

Advice of the Ombudsman for Children in relation to  
the Spent Convictions Bill 2007

**March 2008**

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**June 2009**

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## Background

The Ombudsman for Children's advice was sought on two separate occasions by the Department of Justice, Equality and Law Reform. The original text of the Bill was referred to the OCO on 21 January 2008 by the Department of Justice, Equality and Law Reform.

The OCO submitted its views on the Bill in March 2008.

Having completed the second stage in Dáil Éireann and having been amended significantly, the Bill was referred once again by the Department of Justice to the OCO on 13 February 2009 for consideration in light of the revisions which had already been incorporated into the text.

The OCO submitted its supplementary advice on the Bill in June 2009.



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Advice of the Ombudsman for Children in relation to  
the Spent Convictions Bill 2007 (Private Members Bill)

**March 2008**





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## Background

The Spent Convictions Bill, 2007 (No 48 of 2007) was introduced as a private members bill by Barry Andrews TD on 25 October 2007 and follows on from a previous, similar private members bill (the Rehabilitation of Offenders Bill, 2007) which fell at the first stage in Dáil Éireann.

In essence, the legislative purpose behind the Spent Convictions Bill, 2007 is to alleviate the obligation on certain qualifying persons to disclose minor offences.

In this respect, the current proposal is distinct from its predecessor in that it does not have the effect of expunging the criminal record of qualifying persons, but rather it merely alleviates the duty of disclosure. A comparison between section 3 of the Rehabilitation of Offenders Bill, 2007 and section 4 of the Spent Convictions Bill, 2007 illustrates the key difference between the proposals.

The Law Reform Commission published a Report on Spent Convictions in July 2007, and many of the recommendations contained in the report have been incorporated into the proposed Spent Convictions Bill, 2007.

It is also relevant that a separate scheme is in existence for the benefit of offenders under the age of 18, pursuant to section 258 of the Children Act, 2001 and that the proposed Bill is intended to apply to adult offenders only.

The Bill was forwarded by the Department of Justice, Equality and Law Reform to the Ombudsman for Children's Office on 21 January 2008 for consideration on a general level and on a specific level with regard to four principal issues:

- i. whether the threshold for an "excluded sentence" of 6 months imprisonment is too low;
- ii. whether the list of "excluded employments" is too wide or too narrow;
- iii. whether the other categories of "excluded sentence" are appropriate; and
- iv. whether the "relevant rehabilitation periods" are appropriate.

The following advice was returned on 10 March 2008.

# Introduction

The Spent Convictions Bill, 2007 was introduced on 25 October 2007 as a private members bill. It is currently awaiting consideration at the second stage in the Dáil.

The advice contained in this document is given on foot of a request by the Department of Justice, Equality and Law Reform regarding the probable effect on children's rights and welfare of the implementation of the proposal for legislation.

The statutory basis for this advice is section 7(4) of the Ombudsman for Children Act, 2002.

The advice contained in this document is given with reference to the relevant legal principles concerning the rights and welfare of children under the Constitution of Ireland, the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (CRC) and relevant domestic legislation.

## Section 3 of the Bill: Rehabilitated person and spent conviction

Consideration of this section of the Bill reflects issues (i), (iii) and (iv) (see Background), indicated to the Ombudsman by the Department of Justice, Equality and Law Reform.

This section outlines the statutory criteria by which a person convicted of an offence can qualify as a “rehabilitated person” and thereby enjoy the benefits of a “spent conviction” as detailed in section 4 of the Bill. Section 3 is retrospective, insofar as it proposes to apply to persons convicted of an offence before the commencement of the Act. Thereafter, section 3 operates by setting out the conditions for rehabilitation, and also the categories of sentence which are automatically excluded. It is the latter aspect of the section which is of particular relevance to the Ombudsman for Children.

In particular, section 3(3) defines an “excluded sentence” as being:

- i. a sentence imposed in respect of any offence triable by the Central Criminal Court;
- ii. a sentence imposed in respect of a sexual offence; and
- iii. a sentence for a term exceeding 6 months.

For the purposes of the Spent Convictions Bill, 2007, the term “sexual offence” is to be interpreted as having “the meaning assigned to it by the Sex Offenders Act, 2001”, by virtue of section 2 of the Bill.

It is noted that the term “sexual offence” within the meaning of the Sex Offenders Act, 2001 does not comprise a comprehensive list of sexual offences, as section 3 of the 2001 Act sets out various derogations on the basis of the comparative age of victim and offender, or where the offender has not been sentenced to a term of imprisonment.

It is also noted that the Schedule to the Sex Offenders Act, 2001 contains a list of the sexual offences for the purposes of the Act and that this list does not include the caveats set out in section 3 of the Act.

### Query

We would query why the definition of the term “sexual offences” as set out in the 2001 Act is being used in this Bill as opposed to the more complete definition used in the Schedule to the 2001 Act.

No change is recommended to the threshold of 6 months imprisonment for an “excluded sentence” within the meaning of section 3(3)(c). In a criminal law context, the classification of an offence as “minor” such that it is triable summarily (ie in the District Court) is commonly done by reference to the maximum custodial sentence applicable to the offence. Whilst certain offences with higher maximum sentences have been deemed “minor”, it appears that offences with a maximum sentence of 6 months imprisonment will generally always qualify as “minor”. As such, the reference to a 6 month threshold in section 3(3)(c) of the Bill is appropriate.

No change is recommended to the 5 and 7 year “relevant rehabilitation period” referred to in section 3(4)(a) and section 3(4)(b) regarding a person convicted of an offence attracting a non-custodial and custodial penalty respectively. It seems appropriate that a longer timeframe should apply to custodial sentences than to non-custodial sentences, and timeframes as drafted would appear to represent a significant period for a person convicted of an offence to demonstrate rehabilitation.

## Section 5 of the Bill: Exceptions to general effect of spent conviction for excluded employment

This section sets out the exceptions to the general benefits of a “spent conviction” (which, in turn, are contained in section 4 of the Bill). From a statutory construction perspective, it is important to bear in mind that the exceptions here apply to persons who, with reference to the legislation’s qualifying criteria, would normally benefit fully from the general effect of a spent conviction. Section 5 is not therefore, of itself, a list of further disqualifying criteria. Consideration of this section of the Bill reflects issue (ii) referred to the Ombudsman by the Department of Justice, Equality and Law Reform.

Of particular concern is the range of employment which is not covered by the definition of “excluded employment” for the purposes of section 5(2) as currently drafted. With a view to child protection, there appear to be two broad lacunae in the current legislative proposal:

- i. persons who might apply for a voluntary position, or position without remuneration, involving the care for, supervision of or teaching of a person under 18 years of age; and
- ii. persons who might apply for a position which is not directly concerned with, but is conducted on the same premises as, the care for, supervision of or teaching of a person under 18 years of age.

As currently drafted, section 5(2)(a) of the Bill includes the following within the definition of “excluded employment”:

“any office, profession, occupation or employment involving the care for, supervision of or teaching of any person under 18 years of age, or of any person who, by virtue of their limited mental capacity, is a vulnerable person”.

A literal reading of section 5(2)(a) of the Bill seems to exclude the two above-mentioned categories of person who might represent a risk to the welfare of children and who should, therefore, not be alleviated of any duty to disclose a previous conviction notwithstanding *prima facie* qualification under section 3 of the Bill.

### Recommendation

As such, it is recommended that the definition of “excluded employment” for the purposes of section 5(2)(a) of the Bill be amended to include the following:

“any office, voluntary position, profession, occupation or employment (held with or without remuneration) involving the care for, supervision of or

teaching of any person under 18 years of age, or of any person who, by virtue of their limited mental capacity, is a vulnerable person”.

It is further recommended that the definition of “excluded employment” for the purposes of section 5(2) of the Bill be extended to include the following category:

“any office, profession, occupation or employment conducted on the same premises as the care for, supervision of or teaching of any person under 18 years of age, or of any person who, by virtue of their limited mental capacity, is a vulnerable person”.



## Section 6 of the Bill: Disclosure of spent conviction and other restrictions

Section 6 of the Bill sets out the situations whereby the benefits accruing to a qualifying person with regard to a spent conviction do not apply and, as such, the obligation to disclose same remains. Of interest to the Ombudsman for Children is section 6(2)(b) of the Bill which reads:

“Nothing in this Act shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person’s spent conviction or to circumstances ancillary thereto -

...in any proceedings relating to adoption or to the guardianship, custody, care or control of, or access to, any person under the age of 18 years, including proceedings under the Child Care Act 1991, or to the provision by any person of accommodation, care or schooling for any person under the age of 18 years”

This subsection appears to cover all of the relevant civil proceedings where the welfare of a child is at issue. As such, no change to the wording of this subsection is recommended.

### The relationship between spent convictions and soft information exchange

On a more general level, the relationship between the benefits accruing to a qualifying person under section 4 of the Spent Convictions Bill, 2007 and the exchange of soft information regarding persons posing a potential risk to children (a matter currently under consideration by the Joint Committee on the Constitutional Referendum on Children) is worthy of comment.

The Joint Oireachtas Committee on Child Protection has recommended further study into a statutory framework for the inclusion of soft information (that is to say, allegations in relation to a sexual offence which have not resulted in a criminal conviction) into a controlled vetting process, and it is anticipated that the proposed amendment to the Constitution of Ireland may remove any existing constitutional impediments to such a statutory framework.

The issue then arises as to whether the benefit of a spent conviction pursuant to the Spent Convictions Bill, 2007 is rendered redundant by the inclusion of soft information within the vetting process. It is the view of the Ombudsman for Children that both proposals can logically co-exist, and that any perceived overlap is merely superficial.

In particular, the key distinction is that the privilege granted to a qualifying person under the Spent Convictions Bill is to alleviate their obligation to disclose a conviction, as opposed to expunging of any relevant hard or soft information from their criminal record. The sharing of soft information pursuant to a statutory vetting scheme, does not, of itself, deny a person the benefit of a spent conviction.



Supplementary Advice of the Ombudsman for Children  
on the Spent Convictions Bill 2007

**June 2009**



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# 1. Introduction

The Spent Convictions Bill 2007 (No. 48 of 2007) was introduced as a Private Member's Bill by Barry Andrews TD on 25 October 2007 and was subsequently taken over by the Government. It provides for the establishment of a mechanism by which certain qualifying persons are relieved of the obligation to disclose convictions for certain offences following a prescribed rehabilitation period.

The original text of the Bill was referred to the Ombudsman for Children's Office (OCO) for its consideration on 21 January 2008 by the Department of Justice, Equality and Law Reform and the Ombudsman's views were sought on four issues in particular:

- i. whether the threshold for an "excluded sentence" of 6 months imprisonment is too low;
- ii. whether the list of "excluded employments" is too wide or too narrow;
- iii. whether the other categories of "excluded sentence" are appropriate; and
- iv. whether the "relevant rehabilitation periods" are appropriate.

The Ombudsman for Children submitted her views on the Bill on 10 March 2008 in accordance with the statutory function set out in section 7(4) of the Ombudsman for Children Act 2002 to give advice to a Minister of the Government on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of proposals for legislation.

Having completed the second stage in Dáil Éireann and having been amended significantly, the amended Bill was referred by the Department of Justice, Equality and Law Reform to the Ombudsman for Children on 13 February 2009 for consideration generally in light of the revisions which had already been incorporated into the text, and in particular with regard to two specific sections:

- i. Section 5 dealing with the issue of "excluded employments", in particular section 5(2); and
- ii. Section 6 dealing with the disclosure of spent convictions and other restrictions, in particular section 6(2)(c).

The core issue which arises with respect to the rights of children and young people in the Bill is child protection.<sup>1</sup> While the rights of people with convictions guaranteed by the Constitution and set out in the relevant human rights standards must of course be respected, they must also be balanced against the legitimate aim of protecting children and young people from harm. A number of international human rights instruments must be borne in mind in this regard, including the United Nations Convention on the Rights of the Child, the European Convention on Human Rights and the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.<sup>2</sup>

As many of the more general issues regarding the substance of the Spent Convictions Bill 2007 were addressed in the Ombudsman for Children's initial submission, the advice set out below is confined to commenting on the most significant amendments made to date and on the specific queries raised by the Department of Justice, Equality and Law Reform in its request for observations on the amended Bill.

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<sup>1</sup> The non-disclosure of offences committed by persons under the age of 18 is another important question but is addressed in section 258 of the Children Act 2001 (No. 24 of 2001) rather than in the Spent Convictions Bill 2007.

<sup>2</sup> A number of specific provisions in these instruments are germane to the contents of the Bill, including: Article 19 of the UN Convention on the Rights of the Child regarding the protection of children from violence, abuse, maltreatment and exploitation; the positive obligation under Article 3 of the European Convention on Human Rights to prevent ill treatment; and Article 5 of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse relating to accession to professions involving regular contact with children.



## 2. Definition of sexual offences

The definition of a sexual offence in section 2 of the Bill has been altered so that, for the purposes of determining whether a given sentence constitutes an “excluded sentence”, the term sexual offence has the meaning assigned by section 2 of the Criminal Evidence Act, 1992 rather than the Sex Offenders Act, 2001.

The aim of this amendment was to extend the scope of the term to include a wider range of offences, making the provision regarding excluded sentences more comprehensive. Such an extension would represent a welcome modification to the Bill. However, it would appear from the definition of a sexual offence in section 2 of the Criminal Evidence Act 1992 that a number of offences against children previously included within the ambit of the Bill by virtue of being specified as sexual offences in the Sex Offenders Act, 2001 have now been omitted. Specifically, offences under sections 3, 4, 5 and 6 of the Child Trafficking and Pornography Act, 1998 do not appear in the relevant section of the Criminal Evidence Act.<sup>3</sup> These offences are mentioned in section 12 of the Criminal Evidence Act but are not themselves considered sexual offences within the meaning of section 2 of that Act. Offences under section 2 of the Sexual Offences (Jurisdiction) Act 1996 are also provided for in the Sex Offenders Act 2001 but do not appear in the definition of sexual offences in the 1992 Act.<sup>4</sup>

### Recommendation

Consideration should be given to clarifying that the sexual offences provided for in the Bill also include those contained in the relevant sections of the Child Trafficking and Pornography, Act 1998 and the Sexual Offences (Jurisdiction) Act, 1996.

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<sup>3</sup> The offences provided for in sections 3, 4, 5 and 6 of the 1998 Act are: child trafficking; sexually exploiting a child; travelling to meet or meeting a child for the purposes of sexually exploiting the child; allowing a child to be used for child pornography; producing or distributing child pornography; and possessing child pornography.

<sup>4</sup> Section 2 of the Sexual Offences (Jurisdiction) Act 1996 relates to sexual offences committed against children outside the State.

### 3. Excluded employment

Section 5(2) of the amended Bill defines the term “excluded employment”. This is a crucial element of the Bill as the non-disclosure benefits of section 4 are specifically excluded where an otherwise qualifying individual seeks employment or any position or office in “excluded employment”.

The Ombudsman for Children’s initial submission on the Spent Convictions Bill 2007 expressed concern that section 5(2) as originally drafted did not expressly exclude voluntary positions which might involve the care for, supervision of or teaching of any person under the age of 18. Equally, section 5(2) as originally drafted did not include an office, profession, occupation or employment conducted on the same premises as the care for, supervision of or teaching of any person under the age of 18.

Section 5(2)(a) of the amended Bill now includes voluntary employment within the meaning of “excluded employment”, and this is a positive development.

However, section 5(2) of the amended Bill still does not include an office, profession, occupation or employment conducted on the same premises as the care for, supervision of or teaching of any person under the age of 18. The Ombudsman for Children’s Office is concerned that this omission may enable a person with a relevant criminal record to apply for a position which would involve working on premises where the care for, supervision of or teaching of persons under the age of 18 is being conducted without having to disclose the relevant information. This would mean that although the individual in question would not be responsible for the care, supervision or teaching of children, he or she could nonetheless have regular contact with children. An example of such a position would be the caretaker of a school.

#### Recommendation

The categories of excluded employment should include positions involving work on the same premises as the care for, supervision or teaching of persons under the age of 18.

## 4. Disclosure of [dormant]/[latent]/[suppressed] conviction and other restrictions in certain court proceedings

Section 6(2) of the amended Bill provides that nothing in the amended Bill shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a conviction otherwise attracting the benefit of section 4 in certain listed categories of court proceedings.

Section 6(2)(c) of the amended Bill is of particular importance and sets out the following category:

“in any proceedings relating to adoption or to the guardianship, custody, care or control of, or access to, any person under the age of 18 years, including proceedings under the Child Care Act 1991, or to the provision by any person of accommodation, care or schooling for any person under the age of 18 years.”

In its initial submission on the Spent Convictions Bill 2007, the Ombudsman for Children’s Office commented that this subsection appeared to cover all the relevant civil proceedings where the welfare of the child is at issue and that no amendment was therefore recommended.

### Query

This remains the OCO’s position, although it might be useful to clarify that this provision would encompass family law proceedings in which orders relating to the guardianship of, custody of and access to children are made as ancillary orders (for example, to a decree of judicial separation or divorce).

## 5. Vetting by An Garda Síochána

Section 6(4) of the amended Bill is a new addition to the text relating to the vetting powers of An Garda Síochána which was not included in the original version of the Bill. It provides that:

“Nothing in this Act shall require An Garda Síochána to disclose to any person any information available to it relating to a [dormant]/[latent]/ [suppressed] conviction and which, were it not for this Act, it would be obliged to disclose to a third party on foot of a request made to it by any designated body or employer under or in accordance with any statutory scheme for the vetting of employees or prospective employees”.

In the explanatory note to this section, the stated aim of the provision is to clarify the position of the Garda Síochána Vetting Unit and to provide that it should not disclose information regarding a spent conviction where an individual with such a conviction would not be obliged to disclose it. This is entirely understandable, given that the benefits of personal non-disclosure would be undermined if information regarding a relevant conviction could be found by requesting it from An Garda Síochána. On a plain reading of the text, however, it is not entirely clear whether this section has the effect of precluding members of the Garda Síochána Vetting Unit from disclosing information or whether it simply relieves the Gardaí of their obligation to make such a disclosure where the benefits accruing from section 4 apply to an individual. The latter could potentially imply a certain element of discretion, whereas the former could not.

In either case, the definition of excluded employment discussed above poses a problem from the point of view of vetting. It is clear from the Bill that no one would be in a position to withhold information regarding a conviction for a sexual offence in any situation and that anyone seeking a position which involves the care, supervision or teaching of children would not be able to withhold information on any convictions, whether they relate to sexual offences or not. However, it remains a possibility that someone who sought employment involving regular contact with children (rather than their care, supervision or instruction) who was guilty of an offence other than a sexual offence (assault, for example) and who satisfied the other conditions set out in the Bill would not be obliged to disclose that conviction. Moreover, by virtue of section 6(4) of the Bill, the Garda Vetting Unit would not be in a position to disclose such a conviction pursuant to a request for information from a prospective employer.

The OCO is concerned that the current definition of excluded employment read in tandem with this provision could create a lacuna where relevant offences might not be disclosed in circumstances where an individual may have regular contact with children. This could also create an anomaly should a “soft information” regime as is currently contemplated by the Oireachtas Committee on the Constitutional Amendment on Children be introduced.

#### **Recommendation**

In line with the recommendation made at section 3 above, the definition of “excluded employment” should be broadened so that the operation of the vetting system will not be adversely affected by the enactment of the Spent Convictions Bill 2007.

