



## Standing Committee for Youth Justice

### SCYJ response to Ministry of Justice consultation: Preserving and Enhancing the Quality of Criminal Advocacy November 2015

#### Summary

Following “disquiet” about standards, the Government’s consultation sets out plans “to preserve and enhance the quality of publicly funded criminal defence advocacy”. The Standing Committee for Youth Justice (SCYJ) applauds and fully supports this aim. However, we feel an important aspect has been overlooked: the quality of child defence advocacy. SCYJ believe this is an area of law where quality is too often lacking, to the point where trials are compromised. Youth defence law is distinct from adult criminal law, and child defendants have particular needs and vulnerabilities. All too often, these are not understood by advocates in youth proceedings. This should be addressed as a matter of urgency. SCYJ believes the best way to do this is to introduce specialist training and accreditation for advocates representing child defendants – as recommended by numerous reports over the past ten years, including a recent review by the Bar Standards Board, and following recommendations from the Youth Justice Board.<sup>1</sup> SCYJ believes incorporating accreditation of advocates in youth proceedings into the proposed panel scheme may be an important first step.

#### The need for specialist training and the current lack of expertise:

As the Lord Chancellor rightly states in the consultation document, “Quality of advocacy in our courts is a guarantee of liberty in our lives.” He goes on to say, “Our criminal justice system depends on high quality advocates to uphold basic freedoms. Before any individual is deprived of their liberty they deserve to have the case against them tested in open court. With so much at stake it’s vital that arguments are made, and tested, by professionals of the highest quality.”<sup>1</sup> We agree. However, too often, under the current system, the quality of child defence advocacy is poor. The recently published Youth Proceedings Advocacy Review – which is the only study of advocacy in this field in England and Wales – found that the quality of advocacy was regarded as highly variable.<sup>2</sup> As a result, some children are not receiving a fair hearing, with potentially grave consequences for their future. This is a serious concern.

Barristers and solicitors are not required to have specialist training to practise in youth proceedings. Some may choose to do such training but the proportion who do so is unknown<sup>3</sup> (although the Youth Proceedings Advocacy Review found that while the majority (94%) of advocates surveyed had practised in youth proceedings, over 70% had not received or could not recall completing any youth justice specialist training<sup>4</sup>). Lawyers learn very little, if any, youth court law at undergraduate level or through professional qualifications, and are never taught how to interact with young and vulnerable defendants. Child criminal cases make up a small proportion of the work of most lawyers, particularly barristers (and particularly since the number of children in the justice system has reduced significantly). The requisite knowledge is therefore

<sup>1</sup> Ministry of Justice, 2015: Preserving and Enhancing the Quality of Criminal Advocacy”. Page 3

<sup>2</sup> Wigzell, A. Kirby, A. and Jacobson, J. 2015, *The Youth Proceedings Advocacy Review: Final Report*, London: Bar Standards Board [available at: [http://www.icpr.org.uk/media/41074/ypar\\_final\\_report\\_-\\_for\\_publication\\_19.11.2015.pdf](http://www.icpr.org.uk/media/41074/ypar_final_report_-_for_publication_19.11.2015.pdf)]

<sup>3</sup> Wigzell, A. and Stanley, C., 2015, “The Youth Court – Time for Reform?”, in M. Wasik and S. Santatzoglou (eds) *Who Knows Best? The Management of Change in Criminal Justice*, London: Palgrave MacMillan

<sup>4</sup> Wigzell et al, 2015



difficult to acquire and, troublingly, the evidence is that the youth court is treated as a training ground where junior advocates can “cut their teeth”.<sup>5</sup> In the words of one barrister interviewed for the Youth Proceedings Advocacy Review: “It is a kindergarten for professionals to gain skills”.<sup>6</sup> As a result, many children are represented by lawyers who do not have the knowledge or the skills they need to understand them or to represent them effectively.

This is compounded by the fact that factors that might mitigate poor quality advocacy are often absent in youth proceedings. Crown Court judges are not required to undergo youth training, and specialist prosecutors tend to be reserved for trials<sup>7</sup> (rather than the initial stages of the court process, which often require knowledge of complex legal provisions concerning remand and bail). Magistrates and District Judges must undergo training but the decrease in the number of cases coming before the court (because of the reduction in the number of children entering the criminal justice system) mean they are spending less time on youth work.<sup>8</sup> As a result, in some cases, the prosecution, judiciary, and defence lawyers in court have little or no specialist knowledge of youth justice. In addition, because the youth court is closed, other practitioners cannot observe, meaning poor practice may go uncorrected.<sup>9</sup> In addition, children may be less likely to complain of poor quality advocacy.<sup>10</sup>

Specialist legal knowledge is required if children are to be adequately represented by advocates. Youth defence law is very different to adult criminal law – it is a discrete legal system with, for example, an entirely different sentencing framework, and different criteria for remand and alternatives to custody. Studies have found that the lack of specialist legal knowledge in youth cases undermines the court process. Advocates may lack understanding of the youth justice system and youth legislation.<sup>11</sup> This can result in legal practitioners seeking disposals that are unavailable to the given court<sup>12</sup>, inappropriate sentencing<sup>13</sup>, and poor advice, defence, and representation (for instance, weaker bail applications and sentence proposals being made to the court<sup>14</sup>, and inaccurate advice about the implications of a sentence, particularly the criminal records implications<sup>15</sup>). In addition, the lack of advocate specialism can result in a narrow focus on sentencing rather than on the prevention of offending (which is the primary aim of the youth justice system).<sup>16</sup> Studies have also suggested that a lack of knowledge of youth justice processes may “also play a role in the limited adherence by Crown Court judges to the 2013 Criminal Practice Direction, which requires that proceedings are modified for child defendants to enable their effective participation”.<sup>17</sup> This has significant consequences for children’s ability to understand and participate in a trial.

Specialist skills are required to engage and represent child defendants, because of the particular needs and vulnerabilities of children, and particularly children in the justice system.<sup>18</sup> Neurodevelopment continues throughout adolescence. As a result, numerous studies have found that under-18 year olds find it difficult to participate in criminal proceedings.<sup>19</sup> As a result, the Royal College of Psychiatrists found that young defendants require a “developmentally appropriate child-centred approach”.<sup>20</sup> In addition to these vulnerabilities resulting from their young age, research indicates that child defendants are ‘doubly vulnerable’ due to their

<sup>5</sup> Wigzell et al, 2015; Carlile, A, 2014

<sup>6</sup> Wigzell et al, 2015, p54

<sup>7</sup> Carlile, 2014, p29

<sup>8</sup> Carlile, 2014, p33; Wigzell et al, 2015, p56

<sup>9</sup> Carlile, 2014

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Audit Commission, 2004, cited by Wigzell and Stanley 2015.

<sup>14</sup> Carlile, 2014

<sup>15</sup> Unlock, Co-Director, Christopher Stacey, personal communication.

<sup>16</sup> Ibid

<sup>17</sup> Wigzell and Stanley, 2015

<sup>18</sup> Wigzell et al, 2015

<sup>19</sup> Various authors, cited by Farmer, 2011, cited by Wigzell and Stanley, 2015

<sup>20</sup> Royal College of Psychiatrists, 2006, cited Wigzell and Stanley, 2015



experience of multiple needs including learning disabilities, mental health difficulties, communication problems and developmental immaturity.<sup>21</sup> Such difficulties are enormously common amongst children in court – for instance, “60% of children in the youth justice system have a communication disability, around 30% children who have ‘persistent offending histories’ in custody have IQs of less than 70, signifying a learning disability, and between 65% and 75% of children in custody have a Traumatic Brain Injury”.<sup>22</sup> If advocates lack understanding of these difficulties, and of child development (which is important if practitioners are to understand the context of the child’s behaviour), their ability to represent children, and the ability of children to participate in proceedings, is severely compromised.

Reports and studies have found that a failure to appreciate or understand the particular needs of children leads to significant problems. There is concern that untrained advocates will fail to notice the difficulties faced by child defendants. The Royal College of Psychiatrists describes this as “particularly worrying”, given that it is for these advocates to request mental health and other assessments.<sup>23</sup> The Royal College of Psychiatrists also note the ethical issues raised by untrained advocates interviewing vulnerable and disturbed children.<sup>24</sup> The Jeffrey Review on criminal advocacy, from which the current consultation follows, sets out that the handling of vulnerable defendants and witnesses requires certain skill and a sensitive, appropriate manner.<sup>25</sup>

Lord Carlile’s recent inquiry into the youth court reported that “the overwhelming view” from respondents was that criminal defence advocates should be able to recognise the issues affecting children in the justice system in order to: “engage with young people appropriately; provide any necessary support; and ensure the sentence is tailored to such needs”.<sup>26</sup> In addition, the report found that ‘specialist lawyers’ are better able to communicate with children to gain rapport and explain criminal proceedings, thus ensuring effective representation.<sup>27</sup> Lack of awareness amongst advocates of children’s particular needs may result in them being denied the necessary support and sentences not being tailored to their needs.<sup>28</sup> What is more, it increases the likelihood that there will be lack of understanding of the court process amongst defendants and subsequent confusion and distress.<sup>29</sup>

Ultimately, a child’s right to a fair trial may be breached when a child is represented by an untrained advocate who does not have sufficient knowledge of the relevant law or practice, and is unable to recognise children’s particular vulnerabilities, or to engage or represent them effectively. This could constitute a breach of Article 6 of the European Convention of Human Rights.

The need for specialisation is recognised for other professionals involved in youth proceedings (for example, Youth Offending Teams, CPS prosecutors and youth panels of magistrates) and other practitioners who might contribute to decision making process (for example, a psychiatric assessment should be conducted by a child psychiatrist). This is of a natural concomitant of the recognition that children who break the law require differential treatment, a principle enshrined in statute and embodied in, or example, specialist courts, discrete custodial provision, and a separate statutory framework. In this context, the failure to require specialism from those providing advocacy is rather perverse.

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<sup>21</sup> Jacobson and Talbot, 2009, cited by Wigzell and Stanley, 2015

<sup>22</sup> Various authors, cited by Wigzell and Stanley, 2015.

<sup>23</sup> Royal College of Psychiatrists, 2006, cited Wigzell and Stanley, 2015

<sup>24</sup> Royal College of Psychiatrists, 2006, cited Wigzell and Stanley, 2015.

<sup>25</sup> Jeffrey B., 2014, “Independent criminal advocacy in England and Wales”, page 32 accessed 10 November 2015 at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/310712/jeffrey-review-criminal-advocacy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf)

<sup>26</sup> Carlile, A, 2014

<sup>27</sup> Ibid

<sup>28</sup> Ibid

<sup>29</sup> See, Wigzell and Stanley, 2015.



## Training, accreditation, and support for change

SCYJ strongly believes that defence lawyers representing children should complete mandatory specialist youth training, and be accredited to represent children. This would be a significant step towards overcoming the significant problems with much advocacy in youth proceedings, outlined above. Last week the Bar Standards Board and CILEx Regulation published the report of the Youth Proceedings Advocacy Review, an independent research study undertaken by the Institute for Criminal Policy Research into the quality of advocacy in this field. The report recommended that there should be mandatory training and a licensing system for advocates wishing to practice in youth proceedings. The Bar Standards Board and CILEx Regulation have accepted all the reports recommendations. Both this review and Lord Carlile's 2014 inquiry into youth proceedings sets out a suggested framework for such a training and accreditation scheme, which we believe should be seriously considered.<sup>30</sup>

Training and accreditation would help to ensure children are tried fairly, and would bring the law on practicing in youth proceedings in line with other areas of practice in England and Wales. Legal practitioners in the family court are trained in family law and procedure and solicitors representing children must be accredited. Given that children in the youth court and family court have many of the same needs, the current situation is incongruous. The youth court can pass the equivalent of Crown Court sentences. However, barristers must have substantial experience to operate in the Crown Court, unlike the youth court.

A reform of training and accreditation in youth proceedings is long overdue. A significant number of policy papers and research reports over the past ten years have recommended that legal practitioners be certified to practice in youth proceedings.<sup>31</sup> Lord Carlile's 2014 inquiry into the youth court reported that, in their submissions to the inquiry, the Youth Justice Board (YJB) recommended mandatory specialist training for defence practitioners working in youth proceedings.<sup>32</sup>

The work of advocates cannot be considered in isolation from the legal, institutional and cultural context of youth proceedings. As the Youth Proceedings Advocacy Review identified, there are a vast array of constraints on effective advocacy aside from the absence of training and accreditation requirements. For example, the review found that the formal nature of youth proceedings – particularly the use of legal language – combined with the inadequate youth justice specific knowledge of some judges and magistrates can hinder young people's understanding of and effective participation in the court process. The review also reported that the reduced rates made payable for youth proceedings work as a result of the legal aid reforms have meant that advocates have less time to prepare for cases and to build rapport with their young clients, which is vital to effective advocacy. Further information regarding the various systemic and structural constraints on effective advocacy in youth proceedings is available in Chapter Four of the Youth Proceedings Advocacy Review (enclosed with our consultation response). Despite such barriers, accrediting advocates in youth proceedings would be a significant step towards addressing the problems.

## Panel Scheme

The consultation proposes to introduce a "panel of publicly funded criminal defence advocates", for Crown Court advocates initially, to ensure quality. This may be based on the current model used by the Crown Prosecution Service (CPS). SCYJ strongly recommends that if such a system is introduced it includes trained and accredited youth advocates. As numbers of children in court are now relatively low, it is possible that this could be achieved through sub-lists, or specialist panels alongside regional panels, if appropriate.

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<sup>30</sup> Carlile, 2014, page 37

<sup>31</sup> Carlile, 2014; Centre for Social Justice, 2012; Advocacy Training Council, 2011; Police Foundation, 2010; Jacobson and Talbot, 2009; Royal College of Psychiatrists, 2006, cited by Wigzell and Stanley, 2015

<sup>32</sup> Carlile, 2014, page 35



This would not of course affect the problems of advocacy in the youth court. However, it would be an important step to improving the situation in Crown Courts. Crown Court judges, unlike magistrates, are not required to undertake specialist youth training, and the environment is extremely intimidating. What is more, as outlined above, there is limited adherence by Crown Court judges to the 2013 Criminal Practice Direction, which requires that proceedings are modified for child defendants to enable their effective participation. What is more, the potential consequences for the child of a Crown Court trial – in terms of deprivation of liberty – are significantly greater.

Including accreditation of advocates in youth proceedings in the proposed panel could be an important step to rectifying these important issues in the Crown Court. However, we would also encourage the government to tackle this issue in the youth court too. Advocacy in the youth court suffers from all the problems outlined above and the youth court can hand down more severe sentences than the adult magistrates' court. This should be addressed as a priority.

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

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