NAYJ Briefing

National Association for Youth Justice
Justice for Children in Trouble

Open justice and children in the criminal justice system

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The NAYJ is a registered charity (no. 1138177) and membership organisation campaigning for the rights of – and justice for – children in trouble with the law.

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February 2024

Executive summary

In 2023 the Ministry of Justice issued a consultation, Open Justice: the way forward (Ministry of Justice, 2023)[1]. Children are not mentioned at all in the consultation paper.

Yet the extent to which children involved in the criminal justice system should be publicly named is a matter of key concern that has been flagged by a number of bodies and commentators in recent years.

The United Nations Convention on the Rights of the Child (UNCRC) provides that children have a right to privacy (Articles 16 and 40[2]). The Committee's general comment on children in conflict with the law requires children's right to privacy to be protected.

Charlie Taylor's Review of the Youth Justice System in England and Wales, published in December 2016, recommended that the Government should consider extending reporting restrictions and introducing lifelong anonymity for child defendants (Taylor, 2016)[3].

Yet nothing has been done to further protect children's privacy other than as witnesses and victims (Youth Justice and Criminal Evidence Act 1999, s45A)[4].

On the contrary the tide of open justice has resulted in more child defendants being exposed to publicity. The first televised sentencing hearings of children took place in 2023[5].

Even where reporting restrictions are granted to child defendants in criminal proceedings, they will lapse when the child turns 18 (see *R [on the application of JC & RT] v Central Criminal Court*, [2014] EWCA Civ 1777). The only legal remedy for a child defendant to secure anonymity once they turn 18 is to obtain a civil injunction which has a high threshold and can cause great stress and anxiety (YJLC, 2015)[6].

The National Association for Youth Justice (NAYJ) believes 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. This is in line with the 'child first' principle adopted by the Youth Justice Board (Youth Justice Board, 2022)[7].

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1 https://www.gov.uk/government/consultations/open-justice-the-way-forward

2 https://www.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577105/youth-justice-review-final-report-print.pdf

4 See s45A of the Youth Justice and Criminal Evidence Act 1999 https://www.legislation.gov.uk/ukpga/1999/23/section/45A

5 See, for example, 10 May 2023, https://www.youtube.com/watch?v=FsFVyfp_Its&t=2 ; 15 June 2023 https://www.youtube.com/watch?v=hTqWZ48AAGk&t=6 ; 14 July 2023 https://www.youtube.com/watch?v=YUwDDHhOMMo&t=7

6 https://yjlc.uk/resources/legal-updates/anonymity-court-proceedings-section-39-orders-post-18

7 https://yjresourcehub.uk/images/YJB/Child_First_Overview_and_Guide_April_2022_YJB.pdf

The NAYJ believes that enabling enduring privacy and reporting restrictions for all children involved in the criminal justice system will support greater transparency in decision-making and sentencing. This will in turn provide greater consistency for both victims and defendants, as well as important information to support change and improvements. It will enable court documents and judgments to be made available, as children's personal details will remain anonymous. This will benefit children involved in the system while protecting their privacy.

About NAYJ and its position on open justice for children

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 Wales, and to advocate for child-friendly responses where children are suspected of infringing the law.

Children in conflict with the law do not lose their rights and entitlements (other than the right to liberty for those in detention). Responses to children in trouble should be compliant with, and informed by, international conventions and standards, in particular the UNCRC.

Interventions should accordingly: be consistent with the child's best interests; take into account, and give due weight to, the views of the child; and respect children's rights to privacy, a family life and freedom of association.

Children involved in the criminal justice system have a right to lifelong anonymity; they should never be named at any stage of the youth justice process, or retrospectively when they become an adult.

The law and policy on open justice as it applies to children

The welfare principle

As a matter of both law and policy, all courts must have regard to the welfare of children and adhere to the child first principle.

The welfare principle is enshrined the Children and Young Persons Act 1933[8]. Section 44 (1) states:

> "Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."

[8] https://www.legislation.gov.uk/ukpga/Geo5/23-24/12

This clause remains good law and has been affirmed and emphasised by s58 of the Sentencing Act 2020[9] and the Sentencing Council's guidelines on children, (Sentencing Council 2017)[10]. In recent years, the Youth Justice Board has developed and promoted the "child first" principle which has been endorsed by Ministers through the National Standards (YJB, 2019)[11]. The Board explains the principle in its paper, *A Guide to Child First* (Youth Justice Board, 2022)[12]. It describes how a "Child First approach" requires that the "youth justice system should treat children as children, see the whole child, including any structural barriers they face and focus on better outcomes for children".

This approach is entirely consistent with the UNCRC which provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (UNCRC, Article 3)[13].

In the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4[14], Lord Kerr emphasised that consideration of the best interests of a child is a factor that "must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them" (ZH, §46)[15]. In the same judgment, Lady Hale described Article 3 of the UNCRC as "a binding obligation in international law" and noted that "the spirit, if not the precise language, has also been translated into our national law" through section 11 of the Children Act 2004 which places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children" (*ZH*, §23)[16].

While there is nothing in domestic law that explicitly equates the welfare or best interests principle to the need to protect the privacy of children in the criminal justice system, there is a free-standing right to privacy under both the Common Law and the qualified right to privacy enshrined in Article 8[17] of the European Convention on Human Rights (ECHR), as incorporated into English Law under the Human Rights Act 1998[18]. However, the UNCRC specifically requires that children are entitled to privacy and that the law should facilitate this. Article 16[19] states:

[9] https://www.legislation.gov.uk/ukpga/2020/17/section/58
[10] https://www.sentencingcouncil.org.uk/wp-content/uploads/Sentencing-Children-and-Young-People-definitive-guideline-Web.pdf
[11] https://www.gov.uk/government/publications/national-standards-for-youth-justice-services
[12] https://yjresourcehub.uk/legislation-and-guidance-documents/item/1043-a-guide-to-child-first-youth-justice-board-for-england-and-wales-october-2022.html
[13] https://www.ohchr.org/sites/default/files/crc.pdf Article 3
[14] ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, https://www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf
[15] https://www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf
[16] https://www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf
[17] https://www.echr.coe.int/documents/d/echr/convention_ENG Article 8
[18] https://www.legislation.gov.uk/ukpga/1998/42/contents
[19] https://www.echr.coe.int/documents/d/echr/convention_ENG Article 16

"Article 16

1 No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2 The child has the right to the protection of the law against such interference or attacks."

The UNCRC goes further and requires that privacy is "fully respected at all stages of the proceedings" to enable "every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" (Article 40)[20].

The UN Committee on the Rights of the Child has produced General comment No. 24 (2019) on children's rights in the child justice system to assist in the application of the UNCRC (UN, 2019)[21]. It provides very strong and clear guidance about what is expected in terms of privacy for child defendants in criminal proceedings and beyond:

67 States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.

68 Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.

69 The Committee recommends that States refrain from listing the details of any child, or person who was a child at the time of the commission of the offence, in any public register of offenders. The inclusion of such details in other registers that are not public but impede access to opportunities for reintegration should be avoided.

70 In the Committee's view, there should be lifelong protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's

[20] https://www.echr.coe.int/documents/d/echr/convention_ENG Article 40

[21] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en

reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media.

71 Furthermore, the Committee recommends that States parties introduce rules permitting the removal of children's criminal records when they reach the age of 18, automatically or, in exceptional cases, following independent review."

There can be no doubt that the UN Committee considers that the best interests principle requires that children in conflict with the law should be entitled to privacy both during the case and that this should continue, even when they turn 18.

Domestic provisions and their limitations

The law around privacy for children in the criminal justice process is complex and consists of a patchwork of statute and case law.[22]

The starting position is that the principle of open justice requires all court proceedings to be conducted openly unless restrictions can be justified. This is set out in guidance issued by the Judicial College in 2022:

> "The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings in person, and the media is able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court acts as the eyes and ears of the public, enabling it to follow court proceedings and to be better informed about criminal justice issues.
>
> The open justice principle is reflected in r.6.2(1) Criminal Procedure Rules 2020 (CrimPR), which requires the court, when exercising its powers in relation to reporting and access restrictions, to have regard to the importance of dealing with criminal cases in public and allowing a public hearing to be reported to the public.
>
> The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward. It provides public scrutiny of the trial process, maintains the public's confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent purpose behind criminal justice. Any departure from the open justice principle must be necessary in order to be justified." (Judicial College, 2022, §1)[23]

[22] For a detailed outline of the law see, https://yjlc.uk/resources/legal-guides-and-toolkits/reporting-restrictions-children-criminal-cases and https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf

[23] https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf

The fundamental principle that open justice governs the reporting of cases in the criminal justice system has been reaffirmed in the Government's Open Justice paper 2022 which states:

> "Open justice is a fundamental principle at the very heart of our justice system and vital to the rule of law – justice must not only be done but must be seen to be done. Its history and importance in law can be traced back to before the Magna Carta. It is a principle which allows the public to scrutinise and understand the workings of the law, building trust and confidence in our justice system." (gov.uk, 2022)[24]

In English and Welsh law, there is no statutory provision in force to prevent a person's name being published in connection with an offence before they are charged. Section 44[25] of the Youth Justice and Criminal Evidence Act 1999, if implemented, would create an automatic reporting restriction in respect of a child who is the subject of a criminal investigation but this section has not yet been brought into force. Judicial guidance published in 2022 noted that "it appears that there are no current plans" to bring it into force (Judicial College, 2022, §3.9)[26]. It is generally accepted that the application of Article 8 of the ECHR, as interpreted through case law, means that it will normally be unlawful to name a child who has not yet been charged (ZXC v Bloomberg LP [2022] UKSC 5)[27]. The Editors' Code of Practice warns against it unless their name is already in the public domain, or consent has been given and the police rarely provide information (Editor's Code of Practice)[28]. However, technically, the only way to prevent publication would be to apply for a civil injunction to prohibit it.

The position is very different once a case reaches the Youth Court. The overwhelming majority of cases concerning children are heard in the Youth Court: according to the latest data, 2021-2022, just 5% (around 520) of all sentencing occasions of children were at the Crown Court and this proportion has remained stable over the last ten years, varying between 4% and 5% (MOJ, 2023)[29]. In the Youth Court, section 47 Children and Young Persons Act 1933[30] creates a statutory exception to the open justice principle which generally bars the public from attending Youth Court proceedings. Further, the media, although permitted to attend, are prohibited from publishing the name, address, school or any other information that is likely to identify a person under 18 as being 'concerned in the proceedings' before the Youth Courts (Children and Young Persons Act 1933, s.49[31]). However, there are three exceptional

[24] https://www.gov.uk/government/consultations/open-justice-the-way-forward
[25] https://www.legislation.gov.uk/ukpga/1999/23/section/44
[26] https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf
[27] ZXC v Bloomberg LP [2022] UKSC 5
[28] https://www.ipso.co.uk/editors-code-of-practice/
[29] https://www.gov.uk/government/statistics/youth-justice-statistics-2021-to-2022/youth-justice-statistics-2021-to-2022-accessible-version
[30] https://www.legislation.gov.uk/ukpga/Geo5/23-24/12 Section 47
[31] https://www.legislation.gov.uk/ukpga/Geo5/23-24/12 Section 49

situations in which these automatic reporting restrictions may be lifted, as the Judicial Guidance explains (Judicial College, 2022, §3.9)[32]:

> "First, the court may lift the restriction if satisfied that it is appropriate to do so for avoiding injustice to the child.
>
> Secondly, the court may lift the restriction to assist in the search for a missing, convicted or alleged young offender who has been charged with, or convicted of, a violent or sexual offence (or one punishable with a prison sentence of 14 years or more in the case of a 21-year-old offender).
>
> Thirdly, the restriction may be lifted in relation to a child or young person who has been convicted, if the court is satisfied that it is in the public interest to do so."

In deciding whether or not to lift reporting restrictions in the Youth Court, the Judicial Guidance states:

> "It is wrong for the court to dispense with a child's prima facie right to anonymity as an additional punishment, or by way of 'naming and shaming'. The welfare of the child must be given very great weight and it will rarely be the case that it is in the public interest to dispense with the reporting restrictions. Where it decides to lift the reporting restrictions, the court must clearly identify the specific public interest which justifies that course."

However, the restrictions on anonymity for child defendants in the Youth Court expire when a child turns 18, although for child victims or witnesses, a court has a specific power to make a lifelong reporting restriction order under s45A(2) of the Youth Justice and Criminal Evidence Act 1999[33] (see below).

Where a child is sent to the adult Magistrates' Court (when charged jointly with an adult) or the Crown Court, the automatic restrictions do not apply. However, the Court has a discretion to protect a child's identity under the Youth Justice and Criminal Evidence Act 1999 and is required to balance the harm in doing so, against the harm in not doing so, giving proper weight to the principle of open justice. This provision came into force on 13 April 2015 and replaced the previous discretionary power to make reporting restrictions under s39 of the Children and Young Persons Act 1933[34].

The amendment followed a challenge to whether or not the power under s39, which simply conferred a discretion on the court to grant anonymity to any child in any proceedings, was life-long or expired when the child turned 18. The issue was fully considered in *R (on the application of JC & RT) v Central Criminal*[35] *Court* by the Lord

[32] https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf
[33] https://www.legislation.gov.uk/ukpga/1999/23/section/45A
[34] https://www.legislation.gov.uk/ukpga/Geo5/23-24/12/section/39
[35] R (on the application of JC & RT) v Central Criminal Court [2014] EWHC 1041 (QB) https://www.bailii.org/ew/cases/EWHC/QB/2014/1041.html

Chief Justice at the time. He held that the power conferred by s39 was strictly time limited until they turned 18:

> "My conclusion is straightforward. An order made by any court under section 39 of the Children & Young Persons Act 1933 cannot extend to reports of the proceedings after the subject of the order has reached the age of majority at 18." (Sir Brian Leveson, §38)[36]

In reaching this decision, he rejected arguments that children should be able to leave their past behind them when they grow up. He saw the rationale for reporting restrictions for children to be to protect them from the "glare of publicity arising from contemporaneous reporting of proceedings" but held that "once the proceedings are over, news reports of proceedings are and always have been less likely and there is no reason to provide the same protection" (Sir Brian Leveson, §28)[37].

On the other hand, he took a very different position in respect of victims and witnesses, nothing that "they have different needs" from child defendants (Sir Brian Leveson, §36)[38]:

> "Victims and witnesses need individual and tailor-made protection within the criminal justice system: an example of such a need relates to the victims of female genital mutilation, recently the subject of calls for anonymity. In my judgment, it would be wrong to seek to create a solution out of legislation that was simply not designed to have regard to what is now understood of their needs and to the primacy attached to their legitimate interests. Therefore, it is for Parliament to fashion a solution: the problem requires to be addressed as a matter of real urgency." (Sir Brian Leveson, §37)[39]

It is not clear why the Lord Chief Justice concluded that the needs of child witnesses and victims are very different from child defendants. The overlap between child victims and defendants has long been acknowledged, and was expressly noted in Charlie Taylor's review of the youth justice system (Taylor, 2016)[40]:

> "Many of the children in the system come from some of the most dysfunctional and chaotic families where drug and alcohol misuse, physical and emotional abuse and offending is common. Often they are victims of crimes themselves."

In line with the recommendation of the Lord Chief Justice, Parliament changed the law in 2015 for child victims and witnesses only.

The current legal position is that child defendants in the Youth Court will be entitled to anonymity until they turn 18 unless there is a decision to lift it and child defendants in

[36] https://www.bailii.org/ew/cases/EWHC/QB/2014/1041.html §38
[37] https://www.bailii.org/ew/cases/EWHC/QB/2014/1041.html §28
[38] https://www.bailii.org/ew/cases/EWHC/QB/2014/1041.html §36
[39] https://www.bailii.org/ew/cases/EWHC/QB/2014/1041.html §37
[40] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577105/youth-justice-review-final-report-print.pdf

the Crown or adult Magistrates' Courts will not be entitled to anonymity unless the Court decides to grant it, and even then it will expire when they turn 18.

On the other hand, child victims and witnesses in all criminal courts are able to be granted life-long anonymity by the court (Judicial College, 2022, §4.2)[41].

There is no equivalent power to grant a child defendant life-long anonymity. The only way for child defendants to retain anonymity once they turn 18 (other than where they are still in criminal proceedings where they can make use of the limited adult provisions, such as the provisions under the Contempt of Court Act 1981)[42], is to apply for a civil injunction.

Contra mundum injunctions - the 'Venables' jurisdiction

The High Court has an exceptional power to grant a civil injunction to prohibit the publication of details of a child defendant in perpetuity, derived from s.6(1) Human Rights Act 1998[43] and s.37 Senior Courts Act 1981[44]. As the Judicial College guidance notes, the "power to make such an order is sometimes referred to as the 'Venables jurisdiction', as it was first recognised in the decision of Dame Elizabeth Butler-Sloss P to grant a lifelong injunction to protect the new identities of Jon Venables and Robert Thompson, who were convicted of the murder of James Bulger" (Judicial College, §4.10)[45].

However, the process of obtaining a civil injunction of this type is cumbersome, expensive and difficult. The threshold is very high and it is left to the child, before they turn 18, to bring the application. The difficulty in obtaining such orders is reflected by the fact that relatively few have ever been obtained. As of 1 September 2023, the following injunctions of this nature had been ordered:

- Venables and Thompson who murdered Jamie Bulger when they were children.
- Mary Bell who murdered a child when she was a child.
- Maxine Carr, an adult convicted of perverting the course of Justice in the Soham murder case of two schoolgirls.
- The child defendants in the Edlington Case which concerned the abduction and torture of two young boys by two young brothers in Edlington, South Yorkshire.
- The child defendants responsible for the murder of Angela Wrightson.
- The child defendant convicted of inciting another person to commit acts of terrorism at an ANZAC day parade in Australia.

In each of these cases, with the exception of Maxine Carr, the only one which concerned an adult defendant, the child had to know that it was possible to apply for an injunction, obtain legal representation to investigate the merits of such an application and then go through lengthy proceedings in the High Court to obtain it. As

[41] https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf §4.2
[42] https://www.legislation.gov.uk/ukpga/1981/49
[43] https://www.legislation.gov.uk/ukpga/1998/42/contents
[44] https://www.legislation.gov.uk/ukpga/1981/54/section/37
[45] https://www.judiciary.uk/wp-content/uploads/2022/09/Reporting-Restrictions-in-the-Criminal-Courts-September-2022.pdf §4.10

the grounds for obtaining such an injunction are that the interests of open justice and the right to freedom of expression must be outweighed by the risk to a person's life, the threat of torture or inhuman and degrading treatment and/or their right to privacy and personal development (all provided for by Articles 2, 3 and 8 of the ECHR)[46], evidence must be obtained to prove that such a risk exists. This can be very difficult, especially when the person has not already been named and it is not known precisely what threats will be faced if they are. Evidence can include comments in the press, threats on social media and experiences in prison. Preparing such cases takes many hours of gathering and scrutinising evidence. Applications are usually resisted by members of the press and there is a risk that by making the application, even more of a light is shone on the applicant which would increase publicity and information in the public domain if the case is lost.

Even when granted, the order may often require that the person involved has to change their name and take precautions not to reveal their own identity in breach of the direction, which means creating a backstory, sometimes known as a "legend". The stress associated with this has not been the subject of any published research. Practitioners representing those who have been subject to such orders have found it can often inhibit development and rehabilitation, and it is regularly flagged up as a concern during the parole process.

Recent developments in "open justice"

In light of the difficulties in obtaining such injunctions and the difficulties for children being assured anonymity in the Crown Court, in his 2016 review of the youth justice system Charlie Taylor recommended that the law should be reviewed:

> "Further consideration should be given by the Ministry of Justice to whether the law on youth reporting restrictions should be amended to provide for them to apply automatically in the Crown Court (as they currently do in the Youth Court), to children involved in criminal investigations and for the lifetime of young defendants. The current position seems unsatisfactory as the identity of a child suspect may be reported during a police investigation before criminal court proceedings have even commenced. This can then undermine any youth reporting restriction that later applies in court. Equally, once the child turns 18 years of age their name may once again be reported, which risks undermining their rehabilitation as their identity could be established on the internet even though a conviction may have become spent for criminal records purposes." (Taylor, 2016, §107)[47]

The Government response to the review's recommendation, published in 2016, agreed to consider the appropriate way forward:

[46] https://www.echr.coe.int/documents/d/echr/convention_ENG

[47] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/577105/youth-justice-review-final-report-print.pdf §107

> "We also note the Taylor Review's concern that information published during criminal investigations revealing a young person's identity can undermine a statutory youth reporting restriction applying during criminal court proceedings; and that publication of their identity once they have reached 18 years of age can detrimentally affect rehabilitation into adulthood. It is clear that further expanding the youth reporting restrictions framework raises the significant issue of open justice, which is vital in ensuring fair trials and in maintaining the confidence of the public in the criminal justice system. We will discuss these proposals with interested parties, including the Home Office, media and youth justice interest groups in order to better understand the case for change and consider the appropriate way forward." (gov.uk, 2016,§66)[48]

However, there have been no changes whatsoever to better protect the rights of child defendants in respect of their privacy in criminal proceedings since 2016.

On the contrary, the tide of open justice has resulted in more children being exposed to publicity.

As of 1 September 2023, four children had been subject to live televised sentencing hearings which have since remained available for anyone to watch online. These included:

- The sentencing hearing on 10 May 2023 of a 17-year-old child who had been convicted of the murder of a 14-year-old boy. The child was sentenced to a mandatory life sentence at the Central Criminal Court with a minimum term of 19 years (R v Walker, 2023)[49].
- The sentencing hearing on 15 June 2023 of a 15-year-old for the murder of a 14-year-old boy. The child was sentenced to a mandatory life sentence at Newcastle Crown Court with a minimum term of 12 years (R v Amies, 2023)[50].
- The sentencing of two children aged 17 on 14 July 2023 for the murder of a 16-year-old boy. Both were sentenced to mandatory life sentences at the Crown Court at Wolverhampton, with one child receiving a minimum term of 18 years and the other of 16 years (R v Veadhasa and Shergill, 2023)[51].

In December 2023, a decision was made to report the names of two children who were convicted of the murder of Brianna Ghey. In a decision by Mrs Justice Yip DBE, sitting in the Manchester Crown Court, dated 21 December 2023, it is noted that in relation to both child defendants, the professionals working with them urged her not to lift the reporting restrictions. She was informed that lifting restrictions would have "ramifications for many years" and the impact on the mental health of both children and would impact their families. Despite acknowledging these concerns, the judge referred to the "strong presumption in favour of open justice" and was of the view that their identities would be revealed in any event in 2025 when they turned 18 and

[48] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/576554/youth-justice-review-government-response-print.pdf §66

[49] https://www.youtube.com/watch?v=FsFVyfp_Its&t=2

[50] https://www.youtube.com/watch?v=hTqWZ48AAGk&t=6

[51] https://www.youtube.com/watch?v=YUwDDHhOMMo&t=7

therefore chose to lift the reporting restrictions now. No reference was made to the possibility that they might apply for a life-long anonymity order before then. Her decision was not appealed.

Decisions to allow the reporting of high profile cases concerning children appear to be increasingly common, although there is no data or analysis of the frequency or reasons for such decisions.

However, it is quite clear that the direction of travel is towards promoting the principle of Open Justice, as reflected by the tone and content of the Government's consultation on Open Justice (2023)[52].

While the thrust of the consultation is to promote transparency in the justice system, the introduction acknowledges that the "requirement for open justice is interpreted differently in each type of court and according to the circumstances of each individual case." It goes on to emphasise the room for discretion by the courts and outlines circumstances where open justice may not be appropriate:

> "While the procedure rules for each jurisdiction (which ensure consistency and that cases are managed properly and justly) establish a process for open justice, the courts ultimately have an inherent jurisdiction to decide how it should be applied. The principle of open justice is also not absolute, and when there is specific legitimate justification (eg, to protect vulnerable parties) a case may be held in private." (Gov.uk, 2023)[53]

The Government's consultation does not specifically mention children but they are obvious candidates for private or anonymised hearings. Yet the law does not in fact allow for privacy of children in conflict with the law once they turn 18 so the flexibility alluded to in the introduction of the consultation is only temporary, unless a child applies for a civil injunction to extend their privacy once they attain majority. This was made clear by the Lord Chief Justice in the case of *R (on the application of JC & RT) v Central Criminal Court*[54] as noted above.

The impact of open justice proposals on children

The impact of open justice on child defendants during the court process and beyond is under-researched, although Dr Di Hart's paper, '*What's in a name? The identification of children in trouble with the law*' provides an excellent analysis of the difficulties in naming children who appear in criminal courts (Alliance for Youth Justice, 2014)[55].

As noted above, open justice is recognised by the UN Committee on the Rights of the Child as inherently harmful and counter to the principles of rehabilitation enshrined in the UNCRC.

The Court in RXG recognised the significant risk to the child's rehabilitation should his identity become known and granted him anonymity on that basis:

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[52] https://www.gov.uk/government/consultations/open-justice-the-way-forward
[53] https://www.gov.uk/government/consultations/open-justice-the-way-forward
[54] R (on the application of JC & RT) v Central Criminal Court [2014] EWHC 1041 (QB)
[55] https://www.ayj.org.uk/news-content/whats-in-a-name-the-identification-of-children-in-trouble-with-the-law

> "The evidence demonstrates that the loss of anonymity will present significant challenges and threats to RXG in terms of his rehabilitation and reintegration to society when released. With anonymity removed, his historic offending will remain a facet of his public identity, which he will have to confront. If he is publicly named, the evidence demonstrates that he risks social ostracism and his further rehabilitation is jeopardised. Those risks are exacerbated by his autism. In short, naming him now undermines all the objectives that justified his being anonymised in the first place. The expert evidence demonstrates that if anonymity is maintained, RXG would find it considerably easier to 'shed' his old offending identity and to developing a new pro-social non-criminal identity." (RXG v MOJ, 2019, [§61])[56]

The NAYJ believes that the position as stated by the Court ought to apply to all children, invariably. 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 (Becker, 1963; Link, 1982)[57].

Concerns about applying the proposals in the Open Justice consultation to children

The Open Justice consultation assumes that more open justice is the way forward and seeks contributions on how that should be achieved. It does not mention children as a special category at all and, as noted above, the recommended review of the current system for child defendants has still not occurred.

Any changes to promote Open Justice will need to factor-in the special legal position of children, both while they remain children and beyond. It is essential that children do not suffer further harm because the tide of progress towards Open Justice has not factored-in their needs.

Some particular concerns include, but are not limited to, the following:

- **Listings:** The proposal is to roll out a "new online service (that) will simplify and streamline how the media and public find information on upcoming court and tribunal hearings, by publishing all lists across England and Wales online, in one

[56] https://www.judiciary.uk/wp-content/uploads/2019/07/RXG-v-MoJ-2019-EWHC-2026-QB-Final-Judgment-as-handed-down-003.pdf

[57] Becker, H. (1963) Outsiders: Studies in the sociology of deviance. New York: Free Press; Link, B. G. (1982) 'Mental patient status, work and income: An examination of the effects of a psychiatric label', American Sociological Review, 47, pp.202–215.

place" (Open Justice, page 8)[58]. Even in cases where children are granted anonymity or an application is to be made and determined by the Court, it is the experience of practitioners across both civil and criminal jurisdictions that the listing exercise happens in isolation, regularly publishing the name in full. Once information is in the public domain, it is harder to argue for anonymity. Decisions about anonymity should be judicial and not administrative. Any new listing system will need to build in checks and safeguards to guard against the premature or wrong disclosure of a case that is or may be subject to anonymity. The safest way to protect children in this regard is to exclude them from the new online listing programme.

- **Public access to hearings:** There are plans to make court and tribunal hearings more accessible. Again, where children are involved, a completely different approach should be taken to ensure that they are safeguarded and protected. The starting point should be that children's hearings are closed.
- **Remote observation and livestreaming:** Any plans to increase access to hearings involving children through online technology should be completely different from arrangements for adults to ensure that children are safeguarded and protected.
- **Broadcasting:** Children should be excluded from any broadcasting. The impact of the live broadcasting of sentences on children and the fact that it will remain available in perpetuity is likely to be harmful for children.
- **Publication of judgments and sentencing remarks:** The overwhelming majority of children's criminal cases take place in the Youth Court which is not a court of record. This means that it is difficult for practitioners to achieve consistency in sentencing and decision-making or rely on other judgments in support of legal arguments. There would be a huge benefit in the Youth Court being a court of record provided that children's names were not published and decisions were made in such a way as to protect the identities of the parties. Sentencing remarks in the Crown Court are publicly available only in high profile cases. Again, there is a benefit to being able to see these for the same reasons.

There is also a wider public policy benefit in obtaining and publishing greater information about children involved in criminal cases. Research shows that children who are care-experienced or from minoritized communities are more likely to come into contact with the criminal justice system and receive harsher treatment than other children. For example, care experienced children are up to six times more likely to be criminalised than other children (Prison Reform Trust, 2016)[59]. According to Government data, of all children cautioned or sentenced in 2021-22, 71% were white and 29% were Black, Asian, Mixed or other heritage and of all children in custody 48% were white and 52% were Black, Asian, Mixed or other heritage (Ministry of Justice, 2023)[60]. Yet, in the ordinary population 74% of children aged 10 to 17 are white British

[58] https://www.gov.uk/government/consultations/open-justice-the-way-forward Page 8
[59] http://www.prisonreformtrust.org.uk/wp-content/uploads/old_files/Documents/In%20care%20out%20of%20trouble%20summary.pdf
[60] https://www.gov.uk/government/statistics/youth-justice-statistics-2021-to-2022/ , see Figures 3.5 and 7.6

(Gov.uk, 2023)[61]. The importance of better data and information from the Youth Court was acknowledged by the Magistrates' Association in it's Roundtable Report, *Disproportionality in the Youth Justice system.* In its summary of the suggestions it received, the report stated:

> "More data on youth court outcomes should be recorded and made accessible for the purposes of transparency. This data would make it clearer where white [children and young people] are effectively receiving lenient sentences in comparison to their BAME peers." (Magistrates Association, 2019)[62]

However, NAYJ believes, for all the reasons set out above, that all documents concerning children at the time, whether as defendants, witnesses or children, should be anonymised and redacted appropriately to avoid identification for the purpose of protecting children. Decisions that are appropriately anonymised should be easily accessible on line, which is not the case at the moment.

- **Access to court documents:** it is not entirely clear what is meant by "court and tribunal documents" as these are not defined in the consultation, although reference is made to "transcripts and skeleton arguments". In the case of children it is hard to see how documents examined by the court which may quote extensively from detailed witness statements, medical reports and other materials, could be appropriately redacted to protect them. Therefore, children should be excluded from any changes in respect of access to court documents that contain highly sensitive personal information.
- **Public legal education:** it is right and proper that the Government should support public legal education. However, it is important that any developments in public legal education are also tailored to reach children in, and at risk of being in, the criminal justice system. Too often public legal education is framed on the assumption that it is for the deserving ordinary citizen rather than for those who are most likely to be affected, to whom it is critically important. A specific programme of public legal education aimed at children involved, or at risk of being involved, in the criminal justice system would also be consistent with the aim of the children's justice system to prevent offending.

The way forward

The NAYJ believes that Open Justice is important in the criminal justice system. Greater transparency in decision-making and sentencing will provide greater consistency for both victims and defendants, as well as important information to support change and improvements for the reasons set out above.

[61] Data taken from https://www.ethnicity-facts-figures.service.gov.uk/uk-population-by-ethnicity/demographics/age-groups/latest#age-profile-by-ethnicity

[62] https://www.magistrates-association.org.uk/Portals/0/57%20Disproportionality%20in%20the%20youth%20justice%20system%20MA%20report%2030%2008%2019.pdf , see page 12

However, Open Justice must be secondary to protecting the welfare of children and their re-integration into society, which should remain the primary consideration.

In its response to the Taylor review, the government undertook to consult on his proposals regarding child anonymity. No changes to Open Justice affecting children should be made until that consultation has taken place.

The law should be changed to ensure that all children are entitled to privacy when they come into contact with the justice system, and that this does not expire when they turn 18. Only then should the Government develop transparency as suggested, taking into account the concerns noted above.

This in turn will support greater transparency in the form of fully anonymised court decisions and judgments, benefitting wider society and all children involved in the process, while protecting their privacy.

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