

FORGIVEN, NOT FORGOTTEN?

The proposal to introduce 'spent' convictions for those convicted of minor criminal offences is overly restrictive, argues **Louise McQuaid**



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The *Criminal Justice (Spent Conviction) Bill 2012* is set to introduce a regime whereby certain convictions can be disregarded after a number of years have elapsed since they were imposed. It comes following recommendations of the Law Reform Commission in their *Report on Spent Convictions* published in 2007, which pointed out that Ireland is one of the few states that does not have a spent conviction scheme in place.

The aim of the bill is "to assist the rehabilitation of offenders, who often experience difficulties securing employment as a result of having a conviction".

Section 1 provides that all offences tried in the Central Criminal Court, all sexual offences, and all convictions that involve the imposition of a sentence exceeding 12 months' imprisonment are excluded from the scheme. Section 3 and schedule 2 of the bill outline a matrix of rehabilitation periods ranging from three to seven years, depending on the sentence imposed.

Restrictive and disproportionate

The Mercy Law Resource Centre has several concerns about the new bill. Firstly, certain provisions are restrictive and disproportionate to the aims of the bill.

The necessity of having a blanket exclusion of all offences tried in the Central Criminal Court and all sexual offences must be questioned. There are a number of safeguards in the legislation to justify the inclusion of all offences under the scheme. For example, convictions over the sentence threshold are excluded, thereby preventing persons who have committed more serious offences from availing of the scheme. In Britain, pursuant to the *Rehabilitation*

of Offenders Act 1974, all types of offences are capable of becoming 'spent'. Following 40 years of experience, Britain passed the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This act extended the sentence threshold from 30 months to 48 months and reduced the rehabilitation periods. The adoption of a more liberal approach, similar to that of Britain, would aid the rehabilitation of a broader range of offenders.

Housing support

Secondly, the MLRC advocates the extension of the scheme to the provision of publicly funded housing by local authorities.

The purpose of such housing is to provide support for people who need housing but cannot afford to rent or buy their own homes, and is therefore vital in combating homelessness. In a survey conducted by the Central Statistics Office in 2011, it was revealed that there are 3,808 persons in homeless shelter accommodation or sleeping rough.

Research by Focus Ireland and PACE has revealed that, for some, homelessness leads to crime, which in turn leads to imprisonment. For those who are homeless prior to imprisonment, 62% said that their crime had been committed to survive on the streets. These 'survivalist' crimes were minor in nature and included theft, begging and squatting. In addition, 16% reported that their

street life led to drug misuse and their drug addiction led to committing crimes, including mugging, burglary and shoplifting.

Another study by PACE found that 33% of all Irish female prisoners in the Dóchas Centre and 35% of men would be homeless on release from prison. The majority of the sample also ranked accessing and securing accommodation as being in the top three difficulties they faced following release from prison.

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The provision of social housing in Ireland is regulated by the *Housing (Miscellaneous Provisions) Act 1997*. Pursuant to section 15 of this act, local authorities are entitled to seek information from the gardaí and are entitled to defer or refuse a letting under section 14 of the same act on estate management grounds. Such information can include minor offences, cautions, investigations without charge, and

dismissals under the *Probation Act 1907*, without regard to constitutional and ECHR principles of fairness and proportionality.

The MLRC acknowledges that the contribution that good estate management makes to communities is invaluable; however, the information disclosed by the gardaí must be



proportionate to the aim and in accordance with the law – in particular, the requirements of natural justice and fair procedures. The dissemination of information without regard to its seriousness, accuracy or relevance, and the failure to differentiate sufficiently between different types of behaviour, is a clear violation of the principle of proportionality as it applies to actions that interfere with a person's right to a home.

A just and fair approach with regard to vetting can be achieved by providing specifically in the bill that (1) where the vetting of people who seek positions of employment relating to children or vulnerable person is concerned, the *Spent Convictions Bill* should be read together with the *National Vetting Bureau (Children and Vulnerable Persons) Bill 2012*; (2) in all other cases, the gardaí should only disclose convictions that are 'unspent'; and (3) information relating to

cautions, investigations without charge, and dismissals under the *Probation Act* should not be disclosed in any circumstances. This approach would protect the presumption of innocence and adhere to fair procedures.

Enforcement

Thirdly, the bill does not provide for any means of enforcement of the scheme.

Legislation without any means of enforcement is not always adhered to. For example, the *Probation Act 1907* does not contain any sanctions for non-compliance with its provisions. Information regarding dismissals under the *Probation Act* is often disclosed

to local authorities pursuant to estate management checks. The benefit of a dismissal under the *Probation Act* is that a person avoids holding a criminal conviction and the stigma that attaches to such a conviction. The disclosure of such dismissals therefore defeats the purpose of this act.

In contrast, the *Data Protection Acts* established the Office of the Data Protection Commissioner. Individuals who feel their rights are being infringed can complain to the commissioner, who will investigate the matter and take whatever steps may be necessary to resolve it. This office ultimately ensures that data protection rules are observed and capable of being enforced.

The equivalent British legislation provides for criminal sanctions for the unauthorised disclosure of spent convictions. In order for the bill to be effective in practice, such sanctions should be incorporated into the bill. An independent body should also be set up to investigate any complaints made under the legislation.

Discrimination on past conviction

Finally, under Irish equality legislation, there is no explicit prohibition on discrimination on grounds of conviction.

The bill states that its purpose is to remove barriers to employment for ex-offenders. But this aim does not appear to be met by the current bill.

Research by the Small Firms Association in 2007 indicated that

an average of 76% of companies were unwilling to hire ex-offenders. Discrimination based on past conviction is not confined to the area of employment; it impacts on an individual's ability to obtain housing and their access to education, and it places restrictions on their travel. For this reason, it is imperative that the grounds of discrimination in the *Equal Status Act 2000* and the *Employment Equality Act 1998* be extended to include a broad prohibition on discrimination on grounds of convictions. Without this, the impact of the bill will be diminished.

In conclusion, the bill is ineffective, as it does not address the main difficulties faced by ex-offenders, such as obtaining housing. Consideration must be given to how the scheme will work in practice. For the bill to have the desired impact, it must be extended to the provision of publicly funded housing by local authorities, it must be linked with vetting practices in Ireland, it must establish a body to oversee the operation of the scheme, and it must extend equality legislation to include a prohibition on discrimination on grounds of convictions. ☉

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