

Harmonising the disclosure of childhood criminal records with Child First principles: comparing the approaches in the Republic of Ireland and Northern Ireland

Introduction

Both the Republic of Ireland and Northern Ireland are committed to developing youth justice systems that are ‘Child First’, which broadly means that the responses to youth offending aim to reduce offending while working to make a meaningful and positive difference to children’s lives to allow them to reintegrate into society. The focus of this article is upon the regulation of the disclosure of records of childhood offending and the extent to which these procedures are consistent with a Child First approach in both jurisdictions. Disclosure of records of childhood offending can impede rehabilitation, increase future interactions with the criminal justice system and impact upon job prospects throughout the life course.¹ Both jurisdictions have developed procedures to avoid the risks of criminalisation and stigmatisation by ensuring that records of childhood criminal behaviour can become ‘wiped clean’ and not disclosable in future employment applications. This article will compare and contrast the approach adopted in both jurisdictions and consider the extent to which the respective approaches conform with Child First principles.

Responding to children in conflict with the law in the Republic of Ireland

¹ P. Maurutto, K. Hannah-Moffat, M. Quirouette, “Punishing the Non-convicted Through Disclosure of Police Records” (2023) *British Journal of Criminology*, <https://doi.org/10.1093/bjc/azac092>, at 3; also A.L. Burton” V.S. Burton, F.T. Cullen, J.T. Pickett, A.J. Thielo “Beyond the eternal criminal record: Public support for expungement”, (2021) 20 *Criminology & Public Policy* 123, at 125; M. Love, “The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction’, (2006) 21 *Criminal Justice* 16; C. Uggen, M. Vuolo, S. Lageson, E. Ruhland, E. and H.K. Whitham, “The Edge of Stigma: An Experimental Audit of the Effects of Low-level Criminal Records on Employment” (2014) 52 *Criminology*, 627.

Most children in conflict with the criminal law in the Republic of Ireland are diverted to the Garda Diversion programme and so do not attract a criminal record.² The programme involves a network of approximately 115 Garda Youth Diversion Projects (GYDPs) which are community-based multi-agency crime prevention initiatives that seek to divert children from crime and anti-social behaviour.³ Any child who has been admitted to the programme cannot be prosecuted for the criminal behaviour which resulted in their admission to the programme. As engagement with the programme is not a conviction, it therefore does not carry a disclosable criminal record.

If a child must go to court then the Children Court will try most child offending except homicide, manslaughter or sexual assault and rape. The Children Act 2001 empowers the Children Court to adjourn criminal proceedings and divert children from the Children Court to the Child and Family Agency to consider their need for social services. Alternatively children can be diverted to the probation service or a family conference can be organised.⁴ The family conference aims to bring together the child, the family and others to examine the factors associated with the child's offending behaviour and develop an action plan. These provisions divert children from the criminal justice system and ensure that there will be no criminal record. Furthermore before any child is sent to the Children's 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 to the terms of supervision. This caution will not be disclosed on a criminal record check.

² Garda Youth Diversion Office *Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme*. (Dublin: GYDO, 2013). Also I.D. Marder and L. Forde, "Challenges in the Future of Restorative Youth Justice in Ireland: Minimising Intervention, Maximising Participation" (2022) *Youth Justice* 0(0). <https://doi.org/10.1177/14732254221122568>

³ <http://www.iyjs.ie/en/iyjs/pages/gardadiversionprogramme> [last accessed 30 March 2023]

⁴ Children Act 2001, ss 77 and 78

Children who have been convicted by the Children Court will receive a criminal record. However the Children Act 2001 allows for most of these crimes to be automatically expunged from the record as if no crime had been committed, provided certain conditions are met. Section 258 of the Children Act 2001 introduced a three year rehabilitation period for offences committed by children which was modelled on the English Rehabilitation of Offenders Act 1974.⁵ The Rehabilitation of Offenders Act 1974 enables criminal offences to become ‘spent’ after specified periods of time have elapsed, which means they do not need to be disclosed when applying for employment as the offender is regarded as rehabilitated, unless an exception applies. According to the 1974 Act the rehabilitation period after which the caution or conviction becomes spent is determined by the type of disposal administered, the length of the sentence imposed and whether the convicted person is below 18 years of age or not. In general, the rehabilitation periods for children who were under 18 years at the time of conviction are half the length of time that an adult would experience. However the rules regarding disclosure in England and Wales are subject to a range of complicated exceptions and there are quite a wide range of circumstances in which records of childhood offending behaviour, including convictions and cautions that are considered ‘spent’, will need to be disclosed. Such circumstances are not restricted to occupations which involve working with children and adults and include records of behaviour not confined to the most serious violent or sexual behaviour. There is no process for automatic expungement of childhood criminal records in England & Wales.

The approach in England and Wales contrasts with the Republic of Ireland where section 258 of the Children Act 2001 allows for convictions to become both spent and permanently

⁵ T.J. McIntyre and I. O'Donnell “Criminals, data protection, and the right to a second chance” (2017) 58 Irish Jurist 27.

expunged. Section 258 automatically clears the record of offences committed before reaching the age of 18, provided there has been no further offending within three years of the date of conviction. There is no limit to the number of eligible youth convictions that can be removed from someone's criminal record under the Children Act 2001. There is no requirement to make an application to the Court to have the conviction declared spent. Section 258 also applies to a caution or disposals under the Probation of Offenders Act 1907. Crimes that can only be dealt with in the Central Criminal Court cannot become spent. Therefore the Children Act 2001 does not apply to a small category of extremely grave crimes such as murder and rape. However the Children Act 2001 allows most young offenders in the Republic of Ireland a 'clean-sheet' at 18 years of age as they can legitimately claim to have a 'clean' criminal record when looking for employment or applying for admission to an educational programme.

Youth Justice Strategy (2021–2027)

Ireland's Youth Justice Strategy (2021–2027) commits to the principle of 'Child First' as a central guiding principle of the response to children in conflict with the law.⁶ Child First is a child-focused and developmentally informed approach which operates in a way which is constructive and prioritises the best interests of children and strengthens their capacity for positive participation in community life.⁷ A Child First youth justice system is one which involves a holistic, individualistic, tailored-approach delivered through universal services based on a child's welfare needs that focuses on their strengths and future aspirations.⁸ A Child First approach ensures that childhood mistakes do not continue to develop into entrenched patterns of offending behaviour by focussing on developing the child's prosocial identity away

⁶ Department of Justice Youth Justice Strategy (2021–2027) (DoJ: Dublin, 2021)

⁷ S. Case, K. Haines, "Children first, offenders second: The centrality of engagement in positive youth justice", (2014 54(2) Howard Journal of Crime and Justice 157.

⁸ A M Day, "'It's a Hard Balance to Find': The Perspectives of Youth Justice Practitioners in England on the Place of 'Risk' in an Emerging 'Child-First' World" (2022) Youth Justice, 0(0) <https://doi.org/10.1177/14732254221075205>

from the stigma of the criminal justice system to ensure sustained, and sustainable, desistance. The Youth Justice Strategy (2021–2027) also commits to upholding Ireland’s obligations under the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC recognises that children under the age of 18 years may need special protection because of their age or emotional development. Article 3 of the UNCRC requires that the best interest of children is at the heart of the interpretation of children’s rights and decision-making processes, ‘whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’. The United Nations Committee on the Rights of the Child (CRC) emphasised in General Comment No 24 on *Children’s Rights in the Child Justice System* that the implementation of a comprehensive child justice policy should necessarily involve taking account of the general principle enshrined in Article 3 as well as other relevant articles of the Convention.⁹ The CRC recommended that diversion from judicial proceedings should lead to a definite and final closure of the case, without the child in question being treated as having a criminal record or previous conviction, where the child freely gives their consent to diversion and where such acknowledgement of responsibility will not be used against them in subsequent legal proceedings.¹⁰ The UN Committee has also recommended that, in normal circumstances, a child’s name should be automatically removed from criminal records when they reach the age of 18.¹¹ In General Comment No 24 the CRC recognised the need to keep the identity of the child and their criminal records confidential, to prevent them being subject to publicity that impedes reintegration and leads to stigmatization as the CRC believes that this approach would yield good results by upholding the best interests of the child as well as

⁹ United Nations Committee on the Rights of the Child *General Comment No. 24: Children’s Rights in child Justice* (UNCRC: Geneva, 2019), para 25

¹⁰ UNCRC *General Comment No. 24*, para 18

¹¹ UNCRC *General Comment No. 24*, para 24.

guaranteeing public safety.¹² Research in the US has shown that sealing records in this way has been found to lower recidivism and enhance employability and earnings.¹³

Responding to children in conflict with the law in Northern Ireland

In Northern Ireland AccessNI have responsibility for the issuing of basic, standard and enhanced criminal record checks. A basic check contains details of all convictions considered to be unspent. A criminal offence becomes ‘spent’ after a specified period of time, known as a ‘rehabilitation period’, has elapsed. A standard check contains details of all spent and unspent convictions, informed warnings, cautions and diversionary youth conferences. An enhanced check contains the same information as a standard check and police records held locally, including non-conviction information. For first or second time minor offences, or anti-social behaviour, children in Northern Ireland are usually dealt with outside the court system. When a child receives a diversionary sentence, the investigating officer and a Youth Diversion Officer from the PSNI will make recommendations to the Public Prosecution Service (PPS) on the most suitable sentence. A child may receive an informed warning for less serious offences. An informed warning will normally take place in a police station and will be delivered by a trained police officer. An informed warning is not a conviction but will appear on a criminal record for a period of 12 months, provided no further offending takes place. A child may receive a restorative caution for more serious offending. The restorative caution will normally take place in a police station and will be delivered by a police officer or a community representative. The caution is an opportunity for the child and their parents to meet with the victim and anyone else who has been affected by the crime. Everyone will be provided with the opportunity to discuss the impact the crime has had on them. A written record of the meeting will be kept and signed

¹² UNCRC *General Comment No. 24*, para 15

¹³ T. Wakefield, S. Bialous, D.E. Appollonio, “A survey of criminal record expungement availability and accessibility among US States” (2023) 13 *International Journal of Drug Policy* 10398.

by all present. The child will be invited to apologise, take part in work to make amends to the victim or community, or go to classes to address their offending behaviour. The restorative caution is not a conviction but will remain disclosable on a criminal record for 30 months, provided no further offending takes place.

A diversionary youth conference (DYC) is for cases where the PPS decides that a full conference with the victim should be offered. It is organised by the Youth Justice Agency and managed by professionally trained conference co-ordinators. The conference is a single meeting, or a series of meetings, involving the child, family members and in most cases, the victim or their representative. The meeting(s) provide a forum for discussion about the offence and usually results in a conference plan that can include arrangements for an apology, compensation, community service, restrictions on conduct or involvement in programmes, for example, alcohol dependency programmes. The conference plan must be approved by the PPS and the child accused of offending must consent to the plan. If rejected, or the child fails to comply with the approved plan, the PPS can refer the case to the court for formal adjudication. A diversionary youth conference is not a conviction, but will be recorded on a criminal record and will be disclosable for up to two years.

On an admission or finding of guilt, the Youth Court in Northern Ireland is required in the majority of cases, to offer a youth conference. A court-ordered youth conference is similar to a DYC discussed above but it is a sentence of the court, rather than a diversionary alternative to court ordered by the PPS, and as such it constitutes a criminal conviction. A youth conference will be recorded on a the child's criminal record and will be disclosable for a period of two years. Where consent to the youth conference is not given, or where a conference may not be

appropriate for other reasons, the Youth Court can, on conviction, order any of the following disposals: absolute/conditional discharge, fine of up to £1,000 or a reparation order requiring up to 24 hours of direct reparation to the victim or the community. A fine or reparation order is spent 30 months after it is paid or completed and an absolute discharge becomes spent after six months.

The youth court may also order an Attendance Centre Order which would require the child to spend between 12 – 24 hours at an Attendance Centre, which is usually a Youth Justice Agency local office, for programmes of work on addressing offending behaviour. A Community Responsibility Order may also be issued in which the child must spend between 20 – 40 hours on instructions in citizenship and relevant activities, such as helping out at a local charity, to help them understand their responsibility to the community and the impact of the offence on themselves and others. The hours will usually be split up over a couple of weeks into sessions of between one and two hours each time. Attendance centre orders and community responsibility orders are spent one year after these orders expire, and therefore do not need to be disclosed. Alternatively a Probation Order could be made requiring between six months and three years community supervision and can include specified requirements such as attending a particular programme. This order means that the child will have a probation officer who will work closely with them to help prevent them getting into trouble again. The Probation Order will be spent either within 1 year or the length of the order, depending on which is longer. A Reparation Order requires the child to make amends to their victim or the wider community by carrying out an agreed activity such as attending programmes to address their behaviour or by helping with a local charity. The order can be for a period of up to 24 hours. The Youth Justice Agency will work with the young person to complete this. A Community Service Order

requires the child to engage in unpaid work for between 40-240 hours in the community. This order may be given to those aged over 16 years of age who have committed a crime that may alternatively be punished with custody. Both the Community Service Order and the Reparation Order will become spent 30 months after completion of the orders.

In Northern Ireland children can also be sentenced to a Juvenile Justice Centre Order lasting usually up to six months, but can be for a maximum of two years with half spent in custody in Woodlands Juvenile Justice Centre in Bangor and half under Probation supervision in the community. 16 and 17 year olds can be sentenced to Custody Probation which is a period of custody followed by a specified period of Probation supervision. 16 and 17 years olds could also be sentenced to a Young Offenders' Centre Order which is a custodial sentence of up to four years served in the Woodlands Juvenile Justice Centre. Any custodial sentence over 30 months can never become spent. For children who have been sentenced for between six and 30 months, their conviction will be considered spent five years after the end date of the sentence. A custodial sentence of less than six months will become spent 42 months after the sentence has been completed by the child.

Both standard and enhanced criminal record checks will disclose details of all spent and unspent convictions, informed warnings, cautions and diversionary youth conferences. However in Northern Ireland the role of Independent Reviewer (IR) of Criminal Record Certificates was established by the Justice (NI) Act 2015. Where a child under 18 years is convicted and the conviction becomes spent and there is no information on adult offences, any criminal record information will go to an independent reviewer. Once the reviewer considers

all the relevant information, they can delete the childhood conviction and issue a certificate with none of the criminal record information held if the risk is deemed minimal. Specified offences are serious crimes that will always appear on an AccessNI check no matter when the crime occurred or the offender's age when convicted. In February 2023, there were 1228 specific offences outlined on the specified list including murder, manslaughter, kidnap, hijack, money laundering, violence, sexual crimes, safeguarding or child protection matters and less serious crimes such as affray, simple possession of drugs, criminal damage and obstructing, resisting and assaulting police. A conviction or caution, diversionary youth conference or informed warning for specified offence will not be filtered and will be disclosed.

Judicial consideration of criminal record disclosure in Northern Ireland

The approach in Northern Ireland is quite distinct from the Republic of Ireland, the periods of rehabilitation in Northern Ireland are much longer than in the Republic and there are quite a wide range of circumstances in which records of childhood offending behaviour, including convictions and cautions that are now considered spent will need to be disclosed. Such circumstances are not restricted to occupations which involve working with children and adults and include records of behaviour not confined to the most serious violent or sexual behaviour. This approach has serious longer-term implications for the social reintegration of those who have contravened the law as children and was challenged in the case of *In the Matter of an Application by JR123 for Judicial Review*.¹⁴ The applicant challenged the legality of Article 6(1) of the Rehabilitation of Offenders (Northern Ireland) Order 1978 which prevented his previous convictions, which resulted in a custodial sentence exceeding 30 months, from ever becoming spent. He had been convicted of arson and other offences in 1980 and sentenced to

¹⁴ [2021] NIQB 97

five years in custody. Despite no further offending over the subsequent 40 years he still had to disclose these convictions. He argued that this was incompatible with his right to private and family life under Article 8 of the European Convention on Human Rights. The court concluded that the idea that a conviction can never be spent, irrespective of individual circumstances, pays insufficient weight to the interests protected by Article 8 and that this interference was not proportionate. The objectives of protecting the public and ensuring confidence in the justice system could be achieved by the imposition of less rigid restrictions which would allow the opportunity for the applicant to apply to have his conviction deemed to be spent.¹⁵ Accordingly the court made a declaration of incompatibility with Article 8 of the European Convention on Human Rights by reason of a failure to provide a mechanism by which the applicant can apply to have his conviction considered to be spent, irrespective of the passage of time and his personal circumstances. In reaching this conclusion, the court reviewed a number of significant decisions, and had particular regard for *In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland) R (on the application of P, G and W) v Secretary of State*.¹⁶ In 1996 Lorraine Gallagher was convicted of one count of driving without wearing a seatbelt, for which she was fined £10, and three counts of carrying a child under 14 years old without a seatbelt, for which she was fined £25 on each count. All four counts related to the same occasion. In 1998 she was again convicted on two counts of carrying a child under 14 years old in a car without a seatbelt. She had been carrying two of her children in the back of her car with seatbelts attached, however the children had placed the shoulder straps under their arms. She was fined £40 on each count. Again, both counts related to the same occasion. Ms Gallagher had no other convictions. In 2013, having qualified as a social carer, she was admitted to the Northern Ireland Social Care Council Register of Social Care Workers. In 2014

¹⁵ [2021] NIQB 97, at para. 100

¹⁶ [2019] UKSC 3

she applied for a permanent position at a day centre for adults with learning difficulties and received a conditional offer of employment. The enhanced criminal record certificate disclosed all the convictions and the job offer was withdrawn on the ground that her failure to disclose all of these convictions called her honesty and integrity into question. The filtering rules meant single convictions for certain offences that did not result in imprisonment were filtered, but multiple convictions could be disclosed for the entirety of the person's life. The court found that the multiple conviction rule lead to arbitrary results, and although the aim of the rule was legitimate, namely that repeat offending should lead to disclosure, the practical effect of the rule meant that disclosure could be made even when there was only a single incident that led to more than one conviction, and other circumstances where disclosure was not justified. Lord Sumption concluded that this approach was disproportionate to its reasonable objective because it was insufficiently "granular" in distinguishing between convictions and cautions of varying degrees of relevance and it applied irrespective of the nature of the offences, of their similarity, of the number of occasions involved or of the intervals of time separating them. As framed, therefore, the rule was incapable of indicating a propensity as, "a rule whose impact on individuals is as capricious as this cannot be regarded as a necessary or proportionate way of disclosing to potential employers criminal records indicating a propensity to offend".¹⁷

Applying Lord Sumption's reasoning in the case of *JR123*, the court held that there was a clear public interest and benefit to society in providing offenders the opportunity to fully rehabilitate in society after having been convicted of criminal offences. The court also acknowledged that "it is entirely legitimate to impose restrictions on the circumstances in which individual convictions can be regarded as spent." However the Court concluded that it would be both

¹⁷ 2019] UKSC 3, at para. 63 per Lord Sumption.

practicable and proportionate to devise a system of review which would enable persons such as the applicant to apply to have their conviction deemed to be spent.

Future developments in Northern Ireland

In 2021 the Youth Justice Agency in Northern Ireland developed a new Model of Practice (MOP) which delivers a shared understanding of the principles, theories and models underpinning the work of the Youth Justice Agency. It is a framework which has an overarching Children First philosophy and incorporates different theories and models in a coherent manner, providing a guide to best practice and ensuring all interventions are underpinned by shared professional judgements, ethos and values. In March 2022 the Department of Justice (NI) published a new *Strategic Framework for Youth Justice 2022 – 2027* setting out the strategic direction for the future of youth justice in Northern Ireland together with a five year Action Plan.¹⁸ The Strategic Framework commits to a Child First approach and recognises that the long-term impact of criminal records on future prospects still represents a significant challenge, one that was specifically identified by the children consulted in developing the Strategic Framework.¹⁹ The Strategic Framework commits to ensuring that the youth justice system always treats children as children, acts in the best interests of children, ensures children’s rights are respected at all times and are aligned to international standards, takes a trauma-informed approach at all stages, takes account of the views of children, diverts children from the criminal justice system at the earliest possible stage, and only ever uses custody as a last resort.²⁰ The *Strategic Framework for Youth Justice* also included a commitment to carry out a consultation to seek the views of the public on increasing the age of criminal responsibility in Northern Ireland from 10 to 14 years old. The consultation closed in

¹⁸ Department of Justice *Strategic Framework for Youth Justice 2022 – 2027* (Belfast: DoJ, Youth Justice Agency, 2022).

¹⁹ *Strategic Framework for Youth Justice 2022 – 2027*, pp.41-42

²⁰ *Strategic Framework for Youth Justice 2022 – 2027*, pp.11

December 2022 and the outcomes will be published in due course. Before the Northern Ireland Assembly's mandate came to an end at the elections in May 2022, the Northern Ireland Department of Justice published the Rehabilitation of Offenders (Amendment) Order (NI) 2022. These amendments would have increased the period of imprisonment where convictions are automatically never spent from 30 months to 10 years. Disclosure periods for sentences of between four and 10 years, one and four years and less than a year would also have been substantially reduced. A similar approach would have been taken to disclosure of fines and offences committed by those aged under 18. However this Order remains in draft and has not yet been approved by the Assembly.

Conclusion

Chiricos et al. examined the practice in Florida where judges have the option of “withholding adjudication” of guilt which means the conviction will not appear on a criminal record check. They found significantly less recidivism in those who had their criminal records withheld by a judge in this way as the stigma, labelling and exclusion that typically accompanies a criminal record had been reduced.²¹ Chiricos concluded that “minimizing harm at the individual level has consequences for reducing harm in the broader community”.²² The age of criminal responsibility in the Republic of Ireland is 12 years of age for most offending, although children aged 10 and 11 can be charged with murder, manslaughter, rape or aggravated sexual assault. There are many opportunities in the Republic of Ireland's youth justice system to divert children from the criminal justice system and therefore ensure they do not receive a criminal record. Where children are convicted by the Children Court, there is in place a system to automatically ‘wipe the slate clean’ for most of these children at the age of 18. In Northern

²¹ T. Chiricos, K. Barrick, W. Bales, S. Bontrager, “The labelling of convicted felons and its consequences for recidivism”, (2007) 45(3)Criminology, 547, at p. 572.

²² Chiricos et al. “The labelling of convicted felons”, at p. 571.

Ireland there is the Independent Reviewer whose role is to automatically review criminal record certificates where the information disclosed relates to childhood offending and to filter out information that is no longer relevant in terms of seriousness, age or the specific role for which the application was made.

However, as has been demonstrated throughout this article, the approach to childhood criminal records in Northern Ireland is much more complex than in the Republic and is less distinctive and separate from the approach to adult criminal records. In Northern Ireland there remains a commitment to what Maurutto et al. refer to as “preventative security and precautionary logics ... redefining the parameters of risk”²³ at the expense of embracing a true Child First approach which necessarily involves “the total abandonment of risk-based assessment and intervention”.²⁴ Nevertheless, there remains optimism that there is momentum to change the Northern Ireland approach. Pursuing a commitment to a Child First youth justice response will help to strike a more appropriate balance between children’s protection rights and the adult paradigm of risk management which is being used as a framework to regulate disclosure of childhood criminal records. As Lord Kerr stated in his introduction in *In the matter of an application by JR38 for Judicial Review (Northern Ireland)*: “Protection of our children from the consequences of their immaturity and the preservation of their innocence are just as vital as they have ever been”.²⁵

²³ P. Maurutto, K. Hannah-Moffat, M. Quirouette, “Punishing the Non-convicted Through Disclosure of Police Records”, (2023) *British Journal of Criminology*, <https://doi.org/10.1093/bjc/azac092>, p.2.

²⁴ S. Case and K. Haines, “Taking the risk out of youth justice” in C. Trotter, G. McIvor and F. McNeill (eds), *Beyond the Risk Paradigm in Criminal Justice* (London: Palgrave Macmillan, 2106), pp. 61–75

²⁵ [2015] UKSC 42, at para. 1