

More about the Convention on the Rights of the Child and Articles 3, 12 and 16

What is the Convention on the Rights of the Child, and what is its position in Norwegian law?

The Norwegian Constitution is Norway's highest-ranking law. In relation to human rights conventions and other legislation, the Constitution can be said to stand at the top and provide the framework for all other legislation in Norway. Next come the human rights conventions, including the UN Convention on the Rights of the Child. All other legislation is subordinate to the Constitution and the human rights conventions.

Section 104 of the Norwegian Constitution reflects the general principles of the Convention on the Rights of the Child and provides special constitutional protection for children's rights.

The UN Convention on the Rights of the Child gives rights to all children under the age of 18. Since 2003, the Convention has been incorporated into Norwegian law through Section 2 of the Human Rights Act.

Section 3 of the Human Rights Act gives the Convention on the Rights of the Child and the other incorporated human rights conventions precedence over other legislation. This means that if sector-specific legislation conflicts with the Convention on the Rights of the Child, the Convention takes precedence.

The UN Committee on the Rights of the Child issues General Comments on how the articles of the Convention should be interpreted and understood. In a number of cases, the Norwegian Supreme Court has recognised the Committee's General Comments as a relevant source of law when determining the content of a right under the Convention.

ChangeFactory therefore systematically uses the General Comments to explain and elaborate on the obligations authorities have under Articles 3, 12 and 16.

Procedural rights

Children's procedural rights are intended to ensure that assessments of the best interests of the child are carried out in a safe and legally sound manner, independently of procedural status and capacity to consent.

Children's procedural rights do not give children an entitlement to a particular type of service, action or decision. Instead, they establish how adults within public systems and services must proceed before making decisions or taking actions concerning children.

These rights apply to investigations, procedures, decisions, administrative decisions and actions affecting children. Examples include situations where a child has done something hurtful to another child in kindergarten and the kindergarten wants to inform the parents; when a teacher wants to refer a child to the school health service; when adjustments are being considered at school through the Educational-Psychological Service (PPT); when a school nurse is concerned about a child and wants to discuss the situation with child welfare services; when an outreach youth worker wants to contact another service to help a child; or during case processing and interventions by child welfare services or treatment within child and adolescent mental health services (BUP).

How the rights are connected

To determine and reach a conclusion about what is in a child's best interests, the child must be able to express their views freely on the matter, and the child's views must be given due weight in the assessment.

For the child to be able to express their views freely, they must receive sufficient and appropriate information. In addition, the child must be informed about what will happen to the information they share.

The best interests of the child are the goal, while the other three rights provide the process for reaching that goal. The rights are not sufficient on their own – they depend on one another in order to safeguard children in the best possible way.

The best interests of the child

Article 3(1) of the Convention on the Rights of the Child and Section 104, second paragraph, of the Norwegian Constitution

Article 3(1) of the Convention on the Rights of the Child

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Section 104, second paragraph, of the Norwegian Constitution

In actions and decisions concerning children, the best interests of the child shall be a primary consideration.

Article 3(1) of the Convention states that the best interests of the child shall be “a primary consideration” in “all actions concerning children”. Section 104, second paragraph, of the Norwegian Constitution is inspired by the Convention and states that “in actions

and decisions concerning children, the best interests of the child shall be a primary consideration”.

Both provisions establish that the best interests of the child must be a primary consideration. This places a strong and clear obligation on the State to assess what is best for the child in all cases and decisions concerning children.

However, this does not mean that the best interests of the child are the only consideration, or that they will always be decisive in cases concerning children. The child's best interests may also have to be weighed against other important interests in the individual case.

The Norwegian Supreme Court has nevertheless emphasised, with reference to statements from the UN Committee on the Rights of the Child, that when weighed against other interests, the best interests of the child must be given significant weight. They are not simply one of several factors in an overall assessment: the child's interests must be the starting point, highlighted specifically and placed at the forefront.

For a decision to go against what is considered to be in the child's best interests, there must therefore be particularly strong and important reasons for doing so. This assessment must be made specifically in each individual case.

Actions and decisions concerning children

The best interests principle is intended to apply to all decisions and actions concerning children. “Actions” includes acts, proposals, services, measures and much more. It also applies when a decision is made not to take action, or when adults fail to act. An example could be when child welfare services fail to implement measures to protect a child from violence.

The best interests principle applies whenever actions “concern” one or more children, either directly or indirectly. “Concern” is a broad concept covering many different situations. For example, the principle also applies when measures are introduced that are not specifically aimed at children but nevertheless affect them.

The extent to which an action or decision affects a child may, however, influence how much weight the child's best interests should be given in a particular case.

The best interests of the child have three dimensions

The best interests principle has three dimensions:

- A substantive right
- A fundamental interpretative legal principle
- A rule of procedure

A substantive right

The best interests of the child being a substantive right means that it is a right held by every individual child. Whenever a decision is made or an action is taken that affects a child, the child's best interests must be assessed. Norway is obliged to ensure this right for every child.

A fundamental interpretative legal principle

As an interpretative principle, the best interests principle must be used when understanding and interpreting other laws and provisions. For example, if there is uncertainty about what a law or rule means in practice, the interpretation that most effectively serves the child's best interests should be chosen.

A rule of procedure

The best interests of the child are also a rule of procedure. This means that whenever a decision affecting one or more children is made, the child's best interests must have been assessed.

The consequences of the decision for the child, whether those consequences are in the child's best interests, and the weight given to the child's best interests must be explained. In other words, the best interests of the child are both a goal in themselves and a determining factor in how adults must proceed throughout the process whenever actions concerning children are taken.

The best interests principle is not merely an interpretative principle and a right that becomes relevant when a final conclusion or decision is reached. It is also a primary consideration throughout the procedures, assessments, case processing and processes leading up to the final decision.

What is in the child's best interests must therefore be assessed at every stage of an action concerning the child, from beginning to end. Any formal decision must clearly explain how the child's best interests have been assessed.

How should the best interests of the child be assessed?

What is best for the child must be assessed specifically in each individual case. In General Comment No. 14, the UN Committee on the Rights of the Child identifies a number of elements that may form part of the assessment: the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety; situations of vulnerability; and the child's rights to health and education.

One of the most important elements in assessing the child's best interests is the child's own views, cf. Article 12 of the Convention and Section 104, first paragraph, of the Norwegian Constitution.

In General Comment No. 12, paragraph 74, the Committee explains the relationship between the best interests of the child and the right to express one's views freely. It makes clear that there is no tension between Article 3 and Article 12. Instead, they are complementary: one establishes the objective of ensuring the child's best interests, while the other establishes the method for reaching that objective by listening to the child or children.

The Committee also makes clear that Article 3 cannot be correctly applied unless the requirements of Article 12 are respected, and that Article 3 strengthens Article 12 by enabling children to play an essential role in decisions affecting their lives.

In HR-2021-475-A, paragraph 62, the Norwegian Supreme Court also states that the child's views constitute a central element in determining which solution will be best for the child. The UN Committee on the Rights of the Child further points out that a decision that does not take the child's views into account, or does not give those views due weight according to the child's age and maturity, fails to respect the child's opportunity to influence the determination of their best interests.

The Committee also emphasises that being very young or being in a vulnerable situation – for example because of a disability – does not deprive a child of the right to express their views freely, nor does it mean that their views should automatically be given less weight when assessing their best interests.

The child's right to express their views freely

Article 12 of the Convention on the Rights of the Child and Section 104, first paragraph, of the Norwegian Constitution

Article 12 of the Convention on the Rights of the Child

1. States Parties shall assure to the child who is capable of forming their own views the right to express those views freely in all matters affecting the child, with the views of the child being given due weight in accordance with the child's age and maturity.
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.

Section 104, first paragraph, of the Norwegian Constitution

Children have the right to be heard in questions that concern them, and their views shall be given due weight in accordance with their age and development.

Article 12 of the Convention establishes that children who are capable of forming their own views have the right to express those views freely in all matters affecting them. Section 104, first paragraph, of the Norwegian Constitution states that children have the right to be heard in questions concerning them.

In other words, these provisions give children the right to express their views freely. Children themselves often describe this as being able to **“speak safely”**.

The term “affecting” must be interpreted broadly. It is sufficient that a matter affects the child in some way. The starting point is that children must be given an opportunity to express their views in all matters concerning them, and that there should be no general exceptions to this right.

Children therefore have a right to express their views, but no obligation to do so. Parents or other adults cannot restrict a child's right to express their views freely.

The child's right to express their views freely and to be heard under Article 12 is one of the general principles of the Convention. This means that it is both a right in itself and a principle that must be applied in connection with the other rights in the Convention.

No age limit

There is no age limit for when a child should be heard. The key question is whether the child is capable of expressing their views on the matter.

The UN Committee on the Rights of the Child emphasises that the State has an obligation to assess the child's capacity to express their views, and that children can express themselves in many different ways. Some children may express themselves verbally, while others – for example children without spoken language – may communicate through body language.

It is not sufficient simply to observe a child or interpret what the child thinks based solely on their behaviour or expressions.

What does it mean to express one's views freely – or safely?

For a child to be able to express their views “freely”, the situation must be arranged as effectively as possible to ensure that the child genuinely has an opportunity to say what they think.

Among other things, this means that the child must not be subjected to pressure or influence, and that it is the child who chooses whether or not they wish to express their views.

The responsible adults must also ensure that the situation is safe enough for the child to speak, including by providing an environment that is safe, positive and encouraging.

The child should feel respected and safe, and should feel that the person listening to them is genuinely listening and taking them seriously. Everyone who works with children has a particular responsibility to ensure that children are able to speak with someone they themselves say they feel safe with, and in surroundings they experience as safe.

In addition, children must receive sufficient and understandable information to enable them to express what they believe is best for them, and they must be informed about what will happen to the information they share.

How much weight should be given to the child's views?

Article 12 states that the child's views must be given "due weight in accordance with the age and maturity of the child", while Section 104 of the Norwegian Constitution states that their views must be given weight in accordance with their age and development.

It is therefore not enough simply to listen to the child. The child's views must be taken seriously and given weight in the decision.

The UN Committee on the Rights of the Child emphasises that the child's maturity must be assessed individually in each case. What matters is the child's ability to express their views in a reasonable and independent manner – not simply their age.

In addition, the greater the impact a matter has on the child's life, the more weight the child's views should be given when the matter is decided.

The Norwegian Children Act Committee stated in NOU 2020:14 that the views of an older child should not automatically be regarded as carrying greater weight than those of a younger child. Younger children may have strong and well-founded views on matters that are important to them, and these views must be weighed against other considerations in the case.

Article 12 is closely connected to Article 3 on the best interests of the child. The UN Committee describes the best interests of the child as the ultimate objective, while Article 12 sets out the process for achieving that objective.

The Norwegian Supreme Court has also stated in HR-2021-475-A that the child's own views must be a central element in assessing what is in the child's best interests.

The child's right to express their views freely is therefore key to achieving the objective of the child's best interests and, through this, to fulfilling a range of other rights, including the rights to appropriate healthcare and education and to protection from violence, abuse and harmful care situations.

In summary, the child's right to express their views freely creates an obligation to ensure that the child:

- receives useful and understandable information
- can express their views without influence, pressure or manipulation and without requiring parental consent
- feels safe and respected
- knows what will happen to the information they share

The child's right to information

Implicit in Article 12 of the Convention on the Rights of the Child, cf. General Comment No. 12, paragraphs 16, 25 and 41

General Comment No. 12

The UN Committee on the Rights of the Child states that children must be provided with all the information and advice they need in order to make decisions in their best interests. Realising the child's right to express their views also requires those responsible for hearing the child, as well as the child's parents or guardian, to inform the child about the matters at issue, the options available, any decisions that may need to be made and the possible consequences of those decisions.

The child must also be informed about the circumstances in which they will be asked to express their views. This right to information is essential because it is a prerequisite for children to make informed decisions.

Article 12 of the Convention and Section 104 of the Norwegian Constitution establish the child's right to express their views freely. For this right to be meaningful, children must receive all the information they need to form their own views and express them freely. The child's right to sufficient and appropriate information is emphasised by the UN Committee on the Rights of the Child in General Comment No. 12, paragraph 25, which describes the right to information as an essential prerequisite for children to express their views freely and determine what they believe is best for them in a particular situation.

As a starting point, all children have a right to information, with very few exceptions. This right applies regardless of the child's age, and parents or other adults cannot restrict it. This right is extremely important because, without sufficient information, a child cannot know what options are available or assess what would be best for them in the particular situation.

In other words, the child would not have a genuine opportunity to express their views on an informed basis. This would also make it difficult for professionals to determine what is

in the child's best interests in an individual case.

Information must be provided in an understandable and considerate way and repeated when necessary. If new information becomes available, the child must be informed.

Among other things, children should be informed about:

- the case or situation
- what information the adults have and where it came from
- which choices and decisions can or must be made
- what alternatives are available in the particular situation
- the possible consequences of these choices – what may happen afterwards
- the fact that adults must make it possible for the child to express their views freely by ensuring that the situation is safe and respectful
- what will or may happen to the information the child shares

The child's right to respect for their privacy

Article 16 of the Convention on the Rights of the Child, Section 102 of the Norwegian Constitution, Article 8 of the European Convention on Human Rights and Article 17 of the International Covenant on Civil and Political Rights

Article 16 of the Convention on the Rights of the Child

No child shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation.

The child has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention on Human Rights: Right to respect for private and family life

Everyone has the right to respect for their private and family life, their home and their correspondence.

There shall be no interference by a public authority with the exercise of this right except where such interference is in accordance with the law and is necessary in a democratic society for the purposes set out in Article 8.

Section 102 of the Norwegian Constitution

Everyone has the right to respect for their privacy and family life, their home and their communication. Searches of private homes shall not be made except in criminal cases.

The authorities of the State shall ensure the protection of personal integrity.

See also Article 17 of the International Covenant on Civil and Political Rights and Section 104 of the Norwegian Constitution.

What does the right to privacy mean?

Article 16 of the Convention states that children have the right to protection against unlawful interference with their privacy. Section 102 of the Norwegian Constitution and Article 8 of the European Convention on Human Rights state that everyone has the right to respect for their private life.

The Norwegian Constitution and the European Convention apply to everyone, including children. The relevant provision of the Norwegian Constitution was introduced in 2014 and is based on the European Convention on Human Rights.

“Private life” is a broad concept, and the Norwegian Supreme Court has stated that there is no exhaustive definition of what it encompasses. At its core, however, it includes a person's physical and psychological integrity, the various elements of their identity in the broadest sense, and their personal autonomy. It also includes the protection of personal data.

In General Comment No. 20, paragraph 46, the UN Committee on the Rights of the Child states that the right to privacy gives adolescents the right to access their records in education, healthcare, childcare and protection services, and the justice system.

The Committee further states that this right becomes increasingly important during adolescence. The child's right to privacy becomes stronger as the child grows older and becomes more mature. Correspondingly, parents' authority to make decisions on behalf of the child becomes more limited.

In General Comment No. 20, paragraph 46, the Committee also notes that it has repeatedly expressed concern about violations of privacy, including in relation to confidential medical advice; the space and belongings of adolescents in institutions; and correspondence and other forms of communication, whether within the family or in other forms of care.

Sharing information about the child

One aspect of the child's right to respect for their privacy concerns whether information from or about the child may be shared with other professionals, services or parents, and the child's right to know what happens to the information they provide.

The starting point is that children have a right to respect for their privacy. Information from or about a child therefore cannot automatically be shared with other professionals, services or parents.

In Norwegian sector-specific legislation, this is often regulated through duties of confidentiality, for example under Section 13 of the Public Administration Act.

Children must be protected against both unlawful and arbitrary or unnecessary interference with their privacy. "Unlawful" means that interference with privacy may only take place where there is a legal basis for doing so. In other words, the interference must be authorised by law.

The requirements concerning arbitrariness and necessity mean that the interference must be reasonable and necessary, rather than arbitrary or discriminatory.

This does not mean that others should never receive, or never have a right to receive, information about a child when this is necessary. However, any exception to the general principle requires consideration of the following:

1. **Legal basis:** For professionals to share information from or about a child with other adults, there must be a legal basis for doing so. The child's right to privacy therefore intersects with duties of confidentiality and privacy on the one hand, and the rights of other professionals, services or parents to receive information on the other.
2. **Necessity and proportionality:** It must also be assessed what information is reasonable and necessary to share. Because sharing information constitutes an interference with the child's right to privacy, only information that is necessary may be shared, and the sharing must not be arbitrary.
3. **The best interests of the child:** Sharing information from or about a child is an action that "concerns the child". This means that the child must first receive information about the proposed sharing and be given an opportunity to express their views freely about it (CRC Article 12). When deciding whether information should be shared, and if so what information, the best interests of the child must be a primary consideration (CRC Article 3).

The most important point is that children's procedural rights are upheld. The child must receive information if information about them is going to be shared and must have an opportunity to express their views freely about that sharing.

When assessing whether sharing information is lawful, necessary and in the child's best interests, the child's views must be given due weight.