

Review of Youth Justice – Submission

Criminal records, disclosure and young people

Introduction

Unlock welcomes the opportunity to provide a written submission to the review of youth justice being led by Charlie Taylor. The focus of this submission is in relation to criminal records, disclosure and young people. We were particularly pleased to see that there was recognition of the need to look at criminal records and the implications of contact with the youth justice system in the interim report:

40. We must make sure that a child's contact with the criminal justice system, particularly where this is fleeting or the result of low-level offending, does not disproportionately impair their prospects of pursuing their aspirations and playing a full role in society. The review will consider whether the long-term consequences of receiving a criminal record strike the right balance between protecting the public and employers from risk and promoting the reintegration and rehabilitation of young offenders.¹

This submission is intended to build on that made to the review by the Standing Committee for Youth Justice (SCYJ), of which Unlock is a member. Unlock has been an active contributor to the recent work of the SCYJ in looking at criminal records acquired in childhood. Our Co-director, Christopher Stacey, supported the SCYJ assessment of the current system in England and Wales as part of their international comparisons research, *Growing up, Moving on*. Christopher was also part of the advisory group that produced the recommendations that formed part of the campaign (and that are listed on page 5 of this submission).

The need for a distinctive approach for young people

Unlock advocates for all people with a criminal record who are now leading law-abiding lives and struggling with the stigma and discrimination associated with their record. We believe that the criminal record disclosure system is in desperate need of a wholesale review to redress the disproportionate long-term impact that criminal records have on the life chances of those with them.

¹ Ministry of Justice (2016) Review of the youth justice system, An interim report of emerging findings.

However, we believe there is both a need and an opportunity to think differently and develop a distinctive approach towards those who acquire a criminal record when they are young.

A criminal record acquired in childhood has far-reaching effects that go well beyond the original sentence. There is a wealth of evidence to show that the disclosure of a criminal record has a negative effect on a persons' ability to access education and employment; two factors key to desistance.²

We believe that the criminal record disclosure system that currently exists in England and Wales is not evidence-based and the argument for retaining and disclosing information on childhood records in the way the law requires has not been proven. In addition, the system unfairly holds people back for the rest of their lives and often makes them have to relive the mistakes they made as a child every time they apply for a job. For a system that believes in rehabilitation and redemption, it seems clear to us that there is a need to relook at how criminal records acquired in childhood are treated in adulthood.

We know that children with a criminal record face significant stigma and discrimination in accessing college, university and employment, as well as difficulties in travelling abroad and securing housing. These problems follow children into adulthood and impact on their life chances. Unlock recommends that the criminal records system is reformed so that criminal records obtained in childhood have significantly less impact in adulthood than they do currently. We urge the youth justice review to recommend reforming the current criminal records system so that, at the very least: current rehabilitation periods for children are further reduced; and the filtering system is greatly expanded. We would also urge the review to consider introducing provision to “wipe” childhood records. These recommendations are explained in more detail on page 5.

The attitudes of employers', colleges, universities, housing providers and insurers when criminal records are disclosed to them can also be a significant barrier to people moving on positively with their lives. Reducing the disclosure periods can mitigate this significantly, but arguably the greatest need for jobs, housing and education is when individuals are closest to the criminal justice system and least likely to benefit from any future reduction in the disclosure periods attached to their record. The Government should consider what they can do to shift the attitudes and practices of these important intermediaries as co-operation with these are integral to helping people move on and lead law-abiding lives in the future.

² See, for example, Carr, N. and Dwyer, C. 2015 “Young People, Criminal Records and Employment Barriers”

http://www.niacro.co.uk/sites/default/files/publications/New_Directions_Research_Papers_June2015.pdf

The current situation

In England and Wales the details of cautions and convictions acquired as a child are retained for the rest of their life. Technically, the Police National Computer retains an individual's criminal record until they reach 100 years old. Although each Chief Constable has an exceptional case procedure as data controllers of this information, in practice an individual who has acquired a legally issued caution or conviction is highly unlikely to have this information removed during their lifetime.

Rehabilitation periods and withholding 'spent' criminal records

A person will have to disclose their record acquired as a child to any employer, volunteer organisation or insurance company that asks them for the details, and this information would be disclosed on a basic criminal record check (until it becomes 'spent' under the Rehabilitation of Offenders Act 1974 (ROA), after which point it wouldn't need to be disclosed and wouldn't be revealed on this type of check). Depending on the sentence, it can take many years for a record to become spent and sometimes it never will.

The ROA states that after a certain amount of time, which varies according to the sentence, convictions and cautions become 'spent'. In 2014, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 brought in changes which largely reduced these time periods 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 become spent and there is no right of review of this. This is one of the few examples where there is no difference in approach between children and adults.

Filtering of criminal records from standard and enhanced checks

Certain areas of employment are exempt from the ROA 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 children and vulnerable groups. These jobs and roles involve a standard or enhanced check, and even once a criminal record is 'spent' it will very often still have to be disclosed on these higher levels of criminal record check.

In 2013, the Court of Appeal held that the disclosure of all convictions and cautions on a standard or enhanced check was disproportionate and incompatible with the right to private life under Article 8 of the Human Rights Act. 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 disclosure. The filtering rules apply only to standard and enhanced

checks – they do not change what information is recorded by the police or what might be used for other forms of vetting. An offence committed in childhood will only be removed ('filtered') from a standard or enhanced disclosure in the following situation:

- A childhood conviction will be filtered if 5.5 years have passed since the date of conviction, it's the person's only conviction, and it did not result in a custodial sentence.
- A childhood caution will be filtered if 2 years have passed since the date of the caution.
- Convictions and cautions will only be filtered if the offence 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; these include sexual offences, offences with a degree of violence (other than common assault), safeguarding offences and drug offences involving supply.

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). The Government are likely to appeal this ruling.³

The limited filtering system introduced in 2013 was in response to a legal challenge. As a result, it is very narrow and has arbitrary rules. The vast majority of under-18 convictions, and a significant number of cautions, can continue to be disclosed throughout a person's life.

³ More information on filtering is available at <http://www.unlock.org.uk/policy-issues/specific-policy-issues/filtering/>

Recommendations – Growing up, moving on

In April 2016, the SCYJ published a report⁴ into the treatment of childhood criminal records across a number of countries in Europe, Australasia and three states in the US. As part of this work, SCYJ sought input from Unlock and others. The below recommendations featured as part of the report. We include them here to reiterate our support for these changes:

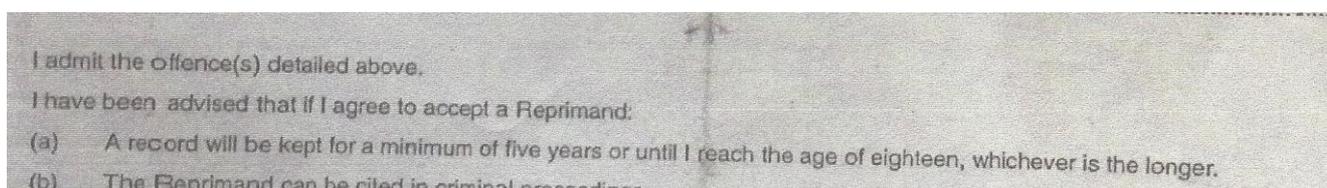
1. Youth Rehabilitation Orders (YROs) should become spent as soon as the order is finished. This would bring YRO Rehabilitation Periods (RP) in line with Referral Order (RO) RPs which are spent as soon as the order ends.
2. Detention and Training Orders (DTOs) should become spent six months after the 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.
3. 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.
4. 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.
5. All under-18 cautions are automatically filtered out after a two year time limit.
6. 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.
7. Police guidance should make it clear that if a person has any unspent convictions, none of their convictions should be filtered.
8. Guidance to police should be amended, setting out the presumption that under-18 police intelligence is not disclosed.
9. 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

⁴ Available at <http://scyj.org.uk/2016/04/new-report-shows-that-england-and-wales-top-the-international-league-tables-for-its-punitive-childhood-criminal-records-system/>

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).

Out of court disposals

Unlock supports the increase of diversion and disposals that seek to divert young people away from the youth justice system. However, progress in this space in the past has been at the expense of genuinely diverting young people away from longer-term consequences of a criminal record. We regularly hear from people who have 'accepted' disposals such as youth cautions⁵ under the false belief that these will not have an impact on them in later life. Often, official guidance suggested this. For example, below is an extract of a reprimand given to a young person in 2004.



This suggests that the reprimand would be removed after 5 years. At the time, there were systems for 'weeding' this type of information. This no longer exists. Although 'filtering' (see above) can apply, not all offences are eligible for this. Action must be taken to deal with historical instances where out-of-court disposals continue to have an impact despite the advice that individuals were given at the time that they wouldn't.

Properly constructed diversionary schemes must have a fundamental acceptance that they do not appear on criminal record disclosures.⁶

⁵ Previously known as reprimands and final warnings

⁶ Crossley, A (2012) *Rules of Engagement: Changing the Heart of Youth Justice*. London: Centre for Social Justice. p.54

Accurate advice

In April 2016, Unlock responded to the Work and Pensions Committee Inquiry into the support for ex-offenders.⁷ In this response, we made a number of recommendations in relation to the need for criminal justice agencies and practitioners to have the knowledge, skills and confidence to advise their clients on issues relating to criminal records. These recommendations are equally applicable to young people going through the criminal justice system and we would urge the review to consider these recommendations as part of this review.

Additional recommendations

There is an opportunity to learn from elsewhere:

In September 2015, the Scottish Government introduced a filtering system for old/minor convictions. Although this system is not ideal⁸, critically they have introduced a ‘review process’ by way of an ‘application to a sheriff’ that allows those with a spent conviction for an offence on the “rules list” to apply to a sheriff to have this information removed from their disclosure certificate if they think it is not relevant to the role for which they have asked for the disclosure.⁹

In March 2016, the Department for Justice in Northern Ireland introduced a criminal records filtering review scheme which includes an opportunity for independent review.¹⁰ Despite this system having its limitations,¹¹ it nevertheless provides a strong basis for a similar process to be introduced in England & Wales.

In April 2015, Unlock’s Co-director, Christopher Stacey, published a report entitled *Rehabilitation and Desistance vs Disclosure – Criminal Records: Learning from Europe*¹². This followed a study into the approaches of France, Spain and Sweden and how they dealt with criminal records. Although not focused

⁷ Available at <http://www.unlock.org.uk/wp-content/uploads/Unlock-written-response-to-Work-and-Pensions-Committee-Inquiry.pdf>

⁸ See our response to the consultation in November 2015 - <http://www.unlock.org.uk/wp-content/uploads/Scottish-Remedial-Order-Response.pdf>

⁹ For more information, see <https://www.disclosurescotland.co.uk/ApplicationtoaSheriff.htm>

¹⁰ For more information, see <https://www.justice-ni.gov.uk/publications/guidance-operation-criminal-records-filtering-review-scheme>

¹¹ See our response to the consultation in September 2015 - <http://www.unlock.org.uk/wp-content/uploads/Unlock-response-Sept-2015.pdf>

¹² Available at www.unlock.org.uk/wcmt

on young people in particular, a number of recommendations were made. Some of the particularly relevant recommendations are copied below. Particular attention is drawn to number 5, which links to a judicial process which allows for a discretionary decision to issue a 'rehabilitation certificate' which also removes the future disclosure of that persons' criminal record.

1. 'Police' records and 'Conviction' records should be held separately. Conviction records may come from Police records, but they would be held separately, solely for disclosure purposes.
2. The Government should explore the use of 'occupational disqualifications' more broadly as a means of regulating who can work in certain roles, allowing for more restricted access to criminal records in other roles and more expansive 'cancelling' systems.
3. The UK should establish an 'ultimate' form of rehabilitation which applies for all types of disclosures.
4. The UK should introduce measures which enable any person with convictions to be ultimately regarded as legally 'rehabilitated'.
5. Research should be undertaken to understand the effectiveness of the system of 'judicial rehabilitation' in France.
6. The UK should learn from how France, Spain and Sweden have been able to have a stronger commitment to 'rehabilitation' laws when applied to jobs that work in sensitive roles.
7. Research should be undertaken into whether measures that deal with criminal records have any positive impact on rehabilitation/desistance.
8. More research needs to be done into the effectiveness of systems which 'forgive', comparing them to systems that 'forget', and how the two can work together in a cohesive criminal record disclosure system.
9. Research should be carried out to understand what impact 'forgiving' and 'forgetting' measures have in mitigating the collateral consequences of criminal records.

Case study – Helen

The case study below has been published on theRecord¹³, an online magazine for people with convictions, run by Unlock. Names and details have been changed.

Like many teenagers, I suffered at the hands of the school bully and like many teenagers, the day came when I finally decided that enough was enough and retaliated. The result was a fight in the school playground when I was 15.

The police were called and I was taken to the local police station. The police officer dealing with my case listened to my side of the story and seemed genuinely concerned about me. He suggested that the best thing would be for me to accept a warning for assault occasioning actual bodily harm. He told me that if I did, I'd be able to go home quickly, wouldn't have the hassle of going to court and in any case, it would be wiped from my record when I was 18. It seemed the best option at the time. The year was 2003 and I'd never been in any trouble before and I've not been in any trouble since.

I put the whole thing out of my mind and started to concentrate on my future.

My troubles only really started in 2010 when I decided that I wanted to work in healthcare. I'd received an offer from one of the top universities in the country but, once the university received a copy of my CRB (now a DBS) certificate, they revoked the offer.

Desperate to get work, I looked to go into the security industry but found it really, really hard to get my SIA badge. Initially I was rejected but, a very supportive employer wrote a fantastic letter of support and I eventually got my badge. I went on to work at some very high profile events.

As a caring individual, I knew I couldn't give up on my ambition to be a nurse and decided to go through the university's appeals process. This was the first of many times that I'd have to write out a disclosure statement explaining to an interview or risk assessment panel how I'd ended up with this warning on my record. Disclosure has never gotten any easier for me - each time as traumatic as the first because it takes me back to a really bad time in my life that people just won't let me move on from. Thinking back to what was going on in my life back then reduces me to tears.

I worked really hard, finished my nursing course and started applying for jobs. I always disclosed my warning on application forms and there were many times when I never heard anything back from an employer. I'll never know whether it was because of the warning or because there were other more suitable candidates.

¹³ Available at <http://www.the-record.org.uk/unlock-people-with-convictions/why-cant-my-childhood-mistakes-be-left-in-the-past/>

Eventually, I received a job offer. I had to write another disclosure statement which was read by so many people - people that I would potentially have to work with!! I had to have a further telephone interview with my manager where I had to explain the warning all over again. I think the process took about five months in all but eventually I thought I had things settled.

Sadly this was not to be the case. As well as my main job, I wanted to apply to join the hospital's 'bank list' which would have enabled me to do overtime shifts around the hospital. Yet another application form asked me to disclose details of my criminal record which I was asked to complete and leave in my new manager's mail tray (on her desk) ready for her to sign off. I was extremely worried about who would potentially see this form and concerned that my personal information was not being more carefully protected.

After yet another discussion about the warning, my manager refused to sign off my application form stating that she 'didn't think I was ready for this'. However, I knew that several of my co-workers (who had considerably less experience than me), had been signed up really quickly and were already doing overtime shifts.

Over time, I've noticed how differently I've been treated from my co-workers and how my manager rarely makes eye contact with me. Sometimes I'd like to shout out "Just because I've got assault on my record, doesn't mean I'm dangerous".

Recently I applied for a job with another nursing agency and as usual, disclosed my warning on the application form. However, once the agency had reviewed my references and my DBS certificate, the job offer was rescinded.

I'm now at the point where I feel employers and agencies only offer me interviews to stop them being accused of discrimination. However, once they see details of my record in black and white, my CV/job offer goes in the bin.

The Government talks about rehabilitation but never stops to consider why re-offending rates are so high. I've really struggled to move on with my life because something I did as a child is always hanging over my head. It's been over 12 years since that stupid fight in the playground but, because my offence is a violent one, it will never be filtered from DBS certificates and will stay with me for life.

About Unlock

Unlock is an independent, award-winning charity for people with convictions which exists for two simple reasons. Firstly, we assist people to move on positively with their lives by empowering them with information, advice and support to overcome the stigma of their previous convictions. Secondly, we seek to promote a fairer and more inclusive society by challenging discriminatory practices and promoting socially just alternatives.

We help

- We support people with convictions by providing information, advice and support through our [websites](#) and [helpline](#)
- We help practitioners who support people with convictions by [providing criminal record disclosure training](#) and useful resources
- We [recruit and train people with convictions as volunteers](#) to help support the information and advice we provide
- We [support employers](#) in the fair treatment of people with criminal records

We listen and learn

- Our [helpline](#) and [forum](#) provide an ear to ground on the problems that people face as a result of their criminal record
- We [collect evidence and undertake research](#) into the barriers caused by criminal convictions

We take action

- We [challenge bad practice by employers and push for improvements to the way that criminal record checks operate](#)
- We advocate for a fairer and more inclusive society by [working at a policy level](#) with Government, employers and others

More information

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Written	May 2016