

THE RIGHT TO CHILD PARTICIPATION AND THE COMPETENCY EXAMINATION OF CHILDREN

Submitted by the Child Witness Institute

KEY CONCEPTS	
UN Convention on Rights of the Child	Child Participation
Competency examination	Child witnesses

The competency of children to testify in South Africa is still a thorny one, but Article 12 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC) provides a basis for arguing that children should be presumed to be competent unless there is evidence to the contrary. The competency test acts as an impediment to the right which children have to be heard.

Article 12 of the UNCRC, ratified by South Africa in June 1995, focuses on the child's right to participation. Article 12 provides as follows:

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 view 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 of the CRC deals with the dilemma of the legal status of children who are themselves bearers of rights, but who do not have the full autonomy of adults. In order to ensure that children are able to access their rights, Article 12 requires States Parties to ensure that children, capable of forming their own views, are accorded the right to do so and that these views are given due weight in accordance with their age and maturity. Paragraph 2 focuses specifically on the child's right to be heard in any judicial or administrative proceedings affecting the child.

The right to be heard is one of the fundamental pillars of the UNCR, not only because it is a right on its own, but also because it must be taken into account when interpreting and implementing other rights. However, the implementation of this right has been hampered by many barriers, including myths, attitudes and a lack of knowledge of children, especially in the case of younger children or children belonging to marginalised and/or disadvantaged groups. Consequently, the Committee issued a general comment on Article 12 in 2009 to improve the understanding of that article and its implications so that States Parties are able to achieve its full implementation.

Key points of the general comment are briefly summarised as follows:

- There is a positive obligation on States Parties to ensure mechanisms are in place for children to express their views and for due weight to be given to their views.¹
- Article 12(1) refers to children "capable of forming his or her own views" and this should not be seen as a limitation of the right, but rather as an obligation on States Parties to assess the capacity of the child as far as possible. A child must be presumed to be

¹ General Comment 12. 2009. Paragraph 19.

capable of expressing their views and that they have the right to do so, and are not required to prove this capacity.

- There is no age limit on the right of the child to express their views and States Parties are discouraged from introducing any age limits either in law or in practice that would disqualify children from exercising this right.
- Even very young children are capable of expressing their views and it is not necessary for a child to have a comprehensive knowledge of all aspects of the matter affecting them. They simply require sufficient understanding to be able to appropriately form their views.²
- A child has the right to express their views freely, which means that children should not be manipulated, unduly influenced or pressured, but should be provided with an environment in which the child feels respected and secure when freely expressing their views.
- If a matter under discussion affects a child, then the child has a right to be heard and must be heard (“in all matters affecting the child”). The concept of “all matters” must be interpreted in a broad sense, which is why the concept was not defined.³
- Article 12 (1) requires that the child’s views be given due weight. The Committee stressed that it is not sufficient to simply listen to the child. The views of the child have to be taken seriously.
- Age alone does not determine the weight to be given to the child’s views. The article includes maturity as a criterion as well, which means that the views of each child must be determined on a case-by-case basis, taking the maturity of the child into account.⁴
- Article 12(2) refers to the right to be heard in “any judicial and administrative proceeding affecting the child.” In the general comment, the Committee stressed that the provision applies to all relevant judicial and administrative proceedings affecting the child, without limitation, including, for example, care and adoption as well as whether the child is a victim of any form of violence, including physical, psychological and sexual abuse.⁵
- Although the article gives children the right to be heard either directly or through a representative body, the Committee recommends that, where it is possible, the child should be given the opportunity to express their views directly. Where this is performed through a representative, it must be done correctly and the representative must have sufficient knowledge and understanding of the decision-making process and should be experienced in working with children.⁶
- The opportunity to be heard must be done in accordance with the procedural rules of national law, according to Article 12(2), but the Committee highlighted that this clause was not to be interpreted as permitting States Parties to restrict or prevent the enjoyment of this right.⁷

The Committee dealt specifically with the position of child victims and/or witnesses in judicial proceedings, and stressed that the child victim of crime must be given an opportunity to fully exercise their right to freely express their views. This should be done in accordance with the Guidelines on Justice in Matters involving Child Victims and Witnesses (ECOSOC 2005/20). In line with the provisions in the UNCRC, every effort should be made to enable child victims and witnesses

² General Comment. 12. 2009. Paragraphs 20 – 21.

³ General Comment. 12. 2009. Paragraphs 26 – 27.

⁴ General Comment. 12. 2009. Paragraphs 28 – 31.

⁵ General Comment. 12. 2009. Paragraphs 32 – 34.

⁶ General Comment. 12. 2009. Paragraphs 35 – 37.

⁷ General Comment. 12. 2009. Paragraph 38.

to express their views or concerns relating to their involvement in the judicial process. Professionals should ensure that child victims and witnesses are appropriately consulted and are able to express their views freely and in their own manner.

In summary, Article 12 of the CRC as well as Guidelines above stress the importance of ensuring child participation in any judicial and administrative proceedings affecting them. It also provides confirmation for the widely-accepted view that all witnesses should be regarded as competent and that the focus should be on whether the child has “sufficient understanding” to be able to understand the questions put to them and to be able to answer the questions in an understandable way.