



Submission: Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016

Introduction

As part of the public consultation phase for the Departmental review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, the Jesuit Centre for Faith and Justice is pleased to have the opportunity to provide this submission. We hope to contribute to the development of a more just, fair, and effective spent conviction regime which will promote rehabilitation and reduce the likelihood of people remaining in conflict with the criminal justice system. For many years, the Centre has advocated for policy reform,¹ focussing on a wide range of issues including juvenile crime and the treatment of young adults in prison, overcrowding, women in prison, prison healthcare, rehabilitation, and the impact of imprisonment on families.

Based on the documents accompanying the invitation, we are heartened that the Department for Justice acknowledges that a spent conviction regime should be “rooted in the principles of rehabilitative justice” and based on “the generally accepted acknowledgement that, after a certain period and having successfully completed their sentence, individuals deserve a ‘second chance’.”² Indeed, the consultation suggests a desire to provide a “genuine opportunity for rehabilitation and reform for former offenders.”³ We are supportive of this aspiration, as people who have completed a punishment, whether custodial or non-custodial, deserve every opportunity to fully re-integrate back into society without hindrance.

A new and more forgiving spent conviction regime is of the utmost importance. Other penal reformers have described the current Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 and the existing spent conviction regime as “mean-spirited” and “failing to meet its rehabilitative purpose.”⁴ A change is long overdue. Ireland’s spent conviction regime, similar to

¹ ‘The Prison Documents’, Jesuit Centre for Faith and Justice in Ireland, accessed 5 November 2020, <https://www.jcfj.ie/research/the-prison-documents/>.

² Department of Justice, ‘Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016: Public Consultation’ (Dublin, 2020), http://www.justice.ie/en/JELR/Review_of_the_Criminal_Justice_Act_2016-Spent_Convictions.pdf/Files/Review_of_the_Criminal_Justice_Act_2016-Spent_Convictions.pdf.

³ Department of Justice, ‘Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016’, 2020, http://www.justice.ie/en/JELR/Pages/Spent_Convictions_Consultation.

⁴ Irish Penal Reform Trust, ‘Spent Convictions Consultation Demonstrates a Commitment by Go...’, 6 October 2020, <https://www.iprt.ie/latest-news/spent-convictions-consultation-demonstrates-a-commitment-by-government-to-supporting-rehabilitation/>.

other common law jurisdictions,⁵ is perceived as an “outlier” compared to other European countries based on its restrictiveness and punitiveness.⁶

The Centre acknowledges there have been recent attempts at reform with the Criminal Justice (Rehabilitative Periods) Bill 2018 which was introduced by Senator Lynn Ruane and supported with a commitment from the incumbent government. Unfortunately, with the dissolution of the last Dáil, this Bill’s legislative journey through the Houses of the Oireachtas ended.⁷ However, this new review process presents an opportunity to design legislation which expands eligibility and proportionality even further than the 2018 Bill, so that rehabilitation, which is often a fragile notion upon release, is not hindered by either bureaucratic caution or an absence of ambition.

As a social justice centre within the wider Society of Jesus, we also seek to implement what are called the Universal Apostolic Preferences,⁸ especially the task of walking with the excluded – the poor, the marginalised and those facing discrimination. Hope is a load-bearing concept in our thinking on prisons and penology. We follow the advice of Francis, when he urges us to not forget that “... for the punishment to be fruitful, it must have a horizon of hope.”⁹ He continues that “otherwise, it is enclosed within itself and is only an instrument of torture, it’s not fruitful.”¹⁰ Punishment much include the hope for social reintegration, not a tokenistic or thin reintegration but a meaningful reintegration which comes through social empowerment, education, and employment.

At this stage, the multifarious limitations — restricted applicability; limited to only one conviction; lack of proportionality; lack of recognition of youth justice issues — of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 are widely known and accepted. Following a public hearing in 2019, the Joint Committee on Justice and Equality published a report on spent convictions.¹¹ With the express intention of not re-treading previously covered ground, this submission from the Jesuit Centre for Faith and Justice will briefly outline four proposals which should be considered as part of any legislation under-girding a new spent conviction regime:

1. Expansion of Eligibility for Expungement of Convictions
2. Removal of Any Limit on Number of Convictions to be Expunged
3. Removal of “Rehabilitative Periods” Except for the Most Serious Crimes
4. Collection and Publication of Annual Data on Spent Convictions

⁵ Katharina Swirak and Louise Forde, ‘Research Papers on Spent Convictions’ (Dublin: The Research and Data Analytics Unit, Department of Justice, 2000.), http://www.justice.ie/en/JELR/Spent_Convictions_Research_Report.pdf/Files/Spent_Convictions_Research_Report.pdf.

⁶ Joint Committee on Justice and Equality, ‘Report on Spent Convictions’ (Houses of the Oireachtas, October 2019), https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2019/2019-10-22_report-on-spent-convictions_en.pdf.

⁷ Irish Penal Reform Trust, ‘Spent Convictions Consultation Demonstrates a Commitment by Go...’

⁸ ‘Universal Apostolic Preferences’, accessed 5 November 2020, <https://jesuits.global/en/about-us/universal-apostolic-preferences>.

⁹ Ines San Martin, ‘Pope Francis: Prison without Hope of Reentering Society Is “Torture”’, *Crux* (blog), 24 August 2017, <https://cruxnow.com/global-church/2017/08/pope-francis-prison-without-hope-reentering-society-torture/>.

¹⁰ San Martin.

¹¹ Joint Committee on Justice and Equality, ‘Report on Spent Convictions’.

Proposals for Legislation on Spent Convictions

1. Expansion of Eligibility for Expungement of Convictions

When individuals are able to access the process of having previous convictions expunged, the incidences of recidivism decrease as the disclosure of minor, non-violent or non-sexual crimes to prospective employers or other societal gatekeepers does not act as “a barrier to progression.”¹²

The eligibility for people who have completed their custodial or non-custodial sentences should be expanded in any forthcoming legislation. Spent conviction provisions should be automatically extended to people who have received a custodial sentence of up to five years, and non-custodial sentences of any length. This proposal would represent a significant expansion on current eligibility criteria in the 2016 Bill; currently, if a person has one conviction (other than a motoring or public order offence) which resulted in a term of imprisonment of less than 12 months, they would only be eligible after seven years.

Specific types of offences in relation to regulated areas of employment such as caring or education professions could be addressed separately through employment vetting.

ACTION 1 – Spent conviction provisions should be automatically extended to people who have received a custodial sentence of up to five years, and non-custodial sentences of any length.

2. Removal of Any Limit on Number of Eligible Convictions to be Expunged

At present, if a person has two or more such convictions, neither can become spent. The ludicrousness of this tenet within current legislation was pointed out in stark terms by witnesses to the Joint Committee Public Hearing. A person with multiple motoring offences, who is putting the wider public at the real risk of serious injury or death, can have their convictions spent without any limits. However, a person with two separate convictions for shoplifting, a crime against property and not putting a person in harm’s way, will not be eligible to have these convictions spent.

Any limit on the number of eligible convictions should be removed from any forthcoming legislation. Petty property crimes can accrue quickly for some offenders, who may be young or living particularly chaotic lives, leading to multiple short custodial sentences. The current disqualification of multiple offences for expungement may be specifically disadvantaging people from lower socioeconomic communities.

ACTION 2 – Removal of Any Limit on the Number of Eligible Convictions to be Expunged

¹² Joint Committee on Justice and Equality.

3. Removal of ‘Rehabilitative Periods’ Except for the Most Serious Crimes

Other common law jurisdictions, such as the United Kingdom, have a range of different rehabilitative periods depending on the length of the sentence. At the low end, short sentences may have a rehabilitative period of six months while higher tariffs may have a corresponding rehabilitative period of 3.5 years. Ireland has eschewed any of this nuance and opted for an “arbitrary blanket term of seven years”¹³ for all eligible sentences. This means a relatively common three-month custodial sentence for shoplifting would have a period before eligibility for expungement of 28 times the length of the actual custodial sentence in question.

“Rehabilitative periods” following a sentence appear to be a widely accepted component of any criminal justice system amongst academics, civil servants and legislators.¹⁴ Disagreements do surface over how long the period should be for a person to be conviction-free after they serve their sentence before they are eligible for their conviction to be expunged. Proportionality is a central theme of this ongoing debate as, for example, there are calls for shorter rehabilitative periods for adults between 18 to 25-years-old.

The Jesuit Centre for Faith and Justice contends that though the introduction of a proportionality principle to rehabilitative periods would be much preferred to the current imposition of a seven-year term, the logic behind rehabilitative periods seems flawed and indicative of a punitive criminal justice system. The words we use are important. This holds even more true within systems in which differentials in the distribution of power exist. By maintaining the structures of “rehabilitation periods”, we are keeping people under the auspices of the criminal justice system by forcing them to disclose convictions. In reality, people are not being permitted to have the opportunity at a meaningful rehabilitation and reintegration due to likely discrimination for employment.¹⁵

The public safety argument which is proffered as a defence for “rehabilitative periods” tends to dissolve for three reasons. Firstly, when convictions are expunged and a person does not have to disclose them, the spent record of the conviction is not deleted from official records. Previous criminal history still remains relevant for any subsequent offending and sentencing. Secondly, even for the more serious crimes which incur a much higher custodial sentence, the risk of recidivism can be much lower than the offences which occur a less severe tariff. Pegging the length of the “rehabilitative period” to the severity of the tariff received is often incongruent with the evidence on recidivism. Finally, “rehabilitative periods” may again disadvantage those who are involved with less serious property-based or drug possession offences where recidivism can be high but risk to public safety is very low.

A vitally important element of the process of desistance and rehabilitation is the cessation of the punishment and the subsequent transition. A punishment should always end. This allows the person who has received a custodial or non-custodial sentence to transition to the next stage of their life. Yet, the “rehabilitative periods” prior to any eligibility for expungement extend the punishment and create barriers to this reintegration.

¹³ Joint Committee on Justice and Equality.

¹⁴ Swirak and Forde, ‘Research Papers on Spent Convictions’.

¹⁵ Marti Rovira, ‘The Stigma of a Criminal Record in the Labour Market in Spain: An Experimental Study’, *European Journal of Probation* 11, no. 1 (2019): 14–29; Amy Sheppard and Rosemary Ricciardelli, ‘Employment after Prison: Navigating Conditions of Precarity and Stigma’, *European Journal of Probation* 12, no. 1 (2020): 34–52.

There will always be certain convictions which will require disclosure for particular jobs, but we propose that all convictions are automatically expunged on completion of custodial sentences of up to five years, and non-custodial sentences of any length. An appeals process could be established for people who have served longer sentences and wish to have their conviction expunged.

ACTION 3 – Removal of ‘Rehabilitative Periods’ as all convictions are automatically expunged on completion for custodial sentences of up to five years, and non-custodial sentences of any length.

4. Collection and Publication of Annual Data on Spent Convictions

On an annual basis, the Department of Justice should collect and publish data on access to spent convictions. The current lack of available detailed statistical information make it impossible to evaluate the effectiveness of the previous 2016 Act and ascertain where needs exist.

If data of this nature was suitably combined with recidivism data, an accurate assessment could be established of any foreseen or unforeseen effects of new spent conviction legislation.

ACTION 4 – Collection and Publication of Annual Data on Spent Convictions

Conclusion

Punishment must have an endpoint and a “horizon of hope” to be fruitful. If the effects of punishment—discrimination for employment; barriers to education; social marginalisation—continue long after a person has been released from prison, can we say in good faith that their punishment was the length of the given sentence and not a day more? The ongoing forced disclosure of previous convictions and the restrictive nature of Ireland’s spent conviction regime is a continuation of a public punishment.

Addressing the growth of penal populism to the detriment of social inclusion, Pope Francis observes that:

“this is not so much about trust in some social function traditionally attributed to public punishment, as about the belief that it is possible that such punishment can obtain those benefits that would demand the application of a different type of social and economic policy as well as social inclusion.”¹⁶

A “rehabilitative period” which was truly meaningful would dispense with the negative definition consisting of an absence of new convictions but embrace a positive definition where a person is provided with every opportunity for reintegration to society. The absence of new convictions is but a healthy societal benefit of individual rehabilitation. The State must acknowledge its punitive instincts

¹⁶ Pope Francis, ‘Address of Pope Francis to the Delegates of the International Association of Penal Law’, 23 October 2014, http://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html.

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when drafting the existing spent conviction legislation and choose now to remove the barriers for people who have completed their punishment. A continuation of the current legislation with only modest tweaks would be in contradiction to the stated aims of this public consultation and the development of policy which engenders an environment for rehabilitation and reintegration.

In summary, the Jesuit Centre for Faith and Justice wish to offer the following four actions for consideration:

1. Expansion of Eligibility for Expungement of Convictions
2. Removal of Any Limit on Number of Convictions to be Expunged
3. Removal of 'Rehabilitative Periods' Except for the Most Serious Crimes
4. Collection and Publication of Annual Data on Spent Convictions