



**23/08/2024**

# UN Committee on the Rights of the Child – draft General Comment 27

CYCJ response to the draft general comment No. 27 on children's rights to access to justice and effective remedies.

## Overview

### Background

The Children and Young People's Centre for Justice (CYCJ) is based out of the University of Strathclyde, Glasgow, and works towards ensuring that Scotland's approach to children and young people in conflict with the law is rights-respecting; contributing to better outcomes for our children, young people and communities.

Our response to this consultation draws together our research evidence, and policy and practice knowledge, and is centred on our recent engagement with six young people (hereafter 'the group'), aged 19-22, currently residing in HMP & YOI Polmont, a young offender's institution (YOI) in Scotland. They have all been in custody for a significant period of time, and have been in the YOI since before they turned 18.

As the care and justice systems are devolved to Scotland within the United Kingdom's constitutional arrangement, our response is focused solely on the Scottish context. Central to this, is the recent and very welcomed incorporation of the United Nations Convention on the Rights of the Child into Scots Law, which came into effect on July 16, 2024, and hereafter referred to as the Incorporation (Scotland) Act.

### Position Summary

CYCJ very much welcomes this concept note for General Comment 27 and strongly endorses many aspects of it. In particular, acknowledging the importance of access to the courts, while also exploring how a child might access justice outside formal legal proceedings, and the mechanisms needed to facilitate meaningful participation of the child throughout. Likewise, the emphasis placed on the participation of children in the design of access to justice processes and remedies is welcomed.

A broad understanding of access to justice which includes judicial and non-judicial mechanisms, is supported by well-resourced and child-friendly procedural supports, and is underpinned by core principles like participation, will be essential to ensuring children can genuinely access remedy if needed.

From our discussion with the group at Polmont, and our wider research and practice knowledge, we believe this needs to be a key focus for Scotland, and the wider UK, moving forward.

### International learning

Although clear guidance on what child-friendly access to justice looks like is early in design, there is much to be learned from existing international law and guidance. While the UNCRC only provides children with the right to international remedy, the Committee on the Rights of the Child (CRC) has provided guidance through General Comment No. 5 (GC No.5).

Helpfully, this guidance illustrates the need for a broad understanding of the justice processes a child should be able to access, both through the domestic courts and other non-judicial routes such as alternative complaints mechanisms (GC No.5). It also highlights the need to provide a

broad range of proactive provisions that can help a child access justice including accessible rights information and independent advocacy.

More broadly, international guidance such as the *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (COE Guidelines) also hints at the importance of a child's experience of their procedural rights such as through legal aid and child-friendly legal representation when accessing judicial justice. However, it also indicates the importance of broader procedural supports such as legal empowerment and independent advocacy, especially in facilitating non-judicial justice (UNICEF, 2008 'UN Common Approach to Justice for Children').

Finally, the COE Guidelines also indicate the need for children's access to justice to be based on core principles, including participation, best interests, dignity, non-discrimination and the rule of law.

### **Scottish context**

Scotland's understanding of access to justice has been well informed by these international developments. Historically, the Scottish model of accessing justice included both judicial and non-judicial mechanisms in an attempt to reduce the need for citizens to use the, often adversarial, court system (Scottish Government, 'Access to Justice' 2018). This approach has been largely mimicked for children over the past decade, however, any policy or legislative consideration has often focused on how children navigate justice proceedings when there are welfare concerns or in adult processes such as family breakdowns (Scottish Government, Justice in Scotland, 2018). Likewise, consideration of the needs of children in conflict with the law tends to focus on how they interact with the Children's Hearings or criminal justice systems when they are accused or convicted, rather than focusing on how they claim remedy when their rights are breached. Additionally, provision to support children to participate in accessing justice can be piecemeal and limited in scope.

In the past decade, Scotland has begun to evolve how it provides support for children to access justice when their rights are not upheld. Part 1 of the Children and Young People (Scotland) Act 2014 (2014 Act) enhanced the investigation powers of the Children and Young People's Commissioner Scotland (CYPCS). Latterly, this interest in children's access to justice continued through the design of the Incorporation (Scotland) Act which includes reference to children accessing both judicial remedy for unlawful acts in Part 2 and accessing a broader range of non-judicial routes to remedy in Part 3, such as through advocacy.

As Scotland navigates the recently enforced incorporation of UNCRC, there is clear potential for national human rights institutions (NHRI) and ombudspersons to play a substantial enabling role in increasing access to justice and effective remedies. In a welcome move the Scottish Public Service Ombudsman has recently (May 2024) published child friendly guidance for complaints handling processes, to assist public authorities in delivering effective complaints mechanisms for children. We also welcome the important responsibilities placed in the Incorporation (Scotland) Act on two NHRIs – the Scottish Human Rights Commission (SHRC) and the Children and Young People's Commissioner Scotland (CYPCS) - to bring or intervene in proceedings of alleged UNCRC breaches. This is emerging and we are yet to see how this will

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take shape. There are also budget and resource implications, however, for these two bodies given these recently created additional responsibilities.

CYCJ firmly believes the accessibility for children in conflict with the law is paramount here and will help determine the success of these recent changes. It is welcome that the Incorporation (Scotland) Act sets out that when a court or tribunal is considering what relief or remedy to grant it must seek the views of the child in question, in an appropriate manner, and must take regard of what is expressed. The Act also states that when Scottish ministers bring in any secondary legislation in relation to a public authority act being deemed incompatible, they must consult with the SHRC and CYPCS, alongside “such other persons as they consider appropriate”. Unfortunately, however, this does not extend explicitly to children and young people.

Alongside this, the Incorporation (Scotland) Act outlines the establishment of a Children’s Rights Scheme to further the ability of children to access justice. This is very much in its infancy, but CYCJ welcomes its core aims, such as promoting complaints handling procedures that children can understand and use and ensuring support and representation to enable children to participate in decision making.

The recently enacted Incorporation (Scotland) Act brings tremendous potential to improve both judicial and non-judicial access to justice and effective remedy and CYCJ endorses the many positive steps being taken in Scotland. However, questions remain to the accessibility of this, particularly for children and young people in custodial settings, or with a past history of serious harmful behaviour.

Core to understanding how justice is accessed for children whose rights are most at risk is the participation of children directly. The following presents a summary of the main reflections from the group in HMP&YOI Polmont. Their reflections strongly evidence the need to consider the experiences of this community specifically if access to justice is to be truly accessible for all children.

## Summary of our discussion with the group

Central from the discussion with the group was a perception that the universality and inalienability of the right to access justice and effective remedies was severely qualified, and at times felt to be non-existent, for children and young people who have engaged in harmful behaviour. The group identified the importance of access to information and education on rights, alongside enabling measures from people in positions of power to support children and young people in custody to feel empowered to exercise their rights.

### Definitions and understandings

When asked to define their understanding of access to justice, the group identified that everyone should have their rights upheld and be informed of what their rights are, regardless of any previous or current behaviour, criminal charges, or convictions. They believed that this means children and young people are informed of their rights in every setting in which they find themselves, and understand, for example, that the UNCRC articles most relevant in school may be different for those in police custody.

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## **Existing barriers and exclusions**

The group felt that young people were generally less informed of their rights, and wider policies, and therefore are not aware of the impact they have on their lives. They are aware of efforts to inform them of what their rights are but receive no information on how to challenge a rights breach, or even how to recognise it. In terms of seeking remedy, this means that young people are not aware that they can challenge authority in constructive ways. The group believed this was in part due to young people having busy lives and not seeing rights as a priority, but also that it suited adults to have young people uninformed.

In the discussion, it was felt that various groups of children and young people were at a disadvantage when seeking access to justice. This included those from marginalised communities, refugees and migrants, young people with disabilities, care experienced young people, people disengaged from school and those from more challenging households. They surmised this was for various structural reasons, such as language barriers, being in the care system, lack of education, and lack of support network.

The group identified that this was particularly the case for children and young people in conflict with the law. They believed that due to their previous or ongoing behaviour, there was less chance of adults taking them seriously when reporting rights violations and that in effect rights did not apply to custody spaces in general.

## **Enabling factors and strategies**

The group raised several actions that could be taken to improve access to justice and effective remedies for children and young people. This included making it a mandatory conversation as part of the school curriculum, with added support from social workers to connect with those not in school. Making sure all care and justice settings are actively educating on rights, with a designated person to support them to access justice and have their rights upheld. A wider point around open access to community classes to allow support networks to learn was also raised.

## **Proceedings**

The group identified clear procedural steps to enhance access to justice. This included embedding in a confirmation process to ensure children and young people understand what is happening and being said during important meetings, by asking them to repeat in their own words. Alongside this, ensuring parents and carers know about rights and access to justice was also important for the group. This would be enhanced by having a designated rights officer – or independent advocate - at any formal proceeding in court or the Children's Hearings System, as well as plentiful signage.

## **Conclusion**

With several ongoing legislative, policy and practice changes, most notably the incorporation of the UNCRC into Scots law, Scotland stands at a critical point in terms of access to justice for children. Historically, access to justice in Scotland has included both judicial and non-judicial measures, in systems and processes which have been well informed by international developments. Where notable gaps have existed – notably around child participation in decision

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making and ability to seek remedy after a rights breach – considerable action has been undertaken over the last decade.

As outlined above, however, there is still work to be done in order to deliver access to justice as understood to include judicial and non-judicial mechanisms, supported by well-resourced and child-friendly procedural supports, and underpinned by participation and other core principles. In this regard, General Comment 27 is very welcome. In particular its emphasis on child participation in designing access to justice processes and remedies, as well as the support structures needed for children to achieve effective remedies.

Central to ongoing process of improving access to justice, is the need to explore critically the experiences of children whose rights are most at risk. As outlined by the group in HMP&YOI Polmont, once children enter the justice system as a result of being accused or convicted of causing harm, the focus on their own rights can feel secondary or entirely non-existent. The group had a clear perception that their past harmful behaviour qualified their ability to exercise their rights and that being in custody served almost as a state of exception. The group identified access to information and education on rights, alongside enabling measures from people in positions of power to support children and young people in custody to feel empowered to exercise their rights, to be critically lacking from their experience.

CYCJ believes the presence of these missing conditions identified by the group to be essential to ensuring children can genuinely access remedy if needed. As Scotland continues its dynamic journey of building child-friendly, rights-based policy and practice, it is vital that the voices of the most marginalised continue to assess and shape processes. The ultimate success, or otherwise, of Scotland's incorporation of UNCRC will be determined by the ability of these voices, including children in custodial settings, to access effective remedies for breaches of their rights.