

Justin Stewart-Rattray
President, Law Society of South Australia
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178 North Terrace
Adelaide SA 5000

Re: Invitation for Written Submission for Guidelines on the Legal Representation of Children in the Youth Court (Care & Protection) Jurisdiction South Australia

Dear Mr Stewart-Rattray

I thank you for the opportunity to provide a submission on new guidelines for legal representation in the Youth Court (Care and Protection) in South Australia.

CREATE represents young people with a care experience, provides direct advice, and advocates on their behalf to Governments and other bodies that have an impact on their lives. Young people we work with have experience with youth justice in states and territories around Australia at higher rates than the general population of young people. CREATE and the young people we represent are keen to provide their insights to you to help develop guidelines that can hopefully make for a better experience for young people in this jurisdiction.

How young people are represented in court is an important issue for young people with a care experience. Their legal representatives have a responsibility to act on the wishes and instructions of their clients. Young people should be given every opportunity to express their views, feelings, and hopes when they appear in front of a body such as a court.


We would like to share some insights from our Youth Justice Report (CREATE, 2018) which asks young people with a care experience about their interactions with the youth justice and family court systems. This report tells of the challenges that young people, especially those with a care experience face when in front of the youth justice and the family court system.

Insights from CREATE's Youth Justice Report (2018)¹

In our research report a number of young people discussed their interactions with legal systems including those that would fall under the Youth Court (Care and Protection) jurisdiction. A selection of testimonials from young people were included in the report highlighting some of the system challenges.

... [Department of Child Protection] should have explained to the judge that I had PTSD... It made me feel like everyone just gave up on me... I wasn't given a fair opportunity... I was chucked in with the defence lawyer. Of course a 15 year old is going to lose their temper when you keep asking them the same questions again and again and accuse them of lying. (Female, 12/18)

¹ Attached to this submission



During court proceedings our research shows (CREATE, 2018) that lawyers are the main support person for children in out of home care.

Young people described their lawyers as *“my voice in court, [they] made sure my views were heard and listened to..”* (Female, 16/19).

One participant told us her lawyer gave her *“moral support and gave me information as well as transport”* (Female, 14/19).

A majority of our research participants, who had contact with the justice system, reported that practical support was provided for them by lawyers with things like making a statement, advice about how to speak with a judge or a court, how to plead, and what was expected of them in court (McDowall, 2018).

As you can see from these insights from young people, lawyers are sometimes the most important support person for young people during court hearings. However, they exist within a system that can be confusing and potentially traumatizing for some young people.

For some young people the outcome was not what they had hoped for.

“You just feel so powerless, and you've lost control of your life, you have trouble remembering the details etc.... It was such a murky time of my life, and the legal process made it more murky. You're told your accuser doesn't have power and control over you anymore, and after it all, that wasn't changed.” (Female, 20/25)

We will now move on to discussing how guidelines can best support lawyers to represent young people in the best way in the Youth Court (Care and Protection) jurisdiction.


In relation to guidelines that can best support legal representatives to support young people the debate across different states appears to be how to determine where limits exist between the direct instructions and the best interests models. The direct instructions model means that young people give instructions after advice to their lawyer and they must follow their client's instructions. The best interests model gives the young person's representative the opportunity to make decisions in their best interests. What constitutes the best interests of the young people in an environment like the Youth Court when the best interests model is used is based on the decision making of their legal representative.

At this time the majority of jurisdictions advise that the limit of the direct instructions model is when the young person does not have 'capacity' to make decisions or give instructions for themselves. Some other jurisdictions refer to the limit as determined by the possession of the 'wisdom' of young people to give instructions. Very few jurisdictions speak about a specific age at which capacity or wisdom is reached. There are also very few specific examples of when that threshold is met or not. They give more space to the consideration by the legal representative of whether the young person can give instruction or not. In other words, it's a judgement made by the individual legal representative.

Recommendation 1

Guidelines for legal representatives of young people in the Youth Court should be developed within a direct instructions framework. There may need to be reference to best interests decision making in exceptional circumstances when young people do not have the capacity to provide direction to their legal representatives. These circumstances should be given significant consideration and clearly delineate what constitutes exceptional circumstances.

Recommendation 2



We further recommend that a situation where a legal practitioner assumes the best interests model needs to clear a high barrier. That is, the concerns the legal representative have are so great that they can't accept the direct instructions of the young person and must make decisions for them. The position of young people who have a care experience is that they want to have their voices heard in as many situations as possible. In this case, that means with their lawyer if they ever need representation.

Recommendation 3

Some examples may include young person's wishes for housing, who they want to live with, and who their support network. Every effort needs to be made by legal representatives to follow the directions of the young person in these matters. CREATE recommends that legal representatives of young people receive training and information in trauma informed approaches when working with young people with a care experience. A trauma informed approach includes explaining judicial processes and terminology in a developmentally appropriate manner, clearly articulating what is expected of the young person, and ensuring that justice system authorities are trained to correctly identify and respond to trauma-based behaviours.

There is also a need for a concerted effort by the sector to combat the stigma associated with being in, or having a care experience. This may involve increased public education and awareness regarding the impact of negative language and stereotypes, and increased promotion of positive images of young people who are in care or who have a care experience. CREATE has made significant resources available through the Snap That Stigma Campaign.

We look forward to reading your draft guidelines for legal representation of young people in the Youth Court (Care and Protection) jurisdiction and can provide direct feedback on the model you choose.

Yours sincerely

Ben McMullin, on behalf of CREATE Foundation