

## Submission on Criminal Justice (Spent Convictions) Bill 2012



## EXECUTIVE SUMMARY

Mercy Law Resource Centre advocates the extension of the proposed spent conviction scheme to the provision of public funded housing by local authorities. We submit that only information relating to 'unspent' convictions should be disclosed to local authorities when carrying out estate management checks, thereby ensuring individuals are given a fair opportunity to obtain social housing. We further submit that to ensure that the proposed scheme is effective, Irish equality legislation should be extended to include a prohibition on discrimination on grounds of a past criminal conviction and further, an independent body with enforcement powers should be set up to investigate complaints under the proposed scheme.

### A. INTRODUCTION

1. Mercy Law Resource Centre (MLRC) is an Independent Law Centre which provides free legal advice and representation to people who are homeless or at risk of becoming homeless in the areas of social housing and social welfare law. The Centre also seeks to advocate change in laws, policies and attitudes which unduly and adversely impact its client group.
2. MLRC welcomes the introduction of the proposed spent conviction scheme ("the proposed scheme") which permits individuals with a minor criminal conviction, after the lapse of a prescribed period of time, to have that conviction regarded as "spent". There are a number of exclusions and limitations<sup>1</sup> to the scheme which have been comprehensively addressed in other submission papers.<sup>2</sup> MLRC's submission focuses on the purpose and effectiveness of the proposed scheme.
3. The primary objective of the present Bill relates to alleviating barriers to employment; MLRC advocates its extension to the provision of public funded housing by local authorities.
4. 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<sup>3</sup>, it was revealed that there are 3,808 persons in homeless shelter accommodation or sleeping rough. Research by Focus Ireland and PACE<sup>4</sup> revealed that there was a link between homelessness and crime/reoffending. For some, being homeless led to crime while for others it was being released from prison that led directly to homelessness.
5. The link between homelessness and crime cannot be ignored if either is going to be successfully tackled. Current legislation in the form of sections 14 and 15 of the Housing

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<sup>1</sup>The Bill provides that all offences tried in the Central Criminal Court, all sexual offences and convictions which involve the imposition of a sentence exceeding 12 months imprisonment are excluded from the Scheme. The Bill also provides for a matrix of rehabilitation periods ranging from 3 to 7 years depending on the custodial or non-custodial sentence imposed and that only two convictions can be considered spent for any individual.

<sup>2</sup> "Disclosure of Criminal Convictions – Proposals on a Rehabilitation of Offenders Bill", The Law Society of Ireland, Spent Convictions Group, May 2009; "Observations on the Spent Convictions Bill 2012", IHRC, June 2012; "IPRT Submission on Criminal Justice (Spent Convictions) Bill 2012", IPRT, June 2012.

<sup>3</sup> "Homeless Persons in Ireland, a Special Census Report", Central Statistics Office, 6 September 2012.

<sup>4</sup> "Crime & Homelessness 2002", by Claire Hickey, Focus Ireland and PACE. The main group who participated in the research was currently homeless men and women who had previous experience of being in prison. Interviews were carried with 46 participants over a ten week period.

(Miscellaneous Provisions) Act 1997 (“the 1997 Act”)<sup>5</sup>, and local authority policy allow for the exclusion of persons from availing of social housing on estate management grounds as a result of information received from the Gardaí. Such information can include minor offences, cautions, investigations without charge and dismissals under the Probation Act 1907 without regard to the Constitutional and European Convention on Human Rights principles of fairness and proportionality.

6. MLRC acknowledge that the contribution that good estate management makes to communities is invaluable. This can be partly achieved through appropriate estate management checks with the Gardaí, however, the information disclosed must be proportionate to the aim and in accordance with the law, in particular, the requirements of natural justice and fair procedures.
7. 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 which is recognized by European Convention on Human Rights jurisprudence as applying to actions which interfere with a person’s right to a home. A more proportionate approach would provide that instead of a blanket disclosure policy, only information relating to ‘unspent’ convictions could be disclosed to local authorities. This would protect the presumption of innocence and adhere to fair procedures.

#### **Concerns**

MLRC have identified a number of areas of concern in the proposed scheme:

- a) The Bill provides that only ‘unspent’ convictions need be revealed by an ex-offender. It does not expressly exclude the disclosure of ‘spent’ convictions, cautions, investigations without charge and dismissals under the Probation Act 1907 to another person or body, including local authorities carrying out their functions under sections 14 and 15 of the 1997 Act. The Bill should provide that only information relating to ‘unspent’ convictions should be disclosed to the local authorities when they are exercising their powers under the 1997 Act;
- b) The Bill does not address how the legislation will be enforced; and
- c) The Bill does not provide for the extension of Irish equality legislation to include a prohibition on discrimination on the grounds of criminal conviction.

## **B. LINK BETWEEN HOMELESSNESS AND CRIME**

8. The aforementioned research by PACE and Focus Ireland demonstrates that for some being homeless 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 shoplifting, larceny, begging and squatting. In addition, 16% reported that their street life led to drug misuse and their drug addiction led to committing a crime including mugging, burglary and shoplifting.
9. This survey also revealed that for others it was being released from prison that led directly to homelessness. A PACE survey<sup>6</sup> found that 33% of all Irish female prisoners in the Dóchas

<sup>5</sup>Pursuant to section 15 of the 1997 Act, local authorities are entitled to seek information from agencies including the Gardaí and are entitled to defer or refuse a letting under section 14 of the same Act on estate management grounds.

<sup>6</sup>Supra n4 at page 23.

Centre would be homeless on release from prison and 35% of men reported that they would not have accommodation upon their release. Following release from prison the majority of the sample interviewed identified that their accommodation needs were paramount and 76% of men and 79% of women ranked accessing and securing accommodation in the top three difficulties they faced post release.

10. In relation to recidivism, the Focus Ireland and PACE research revealed that there is a link between homelessness and reoffending behaviour. Of the sample questioned, 46% reported that homelessness had directly contributed to their offending behaviour, through committing survivalist crimes or the inability to abstain from drug taking when living on the street.
11. This cycle of crime and homelessness is perpetuated by a housing policy which seeks to exclude individuals from public funded housing as a result of information received from the Gardaí without regard to its seriousness, accuracy or relevance.

#### **Case Study 1**

Our client was refused housing on the grounds of a negative estate management check under section 15 of the 1997 Act. The Gardaí report contained information relating to a number of old charges for breach of the peace and breach of a Barring Order. It disclosed that when our client was twelve, he received the benefit of the Probation Act from the Children's Court. It also contained information relating to allegations which were investigated but no charge was imposed.

The breach of the peace charges imposed in 1990, 2005 and 2009 emanated from our client's alcohol addiction. Our client had attended a number of rehabilitation programmes and had remained alcohol free for a number of years at the time his housing application was refused.

MLRC contacted the local authority and pointed out that while a number of charges had been imposed against our client, the only two charges in the last 19 years were for breach of the peace and these related to our client's alcohol addiction which he had taken substantial steps to address. Pursuant to this the local authority reviewed the housing application and a tenancy agreement was negotiated with our client.

#### **C. GAPS IN THE BILL - LINK WITH CURRENT VETTING PRACTICES**

12. The Bill, as it stands, has general application and subject to certain exceptions, operates whenever a person is asked about their criminal record. When asked, a person is not obliged to reveal details of convictions which have become spent under the Scheme. However the Bill does not provide for circumstances where a vetting request is made to the Gardaí. In order for the Bill to be effective, it must be linked with vetting practices currently in place in Ireland.
13. We note the provisions of the National Vetting Bureau (Children and Vulnerable Persons) Bill 2012 ("the Vetting Bill"). This Bill provides a legislative basis for the vetting of persons who seek positions of employment relating to children or vulnerable persons. This Bill does not however account for other instances where vetting arises.
14. As mentioned above, pursuant to section 15 of the 1997 Act, housing authorities are permitted to request information from the Gardaí in relation to any person seeking housing

from the authority. This is commonly referred to as an estate management check. Many of our clients have been denied housing by local authorities on the grounds of receiving a negative estate management check.

15. In our experience, the information provided by the Gardaí under such checks includes not only criminal convictions but also information regarding cautions, warnings, investigations without charge, pending investigations without charge and/or dismissals under the Probation Act 1907.

#### **Case Study 2**

Our client applied for housing with his local authority in 2006 and was considered for tenancy in 2010, but was refused on estate management grounds. MLRC learnt that the refusal was based on the contents of a Gardaí report. The report disclosed that our client had no convictions. The report also stated that our client was a “known drug abuser” and that he was arrested when he and a woman were intoxicated while they were with a small child.

Our client was not given an opportunity to explain that this information was incorrect; he did not have a child and he had no recollection of this incident. The local authority was aware that our client had no criminal convictions; therefore the refusal of his housing application was based solely on an arrest where no charge was actually imposed. MLRC contacted the local authority requesting that they review his application. Agreement was reached and our client is now housed.

16. While MLRC acknowledges that housing authorities are obliged to conduct estate management checks to ensure public safety, the information disclosed must be proportionate to this aim. In our view, the disclosure of cautions, arrests without charge, dismissals under the Probation Act 1907, etc. is not necessary to meet the above objective.

#### **Recommendation 1**

MLRC recommends that a provision be inserted in the Bill stating that:

- i. Where the vetting of persons who seek positions of employment relating to children or vulnerable persons is concerned, the Spent Convictions Bill should be read in conjunction with the Vetting Bill;
- ii. In all other cases, the Gardaí (or any other body with access to such information) should only disclose convictions which are ‘unspent’; and
- iii. Information relating to cautions, investigations without charge, and dismissals under the Probation Act 1907 should not be disclosed in any circumstances, with the exception of those covered by the Vetting Bill.

### **D. PRACTICALITIES OF THE SCHEME**

#### **(i) Criminal Sanctions**

17. As the Bill stands there are no criminal sanctions for the unlawful disclosure of information. In our view, this is a fundamental flaw of the Bill. In our experience, legislation without any means of enforcement is not always adhered to. For example, the Probation Act 1907 does not contain any sanctions. Information regarding dismissals under the Probation Act 1907 is

often disclosed to local authorities through estate management checks. The benefit of a dismissal under the Probation Act 1907 is that a person avoids holding a criminal conviction and the rationale in turn is that they avoid the stigmatism that attaches to a conviction. The disclosure of such dismissals therefore defeats the whole purpose of the Probation Act 1907.

18. In contrast, the Data Protection Acts established the Office of the Data Protection Ombudsman. The Data Protection Commissioner (DPC) is responsible for upholding the rights of individuals as set out in the Acts. 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.
19. The equivalent UK legislation provides for criminal sanctions for unauthorised disclosure of spent convictions<sup>7</sup>. MLRC agrees with the Law Society Spent Conviction Group which recommended that criminal sanctions should be part of an Irish spent conviction scheme.

#### **Recommendation 2**

MLRC recommends that in order for the Bill to be effective in practice, an independent body with enforcement powers should be set up to investigate any complaints made under the legislation. In the alternative, the ambit of the offices of the DPC should be extended to ensure the provisions in the Bill are observed.

#### **E. Equality Legislation**

20. Currently, there is no explicit prohibition on discrimination on grounds of a past criminal conviction in Irish equality legislation. Absent such a provision, the impact of the current Bill will be diminished.
21. Discrimination on the basis of previous convictions is a real issue with serious impacts on former offenders. A criminal conviction impacts upon a person long after they have served their sentence. As well as affecting a person's employment opportunities, past criminal convictions severely impede an individuals' ability to avail of services in the form of public funded housing. It is important that people who have been convicted of a minor offence are able to obtain housing as well as employment in order to aid their rehabilitation and reduce the risks of reoffending.

#### **Case Study 3**

Our client, now homeless, previously had a successful career, working both in Ireland and Germany for a number of years. His sister committed suicide and this tragedy was further compounded when his father died 6 weeks later from a heart attack. Following his loss he suffered from depression. He found it increasingly difficult to cope and became dependent on alcohol. During his alcohol addiction he was charged with public order offences and with stealing alcohol for his own consumption.

Our client has since sought treatment to deal with his alcohol addiction and depression. He is currently in shelter accommodation but was recently offered local authority accommodation. This offer was subsequently withdrawn on estate management grounds due to his minor criminal convictions.

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<sup>7</sup> Section 56 Rehabilitation of Offenders Act 1974

Our client is being discriminated against on the grounds of his criminal convictions. No regard has been given to his tragic background or the fact that his convictions stemmed directly from his alcohol addiction and depression, which he has made every effort to address.

22. Another difficulty which demonstrates the need for the extension of equality legislation is the fact that information today is so readily available online and on other media sources. As a result of this, it is unrealistic to expect that all information relating to convictions will be kept private. Therefore, in order for the Scheme to be effective, the added protection of expanding the scope of the equality legislation to include discrimination on grounds of past criminal conviction is necessary.

### **Recommendation 3**

MLRC recommends that the grounds of discrimination in the Employment Equality Act 1998 and the Equal Status Act 2000 be extended to include a broad prohibition on discrimination on the grounds of criminal convictions

## **F. CONCLUSION AND SUMMARY OF RECOMMENDATIONS**

23. While MLRC welcomes the idea of a scheme which facilitates the reintegration of ex-offenders into society, it is our view that there are a number of gaps in the proposed legislation which will prevent this aim being achieved.
24. Housing is fundamental to a person's well-being and homelessness has been shown to increase criminal activity, drug use and recidivism of ex-offenders. As the case studies described above have demonstrated, the current system of estate management checks are arbitrary and often discriminate against those who are most vulnerable. It can lead to a situation where a person is refused or deferred local authority housing indefinitely on the basis of a minor offence, an investigation without charge or a dismissal under the Probation Act. Such an indefinite deferral can lead to a person remaining in transient homeless accommodation for a considerable period of time which in turn can contribute to increased criminal activity.
25. MLRC wholly accepts that local authorities have an obligation to tackle anti social behaviour and this can be partly achieved through appropriate estate management checks. However, the information disclosed must be proportionate to the aim as required by the principles of natural and constitutional justice and the European Convention on Human Rights.
26. Our clients will only benefit from the Scheme if it is expressly linked with the current vetting practice in Ireland. The legislation should expressly provide that only information relating to 'unspent' convictions can be disclosed as part of an estate management check under section 15 of the 1997 Act. Based on our experience, this will prevent people who have made substantial efforts to reform from being denied housing based on an inappropriate estate management check.
27. MLRC is also of the view that equality legislation must be amended to include a broad prohibition on discrimination on grounds of criminal conviction.
28. Finally, in order for the Scheme to have a real impact on the lives of our clients and the wider community, there must be a means of enforcing the legislation. This can be done by inserting criminal sanctions in the Bill and establishing a body with enforcement powers to oversee the operation of the Scheme.