



FIGHTING FOR
CHILDREN'S RIGHTS
IN INSTITUTIONAL SETTINGS

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By email to:

WorkingTogether2017.CONSULTATION@education.gov.uk

WORKING TOGETHER TO SAFEGUARD CHILDREN

About us

Article 39 fights for the rights of children living in institutions in England. We are a registered charity (no. 1166092). Our name comes from Article 39 of the United Nations Convention on the Rights of the Child (UNCRC), which entitles children to recover from abuse and neglect in environments that nurture their health, self-respect and dignity.

In November 2017, Article 39 launched a national campaign in partnership with the National Children's Advocacy Consortium and the National Association of Independent Reviewing Officers to strengthen children's right to independent advocacy. Our three campaign goals – the development of a national strategy; to enshrine in law the right to an independent advocate for all children and young people receiving or seeking care or support from the state; and visiting independent advocates for all residential establishments – are supported by over 35 organisations and the current and former Children's Commissioners for England.

Our response to this consultation focuses on ways in which children's wishes and feelings and rights can be made more central in safeguarding processes and mechanisms.

Effective safeguarding systems

A series of bullet point descriptors are given for effective safeguarding systems early in the document (pp 9-10). We strongly recommend that the child's feelings be included in the first bullet point. In addition, we urge a new fourth bullet point along the lines of: 'the immediate and long-term effects of childhood maltreatment and trauma are properly understood and attended to, so that children are given the individual care and assistance they need to recover'. In addition to children's right to recovery in Article 39 UNCRC, we are aware of several serious case reviews into the deaths of teenage children which have highlighted the lack of professional attention given to their earlier lives and the sexual and physical abuse they suffered as young children.¹

¹ See, for example, Tower Hamlets Safeguarding Children Board (2013) Serious case review executive summary. Services provided for Child F June 2004 – January 2012.

Human rights and equality

There is only one reference to the Human Rights Act 1998 (HRA) in the document, and this relates to myth-busting and information-sharing. We strongly urge a description of the rights and freedoms protected by the HRA and the duty of public authorities (and private companies and charities carrying out public functions) to act compatibly with these.

The paragraph summarising the UNCRC (page 12) suggests the treaty's main relevance to child safeguarding are the rights it contains relating to freedom of expression and receiving information. However, there are numerous other provisions in the Convention which are directly related to children's welfare and safety. This includes the rights it contains in relation to assistance offered to parents (Article 18). At the very least, the document should describe the UNCRC's four general principles – Article 2 (the right to enjoy all rights without any form of discrimination), Article 3 (the child's best interests to be a primary consideration in all actions concerning them), Article 6 (the right to maximum survival and development) and Article 12 (the right to be heard and taken seriously).

The child's wishes and feelings

We recommend that the guidance gives far greater emphasis to the importance of keeping the child's wishes and feelings central. It is only through getting to know and understanding the child that practitioners can properly assess what would help to safeguard and promote his or her welfare and, over time, determine whether such action has been successful. More fundamentally, failure to develop respectful relationships with children, where their perspectives and feelings truly matter, can greatly compound their powerlessness.² This is anathema to child protection.

The draft revised guidance correctly signposts the legal duties concerning the child's wishes and feelings when determining what services to provide under s17 Children Act 1989, and what action to take to safeguard or promote the child's welfare under s47 Children Act 1989.

There are two parts to these statutory requirements: 1) the duty to ascertain the child's wishes and feelings; and 2) the duty to give due consideration to the child's wishes and feelings, having regard to his or her age and understanding. This mirrors the legal obligations in Article 12 of the UNCRC.

We believe the guidance could be improved by stressing that the child's age and understanding should never be a barrier to seeking to find out his or her wishes and feelings (though it will affect how practitioners work directly with children). Eliciting wishes and feelings is a universal duty applying to all children. Recognising that every child has wishes and feelings immediately accords them value and visibility.³ The feelings part especially

² Munro, E. (2010) The Munro Review of Child Protection. Part one: A systems analysis. Department for Education, p 18; Willow, C. (2010) Children's right to be heard and effective child protection. Save the Children Sweden.

³ Schofield, G. and Thoburn, J. (1996) Child protection. The voice of the child in decision making. Institute for Public Policy Research.

validates children as human beings who must be treated as subjects, rather than as objects of concern.⁴

Analysis of serious case reviews have shown that assumptions continue to be made about children being too young or too disabled to have wishes and feelings.⁵ This was also a message communicated by children participating in research for the Office of Children’s Commissioner for England:

*Kids aren’t as naïve as you think. I think the reason that people don’t listen to kids is that they’re kids.*⁶

The 2010 version of Working Together included guidance on keeping the child in focus – see boxed text below. This was removed in 2013 and continues to be absent from the 2018 document. Given the centrality of keeping the child in focus, we strongly urge that the guidance below (or an improved version) is restored. This would build upon the very positive emphasis given to children’s views, wishes and feelings within the 2015 revised children’s homes regulations and quality standards⁷, which are based on the same duties in the Children Act 1989.⁸

Keeping the child in focus

Guidance included in the 2010 version but removed from 2013 onwards

Effective ongoing action to keep the child in focus includes:

- developing a direct relationship with the child;
- obtaining information from the child about his or her situation and needs;
- eliciting the child’s wishes and feelings – about their situation now as well as plans and hopes for the future;
- providing children with honest and accurate information about the current situation, as seen by professionals, and future possible actions and interventions;
- involving the child in key decision-making;
- providing appropriate information to the child about his or her right to protection and assistance;
- inviting children to make recommendations about the services and assistance they need and/or are available to them;

⁴ Butler-Sloss, E. (1988) Report of the inquiry into child abuse in Cleveland 1987. HMSO.

⁵ Brandon, M. et al (2012) New learning from serious case reviews: a two year report for 2009-2011. Department for Education.

⁶ Cossar, J., Brandon, M. and Jordan, P. (2011) ‘Don’t make assumptions’. Children and young people’s views of the child protection system and messages for change. Office of the Children’s Commissioner for England, p 84.

⁷ See regulation 7, The Children’s Homes (England) Regulations 2015 and Department for Education (2015) Guide to the children’s homes regulations including the quality standards.

⁸ The legal duties to ascertain and give consideration to children’s wishes and feelings in respect of s17 and s47 of the Children Act 1989 were modelled on s22(4) and s22(5) of the 1989 Act (pertaining to looked after children) and introduced through s53 of the Children Act 2004.

- ensuring children have access to independent advice and support (for example, through advocates or children’s rights officers) to be able to express their views and influence decision-making; and
- the importance of eliciting and responding to the views and experiences of children is a defining feature of staff recruitment, professional supervision, performance management and the organisation’s broader aims and development.

In a similar vein, earlier versions of Working Together made several very helpful references to children’s right to independent advocacy. These are no longer present.

Independent advocacy has long been recognised as critical to safeguarding children, particularly when they live away from home.⁹ Local authorities first began appointing children’s rights officers in the late 1980s, when serious child abuse in the care system was officially recognised. The legal right to independent advocacy was established by the Adoption and Children Act 2002, which amended the Children Act 1989.¹⁰ Looked after children, children who are the subject of a special guardianship order, children who may be adopted, children in need and care leavers have the right to access independent advocacy services when they wish to express a view about a social care service or make a complaint. Working Together concerns every one of these constituencies of children. We therefore strongly recommend that the guidance gives much greater prominence to independent advocacy. In particular:

- Local authorities should be required to produce age appropriate information to children and young people about their right to independent advocacy, how they can access such support and the benefits of having an advocate (this mirrors existing statutory guidance relating to independent advocacy and independent reviewing officers¹¹).
- Local authorities should be required to provide age appropriate information to children and young people about independent advocacy whenever they are determining what services to provide under s17 of the Children Act 1989, and what action to take under s47 of the Children Act 1989.
- The guidance should describe the role of independent advocates in ensuring the child’s wishes and feelings are known and understood and accorded due consideration (having regard to his or her age and understanding) in the various assessment and review processes, including child protection conferences.
- Children should be signposted to the advice and assistance offered by independent advocacy services when they are informed of the outcome of s47 enquiries (this is especially pertinent when concerns about significant harm have been found to be unsubstantiated and it was the child who initially sought help).

⁹ Utting, W. (1997) People like us. The report of the review of the safeguards for children living away from home. The Stationery Office, p 111.

¹⁰ s26A Children Act 1989.

¹¹ Department for Children, Schools and Families (2010) IRO Handbook. Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children, p 15.

- In respect of institutional settings, the guidance should require local authorities to make arrangements for all children for whom there are safeguarding concerns to be proactively visited by an independent advocate, wherever practicable *before* a strategy discussion is held.
- All institutional settings must be required to include key learning and action taken in response to children and young people's use of independent advocacy services in their annually reviewed safeguarding children policy.¹²
- Safeguarding partners should monitor and evaluate the availability and effectiveness of independent advocacy in ensuring the child's wishes and feelings are ascertained and given due consideration and statutory safeguarding obligations are upheld.
- Safeguarding partners should monitor and evaluate the effectiveness of training for practitioners on children's rights and safeguarding, including the role of independent advocates.

Equitable safeguarding

Article 39 recently published the findings of our research into allegations against adults working with children in institutional settings (enclosed with this submission). We found that 53 local authorities in England received 2,479 allegations of abuse or neglect against adults working in children's institutional settings in the three years between 2012/13 and 2014/15. The institutions we asked about were: children's homes, secure children's homes, boarding schools, residential special schools, mental health inpatient units, other hospitals, young offender institutions, secure training centres, immigration removal centres (detention) and police custody. The data we were provided shows local authorities were notified of child protection allegations against members of staff from every setting apart from immigration detention.

Our research indicates that the majority of allegations against adults working in institutional settings are not dealt with under s47 of the Children Act 1989, and that a high proportion are found to be unsubstantiated. This causes us great concern because we fear that professionals are making judgements about abuse without children ever being seen or heard by a child protection social worker independent of the institution.

Working Together has consistently failed to address the particular circumstances and vulnerabilities of children living in institutional settings. The guidance is (understandably) framed around children living with their parents. Local authorities use statutory guidance on keeping children safe in education when responding to allegations against adults working in institutional settings, despite the very different circumstances and vulnerabilities of children who attend ordinary schools and those who live in residential placements. We are aware that the department is consulting on its safeguarding guidance relating to schools and colleges, though can see very little fresh content of relevance to children living in institutional settings

¹² We note the draft guidance requires only custodial institutions to have an annually reviewed safeguarding children policy (p 72). We believe this should be a requirement for all institutional settings.

(besides a very alarming new reference to restraint being a “disciplinary measure”).¹³ We strongly recommend the development of distinct statutory guidance on safeguarding children in institutional settings, which outlines how local authorities should respond to institutional abuse allegations.

Secure estate for children

The draft guidance variably refers to ‘secure youth establishments’, ‘youth custody’ and the ‘secure estate for children’. The latter description is preferable because it accurately focuses on children (separate prisons exist for 18 to 21 year-olds). It is also critical to consistently refer to children within the secure estate as children, or children and young people.

The draft guidance does not state who will review the annually reviewed safeguarding children policy of secure establishments. This should be independent of the institution. We further recommend that secure establishments be required to consult children, young people and parents when developing and reviewing their safeguarding policies. The use of strip-searching, caring for disabled children, caring for children with mental health difficulties and children’s contact with their families should be added to the mandatory sections of these safeguarding policies. We believe the reference on page 73 to Prison Service Instruction 08/2012 relates only to children detained in juvenile young offender institutions, and not to those detained in secure training centres and secure children’s homes.

Other comments

We recommend that whistleblowing procedures are referenced in employment contracts (page 62).

The requirement for all newly appointed designated officers to be qualified social workers (page 63) should have a time reference. This appears to have been a requirement since 2015, so it makes sense to have this as the date after which all individuals appointed to these roles must be qualified social workers. We would further recommend that these are social workers with experience of working in statutory child protection roles.

It is odd that the section on ‘voluntary and private sectors’ on page 75 cites only library services, when many children’s services, and the majority of children’s homes, are now run by the private sector and charities. This ought to be explicitly acknowledged.

We remain unconvinced that children will be better safeguarded by the replacement of Local Safeguarding Children Boards with safeguarding partners (page 77). That there appears to be no upper limit to the number of local authority arrangements which can be managed together risks partnerships not being local at all. The more geographically remote the arrangements become, the more difficult it will be for children, young people and parents to

¹³ Department for Education (September 2018) Keeping children safe in education. Statutory guidance for schools and colleges, para 97.

influence local policies and practices.

We strongly recommend that restraint reviews be required in respect of all places of detention (mental health in-patient units, secure children's homes, secure training centres, juvenile young offender institutions and immigration detention) (page 83).¹⁴ For the avoidance of doubt, the guidance should explicitly state that these reviews be published in full. We also recommend that copies be sent to the Children's Commissioner for England and the National Preventive Mechanism.

It is very disappointing that the draft guidance and regulations include no requirements about the professional knowledge, skills and competencies of members of the Safeguarding Practice Review Panel.

We recommend that safeguarding partners be required to have regard to concerns expressed by children, young people or parents, or organisations acting on their behalf, when considering whether to commission a local review of a case or cases (pp 88-89).

For national child safeguarding practice reviews, we recommend 'children who are seriously harmed or die while in the care of the local authority' be changed to '... in the care of the state'. This would include children who die in custody or mental health inpatient units.¹⁵

Given the significant increase in child and family poverty and homelessness, and continuing welfare retrenchment, we recommend the definition of neglect on page 110 is amended to acknowledge the steps taken by parents to try and provide adequate food, clothing and shelter for their children (including by going without food themselves). Instead of 'failing to provide...', we suggest the text could read 'failing to endeavour to provide...'. This would also, in a small way, acknowledge the state's own obligations to protect the socio-economic human rights of children.

We strongly recommend that the provisions of Schedule 2 of the Children Act 1989 be explained in Annex B. The wishes and feelings provisions in s17 and s47 of the 1989 Act should also be described here.

Finally, we believe the guidance could be enhanced by a section outlining the Secretary of State's general duty to promote the well-being of children in England.¹⁶

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¹⁴ The Mental Health Units (Use of Force) Bill, which started its parliamentary passage in November 2017, requires the annual reporting on restraint in mental health in-patient units. It is a Private Members' Bill which has government support.

¹⁵ Thirteen children died while under the care of mental health in-patient services between 2013 and January 2017: HCWS427. Between 1990 and 2017, 34 children died in custody.

¹⁶ s7 Children and Young Persons Act 2008.