

# TIME FOR POLICY REDEMPTION? A REVIEW<sup>i</sup> OF THE EVIDENCE ON DISCLOSURE OF CRIMINAL RECORDS

Beth Weaver<sup>1</sup>

SCCJR<sup>2</sup> and the University of Strathclyde

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## INTRODUCTION

There is wide variation in disclosure practices within and between the U.S, the U.K and Europe, although there is some consensus that reasons for checking criminal records by employers include: minimising risk of liability and loss; concerns surrounding public protection where the nature of employment includes working with vulnerable groups; assessments of moral character in terms of honesty and trustworthiness; and compliance with statutory occupational requirements (Blumstein and Nakamura, 2009). **As the use of criminal record background checks by employers has become increasingly pervasive, having a criminal record can have significant effects on employment prospects producing ‘invisible punishment’ or ‘collateral consequences’** of contact with the justice system (Travis 2002). Taking into account that over 38% of men and 9% of women in Scotland are estimated to have at least one criminal conviction (McGuinness, McNeill and Armstrong, 2013), issues surrounding criminal record checking and disclosure in an employment context affect a large proportion of people.

In recent years, reforms to both the Rehabilitation of Offenders Act 1974 and to practices of disclosure have been and are being implemented, with the aim of **reducing unnecessary barriers to employment for people with convictions while promoting the protection of vulnerable groups**. Additionally, a social movement to ‘Ban the Box’ aims to eliminate criminal history questions from standard employment applications by deferring the stage at which an employer can inquire into criminal history (Smith, 2014), based on the belief that employers use that information to immediately eliminate those with convictions from consideration. **‘Ban the Box’ aims to support those with convictions to be considered on the basis of their skills and experience before disclosing criminal histories** (Vuolo, Lageson and Uggen, 2017). In the USA around 30 states and over 150 cities and counties have taken steps to remove barriers to employment for qualified workers with records.<sup>3</sup> In the UK, 87 employers have signed up to ‘Ban the Box’.<sup>4</sup> How this is implemented in the USA is variable but most call for the removal of any criminal record question on applications for public and private employers. Many also include fairer hiring practice provisions informed by the guidance document issued by the US Equal Employment Opportunity Commission (EEOC) in 2012. This document was designed to clarify standards and provide **‘best practice’ on how employers may check criminal backgrounds** without violating prohibitions against employment

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<sup>1</sup> Correspondence address: [Beth.Weaver@strath.ac.uk](mailto:Beth.Weaver@strath.ac.uk)

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<sup>3</sup> <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>

<sup>4</sup> <https://www.bitc.org.uk/programmes/ban-box/who-has-banned-box-0>

discrimination under Title VII of the 1964 Civil Rights Act (EEOC 2012). This **proposes that employers assess criminal records on an individualised basis, considering factors such as the nature of the crime, the time elapsed since it was committed, and the nature of the job** (Lageson, Vuolo, Uggen, 2015). There is some evidence that the move to more formal, regulated checks has led employers to more people with criminal records for employment than they might have previously (Hartstein, Fliegel, Mora and Zuba, 2015; Lageson, et al., 2015). These guidelines are, in part at least, informed by ‘Time to Redemption’ studies which empirically investigate the period of time when people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions.

In what follows, the findings of these ‘Time to Redemption’ studies are discussed, following a brief review of the evidence into the relationship between employment and desistance. This paper then explores research into employers’ attitudes, beliefs and behaviours with regard to the employment of people with convictions, prior to exploring practices of disclosure and vetting in the UK, Europe and the USA. Existing practices of disclosure tend to retain the requirement that certain spent convictions will always be disclosed in certain circumstances, for the purposes of public protection. By contrast, time to redemption research measures the extent to which **people with convictions become statistically close to people without convictions in terms of risk**, taking into account age at offence, periods of desistance and crime type, suggesting that in general that period is **between 7 and 10 years**. This paper suggests that the findings of Time to Redemption studies allows for information pertaining to criminal histories to be used in a more nuanced way, concluding by bringing together these different areas of inquiry to consider implications for approaches to reform. In so doing, this paper ends by reviewing **four, not necessarily mutually exclusive, approaches to reform**, that might bring Scotland and the UK into closer alignment with European practices and the European Convention on Human Rights, and in particular, Article 8 which provides a right to respect for one’s private and family life, home and correspondence. These approaches, based on a review of and informed by the evidence include: **(1) reviewing spent periods and the issue of enduringly unspent convictions; (2) certificates of rehabilitation; (3) court imposed Occupational Disqualification; and the (4) guidance and revisions to anti-discrimination legislation.**

### THE COMPLEX RELATIONSHIP OF AGE, EMPLOYMENT AND DESISTANCE

Research shows that people can and do stop offending, and that **employment is a key protective factor in desistance**. This would suggest that public protection is increased rather than risked when barriers to employment are removed (McGuinness et al., 2013). However, this process of change is characterised by lapse and relapse (Glaser, 1964), which makes it difficult to pin-point with any certainty when a given individual has finally desisted.

There is some consensus, however, that in general **people commit less crime as they age**. The often cited age-crime curve demonstrates a steady decline in criminal activity after a peak in late teens and young adulthood which would imply that likelihood of further offending diminishes with age. Indeed, Hirschi and Gottfredson (1983) argue that age specific offence rates increase dramatically from age 10 to 17 and then continually decrease thereafter, regardless of the individual’s criminal propensity. However, for employers, the age-crime curve is limited in its capacity to inform decision-making around the employment of a given individual. As Blumstein and others have argued, age is not in fact inversely related to criminal offending at the *individual level of analysis* among active offenders (e.g. Blumstein and Cohen 1979, 1987; Blumstein, Cohen, Roth and Visser, 1986; Blumstein, Cohen and Farrington 1988; Farrington 1983, 1986). They propose that Gottfredson and Hirschi confuse changes in *participation and incidence rates* with changes in the *frequency* of individual offending among active offenders. Rather, the age crime curve is driven by two processes: participation and incidence. As long as people are still criminally active they may continue to commit crimes at a relatively constant rate independent of their age; changes in aggregate crime rates may

mainly reflect changes in prevalence of offending across the whole population (see Farrington 1986; 1997).

Moving beyond the age-crime relationship, **research reveals a complex relationship between (un)employment, offending and desistance**. Cromwell, Olson and D'Aunn (1991 p.83) argued that 'desistance [is] associated with the disintegration of the adolescent peer group and with employment and the ability to earn money legitimately'. Conversely, others have observed that employment also provides opportunities for offending (Hirschi, 1969; Sviridoff and Thompson, 1983; West and Farrington, 1977). Even if employment may reduce the likelihood of re-offending, a lack of employment does not necessarily mean an increase in offending. Indeed, as Maruna (1997) observed, the connection between unemployment and crime is not sustained when applied to women, who have historically been disadvantaged in terms of employment, but remain marginally represented in crime statistics. Age has also been cited as a factor in shaping the impact of employment on criminality. Uggen (2000), in an analysis of data from a national work experiment in the US, found that **those aged 27 or older were more likely to desist when provided with employment**. He inferred from this that **the meaning attached to employment and participation in crime may change as individuals age**, indicating a subjective component to desistance. Similarly, Skardhamar and Savolainen's (2012) quantitative research on the timing of behavioural change and participation in employment problematises a social control interpretation of the role of employment in influencing behavioural change. They identified that rather than triggering desistance, participation in employment emerges *as a consequence of* desistance.

While, then, employment has been generally associated with desistance (for a review of this literature see Weaver, 2015), it is also increasingly acknowledged that **employment in and of itself does not produce or trigger desistance; rather it is the meaning and outcomes of either the nature and/or quality of the work** or participation in employment and how these influence an individual's self-concept and social identity, as well as how these interact with a person's priorities, goals and relational concerns that can explain this relationship (Weaver, 2015). Farrall (2005) similarly suggests that work, and as part of that, association with a new social group, can be a mechanism for rebuilding who one is and forging who one will become. As Owens states, the impact of work goes beyond the effects of obtaining an income or even the injection of a daily or weekly routine; 'employment is part of the idea of what is acceptable' (Owens 2009: 50), and communicates in itself, that one has a place in the world and a role to play – be it in society or even in one's own family – as a reliable partner and provider or a good parent for example.

However, despite the significance of employment to processes of desistance, it is also true that there are many and varied obstacles to people with convictions accessing and sustaining employment, among which - and often underpinning - is the stigma of a criminal record and associated vetting and disclosure practices. Evidence indicates that **anticipated stigma and the repeated encountering of obstacles in obtaining employment can increase risk of reoffending and undermine desistance** (Farrall, 2002; LeBel, 2012; Winnick and Bodkin, 2008). The challenges faced by people with convictions in attempting to find work have also been highlighted in studies on the attitudes towards employing people with convictions, as well as from interviews with people on parole (Cherney and Fitzgerald 2016; Graffam, Schinkfield and Hardcastle 2008; Lageson et al., 2015; Uggen, Manza and Behrens, 2004), discussed further below. Underpinning much of the uncertainty around the recruitment of people with convictions is the lack of clarity as to when past convictions come to be of little or no value in the prediction of criminality, when taking into account information that is self-disclosed or revealed through formal mechanisms of disclosure. It is this uncertainty that 'Time to Redemption' studies seek to address. It should be noted, however, that ensuing guidelines or strategies are not intended directly to reduce recidivism, or support desistance, but rather to reduce stigmatisation of and discrimination against individuals with convictions and thus to improve prospects of employment (Denver, 2017).

## TIME TO REDEMPTION STUDIES & THE IMPORTANCE OF INDIVIDUALISED ASSESSMENT

**Time to Redemption studies empirically investigate the period of time when people with convictions can statistically be considered as exhibiting the same risk of reconviction as people with no convictions.** The key question that these studies seek to answer is this: How many years of non-offending does it take for a person with convictions to resemble a person without convictions in terms of his or her probability of offending? Key to this is establishing that the base-line risk level of a non-convicted person is not zero because they have a certain probability of offending (Soothill and Francis, 2009). Non-convicted persons are those who have never been convicted, which is different to saying that they have never committed an offence. Moreover, the absence of convictions does not preclude the potential to commit a crime and acquire a conviction in the future (e.g. Soothill, Ackerley and Francis, 2004; Soothill and Francis, 2009).

This issue is particularly relevant for employers and, potentially, for policies surrounding the retention and disclosure of criminal records. While criminal record checks are increasingly being used by employers there is evidence to suggest some confusion around the interpretation of criminal record information (Lageson, et al., 2015), which may result in a reluctance to employ people with convictions, precisely because the terminology used to disclose convictions is uninformative or incomprehensible and/or any risks for the employer are unclear. The findings of Time to Redemption Studies can potentially help an employer who has selected a job applicant for a position and wants to compare that individual's risk of arrest or conviction with someone of the same age from the general population, or who wants to make sense of information provided on disclosure certificates. Taken together, the five studies identified in the literature search estimate that *in general after an average of 7-10 years without a new arrest or conviction, a person's criminal record essentially loses its predictive value.*

Authors	Where	What	Time to Redemption Period
Kurlychek et al., (2006); Kurlychek et al., (2007)	U.S	Arrest and Contact Records data.	7 Years.
Blumstein and Nakamura (2009)	U.S	Arrest data: variation by age and crime type	Younger onset of offending leads to longer time to redemption periods; people convicted of violent crimes also have longer time to redemption periods than those convicted of property crimes
Soothill and Francis (2009)	U.K	Conviction data.	10 years
Bushway et al., (2011)	Netherlands	Conviction data: age and criminal history	10 years, but for older people, this time is reduced, and does not apply to those with extensive criminal histories.

Table 1: Overview of Time to Redemption Studies

Kurlychek, Brame and Bushway (2006) and Kurlychek, Brame and Bushway (2007) sought to determine whether people whose last contact with the criminal justice system occurred many years ago had a higher risk of acquiring future arrests or police contact than individuals with no previous contact at all. They wanted to identify whether there is a period after which, if that person has remained conviction free, prior convictions are no longer predictive of future criminality. Kurlychek et al., (2006) looked at the *arrest records* of 13,160 seventeen-year-old males born in Philadelphia in 1958 and followed them up to age 26. Kurlychek et al., (2007) studied *police contact records* of 670 males born in Racine, Wisconsin in 1942 and followed them up until age 32. To sum up their findings, people with convictions converge with people with no convictions by age 25 (Kurlychek et al., 2007) and near converge at this time (Kurlychek et al., 2006). Overall, they conclude that 'if a

person with a criminal record remains crime free for a period of about 7 years, his or her risk of a new offence is similar to that of a person without any criminal record' (Kurlychek et al., 2007: 80). One of the problems with US-based studies, however, is that the data on which the studies are based is location specific, rather than national; if people move out of the area (e.g. Philadelphia), any reoffending will not be captured by their retrieval methods.

Blumstein and Nakamura (2009) used a larger and more recent though still location limited data set, drawing on the New York criminal history repository, again utilising arrest data rather than conviction data, albeit over 27 years, controlling for age and crime type, by examining the hazard of those who were first arrested in 1980. They found that **young first time arrestees who manage to avoid re-arrest in New York eventually converge with the general population of the state, as well as people with no arrest record, in terms of their probability of re-arrest.** Importantly, they found that the actual number of years before this happens depends on the type of crime. For example, people convicted of violent crimes have a longer time to redemption than those convicted of property offences as do those who offending began at an early age.

Kurlychek and colleagues' and Blumstein and Nakamura's (2009) data sets consisted of arrest records or police contact which is important to note, because, as Denver (2017) observes, it may be inappropriate in some contexts to consider arrests that did not result in conviction, albeit this information can be disclosed in formal disclosure practices in the UK (discussed below). In addition, the calculated point of redemption may differ when considering prior conviction records compared to prior police contact or arrest.

Soothill and Francis (2009) drew on data from the whole of England and Wales, rather than a given county, local authority or state as in the US studies, and the birth cohorts (1953 and 1958 to 1999, when participants were aged around 46 and 41 years old) were more recent and larger in number than those of Kurlychek et al., (2006 and 2007). Importantly, Soothill and Francis (2009) measured *reconviction rates*, rather than simply police contact although they like Kurlychek et al., (2006, 2007) focused on people under the age of 20. Rather than iterating their findings in detail here, the key points are that

- a) **the risk of conviction in the *next five years*<sup>5</sup> for a 30 year old, for example, with *no* prior convictions is 1 in 100, with that risk steadily declining with age;**
- b) those who have a finding of guilt as a young person *or* a conviction between 17-20 years old, but no further convictions, converge with the non-convicted population at around age 30, so the time to redemption is between 10-13 years;
- c) for those who have findings of guilt as a juvenile *and* convictions as a young adult prior to age 21, they converge with the non-convicted population at around 35 years old.

They conclude that if a person remains crime free for a period of 10 years after the age of 20, they will have similar likelihoods of further reconviction as those who have not been convicted, of the same age. Critically, however, we do not have a sense from this study of variation in times to redemption by offence type or of how more extensive criminal histories might affect results. An analysis of later research into Time to Redemption studies reveals that age on arrest, age on conviction, current age and type of record (i.e. type of offending, extent of criminal history) can all shift points of redemption.

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<sup>5</sup> The non-offending group has a small and declining risk of being convicted *within the next year* – from around 1 in 100 at the age of 21 years, around 1 in 200 at the age of 25 years, around 1 in 300 at the age of 30 years and around 1 in 700 at the age of 35 years (Soothill and Francis 2009).

Bushway, Nieuwebeerta and Blokland (2011)'s Dutch study provides an important corrective to the limitation of earlier studies reviewed above by examining age and extent of criminal history, and focusing on conviction, as opposed to arrest or contact data, as key variables. They wanted to know if the period of time to redemption differs across the age of last conviction and the total number of prior convictions, which takes us further than preceding studies. To find this out, they used long term, longitudinal data on a Dutch *conviction* cohort. They used a matched control group of 3243 people with and 750 people without convictions, matched by age and gender who were convicted in 1977.

Their key findings reflect those of Soothill and Francis (2009) in that **young people with no prior or subsequent convictions match non-convicted people after approximately 10 years** of remaining conviction free. **For older people, the time to redemption period is considerably shorter** and those with *extensive* criminal histories either *never resemble* the non-convicted population or only do so *after a conviction free period of more than 20 years*. This would imply that some people may not ever be redeemed in terms of risk calculations, if redemption means that they have the same level of risk as those of the same age with no prior convictions. While this would suggest that prior criminal history is significant in considering risk of further offending after conviction, it is not the same as saying that a given person will or will not re-offend.

Bushway et al., (2011) found that risk of re-conviction differs across people of different ages and with a different number of prior convictions. Time to redemption, they argue, depends on age at time of incident conviction, which reflects the methods and measures used in a study - and the number of prior convictions. **Overall, the time to redemption is less for older people with convictions and those with lesser criminal histories.** For those with no previous convictions, the time to redemption is 10 years for those age 12-26, and only 2-6 years for older offenders with no previous convictions. For those with 4 or more offences, the time to redemption is 23 or more years, even if they have been crime free for 20 years. This means that, in the aggregate, time to redemption depends on age at time of incident conviction, and number of prior and subsequent convictions. This study would suggest that arguments for sealing or expunging records on the basis, for example, of time since conviction, is problematic without reference to age and criminal history. It would unnecessarily disadvantage older people with convictions and those with few prior convictions while failing to reflect the potential risk of those with extensive criminal histories. However, Soothill and Francis (2009: 385) go as far to say that **employers 'have more to fear from the non-offending population than from those with convictions' if those with convictions have not been reconvicted in the last ten years.** This is because their calculations suggest that 17 out of every 1000 thirty-year-olds who had a crime free period during the previous ten years would be convicted in the next five years. Of those 17, thirteen will have no previous convictions at all and only 4 will have a conviction between ages 10-20.

Perhaps, then **the US Equal Employment Opportunity Commission (EEOC, 2012) is right to advocate for the practice of individualised assessments**, which include the consideration of mitigating information that might reduce concerns raised by criminal records and which require employers to consider how recent any criminal convictions may be (Denver, 2017). If we consider this through the lens of the Rehabilitation of Offenders Act 1974, the findings of Time to Redemption studies could enable policy makers in Scotland to issue guideline boundaries to increase criminal background check clearance based on time since last conviction, given that permanently unspent convictions are disclosed even where risk is no longer predictive of future criminality or put differently, where that risk reflects that of the non-convicted population. Understanding what *does* matter to employers and what affects the employment of people with convictions, as suggested by research exploring employers' attitudes, decision-making and behaviours, should also inform future policy, if it is to have impact on decision-making practices.

## EMPLOYERS' ATTITUDES, DECISION-MAKING AND BEHAVIOURS

Access to employment can improve outcomes for people embarking on or sustaining desistance. This suggests that **barriers to work as a result of criminal history checking can destabilise desistance**, not least in increasingly precarious labour market conditions (Grimshaw, Johnson, Rubery and Keizer, 2016) and where employers hold negative attitudes towards people with convictions (Fletcher, 2001, 2002, 2008; Denver, 2017).

Research in the USA has revealed some patterns in vetting practices. Holzer, Raphael and Stoll (2007) for example, found that **larger firms tend to conduct more checks than smaller firms, and particularly in industries that have more customer contact such as retail and service industries** (see also Stoll and Bushway, 2008). Applications for restaurant positions seem to be least likely to inquire about criminal histories, whereas racially diverse workplaces and establishments in the most and least advantaged neighbourhoods are more likely to ask (Vuolo et al., 2017). Those firms that do not perform checks are disproportionately represented in manufacturing and construction industries, they tend to be smaller firms, have a larger proportion of unskilled jobs and are ethnic-minority owned (ibid; Holzer et al., 2007).

Empirical research into the attitudes and behaviours of employers in Europe is rare although the evidence which does exist suggests that **criminal background record checks are not an extensive practice in a European context**, excepting the UK, although some suggestion has been made that this is on the increase in Europe, particularly in the area of childcare (e.g. Boone 2011; Backman 2012; Larrauri Pijoan 2014b). The existing research in the USA suggests **that in general those with a criminal record fare worse in the application stage of employment** (Pager, 2003; Pager, Western and Bonikowski, 2009; Uggen, Vuolo, Lageson, Ruhland and Whitham 2014), a finding that underpins the Ban the Box movement. However, **USA-based research further indicates** that this is more pronounced for white people than black people because **employers statistically discriminate against African American men on the basis of perceived criminality in the absence of any opportunities to confirm otherwise** (Holzer, Raphael and Stoll 2006; Pager, 2003; Pager, Western and Sugie 2009). These studies suggest that **employers use characteristics such as race or gender to make assumptions about group differences in productivity and other attributes, particularly when they lack detailed information about applicants**. This would suggest, ironically, that Ban the Box initiatives may have negative consequences for African American men without convictions (Bushway, 2004; Holzer, Raphael and Stoll, 2004; Vuolo et al., 2017). In turn, **employment prospects improve significantly for applicants who have a chance to interact with the employer** and more so among those who elicit sympathetic responses in the course of the interaction (Ali, Lyons and Ryan 2017; Pager et al., 2009). Of course, this will be influenced by the attitudes of the employer, however, Pager et al., (2009) identified that the nature of interactions between prospective employer and candidate can influence employers' decision-making. Personal contact can help convey signals (Bushway and Apel, 2012) as to the disposition of the candidate and help the employer develop an impression of their character. There is also evidence to suggest that **some employers prefer to rely on their own experience in evaluating the suitability of applicants, rather than criminal records** (Lageson et al., 2015). However, the ability to have such a hearing is not available to all applicants with, as noted, African American male applicants significantly less likely to be invited to interview, offering fewer opportunities for such interactions.

Holzer et al., (2007) found that hiring practices are unaffected by whether a firm checks criminal histories, although Pager and Quillan's (2005) research suggests that employers responses to surveys tend to under report the extent of discrimination, suggesting a difference between self-report and actual practice. Notwithstanding this, Holzer et al., (2007) found that **those legally required to conduct checks do not tend to hire people with convictions compared to those that check backgrounds but**

**are not required to do so.** They infer from this that employers may *choose* to perform checks to gain additional information about prospective candidates and or to protect themselves from liability (see also Stoll and Bushway 2008). The primary implication of this study is that the act of checking itself is not the problem; those unable or unwilling to hire people with convictions will not hire them. What is at issue then is the  *motive* or reasons for checking. Holzer et al., (2007) suggest that policy initiatives aimed at restricting background checks, particularly for those firms legally required to perform checks, may not have the desired consequences of increasing the employment of people with convictions. This result is consistent with an alternative view that **some employers are interested in the details of the criminal history record and seek to use information about that record in a more nuanced way.**

Research evidence is therefore mixed on whether criminal records checks that reveal an applicant's convictions do in fact have the effect of screening them out. Vuolo et al., (2017), for example, suggest that employers ask about criminal records on applications for many reasons (Bushway, et al., 2007; Raphael 2010) including fear of liability (Finlay, 2009), distrust (Bushway, Stoll and Weiman, 2007) and ascertainment of moral character (Blumstein and Nakamura, 2009). While many employers show considerable reluctance to hire individuals with criminal records (e.g. Holzer, Raphael and Stoll 2003; 2004; 2007; Pager, 2003; Schwartz and Skolnick 1962; see also Stoll and Bushway, 2008 - particularly if legally required to do so), survey-based research has shown that not all employers want to exclude people with convictions (Holzer, Raphael and Stoll, 2006; Pager, 2003). As previously noted, **employers are concerned with the relative risk posed by people with different types of criminal records** (Bushway et al., 2011), in relation to which the inclusion of **findings from Time to Redemption studies might assist in the formulation of guidelines and/or policy, which might ameliorate some of the confusion experienced by both employers and applicants alike**, in navigating the complex disclosure system in Scotland and the UK.

## DISCLOSURE / CRIMINAL VETTING

### The Rehabilitation of Offenders Act 1974: Existing Rules

The Rehabilitation of Offenders Act 1974, ("the 1974 Act") has been subject to a series of reforms, both in Scotland and in England and Wales. Further reforms have been proposed under the Management of Offenders (Scotland) Bill (2018). **The general purpose of the 1974 Act is to put in place a system that effectively clears the records of many people with convictions, by setting periods following a specific sentence or disposal after which the person is deemed to be rehabilitated.** It provides a legal framework within which information is allowed to be disclosed to or withheld from employers/potential employers to allow them to make an informed decision about whether to employ a given applicant to the post for which they are applying.

In Scotland, anyone who has been convicted of a criminal offence and sentenced to prison for 30 months or less, or who is given an Alternative to Prosecution, such as a fiscal fine, can be deemed rehabilitated under the terms of the 1974 Act, after the specified rehabilitation period has passed, at which point the original conviction is considered spent. The specific rehabilitation period depends on the sentence imposed or the type of alternative to prosecution measure given for that offence, which is deemed to reflect the severity of the offence (Scottish Government, 2015). For people aged under 18 years old at the date of conviction, the rehabilitation period is halved for most disposals as compared to those aged 18 or more receiving the same disposal. **The 1974 Act provides, in principle, for a system of protection to individuals with previous convictions not to have to disclose these in certain circumstances.**

However, the wider system of disclosure of convictions is rather more complex and nuanced as discussed below, in as much as spent convictions can still be disclosed to employers. Also, as noted above, these protections do not apply to everyone with a conviction. For example, they do not



currently apply to **anyone receiving a custodial sentence exceeding 30 months under the current operation of the 1974 Act, whose conviction never becomes spent** and which means it should be self-disclosed for life and it will always be included in even a basic disclosure certificate. **This is a significant departure from practices in continental Europe**, discussed below. It should also be noted that the rehabilitation period for a conviction that is not spent can be extended if the individual is convicted of a subsequent offence on indictment during the rehabilitation period for the previous offence in accordance with the rules under section 6 of the 1974 Act.

**The 1974 Act has been criticised for its lengthy rehabilitation periods** (e.g. McGuinness et al., 2013) and there is evidence that it is confusing for people with convictions (Fletcher et al., 2012) and employers (Metcalf et al., 2001; Haselwood-Pocsick, 2008). It is likely that the recent series of amendments to the ROA<sup>6</sup>, which have expanded the number of professions and situations where ROA 'protections' do or do not apply, have exacerbated this. At the same time, increases in the average lengths of prison sentence also means that more convictions can never be spent and thus having the effect of permanently excluding more people from the growing number of jobs that have become exempted from the Act over recent decades.

### Criminal Record Disclosures in Scotland Explained

Disclosure Scotland processes applications into criminal history enquiries in Scotland. There are four levels of application. **Basic applications** contain only information about unspent convictions under the Rehabilitation of Offenders Act (1974). **Standard applications** contain information about both spent and unspent convictions, registration requirements and cautions (a disposal available in England and Wales). **Enhanced applications** contain all conviction information, whether spent or unspent, and any other non-conviction or 'soft information' considered relevant by the police or other government bodies. The **PVG scheme** (protection of vulnerable groups) came into effect in 2011, and contains the same information as the Enhanced level of disclosure.

Convictions which have passed the rehabilitation period and become "spent" are, then, still disclosed for all but basic level disclosures (i.e., standard, enhanced or PVG scheme records). **The period that spent convictions can be disclosed depends on the offence itself** (unlike the specification of rehabilitation periods under the Rehabilitation of Offenders Act 1974, which are a function of the length of the sentence imposed). In order to determine periods for reporting spent convictions, **two lists of offences are kept, the "offences which must be disclosed unless a Sheriff orders otherwise" and "disclosed subject to rules" lists**. The former contains offences deemed to be relevant regardless of age (such as rape and sexual assault) and will always be disclosed on a higher level disclosure certificate unless the offence is spent and either 15 years (if the individual was 18 or over when convicted) or 7.5 years (if the individual was under 18 when convicted) has passed and a successful appeal has been made to a Sheriff to have the conviction removed. Similar mechanisms of disclosures apply to 'disclosed subject to rules' lists', which include offences such as fraud, robbery and common assault, although there is no requirement to lodge a formal appeal. Offences that are not included on either list are only disclosed while they are unspent.

Protected convictions are those that are either spent or *other than* those on an "Offences which must be disclosed unless a Sheriff orders otherwise" list. If the offence is on the "disclosed subject to rules" list and it has exceeded the relevant 15-year period, if the person was convicted when aged 18 or over or 7.5 years if convicted when under 18 years old, or if the sentence given was an admonition or absolute discharge, then it is also protected. It is important to note that a conviction for an offence on the "disclosed subject to rules" list can become protected before the relevant 15

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<sup>6</sup> See for example, The Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2013, 2015, 2016; 2018; s.109 of the Criminal Justice and Licensing (Scotland) Act 2010, Children's Hearings (Scotland) Act 2011 and so on.

or 7.5 year period has expired if it is spent and a successful application is made to a Sheriff for its removal. Convictions on this list, even if spent, will be disclosed on higher level disclosure certificates and must also be disclosed by the individual, until these time periods have passed. After this period, much like offences on the 'rules list' an individual need only disclose such a conviction if it has already been disclosed on a higher level disclosure certificate.

### Proposed Reforms to Disclosure in Scotland

The 2017-18 Programme of Scottish Government attempts to modernise the 1974 Act through the Management of Offenders Bill 2018, The Proposed Draft Police Act 1997, and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018, and this was consulted on in 2017. In the statement of the Scottish Ministers summarising the written observations, it is stated that **Scottish Ministers do not intend to make any changes to the proposed draft remedial order other than to change some minor points** noted by the Scottish Parliament's Delegated Powers and Law Reform Committee (Scottish Government, 2018). **This will only yield very minor changes to existing legislation, to promote compatibility with the ECHR following legal challenge<sup>7</sup>, by further limiting the circumstances in which convictions are automatically disclosed.** This means that individuals who have been convicted of offences which are listed in schedule 8A (offences which must always be disclosed) will, in certain specified circumstances, have the right to apply to a Sheriff in order to seek removal of that conviction information before their disclosure is sent to a third party.

Following consultation in 2015, the Scottish Government has proposed reforms to the Rehabilitation of Offenders Act 1974 in 2018. In light of this, Ministers will revisit the time periods which apply to offences listed in both schedules 8A and 8B as part of the forthcoming PVG Review. The articulated aim is to strike more of a balance between the rights of people not to disclose previous offending behaviour so they can move on with their lives and the rights of the public to have access to criminal history information on the grounds this means they will be protected. However, **these reforms pertain principally to basic disclosure: they make no direct changes to the higher level disclosure system concerning standard or enhanced disclosures.** The Management of Offenders (Scotland) Bill's provisions relating to spent convictions, overall have the effect of restricting disclosure in two key ways: firstly, by generally reducing the length of time before a conviction (or other disposal) is deemed to be spent; secondly, by modifying the 1974 Act's threshold, currently set at a custodial sentence of 30 months or longer, before a conviction never becomes spent. The Bill changes this so that a sentence of up to 48 months' imprisonment may, in time, become spent.

### Disclosure of Non-conviction Records: 'Soft Information'

**Enhanced Disclosures and the PVG scheme allow for the disclosure of any material which the Chief Officer 'reasonably believe[s] might be relevant' to an employer.** This *Other Relevant Information* (ORI), also known as 'soft information', is supplied by the Chief Officer of a relevant police force. In *A Common Sense Approach*, Mason (2011) reported on a review of the U.K. criminal records regime. Mason re-affirmed the need for the police to disclose ORI and a number of Mason's recommendations were taken forward. Key to this discussion was the inclusion in the Protection of Freedoms Act 2012, Part 5, Chapter 2, s. 82 (1)(c) which: introduced the **change in terminology from the previous requirement of 'might be relevant' to the current requirement of 'reasonably believes to be relevant'** for the prescribed purpose/type of regulated work, inserted into the Police

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<sup>7</sup> in response to the ruling by Lord Pentland in the case *P v Scottish Ministers* [2017]

Act 1997 s. 113B(4)(a); introduced a new statutory guide for the police to follow, with associated principles defining 'relevant' as 'pertinent to, connected with or bearing upon the subject in question', with severity and credibility of information as key criterion, and with regard to the impact on the applicant and their private life, in accordance with ECHR Art. 8.

In practice, criminal, ORI or **'soft' information can include allegations, records of arrest and/or charge and/or prosecution, statements by witnesses, cautions, convictions, records of penalty notices for disorder, sentencing reports and so on** (Grace, 2014). The practice of disclosing 'soft information' has been criticised (e.g. Baldwin 2012), and judicially **challenged with reference to issues of human rights, specifically under Article 8 of the European Convention of Human Rights** (ECHR). Baldwin (2012) cites evidence that this has included unsubstantiated claims including information which ultimately resulted in the individual being released without charge; details of a non-applicant's criminal family history (even though the individual was never suspected of any offence); and details of cases which proceed to court but resulted in an acquittal. Critically, Appleton (2014) reports that **37% of job offers were withdrawn based on 'non-conviction information'**.

Marshall and Thomas, (2015) observe that the courts' role in moving the nature of disclosures of 'non-conviction information' towards a greater degree of compliance with Article 8 of the ECHR has led to more standardisation and focus in police decision-making. Ultimately, Chief Officers will have to focus more closely on the nature or type of the work the vetting is for in order to assess issues of relevance. **However, as noted above, the mere presence of information can be a barrier in terms of employers operating on a blanket policy of a clean record**, rather than weighing up the information against the nature of the employment they are appointing for. Survey research has demonstrated that as many as 56% of public employers and 81% in the private sector had 'anxieties' about employing someone with a criminal record (Fletcher, 2001). Employers' decision-making in the UK, remains unmonitored (Marshall and Thomas, 2015) and, as this review of research reveals, generally under-researched.

Grace (2014) argues for the need for a universal set of guiding principles to underpin the disclosure of 'soft' information otherwise, he contends, public authorities will never be able to catch up as case law will continue to develop fragmentally. Grace (2014: 130) suggests that the following test should apply to the disclosure of soft information to engender greater alignment with Article 8 of the ECHR:

Is the information indicative of the (alleged) commission of a *sufficiently serious* offence which it is *reasonably certain* was committed by the individual, that is *currently relevant* to the purpose for requiring an ECRC/to the purpose of public protection, and which the individual concerned has had an opportunity to *comment meaningfully* upon (where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction)?

## Beyond the UK

Jacobs (2015) compares the US approach to the EU approach with regard to the creation and use of criminal records. These differences are as follows: **the US focuses on 'judicial transparency' while European approaches are governed by individual rights** (for example, the right to privacy). As a result, criminal history records are to a large extent publicly accessible and privately available in the US whereas European countries tend to prohibit private agencies, the media, and the general public from having access to criminal records. Jacobs suggests that US policy puts judicial transparency above the privacy of individuals who once violated the law, whereas it is precisely those individual rights (right to privacy, right to rehabilitation) that underpin much of the legal framework of European countries. In the US, the First Amendment's right to free speech and free press eclipse the privacy interests of people with convictions.

The assumption underpinning disclosure is that it is effective in protecting potential employers and the wider public. However, there is concern that an excessively wide and complex disclosure system undermines prospects for reintegration and contradicts the 1974 Act. Larrauri Pijoan (2014a) identifies two models of disclosure in Europe by comparing practices in continental Europe to that of the UK. **Continental Europe disclose only recent, unspent convictions; the UK and common law countries allow for the disclosure of all convictions, cautions and police records in certain contexts and situations**, such as Standard and Enhanced Disclosure in the UK. The UK system raises a number of questions about justice (Larrauri Pijoan 2014a) such as why, when some old convictions can be spent under the 1974 Act, are they subject to disclosure when applying for a wide range of employment positions? Why are arrests, cautions and soft information disclosable when they are, by definition, judicially unproven? Indeed, a series of judicial challenges have been raised resulting in some of contemporary, albeit minor, modifications to the system (e.g. Baldwin, 2012; Grace, 2014).

Larrauri Pijoan (2014a) contrasts **the general presumption in the UK that an employer may ask for a criminal record certificate before employing someone in Europe, where there is no such general presumption and such information is considered private and confidential**. Larrauri Pijoan (2014a) explains that, in continental Europe, only unspent convictions are disclosed on a criminal record certificate and neither spent convictions nor ORI are disclosed. As with the 1974 Act, convictions become spent by the mere passage of an identified period of time<sup>8</sup>. The rationale is that if governments decide to promote the rehabilitation and reintegration of people with convictions by 'expunging' or 'sealing' their convictions long after people have served their sentences, it seems contradictory then to undermine the purpose of such laws by providing for the disclosure of those convictions in relation to a large list of occupations, as in the UK. **A number of critiques have been levelled at the UK system of disclosure by the European Court of Human Rights (ECtHR)** including: that no distinction is made on the basis of the nature of offence, the disposal of the case, the time elapsed or relevance of the data to the employment in question which is broadly consonant with EEOC (2012) guidance in the US; that the mandatory disclosure of all convictions is disproportionate and does not allow the exercise of any discretion to balance public protection and privacy; and that disclosure should be limited to only convictions.<sup>9</sup> While recent reforms offer a more nuanced approach to disclosure, they are still very restrictive and do not reflect an adequate balance; i.e., at present, a 30-month prison sentence and a large list of offences relevant to safeguarding will always be disclosed so even contemporary reforms fall short of the main criticisms of the disclosure system in place in the UK from a human rights perspective, that convictions and other soft information will still be disclosed. The argument advanced by Larrauri Pijoan (2014a: 735) is not that the disclosure of criminal histories is inappropriate but that:

'a fair balance must be struck between the general aims of public protection, the specific aims of employer selection processes and the individual's right to respect for privacy as well as the criminal justice interests in rehabilitation and reintegration. In brief, the disclosure of criminal records has to be proportionate in order to avoid an illegitimate interference with the right to privacy'.

### APPROACHES TO REFORM

The review of research on disclosure checking and of criminal records, presented above, underlines the need for a continuing review of reforms to the 1974 Act and to practices of Disclosure in the UK. This section builds on this review of international evidence to present several approaches to reform. These ideas broadly echo that of McGuinness et al., (2013), Larrauri Pijoan (2014a) and Stacey (2014), and are thematically categorised in terms of **forgetting, forgiving, forbidding and facilitating**.

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<sup>8</sup> Exceptions include life sentences in Germany or the most serious crimes in France (see Herzog Evans 2011).

<sup>9</sup> *European Court of Human Rights in MM v United Kingdom*, cited in Larrauri Pijoan (2014a)

### **Forgetting: Reviewing Spent Periods and the Disclosure of Enduringly Unspent Convictions:**

Even in light of current planned reforms to the 1974 Act, rehabilitation periods before convictions become officially spent are too long. Some convictions will never become spent which contradicts the evidence of Time to Redemption studies. This position is increasingly problematic and, in view of Article 8 of the ECHR, unduly punitive. Enduringly unspent convictions imply that the individual is never rehabilitated, misleadingly conveying that they pose a permanent risk of re-offending. In addition, if after 7-10 years, the person's risk of re-offending reflects that of a never convicted person, it follows that disclosure of a conviction that pre-dates this time period likely results in no increased public protection, which raises important questions about the purposes of such disclosure practices. Moreover, barriers to work engendered by attitudes towards people with convictions and disclosure of criminal histories may destabilise efforts to desist and cut off opportunities to sustain desistance, thus ironically undermining public protection.

Of course, the recent and ongoing reforms of the 1974 Act are intended to reduce the barriers that a criminal history presents to employment, in keeping with the purposes of the act, 'by devising disclosure periods that are specifically related to the likely risk presented to the employer' (Home Office 2002: 10). Reducing the rehabilitation periods defined in the 1974 Act is unlikely, however, to increase access to employment and support reintegration, if even spent convictions are disclosed in all positions requiring a standard or enhanced disclosure, given the impacts that disclosures have on employer decision-making. Drawing on the European model, Larrauri Pijoan (2014a) proposes that spent convictions should be automatically withheld from disclosure in accordance with the 1974 Act, effectively curtailing existing disclosure practices in the U.K, and signifying 'legal rehabilitation' (Stacey, 2014: 17). In principle, the record is then sealed and the person presumed rehabilitated for the purposes of employment. Larrauri Pijoan (2014) further suggests that all convictions should be subject to the possibility of being erased or spent.

### **Forgiving: Certificates of Rehabilitation**

Certificates of Rehabilitation (Love, 2003 cited in Maruna, 2011), or Judicial Rehabilitation as it is termed in France, are applied for by the individual and issued by the state or judicial authorities in light of evidence that a person has made progress towards desistance (for a more detailed discussion, see Herzog-Evans, 2011; Stacey, 2014). As Stacey (2014) notes, the investigations and considerations informing the issuance of such a certificate and the criteria for granting Judicial Rehabilitation in France are demanding, thorough and based on merit. The certificate would effectively act as a 'letter of recommendation' (Lucken and Ponte, 2008 cited in Maruna, 2011) that can be used by employers as a mechanism for evidencing rehabilitation.

While actively recognising personal reform, such a measure might also encourage prospective employers to employ people with convictions by ameliorating concerns they may harbour with regard to issues of moral character or personal or occupational liability, for example. As McGuinness et al. (2013) observe, any such liability or risk of such would be shared between those issuing the certificate and those employing the individual. Given that the employment of a person who has been certified as rehabilitated would still entail an informed process of decision-making, it is unclear as to whether certificates of rehabilitation would suffice from an employer's perspective to signify clearance to work in the absence of some form of guidance to assist decision-making. Larrauri Pijoan (2014a) suggests a more absolute form of judicial intervention, in the form of Occupational Disqualification.

### **Forbidding: Court Imposed Occupational Disqualification**

Larrauri Pijoan (2014a) suggests that disqualification of a person upon conviction from certain occupations could be incorporated into sentencing. This reflects distinct European practices as

outlined above, where rehabilitation and privacy are both viewed as a right, one that places due limits on punishment and its effects. She argues that ‘where there is a risk of immediate and serious threat that extends beyond the sentence, we should advocate for the use of the criminal law to address the risk, instead of relying on private employers and criminal records checks’ (ibid.:60). Such a court-imposed Occupational Disqualification Order, would be imposed, she argues, by the judge after individualised assessment and limited by proportionality constraints, providing due notice, and applied retroactively as part of the sentence, in similar vein to that of a driving disqualification. The underpinning principle is that the process of employment exclusion has to be authorised in law, with regard to certain employments, and only in cases where there is a specific occupational disqualification order imposed by a court and not a generic criminal record. While this might limit employer discretion and risk of discrimination, McGuinness et al., (2013) suggest that it brings new challenges to the sentencer’s responsibilities. The approach they advance would be for Occupational Disqualification to be an option for sentencers, in respect of community sentences and short prison sentences, and for the Parole Board in respect of longer-term prison sentences.

### **Facilitating: The Production of Guidance and Revisions to Anti-Discrimination Legislation**

Grace (2014) notes that there are two forms of permanencies with regard to criminal history records: a) the permanent retention of a criminal record b) the permanent certainty or inevitability of disclosure for public protection purposes. He argues that the former is acceptable whereas the latter is problematic in view of Article 8 of the ECHR. Weighing up arguments surrounding the need to retain criminal history records against those advocating for the eventual expungement of criminal records, he reasons that convictions may need to be a matter of historical record because of the need for official statistics; to allow people to recall details of their own conviction in line with data protection rights; to produce accurate reports for the purposes of sentencing or probation/parole arrangements; and to reflect the need to recall the importance of harm done to victims and victims’ rights. In terms of the inevitability of disclosure, he proposes that it should not be assumed that any conviction will have a permanent certainty of being disclosed due to the principle of proportionality. Grace (2014) argues that what the courts would accept as proportionate would be a filtering system where no matter how many convictions or cautions an individual may have, over whatever time-period and with whatever level of severity, they are assessed individually. While this would be onerous in terms of workloads, compliance with Article 8 would seem to require it. This would then require development of evidence informed guidelines about conducting individualised assessments.

Building on Time to Redemption studies, the guidelines issued by the USA’s EEOC (2012) and rulings from the ECtHR<sup>10</sup>, practices that best facilitate employers’ appropriate decision-making are based on individualised assessments of criminal records consider factors such as the nature of the crime, the time elapsed since it was committed, the disposal of the case, and the nature of the job and therefore relevance of the data to the employment. Indeed, such non-binding guidance might be reinforced by amendments to existing anti-discrimination legislation such as the Equality Act 2010; currently, people with convictions appear to be the only group that are excluded from its protections. By way of precedence, non-discrimination protections are extended to people with convictions in Australia (McEvoy, 2008). According to the Australian Employment Opportunities Act 1986, (McEvoy, 2008, cited in Larrauri Pijoan 2014a) the principles that follow from this prohibition of discrimination are:

- a) that an inherent requirement of the position must be ‘essential’ to it;
- b) the onus is on the employer to identify the inherent requirement;
- c) it should relate to a specific position rather than general occupation;

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<sup>10</sup> European Court of Human Rights in *MM v United Kingdom*, cited in Larrauri Pijoan (2014a)

d) there must be a 'tight correlation' between the position in question and a particular criminal history.

This places emphasis on the relevance of the nature of the criminal history to the type of employment, rather than whether the conviction is spent. As most European anti-discrimination statutes do not cover criminal records, one implication might be that **people with convictions should be legally recognised as a disadvantaged group entitled to special employment protection** although this would require precise and binding guidelines to be effective.

## CONCLUSION

This paper is intended to inform ongoing discussion and debate around the use and misuse of criminal history information in an employment context. In so doing, it has shown that policies pertaining to the disclosure of criminal histories vary widely both within and between the USA, UK and Europe. Concerns for employers include minimising risk of liability, concerns around matters of public protection, compliance with statutory occupational requirements and assessments of moral character. The impacts and effects of disclosure of criminal histories have significant impacts on access to employment, potentially on prospects for desistance and for social integration. The need to bring Scottish and UK practices in closer alignment with ECHR, as required by various judicial challenges, has resulted in recent and ongoing reforms of both the 1974 Rehabilitation of Offenders Act and disclosure guidelines. The evidence presented in this paper, informed by a comprehensive review of research, suggests that existing reforms could go further. Existing laws and reforms proposed for governing disclosure retain the requirement that some spent convictions will always be disclosed in certain circumstances, irrespective of evidence establishing whether the risk of reconviction is equivalent to that of non-convicted persons. This is likely to continue contributing to risk-averse reactions from many employers. Four different though not mutually exclusive approaches to reform have emerged from the review of the research evidence underpinning this paper, and are presented here, to inform further discussion and reform. These approaches include reviewing spent periods and the issue of enduringly unspent convictions (forgetting); certificates of rehabilitation (forgiving); court imposed Occupational Disqualification (forbidding); and the production of guidance and revisions to anti-discrimination legislation (facilitating) to support more nuanced individualised assessments about the relevance of criminal history.

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**<sup>i</sup> METHODS:**

This review of the evidence was undertaken using the principles of systematic review and presented as a narrative review. The literature search undertaken through a key word search of peer reviewed journal articles, published in the English language between 2000 - 2017. In addition to the use of sources already known to the author from previous, related research conducted by the author (e.g. Weaver, 2015; Piacentini, Weaver and Jardine, 2018), pertinent Boolean search terms (such as 'Criminal Records' and 'Disclosure') were entered into a collection of databases so as to broaden the scope of the report and ensure its contemporary relevance. These include: Sage Journals, Scopus, Web of Science, NCJRS, and Assia. All of the articles identified from the keyword search were screen sorted by relevance, titles and abstracts sifted, to facilitate the identification of relevant articles, which were subsequently downloaded. This process yielded 62 articles, which were supplemented by a hand search of articles referenced in these papers that were not identified by the search.