposals³² With respect to this suggestion, the Commission considers that the definition of sexual, violent, or terrorist offences necessitates careful consideration. Further, given the wide scope for differences among cases, the Commission considers that it would be appropriate for a review mechanism to be established, enabling an independent reviewer to assess the potential for a sentence to be spent on an individualised case-by-case basis.

- 4.7 *R (JF) v Secretary of State* concerned two claimants who had been sentenced to periods of 30 months' detention and 5 years of imprisonment for sexual offences respectively and resultingly, were subject to notification requirements for an indefinite period without the possibility of review.³³ The claimants argued that these requirements, without the possibility of review constituted disproportionate interferences with their rights under Article 8 of the ECHR.
- 4.8 In its judgment, the UK Supreme Court had regard to whether the imposition of indefinite notification requirements, without the possibility of review, was a proportionate interference with the former offender's article 8 rights.³⁴ The court found that the aim of the notification requirements regime, namely, to assist in the prevention and detection of sexual offences, did not necessitate notification where it was clear that there is no significant risk that the sexual offender will re-offend.³⁵
- 4.9 In respect of the same proceedings, the Court of Appeal's judgment (which was upheld by the UK Supreme Court) considered the viability of a review mechanism with respect to the notification requirements and held that "it is by no means uncommon for Parliament to give offenders or others the right to have a review of orders which impose restrictions or prohibitions on them".³⁶ This lends support to the idea of a review mechanism to address offences that cannot ordinarily be spent under the legislation.
- 4.10 Such a review mechanism could operate with an individual submitting their request to an independent board to have their conviction spent, after a specified period of time proportionate to their sentence. The independent

³² Department of Justice, 'Rehabilitation of Offenders – A consultation on proposals to reform rehabilitation periods in Northern Ireland' (January 2021), at 15.

³³ *R (JF) v Secretary of State* [2011] 1 AC 331.

³⁴ *R (JF) v Secretary of State* [2011] 1 AC 331, at para 41.

³⁵ *R (JF) v Secretary of State* [2011] 1 AC 331, at para 51.

³⁶ *R (JF) v Secretary of State* [2009] EWCA Civ 792, at para 48.

board would then undertake an individualised risk assessment to ascertain whether an individual’s conviction can be spent. This mechanism could address more serious offences and still work towards ensuring that a proper balance is struck between the right of a person to rehabilitation and reintegration, and the protection of public safety and order.

4.11 In light of the rehabilitative aims of the legislation, and evidence supporting better outcomes at a societal and individual level following successful resettlement, the Commission suggests the Department explore the adoption of a review mechanism to examine sentences that cannot ordinarily be spent under the legislation.

4.12 The Commission notes that the compliance of Article 6(1) with Article 8 ECHR is currently subject to ongoing judicial review proceedings.

4.13 The Commission recommends the development of significantly enhanced scope for rehabilitation alongside a review mechanism to ensure compliance with Article 8 ECHR.

Conflict related offences

4.14 The Commission notes that there is no reference to conflict related offences in the consultation document save for the exclusion of terrorist offences from proposals to increase the limit under which convictions can become spent. According to NIACRO, it is estimated that over 30,000 individuals have conflict related offences, mostly young men serving long sentences subject to the same disclosure arrangements as any other offences under the Rehabilitation Order 1978.³⁷ Given the prevalence of conflict related offences in Northern Ireland, and the continuing work on the reintegration of ex-offenders, this should be an issue that is addressed by the Department.

4.15 The Fresh Start Agreement commits to “the reintegration of people previously involved in the Troubles taking into account the report of the Review Panel on employers’ guidance on recruiting”.³⁸ In turn, the guidance document advises that any conviction for a conflict-related offence that pre-dates the Good Friday Agreement (April 1998) should not

³⁷ NIACRO, ‘The Department of Justice’s ‘Rehabilitation of Offenders’: A consultation on proposals to Reform Rehabilitation Periods in Northern Ireland’ (February 2021), at 7.

³⁸ A Fresh Start: The Stormont Agreement and Implementation Plan, 17 November 2015, at para 3.10.

be taken into account by an employer unless it is materially relevant to the post.³⁹ Furthermore, in its second report, the Review Panel on the Guidance points to evidence inferring that the majority of former conflict-related offenders are capable, dependable and reliable employees who pose no risk to their colleagues, clients or the business for whom they work, when they are employed.⁴⁰

4.16 The Department of Justice may wish to liaise with the Review Panel, the Ex-prisoners working group and other relevant stakeholders with respect to future developments relating to the reform of legislative and policy measures on the rehabilitation of offenders.

4.17 The Commission recommends that there is additional consideration regarding the spending of conflict-related convictions that pre-date the Good Friday Agreement (April 1998).

4.18 The Commission recommends that the Department of Justice liaise with the ex-prisoners working group, the Review Panel and other relevant stakeholders in respect of future developments on this legislation.

The Commission will provide further advice once more detail becomes available from the Department in respect of its plans to take this work forward.

³⁹ Review Panel on the Employers' Guidance on Recruiting People with Conflict Related Convictions '2nd Report of the Review Panel on the Employers' Guidance on Recruiting People with Conflict Related Convictions' (May 2016), at para 3.3.

⁴⁰ Review Panel on the Employers' Guidance on Recruiting People with Conflict Related Convictions '2nd Report of the Review Panel on the Employers' Guidance on Recruiting People with Conflict Related Convictions' (May 2016), at para 5.11.

Contact us

www.nihrc.org | info@nihrc.org | +44 (0)28 9024 3987
4th Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

