

Written evidence from Article 39 (COV175)

Introduction

1. Article 39 fights for the rights of children living in state and privately-run institutions (children's homes, boarding and residential schools, mental health inpatient units, prisons and immigration detention). 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.
2. The government's response to COVID-19 has had significant and wide-ranging implications for human rights. At this unprecedented time it is vital that we do everything we can to safeguard the rights of children and ensure they receive the care and support they need while also ensuring the lives and health of carers and staff are properly protected. This submission focuses on the impact of changes to law and policy on particularly vulnerable children: children in care, children in the criminal justice system and children detained for mental health reasons.

Steps needed to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant

3. The government must take a child rights-based approach, not just in its response to the crisis but in the development of law and policy generally, in line with its duty to respect, protect and fulfil children's human rights under the UN Convention on the Rights of the Child (UNCRC). The UN Committee on the Rights of the Child has called on governments to consider the impact of measures on children's rights, clarifying that restrictions "must be imposed only when necessary... proportionate and kept to an absolute minimum" and should "reflect the principle of the best interests of the child."¹ Yet legislative changes have been introduced in recent months with no or very little meaningful consideration of their impact on children.
4. The UN Committee has outlined that "...ensuring that the best interests of the child are a primary consideration in legislation and policy development and delivery at all levels of government demands a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights".² In November 2018, the Department for Education launched its training package for civil servants on children's rights and how to undertake CRIA and reiterated the government's commitment to "give due consideration to the UNCRC articles when making new policy and legislation".³

¹ The Committee on the Rights of the Child warns of the grave physical, emotional and psychological effect of the COVID-19 pandemic on children and calls on States to protect the rights of children (8 April 2020)

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en

² UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) at

https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

³ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2018-11-20/HLWS1064/>

5. However, no CRIA was undertaken of the Coronavirus Bill 2020, despite its provisions potentially having a serious negative impact on children subject to mental health detention, young carers and children with special educational needs and disabilities.⁴
6. The Prison and Young Offender Institution (Coronavirus) (Amendment) (No. 2) Rules 2020⁵ reduced the rights of children detained in young offender institutions relating to education, training, physical education, family visits, access to chaplains and religious services, and the adjudication process. The Secure Training Centre (Coronavirus) (Amendment) Rules 2020⁶ and accompanying government policy diminished the rights of children as young as 12 to education, activities and visits from their families. Children may now be kept in their cells for up to 22.5 hours a day.⁷ Both sets of rules were laid with no assessment of the impact on children and came into force the next day.⁸
7. While a CRIA *was* conducted on the Adoption and Children (Coronavirus) (Amendment) Regulations laid in April,⁹ it only sets out the government’s broad policy intentions and contains no proper analysis. No evidence (either quantitative or qualitative) is provided to support or challenge the conclusions it presents and key provisions of the UNCRC are absent from the analysis, including articles 19, 20, 25 and 39.
8. The Children’s Commissioner for England, the statutory children’s rights body, was not consulted prior to the deregulation of safeguards for children in care and called for the Adoption and Children (Coronavirus)(Amendment) Regulations to be revoked, stating that she did not believe “there is sufficient justification to introduce them. This crisis must not remove protections from extremely vulnerable children, particularly as they are even more vulnerable at this time”.¹⁰
9. **Recommendation: Detailed and meaningful CRIA 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.¹¹ Government ministers and senior officials should ensure staff are trained and supported to undertake high-quality CRIA.**
10. **Recommendation: The government should introduce a statutory obligation on public authorities to conduct child rights impact assessments in all decision-making affecting children, as recommended by the UN Committee on the Rights of the Child.¹²**

⁴ See <https://mailchi.mp/1ce4669599c4/coronavirus-bill-childrens-rights-briefing-1343106>

⁵ <http://www.legislation.gov.uk/uksi/2020/508/contents/made>

⁶ <https://www.legislation.gov.uk/uksi/2020/664/introduction/made>

⁷ https://www.legislation.gov.uk/uksi/2020/664/pdfs/uksiem_20200664_en.pdf

⁸ Article 39, Government changes law to legitimise abusive conditions in child prisons, 7 July 2020 at <https://article39.org.uk/childrens-rights-and-covid-19/> <https://article39.org.uk/2020/07/07/government-changes-law-to-legitimise-abusive-conditions-in-child-prisons/>

⁹ http://qna.files.parliament.uk/qna-attachments/1198272/original/52285_Child's_Rights_Impact_Assessment.pdf

¹⁰ Children’s Commissioner for England, Statement on changes to regulations affecting children’s social care, 30 April 2020, at <https://www.childrenscommissioner.gov.uk/2020/04/30/statement-on-changes-to-regulations-affecting-childrens-social-care/>

¹¹ 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)

¹² UN Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of

Groups who will be disproportionately affected by measures taken by the Government to address the COVID-19 pandemic and the impact on their human rights in the UK

11. While some government measures, such as those relating to education, have and will significantly impact all children, certain groups have been disproportionately affected by the response to COVID-19. This is despite a clear obligation under the UNCRC to respect and ensure children's rights are upheld without discrimination of any kind.¹³ Article 39 is particularly concerned about the following groups: children in the criminal justice system, children detained for mental health reasons and children in care.

Children in the criminal justice system

12. Since lockdown measures were introduced, children in custody have spent long periods in isolation, spending more than 22 hours a day in their cells, and have been unable to have face-to-face contact with family members, social workers, youth offending team workers, lawyers and advocates.¹⁴ The introduction of the required technology to enable children to stay in contact with their families has been slow and the lack of external visitors not only affects children's access to services and support, it also reduces the opportunities for external scrutiny and therefore diminishes safeguarding.

13. The Ministry of Justice amended the statutory rules to formalise these violations of children's rights through the Prison and Young Offender Institution (Coronavirus) (Amendment) (No. 2) Rules 2020¹⁵ and The Secure Training Centre (Coronavirus) (Amendment) Rules 2020¹⁶ which both dilute children's rights to family contact, education and work on their offending behaviour. A policy document states that the private providers of secure training centres, G4S and MTC, may restrict children's time outside their cells to 1½ hours a day, instead of the usual 14 hours. The expiry date for this weakening of legal protections for children, although said to be linked to COVID-19, is 25 March 2022.

14. There was no time given for Parliamentary scrutiny and there was no public consultation ahead of these changes. The Children's Commissioner for England was not consulted and has since criticised the rules, stating that "children in prison should be treated as children first and not blindly be subjected to rules which are designed for the adult estate".¹⁷

15. Children as young as 12 can be detained in England's two secure training centres. It is psychologically and emotionally damaging for any child to be kept locked up in prison cells for up to 22.5 hours a day, but especially cruel for those who have learning disabilities, mental health problems and for children who have endured earlier abuse and neglect. The UN Committee has

Great Britain and Northern Ireland, June 2016, at <http://www.crae.org.uk/media/93148/UK-concluding-observations-2016.pdf>

¹³ Article 2, UN Convention on the Rights of the Child

¹⁴ See Howard League for Penal Reform, 100 Days of Solitude: The impact of coronavirus in prisons, 2 July 2020 at <https://howardleague.org/news/100-days-of-solitude-the-impact-of-coronavirus-in-prisons/>

¹⁵ <http://www.legislation.gov.uk/ukxi/2020/508/contents/made>

¹⁶ <http://www.legislation.gov.uk/ukxi/2020/664/made/data.pdf>

¹⁷ Children's Commissioner for England Anne Longfield responds to amended statutory rules for secure training centres, 8 July 2020, at <https://www.childrenscommissioner.gov.uk/2020/07/08/childrens-commissioner-responds-to-amended-statutory-rules-secure-training-centres/>

already called on the UK to “prohibit the use of solitary confinement” on children – this revised policy effectively permits it.¹⁸

16. The UN Committee also called, in response to COVID-19, for the “release children in all forms of detention, whenever possible” and for children who cannot be released to be provided with the means to maintain regular contact with their families. In March 2020, predicting the enormous challenges which prisons would face in meeting children’s needs, Article 39 wrote with other organisations to Ministers urging them to safely release children from custody wherever possible.¹⁹ The government did not take this protective action and now it has found it necessary to change the law to reduce the statutory obligations of the companies who run secure training centres. When children have needed the government to take a firm stance on safeguarding their rights, they have been abandoned and providers have been protected.
17. **Recommendation: The Secure Training Centre (Coronavirus) (Amendment) Rules 2020 and the Prison and Young Offender Institution (Coronavirus) (Amendment) (No. 2) Rules 2020 must be revoked as a matter of urgency.**
18. **Recommendation: Unless and until arrangements are made to ensure children are guaranteed safe and humane conditions in custody, they should not be detained, either on remand or under sentence.**

Children subject to detention for mental health purposes

19. As the Joint Committee on Human Rights has already highlighted, lockdown measures have increased the existing dangers already facing vulnerable people in closed institutions and children and young people's rights are at risk through unlawful blanket bans on visits; the suspension of routine inspections; increased use of restraint and solitary confinement.
20. Article 39’s Children and Young People’s Advocates Network has over 170 members working to empower children and young people to ensure their rights are upheld and their views and wishes are heard and taken seriously. Many of our members have highlighted the difficulties they face in delivering advocacy for children in secure mental health settings because of the importance of face-to-face presence in facilitating engagement and the reliance on medical staff to facilitate contact with children and young people. This can hinder children’s ability to get support to appeal their detention or lodge complaints. Drop-in mental health advocacy sessions are also of vital importance for young inpatients who are not formally detained under the Mental Health Act and therefore not automatically entitled to advocacy, but many of these have not been possible and progress to move to ‘virtual’ provision has been slow. This has highlighted the patchy nature of advocacy entitlement and provision.

¹⁸ 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 78(f) at <http://www.crae.org.uk/media/93148/UK-concluding-observations-2016.pdf>

¹⁹ Article 39, Joint call for safe release of child prisoners, March 27, 2020, at <https://article39.org.uk/2020/03/27/joint-call-for-safe-release-of-child-prisoners/>

21. **Recommendation: All mental health units should be required to ensure that sufficient communication facilities are available so that children and young people detained under the Mental Health Act are able to access independent advocacy and to see family and friends.**
22. **Recommendation: All children and young people receiving any tier of mental health support services should be entitled to an active (opt-out) offer of information and assistance from independent advocacy services, enshrined in legislation through amendments to the Children Act 1989 or Mental Health Act 1983.**

Children in care

23. The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 ('Statutory Instrument 445')²⁰ came into force overnight on 23/24 April, amending 10 sets of regulations in order to "assist the children's social care sector" during the COVID-19 crisis. Changes include the relaxation of requirements around the frequency of social worker visits to children in care, independent reviews of individual children's care, the weakening of care standards in children's homes, relaxation of the statutory timescales for Ofsted inspections of children's homes as well the number of independent visits and reports on children's homes, the increased duration of emergency foster placements and a relaxation of safeguarding checks for new foster carers.
24. These regulations substantially weaken legal protections for children in care and were introduced without clear rationale; without proper consultation; and without parliamentary scrutiny. No extra protections were afforded to children through these regulations and the focus has been not on the best interests of children but on the system. The changes introduced echo previous, unsuccessful, attempts by government to diminish legal protections for children.²¹
25. The lack of regular monitoring of children's welfare "means they are at greater risk of grooming or exploitation, especially older children in semi-independent accommodation"²² and charities working with trafficked and unaccompanied children have seen "a notable increase in the number of young people who have gone missing or experienced homelessness as a result of the lack of contact they have had with statutory services".²³ Article 39 convenes the 'Scrap S.I. 445' campaign calling for the immediate withdrawal of Statutory Instrument 445, supported by more than 50 organisations and many hundreds of care experienced people, social workers and others working in the children's social care sector.²⁴ We have also issued judicial review proceedings seeking a court order quashing the Regulations (to be heard 27/28 July 2020).

²⁰ <http://www.legislation.gov.uk/ukxi/2020/445/made>

²¹ See BBC News, Ministers' U-turn over 'bonfire of children's rights', 2 March 2017, at <https://www.bbc.co.uk/news/education-39143396>; The Guardian, Government backs down over 'myth-busting' guide on child protection, 24 March 2019, at <https://www.theguardian.com/society/2019/mar/24/government-backs-down-over-myth-busting-guide-on-child-protection>

²² 'Children in care at risk from new lockdown rules with demand for review of 'unjustified' cuts', The Independent, 7 June 2020, <https://www.independent.co.uk/news/uk/politics/children-care-coronavirus-sexual-abuse-anne-longfield-a9551596.html>

²³ Number of missing vulnerable children soars as safeguarding is cut during pandemic, 6 June 2020, <https://www.theguardian.com/society/2020/jun/06/alarmed-rise-in-cases-of-missing-children-following-safeguarding-cuts>

²⁴ See <https://article39.org.uk/scrapsi445/>

26. On 14 July, the Children’s Minister announced that “the overwhelming majority of these regulations will expire as planned on 25 September” but that she is “minded, subject to consultation, to extend a very small number of temporary changes for a further period.”²⁵ In response to significant external pressure, a consultation on those changes has been published²⁶ but it is of vital importance that this consultation process is meaningful. The House of Lords Secondary Legislation Committee has called on the government “to be open and transparent in its assessment of any longer-term impact and lessons that may be learned, and to involve the Children’s Commissioner and other relevant organisations in this process”²⁷ – openness and transparency should be an integral part of any and every law and policy making process.
27. **Recommendation: The government must revoke the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 as a matter of urgency.**
28. **Recommendation: Any future proposed changes to the law affecting children genuinely connected to COVID-19 must be necessary, proportionate and transparent and subject to open public consultation and parliamentary scrutiny.**

20/07/2020

²⁵ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-14/HCWS368/>

²⁶ At https://consult.education.gov.uk/children2019s-social-care-covid-19-co-ordination-unit/changes-to-the-adoption-and-children-regulations-c/supporting_documents/CSC%20consultation.pdf

²⁷ House of Lords Secondary Legislation Scrutiny Committee 13th Report of Session 2019–21, May 2020 at <https://committees.parliament.uk/publications/986/documents/7689/default/>