

Good Practice Guidance on Certificates for Assigned Advocate in the Youth Court

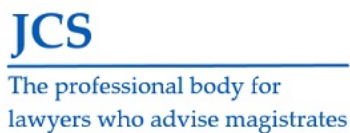
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This guidance has been drafted by Kate Aubrey-Johnson working with members of the MoJ / YJB **Youth Justice: Quality of Advocacy Working Group (QAWG)**, particular thanks to Joanne Cecil, David Ford (Magistrates Association), Greg Stewart, Caroline Liggins and Mel Stooks. The QAWG is grateful to the assistance of the Chief Magistrate, Paul Goldspring. We also acknowledge Kirsty Brimelow KC (former Chair) and Tana Adkin KC (Chair) of the Criminal Bar Association who have been pivotal to the development of this guidance.

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For further information please see - [Criminal Legal Aid Manual](#) (contact details from page 11) and the [Criminal Bills Assessment Manual](#). For any questions arising from this guidance contact info@childrightsyouthjustice.org

This guidance is endorsed by



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Foreword by Senior District Judge Goldspring (Chief Magistrate) for England and Wales

The Youth Court is not only a complex specialist jurisdiction but also is extremely important in the Criminal Justice system. The reality is that in almost all of Youth Court cases, not only is the defendant vulnerable, due to age and maturity, but so are complainants and witnesses, often diagnosed with complex neurological impairments or other disorders that increase their vulnerability.

Both lay Justices and DJ(MC)s that sit in the Youth Court are specially selected and trained. There is additional specialist training for DJ(MC)s before they are authorised to hear serious sexual offences. It is vital that those representing the interests of the vulnerable in the youth court are sufficiently competent to do so.

In the introduction to the recently published paper by the Youth Justice Legal Centre it is stated:-

‘Children need and must be entitled to specialist legal representation. This has long been obvious.

This new research adds to a growing body of evidence but for the first time highlights the extent to which solicitors are themselves seeking to address this training need. However, without clear guidance they are falling short, and children are being failed.

There is no requirement for solicitors representing children in the criminal justice system to have any specialist training before entering a youth court or representing children at a police station. It therefore falls to individual solicitors to identify their training needs. Children end up with worse outcomes than they should as a direct result of lawyers being unaware of guidance and special protections available to children. This is confirmed by the research findings. The situation would be significantly improved if solicitors who represent children undertook regular training on key youth justice topics. More children would be diverted away from formal criminal justice processes, they would be better supported through legal processes and the risk of reoffending reduced. Put simply, children must have better.

As part of this research, lawyers who completed an online survey self-assessed themselves, unsurprisingly, as having the requisite attributes knowledge and skills to represent children. However, when posed specific questions around this, they recognised gaps in knowledge. This was even more evident when YJLC staff observed court proceedings. This research demonstrates a willingness by solicitors to undertake training and the desire to represent children to a high standard – but in the absence of clear guidance on what training to undertake to enhance knowledge and skills, they are falling far short.’

The research paper goes on to describe the quality of representation as a “lottery”. The problem is acute and without specialised and bespoke training, in dealing with children in conflict with the law, there will remain inconsistent and inadequate representation of those children.

There are many levers to militate this which are outside the courts’ hands but one way to ensure effective and appropriate representation is to assign experienced (in terms of their Youth Court knowledge, not necessarily their call), specially trained counsel and advocates to the case, through a certificate for an assigned advocate, this is achieved by extending the Representation Order to cover both the solicitor and an assigned advocate to represent the defendant.

Defendants deserve this, but so do complainants and witnesses. The damage and stress that can be caused by inappropriate questioning of a complainant or witness should not be underestimated and so the use of certificates and the appropriate use of advocates with the necessary skills and training are essential to ensure fair and efficient justice.

For these reasons, I am happy to endorse this guidance document. I encourage its use throughout the Youth Courts and legal profession.

Paul Goldspring
Senior District Judge (Chief Magistrate) for England and Wales

Introduction

1. The Youth Court, as compared to the adult Magistrates' Court, deals with far more serious and complex cases. Therefore, applications for a certificate for assigned advocate should be more frequent in the Youth Court. By granting certificates, children are represented by a litigator and an advocate (which mirrors the position in the Crown Court). For children charged with serious offences it ensures an experienced advocate is able to represent them and should enable continuity of representation which is particularly important for child defendants.
2. However, the evidence suggests that certificates are not consistently being applied for, with some areas where no certificates have been granted, or just one or two over the past five years. Practitioners have also reported that courts adopt different approaches to granting certificates, and as a result there is a perceived inconsistency in decision making.

	Total Assigned Counsel Cases (Magistrates' Court + Youth Court)	Youth Court Assigned Counsel Cases
2017/18	364	125
2018/19	395	112
2019/20	445	114
2020/21	357	100
2021/22	599	187

3. There is currently no guidance provided to magistrates or District Judges on how to determine applications for certificate for assigned advocate.
4. The data suggests the number of cases where certificates are granted represents less than 3% of legally aided Youth Court cases overall.¹ This guidance seeks to increase the number of cases where certificates are applied for in the Youth Court and to support greater consistency in decision making to ensure children are granted the representation they are entitled to receive.

Context

5. The development of the jurisdiction of the Youth Court, as confirmed in the *South Tyneside*² case (see below), has resulted in a higher proportion of unusually grave and difficult cases in the youth court as compared to the adult magistrates' court.

¹ Please note that data identifying youth court claims in the magistrates' court is not always accurately reported, so these figures give an approximate picture but should not be used for analysis requiring exact numbers.

² *R (on the application of the DPP) v South Tyneside Youth Court* [2015] EWHC 1455 (Admin)

6. **Children are tried in the youth court for matters which are usually tried in the Crown Court for adults.** Youth Courts must deal with all cases involving a defendant aged under 18, unless they are charged with –

- murder (homicide),
- a grave crime (sexual or violent offences with sentencing maximum for an adult of 14 years or more) and the court considers the offence is of such gravity that a custodial sentence substantially exceeding two years is a realistic possibility³
- firearms offences with mandatory minimum sentences, or
- jointly charged with an adult. In cases where children are jointly charged with adults, the presumption under the Sentencing Council Allocation Guideline is that they will be remitted to the youth court for trial.

7. Youth Courts have greater sentencing powers; up to a maximum of 2 years Detention and Training Order (DTO).

8. Since 2015, Youth Courts have had the power to commit for sentence after trial, and so the Youth Court is encouraged to retain jurisdiction. This was confirmed in the South Tyneside case.⁴ This means many cases previously tried in the Crown Court will now be tried in the Youth Court.

9. The presumption is that children will be tried in the Youth Court because it is a specialist court:

‘...the general policy of the legislature [is] that children and young persons should, wherever possible, be tried in the youth court, a court best designed to meet their specific needs, avoiding the greater formality and public involvement of the Crown Court.’ - R (on the application of the DPP) v South Tyneside Youth Court [2015] EWHC 1455 (Admin), paragraph 28

10. **Owing to the developmental immaturity and high prevalence of underlying needs, child defendants are more likely to have communication needs and other participation difficulties.**

11. **Youth Courts are routinely dealing with far more serious and therefore ‘grave’ offences than in the Magistrates’ Court and there is a need to be able to instruct advocates who are competent to undertake these cases.** These are cases where an advocate with sufficient experience and expertise is required given the seriousness of the gravity and complexity of the legal and factual issues as well as the difficulties communicating with and advising a child defendant (and who may not have the assistance of a dedicated supporting adult by way of a parent, guardian or full time carer at court). The need to pre-book a specialist

³ See Sentencing Council’s Sentencing Children and Young People Definitive Guideline (2017) paras 2.8 – 2.10

⁴ R (on the application of the DPP) v South Tyneside Youth Court [2015] EWHC 1455 (Admin)

advocate for these types of cases is dependent on assigning the case to a specific advocate who can provide continuity of representation.

The Legal Framework

12. The Criminal Legal Aid (Determinations by a Court and choice of Representative) Regulations 2013 (“the Regulations”), regulation 16:

‘16 (2) The relevant court may determine that the individual can select an advocate if –

The proceedings relate to [...] an indictable offence; and

The relevant court determines that because there are circumstances which make the proceedings **unusually grave** or **difficult**, representation by an advocate **would be desirable.**’ [bold added]

13. If a certificate is granted by the court, the Legal Aid Agency will amend the current litigator only Representation Order to include an assigned advocate.

14. In drafting this guidance, we have confirmed that an in-house advocate (either an employed Barrister or Solicitor with Higher Rights) can act as an Assigned Advocate/Counsel and make a claim in the same way as other Counsel. The LAA have accepted that the wording regarding this in the contract and associated guidance is not sufficiently clear and will therefore look to revise this, working with the Law Society and other interested parties.

Guidance on making an application

When?

15. If legal aid has been granted prior to the first hearing, applications may be made in advance of the first hearing in writing. Alternatively, defence representatives should make the application at the first hearing, where possible.

16. The consideration of whether to make an application for a certificate should remain under review and applications may need to be made after the first hearing, for example, after an intermediary assessment has taken place.

17. Where a defendant is aged 17 and approaching their eighteenth birthday, advocates are reminded that the youth court can continue to hear the case after proceedings have begun (plea and allocation have been considered) and make any order which it could have made if s/he had not attained that age.⁵

⁵ Section 29(1) Children and Young Persons Act 1963 – ‘Provisions as to persons between the ages of 17 and 18. Where proceedings in respect of a young person are begun for an offence and he attains the age of eighteen before the conclusion of the proceedings, the court may . . . deal with the case and make any order which it could have made if he had not attained that age.’

How?

18. Applications must be in writing and specify what the relevant court is being asked to determine and the grounds upon which it is being asked to do so (reg. 11(2) of the Regulations), a request set out on the Youth Court PET Form may be sufficient.⁶
19. Where a case is reserved to a District Judge, and the judge has agreed to receive correspondence directly, applications should be submitted for their attention with a copy to the court office for it to be logged onto the Common Platform. In all other cases, applications should be addressed to the office for the court dealing with the case. If the case is reserved to a district judge, the body of the email should note that the application should be put before the judge without delay. The date of the hearing should appear in the subject line.

Eligibility?

20. Applications may be made if proceedings **relate to** an indictable offence ('indictable offence means an offence which, if committed by an adult, is triable on indictment, whether it is exclusively so triable or triable either way'⁷). Therefore, applications could also be made in cases where a co-accused is charged with an indictable offence, but the applicant faces lesser charges.

Grounds?

21. Identify the factors that make the case unusually grave or difficult, such as
- 21.1. Seriousness of the offence – should always consider whether to make an application for either way or indictable only contested cases. Certain categories of cases are likely to be considered grave, such as terrorism offences, sexual offences or cases involving modern slavery. Cases where the child is on remand to youth detention accommodation or meets the criteria for youth detention accommodation.
 - 21.2. The possible long-term effect on the child or their family resulting from an ancillary order or community behaviour order, for example impact on future employment.
 - 21.3. Complexity of the case (including reliance upon expert witnesses, number of co-defendants etc).
 - 21.4. Vulnerable witnesses / additional preparation for questioning –
 - (a) Any vulnerable witnesses where special measures or other adjustments will need to be considered – including young age, witnesses with communication difficulties or mental health needs, (it may assist to refer to The Advocates Gateway);
 - (b) Cases where a Ground Rules Hearing is likely to be required;
 - (c) Recorded cross examination (cases taking part in the s28 Youth Court Test);
 - (d) Number of witnesses.

⁶ The Criminal Procedure Rules Committee will be invited to consider whether this might be added to the PET form, for example, in Part 9 "Applications for Directions".

⁷ Section 64 Criminal Law Act 1977.

- 21.5. Vulnerability of the defendant –
- (a) The defendant’s young age, in particular, defendants aged under 14 in contested cases;
 - (b) Intermediary has been granted;
 - (c) Children with communication difficulties (including specific learning difficulties or neurodiversity such as autism spectrum disorders, attention deficit hyperactivity disorder, traumatic brain injury, epilepsy, foetal alcohol syndrome disorders; specific language impairment or processing difficulty);
 - (d) Children with psychiatric, psychological or other mental health needs.
- 21.6. Length of the trial – trial is likely to last longer than a day.
- 21.7. Where a co-defendant has been granted a certificate for an assigned advocate.

22. In addition, it may assist the court to identify factors that would make representation by an assigned advocate ‘desirable’. Such as the ability to instruct more experienced and specialist counsel and ensure continuity of representation. Note: the test is representation by an assigned advocate would be ‘desirable’ (not that it would be essential).

Determining applications

23. The Regulations do not prescribe who should determine applications. Where a case is reserved to a District Judge they are usually best placed to decide such an application.
24. When determining an application, the relevant court must give reasons (reg. 11(3) of the Regulations).
25. Applications may be renewed.

Competency of the advocate

26. Youth courts will be encouraged to scrutinise the competency of advocates appearing under a certificate for assigned advocate. Guidance on expected standards of competency is provided by the Solicitor’s Regulation Authority’s [‘Good practice guide for youth court solicitors’](#) (2023) and the Bar Standard Board’s [‘Youth Proceedings Competences’](#) (2017). Advocates must be competent to undertake the case and should be able to demonstrate the training and continuing professional development they have undertaken to meet these competences.

The Regulations

The Criminal Legal Aid (Determinations by a Court and choice of Representative) Regulations 2013

Determinations by the relevant court under this Part

11.—(1) The relevant court may make a determination under this Part(1) only if it has considered an application made in accordance with paragraph (2).

(2) For the purposes of paragraph (1), an application must—

- (a) be made by the individual seeking the determination;
- (b) be in writing; and
- (c) specify what the relevant court is being asked to determine and the grounds upon which it is being asked to do so.

(3) When it makes a determination under this Part, the relevant court must give reasons.

Criminal proceedings before a magistrates' court

16.—(1) Subject to paragraph (2), in relation to any criminal proceedings before a magistrates' court, the right of an individual conferred by section 27(4) of the Act does not include a right to select an advocate.

(2) The relevant court may determine that the individual can select an advocate if—

- (a) the proceedings relate to an extradition hearing under the Extradition Act 2003(1) or an indictable offence; and
- (b) the relevant court determines that because there are circumstances which make the proceedings unusually grave or difficult, representation by an advocate would be desirable.