



**RCNI Observations on the Criminal Justice
(Spent Convictions) Bill 2012**

June 2012

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Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist **information and resource** centre on rape and all forms of sexual violence with a proven capacity in strategic leadership. The RCNI role includes the development and coordination of national projects including expert data collection, using our expertise to influence **national policy and social change** and supporting **Rape Crisis Centres** to reach best practice standards. We are the representative umbrella body for our member Rape Crisis Centres who provide **free advice, counselling and support** for survivors of **sexual abuse** in Ireland.

The Criminal Justice (Spent Convictions) Bill 2012 – RCNI Response

The RCNI response to this Bill is two-fold. In terms of the **positive aspects** from the point of view of survivors of sexual violence who have had the courage to take a case all the way through the criminal justice system, we would say that:

- (i) We are glad to see that sentences for sexual offences **over 12 months** are all excluded, as we are aware that the provisions in other jurisdictions include some sentences of much longer duration;
- (ii) it is appropriate that anyone seeking to work with or provide services to children and/or vulnerable adults will have to declare their convictions;
- (iii) It is right that there is a range of employments with children and vulnerable persons which are excluded, and that convictions will have to be disclosed when applying for certain licences (e.g. taxi licences);
- (iv) It is also right that anyone reconvicted during the relevant period is not able to benefit from this legislation in respect of the original conviction, and will only benefit if he/she has complied with any conditions associated with that conviction;
- (v) We also welcome the provisions in Sections 3 and 7 which relate to circumstances in which convictions otherwise considered spent, must be disclosed.

However, we remain concerned that **not all sexual offences** are excluded from the benefits of this Bill to convicted persons. In our respectful submission, **it is appropriate that sexual offences should all be excluded, because of their gravity, their impact on their victims and because the same offences can be founded on such widely different facts.** We are

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supported in this view by the Law Reform Commission, whose recommendation was that **all** sexual offences should be excluded from the ambit of this legislation.¹

Sexual Offences Convictions which can become spent under this Bill:

These offences are listed at Schedule 1, Part 1 of the Bill, at paragraphs 2, 3 and 4. They include: sexual assault, indecent assault, incest by males, and incest by females over 17 years, where the "other party" (the victim) was over 17 at the time of the offence and there was no custodial sentence (paragraph 2), a defilement offence where the victim is aged over 15 and under 17, buggery of persons under 17 years of age, gross indecency with males under 17, where the "other party" (the victim) was aged over 15 but under 17, and the person guilty of the offence was aged not more than 3 years older than the victim at the date of the offence (paragraph 3). Finally, a defilement offence will attract the benefit of this Bill, if the child victim was under 17 and the person convicted of the offence was not more than 24 months older than that child at the time of the offence (paragraph 4).

The defilement offence referred to in paragraph 2 is that formerly known as "unlawful carnal knowledge" under Section 2 of the Criminal Law Amendment Act 1935. The other defilement offences referred to are those in Section 3 of the Criminal Law (Sexual Offences) Act 2006 (paragraph 4). These include sexual intercourse, buggery, aggravated sexual assault, and two forms of penetrative offence: oral or anal penetration by the penis, and penetration of the vagina by any object "held or manipulated by another person".

It is acknowledged of course that if any of these sentences is longer than 12 months, the benefit of this Bill will not apply to anyone convicted of them.

RCNI submits that there should not be any exceptions to the general rule in this Bill that convictions for sexual offences do not ever become spent, for the following reasons:

Convictions for Sexual Offences Generally:

(1) Sexual offences are serious by their very nature and therefore, convictions for sexual offences entail public safety concerns: Sexual offences are among **the most serious and personally devastating** crimes against the person imaginable. Victims of sexual violence are affected in profound and long-lasting ways, in every aspect of their lives. The negative effects range from extremely serious psychological and physical conditions, such as depression, self-harming behaviour, suicidal thoughts and behaviour, addiction problems, agoraphobia, obsessive compulsive disorders and post-traumatic stress disorder (PTSD), through relationship and sexual difficulties, and losing the ability to work or study as before, or at all, - and consequent economic disadvantage. The Law Reform Commission Report on Spent Convictions (2007) makes the same point at paragraph 3.14:

¹ The Law Reform Commission Report on Spent Convictions (2007), LRC 84-2007, available on the LRC website, www.lawreform.ie. The relevant sections and the LRC recommendation on sexual offences can be found at Appendix I hereto for easy reference.

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".....the Commission considers that the grave harm that is caused to the victims of such crimes coupled with the risks posed to public safety and particularly the safety of vulnerable members of society require that such offences should not be deemed suitable for expungement...."

(2) Public Safety Concerns: While RCNI welcomes the exclusion of working with children and vulnerable adults from the benefits of this Bill, nevertheless we remain very concerned that many victims of sexual violence who are **in fact** quite vulnerable although they would not fall within the definition of "vulnerable persons" in Section 1 of the Bill, might encounter convicted sex offenders in work-related contexts without any impediment, if the convictions which they have are regarded as spent under this Bill, and consequently, the sex offenders in question are under no obligation to disclose them.

RCNI also submits that this Bill should make it very clear that convictions for sexual offences which have become spent under the existing Section 258(1) Children's Act 2001 provisions, should be disclosed **in all the circumstances outlined in this Bill**, for instance when making application for "relevant work", and/or applying for certain licences, etc. As the Bill stands, it does not appear to be consistent with Section 258(1) CA 2001, so that it is not clear whether a conviction for a sexual offence covered by Section 258 (1) (that is, any which is not tried by the Central Criminal Court, such as sexual assault), would have to be disclosed under the new Bill when the convicted person applies for a job involving children or vulnerable persons, for example. We submit that both this Bill and the existing Section 258(1) CA 2001 should be amended to make it clear that the disclosure obligations in the Bill will also apply to any convictions for sexual offences regarded as spent under Section 258(1) CA 2001, in the interests of public safety. In fact, it may be time to revise Section 258(1) CA 2001 to exclude **all** sexual offences, not only those tried in the Central Criminal Court.²

Finally in relation to public safety concerns, RCNI submits that convictions for **all** sexual offences, including those listed in Schedule 1, Part 1 of this Bill, and including those which come under the ambit of Section 258(1) CA 2001, should be disclosed by the proposed National Vetting Bureau, and that this should be made quite explicit in both this legislation and in the National Vetting Bureau Bill now before the Oireachtas. It is vital in the interests of public safety that these two pieces of legislation work together smoothly and do not contradict each other.

(3) Convictions for the same sexual offence of the same length and/or type, may be based on very different facts – the length and/or type of sentence is a very crude and imperfect indicator of the seriousness of what happened, and may bear very little relation

² Section 258(1) of the Children's Act 2001 provides already for convictions of young people under the age of 18, other than those tried in the Central Criminal Court, to become spent in effect after three years if certain conditions are met – see link to webpage at:

<http://www.irishstatutebook.ie/2001/en/act/pub/0024/sec0258.html#sec258>. RCNI National Rape Crisis Statistics (2010), the latest available at the time of writing, show that about 20% of survivors of child sexual violence said that the perpetrators of the violence were under 18, although it is fair to say that the relevant sample is not national **prevalence** data. The document is available online at:

<http://www.rcni.ie/uploads/RCNINationalRapeCrisisStatisticsAndAnnualReport2010.pdf>

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to its impact on its victim. Further, in this country there are no formal sentencing guidelines either statutory or administrative, so that sentencing practice varies widely across all criminal courts, particularly the District and Circuit Criminal Courts.

Multiple variables involved in sentencing process show us that length of sentence is not a very accurate reflection of the harm caused – these offences can disclose offending very serious in its impact on the victim, which resulted in a low sentence for reasons which had nothing at all to do with the victim³. This objection in our view goes to the very heart of why convictions for sexual offences should not ever become spent. The range of different factors involved in an individual conviction, or series of convictions, and which have to be taken into account on sentence, is enormous. Not all of these factors have to do with the circumstances of the offence itself. It may be that the circumstances of the offence are outweighed on sentence by the personal circumstances of the offender, as in the example cited above. The prevalence of child sexual abuse and particularly, historical child sexual abuse means that many of the perpetrators of such abuse are elderly at the time of court proceedings. This fact will have a significant impact on the sentencing of that person, as will the fact that the offences took place so long ago. Length or type of sentence is not always a very accurate indicator of the gravity of the offending. It does not seem fair to victims that perpetrators who avoid custodial sentences because of their personal circumstances should also be able to regard their convictions as spent after a period, because the harm caused is **just as serious for the victims as it would be in the absence of any “personal circumstances” on the part of the convicted person.**

(4) While the argument might be made that some convictions for sexual offences which do attract the benefit of this Bill are for offences which do not come under the Sex Offenders Act 2001, the Law Reform Commission Report on Spent Convictions also makes the point that there is a very wide difference between the absence of an obligation to notify one’s address, etc under the SOA 2001, and the total expungement of a conviction for a sexual offence. RCNI agrees with the Law Reform Commission⁴ that the fact that a conviction for a sexual offence is not covered by SOA 2001 does not mean that it should be capable of being expunged permanently. We note also that under the SOA 2001 as amended, a person imprisoned for a period of 6 months to 2 years is subject to a 10 year notification requirement, by which time his/her conviction if it comes under one of the Schedule 1, Part 1 sexual offence exceptions and is under 12 months in any event, would be considered spent under this Bill.

³ For example, on 18 June 2012, the Irish Times reported on a case in the Central Criminal Court which involved multiple counts of rape, incest and sexual assault against 5 victims, which resulted in an 18 months sentence, apparently because the judge was satisfied that the convicted man had a terminal illness which would result in his death weeks or months after the sentence.

⁴ See paragraph 3.18 of the LRC Report on Spent Convictions (2007): “The Commission considers that there is a great difference between ceasing the requirement to register as a sex offender and wiping the slate clean for sex offenders. The Commission considers that all sexual offences are of such a serious nature that it would be inappropriate to expunge such offences under any circumstances and the Commission therefore recommends that sexual offences should be excluded from the application of the proposed spent convictions scheme.”

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We submit with respect, that this is inconsistent and very confusing for all who are affected by it, and that the appropriate solution from the point of view of victims and public safety generally, is the one proposed by the Law Reform Commission, namely to exclude **all** convictions for sexual offences from the ambit of this legislation.

Convictions for Sexual Assault and Indecent Assault:

(5) Charges of sexual assault are the most frequently brought charges for sexual crimes in our courts, by some distance⁵. Convictions for sexual assault which result in non-custodial sentences are not a very rare occurrence, either.⁶ Even if they were rare, we submit that it would be unjust to the victims of these offences to allow those convictions to become spent, most especially because of the harm which they have caused.

Historic Child Sexual Abuse and Sexual/Indecent Assault:

(6) Historic child sexual abuse is often charged as sexual assault or indecent assault. While each individual act upon which a charge of sexual assault is based might not sound serious or dramatic, the grave damage to victims in cases of historic child sexual abuse lies in the **pattern of these acts**, often repeated many times over a period of months or years, and often planned carefully by the perpetrator to occur at times and places safest for him. Very often in cases of historic child sexual abuse, there are only sample counts on the indictment, which may or may not be an accurate reflection of a pattern of repeated abuse over a lengthy period. It is quite possible that the resulting sentence in turn will not reflect the seriousness of the offending accurately, either. If sexual assault and indecent assault convictions could become spent if they did not result in a custodial sentence, the criminal justice system would fail to acknowledge the gravity of this kind of offending for its victims. This failure would do nothing to encourage victims to report child sexual abuse to the Gardaí and/or help bring these perpetrators to justice.

(7) Sentencing years ago was more lenient for historic child sexual abuse – it is unfair to victims that many perpetrators of historic child sexual abuse will be able to wipe the slate clean. This legislation will affect victims of crimes whose perpetrators were convicted many years ago as well as victims of crimes whose perpetrators are facing justice now or in the future. Years ago, sentencing for historic child sexual abuse, charged as indecent or sexual assault, was generally more lenient, and non-custodial sentences were not unusual. For many survivors of child sexual abuse, the fact that the perpetrator's conviction would be on his record until his death represented the **only meaningful sanction** he would ever suffer. This will now be taken away from them in any case where the perpetrator was

⁵ CSO figures, based on Garda Recorded Crime Statistics, indicate that in 2003, there were 879 sexual assaults "detected", while the corresponding figure for rape was 144 in that year. In 2010, CSO statistics indicate that there were 824 sexual assaults "detected", while the corresponding figure for rape in 2010 was 255.

⁶ In 2010, the number of convictions in the Circuit Courts for sexual offences (the figures are not broken down further into separate offences, but this figure would include most sexual assault and defilement cases) which resulted in a non-custodial sentence was 47, or 36% of all Circuit Court sentences for sexual offences (Courts Services Annual Report 2010, at the time of writing the latest available).

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charged with sexual or indecent assault only and duly convicted, but did not get a custodial sentence. In our respectful submission, this is not fair to that cohort of victims.

(8) Since the Supreme Court case of *DPP vs Judge Devins & Anor [2012] IESC 7*, there is no possibility that buggery which occurred before 1993 can be charged as such. Many of these cases can now only be charged as indecent assault, which is likely to be viewed by sentencing judges as a **less serious** offence. This means that convictions for indecent assault will become at least a little more likely to be based on the **serious** fact of buggery. If the overall sentence is reduced to less than 12 months because of some mitigating factor which has little or nothing to do with the facts of the case, a conviction for indecent assault based on facts which amount to buggery may become spent. In our respectful submission, this does not represent justice for the victims of such crimes.

Convictions for Incest:

(9) We would respectfully submit that to exclude convictions for incest where both people concerned were over 17 at the time of the offence and there is no custodial sentence, would represent a failure to provide a meaningful sanction for the harm which can be caused to its victims by this kind of behaviour, often as part of a **pattern of intra-familial abuse**. We would also say that this kind of offending, like child sexual abuse, often consists of repeated abusive behaviour over a lengthy period of months or years, and therefore is often represented at trial by sample counts only. The result may be that there is a conviction on a small number of counts only, reflected in a short custodial, or even a non-custodial sentence. This kind of sentence is unlikely to reflect the harm caused to the victim(s) concerned. The establishment or the extension of a criminal record which cannot be expunged does create a **meaningful sanction** which goes some way towards recognizing the harm done to the victim, however.

Convictions for Defilement:

(10) Our understanding is that the DPP is not likely to prosecute cases of defilement between two people whose dates of birth differ by no more than 24 months, **unless** the behaviour of the accused is abusive or exploitative of the other person. This means that convictions for defilement are not likely to be based on underage but factually consensual sexual activity. We note that any custodial sentence of 12 months or under for defilement where complainant and perpetrator are no more than 24 months apart, may become spent under this Bill. We submit that convictions for defilement based on facts which are likely to include circumstances of exploitation or abuse **should not ever become spent**, as these are not minor matters but **either** penetrative acts (sexual intercourse, buggery, anal or oral penetration by the penis, penetration of the vagina by an object) against someone as young as 15, **or** acts which would be described as aggravated sexual assault if they were perpetrated against a person of full age without his/her consent.

Appendix I

Extract from the Law Reform Commission Report on Spent Convictions (2007):

3.13 The Commission has concluded that the nature and seriousness of certain offences give rise to legitimate public safety concerns and that these concerns cannot easily be addressed by the provisions of spent convictions schemes. Thus, the Commission considers that it is appropriate to exclude certain offences from the application of the proposed spent convictions scheme. Under section 258(1)(b) of the Children Act 2001, the spent convictions scheme established by that Act provides that offences which are required to be tried by the Central Criminal Court are excluded. Thus, the most serious offences against the person are excluded from the protection of the Act. The Commission is of the opinion that a similar provision would be appropriate in relation to the proposed scheme for adults. The Commission recommends therefore that the proposed spent convictions scheme for adult offenders should exclude any offence which is required to be tried by the Central Criminal Court.

3.14 The Commission notes that, as a general rule in other jurisdictions, sexual offences are excluded from the protection of spent convictions schemes. Most sexual offences are already effectively excluded from the application of the scheme for juvenile offenders under the *Children Act 2001* by virtue of the fact that offences that are required to be tried by the Central Criminal Court are ineligible for expungement, although no specific provision exists to that effect in the legislation. The Commission believes that the same should be the case in relation to the proposed scheme for adult offenders in this jurisdiction. There are two reasons for this. First, the Commission considers that the grave harm that is caused to the victims of such crimes coupled with the risks posed to public safety and particularly the safety of vulnerable members of society require that such offences should not be deemed suitable for expungement. The second consideration is that since the introduction of the registration requirements in the *Sex Offenders Act 2001* (mirroring comparable provisions in the British *Sex Offenders Act 2001*) it would not be possible to deem many sexual offences to be spent since the offender in question may be under a requirement to notify for life under the 2001 Act.

3.15 Section 8(3) of the 2001 Act requires a sex offender to comply with the notification obligation for an “indefinite” period if the sentence imposed is one of imprisonment for life or for a term of more than 2 years. The notification obligation is 10 years if the sentence is more than 6 months but not more than 2 years, 7 years if the sentence imposed is a term of 6 months or less, and 5 years if the sentence imposed is suspended or is non⁷⁶ custodial. The time periods for offenders under 18 years of age at the time of the commission of the offence are reduced to 5 years, 3½ years and 2½ years, respectively, in respect of the three latter sentences.

3.16 In this jurisdiction therefore, an offender who is sentenced to imprisonment for 2 years or more must continue to notify indefinitely. Any proposed spent convictions scheme which would allow for the expungement of a sexual offence for which an individual was sentenced to 2 years or more would, in the Commission’s view, be very difficult to reconcile with the 2001 Act.

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3.17 The position in Britain is similar. The *Sex Offenders Act 1997*¹⁰⁸ requires certain convicted and cautioned offenders to register their new addresses with their local police force with 14 days of being released from custody or on moving home. Registration requirements apply to offenders who have been convicted or cautioned of a specified offence,¹⁰⁹ persons found not guilty by reason of insanity, person unfit to plead but who have been found to have done the act charged and other persons who are still in the criminal justice process.¹¹⁰ As is the case under the Irish 2001 Act (which was based on the 1997 Act), the requirement to register and notify apply for a period of time that varies according to the seriousness of the offence, but is a lifetime requirement for a person sentenced to 30 months or more.¹¹¹

3.18 The Commission is aware that not all sex offenders are required to comply for life with the notification requirements of the 2001 Act and that those sentenced to less than 6 months imprisonment must comply for 7 years while those given a suspended or non-custodial sentence must comply for 5 years.¹¹² However, the Commission does not consider that this should ground an argument that sexual offences should be eligible for expungement after the other requirements of the legislation have been met. The Commission considers that there is a great difference between ceasing the requirement to register as a sex offender and wiping the slate clean for sex offenders. The Commission considers that all sexual offences are of such a

¹⁰⁸ The 1997 Act applies to England and Wales, and Scotland.

¹⁰⁹ These specified offences are contained in Schedule 1 of the *Sex Offenders Act 1997* and include all sexual offences including indecent assault and offences of possessing indecent material in relation to children.

¹¹⁰ Section 1 of the *Sex Offenders Act 1997* sets out the categories of persons subject to the registration requirements of the Act.

¹¹¹ The notification requirements are set out in section 2 of the *Sex Offenders Act 1997*.

¹¹² The Commission is aware of the proposed amendments to the 2001 Act in the *General Scheme of the Criminal Law (Trafficking in Persons and Sexual Offences) Bill 2006* which is discussed in detail in Chapter 4 below.

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serious nature that it would be inappropriate to expunge such offences under any circumstances and the Commission therefore recommends that sexual offences should be excluded from the application of the proposed spent convictions scheme.

3.19 The Commission recommends that any offence which must be tried in the Central Criminal Court and all sexual offences should be excluded from the application of the proposed spent convictions scheme.