



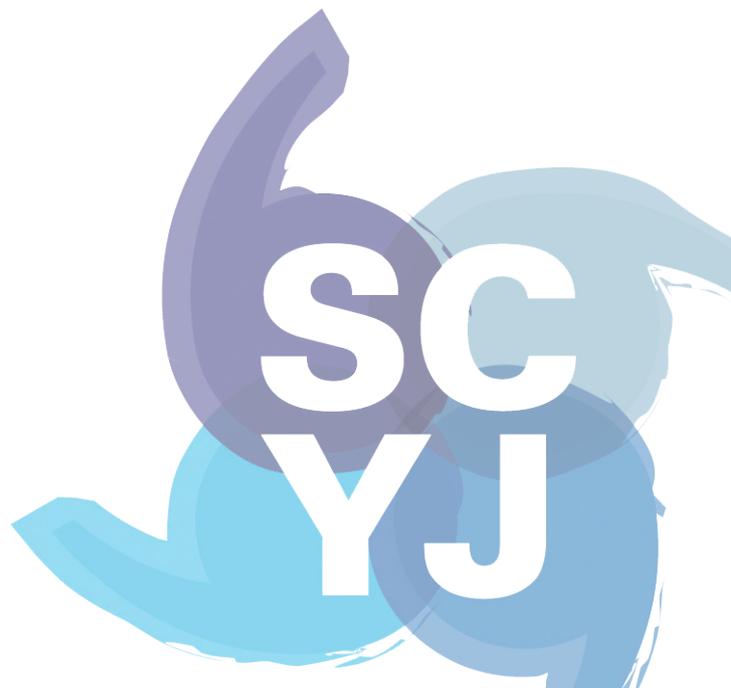
Standing Committee
for Youth Justice

Growing up, Moving on

The International Treatment of
Childhood Criminal Records

Summary

by
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A punitive approach

The childhood criminal records system in England and Wales stands out amongst the 16 jurisdictions considered in this report as being 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 of the other jurisdictions reviewed.

A number of factors combine to make this the case: England and Wales are relatively rare in making no distinction between records acquired as a child, and those acquired as an adult no matter what the offence;¹ unlike many jurisdictions, there is no means to expunge a criminal record acquired in childhood; rules on disclosure are relatively unrestricted, and all convictions can be disclosed for lengthy periods.

As a consequence, children who have offended in England and Wales are bound to the mistakes of their past in a way that is not paralleled with their international equals.

This report looks at the treatment of childhood criminal records across a number of countries in Europe, Australasia and three states in the USA. Commissioned by SCYJ on the back of long-standing concerns about the punitive nature of our criminal records system for children who have offended, it seeks to inform the debate about how our system could be improved based on the practices of other countries.

The report looked in to the treatment of childhood criminal records in:

- **Australia: New South Wales**
- **Canada**
- **England and Wales**
- **France**
- **Germany**
- **Italy**
- **New Zealand**
- **Northern Ireland**
- **Poland**
- **Republic of Ireland**
- **Scotland**
- **Spain**
- **Sweden**
- **USA: New Mexico**
- **USA: Ohio**
- **USA: Texas**

1. *except in respect of the time in which a record becomes 'spent' or can be 'filtered'*

The youth justice system in England and Wales: Formal disposals, criminal records

Any criminal record 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, approaches to offending behaviour, and the types of sanctions they receive.

England and Wales stand out as an outlier amongst the jurisdictions examined as having a criminal records system where children receive formal disposals (both pre-court from the police, and post-court) which have serious criminal records implications, comparatively frequently.

In 2013/14 in England and Wales, 60,000 cautions and convictions (all attracting a criminal record) were given to children. Under the current system, some of the records attached to these disposals will need to be disclosed for many years, and sometimes forever.

By way of contrast, over the same time frame, only 48 children under the age of 17 were given a criminal record in New Zealand and in New Mexico only one child received a criminal record (through an adult sanction).

Comparing the criminal records implications of childhood contact with the justice system when a 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) forever

England and Wales treat child and adult criminal records in similar way

In the majority of the jurisdictions examined for the report, there are separate, and different, systems for dealing with child and adult criminal records. By way of contrast, England and Wales treat criminal records acquired in childhood in the same way as those acquired in adulthood, regardless of the offence category.

The records are held on the same database, and are subject to the same retention and disclosure rules. What distinguishes the two systems is that childhood criminal records become 'spent' (when they no longer must be disclosed) and can be 'filtered' (not disclosed in DBS checks) more quickly than those of adults.

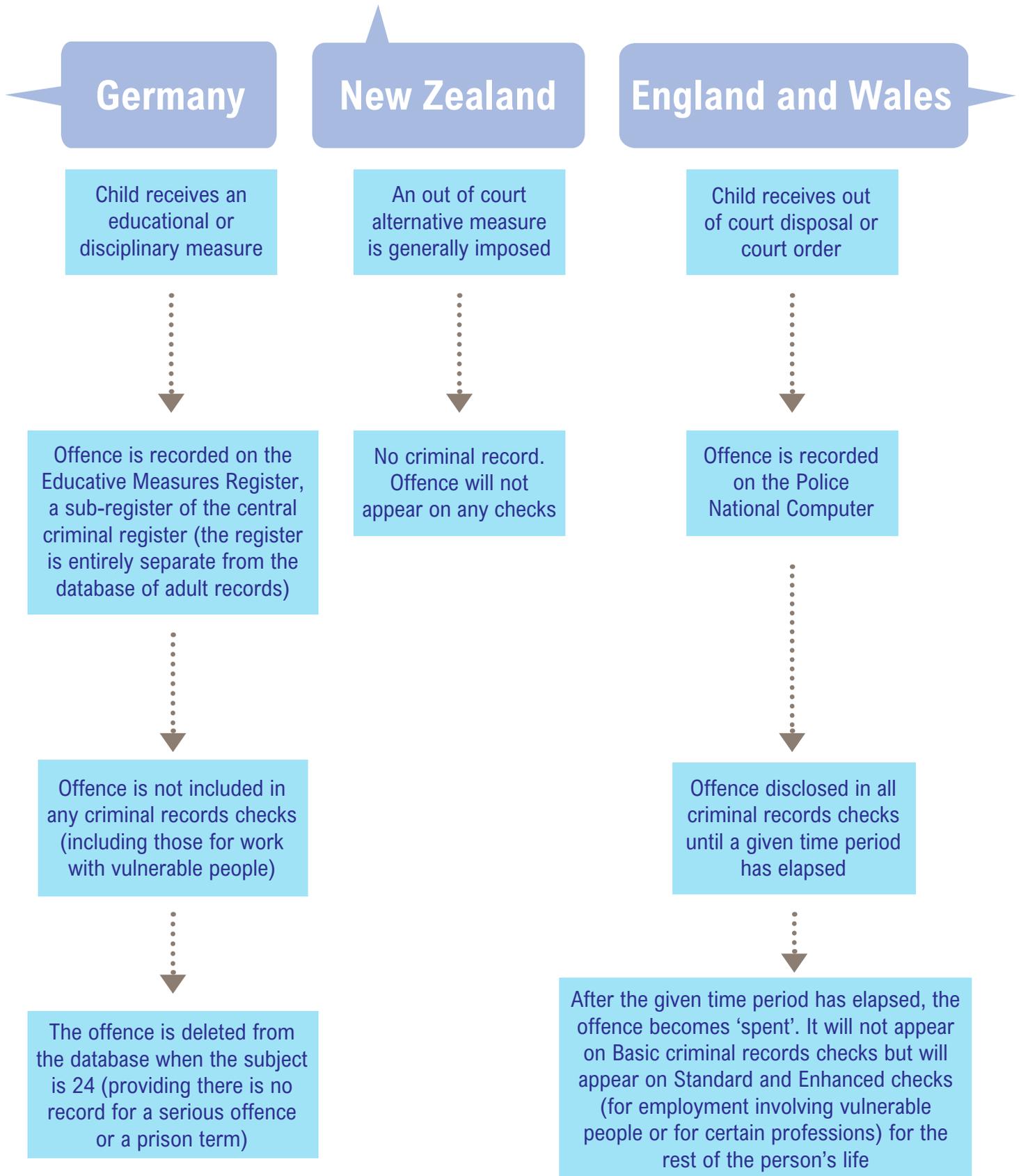
Within England and Wales, the youth and adult justice systems are separate and distinct entities – and with good reason. It is therefore a disturbing anomaly that there is little to distinguish the treatment of criminal records between children and adults.

The majority of jurisdictions examined in the report have separate systems for child and adult criminal records, treating the two differently.

For example, in Germany, Ohio, Texas and Spain childhood records are held on entirely separate databases to those of adults (with rare exceptions) and there are significant restrictions on who can access them. In 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, generally, only the most serious offences committed by children are classed as 'convictions' at all. In a number of jurisdictions, such as Italy, the rules applying to when convictions can be removed from official disclosures only apply to childhood records.

Despite these differences, in many of the jurisdictions examined, criminal records for those children convicted of serious crimes (murder, rape) are treated in the same manner as adult records.

Comparing the criminal records implications of childhood contact with the justice system when a child is convicted of a second minor offence (for example, theft)



Childhood criminal records in England and Wales can never be deleted

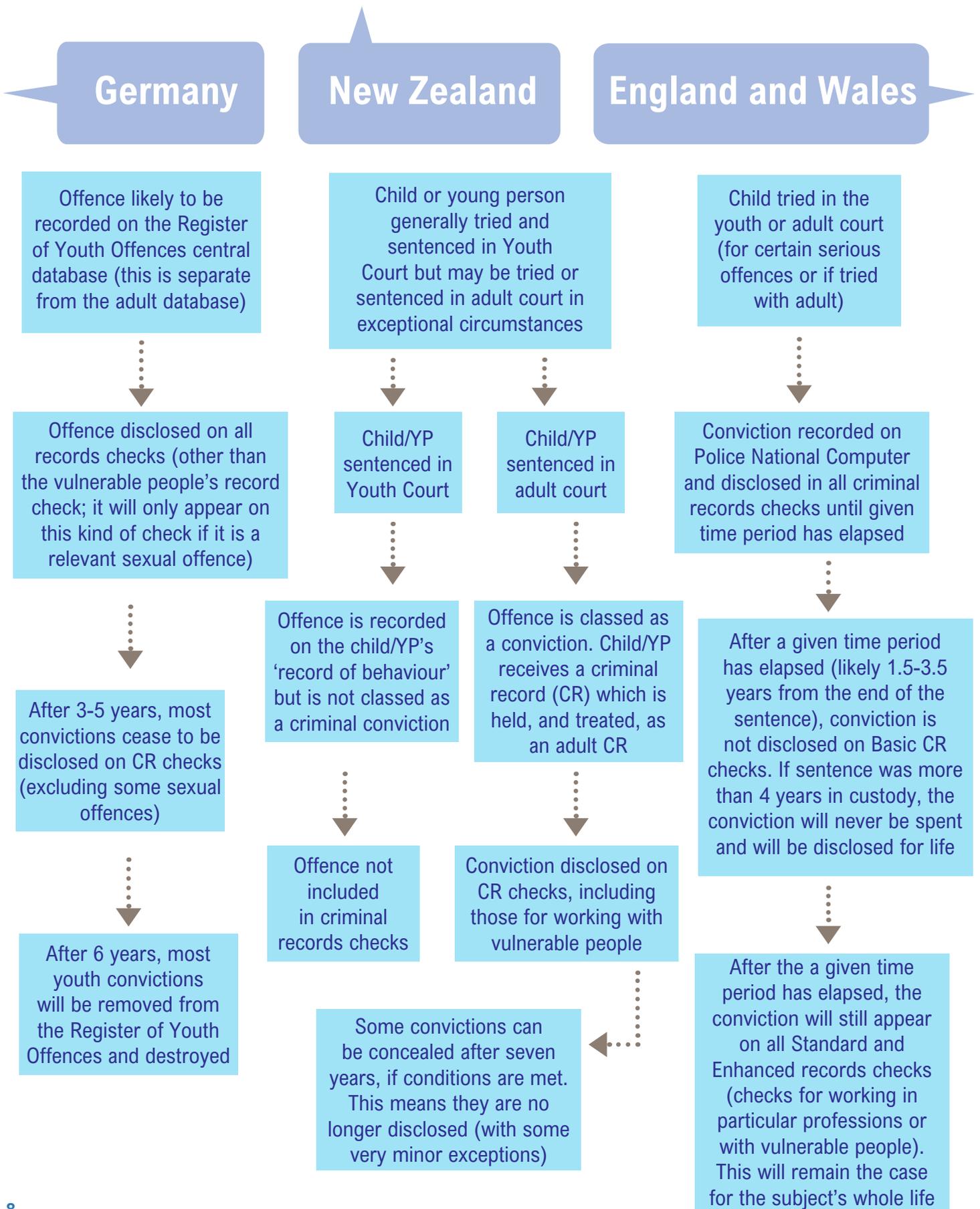
In England and Wales, a record of a childhood caution or a conviction, however minor, is kept by the state for life and can never be erased. This is unusual; 11 of the jurisdictions examined have provisions for expunging (destroying) childhood criminal records.

Amongst the 11, however, there is significant variation in the restrictions, conditions, time frames and processes that apply to expungement policies. For example, only Germany and Spain (from 2019) permit all sentences, apart from life, to be removed from a record, while Canada, Sweden, Italy and Ireland have wide-ranging expungement policies but exclude the most serious offences from the provisions. Other jurisdictions, such as Texas and Scotland have more complex rules on when expungement can occur while others, such as France (in some cases) apply conditions to expungement, often linking it to rehabilitation.

Some places, such as Texas, require people to apply for expungement, while others, such as Poland and Italy, allow most records to be automatically expunged. Some jurisdictions, such as Italy, link the availability of expungement provisions to a certain age while others, such as France, link it to time passed since the offence (in addition to evidence of rehabilitation). Germany is not alone in applying a mixture of these two approaches.

Where England and Wales are in the minority is in having no provision to remove childhood contact with the justice system from a person's record at all. This means that a record of a minor teenage conviction will be kept on record for a person's entire life, and may well be disclosed.

Comparing the criminal records implications of childhood contact with the justice system when a child is convicted of a serious offence (e.g. aggravated robbery)



Wide-ranging disclosure of childhood records

England and Wales 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 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.

Despite the limited provision of filtering, an SCYJ Freedom of Information request to the Disclosure and Barring Service (DBS) in 2015 found that 88% of childhood convictions are not being filtered.

An offence committed in childhood will only be 'filtered' i.e. removed from a DBS Standard or Enhanced certificate if 5.5 years have passed since the date of the conviction; and if it is the person's only offence; and it did not result in a custodial sentence. However, if the offence appears on the list of over 1,000 offences which cannot be filtered (including sexual offences and those with a degree of violence) then the conviction can never be filtered, and details of all their convictions will always be included on a check.

Earlier this year, the High Court ruled that certain aspects of the current criminal records disclosure scheme were incompatible with Article 8 of the Human Rights Act. In the first case, (that of 'P' and 'A'), the Court was asked to consider the 'multiple offence' rule: this rule states that if you have more than one offence on your record neither of the offences are eligible to be filtered and all offences will have to be declared on an enhanced DBS check. In the case of 'G' (a case which concerned a juvenile record), the Court reviewed the fact that certain types of offences are never filtered regardless of the disposal or underlying facts. The rules are capable, the Court found, of producing results which are 'arbitrary' and 'questionable'.

The retention and disclosure of childhood criminal records is far more limited in most of the other jurisdictions we looked at, although it is frequently the case that exceptions apply for children who have committed the most serious offences. For example, in New South Wales, Germany and France only more serious offences are disclosed to employers. In countries such as New Zealand, for those few children who are given a criminal record, these records need not be disclosed providing certain conditions are met. In other countries, such as Spain, access to childhood records is extremely limited while in Ohio, Texas, and New Mexico, childhood records can be 'sealed' so that they are no longer disclosed.

Similar to other jurisdictions, England and Wales allow for wide records disclosure for work involving vulnerable people or public trust. Yet it is unusual, though not unique, in the breadth of disclosable information and the number and scope of the organisations that are allowed to access it. For example, information about 'spent' convictions can be required for a wide range of jobs including locksmith, traffic warden and football steward.

Enhanced checks, which are required for work that involves vulnerable people, contain local police intelligence, as well as almost all the cautions and convictions a person may have acquired at any time in their life. These kinds of disclosures are not unique

to England and Wales, but many of the jurisdictions we looked at take a far more rehabilitative approach to those seeking to work in positions of trust, or with vulnerable people. In Germany, for example, only those childhood offences resulting in custody (which is very rare) are disclosed. In New Zealand and Ohio, only more serious convictions are disclosed.

A culture of checks

Within England and Wales, the prevailing culture is one in which there is a strong appetite for criminal record checks and the results are often used as the basis for hiring decisions. While 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) others were less concerned about an individual's past. For instance, in Spain, it is unusual for employers to ask for a criminal records check; while 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 non-relevant convictions.

Conclusion

The treatment of childhood criminal records in England and Wales is the most punitive of all the jurisdictions SCYJ examined in terms of the extent to which it ties children to their past. In a number of the jurisdictions, conscious decisions have been taken to reduce the impact of childhood criminal records, because of the desire to promote reintegration and rehabilitation. We know criminal records have a negative effect on people's ability to access employment, education and housing. Under the English and Welsh system, this effect can last for years, tying people to even minor offences they committed while they were a child and making it difficult for them to move on with their lives. For some, it can be an impossible barrier to surmount.

Policy makers in England and Wales should review the current system and make significant changes to bring the criminal records systems in line with less punitive systems that promote rehabilitation.

The recommendations proposed by SCYJ would give children who have offended the prospect, at a critical time in their lives, to access education and employment, and for those with a more serious offending history, who have demonstrated years of desistance from criminal activity, to move beyond an offending past.

Recommendations:

- Youth Rehabilitation Orders (YROs) should become spent as soon as the order is finished. This would bring YRO Rehabilitation Periods (RP) in line with Referral Order (RO) RPs which are spent as soon as the order ends.
- Detention and Training Orders (DTOs) should become spent six months after the order has finished. This would reduce RP for DTOs considerably. Currently RPs for DTOs are as follows: DTOs of less than 6 months are spent 18 months after the end of the order; DTOs of over 6 months are spent two years after the end of the order.
- All under 18 custodial sentences greater than two years and less than four years should become spent two years after the end of the sentence.
- Under-18 custodial sentences greater than four years and less than life should become spent seven years after the end of the sentence. Currently, custodial sentences of more than four years for under-18s can never be spent. The threshold at which custodial sentences can never be spent is the same for children and adults. This change would mean that a child's custodial sentence could always become spent at some point in the future, unless they were on a life sentence.
- All under-18 cautions are automatically filtered out after a two year time limit.
- There is no limit on the number of under-18 convictions that can be filtered out providing they did not result in a prison sentence, and providing that four years have elapsed since the last conviction. The police have discretion as to whether or not to filter under-18 convictions that resulted in a prison sentence providing four years have elapsed since the end of their last sentence or order.
- Police guidance should make it clear that if a person has any unspent convictions, none of their convictions should be filtered.
- Guidance to police should be amended, setting out the presumption that under-18 police intelligence is not disclosed.
- Ten years after the end of the sentence or order for the last offence committed, convictions or cautions received as a child should be wiped from the Police National Computer (PNC) and Police National Database (PND) and may not be disclosed by police as part of an enhanced check. So wiping is only available if a person has not reoffended for ten years. A similar recommendation was made by the Home Office report, 'Breaking the Circle' in 2002, and more recently by the Lord Carlile inquiry which proposed that children who have offended be given a 'clean sheet' at 18, meaning that previous offences would be expunged from their record rather than only filtered (this would not be available for homicide, serial sexual offences and other violent crimes).

An overview of the criminal records systems in sixteen jurisdictions:

Australia – New South Wales:

For children who commit the 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 does not constitute a ‘criminal record’ and is not disclosable on standard criminal records checks. Most children who are charged with offences are tried in the children’s court. This court has no power to record a conviction against a child (i.e. to give them a criminal record) when they are under the age of 16. It has discretion to record a conviction against children aged over 16. Children are sent to higher courts for trial or sentence for the most serious offences; these higher courts can record a conviction against a child of any age. In general, only recorded convictions are disclosed on standard criminal records checks. Childhood convictions (except sexual offences and those resulting in more than six months in custody) can become spent, meaning they are generally not disclosed other than for work with children. Records of warnings must be destroyed when a person turns 21.

Canada:

All children are tried in the youth court (from the age of 12 – the age of criminal responsibility). Children are never transferred to adult courts but, in some rare circumstances, the youth court can impose an adult sentence; this possibility is only available for the most serious crimes committed by a child aged between 14 and 17. Childhood criminal records are treated differently to those of adults, unless the child is given an adult sentence. Access to youth criminal records is very restricted. “Access periods” apply, during which criminal records checks include information on a childhood record (the length of this period depends on the offence). Once the access period has expired, the record can’t be disclosed to anyone for any reason and may be physically destroyed. If a child receives an adult sentence, their record is treated as an adult’s. They can apply to have it “suspended”, meaning it wouldn’t be disclosed, but this is not available to everyone.

England and Wales:

Relatively high numbers of children receive formal disposals (primarily cautions – which are given by the police – or convictions) each year; 60,000 such disposals were given to children in 2013/14 all of which attract a criminal record. Children are criminally responsible, and can receive a criminal record, from the age of ten. Despite having a

separate youth justice system, child and adult criminal records are dealt with under a single legal regime. Statutory provisions set down 'rehabilitation periods', which vary depending on the sentence, after which cautions and convictions are deemed 'spent'. Children's criminal records are, generally, 'spent' in half the time of those of adults. Before they are spent, they are disclosed on general criminal records checks. Once spent, the presumption is that they will not be disclosed for most jobs/purposes. There are extensive exceptions to this general rule, however; and where these apply, records are liable to be disclosed for indefinite periods, and some records can never be spent. There is a very limited 'filtering' system which prevents old and minor records being disclosed on any criminal records check. Under this system, childhood records are filtered in half the time of adults. However, in practise, relatively few childhood convictions are filtered. The record of a childhood caution or conviction is never destroyed.

France:

The French juvenile justice system focuses on education rather than punishment. Children under the age of 13 can only be subject to protective and educational measures. Many older children are subject to these measures too, though they can also be subject to penal sanctions if the offence is serious, the child has committed a number of offences, or where every possible educational measure has been tried. Criminal records checks for public employment do not contain information about childhood convictions unless the child was sentenced to more than two months' imprisonment. Private employers can only access records of the most serious convictions. Records of educational sanctions can be deleted after three years, all other childhood records can be deleted three years after the child turns 18, if they have shown 'irreproachable conduct' and a court approves their deletion.

Germany:

The minimum age of criminal responsibility is 14, and even then, the child may only be held criminally liable if they are deemed to show sufficient maturity to understand the unlawfulness of their actions and are capable of acting in line with that understanding. The majority of children receive educational or disciplinary measures. Custody is used very rarely and only as a last resort, where the offence is very serious offence, or where the child has 'dangerous tendencies'. Childhood convictions are held on a separate database to those of adults, called the Educative Measure Register (EMR), other than the minority given an adult conviction or a more serious sanction, such as imprisonment – their records are held alongside those of adults. No criminal records checks include EMR records, even when applicants are applying to work with children, and access to this database is very limited. EMR records are deleted when the person turns 24, unless the person has a separate record which resulted in a custodial sentence. Other offences (those not on the EMR) can be disclosed on criminal records checks for a given period of time, before they become eligible for removal from certificates and eventually from the register itself. All sentences but life can be removed from the register.

Italy:

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. 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.

New Zealand:

Most children are diverted from court and dealt with using alternative measures which do not attract a criminal record. Only the most serious cases go to court; from 2001 to 2010, 80% of children involved in the justice system did not go to court. Most children who are prosecuted appear in the youth court, it is rare for a child to appear in a higher court. Most outcomes handed down by the youth court will go on a child's 'record of behaviour' but this does not constitute a conviction; the sharing of this record is very limited, and it would not appear on a criminal record check, but the child or young person would have to answer 'yes' if asked if they had ever been charged with an offence. If the youth court awards an absolute discharge the child could legally answer 'no' to this question, this affects about 50% of youth court cases. The very small numbers of children given an adult sentence or conviction, are given an adult criminal record. In the majority of cases, a criminal record can be concealed after seven years if certain conditions are met. 'Concealment' means it will not appear on criminal records checks, other than in very specific circumstances.

Northern Ireland:

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. Diversionary disposals have not been disclosed in the past by the criminal record checking service, 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. Records are never deleted.

Poland:

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. 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.

Republic of Ireland:

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.

Scotland:

At the time of writing our report, 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 far 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. Under the Scottish youth justice system, most children under the age of 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. Information relating to children is generally 'weeded' after two years unless the child was placed under compulsory supervision by the Children's Hearing, or the case involved disposal by a court of law.

Spain:

The minimum age of criminal responsibility in Spain is 14. Records of proceedings against children are held separately to adult records on a central register as well as by other agencies. Access is so restricted, however, and requests for childhood records so rare, that the fact the record exists is not perceived as an issue or a burden for children or young people in the vast majority of cases. It is extremely unusual for a child to be asked for a copy of their records, and once the child turns 18 is it almost impossible for anyone, including a judge, to access their childhood record. From 2019, all childhood records will be erased ten years after the child turns 18, so long as their sentence is complete. This applies to all convictions, from the most minor to the most serious.

Sweden:

The minimum age of criminal responsibility is 15. However, Sweden does not have a separate youth justice system and so 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 three or five years from 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.

USA – New Mexico:

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. Children 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 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.

USA – Ohio:

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. Children 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.

USA – Texas:

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: children 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. Children 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.