



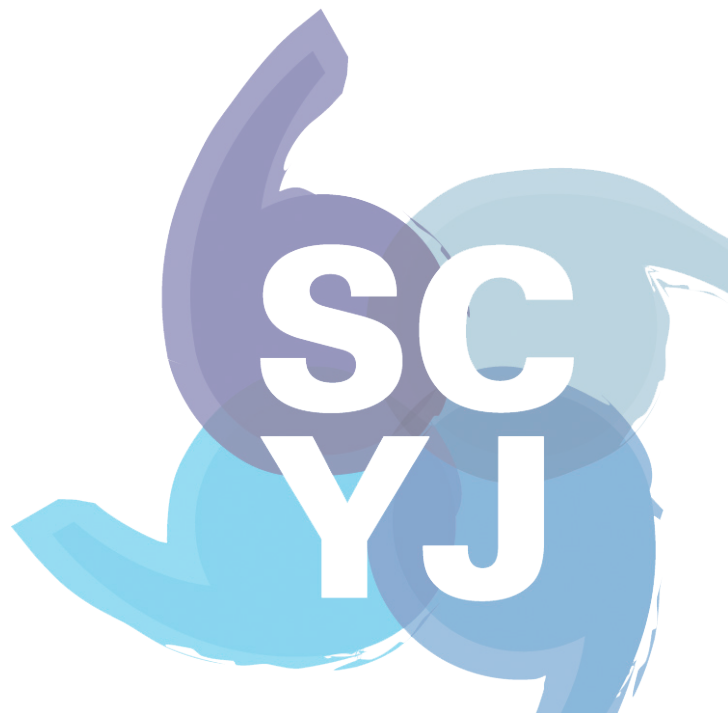
Standing Committee
for Youth Justice

Growing up, Moving on

The International Treatment of
Childhood Criminal Records

by

Claire Sands



Claire Sands is a freelance researcher specialising in issues pertaining to children's rights. Her legal background (she practised as a solicitor for many years) complements her research expertise across a diverse range of issues affecting children.

The Standing Committee for Youth Justice (SCYJ) is a membership body campaigning for a better youth justice system. We pool the expertise of our members to work on issues surrounding children in trouble with the law. Our work focuses on policy and legislation affecting all aspects of the youth justice system and young people caught up in it – from policing to resettlement.

We advocate a child-focused youth justice system that promotes the integration of children in trouble with the law into society and tackles the underlying causes of offending. Such a system would serve the best interests of the children themselves and the community at large.

The contents of this document do not necessarily reflect the views of all member organisations of the SCYJ.

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List of Experts

We are hugely grateful to our eminent team of advisers for reviewing content and providing expert local insight and knowledge.

Australia	Associate Professor Bronwyn Naylor, Monash University Jane Sanders, Principal Solicitor, The Shopfront Youth Legal Centre, New South Wales
Canada	Professor Nicholas Bala, Queen's University, Ontario
England and Wales	Christopher Stacey, Co-Director, Unlock
France	Professor Martine Herzog-Evans, University of Rheims
Germany	Dr Christine Morgenstern, University of Greifswald
Italy	Professor Raffaele Bianchetti, Università degli Studi di Milano Dr Elena Mariani, Università degli Studi di Milano
New Zealand	Dr Nessa Lynch, Victoria University of Wellington
Northern Ireland	Dr Clare Dwyer, Queen's University Belfast
Poland	Professor Barbara Stańdo-Kawecka, Jagiellonian University
Republic of Ireland	Professor Ursula Kilkelly, University College Cork Fíona Ní Chinnéide, Deputy Executive Director, Irish Penal Reform Trust
Scotland	Dr Claire Lightowler, Centre for Youth and Criminal Justice, University of Strathclyde John McCutcheon, Youth Justice and Children's Hearings Unit
Spain	Martí Rovira, Universitat Pompeu Fabra
Sweden	Dr Christel Backman, University of Gothenburg
USA: New Mexico	Beth Gillia, Director, Corinne Wolfe Children's Law Center, University of New Mexico School of Law Judy Flynn-O'Brien, Attorney, Corinne Wolfe Children's Law Center Kathleen Hardy, CYFD Public Records Custodian, Children, Youth and Families Department, State of New Mexico
USA: Ohio	Professor Katherine Federle, The Ohio State University
USA: Texas	Professor Michele Deitch, The University of Texas at Austin

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Key Findings

This report examines how childhood criminal records (those acquired before a person is 18 years old) are treated in 16 jurisdictions. Of all the areas we looked at, the system in England and Wales is one of the most punitive. A criminal record acquired by a child in England and Wales can affect that person for longer, and more profoundly, than in any other jurisdiction under consideration. A number of factors combine to make this the case: England and Wales is relatively rare in making no distinction between records acquired as a child, and those acquired as an adult (other than in the time frames applied to ‘rehabilitation periods’ and ‘filtering’) no matter what the offence; many other countries have entirely separate systems for children and adults for most offences. Unlike many jurisdictions, there is no means to ‘wipe’ or expunge a criminal record acquired in childhood in England and Wales. At the same time, the rules on disclosure are relatively unrestricted, meaning there are few ways to prevent the disclosure of comparatively minor convictions and cautions, and all convictions (and other information pertaining to contact with the criminal justice system) can be disclosed for lengthy periods, in comparison to many other jurisdictions.

Any criminal records system is part of the wider youth justice system, and cannot be understood without some contextual information on the treatment of children within that system, and the types of disposals they routinely receive. England and Wales stands out amongst the jurisdictions we have examined as having a criminal justice system where children receive formal disposals, which have serious criminal records implications, comparatively frequently (almost 60,000 convictions or cautions were imposed on children, each of which carries with it a criminal record, in 2013/14 alone).¹ These factors combine with a strong appetite for criminal records checks by employers and others. The overall environment is such that a childhood criminal record, even for a relatively minor offence or misdemeanour, can have severe implications during childhood and beyond into adulthood; this can affect an individual’s education, employment and other prospects for years to come.

As mentioned above, the majority of jurisdictions we examined have separate systems for child and adult criminal records, to varying degrees, although in a number of cases there are exceptions for the most serious offences, the records for which are treated as though they were adults’ records. In Germany, Ohio, Texas and Spain, for instance, childhood criminal records are held on entirely separate databases to those of adults (with some rare exceptions). These databases are far more restricted in terms of access, and information held about childhood contact with the criminal justice system is rarely, if ever, disclosed on criminal records checks. In Canada, Ohio, and Poland, all but the most serious offences committed by children do not attract a criminal record, and in New South Wales, New Mexico and New Zealand, in the main, only the most serious offences committed by children are classed as ‘convictions’ at all – as a result, in New Zealand in 2014, only 48 children under the age of 17 were given a criminal record, and only one child in New Mexico was given an adult sentence and thus a criminal record in 2013/14. By contrast, as set out above, almost 60,000 criminal records were imposed on children in England and Wales in 2013/14. In a number of jurisdictions, rules on expunging and sealing criminal records only apply to those acquired in childhood, for instance, in Italy, only childhood records are eligible for expungement. In England and Wales, criminal records acquired in childhood are treated the same as those acquired in adulthood, regardless of the offence category (other than a shortening of the time frames that apply to “rehabilitation periods” and “filtering”).

1. Ministry of Justice statistics reveal that 59,527 children received a youth caution or were sentenced by a court in 2013/14 in England and Wales. The same children may have received more than one caution or conviction. Each would appear on the child’s record and be subject to disclosure. The available statistics do not give the exact number of children sentenced or convicted in any given year. Ministry of Justice/ Youth Justice Board (2015) Youth Justice Statistics 2013/14. England and Wales. London: MoJ/YJB

Of the jurisdictions we looked at, 11 have some provision for expunging childhood criminal records – whereby records acquired in childhood are destroyed. There is no such provision in England and Wales. There is significant variation in the restrictions, conditions, time frames and processes that applied to expungement policies. Germany and Spain permit all sentences apart from life to be removed from a record. Many jurisdictions, such as Canada, Sweden, Italy and Ireland, have wide-ranging expungement policies, but exclude the most serious offences. Others, such as Texas, Scotland, and New South Wales, have more complex and restrictive rules on when expungement can occur. Some jurisdictions, such as France, apply conditions to expungement, often linking it to reoffending or rehabilitation. Some places, such as Texas, require an application for expungement. Others, such as Poland and Italy, have provision for the automatic expungement of the vast majority of records. Some link expungement to a certain age (such as Italy), others to time since the offence (such as France), still others use a mixture of these two approaches (for example, Germany).

England and Wales is therefore in the minority in having no provision for the expungement of childhood criminal records. Yet at the same time, we have one of the most unrestricted and, therefore, punitive regimes in terms of childhood criminal records disclosure. Although subject to a very limited filtering system, records of criminal convictions and cautions acquired in childhood in England and Wales, are retained for life, and all convictions and cautions, including those for relatively minor offences, must frequently be disclosed for many years, and often for life. The retention and disclosure of childhood criminal records is far more limited in most of the other jurisdictions we looked at. In New South Wales, Germany and France for instance, only more serious offences are disclosed to employers. In countries such as New Zealand, very few children are given a criminal record at all, and those that are do not have that record disclosed after a given period, if certain conditions are met. In countries such as Spain, access to childhood records is extremely limited. In Ohio, Texas, and New Mexico, childhood records can be ‘sealed’ so that they are no longer disclosed, though they still exist physically or digitally. It should be noted, however, that, as mentioned above, exceptions or different rules apply to the most serious offences in almost all the jurisdictions we examined. Frequently, such records are treated as, or similarly to, adult records.

England and Wales is by no means unusual in allowing far wider records disclosure for work involving vulnerable people or public trust. Most of the jurisdictions we looked at – with some notable exceptions – have different rules around the treatment and disclosure of childhood criminal records for these purposes. For instance, New South Wales applies different rules to spent convictions where working with vulnerable people is concerned, and in Texas, vulnerable people checks include information on juvenile records, where other checks do not. Where England and Wales seems relatively unusual – though not unique – is in the breadth of information it permits to be disclosed for work with vulnerable people, and the number of types of organisation it allows to access otherwise undisclosed information. In England and Wales, ‘Standard checks’ – which contain information about almost all previous convictions and cautions (subject to minimum filtering rules) – can be accessed by a wide range of employers (including for example, vets and locksmiths). Enhanced checks (required for work with vulnerable people) contain information on police intelligence (even where it did not result in an arrest), conviction or other disposal, as well as almost all the cautions and convictions a person has acquired through their life (again, subject to minimal filtering rules). This is not unique, but many of the jurisdictions we looked at take a far more rehabilitative approach. In Germany, only those childhood offences resulting in custody (which is very rare) are disclosed, likewise, in New Zealand and Ohio, only more serious convictions are disclosed.

As noted above, understanding the system around childhood criminal records requires an understanding of the youth justice system more generally, as the two are intimately intertwined. For instance, in many jurisdictions – such as Germany, Italy and New Zealand – how a child’s

criminal record is treated is determined by the sentence they are given; in Texas the court of trial is the deciding factor. Without understanding the frequency with which children are tried in the adult court, in the case of Texas, one could not really understand how punitively, or otherwise, the system treats under 18s. In fact, trial in the adult court in Texas is rare, as are serious sentences for children in Germany, Italy and New Zealand (hence only 48 children under the age of 17 acquiring a criminal record in New Zealand 2014). In Sweden, children under 15 cannot be prosecuted for criminal offences at all. Where England and Wales is relatively unusual – though not unique – amongst the jurisdictions we have looked at, is in using formal disposals and sanctions on children relatively frequently and attaching significant criminal records implications to these sanctions. So, for instance, although the criminal records systems in Northern Ireland and Scotland are most similar to our own, a far greater proportion of children are diverted to youth conferences and children’s hearings, respectively, where the criminal records implications are lessened. A number of other dimensions also contribute towards making the youth justice system in England and Wales more punitive towards children, for instance, the comparatively low minimum age of criminal responsibility.

The culture surrounding criminal records, and criminal records checks, compound the situation in England and Wales. Criminal records checks are fairly common, and it seems hiring decisions are made in light of them. Though this is the case in a number of jurisdictions we looked at, such as New South Wales, where research has shown a criminal record to be a major drawback in searches for employment, employers in other jurisdictions are more relaxed. For instance, in Spain, it is very unusual for employers to ask for a criminal records check, in France, the ‘right to be forgotten’ is a dominant attitude, and in Germany a relaxed approach is often taken by employers to minor or irrelevant convictions.

The culture of the press can also be important in determining whether children in trouble with the law are identified. In Germany and Sweden for example, there is no legislation to prevent children being identified, but it almost never happens in practice. In the majority of the jurisdictions we examined, children in trouble with the law are not generally identified, before or after they are 18. In most cases this is down to statutory prohibitions or restrictions on reporting.

In sum, the treatment of childhood criminal records in England and Wales is the most punitive of all the 16 systems examined in this report, in terms of the extent to which it ties children to their past. It is notable that in a number of the jurisdictions examined, conscious decisions have been taken to reduce the impact of childhood criminal records, because of the desire to promote reintegration and rehabilitation. Given the negative effect criminal records can have on a person’s ability to access employment, education and housing, policy makers in England and Wales may want to review the current system; this report demonstrates that less punitive, more rehabilitative systems are possible.

Standing Committee for Youth Justice

March 2016

Introduction

In 2013/14, almost 60,000 cautions and convictions, which carry criminal records, were imposed on children aged between 10 and 17 in England and Wales.² Under the current system, some of the records attached to these disposals will need to be disclosed for many years and sometimes forever, affecting many aspects of the record holder's life including employment, education, accommodation and travel.

This report examines how records of under 18s' contact with the criminal justice system are treated in 16 jurisdictions around the world. It seeks to establish the legal frameworks and to give some idea of what is happening in practice. It is hoped that the research will offer ideas for changes and improvements that could be made to the system in England and Wales, and provide some insight as to where our system stands in relation to others. It also looks briefly at the laws on identifying children in trouble with the law in each jurisdiction.

The jurisdictions include the four UK nations, some of the Commonwealth countries, a selection of European countries and a small selection of US states. The jurisdictions offer a mixture of roughly similar systems and some quite different regimes. They were selected at random from jurisdictions we felt were comparable to our own. We aimed to select randomly with a view to offering insights across wide geographical and cultural areas, though factors such as the availability of relevant material also played a part.

The research was entirely desk-based, in some cases drawing upon foreign language material which was translated through electronic translation services. Once written up, it was reviewed by at least one local expert in each jurisdiction; the experts checked for accuracy but were also asked to draw upon their in-depth, local knowledge to bring insights and information that were not readily available through digitally published material. We are extremely grateful to our eminent list of experts for the expertise and depth of understanding they have brought to the study.

The sheer complexity of systems was striking, as was the highly technical nature of the law affecting criminal records and the difficulty in establishing both law and practice in many jurisdictions. Information is scattered, inaccessible, confusing, incomplete, often out-of-date and frequently misleading. There was also much evidence of failure to apply non-legal and legal provisions and of significant local variation within jurisdictions, much of which is, of course, unreported and generally unknown. It is a jigsaw puzzle of huge and elaborate proportions, which this report certainly does not claim to have completed. Some excellent research has been published on this subject – much of it by experts who have contributed to this study – but much more work needs to be done to understand and improve regimes internationally.

What is a criminal record?

The term 'criminal record' cannot be simply defined. Every child who comes into contact with the criminal justice system is liable to have records about that contact held on many different files and databases: a conviction record may be held on a central government registry; a record about a court hearing where prosecution was waived may be held by a court; the police will hold records of arrests and cautions; the probation department will have their record of the services they provided;

2. Ministry of Justice statistics reveal that 59,527 children received a youth caution or were sentenced by a court in 2013/14 in England and Wales. The same children may have received more than one caution or conviction. Each would appear on the child's record and be subject to disclosure. The available statistics do not give the exact number of children sentenced or convicted in any given year. Ministry of Justice/ Youth Justice Board (2015) Youth Justice Statistics 2013/14. England and Wales. London: MoJ/YJB

as will any educational services involved, also social services and health services. The list goes on. These records are referred to by a bewildering myriad of names: ‘conviction record’, ‘criminal history’, ‘court alternatives history’, ‘juvenile disposition’ and ‘juvenile adjudication record’ to name but a few. Within jurisdictions each different ‘type’ of criminal record will be subject to its own set of rules: some will be disclosable, some will not; some will be subject to sealing (whereby the record will still exist but cannot be disclosed) or expungement (where the record is physically destroyed or deleted), while other records won’t be eligible for these processes; different groups of people and organisations will have access to each type; different ‘access periods’ will apply and so on.

In most places, the records of children who are convicted of the most serious crimes and those who commit sexual offences are subject to specific rules. Such records are often governed by the adult criminal records system rather than the child system (many jurisdictions having separate systems for adult and child records – in contrast to England and Wales). Limitations of time and space mean that these ‘non-standard’ records are only briefly dealt with in this report.

Many records relating to contact with the criminal justice system which could be defined as ‘criminal records’ are not subject to any legally binding provisions regarding disclosure, retention and deletion. So, for example, there may be a law requiring deletion of records held on central government databases but nothing to ensure local police forces delete their records. Records that aren’t covered by statute are generally subject to non-binding retention and deletion policies. In many cases, these simply don’t exist and records may be held indefinitely in an unregulated filing system. The internet is, of course, making it even more difficult for people to leave their past behind them and legislatures are struggling to keep up with these new challenges.

Overall, there is enormous variation in how children’s contact with the justice system is treated in different jurisdictions, as the diagram overleaf demonstrates.

Children and young people’s knowledge of their rights

Some jurisdictions have legal requirements for children to be informed about their rights in relation to their records. It is rare, however, to find a single information source, written in a style and language that would be accessible to a child. Unsurprisingly, there was evidence in several jurisdictions that children and young people did not understand the system (there was no evidence found anywhere that they did understand it) and some evidence (more of which would, almost certainly, be found if research was carried out), that the professionals working with children and young people were unaware of how their local system worked. This is a major problem as in many places children and young people actively have to assert their rights in order to restrict access to their records. It is also apparent that many children and young people are mistakenly disclosing their criminal histories, for example to prospective employers, when they are not legally obliged to do so.

Terminology

There is a great deal of variation in law, language and constitution of justice systems amongst the various jurisdictions. Because of this, and also because of the differences in the types of accessible information, there is some diversity in the range of facts covered in each section. The language differs also to some extent to reflect local vocabulary. This was done on the advice of experts who cautioned that too much sense would be lost if English terminology was imposed on very different systems. So, for example, we talk of ‘youth’ in Canada, of ‘juveniles’ in Ohio and of

'children' in England and Wales. As mentioned above, criminal records are also subject to wide variations in terminology and the report seeks to retain each jurisdiction's language in relation to these. It should be noted, however, that in accordance with international law, the Standing Committee for Youth Justice recognises that all people under the age of 18 are children.

Youth justice systems

In order to understand how the criminal records regime works it was necessary to have some understanding of the criminal justice system affecting under 18s. Brief facts of each jurisdiction's system have therefore been provided to give context.

Examples of contrasting treatment of childhood criminal records

By way of an example of the variation in different jurisdictions, the diagrams below give a simplified version of how childhood contact with the justice system is likely to be recorded and disclosed in Germany, New Zealand, and England and Wales.

Child is arrested by the police and released with no further action taken

Germany

Information never disclosed on criminal records checks

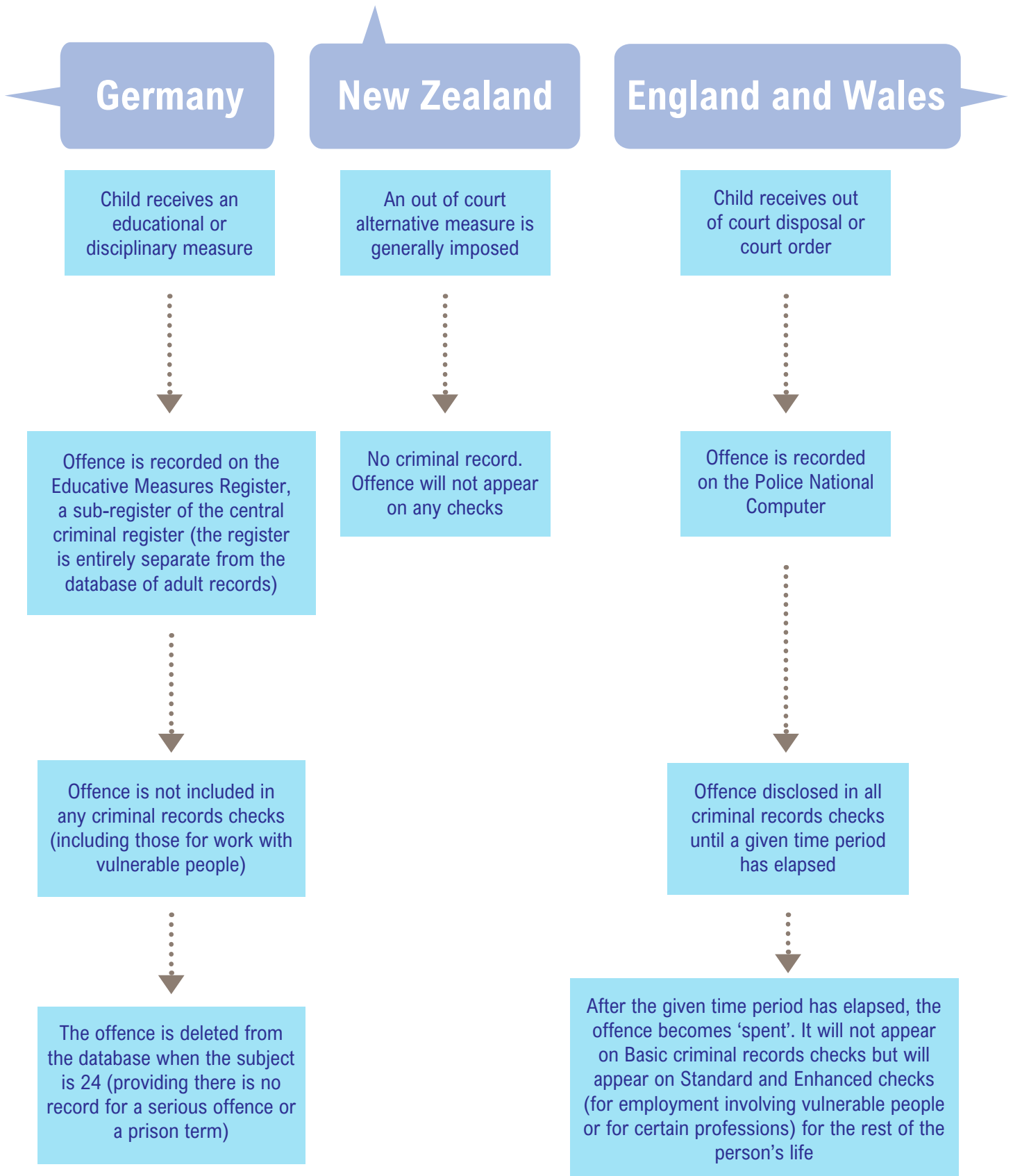
New Zealand

Information never disclosed on criminal records checks

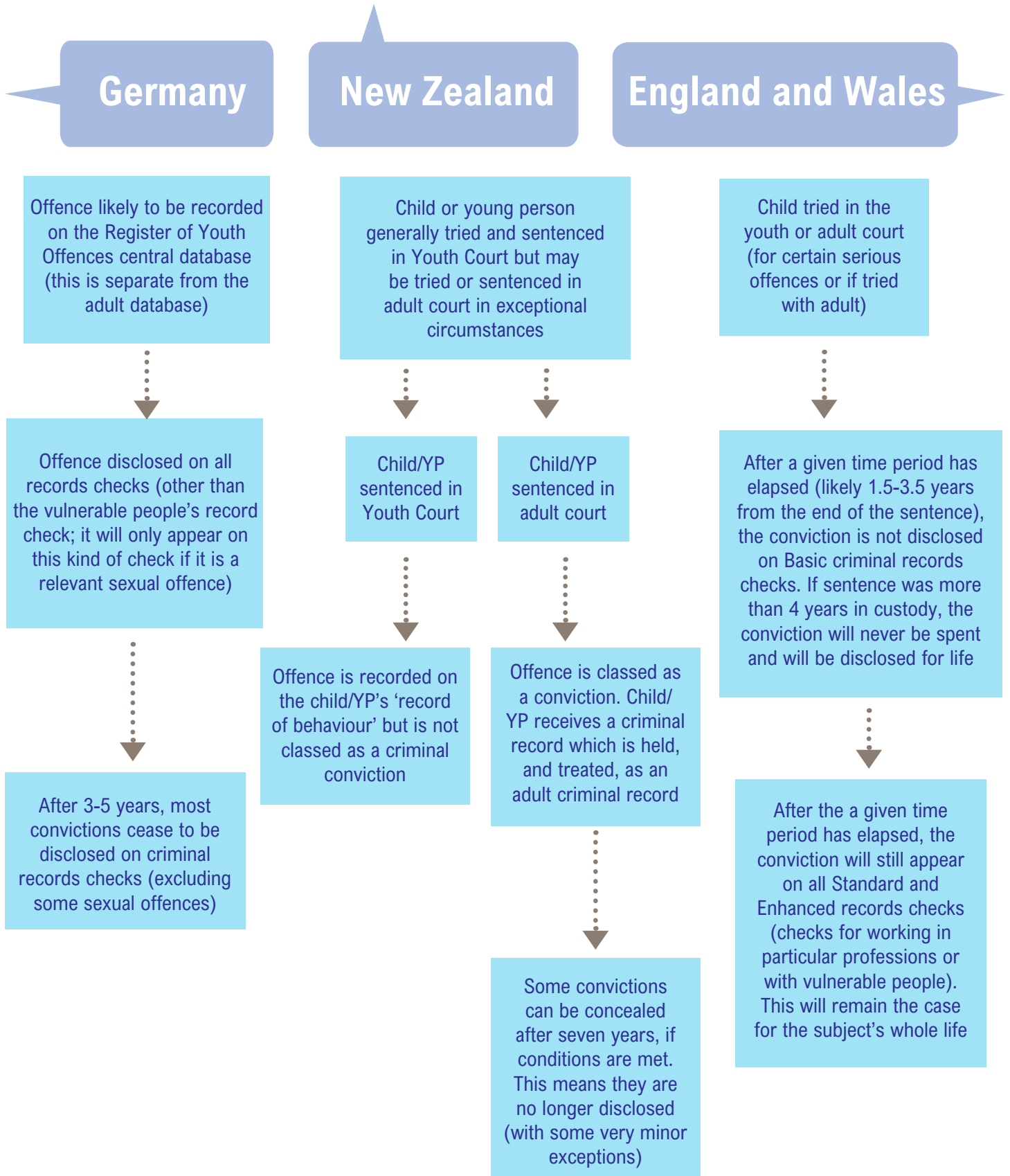
England and Wales

Information held locally by police and may, at the discretion of the police, be disclosed on Enhanced criminal records checks (for employment relating to vulnerable people) for an indefinite period

Child is convicted of a second minor offence (e.g. theft)



Child is convicted of a serious offence (e.g. aggravated robbery)



Australia: New South Wales

Summary

For young people who commit less serious offences, New South Wales operates an ‘alternative to court proceedings’ system. If dealt with under this system, children receive a ‘court alternatives history’. This record does not constitute a ‘criminal record’ and it is not disclosable in the standard employment checks. Judges have discretion as to whether to impose a criminal record on children convicted in the courts. There is a spent conviction scheme; this is not available to everyone and there are circumstances in which spent convictions may be subject to disclosure indefinitely.

Overview

Each state and territory in Australia has its own youth justice legislation, policies and practices. There is much commonality, though, with separate systems for children and adults throughout Australia and close similarities in the processes by which young people are charged and sentenced, and the types of legal orders available to the courts.

This entry looks specifically at New South Wales (NSW). NSW accounts for a very significant number of the children in Australia who come into contact with the youth justice system: it has the largest group of children in detention³ and one-quarter (26%) of all those under youth justice supervision in Australia.⁴

In NSW, as in the rest of Australia, children and young people may be charged with a criminal offence if they are aged 10 or older. The upper age limit for treatment as a child under the criminal law is 17 (at the time an offence was allegedly committed). This is the same in all states and territories except Queensland, where the age limit is 16.⁵ Where children are aged between 10 and 14 the prosecution must prove that the child knew that what they were doing was seriously wrong (the *doli incapax* principle).

As in many places, the juvenile justice ‘system’ is a complicated amalgamation of legislation, rules, guidance and processes some of which apply just to children and some to adults and children.⁶ The Young Offenders Act 1997 provides an alternative to court proceedings in the form of informal warnings, formal cautions and youth justice conferences. The Children (Criminal Proceedings) Act 1987 governs the way courts deal with children who are charged with criminal offences.

Most children charged with offences are dealt with in the Children’s Court,⁷ which places an emphasis on rehabilitation. Children may be committed to the District or Supreme courts for trial or sentence for the most serious offences, which would include homicide, robbery with firearm, aggravated sexual assault and supplying commercial quantities of drugs. Serious indictable

3. Australian Institute of Health and Welfare (2015) *Youth Justice in Australia 2013–14*. Bulletin no. 127. Canberra: AIHW

4. Australian Institute of Health and Welfare (2015) *New South Wales: Youth Justice Supervision in 2013–14*. Youth justice fact sheet no. 38. Canberra: AIHW

5. Australian Institute for Health and Welfare website at <http://www.aihw.gov.au/youth-justice/data-quality/> (accessed on 2 July 2015)

6. For more information on the legislation that applies to children who come into contact with the juvenile justice system in NSW go to the website of the State Library of NSW at <http://guides.sl.nsw.gov.au/content.php?pid=242813&sid=2622103>

7. In 2011–12, only 3% of cases were transferred from the Children’s Court to higher courts across Australia (figures include all states and jurisdictions): Australian Institute of Criminology (2013) *Australian Crime: Facts and Figures 2013*. Canberra: Australian Government; 80 cases involving under 18s were finalised in the higher courts in NSW in 2014: NSW Bureau of Crime Statistics and Research (2015) *New South Wales Criminal Courts Statistics 2014*. Sydney: Department of Justice

offences cannot be finalised by the Children's Court and must be dealt with by the District or Supreme courts;⁸ subject to some limits, it is open to these courts to impose any adult penalty.

Juvenile records

Criminal records are dealt with by individual states in Australia, and also by federal (national) government. Separate state statutes govern what is held and how it may be accessed.⁹ In NSW the relevant statute is the Criminal Records Act 1991.

The Children's Court has no power to record a conviction for any offence against a child under 16.¹⁰ The Children's Court has discretion as to whether or not to record convictions against children aged 16 and over.¹¹ The District or Supreme Court may record a conviction against a child of any age.¹² If a conviction is not recorded, information about the court outcome will be held on the young person's 'criminal history' (see below).¹³

There are no statutory guidelines for what the court must consider when deciding whether to record a conviction, but in practice the following factors are often taken into account:

- * The child's age;
- * Their mental or intellectual capacity;
- * Whether they have previously been dealt with by a court or under the Young Offenders Act;
- * The seriousness of the offence;
- * The particular circumstances of the offence (e.g. were others involved who were more to blame?);
- * Mitigating factors such as an apology to the victim.¹⁴

Diversionary measures under the Young Offenders Act do not carry a criminal record. If the child is given a caution or ordered to attend a youth justice conference a record is kept by the police officer, specialist youth officer or the court who issues the caution.¹⁵ This record will appear on the child's 'court alternatives history' and may be seen by a Children's Court if the child is accused of further offences. The record does not constitute a criminal conviction and it cannot be taken into account by an adult court.¹⁶

When a child is given an informal warning, their name is recorded by the investigating police and will be kept on the police database, but the warning does not form part of their criminal history or court alternatives history.

8. Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters, Chapter 8

9. Naylor, B. (2011) *Criminal records and rehabilitation in Australia*, *European Journal of Probation*, Vol. 3, No. 1, pp. 79–96

10. s14(1) *Children (Criminal Proceedings) Act 1987*

11. s14 *Children (Criminal Proceedings) Act 1987*

12. Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters, Chapter 8

13. *The Shopfront Youth Legal Centre (2015) Convictions and criminal records*. Darlinghurst: SFYLC

14. Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters, Chapter 8

15. s33 *Young Offenders Act 1997*

16. s68 *Young Offenders Act 1997*

Databases holding information about children accused or convicted of a crime

Criminal records are held by the police and centrally by the government agency, CrimTrac. CrimTrac is an Executive Agency, which was set up by the Australian government in 2000 to develop and maintain national information sharing services between state, territory and federal law enforcement agencies. It works in partnership with Australia's police agencies to provide services that allow police to easily share information with each other across state and territory borders.¹⁷

The main databases holding information about under '18s contact with the juvenile justice system are as follows:

Agency	Information held	Access
Police	<p>Criminal record i.e. a record of convictions.</p> <p>Criminal history: this includes everything on the criminal record, as well as details of all court matters which did not result in a conviction being recorded. It will include details of proceedings in which the child was found not guilty, details of any failures to appear in court, and matters which have not yet been finalised.</p> <p>Court alternatives history: This includes details of juvenile police cautions and youth justice conferences.</p> <p>Other: information relating to questioning by police; arrests; police warnings and formal cautions given to children; youth justice conferences; charges; fingerprints and photos taken when you are charged; convictions; 'section 10' dismissals and discharges; sentences.¹⁸</p>	Police and the Children's Court in some circumstances
CrimTrac	CrimTrac administer the National Names/ Persons of Interest Index which includes details of criminal convictions the courts have recorded against children (see above).	Police; NSW Office of the Children's Guardian
Roads and Maritime Services	Traffic convictions and infringements are separately recorded by the Roads and Maritime Services.	Police on request.

17. Information taken from CrimTrac's website at <http://www.crimtrac.gov.au/>

18. The Shopfront Youth Legal Centre (2015) *Convictions and criminal records*. Darlinghurst: SFYLC

Criminal record checks

The National Police History Check (NPHC)

CrimTrac manages the National Police Checking Service. Information is provided in the form of a check results report (through an Accredited Organisation)¹⁹ or a National Police Certificate (through an Australian police agency).

National Police History Checks involve identifying and releasing any relevant Police History Information (PHI) and other information, including warrants, subject to Commonwealth/State/Territory spent convictions/non-disclosure legislation and/or information release policies. PHI is owned by the relevant Australian police agencies. The release/disclosure of PHI, including for juvenile offences, is bound by legislation and/or information release policies specific to each state or territory. The results will indicate either:

- No Disclosable Court Outcomes (NDCO) – to indicate that there is no police history information that is held or that can be released to the submitting organisation;
- Disclosable Court Outcomes (DCO) – to indicate that police history information exists that can be released to the submitting organisation. The police history information may include:
 - * Charges;
 - * Unspent court convictions – including any penalty or sentence;
 - * Findings of guilt with no conviction;
 - * Court appearances;
 - * Good behaviour bonds or other court orders;
 - * Pending matters awaiting court hearing;
 - * Traffic offences;
 - * Unspent juvenile conviction records i.e. where the court has decided to record a conviction.

They should not include any information held on an under 18's 'court alternatives history' or 'criminal history'.

The police history information disclosed in the results is determined by each police agency, based on spent conviction legislation and information release policies. The purpose of the NPHC and any other relevant legislation also determines what information can be released.²¹

An Accredited Organisation must not request a NPHC from CrimTrac without the subject's 'Informed Consent'.

The following organisations may also have access to the results of an NPHC:

- Authorised police staff who need to access criminal history record systems, as part of the vetting process;
- Authorised CrimTrac staff who may need to access results as part of providing the National Police Checking Service to Accredited Organisations and police agencies;
- Authorised staff of the Accredited Organisation who submitted the check to CrimTrac will receive the result from CrimTrac;

19. For a list of Accredited Organisations, go to CrimTrac's website at <http://www.crimtrac.gov.au/documents/NationalPoliceCheckingServiceNPCSListoAccreditedBrokerOrganisations.pdf> (accessed on 6 August 2015)

20. Information provided by the National Police Checking Service in an e-mail dated 1 September 2015

21. Information taken from CrimTrac's website at http://www.crimtrac.gov.au/national_police_checking_service/ (accessed on 6 August 2015)

- A third party organisation may have access to the result with either the subject's explicit consent or through relevant legislation;
- Under certain circumstances police can utilise the NPCS, without the consent of an individual, for law enforcement purposes and the administration of justice. This includes, for example, determining if people are eligible for jury service.

Working With Children Check

Under the Child Protection (Working with Children) Act 2012, anyone working face-to-face with children in a wide range of sectors and roles must obtain a 'Working With Children Check'.²² Employers are required to verify the outcomes of these checks. In NSW, the Working With Children Check is administered by the NSW Office of the Children's Guardian, which is an independent government agency. The check obtains applicants' national criminal histories from CrimTrac as set out above. The check includes a review of the following records:

- Convictions (spent or unspent);
- Charges (whether heard, unheard or dismissed);
- Juvenile records.²³

All records attached against a person's name whether juvenile, spent or not spent, dropped convictions, non-convictions etc. are assessed and taken into consideration when a person applies for this check.²⁴ The Check also searches against findings of misconduct and notifications by the NSW Ombudsman. If a misconduct investigation finds that sexual misconduct or serious physical assault of a child has occurred, nominated reporting bodies must report this finding. The NSW Ombudsman will also report matters he is aware of that indicate serious risk to children.²⁵

The results of these checks are either a clearance to work with children for 5 years or a bar to working with children.

Spent convictions

NSW's spent convictions scheme has been in place since 1991. Under this scheme, criminal convictions for crimes committed when under 18 are spent after the following periods:

- Straight away if the court dismisses the matter without recording a conviction;
- At the end of any bond or probation if a person is released on a bond or probation without a conviction;
- After a 3 year crime-free period from the date of a Children's Court conviction;
- After a 10 year crime-free period from the date of a conviction by any other court;
- If the conviction was for an offence which is no longer an offence.²⁶

22. See s6 and s7 of Child Protection (Working With Children) Act 2012 for details of the roles affected by these requirements

23. Information taken from the website of the NSW Office of the Children's Guardian at <http://www.kidsguardian.nsw.gov.au/working-with-children/working-with-children-check/what-gets-checked> (accessed on 20 October 2015)

24. Communication between Associate Professor Bronwyn Naylor and the NSW Office of the Children's Guardian dated 24 November 2015

25. Information taken from the website of the NSW Office of the Children's Guardian at <http://www.kidsguardian.nsw.gov.au/working-with-children/working-with-children-check/what-gets-checked> (accessed on 3 July 2015)

26. ss7-10 Criminal Records Act 1991

Being crime-free means the young person has not been:

- Subject to a control order (i.e. the juvenile equivalent of imprisonment);
- Convicted of an offence punishable by prison;
- In prison because of a conviction for any offence;
- Unlawfully at large.²⁷

Sexual offences and offences for which the sentence was more than 6 months imprisonment (which does not include a control order) can never be spent.²⁸ There was a parliamentary inquiry into whether convictions for juvenile sex offences should become capable of being spent in 2010. The inquiry advised that they should²⁹ but no changes have yet been implemented.

There is some inconsistency between the Children (*Criminal Proceedings*) Act and the *Criminal Records Act*. In some cases, the *Criminal Records Act* deems a conviction to have been recorded even if the court has not recorded a conviction.³⁰

Once an offence becomes spent the young person does not need to reveal it and can legally 'lie' if asked if they have any convictions (other than in a Working With Children Check). Individuals and organisations are prohibited from taking these convictions into account (including asking about them), or disclosing them to anyone without the consent of the individual. They would not be included on an NPHC check. There are some exceptions to this general rule, for example, for employment in certain occupations.³¹ Spent convictions are not revived by subsequent convictions.³²

It is an offence for someone who has access to conviction records kept by or on behalf of a public authority to disclose records of spent convictions. The maximum penalty is 50 penalty units or imprisonment for 6 months, or both.³³ There are some exceptions to this rule, for example, when law enforcement agencies share information with other law enforcement agencies or the court in discharge of their duties.³⁴

There are very few obligations on the police to destroy records. The Police Commissioner has discretion to have information destroyed on application in some situations, for example, where the charges were withdrawn or dismissed, where a discharge without conviction is more than 15 years old and there have been no other convictions, or where the information relates to very old and minor convictions.³⁵ Records of warnings must be destroyed or expunged³⁶ when the young person turns 21.³⁷

Children aged 14 and over will have their photograph and fingerprints taken when they are arrested. The police must obtain a court order to obtain these from anyone under 14.³⁸ Both

27. Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters

28. s7 *Criminal Records Act 1991*

29. Standing Committee on Law and Justice (2010) *Spent convictions for juvenile offenders*. New South Wales: Parliament. Legislative Council. Standing Committee on Law and Justice.

30. The Shopfront Youth Legal Centre (2015) *Convictions and criminal records*. Darlinghurst: SFYLC

31. s15 *Criminal Records Act 1991*

32. s8(6) *Criminal Records Act 1991*

33. s13 *Criminal Records Act 1991*

34. For all the exceptions, see s13 *Criminal Records Act 1991*

35. The Shopfront Youth Legal Centre (2015) *Convictions and criminal records*, Darlinghurst: SFYLC

36. The Act does not record what the differences between these two processes are

37. s17 *Young Offenders Act 1997*

38. s136 *Law Enforcement (Powers and Responsibilities) Act 2002*

fingerprints and photographs must be destroyed if:³⁹

- The child is found not guilty;
- The offence is otherwise not proved (e.g. certain mental health diversionary options, dismissal under Young Offenders Act);⁴⁰
- The charge against the child is dismissed (with or without caution) under Children (Criminal Proceedings) Act 1987;
- The court orders it;⁴¹
- 12 months have elapsed and no criminal proceedings have been commenced against the child or proceedings have been discontinued.⁴²

There are different rules for 'Commonwealth' offences. Commonwealth offences include social security fraud, tax and customs matters, but also certain offences involving telecommunications or post, including harassment and threats by text or social media. It is becoming increasingly common for young people to be charged with such offences. Any identification material taken from a person between the ages of 10 and 17 charged with a Commonwealth offence must be destroyed 12 months after the material was taken if: (i) no proceedings were commenced; (ii) the offence was proven but no conviction was recorded; or (iii) the person was acquitted.⁴³

Prevalence of criminal record checks by employers

Criminal history information is increasingly sought by employers. This is a legal requirement for all jobs involving face-to-face work with children. There are very few statutory requirements for criminal records to be obtained for other types of employment⁴⁴ and no obligation on prospective employees to provide details. However, in practice, if the individual wants the job, they will have to comply with the request. It is also the case that many young people are unaware of their rights (see below) and that they may disclose information unwittingly.

In 2013–14, CrimTrac processed over 3.7 million National Police History Checks. In 2012–13, the number was 3.21 million and in 2011–12, 3.08 million.⁴⁵ Most employers do ask for criminal conviction history information from prospective employees and some ask for juvenile criminal history information, including, sometimes, non-conviction information that would not be disclosed on the NPHC.⁴⁶

Research suggests that employers are very wary about employing people with convictions. A large-scale Australian study published in 2008 found that people with criminal records were rated less likely to find employment than people with a chronic illness, physical difficulties or communication difficulties.⁴⁷

39. Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters

40. s137 *Law Enforcement (Powers and Responsibilities) Act 2002*

41. s38 *Children (Criminal Proceedings) Act*

42. s137A *Law Enforcement (Powers and Responsibilities) Act 2002*

43. s 3ZK of the *Crimes Act 1914 (Cth)* and *The Shop Front Youth Legal Centre (2004) Convictions and criminal records*, Darlinghurst: SFYLC; for details of the spent conviction scheme for Commonwealth offences see ss 85ZL and 85ZM *Crimes Act 1914 (Cth)*

44. For example, s16 *Security Industry Act 1997* requires refusal of an application for a security licence if the person has specific convictions

45. *CrimTrac (2014) CrimTrac Annual Report 2013–14*. Canberra: Crimtrac

46. Private communication with Jane Sanders on 6 August 2015

47. Graffam, J, et al. (2008) 'The Perceived Employability of Ex-Prisoners and Offenders', *International Journal of Offender Therapy and Comparative Criminology*, 52 (6), pp. 673–85

There are no anti-discrimination laws preventing employers from discriminating on the grounds of criminal history in New South Wales, even for spent convictions. The Australian Human Rights Commission (the AHRC) and others are calling for such laws to be introduced but there is no indication that the situation will change in the near future. The AHRC has reported that it receives a significant number of complaints from people alleging discrimination in employment on the basis on a criminal record. In 2010–2011, 23% of all the complaints the Commission received under the Australian Human Rights Commission Act 1986 were on the basis of criminal record discrimination.⁴⁸ The AHRC has published guidance on the prevention of discrimination in employment on these grounds.⁴⁹

Criminal history information falls into the category of ‘personal information’ which is protected by Australian privacy laws. Under these laws no person (unless authorised by statute) can access personal information without the subject person’s consent. This is rendered irrelevant in an employment situation as a would-be employee has little choice but to give consent if they wish to be considered for a position.⁵⁰

Young people’s knowledge of laws affecting criminal records

It has been reported that there is a commonly-held misconception that convictions recorded against a child are destroyed at 18.⁵¹ Most young people do receive legal advice when charged with a criminal offence and this may include information about criminal records. However, given the complexity of the law in this area this is problematic; there are time issues, difficulties in helping young people understand a very complicated system and the fact that many young people do not, at the time of the proceedings, view it as their most pressing issue. It is often months or even years later that people come up against the consequences of having a criminal record in ways they could not have imagined at the time of their conviction.⁵²

Policy issues

There are a number of private providers of criminal history information in Australia, including CrimeNet, which sold its business to a US company in 2005.⁵³ There are grave concerns about the impact of such organisations, including the difficulty or impossibility of regulating them, the veracity and quality of the information they hold and the fact that they may hold information indefinitely in contravention of rehabilitation laws.

To address the national variation between spent convictions schemes, the Standing Committee of Attorneys-General proposed a Model Spent Convictions Bill.⁵⁴ This Bill has disappeared from the

48. <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/discrimination-employment-basis-criminal-record> (accessed on 27 August 2015)

49. The Australian Human Rights Commission has published *On the Record: Guidelines for the prevention of discrimination in employment on the basis of a criminal record*; the document was last updated in 2012.

50. Naylor, B. (2011) *Criminal records and rehabilitation in Australia*, *European Journal of Probation*, Vol. 3, No. 1, pp. 79–96

51. Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters

52. Insight provided by Jane Sanders in a private communication on 6 August 2015

53. Naylor, B. (2011) *Criminal records and rehabilitation in Australia*, *European Journal of Probation*, Vol. 3, No. 1, pp. 79–96

54. Standing Committee on Law and Justice (2010) *Spent Convictions for Juvenile Offenders*. NSW: SCLJ, p. 5 55. s10 Children (Criminal Proceedings) Act 1987 and Redfern Legal Centre (2014) *The Law Handbook. Your practical guide to the law in NSW 13e*. Sydney: Thomson Reuters

political agenda as has the recommendation to amend the laws concerning children convicted of sexual offences. Criminal records do not appear to be a priority for the NSW government at the present time.

Identification of children accused or convicted of committing a criminal offence

The public cannot attend Children's Courts or any other criminal proceedings involving children. Media reporters are, however, allowed to attend unless the court stipulates otherwise.⁵⁵

Proceedings involving children can be published and broadcast but identifying information may not be included without the consent of (i) the child, if the child is 16 or over; or (ii) the court, if the child is under 16.⁵⁶ The name of a child convicted of a serious indictable offence in the District or Supreme Courts may be published without the child's consent if the court orders it.⁵⁷

Breach of these provisions is an offence which is liable to prosecution at the discretion of the Attorney-General and these laws are generally adhered to by the media.

These rules would continue to apply when the child turns 18 in most cases, although there have been instances of references being made to the juvenile convictions of adults who are accused or convicted of offences. It is unclear how far these laws would protect someone from having their identity published on-line or through other media by a person other than a media outlet.

There are no legal protections available to protect the identities of children before they have been charged or cautioned. Under the current law, the media could legally publish identifying material about children who are just suspected of a crime. This is seen as a major and problematic anomaly.⁵⁸

In most Australian jurisdictions juveniles' identities must not be made public, although there are some exceptions. In the Northern Territory, juvenile offenders can be named, unless an application is made to suppress identifying information.⁵⁹

56. s15A Children (Criminal Proceedings) Act 1987

57. s15C Children (Criminal Proceedings) Act 1987

58. Private communication with Jane Sanders on 6 August 2015

59. Richards, K. (2011) *What makes juvenile offenders different from adult offenders?* Canberra: Australian Institute of Criminology, p. 5

Canada

Summary

Canada has a separate youth justice system for young persons aged between 12 and 17. Although children are never transferred to adult courts, there are limited exceptions which permit adult sentences to be handed down by the youth courts for the most serious crimes committed by youth between the ages of 14 and 17. Records relating to such 'adult' sentences are subject to the same rules as those affecting adults' criminal records. Most young persons found guilty of criminal offences will have a youth record. These records are treated differently to adult's records: access is restricted, and 'access periods' apply which vary depending on the type of offence and how the offence is dealt with. On completion of the access period, the record can no longer be disclosed to anyone for any reason, and some of these records must be physically destroyed.

Overview

The law governing the youth justice system in Canada is largely contained within the Youth Criminal Justice Act (YCJA), which came into force in 2003.⁶⁰ The YCJA applies to people between the ages of 12 and 17. People below the age of 12 are defined as 'children' and are not subject to criminal sanction. Those between the ages of 12 and 17 are referred to as 'young persons' or 'youth' and are subject to the youth justice system. Individuals aged 18 or over are dealt with according to adult criminal legislation.

Under the YCJA young people are not 'transferred' to an adult court. However, for very serious offences, an adult sentence is possible. The youth court first determines whether or not the young person is guilty of the offence and then, under certain limited circumstances, the youth court may impose an adult sentence. Offences that can lead to an adult sentence are indictable offences committed when the youth was at least 14 years old, for which an adult would be liable to imprisonment for more than two years. The YCJA, as passed by Parliament in 2002, also included a presumption that youth aged 14 or older found guilty of certain serious violent offences would receive an adult sentence. In these circumstances, the onus was on the young person to convince the court that a youth sentence would be appropriate.

In 2008, in the case of *R. v. D.B.*,⁶¹ the Supreme Court of Canada struck down the presumptive offence provisions of the YCJA as unconstitutional. The Court found that the presumption of an adult sentence in the provisions of the YCJA was inconsistent with the Canadian Charter of Rights and Freedoms' principle of fundamental justice that, in comparison to adults, young people are entitled to a presumption of diminished moral blameworthiness. The Court stated: 'Because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a presumption of diminished moral blameworthiness or culpability.'⁶²

60. *The Youth Criminal Justice Act (YCJA) came into force on 1 April 2003*

61. *R. v. D.B.*, 2008 SCC 25

62. *At paragraph 41 of the Judgment*

In 2012, Parliament removed the presumptive offence scheme from the YCJA while retaining Crown applications for adult sentences for youth. Parliament also amended the adult sentencing provisions to include the following:

- If a young person is 14 years of age or older and is charged with a serious violent offence, the prosecutor must consider applying to the court for an adult sentence. If the prosecutor decides not to apply for an adult sentence, the prosecutor must advise the court;
- A court can impose an adult sentence only if (a) the prosecution rebuts the presumption that the young person has diminished moral blameworthiness or culpability; and (b) a youth sentence would not be of sufficient length to hold the young person accountable;
- A young person under the age of 18 who receives an adult sentence is to be placed in a youth facility and may not be placed in an adult correctional facility. Once the young person turns 18, he or she may be placed in an adult facility.⁶³

The Canadian Centre for Justice Statistics does not provide statistics on adult sentences under the YCJA.⁶⁴

Criminal records

Section 3 of the YCJA sets out a 'Declaration of Principle' for the Canadian youth justice system: included are the principles of 'promoting the rehabilitation and reintegration of young persons who have committed offences' and protecting the young person's right to privacy. In line with these principles, the provisions for youth criminal records appear to afford much greater protection than is available to adults and, in general, youth criminal records are treated differently to adult criminal records. There are two main exceptions to this rule:

- If the young person is given an adult sentence⁶⁵ their record is treated as an adult record and it will be subject to the laws governing adult records;⁶⁶
- If an individual with an open⁶⁷ youth record is found guilty of an offence committed when they are over 18, their childhood record becomes part of their adult record;

Adult records are kept for 125 years; there is a process for 'record suspension' which allows adults to apply to the Parole Board to have access and use of their criminal records limited, but those youth who receive adult sentences for serious offences may have difficulty in making a successful application.

63. Canadian Government Department of Justice webpage 'The Youth Criminal Justice Act Summary and Background' at <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html> (accessed on 25 September 2015)

64. Canadian Government Department of Justice webpage 'The Youth Criminal Justice Act Summary and Background' at <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html> (accessed on 25 September 2015)

65. For details of when a youth might receive an adult sentence see s64 YCJA, which states that 'The Attorney General may, before evidence is called as to sentence or, if no evidence is called, before submissions are made as to sentence, make an application to the youth justice court for an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence for which an adult is liable to imprisonment for a term of more than 2 years and that was committed after the young person attained the age of 14 years'. The adult sentencing provisions were subject to significant revision by Parliament in 2012; for further details on this, see the Department of Justice on-line summary of the Youth Criminal Justice Act at <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html> (accessed on 24 June 2015)

66. ss 115(2), 115(3) and 117 YCJA

67. i.e. the 'access period' has not expired

Databases holding information about youth and young persons accused or convicted of a crime

The main recording systems affecting under 18s who come into contact with the criminal justice system are as follows:

Database	Information held	Retention periods for youth criminal records
National Repository of Criminal Records (NRCR)	<p>Holds information on adults and youth who have been <i>charged with</i> indictable and hybrid⁶⁸ offences.</p> <p>This database is maintained by the Royal Canadian Mounted Police (RCMP) and accessed through the Canadian Police Information Centre (CPIC).</p> <p>NB With the exception of 'young person' indictable or hybrid offence convictions, police agencies are not required by law to report offences to the RCMP.⁶⁹</p>	'Access periods' apply (see below).
Police Information Portal (PIP).	PIP provides access to local police force information throughout Canada. This database is also managed by RCMP and accessed through the CPIC.	Can be accessed by police forces for investigative and other purposes.
Local police records	<p>The information held may vary considerably between forces. It can include:</p> <ul style="list-style-type: none"> – Personal information, fingerprints and photographs of the young person accused of or convicted of an offence; – Details of extra-judicial measures;⁷⁰ – Calls to 911 for assistance; – Mental health crises involving police; – Being questioned by police; – Arrests; – Charges that do not result in convictions.⁷¹ 	These records are not subject to automatic purging and can be held indefinitely. However, they cannot be used for legal purposes after the end of the access period.
Youth court records	A youth justice court, review board or any court dealing with matters arising out of proceedings under the YCJA may keep a record of any criminal case involving a young person. ⁷² The record will include findings, details of personal circumstances and any reports done for the purposes of sentencing.	These records cannot be used after the 'access period' has expired.

68. Includes offences where the crown prosecutor has a choice as to whether the case will proceed as if the offence were a summary offence or an indictable offence

69. Royal Canadian Mounted Police (2014) *Dissemination of Criminal Record Information Policy*. Available on-line at <http://www.rcmp-grc.gc.ca/en/dissemination-criminal-record-information-policy> (accessed on 19 August 2015)

70. s115(1.1) YCJA as amended by the Safe Streets and Communities Act 2012

71. The John Howard Society of Ontario (2014) *Help Wanted: Reducing Barriers for Ontario's Youth with Police Records*. Ontario: JHSO

Access to youth criminal records

Access to all youth records, except for those kept in respect of an offence for which an adult sentence has been imposed,⁷³ is restricted largely to the young person, their counsel, judicial and law enforcement authorities, the government and the victim. A full list of individuals and organisations entitled to access young people's records and their rights in relation to that access are laid down in the YCJA.⁷⁴

Criminal record checks

Employers can, and often do, require a person to provide a certificate from the police indicating whether or not a person has a criminal record, and if so setting it out. This check would include details of convictions and charges during the 'access period'. Organisations that recruit volunteers for service with 'vulnerable populations' (including children and youth) have similar requirements. These records include information about a youth court record, during the 'access period' (discussed below), and in the case of 'vulnerable sector checks' sometimes include additional information about youth involvement with police, including non-conviction information. The certificate can only be released to a third party with the written consent of the subject of the record.

The basic criminal record checks are managed centrally by the Canadian Police Information Centre, which is part of the Royal Canadian Mounted Police. Individuals must apply to local police services for Police Information Checks.

A vulnerable sector check is an enhanced criminal record check. They provide information about criminal records, but also verify if an individual has a record suspension (formerly pardon) for a sex offence. They also include checks of national databases maintained by the RCMP and local police records where the applicant lives. Some of the sources of information for vulnerable sector checks are: The National Repository of Criminal Records; Investigative Data Bank on CPIC; Police Information Portal (PIP); and local police records. As mentioned above, they may include information about youth records. Vulnerable sector checks must be conducted by the local Canadian police service where an applicant lives, or by an authorised body. It is the responsibility of the organization, or person responsible for the vulnerable person/people, to request a vulnerable sector check. Equally, it is the person or organisation responsible for the vulnerable person/people who decides how often a vulnerable sector check must be repeated.⁷⁵

Access periods and expungement

Canadian law establishes 'access periods' for youth records which vary depending on the type of offence and how the offence is dealt with. These access periods continue to run their course when the youth turns 18.

On completion of the access period, the young person's record can no longer be disclosed to anyone for any reason. Records kept at the Canadian Police Information Centre must be physically destroyed, deleted from electronic storage systems⁷⁶ and removed from the NRCR.

72. s114 YCJA

73. s117 YCJA

74. ss117–124 YCJA; see also *F.N. (Re)*, [2000] 1 S.C.R. 880

75. Information on vulnerable sector checks taken from the Royal Canadian Mounted Police website at <http://www.rcmp-grc.gc.ca/en/faqs-about-vulnerable-sector-checks> (accessed on 25 September 2015).

76. s128(7) YCJA

At the discretion of the record holder, after the access period a youth record can be sent to the National Archives of Canada, or to the Provincial Archives.⁷⁷ These records can be used for research, analysis, and statistics; they cannot be used to identify the individual.

Deletion from the NRCR is controlled by a computerised programme. Deletion from other agencies' records varies hugely. Some are very aware of their responsibilities and have good systems in place for deleting records at the end of access periods. The onus may, however, be on the individual to inform agencies, such as their local police force, holding criminal history records that the access period has expired and request (they cannot demand) destruction of their record.⁷⁸ It is not known to what extent records are deleted or how much they are misused.

The following table sets out the access periods that apply to youth records:⁷⁹

How Offence Is Dealt With / Type of Offence	How Long Before Record Will Be Sealed or Destroyed? (Access Period)
Youth is acquitted (other than verdict of not criminally responsible on account of mental disorder)	2 months after the time allowed to file an appeal, or, if an appeal is filed, 3 months after all proceedings related to the appeal are completed
Charge is dismissed or withdrawn	After 2 months
Youth is found guilty and given a reprimand	After 2 months
Charge is stayed	After 1 year, if no further court proceedings have been taken
Extrajudicial sanction is imposed	2 years after the young person has consented to the extrajudicial sanction
Youth is found guilty and given an absolute discharge	1 year after the young person has been found guilty
Youth is found guilty and given a conditional discharge	3 years after the young person has been found guilty
Youth is found guilty and sentenced for summary conviction offence	3 years after the sentence has been completed (any subsequent offence will result in an extension)
Youth is found guilty and sentenced for indictable offence	5 years after the sentence has been completed (any subsequent offence will result in an extension)
Murder, manslaughter, attempted murder, or aggravated sexual assault	Record may be retained indefinitely
Certain scheduled serious offences	Record will be retained for an additional 5 years

77. s128 YCJA

78. Personal communication with Professor Nicholas Bala on 26 June 2015

79. Table taken from the Department of Justice website at <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/recor-dossi.html> (accessed on 17 December 2015)

How Offence Is Dealt With / Type of Offence	How Long Before Record Will Be Sealed or Destroyed? (Access Period)
Youth is found guilty and receives an adult sentence	Record is treated as an adult record, and the rules applicable to adult records apply
Person is convicted of an offence committed after he or she turns 18, while the access period for their youth offence is still open	Record for the youth offence will be treated as an adult record, and the rules applicable to adult records apply.

Generally adult criminal records are retained until the subject is 125 years of age.⁸⁰ However, Canada does operate a system of ‘record suspension’ which is open to both adult and youth criminal convictions. Under the *Criminal Records Act*, the Parole Board of Canada may order, refuse to order or revoke record suspensions for convictions. If an application is successful, the CPIC is required to keep information about the relevant record separate from other criminal records and not to disclose it on a criminal record check. Local agencies are not required to comply with the order, but in practice many of the provincial and municipal law enforcement agencies do cooperate by restricting access to their records once notified that a record suspension has been ordered. Individuals can apply five years after completing the sentence for a summary offence or 10 years after completing the sentence for an indictable offence. The scheme is not open to people who have been convicted of sexual offences against a child or who have been sentenced to imprisonment of two years or more on three or more separate occasions.⁸¹

Most federal and provincial law enforcement agencies can view criminal records through their computer systems. They include Citizenship and Immigration, Parks Canada, Canada Customs and Revenue Agency, United States Customs and Immigration and the United States police.

The *Freedom of Information and Privacy Act* prohibits information about criminal records being given out to such groups as employers, schools, colleges, universities, and community agencies, unless the individual agrees to sign a criminal record release form. The Act does not, however, apply to court records.⁸²

Advocates for youth and service providers for youth and young adults warn that young people are finding it increasingly difficult to free themselves from youth records in spite of the laws outlined above. Information about a young person’s contact with the criminal justice system, including non-conviction information, is frequently being retained by police and, it is reported, revealed on police record checks.⁸³ These records can affect employment prospects, volunteer opportunities, international travel and even rental of apartments.

80. See the Royal Canadian Mounted Police website at <http://www.rcmp-grc.gc.ca/en/record-suspension-formerly-called-pardon-and-purges> (accessed on 5 August 2015)

81. For further information on record suspensions, see the Parole Board of Canada’s factsheet at http://pbc-clcc.gc.ca/infocntr/factsh/pardon-eng.shtm#_1 (accessed on 24 June 2015)

82. Information obtained from the British Columbia Justice BC website at http://www.justicebc.ca/en/cjis/you/offender/criminal_record/access.html (accessed on 5 August 2015)

83. The John Howard Society of Ontario (2014) *Help Wanted: Reducing Barriers for Ontario’s Youth with Police Records*. Ontario: JHSO

Young people's knowledge of laws affecting criminal records

There is no known research on the understanding and awareness of the rules relating to criminal records amongst young people in Canada. There are no statutory obligations for young people to be informed about their rights in this regard and comprehensive, straightforward information is not readily available.

Prevalence of criminal record checks by employers

Employers and community organisations are required to obtain criminal record checks from potential employees and volunteers for jobs and voluntary positions which involve or might involve unsupervised access to children and vulnerable adults.⁸⁴ Employers are only entitled to require a check after the position has been offered.⁸⁵

It is reported that there is an escalating demand for criminal record checks during the employment process, and that this is exacerbating the stigma and exclusion of young people with convictions.⁸⁶

The Canadian Human Rights Act forbids discrimination on the grounds of a conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.⁸⁷

Policy issues

Whilst significant variation exists between provinces, on a national level (as set down in the YCJA) there is an effort to divert young people from the courts.⁸⁸ This has had the effect of limiting the number of young people who obtain a criminal record, although information will remain on police files and be subject to local retention policies and practices.

In line with the Conservative government's 'get tough on crime' policy, amendments were made to the YCJA in 2012. These amendments largely relate to young people convicted of the most serious, violent crimes; Nicholas Bala, Professor of Law at Queen's University, Canada, argues that the 2012 changes do not alter the fundamental approach to youth justice in Canada.⁸⁹ Indeed, the Minister for Justice spoke of 'a shared view that young people should be rehabilitated and have a second chance',⁹⁰ and since the coming into force of the amendments, rates of youth charging and youth incarceration in Canada have continued to fall. The amendments, however, have

84. For further information, see the *Criminal Records Review Act 1996*

85. s8(2) *Criminal Records Review Act 1996*

86. *The John Howard Society of Ontario (2014) Help Wanted: Reducing Barriers for Ontario's Youth with Police Records. Ontario: JHSO*

87. s3(1) *Canadian Human Rights Act*

88. Bala, N. (2015). *Changing Professional Culture and Reducing Use of Courts and Custody For Youth: The Youth Criminal Justice Act and Bill C-10*, 78(1) *Saskatchewan Law Review* 127–180

89. Bala, N. (2015). *Changing Professional Culture and Reducing Use of Courts and Custody For Youth: The Youth Criminal Justice Act and Bill C-10*, 78(1) *Saskatchewan Law Review* 127–180

90. Bala, N. (2015). *Changing Professional Culture and Reducing Use of Courts and Custody For Youth: The Youth Criminal Justice Act and Bill C-10*, 78(1) *Saskatchewan Law Review* 127–180

affected criminal records in that the police are now legally required to retain records of certain out of court measures such as warnings and cautions.⁹¹

One of the biggest practical concerns for young people in Canada is the agreement the Canadian government has with the United States to share information on the NRCR with the United States Border Agency. The United States Border Agency is not subject to the access periods set out above and it does not expunge records. This means that a person who has a youth record will, throughout their lifetime, whenever they wish to enter the United States, have that record viewed by the United States Border Agency and it will be a discretionary issue whether they are allowed into the United States.⁹²

Identification of youth and young people accused or convicted of committing a criminal offence

The privacy of young people who are accused of or found guilty of committing a crime is generally protected under Canadian law,⁹³ including pre-charge. The Department of Justice states: 'The rationale for protecting the privacy of young persons through publication bans is in recognition of their immaturity and the need to protect them from the harmful effects of publication so that their chances of rehabilitation are maximised'.⁹⁴ Youth courts are, however, open to the public and when a youth is charged with a crime it is often known within their immediate community.⁹⁵

Subject to the narrow exceptions set out below, it is an offence to publish the name of a young person, or any other information related to a young person, if it would identify that he or she has been suspected of, charged with or found guilty of a crime.⁹⁶ This prohibition on reporting of identifying information about criminal acts committed while a youth continues after the person has turned 18.

Publication is defined in the YCJA as the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means.⁹⁷ The posting of such information using social media such as Facebook or YouTube would fall within the meaning of publication.⁹⁸ Publication of the identity of a young person, a victim or a witness in contravention of the YCJA provisions is a criminal offence which can carry up to two years in custody.⁹⁹

91. For further information about the 2012 amendments to the CYJA go to <http://publiclegalinfo.com/wp-content/uploads/2012/03/Chart3.pdf> (accessed on 5 June 2015)

92. Private communication with Professor Nicholas Bala on 26 June 2015

93. s110 YCJA

94. <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/publi-publi.html> (accessed on 25 May 2015)

95. Bala, N. (2015). *Changing Professional Culture and Reducing Use of Courts and Custody For Youth: The Youth Criminal Justice Act and Bill C-10*, 78(1) *Saskatchewan Law Review* 127–180

96. s110 YCJA

97. s2(1) YCJA

98. Ministry of Justice leaflet, *Publication Bans* (accessed at <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/publi-publi.html> on 25 May 2015)

99. Ministry of Justice leaflet, *Publication Bans* (accessed at <http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/publi-publi.html> on 25 May 2015)

There are a number of exceptions to the general rule regarding a young person's right to privacy under the YCJA including:

- Where the young person has received an adult sentence;¹⁰⁰
- Where a court had made an order permitting publication of information that identifies a young person being sought by the police because it is satisfied that (a) there is reason to believe that the young person is a danger to others; and (b) publication is necessary to assist in apprehending the young person. Such an order expires after five days;¹⁰¹
- Where a judge has lifted a publication ban for a young person who has been given a youth sentence for a violent offence. Judges are required to determine whether the young person poses a significant risk of committing another violent offence and whether the lifting of the publication ban is necessary to protect the public against that risk;¹⁰² and
- Where the young person has requested the ban be lifted and the relevant criteria are fulfilled.¹⁰³

100. s110(2)(a) YCJA

101. s110(4)-(5) YCJA

102. This amendment to s75 YCJA as made by the 2012 Safe Street and Communities Act. Professor Nicholas Bala notes that there are very few situations where all the conditions might be satisfied and there are no reported cases of such orders being made. See Bala, N. (2015). *Changing Professional Culture and Reducing Use of Courts and Custody For Youth: The Youth Criminal Justice Act and Bill C-10*, 78(1) *Saskatchewan Law Review* 127–180

103. S110(3) and 110(6) YCJA

England and Wales

Summary

Although England and Wales has a separate youth justice system, both children's and adult's criminal records are dealt with under a single legal regime. Statutory provisions set down a highly complicated set of 'rehabilitation periods', which vary depending on the sentence, after which convictions are deemed 'spent'. Children's criminal records are, generally, 'spent' in half the time it takes an adult's record to become 'spent'. Once spent, the presumption is that the conviction will not have to be disclosed for most jobs/purposes. There are extensive exceptions to this general rule, however; where these apply, records are liable to be disclosed for indefinite periods, although these can be limited by the 'filtering' provisions (for some checks). The system is complex and confusing and has been subject to much criticism.

Overview

The legal provisions governing criminal records in England and Wales are convoluted, extensive and scattered across a bewildering collection of statute, case law and non-statutory instruments. There is a poor understanding of what actually constitutes a 'criminal record'.¹⁰⁴ People with criminal records, employers and others frequently report the system to be hopelessly difficult to understand and navigate.¹⁰⁵

England and Wales operates a separate youth justice system, although children may be tried in an adult court if charged with certain serious offences or if they are charged together with an adult. The principal aim of the youth justice system is to prevent offending but the child's welfare is an important consideration (the weight to be placed on this consideration and the practical application are the subject of much debate). There are a large number of diversionary measures in place and custody is intended to be a measure of last resort. In recent years, levels of children in custody have fallen significantly. In July 2015, 1,003 children (people below the age of 18) were in custody in England and Wales,¹⁰⁶ as compared to the nearly 3,000 under 18s who were in custody in July 2005.¹⁰⁷

Both children and adults are subject to the same rehabilitation scheme, although children's convictions are generally 'spent' in half the time it takes to spend an adult conviction. Some measures, such as a youth caution, are spent immediately.

The age of criminal responsibility in England and Wales is 10.

104. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*, Maidstone: Winston Churchill Memorial Trust and Unlock

105. Mason, S. (2010) *A Common Sense Approach. A review of the criminal records regime in England and Wales. Report on Phase 1*. London: Home Office

106. Ministry of Justice (2015) *Youth Custody Data: July 2015*. London: MoJ

107. Youth Justice Board (2006) *Youth Justice Annual Statistics 2005/06*. London: YJB

Criminal records

Databases holding information about children accused or convicted of a crime

The main databases holding information on children who come into contact with the criminal justice system are the Police National Computer and local police records. The Police National Database holds wide-ranging 'intelligence', which includes information about under 18s.

Database	Information held	Access
Police National Computer (PNC)	Convictions, cautions, reprimands and warnings for any offence punishable by imprisonment and any other offence that is specified within regulations. It can also access other information such as details of people recently arrested.	All police forces in England and Wales have full access. There is an extensive list of non-police organisations with access, including the Disclosure and Barring Service. ¹⁰⁸
Local police records	Includes non-conviction information such as arrests and allegations, and information about convictions for non-recordable offences.	Police. The police disclose information to the Disclosure and Barring Service for Enhanced checks.
Police National Database	The PND holds records on intelligence, crime, custody, domestic abuse and child abuse, and allows users to search the data records of all UK forces in relation to people, objects, locations and events. It allows the named users to search full data records of all UK forces.	The main user is the police. ¹⁰⁹

Criminal record checks

There are three main criminal record checks available in England and Wales: (i) Basic check; (ii) Standard check; and (iii) Enhanced check.

The Basic check is issued by Disclosure Scotland, and the Standard and Enhanced checks by the Disclosure and Barring Service (DBS). Before an organisation considers asking a person to apply for a Standard or Enhanced criminal record check through the DBS, they are legally responsible for ensuring that they are entitled to submit an application for the job role. The types of positions which may be eligible for Standard or Enhanced checks are contained in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. These can be divided into five broad categories:

- 1. Professions:** e.g. medical practitioners, barristers, accountants, vets and opticians;
- 2. Law & Order:** Those employed to uphold the law or involved in the criminal justice system (e.g. judges, constables, prison officers and traffic wardens);

¹⁰⁸. See Unlock's webpage on criminal record databases at <http://hub.unlock.org.uk/knowledgebase/criminal-record-databases-2/> (accessed on 29 May 2015)

¹⁰⁹. See Unlock's webpage on criminal record databases at <http://hub.unlock.org.uk/knowledgebase/criminal-record-databases-2/> (accessed on 21 October 2015)

3. **Certain Regulated Occupations:** (e.g. firearms dealers, directors of insurance companies, those in charge of nursing homes and taxi drivers);
4. **Health and Social Care:** Those who work with children, those whose work is concerned with the provision of care services to vulnerable adults and those whose work is concerned with the provision of health services (e.g. care home worker, social worker);
5. **National Security:** Those whose work could put national security at risk (e.g. air traffic controllers and certain employees of the Crown).¹¹⁰

Employers that do not fall into these categories may request a Basic check from prospective employees.

The table below, compiled by the charity, Unlock (but with additions made by this report's author),¹¹¹ provides further details of the three main checks:

Type	Basic check	Standard check	Enhanced check
Status	Rehabilitation of Offenders Act (ROA) applies. Spent convictions would not be disclosed on these checks.	ROA does not apply. Spent convictions would be disclosed on this check.	ROA does not apply. Spent convictions would be disclosed on this check.
Legal name	Criminal Conviction Certificate	Criminal Record Certificate	Enhanced Criminal Record Certificate
Cost	£25	£26 (free to volunteers) + fee of the 'Umbrella Body'	£44 (free to volunteers) + fee of the 'Umbrella Body'
Issuer	Disclosure Scotland (under delegated authority from the Disclosure and Barring Service since March 2014)	Disclosure and Barring Service	Disclosure and Barring Service
Who applies	Depends – normally sent to the individual	Registered Body/Umbrella Body – sent to individual	Registered Body/Umbrella Body – sent to individual
What is it for?	Any employment or volunteer position (potentially)	Positions exempt from the ROA by virtue of the Exceptions Order (see above)	Positions exempt from the ROA and listed in regulations made under the Police Act 1997
Types of positions requiring check	Government/civil service positions; Working in airports; Office work; Hospitality; Retail, supermarkets.	Security industry licence; Solicitor or barrister; Accountant; Vet; FCA 'approved person' role; Football stewards; Traffic warden.	Working with children and vulnerable adults; Teacher; Social worker; NHS professional; Carer; Taxi driving licences.

110. <http://hub.unlock.org.uk/knowledgebase/eligibility-criminal-record-checks/> (accessed on 23 September 2015)

111. <http://hub.unlock.org.uk/knowledgebase/types-criminal-record-checks/> (accessed on 3 August 2015)

Type	Basic check	Standard check	Enhanced check
No. per year	1 million (approx.) 20% of total checks	250,000 (approx.) 5% of total checks	3.75 million (approx.) 75% of total checks
Databases searched	Police National Computer; the Scottish Criminal History System; and the Criminal Record Viewer (Northern Ireland Conviction System).	Police National Computer; the Scottish Criminal History System; the Criminal Record Viewer (Northern Ireland Conviction System).	Police National Computer; the Scottish Criminal History System; the Criminal Record Viewer (Northern Ireland Conviction System); police intelligence from local police records, if police deem it relevant.
What it discloses	Only unspent convictions	Unspent and spent convictions and cautions (subject to filtering – see below)	Unspent and spent convictions and cautions (subject to filtering – see below), plus local police intelligence that is considered relevant.

In addition to the Enhanced check, certain employers can request an enhanced DBS check with a check of the 'barred lists'. This includes the same information as the Enhanced check, plus information from the DBS 'barred list'. There are two 'barred lists', one listing individuals unsuitable to work with vulnerable adults, the other listing individuals unsuitable to work with children. People on the barred lists cannot do certain types of works, known as 'regulated activities'. According to the British Government website, 'it's against the law for employers to employ someone or allow them to volunteer for this kind of work if they know they're on one of the barred lists'.¹¹²

An individual can also apply for their own police certificate from the ACRO Criminal Records Office. A Police Certificate is needed if you require a work or residency visa for many countries. The United States, Canada, Australia and others also require a Police Certificate for holiday purposes if you have ever been arrested or convicted of any offence, no matter how long ago it was. Police certificates will include details of all convictions, warnings, cautions and reprimands included on UK police systems, although it doesn't disclose anything that is eligible to be 'stepped down'.

In 2006, the Police introduced a process for 'stepping down' information before it appeared on a criminal records check. A person could apply to the Police to have information 'stepped down' from their Standard or Enhanced check. This was typically in relation to offences that were very old and very minor. The decision was at the discretion of the Chief Constable of each local force. Step-down was stopped in October 2009 after a Court of Appeal decision. Step-down no longer operates in relation to Standard and Enhanced checks but ACRO still use it for Police Certificates.¹¹³

112. <https://www.gov.uk/disclosure-barring-service-check/dbs-barred-lists> (accessed 1 January 2016)

113. Information taken from <http://hub.unlock.org.uk/knowledgebase/retention-deletion-police-records/> (accessed on 21 October 2015)

Rehabilitation and spent convictions

The central piece of legislation for criminal records obtained in both adulthood and childhood is the Rehabilitation of Offenders Act 1974 (the ROA). According to government guidance, the ROA exists 'to support the rehabilitation into employment of reformed offenders who have stayed on the right side of the law'.¹¹⁴

The ROA states that after a certain amount of time, which varies according to the sentence, convictions and cautions are spent. In 2014, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 brought in changes to these time periods, largely reducing them but, in some cases, increasing them, particularly with regards to children. In general, childhood criminal records are spent in half the time of an adult criminal record.

Most cautions and convictions acquired when a person is under 18 eventually become spent. However, if the child is given a sentence of detention lasting over four years or a public protection sentence the conviction will never be deemed to have been spent. The table below provides details of current rehabilitation periods for the majority of childhood criminal records:¹¹⁵

Sentence	Rehabilitation period for children
Custodial sentence of over 4 years or a public protection sentence	Never
Custodial sentence of over 30 months (2 ½ years) and up to and including 48 months (4 years)	3.5 years from the end of the sentence
Custodial sentence of over 6 months and up to and including 30 months (2 ½ years)	2 years from the end of the sentence
Custodial sentence of 6 months or less	18 months from the end of the full sentence
Community Order/Youth Rehabilitation Order	6 months from the end of the Order
Fine	6 months from date of conviction
Conditional discharge/Bind over/Hospital Order/Referral Order/Relevant order	Length of order
Absolute discharge/Youth caution ¹¹⁶	Spent immediately
Youth conditional caution	3 months from date of conviction
Compensation order	Once it is paid in full
Endorsement (imposed by a court)	2.5 years from the date of conviction
Motoring disqualification (imposed by a court)	Length of the disqualification

114. HM Government (2014) *Guidance on the Rehabilitation of Offenders Act 1974*. London: HMSO

115. Information take from HM Government (2014) *Guidance on the Rehabilitation of Offenders Act 1974*. London: HMSO

116. Reprimands and warnings, which were abolished in April 2013, are now treated in the same way as youth cautions. See HM Government (2014)

Usually a job applicant has no legal obligation to reveal spent convictions. If an applicant has a conviction that has become spent which the employer finds out about, the employer must treat the applicant as if the conviction has not happened. A refusal to employ a rehabilitated person on the grounds of a spent conviction is unlawful under the Rehabilitation of Offenders Act (ROA) 1974.

Certain areas of employment are exempt from these rules. Under the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, employers may ask about spent convictions for a large range of jobs including social worker, barrister, traffic warden, football steward, taxi driver, locksmith and roles which involve working with vulnerable children and adults. Requests from employers under these provisions are known as asking an exempted question. When answering, the applicant would have a legal obligation to reveal most spent convictions.

Filtering

In 2013, the Court of Appeal held that the disclosure of all convictions and cautions on a DBS check was disproportionate and incompatible with the right to private life under Article 8 of the Human Rights Act.¹¹⁷ In light of this judgment, in May 2013 the government introduced 'filtering'. The filtering rules affect both what an employer can ask an individual in relation to convictions and cautions and what is released on a Standard or Enhanced DBS certificate. The filtering rules apply only to DBS checks; they do not apply to Police Certificates.

An offence committed in childhood will be removed from a DBS Standard or Enhanced certificate if:

- 5.5 years have elapsed since the date of the conviction; and
- It is the person's only offence; and
- It did not result in a custodial sentence.¹¹⁸

Even then, the offence will only be removed if it does not appear on the list of offences which will never be removed from a certificate. There are over 1,000 offences that cannot be filtered;¹¹⁹ these include sexual offences, offences with a degree of violence (other than common assault), safeguarding offences and drug offences involving supply. If a person has more than one offence, then details of all their convictions will always be included.

A childhood caution will be removed after two years have elapsed since the date of the caution, if it does not appear on the list of offences relevant to safeguarding and if there are no other convictions on the individual's records.¹²⁰

On 22 January 2016, the High Court declared that the rule that anyone who has more than one conviction - regardless of the minor nature of the offences, how long ago they were committed and that person's circumstances at the time - is required to disclose them forever when applying for certain types of work was incompatible with Article 8 of the Human Rights Act (the right to a private and family life). It is possible that the Government will appeal this ruling.^{120a}

Guidance on the Rehabilitation of Offenders Act 1974. London: HMSO

117. *R (on the application of) T -v- Chief Constable of Greater Manchester and others* [2013] EWCA Civ 25

118. *Disclosure and Barring Service (2013) Filtering rules for criminal record check certificates.* London: HM Government

119. See *The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013*; and *Disclosure and Barring Service (2013) List of offences that will never be filtered from a DBS certificate.* London: HM Government

120. *Disclosure and Barring Service (2013) Filtering rules for criminal record check certificates.* London: HM Government

120a. Information taken from press releases issued by Liberty and Unlock at <https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/disproportionate-criminal-records-disclosure-scheme-declared> and <http://www.unlock.org.uk/category/news-media/press-releases-latest-news/> (both accessed on 27 January 2016)

Expungement

Both police records and the Police National Computer retain an individual's criminal record until they reach 100 years of age. It is highly unlikely that an individual would be successful in having their details removed from either source before their 100th birthday.¹²¹

So-called 'soft' police intelligence, which includes any non-conviction information contained on local police records, is held on the Police National Database for a minimum of 6 years and can be retained until the subject's 100th birthday.¹²²

Prevalence of criminal record checks by employers

It is increasingly common practice for employers to carry out background checks, which include a criminal record check, on individuals before giving them a job.¹²³ Most employers will only be entitled to the Basic check but there are many that can or must request a Standard or Enhanced check. Christopher Stacey, Director of Unlock, states that there is now a 'tick-box' mentality amongst employers in England in asking for criminal record information when making recruitment decisions.¹²⁴ This is borne out by the figures: from 1 June 2013 to 1 June 2014, 3,699,575 Enhanced checks and 235,602 Standard checks were issued to employers by the DBS.¹²⁵

The *Equality Act 2010*, the primary legislation governing discrimination laws in the United Kingdom, does not include criminal conviction history as one of the characteristics protected from discrimination by employers. Although it is unlawful under the ROA for an employer not to employ someone, or to dismiss someone because of a spent conviction or caution, unless one of the exceptions apply, in practice it is very difficult to prove that an employer has discriminated on those grounds.¹²⁶ Individuals with childhood criminal records report that they feel their criminal record, whether current or spent, adversely affects their employment prospects.¹²⁷

Identification of children accused or convicted of committing a criminal offence

Children involved in proceedings in the youth court in England and Wales (which are not open to the public) are provided with default anonymity and cannot be identified (other than in anti-social behaviour cases, see below). This anonymity is provided under section 49 of the Children and Young Persons Act 1933, which imposes reporting restrictions on proceedings. Section 49

121. <http://hub.unlock.org.uk/knowledgebase/retention-deletion-police-records/> (accessed on 21 October 2015)

122. Lipscombe, S. and Beard, J. (2014) *Retention and Disclosure of Criminal Records*. London: House of Commons Library

123. Mason, S. (2010) *A Balanced Approach. Safeguarding the public through the fair and proportionate use of accurate criminal record information*. London: Home Office

124. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*, Maidstone: Winston Churchill Memorial Trust and Unlock, p. 15

125. DBS (2014) *Freedom of Information request about the number of criminal record checks issued with filtered information*. Ref. 1204. London: DBS

126. Further information about the limited protections available can be obtained on Unlock's website at <http://hub.unlock.org.uk/knowledgebase/convictions-employment-law-2/> (accessed 22 October 2015)

127. See, for example, p. 51 of Berriew, Lord Carlile of, (2014) *Independent Parliamentarians Inquiry into the Operation and of the Youth Court*. London: IPIOYC

prohibits the name, address, school, or any other information that might lead to the child being identified, from being published in print, broadcast or social media, and applies to all children involved in proceedings, be they victims, witnesses or defendants.

Under section 49, the court may lift anonymity in particular circumstances. If the court is satisfied that it is in the public interest to do so, it may dispense with reporting restrictions when a child has been convicted.¹²⁸ It may also dispense with reporting restrictions if it is satisfied it is necessary to do so to avoid injustice to the child, or to apprehend a child unlawfully at large.¹²⁹ It must consider the welfare of the child when coming to its decision.¹³⁰ The penalty for contravening a section 49 order is a fine.

Children tried jointly with an adult, and those accused of more serious offences, will be tried in an adult court, rather than the youth court. In 2014, there was debate and legal challenge around the law on anonymity in relation to children outside the youth court, and whether such anonymity extended beyond the subject's 18th birthday. The law was changed as a result. Children involved in proceedings outside the youth court have no automatic right to anonymity, however, a court can now impose anonymity on proceedings by applying a reporting restrictions order under section 45 of the Youth Justice and Criminal Evidence Act 1999. In practice, they usually do so at the start of proceedings. and consider lifting an order on conviction usually following an application from the press. A section 45 order prohibits the publication of material that could lead to the identification of a child – whether that child be a victim, witness or defendant, and whether the material is published by print, broadcast or social media. The court must consider the child's welfare when deciding whether to impose or lift a section 45 order. Section 45 of the Youth Justice and Criminal Evidence Act 1999 only provides protection until the subject's 18th birthday.¹³¹ The Act has recently been amended by section 78 of the Criminal Justice and Courts Act 2015, a new section (section 45A) now allows courts to restrict reporting for the lifetime of child victims and witnesses; these new provisions are not available to child defendants.

Due to a legal loophole, there is no means to prevent a child being identified pre-charge. This has led to a number of children being identified in print and social media before they have been charged. The last government said it did not wish to legislate on this matter, but wants press regulation to tackle the issue instead.¹³²

Children in the youth court involved in anti-social behaviour proceedings have no automatic right to anonymity. However, the court can impose reporting restrictions on proceedings via section 39 of the Children and Young Persons Act 1933.

128. s49(4A) Children and Young Persons Act 1933

129. s49(5) Children and Young Persons Act 1933

130. s44 Children and Young Persons Act 1933

131. s45(3) Youth Justice and Criminal Evidence Act 1999

132. House of Lords Hansard, 23 July 2014 : Column 1198

France

Summary

France has a separate system for juvenile justice which focuses on education rather than punishment. The legal principle *droit à l'oubli* (the right to be forgotten) is a strongly held one in France and until 2004, records relating to childhood offences were erased when the individual turned 18. This is no longer the case, although this principle remains deeply ingrained within the legal establishment and the public mentality. Records of all sanctions handed down by the juvenile courts (whether educative, punitive or otherwise) are held on a centralised system, the *Casier Judiciaire National* (National Criminal Records). Educational measures and sanctions imposed on children within the juvenile system are now automatically deleted from the *Casier Judiciaire National* after three years. All other penalties imposed on under 18s can be deleted after a period of three years by decision of the juvenile court once the young person is over 18, providing the court is satisfied that the young person has been rehabilitated.

Overview

France does not have a specific age of criminal responsibility; courts are empowered to make decisions regarding a child's 'moral discernment' and it is possible for children to be prosecuted before they are 10 years old if they are deemed to have sufficient maturity to understand the nature of the suspected act. Only protective, assisting, surveillance or educative measures can be ordered for children found criminally responsible for offences committed when they are under 13 years of age.¹³³ Penal sanctions may be inflicted on children aged 13 and over. Sanctions, particularly custodial sanctions, are used only when the offence is really serious, when the child has been found to have committed a number of offences and when every possible educational measure has been tried.

Children are tried either in the Juvenile Court or in the Juvenile Criminal Tribunal. The latter, which was established in 2012, tries more serious crimes committed by children over 16 years of age. The main piece of legislation affecting juvenile justice dates from 1945: *Ordonnance n° 45-174 du 2 février 1945 relative à l'enfance délinquante* (Ordinance n° 45-174 of 2 February 1945 on juvenile delinquency) established that education should be favoured over punishment, that the juvenile jurisdiction should be specialised, and that judgments should be individualised to the child.

Prior to 2004, all records relating to childhood convictions were erased when the subject reached 18. Changes to the system¹³⁴ were brought in for two main reasons: firstly, the government was taking a more punitive approach to young people who came into contact with the youth justice system; the second reason was more of a practical one; because all offences were previously expunged it did not encourage tribunals to inform the *Casier Judiciaire National* (CJN) (see below) and many offences were not, therefore, being reported to the national authorities by local courts. This was felt to be an issue with national data collection which required correction.

133. European Commission (2013) *Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase – France*. Luxembourg: European Commission

134. Article 769-2 of the Code of Criminal Procedure was repealed by Article 201 of Law No. 2004-204 of 9 March 2004 adapting the justice system to developments in crime

Criminal records

Databases holding information about children accused or convicted of a crime

Criminal history information on children is retained on a number of databases in France. The following list is not comprehensive:-

Database	Information held	Access	Period of retention
Casier Judiciaire National (CJN)	Convictions by criminal courts, including the Juvenile Court and the Juvenile Criminal Tribunal; some decisions made by the commercial courts; certain administrative and disciplinary decisions; judgments ordering deprivation of parental rights; expulsion orders against foreigners; sentences or penalty waivers after adjournment of sentencing; pardons, commutations or reductions of sentences; parole decisions; and sentence suspensions. ¹³⁵	Judicial authorities; public and administrative authorities; individuals; some private employers.	Subject to the rehabilitation rules referred to below.
Le Traitement d'Antécédents Judiciaires (TAJ) (The Judicial History of Treatment)	TAJ was implemented in 2013 to combine the information collected by the police and the gendarmerie. It contains a large amount of personal identifying material, photographs and information about any offence or investigation a person is linked to whether they have been convicted or are suspected of an offence.	Police, gendarmerie, judicial authorities and public authorities in their capacity as employers.	Information is retained for a minimum of 5 years and a maximum of 20 years, although it will continue to be retained if the individual comes to the attention of the database again. It is not possible to apply for early deletion of the data. ¹³⁶
Système de traitement des infractions constatées (Processing System of Infringements)	This is a history file containing police information gathered during proceedings and investigations. It includes significant personal information.	Police and judicial authorities. Individuals have no right of access.	Information is kept on children for a minimum period of 5 years, 10 years for more serious crimes and 20 years for the most serious crimes. ¹³⁷
Local police records	Includes non-conviction information and information about convictions for non-recordable offences.	Police force	Will depend on the local police force.
Special register	Details of all charges and convictions brought against the young person and other facts such as whether they have violated probation or run away from the home they were placed in.	Juvenile courts	Will depend on the local court.

135. Information taken from the Ministry of Justice website at <http://www.vos-droits.justice.gouv.fr/casier-judiciaire-11942/casier-judiciaire-contenu-de-casier-20250.html> (accessed on 19 August 2015)

136. <http://vosdroits.service-public.fr/particuliers/F32727.xhtml> (accessed on 4 June 2015)

137. Information taken from the National Commission for Computing and Liberties website at <http://www.cnil.fr/documentation/fichiers-en-fiche/fichier/article/stic-systame-de-traitement-des-infractions-constataces/> (accessed on 19 August 2015)

Criminal record checks

Public authorities are entitled to vet prospective employees on several of the databases set out above. Most criminal record checks go through the CJN, which is held by the Ministry of Justice. This service is managed by judges and files are updated by specially trained civil servants. Individuals can access their records online. The CJN issues criminal record certificates which are referred to as 'Bulletins'. These Bulletins only contain information held on the CJN¹³⁸ and they are subject to the rehabilitation periods, which are explained below.

Bulletin	Contents	Access
Bulletin 1 (B1)	All convictions including juvenile convictions.	Judicial authorities i.e. judges, courts and prisons. Individuals are not entitled to request a copy.
Bulletin 2 (B2)	Most convictions. Juvenile convictions are prohibited from inclusion on a B2 unless they result in imprisonment of more than 2 months. ¹³⁹	Certain administrative authorities and public services. This Bulletin is generally issued in relation to employment and can be accessed by local and national public services. They are used for roles such as solicitors, teachers and social workers. ¹⁴⁰ Individuals cannot request a B2 and they can be issued without the record holder's knowledge or consent. ¹⁴¹
Bulletin 3 (B3)	The most serious convictions for felony and misdemeanour. It can include juvenile convictions.	The subject of the record or, if they are a minor or an adult under guardianship, their legal representative.

Private employers are unable to access any information directly, although they can ask the individual for a copy of their B3. Individuals are not entitled to request a copy of their B1 which prevents employers accessing most juvenile records through the record holder/prospective employee. There are currently no statutory requirements for employers to obtain criminal record checks for jobs involving work with children or vulnerable adults. There are some statutory requirements for searches to be carried out for jobs relating to finance and security activities.¹⁴²

It is an offence, carrying a fine of €7,500,¹⁴³ for an individual, employer or potential employer to fraudulently obtain someone else's B3 from the CJN.¹⁴⁴

138. Private communication with Professor Martine Herzog-Evans dated 25 June 2015

139. Article 775, Code of Criminal Procedure (Code de procédure pénale) and Ministry of Justice website at <http://www.vos-droits.justice.gouv.fr/casier-judiciaire-11942/casier-judiciaire-contenu-de-casier-20250.html> (accessed on 19 August 2015)

140. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*. Maidstone: Winston Churchill Memorial Trust and Unlock

141. Private communication with Professor Martine Herzog-Evans dated 25 June 2015

142. Private communication with Professor Martine Herzog-Evans dated 25 June 2015

143. Ministry of Justice at <http://www.vos-droits.justice.gouv.fr/casier-judiciaire-11942/casier-judiciaire-contenu-de-casier-20250.html> (accessed on 4 June 2015)

144. Article 781, Code of Criminal Procedure

Deletion of juvenile records

Martine Herzog-Evans, Professor of Law at the University of Reims, France, argues that the legal *principe droit à l'oubli* (the right to be forgotten) is a strongly held one both in the legal system and amongst the population more generally.¹⁴⁵ She further states that the French justice system recognises the link between desistance and criminal records and that it actively seeks to aid the desistance process through the expungement of all or part of the criminal record.¹⁴⁶

Educational, assistive and protective measures and sanctions are automatically deleted from the CJN after three years. All other penalties imposed on juveniles can be deleted from the CJN after a period of three years by decision of the juvenile court once the young person is over 18. The matter may come before the court at the request of the individual, through a prosecutor or automatically. It is free to file an application and young people may be able to access legal aid to cover the cost of an attorney.¹⁴⁷

An individual making the request would need to show that they have 'achieved re-education'. An order for removal will only be made if the court is satisfied that the young person is rehabilitated.¹⁴⁸ These provisions can also apply to criminal records obtained when the young person is 18–21 years old. Once deleted the conviction will not appear on any Bulletin.

Audio-visual recordings of interrogations by the police must be destroyed five years after the end of the proceedings against the child.¹⁴⁹

Young people's knowledge of laws affecting criminal records

There are no statutory requirements to inform young people of their right to a merit-based expungement. It is unknown how aware young people are of their rights, since this question has not been the subject of any study.¹⁵⁰

Policy issues

In 2013, the government stated an intention to review juvenile criminal proceedings, including the Ordinance of 1945. This review has not happened and it does not appear to be on the agenda at the moment. It might be revived depending on the outcome of the next presidential election, which will take place in 2017.¹⁵¹

145. Herzog-Evans, M (2011) *Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance*, *European Journal of Probation* 3(1): 4-19

146. Herzog-Evans, M (2011) *Judicial rehabilitation in France: Helping with the desisting process and acknowledging achieved desistance*, *European Journal of Probation* 3(1): 4-19

147. Private communication with Professor Martine Herzog-Evans dated 25 June 2015

148. Article 770, Code of Criminal Procedure

149. Service-Public.fr website at <http://vosdroits.service-public.fr/particuliers/F1469.xhtml> (accessed on 1 July 2015)

150. Private communication with Professor Martine Herzog-Evans dated 25 June 2015

151. Private communication with Professor Martine Herzog-Evans dated 25 June 2015

Prevalence of criminal record checks by employers

Employers in France tend to only ask for a copy of a criminal record at the 'can foresee hiring the individual stage'. This means that they are not used as part of any filtering' process.¹⁵²

In France, the approach tends to be one of general prohibition from access to criminal records, unless there is a specific law authorising it. Employers would historically only do checks where the law specifically required them to do so.¹⁵³ However, the French Data Protection Agency, CNIL, has reported that requests for checks are increasing.¹⁵⁴

Identification of children accused or convicted of committing a criminal offence

Under French law, any information collected about the young person who is the subject of proceedings is strictly confidential and retained in a folder. Any party to the proceedings who makes information held on this folder available to a third party is liable to a fine of €3,750.¹⁵⁵

The people able to attend the trials of young people are strictly limited to witnesses, close relatives, guardian or legal representative of the minor, members of the Bar and representatives of services or institutions dealing with the children, including probation services.¹⁵⁶

The publication of proceedings of juvenile courts are prohibited in any form. This includes anything which might identify the young person accused of a crime. Violation of this provision is a criminal offence which is punishable by a fine of €15,000.¹⁵⁷ The judgment may be published but it cannot contain the name, or even the initials of the minor. Violation of this provision is also punishable by a fine of €15,000. If the press publishes any details which identify young people who have been accused or convicted of a crime, editors and publishers can be held principally liable for the offence as well as the author.¹⁵⁸ This protection extends past the young person's 18th birthday. What counts is the age at which the alleged offence was committed.¹⁵⁹

152. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*. Maidstone: Winston Churchill Memorial Trust and Unlock, p7

153. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*. Maidstone: Winston Churchill Memorial Trust and Unlock

154. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*. Maidstone: Winston Churchill Memorial Trust and Unlock

155. Article 5-2 of the Ordinance of February 2, 1945, on Juvenile Offenders

156. Article 14 of the Ordinance of February 2, 1945, on Juvenile Offenders

157. Article 14 of the Ordinance of February 2, 1945, on Juvenile Offenders

158. Article 14-1 of the Ordinance of February 2, 1945, on Juvenile Offenders

159. Private communication with Professor Martine Herzog-Evans dated 12 June 2015

Germany

Summary

Germany takes a very liberal approach to the records of young people who come into contact with the criminal justice system. The majority of young people under the age of 21 are dealt with using educative and disciplinary measures which are recorded on a separate register. This register is very limited in terms of access and records are deleted from it when the young person turns 24. For the minority who are given an adult criminal conviction, or a more serious sanction within the sanction system for juveniles, such as imprisonment of more than one year, their records are held on a Central Registry alongside the records of adults. These records are disclosable on employment checks for significant periods of time before they become eligible for removal from certificates and eventually from the Register itself.

Overview

The *Jugendgerichtsgesetz* or Juvenile Court Act (JCA) sets out the justice framework for children who are suspected or convicted of committing a crime as defined by the German Criminal Code.¹⁶⁰ The minimum age of criminal responsibility in Germany is 14. The JCA defines 14–17 year olds as ‘youth’ and 18–21 year olds as ‘young adults’.¹⁶¹

Children above 14 years of age can only be criminally liable if they show sufficiently mature moral and mental development at the time of the offence so that they understand the unlawfulness of their actions and are capable of acting in line with that understanding.¹⁶² A judge can apply the JCA provisions to young adults if they assess that the individual’s personality, circumstances and motives indicate that the offence constituted ‘youth misconduct’. In practice, the JCA is applied to young adults in most situations.¹⁶³

Any case for ‘youth misconduct’ will be tried by a criminal court judge sitting as a youth court judge.¹⁶⁴ These judges would generally, but not always, have specialist training.

The overall aim of the JCA is to educate children and young people and to aid their development with the minimum possible intervention. The primary sanctions of the juvenile court are educational or disciplinary measures.¹⁶⁵ Imprisonment is only used as a last resort.¹⁶⁶ Imprisonment might be deemed necessary because of the ‘dangerous tendencies’ of the offender such that community based sanctions are inappropriate, or because of the ‘gravity of guilt’ i.e. the young person had

160. The Criminal Code sets out punishable offences for both adults and children

161. s1(2) Juvenile Court Act

162. s3 Juvenile Court Act

163. European Commission (2013) Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Germany. Luxembourg: European Commission. There are some exceptions, for example, traffic offences, where young people would nearly always be treated as adults.

164. s33 Juvenile Court Act

165. If these measures are ordered by a judge as part of a sentence after conviction they would be classified as ‘convictions’. If they are imposed by the Public Prosecutor or a judge instead of a conviction, they would be classified as a ‘sanction’. The German system is flexible, allowing the same types of ‘sanctions’ to be used at different stages of the judicial process. The differences in classification can make a difference to process and the severity of the measure but it has no practical effect on the child’s criminal record. Information provided by Christine Morgenstern in private communications dated 3 and 4 December 2015

166. Dünkel, F. (2004) Juvenile Justice in Germany: Between Welfare and Justice: www.esc-eurocrim.org/files/juvjusticegermany_betw_welfar_justice.doc (accessed on 11 June 2015)

committed a particularly serious crime such as murder or aggravated robbery.¹⁶⁷ On the 31 March 2014, 500 under 18s were being held in youth prisons in Germany.¹⁶⁸

Juvenile Records

Databases holding information about children accused or convicted of a crime

The Federal Office of Justice holds and manages the Federal Central Criminal Register (FCCR). The FCCR incorporates the Central Criminal Register, the 'adult' register, and the Register of Youth Offences. It holds judgments of the criminal courts which have become final¹⁶⁹ and foreign criminal convictions handed down against Germans or against foreigners living in Germany.¹⁷⁰

All convictions handed down to under 18s involving a prison sentence, suspended or not, will be included on the FCCR. Only about 16% of all sanctions issued against under 21s are included on this register.¹⁷¹

All other sanctions against youth and young adults handed down under the YCA are listed in the Educative Measures Register (EMR) (*Erziehungsregister*). This Register is also a sub-register of the FCCR. Access is very restricted (see below).

The EMR holds details of the following measures and orders:¹⁷²

- Measures imposed by the juvenile court as a result of a finding of criminal liability;
- Acquittal for lack of maturity;
- Educative and disciplinary measures;
- Certain decisions of the Family Court;
- Waiver of prosecution;
- Lack of enforcement of a youth detention order.

Courts do keep hard copies of files concerning children and young people in storage but they would allow access to these in extremely limited circumstances. If a young person comes before the court for a subsequent offence the court would generally simply rely on the records taken from the FCCR. Local prosecutors keep electronic records of young people who have been prosecuted in their area. Again, these could only be accessed in strictly controlled circumstances. The Federal Central Register Act (see below) does not apply to these records, so there are no statutory requirements regarding their sealing or destruction.

Access

The following authorities have access to the EMR:

- Criminal courts, public prosecutors, authorised prison administration;
- Family courts;

167. Dünkel, F. (2004) *Juvenile Justice in Germany: Between Welfare and Justice*: www.esc-eurocrim.org/files/juvjusticegermany_betw_welfar_justice.doc (accessed on 11 June 2015) and s17(2) Juvenile Court Act

168. Statistisches Bundesamt (2015) *Rechtspflege Strafvollzug – Demographische und kriminologische Merkmale der Strafgefangenen zum Stichtag 31.3.* Wiesbaden: Statistisches Bundesamt at https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafvollzug2100410147004.pdf?__blob=publicationFile. See Table 4a (accessed on 3 December 2015)

169. *Mainly convictions and sentences, but also judgments that found that a person lacks criminal capacity due to mental illness as well as certain rulings of administrative authorities e. g. with regard to decisions that withdraw a business license or not to keep weapons*

170. *This is subject to an assessment entailing a comparison of laws*

171. Morgenstern, C. (2011) 'Judicial rehabilitation in Germany – the use of criminal records and the removal of recorded convictions', *European Journal of Probation* 3(1): 20–35

172. For further details, see s60 Federal Central Register Act (*Gesetz über das Zentralregister und das Erziehungsregister* (Bundeszentralregistergesetz – BZRG))

- Youth welfare courts and authorised youth welfare officer administration for carrying out the educational measures;
- ‘Grace’ authorities for clemency matters (ie an authority which is entitled to grant a pardon);
- Authorities dealing with firearms and explosive permits.¹⁷³

Courts, public prosecution and prison administrations, criminal investigation departments of the police, tax authorities and a number of other specific organisations have unrestricted access to all information on the FCCR.¹⁷⁴

Anyone over the age of 14 is entitled to inspect their own file.¹⁷⁵

Criminal record checks

The Federal Office of Justice issues three types of certificates: the ‘private certificate of conduct’, the ‘extended certificate of employment’ and the ‘certificate of conduct for public purposes’.

The private certificate of conduct

The private certificate of conduct will only be sent to the subject of the record. This certificate discloses information about convictions held on the FCCR not including records held on the ERM.

The extended certificate of employment

Since 2009, all public sector employers are obliged to check their employees, prospective employees and volunteers for work which involves contact with minors.¹⁷⁶ Private employers may ask for this check but they do not have a legal obligation to do so. Employees and prospective employees must produce an ‘extended certificate of employment’ which includes all convictions for sexual offences. Employers have to provide details of the job the check relates to. The certificate will only include details of relevant convictions for sexual offences; details of non-relevant and non-sexual convictions would be removed from the disclosure. Records from the ERM would not be disclosed.

The certificate of conduct for public purposes

It is standard for public sector employers to require a copy of the certificate of conduct for public purposes.¹⁷⁷ The certificate is sent directly to the employer. It is subject to fewer restrictions in terms of content than the private certificate. It would include details of any conviction held on the FCCR but again, it would not include details of ERM records. There is a liberal approach taken, on the whole, to information that is disclosed on these records and minor or non-relevant convictions are often overlooked by employers.¹⁷⁸

173. s61 Federal Central Register Act

174. s41 Federal Central Register Act

175. s42 Federal Central Register Act

176. s30(a) Federal Central Register Act

177. Private communication with Dr Christine Morgenstern on 12 August 2015

178. Private communication with Dr Christine Morgenstern on 12 August 2015

Removal of records from the Registers

All entries on the ERM must be removed when the young person turns 24 years of age unless the young person has been imprisoned and has a criminal record on the FCCR.¹⁷⁹

There is a graduated system of deadlines on expiry of which convictions become first of all banned from inclusion in a certificate of conduct,¹⁸⁰ and are finally removed from the FCCR altogether.¹⁸¹ In Germany rehabilitation periods are generally referred to as 're-socialisation periods'.

The records are deleted (or, if still in hard copy, destroyed) one year after the expiry of the deadlines mentioned below.¹⁸² The legislation is ambiguous because sometimes the word 'delete' is used, sometimes the word 'remove', sometimes the word 'extinguish' (*tilgen*).¹⁸³

Sentence	Ceases to be included on certificates	Removed from Register
For adult convictions: Imprisonment of maximum 3 months or day fines of less than 90 units. For juveniles and young adults if YCA is applied: suspended prison sentences of up to 2 years. For both groups only if no other entry can be found in the records.	Never included, except if sex offences according to sec. 174-180 and 182 of the Criminal Code are involved	5 years
For adult convictions: maximum 90 day units of a fine if other entries in the register exist. For juveniles and young adults if YCA is applied: imprisonment of maximum 1 year.	3 years	5 years (10 years for juveniles and young adults if YCA is applied and conviction is for specified violent offences and results in imprisonment of more than 1 year)
For adult convictions: prison sentence between 3 months and 1 year if suspended.	3 years	10 years
Certain sexual offences under sec. 174–180 and 182 of the Criminal Code if conviction results in imprisonment of more than 1 year (both adults and young people).	10 years	20 years
All other cases	5 years	15 years

179. s63 Federal Central Register Act

180. s34 Federal Central Register Act

181. S46 Federal Central Register Act

182. Table kindly provided by Dr Christine Morgenstern

183. Private communication with Dr Christine Morgenstern on 12 August 2015

Policy issues

There are no proposed reforms to the juvenile justice system in Germany at the time of writing and none are anticipated in the near future.¹⁸⁴

Prevalence of criminal record checks by employers

In 2011, about 40,000 requests for information by courts, police and public prosecution services as well as requests for codes of conduct by private individuals were being processed on a daily basis. More than nine million disclosures were being issued every year.¹⁸⁵

It is very common practice for both public and private sector employers to ask for a criminal record check. A private employer may see a copy of the private or extended certificate if they request it and the individual is willing to show them; private employers have no direct access themselves. In many cases employers take a liberal approach and the record does not affect the person's employment prospects.¹⁸⁶

Employers would never be entitled to details held on the ERM so for most young people their contact with the juvenile justice system would not be disclosable. For those young people who are given an adult conviction their record would be disclosable to employers and this is perceived to create difficulties for people when they come out of prison.

German anti-discrimination laws do not expressly prohibit discrimination on the grounds of criminal history, but depending on the circumstances such a prohibition could be deduced from Article 3 of the German Basic Law (the German constitution).

Identification of children accused or convicted of committing a criminal offence

Proceedings and pronouncements of decisions are not public and the court may exclude the public from the trial of a child.¹⁸⁷ Recording of the hearing through audio-visual means is prohibited, as is publication to the public through TV or radio.¹⁸⁸

There is no legislation to prevent identification of children accused or convicted of committing a criminal offence. Unusually, however, the media self-regulates through the German Press Code. Section 13 of this Code sets out a 'Presumption of Innocence' which states that: 'Reports on investigations, criminal court proceedings and other formal procedures must be free from prejudice. The principle of the presumption of innocence also applies to the press.' The media very rarely publishes information other than the initials of adults suspected or convicted of a criminal offence even when their identities are widely known. Identifying information about under 18s has been reported on rare occasions.

184. Private communication with Dr Christine Morgenstern on 12 August 2015

185. Morgenstern, C. (2011) *Judicial rehabilitation in Germany – the use of criminal records and the removal of recorded convictions*, *European Journal of Probation* 3(1): 20–35

186. Private communication with Dr Christine Morgenstern on 12 August 2015

187. s172(4) *Judicature Act* and s48 *Juvenile Court Act*

188. s169 *Judicature Act*

It is possible that the situation will change given increased use of the internet but there is no public appetite or movement for change in the media driving this at present.¹⁸⁹ There are no penalties for breaching the Code aside from publicity about the breach but the Code is nevertheless generally adhered to even by the tabloid press.

¹⁸⁹ *Private communication with Dr Christine Morgenstern on 12 August 2015*

Italy

Summary

The Italian system seeks to provide an innovative and tolerant approach to youth justice. Records of offences committed when a person is under 18 are held on the Central Criminal Register, but are held separately to adults' records. As a general rule, juvenile records do not show up on criminal records checks, the exception is where a custodial sentence has been imposed. Access to juvenile records is very limited.¹⁹⁰ At the age of 18, all records relating to juvenile proceedings are destroyed unless the young person has been given a custodial sentence, in which case the record is transferred to the general adult criminal register. These records are not eligible for expungement until the person reaches 80 years of age and would appear on criminal records checks until then. Children in Italy rarely receive custodial sentences.

Overview

The juvenile justice procedure in Italy was radically reformed in 1988, leading to what many view as an unusually tolerant system. Young people in trouble with the law are viewed as being primarily in need of help and there is a focus on diversion, decriminalisation and decarceration.¹⁹¹

Article 97 of the Italian Penal Code sets the minimum age of criminal responsibility at 14. Young people between the ages of 14 and 18 may only be held criminally responsible if they are deemed able to understand that their actions constituted criminal behaviour.¹⁹² The Penal Code and the Code of Criminal Procedures is complemented by the Presidential Decree 448 of 1988; together these instruments set out the majority of the law pertaining to minors who come into contact with the criminal justice system.

The juvenile court, which is staffed by specialist judges, has jurisdiction until young people are 25 years old in relation to crimes committed before the person's 18th birthday.¹⁹³ At the age of 25, young people serving custodial sentences are transferred to adult prisons.¹⁹⁴ Judges are assisted in their investigations by judicial police specialising in juvenile justice, social services, educational services and other professionals specialising in issues relating to children.¹⁹⁵

The Italian system has sought to replace traditional structures of juvenile custody 'in favour of a shared taking of charge of children and young adults, which involves various 'actors' (teachers, parents etc.)'.¹⁹⁶ It is based on principles of restorative justice, with a focus on responsibility, the educational value the offence can impart and the minimal intrusiveness of the justice system¹⁹⁷ for the evolving young person. There is an emphasis on not harming the child during criminal

190. Article 19(1), Letter a) of Decree of the President of Republic n. 313/2002 'Consolidated text of laws and regulations relating to court records, the register of sanctions administrative offences and related charges'

191. See, for example, Scalia, V. (2005) *A Lesson in Tolerance? Juvenile Justice in Italy*. *Youth Justice*. 5:1, 33–43

192. Articles 85 and 98 of the Italian Penal Code.

193. *Precautionary measures, alternative measures, alternative sanctions, prison sentences and security measures will be dealt with by the Juvenile Court up to the age of 25 (Article 24, Decree 272/1989). Previously, the Juvenile Court had jurisdiction up to the age of 21 (under Article 24, Decree 272/1989).*

194. Article 24, Decree 272/1989 was amended by Article 5, Decree – Law of 26 June 2014 n.92 converted and modified by Article 5 Law 117/2014.

195. *European Commission (2013) Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase – Italy. Luxembourg: European Commission*

196. *Juvenile Justice Department (2015) Juvenile Justice in Italy. Rome: Ministry of Justice*

197. *Juvenile Justice Department (2015) Juvenile Justice in Italy. Rome: Ministry of Justice*

proceedings and on not disrupting their education so that they can move on from the offence without any lasting negative effect on their mental development.¹⁹⁸

Detention is a measure of last resort and only used when the judge considers that the child poses a threat to society.¹⁹⁹ Most young people are dealt with using alternative measures in order to allow the child to leave criminal processes as soon as possible and to ensure their quick rehabilitation and re-integration into the community.²⁰⁰ The judge may, taking into account the seriousness of the offence and the ‘criminal capacity’ of the minor, refrain from pronouncing a judgment or, if judgment is given, the judge may choose not to pronounce sentence when it is assumed that the minor will refrain from committing further offences.²⁰¹ The young person may be placed with a public authority and the trial suspended. During the period of suspension, the judge will consider the personality of the child and their ability to adapt their behaviour. If the child receives a positive evaluation the charges may be dropped entirely.²⁰²

There are a range of alternative measures available during sentencing for young people who may be liable to imprisonment. These include placement under the supervision of social services,²⁰³ home detention²⁰⁴ and day release.²⁰⁵

When the 1988 legislation came into force there were over 7,000 under 18s in prison in Italy.²⁰⁶ On 30 June 2014, there were 336 accounting for approximately 0.6% of the total prison population.²⁰⁷

Criminal records

Records relating to offences committed when the person was under 18 are held on the central criminal register. Juvenile records are treated separately from those of adults. When the young person turns 18, records relating to custodial sentences are transferred to the general adult criminal register. All other records are deleted (see below).

Access

Access to juvenile records is only allowed to judicial authorities and the subject of the record.²⁰⁸

Criminal record checks

As a general rule, juvenile records will not show up on a criminal record check. The exception to this are juvenile records which resulted in a custodial sentence. These records will be disclosed on a criminal record check after the young person turns 18.

198. *Juvenile Justice Department (2015) Juvenile Justice in Italy. Rome: Ministry of Justice*

199. *European Commission (2013) Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Italy. Luxembourg: European Commission*

200. *European Commission (2013) Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Italy. Luxembourg: European Commission*

201. *Department of Juvenile Justice and Community website at http://www.giustizia.it/giustizia/it/mg_2_5_4.wp (accessed on 14 August 2015) and Article 169 Italian Penal Code*

202. *Article 28, Presidential Decree 448/88. Other measures are also available including judgment of not proceeding for irrelevance of fact. See Article 27, Presidential Decree 448/88.*

203. *Article 47 Law 354/75*

204. *Article 47-ter Law 354/75*

205. *Articles 48-50 Law 354/75*

206. *Meringolo, P. (2012) Juvenile Justice System in Italy: Researches and interventions. Universitas Psychologica, 11(4), 1081–92*

207. *International Centre for Prison Studies website at <http://www.prisonstudies.org/country/italy> (accessed on 14 August 2015)*

208. *Articles 21-23-28 of the Consolidated Law 313/2002*

Criminal record checks are provided by the Criminal Record Bureau at the Ministry of Justice. Applications can be made through local Judicial Records Offices which are attached to local juvenile courts.

Judicial Records Offices issue three types of certificate:

- General certificate: this states criminal, civil and administrative decisions that have become final;
- Criminal certificate: this states criminal convictions that have become final;
- Civil certificate: this states measures taken affecting a person's capacity as well as judicial decisions in bankruptcy proceedings taken before 1 January 2008, and deportation orders and their relevant appeals.

The certificate can be requested by:

- The person concerned, or by someone delegated by them;
- A public administration or authority/company managing a public utility or service, if they need the certificate for the performance of their activities, providing the record holder has turned 18;²⁰⁹
- The criminal judicial authorities, which access it directly; and
- The defence counsel of the victim or witness of the offence.²¹⁰

It is also possible to apply for a certificate of pending charges through local Prosecutors' Offices. None of the above would include information on juvenile records, except custodial records, which will only show up after the subject is 18 years of age.

Expungement

Records of judicial proceedings which do not result in a custodial sentence are deleted when the young person turns 18 even if the young person has offended again prior to their 18th birthday. Records relating to legal pardons are deleted when the individual is 21.²¹¹

Records which relate to custodial sentences, even if conditionally suspended, are not deleted until the individual is 80 years old.²¹²

Prevalence of criminal record checks by employers

From 6 April 2014, employers have been statutorily required to obtain a criminal record from prospective employees for any job that involves direct contact with children.²¹³ Failure to do so carries a penalty of 10,000 to 15,000 euros. Some other professions may also require that you have no previous criminal convictions.

There are no laws preventing discrimination on the basis of having a criminal record.

209. Article 28 of the Consolidated Law 313/2002

210. Authorisation of the court would have to be sought under Article 22 of the Consolidated Law 313/2002. Information taken from the Ministry of Justice's website at http://www.giustizia.it/giustizia/it/mg_3_3_2.wp?tab=e (accessed on 30 June 2015)

211. European Commission (2013) *Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase – Italy*. Luxembourg: European Commission

212. Article 5 of the Consolidated Law 313/2002

Identification of children accused or convicted of committing a criminal offence

One of the principles of the Italian juvenile justice system is that of de-stigmatisation. It is recognised that judicial proceedings may have a negative impact on the social image of the child. In order to prevent this, there are legal protections in place to protect the child's anonymity. The law prohibits publication or broadcasting of any information about the identity of the child,²¹⁴ trials are not open to the public and criminal records are deleted when the child turns 18.²¹⁵ Trials may be opened to the public if the young person is 16 (providing there are no co-defendants under that age) and only at their request and in their interests.²¹⁶ If the public are allowed to attend hearings, images of defendants under the age of 18 can be published and otherwise disseminated once the trial has commenced.²¹⁷ Once the young person turns 18 information may only be disclosed with their consent. Italian experts note that it would be absurd to allow information to be disseminated after the young person's 18th birthday given that their criminal record is destroyed at this point.²¹⁸

213. Article 25-bis Legislative Decree of 4 March 2014, n.39 'Implementation of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography'

214. Article 13 Presidential Decree 448/1988

215. European Commission (2013) Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase – Italy. Luxembourg: European Commission

216. Pesarin, S. (undated) *Juvenile Justice in Italy*. Rome: Department of Juvenile Justice, Ministry of Justice

217. Article 13 Presidential Decree 448/1988

218. Giostra G. eds (2009) 'Il processo penale minorile. Commento al D.P.R. 448/1988, Giuffrè, Milano, 138; Marchetti M.R., Sub art. 13. Divieto di pubblicazione e di divulgazione', in Chiavario M eds (1994), *Commento al codice di procedura penale. Leggi collegate. Il processo minorile*. UTET, Torino, 145

New Zealand

Summary

Most under 17s who come into contact with the criminal justice system in New Zealand are diverted from the courts. The records associated with these alternative measures are not classified as 'criminal records' and would be held only by local agencies. Records relating to most of the measures handed down by the Youth Court, apart from an absolute discharge, are held centrally at the Ministry of Justice. They would not be disclosed on a criminal record check but a child or young person would have to answer 'yes' if asked if they had ever been charged with an offence. There is no provision for sealing or expungement of these 'records of behaviour' as they are called. Only a very small number of children and young persons will receive an adult conviction or sentence, which carries with it a 'conviction record'. It is estimated that the numbers of children and young persons who receive this kind of criminal record annually are low, certainly less than 100. These would be disclosed on a criminal record check until and unless they became spent under New Zealand's spent convictions scheme.

Overview

New Zealand operates a youth justice system that is separate and distinct from the adult system. The legal framework is largely contained within the *Children, Young Persons, and Their Families Act 1989* (the CYPFA). The CYPFA applies to children and young persons between the ages of 10 and 16, 10 being the age of minimum criminal responsibility.²¹⁹ Most children and young persons are dealt with through alternative measures, such as police diversion and Family Group Conferences, and diverted from the courts.

Provision is made for two regimes, depending on the age of the individual: the child offending process for 10 to 13 year olds and the youth justice process for 14 to 16 year olds.²²⁰ Young people aged 17 and over are dealt with under the adult system. 10 and 11 year olds may be prosecuted in the High Court (i.e. the adult court) for homicide and 12 and 13 year olds in the Youth Court for specified serious and persistent offending.²²¹ For children aged 10 to 13, the *doli incapax* presumption requires the prosecution to prove that they knew the act or omission was wrong or that it was contrary to law.²²² Custodial measures are used as a last resort.

Criminal records and records of behaviour

The youth justice system is based on principles of diversion, decarceration, acknowledgement of victims' interests and needs and encouragement of the input of family and community.²²³ There is recognition of the damaging effect of a criminal record and except in the more serious cases, children and young people who come into contact with the criminal justice system are dealt with

219. s21, *Crimes Act 1961*. Prosecution of children aged 10 to 11 is limited to murder and manslaughter.

220. The *Children, Young Persons, and Their Families Act 1989* (CYPFA) defines a 'child' as a boy or girl under the age of 14 years and a 'young person' as a boy or girl of or over the age of 14 years but under 17 years; but does not include any person who is or has been married; see s2.

221. s272 CYPFA

222. s198 CYPFA and s22 *Crimes Act 1961*

223. Lynch, N. (2012) 'Playing catch up? Recent reform of New Zealand's youth justice system'. *Criminology & Criminal Justice*, 12(5), 507–526

through out of court alternative measures which do not carry a criminal record. Between 2001-2010, this accounted for approximately 80% of cases.²²⁴

Most prosecutions of 16 year olds and under are dealt with in the Youth Court. The situation for many young people who appear before the Youth Courts in terms of their criminal records is complicated. The vast majority of outcomes handed down by the Youth Court will go on a young person's 'record of behaviour', but they are not 'criminal convictions'.²²⁵ Any order made under s283 of the CYPFA (which lists most of the formal sanctions available to the Youth Court) is recorded at the Ministry of Justice. These measures will not be included on a criminal record check²²⁶ but they can be taken into account by judges if the person is sentenced in the adult court when they are older. The child or young person would have to answer 'yes' if asked if they had ever been charged with an offence.²²⁷ In the calendar year 2014, 615 under 17s were given a s283 order.²²⁸

Youth Courts can award an absolute discharge,²²⁹ in these instances children and young people would be able to legally say that they had never been charged with an offence. This affects approximately 50% of cases.²³⁰

Children and young people who are transferred to the District or High Courts for sentencing²³¹ and anyone aged 17 or over who is convicted of a crime would also receive an adult sentence which carries with it an adult criminal record. This is the only order in the Youth Court that acts as a criminal conviction for the purposes of the young person's record.²³² In 2014, 48 young people aged 16 and under were given an adult sentence.²³³

Overall, with the high rates of diversion and the large proportion of children and young persons being awarded an absolute discharge by the Youth Courts, the numbers of under 17s actually getting a conviction, and therefore a criminal record, each year are very low, probably less than 100 each year.²³⁴ The impact on these young people of having a criminal record is, however, far-reaching.

Databases holding information about children accused or convicted of a crime

Criminal history information is held by the Ministry of Justice (MoJ) and the New Zealand Police Vetting service as well as by Youth Courts, local police forces and other agencies who come into contact with the children and young people.

Access to records of behaviour

Records of behaviour can be accessed by MoJ staff, judges, the Police Prosecution Service and Crown Prosecution staff.

224. Ministry of Justice (2012) *Trends for Children and Youth in the New Zealand Justice System 2001-2010*. Auckland: MoJ

225. *Timo v Police* [1996] 1 NZLR 103 (HC)

226. <http://www.justice.govt.nz/courts/youth/about-the-youth-court/> (accessed on 9 June 2015)

227. *Hartley v State Insurance Ltd* (unreported) High Court New Plymouth Nicholson J NP214/98, 11 November 1999

228. <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7361> (accessed on 21 October 2015).

229. s281(2) CYPFA

230. <http://www.justice.govt.nz/publications/global-publications/c/child-and-youth-offending-in-new-zealand-2001-2010> (accessed on 3 July 2015)

231. s283(o) CYPFA

232. Statistics New Zealand's webpage explains the different types of orders available to the Youth Court at http://www.stats.govt.nz/tools_and_services/nzdotstat/tables-by-subject/child-youth-prosecution-tables-calendar-year/info-about-data/order-types.aspx (accessed on 20 August 2015)

233. Ministry of Justice factsheet, *Trends in Child and Youth Prosecutions* at <http://www.justice.govt.nz/justice-sector/documents/trends-in-child-and-youth-prosecutions.pdf> (accessed on 20 August 2015)

234. Private communication with Dr Nessa Lynch dated 5 July 2015

Criminal record checks

MoJ checks

The MoJ issue copies of ‘criminal conviction histories’. These include a list of criminal and traffic convictions and sentencing from court appearances in adult courts. They do not include any Youth Court measures or court appearances in the District Court which resulted in a not guilty verdict (and do not include the vast majority of outcomes handed down by the Youth Court – only those where an adult sentence was imposed are included). Applications can only be made by the subject of the record or by third parties who have the written permission of the record holder. The checks would reveal the conviction history, the date of the offence, the sentence imposed, the location of the court and details of the offence itself.²³⁵

The Criminal Records (Clean Slate) Act 2004 applies to these checks. Anyone fulfilling the criteria (which are set out below) will not have their conviction shown on the criminal conviction record.

Police Vetting Service

The Police provide a vetting service for approved organisations whose staff care for children, older people, people with special needs or other vulnerable members of society. There is a statutory requirement for employers to obtain criminal record checks for employees who will be working with vulnerable children.²³⁶

Individuals cannot apply but they must give written permission to authorise a search of the MoJ database. There are no statutory guidelines controlling these disclosures and information released by the Police about the person being vetted may include:

- Conviction history;
- Non-conviction information, including charges that did not result in a conviction;
- Driving demerit points or suspension of licence;
- Family violence information;
- Any interaction with Police, including as a victim; and
- Information about violent or sexual behaviour that did not result in a conviction.

The Criminal Records (Clean Slate) Act 2004 (the ‘Clean Slate Act’) applies to the Police Vetting Service, although individuals are entitled to apply to have information released that would otherwise have been concealed under the Act.²³⁷ They may be required to do this if applying for certain jobs that require full disclosure, such as the police or army.

New Zealand laws prevent the Police Vetting Service from releasing records of Youth Court orders relating to children and young persons between the ages of 10 and 16 as part of vetting. If someone under 17 is sent to the adult court (District Court) for sentencing then that result could potentially be released but this would be highly unusual. Until very recently, the Police have not carried out vetting checks on persons under 17 years. Checks on under 17s are now being carried out but the above restrictions still apply and information about under 17s would only be released if they had been sentenced in the District Court.²³⁸

235. Lynch, N. (2013) ‘A Statutory Vetting Scheme for the Children’s Workforce in New Zealand: Rights, Responsibilities and Parameters’. 44 (3/4) *Victoria University of Wellington Law Review*, pp. 439–558

236. *Under the Vulnerable Children Act 2014*

237. s19(3), *Criminal Records (Clean Slate) Act 2004*

238. Information provided by New Zealand Police Vetting Services in a private communication dated 29 June 2015

Rehabilitation periods

There is no statutory provision for sealing or expungement of records of behaviour.

The Clean Slate Act allows individuals with criminal records to conceal their convictions in the majority of cases after seven years have passed. The rules are the same whatever the age at which the offence was committed. These provisions are not available to people who have had a prison sentence imposed on them; they will always have to disclose their record throughout their lifetime. The Act would apply very infrequently to a record imposed on a young person aged 16 or under.²³⁹

Where applicable, the Clean Slate Act provisions are automatically applied without any requirements on the individual to initiate the process. For the provisions to apply to an individual's record you must have:

- No convictions within the last seven years;
- Never been sentenced to a custodial sentence e.g. imprisonment, corrective training, borstal;
- Never been ordered by a Court following a criminal case to be detained in a hospital due to a mental condition, instead of being sentenced;
- Not been convicted of a 'specified offence' (e.g. sexual offending against children and young people or the mentally impaired);
- Paid in full any fine, reparation, or costs ordered by the Court in a criminal case;
- Never been indefinitely disqualified from driving under section 65 Land Transport Act 1998 or earlier equivalent provision.²⁴⁰

If all the requirements are met convictions will not be disclosed on criminal record certificates.

Records are not deleted; New Zealand does not provide for expungement of conviction records under any circumstances. The system is described as an 'all or nothing' regime; an individual must meet all of the criteria in order to become eligible, and the record can become unconcealed in the event of a subsequent conviction.²⁴¹

There are specific exceptions where a complete criminal record is required.²⁴² The Clean Slate Act does not apply to these exceptions. They include:

- If the person applies for certain types of employment, including the police, prison or probation officer, national security position etc;
- For the investigation and prosecution of further offences; and
- If the person's criminal record is relevant in any criminal or civil proceedings.

Prevalence of criminal record checks by employers

The number of vetting requests received by the New Zealand Police Vetting Service in 2012 was around 425,000. Applications have climbed steadily over the last few years and are predicted to

239. The Clean Slate Act could theoretically apply if a non-custodial sentence was handed down by the District Court when a young person was transferred under s 283(o), where a jury trial took place in the District Court or where the Youth Court jurisdiction was refused or District Court elected. Private communication with Dr Nessa Lynch dated 5 July 2015

240. s7 Criminal Records (Clean Slate) Act 2004

241. s8 Criminal Records (Clean Slate) Act 2004

242. s19 Criminal Records (Clean Slate) Act 2004

reach approximately 530,000 this year.²⁴³ Checking by employers is not yet as prevalent as it is in England, for example, but it is standard for some jobs such as any professional jobs or those related to security.

There are no laws preventing discrimination on the grounds of criminal history.

Policy issues

The last five years has seen a more punitive approach to the youth justice system in New Zealand, with the introduction of legislation which significantly lowered the age of prosecution for a number of offences in order to deal with 'serious and persistent 12 and 13 year old offenders'.²⁴⁴ This approach has been criticised as being 'populist politics', introduced to placate a section of the population whose view of the dangers of young people has been distorted by the media.²⁴⁵ In spite of this, transfers to the District Court have actually fallen significantly because of the availability of broader orders in the Youth Court. As such, fewer children and young people are having disclosable criminal records imposed on them.²⁴⁶

Identification of children and young persons accused or convicted of committing a criminal offence

The majority of under 17 year olds who are prosecuted will have their cases heard in the Youth Courts. The Youth Court is not open to the public; the CYPFA contains a list of those people allowed to attend a hearing, which includes the media.²⁴⁷ Under the CYPFA, publication of proceedings is only allowed with the permission of the presiding judge.

The Ministry of Justice Media Centre states that the Youth Court 'is keen to adopt an open approach to publication and will generally take the least restrictive approach necessary, consistent with the principles of the Act and subject to the interests of a fair trial'. It goes on to say, 'It should be noted that, in making this decision, the welfare and interests of the young person shall be the first and paramount consideration'.²⁴⁸

Even if the media is given leave to report on proceedings, they are never allowed to publish, nor does a judge have the discretion to allow them to publish, any information that could lead to the identification of the child or young person.²⁴⁹ Contravention is punishable by a \$2,000 fine for an individual or a \$10,000 fine for an organisation.²⁵⁰

243. Information provided by New Zealand Police Vetting Services in a private communication dated 29 June 2015

244. Lynch, N. (2012) 'Playing catch up? Recent reform of New Zealand's youth justice system'. *Criminology & Criminal Justice*. 12(5), 507–526

245. Wilson, H. (2011) *Swings and Roundabouts: Evaluating the Children, Young Persons and Their Families (Youth Courts Jurisdictions and Orders) Amendment Act 2010*, s14. 42 *Victoria University of Wellington Law Review*

246. Lynch, N. (2013) 'Contrasts in Tolerance' in a *Single Jurisdiction: The Case of New Zealand*. *International Criminal Justice Review*, 23: 217–32

247. s329 CYPFA

248. <http://www.justice.govt.nz/publications/global-publications/m/media-guide-for-reporting-the-courts-and-tribunals-edition-3.1/5-0-courts-with-special-media-provisions/5-5-youth-court> (accessed on 9 June 2015)

249. s438 CYPFA

250. s438 CYPFA

Most cases dealt with by way of prosecution in the Youth Court will have a youth justice Family Group Conference at some stage during the case's progress. The Family Group Conference is a formal meeting for members of the family/whānau, the young person and the victim to decide how the young person can be held accountable and encouraged to take responsibility for their behaviour. The CYPFA prohibits the publication of any report of the proceedings of a Family Group Conference or the identification of any participant in the Conference.²⁵¹ Contravention is punishable by the same fines as above.

It is almost certain that any child tried for homicide, or any young person who is tried in the adult courts will have their privacy protected during the trial²⁵² but this protection is not automatic on conviction.²⁵³ A recent Court of Appeal decision put permanent name suppression in place for a 14 year old convicted of manslaughter, citing *inter alia* the United Nations Convention on the Rights of the Child.²⁵⁴

251. s38 CYPFA

252. Private communication with Dr Nessa Lynch dated 29 June 2015

253. See, for example, the case of Bailey Kurariki, 'New Zealand's youngest killer'

254. *DP v R* [2015] NZCA 476

Northern Ireland

Summary

Northern Ireland operates a separate youth justice system with most children being tried in a youth court. Emphasis is placed on diversion and rehabilitation and it is very rare for a child to be given a custodial sentence. However, many diversionary and rehabilitation measures result in a criminal record, even those handed out by the police, such as warnings and cautions. These records are stored alongside adult information on Northern Ireland's Causeway System. Such records have not been disclosed in the past by the criminal record checking service, *Access NI*, but it is possible that they could be, on some checks, in the future.

If a child is found guilty in a youth or adult court the record of their conviction is subject to disclosure on criminal record checks. A standard rehabilitation regime applies to both juvenile and adult records (conviction and non-conviction), although it is generally the case that children's records are spent in half the time it takes to spend an adult record. There are many exceptions to the general rules, though, exacerbating the complexities of the system. It has been reported that there is a widespread lack of understanding about criminal records amongst young people and the professionals that work with them.²⁵⁵

There is currently no policy on the retention of criminal records in Northern Ireland, which means that records are never deleted.

Overview

In common with the rest of the United Kingdom, youth justice in Northern Ireland is subject to a complex mix of criminal law, public and private provisions, some shared with other United Kingdom nations and others specific to Northern Ireland. We have found conflicting information exists on the law in Northern Ireland, and so what follows is our best understanding of the law and policy at this time.

The framework for Northern Ireland's youth justice system is provided by Part 4 of the *Justice (Northern Ireland) Act 2002* (the 2002 Act). If a young person is charged with an offence they will usually appear before a youth court. If charged with a very serious offence they may have to appear in a Crown Court, rather than a youth court. This might happen if a case involves violent offences (including murder, attempted murder, serious sexual offences and robbery); offences that, if the young person were an adult, could be heard in a Crown Court; and cases sent to the Crown Court from youth courts for sentencing.²⁵⁶

In accordance with the principles of the 2002 Act, youth courts primarily dispose of cases using rehabilitative and restorative justice measures and custodial sentences are now extremely rare for children in Northern Ireland.²⁵⁷ Any measure imposed by a youth court will be recorded on a criminal record. Even diversionary measures, such as informed warnings and restorative cautions given by the police, carry with them a criminal record. Such records are not routinely disclosed on the Standard criminal record checks but there is a possibility of disclosure.

255. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

256. NI Direct website at <http://www.nidirect.gov.uk/youth-court> (accessed on 24 September 2015)

257. European Commission (2013) *Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase* –

Many children are ordered by the youth court to attend Diversionary Youth Conferences. If the Conference is deemed to be successful (for example, a plan is agreed with the young person that can include arrangements for an apology, compensation, service for the community, restrictions on conduct or whereabouts, or involvement in programmes, for example, alcohol dependency), the case does not proceed to adjudication. A case that does not proceed to adjudication is not routinely disclosed on records checks. If a child is found guilty in a youth or an adult court they will have a conviction record that will be subject to the rehabilitation periods set out below.

Most young people for whom there is a finding or admission of guilt in court are ordered to attend a court-ordered conference. These orders are only made with the young person's agreement to being referred. Referrals cannot be made in cases of murder; in other serious cases the court has discretion as to whether to refer. If the court decides not to refer reasons must be given in open court.²⁵⁸

A child is defined as anyone under the age of 18.²⁵⁹ Children are capable of criminal responsibility and, therefore, of acquiring a criminal record, from the age of 10.

The principal aim of the youth justice system in Northern Ireland is to protect the public by preventing offending by children,²⁶⁰ although the 2002 Act does require professionals to have regard to the welfare of the children who come into contact with the system with a view (in particular) to furthering their personal, social and educational development.²⁶¹

Criminal records

Databases holding information about children accused or convicted of a crime

Since 2002, data sharing of criminal intelligence has been managed through the Causeway System. The following organisations contribute their data to the system: the Police Service of Northern Ireland; Forensic Science Northern Ireland; the Public Prosecution Service; Northern Ireland Courts and Tribunals Service; Northern Ireland Prison Service; and Probation Board for Northern Ireland. The data can be accessed electronically through the Criminal Record Viewer. Childhood criminal history information is held alongside that of adults.

Criminal record checks

In Northern Ireland, criminal record checks are administered by *AccessNI*. This organisation was set up in 2008 to implement a new statutory framework for the disclosure of criminal history information for employment purposes.²⁶²

AccessNI issues certificates called 'disclosures'. They provide three types of disclosure:

England, Wales and Northern Ireland. Luxembourg: European Commission

258. Information taken from the Youth Justice Agency Youth Conference Service website at http://www.youthjusticeagency.cyni.gov.uk/youth_conference_service/about_us/background/types_of_conferences/ (accessed on 22 October 2015)

259. s53(6) *Justice (Northern Ireland) Act 2002*

260. s53(1) *Justice (Northern Ireland) Act 2002*

261. s53(3) *Justice (Northern Ireland) Act 2002*

262. This was implemented in response to the *Bichard Enquiry* which reviewed the events leading up to the murders of Holly Wells and Jessica Chapman by a caretaker at a local school in Soham, England; see Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

Type of Disclosure	Information included	Access
Basic	Unspent convictions or states that there are no convictions.	Subject of the record. Employers can ask individuals to provide a Basic check during the recruitment process.
Standard	Spent and unspent convictions, informed warnings and other non-court disposals from the Police National Computer (England).	Only available where the position or role in question is exempt from the <i>Rehabilitation of Offenders (NI) Order 1978</i> . An individual cannot apply for a Standard check. An application for a Standard check must be counter-signed by an <i>AccessNI</i> registered organisation.
Enhanced	The same information as a Standard check as well as a check of police records held locally and, for positions working with children and vulnerable adults, checks may include information held by the Disclosure and <i>Barring Service</i> (England).	Enhanced checks are normally required where the applicant will work or volunteer in a role providing services to or having close and regular supervision of children and / or vulnerable adults. An individual cannot apply for an Enhanced check. An application for an Enhanced check must be counter-signed by an <i>AccessNI</i> registered organisation.

Employers in Northern Ireland can also make an application directly to the *Disclosure and Barring Service* in England.

Between April 2011 and April 2014, *AccessNI* did not routinely disclose diversionary disposals on certificates, such as cautions, warnings and Diversionary Youth Conferences. Since April 2014, such disposals are now considered for disclosure on Standard and Enhanced checks.²⁶³ This has been viewed as particularly problematic for children who may not have been fully aware of the implications when they agreed to the disposal.²⁶⁴ *AccessNI* are unable to provide details of how many issued disclosure certificates include information about childhood criminal convictions.²⁶⁵

AccessNI manually removes convictions from Basic applications, using guidance which indicates the convictions which are spent and when they become spent.²⁶⁶

Rehabilitation periods

The *Rehabilitation of Offenders (Northern Ireland) Order 1978* allows for convictions to become 'spent' after defined rehabilitation periods subject to the exceptions set out in the *Rehabilitation of Offenders (Exceptions) Order (Northern Ireland) 1979*. Spent convictions will not be disclosed on Basic checks by *AccessNI*.

The table below sets out some of the rehabilitation periods that can apply to childhood criminal records; in general, they are half those applicable to adults' records. Time starts running from the date of the conviction for which the sentence was imposed unless stated otherwise.²⁶⁷

263. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: *Niacro*

264. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: *Niacro*

265. Information provided by *AccessNI* on 30 June 2015 in response to a request for information

266. Information provided by *AccessNI* on 30 June 2015 in response to a request for information

267. Unless otherwise indicated, time periods are contained within Article 6, *Rehabilitation of Offenders (Northern Ireland) Order 1978*

Sentence	Rehabilitation period for young people aged under 18 when convicted
Life imprisonment	Never
A sentence of imprisonment exceeding 30 months	Never
A sentence of imprisonment or corrective training for a term exceeding six months but not exceeding thirty months	5 years
A sentence of imprisonment for a term not exceeding six months	3.5 years
Caution	2 years ²⁶⁸
Diversionsary Youth Conference	2 years from the date it is accepted ²⁶⁹
Court ordered Youth Conference Order ²⁷⁰	1 year after the order ceases or ceases to have effect
Absolute discharge	6 months

Filtering

In 2014, the Northern Ireland Executive introduced a filtering scheme.²⁷¹ The scheme allows for the removal of certain old and minor convictions, and other non-conviction disposals, such as cautions and informed warnings, from disclosure on Standard and Enhanced criminal record certificates.²⁷² Childhood convictions are filtered after five and a half years (half the time applicable to adult convictions); cautions received when under 18 are filtered after two years (again, half the time applicable to adult records); Diversionsary Youth Conferences after two years; and informed warnings after one year (for both adults and those aged under 18).²⁷³

Filtering is not available for custodial sentences or if the person has reoffended. There is a list of 1,190 specified offences which will never be filtered from a person's record.²⁷⁴ A caution, restorative caution, Diversionsary Youth Conference or informed warning is always disclosed if it is for a specified offence.

268. AccessNI website at <http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/accessni-criminal-record-checks/accessni-filtering.htm> (accessed on 18 December 2015)

269. AccessNI website at <http://www.nidirect.gov.uk/index/information-and-services/crime-justice-and-the-law/accessni-criminal-record-checks/accessni-filtering.htm> (accessed on 18 December 2015)

270. An order made under Article 36J, Criminal Justice (Children) (Northern Ireland) Order 1998

271. This was in response to the proposals set out in the Mason Review (2011, 2012) and the Supreme Court judgement, *R on the application of T, JB and AW v Chief Constable of Greater Manchester, Secretary of State for the Home Department and Secretary of State for Justice*

272. Department of Justice (2015) Draft Guidance for the Operation of the Criminal Records Filtering Review Mechanism. Belfast: DoJ

273. Department of Justice (2015) Draft Guidance for the Operation of the Criminal Records Filtering Review Mechanism. Belfast: DoJ

274. AccessNI list of offences which will never be filtered from a Standard or Enhanced Criminal Record Certificate – August 2015 at <http://www.nidirect.gov.uk/accessni-list-specified-offences.pdf?rev=4> (accessed on 18 December 2015)

The following table sets out the impact that the filtering scheme has had on all (i.e. relating to both adult and childhood criminal records) certificates issued between its launch, on 14 April 2014, and 31 March 2015. A total of 105,999 Standard and Enhanced certificates were printed during this period.²⁷⁵

Type	Certs with information reviewed	Certs information filtered	Certs convictions filtered	Certs cautions filtered	Certs both filtered
Standard	983	193	65	122	6
Enhanced	12,691	2,994	1,462	1,496	37

The NI Executive is introducing a mechanism, which is due to commence on 1 January 2016,²⁷⁶ which will enable individuals to seek a review (in certain circumstances) where a conviction or disposal has not been filtered. The review will be conducted by someone independent of AccessNI and the government using statutory guidance. Information may be removed if the independent reviewer is satisfied that disclosure would be disproportionate and that the removal of the information would not undermine the safeguarding or protection of children and vulnerable adults, or pose a risk of harm to the public.²⁷⁷

Expungement of records

There is currently no policy on the retention of criminal records in Northern Ireland, which means that records are never deleted.²⁷⁸

Availability of information regarding criminal records and knowledge of rights amongst young people

The Youth Justice Review of 2011 warned that young people were consenting to disposals without being aware that they would appear on Enhanced criminal record checks.²⁷⁹ A recent report commissioned by the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) highlighted the concerns of many agencies over lack of knowledge regarding criminal records amongst young people. This lack of awareness was, the report noted, exacerbated by confusion and lack of understanding about the system (particularly the filtering system) amongst

275. AccessNI list of offences which will never be filtered from a Standard or Enhanced Criminal Record Certificate – August 2015 at <http://www.nidirect.gov.uk/accessni-list-specified-offences.pdf?rev=4> (accessed on 18 December 2015)

276. Department of Justice (2015) *Draft Guidance for the Operation of the Criminal Records Filtering Review Mechanism*. Belfast: DoJ

277. For more information on filtering and the review mechanism see the NI Executive's *Draft Guidance for the Operation of the Criminal Records Filtering Review Mechanism* at <https://www.dojni.gov.uk/sites/default/files/consultations/doj/appendix-a-criminal-records-filtering-review-mechanism.pdf> (accessed on 18 December 2015). A final version of this guidance is expected to be available from early 2016 at www.dojni.gov.uk

278. Mason, S. (2012) *A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland. Part 2*. Belfast: NI Executive

279. Department of Justice (2011) *Review of the Youth Justice System in Northern Ireland*. Belfast: Northern Ireland Executive and Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

practitioners working with young people.²⁸⁰ The research carried out by the authors of the NIACRO report showed a poor level of knowledge and understanding of the criminal records system in Northern Ireland and many young people were found to believe erroneously that most childhood criminal records were 'wiped' at 18.²⁸¹

Prevalence of criminal record checks by employers

Concern has been raised in Northern Ireland about the impact of criminal records on a young person's employment prospects.²⁸² The creation of *AccessNI* in 2008 shows government support for the carrying out of criminal record checks by employers. Little research exists within Northern Ireland on this subject, however.²⁸³

AccessNI reports the following figures for the applications it received between April 2012 and March 2015. The figures show a small increase in the overall number of applications over the last 3 years.²⁸⁴

Disclosure type	April 2012 – March 2013	April 2013 – March 2014	April 2014 – March 2015	% change 13/14 to 14/15
Basic	20,404	18,792	17,405	-7.4%
Standard	6,784	4,371	3,127	-28.5%
Enhanced	104,216	101,419	105,118	3.63%
Total	131,404	124,582	125,650	0.8%

There are currently no legal protections to prevent discrimination on the grounds of criminal history in Northern Ireland, other than those contained in respect of spent convictions in section 4 of the Rehabilitation of Offenders Act 1974. It was proposed that public authorities should not be allowed to unfairly discriminate on the grounds of irrelevant criminal history during the drafting of the Bill of Rights but that Bill is still under discussion.²⁸⁵

280. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

281. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

282. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

283. For some recent views on the attitudes of employers, see Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

284. *AccessNI (2015) AccessNI Performance 1 April 2014 – 31 March 2015*. Belfast: AccessNI

285. Northern Ireland Office (2009) *Consultation Paper. A Bill of Rights for Northern Ireland: Next Steps*. Belfast: NI Office

Policy issues

The review of the Youth Justice System in Northern Ireland undertaken in 2011²⁸⁶ acknowledged that under the current criminal record regime old and minor convictions damage the life chances of young people. The Review recommended that young people should be allowed to apply for 'a clean slate' at 18 (Recommendation 21). This Recommendation has not been implemented; instead, new filtering arrangements were introduced in April 2014 (as described above).

The current provisions for disclosure of both childhood and adult criminal records are being considered as part of the *Justice Bill* (2014). The proposals contained in the Bill have been largely welcomed, but campaigners are disappointed that they do not include the clean slate recommendation of the Review.²⁸⁷

Identification of children accused or convicted of committing a criminal offence

The Youth Court is not open to the public, and although journalists may be present they cannot report anything that would reveal a young person's identity without prior permission from the District Judge. The Criminal Justice (Children) (NI) Order 1998 restricts press and media reporting of proceedings in youth courts and states:

Where a child is concerned in any criminal proceedings in a youth court or on appeal from a youth court (including proceedings by way of case stated):

- No report shall be published which reveals the name, address or school of the child or includes any particulars likely to lead to the identification of the child; and
- No picture shall be published as being or including a picture of any child so concerned, except where the court or the Department of Justice, if satisfied that it is in the interests of justice to do so, makes an order dispensing with these prohibitions to such extent as may be specified in the order.²⁸⁸

The court may make an Order that a child should be identified if they are found guilty and it is deemed to be in the public interest to identify them.²⁸⁹ The legislation is concerned primarily with journalists and does not cover the identification of children more generally.

The provisions under section 49 of the Children and Young Person's Act 1933 and sections 45 and 45A,²⁹⁰ of the Youth Justice and Criminal Evidence Act 1999 which govern the identification of children involved in proceedings in England and Wales are also applicable in Northern Ireland. Please see the section on England and Wales for further details.²⁹¹

286. Department of Justice (2011) *Review of the Youth Justice System in Northern Ireland*. Belfast: Northern Ireland

287. Carr, N. et al (2015) *Young people, criminal record and employment barriers*. Belfast: Niacro

288. Article 22(2), *Criminal Justice (Children) (NI) Order 1998*

289. Article 22(3), *Criminal Justice (Children) (NI) Order 1998*

290. See s78 of the *Criminal Justice and Courts Act 2015*

291. An in-depth explanation of some of the relevant provisions can be found in Ministry of Justice (2015) *Circular 2015/02. Reporting Restrictions Applying to under-18s: Youth Justice and Criminal Evidence Act 1999 and Criminal Justice and Courts Act 2015*. London: MoJ. Accessed at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421538/moj-circular-youth-reporting-restrictions.pdf on 18 December 2015.

Poland

Summary

The majority of children aged 16 or under who come into contact with the criminal justice system in Poland are tried in a family court. They are not deemed to have committed ‘offences’ but rather ‘punishable acts’. Family courts may only impose educational or correctional measures; details of these are held on a central Register alongside those of adult convictions but they are not treated as ‘convictions’ and they would not be revealed to an employer on a criminal record check, even prior to deletion. Records relating to educational measures are generally deleted when the young person turns 18. Records of correctional measures are liable for deletion also by, at the latest, the young person’s 23rd birthday. Young people aged 17 and over, and under 17s who are convicted of the most serious offences, are dealt with by the adult criminal courts. If found guilty, their records are subject to the adult provisions. These records are automatically deleted after statutory time periods have elapsed.

Overview

The age of criminal majority in Poland is 17. There are exceptions to this rule: 15- and 16- year olds who commit the most serious offences may exceptionally be held criminally responsible as adults²⁹² and tried by the common criminal courts. Life imprisonment cannot be imposed and the maximum penalty is reduced by one-third compared to the maximum penalty available for an adult for the same offence. Additionally, extraordinary mitigation of punishment on account of juvenile age is possible.²⁹³

Young people aged 17 and over are subject to the same rules as adults; they will appear before criminal courts and be judged according to the provisions of the Penal Code and the Code of Criminal Procedure. Life imprisonment does not apply to people below 18 at the time of the offence²⁹⁴ and the courts may apply lower levels of punishment for young people between the ages of 17 and 21 (extraordinary mitigation of punishment is possible but not obligatory).²⁹⁵ There are separate prisons for young adults under the age of 21.

Children between the ages of 13 and 16 are dealt with in the juvenile justice system which is largely governed by the Juvenile Act.²⁹⁶ They are not deemed to commit ‘offences’ but rather ‘punishable acts’. If prosecuted for a ‘punishable act’ they will appear before a family court. Family courts are only empowered to impose educational and correctional measures. Such measures are not classified as ‘convictions’ under Polish law. Judges are, however, authorised to transfer cases concerning 15 and 16 year olds suspected of the most serious crimes to the prosecution service in order to bring an accusation (indictment) to a common criminal court. An offence committed by a child under 13 years of age would not be deemed to be a ‘punishable act’ but a sign of antisocial behaviour. A family court could only apply educational measures to children under these circumstances.²⁹⁷

292. Art. 10 § 2 Penal Code

293. Art. 10 § 3 Penal Code

294. Art. 54 § 2 Penal Code

295. Art. 60 § 1 Penal Code

296. Act on proceedings in juvenile matters of 26 October 1982

297. European Commission (2013) Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Poland. Luxembourg: European Commission – Directorate-General for Justice

Juvenile records

Databases holding information about children accused or convicted of a crime

The Information Office of the National Criminal Register is responsible for criminal records. All convictions by criminal courts as well as judgments concerning educational and correctional measures given by family courts are recorded on the Register.

Criminal record checks

Applications for criminal record checks can be made to The National Crime Register Office. Print-outs from the Register may contain the following information:

- Name of court;
- Date of conviction/imposition of educational or correctional measure;
- Date the conviction/imposed measure became legally binding;
- Legal classification of the committed act; and
- Information on the penalty/measure.

Everyone has the right to receive information on his/her record.²⁹⁸ The following may also apply for criminal record information:

- An employer can apply on behalf of an individual if the employer's right to apply arises in national law;
- A third party can apply on behalf of an individual if they have power of attorney;
- The information may be requested by the parent or guardian for under 18s.

Additionally, there are a broad range of persons and entities authorised to apply for criminal record checks under Article 6 of the National Criminal Register Act. These include police, prosecutors, courts, probation officers and the Internal Security Agency. Agencies responsible for the enforcement of educational and correctional measures are entitled to information on these measures insofar as it is necessary to enforce the measure imposed. The Internal Security Agency is entitled to any information held on the National Criminal Register, including records of educational and correctional measures, to the extent that such information is necessary to fulfil their statutory tasks. Other agencies, such as the police, may request such information on the basis of specific legal provisions.

Most employers are only entitled to request evidence that prospective employees have 'not been convicted' (*nie był skazany*) or 'not been punished' (*nie był karany*), sometimes that they have 'not been punished for an intentional offence'. For example, someone wanting to work as a teacher is obliged to provide evidence from the National Crime Register that they have not been punished for an intentional offence. Someone applying to be a policeman is required by law to show that they have not been sentenced with an enforceable court sentence for an offence or for a fiscal offence.

If an employer is only entitled to have information about 'convictions' (*skazanie*) they would not be entitled to know about education or correctional measures since, as stated before, these are not classified as 'convictions' under Polish law. Juveniles on whom measures are imposed are not 'convicted'. They are also not 'punished'. They do not commit 'offences' in the meaning of the criminal law, but 'punishable acts'. There is a strict division between punishment and educational and correctional measures which, at least according to Polish criminal law, are not imposed as a punishment but in order to protect, educate and resocialise juveniles. As such, the circumstances

²⁹⁸ Article 7, National Criminal Register Act

under which educational or correctional measures would be made available to a third party are rare and limited.

Expungement

Records of educational measures imposed on children by the family court are removed from the National Criminal Register when the young person turns 18, unless the measure is explicitly stated (in statute) to expire at the age of 21 or at the point of undertaking military service.²⁹⁹

In the case of correctional measures, the record is deleted after the following time periods have elapsed:³⁰⁰

Measure	Time after which the record is deleted
The enforcement of the measure was conditionally suspended and the suspension was not revoked during the probationary period	3 months following the end of the probationary period
When the measure was imposed without suspension but the family court decided to conditionally refrain from enforcing the measure and did not revoke its decision	3 months following the 2 year period of conditional refraining
When the juvenile was conditionally released from the correctional institution and the release was not revoked during the probationary period	3 months following the end of the probationary period
In other cases when the juvenile was released from the correctional institution at 21 years old (the maximum age limit for stay in correctional institutions)	When the young person turns 23

Young people between the ages of 17 and 21 (also 15 and 16 year olds who were exceptionally tried by common criminal courts as adults) are subject to the laws pertaining to adult criminal records. Adult records are eligible for deletion after statutory time periods have elapsed. The time periods run from the '*wykonanie kary*' (the time at which the penalty was effectively executed), the date of the '*darowanie kary*' (pardon) or the '*przedawnienie wykonania kary*' (the penalty was not executed and the offender was not pardoned but the execution of the penalty if no longer possible because of the lapse of time). The latter translates as 'expiration of enforcement of the penalty'. Generally, time periods run not from the date of the judgment but from completion of the sentence e.g. the date a fine is paid or the prison term is completed:³⁰¹

299. Article 14, National Criminal Register Act

300. Information provided by Professor Barbara Stańdo-Kawecka in a private communication dated 3 August 2015

301. Article 107, Penal Code

Measure	Time after which the record is deleted
Fine	1 year
Liberty limitation	3 years
Imprisonment	10 years. Individuals who are sentenced to imprisonment of 3 years or less may apply to the court for expungement 5 years after the completion of their sentence
Suspended sentence	6 months following the end of the probationary period ³⁰²

In Poland, penalties are not the only penal measures that may be handed down. Someone sentenced to one year's imprisonment may also receive, for example, a 15-year curfew order or post-penal safety measure consisting of electronic monitoring for an unspecified period. The sentence of one year's imprisonment cannot be expunged and removed from the criminal record if the curfew order or safety measure is still running.³⁰³

In July 2015, the amended *Penal Code* and *Code of Criminal Procedure* came into force, this included changes to the expungement laws. The amendments were significant and included, for example, bans on practising certain professions or taking certain positions. Some of the measures may be imposed for many years or even for an undetermined time. In some cases, the sentence will never be eligible for expungement. Such a possibility existed before the 2015 amendment, also; for example, Article 106a of the Penal Code, which was introduced in 2005, provides that the sentence of unsuspended imprisonment imposed for a sexual offence against a minor below 15 years of age will never be eligible for expungement.

Records are automatically deleted when the relevant time periods are reached without any need for action on the part of the record holder.³⁰⁴

Prevalence of criminal record checks by employers

Criminal record checks are standard for jobs in the financial sector or where they involve working with children or vulnerable adults. They are not routinely asked for in other employment sectors.

302. In Poland there is not 'probation' in the meaning of English criminal law but the execution of the sentence of imprisonment may be conditionally suspended. Private communication with Professor Barbara Stańdo-Kawecka dated 12 November 2015

303. Private communication with Professor Barbara Stańdo-Kawecka dated 4 August 2015

304. Polish Ministry of Justice website at <http://bip.ms.gov.pl/pl/rejestr-y-i-ewidencje/krajowy-rejestr-karny/pytania-i-odpowiedzi/> (accessed on 17 June 2015)

Identification of children accused or convicted of committing a criminal offence

In criminal proceedings, the court may close the hearing to the public where one of the accused is a juvenile.³⁰⁵ Family court proceedings concerning educational and correctional measures as a rule are closed to the public.³⁰⁶ The family court is allowed to order a public hearing if it finds it is advisable for educational reasons. In all cases the delivery of the court's judgment is public.

Personal information and images of defendants in any court may not be published without the person's consent or the prosecutor's authorisation.³⁰⁷

305. Article 360(3), Code of Criminal Procedure

306. Article 15 § 2, 32l § 2 and 32n § 1, Act on proceedings in juvenile matters of 26 October 1982

307. Article 13, Act on Press Law of 26 January 1984

Republic of Ireland

Summary

The Republic of Ireland operates a juvenile system which is distinct and separate from its adult criminal justice system. Many children are diverted and so do not attract a criminal record. Children who are convicted of a crime by the Children Court will receive a criminal record. These records are eligible for expungement after three years provided that: (i) the crime was not of such a serious nature that it had to be tried in the Central Criminal Court; and (ii) no other offences were committed during the three year period. Once expunged the record is not liable for disclosure on any criminal record check but there are a number of issues with the system in practice. The small number of children convicted in the Central Criminal Court will largely have their records treated as adult records.

Overview

Conflicting information exists on childhood criminal records in the Republic of Ireland. What follows is our best understanding of the situation as it currently stands.

The youth justice system in the Republic of Ireland is a complex mixture of criminal, public and private law provisions. The legal framework is the Children Acts 2001 to 2015, which defines anyone under 18 as a child.³⁰⁸ The minimum age of criminal responsibility in Ireland is 12, although there is an exception for children aged 10 and 11 who commit very serious offences. Where a child under 14 years of age is charged with an offence, no further proceedings can be taken without the consent of the Director of Public Prosecutions.

When a person under 18 years of age is responsible for a crime the matter can be dealt with in one of two ways: (i) the child can be referred to police diversion (the Garda Diversion Programme); or (ii) they can be brought before the courts. Before any child is sent to court they must first be considered for a caution. To be considered for a caution the child must take responsibility for the offending behaviour; they must agree to be cautioned; and where appropriate, they must agree to terms of supervision.

The Garda Diversion Programme deals with children who commit an offence or crime.³⁰⁹ Any child who has been admitted to the programme cannot be prosecuted for the criminal behaviour which resulted in their admission to the programme. Any acceptance by the child of responsibility for that criminal behaviour will not be available in any civil or criminal proceedings against that child. However, it may be used where a court is considering the sentence to be imposed in respect of an offence committed after admission to the programme.³¹⁰ It is not a conviction and it does not carry a disclosable criminal record.

The majority of children who do go to court are tried in the Children Court. This Court takes place for the most part in the District Court buildings,³¹¹ but its hearings should be held in a different

308. s3 Children Act 2001

309. Garda Youth Diversion Office (2013) Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme. Dublin: GYDO

310. s126 Criminal Justice Act 2006

311. In Dublin, there is a dedicated building which is separate from the district court.

room or building or on a different day or time from those of other courts.³¹² The Children Court can try a child for any offence except indictable offences, including homicide, manslaughter or sexual assault and rape. All indictable offences must be tried in the Central Criminal Court. In all other cases, the Children Court can retain jurisdiction or refer the case to the Circuit Court if it is serious or it is considered the case is more suitable for trial by that court. In certain cases, children, or their parents, can opt for the child to be tried before a jury in the District Court. In 2013, 118 juvenile crime order offences were returned to a higher court for trial.³¹³

The Court may direct the probation and welfare service to arrange for the convening of a family conference in respect of the child and adjourn the proceedings until the conference has been held.³¹⁴ At the family conference an action plan will be formulated, which may include, for example, an apology to the victim, or financial or other reparation. If the provisions decided at the family conference are successful, the charges against the child may be dismissed. There are a range of corrective measures available as an alternative to detention. There is no maximum period of detention specified for children.³¹⁵

Since 1st January 2012, the Irish Youth Justice Service (IYJS) has operated as an executive office of the Department of Children and Youth Affairs (DCYA). It is staffed by officials from both the DCYA and the Department of Justice and Equality.³¹⁶

Criminal records

Databases holding information about children accused or convicted of a crime

Records of convictions are held centrally by the Garda Síochána (the national police force). The records held by the Gardaí are wide-ranging and can include any contact a person has with the criminal justice system, including their inclusion in the Garda Juvenile Diversion Programme. Information is stored on a computer system called PULSE, which stands for 'Police Using Leading Systems Effectively'.

Individuals can make a data request for a copy of their own personal data from the Garda Criminal Records Office.

Criminal record checks

Garda Vetting

The Garda Central Vetting Unit provides information in respect of personnel working in a full-time, part-time, voluntary or student placement capacity in a registered organisation, through which they have unsupervised access to children and/or vulnerable adults. The following types of activities require Garda checking: childcare services; schools; hospitals and health services; residential services or accommodation for children or vulnerable persons; treatment, therapy or counselling services for children or vulnerable persons; provision of leisure, sporting or physical activities to children or vulnerable persons; and promotion of religious beliefs. It is a criminal offence to fail

312. European Commission (2013) *Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase – Ireland*. Luxembourg: European Commission – Directorate-General for Justice

313. Statistics drawn from the Courts Services Ireland website at <http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/0a22fef76e26cf2680257a6b0035ec33?OpenDocument> (accessed on 24 September 2015)

314. s78 Children Act 2001

315. European Commission (2013) *Study on children's involvement in judicial proceedings. Contextual overview for the criminal justice phase – Ireland*. Luxembourg: European Commission – Directorate-General for Justice

316. Minister for Justice and Equality (2013) *Youth Justice Action Plan 2014–2018*. Dublin: MJE

to notify employers if you are guilty of certain criminal offences before taking a job or performing a service in the above areas. This duty to notify your employer relates primarily to sex offenders guilty of offences committed in Ireland and abroad. Section 26 of the Sex Offenders Act 2001 makes it an offence for a sex offender to 'apply for work or to perform a service (including State work or service) which involves having unsupervised access to, or contact with children or mentally impaired people without telling the prospective employer or contractor that you are a sex offender'. The terms State work or State service includes work done by civil servants, Gardaí, Defence Forces, local authority and Health Service Executive staff.³¹⁷

Garda Vetting is conducted only on behalf of registered organisations and is not available to individuals on a personal basis.³¹⁸ The Gardaí provide details of all convictions not subject to the Administrative Filter (see below) and details of cases pending (cautions or inclusion in the Diversion Programme are not included). The Gardaí will consider non-convictions for disclosure where the circumstances of an offence gives rise to a bona fide concern that the person concerned may harm a child or vulnerable person.³¹⁹

Although not expressly stated on the form, if the offence was committed prior to the age of 18 and the record holder comes within the expungement provisions laid down in section 258 of the Children Act 2001 (see above) then they are not required to disclose their conviction on the Garda vetting form. Therefore, in relation to the question '*Have you ever been convicted of an offence in the Republic of Ireland or elsewhere*' that person can truthfully answer '*no*'.

Practice varies across organisations which require Garda Vetting. Many organisations do not inform applicants of their rights under section 258. Other organisations specifically state in their guidelines that all convictions must be disclosed including those received for juvenile offences.³²¹ There is concern that young people do not understand when they are not legally obliged to declare convictions.³²²

Irrespective of the guidelines, a person covered by section 258 does not have to disclose their criminal conviction on the Garda Vetting form and to ask that person to do so may be an infringement of their rights. The Garda Central Vetting Unit (GCVU) will disregard any information that might be provided to which section 258 applies and will not disclose information relating to that criminal conviction to the employer/organisation.³²³

Police certificate

Individuals can also make a request for a Police Certificate from the Garda station in the district where they reside (or used to reside). These certificates may only be obtained for the purposes of: (i) foreign consular authorities; (ii) foreign visas; (iii) establishing a business in another EU state.³²⁴ They include basic personal information and state whether the individual has a criminal conviction(s) or not.

317. Citizen's Advice website at http://www.citizensinformation.ie/en/employment/employment_rights_and_conditions/monitoring_and_surveillance_at_work/garda_clearance_for_employees.html (accessed on 15 December 2015)

318. <http://www.garda.ie/controller.aspx?Page=66> (accessed on 16 June 2015)

319. Garda Vetting Procedures. Administrative Filter (accessed at <http://www.garda.ie/Documents/User/Garda%20Vetting%20Procedures%20-Aministration%20Filter.pdf> on 16 June 2015)

320. Under the Children Act 2001 there is, for example, no requirement to disclose the existence of a criminal record when seeking employment in sensitive areas such healthcare or childcare; however, section 258(4)(d) of the Act provides that the Minister for Justice may, by Order, exclude or modify the application of the 2001 Act. To date, no such exclusions or modifications have been made

321. Irish Penal Reform Trust (2012) *IPRT Briefing on Expungement of Criminal Records for Crimes Committed under the Age of 18*. Dublin: IRPT

322. E-mail communication with Ursula Kilkelly dated 18 December 2015

323. E-mail communication with Ursula Kilkelly dated 18 December 2015

324. <http://www.garda.ie/controller.aspx?Page=1548> (accessed on 16 June 2015)

Although non-registered organisations cannot apply to Garda Vetting, they could ask an individual to provide a copy of their Police Certificate.

Filtering

Since March 2014, an 'Administrative Filter' has been in place which allows for the non-disclosure of certain minor offences which are seven years old or more. This filter applies to some minor offences³²⁵ even where more recent offences have been committed.³²⁶

Expungement of records

A childhood criminal record may be cleared providing the following conditions, set out in s258 of the Children Act 2001, are met:

- (a) The offence was committed before the person attained the age of 18 years;
- (b) The offence is not an offence required to be tried by the Central Criminal Court;
- (c) A period of not less than three years has elapsed since the finding of guilt; and
- (d) The person has not been dealt with for an offence in that three year period.³²⁷

Situations where a person has been given a caution or has been dealt with under the *Probation of Offenders Act 1907* are also covered by these provisions.³²⁸

If the individual meets all the above criteria, details of their conviction should be automatically expunged from their record and they will be 'treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or found guilty of or dealt with' the offence(s) in question.³²⁹ These provisions also apply to disclosures made by the Garda Central Vetting Unit as stated before.³³⁰ Whilst section 258 is in force, there have been no statutory arrangements for the mechanics of the expungement process, with the effect that neither the police nor the courts service have any means of operating the provision. It is unlikely that convictions outside the Children Court would be covered - certainly Central Criminal Court convictions of rape, manslaughter and rape, would not be covered - but is impossible to say for sure at present as the provision has not been tested or challenged.³³¹

There is currently no legislation in Ireland providing for the expungement of criminal convictions other than the provisions above. Anyone who does not fulfil these requirements will have to disclose their convictions throughout their lifetime, in accordance with the rules above.

All investigation files and incident records regarding Headline and Indictable Crimes and Incidents (i.e. records of more serious crimes) will be retained for 30 years by the Gardaí. Decisions in respect of the further retention of such files will be made on a case by case basis following the end of the 30 year period.³³²

325. Specifically road traffic offences and public order offences

326. Garda Vetting Procedures. Administrative Filter (accessed at <http://www.garda.ie/Documents/User/Garda%20Vetting%20Procedures%20-Aministration%20Filter.pdf> on 16 June 2015)

327. s258 Children Act 2001

328. Irish Penal Reform Trust (2012) *IPRT Briefing on Expungement of Criminal Records for Crimes Committed under the Age of 18*. Dublin: IRPT

329. See section 258(4)(a) of the Children Act 2001. See also Law Reform Commission, *Report on Spent Convictions* (Dublin: LRC 84-2007, July 2007) p. 53.

330. Irish Penal Reform Trust (2012) *IPRT Briefing on Expungement of Criminal Records for Crimes Committed under the Age of 18*. Dublin: IRPT

331. E-mail communications with Professor Ursula Kilkelly dated 18 and 21 December 2015

332. Data Protection in An Garda Síochána. Code of Practice for An Garda Síochána (accessed at <http://www.garda.ie/Controller.aspx?Page=136&Lang=1> on 25 August 2015)

The Children Act 2001 and relevant amendments in the Criminal Justice Act 2006 are silent on the retention of records relating to young people included in the Diversion Programme. As such these records are retained indefinitely on the PULSE database. Records of cautions given to young people are also retained on PULSE³³³ (however, inclusion in PULSE does not lead to these records being disclosed on checks).

Prevalence of criminal record checks by employers

In 2014, the Garda Central Vetting Unit processed 323,032 requests for information. As mentioned before, activities relating to work with children or vulnerable adults require Garda Vetting.

At present it is not illegal in Ireland to discriminate on the basis of a criminal conviction.³³⁴ The Irish Human Rights Commission and the Irish Penal Reform Trust have called on the government to amend the *Employment Equality Act 1998* so that it includes the additional ground of discrimination on the basis of criminal conviction.³³⁵

Policy issues

In 2012, the Irish Government introduced the *Spent Convictions Bill 2012*. The Bill proposes a regime under which certain convictions can be disregarded after a number of years have elapsed since they were imposed. It is intended solely for offences committed when the individual is over 18 years of age. The Bill had not made any progress since reaching Report Stage in March 2013 but it has now been scheduled to return to the Oireachtas (the Irish legislature) at the beginning of February 2016.³³⁶

When the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* comes into effect,³³⁷ it will be mandatory for anyone working with children or vulnerable adults to be vetted by the Gardaí, subject to some exclusions, including babysitters and childminders. The Act provides for the use of 'soft' information for vetting purposes; 'soft' information would include non-conviction information which leads to a *bona fide* belief that a person poses a threat to children or vulnerable persons. Under the Act, the Garda Central Vetting Unit will become the National Vetting Bureau and the vetting procedures will be put on a statutory basis.

Identification of children accused or convicted of committing a criminal offence

Court hearings involving children who have been accused of a crime are private and there is a general prohibition on the dissemination of information collected during the course of the proceedings.

333. Private communication with the Garda Youth Diversion Office dated 8 October 2015.

334. The matter has been subject to previous government review. See, for example, Kilcommins, S. et al (2004). *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*. Dublin: The Stationery Office, which was commissioned by the then Department of Justice, Equality and Law Reform.

335. Irish Penal Reform Trust (2015) *IPRT Submission on Criminal Justice (Spent Convictions) Bill 2012*. Dublin: IRPT

336. *Written answers to questions in the Dáil Éireann on 19 January 2016*, accessed at <https://www.kildarestreet.com/wrans/?id=2016-01-19a.618> (27 January 2016)]

In relation to any proceedings before the Children Court, it is prohibited to publish or broadcast any report that reveals the name, address, school or picture of any child involved in the proceedings or which includes any information likely to lead to the identification of the child.³³⁸ This provision was amended by s139 Criminal Justice Act 2006, to extend its application to the higher courts. There are a couple of exceptions to this rule: (i) where it is necessary to avoid injustice to the child; or (ii) for the purpose of apprehending a child who is unlawfully at large.³³⁹ Under s139 of the Criminal Justice Act 2006, the court may also dispense with the general rule on non-identification if it is 'in the public interest' to do so.³⁴⁰ Breach of these rules is a criminal offence carrying a maximum fine of £10,000, three years' imprisonment, or both.³⁴¹

There are also restrictions in place regarding attendance at the hearing. The following are allowed to attend:

- Officers of the Court;
- The parents or guardian of the child concerned;
- An adult relative of the child, or other adult who attends the Court in place of the parents;
- Persons directly concerned in the proceedings;
- Bona fide representatives of the Press; and
- Such other persons (if any) as the Court may at its discretion permit to remain.³⁴²

The identity of any child who is either admitted to or considered for admission to the Garda Diversion Programme is not disclosed publicly. Any person who publishes or broadcasts such information is guilty of an offence.³⁴³

337. 'Unfortunately it is not possible to provide an indicative date for the commencement of the Act at present. However, the Minister intends to bring the amendments before the Oireachtas and commence the Act as soon as possible thereafter, subject to competing legislative priorities'.

Private communication with the office of the Minister for Justice and Equality dated 4 November 2015

338. s93(1)(a) and (b) Children Act 2001

339. s93(2)(a) and (b) Children Act 2001.

340. A further exception is set down at s139(2)(b) Criminal Justice Act 2006

341. A further exception is set down at s139(2)(b) Criminal Justice Act 2006

342. s94(1) Children Act 2001

343. Citizen's Information web page 'Garda Juvenile Diversion Programme' at http://www.citizensinformation.ie/en/justice/children_and_young_offenders/garda_juvenile_diversion_programme.html (accessed on 24 September 2015)

Scotland

Summary

At the time of writing, the criminal records regime in Scotland was under consultation and subject to significant change. These changes are expected to create a system which will allow more young people to put their contact with the criminal justice system behind them. The current situation is that most children who receive a criminal record are subject to rehabilitation periods that are half those for adult convictions. Non-statutory arrangements determine when records relating to offences committed by children are completely deleted ('weeded') from the central criminal history system. The arrangements for 'weeding' are determined by the method of disposal (i.e. how the case was resolved) and retention periods range from two years to 100 years. These are general rules and there are many exceptions in this highly complex system.

Overview

The youth justice framework in Scotland is a complicated mixture of law and policy. There is some retention of English laws and imposition of laws in areas that have not been devolved, but there also exists post-devolution legislation and policy which has resulted in some significant divergence in approaches between Scotland and England. The key pieces of legislation are the *Children's Hearing Scotland Act 2011* and the *Children (Scotland) Act 1995*. Although the minimum age of criminal responsibility in Scotland is eight, children under the age of 12 cannot be subject to criminal prosecution.

Children between eight and 12 who have committed an offence can be referred to the children's reporter on offence grounds; the children's reporter may decide that a compulsory supervision order is required and could arrange for the young person to attend a Children's Hearing. This is an independent tribunal intended to assess and support the wellbeing needs of children and young people within the context of their family and the wider community. It recognises the fact that children who offend are often the same children who are in need of care and protection, and offending is considered a wellbeing need.

Most young people aged under 16 who are accused of a crime will either be diverted from formal systems or have their needs and behaviours dealt with in the Children's Hearing System. The Children's Hearings System has a wide range of protective and corrective disposals available, including deprivation of liberty measures. Children who are 16 or 17 are more likely to be dealt with by the adult court under most circumstances. On 20 September 2015, 69 children aged 16 and 17 were in custody in Scotland (no children under 16 were in custody); on 23 September 2015, 90 children (under 18s) were in secure care.³⁴⁴

Criminal records

If a child accepts the offence grounds at a Children's Hearing or they are established by a sheriff, this will be regarded as a conviction. A record of this conviction will be held on the Scottish

344. Centre for Youth & Criminal Justice website at <http://us8.campaign-archive1.com/?u=97fe24e5e4dcabf499ac7d66b&id=bd15e8c918> (accessed on 27 November 2015)

Criminal History System and it will be subject to the *Rehabilitation of Offenders Act 1974*. Any young person who is convicted in an adult court will receive a criminal record which will also be stored on the Scottish Criminal History System and be subject to the *Rehabilitation of Offenders Act 1974* (see below).

Databases holding information about children accused or convicted of a crime

The main database holding disclosable information about children in Scotland is the Scottish Criminal History System, although there will be data and files concerning the child held by any agency who is involved in the particular incident/proceedings.

Information held on the Scottish Criminal History System will include (i) conviction information, i.e. information relating to criminal activity where a conviction has resulted; and (ii) non-conviction information, i.e. information relating to criminal activity where use has been made of a non-court based option to deal with the offending behaviour such as a fiscal fine.

Criminal record checks

In Scotland, criminal record checks are administered by *Disclosure Scotland*. The organisation was founded in 2002 and, since 2009, it has been an Executive Agency of the Scottish Government.

Disclosure Scotland issues certificates, called 'Disclosures', which give details of the subject's criminal record or state that they have none. The agency issues a range of Disclosures:

Type of Disclosure	Information included	Access
Basic	Unspent convictions or states that there are no convictions.	Subject of the record or someone on their behalf with their consent
Standard	Spent and unspent convictions, including minor offences and cautions.	A 'registered body'* – usually an employer or voluntary organisation
Enhanced	In addition to the information included on a Standard Disclosure it may include information a Chief Officer or Chief Constable believes to be relevant to the position being applied for.	Registered body
PVG Scheme (Protecting Vulnerable Groups scheme)	Whether you are barred from working with children and/or vulnerable adults. A search is carried out for convictions, cautions, children's hearings findings or 'other relevant information from the police'. ³⁴⁵	Registered body

(* Organisations apply to Disclosure Scotland to become a registered body)

The PVG Scheme was set up in 2011 to 'replace and improve upon the current disclosure arrangements for people who work with vulnerable groups'.³⁴⁶ All PVG Scheme Members (i.e. anyone who has undergone the checks and is not barred from the Scheme) are subject to on-going monitoring to keep their record up-to-date.

345. <http://www.disclosurescotland.co.uk/disclosureinformation/pvgscheme.htm> (accessed on 2 June 2015)

346. <http://www.disclosurescotland.co.uk/disclosureinformation/pvgscheme.htm> (accessed on 2 June 2015)

For Basic Disclosures, Disclosure Scotland runs checks through the Police National Computer (England and Wales), the Scottish Criminal History System and Northern Ireland's Criminal Record Viewer.

Disclosure Scotland states that information used for the PVG scheme 'comes from a variety of sources'. This includes 'conviction information retrieved from criminal justice systems and non-conviction information held by the police that they consider to be relevant to regulated work'.³⁴⁷

Rehabilitation periods

Criminal records in Scotland, including those relating to disposals at Children's Hearings, are subject to the law on spent convictions contained in the *Rehabilitation of Offenders Act 1974* (the ROA). The reforms introduced in England and Wales in 2014 by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) do not apply to Scotland, which uses the rehabilitation periods set down in the ROA before it was amended by LASPO.

For measures handed down by Children's Hearings, the rehabilitation period is either six months from the date the referral to the Hearing was discharged or, where the child was placed on a compulsory supervision order, it is one year from the date the order was made. If the child is on supervision for more than one year, then it is on the date the order is terminated. Once section 187 of the *Children's Hearings (Scotland) Act 2011* has been brought into force (no date has been fixed for this yet), disposals by a Children's Hearing will be classed as an alternative to prosecution and the rehabilitation period will be three months.

Scottish specific exceptions to the ROA's general principle that once convictions are spent they need not be disclosed are set down in the *Rehabilitation of Offenders (Exclusions and Exceptions) (Scotland) Order 2013*.³⁴⁸

Scottish Ministers have powers to vary rehabilitation periods and to vary the threshold age of offenders for which certain rehabilitation periods may be halved.³⁴⁹ At the time of writing, the Scottish Government was consulting on proposals to reduce rehabilitation periods.

Rehabilitation periods for childhood criminal records are subject to a very complicated regime at present. In general, rehabilitation periods for convictions relating to crimes committed when the person was under 18 are half that of adult convictions. The table below sets out some, but not all, of the relevant rehabilitation periods for under 18s.³⁵⁰

347. <http://www.disclosurescotland.co.uk/faq/index.htm> (accessed on 2 June 2015)

348. As amended by the *Rehabilitation of Offenders (Exclusions and Exceptions) (Scotland) Amendment Order 2013*

349. s5(11) *Rehabilitation of Offenders Act 1974*

350. Information taken from Scottish Government (2013) *A Discussion Paper on the Rehabilitation of Offenders Act 1974*. Accessed at <http://www.gov.scot/Publications/2013/08/6133/5> on 4 November 2015

Sentence	Rehabilitation period for under 18s
Custodial sentence exceeding 30 months	Never
Custodial sentence exceeding 6 months but not exceeding 30 months	5 years
Custodial sentence not exceeding 6 months	3.5 years
Variety of armed forces offences	3 to 7 years
Absolute Discharge	6 months
Conditional discharge	1 year or the date when the order ceases to have effect (whichever is longer)
Community Order	2.5 years
An Order under section 1(2A) of the Street Offences Act 1959	6 months
Hospital Order	5 years or length of order plus 2 years (whichever is longer)

Filtering

Until September 2015, all spent convictions (no matter how minor, how long ago they were obtained, the age of the person, or how relevant they were to the employment sought) had to be disclosed on request by the record holder and by *Disclosure Scotland* on Standard, Enhanced and PVG Scheme Record Disclosures. In September 2015, a new two-stage process was introduced through legislation³⁵¹ to determine whether spent convictions should be disclosed on these higher level checks. Spent convictions are now split into two groups: 'offences which must always be disclosed'³⁵² and 'offences which are to be disclosed subject to rules' ('the rules list').³⁵³

If a conviction is spent and the offence is included on the 'offences always to be disclosed' list it will always be disclosed no matter how old the conviction is.

A conviction on the 'rules list' will not be disclosed now if it is over 15 years old for adults or 7.5 years for people aged under 18 years when convicted. Where a spent conviction for an offence on the 'rules list' is less than 15 years old, or 7.5 years as for those convicted when under 18 years, the disposal will be taken into account. Convictions that result in no punishment or intervention will not be disclosed, that is, any conviction for which the court imposes a sentence of admonishment

351. The filtering system was introduced by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015. The Remedial Order operates alongside the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2015 which provides for associated changes to the system of self-disclosure of previous criminal convictions by an individual under the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013. The Remedial Order (or any second remedial order which is made in its place as a result of the public consultation exercise which closed on 24 November 2015) will fall on 4 February 2016 unless it has been approved by the Scottish Parliament. In reality, there will still be a filtering system in place but it is possible that it will not be exactly the same as the system introduced in September 2015. Information provided by John McCutcheon, Youth Justice and Children's Hearings Unit in an e-mail dated 25 November 2015

352. This list includes the most serious crimes. The list can be viewed in full at <https://www.disclosurescotland.co.uk/about/documents/UKSCOffencesThatWillAlwaysBeDisclosedv1website10September2015.pdf> (accessed on 1 October 2015)

353. The full 'rules list' can be viewed at <https://www.disclosurescotland.co.uk/about/documents/UKSCOffencesThatWillBeDisclosedSubjectToRulesv1website10September2015.pdf> (accessed on 1 October 2015)

or absolute discharge or a discharge from a Children's Hearing. Spent cautions issued by the police in England, Wales and Northern Ireland will not be disclosed. Convictions that satisfy these rules are now termed 'protected convictions'. They will be filtered by *Disclosure Scotland* when they run higher level checks and they do not have to be self-disclosed by individuals.

A spent conviction for an offence which is not on either list will not usually be disclosed on a higher level Disclosure.

If an applicant has multiple convictions on their record, each conviction will be treated separately as if it is the only conviction on the record.³⁵⁴

Expungement

There are various provisions for the 'weeding' of information from the Scottish Criminal History System. These rules are set and controlled by *Police Scotland* and are not laid down in legislation. When a record is weeded it is completely deleted from the system.

As stated above, the acceptance or establishment of the grounds of an offence referral to a Children's Hearing is currently treated as a conviction³⁵⁵ and, as such, recorded on the Scottish Criminal History System. Under current weeding and retention rules, information relating to children is weeded from the Scottish Criminal History System after two years unless the child was placed under compulsory supervision by the Children's Hearing (or the case involved a disposal by a court of law). Where that is the case, the record is held on the Scottish Criminal History System until the person reaches the age of 40 and the conviction is 20 years old (this is known as the 40/20 rule). If there is a sexual aspect to the offence, information is held for 100 years (or the life of the person). Compulsory supervision orders must be necessary for the protection, guidance, treatment or control of the child. As such, they do not necessarily relate to serious offences and they may be put in place in primarily order to protect the young person from hurting themselves. If information is weeded, it will not show up on criminal records checks.

The Scottish Ministers consider that the application of the current weeding rules to Children's Hearing offences are disproportionate. Provisions have, therefore, been included in the *Children's Hearings (Scotland) Act 2011*.³⁵⁶ These provisions will re-define Children's Hearings disposals on offence grounds from convictions to alternatives to prosecution, which will in turn effectively change the rules around weeding. They will also limit the offences which *Disclosure Scotland* will be able to access automatically to those which are of a serious violent or serious sexual nature. At the time of writing no date had been fixed for commencement of these provisions.

It is likely that the weeding and retention rules for Scottish Criminal History System records will need to be revised for those cases which will be subject to the disclosure provisions in the *Children's Hearings (Scotland) Act 2011* to ensure that the continued retention of such records is proportionate, fair and justifiable.

A number of complex legal issues have had to be resolved before the provisions in the *Children's Hearings (Scotland) Act 2011* could be implemented. In the meantime, the existing weeding and retention rules will continue to apply.³⁵⁷

354. Information taken from *Disclosure Scotland's* website at <https://www.disclosurescotland.co.uk/about/SummaryofChanges.htm> (accessed on 1 October 2015)

355. s3 *Rehabilitation of Offenders Act 1974*

356. s187 *Children's Hearings (Scotland) Act 2011*

357. Information in this section provided by John McCutcheon, Youth Justice and Children's Hearings Unit in an e-mail dated 4 June 2015

Policy issues

Campaigners have argued that the threshold for criminal liability in Scotland needs to be raised in order to prevent so many young people from being given a criminal record in the first place. Scotland's *Centre for Youth and Criminal Justice* noted in their 2014 report that efforts to reform the existing system are in motion but that these have been ongoing for many years now without effect.³⁵⁸

Following a previous consultation which indicated support for both adult and childhood sentences to be spent sooner and for young people with criminal records to be able to move on from their offences, the Scottish Government has consulted (the consultation closed on 12 August 2015) on proposals which include:

- Extending the parameters in relation to disclosure periods from 30 to 48 months where a custodial sentence is imposed;
- Reducing rehabilitation periods for people who receive alternatives to prosecution, non-custodial sentences and custodial sentences;
- Maintaining the current approach to halving the rehabilitation periods when a person commits an offence under the age of 18.

The Scottish Government has also identified the need to simplify and clarify the existing legislation and rules regarding criminal records. This has been highlighted as an area requiring future reform but there are no specific proposals in place at the time of writing.

The *Children and Young People (Scotland) Act 2014* has the aim of strengthening the rights of children and of supporting them to have the best possible childhood. Under the Act each child in Scotland will have a 'Named Person'. This person will be the key contact for information sharing on all aspects of a child's wellbeing. The section of the Act which deals with the role and responsibilities of the Named Person will come into force on 1 August 2016. It is possible that these provisions will allow wellbeing needs to be identified earlier and enable them to be dealt with before they escalate. This may result in less referrals to children's hearings.

Prevalence of criminal record checks by employers

Applications made to Disclosure Scotland are typically made in the context of an employment application or offer.³⁵⁹ The number of applications for each kind of criminal record check have risen significantly over the last five years.³⁶⁰

358. Lightowler, C. et al (2014) *Youth Justice in Scotland. Fixed in the past or fit for the future?* Glasgow: CYCJ

359. McGuinness, P. et al (2013) *The use and impact of the Rehabilitation of Offenders Act (1974): Final Report.* Glasgow: Scottish Centre for Crime and Justice Research

360. Figures provided by Disclosure Scotland on 30 June 2015 in response to a Freedom of Information request

	Basic	Standard / Enhanced	PVG	Total	Notes
2010–11	738,340	295,742	5,738	1,039,820	PVG only came into force on 28/02/11.
2011-12	828,661	22,008	205,453	1,056,122	PVG came into force in February 2011 and replaced the majority of Standard and Enhanced applications.
2012-13	947,798	21,366	259,890	1,229,054	
2013-14	1,028,190	24,444	358,186	1,410,820	
2014-15	1,208,784	23,396	347,061	1,579,241	NB Since March 2014, Disclosure Scotland have delivered Basic Disclosures for England and Wales under delegated authority from the Disclosure and Barring Service. The figures here are include applications processed for England and Wales.

Organisations who wish to be 'Registered Bodies' with *Disclosure Scotland* are bound by the terms of a Code of Practice. This Code stipulates that they must 'not discriminate against the subject of disclosure information on the basis of any conviction or other details revealed'. If they do, there is legislative provision to remove bodies and individual countersignatories from the register.³⁶² At the time of writing, Disclosure Scotland have not deregistered on the basis of a breach of the Code of Practice relating to discrimination on the part of a registered person.³⁶³

The *Equality Act 2010*, the primary legislation governing discrimination laws in the United Kingdom, does not include criminal conviction history as one of the characteristics protected from discrimination by employers. Some protection is provided under the ROA³⁶⁴ in relation to spent convictions but the Act does not provide any sanctions for employers who discriminate on these grounds. The Scottish Government is consulting on whether an enforcement mechanism should be introduced.³⁶⁵

Identification of children accused or convicted of committing a criminal offence

Reporting restrictions for criminal proceedings in courts in Scotland are governed by the *Criminal Procedure (Scotland) Act 1995*. Section 47 of this Act prohibits the publication of identifying information about children under 16 years of age. This age was raised to 18 when section 15 of the *Victims and Witnesses (Scotland) Act 2014* came into force on 1 September 2015.

361. Many employers required to undertake background checks of staff under the PVG Scheme experienced backlogs and the increase in figures will probably reflect the process of clearing such backlogs to some extent

362. Scottish Government (2011) Code of Practice. In connection with the use of disclosure information and with the functions of registered persons (accessed at <https://www.disclosurescotland.co.uk/publications/documents/codeofpracticeDocs/PoliceAct1997--CodeofPractice--18February2011.pdf> on 21 July 2015)

363. Private communication with Disclosure Scotland dated 31 July 2015

364. s4

365. Scottish Government (2015) *Rehabilitation of Offenders Act 1974. Consultation Paper*. Edinburgh: Scottish Government.

The Children's Hearings (Scotland) Act 2011 sets down restrictions regarding who can attend Children's Hearings and in relation to publishing information about the child who has been accused of the criminal offence.

'A representative of a newspaper or news agency' may attend a hearing. However, the children's hearing may exclude them from any part of the hearing where it is satisfied that:

- It is necessary to do so to obtain the views of the child; or
- The presence of that person is causing, or is likely to cause, significant distress to the child.

The decision to exclude a journalist lies with the Children's Hearing. Where a person is excluded, the chairing member may explain to the person, where it is appropriate to do so, the substance of what has taken place in the person's absence.³⁶⁶

It is a criminal offence to 'publish' 'protected information' if the publication of the information is intended, or is likely, to identify a child, or the child's address or school. 'Protected information' is defined as information in relation to a Children's Hearing, an appeal against a decision of a children's hearing, proceedings before the sheriff or an appeal from any decision of the sheriff or sheriff principal made under this Act. It also includes information given to the Principal Reporter in respect of a child. To 'publish' includes printed media, television, radio, online and social media.³⁶⁷

366. s78, *Children's Hearings (Scotland) Act 2011*

367. s182, *Children's Hearings (Scotland) Act 2011*

Spain

Summary

It is a common misconception in Spain amongst young people and the professionals working with them, that juveniles are unable to have criminal records in order to prevent them from suffering stigmatisation. In reality, records of juvenile proceedings are held on a central register as well as by other agencies. Access is so restricted, however, and requests for juvenile records so rare, that the fact the record exists is not perceived as an issue or a burden for young people in the vast majority of cases.³⁶⁸

Overview

The law governing juvenile justice in Spain is largely contained in the *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*³⁶⁹ (roughly translated as the ‘Organic Law on the Criminal Responsibility of Minors’). This law applies to children between the ages of 14 and 17 who are suspected or found guilty of having committed a crime as defined by the Spanish Criminal Code.³⁷⁰ Specialised juvenile courts hear cases involving under 18s. Measures must be both educational and sanctioning, except in the most serious cases, where the criminal responsibility of the young person takes priority.³⁷¹ Below 14, children are not deemed to be criminally liable but they can be subjected to educational measures.³⁷²

Criminal records

Conviction records are classified under Spanish law as ‘personal data’. The Spanish Data Protection Law specifically states that all records held at the Central Criminal Registry (see below) are protected by its provisions.³⁷³ The Spanish Data Protection Agency has issued several decisions prohibiting disclosure of criminal history information via the internet.³⁷⁴ Infringements, which would include publishing information on-line, are punishable by fines.³⁷⁵ These laws protect both juvenile and adult conviction records.

The preference for keeping an individual’s criminal history confidential is, according to Elena Laraurri, Professor of Criminal Law and Criminology, reinforced by Spanish law’s strong commitment to rehabilitation as the primary goal of criminal sentencing.³⁷⁶ Laraurri reports that academics and policy makers in Spain believe that the rehabilitative process would be seriously

368. Private communication with Martí Rovira on 18 August 2015

369. *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*, which came into effect on 13 January 2001

370. *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*

371. European Commission (2013) *Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Spain*. Luxembourg: European Commission

372. European Commission (2013) *Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Spain*. Luxembourg: European Commission

373. *Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal*, Article 2

374. Jacobs, J. B. and Laraurri, E. (2012) ‘Are criminal convictions a public matter? The US and Spain’, *Punishment & Society*, 14 (1), pp. 3–18

375. *Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal*, Article 45

376. Jacobs, J. B. and Laraurri, E. (2012) ‘Are criminal convictions a public matter? The US and Spain’, *Punishment & Society*, 14 (1), pp. 3–18

undermined if conviction records were made public.³⁷⁷ Rehabilitation is a primary objective of the *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores*.³⁷⁸

Databases holding information about children accused or convicted of a crime

Register of Criminal Responsibility of Minors

Records of judgments against under 18s are held on the *Register of Criminal Responsibility of Minors* (RCRM). This Register is administered by the Criminal History Registry, which maintains a separate register of adult convictions.

The RCRM holds only details of ‘firm judgments’ i.e. convictions for offences, which are referred to as ‘conviction records’. Its stated main objective is to support the administration of justice through the activity of the courts, prosecutors and other relevant authorities with responsibility for public safety.³⁷⁹

The RCRM holds the following information on convicted minors:- criminal offences, measures imposed, sex, age and nationality of the offender, the date of commission of the offence, place of sentencing and details of the sentence imposed.³⁸⁰

The court clerk is responsible for sending the data to the Ministry of Justice within a maximum of five days of the date of the judgment being handed down.³⁸¹

Access to the RCRM is very restricted to:

- The Courts
- The prosecution (in any subsequent juvenile criminal investigation)
- The individual who is the subject of the record.³⁸²

Employers would never be entitled to access this database. Even the army would not be able to vet prospective entrants in this way.³⁸³

Other records

The Prosecuting Authority will keep a file on every child who comes under its remit, together with a record of proceedings of the court that hears the case.³⁸⁴ If a child has been charged with crimes in a number of areas, the authority nearest to the child’s home will keep the record.³⁸⁵ Children’s records must be kept in a separate database to adult records³⁸⁶ and their disclosure is not

377. Laurari, E. (2011) ‘Conviction Records in Spain: Obstacles to Reintegration of Offenders?’, *European Journal of Probation*, 3 (1), pp. 50–62

378. Article 3

379. *Real Decreto 95/2009, de 6 de febrero, por el que se regula el Sistema de registros administrativos de apoyo a la Administración de Justicia*, Article 2

380. *National Institute of Statistics (2014) Conviction Statistics – 2014*. Madrid:INE (accessed at <http://www.ine.es/prensa/np863.pdf> on 27 May 2015)

381. *Real Decreto 95/2009, de 6 de febrero, por el que se regula el Sistema de registros administrativos de apoyo a la Administración de Justicia*, Article 13

382. *Real Decreto 95/2009, de 6 de febrero, por el que se regula el Sistema de registros administrativos de apoyo a la Administración de Justicia*, Article 5

383. *Private communication with Martí Rovira on 18 August 2015*

384. *European Commission (2013) Study on children’s involvement in judicial proceedings. Contextual overview for the criminal justice phase – Spain*. Luxembourg: European Commission

385. *Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores*, Article 20

386. *Real Decreto 1774/2004, de 30 de julio, por el que se aprueba el Reglamento de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores*, Article 2

permitted in adult cases.³⁸⁷ In exceptional circumstances, disclosure of a childhood criminal record may be made by the police for immigration purposes.³⁸⁸

The police also keep some records of juveniles with whom they have contact. Again these records are subject to strict access restrictions.

Every trial chamber keeps a record of sentencing for cases involving children. The files and records of children who have been prosecuted in criminal proceedings may be kept secret at the request of the child, their family or the Prosecuting Authority.³⁹⁰

Spanish law prohibits the communication of a childhood criminal record to the adult system. This means that childhood criminal records may not be considered in adult prosecutions.³⁹¹

Criminal record checks

Individuals can apply for a copy of their own Certificate of Convictions from the Ministry of Justice. These certificates would include juvenile guilty convictions. Most people don't know these exist and it is very rare for a young person to be asked to produce one.³⁹²

Expungement of juvenile records

When the record holder reaches the age of 18 it is almost impossible for anyone to access their records, even a judge.³⁹³ Further protections were introduced through a law passed in 2009. This law allows for juvenile conviction records to be erased from the RCRM automatically³⁹⁴ ten years after the minor has come of age (calculated from the birthday itself) i.e. on the person's 28th birthday, providing the minor's sentence has been completed.³⁹⁵ There are no exceptions to this rule and it applies to all convictions, from the most minor to the most serious. These provisions do not come into operation until 2019.³⁹⁶ Until then all records will remain on the system indefinitely.³⁹⁷ The 2009 law only applies to records on the RCRM. There are no formal systems in place for the retention or deletion of records on other databases.

Young people's knowledge of laws affecting criminal records

There is very little public information available about criminal records in Spain.³⁹⁸ This lack of information is particularly acute for juvenile records, with the law itself being unclear as to the rules. This is perhaps partly due to the fact that childhood records enjoy significant legal

387. Audiencia Provincial de Barcelona (Sección Tercera) Ejecutoria nº38/2008. 9 of May 2008

388. Carr, N. et al (2015) *Young People, Criminal Records and Employment Barriers*. Belfast: Niacro

389. Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, Article 39.3

390. Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores, Article 24

391. Audiencia Provincial de Barcelona (Sección Tercera) Ejecutoria nº38/2008. 9 of May 2008

392. Private communication with Martí Rovira on 18 August 2015

393. Private communication with Martí Rovira on 18 August 2015

394. <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/registros/cancelacion-rectificacion>

395. Real Decreto 95/2009, de 6 de febrero, por el que se regula el Sistema de registros administrativos de apoyo a la Administración de Justicia, Article 24

396. Private communication with Martí Rovira on 18 August 2015

397. Private communication with Martí Rovira on 18 August 2015

398. Laurari, E. (2011) *Conviction Records in Spain: Obstacles to Reintegration of Offenders?*, *European Journal of Probation*, 3 (1), pp. 50–62

protections in Spain.

Policy issues

There is no indication that the system described above will change in the near future to any great extent.³⁹⁹ However, new laws relating to a central sex offenders register are currently going through a process of approval; this register will include details of relevant offences committed by minors (see below).

Prevalence and attitude towards pre-employment criminal record checks

Employers hardly ever ask for adult criminal history information and it would be extremely unusual for them to ask about juvenile records. Whilst it is theoretically possible for juveniles to apply for a copy of their criminal history information from the juvenile register once they are 18 applications would be very rare.⁴⁰⁰

A new law has just been passed allowing for the creation of a central register of sex offenders, which will include details of minors convicted of relevant offences.⁴⁰¹ Employers will be required in future to request a certificate from this database for employees and volunteers who work with children.⁴⁰² The new system is likely to be approved at some point between December 2015 and February 2016. Further details will become available after approval.

There are no laws preventing discrimination on the grounds of criminal history.

Identification of children accused or convicted of committing a criminal offence

The right to a public trial is set down in the Spanish Constitution.⁴⁰³ This right is protected for both adults and juveniles, but it is accompanied by strict privacy rules which protect the identity of all offenders whatever their age.

Court files and judgments relating to both adults and juveniles are not available for public inspection in order to protect the individual's 'honour'⁴⁰⁴ and privacy. Real names and other identifying information are anonymised in any published decision in order to protect these rights.⁴⁰⁵ Even when reporting cases concerning adults in Spain, journalists generally refer to the accused using initials only, unless the defendant is particularly high profile.⁴⁰⁶

399. Private communication with Martí Rovira on 18 August 2015

400. Private communication with Martí Rovira on 18 August 2015

401. Ley 26/2015, de 28 de julio, de modificación del sistema de protección a la infancia y a la adolescencia

402. Private communication with Martí Rovira on 18 August 2015

403. Article 24

404. This is explained as 'the right to a good reputation, the right not to be despised, and the right not to be humiliated in front of others' in Jacobs, J. B. and Larrauri, E. (2012) 'Are criminal convictions a public matter? The US and Spain', *Punishment & Society*, 14 (1), pp. 3–18

405. Jacobs, J. B. and Larrauri, E. (2012) *Are criminal convictions a public matter? The US and Spain*, *Punishment & Society*, 14 (1), pp. 3–18

406. Laurrari, E. (2011) 'Conviction Records in Spain: Obstacles to Reintegration of Offenders?', *European Journal of Probation*, 3 (1), pp. 50–62; however, Jacobs, J. B. and Larrauri, E. (2012) *Are criminal convictions a public matter? The US and Spain*, *Punishment & Society*, 14 (1), pp. 3–18, reports that there have been a number of Supreme Court cases recently which are indicative of a trend towards giving newspapers greater leeway on reporting criminal cases

The *Ley Orgánica 5/2000, de 12 de enero, de Responsabilidad Penal de los Menores* provides further protections for juveniles: the Judge can decide that in the interests of the accused or the victim that the proceedings should not be public;⁴⁰⁷ the media cannot obtain or release the minor's photo or any data that would allow the young person to be identified;⁴⁰⁸ and every participant in the proceedings is bound to strictly respect the child's right to confidentiality and non-dissemination of personal data or information.⁴⁰⁹ Civil and criminal liability may arise for anyone who breaches these provisions.⁴¹⁰

When a young woman was murdered in Spain in 2013 by four people between the ages of 14 and 19 the media reported their names. The case did not, however, change the media's approach to generally not identifying young people who are accused or convicted on a crime and it would be exceptional for them to do so.⁴¹¹

407. Article 35(2)

408. Article 35(2)

409. Article 35(3)

410. Article 35(3)

411. Private communication with Martí Rovira on 18 August 2015

Sweden

Summary

Sweden does not have a separate youth justice system and anyone aged 15 or over who is accused of a crime is treated as an adult and tried in the general courts. Young people aged 15 to 21 are, however, subject to special protections which provide for a much more lenient approach to be taken with this age group. Special rules apply to the criminal records of under 18s; records become eligible for expungement in three or five years of the date of the judgment, depending on the sentence. Once expunged, the record will not be disclosed on any criminal record checks and it cannot be accessed by judicial or state authorities. Youth custody sentences are excluded from these provisions. However, it is highly unusual for anyone under the age of 21 to be sent to prison in Sweden and under 18s may only be committed to prison under extraordinary circumstances.

Overview

The minimum age of criminal responsibility in Sweden is 15. Although under Swedish law children below that age are capable of committing a crime they cannot be criminally liable. They are dealt with outside the criminal justice framework and could not have a criminal record imposed on them.

Sweden does not have a separate youth court and anyone aged 15 or over is viewed as an adult and heard in the general courts. There are, however, special protections for young people between the ages of 15 to 21 set down in the *Young Offenders Act*⁴¹² (YOA). This Act provides for less stringent penalties for young people, including wide-ranging powers to waive prosecution. In addition, children under 18 can only be committed to jail under extraordinary circumstances.

Criminal records

Anyone aged 15 or over will be given a criminal record if convicted of an offence in Sweden, or if the prosecutor waives the prosecution. The *Criminal Records Act*⁴¹³ (CRA), which applies to anyone aged 15 and over, contains special provisions for offences committed when the individual was under 18, including provision for criminal records to be expunged sooner for 15–17 year olds than is the case for adults.

Criminal Intelligence Databases

The Swedish National Police Authority administers the national Criminal Records Registry. The Registry consists of two separate databases: (i) the criminal records database, containing court records of actual convictions; and (ii) the criminal suspects registry (which holds information from police records about those who are ‘under reasonable suspicion’ of having committed a crime).

412. *Young Offenders Act (Lag (1964: 167) med särskilda bestämmelser om unga lagöverträdare)*

413. *Criminal Records Act (1998: 620) (Lag (1998: 620) om belastningsregister)*

Under 15s who commit acts which would be defined as a criminal offence if they were over 15 are dealt with by social services and files would be kept by individual departments on every child the department worked with. The police may also keep information about under 15s who come into contact with them. The police are supposed to delete information from their files once a person has been cleared or convicted but the Swedish Data Protection Authority have shown repeatedly that police forces fail to do this.⁴¹⁴

Access rights and criminal record checks

There is an extensive list of authorities with access rights to criminal history data.⁴¹⁵ In general, however, criminal records are not accessible by the public and applications for criminal history certificates may only be made by the record holder. Applications can be made to the Swedish National Police Authority for a 'police record extract'.

Since 2001, statutory requirements have been introduced on certain categories of employers requiring them to obtain criminal record checks from prospective employees, although it is still the case that applications must be made by the record holder through the Swedish National Police Authority (SNPA).

Applications for these checks are made on-line, and the SNPA provides different forms depending on the type of job being applied for, e.g. working with children, financial sector etc. This form highlights to the police the type of job being applied for and they will disclose the information set down in statute as being relevant to that job.⁴¹⁶ A 'Section 9' request reveals all information held on the criminal records database. Unfortunately many applicants use the wrong form and their disclosures may consequently include information their employers are not entitled to see.⁴¹⁷

Individuals have a right to access information held about themselves on the criminal suspects registry providing the request does not interfere with the police's mission to prevent and detect crime.

Expungement of records

The majority of convictions for people both under and over 18 years of age will have been expunged after ten years.⁴¹⁸ Once expunged, the record will not be disclosed on any criminal record check and it cannot be accessed by judicial or state authorities. However, it will be archived and it would be accessible, for example, for research.

Up until 2010, the records for young people (under 18) were kept for the same periods as those of adults. In 2010, the law was amended and young people's records are now generally only kept for three or five years, depending on the sentence.⁴¹⁹ Youth custody sentences are excluded from this amendment, but it is highly unusual for people under 21 to be sent to prison in Sweden.⁴²⁰

414. Private communication with Dr Christel Backman dated 1 July 2015

415. See SFS 1999: 1134 (Förordning (1999: 1134) om belastningsregister) and section 6, Criminal Records Act (1998: 620)

416. Backman, Christel (2012) *Criminal Records in Sweden. Regulation of Access to Criminal Records and the Use of Criminal Background Checks by Employers*. Göteborg: Göteborgs universitet, Institutionen för Sociologi och arbetsvetenskap

417. Private communication with Dr Christel Backman dated 1 July 2015

418. It can be longer if new offences are added to the record

419. s17, Criminal Records Act (1998: 620)

420. Backman, Christel (2012) *Criminal Records in Sweden. Regulation of Access to Criminal Records and the Use of Criminal Background Checks by Employers*. Göteborg: Göteborgs universitet, Institutionen för Sociologi och arbetsvetenskap.

The following periods apply to the criminal records for offences committed under the age of 18:

Sentence	Length of time before the record is culled
Waiver of prosecution	3 years after the decision
Suspended sentence, probation, care of young persons, youth service, fines	5 years after the judgment, decision or acceptance
Youth custody sentence	10 years

Prevalence and attitude towards employment checks

Historically in Sweden, employers would only do checks where the law specifically required them to do so. Until 1989, there wasn't even a right for individuals to review their own criminal record data to protect them from being forced by employers to reveal their criminal record.⁴²² However, the last ten years has seen a dramatic increase in the use of criminal records in the employment process.⁴²³ Dr Christel Backman, of the University of Gothenburg, links this trend to the introduction of new statutory requirements beginning in 2001 which required employers to seek criminal record checks for various categories of jobs, notably those related to work with vulnerable children and adults.⁴²⁴

Many employers are requiring prospective employees to provide criminal record history or to make 'Section 9 requests' even though they don't have the legal right to ask for any criminal history information. Given that Sweden does not have any anti-discrimination laws covering criminal records, if the person refuses and they are not given the job, they have no recourse. The system means that employers without legal rights to see criminal records often have more information disclosed to them by the potential employee than employers who do have a legal right to a limited check will obtain by going through the official system.⁴²⁵

This can affect children, even when they are applying for voluntary work. For example, there has been an incident recently where a church required youth leaders who were just over 15 and known to the congregation to provide a copy of their criminal record.⁴²⁶

Having a criminal record can also affect young people's ability to attend certain higher education programmes. Teaching and pre-school education programmes, for example, all include internships

421. 'A waiver of prosecution can, for example, be granted if a person has recently received sentence for another offence and the crime in question would not result in the punishment being increased. Waiver of prosecution is also common in the case of young people under the age of 18. If the person in question is a first offender and it is a question of a minor offence, the idea is that he or she should be given another chance'. Information taken from the Swedish Prosecutor's Office website at <http://www.aklagare.se/> (accessed on 23 September 2015)

422. Backman, Christel (2012) *Criminal Records in Sweden. Regulation of Access to Criminal Records and the Use of Criminal Background Checks by Employers*. Göteborg: Göteborgs universitet, Institutionen för Sociologi och arbetsvetenskap.

423. Backman, Christel (2011) 'Vocabularies of motive among employers conducting criminal background checks', *Acta Sociologica*, 54 (1), pp. 27–44

424. Backman, Christel (2012) *Criminal Records in Sweden. Regulation of Access to Criminal Records and the Use of Criminal Background Checks by Employers*. Göteborg: Göteborgs universitet, Institutionen för Sociologi och arbetsvetenskap.

425. Private communication with Dr Christel Backman dated 1 July 2015

426. Private communication from Dr Christel Backman, 24 June 2015

which require the production of criminal record checks. Whilst these checks should only reveal 'relevant' crimes, young people may be put off from applying altogether.⁴²⁷

Young people's knowledge of laws affecting criminal records

There has not been any research on how well-informed young people are about the laws affecting their criminal records in Sweden. Anecdotal evidence suggests that many people do not know whether they still have a record or not.⁴²⁸ The police website contains an overview of the system but there are no statutory requirements for young people to be informed about the laws or their rights during any stage of the justice process.

Policy issues

A new website, Lexbase, was launched in early 2014. Lexbase is a private company which provides details of criminal records and other information about individuals' convictions. Lexbase collects information daily from court records and provides information to anyone who wants it at very cheap rates.⁴²⁹ The company is not subject to the expungement laws outlined above and it is possible that criminal history information will be retained by it indefinitely.

In response to this problem, some courts have stopped making verdicts available as pdfs and now require people to obtain copies of verdicts in person at the court house. This is creating some obstacles to Lexbase since they can no longer order copies of verdicts by e-mail.⁴³⁰

Identification of children who come into contact with the criminal justice system

There are no specific statutory provisions to protect the privacy of children who have, or are suspected of having, committed a crime. There is a general rule that as soon as the investigation has been concluded it becomes publicly available, with the exception of the information contained in the investigation conducted by social services. Information in court proceedings is also publicly available, subject to some exceptions, for example, if releasing the information would be harmful to the person to whom it relates.⁴³¹

Criminal records have historically been considered sensitive information; news media rarely publish names of suspects or offenders even after the sentence has been handed down and the existence of criminal records has been viewed by state authorities as potentially stigmatizing and hazardous for those with a record.⁴³²

427. Private communication from Dr Christel Backman, 24 June 2015

428. Private communication from Dr Christel Backman, 24 June 2015

429. Stacey, C. (2015) *Rehabilitation and Desistance vs Disclosure. Criminal records: Learning from Europe*. Maidstone: Winston Churchill Memorial Trust and Unlock

430. Private communication with Dr Christel Backman dated 1 July 2015

431. Chapter 35, section 12 of the Public Access and Secrecy Act (*Offentlighets- och sekretesslag* (2009: 400))

432. Backman, Christel (2012) *Criminal Records in Sweden. Regulation of Access to Criminal Records and the Use of Criminal Background Checks by Employers*. Göteborg: Göteborgs universitet, Institutionen för Sociologi och arbetsvetenskap.

The internet has made information about children who come into contact with the youth justice system more readily available in Sweden and some tabloids have published identifying material about under 18s. There is a case current in Sweden at the time of writing involving two 13 year olds who have been accused of killing an elderly man after breaking into his house. Traditional news media is only reporting their age and the fact that they have escaped from a foster home but the tabloids are reporting more details about the children. In other serious cases involving child defendants significant precautions have been taken to protect the identities of children, including help from social services to relocate them and their families under new identities.⁴³³

433. *Private communication with Dr Christel Backman dated 1 July 2015*

USA: New Mexico

Summary

New Mexico operates a separate youth justice system with the vast majority of cases being dealt with on an informal basis and without the imposition of a criminal record. Young people who are adjudicated guilty by the Children's Court are given a 'juvenile disposition'. These records are held separately from adult criminal records and they are not accessible on the public access websites. There are provisions for records of juvenile dispositions, and other juvenile justice records, to be sealed. These rules are complex and implementation is very patchy. Expungement is not available and sealed files may be re-opened if the young person comes into contact with the juvenile or criminal justice system subsequently. A small number of under 18s are given adult sentences each year. Records of these convictions are treated as adult criminal records and will be held on the central Repository indefinitely.

Overview

New Mexico's juvenile justice laws are largely contained within Article 2 of the Children's Code,⁴³⁴ generally referred to as the 'Delinquency Act'. Any act committed by a child that would be designated a crime if committed by an adult constitutes a 'delinquent act'.⁴³⁵ A child is defined as anyone under the age of 18.⁴³⁶ There is no minimum age of criminal responsibility.⁴³⁷

Juvenile Justice Services (JJS) are organised through the Children, Youth and Families Department (the CYFD), which also provides early childhood services and 'protective services' ie child welfare.

When juveniles are arrested they are referred to a district Juvenile Probation Office (JPO), which is part of the CYFD. The JPO officer will meet with the juvenile and their families to discuss the case. The JPO will then decide whether to refer the case to the children's court attorney (CCA) or to handle the case with informal means,⁴³⁸ although more serious cases (felonies) must go to the CCA.⁴³⁹ JPOs can handle three misdemeanor complaints about an individual juvenile with informal measures within a two year period. The fourth complaint must be passed to the CCA who will decide whether or not to file a petition against the child (i.e. initiate court proceedings).⁴⁴⁰

A person between the ages of 15 and 18 can be tried as an adult in a district court for first degree murder. All other cases involving under 18s would be tried in the Children's Court, which is part of the district court but with its own rules of procedure. A judgment in the Children's Court results in a 'juvenile disposition' in most cases. This is specifically not deemed to be a criminal conviction. The exception to this is where an adult sentence is imposed (this would only be considered in the

434. *New Mexico Statutes Ch. 32A*

435. *New Mexico Statutes § 32A-2-2(A)*.

436. *New Mexico Statutes § 32A-1-4*

437. *UNM School of Law (2011) New Mexico Juvenile Justice Handbook. A Legal Manual on Delinquency. New Mexico: UNM School of Law*

438. *Children, Youth and Families Department (2015) New Mexico Juvenile Justice Services Annual Report. Fiscal Year 2014. New Mexico: CYFD*

439. *New Mexico Statutes § 32A-2-7(F)*

440. *New Mexico Statutes § 32A-2-7(E)*

most serious cases).⁴⁴¹ When given an adult sentence, the young person would have a criminal conviction.⁴⁴² Children are only, therefore, given a criminal record if they are a) given an adult sentence; or b) convicted of first degree murder. In these circumstances, none of the information below would apply – the child would be treated as an adult.

Between 1 July 2013 and 30 June 2014, 12,351 referrals were made to the JPO. Of these, 5,331 were handled formally; 901 young people received a juvenile disposition; 474 were pending a disposition; 2,683 were non-adjudicated (i.e. the issue was resolved using alternative measures or the youth was found not guilty). Only one young person received an adult sanction.⁴⁴³

Criminal records

Databases holding information about children accused or convicted of a crime

Records pertaining to juvenile dispositions are held by the New Mexico court that adjudicated the case, by CYFD which supervises the disposition and by local law enforcement agencies. They are not included in the New Mexico State Central Repository for Criminal History. This Repository, which is administered by the Department of Public Safety, maintains arrest record information on persons arrested in New Mexico, aged 18 or over, for felony, misdemeanor (offences punishable by six months or more imprisonment) and Driving While Intoxicated offences.⁴⁴⁴ Records of under 18s who have received an adult sentence would be kept on the Repository.

Records for the many cases that are dealt with on an informal basis by the JPO are kept by juvenile probation services at CYFD and the referring agency, such as law enforcement.

Access and criminal record checks

Records of juvenile proceedings are available in part to the public under New Mexico law.⁴⁴⁵ Behavioural health screenings and other records obtained by the juvenile probation office, for example, are confidential while some legal records are publicly available, including pleadings, court orders, and transcripts.⁴⁴⁶ No state or local government agency may disclose on a public access website any information concerning the arrest or detention of a child⁴⁴⁷ or delinquency proceedings for a child but anyone wishing to see the pleadings in the case, for example, could go to the courthouse and do so, if those records had not been sealed. Nowadays the courts are scanning documents into the judicial electronic filing system and some of them do not keep paper copies. In these cases, the court clerk will arrange for the member of the public to sit at a computer terminal and review the file on the computer. If the paper file still exists, the person can review the hard copy.⁴⁴⁸ In practice, it would therefore be possible for, say, an employer to gain access to an unsealed record of a juvenile disposition. However, this information would not be included on a criminal records check.

441. In order to impose adult sanctions on an under 18, in addition to finding that the child has committed a delinquent act classified as a youthful offender offence in New Mexico Statutes § 32A-2-3(J), the court must find that: (i) the child is not amenable to treatment or rehabilitation as a child in available facilities; and (ii) the child is not eligible for commitment to an institution for children with developmental disabilities or mental disorders. New Mexico Statutes § 32A-2-20(B).

442. New Mexico Statutes § 32A-2-18

443. Children, Youth and Families Department (2015) *New Mexico Juvenile Justice Services Annual Report. Fiscal Year 2014*. New Mexico: CYFD

444. <http://www.dps.state.nm.us/index.php/criminal-history-records/> (accessed on 16 June 2015)

445. New Mexico Statutes § 32A-2-32

446. UNM School of Law. (2011) *New Mexico Juvenile Justice Handbook. A Legal Manual on Delinquency*. New Mexico: UNM School of Law

447. New Mexico Statutes § 32A-2-32.1

448. Private communication with Judy Flynn-O'Brien dated 25 November 2015

Judicial, administrative and other statutorily entitled organisations (in practice, certain state bodies) have full access rights to any records of the child's contact with the juvenile justice system unless they are mental health records or have been sealed.⁴⁴⁹ For example, the child's school will be allowed access to records that concern the child's educational needs if the information is necessary to provide for the child's educational planning.⁴⁵⁰ Employers are not entitled to see these records. The aim is to maintain confidentiality except in so far as it is necessary to share information for law enforcement reasons or to help the child.

It is a criminal offence to improperly use confidential records and sanctions are available.⁴⁵¹

Sealing

If a child is the subject of a delinquency petition but is determined by the court not to be a delinquent offender or is non-adjudicated the law requires all files and records to be sealed automatically by the court on motion of the CCA.⁴⁵² There are three districts that do this regularly and there are many that do not.⁴⁵³

Children may also petition for a court order requiring their files to be sealed.⁴⁵⁴ The court must make an order for sealing if the following criteria have been met:

- Two years have elapsed since the final release of the person from legal custody and supervision or two years have elapsed since the entry of any other judgment not involving legal custody or supervision;
- The person has not, within the two years immediately prior to filing the motion, been convicted of a felony or of a misdemeanor involving moral turpitude or been found delinquent by a court and no proceeding is pending seeking such a conviction or finding; and
- The person is 18 or older or the court finds good cause exists to seal the records prior to his or her 18th birthday.

If an order is made, all agencies (that are listed on the order) holding files on that child must seal their records.⁴⁵⁵

Regardless of whether the child files a motion to seal, the law specifically requires the CYFD to automatically seal their records when the child reaches the age of 18 or at the expiration of the disposition, whichever occurs later.⁴⁵⁶ New Mexico Court Rules further explain that the young person must not be subject to any pending delinquency proceeding or any other order not involving legal custody or supervision at the time of sealing.⁴⁵⁷ The CYFD must notify the young person that their records are being sealed and it must also notify all other relevant agencies that their records are 'subject to sealing'.⁴⁵⁸ Some agencies comply with this notification by sealing their records but many do not if there is no court order requiring sealing. If agencies fail to seal records,

449. See New Mexico Statutes §32A-2-32(C) for details

450. New Mexico Statutes § 32A-2-32

451. New Mexico Statutes § 32A-2-32

452. New Mexico Statutes § 32A-2-32(H)

453. E-mail communication with Kathleen Hardy, Children, Youth and Families Department on 20 August 2015

454. New Mexico Statutes § 32A-2-26(A)

455. New Mexico Statutes § 32A-2-26(A)

456. New Mexico Statutes § 32A-2-26(G)

457. New Mexico Court Rules § 10-262 (E)

458. New Mexico Statutes § 32A-2-26(G)

it will be up to the person who wants his or her records sealed to file a motion in court to get them sealed.

The implications for the record holder when agencies do not seal records can be significant. Some agencies require a release signed by the individual before they disclose records, but others do not. Some records, such as mental health, medical and school records, are protected by confidentiality laws. Courts file confidential records separately when receiving such records in the course of proceedings⁴⁵⁹ and, it is hoped that other agencies would have similar procedures in place. Penalties may be available for the disclosure of confidential information⁴⁶⁰ but generally agencies cannot be held accountable for failing to seal records unless they are violating a court order.

Regardless of access requirements, it is not uncommon for, for instance, military recruiters or government background checkers to obtain copies of arrest reports from law enforcement agencies. This might, for example, mean that a child who had a single juvenile arrest for illegal pharmaceuticals but was never prosecuted could be denied entry into the armed forces; a person referred for a fight at school with no other history could be refused access to supported housing; someone with a domestic violence or petty larceny referral could be refused employment working with vulnerable individuals, or for a position of trust such as housekeeping. The implications can be wide-ranging and long-term.⁴⁶¹

On a monthly basis the CYFD:

- Identifies the clients who have closed, unsealed files and have turned or will be turning 18 in the next 60 days;
- Generates a list of those clients, which in turn generates a letter notifying the client that their record will be sealed in 60 days; those letters are sent out the first week of every month;
- Seals all eligible files and expunges their index references;
- Generates three additional lists: the first for clients who have had petitions filed against them, which is sent to the District Attorneys, the Public Defenders, the AOC, and the Department for Public Safety; the second for the county offices, which then pull, seal, and securely store all the physical files now subject to sealing; and a third identifying the referral sources, which the county clerks then use to notify all the agencies who have referred clients to the CYFD that the files on those clients are now subject to sealing. There are some agencies that do seal the files upon notice and there are others that do not.⁴⁶²

The CYFD treats all files identically when it comes to sealing and makes no distinction between adjudicated, non-adjudicated or informal clients.

The Court Rules provide a procedure for the sealing of records by the courts, law enforcement and other agencies under this automatic sealing law. As of 27 October 2015, implementation of this Rule began with the delivery of a test database to the Administrative office of the Courts (AOC), consisting of 7,694 cases spanning all 33 counties. The AOC's information technology division has successfully imported this database into their own system, and as of 9 November 2015, 14 counties in nine judicial districts have issued court orders directing law enforcement and other agencies to seal their records.⁴⁶³

459. Private communication with Judy Flynn-O'Brien dated 25 November 2015

460. New Mexico Statutes § 32A-2-32

461. E-mail communication with Kathleen Hardy, Children, Youth and Families Department on 9 November 2015

462. E-mail communication with Kathleen Hardy, Children, Youth and Families Department on 20 August 2015

463. New Mexico Court Rules § 10-262(F)

These rules apply only to the young people who have petitions filed against them. There are many more young people⁴⁶⁴ for whom these rules would not apply, since they are not in the court system.⁴⁶⁵ They would have to rely on the measures described earlier, where CYFD seals its records and notifies other agencies that their records are 'subject to sealing'. As noted, many agencies will not seal records without a court order.

Once the record is sealed it can still be accessed in limited circumstances by a court order. Other than that, all departments and agencies must reply to any inquiry that no delinquency proceedings exist and the person who is the subject of the sealing order in a delinquency proceeding may also state that no record exists if asked (they have the option to disclose them if they wish to). Records may be unsealed at the court's discretion if the young person subsequently comes into contact with the court.⁴⁶⁶

There are no expungement provisions for records of delinquency dispositions, except that all index references are supposed to be deleted. It is possible to petition to expunge arrest information from the New Mexico State Central Repository for Criminal History if the arrest was for a misdemeanor or a petty misdemeanor offence and the arrest was not for a 'crime of moral turpitude'. If successful, the record will be completely removed from the Repository.⁴⁶⁷ This would never apply to under 18s, however, because their arrest information would be in the Repository only if they committed a more serious crime and received an adult sentence. There are no other expungement provisions available in New Mexico, except for DNA samples and records in certain situations.⁴⁶⁸

There are retention and disposition schedules, established by the State Commission of Public Records, which establish minimum timelines for the retention and subsequent disposal (destruction) of records.⁴⁶⁹ While the schedules are not necessarily incumbent on non-state government entities, most government entities in New Mexico follow them. At the expiration of the minimum retention period it is up to the individual agencies to dispose of the records if they wish to do so. In terms of juvenile records this means that even if there is a court order to produce sealed juvenile records, there's always the chance that, if the record is old enough, the physical copy, and possibly any electronic copy, has already been disposed of.

Prevalence of criminal record checks by employers

There is no standard approach to requests for criminal record checks by employers in New Mexico. Many jobs would not require one. Technically speaking, juvenile dispositions would not have to be disclosed if the young person has had his or her record sealed but, as noted, the sealing law does not prohibit the young person from disclosing the information. There are no laws preventing discrimination on the basis of having a criminal record.

464. Approximately 7,500 each year. E-mail communication with Kathleen Hardy, Children, Youth and Families Department on 20 August 2015

465. E-mail communication with Kathleen Hardy, Children, Youth and Families Department on 20 August 2015

466. New Mexico Court Rules § 32A-2-26(E)

467. New Mexico Statutes § 29-3-8.1

468. New Mexico Statutes § 29-16-10

469. New Mexico Administrative Code Title 1 Chapter 21 Part 2

Policy issues

New Mexico's juvenile justice system, including the juvenile probation officers and the Children's Court, in many ways focuses on helping young people. The measures it imposes are often intended to be therapeutic and there are many programmes in place designed to help young people who come into contact with law enforcement. Young people are encouraged to participate and to engage with the support offered to them. This rehabilitative approach is well-imbedded and supported by government.⁴⁷⁰

Identification of children accused or convicted of committing a delinquent act

Delinquency cases are open to the public unless the court in its discretion, after a finding of exceptional circumstances, deems it appropriate to close the hearing.⁴⁷¹ If the judge finds that exceptional circumstances exist to close the hearing, only the parties, their counsel, witnesses, and other persons approved by the court may be present. If the hearing is closed, the court may admit anyone deemed to have a proper interest in the case or the court's work. Anyone attending a hearing is prohibited from divulging any information concerning the exceptional circumstances that resulted in the need for a closed hearing.

Representatives of the news media are allowed to attend closed hearings under the same condition, and 'subject to such enabling regulations as the court finds necessary for the maintenance of order and decorum and for the furtherance of the purposes of the Delinquency Act'.⁴⁷² Any person granted admission to a closed hearing who intentionally divulges information in violation of this prohibition is guilty of a petty misdemeanor.⁴⁷³

There are no laws preventing the media from publishing information about children unless the material falls under the Delinquency Act definition of being confidential. There are, for example, very strict laws about the release of mental health records.

A recent case highlighted the uncertainty surrounding the law on whether children accused or convicted of a delinquent act could be identified. Bernalillo County had been routinely releasing booking sheets and photos of young people accused of criminal activity but changed its policy after consulting with its attorneys. However, when a group of youth were arrested, news organisations and others objected to the restriction of public access to records. The president of the New Mexico Foundation for Open Government complained that, 'These are records of alleged criminal activity in our community and nothing in New Mexico law prevents their release'. The County Attorney is quoted as saying: 'There are some inconsistencies in the way state law addresses juvenile record confidentiality. This might be a good issue for the New Mexico Legislature to review and possibly make changes to the law that can provide greater clarity on how juvenile records should be managed in the criminal justice system'.⁴⁷⁴ Bernalillo County released the photos of the youth.

470. Children, Youth and Families Department (2015) *New Mexico Juvenile Justice Services Annual Report. Fiscal Year 2014. New Mexico: CYFD* (see the letter from the Juvenile Justice Services Director at p. 5)

471. *New Mexico Statutes* § 32A-2-16(B)

472. *New Mexico Statutes* § 32A-2-16(B)

473. *New Mexico Statutes* § 32A-2-16(C)

474. <http://www.abqjournal.com/620214/news/bernalillo-county-agrees-to-resume-releasing-juvenile-booking-info.html> (accessed on 12 August 2015)

USA: Ohio

Summary

Ohio has a separate criminal justice system for under 18s. People below this age charged with having committed 'delinquent' (or sometimes 'unruly') acts are tried in a juvenile court and, if found guilty, given a 'juvenile adjudication record'. These records are not classified as criminal records; they are not publicly available and if the young person is asked if they have been convicted of a crime they can legally say that they have not. A statutory scheme is in place for the sealing and expungement of these records, although it has been criticised for poor implementation and the fact that it relies too greatly on the discretion of individual judges. Young people charged with the most serious crimes may be transferred to an adult court and, if found guilty there, given an adult sentence which carries with it an adult conviction record. There are limited sealing or expungement provisions available for these records,⁴⁷⁵ which will be publicly accessible on an indefinite basis.

Overview

Ohio's juvenile justice laws are largely set down in the *Ohio Revised Code*. The Code defines anyone below the age of 18 as a child. The state has no minimum age of criminal responsibility and there are numerous instances of children below the age of 10 being charged with delinquency.⁴⁷⁶

Children in Ohio can come into contact with the justice system by committing a 'delinquent' or an 'unruly' act. A delinquency is an act that if committed by an adult would be a crime (either a felony or misdemeanor). If found guilty of a delinquent act, the child would be given a 'juvenile adjudication record'. An unruly act is an act that is illegal when done by a child, but which would not constitute a crime for an adult, for example truancy or running away.⁴⁷⁷ A child charged with an 'unruly' act can be sent to court and they will have a juvenile file, but this would not constitute a juvenile adjudication record.

Ohio operates a separate juvenile court system. The majority of children are dealt with by the juvenile courts, but there are provisions allowing children to be tried in adult courts under certain circumstances, mainly where they are accused of having committed the most serious offences.⁴⁷⁸ In 2014, 115 under 18s were transferred to the adult court.⁴⁷⁹ If a child is convicted in the adult court they would generally have an adult record. New 'bindback' provisions have recently been introduced under which minors found guilty of lesser offences in the adult court may be sent back to the juvenile court for sentencing. If this happens, the child would have a juvenile record rather than an adult one.

475. *Ohio Revised Code §§ 2953.31 to 2953.61 provide that adult offenders who have 'not more than one felony conviction, [and] not more than two misdemeanor convictions' are eligible to petition the court to seal or expunge records. First and second degree felonies, offenses with mandatory prison terms, and most sex offences are exempted from sealing and expungement provisions.*

476. *Private communication with Professor Katherine Federle on 31 July 2015*

477. *Voice's for Ohio's Children (2008) Family Guide to Ohio's Juvenile Justice System. Cleveland: VOC*

478. *Under 18s can be dealt with in the adult system through one of three procedures: 1) bindover, 2) Serious Youthful Offender (SYO) laws, and 3) laws that allow young people between the ages of 18-21 who are still under the jurisdiction of the juvenile court to be placed in adult jails. Ohio Revised Code § 2152.10 and § 2152.12 define what types of cases are eligible for transfer and procedures for transfer*

479. *Ohio Department of Youth Services (2015) Profile of Youth Transferred to Adult Court. Fiscal Year 2014. Columbus: ODYS*

Ohio comprises 88 counties; although all are governed by the Ohio Revised Code, application of the Code and non-statutory rules and practices vary greatly depending on locality.⁴⁸⁰

Juvenile and criminal records

Under 18s in Ohio do not receive criminal convictions unless sentenced in the adult court and their juvenile adjudication records are not classified as criminal records. If a person who only has a juvenile record is asked if they have been convicted of a crime, they can legally answer that they have not. This does not, however, mean that there are not collateral consequences to having a juvenile record in Ohio. Juvenile adjudications can be used in a subsequent criminal prosecution to determine the level of the charge and the seriousness of the penalty imposed⁴⁸¹ and some offences can bar possession of weapons, prevent employment in certain fields, impact applications for professional licences and limit driving privileges.⁴⁸²

Databases holding information about children accused or convicted of delinquency

All adults who come into contact with the criminal justice system in Ohio will have their details held centrally by the Identification Division of the Bureau of Criminal Investigation (BCI).⁴⁸³ Records of adult sentences imposed on under 18s and sex offence adjudications involving offender registration would also be held on this system. Local courts are also required to notify the BCI of juvenile adjudications involving felony offences and crimes of violence. The BCI retains fingerprints and photographs of juvenile offenders in these cases.⁴⁸⁴ Notwithstanding these offences, there is no central repository of juvenile justice records in Ohio. Local police forces hold records of the children they come into contact with, and local juvenile courts keep files on any child who comes before them.

All agencies and offices that hold information on children who have been suspected of, or prosecuted for, a delinquent act are subject to the sealing and expungement rules set out below. It is generally the case that law enforcement does not purge their records.⁴⁸⁵

There are limited sealing or expungement rights for adult criminal records, including adult records handed down to under 18s. These rights extend to first time offenders in cases involving third, fourth and fifth degree felony offences and the first two misdemeanor offences.⁴⁸⁶

Access to juvenile records

Since juvenile justice records are not public information, they will not appear on most background checks, including checks from the Clerk of Courts, a sheriff's check, or on private background checks. Violent offences and offences that would have been a felony if committed by an adult will be accessible in a few cases. These include background checks for jobs in hospitals, schools,

480. The collateral consequences of a juvenile adjudication are wide-ranging and dependent on a variety of factors, including criminal law and court decisions. The American Bar Association's (ABA) website provides a database on collateral consequences searchable by state at www.abacollateralconsequences.org. The ABA also has a website, www.thinkbeforeyouplea, which provides a very short and non-exhaustive description of the impact of a juvenile adjudication in Ohio. As an example, if a juvenile is adjudicated and is in a juvenile justice facility, then that juvenile is not eligible to receive federal student loans while incarcerated. That is a federal law. Information provided by Professor Katherine Federle in private e-mails dated 31 July 2015 and 26 November 2015.

481. Ohio Revised Code § 2901.08

482. Private communication with Professor Katherine Federle on 29 July 2015

483. For more information about this organisation, go to <http://www.ohioattorneygeneral.gov/Law-Enforcement/Bureau-of-Criminal-Investigation>

484. Ohio Revised Code § 109.57

485. Private communication with Professor Katherine Federle on 31 July 2015

486. Ohio Revised Code § 2953.31

daycare centres, security and others. Juvenile records are available to the police, courts and prosecutors,⁴⁸⁷ but law enforcement officers must apply for a court order granting access, which will only be awarded if they can satisfactorily demonstrate need at a court hearing.⁴⁸⁸

Sealing and expungement

Ohio operates both sealing and expungement processes in respect of juvenile records.⁴⁸⁹

Sealing

Courts have the power to seal a child's criminal record. They can initiate this process themselves, or the process can be started on application by the young person or their representative.

Generally, courts do not consider sealing records on their own accord where sealing is not mandatory.⁴⁹⁰

Records are automatically sealed under the following circumstances:

- When a child is arrested, but a complaint is not filed against them;
- When a child is charged with underage drinking, but he/she successfully completes a diversion program;
- When the court dismisses the complaint after a trial on the merits or finds the person not to be a delinquent child, an unruly child, or a juvenile traffic offender.

If the person is under 18 years of age, they can ask a court to seal their record any time after six months after any of the following events occur:

- The termination of any order made by the court in relation to the adjudication;
- Unconditional discharge from Department of Youth Services/other facility;
- The court enters a sex offender declassification order.

If the person is 18 or older, they can ask for their record to be sealed at any time after the later of the following:

- The person's attainment of 18 years of age;
- The occurrence of any event listed above for those under 18 years of age.⁴⁹¹

A court will consider sealing records, either through the court's own accord or through the child's written application where:

- The child has been satisfactorily rehabilitated, as determined by an investigation (conducted by the court probation department) based on age; nature of case; education and employment history; any other delinquent, unruly, or criminal behaviour; and any other circumstances;

487. Ohio Justice & Policy Center (2012) *Understanding and Clearing Up Criminal Records in Ohio*. Cincinnati: OJPC

488. Ohio Revised Code § 2151.14

489. Information obtained from the website of the Office of the Ohio Public Defender at http://www.opd.ohio.gov/Juvenile/JV_Sealing.htm (Accessed on 26 June 2015) and Ohio Rev. Code §2151.35.5-2151.35.8

490. Private communication with Professor Katherine Federle dated 26 November 2015

491. Ohio Rev. Code. §§ 2151.356(C)1

- The prosecuting attorney has no objections or does not respond. If the prosecuting attorney does have objections, a hearing may be scheduled.

Filing fees vary from county to county. In addition, many young people hire an attorney or retain the County Public Defender.

The requests are not always granted and remain within the discretion of the judge. The right to apply for record sealing is not available for adjudications for the offences of aggravated murder, murder, rape, juvenile traffic offences and unruly petitions.⁴⁹²

If the court makes an order for records to be sealed 'the person who is subject of the order properly may, and the court shall, reply that no record exists with respect to the person upon any inquiry in the matter'.⁴⁹³ Any office that had contact with the case must also seal their records.

There are a limited number of people who will have access to sealed records, including the record holder themselves, the court and law enforcement and prosecuting agencies if the offence was of a violent nature.⁴⁹⁴ Sealed records must be disclosed under certain circumstances including applications for military enlistment and some professional license applications, e.g. attorneys.

Expungement

The court must automatically expunge all records five years after they are sealed or when the young person turns 23, whichever happens first.⁴⁹⁵ The court may expunge sealed records if the petitioner applies earlier.⁴⁹⁶

- If the young person has been satisfactorily rehabilitated, as determined by an investigation conducted by the probation department based on age; nature of case; education and employment history; any other delinquent, unruly, or criminal behaviour; and any other circumstances;
- If the prosecuting attorney has no objections or does not respond (if the prosecuting attorney does have objections, a hearing may be scheduled).

An expunged juvenile record is totally destroyed, in physical and electronic forms, so that the record is permanently irretrievable.

- The young person and the court can respond that no record exists, and it is as if the proceedings never occurred;
- The record shall be expunged with every office that had contact with the case;
- The record no longer exists.

Records for aggravated murder, murder and rape can never be sealed or expunged.⁴⁹⁷

Once a record is sealed, anyone who disseminates information relating to it is guilty of divulging confidential information.⁴⁹⁸ The offence would constitute a misdemeanor of the fourth degree, which is punishable by a jail term not to exceed 30 days.

492. *Ohio Rev. Code. §§ 2151.356(C)*

493. *Ohio Rev. Code. §§ 2151.356, 2151.357(A)*.

494. *Ohio Rev. Code. §§ 2151.357(E)*

495. *Ohio Revised Code. § 2151.358(A)*

496. *Ohio Revised Code. § 2151.358(B)*

497. *Ohio Revised Code. § 2151.356 (A)*

498. *Ohio Revised Code Ann. § 2151.357(F)*

Despite the fact that expungement laws have existed in some form for decades,⁴⁹⁹ the courts in Ohio have not followed the laws in this area.⁵⁰⁰ There are no statistics available as to how many records have been sealed under the new statutory scheme which came into force in 2012.

Availability of information regarding juvenile records and knowledge of rights amongst young people

Ohio requires that the young person is notified of their expungement rights.⁵⁰¹ How well this works varies by court. There is limited understanding among attorneys about sealing and expungement of records or about the collateral consequences of these records for young people. There is even less understanding among defendants, and juvenile courts are not good at advising defendants on their rights.⁵⁰² There is no remedy available to young people who are not properly advised by the court.⁵⁰³

Prevalence of criminal record checks by employers

Although juvenile records in Ohio are not classified as criminal convictions and employers are not entitled to ask for details of juvenile adjudications, many employers get round this by asking the prospective employee if they have ever been adjudicated a delinquent.⁵⁰⁴ Individuals are not compelled to answer this but the reality is that many think they do have to answer truthfully and, if they say they are not prepared to provide an answer, they may not get the job. Any person who seeks to enlist for military service is compelled to reveal adjudications that are expunged.

Questions about both adult and juvenile criminal convictions are standard when applying for jobs. There are no laws prohibiting discrimination on the grounds of criminal convictions.

Policy issues

There has been a more considered approach to juvenile justice in Ohio in the last couple of years. There is recognition that the current juvenile justice system is not helping to reduce crime or help young people and attempts have been made to help children stay away and move on from the system,⁵⁰⁵ for example, the diversionary scheme RECLAIM Ohio,⁵⁰⁶ the 'bindback' provisions referred to above and the re-consideration of the 'zero tolerance' policies within schools.

499. Previously the juvenile court was required to expunge records on their own motion or to send certified mail notice to offenders that advised them to petition the court to expunge records. Private communication with Professor Katherine Federle on 29 July 2015

500. Private communication with Professor Katherine Federle on 29 July 2015

501. Rule 34(J) Ohio Rules of Juvenile Procedure

502. Private communication with Professor Katherine Federle on 29 July 2015

503. Private communication with Professor Katherine Federle on 29 July 2015

504. Private communication with Professor Katherine Federle on 31 July 2015

505. Private communication with Professor Katherine Federle on 31 July 2015

506. <http://www.dys.ohio.gov/dnn/Community/RECLAIMOhio/tabid/131/Default.aspx>

The statutory scheme for sealing and expungement (introduced in 2012) was an attempt to standardise the system, although at present it seems that the provisions are not being enforced and there is poor knowledge and understanding about the rules amongst young people and professionals.

Identification of children accused or convicted of committing a criminal offence

Juvenile court proceedings in Ohio involving abused, neglected and dependent children are neither presumptively open nor presumptively closed since a 1990 case in the Ohio Supreme Court.⁵⁰⁷ On the other hand, courts have strongly favoured openness for juvenile delinquency proceedings.⁵⁰⁸

The court may exclude the general public from its hearings in a particular case. This decision may be taken if the court determines that potential harm to the child outweighs the benefits of public access. A separate hearing must be held to consider this point. If the court decides that exclusion of the general public is appropriate, the court still may admit to a particular hearing, or all of the hearings relating to a particular case, those persons who have a direct interest in the case and those who demonstrate that their need for access outweighs the interest in keeping the hearing closed.⁵⁰⁹ In practice, this balancing test is almost always resolved in favour of opening court proceedings in juvenile delinquency cases. In these matters, protecting the public is considered to be an overriding state interest.⁵¹⁰ If the public are granted access the media may report fully on the case.

In general, as stated above, juvenile court records are not open for public inspection in Ohio. However, there are exceptions for certain juvenile records that are relevant to the state in prosecuting the juvenile as an adult and for the defence to impeach the testimony of a witness with a juvenile record. Moreover, some juvenile court judges allow access to juvenile court records, especially when the juvenile court proceedings are open to the public.⁵¹¹

Ohio is one of just a few states that allow cameras and recording devices in juvenile courts, provided a victim or witness does not object to their presence. Members of the news media who wish to photograph proceedings in a juvenile case must file a written request with the presiding judge, who, after consultation with the news organizations, will specify the place in the courtroom from which photographs and recordings may be made. If the media's request is granted, there is no prohibition on photographing or recording the juvenile⁵¹² or on disseminating them.

Absent an order from the court, the media is not barred from releasing details in its possession about any investigation or proceedings involving under 18s. Legislators and the court hope that the media will act responsibly but they rarely do⁵¹³ and identifying information about under 18s is frequently published.

507. *Re T.R.*, 556 N.E.2d 439, 451 (Ohio 1990)

508. Private communication with Professor Katherine Federle on 26 November 2015

509. Ohio Revised Code Ann. § 2151.35

510. Private communication with Professor Katherine Federle on 29 July 2015

511. Reporters Committee for Freedom of the Press (2012) *Access to Juvenile Justice*. RCFP

512. Reporters Committee for Freedom of the Press (2012) *Access to Juvenile Justice*. RCFP

513. Private communication with Professor Katherine Federle dated 29 July 2015

USA: Texas

Summary

Texas has a separate juvenile justice system for children between the ages of 10 and 16. Children between these ages who are found guilty by a juvenile court would receive a juvenile court record, which, depending on the seriousness of the crime, may be held on a centralised criminal history database. Members of the public do not have access to juvenile information held on this database but it is accessible by a wide range of public and judicial entities until the young person turns 17. At this point, the record is restricted on an automatic basis and the individual can legally say that they do not have a juvenile record. Sealing and expungement is also available in many cases.

The situation is very different for some categories of young people charged with the most serious crimes who receive adult criminal records: juveniles aged 14-16 may be 'certified as adults' at the judge's discretion for any felony crime, although typically it only happens in the most serious cases. Youth who stay in the juvenile court but who receive 'determinate sentences' will see those sentences carried over into adulthood and will have an adult criminal record. 'Determinate sentences' are available from the age of 10 for the most serious offences. Adult records are publicly available and easily accessible to anyone who wants to see them. There are very limited circumstances in which access to these records may be restricted and in most cases they would be available indefinitely.⁵¹⁴

Overview

Texas juvenile justice law is contained predominantly within the *Texas Family Code*, although provisions affecting children who come into contact with the juvenile correctional system exist in other Texas statutes also. The Texas Juvenile Justice Department states that, 'public safety and holding juveniles accountable for their actions are certainly considerations [but] the juvenile correctional system places an emphasis on rehabilitation'.⁵¹⁵

The minimum age at which the juvenile court has jurisdiction over a case and at which a child could receive a determinate sentence⁵¹⁶ is 10. Children dealt with through the juvenile court would receive a juvenile court record. The maximum age of juvenile jurisdiction in Texas is currently 16, meaning that a 17 year old youth is considered an adult for all criminal justice purposes, including all matters relating to criminal records. Most of the information below, therefore, pertains only to children between the ages of 10 and 16.

Texas law permits juveniles of 14 and older who have committed felony offences to be transferred by a juvenile judge to adult criminal court for trial and punishment. The discretionary process is known as 'certification'. Certification hearings in Texas are rare and typically involve only the most serious types of felony offences. A juvenile offender is treated as an adult from the moment the juvenile court judge signs the certification and transfer order. Upon conviction in the criminal district court, a judge or jury may impose the same punishment, excluding the death penalty

514. Texas Department of Public Safety FAQs. Available at https://www.txdps.state.tx.us/administration/crime_records/pages/faq.htm (accessed on 19 August 2015)

515. <http://www.tjjd.texas.gov/about/overview.aspx> (accessed on 22 June 2015)

516. 'Determinate sentences' are reserved for the most serious offences. The sentence begins in the juvenile system; the youth is reviewed at the age of 19 to determine if he or she needs to move to an adult prison or if they have been rehabilitated.

and mandatory life without possibility of parole, as can be imposed on any adult defendant for commission of the same offence.⁵¹⁷ The individual would have an adult criminal record.

Juvenile records

Databases holding information about children who come into contact with the juvenile correctional system

There are two main depositories of juvenile records in Texas:

- Files kept by the court and probation department. These include records of 'conduct indicating a need for supervision' and records of 'delinquent conduct';
- The *Juvenile Justice Information System* (JJIS). This is a database maintained by the Texas Department of Public Safety (TDPS). It includes records of arrests, prosecutions, adjudications, and dispositions for delinquent conduct related to Misdemeanor Class Bs⁵¹⁸ and above. The JJIS is part of the central computerised criminal history search (CCHS) which also holds adult criminal history records. The TDPS submits copies of the information held on the JJIS to the FBI.

Access to juvenile records

Juvenile records are not available to the general public and they enjoy far greater protection generally than adult records. However, they are part of the public record and a wide range of public and judicial entities are entitled to access information held on them. These include the following:⁵¹⁹

- Criminal justice agencies for criminal justice purposes, including law enforcement agencies during investigations;
- Entities identified in the Government Code are entitled to run background searches for specific non-criminal justice purposes, such as: certain governmental licenses (medical, law, educator, etc.); certain jobs serving vulnerable populations, especially children, the elderly and the disabled (day care centres, nursing homes, hospitals, mental health workers, etc.); certain security sensitive jobs, such as nuclear power plants, financial institutions, etc; firearm sales.
- Companies that provide in-home services, such as plumbing or electrical repair;
- The record holder;
- Researchers.⁵²⁰

Criminal justice agencies can access all the information, wherever it is held. However, anyone using the data for background checks is limited to accessing records available through the JJIS.

A further exception to the confidentiality of juvenile records is made in respect of the child's school. The child's school district superintendent and school principal must receive oral notification within 24 hours or before the next school day whichever is earlier, following a child's arrest, referral, conviction or adjudication for any felony offence and for certain misdemeanor offences.⁵²¹

517. Attorney General Texas (2014) *Juvenile Justice Handbook 2014*. Austin: Office of the Attorney General

518. A Class B misdemeanor is any offence that is punishable by up to a \$2,000 fine and/or 180 days in the county jail

519. For a full list of all entities with access rights to the Juvenile Justice Information System see § 58.0072 Texas Family Code

520. Texas Department of Public Safety (2003) *A Brief Guide to the Texas Computerized Criminal History Database*. Texas: TDPS (accessed at https://www.txdps.state.tx.us/administration/crime_records/docs/GuideToCCHSystem.pdf on 17 June 2015)

521. Code of Criminal Procedure § 15.27

In recent years, it has been the case that at each session the Texas legislature has increased the use of CCHS for non-criminal justice purposes.⁵²²

Juveniles are also eligible for placement on the state's sex offender registry. It is discretionary with the judge, but the default is placement on the list. That registry is publicly available, thus undercutting in practice the objective of confidentiality of juvenile records for youth charged with sex offences.

Anyone given an adult sentence in the adult system, including 17 year olds (who are all considered adults under Texas law) and 14-16 year olds who have been certified as adults, will have an adult criminal record. This record will be publicly available and can be accessed by anyone, including employers. The information will remain on public systems indefinitely and would only be eligible for removal under limited circumstances, such as acquittal or the granting of a pardon.⁵²³

Release from juvenile court records

There are three systems in place for releasing young people from the burden of a juvenile court record in Texas. These are (i) automatic restriction of access; (ii) sealing; and (iii) expungement.

Texas law requires that juveniles are informed of their rights in relation to their juvenile records when they are discharged from the juvenile system.⁵²⁴

Restriction of access

Since 2011, juvenile records have been subject to automatic 'restriction of access' when the child turns 17.⁵²⁵ The record holder does not have to do anything, restriction happens automatically. Under restriction of access, the records are not destroyed or sealed; they still exist but can only be accessed by federal or state criminal justice agencies for a criminal justice purpose, such as investigation of a crime or screening applicants for employment with the criminal justice agency. For anyone else who asks about the records, including employers, schools, and licensing bodies, the entity in possession of the records is required to respond, 'No records exist for that person'. Additionally, once records have been restricted, the young person is allowed to 'legally deny' their history and say they were never arrested, prosecuted, or adjudicated for an offence.

There are a number of important exceptions to this practice:

- Cases handled as determinate sentence cases by the juvenile court i.e. serious offences;
- Cases certified (transferred) to adult criminal court;
- Cases prosecuted in a justice or municipal court;
- Sex offender registration records maintained by the TDPS or by local law enforcement agencies; and
- Gang records (although these can only be accessed by criminal justice agencies for criminal justice purposes).

If an individual is convicted of, or placed on deferred adjudication for, a crime that is a Class B Misdemeanor or higher after turning 17, their records can be taken off restricted access.⁵²⁶

522. Texas Department of Public Safety (2003) *A Brief Guide to the Texas Computerized Criminal History Database*. Texas: TDPS (accessed at https://www.txdps.state.tx.us/administration/crime_records/docs/GuideToCCHSystem.pdf on 17 June 2015)

523. Chapter 55 Texas Code of Criminal Procedure

524. Texas Family Code § 58.003

525. Texas Family Code § 58.203

526. Texas Family Code Ann. § 58.211

Sealing

A new law, comes into force on 1 September 2015,⁵²⁷ which allows for the immediate sealing of eligible juvenile records. House Bill 263 (H.B. 263) allows courts to initiate the record sealing process if the subject of the record, the person's attorney, a juvenile probation officer, or a school attendance officer provides notice to the court that the individual is eligible to have their record sealed. Notice to the court of an individual's eligibility must be submitted by a signed statement or 'notarised affidavit'.

When a juvenile record is sealed, a court orders all the records to be sent to the court issuing the order. The records remain at the juvenile court, where prosecutors and the Department of Public Safety may seek to reopen the records under limited circumstances. Individuals may also allow inspection of their records by others through a court order. Once a record is sealed, the individual can deny, in applications for employment, licensing, or other essentials such as housing and education, that they have ever been the subject of a juvenile proceeding or that they have ever been adjudicated delinquent. Courts, prosecutors and others must, if asked, answer that the record does not exist.⁵²⁸

The previous system was criticised as being 'cumbersome, lengthy and expensive'⁵²⁹ because the individual had to make an application to the court. It is hoped that the new system will 'better enable people to seal their records and prevent these records from negatively impacting them in the future'.⁵³⁰ Supporters of the new law stated:

Juvenile records can greatly impact a young person's ability to mature into a successful adult. Youth who have committed offences and have paid their dues to society are entitled to move on with their lives and move past their mistakes. The bill would speed up record sealing eligibility for individuals who were 17 or older, which is when most people finish high school. Expanding the ability of these youthful offenders to seal their records would remove potential barriers to college, the military, or housing when they reach this critical age.⁵³¹

Critics of the law were concerned that the new system would make it harder for law enforcement to track youth recidivism. There were also concerns that young people would think that it amounted to automatic sealing and that young people and the courts would not be aware of or understand the new process.⁵³²

The new law allows young people who are 17 or older to have their records sealed if:

- Two years have elapsed since final discharge of the person or since the last official action in the person's case if there was no adjudication; and
- Since that time the person has not been convicted of 'a felony or a misdemeanor involving moral turpitude' or been found to have engaged in delinquent conduct or

527. House Bill 263; for further information, see the Texas Legislative Guide at <http://txlege.texasribune.org/84/bills/HB263/> (accessed on 19 August 2015)

528. House Research Organization (2015) Bill Analysis: Amending procedures to seal certain juvenile court records. Juvenile Justice and Family Issues Committee

529. House Research Organization (2015) Bill Analysis: Amending procedures to seal certain juvenile court records. Juvenile Justice and Family Issues Committee

530. House Research Organization (2015) Bill Analysis: Amending procedures to seal certain juvenile court records. Juvenile Justice and Family Issues Committee

531. House Research Organization (2015) Bill Analysis: Amending procedures to seal certain juvenile court records. Juvenile Justice and Family Issues Committee

532. House Research Organization (2015) Bill Analysis: Amending procedures to seal certain juvenile court records. Juvenile Justice and Family Issues Committee

conduct indicating a need for supervision and no proceeding is pending seeking conviction or adjudication.⁵³³

If a court finds a person eligible for a sealed record, the court must issue notice to the prosecutor that the record will be sealed in 30 days if no objection is made within that time by the prosecutor. Unless the prosecutor objects to the record sealing, the court will be required to seal the record immediately without holding a hearing.

To seal a record for conduct that equated to a felony, the court is required to hold a hearing unless that need is waived.

H.B. 263 amends requirements for the handling of sealed juvenile records by the TDPS, requiring it to certify restricted access to the records. Individuals would be permitted to allow others to copy and inspect their records by court order.

Records are not eligible for sealing in a number of circumstances, which are broadly the same as those exempted from eligibility for the restriction of access provisions above:

- The young person received a determinate sentence adjudication for any of the following offences: Murder; Attempted Murder; Manslaughter; Sexual Assault; Aggravated Assault; Aggravated Robbery; Causing Injury to a Child, Elderly Person, or Disabled Person; Deadly Conduct with a Firearm; Possession and/or selling of large amounts of illegal drugs (generally anything more than 200 grams); Criminal Solicitation; Indecency with a Child; Arson; Conspiracy to commit any of the above;⁵³⁴
- The young person committed a felony, and their case was transferred from the juvenile court to the adult criminal court;⁵³⁵
- The young person has been engaged in 'habitual felony conduct' for which they have received a determinate sentence;⁵³⁶
- The young person is required to register with and report to the Texas Sex Offender Registration Program.

Expungement

Texas provides for the expungement of juvenile criminal records.⁵³⁷ The law is explicit in requiring physical destruction. The individual must generally make an application to have their record expunged. The criteria for expungement are as follows:

- The records in questions must have been sealed;
- The records must relate to conduct that did not violate a penal law of the grade of felony or a misdemeanor punishable by confinement in jail;
- Five years must have elapsed since the person's 16th birthday; and
- The person must not have been convicted of a felony in the time since the earlier conduct that resulted in the record.⁵³⁸

533. House Bill 263, §

534. Texas Family Code Ann. § 53.045

535. Texas Family Code Ann. § 54.02

536. Texas Family Code Ann. § 58.003

537. Texas Family Code Ann. § 58.003,.006

538. Texas Family Code Ann. § 58.003(l)

If a juvenile court or a prosecutor determines that no probable cause exists that a child engaged in illegal conduct (ie that they are found the equivalent of 'not guilty'), the court must order the destruction of the records relating to the conduct, including records contained in the JJIS.⁵³⁹

Expunction is comprehensive and includes records held by law enforcement agencies, prosecuting attorney, clerk of court, juvenile court records, the FBI and any public or private agency or institution.⁵⁴⁰

Policy issues

The Texas legislature has just passed a bill that creates an Advisory Committee to re-examine all law pertaining to juvenile records.⁵⁴¹ The Committee is required to submit its recommendations by 1 November 2016.

Prevalence of criminal record checks by employers

The burden of a juvenile record when it comes to employment depends very much on the seriousness of the crime. Those with records for relatively minor offences will probably be relieved of the consequences of the record in due course through the restriction of access, sealing and expungement provisions. Others, with records for more serious offences, may be affected for life.

Under Texas law, employers are generally not allowed to run background checks for criminal history dating back further than seven years if the annual salary is expected to be less than \$75,000.⁵⁴² Many out-of-state companies, who may be consulted if the person has not lived in Texas continuously for the last seven years, ignore this rule.

There are no laws preventing discrimination on the grounds of criminal history.

Identification of children who come into contact with the juvenile justice system

Juvenile proceedings for children aged between 10-14 are presumptively closed, but can be opened. If a hearing is closed to the public the protection afforded to the youth in terms of non-disclosure of identifying information continues after their 18th birthday. For young people aged over 14 proceedings are presumptively open (unless a judge has good cause to close the proceeding).⁵⁴⁴

Generally the media protects the identities of children aged 14 and under in Texas, although there is no recourse if they fail to do so.⁵⁴⁵ If the press choose to attend an open hearing for a child aged

539. *Texas Family Code Ann.* § 58.006

540. *Texas Family Code. Ann.* §§ 54.04, 58.003, 58.201-211

541. *H.B. No.* 431

542. *Fair Credit Reporting Act* 15 U.S.C. § 1681 *et seq.*

543. *Private communication with Michele Deitch dated 10 December 2015*

544. *Texas Family Code* § 54.08

545. *Private communication with Michele Deitch dated 15 August 2015*

over 14 they are legally able to publish anything they want about the proceedings. This, of course, undercuts the goal of confidentiality of records in these juvenile cases, since any news stories written about these hearings will remain in the public domain indefinitely. A major court case took place about this issue in 2014.⁵⁴⁶ The case could have resulted in a ruling that would have made all juvenile proceedings public; it didn't do that, but it did make it far tougher for judges to exclude the media in the over 14 cases.⁵⁴⁷

The juvenile court may only publicly disclose information about a juvenile who is the subject of a directive to apprehend, or a warrant of arrest, and who cannot be located by law enforcement.⁵⁴⁸

546. *In Re: Fort Worth Star Telegram*; 441 S.W.3d 847 (Tex. App.—Fort Worth 2014, orig. proceeding)

547. Private communication with Michele Deitch dated 15 August 2015

548. Texas Family Code § 58.007(h)

Conclusion

The system governing the treatment of childhood criminal records in England and Wales is the most punitive of all the jurisdictions examined in this report: there is no distinction between child and adult records; even minor records are retained and disclosed over lengthy periods; there is no provision for the sealing or expungement of records; and the youth justice system operates in such a way that a sizeable number of children acquire criminal records which have long-term implications – almost 60,000 cautions and convictions attracting a criminal record were imposed on children in 2013/14 alone.⁵⁴⁹

The complexity of the systems in a number of jurisdictions, including England and Wales, is notable, and calls into question how far children really understand the implications of the record they have acquired. In many places, the systems are so complex that practitioners and experts barely understand them. There is concern that children may be accepting disposals without full information or understanding of their implications. It is also apparent that children and young people may ‘over disclose’ because of lack of understanding – that is, they may tell employers (and others) about records those people were not entitled to know about simply because they do not understand what records employers (and others) are entitled to know about.

Criminal records systems are not keeping up with the challenges of our times: England and Wales is struggling to deal with the implications of the widespread teenage practice of ‘sexting’⁵⁵⁰ within a system which classifies such behaviour as a sexual offence; convictions and out of court disposals for ‘sexting’ remain disclosable throughout a person’s lifetime. Concerns relating to this issue have recently been raised by the All Party Parliamentary Group for Children.⁵⁵¹ There are also the problems associated with the publishing of information on the internet, and through social media, and the challenges in erasing that information from the public domain. In this context, laws which protect the identity of children become more important than ever.

Technology also creates opportunities, however, in theory at least; digital systems should more easily be able to control and delete information held on electronic databases, and the information management systems of agencies holding records have the potential to be more easily monitored where electronic systems are in place.

The research undertaken for this report reveals the gaps in knowledge and understanding worldwide of the implications of a childhood criminal record. Clearly, more needs to be done to understand the complex ways in which a record obtained in childhood can affect young people for lengthy periods of time, sometimes their whole life, and evidence needs to be brought of the benefits or otherwise of differing criminal records systems. Urgently, young people (and the professionals working with them) need to be provided with accessible, straightforward information about the law and their rights as record holders.

Though practice problems remain in a number of the jurisdictions examined, the law and policies outlined here provide examples of how this complex area operates in comparable jurisdictions, and can inform consideration of changes that could be made to the system in England and

549. Ministry of Justice statistics reveal that 59,527 children received a youth caution or were sentenced by a court in 2013/14 in England and Wales. The same children may have received more than one caution or conviction. Each would appear on the child’s record and be subject to disclosure. The available statistics do not give the exact number of children sentenced or convicted in any given year. Ministry of Justice/ Youth Justice Board (2015) Youth Justice Statistics 2013/14. England and Wales. London: MoJ/YJB

550. For more information on the prevalence of sexting see, for example, the NSPCC’s advice to parents on ‘sexting’ at <https://www.nspcc.org.uk/preventing-abuse/keeping-children-safe/sexting/> (accessed on 1 December 2015)

551. All Party Parliamentary Group on Children (2015) Building Trust: One year on Progress in improving relationships between children and the police. APPG for Children: London

Wales. Systems need to be closely monitored, regulated and capable of adapting to changing environments. The Standing Committee for Youth Justice believes that people need to be given the chance to leave the mistakes of childhood behind them. The current system in England and Wales does not allow this, tying thousands of people to childhood contact with the criminal justice system more tightly than in any of the other jurisdictions we have examined. The Committee calls on the Government to consider changes to law and policy governing the treatment of childhood criminal records as soon as possible.