Observations on the Heads of the National Vetting Bureau Bill 2011

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IHRC
AN COIMISIÚN UM CHEARTA AN DUINE
IRISH HUMAN RIGHTS COMMISSION

A. Introduction

1. The Irish Human rights Commission (IHRC) is Ireland's National Human Rights Institution, established pursuant to the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit to endeavour to ensure that the human rights of all persons in the State are fully realised and protected in law and practice. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State by reference to Constitutional and international human rights standards.

2. The IHRC welcomes the opportunity to make a submission to the Minister for Justice, Defence and Equality (the Minister) in relation to the Heads of the National Vetting Bureau Bill 2011 ("Heads of Bill"), which seeks to introduce a national scheme for the vetting of prospective employees in certain areas. **The IHRC recognises the importance of a strong system for ensuring the protection of children and vulnerable adults.** The IHRC notes that the Heads of the Bill seek to redress the lack of a statutory framework governing the current *ad hoc* system of Garda Vetting. The IHRC notes that the Data Protection Commissioner has previously commented on the lack of a comprehensive statutory basis underpinning the vetting process.[1] The IHRC therefore welcomes the initiative to introduce this legislation, and provides the present observations to ensure its compliance with human rights standards.

3. The IHRC has set out in the present observations its recommendations on how the Minister might seek to ensure the Bill adheres to national and international human rights standards. Central to the Observations of the IHRC on the Bill is its view that appropriate legislation on 'spent convictions' should be introduced by the Government in tandem with the Bill. The IHRC has previously issued observations on proposed spent conviction legislation.[2] The IHRC views the issues of employment vetting and 'spent convictions' as being interlinked and non-divisible in the context of the human rights standards at issue.

4. The IHRC is aware that the question of the use of so-called 'soft' information in relation to the possible endangerment of children or vulnerable adults is a difficult area, which has been the subject of considerable debate, in particular as regards whether the use of such information requires constitutional amendment. The IHRC recalls that the *Report of the Special Rapporteur on Child Protection* submitted to the Oireachtas in November 2007, examined the constitutional implications of vetting in the context of a child protection system. In particular, the report considered the implications for the rights to equality, privacy, good name and to earn a livelihood of the person subject to vetting. The report noted that vetting legislation was required as a matter of some urgency, and advocated both a constitutional referendum to permit the use of soft information in vetting, and the development of a clear, concise, limited legislative framework which would be subject to procedural safeguards and proportionality.[3] The IHRC understands that with the introduction of this present

[1] Data Protection Commissioner; Guidance Note: Data Protection Considerations when Vetting Prospective Employees.
[2] IHRC Observations on the Spent Convictions Bill 2007, April 2009.
[3] The use and sharing of soft information was included in the wording of the proposed constitutional amendment contained in the Twenty-Eighth Amendment to the Constitution Bill 2007. The proposed

legislation, the State has chosen not to undertake a Constitutional amendment, but rather the legislative option, in which case the current constitutional rights of a vetting subject are still relevant.

B. Guiding Principles

5. The IHRC is fully cognisant of the important role that vetting plays in ensuring protection for children and vulnerable adults. It recalls in this regard that under human rights standards, States will be held responsible if they fail to take preventive measures to prevent abuse of individuals by private actors and specifically in the child protection area. While the State is obliged to ensure that sufficient safeguards are in place to protect children and vulnerable adults, human rights standards also require that the State protects the rights of individuals subject to vetting processes. In order to ensure State compliance with the European Convention on Human Rights (ECHR), the proposed legislation must thus be informed by Article 8 of that Convention (right to respect for his private and family life) and exercise a delicate balance between robust measures to prevent abuse and fair procedure measures to allow individuals to correct inaccurate information concerning them. In this regard the IHRC **recommends** that a number of overarching principles inform the drafting of the legislation and be reflected in its normative values as follows:

a) Information, although already in the public domain, can fall within the scope of Article 8 (private life) where it is systematically collected and stored by State authorities.[4]

b) The retention of personal data is permitted under Article 8(2) ECHR for, *inter alia*, the prevention of crime, the protection of health and for the protection of the rights and freedoms of others.[5] However, the compatibility of the proposed vetting scheme, which necessarily involves not only the storage of personal information but also its disclosure to third parties, with the protections of Article 8 may be called into question if it cannot be determined to be "necessary in a democratic society". In order to meet this requirement, the decision-making process proposed under the vetting scheme regarding disclosures by the National Vetting Bureau should incorporate a proportionality assessment on a case-by-case basis. Thus, a case-by-case assessment of the appropriate balance between the pressing social need to protect children and vulnerable adults and the individual's right to respect for private life should be undertaken.[6]

c) In order to meet the requirements of Article 8 ECHR that interferences with private life be in accordance with law, the storage of information by State

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draft Article 42A stated that, "*Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law*".

[4] *Rotaru v Romania* (App.28341/95), Judgment of 4 May 2000.

[5] The requirements of a vetting system for employment purposes must be considered to be wholly different from the recording of criminal convictions, prosecutions and so on, for purposes relating to the core functions of An Garda Síochána.

[6] *See, S and Marper v United Kingdom* (App. 30562/04), Judgment of 4 December 2008, (2009) 48 EHRR 1169.

authorities should be established under primary legislation that is sufficiently clear and precise as to its ambit.[7]

d) Insofar as the Heads of Bill relates to matters concerning questions of national security, the margin of appreciation to be permitted to the State under Article 8 ECHR is wide.[8] However, adequate and effective safeguards are still required to ensure that any interference with an individual's rights under Article 8 is strictly no more than is necessary in a democratic society.

e) In pursuing the objectives of protecting the peace, order and authority of the State, the State must in its laws, as far as practicable, continue to protect the constitutional rights of the individual. Legislation must not be overly broad in its pursuit of a legitimate purpose.[9]

f) On its establishment, the National Vetting Bureau will be (unless specifically exempted) an "organ of the State" for the purposes of Section 3 of the European Convention on Human Rights Act 2003 - which creates a statutory duty on such bodies to perform their functions in a manner compatible with the State's obligations under the ECHR

6. The IHRC considers that the reality of the system established under this legislation is that a finding akin to finding of 'guilt' in relation to a person (that is, the assessment resulting in a disclosure that a person may pose a risk to children or vulnerable adults) will result from the Vetting Bureau. The vetting procedure is not undertaken however, through a court of law, although it is noted that there is provision for an independent appeal. It is vital that full procedural and administrative safeguards are in place in the entire vetting process. This is particularly important given the impact that a disclosure by the Bureau that a person is unfit to work with children or vulnerable adults may have on a person's life. In order to ensure that the vetting scheme fulfils its purpose of protecting children and vulnerable adults while ensuring protection for persons vetted from undue interference with their right to private and family life, further safeguards must be included in this Bill. The IHRC would also **recommend** that the views of organisations working with children and vulnerable adults be sought in relation to this Bill.

7. The IHRC is particularly conscious of the potential constitutional implications of the proposed legislation as regards the guarantees of the right to a good name under Article 40.3.2 and the presumption of innocence.[10] The IHRC considers that the protection of these rights must also inform the drafting process and be reflected in the legislation's normative values.

8. A corollary to the right to a good name is the right to defend one's good name, recognised in the case of *Re Haughey*, where the Supreme Court outlined the

[7] *Leander v Sweden* (1987) 9 EHRR 433.
[8] *Ibid*.
[9] *Cox v Ireland* (1992) 2 IR 563, per Finlay CJ.
[10] *Report of the Special Rapporteur on Child Protection* para. 2.4.2. The Supreme Court considered the right to a good name in the case of *State (Vozza) v Floinn* where a defective conviction was quashed in order to uphold the good name of the person involved, [1957] IR 227.

minimum protections which must be afforded to a person whose good name is under attack in an inquiry as follows:

> (a) the person accused should be furnished with a copy of the evidence which reflected on his good name;
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> (b) he should be allowed to cross-examine his accuser, by counsel;
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> (c) he should be allowed to give rebutting evidence; and
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> (d) he should be permitted to address the tribunal in his own defence, by counsel. [11]

The constitutional protection of a person's good name also extends to a presumption of innocence in the context of criminal or disciplinary proceedings.[12] The right to a good name in the context of vetting of childcare workers was considered in *MQ v Gleeson.*[13] Here, the Eastern Health Board informed the VEC of its opinion that the applicant was an unsuitable candidate to work with children based on previous allegations of sexual offences and serious misbehaviour where the applicant had never been convicted of any crime against children. Barr J. held that it was incumbent on the Eastern Health Board to make its concerns known but at all times to comply with the fundamental rules of constitutional justice and fair procedures.

B. Object and Purpose of the Bill

9. The IHRC notes that the Heads of Bill does not contain a Long Title and therefore the object and purpose of the Bill is not made expressly clear. While it may be the case that the usual practice is to include the Long Title at a later stage in the drafting process, the lack of precision as to the object and purpose of the Heads of Bill is a significant deficiency, which impacts across many of the provisions of the proposed Bill. The IHRC notes however, in this regard that the purpose of this proposed legislation is listed in the Government Legislation Programme for Summer Session 2011, at Section C (Bills in Respect of which Heads have yet to be Approved by Government) at No. 77 as being:

> To provide a statutory basis for the vetting of applicants for employment and employees, including vetting to identify, in particular, information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, to children and vulnerable adults. The bill will provide for the establishment of a National Vetting Bureau for the collection and exchange of both 'hard' and 'soft' information for vetting purposes.[14]

The IHRC **recommends** that the Bill should state its object and purpose clearly along these lines in a Long Title.

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[11] [1971] IR 217.
[12] *State (O'Rourke and White) v Martin* [1984] ILRM 333.
[13] [1998] 4 IR 85.
[14] Website of the Department of An Taoiseach, September 2010.

10. It is of further note that the purpose that can be implied for the present Heads of Bill on the basis of the above, does not refer to State security. The Heads of Bill however, clearly includes references to State security and the administration of justice. It is recommended that if it is intended that the purpose of the Bill is for it to cover issues relating to the protection of the security of the State that this be clearly set out in the legislation. At present, there is a risk of confusion in the purpose of this Bill and several of its provisions are problematic in the absence of a clear stated purpose (see for example, Head 5(a) below). The IHRC **recommends** that the reference to State security be removed from the present Bill insofar as it is not relevant to the object and purpose of protecting children and vulnerable adults, and that separate, specific legislation be introduced for the purpose of vetting in relation to State security matters, should the State feel that this is required.

C. Heads of Bill Part 1: Preliminary and General

a. Head 2: Interpretation

11. The IHRC queries whether the interpretation provided in Head 2 in respect of the common noun "*employment*" – which is given a neutral meaning in the Bill - should instead be expressly linked to the object and purpose of the Bill which is *de facto* to safeguard the welfare and integrity of children and vulnerable adults.

D. Heads of Bill Part 2: Employment Positions Covered By This Act

a. Head 5(1): Persons required to submit vetting disclosure applications

12. This Head lists the range of *employment types* which will be subject to vetting. The IHRC considers that the mandatory requirement that persons applying for employment positions as defined in Head 5(1)(a) – that is, "governed by the Public Service Management Act (civil/public servants)"; private security staff; taxi licence operatives – are subject to the vetting disclosure requirements is not clearly linked to the (implied) object and purpose of the Bill to safeguard the welfare and integrity of children and vulnerable adults. Furthermore, the inclusion of all civil servants and employees of local authorities is an extremely broad category of persons for inclusion in any vetting bill. There must be a **clear reason** for the inclusion of this category of persons in this Bill. Whether the Bill's ultimate purpose is the protection of children and vulnerable adults, or State security, or both, there must be justifiable reasons for the inclusion of each category of persons. Categories should be defined on the basis of objective, justifiable criteria such as access to children and vulnerable persons or access to documents or materials pertaining to national security.

13. The Note to this Head indicates that this particular Head seeks to define the positions which will be subject to vetting by reference to the type of employment rather than type of employer, the IHRC would question whether this aim is in fact achieved in Head 5(1)(a) of the Bill, particularly with regard to sub-head (i) [the Public Service Management (Recruitment and Appointments) Act 2004], which as stated is an extremely broad category of employment.

14. In the view of the IHRC, the scope of this mandatory vetting provision appears to be disproportionate insofar as the nature of the employment position is not clearly linked to services which may bring persons into contact with children and vulnerable adults. The IHRC **recommends** that the legislation explicitly define any mandatory vetting requirement with reference to employment positions which may involve actual contact with the persons purported to be protected within the provisions of the Bill. The current formulation is overly broad and may not meet the requirements of necessity and proportionality.

15. In this regard, the statement in the Notes to the Heads of Bill that "*even in registered organisations; employment positions which do not involve working with children do not require vetting*" is of note. At present, there is no provision in the Heads of Bill providing that a person applying for one of the positions covered in Head 5 is not necessarily covered by the vetting disclosure requirements if their employment does not involve "regular or ongoing unsupervised" contact with children or vulnerable adults. It is noted in a recent decision of the Court of Appeal of the United Kingdom, the question of actual access to children was found to be a relevant consideration when a local authority was determining whether to make disclosure of a previous conviction for a sexual offence against a child, and a "blanket policy" in relation to disclosure did not uphold the person's rights under Article 8 ECHR.[15]

16. The IHRC notes that in **Head 6** applications for vetting are not required from "family members caring for a child or vulnerable adult". The IHRC considers that the legislation may benefit from a clear definition of the term 'family members'.

E. Heads of Bill Part 3: National Vetting Bureau

a. Head 7(1)(c)(i)

17. The broad range of records (information concerning prosecutions, convictions other court orders or decisions) to be established and maintained under this Head by the National Vetting Bureau points to a serious *lacuna* in the legal framework in this area, as no clear guidance is provided under existing law concerning the duration for which criminal record information is retained and subject to disclosure under the Bill (Heads, 16, 17, 18). This matter is examined more fully below.

b. Head 7(1)(c)(i)

18. Regarding the substance of Head 7(1)(c)(i), the IHRC notes that the records referred to as being maintained by the National Vetting Bureau include those pertaining to criminal prosecutions, *whether or not convictions were secured*. This raises significant issues concerning the presumption of innocence in law. The IHRC **recommends** that serious consideration be given to removing the provision for the disclosure by the Chief Bureau Officer to a registered organisation of prosecution information in circumstances where no conviction was secured. The IHRC

[15] *H and L v A City Council*, [2011] EWCA Civ 403.

understands that different consideration apply under Heads 17 and 18 (see also Head 20(2)(b)).

c. Head 7(c)(iii)

19. Head 7(c)(iii) refers to information received by the National Vetting Bureau from other jurisdictions (in accordance with Head 10 of the Bill). In the view of the IHRC, the retention of such information may be problematic depending on (i) the nature of the information received, (ii) its relevance to an Irish context and (iii) the human rights standards in the country of origin. In this context, heightened scrutiny should be given to the reliability of the information for the purposes of facilitating a vetting disclosure decision by the Chief Bureau Officer (as set out at Head 20). Particular attention should be paid to the procedural safeguards in place in the country from which the information originated. This is also of relevance in relation to **Head 10.** Full and proper procedural safeguards for the treatment of information from outside the jurisdiction should be put in place. In the Notes to Head 10, it is stated that such information does not necessarily have to come from police services. The legislation should clearly elucidate the sources from which information can be obtained from outside the jurisdiction.

d. Information on Previous Convictions

20. The IHRC considers that difficulties arise in relation to this draft legislation as regards the disclosure of previous criminal convictions. This difficulty arises in part as a result of the lack of legislation in relation to the treatment of previous "spent" convictions.

21. In the view of the IHRC, an opportunity arises in connection with this legislation to address the co-determinate issue of spent convictions. The IHRC notes that the *Report of the Working Group on Garda Vetting (2004)* and the *Report of the Joint Oireachtas Committee on Child Protection (2006)* both recommend reform of the Irish system along the lines of those in place in the United Kingdom. The approach adopted by the United Kingdom under the framework of the *Rehabilitation of Offenders Act 1974* which creates a scheme whereby the lapse of time determines whether a conviction is required to be revealed by a previous offender to a prospective employer recommends itself.

22. The IHRC notes that it previously provided Observations on the Spent Convictions Bill 2007.[16] The purpose of that Bill was stated to be:

> [T]o establish a mechanism by which persons convicted of minor offences can have a possibility of non-disclosure of convictions for those offences. Its purpose is to facilitate the rehabilitation of persons convicted of minor offences, primarily through their reintegration into the workforce, and to do so in a way that not only benefits the individuals concerned but that takes account of the wider interests of society especially the protection of vulnerable persons.[17]

[16] IHRC Observations on the Spent Convictions Bill 2007, April 2009.
[17] Deputy Barry Andrews, Dáil Debates, Vol. 671, No. 2, 18 December 2008.

The Spent Convictions Bill 2007 lapsed with the dissolution of the 30th Dáil on 1 February 2011. The IHRC would respectfully suggest that consideration be given to the introduction of a new Spent Convictions Bill incorporating the recommendations in the IHRC's Observations on the Spent Convictions Bill 2007, in tandem with the present legislation. In the view of the IHRC, reform of the system dealing with employment vetting necessitates a parallel initiative establishing a system for regularise when convictions may be considered "spent".

23. The IHRC recalls that the Law Reform Commission (LRC) published a Report on Spent Convictions in 2007.[18] The LRC recommended that a scheme for adult offenders ought to be introduced but limited the scope of the application of the scheme by excluding certain offences and imposing a sentencing threshold.[19] It is relevant to note that the majority of common law and civil law jurisdictions have introduced some form of spent convictions scheme.[20] In a survey of some 21 jurisdictions undertaken by the British Home Office in 2002, it emerged that of those jurisdictions, only Ireland and Slovenia had no such scheme in place in respect of adult offenders.[21] The United Kingdom has operated a spent convictions scheme since the enactment of the Rehabilitation of Offenders Act 1974, which was extended to Northern Ireland in 1978. Canada, Australia, and New Zealand have similarly introduced spent convictions legislation. There is not a great deal of uniformity between the schemes in the various jurisdictions; the schemes vary in terms of the scope of their application, their manner of operation, and the rehabilitation periods to be applied.[22] Despite these differences all of these schemes have the same underlying rationale to provide a system of rehabilitation for offenders and a proportionate response to their right to privacy.

24. The importance of developing a spent convictions scheme to aid rehabilitation and reintegration is implied in a number of international instruments. Under Article 10(3) of the International Convention on Civil and Political Rights (ICCPR) the State is obliged to seek the reformation and social rehabilitation of prisoners. It is difficult

[18] Law Reform Commission *Report on Spent Convictions*, LRC 84-2007.

[19] The LRC recommended that all offences which are required to be tried in the Central Criminal Court ought to be excluded from the scheme, as well as all sexual offences. They recommended a sentencing threshold of 6 months so that any offender receiving a sentence in excess of 6 months would not be entitled to avail of the scheme. The ex-offender would have to remain conviction-free for a period of 7 years from the date of conviction, after which time his conviction would become automatically spent. There would be exclusions from the scheme relating to certain sensitive posts, positions or professions, particularly in relation to the care or supervision of children or vulnerable adults. The Spent Convictions Bill 2007 reproduced the draft Bill prepared by the LRC (and attached to its Report). It was based on the principle of non-disclosure of a conviction, rather than an expungement of the conviction. In other words, the conviction would remain on the records but there will be no obligation to disclose it in certain circumstances.

[20] For a more detailed analysis of the various schemes *see* Chapter 1 of the LRC Report on Spent Convictions (LRC 84-2007).

[21] Rehabilitation of Offenders Act 1974 Breaking the Circle a report of the review of the Rehabilitation of Offenders Act 1974, Home Office, 2002 at pages 65-72.

[22] A comparative table of legislation of these jurisdictions, however, does offer some guidance as to the issues to be considered in introducing such schemes. See Comparative Table of Legislation on Spent Conviction from Attorney-General's Department (South Australia), 'Spent Conviction Legislation', discussion paper, Adelaide 2004.

to understand how this can be wholly achieved in the absence of spent convictions legislation.

25. In 2004, the UN Sub-Commission on the Promotion and Protection of Human Rights, in a resolution concerning discrimination against convicted persons who have served their sentence, *"[u]rges States to examine their treatment of convicted persons after they have served their punishment and to cease any official or unofficial practices of discrimination*".[23]

26. In 1984 the Council of Europe Recommendation on the Criminal Records and the Rehabilitation of Convicted Persons considered that:

> …a crime policy aimed at crime prevention and the social integration of offenders should be pursued in member States…and considering that any other use of criminal records (other than assisting the judiciary to dispose of individual cases) may jeopardize the convicted person's chances of social integration, and should therefore be restricted to the utmost, the committee of Members…recommends that the governments of Member States review their legislation and their practices relating to criminal records.[24]

27. In this regard further, the IHRC notes the provision of the Council of Europe Committee of Ministers Recommendation Regulating the Use of Personal Data in the Police Section, which provides, inter alia:

> Principle 7 – length of storage and updating of data
>
> 7.1 Measures should be taken so that personal data for police purposes are deleted if they are no longer necessary for the purposes for which they were stored. For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; **spent convictions**; amnesties; the age of the data subject, particular categories of data.[25]

e. Head 7(1)(c)(ii)

28. This Head provides that, upon establishment, the National Vetting Bureau may maintain records concerning relevant information as provided for by Head 14 of the

[23] Sub-Commission on Human Rights Resolution 2004/28.

[24] Recommendation No. R (84) 10. A Council of Europe Report in 2006 entitled *Social Re-Integration of Prisoners*, 7 February 2006, noted that in many Member States prison does not have the desired effect of good re-integration. The Council of Europe Assembly recommended taking measures during and after imprisonment concerning, in particular, the setting up of social re-integration counseling and the use of alternatives to custodial sentences. A Research Study by the UK Home Office in 2001 found that two thirds of prisoners in the UK were serving sentences of less than one year and, of this number, over a half of those persons were reconvicted within 2 years. *Building Bridges to Employment for Offenders*, Home Office Research Study 226, 2001 This indicates that the likelihood of recidivism increases with each sentence served. It is also significant that the same findings point to employment as the single greatest factor in reducing re-offending.

[25] Recommendation No. R (87) 15. Emphasis added.

Bill. Head 14 concerns determinations either by the Bureau or an organisation listed in Schedule 2 of the Bill. The access to, management and utilisation of the information in this database should clearly be set out in the legislation.

f. Head 7 – Notes

29. The notes to Head 7 state that "The Bureau will… simply replace the existing Garda Central Vetting Office" and that the systems and procedures of that office will continue as is. It is important that with the introduction of new powers, the National Vetting Bureau ensures that the relevant international human rights standards are incorporated into their working procedures and practices. The IHRC **recommends** that relevant standards should be explicitly and clearly referred to in the legislation to assist with this process.

F. Part 4: Vetting Disclosure Procedures

a. Head 11: Register of Organisations Applying to have Persons Vetted

30. Head 11(2) provides that organisations registered with the existing Garda Central Vetting Office at the time of the commencement of the present Bill will be deemed to be registered for the purposes of the Act. The IHRC queries whether this means that in practice, organisations may potentially be inappropriately registered, insofar as they do not fulfil the criteria set out in Head 5 of the Bill and so would have access to information that is irrelevant to the purpose of the legislation. While ensuring continuity of registered organisations may be less administratively burdensome, the IHRC would **recommend** that there would be a transitional provision whereby all organisations previously registered would have to demonstrate that they fulfil the criteria set out under the legislation before having their registration continued. It is notable that Subhead 6 provides a mechanism for removing an organisation from the register, although it is unclear how this would occur in practice.

b. Head 12: Duties of Registered Organisations

31. Head 12(3) implies that an assessment of the information disclosed by the National Vetting Bureau to a registered organisation is left to the complete discretion of the organisation. This raises concerns regarding the appropriateness of a registered organisation receiving the totality of the information available from the National Vetting Bureau in circumstances where an assessment may be required to determine the correct balance to be struck between the public interest and the completing value of individual privacy. In judging each vetting application on a case-by-case basis, it may be appropriate for the National Vetting Bureau to release all, some or indeed none of the information given the individual circumstance at issue. Under the present Heads of Bill it appears that once certain technical criteria are met by the organisation full disclosure will always be made.

32. In this regard, the IHRC would highlight the Judgment of the United Kingdom Supreme Court in the matter of *R (on the application of L) v Commissioner of Police of the Metropolis*, which sets out the approach adopted in that jurisdiction in respect

of the disclosure of information through its national vetting system.[26] *In R (on the application of L)* the first question for the United Kingdom Supreme Court was whether the applicant's Article 8(1) ECHR right to privacy was engaged. Lord Hope, who gave the leading judgment, accepted that Article 8 was applicable in the case and that all disclosures of non-conviction information by way of the Criminal Records Bureau would be likely to engage Article 8. The question then to be considered was whether any interference with privacy could be justified under Article 8(2) and whether in fact the information ought to be disclosed. Lord Hope held that in every case this would involve consideration of whether there would be an interference with the applicant's private life, and if so whether it could be justified. A balance needed to be struck between the pressing social need to protect children and vulnerable adults, and the applicant's right to respect for private life. The Supreme Court noted that the earlier judgment in the case of *R(X) v Chief Constable of the West Midlands Police*[27] tilted the balance the wrong way by encouraging the notion that the former took priority over the latter. The correct approach, in the view of the Supreme Court, was that neither consideration took precedence over the other. In cases of doubt, the police should give individuals an opportunity to make representations before they decided whether or not to disclose.[28]

c. Head 13: Duties of Liaison Persons

33. Head 13(2) provides for the making of secondary legislation by the Minister permitting registered organisations to submit a vetting application in respect of persons already employed (in employment positions as indicated in Head 5). The IHRC is concerned about the necessity of such retrospective vetting. Such retrospective vetting must only be undertaken with regard to the requirements of necessity and proportionality. There should be clear criteria in place for retrospective vetting. This Head again highlights the need for a clear stated purpose for this legislation. It is likely that most if not all persons working with children and vulnerable adults have already been vetted through the existing structures. Therefore, the necessity of including a provision for retrospective vetting is unclear. If it is for the purpose of 'national security' then the criteria for such vetting should also be clearly established in the legislation. Furthermore, a definition of national security should be included in the Bill.

34. The duties of the liaison person as regards the treatment and protection of the information received from the Vetting Bureau should be clearly set out. (See further, comments on Head 23, below).

d. Head 14: Relevant Information

35. The IHRC would again highlight the jurisprudence of the United Kingdom Supreme Court in relation to the applicability of Article 8 to decisions to disclose "*soft information*". A determination by either the National Vetting Bureau or a listed organisation must be subject to the appropriate safeguards to ensure that the correct balance is struck between the pressing social need to protect children and vulnerable

[26] [2009] UKSC 3.
[27] [2005] 1 WLR 65.
[28] This approach was followed by the Court of Appeal in the more recent case of *H and L v A City Council*, 2011 EWCA Civ 403.

adults and the individual's right to respect for private life under Article 8 of the ECHR.

36. This Head defines relevant information as information resulting from a determination that there are bone fide reasons for believing that a person may cause harm to a child or vulnerable adult "where this determination has been made by an organisation listed in Schedule 2 to this Act". The list of organisations in Schedule 2 seems somewhat arbitrary and includes the very broad category of "any religious group or organisation or group or organisation of other similar nature". The broadness of this categorisation should be reconsidered. In addition, given that the determinations of the organisations listed in this Head will constitute 'relevant information', there should be clear guidelines in place for all such organisations to ensure that such determinations are carried out in a fair manner, in compliance with relevant standards for fair procedures and with due regard for the rights of the person concerned. This is particularly important for organisations that may not have a statutory basis or formal investigatory powers and private organisations (such as religious institutions).

37. The IHRC would further note that should this Bill have a purpose other than the protection of children or vulnerable adults, this Head should be revised accordingly.

e. Head 15: Organisations Required to Report Relevant Information to the Bureau

38. The IHRC is concerned that the statutory duty created by this Head which will place an obligation on listed organisations to report relevant information to the Vetting Bureau. Failure to comply with this Head will be an offence (Head 23). There appears to be an onus on organisations – some of which may have neither statutory basis nor any formal investigative powers – to undertake investigative processes. The process under which any investigation leading to a determination that a person may harm or attempt to harm children or vulnerable adults – which is an extremely serious determination – must be carried out with due regard for fair procedures and natural justice. The Vetting Bureau must take into account the process by which the organisation has made its determination when considering its bona fides. Where investigations are carried out by private entities and outside of statutory provisions, it must be always be ensured that the person concerned has had a right to an independent appeal.

39. The IHRC is concerned that this Head creates undue burdens on a range of organisations who are not equipped to undertake such serious investigations. This Head also creates a burden on the organisation to inform the vetting subject and to invite them to make a submission regarding the procedure. These procedures should be the responsibility of the Vetting Bureau, as the responsible body in the State. Appeals and submissions should be sent directly to the Bureau and not through the organisation applying for vetting or conducting the investigation.

40. It appears from a reading of Heads 14 and 15 that 'relevant information' may include information on an ongoing investigation. The fairness of such inclusion may

be called into question. It appears from this Head that the fact of a person being under investigation may constitute 'relevant information' for the purpose of the Act. Such a situation may violate a person's right to innocence and their right to fair procedures, and right to appeal.

f. Heads 16, 17 and 18

41. These heads create three levels of vetting disclosure. Head 16 concerns employment positions which *do not involve* contact with children or vulnerable adults. The IHRC is concerned regarding the scope of the application of this provision. As indicated above, it is unclear why employment positions which do not relate to the purpose of the Bill (which is presumed to be to protect the safety and welfare of children and vulnerable adults) are being considered for inclusion in this instrument. This overly broad category raises questions of proportionality and necessity with regard to Article 8 ECHR.

42. The IHRC also has concerns under all three heads as to the disclosure to the 'liaison person' of information regarding prosecutions that did not lead to a conviction. The disclosure of such information may be contrary to the protections of the Constitution under Articles 38, 40 and possibly Article 6 of the ECHR, insofar as such a disclosure may have an impact on a person's employment without any of the safeguards that would attend a criminal trial in law. The presumption of innocence is a cornerstone of constitutional democracy and disclosure of unsuccessful prosecutions of incomplete investigations would have a tendency to undermine this fundamental right and should therefore be attended by very stringent safeguards.

43. Head 18 relates to persons in 'state security positions' "which involve regular or ongoing unsupervised contact with children or vulnerable adults". This specification has not been included in previous Heads of the Bill relating to persons in state security positions. Such specificity should be included in earlier provisions of the Bill, and in the stated purpose of the Bill.

44. In relation to schedule 1, listing offences referred to in these heads, but not elucidated in the present document, it should be ensured that the offences are relevant to the purpose of the Bill. Furthermore, the IHRC recalls its comments above in relation to spent convictions.

G. Head 20: Use of Relevant Information for Vetting Purposes

i. Head 20(2)(b)[29]

45. The IHRC considers this Head to be a key provision of the Bill, given that it sets out the criteria to which a Chief Bureau Officer shall have regard when deciding to disclose relevant information to a requesting organisation (this is separate from disclosure regarding other information as set out under Head 7). The Notes to this Head indicate that the list of considerations for the purpose of informing the decision of the Chief Bureau Officer "*are in accordance with the existing decision model and legal advices*". In this regard, the IHRC is of the view that the statutory duty on the

[29] The IHRC notes that there is no Head 20(2)(b), and that (c) appears twice.

Chief Bureau Officer to act in a manner compatible with the ECHR requires an assessment of the balance to be struck between the pressing social need to protect children and vulnerable adults and the vetting subject's right to respect for his/her private life.

46. To this end, the IHRC **recommends** that consideration by the Chief Bureau Officer of the relevant human rights principles be expressly included in this Head as a mandatory factor to which that decision maker should have regard. Given that such consideration requires a proportionality assessment, the IHRC **recommends**, that provision be expressly made in the Bill setting out the levels of disclosure applicable to a decision by the Chief Bureau Officer. In the view of the IHRC, decision making by the Chief Bureau Officer should include the capacity to disclose all, some or none of the relevant information, if any, as appropriate. The rationale for such decision making should be clearly identified given the Chief Bureau Officer's role as an organ of state and in order to diminish any *vires* concerns which may arise on a case-by-case basis.

47. Head 20(2)(c)(ii) allows for the consideration of the "reliability of the information…on the balance of probabilities". When considered in conjunction with previous Heads, including Head 14, it appears that the Chief Bureau Officer may consider information contained in a prosecution that did not result in any criminal conviction. Particular concerns arise as to disclosure of information where a prosecution has been dropped or was unsuccessful. It should not be the case – if this is what is intended by the present Head – that either un-redacted interview notes arising from a criminal investigation or other un-assessed material would be disclosed. The "Record of Information" should be verified material capable of objective assessment, and should not be accompanied by any subjective assessment by the Chief Bureau Officer or otherwise.

ii. Head 20(3)(a)

48. The IHRC considers that the requirement that the Chief Bureau Officer notify the vetting subject of the intention to disclose relevant information to a registered organisation and the provision of an appeal mechanism whereby the vetting subject can contest the proposed disclosure within a definite timeframe, are important safeguards in the scheme.

49. Finally, as regards Head 20, the IHRC notes that Head 20 does not relate to Head 16. It is unclear why this is the case and once again calls into question the relevance of Head 16 and its purpose *vis a vis* the object and purpose of the Bill.

iii. Head 21(1)

50. Head 21(1) states that a vetting subject may appeal against "the disclosure of relevant information *to* the Bureau" (emphasis added). It would appear in the context of the Head that the appeal is against the disclosure of information *by* the Bureau, and this Head may therefore benefit from clarification.

H. Disclosure of Information: Head 23(4)

51. In light of the seriousness of a determination made under the proposed legislation that a person may cause harm to children or vulnerable adults and the impact that public disclosure of such a finding may have on a person's private and family life, the prohibition of disclosure of information relating to vetting should be clearly highlighted in the Bill. A separate Head might be considered for this. In particular, the role of the liaison person and the persons to whom they may further disclose the information – and the obligations on those third parties – must be clearly set out in the legislation. The storage and onward transmission of vetting determination should also be clearly provided for in the Bill. The IHRC **recommends** that the views of the Data Protection Commissioner be sought in relation to this legislation.