**Comments on Draft revised General Comment N0. 10 (2007) – Children’s rights in juvenile justice**

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**The right to effective participation in the proceedings (art 40(2)(b)(iv))**

**57.** A young person’s right to effectively participate in criminal proceedings recognises the young person as an independent holder of rights and reflects a deeper appreciation of the autonomy of the child. Autonomy, in the context of effective participation in criminal proceedings, is not simply a matter of comprehension, it is also a matter of the child’s ability to make evaluative judgments.[[1]](#footnote-1) This ability to make evaluative judgments requires the combination of cognitive ability (to understand the nature and likely consequences of an action) and the evaluative ability to appraise the action and consequences in light of the decision-maker’s own preferences, desires, goals, values and standards.

Research tells us that young defendants often do not understand legal proceedings or the language used by lawyers, they report feeling intimidated and isolated in court and may not receive a proper explanation of what has happened until after a hearing is over.[[2]](#footnote-2) Children lack the ability to concentrate for long periods, consequently it may be difficult for them to participate effectively in criminal proceedings. As a result the child may not be able to give instructions to his lawyer and may not be in a position to make vital decisions.[[3]](#footnote-3) Young people often feel anxious and nervous before and during court proceedings, and feel unsupported and confused throughout the proceedings.[[4]](#footnote-4) They also feel frustration that the courts seem rarely to understand the context in which their offences were committed, including the pressures facing them. The UN Committee on the Rights of the Child have also expressed concern that many children feel they are not listened to by judges and other professionals working with children in conflict with the law.[[5]](#footnote-5) Such feelings of bewilderment can lead to young people becoming passive parties in the court process unable to understand the impact the proceedings will have on their lives, thus undermining the rehabilitative function of the youth court.[[6]](#footnote-6) The young defendant’s in the *Youth Proceedings Advocacy Review*[[7]](#footnote-7) reported inadequate, inconsistent and often ad hoc approaches to assessing their needs and vulnerabilities, with the result that in many instances specific needs were not identified by the time of the court appearance. This can lead to sentencing decisions that can further entrench young people in the criminal justice system.[[8]](#footnote-8) Although adults in the course of a criminal trial can experience similar confusion and fear, the developmental characteristics of young people means they are more likely to suffer from deficits relevant to effective participation and may be further disadvantaged by virtue of their immaturity.[[9]](#footnote-9) It has also been found that the stress caused by being a defendant in criminal proceedings has a greater adverse effect upon reasoning abilities for young people than adults[[10]](#footnote-10) which is a significant finding given the heightened stress that many young defendants experience in court proceedings.

The child should be able to participate effectively in such proceedings, as is required by Article 40(2)(b)(iv) of the UN Convention on the Rights of the Child. The right to participate in decision-making is a core right under Article 12 of the Convention which requires States Parties to:

assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This right has been identified by the Committee on the Rights of the Child as a general principle with which all Convention provisions must be read.[[11]](#footnote-11) In order for the right to effectively participate to be satisfied, each time a young person appears before a criminal court this should trigger an enquiry into the young defendant’s capacity for effective participation. Each court should develop a procedure for testing whether the young person is capable of effectively participating in their own criminal proceedings despite their youth and immaturity inhibiting their understanding. This test should examine factors such as the degree of maturity of cognitive abilities or the development of social-emotional capacities, as these directly impact upon the young persons’ ability to use information to make sound judgments and decisions. This test should embrace both the foundational competence to assist counsel and the contextualised concept of decisional ability which explicitly acknowledges the defendant’s decisional competence and best interests.

The above analysis of the evidence demonstrates that children are not naturally equipped with an ability to understand the wrongfulness of criminal acts and participate in criminal proceedings but develop this gradually, at different and inconsistent rates.It is therefore essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that active steps are taken to test his ability to understand and participate in the proceedings.

**Treatment and conditions (art. 37(c))**

**108 Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others and … must never be used as a means of punishment.**

The General Comment should expressly prohibit the use of restraint and force for the purposes of maintaining good order and discipline (GOAD) as the very open-ended terms of ‘good order and discipline’ allow too much discretion to officers on the ground, and the boundary between refusal to comply and threats to good order is very unclear. The General Comment should also express that restraint should not cause humiliation or degradation, and should be used restrictively and only for the shortest possible period of time.

The use of force and violent restraint can have profound cognitive and behavioural effects on the restrained young person resulting in feelings of powerlessness, fear, rage and anxiety. Violent use of force profoundly affects the thoughts and behaviour of young people but has no proven impact on improving their behaviour.[[12]](#footnote-12) The use of force to restrain young people can have a negative psychological and emotional impact resulting in perceptions of unfairness, broken spirit and re-traumatisation.[[13]](#footnote-13) Smallridge and Williamson, in their independent review of the use of restraint in youth custodial settings emphasised that there is no such thing as an ‘entirely safe restraint’ and that restraint is intrinsically unsafe as even where it does not end in physical injury it can be ‘profoundly damaging psychologically’.[[14]](#footnote-14)

The General Comment should expressly acknowledge that young people in custody are highly vulnerable and accordingly imposes a requirement to protect their physical and mental integrity and ensure that conditions in custody do not aggravate the suffering inherent in custody. It is recommended that good order should instead be maintained by creating a safe and secure environment in which the dignity and physical integrity of the young person are respected.[[15]](#footnote-15) The General Comment should ultimately seek to echo a commitment to the central message of the *World Report on Violence against Children*[[16]](#footnote-16)that ‘no violence against children is justifiable, and all violence against children is preventable’

1. R. Arthur *Giving effect to young people’s right to participate effectively in criminal proceeding*s Child and Family Law Quarterly (2016) 28, 3, 223-238. [↑](#footnote-ref-1)
2. J Jacobson and J Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (PRT, 2009). Also H Neal, A Hagell and L Brazier *Young Offenders’ Perceptions of their Experiences in the Criminal Justice System* (Polict Research Bureau, 2002); M Botley, B Jinks and C Metson *Young people’s views and experiences of the Youth Justice System* (CWDC, 2010). [↑](#footnote-ref-2)
3. T Croft *The Criminal Responsibility of Children and Young Persons* (Ashgate,t 2002) at p. 78. [↑](#footnote-ref-3)
4. N Cleghorn, R Kinsella, C McNaughton Nicholls *Engaging with the views of young people with experience of the youth justice system* (Paul Hamlyn Foundation, 2011). [↑](#footnote-ref-4)
5. United Nations Committee on the Rights of the Child *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (UNCRC, 2016), para 29 [↑](#footnote-ref-5)
6. C Driver, E.M. Brank ‘Juveniles’ Knowledge of the Court Process: Results from Instruction from an Electronic Source’ (2009) 27 *Behavioural Sciences & the Law* 627 [↑](#footnote-ref-6)
7. A Wigzel, A Kirby & J Jacobson *The Youth Proceedings Advocacy Review: Final Report* (Bar Standards Board, 2015). [↑](#footnote-ref-7)
8. R Deuchar, M Sapouna ‘‘Its harder to go to court yourself because you don’t really know what to expect’: Reducing the negative effects of court exposure on young people – Findings from an Evaluation in Scotland’ (2015) *Youth Justice* 1, at p. 13. [↑](#footnote-ref-8)
9. J O’Leary, S O’Toole, BD Watt ‘Exploring juvenile fitness for trial in Queensland’, (2013) 20(6) *Psychiatry, Psychology and Law* 853 [↑](#footnote-ref-9)
10. SB Johnson, VC Jones ‘Adolescent development and risk of injury: using developmental science to improve interventions’ (2011) 17(1) *Injury Prevention* 54; J O’Leary, S O’Toole, BD Watt ‘Exploring juvenile fitness for trial in Queensland’, (2013) 20(6) *Psychiatry, Psychology and Law* 853 [↑](#footnote-ref-10)
11. United Nations Committee on the Rights of the Child *General Guidelines regarding the form and contents of Periodic Reports to be submitted by States Parties under Article 44, paragraph 1(b) of the Convention* (UNCRC, 1996). [↑](#footnote-ref-11)
12. R. Arthur, *The Criminal Justice and Courts Act 2015 – Secure Colleges and the Legitimation of State Sponsored Violence* Modern Law Review (2016) 79, 1, pp. 102-121 [↑](#footnote-ref-12)
13. T.D. Strout ‘Perspectives on the experience of being physically restrained: An integrative review of the qualitative literature’ (2010) 19 *International Journal of Mental Health Nursing* 41*6* [↑](#footnote-ref-13)
14. P. Smallridge and A. Williamson *Independent review of restraint in juvenile secure settings* (London: Ministry of Justice and Department for Children, Schools and Families, 2008), 4-5 [↑](#footnote-ref-14)
15. R. Arthur, *The Criminal Justice and Courts Act 2015 – Secure Colleges and the Legitimation of State Sponsored Violence* Modern Law Review (2016) 79, 1, pp. 102-121 [↑](#footnote-ref-15)
16. P. Pinheiro *Independent Expert for the United Nations Secretary-General’s Study on Violence Against Children, World Report on Violence Against Children* (Geneva: UNICEF, 2006), 18-24 [↑](#footnote-ref-16)