Standing Committee for Youth Justice

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Response to the Sentencing White Paper
Reform of childhood criminal records

Introduction

The Standing Committee for Youth Justice (SCYJ) is an alliance of over 60 not-for-profit organisations working to improve the youth justice system in England and Wales. SCYJ pools its members' expertise to advocate for child-focused responses that tackle underlying causes of offending, reduce criminalisation and imprisonment, and promote positive long-term outcomes. Such a system would serve the best interests of children and the wider community. Our members range from large national charities to grassroots service providers.

SCYJ has long been calling for reform of the criminal record system in England and Wales. The current system allows widespread, lengthy disclosure of childhood records, which our research has found acts as a barrier to employment, education and housing and therefore works against rehabilitation. It anchors children to their past, preventing them from moving on from childhood mistakes.

We welcome the recognition by the Government, set out in the 2020 Sentencing White Paper, of the importance of proportionate criminal records disclosure in reducing reoffending, and the intention to ensure a reformed disclosure regime improves access to employment and allows people to move forward with their lives.

We warmly welcome the proposals for criminal record reform set out in the White Paper, but believe we can and should go further for children. We would like to see a childhood criminal record system that is child-specific and reflects the nature of childhood offending, and believe the only way to ensure this is the case is for the Government to conduct a widespread review of the criminal record system. We also call on the Government to urgently address the worrying and growing issue of young people receiving adult criminal records for offences committed during childhood.

This paper sets out our rationale for our call for review, with a view to significant reform.

The current criminal record system in England and Wales

All formal responses to offending become part of a child's criminal record in England and Wales. A childhood criminal record must be disclosed on basic criminal records checks for the duration of the rehabilitation period. Once the rehabilitation period has elapsed, the conviction becomes "spent", meaning it is only disclosable on standard and enhanced Disclosure and Barring Service (DBS) checks, which are accessible to a defined, but expanding, list of professions.

Rehabilitation periods can be lengthy, and some convictions never become spent. Some cautions and convictions can be "filtered" out from a standard and enhanced check (meaning they will not appear on such a check) after a number of years, but the system is

very limited. For example, there is a lengthy list of offences that are exempt from filtering, so will always appear on a DBS check, and if a person has two or more offences, no matter how minor, all of the offences will be disclosed (the "multiple conviction rule").

Records of under-18 offences are retained for life. There is no distinct criminal records system for children in England and Wales; child and adult records are treated the same, other than reducing rehabilitation periods and other time frames for children.

Response to Government proposals for reform

We warmly welcome draft Statutory Instruments the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2020, and the Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2020, which were laid before Parliament in July 2020 and are set to come into force on 28th November 2020.

Once the Orders are signed into law, they will amend the criminal record system to stop automatic disclosure on standard and enhanced criminal record checks of childhood cautions, and of all convictions where a person has more than one conviction. The removal of the "multiple conviction rule" and disclosure of youth cautions will also apply to self-disclosure when applying to certain roles. These changes are long-awaited following the 2019 Supreme Court ruling that these elements of the system for children are disproportionate and unlawful.

We are also very glad to see the proposals set out in the White Paper for reducing rehabilitation periods under the Rehabilitation of Offenders Act 1974 (ROA). These are a significant improvement over the current system.

However, the proposed rehabilitation periods for children, while improved, remain tied to the adult system and fail to reflect or mirror the sentencing regime for children. We question the rationale for, for example, a 1-4 years custodial sentence bracket applying to children's rehabilitation periods, when Detention and Training Orders (DTO) - the most common custodial sentence for children - range between four months and 2 years. The criminal record regime would align far better with the children's justice system if there were graduated rehabilitation periods linked to DTO and Section 91 (grave crime) sentence lengths, for example.

While we welcome the proposed introduction of rehabilitation periods for custodial sentences of over four years, the exclusion of sexual, violent and terrorism offences means that for children the change will make little to no difference, with these convictions remaining unspent for the rest of their lives. The exclusion should not apply for children. It is wholly inappropriate that any child in effect receive a whole life sentence for childhood behaviour, which remains a very real possibility under these proposals. The Government's own research shows this group is the least likely to reoffend.[1]

Overall, the positive direction the Government is moving in on criminal records is to be applauded, but could go much further, for example around filtering or considering the sealing of childhood records. Finally, we are clear that if these proposals for amending the ROA are to be implemented fairly, rehabilitation periods must be reformed to be linked to the age of the person at the date of commission of the offence, not at the date of conviction. We discuss this in detail below.

1https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919564/reoffending-custodial-sentences-community-orders-research-report.pdf

The need for a full review

We need a criminal record system that is child-specific, fair and actively promotes the rehabilitation and reintegration of children who have offended. A reformed system that reflects the nature of childhood offending can protect the public, without harming children's opportunity to change. Information should not be disclosed where it is no longer a reasonable indicator of risk of reoffending. A better balance between rehabilitation and public protection can be struck.

A number of high-profile reports have raised concerns about the system and called for more radical reform than that proposed by the Government, including Charlie Taylor's review of the youth justice system; David Lammy's review of the treatment of, and outcomes for, Black, Asian and Minority Ethnic people in the criminal justice system; the Law Commission review of the filtering system; and Justice Select Committee inquiry reports into the treatment of childhood criminal records and young adults in the criminal justice system.

The Ministry of Justice and Youth Justice Board have set out ambitions for a youth justice system that promotes positive long-term outcomes for children in trouble with the law. Yet, as clearly demonstrated in this SCYJ briefing, criminal records in their current form actively impede all attempts to encourage desistance and ensure young people can become productive members of society.

- The criminal records system fails to recognise child development. Children change quickly. They may go through a stage of offending, say when they are having difficulties in their lives, and then desist entirely. Statistics show that children's involvement in offending behaviour is related to an age-crime curve and many desist, or 'grow out' of crime naturally as they mature.
- SCYJ's research shows the system acts as a clear barrier to accessing employment, education and housing, found by multiple studies to be core elements of resettlement and rehabilitation.[2]
- The stigma and emotional impact of criminal records undermine efforts to support children in moving away from an offending identity towards a prosocial identity, interfering with the 'constructive resettlement' model.
- Criminal records continue to entrench and perpetuate racial disparity and disadvantage, which the Government has committed to address. The harsher response of the criminal justice system to offending by Black, Asian and Minority Ethnic children results in more punitive and long-lasting criminal records, creating an additional burden for people already discriminated against on the basis of their race.[3]
- The system fails to recognise the complex factors that lead to a child becoming entangled with the law, often as a result of being victims of crime or being exploited themselves. We are particularly concerned about children who receive criminal records as a result of exploitation or a response to trauma.
- We have concerns that criminal records make children increasingly vulnerable to exploitation, particularly by cutting off routes out of violence and crime. We have heard reports from SCYJ members of gangs using the fact a child has a criminal record as a way of solidifying their influence over a child, convincing them they have no life options other than with the gang.

2 http://scyj.org.uk/wp-content/uploads/2017/07/Growing-Up-Moving-on-A-report-on-the-childhood-criminal-record-system-in-England-and-Wales.pdf
3 http://scyj.org.uk/wp-content/uploads/2020/09/Childhood-criminal-records-undermining-positive-developments-across-youth-justice.pdf

While we welcome the Government taking action on criminal records, we are clear that these tweaks of the system will not go far enough. We urge the government to commit to a widespread review of the childhood criminal records system, alongside the planned amendments. Without significant reform, the government will continue to be at risk of more litigation. We fully support the work of SCYJ members Unlock and Transform Justice, leading the #FairChecks campaign, calling for a review of the entire criminal record system, with specific consideration of the treatment of records obtained during childhood. A comprehensive review of the system has transformative potential as a vital tool in addressing racial disparity and disadvantage, in accordance with the Lammy Review principle of 'explain or reform'.

In line with the UN Convention on the Rights of the Child, it is crucial that a distinct approach is taken to childhood records. **The Government should conduct a wide-ranging review of the entire regime, considering:**

- Whether the current framework is appropriate, effective, and strikes the right balance between rehabilitation and public protection
- When childhood criminal records become 'spent' and no longer have to be self-declared or revealed on basic DBS checks
- When childhood criminal records are revealed on standard or enhanced checks, when they are filtered out, and what information can be disclosed
- Introduction of a review system for disclosure decisions and provision to seal or wipe records obtained in childhood

Turning 18 between committing an offence and conviction

As mentioned above, we are calling for the Government to urgently amend the 'relevant date' for rehabilitation periods of children who turn 18 between committing and being convicted of an offence, such that the corresponding date is when the offence was committed, not the conviction. This is a simple, quick change in legislation that would have a profound impact on young people, particularly crucial given the increasing number impacted by court backlogs exacerbated by the COVID-19 lockdown.

Youth Justice Board data shows that each year around 2-3% of proven offences are committed by children who turn 18 before they are convicted, corresponding to around 2,500 offences in the year ending March 2017, and 1,400 offences for the year ending March 2018.[4] These numbers will have increased over 2020, with backlogs in magistrates' courts having increased by 41% between March and May 2020, and in Crown Courts by 53%.[5] The HM Crown Prosecution Service Inspectorate notes "Some estimates show that the current scale of increase in the backlog would take 10 years to clear at pre-pandemic rates".[6]

This "significant and increasing"[7] number of young people who commit offences before they turn 18 but are not convicted until after turn 18 is cause for great concern. These young people are treated as adults by the criminal record system, including facing rehabilitation periods twice as long as if they had been convicted while still a child.

[4] https://justforkidslaw.org/sites/default/files/upload/YJLC%20Turning%2018%20briefing%20(June%202020).pdf
[5] https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2020/06/2020-06-24-COVID-19.pdf
[6] https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2020/06/2020-06-24-COVID-19.pdf
[7] https://howardleague.org/wp-content/uploads/2020/10/Response-to-Criminal-Injuries-Compensation-Scheme-Review-2020.pdf

This rule is unjust, somewhat arbitrarily (two children who committed the same offence on the same day could, if one has their case heard earlier than the other for any number of reasons, face significantly different, potentially lifelong, impacts),[8] and is arguably incompatible with Article 14, taken together with Article 8, of the European Convention on Human Rights.

A simple amendment to the ROA would solve this issue. Section 5(2), ROA, states that:

> *(2) For the purposes of this Act and subject to subsections (3) and (4), the rehabilitation period for a sentence is the period—*
> *(a) beginning with the date of the conviction in respect of which the sentence is imposed, and*
> *(b) ending at the time listed in the following Table in relation to that sentence:*

The third column in the table is headed *"End of rehabilitation period for offenders under 18 at date of conviction"*

The heading in the third column in the table under section 5(2)(b) should be amended to read: *"End of rehabilitation period for offenders under 18 at the date of commission of the offence(s) for which the sentence is imposed"*

The prosecution always has to specify the alleged charge and there will always be a date upon which the conviction is based. In some instances the charge will relate to a number of incidents. In those cases the time span will always be set out, so the latest date can be used. A sub-clause could be inserted into the legislation to clarify this.

There is precedent for criminal justice consequences to flow from the date an offence is committed:

- The sentence of Detention at Her Majesty's Pleasure is imposed as a matter of law where a person is convicted of an offence committed when he or she was under the age of 18. Section 90 of the Power of Criminal Courts (Sentencing) Act 2000 states: "Where a person convicted of murder or any other offence the sentence for which is fixed by law as life imprisonment appears to the court to have been aged under 18 at the time the offence was committed, the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure."
- Detention for Life under section 226 of the Criminal Justice Act 2003 also applies as a matter of law in cases of "serious offences committed by those under 18". And the "Special custodial sentence for certain offenders of particular concern" under section 236A of the Criminal Justice Act 2003 applies where "the person was aged 18 or over when the offence was committed".
- Mandatory minimum sentences based on the person's age at the date of the offence: Powers of Criminal Courts (Sentencing) Act 2000 ss.110 and 111; Firearms Act 1968 s.51A; Violent Crime Reduction Act 2006 s.29; Prevention of Crime Act 1953 s.1 and s.1A; and Criminal Justice Act 1988 s.139 and 139A. For example, the requirement to impose a custodial sentence in the case of possession of a blade in a public place under section 139 of the Criminal Justice Act 1988 where, amongst other things, "when the offence was committed, the person was aged 16 or over".
- Paragraphs 6.2 and 6.3 of the Sentencing Council's guideline for children requires that any court sentencing a young person who has turned 18 but committed the offence as a child to "take as its starting point the sentence likely to have been imposed on the date at which the offence was committed."

[8] Please contact SCYJ member Unlock for case studies. See also https://www.theguardian.com/society/2019/nov/05/revealed-hundreds-of-children-pushed-into-adult-courts-by-delays

- The Victim Surcharge: The Criminal Justice Act 2003 (Surcharge) Order 2012 (SI 2012 No. 1696) applies where all the offending before the Court was committed on or after 1 October 2012. For offenders aged under 18 at the date of the offence the Victim Surcharge Order was £30.00.[9]

International comparison

SCYJ research examining the treatment of childhood criminal records in sixteen comparable jurisdictions found that the system in England and Wales was the most punitive of all those examined.[10] Children are more likely to obtain a criminal record, and the effect of that record is more profound, with wider and longer lasting disclosure than in other jurisdictions. This comparison has only become starker with recent changes to the criminal record system in neighbouring Scotland.

The new system in Scotland creates clear distinctions between the treatment of childhood and adult records and goes a long way to end the automatic disclosure of any childhood information. Most significantly, the vast majority of childhood offences will become spent immediately, meaning they won't be disclosed on basic checks, or need to be disclosed to employers. Only certain serious offences will not be immediately spent.[11]

For standard and enhanced criminal record checks, the Scottish system means only certain offences, deemed more serious or relevant for public protection, are eligible to be disclosed. They can only be disclosed if they pass a legal test - that they are relevant, and that they ought to be disclosed. And only within certain timeframes.

Essentially, even if an offence fits a certain list, and is deemed relevant to a job role, officials can still decide it is not beneficial to disclose it – due for example to the specific circumstances, or the impact it would have on the child. Children in Scotland will have the right to know why the disclosure decision was made, and can have these decisions reviewed and, if necessary, challenged in court.

These changes highlight the clear need to take an ambitious look at the treatment of records in England and Wales.

[9] With particular thanks to SCYJ members Dr Laura Janes and Kate Aubrey-Johnson for informing this section of our response.
[10] http://scyj.org.uk/wp-content/uploads/2016/04/ICRFINAL.pdf
[11] For more information read this explanation by Clan Childlaw: https://www.clanchildlaw.org/disclosure-of-childhood-criminal-records-explained