



Standing Committee for Youth Justice

Mr Jonathan Grun
Secretary
Editors' Code Committee
c/o News Media Association
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London
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By email: codereview2017@gmail.com

2 March 2017

Dear Mr Grun

RE: Code Review: recommended changes to the Code

We write to request you consider three changes to the Editor's Code of Practice concerning reporting on children.

The Standing Committee for Youth Justice is an alliance of over forty organisations campaigning for a better youth justice system in England and Wales. We believe the changes we propose are necessary to ensure the Code is consistent, legally accurate, meets government expectations, and is in-keeping with children's rights, other media guidance, and the spirit of the law. The proposed amendments, and their rationale, are detailed below. If they are not accepted by the Committee, we would welcome an explanation as to why.

Amendment 1: Section headed "public interest": subsection 5, delete "16" and insert "18".

The Code enables exceptions on public interest grounds to its clauses on: privacy; harassment; reporting suicide; children in sex cases; hospitals; reporting of crime; clandestine devices; payments to criminals; and some clauses on witness payment. However, it states that, "An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16".

The proposed amendment would apply this requirement to cases involving all children under 18. This is in-keeping with media guidance and international and domestic law and policy, which affords 16 and 17 year olds the same rights and protections as other children, whilst, in some instances, allowing them greater freedoms.

It is legally inaccurate for the Editor's Code to define children as those under 16 for the purposes of protecting their interests. The UK ratified the UN Convention on the Rights of the Child (UNCRC) in the 1990s and as a result, children's Human Rights should be interpreted through it.





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Article 1 of the UNCRC states that: 'A child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. In England and Wales, the age of majority is 18 (Family Law Reform Act 1969).

Article 3 of the UNCRC requires that "in all actions concerning children...the best interests of the child shall be a primary consideration".¹ This reflects the provision in subsection 5 of the public interest section of the Code. The UN Committee on the Rights of the Child's legal analysis of Article 3 is clear that its protections apply to all children under 18.² Article 3 is binding on all administrative authorities and, as such, the Code should be amended to reflect the protections contained therein.

Virtually all domestic legislation protecting and promoting the rights and welfare of children applies to all those under 18. This includes the Children and Young Persons Act 1933, the Children's Act 1989, and the Children's Act 2004, all of which contain provisions to promote and protect the welfare of children.³ The direction of government policy is towards rectifying those remaining instances where older children do not receive the same protections. For instance, over the past few years, the government has amended the law so that 17 year olds in police stations have the same protections as other children.

It is important to distinguish between the freedoms and protections children enjoy. In some instances older children have greater freedom than younger children (children aged sixteen and over can legally have sex and get married with parental consent, for example). However, as above, almost all legislation protecting children's rights and welfare applies equally to all those under 18. Arguably, this reflects a sensible approach to impending adulthood; as children move towards maturity, they are granted increasing freedoms but receive the same degree of protection.

Our amendment broadly mirrors this approach. The protection provided by subsection five of the Code's public interest section would be expanded to include 16 and 17 year olds. However, other aspects of reporting on older children would not be affected. A 16 year old could still be interviewed in the absence of parental consent, for example.

¹ The UN's legal analysis of Article 3 states: "The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures". (Para 17) And "The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad... Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures." (Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14.)

² Para 21, Committee on the Rights of the Children, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14.

³ As Lord Justice Moses set out in paragraph 38 of the case of HC (2013, case number CO/7772/2012): *The impetus driving the United Kingdom to afford special statutory protection to those under 18 is the United Nations Declaration on the Rights of the Child 1959 and the Convention on the Rights of the Child 1989 ("UNCRC"). One of the key principles of the United Nations Declaration is that a child is to enjoy special protection. The preamble to the UNCRC speaks of entitlement to special care and assistance for a child. The UNCRC is the most widely ratified human rights treaty in the world ...For the purposes of the instant application, what is of most significance is not so much what it provides but whom it protects. Article 1 of the UNCRC defines a child as a person aged under 18 unless, under the law applicable to the child, majority is attained earlier. The age of majority in the United Kingdom is 18.*





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Media guidance clearly defines children as those under the age of 18 for the purposes of protecting their interests. The BBC's Editorial Guidelines provide particular protections for "children and young people" on whom the BBC is reporting.⁴ It defines "children and young people" as those under 18.⁵ Similarly, the Ofcom Broadcasting Code provides protections for all those under eighteen, particularly when reporting on them.⁶ The recently updated guidance, Reporting Restrictions in the Criminal Courts, issued by the Judicial College, is clear that special considerations apply when deciding whether to lift or apply reporting restrictions on children, defined as those under 18.⁷ This guidance has been adopted by the Society of Editors, the News Media Association, and the Media Lawyers Association. It seems bizarre for the Code to be at variance with it on such a fundamental issue.

Amendment 2: Section 9 insert new subsection: "(iii) When deciding whether to identify a defendant under eighteen years of age, their rights and welfare must be balanced against the public interest. This should not restrict the right to report legal proceedings."

As it stands, the Code does not require editors to consider the vulnerabilities or interests of child defendants at all. This is inconsistent with the Code's own principles and does not reflect media guidance. Our proposed amendment would insert a new clause into the Code to require editors to consider the rights and welfare of a child defendant before naming them. It would not place a blanket ban on naming child defendants, or prevent legal proceedings being reported.

As it stands, the Code is inconsistent with other media guidance. The BBC Editorial Guidelines state that: "When considering whether or not to identify children and young people involved in anti-social or criminal behaviour, we should take due account of their interests. Consideration should be given to the age of the child or young person, the nature or seriousness of the behaviour and the possible consequences of identification".⁸ The Ofcom Broadcasting Code states: "Particular justification is also required for the broadcast of such [identifying] material relating to the identity of any person who is not yet adult who is involved in the defence as a defendant or potential defendant."⁹ Last year, the Judicial

⁴ For instance: "A clear editorial justification is required for the broadcast of material related to the identity of anyone under 18 who is involved as a potential defendant in a court case before proceedings are commenced" (BBC Editorial Guidelines 8.4.32); "When considering whether or not to identify children and young people [those under 18] involved in anti-social or criminal behaviour, we should take due account of their interests (BBC Editorial Guidelines 8.4.33); "We must take great care when dealing with anyone under 18 involved as a witness or victim, when reporting an investigation into an alleged criminal offence in the UK (BBC Editorial Guidelines 8.4.39). The Guidelines can be accessed here: <http://www.bbc.co.uk/editorialguidelines/guidelines>

⁵ "For the purposes of the Editorial Guidelines and unless stated otherwise, a child is someone under the age of 15 years. Young people are those aged 15, 16 and 17". (BBC Editorial Guidelines 9.1) <http://www.bbc.co.uk/editorialguidelines/guidelines>

⁶ See Section One of the Ofcom Broadcasters Code, "Protecting the under-Eighteens". Particularly 1.8 and 1.9: "The coverage of sexual and other offences in the UK involving under-eighteens". The Code can be accessed here: https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf

⁷ See for instance page 4, "Reporting Restrictions in the Criminal Courts, April 2015 (Revised May 2016)" accessible here: <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>

⁸ BBC Editorial Guidelines, 8.4.33, accessible here: <http://www.bbc.co.uk/editorialguidelines/guidelines>.

⁹ Ofcom Broadcasting Code, 1.9, accessible here: https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf





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College re-issued guidance on reporting restrictions in the criminal courts, which was adopted by the Society of Editors, the News Media Association, and the Media Lawyers Association. This is clear that the welfare and rights of children must be considered before any decision is taken to identify them, and that the best interests of the child must be weighed against the principle of open justice in each case. The Code should be consistent with this and other guidance and require editors to carry out a similar balancing act when deciding whether to identify child defendants.

The Editors' Codebook states that the Code "goes to exceptional lengths to safeguard children". And that, throughout, "the most vulnerable members of society are given special protection". However, this is not the case for child defendants, who are afforded little protection by the Code, particularly 16 and 17 year old defendants, to whom the "exceptional public interest" requirements do not apply. This is despite the fact that child defendants are some of the most vulnerable children in society.

Research has consistently shown that children in serious trouble with the law are some of the most disadvantaged in society. A 2014 British Medical Association (BMA) report, *Young Lives Behind Bars*, found that "children and young people who offend are amongst the most vulnerable and disadvantaged members of our society".¹⁰ Numerous other studies have found high levels of disadvantage amongst children who offend – particularly those in custody – such as time in local authority care, educational and psycho-social problems, and parental addiction and mental health problems.¹¹

The Judicial College guidance states that "publication can have a significant effect on the prospects and opportunities of young defendants and, therefore, on the likelihood of effective integration into society".¹² The UN Committee on the Rights of the Child has made clear that naming children in trouble with the law is against their interests. Children can find being identified traumatic, it can put them at risk of attack and bullying and can seriously compromise their privacy – the details of family life (such as being in care) is more likely to be reported where a defendant is a child. Identification can also negatively affect a child's rehabilitation, giving them a reputation they may try to live up to, and making it near impossible to escape the past, particularly in the age of the internet.¹³ Identifying children in trouble with the law often compromises their family's privacy and puts them at risk of reprisals as well.

If the Code is to fulfil its ambition to safeguard children and protect vulnerable members of society, it needs to address the serious implications identification can have on vulnerable child defendants.

¹⁰ BMA, 2014, "Young Lives Behind Bars", accessible at: <https://www.bma.org.uk/collective-voice/policy-and-research/equality/young-lives-behind-bars>

¹¹ See for instance, Prison Reform Trust, 2010, "Punishing Disadvantage a profile of children in custody", <http://www.prisonreformtrust.org.uk/portals/0/documents/punishingdisadvantage.pdf>

¹² See page 21, "Reporting Restrictions in the Criminal Courts, April 2015 (Revised May 2016)" accessible here: <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf> Page 21

¹³ SCYJ, 2014, "What's in a Name? The identification of Children in Trouble with the Law" http://scyj.org.uk/wp-content/uploads/2014/05/Whats-in-a-Name-FINAL-WEB_VERSION_V3.pdf





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Amendment 3: Section 9 “reporting crime”: At end insert new subsection: “(iv) Under-18s under criminal investigation should not be identified unless it is for the purposes of solving a crime”.

This amendment inserts a new clause into the Editor’s Code to prevent children being identified before they are charged (subject to the public interest exception), other than for the purposes of crime detection, when it would still be permitted. The amendment is necessary to ensure that the Code is consistent, in-keeping with other media guidance and the spirit of the law, and meets the government’s stated expectation that press regulation tackles this issue. The amendment limits pre-charge naming to those instances where it is justified in the public interest, which would be the only possible reasonable grounds, and the only one consistent with the principles set out in the Code.

Currently, judges have discretion as to whether or not a child involved in criminal proceedings may be publicly identified by lifting or imposing reporting restrictions (s.45 or s.49 orders). S.49 orders apply automatically to cases in the youth court (other than anti-social behaviour cases), however, the judge has the power to lift the order to allow the defendant to be identified. In courts other than the youth court, children have no automatic right to anonymity. However, a judge can grant a s.45 order to impose anonymity on proceedings. They usually do so at the start of the trial and consider lifting the order if the child is convicted.

However, reporting restrictions only apply after a child has been charged, meaning their identities can legally be reported beforehand. There have been a number of recent cases where the names and photographs of children subject to criminal investigations have been published in the media. For instance, several newspapers published the identity of a child actor who was alleged to have committed a sexual assault but subsequently was never charged. The child accused of involvement in the TalkTalk hacking was identified by national media, despite not having been charged, and the boy later convicted of killing his fellow pupil, Bailey Gwynne, at a school in Aberdeen, was identified pre-charge in national media too.

The principle underpinning the current legal framework is that it is for judges, who have heard the facts of the case and representations from both sides, to determine whether the case for identifying a child has been made. However, this is entirely undermined if the media publish the names of children pre-charge; by the time the judge makes a decision, the child’s identity is already public. To ensure that editorial practice is in-keeping with the spirit of the law, the Code must be changed to protect those who are under arrest but have not been charged.

Other media guidance restrict identifying children pre-charge. The BBC Editorial Guidelines state: “A clear editorial justification is required for the broadcast of material related to the identity of anyone under 18 who is involved as a potential defendant in a court case before proceedings are commenced.”¹⁴ And that, “When considering whether or not to identify children and young people involved in anti-social or criminal behaviour, we should take due

¹⁴ BBC Editorial Guidelines, 8.4.32, accessible here: <http://www.bbc.co.uk/editorialguidelines/guidelines>





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account of their interests.”¹⁵ Ofcom’s Broadcasting Code states: “When covering any pre-trial investigation into an alleged criminal offence in the UK ...Particular justification is also required for the broadcast of such material relating to the identity of any person who is not yet adult who is involved in the defence as a defendant or potential defendant.”¹⁶

As above, judges decide whether to allow a child to be identified on the facts of the case. These are not available to editors in the short window they usually have to decide whether to name a child pre-charge. This can have serious consequences for children and their families. For instance, their family could be under police protection or have new identities following serious domestic violence, which pre-charge identification would destroy, or a child could be vulnerable to exploitation, which publicity could exacerbate. As above, the Editors’ Codebook states that the Code “goes to exceptional lengths to safeguard children” and “the most vulnerable members of society are given special protection”. However, permitting identification pre-charge, in the absence of any information about whether this jeopardises the safety and wellbeing of the child or their family, is directly at odds with this.

The Codebook states that, “the law does allow children who allegedly commit crimes to be named before they are charged and appear in court. Many newspaper editors refrain from naming these children, although they have done so in exceptional cases.” Given the negative affects identifying a child can have on them and their family (see above), and the Code’s commitment to safeguarding children, pre-charge naming should require a public interest justification. As a part of the “Reporting of crime” section of the Code, our proposed amendment would be subject to the public interest exception; it would not be absolute, but decisions to name a child would have to be justified on public interest grounds. If the Codebook is correct, the proposed amendment will only affect those editors who are identifying children pre-charge other than on public interests grounds, which is not justifiable.

The Youth Justice Board for England and Wales (YJB) is opposed to children being named pre-charge. YJB Chair, Lord McNally wrote to SCYJ:

“We [the YJB] firmly believe that a young person’s identity should be protected from the onset of an investigation rather than at the onset of criminal proceedings, as is currently the case.”¹⁷

In 2014, the House of Lords discussed identifying children pre-charge. During these debates, the government expressed the view that the new system of press regulation should be tackling the issue. Peers tabled amendment to the Criminal Justice and Courts Bill to bring Section 44 of the Youth Justice and Criminal Evidence Act 1999 into force. This prohibits a child’s identity being reported before charge. In his response to these amendments, Lord Faulks, speaking for the government said:

¹⁵ BBC Editorial Guidelines 8.4.33, accessible here: <http://www.bbc.co.uk/editorialguidelines/guidelines>

¹⁶ Ofcom Broadcasting Code, 1.9, accessible here: https://www.ofcom.org.uk/_data/assets/pdf_file/0024/49308/Ofcom-broadcast-code-May-2016.pdf

¹⁷ The letter can be viewed here: <http://scyj.org.uk/wp-content/uploads/2015/03/2015-03-02-Letter-from-Lord-McNally-to-SCYJ-Penelope-Gibbs-TM.pdf>





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“This is not the right time to consider commencing Section 44, in the light of the significant changes to press self-regulation recently introduced by the Government... We should therefore give this new approach a chance to succeed.”¹⁸

To ensure that IPSO meets the government’s expectations, that the Code is consistent and in-keeping with policy and media guidance, and that the spirit of the law is preserved, the Code should be amended to prevent editors identifying children pre-charge.

We hope your committee will give these amendments serious consideration and look forward to hearing the outcome of your discussions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Alex Wigzell', with a long horizontal flourish extending to the right.

Alexandra Wigzell
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¹⁸ House of Lords Hansard, 23 July 2014 : Column 1198

