Written evidence from Article 39 (HRA0017)

1. Article 39 fights for the rights of children living in state and privately-run institutions in England (boarding and residential schools, children's homes, immigration detention, mental health inpatient units and prisons). We do this through awareness-raising of the rights, views and experiences of children; legal education; practice development; and policy advocacy, research and strategic litigation. We take our name from Article 39 of the UN Convention on the Rights of the Child (UNCRC), which entitles children who have suffered rights violations to recover in environments where their health, self-respect and dignity are nurtured.

Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?

2. The Human Rights Act 1998 (HRA) has significantly advanced the protection of children's rights in the UK by allowing children, young people and families whose rights have been violated to bring cases to the domestic courts and obtain a form of remedy for those violations. It has helped further entrench children's rights considerations in decision-making and provided a much-needed domestic avenue for ensuring that systemic failings causing great harm to children are investigated and rectified.

3. The HRA has, for example, been used to challenge public authorities where they have failed to protect children against abuse in foster care[1] and ensured that children are not inappropriately stopped from seeing and maintaining their relationships with their parents.[2] It has been used to protect child victims of trafficking from criminalisation[3] and to prevent the use of violent pain-inducing techniques in the secure estate (see case study below). Seminal cases based on a child's right to a private and family life (protected under Article 8 of the European Convention on Human Rights (ECHR)) have helped ensure that the interests of children are properly considered in decisions by public bodies and that children's wishes and feelings are taken seriously.[4] The HRA has helped protect the right to education for all children and young people.[5] It is deeply regrettable that the

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[1] See, for example, *A and S (Children) v Lancashire CC* [2012] EWHC 1689 (Fam) . This case involved two brothers were first taken into care in 1998, aged just three and six months' old, after their mother abandoned them. A placement order was made, severing all ties with their birth family. However, no adoptive placement was found for the boys, and the boys were passed from one foster carer to another over the course of the next 14 years. At least two sets of foster carers were abusive. The local authority and the IRO agreed to declarations that they acted incompatibly with the ECHR in no fewer than ten ways, involving breaches of Articles 3, 6 and 8 of the Convention.

[2] For example, in *M & T v Medway County Council* [2015] the court awarded damages to the mother and child following a lengthy separation which had made it very unlikely that the family would be reconciled.

[3] *L, HVN, THN & T v R* [2013] EWCA Crim 991

[4] See, for example, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

[5] See, for example, *C & C v Governing Body* [2018] UKUT 269 (AAC) which held that the Equality Act exemption discriminated against autistic children. See also *R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent)* [2015] UKSC 57, which concerned a 20 year old who came to the UK aged 6 from Zambia and was blocked from university because she could not get student finance. The Supreme Court made a declaration that the application of the settlement criterion to the Appellant was a breach of her rights under Article 14 ECHR read with her right of access to education under Article 2 of the First Protocol to the European Convention on Human Rights.

government's review of the HRA leaves no room for sharing examples of the positive impact that it has had both on individuals' lives and the culture and practices of organisations.

4. One of the key benefits of the HRA for children has been the ability to bring cases to national courts, rather than having to go to Strasbourg, and to access remedies more swiftly as a result. Timescales are especially critical for children and young people who are often deterred from challenging mistreatment due to long proceedings, and for those in institutional settings, there can be a pessimistic sense that pain and suffering will be temporary, so they will endure it. (Children are also extremely fearful of victimisation – see paragraph 9). A significant amount of the UK's progress on human rights has been achieved without any need for people to rely on their right of individual petition under Article 34 ECHR and the number of cases heard against the UK by the European Court of Human Rights (ECtHR) in Strasbourg is now low. Of all the substantive decisions made by the ECtHR in 2020, only four related to the UK.[6]

5. The role of the HRA in protecting children's rights is all the more vital given that the majority of children's rights provisions contained in the United Nations Convention on the Rights of the Child (UNCRC) are not justiciable in domestic law. The UNCRC is a set of minimum standards for the treatment of all children. It is a binding international treaty and by ratifying it the UK Government has committed itself to giving children the rights and protections contained in it. However, due to the UK's dualist system, and the failure of the UK Government to incorporate the treaty into domestic law (it is in the process of being incorporated in Scotland),[7] children whose rights under the UNCRC have been breached by a public authority cannot take a case to court under the UNCRC itself. Instead, a case can be brought under the HRA and the court asked to use the UNCRC to help guide its decision.

6. The UNCRC has been used as an interpretative tool and over the last 20 years a body of law has imported children's rights considerations from the UNCRC into domestic judgments through cases brought on HRA grounds. While children's rights-based decision making in the courts can vary,[8] in part due to inconsistency in the use of children's rights based arguments by lawyers, strong examples have been set by UK Supreme Court judges using the UNCRC, particularly the best interests standard enshrined in Article 3.[9]

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[6] Of the 566 judgments made regarding the UK since 1959 (an average of nine a year), in 58% at least one violation of the ECHR was found. See Statistics published by the Council of Europe showing violations of the Convention by Article and by State in the period 1959-2020

[7] The UNCRC (Incorporation) (Scotland) Bill was introduced to the Scottish Parliament on 1st September 2020. The First Minister announced the Bill would incorporate the UNCRC into Scots law "fully and directly", to the maximum extent of the Scottish Parliament's powers and be passed before the end of the current parliamentary term. The main purpose of the Bill is bring the UNCRC into Scots law. See Together Scottish Alliance for Children's Rights, *Incorporation of the UN Convention on the Rights of the Child*

[8] Stalford, H. Hollingsworth. K. and Gilmore, S. (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (2017, Oxford: Hart). Chapters 2 and 3

7. **Children need the protection of both the HRA (dealing with Convention rights) <u>and</u> UNCRC rights both in domestic law. As consistently recommended by the Committee on the Rights of the Child, and the JCHR, the government should expressly protect children's rights in primary legislation through the full incorporation of the UNCRC into UK law.**

8. Notwithstanding this bringing of children's rights home, severe cuts to legal aid have threatened the ability of many children and young people in the UK to access an effective remedy under Article 13 of the ECHR using the HRA, as the Joint Committee on Human Rights (JCHR) itself highlighted in 2018.[10]

9. Many vulnerable children face further difficulties in challenging breaches of their human rights – particularly if they are living away from their family and in institutional settings where they fear the consequences of raising concerns or do not know that their treatment breaches the law. This was epitomised in a challenge brought by the Children's Rights Alliance for England following the widespread unlawful restraint of children in secure training centres from when they first opened in 1998, which was confirmed by the High Court.[11]

10. The dependency of children, including very young children and disabled children, was one of the reasons the Committee on the Rights of the Child built into its Optional Protocol to the Convention on the Rights of the Child on a communications procedure the facility for others *acting on behalf of children* to bring complaints. Five years ago the JCHR highlighted the importance of an independent complaints mechanism to the UN Committee for children because "they are particularly vulnerable to rights abuses" and that "with the recent reforms to legal aid, there are growing concerns about the extent to which children enjoy practical and effective access to the legal remedies that do exist in domestic law".[12]

11. **The UK, however, has not signed up to the Third Optional Protocol of the UNCRC. We believe it should and that provisions in law should be made for organisations representing the rights of children to bring claims on their behalf – in prescribed circumstances. We would also ask the JCHR to consider whether it is time, two decades since the HRA came into force, for provision to be made in the legislation for national human rights institutions and/or NGOs to have standing to bring human rights claims on behalf of children and adults in certain, delineated**

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[9] See, for example, *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 (per Lady Hale and Lord Kerr dissenting); *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 (per Lord Wilson); *Nzolameso v City of Westminster* [2015] UKSC 22 (per Lady Hale); and *ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4 (per Lady Hale). As outlined in Stalford, Hollingsworth and Gilmore, *Rewriting Children's Rights Judgments* (see note 8).

[10] Joint Committee on Human Rights, *Enforcing Human Rights*, July 2016

[11] *Children's Rights Alliance England v Secretary of State for Justice* [2012] EWHC 8 (Admin), paras 88-91

[12] Joint Committee on Human Rights, *The UK's compliance with the UN Convention on the Rights of the Child Eighth Report of Session 2014–15*, March 2015, para 37

circumstances.

12. The constant political attacks on the HRA also means it has not had sustained positive public dissemination. We are not aware of any systematic awareness-raising of the HRA to children in England – through schools, the care system, health settings and custody – which has been delivered or enabled through public funds.

13. **As part of its recommendation to lower the voting age, the UN Committee on the Rights of the Child recommended the use of 'active citizenship and human rights education in order to ensure early awareness of children that rights are to be exercised'. It also recommended making "children's rights education mandatory".[13] As we approach the 30th anniversary of the UK's ratification of the UNCRC, in December 2021, this is long overdue.**

How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?

14. The HRA has allowed children, and those representing their rights and interests, to challenge the decisions or actions of public bodies which potentially breach their rights and its importance cannot be overestimated for vulnerable children who are often powerless in relation to public authorities and those performing public functions. Litigation can not only result in a remedy for the individual but also bring about wider improvements to policy and practice which helps many others (see case study below).

Case study: Use of restraint on children

15. The case of *R (C) v Secretary of State for Justice* in 2008,[14] before the Court of Appeal, involved a challenge to the introduction of regulations by the government that expanded the use of physical restraint on children as young as 12 detained in secure training centres (STCs), then operated by G4S and Serco. Following the appalling restraint-related deaths of two children, Gareth Myatt and Adam Rickwood, the Joint Committee on Human Rights, serious case reviews and other investigations demonstrated that restraint was being used frequently when the law did not authorise it and that techniques were being used that were inappropriate, excessive, or positively forbidden. Instead of the government ensuring that the two private companies running the STCs complied with the existing law, new rules were introduced which broadened the context in which restraint could be used on children.

16. The Court quashed the new rules as they were introduced without proper consultation, without assessment of their impact, and they breached Article 3 of the European Convention on Human Rights, which prohibits torture and other ill-treatment. In

[13] UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, June 2016, Para 72 (g)
[14] *R (C) v Secretary of State for Justice* [2008] EWCA Civ 882

considering the Article 3 breach, the Court emphasised that "Convention jurisprudence requires article 3, as it relates to children, to be interpreted in the light of international conventions, in particular the Convention on the Rights of the Child, article 37(c) of which provides that '*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age*.'"

17. The Court also emphasised the need to consider the view of the UN Committee on the Rights of the Children which provides the "authoritative international view of what the UN convention requires". General Comment 8 of the UN Committee states that deliberate infliction of pain is not permitted as a form of control of juveniles.

18. **This case illustrates the unique value of the HRA as a means of ensuring that the impact of legislation and practice on children's rights can be properly examined by domestic courts, and a vehicle by which the UK's fundamental obligations to children under the UNCRC can also be considered. More directly, the HRA in this instance protected very vulnerable children in closed institutions run by large security companies from being subjected to widespread unlawful force and violence.**

19. 10 years after this case, Article 39 lodged a judicial review application with the High Court challenging the Government's decision to allow escort officers working for the private contractor GEOAmey to inflict pain on children during their journeys to and from secure children's homes. Staff working *within* secure children's homes are prohibited from using such techniques, which Department for Education statutory guidance states can never be proportionate.[15] The pre-action letter argued that the lack of clarity and/or the failure to circumscribe such powers on escorting was a breach of Article 3 and/or Article 8 and consequently the HRA.

20. Following the application, the Justice Minister announced that Charlie Taylor, the then Chair of the Youth Justice Board, had been appointed to lead a review of the authorisation of pain-inducing restraint techniques on children detained in young offender institutions and secure training centres, and during escort to these prisons and secure children's homes. The Charlie Taylor Review was the first time Ministers had commissioned a stand-alone investigation of the deliberate infliction of pain on vulnerable children as a form of restraint, and this only happened as a direct result of our legal challenge. The Taylor Review found the use of pain-inducing restraint in child prisons to be "an acceptable and normal response rather than what [it] should be, the absolute exception".[16]

21. **The government accepted the review's recommendation that pain-inducing techniques no longer be part of the core restraint syllabus – within the institutions themselves as well as during the secure escorting process. But this unlawful and**

[15] Department for Education, *Guide to the Children's Homes Regulations including the quality standards*, April 2015 at
[16] Taylor, C., *A review of the use of pain-inducing techniques in the youth secure estate*, June 2020

abusive treatment of children has been continuing for decades and it took the use of the HRA and threat of legal action to secure this policy change.

22. However, we do need to see even more effort to improve the understanding and awareness of public authorities of human rights; how they should be considered when making decisions that affect children and young people; and how the HRA can be used. For example, independent reviewing officers (IROs), whose role is to ensure that the local authority complies with their duties to children in their care, can refer a child's case to the Children and Family Court Advisory Support Service (Cafcass) if they consider the local authority is failing in their duties to a child.[17] Cafcass may then bring court proceedings on behalf of the child, including by way of a claim under the HRA. However, research by Article 39 in 2019 showed that just 20 referrals were made to Cafcass from IROs in the 10 years between 2009/10 and 2018/19 and Cafcass had not initiated any legal proceedings, including HRA claims, as a result, despite known persistent scandals in the care system.[18] This suggests a lack of understanding of, or commitment to, use of this human rights safeguard.

What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?

23. Sections 3, 4 and 10 of the HRA[19] work well to preserve parliamentary sovereignty and the separation of powers. Where a court makes a declaration of incompatibility, the law remains in force until Parliament decides whether to address the incompatibility and, if so, how. The government itself explains that Section 4 "respects the supremacy of Parliament in the making of the law" and "there is no legal obligation on the Government to take remedial action following a declaration of incompatibility or on Parliament to accept any remedial measures the Government may propose".[20] The HRA allows the courts to send a clear message concerning incompatible legislation but not to override the sovereignty of Parliament. The Bill of Rights Commission reported that the declaration of incompatibility mechanism "has been widely seen as striking a sophisticated and sensible balance between Parliament and the courts – indeed one that has subsequently been adopted by a number of other common law jurisdictions".[21]

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[17] Under section 25B(3) of the Children Act 1989

[18] Article 39, *Children in care in 'other arrangements'*, 29 May 2019. For overviews of ongoing problems in the care system see Children's Commissioner's reports at https://www.childrenscommissioner.gov.uk/children-in-care/

[19] Under Section 3 of the HRA, "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Under Section 4 of the HRA, if a court determines that a provision of primary legislation is incompatible with a Convention right, it may make a "declaration of incompatibility". Ministers have the power (but are not under a duty) to correct that incompatibility, through a 'remedial order' which can be used to amend primary legislation, under section 10 of the HRA. Or they can introduce primary or secondary legislation or, indeed, do nothing at all.

[20] Ministry of Justice, *Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*

[21] *The Commission on a Bill of Rights' report– A UK Bill of Rights? - The Choice Before Us - Volume 1*, 18 December 2012 at para 69.

24. By July 2020, 43 declarations of incompatibility had been made, of which 8 were addressed by Remedial Order, 15 by primary or secondary legislation (other than by Remedial Order) and the government has proposed to address a further two by Remedial Order. Two are still under consideration.[22] As well as not being an obligation on government, it is also important to note that often the action that *is* taken can be very slow, as the case study below illustrates, and with legislation remaining in force, the human rights violations continue.

Case study: Children's entitlement to British citizenship

25. The case of *K (A Child) v Secretary of State for the Home Department*[23] involved a child who was informed that they were not a British citizen by birth even though there was DNA proving that that their father is British. This was because section 50(9A) of the British Nationality Act 1981 (BNA) provides that if a woman is married at the time of a child's birth, for the purposes of British nationality law, her husband will be deemed to be the father.

26. The Court declared this incompatible with Article 14 ECHR, read with Article 8, because it discriminates unlawfully against children whose mothers are married to a man other than the child's father when the child is born. These children will not be entitled to British nationality through the biological father. Their only option instead is to apply to be registered at the 'discretion' of the Home Secretary, at a fee currently of over a thousand pounds[24] and, if aged over 10 years subject to a 'good character' test. The judge concluded that although 'certainty' under the law was a legitimate aim, it did not justify the high fee nor the risks associated with use of discretion in deciding whether to grant citizenship (compared to the right to claim it as the child of a British citizen).

27. By December 2020, 17 months after the judgment and 13 months after the government withdrew its appeal,[25] Ministers were still "considering appropriate legislative options to address the issue raised in" the K case having "amended fee regulations to remove the requirement for a fee to be paid for registration applications from this group".[26] While the fee removal is welcome, this does not sufficiently address the discrimination suffered by children affected by the legislation which is then passed down to the next generation.[27]

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[22] 9 have been overturned on appeal (and there is no scope for further appeal); 5 related to provisions that had already been amended by primary legislation at the time of the declaration; 8 have been addressed by Remedial Order; 15 have been addressed by primary or secondary legislation (other than by Remedial Order); 1 has been addressed by various measures; 1 has been overturned on appeal but there is scope for further appeal; 2 the Government has proposed to address by Remedial Order; 2 are still under consideration: 30 and 40. Ministry of Justice, *Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*

[23] *K (A Child) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin); 18 July 2018

[24] Home Office *Immigration and nationality fees: 20 February 2020*, updated January 26 2021

[25] Garden Court Chambers, *Home Secretary withdraws appeal in child's citizenship challenge*, 6 November 2019.

[26] See Ministry of Justice, *Responding to Human Rights judgments - Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*

[27] See British Future, *Barriers to Britishness*, October 2020 and Coram Children's Legal Centre, *Evidence for British Future Citizenship Inquiry*, October 2019

28. The HRA review asks about the role of courts and tribunals in dealing with provisions of subordinate legislation that are incompatible with the HRA Convention rights. Currently the remedy for secondary legislation found to be unlawful is that it be quashed or disapplied - this is not confined to the HRA and is an essential part of the courts' role to ensure that government acts lawfully.

29. Concerns have long been raised about the use of delegated powers and statutory instruments (SI) by government to amend laws without first facing detailed parliamentary scrutiny[28] – while SIs have the 'technical approval' of parliament, scrutiny is often perfunctory, particularly for those passed under the negative resolution procedure.

30. In the context of children right's, this was highlighted last year when the government introduced the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (known as Statutory Instrument 445, or 'SI445') which removed and diluted 65 safeguards for children in care overnight. There was no public consultation or time given for parliamentary debate, and while a Child Rights Impact Assessment (CRIA) was conducted,[29] it only set out the government's broad policy intentions and contained no proper analysis. No evidence (either quantitative or qualitative) was provided to support or challenge the government's actions and key provisions of the UNCRC were absent from the analysis.

31. After Article 39 brought a legal challenge, the Court of Appeal held that the Education Secretary had acted unlawfully in failing to consult the Children's Commissioner and other children's rights bodies before amending legislation affecting children in care.[30]

32. **Article 39 is of the firm view that the courts should retain powers to quash secondary legislation found to be unlawful. In addition, detailed and meaningful CRIAs should be undertaken for all proposed legislation and policy impacting children (directly or indirectly), as early as possible in the decision-making process, following international guidance.[31] Government ministers and senior officials across all departments should ensure staff are trained and supported to undertake high-quality CRIAs.**

Conclusion

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[28] See, for example, Brexit and Children Coalition, *Making Brexit work for children - The impact of Brexit on children and young people*, November 2017, p 5-7 and Public Law Project's SIFT project findings, October 2020.

[29] http://qna.files.parliament.uk/qna-attachments/1198272/original/52285_Child's_Rights_Impact_Assessment.pdf

[30] *Article 39 v Secretary of State for Education* [2020] EWCA Civ 1577. In the Court of Appeal the claimant did not seek an order quashing the Regulations because they were time-limited. Instead a declaration that the regulations were unlawful by reason of the failure to consult was sought. Read more at https://article39.org.uk/2020/11/24/court-of-appeal-rules-education-secretary-acted-unlawfully-in-removing-safeguards-for-children-in-care/

[31] See UN Committee on the Rights of the Child, General Comment No. 5 (2003), *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6)

33. The HRA provides vital protection for children and families. Civilised, democratic societies ought not to fear legislation which upholds the fundamental rights and freedoms of all people, whatever our age, backgrounds, personal circumstances or status in society. Our legal system must be capable – in design and reality – of providing protection to those living in perilous conditions and offer redress for those who have suffered human rights violations at the hands of public authorities and those undertaking public functions.

34. All governments, of whatever political persuasion, have comprehensive obligations to protect children's rights and it is incontestable that the HRA, together with the independence of the judiciary, provide critical checks and balances on the executive. Any dilution of the HRA, or how it is used, would seriously imperil the protection and well-being of the children we serve at Article 39.

35. Human rights awareness-raising and litigation should not be seen as an adversarial process designed to 'frustrate' government, but as vital mechanisms upholding the rule of law, and ensuring that due process is followed when developing law and policy.

18/02/2021