ADVICE OF THE OMBUDSMAN FOR CHILDREN IN RELATION TO THE SPENT CONVICTIONS BILL, 2007 (PRIVATE MEMBERS Bill)

10 March 2008
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Background:

The Spent Convictions Bill, 2007 (No. 48 of 2007; see Appendix 1) was introduced as a private members bill by Barry Andrews T.D. on the 25th 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 also 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 the 21st 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 the 10th of March 2008.
Advice of the Ombudsman for Children in relation to the Spent Convictions Bill, 2007

Introduction

The Spent Convictions Bill, 2007 was introduced on the 25th 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 & 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, the UN Convention on the Rights of the Children 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 above), 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 on 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:

“(a) a sentence imposed in respect of any offence triable by the Central Criminal Court,

(b) a sentence imposed in respect of a sexual offence, and

(c) 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 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 (i.e. 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 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 lacunas in the current legislative proposal:

a) 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

b) 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 abovementioned 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
ears 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 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 the 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.
Appendix 1: Spent Convictions Bill, 2007

AN BILLE UM CHIONTUITHE SPI’ONTA 2007
SPENT CONVICTIONS BILL 2007

Mar a tionscna’odh
As initiated

ARRANGEMENT OF SECTIONS
Section
1. Short title and commencement.
2. Interpretation.
3. Rehabilitated person and spent conviction.
4. General effect of spent conviction.
5. Exceptions to general effect of spent conviction for excluded employment.

[No. 48 of 2007]

Acts Referred to
Child Care Act 1991 1991, No. 17
Ethics in Public Office Act 1995 1995, No. 22
Probation of Offenders Act 1907 7 Edw. 7, c.17
Sex Offenders Act 2001 2001, No. 18
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BILL
titled
AN ACT TO PROVIDE THAT 5 CERTAIN CONVICTIONS MAY 
BE REGARDED AS SPENT FOR CERTAIN PURPOSES 
WHERE THE CONVICTED PERSON HAS NOT BEEN 
CONVICTED OF ANY OTHER OFFENCE WITHIN SPECIFIED 
PERIODS OF YEARS, AND TO PROVIDE FOR 
10 RELATED MATTERS.
BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:
1.—(1) This Act may be cited as the Spent Convictions Act 2007.
(2) This Act comes into force on such day or days as the Minister 
may by order appoint.
15 2.—In this Act, unless the context otherwise requires—
"circumstances ancillary to a conviction" has the meaning assigned 
by section 4(5);
"court" means any court exercising jurisdiction in civil or criminal 
matters;
20 “excluded employment” has the meaning assigned by section 5(2);
“excluded sentence” has the meaning assigned by section 3(3);
“Minister” means the Minister for Justice, Equality and Law Reform;
“rehabilitated person” has the meaning assigned by section 3;
“relevant rehabilitation period” has the meaning assigned by 
25 section 3(4);
“sentence” means—
(a) any custodial order made by a court in connection with 
a criminal conviction providing for the deprivation of a 
person’s liberty for a period of time imposed by a court,
30 and includes any such sentence which is suspended, 
whether in whole or in part,
Rehabilitated person and spent conviction.
General effect of spent conviction.

(b) any other non-custodial order made by a court in connection with a criminal conviction, including any disqualification, penalty, fine, prohibition or order postponing sentence;
"sexual offence" has the meaning assigned by the Sex Offenders Act 2001;
"spent conviction" has the meaning assigned by section 3.

3.—(1) Subject to the conditions in subsection (2) and the other provisions of this Act, where an individual, in this Act referred to as a "rehabilitated person", has been convicted of an offence or offences, whether before or after the commencement of this Act, the conviction of the rehabilitated person shall be referred to as a "spent conviction" and shall have the effects referred to in section 4.

(2) The conditions referred to in subsection (1) are that—
(a) the conviction did not involve the imposition by the court of an "excluded sentence" within the meaning of subsection (3),
(b) the rehabilitated person did not have a sentence imposed upon him or her in respect of any offence during the "relevant rehabilitation period" within the meaning of subsection (4), and
(c) the rehabilitated person has complied with all conditions of the sentence.

(3) An "excluded sentence" means—
(a) a sentence imposed in respect of any offence triable by the Central Criminal Court,
(b) a sentence imposed in respect of a sexual offence, and
(c) a sentence for a term exceeding 6 months.

(4) "Relevant rehabilitation period" means—
(a) in respect of a custodial sentence for a term not exceeding 6 months, a period of 7 years from the date of conviction, and
(b) in respect of any non-custodial order, including disqualification, penalty, fine or prohibition, a period of 5 years from the date of conviction or when such order ceased to have effect, whichever is the earlier.

(5) For the purposes of subsection (4), the relevant rehabilitation period is interrupted by a subsequent conviction for any offence during the 7 year period or the 5 year period, as the case may be, and a new relevant rehabilitation period shall be deemed to begin from the date of any such conviction, but this shall not apply in the case of a dismissal under section 1(1) of the Probation of Offenders Act 1907.

4.—(1) Subject to section 3 and the other provisions of this Act, a rehabilitated person shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted.

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for or convicted of or sentenced for the offence or offences which were the subject of that conviction and, notwithstanding the provisions of any other enactment or rule of law to the contrary, no evidence shall be admissible in any proceedings before a court to prove that a rehabilitated person has committed 5 or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction.

(2) Subject to section 3 and the other provisions of this Act, where a question seeking information about an individual's previous convictions, offences, conduct or circumstances is put to him or her or to any other person otherwise than in proceedings before a court—
(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly, and
(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent sentence in the answer to the question.

(3) A person convicted of fraud, deceit and an offence of dishonesty in respect of an insurance claim shall not be excused by subsection (2) from admitting any such conviction on any insurance proposal or form.

(4) Subject to section 3 and the other provisions of this Act,
(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him or her to disclose a spent conviction or any circumstances ancillary to a spent conviction, and
(b) subject to the provisions of section 5 concerning any "excluded employment," a spent conviction, or any failure to disclose a spent conviction, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him or her in any way in any occupation or employment.

(5) For the purposes of this Act, “circumstances ancillary to a conviction” means—
(a) the offence or offences which were the subject of that conviction,
(b) the conduct constituting that offence or those offences, and
(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.
Exceptions to general effect of spent conviction for excluded employment.
Disclosure of spent conviction and other restrictions.

5.—(1) Nothing in section 4 shall affect the obligation of a rehabilitated person or of any person to disclose any conviction, including a spent conviction, where an individual seeks employment or any position or office in an "excluded employment" within the meaning of subsection (2). 5

(2) "Excluded employment" means—
(a) 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, 10
(b) any office, profession, occupation or employment in the provision of health care,
(c) membership of the judiciary, barrister, solicitor, court clerk, court registrar or any employee of the Courts Service, 15
(d) civil servant, public servant, or of any office within the meaning of the Ethics in Public Office Act 1995,
(e) firearms dealer,
(f) traffic warden,
(g) employment as a member of the Defence Forces, 20
(h) employment as a prison officer, as a member of the probation service, or membership of a prison visiting committee,
(i) employment as a member of An Garda Síochána (including reserve membership), 25
(j) accountant or dealer in securities, and
(k) director, controller or manager of a financial institution or of any financial service provider which is regulated by the Financial Regulator.

6.—(1) Nothing in this Act shall affect— 30
(a) the right of the President to grant a pardon or commute a sentence in accordance with the provisions of the Constitution,
(b) the enforcement by any process or proceedings of any fine or other sum adjudged to be paid by or imposed on a 35 spent conviction,
(c) the issue of any process for the purpose of proceedings in respect of any breach of a condition or requirement applicable to a sentence imposed in respect of a spent conviction, or 40
(d) the operation of any enactment by virtue of which, in consequence of any conviction, a person is subject, otherwise than by way of sentence, to any disqualification, disability, prohibition or other penalty the period of which 6
extends beyond the rehabilitation period applicable to the conviction in accordance with section 3.

(2) 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 5 circumstances ancillary thereto—

(a) in any criminal proceedings before a court (including any appeal or reference in a criminal matter),
(b) 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,
(c) in any proceedings in which a rehabilitated person is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he or she consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1).

(3) If at any stage in any proceedings before a court the court is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person’s spent conviction or to circumstances ancillary thereto, the court may admit or, as the case may be, require the evidence in question notwithstanding the provisions of section 4, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.

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