

23 August 2024

Attn: Chairperson for the Committee on the Rights of the Child

Attn: United Nations High Commissioner for Human Rights

By email: ohchr-crc@un.org

To the Committee on the Rights of the Child ('the Committee')

Re: Submissions on General Comment No. 27 – Children's Rights to Access to Justice and Effective Remedies

Introduction

1. Equal Education Law Centre (EELC) is a registered law clinic whose staff of social justice lawyers specialise in education policy, legal advocacy, community lawyering and public interest litigation. The EELC engages in strategic litigation regarding long-term educational reform, as well as working on individual cases arising from experiences of learners, parents and teachers, such as access to schools amongst others. The EELC provides free legal services and representation to persons who would not otherwise be able to afford them. The EELC's legal processes seek to create systemic change in the education sector. Based on our work and the lived realities of the individuals and communities we work with in enabling access to justice, we also make legal submissions on law and policy reform. We additionally produce action-based research to facilitate reform within South Africa's education system and ensure equal and quality education for all learners.
2. In response to the Committee's call for submissions, EELC seeks to provide information which we believe will assist the Committee in drafting an effective, inclusive and relevant General Comment on this crucial right.

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3. School-going children spend most of their waking hours at school, participating in school activities, or travelling to and from school. We submit, therefore, that a General Comment on children's rights to access justice and effective remedies requires due consideration of injustice which occurs within school or educational contexts, and the mechanisms which ought to be available to learners for redress. Our submission therefore places particular (but not exclusive) emphasis on the nexus between learners' rights and their experiences in school and educational settings.
4. We sincerely appreciate the Committee's invitation for innovative and creative submissions. We are pleased to provide submissions which are based on extensive consultation with children, including videos and scans of feedback given by children as part of our consultation process. These consultations were conducted with our partner organisation Equal Education (EE) who organises in five provinces of South Africa, and its child and adolescent members aged 12 – 18 (known as 'Equalisers'), who provided significant feedback on their perceptions of access to justice. The physical submissions were created by 130 Equalisers during full-day consultations, including legal empowerment workshops and informational material, in the provinces of Western Cape, Eastern Cape and Gauteng. Children were encouraged to answer questions in any language or format with which they were comfortable. This final submission will also be shared with all children who were consulted.
5. Drawing both on our legal experience and from children's answers, we set out the information and recommendations below, according to the questions listed in the Committee's call for submissions.

Definitions and understandings

6. While it is important to define and understand justice, we believe this also requires a consideration of *injustice*, especially as experienced by children. Our clinic data provides insight into some of the most common types of education-related injustices experienced by children in South Africa.

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7. Since opening, our law clinic has assisted more than four thousand clients, the vast majority of whom have either been children or adult caregivers seeking to protect their children's rights in the face of injustice.
8. In descending order, the five most common forms of injustice faced by our clients are:
 - 8.1. Denial/delay in admission to a school
 - 8.2. Unjust disciplinary procedures at school
 - 8.3. Denial of education for financial reasons
 - 8.4. Bullying, victimisation (including SGBV) and discrimination
 - 8.5. Failure to include learners with support needs
9. While our clinic also receives many other queries, these five trends illustrate that, while injustice *includes* procedural unfairness in a formal adjudication space, its *definition* extends significantly beyond this example. We submit that the General Comment should consider injustice to mean any deprivation or denial – whether by act or omission – of a child's full enjoyment of their rights. Such rights may be procedural or adjudicative in nature but are more commonly substantive rights to services, protection and safety. Justice should therefore be understood broadly as the successful claim and full enjoyment of one's rights, and access to justice as the ability to achieve this outcome, whether formally or informally. Throughout this submission, where we refer to 'justice,' 'injustice' or 'access to justice,' we do so in this context.
10. Our consultations with children showed that they tend to have a similarly broad experience of justice and injustice. As part of the consultations, children were asked about their own understandings and examples of the terms 'justice' and 'injustice,' before any definitions or explanations of justice were then provided. In defining justice, many children made references to variants of 'doing the right thing,' 'making things right,' knowing the truth,

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punishing wrongdoers, having one's rights protected, and treating others fairly. Many children defined injustice as the denial or deprivation of one's rights or needs, discrimination, and active harm such as abuse or assault.

11. Significantly, while many children's answers reflected a criminal understanding of justice (i.e. retribution or compelled restitution for wrongdoing), most children did not consider justice to involve an exclusively vertical or horizontal relationship. That is, the answers demonstrated an awareness that justice, especially as it pertains to the enjoyment of rights, may concern interactions between ordinary people (for example, school bullying or domestic violence), as well as the interactions between a State and its population.
12. It should be noted, however, that while our consultations showed a strong *experiential* understanding of justice and injustice among children, they were significantly less aware (on average) of the formal terminology used in discussing justice and related issues. While this will be discussed in further detail below as a barrier preventing access to justice, we submit this is equally indicative that children have interest, agency and volition in accessing and understanding justice, even when they are not always able to articulate their experiences and needs in the formal language of law and procedure. The General Comment should consequently provide for broad and purposive interpretations of legal terminology, where to do so would be in the best interests of the child.
13. Finally, the children consulted tended to demonstrate an understanding of effective remedies which closely resembles that often held by adults. That is, most children gave answers which suggested they would feel they had accessed justice once their rights had been vindicated, wrongdoers (particularly abusers) had been punished, and their requests (such as for information) had been met. Indeed, one child gave repeated answers indicating that his desires in seeking justice were not different from those of his community, including its adults. We submit, therefore, that remedies for children may not always be made effective by the substance of the remedy itself, but instead by the mechanism through which it was

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obtained and the safeguards taken to ensure the remedy is implemented. In this respect, the answers given by children on barriers are helpful in enhancing both access and remedies.

Barriers preventing access – including proceedings

14. As mentioned above, a significant barrier is the inaccessibility of the formal language, terminology and institutions required to utilise many support services. For example, while most children could immediately identify examples of unjust practices at their schools – such as corporal punishment, discrimination and financial exclusion – they were generally less able to identify or articulate the reasons such practices were unjust or unlawful. They were also less capable of identifying support services tasked with the protection of their rights, which in South Africa include ‘Chapter 9 Institutions’ (independent oversight institutions established under Chapter 9 of the Constitution to ensure the Constitution is implemented) such as the South African Human Rights Commission or the Commission for Gender Equality.
15. As part of our consultations, and after explaining the concept of access to justice, we asked children about the barriers to access which they personally experienced. We received extensive feedback, which can be found in the attached physical submissions, and which may be categorised broadly as five interrelated barriers:

15.1. Information:

Most children indicated that they were unaware or uncertain of the appropriate avenues to follow when experiencing different types of injustice. In addition, even where children knew about the existence of certain institutions (such as courts, the police or social workers), many were unaware of how to approach them, or indeed that they were allowed to approach them. Significantly, most children were unaware that South African law allows for children to make criminal reports, institute civil litigation, seek legal advice and approach Chapter 9 Institutions on their own and without an adult’s permission. This is a

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particularly pernicious barrier, given that most adult perpetrators of child abuse and assault are known to the child, either in the home or at school.

15.2. **Administration:**

In all three provinces where children were consulted, several children indicated that they had in fact attempted to access support for injustice previously, but that they encountered incompetent, unprofessional and unhelpful officials. While this would be a major barrier even for an adult, this is especially problematic for children's access to justice. Children may already be uncertain about the process to follow or generally afraid to use the service, especially in cases of criminal injustice such as abuse and assault, and administrative officials therefore have the ability either to support and affirm the child, or to be gatekeepers of justice through improper service.

15.3. **Discrimination:**

Many children reported (in their own words) experiences of secondary victimisation by officials at institutions tasked with enabling access to justice. This was especially common in instances where children had attempted to lay charges at police stations, access sexual and reproductive health services, or approach social workers to report abuse. The most frequent forms of discrimination reported by children were ageism, sexism, homophobia, transphobia, racism and cultural discrimination. In each of these instances, children reported feeling frustrated, helpless, and ultimately less willing to seek justice.

15.4. **Intimidation:**

Generally, injustice against children is most likely to occur either at home or at school, the two places where most of their time is spent. These are sites over and within which

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children tend to have little control, especially regarding whether to remain in them. A particular barrier for children, therefore, is the fact that they are especially likely to remain in contact with those against whom they seek justice. This obviously includes criminal matters such as abuse and assault, but also extends to civil and administrative injustice, such as discrimination, inadequate teaching and learning materials, and financial exclusion. Many children indicated that, even if they were able to report such injustice, they were unlikely to do so, due to fear of reprisal by educators, family members, school bullies or other perpetrators of injustice.

15.5. **Physical and spatial access:**

Most consistently, children indicated that they would find it physically or logistically difficult to access justice and support services, especially when such services are located outside of their schools. Children provided several reasons for such difficulties. Firstly, many communities remain vastly under-served and under-resourced as a direct consequence of Apartheid-era spatial planning and ineffective or insufficient infrastructure development under democracy. Secondly, several children indicated they would only be able to visit a support service provider would be on a weekend or after school, by which time many institutions are already closed. Thirdly, most buildings in South Africa, including many housing State departments and Chapter 9 Institutions, remain inaccessible to persons with physical disabilities and other access needs.

Enabling factors and strategies

16. We submit that the barriers listed above are connected fundamentally to South African legislation and policy which, despite the Constitution's incorporation and codification of the 'best interests of the child' principle as binding,¹ remain largely paternalistic in considering

¹ Section 28(2) of the Constitution of the Republic of South Africa, 1996

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children and their needs. This is especially true for children who seek (or are entitled) to enforce their rights through civil litigation or alternative dispute resolution mechanisms.

17. For example, the Children's Act² is the primary domestic legislation intended to give effect to the rights of children enshrined at Section 28 of the Constitution. Despite its extensive range of considerations, its sections on children in litigation primarily envision children either as criminally accused, or as passive subjects in civil litigation between adults, such as divorce proceedings. Little provision is made for children who wish to seek legal advice, institute civil litigation or approach Chapter 9 institutions on their own. We submit that the lack of rights awareness among children is partly a *consequence* of our legislation, rather than a mere barrier thereto.
18. As a primary enabling strategy, therefore, we submit it is crucial for GC 27 to make clear that States Parties should not merely *recognise* the rights and capacity of children to access justice. Rather, they should meaningfully give effect to these rights by accounting and providing for children's unique needs and vulnerabilities in legislation and policy. A particularly important domestic legislative action would be codifying the rights of children to civil *and* criminal legal standing, in line with their evolving legal capacity.
19. Importantly, many of the required interventions would neither be unprecedented, nor exclusively beneficial for children. This was demonstrated by the children we consulted, who were asked to indicate what would be necessary for them and their peers to access justice. The most common types of suggestions given by children were:

19.1. **Infrastructural:** examples included ensuring there are more places of safety, psychosocial and healthcare services and dispute resolution forums in under-resourced communities.

² 38 of 2005

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- 19.2. **Socio-political:** examples included community rights awareness campaigns and advocating for increased funding from Treasury for initiatives fostering access to justice.
- 19.3. **Administrative:** examples included enhancing transparency at police stations and the vetting and training of administrative officials.
20. These suggestions are already intuitive, reasonable and necessary interventions to ensure equitable access to justice for all people, rather than only children. We submit, therefore, that a firm and detailed endorsement by the Committee of a *proactive* approach to enhancing children's access to justice would not require radical fiscal or legislative overhauls by States Parties. Rather, it would enhance accountability by providing tangible and measurable indicators for assessing meaningful compliance with – rather than mere observance of – the right of every child to access justice.
21. Finally, while States Parties are primarily responsible for the implementation of the Convention, an enabling ecosystem also requires that civil society and independent institutions empower children proactively. In this regard, we have seen particular success in models such as those of our partner, Equal Education, as well as the Western Cape Commissioner for Children (WCCC), both of whom work with children as active rightsholders and claimants, rather than as passive subjects viewed only as victims.

Conclusion

22. We thank the Committee and are deeply grateful for its consideration of our submission. We welcome any questions which the Committee may have.

Yours faithfully,

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