



JFCY Submissions on Proposed General Comment No. 27

Justice for Children and Youth (JFCY) is a legal clinic and child rights organization located in Ontario, Canada. JFCY's mandate is to provide child-centred legal services that enhance access to justice through specialized representation and advice for children, leadership on systemic law reform and advocacy, and legal education and outreach.¹ JFCY's clients face issues engaging myriad and often intersecting areas of law, including juvenile justice, education, human rights, child welfare, health, victimization, privacy, and others. Our clients experience intersecting grounds of vulnerability, diverse and complex personal contexts, and disadvantage arising from their legal and social circumstances.

JFCY operates on a clinic model to provide free legal services that extends beyond those that may be traditionally included within Ontario's legal aid system.² This model provides independence to determine the scope of services and flexibility to respond to the unique barriers to access to justice experienced by our child clients. JFCY has direct and frontline knowledge of the barriers and bridges to children's access to justice and effective remedies, and advances the within submissions from this perspective. We recommend to the Committee that it provide commentary and guidance that addresses the following matters.³

¹ See www.jfcy.org for further information regarding JFCY's mission, mandate, and legal services.

² Abramowicz, Lenny. (2004). [The Critical Characteristics of Community Legal Aid Clinics in Ontario](#). *Journal of Law and Social Policy*, 19(1), 70-81.

³ We have reviewed the submissions of the Canadian Bar Association and the Canadian Coalition for the Rights of Children, and support the recommendations made by these organizations.

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Access to Justice for Children as an Equity-Seeking Group

Although not expressly mentioned in the Convention, access to justice is necessarily implied by the rights it guarantees: there can be no right without a remedy. Access to justice is interconnected with and fundamental to the enjoyment of all other rights in the Convention. It is the means through which rights are exercised and vindicated, and through which redress can be sought when rights are denied or violated.⁴ Access to justice for children also implies their legal empowerment, that is, the promotion and reinforcement of children's capacities to exercise their rights and access their entitlements. It necessarily entails institutions, systems, and communities equipped to recognize children's rights, respond to children's circumstances, and redress the harms uniquely experienced by children.

The four essential principles of the Convention - non-discrimination, participation, maximum survival and development, and the best interests of the child - are supported and advanced by robust access to justice for children. Access to justice means that children have ways to identify and address discrimination experienced as a result of their status as children, as well as their individual personal identities. It means children have the right to be heard in processes that affect their rights, interests, and access to the means necessary to both survive and to build a meaningful life. Finally, it means ensuring that children's best interests, including the ability to exercise the rights guaranteed by the Convention,⁵ are considered in all matters that affect them.

Although they are not always understood as such, children are an equity-seeking group. They experience unique disadvantage as a result of their age and dependency, and the persistence of negative paternalistic attitudes about their capacities and abilities. Justice systems, whether informal or formal, which fail to understand these experiences of disadvantage and discrimination will similarly fail to adequately protect children's rights. Children require justice processes sensitive to their unique vulnerabilities, not as a special class of rights or parallel justice, as a means of achieving equal recognition of their rights and their status as full human beings, deserving of respect and dignity. This is essential to ensuring that children's rights do not remain merely aspirational.

⁴ Liefwaard, Ton, "[Access to Justice for Children: Towards a Specific Research and Implementation Agenda](#)" (2019).

⁵ UNCRC, [General Comment No. 14 \(2013\)](#) on the right of the child to have his or her best interest taken as a primary consideration (art. 3, para. 1 at 4.

Access to Justice as Participation in Justice Processes

As an equity-seeking group, children experience ongoing discrimination and disadvantage individually and systemically, including as entrenched within the legal system. Children are often stigmatized as incapable and irrational, particularly where the views they express are defiant, rebellious, or hostile.⁶ Frequently, children's participation is contingent on their ability to demonstrate that their views are rational, consistent, and independent. As a result, children are often held to a higher standard than expected of adults.⁷

Children are regularly excluded from participation in formal and informal justice mechanisms. In many jurisdictions, children either lack party status in proceedings in which they have a direct interest or are entitled to representation only at the discretion of the decision-maker, including in family, child protection, victim/witness, privacy, and education settings. Decision-makers may subscribe to the incorrect view that children's exercise of their rights, particularly their evolving capacities for agency, are in tension with their best interests, rather than fundamental to their realization.⁸

In family law proceedings, the view that children lack capacity to form and express their views remains prevalent and is frequently cited as a reason to exclude children's participation or to give their views little weight. This is particularly so at young ages, or where parties advance allegations of parental alienation. A child's wishes may not be adequately represented by their parents, who may be self-interested, or through an assessor who is tasked with balancing competing interests.⁹ In some custody/access litigation, a child's desire to be heard is treated as evidence of emotional harm, which can only be remedied by refusing the child's access to the legal process; the child's attempt to exercise her right to access to justice becomes the justification for its denial.

In many areas, children are excluded from decision-making processes of central importance to their well-being and day-to-day life. This may result from the persistent perception that access to

⁶ Lansdown, Gerison, [The evolving capacities of the child](#); Cashmore, Judith et al, "[Children's Participation in Care and Protection Decision-Making Matters](#)"; UNCRC, [General Comment No. 20 \(2016\) on the implementation of the rights of the child during adolescence](#).

⁷ Daly, Aoife, "[No Weight for Due Weight: A Children's Autonomy Principle in Best Interest Proceedings](#)" at 73.

⁸ UNCRC, [General Comment No. 14, supra](#), n5.

⁹ Cashmore, [supra](#), n6.

justice for children is in opposition to a parent’s role in their child’s upbringing. For example, under Ontario’s *Education Act*, parents are the rights-holder in matters concerning discipline and special education, despite children’s direct interest in these decision-making processes. Similarly, the notion of “parents’ rights” in education matters has proliferated in Canada, to the detriment of children’s rights to privacy, identity, and participation.¹⁰

A child’s participation and respect for their rights, agency, and evolving capacities is fundamental to the promotion of the child’s best interests. Without this, the best interests principle becomes susceptible to manipulation and subordination to the desires and interests of adults, who maintain discretion and power over many aspects of a child’s daily life.¹¹ These problems are exacerbated by an observed tendency of service providers and decision-makers to prefer the evidence of adults over that of children, with little justification.

Remedies themselves must also be in the child’s best interests, and in recognition of their unique vulnerabilities and attendant need for special care and attention. Remedies must be timely and accessible for a child, taking into account the nature of the breach and the child’s lived experience. For example, a financial award in the face of a serious breach of privacy for a child, resulting in stigmatization, trauma and isolation for the young person, may not be a meaningful remedy. Children without standing may be left with no remedy at all.

Domestic legislation and policy should clearly delineate children’s rights and enshrine their entitlements under the Convention, including the entitlement to participation in justice processes, which decreases discretion to refuse them and enables remedies to be effective where they are denied.¹²

Access to Legal Representation is Vital to Access to Justice

Access to legal advice and representation is foundational to achieving access to justice. Lawyers assist children to understand and exercise their rights, entitlements, and obligations. They assist to ensure that their voices are heard in decision-making that affects them across legal subject areas and that processes are adapted and responsive to their interests and needs. Legal assistance

¹⁰ e.g. [New Brunswick Education Policy 713 \(Sexual Orientation and Gender Identity\)](#); [Saskatchewan Parents’ Bill of Rights](#).

¹¹ Daly, Aoife, “[Children, Autonomy and the Courts](#)”, at 2.

¹² Liefwaard, Ton, *supra* n4.

can help to demystify and normalize legal decision-making, decreasing the intimidation and stigma a child may feel when navigating formal and informal justice processes.

Lawyers play a distinctive role as compared to other adults, service providers, or representatives: they are dedicated solely to the child's cause, and are essential to the child's own experience of access to justice. Children frequently have legal interests distinct from, or even in conflict with, those of their parents, service providers, and other adults. Lawyers provide a conduit for legal assistance solely in the child's interest, consistent with a lawyer's professional obligations, rather than the child's views being filtered and interpreted, or balanced against the interests of others¹³. Yet presumptions that a child lacks capacity to make legal decisions or would be "over-empowered" by access to a lawyer may bar children from accessing the justice system directly.

Age-based restrictions on children's ability to retain and instruct counsel, such as the requirement in many jurisdictions for a litigation guardian, further limit children's access to justice. The ability to instruct counsel does not begin at adolescence. Even very young children may have the capacity to receive age-appropriate legal information and advice, understand the nature of their legal situation, and provide instructions to counsel. Children's evolving capacities to engage in a solicitor-client relationship must be respected.

In Ontario, a lawyer has a duty to establish that a client is competent to instruct counsel and to maintain a normal solicitor-client relationship as far as reasonably possible, regardless of age.¹⁴ Having dedicated and professional counsel permits an independent evaluation of this capacity and allows a child client to engage at the level their capacity allows, rather than relying in expert assessments or self-interested positions regarding a child's capacity. Where children may lack capacity due to their very young age and are represented in an *amicus* or guardian *ad litem* capacity, that representation must be focused on promoting their status as a rights-holder, evolving capacities, best interests, and the progressive realization of their rights.¹⁵

Access to legal representation not only provides the means by which children can understand and exercise their rights in justice processes, but further provides psychological and emotional

¹³ Cashmore, *supra* n6.

¹⁴ Law Society of Ontario, [Rules of Professional Conduct](#), r. 3.2-9.

¹⁵ UNCRC, [General Comment No. 7 \(2005\): Implementing Child Rights in Early Childhood](#).

support to children as they navigate difficult legal and personal contexts.¹⁶ Children may experience intimidation and lack of trust in adults or systems that might support them, and fear that adult decision makers will not meaningfully consider their wishes or take them seriously. Children frequently lack power and control over their own lives and personal circumstances, and have little access to information about their rights and how to protect them. Children are often dependent on adults who may not be aware of children's rights, or know how to best support them.¹⁷ Lawyers can assist to correct the power imbalances that exclude children from justice processes, and communicate to adult supporters the child's needs from the child's perspective.

Children's Rights as an Area of Expertise

The provision of legal services for children must recognize children as a unique client community and equity-seeking group, and include sufficient flexibility to address the diverse range of a child's legal needs. Because the legal issues faced by children are frequently occasioned by their disadvantage and vulnerability itself, their legal issues are seldom discrete. For example, a 16-year-old child who has left home as a result of a situation of abuse may require legal assistance in order to, *inter alia*, access housing, enroll in school, access health and social services, maintain extended family relationships, request child support, and to navigate court systems as a victim of crime. Meaningful access to justice in such contexts requires lawyers who are knowledgeable, skilled, and available to respond to all of these legal needs and to serve the whole child.

The legal clinic system provides a model for the provision of free, rights-respecting, child-centered legal services, of which Justice for Children and Youth is an example. As some of the most vulnerable members of our society, children generally lack the resources needed to retain counsel. Moreover, children experiencing poverty or without access to family resources may be among the most susceptible to denial of their rights, and have an increased need for funded legal services.

The existence of publicly-funded lawyers specializing in children's legal issues allows young people to seek legal assistance aligned with their self-identified needs. It provides access to legal

¹⁶ UNCRC, [General comment No. 24 \(2019\) on children's rights in the child justice system](#).

¹⁷ UNCRC, [General Comment No. 5 \(2003\): General measures of implementation of the Convention on the Rights of the Child](#), at 66.

help that is expert in the law as uniquely experienced by children, informed by knowledge of children's developmental needs and the impact of their lived experiences.

Children's Access to Justice Should be Construed Broadly

Access to justice should not be narrowly construed simply as access to legal systems and processes. Children's access to justice depends equally on children's fair and equitable treatment across legal areas and everyday life: at home, in institutional care, at school, in hospital, on the street, and in the community. Justice in this broader sense encompasses not only access to courts and lawyers, but to the fundamental values of fairness, equality, understanding, quality of life, participation, and civic engagement.¹⁸

A necessary precondition for the meaningful fulfillment of children's rights is that children have mechanisms for participation in their own affairs, and that they meet a culture of recognition of and respect for children's rights. Legal education, both of children as rights-holders and adults and institutions as duty-bearers, is fundamental to ensuring the realization of access to justice on the ground.

Achieving access to justice further requires States ensure to that duty-bearers receive necessary training and sensitization regarding the meaningful implementation of children's rights and evolving capacities. Parents, caregivers, service providers, decision-makers, and legislators must be prepared to be receptive to children's participation and exercise of agency as normative and in service of their best interests. Without the engagement of adult supporters, the establishment of reliable mechanisms for children's access to justice and needed transformative change necessary for the fulfillment of their rights is impossible.

We thank the Committee for its consideration of these submissions.

¹⁸ Farrow, T.C.W., ["What is Access to Justice?"](#).