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### *Challenging Notions of Children's "Participation" in the Youth Justice System*

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*Published in:*

The International Journal of Children's Rights

*DOI:*

[10.1163/15718182-32010002](https://doi.org/10.1163/15718182-32010002)

*Publication date:*

2024

*Citation for published version (APA):*

Charles, A., Hampson, K., Case, S., & Brown, A. (2024). Challenging Notions of Children's "Participation" in the Youth Justice System: The United Nations Convention on the Rights of the Child, Article 12. *The International Journal of Children's Rights*, 32(1), 9-44. Advance online publication. <https://doi.org/10.1163/15718182-32010002>

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## **Title: Challenging notions of children's 'participation' in the Youth Justice System: The United Nations Convention on the Rights of the Child Article 12**

### **Abstract:**

A child's right to participate in decision making is seminally proclaimed in Article 12, UNCRC. Yet, it is often the case that the rhetoric associated with children's 'participation rights' does not reflect practice. Especially in the case of the youth justice system, significant challenges exist concerning both notions of the right to participate and how it translates into and influences what should be appropriate interventions for young people. This article draws upon three studies which critically examined the concept of participation and children's decision making in pre-court and custody and resettlement settings. Listening to what young people said through these studies, reflections are offered concerning prevailing understandings and the operationalisation of 'participation' within existing youth justice approaches. Additionally, consideration is afforded to barriers to effective participation in youth justice and the transformative potential that the right to participate in decision making offers those who come into conflict with the law.

### **Plain Language Summary:**

Children have the right, under Article 12 of the UNCRC to participate in making decisions that affect them. Whilst this right is enshrined in international law, it is not always applied in practice. Such is especially noteworthy when children come into conflict with the law and enter the orbit of the youth justice system. Challenges around achieving meaningful participation are arguably two-fold, relating to notions of the right to participate in decision making and how pragmatically (and appropriately) it should manifest in practice. This article draws upon three studies that have looked at what children understand by 'participation' and their decision making in pre-court and custody and re-settlement. Reflections are offered regarding what children have said, and consideration is given to the nature of barriers to Article 12 rights, and also, the transformative potential of participation.

### **Key Words:**

Youth Justice; Participation; Youth Voice; Children's Rights; Article 12

### **Introduction**

*'They [adult officers] said, 'what you say matters' but then when I wanted to say something, I wasn't allowed. It wasn't nice. People shouldn't say things that they don't mean. It can really upset you.'*

(Adrian<sup>1</sup>)

The quotation above, offered by a justice-involved child, contradicts understandings of children's 'participation' which are so often communicated by Government and youth justice professionals (Welsh Government/Youth Justice Board, 2019; Gray, 2019; DCMS, 2018). Adrian's negative experience is regrettably not isolated (Welsh Parliament, 2020, Children's Commissioners, 2020; Gal, 2017; Bejier and Leifaard, 2011) despite a positive policy rhetoric of participation rights which reflects the overarching aims of the United Nations (UN) Convention on the Rights of the Child (CRC) regarding children's provision, protection and *participation* and purports to animate Article 12 in particular, which asserts that:

1. *'States Parties shall 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.'*
2. *'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'*

(Article 12, UNCRC 1989)

The UK Government, having ratified the CRC in 1991, is duty-bound as a rights bearer to prevent the type of experience that Adrian suffered. Regrettably, as Periodic Reviews suggest (see UN Committee on the Rights of the Child, 2016; 2023), not enough is being done to recognise, facilitate or respect children's Article 12 rights. Rather, reviews suggest a failure of public policy, despite an enduring focus upon the importance of participation both domestically and globally, something reinforced by General Comment (GC) 24:

*'A child who is above the minimum age of criminal responsibility should be considered competent to participate throughout the child justice process...'*

(UN Committee on the Rights of the Child, 2019, Para.

46)

It is noteworthy that failure to respect children's participation rights persists in spite of the binding authority of the CRC as a ratified treaty, and also dedicated youth justice approaches which insist on partnership and pro-active approaches to decision-making between young citizens and adults (for instance, Council of Europe, 2010).

Within policy and practice, efforts have been made to promote children's participation but, as the literature evidence, initiatives have been designed by adults to satisfy *system* needs, rather than those which children themselves understand, need or want (Lundy, 2007; see UN Committee on the Rights of the Child, 2009). In the Youth

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<sup>1</sup> Gender respecting pseudonyms are used throughout this article when referring to what child participants said to protect their identities.

Justice System (YJS), it is noteworthy that there remains a failure to facilitate meaningful dialogue between adult decision makers (with legal responsibility to honour and facilitate children's rights) and children (the rights holders) (Gray, 2019; Charles, 2017). Such failure has multiple implications, including, critically, a denial of children's ability to *explain* what participation is, their *expectations of decision-making* and the *transformative power* of this right. The disconnect between children's understandings of participation and that of adults matters and can impact upon children's willingness to engage in state processes, the appropriateness of interventions, relationship building between children and practitioners, and seeing and treating children as children - a principle that features prominently in discourse such as 'Child First' justice<sup>2</sup> (Kilkelly and Bergin, 2023; Case and Browning, 2021).

Children's participation, as envisaged in the CRC is not however merely a matter of legal compliance. Rather, denial of participation can have system-wide consequences. For example, the Scaled Approach<sup>3</sup> (Haines and Case, 2012), rather than hearing children's voices and responding to their needs (see UNCRC, Article 12), further embedded an adult-centric actuarial model of youth 'justice', privileging adult-determined interventions and views. Contact levels with practitioners were less about addressing children's own perceived needs and more about following prescribed notions of 'dosage' (McGuire, 1995) mapped through *criminogenic* needs (risk factors; rather than *actual* needs), following a central-Government, rather than child-determined approach. This completely sidelined children's participation, potentially engendering disengagement (Tisdall et al., 2021; Lundy, 2018).

The failure of initiatives such as the Scaled Approach assessment-intervention framework in the YJS of England and Wales to respect children's participation, largely due to privileging adult decision-making (i.e. adult-centrism) is in stark contrast to the child-centric and transformative potential of Article 12 and complementary international instruments such as Council of Europe Guidelines (2010). For example, even within the YJS, Haines et al. (2013) demonstrate how developing participatory partnerships between children and adults can reduce non-stigmatising processes and promote pro-social behaviours, which positively impact recidivism and children's lifelong journeys. Underpinning positive examples of participatory approaches is the need for children to be able to articulate what 'participation' means to them (implicit within Article 12) at all levels of system contact, even when in custody (see United Nations, 1990b). The converse also is true, reinforcing that children should not merely be passive recipients of change, but respected as competent actors who enhance *processes* of co-production (Johns et al. 2023).

Directly addressing the potential for Article 12 participatory rights, this article will consider how in the YJS listening to children's voices and experiences improves policy and practice, and therefore outcomes, for justice-involved children. Rather than merely offering another critique of participation, this article seeks to make a case for reimagining this fundamental right and its operation, through reflection on what

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<sup>2</sup> The other related tenets of the guiding principle are promoting prosocial identity for positive child outcomes, collaboration with children (which holds participation as central) and diversion from the formal YJS.

<sup>3</sup> The Scaled Approach was introduced to the YJS in England and Wales in 2009, seeking to formalise the level of contact a child was required to make with the Youth Offending Team (YOT) making it entirely dependent on assessment of risk (YJB, 2010).

children have said about the concept of participation and their lived experiences of decision-making through research undertaken in Wales. Critically, we conclude that rather than accepting current participatory orthodoxy, radical change is required to understand and meet children's needs and realise the true nature of their right to participate.

### **Making Sense of Children's 'Participation'**

Adults have variously sought to define, map out and comprehend Article 12 rights (Vromen and Collin, 2010; Checkoway, 2012 and Mitra, 2014). Whilst many of these are positive, they nonetheless raise significant questions about what is meant, in a strict sense by 'participation' including its dimensions and context (Cahill and Dadvand, 2018). In the YJS, for instance, questions may arise, due to adult-domination of process and practice, concerning assumptions and practices around children's ability or desire to participate and whether these meet the provisions of Article 12 (Gray, 2019; Peer Power, 2021; Smithson and Jones, 2021). Before engaging with contemporary challenges to children's participation in youth justice, it is useful to consider what 'participation' may actually mean. Much is said regarding the failure of honouring children's participation rights in criminal justice (Marder and Forde, 2022; Daly and Rap, 2018; Ravulo, 2016), yet, what might be understood by Article 12 rights in this area of public policy?

Within Article 12, an imperative for duty-bearers to hear and give weight to the voice of the child is clearly stated. When deconstructed, critical within the architecture of Article 12 is: the right to express a view freely; the right to be heard when matters are determined that affect a child; that due weight to be given to a child's views (depending upon age and maturity); and rights to be heard and/or represented in judicial or administrative proceedings. Overall, the provisions of Article 12 appear positive, yet as Byrne and Lundy (2019) observe, several challenges exist. These include children's knowledge of CRC provisions (something to which the recent Periodic Review alluded - see UN Committee on the Rights of the Child, 2023), lack of understanding by adults concerning the existence and extent of participation rights and their obligations to facilitate these, and a paucity of investment in supporting children to directly exercise their rights (Smithson and Gray, 2021).

Arguably the term 'participation' is problematic, since it can sometimes be used as an umbrella term for a range of activities, many of which are well-intentioned and constructive, such as seeking to involve children in tasks or actions (Burns and Creaney, 2023; Tisdall and Cuevas-Parra, 2022; Seim and Slettebo, 2017). Positive and popular usage of 'participation' can pose a risk to the concept, rendering it expansive and potentially divorcing it from what Article 12 states is its true purpose (Gray, 2019; Coyne, 2008). Reflecting this reality, several participation-related terms exist such as consultation, empowerment, involvement and taking part (Eriksson, 2023; Tuulikki and Jonna, 2012; Percy-Smith and Taylor, 2008). These broad terms are often constructively developed but may obscure CRC rights. In that light, it is useful to critically examine what may be meant by participation.

Reflecting upon the many definitions and working understandings of participation which exist (Akyol and Erdem, 2021; Skauge, Storhaug and Marthinsen, 2021; Hart, 2013; Skivenes and Strandbu, 2006; Francis and Lorenzo, 2002), core elements of

the right to participate in decision making are discernible. The central driver of Article 12 is the universal achievement of a child's legal right to (considering their age and maturity) freely express a view, which is heard and given due weight. This applies whenever a decision is made which would affect the child and should be honoured by all duty-bearers: in the context of this article, this would include the Ministry of Justice and agencies operating under its auspice (tacitly recognised by the Ministry and the Youth Justice Board; Taylor, 2016). At face value, Article 12 appears to be a relatively linear right for decisions impacting a child - Article 12 obligates duty-bearers to enable a child to express a view and be heard and the child's view should be given due weight. Yet pragmatically, assumptions and practical challenges can impede the operation of this right, notably in terms of knowledge (of both children and adults), access to services or support, and the construction of processes and systems to accommodate the right to participate in decision making (Daly, 2020, 2018). Whilst Article 12 makes clear that a right to participate in decision making exists, the ability of duty-bearers to meet that legal provision, both from domestic and global perspectives, is less clear. This is evident even in nations where the CRC is partially incorporated (e.g., Wales via the Rights of Children and Young Persons (Wales) Measure (2011); Welsh Government, 2023, UN Committee on the Rights of the Child, 2023), or embedded within legislation and policy, for instance, in Scotland in terms of The Promise (The Promise Scotland, 2023, Scottish Parliament, 2014) and, aspirationally, the UNCRC (Incorporation) (Scotland) Bill.

The discord between legal reality and what are sometimes claimed to be Article 12-shaped forms of participation, arguably creates a blurring in understandings of participation. For the purposes of this article, key aspects of what is commonly called 'participation' will be drawn upon to aid comprehension of what this term means. Primarily, Article 12 provides that a child should be able to invoke and enjoy those rights which the Convention provides. Pragmatically, this relates to the need for those who have duty-bearing responsibilities (e.g. government and other agencies) to respect and enable the rights held by rights-holders (i.e. children) (Welty and Lundy, 2013). In the youth justice context, this should mean, as Lundy (2007) helpfully proposes, space for participative activity, opportunities for the child's voice to be heard, access to appropriate audiences, i.e. those engaged in decision making which impacts upon the child and the potential of influence (as well as reasons why the child's participation does not always lead to change). Rights-bearers should, in this conception of participation, be not merely rights-respecting (see UNICEF 2023) or tokenistic (Hart, 1999) but at least meet the minimum standards detailed in GC 24, and more broadly, other provisions of the Convention, since this range of rights is vital to those who come into conflict with the law (Smith, 2005; Maxwell et al., 2004).

Underpinning the relationship between rights-bearing adults and rights-holding children is tacit acceptance that, although young, children can play a powerful role in leading participative discourse and can formulate and express appropriate views. Article 12 is not, in that sense passive or static. Yet, a special challenge arises in this respect, not least because of the qualifying clauses of Article 12 relating to due weight, age and maturity: these can sometimes be used as excuses to not hear or listen to children (Bradwell, 2019). However, rights-bearers must be cognisant of the exhortation made by the Committee that Article 12 rights are not merely single point or inconvenient occurrences. Rather, they are:

*‘... ongoing process, which includes information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.’*

(UN Committee on the Rights of the Child, 2009, Para.3)

The words of GC 12, stated above, highlight the imperative for duty-bearers to be pro-active in their comprehension and response to children’s participation rights. In the context of youth justice, given much publicised tensions around children’s literacy, speech, language and communication needs and negative, previous encounters with justice agencies, this prospective approach to Article 12 rights takes on a powerful impetus (Smithson, Gray and Jones, 2021).

The inter-relationship between Article 12 and other CRC provisions should not be ignored either and, as will be explored below, can have a strong influence on the extent to which participation rights are realised. To illustrate the importance of a ‘whole convention’ approach, it is perhaps useful to consider the role which Article 5 of the Convention may play in youth justice. In Article 5, State Parties recognise the responsibilities, rights and duties of parents to support and guide children in the exercise of their rights. This must be undertaken in a: *‘... manner consistent with the evolving capabilities of the child...’* (Article 5). As Kilkelly (2020) poignantly recognises, there has been little analysis of the impact of this right and, pivotally for children in conflict with the law (who are ‘minors’ in the context of most state jurisdictions), it can overcome, in practical terms, challenges facing the child when the state seeks to hold them criminally responsibly (Article 37) and in accessing adequate support when engaging with the criminal justice system. In this sense, Article 5:

*‘... bridges the gap between children who require parental support to exercise their rights and those who are capable of exercising them on their own behalf.’*

(Kilkelly, 2020: 502)

Article 5 can be a powerful instrument to reinforce a child’s participation rights – and may actually offer them opportunities to invoke their rights, supported by parents/carers who want positive outcomes for children in their care. In the context of participation rights, Article 5 is important since agencies often are required to interact with both children and parents/carers when key decisions are made about those with whom they work. In that light, the duties specified in Article 5 arguably complement and buttress those detailed in Article 12.

Similarly, Article 40 has importance within youth justice, as it provides a range of due process rights for children (described and amplified in GC 24). Participation in the youth justice system is an element of Article 40 - for instance, Article 40 (2) (b) (iv). Supporting a universal application of children’s participation rights (even for those who are young), GC 24 unequivocally states that:

*‘... a child who is above the minimum age of criminal responsibility should be considered competent to participate throughout the child justice process’*

(UN Committee on the Rights of the Child, 2019, Para. 46)

Of course, the sense afforded to the words, ‘... to participate ...’ here relates expressly to Article 12 of the Convention and not some more amorphous understanding of engagement or involvement. The statement made by the Committee in GC 24 is significant because Article 40 rights embrace fundamental due process provisions such as: the presumption of innocence; to be informed (and promptly) of any charges; a fair hearing; protection from self-incrimination; and to appeal any convictions. Additionally, when contemporary youth justice systems are considered, the reality is that they are often branches of criminal justice machinery designed for adults and therefore comprise institutions such as courts, custodial settings and municipal councils. Article 12.2 rights to engage in administrative proceedings and to be heard therefore take particular significance.

Article 12 then requires duty-bearers to design (and/or amend) systems so that children can exercise their right to participate in decision making. Indicated above are essential accompanying elements, which arguably distinguish participation from other types of ‘taking part’. Considering the literature, it is proposed that the subdimensions of participation identified by Steinhardt et al. (2022), i.e. involvement and engagement, form a helpful tool in framing the difference between participation and related activities (sometimes *called* participation). Steinhardt et al. (2022) propose that below participation sits *involvement*, defined as:

*‘... an unobservable state of motivation, arousal or interest towards a specific activity or product... triggered by a specific stimulus or situation.’*

(Steinhardt et al., 2022: 458)

Reflection on what involvement is suggests that it requires an interest in something, for instance, sport or a hobby. Even though involvement can be understood constructively, its outward manifestation can be limited. Nonetheless, involvement can lead individuals to eventually participate through an exciting of interest, and perhaps, the desire to make decisions. It should perhaps be noted that the potential exciting of interest is something that adults in agencies can play a pivotal role in achieving: for instance, through the provision of interesting activities and/or voluntary interventions which can achieve pro-social outcomes.

A further subdimension, engagement, is in many ways a further step towards participation, described in the Convention as comprising:

*‘... the individual’s behavioural, cognitive and affective investment during role performance. Role performance implies that the individual is executing and experiencing their specific role, for example, as a student, playmate, player in a sports team etc., in a specific context (e.g. school, peer group, sports club).’*

(Steinhardt et al., 2022: 459)

Engagement then, rather than being invisible or subconscious, is more akin to the types of ‘taking part’ that service standards (see EU and UNICEF, 2021, Welsh Government, 2018 and Save the Children, 2005) often refer to and entails being



actively engaged in some type of activity, and fitting into a pre-ordained role. Whilst engagement is more active, as opposed to a more passive mode of involvement, it still falls below the empowered decision-making type of participation described in Article 12.

Acknowledging the terms 'involvement' and 'engagement' maybe helpful to consider when the extent to which participation occurs, both generally and in youth justice. Pragmatically, many opportunities for children to become involved or engaged are designed for and implemented through intervention programmes, e.g. primary prevention programmes. However, the possibility of children making decisions in respect of those programmes is limited, with adults having determined the nature and scope of involvement and engagement. This does not mean that involvement and engagement are negative or inappropriate, rather the contrary; they may be precursors to full participation and can be transformative (Case and Browning, 2021; Creaney, 2020; Williams and Daniels, 2020; Denov, 2007). When pondering participation though, it is important to delineate Article 12 rights, with forms of interactivity which arguably fall below the legal threshold stated in the Convention.

Reflecting on the above, within this paper, participation will be understood in a stricter sense to accord with the provisions of Article 12. Below this, but representing practice which also occurs within the youth justice system, will be engagement and involvement. Terminology will mirror that described above to delineate degrees of activity or interest which are both offered to, and experienced by, children. Supporting an exploration of 'participation', reflections will be offered concerning three pieces of empirical research, which engage both with notions of, and practices concerning, participation.

### **Methodology: Applying a research-focused analytical lens**

Guiding the ensuing discussions on children's experiences of 'participation' will be three pieces of research undertaken by Charles (2011), Brown (2019) and Hampson (2016). This research has been selected to enable exploration of:

- Children's understanding of their participation. Charles (2011) engaged with 524 children aged between 10 and 18 years, using a co-production approach to understand the concept and practice of participation within the lived experiences of children.
- The impact of participation rights within diversion processes. Brown's (2019) doctoral thesis explored children's thoughts about system contact, assessment and interventions offered by three youth offending teams (YOTs). A key element was the extent to which children's voices and views can make a difference. In this research, 22 justice-involved children shared their accounts.
- How participative practices can be applied within custody and resettlement. Hampson (2016) explored the views of children on their custody experience and resettlement planning. Sixteen child participants engaged in this research, reflecting on a range of YJS experiences, from initial contact to resettlement).

The above research was selected to provide a pro-participation and voice-focused lens through which children's participation can be explored spanning a wide range of youth justice experience, from diversion to custody and beyond. Together, these qualitative research studies provide insights concerning the concept of participation, children's experiences of real-world engagement and how the YJS might be able to better embed Article 12 rights within its operations.

Reflecting upon Charles (2011), Brown (2019) and Hampson (2016), the proceeding sections of this article will first consider current youth justice system challenges and explore: children's understanding of participation, youth diversion and participation, and children's participation in custody and resettlement. Themes from these studies will be explored leading to conclusions on changes needed for an authentic facilitation of Article 12.

### Current Youth Justice System Challenges to Article 12 Rights

Analysis of the literature suggests that two problematic assumptions exist concerning children's participation in youth justice.

Firstly, participation is inextricably linked to policy agendas. For instance, in England and Wales the 2021-2024 Youth Justice Board (YJB) Strategic Plan states that:

*'We have committed to ... a culture that promotes the participation of children.'*

(Youth Justice Board, 2021: 8)

Although laudable, the YJB (2021) does not either define participation in its Strategic Plan (e.g., in the context of its 'Child First' collaboration tenet), nor consider its parameters or dimensions (and certainly not in terms of what children think). Within operational guidance such as the National Standards for Youth Justice, ambiguity continues to exist (see principle 3, YJB, 2019: 6). Even with the publication of a Youth Justice Participation Strategy (YJB, 2016) which moved towards a more comprehensive conceptualisation of participation, generality prevailed concerning what 'participation' might mean (see YJB, 2016:3). Unfortunately, generality, which suggests a positive acceptance of CRC Article 12, does not facilitate children's meaningful participation or guide practitioners, especially in a context such as youth justice, with clear power imbalances between adults and children (see GC 24, Riyadh Guidelines, 1990). This can be seen in the reality that participation is not always prioritised (as can be seen in the difference between the language used concerning out of court disposals and court related practice (YJB, 2019), suggesting a blurring of understanding and implementation of the Convention in youth justice.

Secondly, participation is often portrayed as provided for children by adults, expecting that 'participation' *should* occur, denying children the right *not* to engage. Children's participation is often presented as an opportunity for interface, whether children want this or not - contrary to CRC provisions. National Standards require evidence of 'participative expectation', for instance, in relation to community disposals (Youth Justice Board, 2019: 6, 12-13), with *non*-participation potentially resulting in sanctions for children and 'up-tariffing' practices (Creaney, 2015; Hart, 2011), exacerbating what Bateman (2017: 24) notes as '*... ambiguity between the*

*enabling and enforcement role of youth justice practitioners.*’ As such, it sits in stark contrast to what the (2009) Committee on the Rights of the Child has advocated, especially continuing concerns expressed by the Committee that:

*‘53. The Committee is deeply concerned about the draconian and punitive nature of the State party’s child justice system and the limited progress made in implementing the Committee’s previous recommendations to bring the child justice system in line with the Convention...’*

(UN Committee on the Rights of the Child, 2023: Para. 53)

Whilst taking part in interventions can create positive outcomes for children (see Smith and Gray, 2019; Case, 2018) unless the type of participation experienced is meaningful, engagement can be counterproductive. By emphasising engagement, sometimes in an almost metrified, system-important manner (Young, 2014), rather than prioritising the quality and appropriateness of participation, the vitality of the concept can become lost, as well impacting negatively on the child’s involvement in the YJS. In this context, the point made by Children’s Rights International (2005: 27) is both poignant and relevant: *‘The voices of children themselves must be prominent in [the] exploration of what is going on in their lives’*.

The challenges outlined matter as much to children involved with the YJS as to any other child; indeed, they may be *more* important for them, given that their active participation might previously have been constrained or even ignored. In fact, specifically relating to the YJS, the CRC suggests that, as a matter of international law, *more* lateral and meaningful understandings of participation are required. However, despite clear international legal standards requiring the placing of children at the heart of their own participative activity, in the YJS of England and Wales, the extent to which children can appropriately participate in decision-making remains unclear. There is continued emphasis on an adult constructed system (Colliver, 2017) as opposed to a YJS which meets the needs of rights holders - children (UNICEF UK, 2020).

### **Children’s understanding of participation (Charles, 2011)**

The problematic assumptions discussed above concerning the concept of participation often go unchallenged. Yet when children were asked to conceptualise and explain their participation to Charles (2011), their responses directly confronted core aspects of these problems coalescing around three foundations: the importance of a child’s intention/choice and communication, the criticality of relationships, and the reality that participation is located in everyday decision-making. These foundations arguably help, because they relate to Article 12, understandings of this provision, in practice (and critically, from the lived experience of children).

#### ***Foundation 1: The importance of a child’s intention/choice and communication***

The children who took part in Charles’ (2011) research, which explored their understanding of participation, evidenced sophisticated views. Views offered flowed from a position where children believed themselves to be the holders of rights, which were important, and critically, *belonged to them*:

*'We've all got rights and no-one minds because the rights are really important. I don't like it when people act like we don't all have them.'*  
(Craig<sup>4</sup>)

Contradicting the assumptions detailed earlier, participation was adamantly claimed to be a personal and organic right flowing from intention - *a child's choice* to decide. This was framed as a personal choice, over which the child had franchise rather than being granted by adults. Refuting the element of compulsion often inherent in adult-centric 'participation' practice, children explained that when an individual was compelled or coerced into making decisions, this significantly *diluted* their right to participate:

*'This is where the adults get it so wrong. If you try to force someone to do something, that's not participation... You don't make that decision, it's taken from you... To participate, you have got to want to do it. End of.'*

(Kyle)

Reflecting the CRC, an understanding of participation as a right which was personal, inviolable, and inherent was robustly articulated. This applied even at a young age and in situations, for example, when encountering YJS agencies, where access to rights could be constrained (Tobin, 2021). At variance with orthodox, adult-centric notions of engagement, this contrasted sharply with more usual hierarchical structures, which enshrine adult dominance of children, especially within the YJS (see Kilkelly and Liefwaard, 2019; YJB, 2016; UN Committee on the Rights of the Child, 2019):

*'I know, I was on an order and the people [YOT staff] were saying they [the Court] wanted me to do things... I got that, but like I said, I still have to agree to do it. It's not as simple as just saying 'do it'...'*

(Jason)

Allied to the notion of intention, children went much further. Critical as their free will to make decisions was, their choices had to be operationalised - something children indicated that *they* had to do. Rejecting more legalistic conceptions of decision-making processes and reflecting aspects of the New Sociology of Childhood (Prout and James, 2015), they described a cycle of participative activity which began with the individual children, expanded to involve others and subsisted in a communicative exchange of words and actions (Charles, 2017). According to the children, at all times, they were key actors in the participative process, with participation being guided by their choice and engagement (Lundy, 2007).

Interestingly, children did not consider there to be any problems communicating with others about what they were doing. Explained as essential to their decision-making, children recognised that, similarly to adults, they cannot simply do whatever they

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<sup>4</sup> Henceforth, all first names used are pseudonyms to protect the child's identity.

want (Johnson, 2017). Rather, whilst choices could be made, they then needed translation in action which involved others. In this sense, participation was seen not as a singular event, but a series of interconnected choices and engagements which could lead to the fulfilment of what a child wanted (Smith and Gray, 2019). For example:

*'Yeh, I can decide some things, but you know, you've got to know what you're doing too... So, when I want to go to town I've got to tell my Dad, then sort out who I'm going with, what bus and where we go. So, there's a few things there I have to think about. It's not as simple as just saying, 'I'm off to town'. So when you tell someone, you've got to have thought about what comes next.'*

(Rhys)

The first foundation of participation from Charles (2011) critically situated children as the drivers of their decision-making. Echoing Article 12:1, children understood and cherished the fact that they themselves had the right and ability to make decisions. Pragmatically, individual children initiated their own participation, directed and then continued its execution; thus, they play a pivotal role in exercising their participative rights. Almost incremental in nature, decision-making was considered a cycle of activity, one where both choice and engagement with others were important.

### ***Foundation 2: Relationships are critical***

Building upon explanations of intention and communication, when explaining the operation of their right to participate, children insisted that relationships were critical. In this context, the term 'relationship' was seen laterally: children saw their interaction in decision-making as part of a complex web embracing individuals and wider society. Notably, they rejected neo-liberal, individualistic understandings of participation and instead tacitly understood that:

*'You don't really make a difference on your own. You can do some stuff, but when you do it with others... a lot more happens.'*

(Jacob)

Representing a more collegiate, social capital-acknowledging and mutually respecting model of participation (Lindfors et al., 2018), participants in Charles (2011) referred to the transformative experience of making decisions in partnership with others. This was seen to enhance their personal maturity, promote experiential learning of participation, generate positive participative capital and bridge inter-generational understandings (and experience of) decision-making. In this sense, children's participation could have broad, positive outcomes and help to foster partnerships between both children and adults.

These types of relational partnerships were seen as being subject to interplay and shifts between those engaged, with a clear understanding that negotiation was central (Beneitez and Dumortier, 2018). Rather than being problematic, this was seen as a chance to more fully explore decision-making and optimise participation in tandem with adults:

*'... sometimes, even though you've decided, you've got to talk to the worker and run through things. They don't normally stop you, but you get little comments and things. They help you to understand things you hadn't thought of...'*

*(Elizabeth)*

Relationships were described as organic, rather than instruments of policy or legislation. 'Organic' in this sense was presented as being somewhat at variance to more traditional power-focused relationships between children and adults, where adults have authority at a child's expense. Rather, equality, inclusion and mutual respect were emphasised, respecting a child's innate autonomy and status as a rights holder:

*'Different people know different things. Even though we're younger, we still know a lot and some things have moved on... When like at school or youth club you work with your teacher or worker, they know certain things. But we see the world differently and don't mind sharing what we know... Together, we can make sense of things.'*

*(Theresa)*

Evolving, respectful and developing forms of relationship were ascribed powerful positive impacts on both children and adults, since each could learn from the other (McMellon and Tisdall, 2020; Riyadh Guidelines Ch. IV A and C, 1990). In addition, constructive adult-child relationships were acknowledged as being important:

*'... we can't do everything on our own and we don't want to... Everyone works together and that's a good thing coz you can help each other.'*

*(Emyr)*

Rather than children wishing to do things by themselves, participants articulated a positive conception of relationships as not merely functional, but a core foundation of participation. Relationships were framed as necessary, welcome interactions facilitating stronger decision-making, enriching understanding between those involved and not relying on power or authority to grow. Through relationships, refinement of decision-making could occur, thus benefitting children and adults alike.

### ***Foundation 3: The reality that participation is located in everyday decision making***

The final foundation of participation articulated by Charles (2011) was that primarily, decision making was to be found in the everyday. Contradicting adult reliance on formal structures, children perceived that participation was, '*... nothing special...*' (Jim) in the sense of it being a privileged activity but was nonetheless fundamental to lived experience. This understanding of participation is profound, especially when considered in the contexts of foundations 1 and 2 above. In each, the child is at the heart of participation and the utilisation of decision-making rights is personal and applied (Desmet et al., 2015), with children (if meaningful participation is being undertaken) playing a leading role (see Committee on the Rights of the Child, 2009).

Allied to this understanding of participation was robust rejection of adult-centric processes, which ironically could themselves inhibit or negate participation. For instance:

*'I am part of a committee where I live which wants to make a difference for kids in the area. To be honest, it's interesting, but I don't see it as changing much for anyone... perhaps those of us in the group.'*

*(Lucy)*

Adult emphasis upon formal process was seen to obscure the real power of everyday decision-making to create positive outcomes. Rather than acknowledge engagement in regular participative activity and building upon this, children suggested that adults failed to recognise what was already happening and thereby limited participation by underestimating children's capacity, experience and ability to make meaningful decisions (Federle, 2017). Moreover, reliance on formal, policy-derived participation was considered deeply problematic, since it constrained or compartmentalised decision-making artificially, when in reality it was more diffuse, or as Seim and Slettebø (2017: 822) suggest, '*... more messy and complicated than the policy rhetoric suggests.*'

The clear message offered by children regarding the problematising impacts of formal 'participative' processes should not be underestimated. Ironically, the processes that adults created were considered to deprecate the very fabric of participation, minimising potential for engagement. Engagement in decision-making identified as important by children was mundane, as stated during Charles (2011):

*'You know, I get up and I decide to have a shower, then I have breakfast, and I get ready for school. That's me making decisions all the time, but really, it's boring... just what we do all the time.'*

*(Osian)*

A conclusion from the process-everyday distinction of participation voiced by children could be that adults choose not to recognise the sheer volume of decisions made by children. Further, by not perceiving the everyday as important, impactful participation in spaces such as education, but not necessarily within classroom spaces (Fleming, 2017), are also ignored. The prospective effect of harnessing everyday decision-making then fades. Children related how exercising their right helped them make better decisions and generate experiences to inform this going forward, emphasising the dangers of replacing this with something that children *do not want nor understand*.

### ***What the three foundations suggest about understandings of participation***

Findings from Charles (2011) suggest that children have a well-developed understanding of their participative rights and what they mean by 'participation'. The centrality of the child in the decision-making process was acknowledged and they emphasised their need to meaningfully participate by it being a matter of their choice (Krappmann, 2010). There was also a challenge for adults to comprehend that children already make many decisions, but these have been rendered invisible, privileging adult-centric process instead. Reflecting upon these key foundational

messages, there is a clear divide between children and adults' understanding of participation. This division has real consequences on how the lives of children are perceived and the way participative opportunities are developed. Importantly, these foundations grant insight into children's views and can guide the generation of more progressive, child-respecting approaches.

### **Child Diversion and Participation (Brown, 2019)**

Whilst the section above suggests that much change is needed for policy and practice to reflect children's understanding of participation, the YJS landscape is not entirely bleak. Brown's (2019) findings illustrate how interesting and constructive approaches to both participation and engagement have been generated in the YJS at initial, or lower stages of contact with justice-involved children.

The use of pre-court diversion with justice-involved children is a recurrent thread running through various iterations of international children's rights standards (see United Nations, 1985; UNCRC, Article 40,3 (b), UN Committee on the Rights of the Child, 2019). When these standards are set alongside existing research cautioning against the criminogenic dangers of 'system contact' (McAra and McVie, 2007), it is clear that youth diversion should occupy a prominent role within any authentically rights-respecting system which seeks to be 'Child First' in its approach to justice (Kilkelly et al. 2023). Viewing youth diversion in isolation however - as a bolt-on component of a rights-respecting YJS - is potentially unhelpful. Youth diversion instead has the potential to imbue key children's rights principles within its workings. Participation (Article 12) is one such a principle that can and should saturate youth diversion. However, the extent to which - as discussed above - genuine forms of child participation have routinely been embedded in such processes (and the YJS more widely) has been questioned (Creaney, 2014; Little, 2015; Gillon, 2018; UN Committee on the Rights of the Child, 2023).

### ***Diversion in Wales: Offering an example of pro-participatory practice***

Wales, since its devolutionary settlement, via both legislation and policy, has afforded prominence to child participation (Williams, 2013) and youth diversion (Welsh Assembly Government and Youth Justice Board, 2004; Welsh Government and Youth Justice Board, 2014; Welsh Government and Ministry of Justice, 2019). Within youth justice practice, such policy prioritisation has arguably helped foster dynamic forms of youth diversion at a localised level, which aim to embed child participation.

Brown (2019) explored youth diversion in Wales, including the extent to which Article 12 rights were operationalised and experienced by children, as well as the significance afforded to parental and carer involvement - see Article 5; Kilkelly, 2020. Specifically, the research examined a pre-court youth diversion model operating in three distinct locations (within one YOT region). The model was based upon the 'Bureau' approach as described in Haines et al. (2013) which broadly adopts the processes detailed in Haines and Charles (2010). The principal ambition of the pre-court diversion approach is to divert children aged 10-17 years old, who had committed a criminal offence, away from formal YJS processes, but also where necessary into appropriate interventions designed to meet their needs and promote



pro-social behaviour (i.e., a type of 'dual diversion'). As a Senior YOT Practitioner in one of the locations examined emphasised:

*'There's getting the young people who make that one-off mistake, who are never going to do it again, and they won't have to pay for it for the rest of their lives. And it's catching those ones who actually are on a path to a criminal career, because of no support or whatever else is going on, and chucking that support at them then...'*

*(Senior YOT Practitioner)*

Key to achieving this 'dual diversion' within the diversionary approach adopted was the Panel stage: which formed a critical part of the diversion process and was specifically intended to inform decision-making by agencies, as well as recognising the child's voice (and where appropriate) catering for parent/carer' input. The Panel stage comprised two halves; the first involved a police sergeant chairing a meeting with other Panel members (normally a volunteer member of the public, a YOT practitioner and a YOT police officer), in which a report on the child and the offence context, was read, deliberated and a 'suggested' outcome agreed. The report laid before the Panel was co-written by a YOT Officer, reflecting the child's input, encompassing their views about what led to their engagement with the YOT and what types of support they might have benefitted from post-Panel (Haines et al., 2013). The second half of the Panel provided a dedicated opportunity for the Panel members - led by the police sergeant - to meet with the child and their parents/carers. At this discussion, children, supported by a YOT Officer and their parents/carers were able, using their own language, to share their views about their experiences and to give context to their 'drawing in' to the justice system. Finally an 'agreed' disposal outcome was decided upon and administered (e.g., a Youth Restorative Disposal, a Youth Caution, or a Youth Conditional Caution), along with any packages of support that may benefit the child (or which was asked for by the child).

Within the youth diversion model, the Panel stage provides an important forum for child participation. Many of the children interviewed in Brown (2019) welcomed the chance to participate at the Panel, as one child explained:

*'... They don't just put everything on you! They want to know what your side of the story is! So that's good! They were really understanding as well like!'*

*(Aled)*

That the second half of the Panel was designed to cater for child participation is clearly important, as is the fact that children's views were initially captured in designing the process in some of the areas – yet, as has already been highlighted, simply creating space for children's participation within established youth diversion processes does not in itself make a process genuinely participatory or rights-respecting in the context of the legal requirements of Article 12. Given this fact, it is notable that certain children in Brown's (2019) research went on to afford credence to a 'variety of dynamics' they felt assisted them in participating more fully in the Panel discussion - suggesting that both positive engagement and an application of Article 12 rights were occurring.

For example, attention was drawn to the importance of Panel members' interpersonal and relational skills when talking with them. Existing research (Robin-D'Cruz, 2020) highlights the necessity of treating children respectfully within YJS processes (see also Article 40; UN Committee on the Rights of the Child, 2019: Para. 46). Mirroring those findings, Brown (2019) highlighted the importance of Panel members being considerate and attentive:

*'I felt comfortable there ... people spoke to me how I wanted people to speak to me.'*

*(Idris)*

These children clearly recognised and valued a respectful, rather than antagonistic environment. This is important for pre-court youth diversion, as children are often appearing for a first offence and therefore may not possess prior experience of the Panel process. They may initially be apprehensive and perceive it a scary or stressful event, as one child in the research explained:

*'Obviously, it's going to be nervous for me first time coming into here, not knowing what is going to happen.'*

*(Elijah)*

Certain children also drew attention to the foci of conversation with Panel members. Rather than acknowledging children's strengths, ambitions and promoting their capabilities, attention in such processes has often instead focused on their failings, riskiness, and shortcomings (Case and Haines, 2015). Refreshingly, children commented on the way Panel members chose not to fixate on negatives, including any offences/negative behaviours, and instead spent time engaging constructively with them about their interests, ambitions, and goals (Article 40.1). As a YOT police officer in one of the locations emphasised: *'It's not about a row, I never raise my voice [...] I want them to do the talking and think...'* Here, the forward-focus of the conversations (and the emphasis on the participative elements of thinking and talking) not only helped encourage certain children to open-up about their hobbies and hopes, but also aligned strongly with the diversionary ethos and intent behind the whole youth diversion model:

*'They were trying to get me to think about the positives, not the negatives!'*

*(Steffan)*

*'...I was expecting them to ask about details, that's a good thing of course, because I was worried that I would have to talk a lot about the incident, and I didn't want to do that, so I really liked how they made it short and understanding.'*

*(Freya)*

That children felt able to enter into dialogue with Panel members around positive foci opened up interesting conversation about interventions, which may not have otherwise been fully explored. These conversations created opportunities for participation in decision making, where the child's views and formed part of outcome setting. For example, one child who had committed criminal damage indicated that

he was pleased to be given the opportunity to acquire trade and industry skills, which could assist him to gain an occupation upon finishing his education, as he explained:

*'I think it is a good thing as well, because if you did do criminal damage...you can learn something as well by fixing it as well ... you're actually learning something as well ... instead of just ending it here ...'*

(Noah)

As has been illustrated, the strength of the Panel meeting in youth diversion models examined by Brown (2019) was not simply in providing a setting *allowing* children to speak, but recognising the binding effect of Article 12 rights and the importance of both hearing and responding positively to children's voice. When additional factors such as the presence of parents and carers are also considered, regarding their impact for children, then a simple conversation can potentially significantly impact a child's future life trajectory. Here, the supportive role that parents/carers were able to occupy was reflected upon by Noah who explained: *'...say they was asking me questions [the Panel members] I didn't really know, then they [my parents] could understand them and translate them...'*, whilst Aled also emphasised that *'I much prefer my mother to be with me! Not because I can't do it on my own, or whatever, but because she comforts me.'* What these quotations demonstrate is that parents and carers – reflecting Article 5 – can play a significant role in supporting children to exercise their rights, particularly owing to the at times reconditeness of the YJS, which can be both confusing and overwhelming for them (see Kilkelly, 2020 – although this support should not be conflated with the distinctive role of legal representation within justice processes).

### ***Consistency: ensuring participation throughout the diversionary process***

The development of diversion in Wales, framed within pro-children's rights principles, is characterised by activity which has been welcomed by children and practitioners alike. Whilst there is evidence of constructive work to promote engagement, challenges still remain in terms of participation, as envisaged in Article 12. In particular, across the YJS, there is a constant danger of participation being siloed to phases/stages of the overall process (see UN Committee on the Rights of the Child, 2009; 2019). However, Brown (2019) found that pro-participatory approaches in the areas of: voice (children felt that they could speak and discuss openly), a respectful environment (diversion schemes were designed to avoid intimidation), and a future-focus (rather than fixating on the offence committed, children appreciated discussion around their hopes and aspirations moving forward), were positive innovations (see Lundy, 2007; United Nations, 1990a).

Although welcome and appreciated, Brown (2019) also highlighted that children felt that the bedrock of pro-participative activity demonstrated in youth diversion models could still be improved. For instance, children suggested that more information (see Article 17) should be given to them prior to diversion scheme engagement to encourage and inform their subsequent participation:

*'I knew what it was about this time, because it's happened before, but last time I didn't have a clue.'*

(Alys)

Reflecting the participatory provisions and foci of the CRC, any genuinely participatory youth diversion processes must ensure that children are fully informed – using understandable methods – of what a youth diversion process entails. Ignoring this right to information could result in anxiety, apprehension and non-engagement: in short, a denial of participation rights. At a more strategic level however, Brown (2019) exemplifies the potential that when YJS diversion processes are designed to respect provisions such as CRC Article 12, significant benefits can be achieved, both for children and adults.

### **Participation in Custody and Resettlement (Hampson, 2016)**

Brown's (2019) research on diversion processes evidenced potential positive steps to realise children's participation rights in meaningful ways (see GC 24, Para 46). In contemporary discussion, notably concerning the England and Wales approach to youth justice, this matters due to the recommendation made by the UN Committee on the Rights of the Child (2023: Para 54 (c)) and the statement by the Committee that:

'54. Recalling its general comment No. 24 (2019) on children's rights in the child justice system, the Committee reiterates its previous recommendations and urges the State party to bring its child justice system fully into line with the Convention and other relevant standards...'

(UN Committee on the Rights of the Child, 2023: Para 54)

It must be recognised at the same though that arguably, there is some system flexibility at the pre-court stage, whereas this is much more challenging, but no less important, for higher-tariff disposals. Accordingly, Hampson (2016) explored the extent of children's participatory rights, particularly the right to be meaningfully heard, in youth justice practice with children given custodial outcomes within a secure system which struggles to facilitate not only the prevailing Child First justice approach supported by the YJB (Case and Haines, 2021), but core provisions of the CRC (UN Committee on the Rights of the Child, 2023)

Sentencing children to custody is the most extreme YJS disposal and, positively, is now in significant decline (now consistently below 500 children in custody in England and Wales at any one time, compared with over 3000 in 2003; Ministry of Justice, 2021), *more* in line with principles of 'last resort' (Article 37). However, despite this important trend, children *are* still sent to custody, despite frequent serious concerns about the safety and general state of the secure estate into which they are sent (see for example the closure and removal of children from both Medway and Rainsbrook Secure Training Centres (STC), HMIP's (2021a) critical re-inspection of Oakhill STC and persisting international concern regarding the use of child custody (UN Committee on the Rights of the Child, 2016). CRC rights also apply to children in custody but are often in danger of being disapplied by default (see UN Committee on the Rights of the Child, 2023: Para 54 (b)). It is unfortunate that the UN rules covering incarcerated children ('Havana Rules'; United Nations, 1990b) do not specify anything regarding participation and the child's right to be heard; nevertheless, since

the CRC applies in its entirety to *all* children, Article 12 is still relevant (if more difficult to realise in practice) (Killkelly and Bergin, 2021; EU, 2016; Freeman, 2009)

Custodial institutions are designed and run by adults so children are expected to conform to adult agendas. Accordingly, the extent of meaningful participation which can take place is severely limited, challenging the respecting children's rights and the provision of Article 12-informed environments. However, within this, there are promising aspects reported through inspections indicating that children are listened to once *in* custody, at least relating to the regime imposed upon them, for example a recent inspection report of Parc YOI states: '*Consultation was thorough and children's views were listened to, which often led to change*' (HMIP, 2021b: 15). However, an inspection undertaken at Feltham A reported that children generally did not attend their own meetings (suggesting that there may not even have been any 'involvement', as explored by Steinhardt et al., 2022), leaving them unable to input into their own plans, and in many cases even being unaware of the targets made for them, surely rendering them meaningless (HMIP, 2021c) and not CRC-compliant. It seems that while consultation-type approaches towards children might not in themselves result in a constructive regime, in the context of custodial settings, these may be necessary *pre-requisites* of participation (Parc YOI's inspection was largely positive, whereas both the reinspection of Oakhill STC and the inspection of Feltham A identified many 'key concerns', with neither reports referencing evidence of consultation with children; the use of the term 'consultation' should be noted here, since it is differentiated from 'participation'. This may be, as suggested above, an example of terminological blurring, which can obscure the extent to which Article 12 rights are respected).

It is a strength of the inspectorate that yearly surveys of children in custody are conducted (specifically STCs and YOIs) to give them a voice in their own provision, although how much change results is unclear. However, it at least gives children an opportunity to proffer their views (thereby realising core aspects of their Article 12 rights) without hinderance and has given rise to concerns about children feeling unsafe and uncared for (HMIP, 2022a, 2022b and 2020). Whilst this kind of feedback is deeply worrying, it illustrates that children *can* give honest survey responses and are capable of formulating important and impactful views. Yet, although this annual consultation itself gives children a voice and covers a wide range of issues, nowhere does it ask children about whether (or how) they are facilitated to participate in processes, whether (or how) they are consulted, or whether any consultation taking place leads to change indicating that any such opportunities are meaningful. Given the capacity for children to answer honestly in other areas of the survey, this would be a useful addition and might, as Leifaard and Rap (2016) suggest, enhance professional learning and subsequent practice.

### ***Participation at the YJS 'high end'***

To gain some understanding of children's experiences of custody and resettlement, Hampson (2016) interviewed a range of children both in and post-custody. Whilst the primary purpose of this research was to compare resettlement good practice (and what YOTs claimed to be doing) with the realities for children, it also explored children's participation, since this is vital for effective resettlement. Whilst children are in custody, they have plans with a range of targets to achieve; although good

resettlement practice maintains that everything happening inside should be focused on release, this rarely happens in reality, with most targets insularly focused on in-custody regime and behaviour management (Hazel and Bateman, 2021).

Planning meetings also (theoretically) give opportunity for the child to input ideas and preferences, but as the Feltham A inspection showed, and a previous resettlement-focused thematic inspection also discussed, children were rarely able to participate meaningfully in the development either of custodial plans or plans for resettlement (HMIP, 2015). Instead, 'consultation' opportunities were offered, but these were, in terms of Article 12, not participation, but much reduced, tick-box exercise with which children were expected to agree and, for instance, merely sign proposed plans. Unfortunately, a more recent report into custody and resettlement shows little improvement with 35% of the children not even being aware that they had a plan, let alone being facilitated to contribute (HMIP, 2019). Despite the 2015 HMIP report calling for children to have more of a voice within their plans, as required by Article 12.1, disappointingly the more recent one did not appear to consider this at all, the closest reference being:

*'Children were 'fitted in' to what was available within the institution, with little attention paid to their individual needs'*

(HMIP, 2019: 12)

This indicates not only that children were not involved in decision-making, but that regard was not given to their strengths and interests (see GC 24, 2019: 41 and 46). This was borne out by Hampson (2016), where a child explained that although he was being given a chance of weekly temporary release from custody to help his resettlement by developing employment skills, the work provided was farm-based within the locale of the prison – he expressed frustration that as he had zero interest in farming it would not help his resettlement. This speaks of a convenience placement rather than one based on hearing the child's view about what could be meaningful to assist with *their* future career prospects.

Hampson's (2016) research also observed an emphasis (both in custody and beyond) on offence-focused work, creating negative 'offender' labelling of the child, rather than facilitating pro-social development. This may partially explain the high rate of children unable to maintain post-release supervision plans (Hampson, 2016), especially when they include negative options uninformed by their own view of what would be useful. Hopefully this negative focus is changing with the shift in youth justice policy towards Child First, with positive-focused plans much more based on children's own perception of what would help; but the habit of offence focus appears to be a tenaciously sticky relic from the previous risk-focused approach (Hampson, 2022).

In Hampson's (2016) study, planning whilst in custody not only tended to be focused on in-custody concerns (rather than resettlement planning), but also appeared to be imposed on children, rather than reflecting their opinion on their own needs and recognising their Article 12 rights. As one child expressed:

*'they put me on loads of courses, like they put me on cocaine courses, loads of different courses that I didn't really didn't feel that I needed to do because I wasn't like a heavy drug user.'*

*(Rhys)*

Another participant explained that they had not been given an opportunity to contribute to their custody plan and expressed dislike of its content, which was deeply concerning in terms both for the child's ability to achieve aims imposed by others, and for the likelihood of enforced goals having any positive impact. Other children within the study seemed unclear whether they had inputted into their plans, but their lack of clarity regarding the contents of those plans rather suggests that this was, at best, limited. These examples suggest that Article 12 rights were neither prioritised, explained to, or implemented by these highly vulnerable children.

When children are released from custody they have a period of time on licence, with a range of conditions to which they need to keep in order to remain in the community (otherwise being recalled to custody) (YJB, 2019). A complete lack of meaningful participation appeared to be commonplace in Hampson's (2016) study in the construction of these conditions, which were imposed on the child on their release. One girl who was interviewed commented that:

*'they [the YOT workers] ... come up and like just told me licence stuff like what was happening when I got out. So I just thought ...that I didn't really have much say in what I was what was gonna happen.'*

*(Ffion)*

Another child explained that although he tried to tell the Court, when he was accused of breaching his electronic tag (curfew), that this restriction was something with which he could not cope, his licence contained the same requirement, causing him frustration that they would not listen and worry that he would breach again and be recalled:

*'I got put in there for breaching me tag and they put me back on tag and I told the court that I couldn't do it, and they put me on, put me back on tag as soon as I got out.'*

*(Ifan)*

The picture regarding how much input children have into their resettlement plans (discussed and arranged whilst in custody, to assist with resettlement post-release) was somewhat mixed, with some children appreciating that their opinions had been taken into account. One child commented: *'fair play they did listen to me'*, whereas another child complained that he was put on a course in which he was not really interested:

*'it's not the course I want to do I wanted to do like vehicle maintenance, but I got on vehicle body repair because there was no spaces left on the other one.'*

*(Dylan)*

The tendency for children to be put on courses of convenience rather than those in which they are truly interested has been found elsewhere – reducing the capacity for education to act as a ‘rehabilitative tool’ (Case and Hazel, 2020: 2). This is especially difficult for children leaving custody during the year, when many further education courses only have a start date of September (Hampson, 2016). In such contexts, in addition to a failure of Article 12 rights, there appears also to be little regard for ‘whole Convention’ approaches to safeguard critical rights such as (meaningful) education (Article 28).

Hampson’s (2016) study shows that whilst there are some attempts to draw on children’s own goals, strengths and to hear their voices within custodial and resettlement planning, there are still barriers to this being consistently applied, resulting in something of a postcode lottery, depending on attitudes within both the home YOT and the custodial institution towards children’s participation. This variability in approach sits uneasily with the CRC, which requires global adherence to minimum participative rights standards. Specifically, GC 24, Paragraph 14, clearly states that:

*‘The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice...’*  
(UN Committee on the Rights of the Child, 2019, Para. 14)

This applies as much to those engaged in higher end YJS involvement, as with those at the pre-court, lower part of the spectrum. It is clear from Hampson’s (2016) work that although some efforts are being made to adopt pro-participative approaches, attainment of the standard expected by the United Nations Committee on the Rights of the Child and children has not yet been achieved and that much more work, including listening to children and engaging them as co-creators of participative approaches, is needed.

## **Conclusion - Key research messages on children’s participation in the YJS**

The need to consider how participation works in the YJS is clear when considering that children’s rights instruments (both general and youth justice-centric) all identify facilitating, and actively listening to, the child’s voice as key. This has been reiterated repeatedly through Periodic Reviews of the UN Committee on the Rights of the Child and in other critical reports (for instance, UNCRC, 2023, Welsh Parliament, 2021). There are hints in the literature concerning where reform is necessary. For example, Peer Power (2021) highlights the importance of YOTs understanding terminology and children’s perspectives better, which echoes points from Charles’ (2011) research. Even within YJB strategy (2019, 2016), the need for a more co-ordinated and consistent approach to participation is recognised, points also identified by Brown (2019) and Hampson (2016).

In order to enable the YJS to fully reflect global participation right expectations (which, of course, are minimum thresholds), key steps are required which are difficult. Primarily, understandings of participation need to be child-centric, rather than adult-centric. Assumptions which adults make about child participation can at best be limiting but at worst can completely negate it and damage the very fabric of the



concept. An example is the assumption that children always *want* to participate, developing into an unhelpful mandatory activity (ironically removing the child's ability to decide). Children have the right to choose *whether* they will participate, as well as *how* - so it needs to be led by children. Additionally, children's expectations of participation need to be understood and positively responded to by adults. Participation happens best as part of a collaborative relationship, a partnership approach which is characterised by collegiate and respectful decision-making which contributes towards personal (pro-social) development. This way, the strengths of all participants (adults and children) are maximised and utilised, and the decision-making which children routinely undertake, whilst currently often invisible, is recognised as a strength enabling them to develop the constructive approaches to the exercise of their Article 12 rights still further.

The success of children's participation processes within diversion demonstrates that it is *possible* to develop this within the youth justice arena, but the *lack* of positive progress with this for children at the higher end of the system - those in custody, demonstrates an uneven application across the YJS. Recently, the UK Government was heavily criticised in the 2023 Concluding Observations offered by the UN Committee on the Rights of the Child and, in terms of participation, the Committee poignantly stated that:

'... children's views are not systematically taken into account in decisions affecting them and in national and local decision-making...'  
(UNCRC 2023: Para 23)

Undoubtedly it is more challenging to introduce true (voluntary) participation where statutory processes are in progress, particularly as youth justice practitioners then work in a '*dual role of enforcer and enabler*' (Peer Power, 2021: 42). Challenging though this may be, progress is possible and, since the UK is a signatory to the UNCRC, a powerful case can be made that to meet international legal obligations, further effort is required - by Government, the YJB, secure estate providers and youth justice practitioners. This extends even into what have sometimes been considered non-negotiable aspects to the system, such as Court-imposed sentences or statutory requirements from Parliament. Whilst these may currently act to reduce opportunities for meaningful participation, recognition of what children say about the vital and transformative impacts that their participation can create surely sound the clarion call for legislative and policy change. As Charles (2011), Brown (2019) and Hampson (2016) all commonly found, a rights-respecting and consistent approach to participation, grounded in genuine partnership between adults and children, can yield positive outcomes. In terms of the YJS, these outcomes may include reduced offending, the building of resilience in children and early identification of challenges which can be resolved. The provisions of Article 12 are often spoken of fondly by adults, but as this article suggests, non-implementation of participation rights is endemic in the sphere of youth justice and can have severe consequences. Across the YJS in England and Wales therefore, it is advocated that an urgent revisitation be undertaken of how Article 12 is understood and truly embedded within process and practice, informed by the valuable voices of children .

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