NAYJ

Justice for Children in Trouble

www.thenayj.org.uk

Submission to the Law Commission Consultation on Appeals in respect of children

About the National Association for Youth Justice (NAYJ)[1]

The NAYJ is the only individual member organisation within England and Wales which campaigns exclusively for the rights of and justice for children in trouble with the law. It seeks to promote the welfare of children in the youth justice system in England and to advocate for child friendly responses where children are suspected of infringing the law.

About this response

The NAYJ refers to our submission to the Law Commission on the issues paper, prepared jointly with the YPA.[2] This paper sets out our key concerns about appeals as they affect children and those who offended as children. It also provides important background and context about this group. We do not repeat that information here. In this short response we respond to questions in the consultation that we consider particularly relevant to children and those sentenced as children. We broadly welcome the progressive and ambitious tone of the Law Commission's paper in achieving better justice for all.

In preparing this response, we have had sight of the draft response by the Criminal Appeal Lawyers' Association and endorse it where indicated.[3]

Restriction on imposing more severe sentences on appeals from the Youth Court: Consultation Question 4, Consultation Question 14 and Question 19

18.4 We provisionally propose that, in principle, a person should not be at risk of having their sentence increased as a result of seeking to appeal their conviction or sentence.

18.14 We provisionally propose that, even if the Crown Court remains able to impose a more severe penalty on appeal from a magistrates' court, the Crown Court should not be able to impose a more severe penalty on appeal from a youth court.

18.19 We provisionally propose that the power of the Court of Appeal Criminal Division to make a loss of time direction, ordering that time counted between the making of an application for leave to appeal and its determination not be counted as part of an applicant's sentence, should be limited to a period of up to 56 days of that time.

Do consultees agree?

We strongly agree with all the first two proposals but would go further in respect of the third proposal, arguing that loss of time orders should never be applied to children.

---

[1] https://thenayj.org.uk/
[2] https://thenayj.org.uk/cmsAdmin/uploads/ypa-nayj-law-commission-appeals-for-children.pdf
[3] https://www.cala.org.uk/news-articles

We consider that as a matter of principle nobody should be penalised for appealing, but this is especially true for children. Even if this change is not applied to all cases, this reform should certainly apply to children and those who offended as children.

Our response to the issues paper raised concerns about the chilling effect of the review function of the crown court on children.

The law is clear that children's welfare should be a primary consideration in all actions by the courts. Imposing a more severe sentence on appeal is contrary to this principle. For the same reasons, and in light of the principle that custody should always be for the shortest appropriate period for children, loss of time orders should never be imposed on children.

Guilty pleas: Consultation Question 9.

18.9 We invite consultees' views as to the circumstances in which there should be a right to appeal against conviction following a guilty plea in a magistrates' court.

Our response to the issues paper raised strong concerns about the inability of those who pleaded guilty as children to appeal. We stated:

> "The special position of children in respect of appeals following guilty pleas requires particular examination. There are many reasons why children might plead guilty that differ from adults. Children may not have had the benefit of specialist legal representation (see above) or may struggle to understand the consequences of pleading guilty. A paper from the University of Exeter argues that children are more likely to plead guilty in response to the prospect of relatively modest reductions in sentence, as well as perceived pressure from their lawyers (Helm,R).[4]
>
> There are a number of examples where children have pleaded guilty where defences were available to them. For example, a child may have failed to utilise a modern slavery defence. In some instances, children have not realised they have been victims of modern slavery or been too worried about the repercussions from talking about it, even with their defence lawyers. In other cases, they may not have been advised as to its availability. This is what happened in *R v BSG* leading the Court of Appeal to state at §57: "we accept that the defence under s45(4) of MSA 2015 was not advanced because the applicant was not advised about it. We further accept that, if it

[4] Helm, R. (2021) Guilty pleas in children: legitimacy, vulnerability, and the need for increased protection, University of Exeter, Available at https://ore.exeter.ac.uk/repository/bitstream/handle/10871/124736/jols.12289.pdf?sequence=5&isAllowed=y

had been advanced, it would probably have succeeded and that a clear injustice has been done." [5]

Similarly, a child may also have been able to argue that they did not have the requisite intent to commit the offence due to a mental disorder or cognitive difficulties that were not known about or evidenced at the time.

Regardless of the reason, if a child has pleaded guilty and not made use of a defence or argument open to them, an injustice will have occurred.

However, the circumstances in which a child and adult may vacate a plea are the same and very limited. There should be provision for those who were convicted or sentenced as children to appeal their convictions, even where they have pleaded guilty to correct this injustice.

There may be other scenarios, such as when a child is subsequently diagnosed with a mental disorder that could have affected their culpability. The focus on speedy justice in the youth court and sentencing on the day, where low level penalties are envisaged, means that diagnoses may well be missed and specialist reports not commissioned."

Our position has not changed.

We note that CALA also strongly supports law reform to ensure that a guilty plea in the magistrates' court should not be a statutory bar to an appeal to the Crown Court for the following reasons. We endorse their submission and particularly highlight the case study they cite provided by the Howard League that demonstrates just how problematic and unjust the current prohibition is, with the child in that case having to wait for over seven years to challenge his wrongful conviction.

Anonymity for children: Consultation Question 15 and Consultation Question 73.

In 2024, we published a paper, Open justice and children in the criminal justice system, in which we argued that "all children (including suspects, defendants and victims) should be entitled as a matter of law to privacy when they come into contact with the justice system and that this should continue when they turn 18."[6] We were pleased to see this paper cited in the Law Commission's consultation and to see the proposal that children whose anonymity has not been lost should retain it on appeal, even when

[5] https://yjlc.uk/sites/default/files/attachments/2023-10/BSG%20v%20R%202023%20EWCA%20Crim%201041.pdf
[6] https://thenayj.org.uk/cmsAdmin/uploads/nayj-open-justice-briefing.pdf

they turn 18. However, we consider there should be greater protections for children whose anonymity is removed.

Question 15 – retaining anonymity

18.15 We provisionally propose that where a person has been convicted as a child and their anonymity has not been lost as a result of an excepting direction or their being publicly named after turning 18, that person should retain their anonymity during appellate proceedings.

Do consultees agree?

We strongly agree with this proposal. It accords entirely with the welfare principle which is at the heart of the criminal justice system for children. We note that our *Open Justice* paper emphasised the harm of being named as follows:[7]

> "The harm caused by being associated with your crimes as a child for the rest of your life, both psychologically and practically in terms of the negative impact on access to education, work, housing or safety, are obvious and expressly recognised by the UN Committee on the Rights of the Child. One practitioner has told NAYJ of a young person, now almost 30 years old, who has been publicly named in respect of crimes committed as a child and has described difficulties in all of these areas. There is extensive evidence that the process of labelling children as 'offenders', and the stigma that attaches to the label, has been shown to impede rehabilitation and increases the risk of continued offending."

Children who are on the cusp of turning 18 should not be deterred from appealing just for fear of being named. Many children in the criminal justice system will be at risk of this, especially given the delays and backlogs in the system: The latest youth justice statistics show that over half of all children cautioned or sentenced in the year ending March 2024 were aged 16 or 17.[8]

Question 73 – challenging decisions to lift reporting restrictions

18.73 We provisionally propose that there should be no right to appeal against:

(1) a refusal to impose reporting restrictions; or
(2) a decision to lift reporting restrictions.

Do consultees agree?

[7] https://thenayj.org.uk/cmsAdmin/uploads/nayj-open-justice-briefing.pdf, page 14
[8] https://www.gov.uk/government/statistics/youth-justice-statistics-2023-to-2024, Table 3.4: Children cautioned or sentenced by age, years ending March 2014 to March 2024

We strongly disagree with the proposal not to introduce a right of appeal against a decision to lift reporting restrictions. As noted in our paper on Open Justice, once restrictions are lifted, these can have a serious and irreversible impact on children's well-being. We believe that there is a strong case for introducing a right of appeal for child defendants in respect of decisions to lift reporting restrictions.

This additional layer of appeal should be available prior to having to resort to judicial review. Judicial reviews of decisions to lift reporting restrictions are often not pursued by criminal lawyers, who may feel that the public law threshold is too high and cumbersome. It is rare to see judicial reviews of decisions to lift reporting restrictions. A right of appeal would enable a swift review of the decision within the context of the criminal proceedings.

Fresh evidence in children's cases: Consultation Question 17

18.17 We provisionally propose that the test for admitting fresh evidence in section 23 of the Criminal Appeal Act 1968 should remain "in the interests of justice", provided that the considerations in subsection (2) are treated as such rather than as criteria which must be met before fresh evidence can be admitted.

Do consultees agree?

We do not agree. We consider there should be an amendment as recommended by CALA.

In the issues paper we noted the specific issues that affect children in relation to fresh evidence as follows:

> "In the case of children, it may be that the child was aware of the relevant information but was not aware as to its relevance to the process or was scared to mention it.
>
> The test should recognise the multiplicity of reasons as to why, in the case of a child, available evidence may not have been adduced that an adult would have been expected to put forward if they were to wish to rely on it later. The test should be adapted in the case of those convicted or sentenced as children so as to remove or reduce the need on appellants to satisfy the reasonable explanation requirement given that it is likely that there will be additional reasons as to why evidence was not available at the time. According to Dr. Enys Delmage, Consultant in Adolescent Forensic Psychiatry, child and adolescent psychiatrists are understandably reluctant to make hasty diagnoses. This is partly due to the diagnostic criteria requiring evidence of behaviour over time, and partly due to the high degree of complexity in a group with high comorbidity. It is not uncommon to encounter young people with comorbid conduct disorders, psychosis, ADHD, complex PTSD intellectual disability

> and autism on a background of severe abuse and neglect. Picking apart these diagnoses can take months, even in inpatient settings where they are being assessed 24 hours a day. Over time it may become clear that there has been a wrong outcome in the criminal case, for example, if it becomes clear that they have a long-standing and enduring mental illness that affects their culpability or the appropriate sentence, and this may have been masked or missed. This is of course more likely in a group who are mistrustful of services and may not be forthcoming about the nature of their difficulties, or may feel shame and embarrassment about anything which differentiates them from their peers.
>
> Similarly, it may be the case that, as noted above, a child was not aware that they were subject to exploitation or feared to provide information about it at the time."

The requirement to provide "a reasonable explanation for the failure to adduce the evidence" at first instance is too onerous for children for the reasons set out above and should be removed.

Changing the test in sentence appeals for children - Consultation Question 23

18.23 We provisionally propose no change to the current arrangements for defence appeals against sentence in the Court of Appeal Criminal Division ("CACD").
Do consultees agree?

We invite consultees' views on the tests applied by the CACD in appeals against sentences, specifically whether a sentence was "manifestly excessive", and on whether the tests could and should be codified.

We strongly believe that the test for sentence appeals for children should be amended to enable children to challenge sentences that are unjust and where the child should have been sentenced differently, rather than being restricted to sentences that are too "manifestly excessive".

We endorse the approach set out by CALA for all sentences and believe this will benefit children and accord with the welfare principle, and the UNCRC requirement which states that children should be in custody for the shortest appropriate period of time.

Reforming minimum term reviews: Consultation Questions 31 and 32

18.31 We provisionally propose that children serving a sentence of detention for life should have the same right to a review of the minimum term as is available to a child sentenced to Detention at His Majesty's Pleasure ("DHMP").

We provisionally propose that this right should extend to young adults sentenced to DHMP or life imprisonment for offences committed as a child.

Do consultees agree?

We invite consultees' views on how far into adulthood this right should extend. Should it be:

(1) 21 years old (the age at which a person leaves a young offender institution);
(2) 25 years old (the age at which most people will be neurologically mature); or
(3) some other age?

Consultation Question 32.

18.32 We provisionally propose that reviews of minimum terms for children and young people on indeterminate sentences should be heard by the Court of Appeal Criminal Division.

Do consultees agree?

We believe that minimum term reviews accord with the welfare principle and provide an important mechanism to provide those who offended seriously as children with hope. We have had sight of the paper by Edward Fitzgerald KC, Pippa Woodrow, Dr Laura Janes KC (Hon) and Simon Creighton, which is appended to the CALA submission, and agree with it.[9]

Indeterminate sentence for public protection for children- Consultation Question 33

18.33 We invite consultees' views on whether the current powers afforded to the Court of Appeal Criminal Division in relation to sentence appeals are sufficient to deal with a change of circumstance post-sentence? This includes a change in law (for example, the repeal of a type of sentence) or a change in the personal circumstances of the defendant.
We invite consultees' views specifically on whether those currently serving sentences of imprisonment for public protection ("IPP") should be entitled to challenge their IPP on an individual basis on appeal and, if so, what the test for quashing an IPP should be.

[9] https://www.cala.org.uk/news-articles, Appendix 2

We note that 326 children received indeterminate sentences of detention for public protection (DPPs). The concerns about the injustice of this sentence described in the recent Howard League report as follows, are particularly acute for those who were sentenced as children:[10]

> "Studies have shown that IPP sentences are psychologically harmful, leaving people in a state of hopelessness and detrimentally impacting their mental health. The self-harm rate in prison is higher among people serving IPP sentences than for people serving other sentences. As of March 2025, 94 people on IPP sentences had taken their own lives in prison. And in the five years to April 2024, a further 37 people on IPP sentences had taken their own lives after their release."

We consider that a broader approach to sentence appeals, proposed by CALA, will facilitate appropriate appeals for those serving IPP sentences, and will be of particular benefit and importance to those on DPP sentences.

We agree with both CALA and the Howard League[11] that urgent change is required to actively support children who were sentenced to indeterminate sentences to challenge them. The proposals to remove hurdles to appeals and empower the CCRC to identify and refer cases automatically to the Court of Appeal are all sensible and should be considered.

Protected characteristics of children in the criminal justice system - Consultation Question 107

18.107 We invite consultees' views if they believe or have evidence or data to suggest that any of our provisional proposals or open questions could result in advantages or disadvantages to certain groups, whether or not those groups are protected under the Equality Act 2010 (age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation), and which those consultees have not already raised in relation to other consultation questions.

Our paper on the issues set out the particular needs and characteristics of children in the criminal justice system, which relate both to their age and the prevalence of multiple disadvantages.

A recent report by the Ministry of Justice, published in April 2025 found that children with higher propensity to offend had higher levels of need compared to nonprolific children across all eight criminogenic areas: accommodation, employability,

[10] https://howardleague.org/wp-content/uploads/2025/06/Ending-the-detention-of-people-on-IPP-sentences.pdf
[11] Ibid, Recommendation 6.

relationships, lifestyle, drug misuse, alcohol misuse, thinking & behaviour, and attitudes.[12]

Children are particularly disadvantaged in the criminal justice system for the reasons outlined above. They have multiple needs and often are unable to recognise potential legal arguments and relevant evidence, find lawyers and formulate instructions.

It is for these reasons that a special approach is required for children.

Access to justice for children - Consultation Question 108

18.108 We invite consultees' views in relation to any issues relevant to the criminal appeals project that they have not dealt with in answer to previous consultation questions.

In our issues paper, we emphasised the need for children to have specialist legal representation and that legal aid should be available at all stages of the process:

> "…children require specialist legal representation but often find it hard to obtain. The fee structure does not incentivise lawyers to represent children on appeal as this work is poorly paid. It is also the case that, where leave is not granted by the Court of Appeal, there is no legal aid funding available for an oral renewal. Solicitors and barristers are expected to work pro bono or children and young people are expected to represent themselves. This cannot be right: at the very least there should be automatic legal aid for any person sentenced or convicted as a child for the oral renewal stage."

It is of concern that criminal appeal work for fresh appeals has been left out of the recent consultation on solicitor fees in criminal cases: a sustainable legal aid system is essential if children are not to be disadvantaged. We endorse the submissions of CALA on this point.

Conclusion

The NAYJ welcomes the Commission's consultation paper: criminal appeals are a vital safeguard for everyone, but especially so for children, who as a group merit special consideration.

We would be happy to discuss the issues raised in this paper further with the commission.

27 June 2025

[12] https://www.gov.uk/government/publications/a-profile-of-repeat-offending-by-children-and-young-people-in-england-and-wales/a-profile-of-repeat-offending-by-children-and-young-people-in-england-and-wales