

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Youth Proceedings Advocacy Review: BSB Response

May 2016

Status: For discussion

1. To provide an update and to seek the Board's approval for the BSB's proposed response to the findings highlighted in Youth Proceedings Advocacy Review: Final Report (YPAR Report).
2. The YPAR Report was provided to the Board in October 2015. A copy is available on the BSB's website:
<https://www.barstandardsboard.org.uk/media/1712097/yparfinalreportfinal.pdf>

Executive Summary:

3. The Board has committed to raising the standards of advocacy within youth courts given the risks associated with poor quality of advocacy in these proceedings and the vulnerability of those involved.
4. The Board is aware of the findings of the YPAR Report which was published by the BSB in November 2015. Whilst recognising that there were instances of good practice, the report highlighted that standards of advocacy were not at the level the public should expect them to be. In particular, it highlighted the damaging effects that poor advocacy has on access to justice for young, and often very vulnerable offenders, and their perceptions of the system in general. Advocates receive little or no training before they represent youths within the youth court or the crown court both in terms of the law and practice within those proceedings or in how to engage or communicate with young and vulnerable people. The impact on the experience for young people and the outcomes of their cases can be grave.
5. The youth justice sector is under close scrutiny. In addition to our own work, the Ministry of Justice (MOJ) has commissioned an independent sector-wide review of the youth justice system which will report in July 2016. This is as a result of wide concern about whether the current system is meeting the needs of young people and whether the court process is operating in the most effective manner to reduce re-offending and to manage the underlying issues that are often present in young offenders. Allied to this is greater expectation on cases involving youths to be heard not in the crown court but in the youth court. As a result more complex and serious cases are being tried in the youth court.
6. The youth justice sector is complex with a wide range of organisations involved and representing different parts of the system. Following the publication of the report, the BSB has held discussions with senior representatives from each of those organisations to

identify opportunities to work together in order to improve and promote effective advocacy in youth proceedings. These include:

- recognising youth courts advocacy as a specialism;
- identifying the competencies we would expect from advocates;
- training programmes which would enable advocates to develop the competencies required to be an effective youth court advocate; and
- raising the status of the youth courts as a whole.

7. This paper sets out the steps we propose to take to address these issues.

Recommendations

8. It is recommended to the Board that it:

- a. **notes** the progress since the publication of the report
- b. **agrees** to the further development of the proposed way forward
- c. **agrees** that further discussions are held with the MOJ and Legal Aid Agency (LAA) on how to address the financial value placed on the youth justice system.

Update

9. Since the publication of the YPAR Report, we have met with a range of key organisations within the youth justice sector. The aim of these meetings was to see whether the findings of the research resonated with them and to discuss possible solutions for addressing the concerns identified. From those meetings it is clear that there is consensus that standards of advocacy are generally low and that the impact on the youth justice system is grave. It is important to note that, whilst the research focused on barristers and legal executives (as the SRA had declined to participate in the research), the discussions following the report have been clear that issues in respect of standards apply across all professions. Encouragingly, following the publication of the YPAR Report, the SRA has become engaged in this area of activity and any regulatory response will, therefore, be developed to apply across the whole sector.

10. Listed below are the organisations that we have met with. The breadth of these organisations reflect the complexity of the sector and the importance of developing constructive relationships across the sector in order to make the necessary progress. One of our challenges is that we are a relatively small organisation looking at one part of the youth justice sector. Our approach has been therefore to develop effective relationships with key stakeholders and to be seen to be demonstrably taking the lead to improve the standards of advocacy within this sector. This combination has allowed us to build strong support for our work in this area.

- The Ministry of Justice (and Charlie Taylor who has been commissioned by the Ministry to conduct the review into the youth justice system)
- The Youth Justice Board
- The Magistrates Association
- The judicial lead for youth justice - Mr Justice William Davis
- The Association of Youth Offending Team Managers
- The Standing Committee on Youth Justice
- The Law Society
- The Criminal Bar Association

- Voluntary sector organisations and charities with an interest in protecting the rights of children – the Michael Sieff Foundation for example
 - Youth justice training organisations such as Just for Kids Law
 - The Advocacy Training Council (ATC)
 - The Court Service
11. Allied to the meetings outlined above, we have spent time in youth courts observing advocacy first hand and speaking with youths, advocates, youth offending teams and magistrates to get their views on the youth justice system. This engagement activity culminated in a roundtable event on 5 April 2016, which brought together senior representatives from a wide range of organisations working in the youth justice sector (including most of those listed above). The outputs of the meeting were:
- Support for the introduction of a training infrastructure to enable advocates to develop the competencies required to be an effective youth court advocate
 - A collective commitment to trying to address the value and the status of the youth court.
12. On 3 May 2016, the BSB was invited to speak at the ‘Development and Research Needs in Youth Justice’ conference organised by the Michael Sieff Foundation and the Nuffield Foundation. The conference was attended by key people and organisations working within the youth justice sector. It was an excellent opportunity for us to set out the work that we have undertaken to date and to outline the role we, as a regulator, wish to play in improving the standards of advocacy within this sector. As part of the conference there were numerous workshops, one of which centered on youth court representative competence and was facilitated by the BSB. It enabled us to gather further feedback and comments on our desired approach.

Proposed approach

13. This section of the paper sets out what we believe the BSB response should be. Further refinement is necessary but we set out here the broad outline of how we think we can support advocates to become more competent in their representation of young and vulnerable people.

Why do anything?

14. Whilst there has been overwhelming support across the youth justice sector for the BSB’s work in this area, there has been some criticism in other quarters that the BSB is focusing on an area where only a relatively small number of barristers practise. The BSB is a risk based regulator. We target our regulatory intervention where there is evidence of the greatest risk to the public interest. The YPAR Report indicated (and its findings have been supported) that there was evidence of poor quality advocacy within the youth justice sector and that the impact on some of the most vulnerable people within the criminal justice system was grave. It also indicated that poor representation at the youth court stage lead to the wrong outcomes for young people and, as a result, an increased likelihood of re-offending (as a youth and as an adult). The BSB is, therefore, clear that it is absolutely its responsibility to take action to address these concerns and improve the experience and outcomes for young people.

Training

15. The YPAR Report identified the following as key and frequently occurring themes within the youth justice sector:
 - a. Many advocates lacked the knowledge of youth justice law, procedures and provisions.
 - b. Many advocates struggled to communicate well with young defendants and witnesses.
 - c. Barristers practicing in the youth courts tended to do so at the outset of their careers.
 - d. Advocates and solicitors juggled large caseloads but were being paid ever lower legal aid fees.
 - e. Some cases were treated as matters to be progressed as quickly as possible and advocates failed to prepare their cases accordingly.
 - f. Youth court work was not given enough significance and status by those involved in youth proceedings.
 - g. Due to the status of youth court work and the low fees involved, advocates tended to favour other kinds of criminal work.
16. To date the debate on the introduction of training has centered not on the need for training, which is accepted, but whether it should be compulsory or voluntary.
17. The argument for compulsory training is that there is sufficient evidence that standards are low and the risks are great to access to justice. Requiring all advocates to undertake training before they are able to appear within the youth court would be the most effective means of ensuring that all advocates are competent. There is however, a risk in imposing compulsory training. We are aware that the youth justice sector is fragile. The report indicated that there is little appetite amongst advocates to undertake work within the youth court because it is viewed as of lower status than the adult court and it attracts significantly lower fees than similar work within the crown court. The risk therefore of introducing a compulsory regulatory requirement into the market is that the additional regulatory burden reduces further the number of advocates prepared to undertake the work. This combined with more complex and serious cases being heard in the youth court presents a significant risk to access to justice and the proper administration of justice.
18. The second option available is a 'voluntary' training approach. Training would be developed and made available on a voluntary basis but made as attractive as possible so that advocates felt compelled to do it. This could be achieved by:
 - broadening the scope of any training so that it provides training in competencies that apply beyond youth courts (training in how to engage with a vulnerable person will be valuable whether you undertake work in the youth or the adult courts); and
 - developing the training so that it is seen as a mark of excellence and a means by which advocates can differentiate themselves from the market.
19. The effect would be that youth court advocacy was seen as specialism and an opportunity to develop competence that would benefit your wider practice aspirations.
20. The debate on whether training should be compulsory or voluntary has, we believe, distracted focus from what the aim of our approach to regulating in this area should be (and indeed what our wider regulatory approach has become). The BSB is a risk and outcomes focused regulator. Our approach to future bar training and other regulatory activity is not to prescribe regulation but to define the outcome that we are aiming for. For

example, CPD will no longer be based on a defined number of hours but on whether an advocate can demonstrate they have, through their CPD choices, taken steps to maintain standards of their practice.

21. The key issue is to improve the standards of advocacy within the youth justice sector for the benefit of the young people going through the system. All of the professions working within the youth justice sector have to meet certain competencies in order to attain the right skills to work with vulnerable people. Magistrates and judges have clear expectations placed upon them about what is required before they hear cases involving young people. The legal advisor in the youth court and the youth offending team will all need to demonstrate their competence in order to undertake their role.
22. We believe, therefore, that the right regulatory approach to take is to focus on the competency requirements for advocates undertaking youth courts work. This would build upon the Professional Statement that is already in place for barristers and which sets out what the regulator expects from an advocate when they enter practice. There would be a similar complementary statement setting out what competent advocacy within the youth court looks like and an expectation that an advocate who wishes to do youth court work must be able to demonstrate that they are competent to do so. This statement would be supported by guidance to the profession on how to achieve the required competence and a highlighting of certain training courses and materials. It would however be the professional responsibility of the advocate to decide how they developed that competence. Allied to that could be the ability of an advocate to self-certify that they were competent to undertake youth court work. That information would be included on their entry on the Barristers Register. It would be open to us to seek evidence to support that self-certification (through a process of spot checking) and to monitor through CPD completion whether that competence was being actively maintained (either for example through training or through regular practice within the youth court).
23. This approach has a number of benefits:
 - It is in line with an outcomes focused approach and allows us to seek to address the issue in a way which fits with our regulatory approach.
 - It emphasises that we believe that youth advocacy is a specialist area that justifies particular regulatory response (over and above the expectations set out in the Professional Statement).
 - It places responsibility on the advocate to ensure that they are competent rather than the regulator imposing prescriptive regulatory requirements.
 - It could be a means by which the value placed on youth court advocacy could be addressed – advocates who are prepared to self-certify (and therefore expose themselves to the need for justification by the regulator) could be entitled to an uplift in fees for work undertaken in the youth court.
24. The Board is asked to give its support for the development of this option. The approach reflects considerable consideration of the issues arising from the report and the various regulatory responses. We believe that it is a proportionate approach and a means by which we can have a positive impact on the standards of advocacy. The proposal requires further development and consideration as well as discussion with the other regulators and the wider youth justice agencies. We would look to engage a wide group of people to discuss the development of any specific youth advocacy competencies. But before doing any further work we would welcome Board endorsement for this approach.

Identifying poor performance

25. In order to maintain public confidence some consideration should be given to whether and how poor performance within the youth courts should be identified. We propose to commit to a periodic review of advocacy standards within the youth court to assess whether our regulatory intervention has had the desired impact so that an informed and evidenced based decision can be taken if further regulation is necessary. No firm views are established on how poor performance can be established and it would be useful to hear the Board's views. Options range from risk based or sampled visits to youth courts to observe advocacy, to encouraging anyone who comes into contact with an advocate during the youth justice process to bring to our attention concerns they might have about the competence of that advocate. It would also be important to encourage positive feedback so that good practice can be shared.
26. Allied to the issue of reporting poor performance is the need for us to be clear about what we would do if such evidence came to light. Historically there has been a reluctance to bring to our attention cases of incompetent advocacy for fear of the impact that could have on the advocate's ability to practise. Under our current regulatory approach, our first step (unless that incompetence fell into the category of misconduct) would be to establish what steps could be taken by the advocate to improve their advocacy through training or other forms of development. Disciplinary action would therefore be reserved for persistent or serious cases of poor performance. Providing this greater clarity about our regulatory approach may address some of the reluctance to raise concerns about poor performance.

Raising the status of Youth Courts

27. A recurring theme which has arisen in our engagements with stakeholders is the concern that youth court work isn't given enough significance by members of the profession. The YPAR Report highlights that there is evidence that youth courts can be used as a training ground for many advocates and advocates generally view the youth court as of lower status than the adult courts. In part this relates to the level of fees available within the legal aid system but it also perhaps reflects the lack of prominence and importance placed on the youth justice part of the wider criminal justice system.
28. Greater focus will be given to youth justice through the Charlie Taylor report to be published in July. Our work in this area has also raised the profile of the need for competent advocates but there is more to be done. At the recent roundtable discussion, there was a collective commitment to improving the experience of young people within the youth justice sector. We understand that we regulate a small section of this sector. However, we firmly believe that as a public interest regulator, we have an obligation to take the necessary steps towards making a difference to the sector as a whole.
29. We intend to liaise with other organisations to seek out opportunities to work together to promote the work undertaken within the youth courts. In this regard, we are currently putting together a communications strategy which will focus on raising the profile and status of youth courts work. This will target not only advocacy competence but also seek to demystify the youth court for young people and what they can expect from their advocate. We have been in discussion with the ATC on the development of a toolkit to support advocates undertaking the youth court. The ATC has also agreed that a section of their annual conference will focus on competency in dealing with vulnerable people and which will extend to include advocacy within the youth court.

30. The Board is asked to note the above and to provide its thoughts. It is also asked to agree to continued dialogue with the MOJ and the LAA on the financial value placed on youth justice.

Ministry of Justice review

31. As mentioned above, the MOJ has commissioned Charlie Taylor to conduct an independent review of the youth justice system as a whole. The findings of the review are due to be published in July. We have met with Charlie Taylor (and he attended our roundtable in April and the youth justice conference in May.) It is highly likely that he will make reference to the work that we have been doing and the findings of the YPAR Report and the concerns around standards of advocacy within the youth courts. We would expect that there would be alignment with his recommendations and what is outlined in this paper. We will continue to engage with him and will keep the Board apprised.

Issues for the Board

32. The Board is invited to consider the approach outlined in the paper to improve the standards of advocacy within the youth courts. We propose to continue working with other organisations in order to formulate a collaborative approach.
33. It is recommended to the Board that it:
- a. **notes** the progress since the publication of the report
 - b. **agrees** to the further development of the proposed way forward
 - c. **agrees** that further discussions are held with the MOJ and Legal Aid Agency (LAA) on how to address the financial value placed on the youth justice system.

Resource implications

34. Resources have been managed through the Supervision Department. The Director of Supervision has lead on this area of work supported by Faryal Khurram, Senior Supervision and Authorisation Officer. There will need to be on-going input from the Communications Department.

Equality Impact Assessment

35. Regular contact has been made with the Equality and Access to Justice Team and they will work with us to develop an EIA.

Risk implications

36. This work relate to one of the core themes of the 2016 Risk Outlook – the failure to meet consumer needs.

Regulatory objectives

37. The BSB's work on the youth courts particularly impacts on our regulatory objectives to protect and promote the public interests and the interests of consumers as well as improving access to justice.

Lead responsibility:

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