

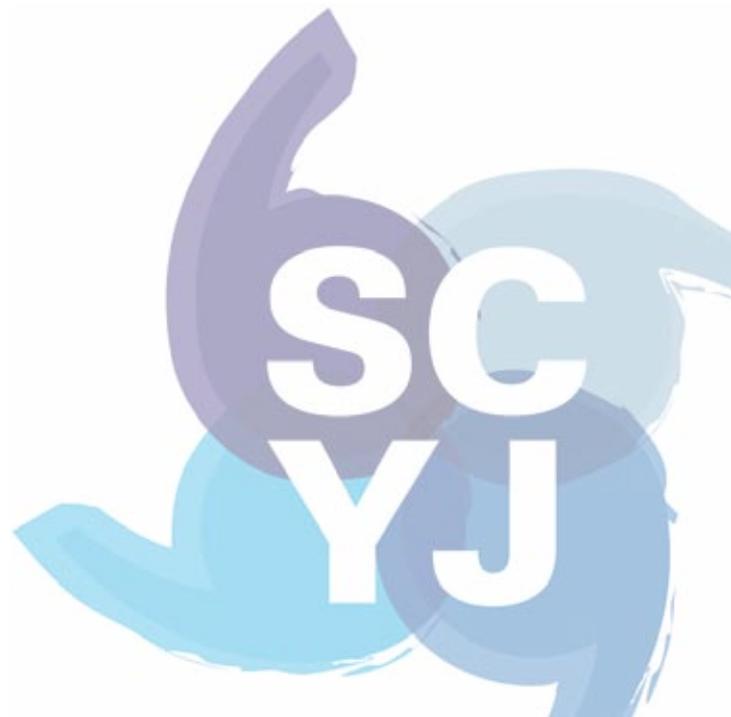


Standing Committee  
for Youth Justice

# What's in a name?

## The identification of children in trouble with the law

By Dr Di Hart



## SCYJ

The Standing Committee for Youth Justice (SCYJ) is an alliance of over 30 organisations working together to improve the youth justice system in England and Wales.

We advocate a child-focused youth justice system that promotes the integration of children in trouble with the law into society and tackles the underlying causes of offending. Such a system would serve the best interests of the children themselves and the community at large.

[www.scyj.org.uk](http://www.scyj.org.uk)

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Dr Di Hart now works on a freelance basis, but has a background in childcare social work and management. Most recently, she was employed for 10 years in a practice development post at the National Children's Bureau where she undertook a number of projects on youth justice, safeguarding and looked after children. She has a particular interest in children in secure settings and the welfare needs of children who offend. Recent publications include '*Into the Breach: the enforcement of statutory orders in the youth justice system*' and '*Care – a Stepping Stone to Custody?*' published by the Prison Reform Trust.

## UR Boss

U R Boss is a project led by young people and young adults aged 10 to 24 years old that are or have been involved in the criminal justice system. U R Boss is a project that supports young people in the criminal justice system to secure their legal rights and to have an impact on policy, practice and the services that affect them. It is part of the Howard League for Penal Reform.

May 2014

*The contents of this document do not necessarily reflect the views of all member organisations of the SCYJ.*

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# Foreword

Guardian columnist and former prisoner

Erwin James

When a child gains a criminal record the consequences are life-changing. Even when children who have been convicted of criminal behaviour are not named publicly by the courts, the road to rehabilitation is a hard and uncertain one and can impact on an individual's life many years after the event. In 2012 for example I interviewed prospective Police and Crime Commissioner for Avon and Somerset, Bob Ashford, for The Guardian after he had been forced to step down as a candidate for the newly formed elected role because of a criminal conviction he had for trespass and possession of an offensive weapon 46 years earlier when he was just thirteen years old. The offensive weapon was an air rifle belonging to another member of the group of boys he was with when he climbed over a fence onto railway lines. In the interim period Ashford had put the conviction long behind him and had built a formidable and respected career as a youth justice professional. It made no difference when it came to the judgment of his character for the role of PCC.

In England and Wales children are held criminally responsible from the age of ten. As the case of Bob Ashford demonstrates, the criminalisation of people at such a young age is a serious business and, as this timely report demonstrates powerfully, when child defendants are identified by magistrates or judges and their cases reported by the media the effect can be even more serious.

I have always found our society's attitude to abused and damaged children perplexing in many ways. When a child is harmed to the extent for example of Peter Connelly – "Baby P" – who died at the hands of those who should have been protecting him, there is an outpouring of national grief and outrage. In such cases reporting is overwhelmingly sympathetic to the child, which is as it should be.

The media attention is focused on demanding answers and explanations from social workers, the police and any other agency that might have been in a position to save the victim. Everybody wants to be seen to care.

Yet when children, who so often have experienced damaging and abusive treatment in their formative years, are charged and convicted of crimes, sympathy and understanding is almost always non-existent. All too soon the popular press seem bent on vilification and demonization. Tabloid caricatures are created, such as "Safari boy", "Rat boy" or "Spider boy." These are just three stories that spring to mind where the popular press has paid not the slightest heed to the fact that the boys being written about were in fact troubled youngsters with serious behavioural issues who needed help and support. Instead, thanks to the discretion of the courts, supposedly in order to serve the "public interest," the journalists were free to vilify and demonise them for no other purpose as far as I could see than to titillate and stimulate their readers.

A classic example of how such exposure can not only limit and debilitate the life chances of the subject, but also significantly hurt family members, is shown in relation to 'Robert' whose case history is explained in this report. Reading his story it is hard to see what part of the public interest was ever going to be served by his public naming and shaming.

The report makes a number of excellent recommendations, the most important I think is that training should be provided for Judges and Magistrates on the impact of identifying child defendants. Part of that training should be to ask themselves the question, if it was a child of theirs how would they feel about having their son or daughter named and shamed for the whole world to see?

## Executive summary

**Is there any justification for ‘naming and shaming’ children in trouble with the law? Some would argue that the public have a right to know their identity, but this briefing suggests that it can put children at risk of harm – and increase the chances that they will offend again.**

The law in England and Wales on whether children appearing in court can be publicly identified is over 80 years old – enacted long before the advent of 24 hours news, social media and international law on the treatment of children in the justice system. Only children in the Youth Court (other than those subject to anti-social behaviour orders) have automatic anonymity, although the court can decide to waive it. Other criminal courts can, and usually do, grant anonymity but there is no right to it.

The names of children in trouble with the law become public in three main ways:

- children subject to anti-social behaviour orders are identified so that the community can notify the police if they do not comply with the conditions of the order
- anonymity only applies to children once they have been charged with an offence so they may be identified at an earlier point, while the case is being investigated
- the court decides, usually following an application by the media at the point of conviction, that it is ‘in the public interest’ to allow the child’s name, personal details and photograph to be reported.

Not only does this legal system breach the UK’s international commitment to uphold children’s rights, but there are a number of weaknesses and anomalies that make it unfit for purpose. Apart from the obvious legal loophole that allows children to be named before they have been charged with an offence, the law is unclear about what happens when children reach the age of 18. Does anonymity ‘expire’ at this point, potentially undermining their rehabilitation? It is also questionable whether children are guaranteed a fair hearing when

courts are considering whether to name them. Is a legally-aided 14 year old with little support, a match for the massed ranks of the TV and print media with the means to employ expert barristers? If publicity is allowed, the advent of social media and the internet means that it is there forever, a situation that could not have been envisaged by those drafting the legislation in 1933. An internet search immediately reveals old news reports, comments (often vitriolic) by members of the public and vigilante sites, making it very difficult for the child to put their offending past behind them. This applies not only to the child defendant, but to their brothers, sisters and other family members, who also lose their right to privacy. This situation is in sharp contrast to cases in the family courts, where the child and all family members are entitled to lifelong anonymity.

In spite of the serious consequences, we do not know how many children are being named by the courts in this way – no data is kept. Neither has there been systematic research into the impact that the experience of being publicly ‘named and shamed’ has on children’s safety, future behaviour or life chances. This means that the courts – and the media – are unaware of the effects of their actions.

In the absence of this important evidence, the courts attempt to balance the principle of ‘open justice’ against their duty to consider the welfare of the child. There is a wealth of guidance and case law, but the definition of ‘public interest’ remains vague. It is not the same as the public merely wanting to know. It must also be differentiated from the interests of the press: the Leveson Inquiry exposed the harm that irresponsible reporting can cause in the drive to get a ‘good story’.

Other arguments put forward to support ‘naming and shaming’ are that it protects the public and deters others from offending, but there is no credible evidence to support either of these justifications. Neither is there evidence that it helps children to face up to the consequences of their actions so that they change their behaviour. In fact, public condemnation can have the opposite effect and is much less effective than restorative justice

approaches, which help the child to make amends rather than writing themselves off as 'bad'.

In contrast, the arguments against 'naming and shaming' are based on the serious impact it can have on children's lives. There is an urgent need for proper research, but on the basis of a number of interviews and information gathered for this report, there is evidence that:

- siblings and other family members of the children identified also lose their privacy, in spite of having done nothing wrong, and can be stigmatised and bullied as a result
- the children themselves are put at risk of physical attack, sexual exploitation and psychological or emotional harm
- the rehabilitation of the children is threatened because they are labelled and stigmatised for life. Their ability to make healthy relationships and to seek employment will be threatened by their inability to escape from their past.

If anyone is in doubt about the consequences of being publicly named, the cases of Robert Thompson and Jon Venables illustrate the devastating and permanent impact that it can have. They continue to be pursued by the press more than 20 years on from the Bulger case, and have been given new identities and lifelong anonymity to protect them from the real risk of attack by vigilantes. Whilst this is an extreme case, it is difficult to see what purpose was served by their identification. If the present system is to remain, the following measures could improve the way it works in the short-term:

1. Ban the identification of children being investigated for a crime and where court proceedings have not yet commenced.
2. Ensure that the anonymity afforded by sections 49 and 39 of the Children and Young Persons Act 1933 does not expire when the subject reaches adulthood.
3. Extend the legislation to include restrictions on identifying children within social media.

4. Make anonymity automatic for all child defendants until the point of conviction, or the conclusion of any appeal.
5. Make it a statutory requirement to notify the Youth Offending Team (YOT) of any applications to lift anonymity and allow them to make representations.
6. Youth Justice Board (YJB) to issue guidance to YOTs confirming that they should consider the impact of identification on child defendants and include this in pre-sentence reports.<sup>1</sup>
7. Review the knowledge and skills needed by the legal representatives of child defendants and ensure that only those who are suitable take on this role.
8. Training for Judges and Magistrates on the impact of identifying child defendants.
9. Establish systems for the collection and analysis of data on the incidence of identification, including the type and location of the courts involved.
10. Commission research into the outcomes for children who have been identified, and the impact on their families.
11. Hold the media to account for irresponsible reporting of child defendants and remind them of their child protection responsibilities.

Even if all the above were to be implemented, the SCYJ can see no good reason for naming child defendants. Whilst it is important that justice should be seen to be done, we believe that the identification of children in trouble with the law is not necessary to tell the story, and is neither in the best interests of the child, nor of society in general. Surely anything that will maximise the chances of a child's reintegration into society is where the public interest truly lies, rather than the short-term satisfaction of their curiosity?

**The SCYJ is therefore calling for a change in the law so that all children involved in criminal proceedings are granted automatic and lifelong anonymity.**

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<sup>1</sup>The YJB agrees that more guidance is needed and the revised case management guidance will include directions to YOT court officers to challenge the naming of children

## Introduction

The legal system in England and Wales recognises that children are different from adults and therefore require additional protection within criminal or civil court proceedings. This includes the opportunity to prevent their identity from being reported, leading to the cryptic statement that the child '*cannot be named for legal reasons*', which sometimes appears in media reports. There are stark differences of opinion about this.

At one end of the spectrum are those advocating that children must never be 'named and shamed' under any circumstances; at the opposite end are those who argue that the public are always entitled to know what happens in court in the interests of 'open justice'. These positions are based primarily on personal belief rather than objective evidence.

The Standing Committee for Youth Justice believes that the privacy of children under the age of 18 who get into trouble with the law should be respected, but also wants to further the debate by exploring the issues in more depth. This report will:

- describe the law and policy in relation to the identification of children involved in criminal or anti-social behaviour proceedings;
- consider how the law operates in practice;
- set out the arguments for and against identification;
- explore the impact that identification has on children – and their families.

## Summary of the legal and policy context

The identification of children involved in criminal or anti-social behaviour proceedings is determined by both international law and the law in England and Wales. This section summarises the main provisions before considering whether they provide a sound framework.

### International treaties

The UK has agreed to abide by a number of international treaties designed to protect human rights. When criminal or civil courts are making decisions about individual cases, these treaties should be taken into account when applying domestic law.

The international obligations that are of most relevance when deciding whether to identify those involved in court hearings are the public's right to information<sup>2,3</sup> versus the individual's right to privacy<sup>4</sup>. These principles are contained in the European Convention on Human Rights, which has been brought into domestic law via the Human Rights Act 1998. The principle of 'open justice' – the public's 'right to know' what happens in criminal trials – normally takes precedence in cases concerning adults, but the situation is more complicated when children are involved.

The United Nations Convention on the Rights of the Child 1989 (UNCRC) states that, as well as the right to privacy<sup>5</sup>, the best interests of the child<sup>6</sup> should always be a primary consideration when decisions are being made<sup>7</sup>. These rights are not conditional on good behaviour – children involved in the criminal justice system are entitled to be treated with dignity and in a way that promotes their rehabilitation, and to have their privacy fully respected 'at all stages of the proceedings'<sup>8</sup>. The right to privacy for children involved in the criminal justice system is also confirmed in the

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<sup>2</sup>Article 6 of the European Convention on Human Rights protects the right of the defendant to an open trial but allows the press and the public to be excluded if the interests of juveniles so requires

<sup>3</sup>Article 10 of the European Convention on Human Rights

<sup>4</sup>For example, as contained in article 8 of the European Convention on Human Rights

<sup>5</sup>Article 16 of the United Nations Convention on the Rights of the Child 1989

<sup>6</sup>Defined as all those under the age of 18

<sup>7</sup>Article 3 of the United Nations Convention on the Rights of the Child 1989

<sup>8</sup>Article 40 of the United Nations Convention on the Rights of the Child 1989

UN Beijing Rules<sup>9</sup>, which cite research evidence that young people are particularly susceptible to stigmatisation, and are at risk of harm from being labelled as ‘criminal’ or ‘delinquent’.

International expectations are therefore very clear, indicating that the public’s right to information does not extend to details about children involved in criminal trials. Many other countries have incorporated this into their domestic law. Although some allow exceptions to be made in certain cases, others, such as India and New Zealand, grant blanket anonymity to child defendants under the age of 18<sup>10</sup>. How is the right to privacy reflected in the court system in England and Wales?

## The law in England and Wales

The law about reporting the identity of children involved in criminal court proceedings dates from the Children and Young Persons Act (CYPA) 1933, long before the UNCRC came into force. It allows for two ways in which the identity of children can be protected, differentiating between cases heard in the Youth Court and all other courts.

In the Youth Court, for all cases except applications for anti-social behaviour orders (ASBOs)<sup>11</sup>, Section 49 (S49) of the CYPA creates an automatic ban on reporting anything that will reveal the identity of any child involved. This means defendants, victims and witnesses (although this report focuses only on defendants). The Court can lift this ban in certain circumstances:

- if it will avoid injustice to the child;
- to assist with finding a child defendant who is ‘at large’, if they are charged with a serious violent or sexual offence;
- where the child has been convicted and, after considering representations, the court considers it to be in the public interest.

<sup>9</sup>*The United Nations Standard Minimum Rules for the Administration of Justice 1985*

<sup>10</sup>*A fierce debate is currently taking place in Queensland, Australia, because of a move to allow the identity of children over 14 to be reported if they have committed a serious crime.*

<sup>11</sup>*These will be re-named as Injunctions under the Anti-social Behaviour, Crime and Policing Act 2014, but are described as ASBOs within this report because that is the term by which they have been known until now.*

There is no automatic right to anonymity in any other court but Section 39 (S39) of the CYPA allows any court to prohibit the identification of any child concerned in the proceedings. The power is discretionary and courts are expected to give reasons for imposing a S39 order.

Whichever court is involved, there is never an automatic ban on naming children given an ASBO. The rationale given for treating ASBOs in a different way is so that the public can be made aware of the conditions within the order, with which the child is required to comply, and report any infringements to the police. This is intended to increase public confidence that antisocial behaviour is being tackled within their community. The Anti-social Behaviour, Crime and Policing Act 2014 will replace ASBOs with injunctions to prevent antisocial behaviour and criminal behaviour orders (CBOs) but the approach to identification will remain the same, allowing children to be named unless the court forbids it by making a S39 order.

Whatever type of case it is, the presiding magistrate or judge may initiate the making – or lifting – of an order regarding anonymity, but applications may also be made by anyone else affected. In practice this will usually mean the police, Crown Prosecution Service (CPS), the defence lawyer on behalf of the child, or the media. Although exact figures are not available, most applications to name child defendants are made by the media on ‘public interest’ grounds, often acting together to make joint applications.

The Criminal Procedure Rules<sup>12</sup> state that anyone ‘directly affected’ must be notified when an application is made and given an opportunity to make representations to the court. This includes the media as well as the child concerned – but not necessarily any agencies (such as children’s social care, mental health services or the Youth Offending Team) working with the child – and they can instruct lawyers to present their arguments.

There are legal routes for protecting children’s identity other than the CYPA 1933<sup>13</sup>. The most important is the power of the High Court to grant Injunctions

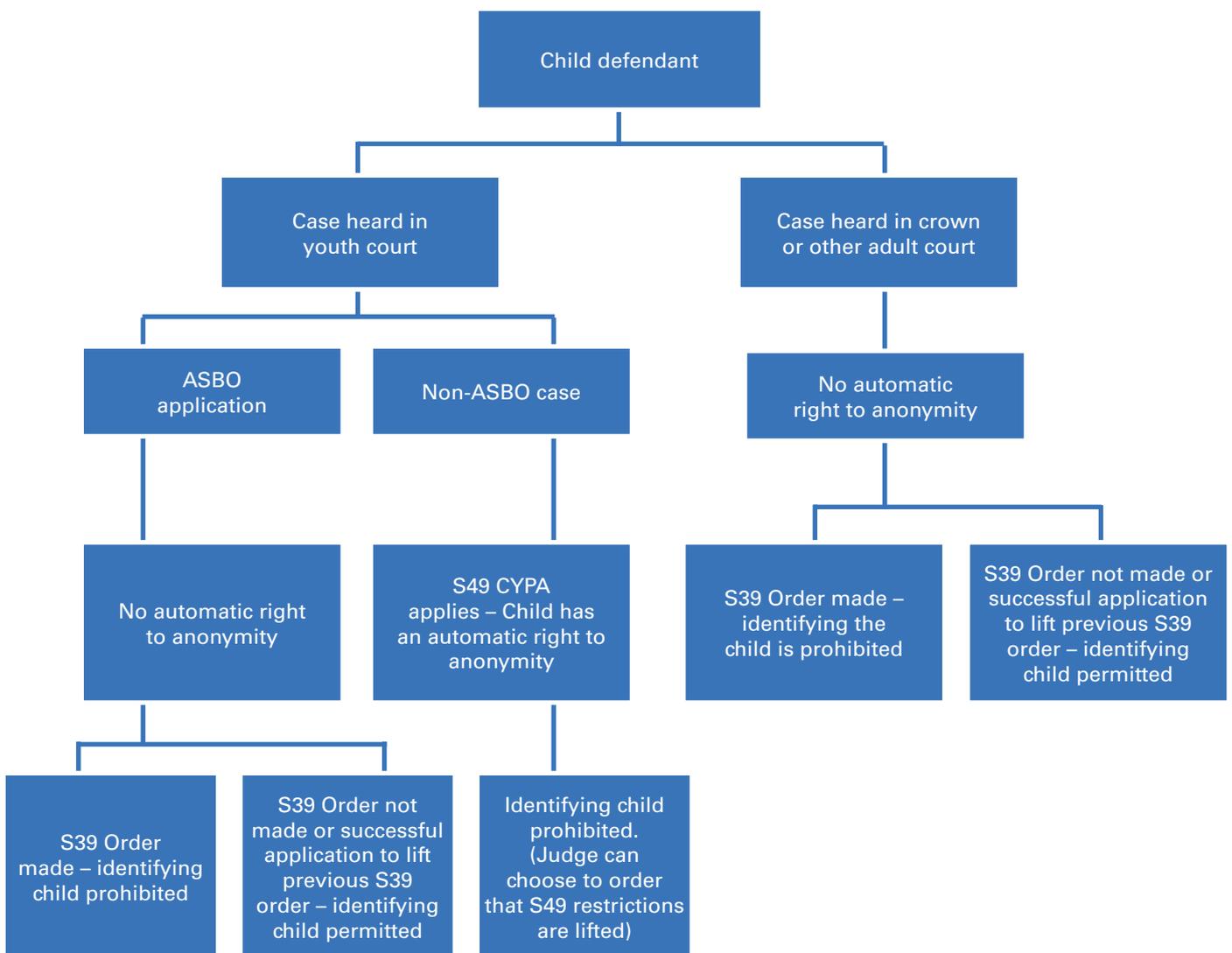
<sup>12</sup>*The Criminal Procedure Rules 2011*

<sup>13</sup>*For example, the Contempt of Court Act 1981, which can be used to restrict reporting that could prejudice criminal proceedings.*

or Reporting Restriction Orders (RROs) in order to protect the rights of children or incapacitated adults under international conventions, such as the European Convention on Human Rights. Applications are likely to be made in complex cases, such as those where a parent is facing child abuse charges and there is a wish to protect the children’s identity. It is rare for them to be used in cases involving child defendants but there may be instances where it is appropriate.

Family Court hearings, which consider applications for care orders and other child welfare matters, automatically grant anonymity to all children and other family members involved in the case<sup>14</sup>. This difference in approach is considered in the next section.

## The law in England and Wales



<sup>14</sup>Children Act 1989. S97.

## Does the law provide a sound framework for practice?

There are a number of weaknesses and anomalies in the legal framework as it stands.

### Breach of international treaties

The first problem is that there appears to be little motivation to comply with international law. The most recent UNCRC Committee Report (2008) on compliance with the Convention criticised the UK for not taking 'sufficient measures to protect children, notably those subject to ASBOs, from negative media representation and public "naming and shaming"'. It recommended that the UK should:

*Intensify its efforts, in cooperation with the media, to respect the privacy of children in the media, especially by avoiding messages publicly exposing them to shame, which is against the best interests of the child (para 37).*

The Government is due to respond in 2014 but appears to have made no moves towards implementing this recommendation. In fact, the Youth Crime Action plan committed the government to exploring with courts how a greater number of cases in the youth court involving 16-17 year olds could have S49 reporting restrictions lifted in the interests of 'transparency'<sup>15</sup>. More recently, the Home Secretary, Theresa May, said following the 2011 riots that she wanted the CPS, where possible, to ask for the anonymity of children found guilty of criminal activity to be lifted. Or as the Express newspaper put it: '*Reclaim Our Streets: Let's name and shame yobs*' (5 August 2011).

### Lack of protection pre-court

A major loophole in the legislation is that the rules about anonymity only apply once the case gets to court. There were provisions to change this within the Youth Justice and Criminal Evidence Act 1999 but they have not been implemented.

Although guidance to the police<sup>16</sup> says that they should not normally release the names of those who are arrested or suspected of a crime, it does

not forbid them from confirming the person's identity if directly asked by the press. The advent of social media means that information – and rumours – can circulate widely. There have been recent cases where the names and photographs of children subject to police investigations have been published in the media, including one where a child actor was alleged to have committed a sexual assault. Several newspapers not only published his identity but created message boards for people to make comments such as:

*...there is something about him that makes me sick and the fact that he has been charge (sic) with sexual assault has made my feelings towards him even worst (sic). He just looks so vile<sup>17</sup>.*

Children in these circumstances may not go on to be charged, or may be given anonymity when the case gets to court, but by then it is too late. Even within the court setting, lists of the cases to be heard with the names of defendants are widely available and can be seen by the media. Information is difficult to contain: the only real safeguard is a legal ban on publishing it.

### Age limitations

An additional challenge is that the CYPA only applies to children. If a defendant reaches the age of 18 during their hearing, neither S49 nor 39 can be used to give them anonymity. Several major media organisations, including the BBC, have recently taken a case to court to argue that this means that all reporting restrictions under the CYPA expire when a child reaches adulthood, even where these cases have long since concluded and the child has served their sentence. Their argument was accepted by Lord Justice Leveson<sup>18</sup> on the grounds that the law does not explicitly state what should happen when children who were granted anonymity become 18. Leave is being sought to appeal.

This judgement is potentially very damaging. If the media are allowed to name young adults in this

<sup>15</sup>HM Government (2008) Youth Crime Action plan. Para 4.19

<sup>16</sup>ACPO (2010) Communication Advisory Group Guidance 2010

<sup>17</sup>Reference not given to protect the child from further identification

<sup>18</sup>R (on the application of JC and RT) v Central Criminal Court and the Crown Prosecution Service and the British Broadcasting Corporation

way, it would seriously undermine the spirit of the legislation. Children granted anonymity should be entitled to assume that this is permanent and that they can pursue their lives without further media attention, provided they comply with the conditions of their sentence and do not reoffend. As one commentator warns:

*...as a nation supposedly devoted to the rule of law we ...need to consider whether it is acceptable to allow the tabloid press to usurp the function of the criminal courts by imposing their own form of punishment on those whom they believe those courts have inadequately sentenced<sup>19</sup>.*

### **A fair fight?**

Media organisations often act together when applying for a child’s anonymity to be lifted and can afford to instruct senior barristers with specialist expertise to put their arguments. Child defendants, in contrast, are likely to rely on legal aid and their legal representative may have little knowledge of this aspect of the law. Unlike the system within family law, where only solicitors on an approved list can act for children, there is no requirement for lawyers representing children in criminal cases to have any specialist knowledge or skills. Some children appear to have been unaware that the court was considering whether to name them – or what the implications might be<sup>20</sup>.

*No one explained it – I remember them speaking about it in front of me in the court – asking them not to – but I thought they said put my dad’s name and not mine.  
(U R Boss Young Advisor)*

This raises the question of fairness: is a 14 year old with little support a match for the massed ranks of the TV and print media?

<sup>19</sup>Spencer, J (2006) *Can Juvenile Offenders be ‘Named and Shamed’ When They Are Adults? Criminal Law and Justice Weekly (formerly Justice of the Peace) Issue 34*

<sup>20</sup>U R Boss is a project that supports young people in the criminal justice system to secure their legal rights and to have an impact on policy, practice and the services that affect them. It is part of the Howard League for Penal Reform.

There is not even any guarantee that the Youth Offending Team (YOT) working with the child will be notified when consideration is being given to naming a child – they may only be aware of the application on the day of sentencing (if at all) making it impossible to put their point of view to the court. As the Secretary to the Association of YOT Managers says:

*Whether children are named by the court **is** the business of the YOT. In one case where it seemed likely that the judge would lift reporting restrictions at the point of sentencing, I wrote to him explaining how the youngest defendant, who was only thirteen, would suffer as a result. He decided not to name any of the family members because of that and cited the YOT letter in court. One of the problems is making sure that the YOT is notified automatically when an application to lift reporting restrictions is made. We should be notified in the same way as we are with ASBO applications and given at least two working days to make representations. Whatever the circumstances, if children are named it’s not going to help the work that the YOT needs to do with them.*

### **Impact of the internet and social media**

One challenge that has recently been acknowledged by government is the impact of social media, which did not exist when the CYPA was passed in 1933. The law preventing a child from being identified refers to newspapers and was later amended to include ‘broadcast programmes’ but not to social media. As Shauneen Lambe, Executive Director of Just for Kids Law, points out:

*At the time, the drafters of the legislation would have been unable to envisage a society where news stories did not disappear with the paper but the phrase ‘today’s news – tomorrow’s chip paper’ no longer applies in a cyber-society where news stories remain forever on the internet. Children today cannot move on from their past...*

Once a child has been named, they will never be able to escape the repercussions of their criminal or antisocial behaviour however much they have matured or changed. This has been demonstrated by the continuing pursuit of Jon Venables and Robert Thompson, and the need to provide them with new identities and life-long anonymity.

The advent of the internet and social media can undermine the spirit of the law<sup>21</sup>, which gives individuals the right not to have to disclose criminal convictions after a specified time has elapsed. These timescales are reduced for children in recognition of their immaturity, but this becomes meaningless if a search of the internet reveals their offending history: individuals cannot insist that reports are removed. In theory, individuals should not be discriminated against on the basis of 'spent' convictions but the reality may well be different.

*When I was in secure unit they got internet and I googled myself. It was quite mad when you think about it. I clicked on it, I scrolled down, I read all the reports and that. I scrolled down to see people commenting – one of them said 'monkey see monkey do'. I thought fuck that so I wrote something myself. I said something like 'things ain't always what they seem' except it wasn't as articulate as that. (U R Boss Young Advisor)*

Last year, Sarah Teather MP asked the Government about its intentions to amend S39 of the CYPA 1933 so that it explicitly applies to social media. Jeremy Wright, Under-Secretary of State for Justice, responded in October 2013:

*The Government is currently considering the existing law on reporting restrictions in cases involving under-18s, including social (electronic) media<sup>22</sup>.*

A follow-up question in January 2014 by Andrew Smith MP did not elicit any firm plans to take action. This time the Under-Secretary responded that the Government had 'consulted interested

*parties including the judiciary and representatives of the press. We will publish our conclusions in due course'*<sup>23</sup>. It is unclear from this answer whether the 'interested parties' included anyone who could speak on behalf of the children affected, or those responsible for working with them.

### **Inconsistency with family law**

Children involved in family court hearings are treated very differently from those involved in criminal or anti-social behaviour cases. Although there is increasing pressure to make family proceedings more transparent by publishing court judgments, it is accepted that the children involved, and their families, are still entitled to complete anonymity<sup>24</sup>.

Evidence shows that the factors that lead children to offend are similar to those that bring cases to the family court – abuse, neglect and disadvantage<sup>25</sup>, yet only this route guarantees that children's privacy will be protected. A number of children who have recently been named, and vilified, in the media following a criminal conviction or ASBO are also children in care. In England and Wales the media has no compunction about reporting this fact, although in other jurisdictions that would be an offence<sup>26</sup>.

Such thoughtless breaches of confidentiality can have a devastating impact (see for example Robert's story below). It also creates a real anomaly for the brothers and sisters of child defendants, who are punished by association. This will be explored in more detail later when considering the arguments for and against disclosure.

### **How is the law interpreted?**

Reliable data about the proportion of cases where child defendants are named is hard to come by. Anecdotally, those concerned with the youth justice system feel that it is becoming more common but statistics are not collected.

<sup>23</sup>HC Deb, 24 January 2014, c352W

<sup>24</sup>Transparency In The Family Courts Publication Of Judgments: Practice Guidance issued on 16 January 2014 by Sir James Munby, President Of The Family Division

<sup>25</sup>Social Justice Policy Group (2007) *Being tough on the causes of crime: Tackling family breakdown to prevent youth crime*

<sup>26</sup>For example, the Australian Child Protection Act 2000

<sup>21</sup>Rehabilitation of Offenders Act 2014

<sup>22</sup>HC Deb 29 October 2013, c415w

## ROBERT

'Robert' (not his real name) is 15 and has recently been identified in the media after being sentenced to custody for his part in a robbery. Press reports variously describe him as a 'cocky career criminal' and as a 'baby-faced schoolboy who committed his first crime just a day after his tenth birthday'. The reports include not only Robert's name and photographs of him at different ages but the following information:

- the names of Robert's mother, grandmother and great-grandmother;
- the estate where the family live;
- Robert's previous convictions;
- the fact that Robert's father is unknown, his mother has a drug problem and that he has been in care;
- the name of Robert's girlfriend and the fact that she was pregnant with his child;
- when the baby was due and the name the couple had chosen for him;
- the secure establishment where Robert would begin his sentence.

This highly personal information led to many derogatory comments being posted by the public, many of them passing judgement on Robert, his family, his girlfriend – and even the baby.

Robert was not aware that he was going to be identified. The court is insistent that it did consider the arguments for and against allowing the press to disclose his identity but Robert appears not to have understood what was happening. The first he knew about it was when he was told by a member of staff in the establishment where he is serving his sentence that there were articles about him in the media. Friends then confirmed that people were making negative comments about him and his family in the press and online, such as saying that his son should be taken into care as he is an unfit parent and that his girlfriend is a disgrace for being in a relationship with someone like him.

Robert is angry and upset about his girlfriend and unborn son's name being published; his girlfriend was extremely distressed and cried a lot in the days following the publication. He feels that there was no need to publish their names: his girlfriend was previously unknown but people have treated her differently since knowing that she is connected with Robert. His son carries his surname, and Robert worries that he will always be associated with his father's actions and possibly labelled as a potential future criminal.

Robert is keen to fulfil his responsibilities as a father, to put his past behind him and be a good role model for his son. This includes getting a good job, possibly one which requires qualifications, but he is concerned that if he applies for a college place or a job, his past will be discovered and he will be prevented from moving on with his life. Robert observed that people struggling to get qualifications or a job could become so disheartened that they might resort to committing crime, and that 'naming and shaming' does nothing to help people move on once they are released.

A particular source of distress for Robert is the reporting of his care history: this is something that he hadn't shared with many people. He feels that it was excessive to disclose this, along with his mother's drug problems.

Robert's co-defendant is 31 years old and it was acknowledged in the judgement that he led Robert to commit the robbery. This man is involved in much more serious and violent offending than Robert, whose previous convictions were for criminal damage and car crime. He was disturbed that CCTV photos from the offence were published and that the media have inaccurately portrayed him as a career criminal. Robert is concerned that the reports make it look as if he and his co-defendant are friends, which they were not. This has not only resulted in Robert losing some of his real friends, which is distressing in itself, but has also put Robert at risk of harm. There are a number of dangerous people in the community who have reason to want revenge against Robert's adult co-defendant and Robert fears they will come after him instead. He is due to be released much earlier and is worried that he is going to be stabbed, that his life will be in danger and he will constantly have to 'look over his shoulder'. This risk is increased by the fact that the press disclosed his address. Robert also fears for the safety of his grandmother, who lives there, and for his girlfriend and son.

Robert's grandmother is upset about the media reporting. The press came to her door and she talked to them because she wanted to put the other side of the story, and convey that Robert is fundamentally a good boy. At the time she thought she was doing the right thing, but was not warned by the journalists that they would print such highly personal and intrusive information about the family. The press also tried to talk to Robert's girlfriend, but her father intervened to prevent it as she is not yet an adult. Robert's grandmother continues to be shocked and upset that the system allowed Robert to be publicly identified in this way and hopes that it will not continue to damage him into the future.

## Decision-making criteria

The provisions to name children in order to avoid injustice or because they are 'at large' are rarely used, although there have been some cases. For example, parents may ask for their child to be named if they are acquitted, so that their innocence can be publicised, or a child's photograph may be released if they have failed to appear in court to answer a serious assault charge.

By far the most common, and the most contentious, reason for seeking to identify a child in trouble with the law is because it is deemed to be 'in the public interest'. There is no simple definition of this and the courts must weigh up arguments about the public interest against the individual interests of the child concerned. The CYPA 1933 requires that:

*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<sup>27</sup>.*

How can courts achieve the right balance between the public and private interest? There are a number of guidance documents for the CPS, magistrates, the Judiciary, the police and the media that suggest how the law should be applied. However, in the plethora of guidance from the Youth Justice Board to YOTs about the way they should manage cases<sup>28</sup>, there is no mention of their role regarding the naming of child defendants<sup>29</sup>. This could be taken to mean that YOTs are not expected to become actively engaged in arguments about the identification of child defendants.

As well as specific guidance, there are a number of key court judgments to guide the courts in how to interpret the law on a case by case basis.

## Youth Court v. other courts

The Youth Court Bench Book (2013) suggests that the lifting of automatic reporting restrictions

<sup>27</sup>(S44(1) C&YPA 1933)

<sup>28</sup>YJB. *Case Management Guidance: Work in Courts*. <http://www.justice.gov.uk/downloads/youth-justice/improving-practice/CaseManagementGuidanceSection2Workincourts.pdf>

<sup>29</sup>The YJB agrees that more guidance is needed and the revised case management guidance will include directions to YOT court officers to challenge the naming of children

should be considered where a child has been a persistent offender and it is in the public interest to do so, although the law itself makes no mention of persistent offending as being relevant. It urges careful consideration, however:

*The power to dispense with anonymity should be exercised with great care and caution as identification may conflict with the welfare of the child or young person. It should not be seen as an additional punishment.*

Similarly, in a judgment relating to a Youth Court case, the judge ruled that:

*It would be wholly wrong for any court to dispense with a juvenile's prima facie right to anonymity as an additional punishment. It is also very difficult to see any place for 'naming and shaming'. The ... criterion that it is in the public interest to dispense with the reporting restriction must be satisfied. This will very rarely be the case ...<sup>30</sup>.*

It has been argued that cases heard in Crown Court – or other adult court settings – are different in that there is no presumption of anonymity, and that Parliament clearly meant to distinguish between Youth and other courts when drafting the legislation. When the CYPA 1933 was passed, however, the thresholds for which children could appear in the Crown Court were considerably higher with only cases of murder, attempted murder, manslaughter and wounding with intent being heard in this setting. Subsequent legislation has expanded the role of the Crown Court so that less serious cases can be referred, with the risk that children will be identified who have not committed the grave crimes intended by the legislators.

In 1992<sup>31</sup> a judge suggested that being a child would normally be a good enough reason to restrict reporting by imposing a S39 order, and situations where it was appropriate to name children would be 'rare and exceptional'. Other judgements have not accepted this interpretation. However, in practice,

<sup>30</sup>McKerry v Teesdale and Wear Justices [2000] WL 546

<sup>31</sup>R v Leicester Crown Court, ex parte S (a minor) [1992] 2 All ER 659

S39 orders prohibiting reporting are generally requested – and granted – routinely at the start of the hearing in most cases involving under-18s. This means the media cannot report the identity of the child whilst the case is being heard in court, although the issue may be revisited at the end of the trial if the child is convicted. This is partly to ensure a fair trial. The guidance issued by the CPS<sup>32</sup> reminds prosecutors that children are ‘vulnerable defendants’, and must therefore be supported to fully participate in their trial and that having their identity reported during the proceedings may serve as a distraction. Prosecutors are told to request, or at least not oppose, applications for S39 orders where these are necessary for a fair trial, or in cases that are only being heard in Crown Court because the child is jointly charged with an adult. Recently issued directions<sup>33</sup> also remind the courts of their responsibility to make S39 orders in trials likely to attract media attention.

### Post-conviction

If the child is convicted, the question of a fair trial no longer applies and this is when most decisions to allow children to be identified are made, usually as a result of an application by the media. Again, there are a number of judgments that seek to clarify the factors that the court must take into account at this point. The following principles, as set out in a High Court decision in 2012, seem to be widely accepted<sup>34</sup>.

- The defendant will have to satisfy the court that there is a good reason to impose a S39 order. In most cases this will be the child’s welfare.
- The child’s future progress may well be assisted by restricting publication because it could have a significant effect on their prospects and opportunities and, therefore, on the likelihood of effective integration into society. Identifying a defendant in the media may constitute an additional and disproportionate punishment. In rare cases the child may be at serious personal risk if identified.

- The court must also consider the public interest in knowing the outcome of proceedings in court, and the valuable deterrent effect that the identification of those guilty of at least serious crimes may have on others.
- The court must balance the welfare of the child (likely to favour restriction on publication) with the public interest and the requirements of Article 10 of the ECHR (likely to favour no restriction). Prior to conviction, the welfare of the child is likely to take precedence over the public interest. After conviction, the age of the defendant and the seriousness of the crime will be particularly relevant.
- Where the factors are evenly balanced, the court should make an order restricting publication.
- Any order restricting publication must be necessary, proportionate and there must be a pressing social need for it. The judge can permit the publication of some details but not all.
- The court should give reasons for its decision.

The judgment acknowledges that children can be damaged by being publicly identified as a criminal ‘before having the burden or benefit of adulthood’.

To summarise, the ‘welfare’ factors that are described include the impact on the child’s prospects of rehabilitation, the fact that it may constitute an additional punishment, and that it might jeopardise the child’s safety. The factors that constitute the public interest are more difficult to pin down but this judgement suggests that: identification will deter others from crime, and there is an inherent interest in the public knowing the outcome of criminal trials *per se*. Others have suggested that an element of ‘disgrace’ is a proper objective for the court to seek<sup>35</sup> or that it may be appropriate to name a child defendant if they pose a direct risk to public safety<sup>36</sup>.

<sup>32</sup>Crown Prosecution Service (2013) *Reporting Restrictions - Children and Young People as Victims, Witnesses and Defendants*.

<sup>33</sup>*Criminal Practice Directions (2013) CPD I General matters 3G: VULNERABLE DEFENDANTS*

<sup>34</sup>*R (on the application of Y) v Aylesbury Crown Court, CPS, Newsquest Media Group Ltd [2012] EWHC 1140 (Admin)*

<sup>35</sup>*R v Winchester CC ex p B [2000] 1 Cr. App. R. 11*

<sup>36</sup>*Damien Pearl v Kings Lynn Justices [2005] EWHC 3410 (Admin)*

## Inconsistency

Given the somewhat vague definition of the public interest, perhaps it is not surprising that there appear to be different thresholds being applied by different courts, or by individual judges. In the absence of data, YOTs were invited to provide case examples for this report. Although the response was too limited to draw firm conclusions, some YOTs could not remember cases where children had been named, regardless of serious offences and public curiosity. The courts in other areas seemed to adopt a much lower threshold, as this case illustrates.

*A 17 year old boy was recently named in the national and local press after pleading guilty to a single count of supplying ecstasy. A girl who bought the drug subsequently died. There was no suggestion that he put pressure on her to buy the drug, and he warned her that he was uncertain about its strength. His address and place of employment were revealed, alongside photographs, as were the names of his mother and sister. The boy had no previous convictions and had surrendered himself to police. His defence solicitor said that 'There's not a day goes by when he isn't thinking about what has happened and is consumed by the overwhelming guilt which flows from the consequences of his actions.'*

## Child's interests or public interest?

The balancing act between the interests of individual children and 'the public' is at the heart of the debate. The difficulty lies in determining exactly what is meant by public interest: is it restricted to the local community or society as a whole; and how should the short-term gratification of wanting to *know* be measured against longer-term effects? Given its nebulous nature, how can the public interest be determined on a case-by-case basis? And what part do the media play? The following arguments are presented on either side of the divide.

### Arguments for disclosure

#### Open justice means that the public are entitled to know

There is some acknowledgement that the public interest is not the same thing as the public wanting to know. As Mr Justice Keith said in relation to the Edlington boys<sup>37, 38</sup>:

*Who A and B are may be a matter of interest to the public, but it is questionable whether their identities are really a matter of public interest.*

There are, however, suggestions that the media can be trusted to act on behalf of the public. This seems to be the view expressed within the joint guidance issued by the Judicial Studies Board<sup>39</sup> and journalists<sup>40</sup>:

*The media bring a different perspective to that of the parties to the proceedings. They have a particular expertise in reporting restrictions and*

<sup>37</sup>Ruling on application to lift reporting notification on the defendants' identities. Sheffield Crown Court. 22 January 2010

<sup>38</sup>In 2009, two young brothers, the "Edlington boys," seriously assaulted two other children, one of whom nearly died from his injuries. They pleaded guilty to causing grievous bodily harm with intent and were sentenced to a minimum of five years' detention. The Edlington boys were victims of abuse themselves and the local authority had repeatedly failed to intervene effectively. The Judge refused an application by the press to lift reporting restrictions and allow the boys to be publicly identified.

<sup>39</sup>Now Judicial College

<sup>40</sup>Judicial Studies Board, the Newspaper Society, the Society of Editors and Times newspapers Ltd (2009) Reporting Restrictions in the Criminal Courts

*are well placed to represent the wider public interest in open justice on behalf of the general public (p.14).*

This does not accord with the view of Lord Justice Leveson who, in his report on the culture, practice and ethics of the press<sup>41</sup>, recognised that the media often act in no-one's interests but their own:

*Based on all the evidence that I have heard, I have no doubt that, to a greater or lesser extent with a wider range of titles, there has been a recklessness in prioritising sensational stories, almost irrespective of the harm that the stories may cause and the rights of those who would be affected (perhaps in a way that can never be remedied), all the while heedless of the public interest. In the determination to get the story...in each case, the impact has been real and, in some cases, devastating (Executive Summary p.10).*

In a recent judgement<sup>42</sup>, Mr Justice Tugendhat said that the media may know what is of interest to the public but 'judges have the final decision what it is in the public interest to publish.'

This is clearly a source of frustration for some elements of the media, as this extract from a local newspaper illustrates.

#### Huge backing for naming and shaming jobs

*WE MUST be able to name and shame them. That is the firm stance taken by the majority of Evening Star readers who have made it clear that we should reveal the identity of two Ipswich youths.*

*On Saturday, our front page carried the story of the two teenagers who admitted in youth court that they had damaged a number of vehicles in Ipswich. We pictured the two baseball-capped youths leaving the court*

<sup>41</sup>The Right Honourable Lord Justice Leveson (2012) An inquiry into the culture, practices and ethics of the press. HM Government

<sup>42</sup>Goodwin v NGN Ltd & VBN [2011] EWHC 1437 (QBD)

on the front page with their faces obscured, partially by a large black square we included to mask their identity, and partially by a two-fingered gesture directed at our photographer and law and order. Another reader agreed, saying: 'They should be named along with their parents names and they should also be birched. That is the only deterrent. Let's get rid of them and get our town back to a law-abiding town'.

It was October 22 last year when the pair damaged four vehicles... An Ipswich Borough Council Mercedes van, a Renault, a Vauxhall Astra and a Ford Granada were all attacked. More than £1,000 of damage was caused.

The two youths will be sentenced in August, but because of their age, they continue to be protected from the public shame that should rightly be theirs.

The Star verbally requested a lifting of the ban on identification – Section 49 of the Children and Young Persons Act of 1933 – this has been recorded by the court. When the pair of louts return to court on August 8 for sentencing this request will be formalised in writing before South East Suffolk magistrates.

children. It would have satisfied no-one other than the lynch mob brigade to name him. The blanket of anonymity can be abused, though. If the identity of defendants cannot be disclosed, we as journalists can't report many circumstances of the crime. Children who commit crimes are a product of the environment in which they live, but if we can't report their name, we can't properly report the failings of their parents or hold the agencies to account who should have done more to prevent it.

Others have questioned whether the principle of open justice is necessarily compromised by withholding the names of those on trial, given that all the facts of the case can still be reported. For example, there was an application to lift the S39 order following the conviction of the two young boys in the Edlington case<sup>43</sup>. They had been found guilty of grave crimes and the case was widely reported. In his rejection of the application, Mr Justice Keith said:

*I recognise, of course, that the public has a legitimate interest in knowing what takes place in court and the outcome of criminal proceedings, but an understanding of what A and B did, or why they did it, or what effect it had on their victims, or of the wider issues of how children who have begun to exhibit anti-social behavioural traits should be monitored, or when social services or child protection agencies should intervene, is not affected, one way or the other, by A and B's anonymity being maintained or their identities becoming known. Indeed, it is difficult to see how transparency in the criminal process is compromised by A and B's identity not being known.*

The wish to publish an actual name rather than just the facts of the case may be less to do with public interest, and more to do with the media interest in audience figures or newspaper sales. This was

<sup>43</sup>Ruling on application to lift reporting notification on the defendants' identities. Sheffield Crown Court. 22 January 2010

## **It allows the implications of the case to be fully reported**

Why are the media so keen to name child defendants? One argument put forward by the news editor of a national newspaper is that some cases raise wider social issues:

*We don't automatically challenge anonymity orders – only in specific cases where there are wider issues. There was a case recently where we wouldn't have dreamt of challenging anonymity, on ethical grounds. It was a 12 year old who'd raped his 7 year old sister and the family wanted to do their best for both*

acknowledged in a Supreme Court Judgement<sup>44</sup> by Lord Rodger of Earlsferry:

*What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people.*

So if open justice does not rely on the naming of child defendants – and media interest is no guarantee of the public interest, what is the merit of other arguments that are advanced on either side of the divide?

### **It protects the public from dangerous offenders**

There is some justification for publishing information about potentially dangerous offenders who are at large in the community, even where that person is a child. For example, CCTV images of a boy who had committed a violent assault on a bus were circulated both to protect the public and to help bring him to justice. It may also be the case that releasing the identities of people facing allegations of sexual assault encourages other victims or witnesses to come forward – and presumably makes others aware of the risks. Both of these situations will be rare amongst the under 18s, however. In two cases cited in the CPS guidance, the judge was asked to lift reporting restrictions in order to protect the public where the defendants had committed serious driving offences and had not complied with previous orders.

Yet where there is genuinely a serious, immediate, risk to the public, then bail will almost certainly be refused or a custodial sentence imposed. It is not at all clear how publicising names or pictures of a defendant actually makes the public safer. For instance in the cases of dangerous driving cited above, it is difficult to see how other road users would be made any safer by disclosure of identity – since they wouldn't be in a position to know whether the defendants would be on the road at a particular place or time.

Another difficulty with the argument about public protection is that it assumes the child is not going to change. Even where there has been a history of repeat offending, surely any new sentence must operate on the assumption that it *could* be effective? The interventions may successfully tackle the causes of offending, or the child may simply 'grow out' of the behaviour. Even where there is thought to be an ongoing risk to the public, Multi-Agency Public Protection Arrangements (MAPPA) should be in place to manage that risk. It is a defeatist position to claim at the point of sentence that nothing will work, and members of the public must therefore take responsibility for protecting themselves.

The situation with ASBOs is different, in that the public are considered to have a role in enforcing the orders and it is claimed they must therefore know the details. The harm that this can cause was raised by Peers during the passage of the Anti-social Behaviour, Crime and Policing Act 2014. In a letter to the Lord Chief Justice, Lord Taylor, the Minister responsible for the Act in the Lords, acknowledged that naming children involved in antisocial behaviour is a 'sensitive issue' and should only be done when 'necessary and proportionate'.

The reality is that, both with criminal convictions and ASBOs, the communities directly affected are likely to know anyway. It is good practice for the police to tell victims about the outcome of cases so that those most directly affected will know about the order and the conditions attached to it: they should not have to rely on the media.

Given this, the argument that public protection will be increased by printing the child's name and photograph is weak. This is particularly true with regard to the national, rather than local, press who continue to avidly report cases. It is difficult to see how this recent extract from a national newspaper, accompanied by names and photographs, will contribute to community safety.

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<sup>44</sup>Re Guardian News and Media Ltd and Others [2010] 2 AC 6897

## SEAN

'Sean' (not his real name) is 20 and has been living with the consequences of being 'named and shamed' for the past 5 years. He was one of nine children given ASBOs because of their behaviour on their housing estate where they were described by the media as 'roaming in a pack', and allegedly threatening residents and vandalising property. When the ASBOs were granted, their names and photographs were published in the local and national press with a typical headline being '*Shaming of the 'Wild Runt' gang: Child thugs are unmasked and given ASBOs for reign of terror*'. An internet search of Sean's name today immediately brings up these reports, accompanied by punitive comments by members of the public. More chillingly, it also brings up a report on a self-proclaimed vigilante website which says:

*Years ago, before the advent of NuLab, The Human Rights Act and hundreds of pressure groups screaming that the rights of criminals are sacrosanct, these pieces of vermin would NEVER have been allowed to terrorise a single person let alone a whole neighbourhood!... Don't let them get away with it!*

With hindsight, Sean can see that his behaviour was distressing, but he had no idea at the time that it was serious: they thought they were just 'messaging about'. As he can now see: 'No-one was telling us what was right or wrong'. He also feels that the media made it sound much worse than it was. The conditions of the ASBO meant that Sean was excluded from most of the estate, or from associating with the other children. This was almost impossible to comply with. The children came from dysfunctional homes, spending all their time on the streets and looking after each other in the absence of any parental supervision or support. Sean's life was difficult, although until that point he had managed to stay out of trouble with the law. His mother had a serious substance misuse problem, and he and his sister lived with their grandmother, who '*wanted us out of the house all the time*'.

As with a number of other children mentioned in this report, Sean was not aware that his identity would be reported and has no memory of anyone discussing the possibility of applying for anonymity. Following the publicity, Sean's situation rapidly deteriorated. Everyone was 'having a go' and he was not allowed in shops, being called a 'wild runt' to his face. Elements of his family were angry with him

for bringing them shame, and his grandmother was door-stepped by the press. She refused to speak to them, but they interviewed other residents of the estate. Sean was physically attacked by an adult, but the police took the adult's side. He found it impossible to comply with the restrictions of the order because of his chaotic life, and was breached. His grandmother was evicted and blamed Sean and his sister. She moved to a small privately-rented flat away from the estate but would not take them with her in case she was evicted again. Sean's sister was taken into local authority care but Sean was left homeless. He slept on sofas at friends' houses, or just stayed out all night, and began to use drugs. It was inevitable that he would get into trouble:

*They was always watching – I didn't really know anywhere off the estate and there was nowhere else to go. Everyone was ringing the police. I used to get locked up for things I didn't do.*

Even when the YOT became involved, no accommodation was provided and after yet another breach offence, Sean was given a custodial sentence. During his sentence, his mother died and Sean was taken to the funeral in handcuffs. His application to the local authority for social housing was rejected on the grounds that, in the words of the housing officer:

*I consider your behaviour to have been totally unacceptable and it is unlikely that your behaviour will improve...*

Since then, Sean has had good times and bad. With the help of an employment scheme, he managed to find work and proved to be committed and hard-working. He has a girlfriend, a baby and another on the way. He is, however, currently serving a custodial sentence for something he says he did not do. He feels his life would have been very different if he had not been 'named and shamed' and does not want other young people to experience it. In his experience: '*it makes everyone against you*'.

**No regrets! Five grinning teenagers give the thumbs-up sign outside court ... just MOMENTS after they were handed Asbos for terrorising neighbourhood with arson, vandalism and racist abuse.**

*It was meant to be the day that justice made them see the error of their ways. But instead of hanging their heads in shame, these five teenagers posed for a photograph, proudly clutching their Asbos.*

*In a glaring example of the contempt that many young tearaways have for Anti-Social Behaviour Orders, the four boys and girl flaunt them as if they have won an award.*

### **It will deter others from offending**

Both guidance and case law mention the deterrent effect that the naming of child defendants could have on others. The evidence for this is questionable. Research has shown that, even for adults, knowledge about what could happen if they were caught – and convicted – of a criminal offence has limited impact on their behaviour<sup>45</sup>. People do not generally expect to get caught, and criminal or antisocial acts are often impulsive rather than premeditated. This is much more so with those under the age of 18: a fact well-recognised in sentencing guidelines<sup>46</sup>, which state that children should be dealt with less severely than adult defendants because:

*...young people are unlikely to have the same experience and capacity as an adult to realise the effect of their actions on other people or to appreciate the pain and distress caused and because a young person is likely to be less able to resist temptation, especially where peer pressure is exerted (p.6).*

<sup>45</sup>Von Hirsch A, Bottoms A, Burney E and Wikström P-O (1999) *Criminal Deterrence and Sentence Severity*. Oxford: Hart Publishing.

<sup>46</sup>Sentencing Guidelines Council (2009) *Overarching Principles – Sentencing Youths: Definitive guideline SGC*

Unlike sentencing for adults, deterrence is not mentioned as a principle that should guide decisions when sentencing children. Instead, the factors that must be taken into account are:

- the child's welfare;
- the prevention of further offending.

The latter means offending by this particular child or children in general, and is designed to reassure the public that the law is being enforced, but this is not the same as taking a punitive approach simply in order to deter others. The High Court has conceded that these principles are relevant to decisions about whether to name child defendants<sup>47</sup>.

Magistrates and Judges are therefore receiving mixed messages: deterrence is not explicitly mentioned as a factor guiding sentencing decisions, but should influence whether a child is named or not. Again, Mr Justice Keith dismissed the arguments about deterrence when deciding whether to name the Edlington boys<sup>48</sup>:

*I see the force of the argument about deterrence – theoretically at any rate – but I rather doubt whether in practice the thought that you might be named in public if you committed a sufficiently serious offence would actually occur to any potential young offender.*

### **Criminals should be shamed for what they have done**

Linked to the concept of deterrence is that of disgrace, mentioned a number of times within guidance and case law as a legitimate objective when making decisions. Again, this seems at odds with the principles that guide sentencing which state that:

*...in most cases a young person is likely to benefit from being given greater opportunity to learn from mistakes without undue penalisation or stigma.*

<sup>47</sup>R (on the application of Y) v Aylesbury Crown Court, CPS, Newsquest Media Group Ltd [2012] EWHC 1140 (Admin)

<sup>48</sup>Ruling on application to lift reporting notification on the defendants' identities. Sheffield Crown Court. 22 January 2010

There is a well-established theory that it is unhelpful to attach negative labels to those who display criminal behaviour: it may confirm their identity as an outsider and impede rehabilitation. Hence the concern that some children have seen an ASBO as a 'badge of honour'. Having been in custody can also have this effect, as one young woman has found:

*People want to try and latch on to me because of it. [My boyfriend] got it the same when he came out of jail.  
(U R Boss Young Advisor)*

There is a form of shame, described as 're-integrative' that *can* support people to change their behaviour<sup>49</sup>. It is based on the theory that it is the behaviour that should be castigated, not the person. Rather than public humiliation, offenders should be given the opportunity to make amends through restorative justice approaches.

The way that children in trouble are described in the media does not contribute towards this, with derogatory labels being common. For example, recent headlines include: 'A teen thug was jailed today'; 'Teenage tearaway (name) given Asbo'; 'Bid to shield child fiends'. This process may be particularly damaging for the younger or more disturbed children in the system. Professor Sue Bailey, President of the Royal College of Psychiatrists, tells of the difficulty of working with children who have been described in the media as 'monsters' or 'evil'.

*They may already be struggling to understand what they did, and this will confirm their sense of being beyond redemption. They may also be so terrified of retribution that they cannot engage with the help on offer. This is the case even where children have not been publicly identified but naming them can only make matters worse.*

## **Naming young offenders means that they are properly punished**

There is a perception that children in trouble 'get off lightly' and that the sentences handed down are too soft.

When deciding on the appropriate penalty for a criminal offence, sentencers are told that the purpose of punitive sanctions is to help the child take responsibility for their actions and make amends, that is, '*to promote reintegration rather than to impose retribution*'<sup>50</sup>. It is up to the individual judge or magistrate to consider what is appropriate and to include it within the sentence.

The process of deciding whether to name the child is completely separate and the Youth Court Bench book stresses that it must not be used as an additional punishment. The risk that it could constitute an additional – and disproportionate – punishment has also been acknowledged in case law. This is clearly not its purpose, but those urging courts to allow disclosure seem to want exactly that. In a submission by both the police and the media to name a 16 year old<sup>51</sup>, one of their reasons was: '*the naming of the defendant is an additional necessary punishment for him*'.

The arguments on the other side of the divide focus mainly on the negative impact that the loss of privacy has on the child and their family.

<sup>49</sup>Braithwaite, J (1989). *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press

<sup>50</sup>Sentencing Guidelines Council (2009) *Overarching Principles – Sentencing Youths: Definitive guideline p.3*

<sup>51</sup>R (on the application of Y) v Aylesbury Crown Court, CPS, Newsquest Media Group Ltd [2012] EWHC 1140 (Admin)

## Arguments against disclosure

### Naming the child will punish innocent family members

The CYPA 1933 protects only the identities of children directly involved in proceedings as defendants, victims or witnesses. There have been attempts to argue that the children of adult defendants are also entitled to their privacy through the Human Rights Act<sup>52</sup> and should be protected from the stigma, or other harm, caused by reporting their parent's identity. For example, the child may become the victim of bullying in school – or worse. Mr Justice Jackson in the Family Division of the High Court recently granted an order for this very reason<sup>53</sup>. He said that a mother facing criminal charges involving her children must not be identified because:

*While there is no evidence of a risk to life and limb, if [mother] is publicly identified, the probable consequences for the younger family members would at best be harmful and at worst disastrous.*

This argument has also been put forward in the case of child defendants, where the court has been asked to impose a S39 order in order to protect family members. Whilst the law does not allow anyone other than child defendants, victims or witnesses to be the subject of such an order, could the court take this into account when making a decision? In a High Court judgment<sup>54</sup> Mr Justice Elias did not rule it out completely but said that the circumstances would have to be exceptional:

*Sadly, in any case where someone is caught up in the criminal process, other members of the family who are wholly innocent of wrongdoing will be, as it were, innocent casualties in the drama. They may suffer in all sorts of ways from the publicity given to another family member.*

<sup>52</sup>For example, *R v Croydon Crown Court & A & B ex parte Trinity Mirror plc & Ors*

<sup>53</sup>*A Council v M & Ors (Judgment 3: Reporting Restrictions) [2012] EWHC 2038 (Fam)*

<sup>54</sup>*R (A) v St Albans Crown Court ex parte T [2002] EWHC 1129*

He also said, however, that the effect on other family members of naming a child defendant might be a relevant consideration, if it interfered with the prospect of rehabilitation. For example, the stress caused by adverse publicity could strain family relationships to the point where parents might refuse to have the child home.

One case that could fairly be described as exceptional is that of the Edlington boys. When giving his reasons for not naming them, Mr Justice Keith did refer to the needs of a family member:

*There is also the possibility expressed in some quarters that the rehabilitation of a member of A and B's family who is in care could be adversely affected by people knowing that he is related to A and B<sup>55</sup>.*

In most cases, however, it seems that the families of both adult and child defendants are fair game. This seems against natural justice: the sibling of a child involved in family proceedings is entitled to privacy but the sibling of a child in trouble is not. It is difficult to see how this can be justified. In an article about the impact of 'naming and shaming'<sup>56</sup>, one boy described his experiences:

*"My little sister was picked on", says Connor. His mother confirms that the eight-year-old was taunted and slapped in the playground. There has also been abuse from strangers. "One day someone shouted from a van, 'There goes the ASBO family'," he says.*

This is not an isolated experience. Research commissioned by the Youth Justice Board found a number of similar examples, with younger siblings being picked on at school and children being called 'ASBO boys' in the street<sup>57</sup>. As one mother told the researchers:

<sup>55</sup>*Ruling on application to lift reporting notification on the defendants' identities. Sheffield Crown Court. 22 January 2010*

<sup>56</sup>*White, P (2006) Violation of privacy. Young People Now, no.330 (17 May) pp14-15.*

<sup>57</sup>*Solanki A-R, Bateman T, Boswell G and Hill E (2006) Antisocial Behaviour Orders for Young People. London: Youth Justice Board for England and Wales.*

*'You can do that to an individual – but it's not just the individual you do that to, it's the entire family.'*

Families also described being 'door-stepped' by reporters, and one mother felt that her son's mental health problems had been exacerbated as a result.

### **Child defendants will be at risk of harm if named**

The Children Act 1989 states that all children, that is up to the age of 18, are entitled to be safeguarded and to have their welfare promoted. In 2002, Mr Justice Munby confirmed that this includes children in custody<sup>58</sup>. Guidance and case law confirm that courts must consider the harm that could be caused to children if they are named within proceedings. In some cases, this will be the risk of physical harm by vigilante action. For example, Sir David Omand said of Jon Venables and Robert Thompson 17 years after their conviction for the murder of James Bulger<sup>59</sup>:

*Such was the depth of public feeling aroused against the offenders that the police were in no doubt that there was a continuing clear and credible threat to their lives from mob violence and vengeful attacks if their whereabouts were discovered. I am satisfied that remains the case.*

This level of risk was one of the reasons given by Mr Justice Keith for maintaining the anonymity of the Edlington boys. He acknowledged that, not only could the boys be ostracised and harmed by other residents in their secure units, but there would be long-term consequences for their safety requiring ongoing public expenditure. In his judgment the media were portrayed as intrusive, reporting the case in emotive terms and willing to pay for information or photographs against the best interests of the boys, their family and the secure units that were trying to care for them.

These cases are extreme, but there will be other instances where children are harmed as a result of revealing their identities. Apart from the risk of physical attack, children may be targeted by

<sup>58</sup>The Munby Judgement (2002 - R v Secretary of State EWHC 2497)

<sup>59</sup>Omand Review (2010) Independent Serious Further Offence Review: The Case of Jon Venables

sexual predators who realise that they are poorly supervised by their parents or carers. Recent cases of systematic sexual exploitation have demonstrated that this is a real, not theoretical, risk<sup>60, 61</sup>.

Less easy to identify, but probably more pervasive, is the risk to the child's psychological and emotional health. Children may internalise the derogatory labels attached to them by the media, or be rejected by peers because of the nature of their offence, and become depressed, hopeless or even suicidal. Alternatively, they may become brutalised as a means of self-protection. Anyone who has tried to work with these hard-to-reach children will recognise their repeated claims that they 'don't care' what happens to them<sup>62</sup>.

*At the end of the day we're just a number...they don't really care. That's what I think. To them this is a flipping job, so I don't care. If they don't care, I don't care' (15 year old boy in custody)*

The media are now more aware of their child protection responsibilities as a result of recent historic sexual abuse allegations against staff in the wake of the Jimmy Savile revelations. The BBC, for example, published a Child Protection Policy in 2013 stating that all staff, whether directly employed or freelance, have a responsibility to safeguard the welfare of children<sup>63</sup>. There is an explicit section within their editorial guidelines about the risks from loss of privacy:

*We must take care that the information we disclose about children and young people does not put them at any risk<sup>64</sup>.*

On closer reading, however, there are mixed messages. The documents only apply to

<sup>60</sup>Berelowitz, S. Clifton, J. Firimin C. Gulyurtlu, S and and Edwards, G (2013) *If only someone had listened: Office of the Children's Commissioner's Inquiry into Child Sexual Exploitation in Gangs and Groups. Final Report*

<sup>61</sup>Home Affairs Committee (2013) *Child sexual exploitation and the response to localised grooming. HM Government*

<sup>62</sup>Blades, R. Hart, D. Lea, J. Willmott, N. (2011) *Care – a Stepping Stone to Custody? London: Prison Reform Trust.*

<sup>63</sup>BBC (September 2013) *Child Protection Policy. Para 3.1*

<sup>64</sup>BBC. *Editorial Guidelines. Section 9. Children and Young People as Contributors: Safeguarding the Welfare of Under-18s. Para 9.4.2*

children that the BBC ‘interacts with’ or who are ‘contributors’. This may explain the fact that the BBC has led a number of applications to the courts to disclose the identity of child defendants, even when presented with clear evidence of the harm that will result. If the BBC is saying that it has a duty only towards children who have chosen to ‘interact’ with it, where does this leave children who are given no choice? Are only certain categories of children entitled to protection? This would not only be a breach of their own guidance, which says that all children are entitled to protection, but of international law and the law in England and Wales.

Ofcom guidelines<sup>65</sup> also have a section on the involvement of children in programmes, stressing that their welfare must be central, and exploring the issue of informed consent. Again, it is difficult to see how naming children in news or documentary programmes against their will, and regardless of the impact, fits with this guidance. The print media are guided by the Society of Editors Code of Practice<sup>66</sup>, which does not explicitly mention child protection other than to say:

*In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.*

It is difficult to comment on this, other than to say that it does not accord with the legal definition of childhood as being all those under the age of 18.

*In a case involving two brothers aged 23 and 14, who killed their violent step-father, the Crown Court judge decided to accept an application from the media, including the BBC, to name the 14 year old, in spite of evidence that it would cause him harm. This was during the trial itself and the boy’s photograph and identity have been widely reported. The High Court then refused a request from the local authority to impose*

*a reporting restriction in order to protect the identity of both this boy and other children in the family who are subject to care proceedings. This was on the basis of the public’s Article 10 right to information. Again, five media organisations strongly opposed the making of a reporting restriction order and both the BBC and Guardian newspaper made written submissions. In his final comments after sentencing, the Judge said: ‘Given your youth, this court hopes that whatever therapy or psychotherapy you receive will ensure that upon release you will be able to lead a normal life’. Given the publicity which the judge has allowed, a normal life seems unlikely.*

### **Identification will reduce the chance of rehabilitation**

Given that the primary purpose of the youth justice system is to prevent offending, the court should consider the likely impact of any decisions on the child’s rehabilitation. Commenting on an application to lift a S39 order, Mr Justice Elias said that:

*In principle, I would accept that the fact that rehabilitation is more likely to be achieved if the identity is concealed, is plainly a relevant factor for a court to take into consideration<sup>67</sup>.*

There seems little doubt that being publicly named puts rehabilitation at risk. This could be because of the damaging psychological effects of labelling, or because of rejection by the community, including prospective employers. It may also lead to the withdrawal of family support. A YOT worker described the experience of a vulnerable 17 year old whose conviction and ASBO were publicised<sup>68</sup>:

*People living in the same hostel recognised her from the newspaper reports and began to comment. ‘She became depressed and lost her place at the hostel and was homeless*

<sup>65</sup>Ofcom (2009) Guidance Notes. Section One: Protecting the under 18s. Rules 1.28 -1.30

<sup>66</sup>Society of Editors (2012) Code of Practice

<sup>67</sup>R (A) v St Albans Crown Court ex parte T [2002] EWHC 1129

<sup>68</sup>White, P (2006) Violation of privacy. Young People Now, no.330 (17 May) pp14-15.

*over Christmas,' says the Northwest-based worker. 'It took a huge amount of work to rescue that situation.'*

YOT managers are concerned that their work with children will be undermined if they are coping with the consequences of adverse publicity, but they are not routinely given the opportunity to explain this to the court. As the YOT manager for a large urban area said:

*I would agree that if children are named, there is a strong chance it will have a negative impact on their future.*

In other instances, the child will already have been identified before the YOT becomes involved. One YOT manager described a supermarket's policy of passing CCTV images of shop-lifters to the local press without any attempt to ascertain their age.

*The net result was that the girls were identified and received conditional cautions. Their photos were seen by their peers at college, who promptly ostracised them. I am told that the effect on the two girls was severe.*

This could potentially disrupt their education and future employability and is disproportionate to the seriousness of the offence. Young people are aware of the risk to their future that publicity can bring.

*If [young people] do get their life on track or come [to] prison and learn things, and ... grow up, some people might decide they want to strive for something – it could hinder their chances. (U R Boss Young Advisor)*

## Conclusions and recommendations

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Once the court process is complete, those who have been involved in decisions to identify a child will cease to have any responsibility for the consequences, or even to know what those consequences are. A judge may never be made aware that siblings were bullied as a result of his decision to name a child, or that the child was subsequently unable to find a job because prospective employers found an online report of his offence. Whilst most public servants are increasingly held to account for the outcomes they achieve, this does not apply to those working in our courts. Neither does it apply to the media. The people who have to live with the consequences are the children involved, their families and the local community.

Even if the present system is to remain – and there seems to be little political appetite for change – there are glaring anomalies and weaknesses that are resulting in injustice. The following measures could improve the way the system operates in the short-term.

- 1. Ban the identification of children being investigated for a crime and where court proceedings have not yet commenced.**
- 2. Ensure that the anonymity afforded by S49 and 39 does not expire when the subject reaches adulthood.**
- 3. Extend the legislation to include restrictions on identifying children within social media.**
- 4. Make anonymity automatic for all child defendants until the point of conviction, or the conclusion of any appeal.**
- 5. Make it a statutory requirement to notify the YOT of any applications to lift anonymity and allow them to make representations.**

- 6. YJB to issue guidance to YOTs confirming that they should consider the impact of identification on child defendants and include this in pre-sentence reports.<sup>69</sup>**
- 7. Review the knowledge and skills needed by the legal representatives of child defendants and ensure that only those who are suitable take on this role.**
- 8. Training for Judges and Magistrates on the impact of identifying child defendants.**
- 9. Establish systems for the collection and analysis of data on the incidence of identification, including the type and location of the courts involved.**
- 10. Commission research into the outcomes for children who have been identified, and the impact on their families.**
- 11. Hold the media to account for irresponsible reporting of child defendants and remind them of their child protection responsibilities.**

Even if all the above were to be implemented, the SCYJ can see no good reason for naming child defendants. Not only is it in contravention of the international standards on children's rights that the UK has agreed to uphold, but the arguments about 'public interest' do not stand up to scrutiny. This is particularly true in the internet age where information is impossible to control. Open justice would not be compromised by allowing anonymity. Cases, and the issues they raise, could still be fully reported and there is no additional benefit to the public of knowing the name of the child concerned. To summarise the reasons for the SCYJ position:

- The media cannot be relied upon to represent the public interest or to act responsibly in relation to the reporting of children in trouble.

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<sup>69</sup>The YJB agrees that more guidance is needed and the revised case management guidance will include directions to YOT court officers to challenge the naming of children"

## Acknowledgements

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- Even where a child is a violent or persistent offender, there will very rarely be any justification for naming them in order to keep the public safe.
- There is no credible evidence that allowing children to be named will deter others from offending, and it is not in keeping with the spirit of the sentencing guidelines.
- The stigma of being publicly identified as a criminal is damaging and counter-productive for children, and likely to increase rather than reduce criminal or anti-social behaviour.
- Public identification appears to be used as an additional punishment by some courts. This is unjust and in conflict with the aims of the youth justice system.
- Naming child defendants can result in harm to family members who have done nothing wrong, including siblings, and is against natural justice.
- Being publicly identified for criminal or antisocial behaviour puts children at risk of physical, sexual and emotional harm.
- Last but not least, public identification reduces a child's chance of effective rehabilitation.

Surely anything that will maximise the chances of a child's reintegration into society is where the public interest truly lies, rather than the short-term satisfaction of their curiosity? The opportunity to post a message describing a child as '*looking a little bit rape-y*' seems a very limited gain, when offset against the harm, including the risk of future offending, that can be caused by public vilification.

**The SCYJ is therefore calling for the law to be changed, to grant automatic and lifelong anonymity to all children in trouble with the law in accordance with international law.**

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