

THE KEY ISSUES

The right of children to have a say and have their views taken seriously is one of the core values of the UNCRC. It applies to decisions across all levels and situations. While children do not vote in elections, Governments and other authorities nevertheless have to take into account children's wishes in other ways when developing policies, procedures or legislation.

As the UN Committee on the Rights of the Child pointed out in its General Comment 12 (2009), this right also applies to decisions made about individual children, about their care, education, home life, communities, healthcare, judicial or administrative proceedings and other matters.

Indeed, as one of the four general principles of the Convention, the right of children under article 12 to have a say in decisions affecting them is not only a right in itself, but it also must be taken into account when considering the application of all other rights.² It should be considered in the light of other UNCRC articles, including article 3 (the best interests of the child being the primary consideration), article 5 (appropriate direction and guidance from parents), article 13 (freedom of expression), article 17 (the right to access information) and article 42 (duty to inform children and adults of the rights of children).

Evolving capacity

Childhood is a period of extraordinary growth and development, during which children's capacities to understand, weigh information, exercise judgment and make and communicate decisions are constantly evolving. Indeed this is a key distinction between childhood and adulthood. Adults are legally presumed to have developed the necessary capacities in all spheres to take sole responsibility for their actions – whether or not in reality they are competent. Since children's capacities are developing, they are presumed to lack the competence to take responsibility for themselves and are provided with protections corresponding to their perceived immaturity and vulnerability.³

The evolving capacity of children to form views and express them is recognised in article 12, along with the responsibility of authorities to give the views of children "due weight" in accordance with their "age and maturity".⁴ While very young children do not have the same capacities as older children or adults, they are often able to express views on issues that affect them.⁵ They are entitled to respect for their capacities and failure to do so both denies them respect as individuals and restricts their opportunities to develop decision-making capacity.

While adulthood confers responsibility for decisions in all spheres, there is also provision in law for children to make – or have a say in – decisions affecting them. In some cases this is done through fixed age-limits, for example at the age of 14 children can elect whether a case against them will be heard by a jury or magistrate, and at 16 they can have sexual intercourse and join the army.⁶ In contrast, at the age of 10 children are presumed to have sufficient capacity for criminal intent and are held responsible for criminal behaviour.

However, age alone is an unreliable predictor of competence. Recognising this, provisions are also in place to assess the competence of children to make decisions in specific circumstances regardless of age and without the knowledge or consent of parents or carers. For example, counselling and psychology professionals assess children's capacity to consent to treatment and make decisions about interventions, and health professionals judge if they are able to give permission for treatment.⁷

There is a need to address the contradictory legislative direction around children's capacity