



## **IPRT Submission to the Department of Children, Equality, Disability, Integration and Youth on the Review of the Equality Acts**

**8<sup>th</sup> December 2021**

### **About IPRT**

Established in 1994, the Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for rights in the penal system and the progressive reform of Irish penal policy. Our vision is one of respect for human rights in the penal system, with prison as a sanction of last resort. We are committed to respecting the rights of everyone in the penal system and to reducing imprisonment. Our work is underpinned by an emphasis on evidence-based policies and a commitment to tackling social injustice.

IPRT publishes a wide range of policy positions and research documents; we campaign vigorously across a wide range of penal policy issues; and we have established IPRT as the leading independent voice in public debate on the Irish penal system.

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## Introduction

IPRT welcomes the opportunity to make a submission to the Department’s consultation on the review of the Equality Acts. In looking at the six areas on which the public’s views are particularly sought, this submission focuses primarily on item 3 (the scope of the existing equality grounds and whether new grounds should be added), but also briefly addresses item 2 (obstacles which prevent people from taking action against discrimination) and item 5 (whether exemptions in the legislation should be removed).

## A. Scope of the Existing Equality Grounds

### Discrimination on the Basis of a Criminal Conviction

#### i. Proposal

IPRT proposes that the Employment Equality Acts 1998-2015 (‘the EEA’) and Equal Status Acts 2000-2018 (‘the ESA’) are amended to add a new ground of discrimination on the basis of a criminal conviction. There are numerous ways in which such an amendment might be made e.g. by adding the ground of “criminal conviction” to section 6 of the EEA and section 3 of the ESA, or by adding a new provision to each Act that specifically addresses discrimination on the basis of a criminal conviction (see e.g. section 10 of the Criminal Justice (Rehabilitative Periods) Bill 2018 for an example of how such an amendment might be made<sup>1</sup>).

#### ii. Rationale

Discrimination against individuals with a criminal conviction is an ongoing and significant issue of concern. A 2016 YouGov survey in the UK found that 50% of employers would not consider employing an ex-offender.<sup>2</sup> While recent surveys carried out with employers in Ireland and Northern Ireland have been more positive in regards employers’ willingness to hire people with convictions histories,<sup>3</sup> IPRT’s own research indicates that many people continue to experience disadvantage as a result of their criminal conviction. For example, the results of a small-scale survey carried out by IPRT in 2019 revealed as follows:

- 81% (120) of respondents stated that having a conviction has had a negative impact on their “getting a job”;

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<sup>1</sup> Criminal Justice (Rehabilitative Periods) Bill 2018, section 10, available at: [https://data.oireachtas.ie/ie/oireachtas/bill/2018/141/eng/ver\\_a/b141a18s.pdf](https://data.oireachtas.ie/ie/oireachtas/bill/2018/141/eng/ver_a/b141a18s.pdf). Section 10 inserts a new ground of discriminatory treatment of persons with spent convictions or findings of guilt into the EEA, by way of a new section 14B.

<sup>2</sup> See YouGov, *YouGov / DWP Survey Results* (2016), at p.1, available at: <https://d25d2506sfb94s.cloudfront.net/cumulus/uploads/document/42yrwvixdo/YG-Archive-160126-DWPwaves.pdf>.

<sup>3</sup> See e.g. a 2019 Solas survey which found that over 60% of employers would be willing to hire an ex-offender if they were supported to do so, Solas, *Over 60 per cent of employers would hire an ex-offender if supported to do so* (2019), available at: <https://www.solas.ie/news-media/over-60-per-cent-of-employers-would-hire-an-ex-offender-if-supported-to-do-so/>; and a 2021 Ulster University/NIACRO study which reported that the vast majority of local Northern Irish employers (97%) believed in rehabilitation, see Ulster University, *Ulster University and NIACRO release first-of-its-kind research into employers’ attitudes to recruiting those with criminal records* (2021), available at: <https://www.ulster.ac.uk/news/2021/october/ulster-university-and-niacro-release-first-of-its-kind-research-into-employers-attitudes-to-recruiting-those-with-criminal-records>

- 53% (79) were concerned about the impact of their conviction on volunteering;
- 39% (58) were concerned about the impact of their conviction on obtaining car / home / personal insurance; and
- 29% (43) were concerned about the impact of their conviction on accessing education.<sup>4</sup>

Only 3% (5) of those surveyed said that their convictions have had no negative impact on their lives and many of the respondents commented on the impact of the internet on their convictions, noting that the “*internet means that the conviction was/will always be just yesterday.*”<sup>5</sup>

The creation of a criminal conviction ground has been considered as far back as 2002, when the Department of Justice, Equality and Law Reform commissioned researchers to carry out a comparative review of the international experience of employment legislation that prohibits discrimination on the basis of a conviction.<sup>6</sup> Recommendations to introduce a new criminal conviction ground were further made by the Irish Human Rights and Equality Commission (IHREC) in 2005,<sup>7</sup> and more recently in IHREC’s submission to the Public Consultation on Spent Convictions.<sup>8</sup> In 2019, the Joint Committee on Justice and Equality recommended in their report on spent convictions that anti-discrimination legislation “*should be extended to preventing people with spent convictions from, inter alia, being charged higher insurance premiums or excluded from educational courses*”.<sup>9</sup> The Joint Committee further acknowledged the particular difficulties that people can have in accessing public housing as a result of their convictions history.<sup>10</sup>

Despite these various recommendations, as it stands, Ireland does not provide any protection against discrimination on the basis of a criminal conviction. The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, while permitting those with a spent conviction to not disclose it, does not include any explicit anti-discrimination provisions. This means that it is still possible for employers or service-providers to discriminate against a person on the basis of their spent conviction (if they happen to find out about it through some other means e.g. the internet or media reports) or their unspent conviction (which must be disclosed by an individual if they are asked about it).<sup>11</sup> As commentators in other jurisdictions have noted, in order to “*provide individuals with criminal records with a universal and successful remedy against employment discrimination, a statute that explicitly bars employment discrimination based on criminal history needs to be adopted*”.<sup>12</sup>

Senator Lynn Ruane’s Criminal Justice (Rehabilitative Periods) Bill 2018 (as amended at Committee stage) addresses this to a certain extent, by proposing an amendment to the EEA that would make it

<sup>4</sup> See full details of the IPRT survey as follows, IPRT, *IPRT Survey: Living with Convictions* (2019), available at: [https://www.iprt.ie/site/assets/files/6810/iprt\\_submission\\_on\\_spent\\_convictions\\_november\\_2020.pdf](https://www.iprt.ie/site/assets/files/6810/iprt_submission_on_spent_convictions_november_2020.pdf) (at Appendix I).

<sup>5</sup> Ibid.

<sup>6</sup> Shane Kilcommins, Emma McClean, Maeve McDonagh, Siobhán Mullally and Darius Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of Discrimination* (2004), available at: <https://www.justice.ie/en/jelr/discrimination.pdf/files/discrimination.pdf>. This study also examined the potential for introducing other new grounds of discrimination.

<sup>7</sup> See Irish Human Rights Commission, *Extending the Scope of Employment Equality Legislation* (2005), at pp.6-10, available at: <https://www.ihrec.ie/documents/submission-on-extending-the-scope-of-employment-equality-legislation/>.

<sup>8</sup> IHREC, *Review of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 Submission by the Irish Human Rights and Equality Commission* (2020), at pp.7-8, available at: <https://www.ihrec.ie/app/uploads/2020/11/IHREC-Submission-to-Consultation-on-Spent-Convictions.pdf>.

<sup>9</sup> See Rec 8, Joint Committee on Justice and Equality, *Report on Spent Convictions* (2019), at p.29, available at: [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](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).

<sup>10</sup> Ibid., at p.22.

<sup>11</sup> See McIntyre & O’Donnell, *Criminals, Data Protection and the Right to a Second Chance* (2017) 58 *Irish Jurist* (ns) 27, at pp.8, 26, available at: <https://ssrn.com/abstract=3150591>.

<sup>12</sup> Elizabeth Westrope, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy* (2018), 108 *J. Crim. L. & Criminology* 367, at p.388, available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7626&context=jclc>.

unlawful discrimination for an employer to treat a person less favourably by reason of their spent conviction. The Bill is limited, however, in two respects: first, it only prevents discrimination in the employment sphere; and second, it only applies where a person has been discriminated against on the basis of their spent conviction (as opposed to a criminal conviction more generally). IPRT will accordingly be seeking to expand the scope of these proposed amendments when the Bill returns to the Dáil.<sup>13</sup>

It is worth emphasising that there is precedent in other common law jurisdictions for explicitly protecting against discrimination on the basis of a criminal conviction. In Canada, legislative provisions at both the federal and provincial level address such discrimination, with the Canadian Human Rights Act 1985 including within its prohibited grounds of discrimination a “*conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered*”.<sup>14</sup> Similarly, in Tasmania, the Anti-Discrimination Act 1998 prohibits discrimination on the ground of an “*irrelevant criminal record*”.<sup>15</sup>

Finally, IPRT notes that inclusion of such a ground of discrimination within the revised Equality Acts would assist in meeting the State’s responsibility to pursue the rehabilitation of prisoners *per* Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR), and help vindicate the right to work *per* Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Such protection would further assist in ensuring the right to privacy of those with criminal convictions, as guaranteed by Article 40.3 of the Constitution and Article 8 of the European Convention on Human Rights.

## **Discrimination on the Basis of Socio-Economic Status**

### **i. Proposal**

IPRT supports IHREC and FLAC’s calls for the introduction of a new ground of discrimination on the basis of socio-economic status.<sup>16</sup>

One possible definition of such a ground is set out in section 2 of the Equality (Miscellaneous Provisions) Bill 2021, which defines ‘socio-economic disadvantage’ as follows:

*“socio-economic disadvantage’ means having disadvantaged social status or disadvantaged economic status, or both, that may be indicated by a person’s inclusion, other than on a temporary basis, in a socially or geographically identifiable group that suffers from such disadvantage resulting from one or more of the following circumstances:*

- (a) poverty,*
- (b) source of income,*
- (c) illiteracy,*
- (d) level of education,*
- (e) address, type of housing or homelessness,*

<sup>13</sup> IPRT is waiting to hear more about the return of the Bill to the Dáil; it is hoped that this might take place before the end of the year 2021 but no exact date has yet been given.

<sup>14</sup> See s.3 of the federal Canadian Human Rights Act 1985, available at: <https://laws-lois.justice.gc.ca/eng/acts/h-6/page-1.html#h-256801>. See also s.18(2) of the Quebec Charter of Human Rights and Freedoms, available at: [http://legisquebec.gouv.qc.ca/en/showdoc/cs/c-12; https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00\\_96210\\_01](http://legisquebec.gouv.qc.ca/en/showdoc/cs/c-12; s.13 of the British Columbia Human Rights Code, available at: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/00_96210_01).

<sup>15</sup> See s.16(q) of the Anti-Discrimination Act 1998, available at: <https://www.legislation.tas.gov.au/view/html/inforce/current/act-1998-046>.

<sup>16</sup> See e.g. IHREC, *Submission to the Third Universal Periodic Review Cycle for Ireland* (2021), at p.3, available at: [https://www.ihrec.ie/app/uploads/2021/07/IHREC\\_UPR\\_2021\\_FINAL.pdf](https://www.ihrec.ie/app/uploads/2021/07/IHREC_UPR_2021_FINAL.pdf); and FLAC, *FLAC Guide: The Review of the Equality Acts, Making a Submission to the Review, & The Key Issues Under Review* (2021), at p.27, available at: <https://www.flac.ie/publications/flac-guide-the-review-of-the-equality-acts-making/>.

(f) employment status,  
(g) social or regional accent,  
or from any other similar circumstance,”<sup>17</sup>

IPRT is aware that FLAC has supported this definition<sup>18</sup> and agrees that it may be sensible wording to follow when drafting a new ground of discrimination on the basis of socio-economic status.

## ii. Rationale

While there is a lack of robust data on the social profile of people in Irish prisons, previous studies suggest that prisoners have a history of social exclusion, including high levels of family, educational and health disadvantage, and poor prospects in the labour market.<sup>19</sup> For example, a 1997 study of the social background of prisoners in Mountjoy Prison found that 56% of prisoners came from just 6 districts in Dublin characterised by high levels of economic deprivation.<sup>20</sup> More recently, a Central Statistics Office (CSO) analysis of outcomes from 2016 – 2019 for persons counted in prison settings on Census Night 2016 revealed that, up to May 2019, the highest level of education for more than half (57%) of the cohort was the Junior Certificate or less and approximately 59.7% of the group were not in work or education.<sup>21</sup>

This link between prison and social exclusion highlights the possible consequences of socio-economic deprivation, and supports the introduction of a specific ground of discrimination to help counter such disadvantage. As has been previously stated by Tamás Kádár, writing for the Equality and Rights Alliance:

*“Socio-economic disadvantage by its very nature impedes full and equal access to all human rights and in particular to economic and social rights. Persons experiencing socio-economic disadvantages face a number of human rights violations, including their right to education, right to adequate housing or right to work. These human rights violations are exacerbated by the discriminatory treatment such groups also face. A socio-economic status ground in equality legislation thus also supports and enables a more holistic response to socio-economic disadvantages, involving both human rights and equality-based arguments and actions.”<sup>22</sup>*

Again, research on the potential for including such a ground within the Irish Equality Acts has been carried out as far back as 2002.<sup>23</sup> This research, commissioned by the Department for Justice, described how prohibiting discrimination on the basis of social origin / socio-economic status would “serve the objectives underpinning the adoption of equality legislation, namely the pursuit of a more equal and just society” and “promote a more sophisticated intersectional approach to discrimination, leading to greater recognition of the multiple forms of discrimination that many groups face”.<sup>24</sup> The

<sup>17</sup> Equality (Miscellaneous Provisions) Bill 2021, section 2, available at: <https://www.oireachtas.ie/en/bills/bill/2021/6/?tab=bill-text>.

<sup>18</sup> See FLAC, *FLAC Guide: The Review of the Equality Acts, Making a Submission to the Review, & The Key Issues Under Review* (2021), at p.27, available at: <https://www.flac.ie/publications/flac-guide-the-review-of-the-equality-acts-making/>.

<sup>19</sup> See IPRT, *The Vicious Circle of Social Exclusion and Crime: Ireland’s Disproportionate Punishment of the Poor* (2012), at p.6, available at: [https://www.iprt.ie/site/assets/files/6264/position\\_paper\\_final.pdf](https://www.iprt.ie/site/assets/files/6264/position_paper_final.pdf).

<sup>20</sup> O’Mahony, Paul, ‘Punishing Poverty and Personal Adversity’ in Bacik I. and O’Connell M. eds. *Crime and Poverty in Ireland* (1998), pp. 49–67, at p.55.

<sup>21</sup> See CSO, *Offenders 2016 - Employment, Education and Other Outcomes 2016 – 2019* (2020), available at: <https://www.cso.ie/en/csolatestnews/pressreleases/2020pressreleases/pressstatementoffenders2016-employmenteducationandotheroutcomes2016-2019/>.

<sup>22</sup> Equality and Rights Alliance (2016), *An analysis of the introduction of socio-economic status as a discrimination ground* (2016), at p.20, available at: <https://equineteurope.org/wp-content/uploads/2020/07/Analysis-of-socio-economic-status-as-discrimination-final.pdf>

<sup>23</sup> Shane Kilcommins, Emma McClean, Maeve McDonagh, Siobhan Mullally and Darius Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited grounds of Discrimination* (2004), available at: <https://www.justice.ie/en/jelr/discrimination.pdf/files/discrimination.pdf>.

<sup>24</sup> *Ibid.*, at Executive Summary, p.xiii.

time for action on this ground is now and IPRT joins others in calling for a specific ground of discrimination on the basis of socio-economic status to be included within the revised Equality Acts.

## B. Other Issues

### Access to Justice

IPRT shares FLAC's concerns in regards the lack of civil legal aid available to persons hoping to pursue a discrimination claim under the Equality Acts,<sup>25</sup> and notes that the UN Committee on the Elimination of Racial Discrimination in 2019 recommended that the Government address these gaps by extending the scope of the Legal Aid Board to areas of law that are particularly relevant to Traveller and other ethnic minority groups.<sup>26</sup>

IPRT accordingly urges the Department, as part of this review, to consider expanding the legal supports available to people to take discrimination claims. Such supports should particularly be made available to people in prison, who may experience discrimination within the prison system<sup>27</sup> and will generally have even less recourse to mechanisms which can resolve their concerns. This is particularly the case in circumstances where the prison complaints system remains inadequate in resolving complaints, lacking both the trust of prisoners and prison staff alike<sup>28</sup> and being described most recently by the Office of the Inspector of Prisons as “*not fit for purpose*”.<sup>29</sup>

### Exemptions for the Functions of Public Bodies

IPRT is concerned by the uncertainty arising as to whether the ESA applies to public authorities performing general functions (as opposed to “services” *per* section 2 ESA). This is again an issue that has been identified in detail by FLAC.<sup>30</sup>

IPRT particularly notes the comments made in 1999 during Dáil debates on the Equal Status Bill by the then Minister for Justice, Equality and Law Reform as follows (emphasis added):

*“Not all actions of the State vis-à-vis members of the public can be regarded as services. There is a difference between controlling duties exercised by the State and services provided by the State. I am advised that immigration and citizenship matters, for example, are not services within the meaning of the Equal Status Bill but rather an expression of the State's duty as a sovereign power to control who it admits to the State. **Controlling duties in the areas of policing, defence and prisons would likewise not be regarded as services. The service aspect***

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<sup>25</sup> See e.g. FLAC, *FLAC Guide: The Review of the Equality Acts, Making a Submission to the Review, & The Key Issues Under Review* (2021), at p.45, available at: <https://www.flac.ie/publications/flac-guide-the-review-of-the-equality-acts-making/>.

<sup>26</sup> UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fifth to ninth reports of Ireland* (2019), at p.9, available at: [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT\\_CERD\\_COC\\_IRL\\_40806\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/IRL/INT_CERD_COC_IRL_40806_E.pdf).

<sup>27</sup> See e.g. IPRT, *Travellers in the Irish Prison System: A Qualitative Study* (2014), available at: [https://www.iprt.ie/site/assets/files/6339/iprt\\_travellers\\_report\\_web.pdf](https://www.iprt.ie/site/assets/files/6339/iprt_travellers_report_web.pdf); and IPRT, *Access to Rights & Justice for Migrants and Ethnic Minority People in the Penal System* (forthcoming). For more information on the latter report, due for publication in early 2022, see here: <https://www.iprt.ie/latest-news/rights-and-justice-for-migrants-foreign-nationals-and-ethnic-minorities-in-the-penal-system/>.

<sup>28</sup> See IPRT, *Access to Rights & Justice for Migrants and Ethnic Minority People in the Penal System* (forthcoming); and IPRT, *Progress in the Penal System: Assessing Progress During a Pandemic* (2021), Standard 22, available at: <https://pips.iprt.ie/progress-in-the-penal-system-pips-2020/part-2-measuring-progress-against-the-standards/4-oversight-accountability-and-complaints/22-complaints-system/>.

<sup>29</sup> Office of the Inspector of Prisons, *Annual Report 2020* (2021), at p.24, available at: <https://www.justice.ie/en/JELR/Pages/PR21000147>.

<sup>30</sup> See FLAC, *FLAC Guide: The Review of the Equality Acts, Making a Submission to the Review, & The Key Issues Under Review* (2021), at p.17, available at: <https://www.flac.ie/publications/flac-guide-the-review-of-the-equality-acts-making/>.



***of policing, immigration, defence and prisons will, however, come within the scope of the Bill.***

...

*In the policing area, for example, while riot control or apprehending a criminal gang could not be regarded as services, information and assistance provided by gardaí, including responding to reported crimes, would be regarded as services within the scope of the equal status legislation.”<sup>31</sup>*

These comments were subsequently cited by the Equality Tribunal (the predecessor to the Workplace Relations Commission) when considering a case against An Garda Síochána, with the Tribunal concluding that the ESA excluded from its scope the “controlling duties of the Garda Síochána, including those of the investigation and prosecution of crime, while at the same time legislating that the service aspects of policing come within its scope.”<sup>32</sup>

While this principle has been applied by the Workplace Relations Commission in subsequent cases relating to An Garda Síochána,<sup>33</sup> there do not appear to be any cases involving its consideration as it applies to the Irish Prison Service (IPS). There is accordingly – at the very least – a lack of clarity as to when the IPS will be considered to be exercising their “controlling duties” (not covered by the ESA) and when they will be considered to be providing “services” (covered by the ESA). This lack of clarity is undesirable, and the current state of the law potentially provides an overly broad exemption for the IPS in meeting its duties under the ESA. IPRT therefore recommends that the ESA is amended so as to make clear that the legislation applies to a public authority when it is both providing services and carrying out its general functions and/or controlling duties.

## Conclusion and Summary of Recommendations

It is over 20 years since the Equality Acts were passed and the legislation is ripe for review. IPRT urges the Department to take this opportunity to make meaningful updates to the legislation, which strengthen the protections provided to people who have suffered discrimination.

**Specifically, IPRT asks the Department to closely consider the following recommendations:**

- 1. Update both the EEA and ESA to include a new ground of discrimination on the basis of a criminal conviction.**
- 2. Update both the EEA and ESA to include a new ground of discrimination on the basis of socio-economic status, potentially drawing on the definition of ‘socio-economic disadvantage’ set out in the Equality (Miscellaneous Provisions) Bill 2021.**
- 3. Extend the legal supports that are available to people to take discrimination claims under the Equality Acts (and particularly consider extending the scope of civil legal aid), including for people in prison.**

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<sup>31</sup> See Dáil Éireann, *Equal Status Bill, 1999: Report Stage* (1999, Vol. 512 No. 7), available at: <https://www.oireachtas.ie/en/debates/debate/dail/1999-12-15/7/>.

<sup>32</sup> See *Donovan v Garda Donnellan* [DEC-S2001-001], at para.5.3, available at: <http://miris.eurac.edu/mugs2/do/blob.pdf?type=pdf&serial=1021471577581>.

<sup>33</sup> See e.g. the 2019 case of *Dariusz Bula v The Commissioner of An Garda Síochána, Nóirin O’Sullivan* [ADJ-00006593], available at: <https://www.workplacerelations.ie/en/cases/2019/november/adi-00006593.html>.

4. Remove exemptions which disapply the ESA in circumstances where a public body is exercising general functions or “controlling duties”, as opposed to “services” (as defined by section 2 ESA).