



Standing Committee for Youth Justice

SCYJ response to Bar Standards Board consultation: New Information and Registration Requirements for the Bar – Consultation on Rule Change September 2017

Summary

The Standing Committee for Youth Justice (SCYJ) is an alliance of almost fifty not-for-profit organisations campaigning to reform the youth justice system in England and Wales. Our response to the Bar Standard Board (BSB) consultation focuses on the suggested changes to registration involving young people (children). We support the BSB proposal to require barristers undertaking work in proceedings involving children to register. However, registration alone will do nothing to improve standards of advocacy in youth justice. To improve standards of advocacy, we strongly believe that the BSB should introduce the mandatory training recommended by various high-profile reviews alongside registration, and include modules on youth justice, vulnerability and communication in standard academic training prior to practice. We recognise the BSB's concerns around requiring barristers to register before accepting youth work, but ultimately believe training should be compulsory for advocates undertaking work in proceedings involving children in all but the most exceptional circumstances. In addition, we urge the BSB to clarify that its proposals apply to advocates representing children in all forms of proceedings, not just in the youth court.

Response:

Consultation questions:

1. Do you foresee any practical challenges with introducing compulsory registration for Youth Court advocates? If you do, what are these?
2. Do you agree with the proposal to require barristers undertaking work in proceedings involving young people to register?
3. Do you agree that the registration should appear on the BSB Register?

Background

There is currently a huge variation in the quality of advocacy in children's proceedings, as highlighted in the Bar Standards Board (BSB) consultation document. Poor representation has various causes and serious consequences; specialist knowledge is required if children are to participate effectively, receive adequate representation, and, ultimately, have their right to a fair trial respected. Several high-profile reviews have suggested that the best way to ensure quality representation is through mandatory specialist training of defence lawyers, amongst other things.

The variable quality of advocacy in children's proceedings has been highlighted by a number of recent high-profile reviews, including that published by the BSB and the Chartered Institute of Legal Executives (CILEx) in 2015 (BSB et al 2015), the Carlile Review of the youth justice system (Carlile 2014), and the Centre for Social Justice (CSJ) review of the same (CSJ 2012). Various factors lead to children receiving poor legal representation, including "limited opportunities to undertake training and to learn from their own and their peers' practice; and an array of structural, systemic and social constraints" (BSB 2015: 11).

By virtue of their age, child defendants have particular needs which should be addressed through a 'developmentally appropriate child-centred approach' (Royal College of Psychiatrists (RCPsych) 2006 cited by Wigzell and Stanley 2015). Children in court frequently have complex needs – significant numbers have some form of communication disorder, mental health problem or learning disability, for instance.¹ Such needs may impede the child's understanding in court and subsequently affect their actions (see for instance, Carlile 2014 and Wigzell and Stanley 2015). These difficulties will be compounded by the fact that child defendants have no statutory entitlement to an intermediary.

Barristers and solicitors learn very little, if any, youth court law at undergraduate level or through professional qualifications. This is despite youth court law, sentencing, and criteria for remand being complex and distinct to that in adult courts (Carlile 2014: 30). With child criminal cases making up a small proportion of the work of most barristers, it is difficult to acquire the requisite knowledge. Many children are therefore represented by lawyers who do not have the knowledge or the skills they need to understand them, identify their needs or to represent them effectively (Carlile 2014, CSJ 2012). Various factors - including an erroneous perception that the youth court is less complex, and the lower fees paid for youth court work compared to equivalent adult work - result in the youth court often being "used as a place for junior legal practitioners to 'cut their teeth'. In other words, it is as a training ground." (Carlile 2014: 31)

The consequences of the lack of specialist training for defence practitioners representing children have been outlined by many (see for instance BSB 2015, section 1.1.4). Child defendants often receive poor advice and representation (Carlile 2014, CSJ 2012), and may fail to understand or participate in proceedings and court process (Audit Commission 2004, Carlile 2014) leading to distress and confusion. Court outcomes, including sentencing, may be inappropriate as a result (Audit Commission 2004). The CSJ investigation into the youth justice system found that: "inexperienced defence practitioners who lack youth specific expertise are often unaware of alternatives to custody and of other support services that could be available for the young person; the issues concerning the mental capacity of child defendants; or relevant legislation" (CSJ 2012: 84). Youth specialist knowledge is necessary to communicate effectively with a child, assist them in participating in proceedings, and identify whether specialist support, such as an intermediary, is required (BSB 2015: 26) – intermediaries are only appointed to assist defendants when the advocate recognises that the defendant has a vulnerability that will affect participation.

Ultimately, inadequate representation can lead to the child's right to a fair trial being compromised. This could constitute a breach of Article 6 of the European Convention on Human Rights. There are also ethical concerns over untrained barristers interviewing vulnerable children (RCPsych 2006, cited in Wigzell and Stanley 2015).

The lack of training required of defence practitioners in youth proceedings is at odds with the norm. Magistrates and district judges require specialist youth training, and in the family court solicitors working for children - often with similar complex needs to children in the youth court - undergo additional training and are accredited (Carlile 2014).

Several reviews have recommended that mandatory training be introduced for defence practitioners in the youth court – including the Carlile Review (Carlile 2014), the CSJ report (CSJ 2012), the BSB/CILEx report (BSB et al 2015), the government-commissioned review of the youth justice system by Charlie Taylor (Taylor 2016), the Law Commission (2016), and others. A number of these reviews have recommended that mandatory training apply to defence practitioners working on children's cases in other proceedings too (for instance, in the Crown Court) (see for instance Law Commission 2016, Carlile 2014, and CSJ 2012). The Lord Chief Justice has also addressed this issue recently in a Court of Appeal case, saying:

It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training. That

consequence should help focus the minds of advocates on undertaking such training, whilst the Regulators engage on the process of making such training compulsory.

(R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt [2017] EWCA 1228, paragraph 226).

In its report on fitness to plead, the Law Commission (2016) emphasised that mandatory training should include identifying participation and communication difficulties, and the “available mechanisms to adjust proceedings to facilitate effective participation” (Law Commission 2016: 9).

SCYJ fully supports mandatory training for defence practitioners working in all forms of proceedings, and believes this should include training on communication and participation, amongst other things.

BSB Proposals

SCYJ strongly believes standards in children’s advocacy need to be improved, and welcomes the BSB’s commitment to this goal. We therefore welcome the BSB proposals to introduce a registration process as a positive first-step towards improving standards and affording youth proceedings advocacy the specialist status it deserves.

However, registration alone will have no effect on the quality of advocacy. SCYJ strongly believes that training on youth justice, including vulnerability, and communication, should be built into standard advocate training, that youth justice specific training should be undertaken prior to registration, and that knowledge should be maintained and developed throughout an advocate’s career through Continuing Professional Development (CPD).

We welcome the suggestion that registration could be used to ensure CPD monitoring is tailored, ensuring barristers working with young people are “maintaining their competence in this area” (though this assumes prior competence which is not necessarily the case). We urge the BSB to implement this proposal alongside compulsory registration, and that the content of the training required is specified. Otherwise registration will have no impact on standards.

In addition, we strongly believe that a requirement for barristers to receive specialist training before they can register to represent children should be introduced alongside these reforms. The introduction of compulsory training alongside registration would be in-keeping with the findings of the Carlile Review (Carlile 2014), the Taylor Review (Taylor 2016), the CSJ Inquiry (CSJ 2012), the BSB’s own youth advocacy review (BSB et al 2015), the Law Commission report on fitness to Plead (Law Commission 2016), as well as a number of earlier reviews and a recent Court of Appeal judgement (R v Grant-Murray and Henry; R v McGill, Hewitt and Hewitt [2017] EWCA 1228). Good quality, demonstrable prior experience, tested by case studies and references, could be an alternative route to registration, though such advocates should still have to undertake relevant CPD to remain registered.

In addition to training prior to registering to represent children, SCYJ believes that modules on youth justice, working with vulnerable court users, and communication should be included within academic training and as part of the Bar Professional Training Course (BPTC) and Legal Practice Course (LPC) (as recommended by the BSB/CLIEx report (BSB et al 2015: 67).

SCYJ appreciates the BSB’s concern that justice is not frustrated, and that registration requirements do not lead to children appearing in court unrepresented. It is on this basis that the BSB has concluded that registration should not be required prior to representing a child in youth proceedings; it is proposed that barristers are able to represent children without having registered, providing that they do so promptly afterwards. SCYJ is concerned by this approach and urges the BSB to revise its proposals. Registration is, it is suggested, to pave the way for improved representation of children by allowing the BSB to ensure barristers have the requisite knowledge. However, allowing practitioners to register after a case means the system cannot guarantee that standard of representation; barristers will still be able to represent children without

any training at all. As set out above, SCYJ strongly supports mandatory training for defence practitioners in child proceedings, and does not believe the proposed approach can provide this.

The default position should be that all practitioners are registered before representing children on the understanding that in exceptional circumstances (decided as such by the bench chair or judge against strict criteria) advocates could register after the case. In most cases, it will be preferable to delay the case until a suitably qualified advocate is available. However, if the judge or bench chair determines the circumstances are exceptional, a hitherto unregistered barrister could take the case. An example could be a child who appears in court on a Saturday morning having been detained overnight by the police, who is at risk of being denied bail and detained over the weekend if an appropriately trained advocate cannot be found.

Whilst the BSB register will theoretically mean “anyone will be able to see whether a barrister is registered to conduct work in proceedings involving young people” (BSB 2015), practically few will do so before accepting or rejecting a barrister. Most children and their parents will not know to check the register, or know what registration means practically. What is more, if they were to consult the register, with no accreditation requirements prior to registration, possible clients would assume that barristers are better qualified to represent them than they actually are. This is not to say that registration for youth proceedings should not appear on the register – they should – just that this will not allay our concerns around barristers registering *after* they have taken child cases. The onus needs to be on the BSB to make sure all barristers involved in proceedings involving young people are adequately trained. We would also recommend an awareness raising exercise of the register amongst youth offending teams, magistrates and courts, to ensure relevant practitioners are aware of the registration requirements and what they mean in practice.

SCYJ believes that registration should appear on practising certificates, contrary to the BSB proposals. Since practice certificates must be renewed annually, and a practising certificate does not compel advocates to carry out work in all areas specified, the burden borne by barristers no longer wishing to conduct youth work will be minimal.

The content of initial and CPD training should be specified by the BSB, in accordance with the findings of the various reviews that have looked at this matter. For instance, it might cover, amongst other things: youth court and child law; the needs of child defendants (including, for example, mental health and welfare issues, speech, language and communication needs, and child development); mental health; effective participation (for instance, managing learning and communication difficulties); and the impact of interventions (Carlile 2014: 37, adapted from CSJ, 2012: 93). The Inns of Court College of Advocacy (ICCA) has developed an advocacy training programme for the appropriate examination of child and vulnerable witnesses, which aims to have all relevant barristers trained by the end of 2018 and should also form part of mandatory training (see ICCA 2017).

Other steps should be taken to improve the standards of advocacy in child proceedings too. For instance, the fee structures should be revised, as recommended by various reviews (including the BSB’s own (BSB et al 2015)). Structural changes and court based measures should be brought in to promote and facilitate effective advocacy, including assessing children’s needs and providing court adaptations, such as intermediaries, as necessary (BSB et al 2015).

SCYJ would welcome clarification that the proposed registration requirements apply to all child proceedings. The BSB/CLEx report defines youth proceedings as, “cases that are heard in the Youth Court and cases involving young defendants (that is, those under the age of 18) that are heard in the Crown Court” (BSB et al 2015:1). However, elements of the current consultation give the impression that it is only youth court proceedings that are the subject of discussion. SCYJ believes training, and therefore registration, should be mandatory for practitioners representing children in all proceedings – the youth, magistrates’, family and Crown courts – as recommended by several significant reviews (see above). We therefore urge the BSB to clarify that the proposed changes apply to all proceedings in which an advocate is representing a child.

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

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