

### 3. Nature and Scope of Article 12 of the CRC

According to the UN Committee on the Rights of the Child, Article 12 is one of the Convention's four

Article 2 – Non-Discrimination  
Article 3 - Best Interests  
Article 6 – Right to Life, Survival and Development  
**Article 12 – Right of the Child to be Heard**

General Principles, which guide its effective implementation.

Thus, as a General Principle, the Committee considers Article 12 not only as a right in itself, but it is also relevant in the interpretation and implementation of all other rights. It is a substantive right in that it

highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights but it is also a procedural right in that it gives children the ability to indicate if any of their other rights have been violated. The status given to Article 12 reflects the fact that the right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. Although Article 12 contains a right of the child, and places obligations, explained below, on duty bearers to fulfil this right, it does not impose a duty on the child to express his or her views.

#### Article 12 & Child Participation

Often the terminology around Article 12 can be confusing. Sometimes, it is referred to the right of the child to participate. However, participation, which is not specifically mentioned in Article 12, is a multi-faceted concept and much broader in scope than this particular provision. Child Participation encompasses not only children having their views respected in decisions affecting them but it also embraces all the CRC articles which must be read together with Article 12 to ensure effective participation. First Article 12 will be addressed based on a literal interpretation of this provision. Following this, the other provisions (Articles 3, 13 and 17 in particular), which enhance the process of listening to children, will be explored.

## Article 12 (1) and (2): A Literal Interpretation

Article 12 of the Convention has two distinct parts or paragraphs.

### **Article 12**

**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 establishes the right of every child, once they are capable of forming views, to freely express her or his views in all matters affecting her or him. Once the child has expressed their views in a manner suited to their circumstances, those views must be considered seriously by being given due weight in accordance with the child's age and maturity. This right imposes a clear legal obligation on States parties to ensure that this right is recognised in practice and ensure its implementation by listening to the views of the child and accord them due weight. According to the UN Committee on the Rights of the Child, the international body responsible for monitoring the CRC's implementation, this obligation requires that states, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.

It is important at the outset to point out that Article 12 refers to the voice of the child not choice. In other words, the views of the child are not determinative, they are merely to be considered as one factor in the overall decision-making process. Thus, it differs from a child's right to consent for example, as the right to consent implies that the child decides. In the context of Article 12, the child does not make the final decision – he or she merely contributes informed views (provided information is given to them beforehand) into the decision-making process.

The interpretation of Article 12 is drawn from General Comment No 12<sup>1</sup> of the Committee on the Rights of the Child.

**‘Shall assure’:** The provision requires that states “shall assure” the right of the child to freely express her or his views. According to the Committee, “shall assure” is a legal term of special strength, which leaves no leeway for State parties’ discretion. This means that states parties are under strict obligation to undertake appropriate measures to fully implement this right for all children.

**‘Capable of forming his or her own views’:** Given the literal interpretation only a child capable of forming his or her own view enjoys the right under Article 12. According to the Committee, this phrase should not be seen as a limitation on which children can enjoy Article 12 rights, rather it creates an obligation on states to assess the capacity of each child to form an autonomous (‘his or her own’) opinion to the greatest extent possible. States should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.

Although many states use age limits, the Committee on the Rights of the Child discourages states parties from introducing age limits either in law or in practice, which operate to restrict the right of the child to be heard.

The Committee makes the following points:

1. Children of young ages and who are non-verbal are capable of forming views and have the right to have them heard by adults using creative approaches like play, body language, facial expressions, and drawing and painting, to demonstrate understanding, choices and preferences.
2. Sufficient understanding rather than comprehensive knowledge is required before children can form their views.
3. Particular efforts will be necessary to ensure the views of children who have disabilities, are marginalised or who do not speak the majority language are heard.
4. It is important to be aware of the potentially negative or harmful effects for some children in expressing their views. This might be relevant, for instance, to victims of abuse or children who for whatever reason risk reprisal or rebuke for speaking out.

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<sup>1</sup> UN Committee on the Rights of the Child, General Comment No 12 (2009): The Right of the Child to be Heard, UN Doc. CRC/C/GC/12.

**“The right to express those views freely”:** This requirement of Article 12(1) means that children can express their views without pressure and they can choose whether or not to exercise the right to be heard. It also means that children must not be manipulated or subjected to pressure. This requirement also means that children must have the benefit of a safe environment to speak out and share their views. The environment must be one in which the child feels respected and secure when freely expressing her or his opinions. The Committee on the Rights of the Child has highlighted that a child should not be interviewed more often than necessary, in particular when harmful events are explored because this can have a traumatic impact on the child.

**“In all matters affecting the child”:** This indicates a broad and inclusive interpretation of Article 12(1) is important. The provision does not list those matters in which the child’s views must be heard but rather states that the child has a right to be heard with respect to all issues and subjects, which affect him or her.

So to recap the first part of Article 12(1) requires that:

Every child capable of forming his or her own view must be facilitated to express that view in all matters that affect him or her.

The second part of Article 12(1) deals with what must then happen to those views.

**“Being given due weight in accordance with the age and maturity of the child”:** This part of Article 12 makes it clear that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views. Once a child has expressed his or her own view, the child’s age and maturity must be assessed in order to identify the weight to be attached to those views.

Crucially, this is a dual process – neither element of age nor maturity can be taken in isolation – as both age and maturity are relevant to the assessment. This reflects that age alone is not an adequate indication of what weight to afford to a child’s views. The Committee has recognised that children’s levels of understanding are not uniformly linked to their biological age; research shows that information, experience, environment, social and cultural expectations and levels of support all contribute to the development of a child’s capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination.

Maturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of article 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child.

Relevant here too is the concept of evolving capacity, set out in Article 5 of the CRC. Under Article 5, states parties shall respect the responsibilities, rights and duties of parents, legal guardians, or members of the extended family or community as provided for by local custom, to give direction and guidance to the child in her or his exercise of the rights recognized in the Convention. Consequently, the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities. This recognises that the more the child, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute her or his views.

In short, the second part of Article 12 details the right of the child to be heard in judicial and administrative proceedings. This can be done either directly or indirectly.

The fact that Article 12(2) begins with a link ("for this purpose") to Article 12(1) explains the important connection between the first and the second paragraphs of Article 12.

**"in any judicial and administrative proceedings affecting the child":** On top of the more general right to be heard in all matters affecting the child, Article 12(2) requires in furtherance of this right and addition that the child shall be provided with the opportunity to be heard in 'any judicial and administrative proceedings'. According to the Committee on the Rights of the Child, this provision applies to all relevant judicial proceedings affecting the child, without limitation.

The following are the types of proceedings to which Article 12(2) applies

**Judicial proceedings:** Parental separation, custody, alternative care, adoption, maintenance and succession, children in conflict with the law, children as victims of violence, abuse or other crimes, health care, social security, separated asylum-seeking and refugee children, children as victims of humanitarian crises, armed conflict or emergencies.

**Administrative proceedings:** Decisions about children's education, health, environment, living conditions, right to state benefits like social security and housing.

Both kinds of proceedings may involve alternative dispute mechanisms such as mediation, arbitration and restorative justice mechanisms.

The state, the child or another party may initiate proceedings. They may involve the child directly as a party or the child may be a third party – a victim, witness or other participant – involved indirectly.

**“Either directly, or through a representative or an appropriate body”:** According to the Committee on the Rights of the Child, after the child has decided to be heard, he or she must decide how they want to be heard. The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.

**Representatives:** The representative of the child can be the parent, a lawyer, or another person like a social worker or a youth worker for instance. The Committee on the Rights of the Child has warned, however that in many cases there may be a conflict of interest between the child and their most obvious representative (e.g. his or her parent). The representative must ensure that he or she transmits the child's views correctly to the decision maker and representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children. The representative must be aware and act so as to convey the understanding that that he or she represents exclusively the interests of the child, representing his or her views. The Committee on the Rights of the Child has recommended that codes of conduct should be developed for representatives who are appointed to represent the child's views.

**“In a manner consistent with the procedural rules of national law”:** The Committee on the Rights of the Child has warned that this clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States parties are encouraged to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one's own files.

In summary:

- All children capable of forming a view have the right to be heard – this is not a duty;
- Children may need assistance, support and creativity to help them to express their views;
- Their entitlement is to express those views on all matters that affect them, broadly defined;
- The process of determining what weight should be given to the child's views is a distinct process that requires an individual assessment of the child's age and the child's maturity.
- It is important to remember that as children's capacity evolves, it will involve them taking on greater responsibility for decision-making.
- Article 12(2) applies the principle in Article 12(2) by recognising the right of the child to be heard in judicial and administrative proceedings affecting the child;
- This can be done directly or indirectly, as the child chooses;
- Representatives have particular obligations to act for the child.

#### **Child Participation: Article 12 and Relationship with other CRC**

It should be noted that the holistic nature of the CRC requires that in order to effectively implement

Article 12, other rights of the child must also be adhered to in tandem with Article 12. These include: Article 3 requires that children be heard in order to help determine what decision will be in their best interests; Article 13 which protects the child's right to freedom of expression and acknowledges that children express themselves 'regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice'; and finally, Article 17 which together with Article 13 requires that States 'shall ensure that the child has access to information and material from a diversity of national and international sources'. Thus, in effect, in order to make sure that any decision affecting a child is made in his or her best interests, he or she must be provided with an opportunity to express views on the decision being made. However, in order to be able to contribute to a decision,

the child should be provided with relevant child appropriate information concerning the decision. Where the child wants to contribute to the decision making process and has been provided with this information, he or she must be facilitated in expressing his or her views in a manner which is appropriate under the circumstances. Any views expressed must be seriously considered during the final decision-making process with feedback being provided to the child following the decision-making process. In the absence of feedback, the process runs the risk of being a tokenistic one and may cause more harm than good to the child concerned.