



Position Paper on Spent Convictions Bill 2007

20 November 2008

1. Introduction

The Irish Penal Reform Trust (IPRT) warmly welcomes the proposal of a Spent Convictions Bill as a first initiative to provide for expungement of adult criminal records in Irish law.¹ The IPRT has already contributed a consultation process run by the Law Society's Spent Convictions Group (hereafter the Spent Convictions Group) and our views have been incorporated in that Group's Report on the issue, which we understand will be published shortly. Given the profound significance that the current proposal may have on the lives of ex-offenders IPRT hopes that the parliamentary consideration of the Bill will afford the opportunity for a broad discussion of the important issues raised. We hope this Position Paper will assist in that process.

2. Benefits of Expungement

Ireland is arriving at the issue much later than other common law jurisdictions, many of which introduced expungement legislation several decades ago. For example, a system of expungement was introduced in the United Kingdom in 1974. As noted in the Law Reform Commission's Report on Spent Convictions 2007, the absence of any system for expunging convictions has the effect of making the punishment of crime permanent with substantial collateral consequences for the convicted person. Convictions can prevent access to certain professions; exclude individuals from obtaining licenses; lead to restrictions on travel; and prevent the individual from accessing insurance policies. Individuals may

¹ Section 258 of the Children Act 2001 already addresses issues relating to offences committed under the age of 18, see section 8 of this Position Paper below.

also be disinclined to appear as witnesses in court for fear that a previous conviction would emerge under cross-examination. Research also establishes that access to employment is instrumental in the desistance process (whereby the cycle between imprisonment and re-offending is broken)² and the lack of employment opportunities may increase the economic incentives to commit crime.³

3. Spent Convictions Bill 2007

The critical features of the Bill as currently drafted are as follow:

- A category of “rehabilitated persons” is to be created who will not have to divulge information about a conviction that is considered to be “spent”.
- This scheme will apply to persons not serving an “excluded sentence” and who have remained conviction free for the appropriate “rehabilitation period”.
- The “rehabilitation period” will be seven years for sentences of imprisonment and five years for non-custodial sentences.
- “Excluded sentences”, which will not qualify under the Bill will include all sentences imposed in the Central Criminal Court, all sentences imposed in relation to sexual offences, and all sentences of more than six months imprisonment.
- “Excluded employment”, not covered by the Bill will include: (a) all work with children or the intellectually disabled; (b) all healthcare work; (c) all legal work; (d) all work in the civil and public sector; and (e) a wide range of financial and related employment.

While the Bill presents an improvement on the current situation, we believe that substantive amendments to the Bill are required to ensure that the opportunity to provide a comprehensive, balanced and effective scheme of expungement is not missed.

² Sampson and Laub, *Crime in the Making Pathways and Turning Points Through Life*, Harvard University Press, 1993.

³ Bennet and Wright, *Burglars on Burglars* Farnborough, Hants: Gower 1984.

4. Periods of Rehabilitation - A Model Based on Existing Practice

The rehabilitation periods proposed, while understandably aimed at ensuring that the period of desistance from offending are significant and meaningful, in our view are so long as to be an ineffective incentive to desist from offending following completion of a sentence. In practical terms, a period of 5 or 7 years represents an unnecessarily long time for an offender convicted of a minor property offence and the detrimental effect of conviction in excluding that person from employment may be long-lasting. IPRT believes that these criteria do not have sufficient flexibility or proportionality.

The Spent Convictions Group proposes a scheme incorporating a proportionate scale linking the requisite conviction free period to the sentence imposed. IPRT is of the view that such an approach would be of much greater practical value and would reflect and complement the principles of existing sentencing law and practice. Currently, it is the practice of judges when sentencing to take account of the length of time between the last offence or release from custody and the instant offence and exercise leniency on that basis. Should the interval between offences be considerable, it is possible that the offender may receive some credit for his efforts and may even be treated as of good character.⁴

Recommendation:

The relevant qualifying rehabilitation period should be proportionate to the seriousness of the offence committed. A scale should assign different periods of rehabilitation on this basis.

5. Excluded Categories of Offenders - The Need for Evidence

The IPRT believes that an expungement scheme should be potentially open to all offenders, save those who have committed an offence attracting a life sentence. Research suggests that a scheme based on the principles of proportionality and real assessment of risk can operate effectively without compromising public safety. A study recently conducted into the recidivism rates of ex-offenders in the US has found that the risks presented by ex-offenders “weaken dramatically and quickly over time so that the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with no criminal record.”⁵ It is significant that the research found that this trend applied to both violent and non-violent

⁴ See O'Malley, T *Sentencing Law and Practice* 2nd ed, Thomson Round Hall, 2006, p. 144.

⁵ Kurleychek, Blame and Bushway, *Scarlet Letters and Recidivism: Does and Old Criminal Record Predict Future Offending?* (2006) 5(3) *Criminology and Public Policy* 483.

offenders: there was little to distinguish statistically between groups of violent and non-violent offenders.

We believe that any decision to exclude a particular category of offender should be justified by evidence. As the Spent Convictions Group have correctly observed, it is usually assumed that the recidivism rates of sex offenders are much higher than those for other offenders, despite the fact that the Irish and international research into recidivism does not appear to support this.⁶ The proposed exclusion of any broad category of offender should be supported by empirical evidence and in the absence of such evidence, the singling out of sex offenders or any other category of offenders regardless of the severity of instant offence appears arbitrary.

Recommendation:

In the absence of any evidence as to the special nature of any particular category of offenders, IPRT believes that no category of offenders serving a finite sentence should be excluded from the Bill.

6. Length of Sentences – So Narrow as to be of Little Effect

The provision of six months as the outer limit for any qualifying sentence will have the effect of excluding from the potential benefit of the Bill a significant proportion of convicted persons, including large numbers of persons convicted of non-violent offences and relatively minor assaults. In this regard it is to be noted that a recent review of the United Kingdom system of expungement recommended that the 30 months limit in relevant legislation there should be lifted to make the legislation more effective.⁷

Recommendation:

The six-month limit for qualifying sentence will exclude a significant proportion of offenders from the application of the Bill. Consideration should be given to extending this period, by reference to the recent review of the corresponding UK legislation.

⁶ O'Donnell et al., (2008) *Recidivism in the Republic of Ireland, Criminology and Criminal Justice*, 8 (2):123-146. See also Hood et al., *Sex Offenders Emerging from Long Term Imprisonment: A Study of Their Long Term Reconviction Rates and of Parole Board Members Judgments of their Risk*, (2002) 42 *British Journal of Criminology* 371.

⁷ *Breaking the Circle: a report of the review of the Rehabilitation of Offenders Act 1974* Home Office, 2002.

7. Excluded Employment – The Blanket Nature of Exclusion

It is our view that it may well be appropriate to exclude from the scheme those who work in a fiduciary capacity or with groups who could be considered particularly vulnerable, such as children. However, It is important to be alive to the very real risk of over predicting criminal activity and for this reason we advocate parsimony in selecting the professions to which the scheme will not apply. IPRT believes that the categories of “excluded employment” proposed are drawn so widely as to exceed any reasonable or proportionate linkage between the severity and nature of an offence committed and any perceived public safety concern. For example, the exclusion of *all* civil service and healthcare work would close off a significant proportion of the workforce for a person whose offence may have no connection to public safety or proper public administration.

Recommendation:

The current categories of excluded areas of employment are drawn far too broadly. While it is critically important that any sensitive area of public employment or any work with children or vulnerable individuals should be given special attention, the exclusion of any area of employment from the Bill should be justified by demonstration of clear link to a particular risk.

8. Application to Young Offenders

Section 258 of Children Act 2001 provides for comprehensive scheme whereby persons are not required to divulge information relating to any offence committed before the age of 18. This provision potentially applies to all but the most serious of offences and the required rehabilitation period under the section is three years. While the only category of offender excluded under this section are offenders convicted in the Central Criminal Court, there is a provision whereby the Minister may introduce further exclusions or conditions by way of a Ministerial Order, to be put before the Oireachtas.

Recommendation:

There is no reference in the new Bill to the existing provisions of the Children Act and IPRT believes that careful consideration should be given to ensuring consistency between the two approaches.

9. Discrimination on the Basis of a Criminal Conviction

The Bill provides that while qualifying offenders will not have to divulge criminal convictions, any such “spent conviction” cannot be used as a proper ground for a dismissal from employment. The question of discrimination on the grounds of a person having a criminal conviction was recently examined in a report for the Department of Justice, Equality and Law Reform conducted by University College Cork.⁸ Following that report's analysis of equivalent schemes in six other jurisdictions, the Irish Human Rights Commission recommended to Government that a new ground should be created under the Employment Equality Act 1998 relating to discrimination on the basis of a criminal conviction.⁹ To date no action has been taken on foot of that recommendation.

Recommendation:

In the context of the present Bill, and on foot of the UCC/Department of Justice, Equality and Law Reform report on the issue, further consideration should be given to extending the grounds of discrimination under the Employment Equality Act 1998.

10. Broader Issues relating to the Reintegration of Offenders

Finally, IPRT would like to emphasise that the expungement of spent convictions is one important issue in a wider context of the need to support the reintegration and rehabilitation of offenders. Supporting the reintegration of offenders into society and into employment is crucial, not only from the perspective of the offender, but also in making re-offending less likely and thereby protecting society at large. In this regard, a package of policy and legislative solutions is needed to address the different barriers to reintegration facing prisoners on release. A key element in moving towards effective reintegration supports is the need for integrated sentence management, which would map out a programme of rehabilitation for each convicted person aiming ultimately towards successful reintegration in society on release. This is an issue on which the Inspector of Prisons has taken a special interest and on which he is currently inviting submissions from interested parties.

IPRT hopes that the present Bill will afford the Oireachtas the opportunity to address wider questions of law and practice relating to the supports needed for the successful reintegration of offenders.

⁸ Kilcommins, McClean, McDonagh, Mullally and Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*, Department of Justice 2004.

⁹ IHRC, *Submission Extending the Scope of Employment Equality Legislation*, May 2005.