

Advice to the Department of Justice regarding Draft Guidance for the operation of the Criminal Records Filtering Review Mechanism

Introduction

The office of the Northern Ireland Commissioner for Children and Young People (NICCY) was established under the Commissioner for Children and Young People (Northern Ireland) Order 2003. The principal aim of the Commissioner is to safeguard and promote the rights and best interests of children and young people. Under Articles 7(2) and (3) of the Order, NICCY has a duty to keep under review the adequacy and effectiveness of law, practice and services relating to rights and welfare of children and young people.

NICCY have engaged on vetting and barring arrangements since the introduction of the Protection of Freedoms Bill and the review of the criminal records regime in Northern Ireland at all stages. NICCY's previous work has always recognised that the criminal records regime is a key part of safeguarding arrangements to protect children and young people and as such must operate to the highest safeguarding standards.

NICCY has concerns about the current disclosure arrangements and their compliance with international human rights standards. As such, NICCY has been supportive of the commencement of a filtering review mechanism in an attempt to bring the current regime closer to the UK's international obligations following recent case law in both the European and domestic courts.

In providing this advice, NICCY would take the opportunity to reinforce the Department's need to comply with Article 8 of the European Convention on Human Rights (ECHR) and Articles 3, 16, 19, 37 and 40 of the United Nations Convention on the Rights of the Child (UNCRC).

Particular cognisance should be paid to the aims of the youth justice system provided for under s.53 of the Justice (Northern Ireland) Act 2002 (as revised by s.98 of the Justice Act (NI) 2015). The latter states that all persons and bodies exercising functions in relation to the youth justice system must:

“(a) have the best interests of children as a primary consideration; and

(b) have regard to the welfare of children affected by the exercise of their functions (and to the general principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development.”

Finally, NICCY would remind the Department of Recommendation 21 of the Youth Justice Review¹ which we support. The recommendation states:

“Policy and legislation relating to the rehabilitation of offenders should be overhauled and reflect the principles of proportionality, transparency and fairness. Specific actions should include:

- a. diversionary disposals should not attract a criminal record or be subject to employer disclosure;*
- b. young offenders should be allowed to apply for a clean slate at age 18;*
- c. for those very few young people about whom there are real concerns and where information should be made available for pre-employment checks in the future, a transparent process for disclosure of information, based on a risk assessment and open to challenge, should be established. The decision to disclose and the assessment on which it is based should be regularly reviewed.”*

General Comments

NICCY have been concerned by the filtering regime particularly in respect of the disclosure time periods for those who were under 18 at the time of the offence, the information which will always be subject to disclosure, the disclosure of non-conviction information and the volume of offences categorised as “specified.” NICCY consider that a regime more akin to Recommendation 21 of the Youth Justice Review would be compliant with international human rights standards.

NICCY considers that children and young people should not be burdened by, in effect, ‘life sentences’ which will impact on their ability to access education, training and employment. As the European Court of Human Rights have stated “...it is realistic to assume that, in the majority of cases, an adverse criminal record certificate will represent something close of a ‘killer blow’ to the hopes of a person who aspires to any post which falls within the scope of

¹ A Review of the Youth Justice System in Northern Ireland (2011)

*disclosure requirements.*² The ability to avail of education, training and employment opportunities will protect the public by reducing further offending, thereby assisting the criminal justice system to achieve its overarching aim. Children and young people should be given every chance to address and move on from their behaviours and fulfil their potential without obstruction.

NICCY note that the Department proposes to commence with the review mechanism on 1st January 2016. NICCY urges the Department to commence a review mechanism as soon as possible to ensure that human rights deficiencies in the current regime are rectified urgently.

NICCY notes the Department's proposal to produce an information leaflet for applicants and considers this to be essential. The disclosure regime and the review mechanism can be confusing for most and will be particularly so for young people and those with mental health issues. NICCY urges the Department to produce a child friendly version of the information leaflet and would be happy to advise the Department regarding the production of same.

NICCY recommend that details of organisations and professionals who can assist individuals and in particular children and young people, with the review process are detailed in, or annexed to, the guidance.

Comments on the Draft Guidance

NICCY considers that the draft guidance should include an explicit reference to the aims of the youth justice system under s.53 of the Justice (Northern Ireland) Act 2002 (as revised by s.98 of the Justice Act (NI) 2015), as set out above, in order to ensure that this guidance, and those acting within its remit, are compliant.

NICCY feels that the guidance is somewhat confusing as the legislative basis for criminal record disclosures is so disjointed. By necessity the guidance is littered with references to legislation however no legislative provisions are included. The guidance would be much improved if all relevant and fully amended legislation were annexed.

NICCY note the proposals contained within paragraphs 4.4 – 4.6 of the draft guidance

² MM v UK (Application no. 24029/07) Para. 200

regarding eligibility for review. However these are contradicted by the overriding ability of PSNI to disclose information under s.113B(4) of the Police Act 1997, even where this has been filtered or the subject of a successful review. NICCY would ask for more information as to in what circumstances it is envisaged that PSNI could or should disclose information which has been filtered or which the Independent Reviewer has determined should be removed. NICCY suggest that a protocol is established between PSNI, Access NI, the Independent Reviewer and the Independent Monitor to ensure consistency in criminal record checks. This should be reflected in this draft guidance and Access NI's statutory code of practice for Chief Officers.

Regarding paragraph 4.6 'Disclosure in relation to Young People', NICCY considers that this could be simplified for young people and their parents / carers who may consult the guidance for information regarding a review. The information leaflet should also be referenced in this section with a link to it or details as to where it can be found. It should also be clearly stated in this section that even if information were filtered or removed following a review, it may still be disclosed by PSNI under "other information". Young people and their parents / carers should be advised of where they can obtain further information regarding an appeal to the Independent Monitor.

With respect to diversionary disposals administered to a person when they were under the age of 18, NICCY considers that that the draft guidance should emphasis a starting point of non-disclosure. Both the Criminal Justice Inspection Northern Ireland³ and the UN Committee on the Rights of the Child⁴ have confirmed that such disposals should not form criminal records and as such should not be shared. The Youth Justice Review stated "*we...recognise the importance of screening out from the workforce those who pose a real danger to children and vulnerable adults. The vast majority of children and young people who offend do not however fall into this category.*"⁵ NICCY considers that diversionary disposals should not be disclosed unless necessary for safeguarding purposes. In those circumstances, disclosure should be conducted in a transparent, proportionate, rights respecting and sensitive manner.

Regarding representations to the Independent Reviewer, as detailed in paragraph 5.3, NICCY consider that a template is essential for young people or their parents/carers so

³ CJINI, Youth Diversion (2011)

⁴ General Comment No. 10 (2007) Children's Rights in Juvenile Justice, para 27

⁵ Page 84

that they may fully participate in the process and realise their rights as protected by Article 8 ECHR and Articles 3, 12 and 40 UNCRC. NICCY would be willing to assist the Department in the development of a template for children and young people. Further, as recommended above details of organisations who may be able to assist young people, their parents or carers should be provided.

NICCY note with concern that prior to issuing an amended certificate, Access NI will not re-check the individual's criminal record. This is of particular concern given that paragraph 5.4 allows for 90 days plus 28 calendar days between the date the original certificate is issued to the determination of the Independent Reviewer. NICCY considers this to be a potential gap in safeguarding and would ask for more information as to how such a gap will be addressed.

Turning to paragraph 5.5 'Factors to be considered by the Independent Reviewer', NICCY recommend that in addition to the reference to Article 8 ECHR, explicit reference is made to the UNCRC. Further, the fleeting reference to the best interests of the child as a primary consideration should reflect the statutory obligation placed upon persons and bodies exercising functions in relation to the youth justice system through specific reference to s.53 of the Justice (NI) Act 2002 (as amended) to reflect the best interests of the child principle.

Conclusion

NICCY remain concerned by the current disclosure regime which subjects children and young people to the continuing threat of disclosure.

NICCY welcome the introduction of a review mechanism and the opportunity this provides for closer scrutiny. NICCY are however troubled by the overriding ability of PSNI to disclose information which may have been filtered or the subject of a successful review. NICCY recommend that a protocol is established between PSNI, Access NI, the Independent Reviewer and the Independent Monitor and reflected in this draft guidance and Access NI's statutory code of practice for Chief Officers.

NICCY consider that an information leaflet and template for representations are essential for young people and their parents / carers. NICCY are happy to advise the Department regarding the production of both. Young people, their parents and carers should be

advised as of the details of organisations / professionals who can assist with the review process.

NICCY note a potential safeguarding gap and request information as to how this will be addressed.