Advice of the Ombudsman for Children on the Scheme of the National Vetting Bureau Bill 2011

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1. Introduction

1.1. The Minister for Justice, Equality and Defence published the Scheme of the National Vetting Bureau Bill on 27 July 2011. The aim of the Bill is to give effect to the recommendation made by the Joint Oireachtas Committee on the Constitutional Amendment on Children to introduce legislation to regulate and control the manner in which records of criminal convictions and information including soft information can be stored and disclosed by the Garda Síochána and other agencies for the purpose of child protection.

1.2. The Oireachtas Committee concluded that an amendment to the Constitution would not be necessary to allow for the establishment of a statutory vetting scheme that would satisfy the requirements of child protection and provide adequate safeguards for the rights of any persons affected by the proposed vetting legislation. Specifically, the Committee recommended in its first report on the 28th Amendment of the Constitution Bill 2007 that the Government prepare and publish as a matter of priority legislation to establish a statutory scheme:

- for the vetting of all persons involved in working in any capacity with children;
- for the statutory regulation of the manner in which information in relation to records of criminal prosecutions, criminal convictions and soft information may be collated, exchanged and deployed by An Garda Síochána or other statutory agencies for the purpose of ensuring the highest standards of child protection within the State; and
- to require that all agencies, organisations, bodies, clubs, educational and childcare establishments and groups working with or involved with children ensure that all of those working under their aegis either in a paid or voluntary capacity with children are subject to vetting[1].

1.3. Section 7 of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children may give advice to Ministers of the Government on any matter relating to the rights and welfare of children, including the probable effect of proposals for legislation. In accordance with this statutory function, the Ombudsman for Children's Office has set out below a number of observations and

[1] Joint Oireachtas Committee on the Constitutional Amendment on Children, *First Report - Interim Report on the Twenty-Eighth Amendment of the Constitution Bill 2007* (Dublin: Houses of the Oireachtas, 2008), p. 4

recommendations on the proposals put forward by the Government in the Scheme of the National Vetting Bureau Bill 2011, in addition to highlighting a number of relevant international human rights standards.

1.4. The Ombudsman for Children's Office has on a number of occasions provided advice to Government and to the Houses of the Oireachtas on proposals to amend the Constitution; in these submissions, this Office advised that such an amendment explicitly enable the Oireachtas to legislate for the collection and exchange of information relating to the potential endangerment of children[2].

1.5. The absence of a statutory framework governing this aspect of child protection represents a serious lacuna in existing legislation aimed at shielding children from harm, notwithstanding the significant and essential work carried out by the Garda Central Vetting Unit (GCVU). The passage of the National Vetting Bureau Bill 2011 through the Houses of the Oireachtas is therefore a welcome opportunity to address this deficit and put in place a legally robust vetting system.

1.6. In emphasising the importance of vetting, however, it should not be forgotten that it is one component of a larger child protection framework and that it cannot guarantee children's safety in isolation. A strong vetting mechanism is not a replacement for sound recruitment processes; indeed, as *Children First: National Guidance for the Protection and Welfare of Children* makes clear, employers and heads of organisations where staff or volunteers have access to children should at all times implement safe recruitment practices, including vetting of applicants and staff, rigorous checking of references, interview procedures and monitoring of good professional practice[3].

1.7. In addition, reform with respect to vetting will necessarily interact with other forthcoming legislation relevant to child protection dealing with the reporting of child abuse, spent convictions, and the proposals to put *Children First* on a statutory footing. Every effort must be made to ensure consistency and coherence between these different proposals.

1.8. It is acknowledged that there are already great demands placed on the GCVU and that the issue of capacity cannot be ignored. However, the trajectory of law reform must be clear: Ireland should put in place a

[2] See in particular the Ombudsman for Children's *Report to the Oireachtas on the 28th Amendment of the Constitution Bill 2007* (Dublin: OCO, 2007) and its *Submission to the Joint Oireachtas Committee on the Constitutional Amendment on Children* (Dublin: OCO, 2008)
[3] Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (Department of Children and Youth Affairs: Dublin, 2011), p. 21

mechanism that builds on the work done at present and aligns it with best practice.

2. International human rights standards

The United Nations Convention on the Rights of the Child

2.1. The United Nations Convention on the Rights of the Child (UNCRC) was ratified by Ireland in 1992 and it contains a range of provisions relating to the prevention of violence, exploitation and abuse, in addition to protecting and supporting victims of such abuse[4].

2.2. Of most immediate relevance in the context of the Scheme is Article 19, which provides that:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
>
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

2.3. The UN Committee on the Rights of the Child – the expert body charged with monitoring the implementation of the UNCRC – has elaborated on the nature of the obligations that arise from these provisions. In particular, its General Comment on the right of the child to freedom from all forms of violence provides guidance on what is required of States in order to comply with Article 19 in terms of identifying, reporting, investigating and following up on allegations of abuse and ill-treatment[5].

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[4] These include articles 2, 3, 6, 12, 19, 20, 27, 34, 37 and 39 of the Convention.
[5] UN Committee on the Rights of the Child, General Comment No. 13, *The Right of the Child to Freedom from All Forms of Violence,* CRC/C/GC/13 (2011)

2.4. The UN Committee has emphasised in the strongest terms that child protection must begin with proactive prevention of all forms of violence, abuse and neglect. States have an obligation to adopt all measures necessary to ensure that adults responsible for the care, guidance and upbringing of children will respect and protect children's rights[6]. The UN Committee has also highlighted the particular obligations on States to demonstrate due diligence and to ensure that that all persons who, within the context of their work, are responsible for the prevention of, protection from, and reaction to violence are addressing the needs and respecting the rights of children[7].

2.5. In addition, the UN Committee has raised the specific issue of vetting procedures in the context of States' compliance with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[8]. In particular, the Committee has welcomed initiatives to enhance the vetting of those working with children but has expressed concern in situations where such measures do not cover all employees and volunteers already working with children. The Committee has further emphasised the need for adequate guidelines and training for personnel responsible for administering requests for criminal record disclosures[9].

Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.

2.6. Ireland has signed but not yet ratified the 2007 Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse. The Convention is wide-ranging in its scope, covering prevention and protection measures, criminal law, assistance to victims and national coordination of efforts to combat the sexual exploitation and abuse of children.

2.7. Article 5(3) of the Convention states that:

> Each Party shall take the necessary legislative or other measures, in conformity with its internal law, to ensure that the conditions to accede to those professions whose exercise implies regular contacts with children ensure that the candidates

[6] UN Committee on the Rights of the child, General Comment No. 13, para. 46
[7] UN Committee on the Rights of the child, General Comment No. 13, para. 5
[8] Ireland signed the Optional Protocol on 7 September 2000 but has not yet ratified it.
[9] See R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child (*3rd edition*),* (UNICEF: Geneva, 2007), p. 675

to these professions have not been convicted of acts of sexual exploitation or sexual abuse of children.

2.8. The explanatory report to the Convention clarifies that this provision sets out an obligation on the Parties to ensure that candidates are screened prior to the exercise of professions involving regular contacts with children to ensure that they have not been convicted of acts of sexual exploitation or sexual abuse of children; it further notes that in certain member States of the Council of Europe, this obligation can be applied also to voluntary activities[10]. The addition of "in conformity with its internal law" permits States to implement the provision in a way which is compatible with internal rules, in particular the provisions on rehabilitation and reintegration of offenders.

2.9. It should be noted that these are minimum standards and that it is open to States Parties to exceed them.

3. Employment positions

3.1. Part 2 of the Scheme addresses the categories of employment position that will fall within and outside the scope of the Act.

3.2. Head 5 sets out the positions for which submissions for vetting disclosure applications are required. These include:

- employment in pre-school services as defined by the Child Care Act 1991;
- employment in positions as teachers, as defined by the Teaching Council Acts 2001 and 2006;
- other employment working with children or vulnerable adults which involves regular or ongoing unsupervised contact with children or vulnerable adults;
- a position concerning the management or operation of a children detention school, as defined by the Children Act 2001; and
- persons providing accommodation in their private homes for children or vulnerable adults, other than family relatives.

3.3. The explanatory note to this Head indicates that positions subject to vetting are to be defined with reference to the type of employment rather than the type of employer, and that employment positions which do not involve working with children do not require vetting. It explains

[10] Explanatory report to the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (CETS 201), para. 57

further that, with respect to the use of the term “regular or ongoing unsupervised contact with children or vulnerable adults”, the intention is to screen out employments which involve everyday contact with children but that do not involve ongoing contact (the example of a sales employee in a shop is given).

3.4. Vetting needs to have definite boundaries. Whilst there will inevitably be situations in which the National Vetting Bureau and registered organisations will have to exercise their discretion in determining who should be subject to vetting, the legislation should nonetheless provide as much clarity as possible. There are certain elements under Head 5 that could benefit from further clarification; furthermore, this Office believes that, on balance, the Scheme is under-inclusive in terms of the categories of person who will be subject to vetting.

3.5. Using the criterion of whether one “works with” children or not to determine the need for vetting gives rise to certain difficulties. If it encompassed only those roles that involve interaction with children as part of one’s professional duties, it would exclude positions that may involve contact with children by virtue of location rather than function (an example would be the caretaker of a school). Notwithstanding the fact that individuals in this situation would not “work with” children per se, they may work in close proximity or have access to children.

3.6. A similar point was raised by this Office in its advice of June 2009 on the Spent Convictions Bill 2007, as amended in 2009. The 2007 Bill addressed the issue of “excluded employment”, positions for which otherwise qualifying individuals seeking employment would not be able to avail of the non-disclosure benefits of the 2007 Bill due to the sensitive nature of the position. Excluded employments included an office, profession, occupation or employment involving the care for, supervision of or teaching of any person under the age of 18. This Office recommended that the definition of excluded employment be expanded to 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 purpose of this recommendation was to ensure that those with an opportunity to have regular or ongoing contact with children in the course of their work – even if they have no direct responsibilities vis-à-vis the children – would fall into the category of excluded employment. On the same logic, such positions should be subject to the vetting requirements of the 2011 Bill.

3.7. In addition, it would appear from Head 13(1) that organisations registered with the National Vetting Bureau would be permitted to submit applications for vetting disclosures **only** with respect to those seeking employment for positions covered by Head 5. Given that many of the organisations that will become immediately registered with the Bureau once the 2011 Bill is enacted and commenced currently vet all staff and volunteers – including those that do not have regular or ongoing unsupervised access to children – the net effect of Heads 5 and 13 would be a scaling back of current practice.

3.8. One of the reasons it is important to include those that may not have direct contact with children within the scope of the vetting legislation when they work for an organisation that engages with or provides services to children is that they may have access to sensitive information regarding children. An example would be a designated liaison person for child protection within the meaning of the *Children First* guidance; his or her normal duties may not involve working with children but in considering and referring child protection concerns that come to the attention of the organisation, the designated liaison person has access to very sensitive information. It is essential that individuals in this position be vetted.

3.9. A further clarification of the scope of Head 5 is also required with respect to the definition of "regular or ongoing unsupervised contact" with children, bearing in mind the comments made above with regard to the term "working with" children. It is important that variable practice does not develop and it would therefore be useful to give greater specificity to what constitutes regular or ongoing contact and any further qualifications that are introduced to the Bill.

3.10. The question of supervised and unsupervised contact also merits consideration. At present, the Scheme does not generally require the vetting of individuals whose contact with children is supervised; supervision obviates the need for vetting. A difficulty arises with this element if by supervision the Scheme means an adult working with children in the presence of at least one other adult, whether the other adult has management responsibility or not. While there are in practice many instances in which professionals legitimately work directly with children without any other adults present – in the areas of health and education for example - *Our Duty to Care: the principles of good practice for the protection of children and young people* specifies that organisations must ensure that there is an adequate number of

workers of both sexes available to supervise children[11]. Individuals whose work involves regular and ongoing contact with children, even when that work is supervised, occupy a position of trust; moreover, people who currently occupy such positions are generally subject to vetting. It would be a retrograde step to remove them from the scope of the legislation.

3.11. In considering the parameters of the vetting requirements under the Scheme, a comparison with the draft Criminal Law (Spent Convictions) Bill 2011 is instructive. The Ombudsman for Children's Office understands that the most recent draft of the Spent Conviction Bill provides that where the Garda Síochána is requested by a third party to provide information in relation to a person's criminal record, information relating to spent convictions and circumstances ancillary to those convictions which are part of the person's record shall be excluded from the information provided to the third party. However, it provides further that this subsection will not apply where a third party is an employer seeking information in relation to a person who has applied for a position of employment which:

- Wholly or mainly involves direct or indirect contact with children or other vulnerable persons, whether the contact concerned is supervised or not; or
- Provides opportunities for direct contact with children or other vulnerable persons, whether the contact is supervised or not.

3.12. Although the object and purpose of the legislation relating to spent convictions is different from the National Vetting Bureau Bill – as indeed are the practical consequences of its operation – consideration should be given to expanding the scope of the vetting legislation to encompass positions of employment that would not benefit from the non-disclosure provisions of the Criminal Law (Spent Convictions) Bill 2011, subject to appropriate exceptions provided for in Head 6.

3.13. If it is decided to proceed with a more limited range of positions for which vetting is required, consideration should be given to permitting organisations to submit applications for vetting disclosures voluntarily. A comparison with the recommendations made in the February 2011 review of the Vetting and Barring Scheme in the United Kingdom is instructive in this regard. Although the review proposed a scaling back

[11] Department of Health and Children, *Our Duty to Care: the principles of good practice for the protection of children and young people* (Department of Health and Children: Dublin, 2002), p. 11

of the scope of the Vetting and Barring Scheme, the review recommended that in addition to requiring that individuals in a "regulated activity" (a role involving regular or close contact with children or vulnerable adults) be vetted, the Scheme would allow (but would not require) employers to seek a vetting disclosure in relation to employees/volunteers that worked with a child or vulnerable adult in a role other than a regulated activity[12].

3.14. Head 6 of the Scheme refers to employment positions excluded from the scope of the Bill and lists the categories of person that are not required to submit applications for vetting disclosures, which are:

- family members caring for a child or vulnerable adult;
- persons minding a child or vulnerable adult in the family home of the child or vulnerable adult, at the request of a parent or guardian;
- persons assisting on an occasional, ad-hoc, voluntary basis in sports or community or other organisations which involve children or vulnerable adults but where those persons do not have regular or ongoing unsupervised contact with children or vulnerable adults; and
- students providing occasional or ad hoc tutoring to other students.

3.15. With respect to the first category, it should be clarified whether it is intended to apply to family members who are also foster carers (this is also of relevance to Head 5[2]). Although the logic of excluding family members caring for children on an informal basis is clear, when a child is in care there is a case for applying different (and more stringent) standards with respect to their care.

3.16. The explanatory note to this Head indicates that in relation to persons assisting on an occasional, ad-hoc, voluntary basis at events such fundraisers or sports days, vetting is not required so long as the individuals in question are not going to have regular or ongoing unsupervised contact with children. In the absence of further precision in the definition of what constitutes occasional, ad hoc, voluntary work, the potential for divergent practice is great. It may be useful to specify the duration and quality of contact that would constitute the threshold dividing such occasional, ad hoc, voluntary work from positions that may be subject to the vetting requirements of the Scheme. This would be a reasonable basis on which to balance the requirements of good

[12] *Vetting and Barring Scheme Remodelling Review – Report and Recommendations* (London: Home Office, 2011), pp. 17f

child protection practice with the need to support volunteerism and community engagement.

4. The National Vetting Bureau

4.1. Part 3 of the Scheme provides for the establishment of the National Vetting Bureau; the Bureau will in effect replace the Garda Central Vetting Unit.

4.2. It would be useful for the Scheme to clarify the issue of information sharing. At present, there is no requirement in the Scheme for organisations that have sought and received a vetting disclosure to receive any update from the Bureau should any further relevant information within the meaning of the Scheme come to its attention. This means that the Bureau may obtain such information but may not disclose it until such time as the individual seeks another position that falls within the ambit of Head 5. If such an individual remained in the same position or with the same organisation, that relevant information would not become known to the employer.

4.3. This has a bearing on the related question of re-vetting. The Scheme proposes that the Minister may make regulations providing for re-vetting of persons on a periodic basis of not less than every 5 years. However, the explanatory note to Head 15 states that the possibility of re-vetting persons previously vetted will be dependent on available resources; re-vetting will not be mandatory.

4.4. The lack of a provision for mandatory re-vetting following a certain period of employment would be less problematic were the National Vetting Bureau empowered to share relevant information within the meaning of the Act with employers that comes to the Bureau's attention after a vetting disclosure has been made. Indeed, it could be argued that there would be no need for re-vetting with respect to those that remained employed within an organisation for a considerable period of time if such a mechanism were put in place. However, as noted above, such a provision does not at present exist within the Scheme.

4.5. The Scheme also makes no provision for the portability of vetting; in the absence of any change in this area, the current situation in which multiple requests for vetting disclosures may be made with respect to the same individuals will persist. Establishing a system where a vetting disclosure may remain valid within a given timeframe - on the

assumption that no relevant information comes to the attention of the Bureau in respect of that individual following the initial vetting disclosure - would be advantageous.

4.6. Head 10(1) of the Bill states that the Garda Commissioner, with the consent of the Government, may enter into agreements with other jurisdictions for the exchange of information for the purposes of this Act. It states further under Head 10 (2) that the Bureau may access and use criminal records information provided by other states for the purposes of this Act.

4.7. It is noted that the latter provision makes reference to accessing and using information relating to criminal records. In light of the general approach adopted by the General Scheme to information other than criminal information, it would be useful to clarify that relevant information which would be included by the Bureau in a vetting disclosure were it gathered within this jurisdiction could also be used by the Bureau if it is held by an equivalent authority in another jurisdiction. It is acknowledged that practical difficulties beyond the power of the National Vetting Bureau to remedy can arise in the context of seeking such information; however, it is important to apply the same standard to all individuals in respect of whom a vetting disclosure is sought.

5. Vetting disclosure procedures

5.1. Head 14 of the Scheme relates to “Relevant Information”, which consists of information which will only be disclosed if the Bureau determines that the person concerned poses a bona fide risk to children or vulnerable adults, in accordance with the procedures set out in Head 20. Relevant information within the meaning of the Scheme will include soft information.

5.2. It is noted that Head 14(c) includes within the scope of “relevant information” protection orders as notified to An Garda Síochána in accordance with the provisions of section 11(3) of the Domestic Violence Act 1996. This Office understands that section 11(3) of the1996 Act relates to notifications to the HSE rather than An Garda Síochána (which is provided for in section 11[2]) and it would be useful to clarify this in the Scheme.

5.3. Head 15 of the Bill refers to organisations required to report relevant information to the Bureau. The explanatory note clarifies that

organisations included in Schedule 2 - which will be obliged to comply with the requirements of Head 15 - will be specified professional/disciplinary bodies rather than individuals. The note further explains that Head 15 may have to be considered again in light of developments in regard to placing the *Children First* guidance on a statutory footing.

5.4. As noted above, the revised *Children First* guidance states that "employers/heads of organisations where staff or volunteers have access to children should at all times implement safe recruitment practices, including vetting of applicants and staff, rigorous checking of references, interview procedures and monitoring of good professional practice"[13]. This section makes reference to the importance of vetting in the context of staff or volunteers having access to children rather than employment that involves regular or ongoing unsupervised contact with children. Consideration should be given to how the Scheme will interact with the proposed legislation relating to *Children First* in light of the comments above regarding Head 5.

5.5. Head 19 permits the Bureau to defer a vetting disclosure where an organisation is conducting an investigation into a "serious allegation of abuse" and the organisation requests the Bureau to so defer the disclosure, or where a vetting disclosure would prejudice an ongoing criminal investigation or proceeding.

5.6. The term "serious allegation of abuse" does not appear to be defined in the Scheme, either in respect of Head 15 (4) or Head 19. It is unclear therefore under precisely what circumstances Head 15(4) and the corresponding Head 19 would come into effect. The Scheme would benefit from further clarification on this point.

5.7. Heading 20 of the Scheme relates to the use of relevant information for vetting purposes. This sets out the procedures to be followed in disclosing relevant information and reflects the ongoing concern, and indeed obligation, on the legislature to ensure that the rights of a vetting subject are balanced with the need to protect children and vulnerable adults. It is important to ensure that the Scheme complies with international human rights standards with respect to this provision.

[13] Department of Children and Youth Affairs, *Children First: National Guidance for the Protection and Welfare of Children* (Department of Children and Youth Affairs: Dublin, 2011), section 4.5.5, p. 21

6. Offences

6.1. Head 23 sets out a range of offences which may arise under the Act. Of particular note is the provision of that Bill that will render it a criminal offence to employ a person in a position for which a vetting disclosure is required without first obtaining such disclosure or, having obtained such disclosure, to employ such person where there are reasonable grounds for believing that such person may prove a risk to children or vulnerable adults.

6.2. Clarification will be required as regards who within the organisation can be charged with an offence under Heading 23 (6). The liaison person is tasked with submitting applications to the Bureau and receiving vetting disclosures, but may not have full knowledge of ongoing recruitment processes and may have no role in making a decision to employ or not to employ an applicant based on a vetting disclosure.

6.3. Such clarification is particularly important in light of the explanatory note accompanying Head 12 of the Scheme, which makes it clear that the responsibility for determining the suitability of a vetting subject for employment lies with the organisation in question; individuals are not barred by the Bureau as such.

6.4. Schedule 1 will set out the offences which may be disclosed to Registered Organisations through the relevant liaison person(s). It is noted that it is intended to exclude minor offences, including certain road traffic offences.

6.5. It is important to ensure consistency between the Scheme and the proposed Spent Convictions Bill with respect to these offences. As noted above, this Office has raised the issue of vetting in the context of previous advice on the Spent Convictions Bill. The concerns previously expressed by this Office relating to the interaction between the statutory framework for spent convictions and the operation of the vetting system arose from the definition of excluded employment in the earlier draft of the Spent Convictions Bill.

6.6. In light of the relevant provisions of the Criminal Law (Spent Convictions) Bill 2011 highlighted above at section 3.11, it is possible that the categories of those who may not benefit from the spent convictions legislation and who would have to disclose all previous convictions to an employer could potentially be wider than the categories of those who will be subject to vetting under the Scheme of

the National Vetting Bureau Bill 2011. Consideration should be given to how the National Vetting Bureau Bill and the Criminal Justice (Spent Convictions) Bill 2011 will interact on this point and what the implications are for Schedule 1 of the former.

6.7. The Scheme must also take into account the provisions of the Probation Offenders Act 1907. Under the relevant sections of the Act, a Court may convict an offender but, often on a first offence, could then grant the offender the benefit of the Probation Act ensuring the offender would avoid a criminal conviction and the subsequent criminal records that would follow same. However, in such an instance, there remains a record of a “dismissal” on the Garda file but the offender is technically without a criminal conviction going forward and indeed no conviction is recorded in the District Court file.