CLOSING SUBMISSIONS ON BEHALF OF ARTICLE 39

A. INTRODUCTION

1. The evidence heard by Module 8 demonstrates an overall failure by the UK Government to consider and protect the rights of children during the pandemic. Children's fundamental rights to education[1] and play[2] were routinely overlooked. The closure of schools to the vast majority of children caused significant harm, the effects of which are still being felt today. The lockdown rules and guidance meant that *"millions of children were unnecessarily deprived of essential play, outdoor time, physical activity and safe social contact for long periods over the two years, with massive, lasting damage to their physical and mental wellbeing."*[3]

2. Article 39's submissions are directed to the rights of children living in state and privately-run institutions (including children's homes, mental health inpatient units, prisons and supported accommodation for looked after children aged 16 and 17) in England. To that end, the focus of these submissions is on the changes introduced to children's social care and the treatment of children in prison during the pandemic. This is not to minimise the significant impact on the vast majority of children of the closure of schools, the curtailment of their right to play, or the myriad other challenges for children brought about by the Government's actions and omissions during the pandemic, but rather to focus on the issues most relevant to the children whom Article 39 serves.

3. Children in state care or detention, whether through the mental health, social care or criminal justice systems, are not one homogenous group but there are many factors which they routinely share in common: abuse or threat of abuse from those who have been caring for them; separation from their parents and other loved ones, including brothers and sisters; living with uncertainty and instability by having a corporate parent, a local authority, often with ever-changing homes, carers and professionals; dislocation from their local communities, places of education and friendship groups through being sent many miles from home; challenges to their identity and feelings of self-worth; and living with the difference, stigma and discriminatory treatment that often arises from being a looked after child or a child who is detained. What is more, at the onset of the pandemic,

[1] Article 28 UNCRC
[2] Article 31 UNCRC
[3] INQ000588036_0011, para 57

half of local authority children's services in England were judged by Ofsted as 'requiring improvement' or 'inadequate'.[4]

4. In short, prior to the pandemic, children in care or custody were amongst the most vulnerable of an already vulnerable group. If *"there can be no keener revelation of a society's soul than the way it treats its children"*,[5] the way society treated these especially vulnerable children during the pandemic provides the keenest revelation of our society's priorities.

5. This prevailing failure could be mitigated in a future pandemic by implementation of the three core recommendations sought by Article 39, and supported by numerous other witnesses and core participants in Module 8:
    a. Full incorporation of the UNCRC into domestic law;
    b. A statutory obligation to consult with and give due weight to the views of the Office of the Children's Commissioner prior to making legislation or policy which affects the interests of children; and
    c. The appointment of a Cabinet Minister for Children.

6. These closing submissions will set out the findings and other recommendations sought by Article 39, under the following headings:
    a. The Government's overall failure to recognise children's specific needs and rights during the pandemic;
    b. Specific illustration of the Government's said failure by reference to:
        (i) The introduction of the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 (**"the Amendment Regulations")**; and
        (ii) The treatment of children in prison.

B. OVERALL FAILURE TO RECOGNISE CHILDREN'S SPECIFIC NEEDS AND RIGHTS

Context

7. The UK ratified the UNCRC in December 1991. In Wales, the Rights of Children and Young Persons (Wales) Measure 2011 mandates that Welsh Ministers must have due regard to the UNCRC when making strategic decisions, policies, and laws. The UNCRC was recently incorporated in Scotland by the UNCRC (Incorporation) (Scotland) Act 2024. Although it has not yet been fully incorporated into English domestic law, in 2010 the UK

[4] INQ000588071_0005, para 13
[5] 1/82/19-22

Government committed to give due consideration to the UNCRC when making legislation and policy affecting children, reaffirmed in a parliamentary statement shortly before the pandemic in November 2018.[6]

8. The establishment of the Office of the Children's Commissioner for England by the Children Act 2004 has its place in the development of children's rights protection in the UK from the inquiry in 1945 into the manslaughter and neglect of 12 year old Dennis O'Neil at the hands of his foster parents through to the 2003 Lord Laming report into the circumstances leading to the murder of Victoria Climbié by her great-aunt (who was privately fostering her) and her great-aunt's partner. Lord Laming envisaged a newly created post of Children's Commissioner advising government on law and policy and on the general implementation of the UNCRC. He also recommended a ministerial Children and Families Board at the heart of government and chaired by a minister of Cabinet rank, with ministerial representation from government departments concerned with the welfare of children and families.

9. The Office of the Children's Commissioner is a key national mechanism for the implementation of the UNCRC. The primary function of the Children's Commissioner is the promotion and protection of the rights of children in England.[7] In the discharge of this function, the Children's Commissioner must, in particular, have regard to the UNCRC in considering what constitute the rights and interests of children.[8] In the discharge of its primary function as a statutory children's rights body, the Children's Commissioner must have particular regard to the rights of looked after children and care leavers, as well as others who are living away from home or receiving social care and additional groups who the Commissioner considers to be at particular risk of having their rights infringed.[9]

10. As the Inquiry heard in evidence, there is a perception within government and the civil service that a Cabinet Minister for Children already exists – namely, the Secretary of State for Education. Furthermore, during the pandemic, there existed within and across government departments an at best ad hoc practice of undertaking child rights impact assessments **("CRIAs")** before introducing some legislation and policy affecting children.

[6] INQ000620884_0002
[7] Section 2(1) Children Act 2004
[8] Section 2A(1) Children Act 2004
[9] Sections 2(4) and 8A Children Act 2004

11. Any sense of children's rights thereby being embedded *"within the machinery of government"*[10] during the pandemic evaporated in the light of the evidence heard in Module 8. The refrain of individual ministers *"caring deeply about children"*[11] was not enough to uphold children's rights in the context of a deadly pandemic. In the absence of a substantive legal framework and effective government systems and structures, children's distinct needs and rights were routinely overlooked. Without major change to the current structures, these rights breaches will continue in the event of future pandemics. Article 39 endorses the assessment made by the Children and Young People's Commissioner Scotland:

    "One of the greatest failings during the pandemic response was the lack of recognition of children as rights holders rather than as passive objects of education, care or charity. The structures within which decisions are made need to be fundamentally rethought in order to enable children to take an active role in their own lives and communities."[12]

12. Article 39 submits that this failure was caused by a lack of adequate systems and safeguards to promote children's rights and wellbeing within government, which manifested in three key ways:
    a. Children were not regarded as distinct rights holders and their unique status was only considered through the lens of their need for education, meaning their substantive, holistic rights and needs were overlooked;
    b. The failure to involve children in decision-making, whether directly or by consulting with and giving due weight to the views of the statutory children's rights body, the Children's Commissioner for England;
    c. The routine failure to undertake CRIAs when introducing legislation and guidance affecting children.

<u>Erroneous government approach to children only through the lens of their need for education</u>

13. A number of witnesses giving evidence to the Inquiry argued that there is no need for a separate Cabinet Minister for Children to be created because the Secretary of State for Education is also the cross-government Minister for Children.[13]

[10] 15/197/1
[11] For example: Vicky Ford 9/122/5-7; Lucy Frazer 12/119/16
[12] INQ000649659_0013, para 47
[13] Acland-Hood: 11/31/8-13; Rycroft: 14/151/18-20; Johnson: 14/104/15-16

14. One of the key problems with the responsibility for children's rights overall sitting within the Department for Education (**"DfE"**) during the pandemic is well-articulated by Daniel Alexander Paskins on behalf of Save the Children:

> *"discussions of the pandemic tended to focus on issues such as how children impact adult lives, and what is needed to ensure children can become productive workers and members of society once they become adults. Before, during and after the pandemic, children's needs are mainly considered in education, and the focus is often on ensuring children pass exams and develop the tools to become productive adults."*[14]

15. Placing responsibility for children's rights and wellbeing with the Secretary of State for Education not only leads to a particularly narrow vision of childhood – as articulated by Mr Paskins above – but also relies on the individual minister *"choos[ing] to step into and exercise that wider responsibility"* alongside their *"core role",* which has *"standing teams existing, guidance, sets of levers."*[15] As Susan Acland-Hood put it: *"when you exercise your cross-cutting role, some of those levers, teams and responsibilities sit in other people's departments. And if you want to, you can call on your cross-cutting role to have influence, but you're not, as it were, obligated to, and the system doesn't necessarily push you to in the same way."*[16]

16. Ms Acland-Hood and Sir Matthew Rycroft agreed that, notwithstanding his role as the cross-government Minister for Children, Sir Gavin Williamson did not call on his *"cross-cutting role to influence policy or other departments*"[17] during the pandemic.

17. This was apparent from the evidence of former Children's Commissioner for England, Baroness Anne Longfield, who described it as *"virtually impossible"* both before and during the pandemic to find the relevant person within government to discuss children's issues outside of schools, as "*no one in the round took responsibility for children's best interests."*[18] This led her to conclude that *"the machinery of government is ill suited to the lives of children and makes it too easy for children to be overlooked."*[19]

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[14] INQ000651556_0005, para 16
[15] 11/122/14-24
[16] 11/122/24-11/123/5
[17] 14/152/ 6-21
[18] 4/95/17-23
[19] 4/96/6-8

18. Boris Johnson explained, in response to a question from Her Ladyship (as to the need for a Cabinet Minister for Children) that parents should be responsible for children.[20] Not only does that view exclude those children living in institutional settings and/or without a parent able to meet their needs, it ignores the fact that children, like adults, require effective government structures, decision-making and action.

19. Notwithstanding the lack of effort made by Sir Gavin Williamson to undertake his secondary, cross-cutting role during the pandemic, the likelihood of him having had any influence, had he done so, is remote, given the overwhelming evidence before the Inquiry that he was not 'at the table' when even key decisions within his core portfolio - such as the decision to close schools in January 2021 – were made.[21]

20. The fundamental change required to put children *"at the heart of all government decision-making"*[22] and, thus, 'at the table' is the appointment of a dedicated Cabinet Minister for Children, so that children are not viewed solely through the lens of education or as a minor subset within other departments. Such an appointment would not prevent other structural changes being made within government to promote cross-government working on children's rights, for example – as Indra Morris suggested (and foreshadowed by Lord Laming's first general recommendation) – named ministers for children within each of the existing departments.[23] But it would give the Cabinet Minister the *"levers"* and *"standing teams"*[24] necessary to influence government decision-making on children's rights in the event of future pandemics and ensure that the full range of issues affecting children are considered and not lost, as they frequently were during the pandemic where so much focus was on school closures (albeit there were significant government failures in this area of policy too). The benefit of such a role was summarised by the Independent Inquiry on Child Sexual Abuse in its closing report:

> *"A Minister with cabinet responsibility for children would bring the diverse strands of policy development together by giving a voice to the child's perspective. The creation of such a post would…provide strong, single leadership for child protection at the highest level."*[25]

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[20] 14/104/19-21
[21] 14/64/1-8
[22] INQ000588036_0047, para 204
[23] 9/17/1-9/18/14
[24] 11/122/22-25
[25] INQ000588071_0063, para 148

Failure to involve children in decision-making

21. Baroness Longfield confirmed that prior to the pandemic there was *"no settled practice of the Government coming to the office of the Children's Commissioner to consult."*[26] During the pandemic, she described how she was often informed the night before a policy announcement *"as a courtesy,"*[27] rather than consulted; the situation was, she said,*"very fluid, and somewhat chaotic."*[28] It is clear that, during the pandemic, systems and processes were not in place for routine consultation between the Government and the statutory children's rights body, despite that body having then existed for 15 years.

22. Compounding this issue was the lack of any effort on the part of the UK Government to directly involve children in decision-making during the pandemic. Indra Morris was frank in her written evidence that *"the voice of children in some of the most difficult situations was missing, including those in special residential settings."*[29] In her oral evidence, Ms Morris made repeated reference to departments having a *"sector-focused, service focused, way of doing things"*[30] and the need to have *"a lens that starts with the child,"*[31] but she was unable to provide concrete mechanisms for doing so, other than a vague suggestion to set up a *"children and young people's board."*[32]

23. Mr Johnson seemed surprised by the idea of holding press conferences for children during the pandemic before conceding that they *"might have been a good thing to do,"*[33] without giving any reason why he did not do so. This contrasted with the devolved administrations in Scotland and Wales, the latter having the most embedded UNCRC framework during the pandemic. Mark Drakeford gave compelling evidence that he was *"absolutely committed to the voice of the child being heard in the ears of people who make decisions,"*[34] demonstrating this commitment to children's right to respect for their views under Article 12 UNCRC by meeting with them every month during the pandemic. These different governmental approaches serve to highlight the significance of UNCRC incorporation.

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[26] 4/7/24-4/8/3
[27] 4/8/25-4/9/4
[28] 4/9/11-12
[29] INQ000588009_0027, para 6.4
[30] 9/23/16-17
[31] 9/65/10-11
[32] 9/74/6
[33] 14/45/23
[34] 15/171/3-4

24. Incorporation of the UNCRC and the introduction of a statutory duty to consult and give due weight to the views of the Children's Commissioner before making legislation and policy affecting children would ensure *"inclusive and meaningful participatory structures for children and young people"*[35] were in place well ahead of a future pandemic or national emergency, therefore mitigating the impact of such an emergency on their rights.

Routine failure to assess the impact of new policy and legislation on children's rights

25. Sir Gavin Williamson's answer to Article 39's question about the systems and processes in place at the DfE to implement his general statutory duty to promote the well-being of children[36], was largely rhetorical and lacking in specifics. Despite the government's twice-cited commitment to the UNCRC having been set out in the prelude, he did not reference the UNCRC. Instead, he spoke of his *"brilliant Children's minister"*[37] and the child being *"at the heart every single day."*[38] When pressed, he was only able to name one specific 'system and process' – impact assessments.[39] However, within the disclosure for this Module, there is evidence of only two such assessments produced by the DfE during the pandemic – one for the Amendment Regulations, found by the Court of Appeal to be flawed, and one for the successor regulations. Incorporation of the UNCRC – making CRIAs routine - would have made a significant positive difference for children.

26. Baroness Longfield described the lack of routine CRIAs *as "a huge gap in the machinery of government,"* noting that "*although there were occasional impact assessments, they didn't have the status or the depth or weren't given the importance by ministers and government leaders that would mean that they would have the teeth to ensure that the resources followed."*[40]

27. Ms Acland-Hood cautioned against *"the writing of the assessment substituting for the thinking really deep embedded in the decision itself,"*[41] yet a CRIA provides the necessary structure, objectivity and template for ensuring that decisions appropriately recognise and take account of children's rights. Ms Acland-Hood also argued that *"a lot of the decisions the department took during the pandemic were kind of deep focused on the rights and interests of the child,"*[42] but the provision of CRIAs would both evidence this process and

[35] 16/47/19-23
[36] Section 7, Children and Young Persons Act 2008
[37] 10/128/3
[38] 10/128/16
[39] 10/128/8-14
[40] 4/89/23-4/90/4
[41] 11/44/2-3
[42] 11/44/9-10

ensure, objectively, that child-focused aims were achieved rather than leaving it to general reassurances. Article 39 supports the opinion of Professor Steve Turner that CRIAs accompanying all policy decisions or legislative changes which impact children *"would help people in senior decision-making places to think 'child'… not to forget children."*[43]

28. CRIAs are important even when they are flawed. As set out below, Article 39 submits that the introduction of the Amendment Regulations provides a paradigm example of the use of a CRIA yielding objective evidence that the thinking was not *"deep focused on the rights and interests of the child."* The flaws in the CRIA produced for the Amendment Regulations - which should have been apparent to the DfE - did not withstand objective scrutiny by the courts. That is how children's rights being embedded in the machinery of government should work: objective scrutiny of analysis over subjective assurances of good intentions.

29. The benefit of routine CRIAs can be seen from the approach of the Welsh Government. Mr Drakeford provided compelling *"direct practical examples… where the perspective of the UNCRC Children's Rights Measure made a genuine difference"* to the decisions made by the Welsh Government.[44] With respect to CRIAs, Mr Drakeford said it was *"part of our culture to be thinking about these things. We don't rely simply on there being a document produced."*[45] When the value of producing retrospective CRIAs was questioned, he was clear that the purpose was not "*to retrofit a CRIA to the decision we had made,"* but rather *"to learn lessons from it…So that we can then apply that to the children's rights impact assessment that we do hope to have alongside our next decision making."*[46]

30. Article 39 strongly welcomes the Inquiry's recommendation in its Module 2 report that legislation should be introduced to place CRIAs on a statutory footing in England. Article 39 submits that the mechanism for achieving this should be full incorporation of the UNCRC into English law. The UNCRC provides the most globally respected framework for ensuring every child can thrive and reach their potential, with the inherent worth and dignity of each child being recognised and protected. The treaty covers all aspects of a child's life, and affords additional protection to children in especially vulnerable circumstances, including those living in care and custody. Incorporation of the UNCRC would not only enable children to enforce their own rights, it would also bring with it a full suite of children's rights protection, if the Scottish incorporation model is to be followed.

[43] 7/103/15-20
[44] 15/193/22-15/194/6
[45] 15/133/8-11
[46] 15/156/2-12

Firstly, it would place obligations on the government to produce CRIAs when introducing law and policy affecting children.[47] If a CRIA is to be meaningful and effective, it must be firmly rooted in enforceable rights which are specific to children's distinct needs: full incorporaton of the UNCRC would give CRIAS the requisite *"teeth."*[48]

31. Secondly, if the Scottish model is followed, incorporation of the UNCRC would broaden the powers of the Office of the Children's Commissioner by introducing a power to bring or intervene in proceedings claiming that a public authority has breached a child's rights under the UNCRC.[49] Baroness Longfield gave numerous examples in her evidence of government decisions during the pandemic which she did not agree with because they breached children's rights, yet she did not have the statutory power to challenge those decisions through the courts.

32. Combined with a statutory duty to consult with and give due weight to the views of the Office of the Children's Commissioner prior to making legislation and policy affecting children, full incorporation of the UNCRC would provide the safeguards which children require to protect their rights, particularly in the event of future pandemics. One of the pioneering aspects of the Scottish UNCRC legislation is the duty on courts and tribunals to have regard to a child's expressed views about any relief, remedy or order arising from UNCRC proceedings – thus underlining the importance of not only hearing from children as to how their rights have been breached but also seeking their perspective on what would improve and mitigate this.

Proportionality

33. Article 39 submits that embedding a statutory framework for children's rights implementation does not mean that their rights must then be automatically *"counterpoised to the rights of other people."*[50] Since the Human Rights Act 1998 came into force in the UK, leading to full incorporation of the ECHR, decision-makers (including courts) have become accustomed to balancing different rights as part of proportionality assessments, the most common example being the balancing of an individual's privacy rights under Article 8 with the press's Article 10 free-expression rights. The correct approach to proportionality is well-established by the Supreme Court.[51]

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[47] UNCRC (Incorporation) (Scotland) Act 2024, section 17(1)-(3)
[48] 4/89/23-4/90/4
[49] UNCRC (Incorporation) (Scotland) Act 2024, section 11
[50] 15/133/24-25
[51] Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39, per Lord Reed at [74]

34. As well as providing a means by which children – and their Children's Commissioner - could enforce a suite of rights, drafted and designed to recognise their distinct needs, full incorporation would, critically, *"change culture and practice, hopefully to avoid the need for that action to have to happen."*[52] As Her Ladyship indicated, it is *"not a binary question between children's rights and the rights of the rest of society and adults."*[53]

35. Article 39 submits that its three core recommendations would address the lacunae set out above and ensure the rights of children were embedded within the machinery of government in the event of future pandemics. This would help to ensure that the failures exemplified by the introduction of the Amendment Regulations and the treatment of children in prison - as set out below - would not be repeated.

C. ADOPTION AND CHILDREN (CORONAVIRUS) (AMENDMENT) REGULATIONS 2020

Increased need to safeguard the most vulnerable children during the pandemic

36. Article 39 submits that the unique vulnerability of those children who were subject to the highest form of child protection, by virtue of being in the care of the state, was disregarded by the DfE during the pandemic. The experience of these particular children provides a clear example of government action endangering children during the pandemic. Moreover, notwithstanding the extensive disclosure made to the Inquiry in relation to this issue, and the written and oral evidence directed to it, it remains wholly unclear how or why so many significant errors were made. Article 39 has provided a list of proposed findings as to these errors at paragraph 64 below, none of which has been explained. The Inquiry is invited to find that the answer lies in the poor understanding of the nature and importance of children's legal protections, combined with a disproportionate reliance upon the views, interests and priorities of local authorities and service providers. Incorporation of the UNCRC would ensure that this would not be permitted to recur in the event of another pandemic.

37. Early in her oral evidence, the former Minister for Children and Families, Vicky Ford, said, that *"the big concern"* was: *"are you going to able to be keep eyes on vulnerable children? Because it's so important … for safeguarding."*[54] When asked on behalf of the Children's Rights Organisations whether the increased vulnerability of looked after children was recognised by the DfE in the pandemic, in a context where Ofsted was not inspecting

[52] 16/5/10-12
[53] 16/55/11-13
[54] 9/129/1-4

local authorities for six months, Mrs Ford stated that it was, and *"that was why we did as much as we can to try to keep eyes on in other ways."*[55]

38. The Inquiry is invited to find that, rather than ensuring that they had *"eyes on them for safeguarding,"* the steps taken by the DfE ensured the opposite – many thousands of looked after children (including disabled children) became hidden behind closed doors of institutions, the statutory scheme protecting them having been dismantled by secondary legislation.

39. The Amendment Regulations were laid before parliament on 23 April 2020 and came into force the following day. This resulted in approximately 100 amendments to 10 statutory instruments affecting a wide range of highly vulnerable children and young people, including looked after children, care leavers, and disabled children. Article 39 calculated that 65 safeguards for children were either removed or diluted.[56]

Dilution or removal of safeguards

40. An example of this reduction in safeguarding and oversight of children in care is the amendment to Regulation 28 of The Care Planning, Placement and Case Review (England) Regulations 2010. Prior to the passing of the Amendment Regulations, local authorities were required under this regulation to visit children within one week of the start of any new placement, then at least every six weeks for the first year of the placement and then at intervals of every three months if it was planned that the child would stay in that placement until they were 18 (every six weeks otherwise). Under the changes made by the Amendment Regulations, where the local authority was unable to visit within these statutory timescales, it was required only to ensure that visits take place *"as soon as is reasonably practicable thereafter."* In addition to this, Regulation 28 was also amended to permit these visits to be conducted by telephone, video-link or other electronic means.[57]

41. In her oral evidence, Carolyne Willow on behalf of Article 39, described the reality of these amendments for looked after children, namely that "*local authorities did not even have to call them once every six weeks, because that was taken away from the statutory scheme.*"[58]

[55] 9/197/7-13
[56] INQ000620782
[57] Regulation 8(13), Adoption and Children (Coronavirus) (Amendment) Regulations 2020
[58] 12/90/12-16

42. Regulation 33 of The Care Planning, Placement and Case Review (England) Regulations 2010 was also amended so that, rather than having to review a looked after child's welfare every six months after their first two statutory reviews, this could take place *"where reasonably practicable thereafter."*[59]

43. These changes were of particular concern not only to Article 39, but also to others in the sector. Professor Sam Baron on behalf of BASW noted the *"inherent assumption"* within the Amendment Regulations that:

> *"because children were looked after, they therefore were in a safe, protected place, and therefore you could ease their legal rights to have a timed assessment, when actually a social worker would do that quite the opposite way round, which is a child that has been removed is significantly at risk and has faced considerable risk, and therefore the need for timed assessment. And the timed – timing of an assessment and the timeliness of a review is to protect the child."*[60]

44. Independent oversight of children in children's homes became virtually non-existent as a result of the Amendment Regulations. The requirement for children's homes to ensure that an independent person visited the home at least once a month was diluted so that they only had to use reasonable endeavours to ensure such a visit.[61] The requirement for Ofsted to inspect children's homes twice a year (unless they had in the past year been judged good or outstanding) was deleted.[62] These amendments were particularly concerning in the context of children in children's homes not being permitted to have visits from their families, who also provide crucial oversight.[63]

45. The Association of Lawyers for Children considered that the Regulations *"went too far and were largely unrestrained in time"* and expressed the concern that many of the safeguarding duties amended by the regulations were *"all but extinguished if they are to be undertaken 'as soon as is reasonably practicable'",* given that *"'as soon as reasonably practicable' may drift into 'never.'"*[64]

<u>One-sided consultation</u>

[59] Regulation (14), Adoption and Children (Coronavirus) (Amendment) Regulations 2020
[60] 9/104/4-16
[61] Regulation 11(6), Adoption and Children (Coronavirus) (Amendment) Regulations 2020
[62] Regulation 12, Adoption and Children (Coronavirus) (Amendment) Regulations 2020
[63] INQ000588071_0031, para 80.6
[64] INQ000587953_0016, para 49

46. Article 39, a small charity operating on an extremely limited budget, challenged the Amendment Regulations by issuing judicial review proceedings, through which it transpired that, prior to their introduction, the DfE had conducted a selective consultation with some but not all local authorities, adoption agencies and relevant charities. The Children's Commissioner for England was informed but not consulted about the changes, and no children's rights organisations were consulted.

47. The introduction of the Amendment Regulations in this way is a clear example of the Government failing to involve children and young people in decision-making during the pandemic, and of introducing legislation without properly assessing the impact on children's rights (contrary to Articles 3, 4 and 12 of the UNCRC). Had there been full incorporation of the UNCRC, either this would not have happened - as the errors would have been obvious to the DfE - or children's rights would have been more easily protected by court proceedings, either by the Children's Commissioner and/or without the need to establish as a prerequisite an obligation to consult (required in Article 39's challenge).

48. Article 39's judicial review application did not succeed in the Administrative Court. The Court of Appeal concluded in November 2020 that the then Secretary of State for Education, Sir Gavin Williamson, had acted unlawfully in failing to consult the Children's Commissioner for England or any other children's rights organisation when considering changes to the statutory scheme for highly vulnerable children.[65] This judgment provides the Inquiry with firm foundations from which to draw conclusions as to the DfE's approach to vulnerable children during the pandemic. Giving the leading judgment, Lord Justice Baker, with whom Lord Justice Henderson and Lord Justice Underhill agreed, held that consulting those agencies and organisations representing the rights and interests of children in care, "*was manifestly in the interests of the vulnerable children who would be most affected by the proposed amendments.*"[66]

<u>Depiction of the amendments as a removal of administrative burdens</u>

49. The email to Baroness Longfield advising her of the proposed changes to a number of statutory instruments stated that the purpose of the changes was to continue to prioritise the needs of children while *"**relaxing some minor burdens** in order that local authorities can continue to deliver children's services without being unnecessarily hindered by process…"*[67](emphasis added). The DfE maintained the language of 'burdens' in the

[65] *Article 39 v Secretary of State for Education* [2020] EWCA Civ 1577 at [87]
[66] *Ibid* at [86]
[67] INQ000588139_0044, para 131

explanatory memorandum to the Amendment Regulations: *"Most changes are procedural; **easing administrative burdens,** allowing visits and contact to take place remotely and relaxing strict timescales where possible"*[68] (emphasis added).

50. The Administrative Court rejected the Government's characterisation of the weakened safeguards as *"bureaucratic provisions that are a 'burden'",* instead describing them as *"critical safeguards to protect deeply vulnerable children in a field where errors happen with sad frequency and the consequences can be devastating."*[69]

51. When Mrs Ford was asked by Article 39 what the failure to consult with the Children's Commissioner says about the DfE's approach to children's rights at the time, she said: *"They should have consulted equally, okay?...I think it was an oversight…I still believe that the main thing that was being done in trying to pass those regulations was trying to operate in a way that put children first **and the children at greatest risk first"***[70] (emphasis added).

52. Article 39 submits that this response betrays the former minister's lack of understanding that the changes made in fact removed and reduced safeguarding and oversight, putting the children already at greatest risk – those in the care of the state - at even greater risk. As summarised by Ruth Allen on behalf of the British Association of Social Workers ("**BASW"**), not only had the amendments *"been proposed …and then adopted with a lack of due parliamentary process,"* but many of them *"undermined children's rights and failed to put their welfare and best interests at the centre."*[71]

53. This view is shared by Baroness Longfield, who told the Inquiry that the Amendment Regulations represented *"a sweeping dilution of legislative protection at the absolute worst time for these vulnerable children."*[72] Her evidence is echoed by The Care Leavers Association: *"We did not believe that any of the changes were required, on health or any other grounds, as they create more risk and harm than they deflected. At such a difficult time, children in care [needed] more care and direct support, not less. The changes served the convenience and fears of local authorities and their workforces, to the detriment of children."*[73]

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[68] INQ000540899_0004
[69] *Article 39 v Secretary of State for Education* [2020] EWHC 2184 (Admin) at [48]
[70] 9/185/17-9/186/9
[71] INQ000650824_0027, para 126
[72] 4/52/13-15
[73] INQ000588010_0007, para 22

54. Sarah Hammond, on behalf of Kent County Council Children's Services, also stated that the Regulations were not *"in the best interests of vulnerable children."*[74] Article 39 submits that consultation with the Children's Commissioner and children's rights organisations would have (a) identified these deficits for the Government and (b) corrected Mrs Ford's erroneous belief. Incorporation of the UNCRC would have given the Children's Commissioner the power to right the DfE's wrongs through the courts. Government ministers would have likely exercised far greater care and caution, knowing their actions would be open to legal challenge.

Child Rights Impact Assessment

55. Notwithstanding the obvious risk that the reduced visibility of highly vulnerable children during the pandemic (including several thousand children in care living in unregulated provision) could lead to harms not being identified and acted upon, the CRIA produced by the DfE's Children's Rights Team on 15 April 2020 made no reference to this.[75] When the CRIA was considered by the Court of Appeal, the court noted that the Department's assessment of how the proposals might impact on children and young people was summarised as focusing on "*administrative procedures and timescales, and on visits and contact with children in care and those who may enter care as a result of Covid-19 should, for example, their parents or carers become unable to look after them. No changes are being made to the substance of the services being provided to these children."*[76]

56. The Court of Appeal concluded that, contrary to what was said in the CRIA, *"the amendments manifestly had the potential to change the substance of the services being provided to children in care"* and that *"taken as a whole",* they *"represented a significant change in the substantive provision of services to children."*[77]

57. It is striking that the only error accepted by the DfE witnesses in relation to the Amendment Regulations was the failure to *"properly"* consult the Children's Commissioner.[78] There was no reflection on the courts' rejection of the department's characterisation of these crucial children's safeguards as administrative burdens. Indeed, the DfE, in its evidence to the Inquiry, lacked insight and continued to describe the changes as *"easing*

[74] INQ000588016_0020, para 73b
[75] INQ000540857
[76] *Article 39 v Secretary of State for Education* [2020] EWCA Civ 1577 at [12]; INQ000540857_0001
[77] *Article 39 v Secretary of State for Education* [2020] EWCA Civ 1577 at [80]
[78] 9/171/20; 11/34/1-5

administrative obligations on social workers."[79] Article 39 submits that the failure to consult with the Children's Commissioner and other children's rights organisations led to the DfE's gross mischaracterisation of the Amendment Regulations which would otherwise have been avoided, thereby avoiding endangering vulnerable children in the care of the state when they most needed protection and independent oversight.

Use and impact of the Amendment Regulations

58. The DfE will make the case that the Amendment Regulations were not widely used by local authorities and that their impact was therefore limited. The witness statement of Frances Oram, a former senior civil servant in the DfE, states:

    "After the regulations came into force, to understand which amendments were being used and why, DfE gathered regular feedback from a variety of sources including local authorities, social workers, charities, Ofsted and other key partners via weekly, fortnightly, and monthly engagement…This engagement indicated that the amendments had not been widely used overall."[80]

59. Ms Oram subsequently confirms that, as part of this monitoring, 81 local authorities had been *"spoken to"* in July 2020.[81] In Mrs Ford's witness statement, she confirms that *"in May 2020, 20 out of 69 local authorities used the flexibilities, increasing to 65 out of 108 in June."*[82]

60. The Inquiry is invited to treat this data with considerable caution for the following reasons:
    a. There are 152 local authorities in England with children's social care responsibility. On the DfE's own evidence, therefore, they had *"spoken to"* only a fraction of those regarding their use of the Amendment Regulations – 69 local authorities in May 2020, 108 in June 2020 and 81 in July 2020;
    b. Local authorities were asked only to indicate whether or not they were using the so-called 'flexibilities', not about the impact on individual children and young people;
    c. What little information has been disclosed to the Inquiry gives no sense as to how local authorities collected their data; and
    d. Crucially, this data is dependent on local authorities accurately self-reporting in conversations with DfE officials.

[79] INQ000587997_0032, para 7.4; INQ000268013_0034, para 4.10.1
[80] INQ000587996_0049, para 4.9
[81] *Ibid*
[82] INQ000587997_0036, para 7.15

61. As Ms Willow put it during her oral evidence to the Inquiry:

> *"This is requiring, expecting local authorities to report to central government that: yes, we've stopped having six-weekly telephone contacts with children in care, we've stopped reviewing their welfare, we've let people who are not connected to children look after them without a full assessment, we've stopped placement plans, which were very clear in law before. You are expecting the local authority to say: we've done that, and could you tell the minister that this is the effect on children."*[83]

62. Furthermore, notwithstanding the statutory instrument having placed a statutory duty on the Secretary of State for Education to review the effectiveness of the regulations,[84] the DfE confirmed in its evidence that it *"has not subsequently specifically or distinctly measured the impact (if any) of the regulations, partly because reported use of the exceptions was low."*[85]

63. The monitoring and accountability mechanisms in place in respect of the Amendment Regulations were not sufficient to be able to conclude that they were not widely used, nor can the impact of the regulations on looked after children and those entering and leaving care be accurately measured as a result**.** Article 39 submits that the errors identified above placed vulnerable children who were already at risk of harm at even greater risk of harm during the pandemic.

<u>Findings sought by Article 39 in respect of the Amendment Regulations</u>

64. The Inquiry is invited to find, both in the light of the Administrative Court and Court of Appeal's conclusions identified above and the evidence it has read and heard, that:
    a. The regulations removed critical safeguards to protect deeply vulnerable children, in a field where errors are frequent and the consequences can be devastating, thereby exposing them to increased risk during the pandemic;
    b. It was manifestly in the interests of vulnerable children that agencies and organisations representing their rights should be consulted and it was a failure, which remains unexplained, not to do so;
    c. The CRIA failed to identify the impact on children's rights and the risks to vulnerable children arising from the regulations;

[83] 12/97/2-12
[84] Regulation 13, Adoption and Children (Coronavirus) (Amendment) Regulations 2020
[85] INQ000587996_0054, para 4.21

d. The DfE wrongly regarded and described the changes as removing administrative burdens;
e. Given the adverse consequences for all children of the pandemic, but especially the vulnerability of children in care, safeguards for those children should have been increased and not reduced;
f. The DfE put the interests of local authorities and service providers above the needs of vulnerable children and young people by developing and implementing the Amendment Regulations at speed, without consulting the Children's Commissioner for England or children's rights organisations;
g. Due to the then Secretary of State for Education's failure to fulfil his statutory duty to review the effectiveness of the Amendment Regulations, the impact of the regulations on looked after children cannot be accurately measured.

65. Article 39 submits that implementation of its three core recommendations – incorporation of the UNCRC into domestic law, a statutory duty to consult with and give due weight to the views of the Children's Commissioner before making law and policy affecting children, and the appointment of a Cabinet Minister for Children – would ensure that critical safeguards for looked after children could not be lawfully removed or diluted in the event of a future pandemic. Furthermore, if these safeguards were removed, children themselves or the Office of the Children's Commissioner would more readily be able to challenge this through the courts as a result of UNCRC incorporation. Government departments would be mindful of this during the policy development process.

D. CHILDREN IN PRISON

66. Article 39 endorses the overall conclusion of Professor Hannah Smithson in her statement to the Inquiry: *"Children and young people in the Youth Justice System were woefully neglected during the pandemic."*[86]

Early Custody Temporary Release Scheme

67. Article 39 invites the Inquiry to find that, by maintaining the same criteria for the early release of both children and adults throughout the pandemic, the government failed to have regard to and address the rights of children and their particular needs.

68. In December 2016, the government made a commitment to phase out child prisons and replace them with smaller secure schools situated in the regions that they serve. In 2017,

[86] INQ000587801_0001, para 1

a review of the children's secure estate stated that the Youth Justice Board (**"YJB"**) - then responsible for the estate - had *"acknowledged that the [children's secure estate] is not fit for the purpose of caring for or rehabilitating children and young people."*[87]

69. Against that backdrop, at the onset of the pandemic on 18 March 2020, Article 39 coordinated a joint letter to the then Lord Chancellor and Secretary of State for Justice urging the government to release child prisoners. The joint letter was signed by several charities and the former Children's Commissioner for England, Maggie Atkinson (2015-20). The letter asked the Youth Custody Service to "*make arrangements to release, and stop admitting, children who can be safely supervised and looked after within the community."*[88]

70. Despite seemingly extensive efforts being made by the Ministry of Justice (**"MoJ"**) to set up a Covid-19 release scheme for prisoners, including child prisoners, the former Minister of State in the Ministry of Justice, Lucy Frazer KC, confirmed that not a single child was released from custody under the scheme, although some adults were released.[89]

71. Article 39 submits that the primary reason for this was that the same criteria for release under the scheme were being applied to both adults and children, despite the fact that those criteria were not relevant to the children's secure estate, nor the specific needs and characteristics of children. This was raised as a concern by the YJB in May 2020, which recommended that the MoJ review the criteria being applied to children under the scheme and *"develop a set of criteria particularly for children rather than overlaying the criteria for adults."*[90] The YJB now recommends that, in the event of a future pandemic, *"more children, those who are on remand and short sentenes, be considered for release into the community with appropriate measures to protect the public and victims through use of electronic monitoring, licence and bail conditions."*[91]

<u>Recommendation sought in respect of early release</u>

72. The Inquiry is invited to make a recommendation that a specific set of early release criteria tailored to children is developed <u>in advance of any future pandemic or national emergency.</u> Notwithstanding the imperative to close child prisons, should any children be

[87] INQ000588071_0013, para 32
[88] INQ000588071_0044, para 107
[89] INQ000588042_0043, para 166; 12/163/23–12/164/3
[90] INQ000567552_0004
[91] INQ000547938_0072, para 227.

detained in prison at the outset of such an emergency, this would ensure those who can be are safely released into the community, in line with the YJB recommendation.

Insufficient consideration given to children's specific needs and rights

73. The Inquiry is invited to find that:
    a. Children in prison (whether in young offender institutions ("**YOIs**") or secure training centres (**"STCs"**)) were, overall, treated in the same way as adult prisoners and, consequently, insufficient consideration was given to their specific needs and rights; and
    b. The guidance produced by His Majesty's Prisons and Probation Service (**"HMPPS"**) had a disproportionate focus on preventing the spread of Covid-19 at all costs, without sufficient mitigations put in place to ameliorate the impact of what amounted to *"brutal conditions"*[92] on vulnerable children in custody, who were in any event at a lower risk from Covid-19.

74. Charlie Taylor on behalf of His Majesty's Inspectorate of Prisons (**"HMIP"**) gave compelling evidence to the Inquiry to this effect, stating in his witness statement that *"at the start of the pandemic, HMPPS gave too little attention to the distinct needs of children in custody."*[93] Mr Taylor expanded on this in his oral evidence:

    "the needs of children are different, and yet there was a blanket application of the rules. The ordinance came down that prisons would lock down and they would lock down in a certain way and that children were simply swept up in that, rather than thinking more particularly about the needs of children."[94]

75. Matthew Coffey on behalf of Ofsted, similarly, stated in his witness statement:

    "From the outset, one of the most significant problems faced by YOIs, SCHs [secure children's homes] *and STCs was that public health guidance on secure settings was focused on adult prison settings, rather than children…and resultant guidance contained many mixed messages. The guidance exhibited a lack of understanding of the operation and needs of children's secure settings, which produced various risks to the mental and physical wellbeing of children in these settings..."*[95]

Lack of education leading to solitary confinement

[92] INQ000651556_0021, para 74
[93] INQ000649961_0057, para 256
[94] 2/79/2-7
[95] INQ000588111_0307-0308, para 722

76. The Inquiry is invited to find that:
    a. HMPPS was responsible for children in custody going for many months without face-to-face and/or meaningful education in breach of their right to education;
    b. The primary goal of HMPPS was to prevent the spread of Covid-19 at all costs, and, consequently, insufficient consideration and weight was given to the potential impact on the health and wellbeing of children of prolonged periods of isolation in their cells, without access to meaningful activity or human contact; and
    c. A new regulatory scheme, namely that the minimum number of hours of education and programmes of activities need only be provided *"so far as reasonably practicable,"* was introduced by the MoJ without any children's rights impact assessment or consultation with the Children's Commissioner and had the effect of legalising a punitive regime.

77. The failure to provide meaningful education during the pandemic was intertwined with the rise of solitary confinement. Prior to the pandemic, Rule 38 of the Young Offender Institution Rules 2000 imposed a duty on YOIs to provide at least 15 hours of education or training per week to children of compulsory school age detained within the YOI. Similarly, Rule 28 of the Secure Training Centre Rules 1998 imposed a duty on STCs to provide at least 25 hours of education of training per week to children, according to the age and individually assessed needs of each child detained within the STC. Both the YOI Rules 2000 and the STC Rules 1998 also imposed duties on establishments to engage children in programmes of activities. These rules had been in place for over 20 years for good reason: they acknowledged children's right to an education,[96] as well as their need for human interaction and meaningful activity, notwithstanding their detention in custody.

78. The UN Standard Minimum Rules for the Treatment of Prisoners ("the Mandela Rules") define solitary confinement as being when a child or adult prisoner is confined for 22 hours or more per day without meaningful human contact.[97] The Mandela Rules state that prolonged solitary confinement (in excess of 15 days) and indefinite solitary confinement (when someone does not know when their confinement will end) should be prohibited.

79. Article 37 of the UNCRC prohibits inhuman or degrading treatment or punishment and confirms that every child deprived of their liberty shall be treated with humanity and respect, and in a manner which takes into account the needs of persons of his or her age.

[96] Article 28 UNCRC
[97] INQ000588071_0014, para 36

80. In spite of these long-standing minimum requirements, *"HMPPS cancelled all face-to-face education for children in public sector prisons in March 2020; they were offered in-cell education packs instead…Face-to-face education also stopped in March 2020 in STCs. It began to gradually return from June 2020."*[98] As a consequence of this*, "all children in custody experienced a dramatic reduction in their time out of cell with most children in custody spending more than 22 hours a day in their cells."*[99] According to Ofsted, weekend hours were particulary limited, with some children reporting as little as 45 minutes of activity outside their cells.[100]

81. According to Elisabeth Sian Davies, who provided a statement on behalf of the Independent Monitoring Boards (**"IMB"**), *"in-cell provision largely consisted of distraction packs 'dumped' on wings, rather than learning materials."*[101] Her evidence is echoed by Mr Taylor on behalf of HMIP, who described *"someone shoving a folder under their door with some learning in that might get marked a day or two later…in terms of any meaningful progress with children's learning, I think it was pretty negligible".*[102]

82. This poor provision of education was routine in public-sector YOIs and STCs *"despite most children in custody meeting the definition of a vulnerable child. In the community face-to-face education was maintained for such children when the Covid-19 restrictions took effect in recognition of its vital importance in their wider wellbeing."*[103] Furthermore, as the pandemic progressed and some face-to-face education was re-introduced in public sector YOIs and STCs, Mr Taylor confirms that *"this continued to vary across the estate,"* giving the example of Wetherby YOI only having resumed face-to-face education in the weeks before the Inspectorate's visit in April 2021.[104]

83. Lucy Frazer KC was challenged as to the reasons for the immediate cessation of face-to-face education in child prisons. In particular, the initial guidance from HMPPS, "Covid-19 Operational Guidance – Temporary regime to reduce risk,"[105] dated 24 March 2020, was explored. Page one of the guidance states:

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[98] INQ000649961_0058, para 257
[99] INQ000649961_0055, para 244
[100] INQ000588111_0308, para 724a
[101] INQ000587900_0031, para 131
[102] 2/74/8-15
[103] INQ000649961_0058, para 256
[104] INQ000649961_0058, para 260
[105] INQ000530765

"With immediate effect Governors need to review every aspect of their daily regime so as to minimise contact: ***All non-essential activities involving groups of people should be stopped. This includes*** *social visits,* ***education,*** *non-essential work, association, communal dining, periods of mass prisoner movement, religious services and access to the gymnasium".*[106]

84. The guidance is five pages long and includes a single paragraph, at the end, titled "Youth Custody Service" (emphasis added):

*"****The YCS will operate under the same temporary guiding principles as the rest of the adult estate when it comes to carrying out the Government's instructions on social distancing. All non-essential activities and activities involving large groups of people or mass movement of young people have been ceased.*** *Children all have access to telephones in their rooms and have been provided with additional PIN credits free of charge. The guidance above will be followed in relation to access to showers, time in the fresh air and serving of meals. Children in custody are recognised as a particularly vulnerable group and additional safeguards should be considered by governors and directors of STC's* (sic) *where necessary.* ***Human contact is especially important for children and this should be provided where possible and practicable, via teachers, key workers, youth workers etc, while still adhering to strict principles of social distancing. Provision of additional in-room activities, and education should be considered and routinely provided."***[107]

85. This guidance was at best unclear and at worst contained a presumption against face-to-face education being provided. Page one of the guidance expressly refers to education as a non-essential activity. The concluding page includes a brief section on the Youth Custody Service which reads as an afterthought, and contains the vague statement *"education should be considered and routinely provided,"* which contradicts the instruction several sentences earlier that *"the YCS will operate under the same temporary guiding principles as the rest of the adult estate."*

86. Ms Frazer KC was at pains to emphasise, throughout her evidence, her understanding that face-to-face education should continue in child prisons throughout the pandemic. When it was put to her that the above HMPPS guidance did not contain a clear statement that face-to-face education should continue for children, she said, *"I don't know why the*

[106] INQ000530765_0003
[107] INQ000530765_0007

guidance didn't explicitly say it."[108] She refused to accept Mr Taylor's evidence that, in light of the above guidance, HMPPS played a key role in stopping face-to-face education in child prisons. The Inquiry should prefer the evidence of Mr Taylor – from an independent inspectorate – in this regard.

87. Ms Frazer KC also gave evidence on the role of the education providers and the relevant trade union, the POA, in stopping face-to-face education in public sector YOIs and STCs. In her witness statement, she confirmed that education at the four public sector YOIs was more restricted *"due to sensitive relationships with the POA."*[109] She also blamed the providers themselves.[110] While it appears to be the case that the POA had a role to play in the cessation of face-to-face education (Mr Taylor agreed that this was the case), the Inquiry is invited to find that HMPPS bears primary responsibility for children in custody going for many months without face-to-face education:
    a. According to the IMB, *"within two weeks of 20 March 2020, Novus* [an education provider] *had developed a risk assessed plan for partial return to education. This was supported and agreed locally by management, staff and unions, but rejected at higher levels in the prison service by HMPPS Gold Command, though a very similar plan was implemented four months later."*[111]
    b. According to Mr Taylor on behalf of HMIP, at the start of the pandemic, *"governors at Cookham Wood and Wetherby had wanted to introduce some face-to-face education, however these efforts were undermined by HMPPS's decisions nationally to treat children in the same way as prisoners held in the adult estate, which meant that governors were prevented from introducing this."*[112]
    c. When Mr Taylor was asked in oral evidence what he meant by the governors' efforts being "undermined", he said that this happened in two ways: *"the trade untion for the education providers had decided to withdraw members from those prisons. But it was also the directive. As we saw often during the pandemic…directives were about prisoners generally and the needs of children were an afterthought…the result was that a guillotine was put on education. And attempts to reopen education quite quickly – and nothing really got going until we were going back in the summer, later on in the summer."*[113]

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[108] 12/136/22
[109] INQ000588042_0058, para 230
[110] INQ000588042_0057, para 225
[111] INQ000553850_0016, para 3.4
[112] INQ000649961_0057-0058, para 256
[113] 2/72/6-17

88. Crucially, it was possible to deliver face-to-face education in child prisons safely during the pandemic, as demonstrated by Parc YOI, which is run by a private provider. At Parc YOI, within one week of lockdown starting, they were providing at least 2.5 hours of face-to-face education per day.[114] When Mr Taylor was asked why he thought this was the case, he gave a number of reasons including that *"the way in which they couched the question to Public Health Wales"* made a difference – *"which was rather than 'How do we stop Covid having an effect on the jail', it was "How can we continue to run services while keeping our staff and prisoners safe from the effects of Covid?"*[115]

89. This, in Article 39's submission, lies at the heart of how things went wrong in public-sector YOIs and STCs during the pandemic. It is submitted that the MoJ and HMPPS started from the former position – their primary goal was to prevent the spread of Covid-19 at all costs, notwithstanding the lower risk to children of the virus. Insufficient consideration was given to balancing the risk of Covid-19 with the serious impact on the health and wellbeing of children of prolonged isolation in their cells, including through 'reverse cohorting' which, by design, kept children in a state of solitary confinement for 14 days. In oral evidence, Ms Frazer KC said that *"the most important factor"* when producing guidance for prisons during the pandemic was *"stopping people dying on our watch…we wanted staff to come into prisons and we didn't want riots across our estate."*[116]

90. Although Ms Frazer KC emphasised twice during her oral evidence that she was not responsible for the operation of the children and young people's secure estate, which was the responsibility of HMPPS,[117] she later correctly identified that she carried <u>overall responsibility</u> for the estate.[118] Furthermore, she recognised that, during the pandemic, she had a *"much closer relationship with HMPPS"*[119] than she had done previously – which was clear from her daily phone calls with Dr Jo Farrar. Notwithstanding this additional level of scrutiny and monitoring of HMPPS's actions during the pandemic, and Ms Frazer KC's apparent concern that children in public sector prisons were not receiving face-to-face education, as the responsible minister, she failed to intervene to remedy this sufficiently quickly. As a result, children in public sector YOIs and STCs were deprived of face-to-face education for many months longer than was necessary in the pandemic.

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[114] INQ000649961_0058, para 257
[115] 2/71/6-11
[116] 12/120/20-25
[117] 12/101/16-17; 12/132/5-6
[118] 12/102/1-12; 2/104/18-23
[119] 12/101/18-19

91. This is clear from the fact that secondary legislation was introduced to dilute children's statutory rights to face-to-face education in YOIs and STCs as late as May and July 2020 i.e. when restrictions in the community were reducing, and face-to-face educaton clearly should have resumed for children in custody.

92. The Prison and Young Offender Institution (Coronavirus) (Amendment) (No2) Rules 2020 and The Secure Training Centre (Coronavirus) (Amendment) Rules 2020 amended, respectively, the YOI Rules 2000 and the STC Rules 1998 so that the minimum number of hours of education and programmes of activities need only be provided *"so far as reasonably practicable."*

93. The explanatory memorandum for The Secure Training Centre (Coronavirus) (Amendment) Rules 2020 stated that the new *"temporary minimum restricted regime"* permitted children to be locked in their cells for up to 22.5 hours a day.[120] Children as young as 12 can be detained in STCs. Some children and young people who phoned the Howard League's Advice Line described these conditions as *"dehumanising… caging people rather than rehabilitating them."*[121]

94. The former Children's Commissioner for England, Anne Longfield, has described these Rules as *"including a set of draconian measures undermining child's rights to … access to education and enjoyment of other activities."*[122] Furthermore, she was concerned about the timing of the Rules: *"the changes introduced by these Rules…effectively regularised an emergency situation introduced following the beginning of lockdown."*[123]

95. Ms Frazer KC emphasised that these statutory instruments were necessary *"to make sure that what we were doing was legal…to ensure that what was practically happening on the ground was provided for by legislative base."*[124] Rather than legislating to legalise a punitive regime, which breached children's rights, the then prisons' minister should have been taking all reasonable steps to change the position on the ground so that children in prisons were protected from solitary confinement and substandard (if any) education.

[120] INQ000620800_0002, para 7.3(a)
[121] INQ000587985_0011, para 40
[122] INQ000588139_0055, para 170
[123] *Ibid*
[124] 12/152/5-11

96. Furthermore, notwithstanding the Government's pledge (since 2010 and reiterated in 2018) to give due consideration to the UNCRC when making law and policy, Phil Copple, on behalf of HMPPS, confirmed that no CRIA was carried out in respect of these statutory instruments.[125] Ms Frazer KC also confirmed that the Children's Commissioner was not consulted before the statutory instruments were brought into force.[126]

97. These failings are of major to concern to Article 39. As Ms Willow said in her evidence:

> *"If you are going to take away legal protections that are there because we know children can just about survive prison by seeing their mum or their grandma or their dad, that children can just about survive prison by having something to do, and not being stuck in a cell the size of a small bathroom for 20, 22, 23 hours a day. Then, if you are going to take that away, then you have to follow a robust, rigorous process. Otherwise all the child protection legislation we have in place, all of the procedures, all of the systems we have in place, count for very little….If those processes had been followed, hopefully they would get a series of responses which in technicolour remind them that these are highly vulnerable children and you cannot amend the law which will legitimise treatment and arrangements that will cause great injury, psychological, emotional, physical injury to children."*[127]

98. Article 39 submits that incorporation of the UNCRC and the introduction of a statutory duty to consult and give due weight to the views of the Children's Commissioner before making legislation and policy affecting children would ensure that, in the event of a future pandemic, children in prison were not dependent on particular ministers to ensure their rights were upheld, as the necessary safeguards would be in place to protect against the introduction of sweeping measures curtailing their rights. As set out above, incorporation of the UNCRC would mean that these safeguards would include the production of a CRIA with *"teeth"* before any measures restricting the rights of children were introduced, as well as the ability for the Office of the Children's Commissioner to challenge those measures in court, if necessary.

<u>Secure children's homes were better prepared to maintain a child-centred approach</u>

99. The Inquiry is invited to find that the ethos of secure children's homes meant that they were better prepared than YOIs and STCs to maintain a child-centred approach during the pandemic.

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[125] INQ000588021_0050-0052, paras 169-172
[126] 12/154/4-6
[127] 12/81/12-12/82/19

100. In contrast to the draconian conditions experienced by children in YOIs and STCs during the pandemic, *"children in secure children's homes received much better and generally a good quality of care and education."*[128] Mr Coffey on behalf of Ofsted further explained:

> *"Although the initial period of lockdown was crisis-management, in a very short time SCHs generally got to grips with the restriction requirements. They applied a child-centred approach resulting in children for the most part (albeit outbreaks required a different procedure) having a normal routine including attending education."*[129]

101. The Inquiry is invited to accept this evidence - which is echoed by the evidence from the YJB,[130] the Howard League,[131] and Article 39.[132]

The importance of independent inspections

102. Article 39 submits that the treatment of children in prison during the pandemic has shone a light on the importance of independent inspections of *all* institutional settings (not only prisons), at all times, but in particular during the circumstances of a national pandemic.

103. Mr Taylor on behalf of HMIP, in response to a question from Her Ladyship, described the *"importance of shining a light and providing oxygen into places of custody that the public don't always see and don't always know about."*[133] Ms Willow also emphasised this in her evidence on behalf of Article 39:

> *"It has to be an imperative that the inspectors get in there, and that has to be the headline task for those giving advice to government, because of the knowledge of the risk of closed institutions developing punitive, coercive cultures. There is decades of evidence of the risk and the injury caused to children when there isn't an external oversight. And it's not just that an external oversight exists, it's also that it's seen to exist."*[134]

Recommendations sought in respect of children in prison and other institutional settings

104. Article 39 submits that, in the event of a future pandemic, incorporation of the UNCRC and a statutory duty to consult the Children's Commissioner before making legislation and

[128] INQ000588111_0308, para 723
[129] *Ibid,* para 724a
[130] INQ000547938_0013, para 40
[131] INQ000587985_0005, para 16.
[132] 12/87/10-21
[133] 2/84/17-21
[134] 12/79/2-10

policy affecting children in prison and other institutional settings would provide the necessary guiderails to ensure that they were not deprived of their right to education, nor subjected to prolonged solitary confinement as a result.

105. In addition to the core recommendations sought by Article 39, the following specific recommendations are also sought:

a. Future planning for the children's secure estate must ensure that the specific needs and rights of children are recognised and upheld by the routine use of CRIAs;
b. Planning should make provision for the continued face-to-face education of detained children during a pandemic. Remote or indirect education should be a last resort and regularly reviewed so that face-to-face education is restored as soon as possible;
c. The solitary confinement of children in prisons and other institutional settings should be prohibited in law, with the legal definition of solitary confinement tailored to children's distinct vulnerabilities and developmental needs;
d. Secure establishments across health, social care and justice should produce and regularly update strategies for responding to pandemics and health emergencies to minimise and mitigate against interference with children's rights; and
e. Independent inspections, in-person advocacy services and safeguarding checks of children's custodial institutions, residential children's homes and mental health inpatient units must be maintained in a pandemic.

E. CONCLUSION

106. While all children suffered during the pandemic, the rights breaches for looked after children and children living in institutional settings were profound, and for many children in prison continue today. Article 39's three core recommendations – (a) incorporation of the UNCRC into domestic law, (b) the introduction of a statutory duty to consult with and give due weight to the views of the Office of the Children's Commissioner before making legislation or policy affecting children and (c) the appointment of a Cabinet Minister for Children would provide the *"machinery of government"* and necessary cultural change to make sure that children's rights are protected in the event of future pandemics.

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