FIGHTING FOR CHILDREN'S RIGHTS IN INSTITUTIONAL SETTINGS

This is an edited* version of Article 39's Director's first witness statement (June 2020) in the charity's legal action against **The Adoption and Children (Coronavirus) (Amendment) Regulations 2020** (known as Statutory Instrument 445).

*Introductory information and references to exhibits have been removed.

Coronavirus outbreak

1. Article 39 supports changes to the statutory framework which relate directly to COVID-19 and are necessary to protect the health and lives of children, young people, carers and staff – for example, clarifications around visits and meetings being held virtually. However, as an organisation we are extremely concerned about the coronavirus outbreak leading to a significant reduction in statutory safeguards for vulnerable children.

How the regulatory changes were introduced

2. The Adoption and Children (Coronavirus) (Amendment) Regulations 2020 ('the Regulations') were published on the Parliament website on 23 April 2020. There was no media release by the Department for Education, or Ministerial statement in Parliament, as would ordinarily be expected where such significant changes to children's social care legislation are announced.

3. Even though a briefing for Ministers on 6 April 2020, provided by the Defendant with its response to the letter before action, included a table with each of the amendments listed (Annex A), the Explanatory Memorandum to the Regulations does not contain the full list of changes. When the Department was questioned by the Joint Committee on Secondary Legislation (the Parliamentary committee which assesses the technical aspects of statutory instruments and decides whether to draw the special attention of each House to any instrument, as it did do in this case) about why it had omitted a particular regulatory change from the Explanatory Memorandum (Explanatory Notes – EN), it replied on 12 May 2020:

   The intention here was for the EN to summarise the changes being made as referring to all of them would have been very unwieldy given the number of changes being made in the instrument…[1] [Emphasis added]

4. But it was not only the scale of the changes which was not fully set out. I believe the implications of the Regulations have not been properly described either. The Explanatory Memorandum refers to the legal protections removed or diluted as "administrative and procedural obligations"[2], and claims:

[1] Joint Committee on Statutory Instruments (20 May 2020) Twelfth report of sessions 2019-21, paragraph 10.
[2] Explanatory memorandum to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 no. 445, paragraph 2.1.

These are low risk changes to ease administrative and procedural duties and are required to ensure stability of children's social care during the outbreak.[3]

5. The 6 April briefing prepared for Ministerial sign-off similarly summarised:

Most changes will ease administrative burdens, allow visits and contact to take place remotely and relax strict timescales where possible. These are low risk changes and will provide more flexibility to focus on core safeguarding responsibilities.[4] [Emphasis added]

6. In claiming the changes would free up local authorities and others "to focus on core safeguarding responsibilities", the briefing implied that the legal protections to be removed or diluted were not forms of safeguarding. I strongly refute this. I am not alone in this: four days after the Regulations came into force, the Chief Executive of the Nationwide Association of Fostering Providers wrote:

I'm confused by the children's minister's reference before the select committee to lower-risk areas on the one hand, but safeguarding coming first on the other. How can we know what is lower-risk for a child unless we keep in regular contact with them and have formal systems for capturing and checking this? How will we know if we don't visit, hold reviews and panels, and make checks?[5]

7. Having reviewed the Regulations, the House of Lords Secondary Legislation Scrutiny Committee, concluded on 7 May 2020:

This instrument makes extensive changes to a very sensitive policy area.[6]

8. The Chief Social Worker for Children and Families tweeted on 27 April 2020:

Still following up on implications since return to work. Would emphasise no changes to primary legislation. Principles remain. Best interests paramount. Guidance to accompany reg changes due to be published imminently.

9. The Department's coronavirus guidance for children's care services (which was published before the Regulations and then updated on 6 May) continues to emphasise that primary legislation remains intact:

The duties to our most vulnerable children that are set out in primary legislation (such as in section 22(3) of the Children Act 1989 and section 1 of the Adoption and Children Act 2002) remain in place but we recognise that we are operating in a challenging context.

Amendments have been made to provide for extra flexibility in some circumstances, but this should only be used when absolutely necessary, with senior management oversight, and must be consistent with the overarching safeguarding and welfare duties that remain in place.[7]

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[3] Explanatory memorandum to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 no. 445, paragraph 3.4.
[4] Explanatory memorandum to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 no. 445, paragraph 3.
[5] Gallagher, H. in Community Care magazine, 28 April 2020: 'We need answers on the government's weakening of safeguards for children in care'.
[6] House of Lords Secondary Legislation Scrutiny Committee (May 2020) 13th report of session 2019-21, paragraph 40.
[7] https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care

10. I do not believe it is helpful for the Department to distinguish primary and secondary legislation in this way, since they are inter-dependent and the removal or dilution of duties in regulations inevitably affects the implementation of Acts of Parliament.

11. The Department had anticipated that "some in the sector could view this as 'watering down' existing arrangements, particularly around safeguarding, at this critical time". The Ministerial briefing had therefore advised that "this announcement will need careful handling" and recommended "rolling this regulatory amendment into wider children's social care media handling presented as a package of support for the sector to ensure that local authorities are meeting demands while coronavirus measures are in place".[8] This appears to be what happened, as the day before the Regulations were laid updated guidance on financial support for education, early years and children's social care was published on the Department's website. On the day the Regulations came into force, further new funding was announced.

Who was and was not consulted

12. The Ministerial briefing states that the Department had "engaged with stakeholders on the proposals in confidence".[9] There is no explanation for why these discussions had taken place in private. This secrecy is continued in the correspondence from the Chief Social Worker for Children and Families circulated on the evening of 23 March 2020, less than a month before the Regulations were laid, which contains the subject, "STRICTLY CONFIDENTIAL: not to be distributed further". The covering message states: "This is of course strictly confidential and not to be distributed further", though no justification is given for this.

13. Since COVID-19 affects the whole population, it would have been entirely appropriate for government to have been open about consulting to see what, if any, regulatory changes were required to cope with the health crisis. However, what is apparent from the documents obtained through disclosure is that this was not a consultation about the pressures of COVID-19, and which (if any) statutory duties may need amending in the light of this. Rather, it was a 'consultation' on the regulations the Department had *already* determined should be amended. At no point, as far as I can see from the correspondence disclosed, were organisations and individuals asked to specify why COVID-19 was making it impossible or difficult to meet any particular statutory duty, and what options might be available to mitigate these difficulties as an alternative to removing the duties themselves. Moreover, the process was extremely rushed. The message from the Chief Social Worker for Children and Families (Isabelle Trowler) was circulated to a number (though not all) of local authorities at 7.10pm on 23 March, with responses requested by close of the following day. This read:

    Dear all

    Below is our list of proposed possible amendments to secondary legislation.

    Regulatory changes will sit alongside further communications we have planned around the ability of local authorities to divert from statutory guidance should they have good reason to do so, and that they should do so on the basis of risk while aiming to adhere to guidance as far as possible.

[8] 6 April 2020 DfE briefing for Ministers, paragraphs 31 and 32.
[9] 6 April 2020 DfE briefing for Ministers, paragraph 4.

We have a very small window for comment. Can you get back to us tomorrow cop. Please do not distribute more widely for obvious reasons.

…

If you have any further comments please do let us know as well. We are aiming to make changes as soon as possible.

Regards

Isabelle

14. It appears the Chief Social Worker for Children and Families received only two written responses to that particular request.

15. The Explanatory Memorandum lists a number of organisations who the Department said it consulted. These are:

- Association of Directors of Children's Services
- Independent Children's Homes Association
- Local Government Association
- Ofsted
- Principal Social Workers.

16. Four of these five organisations (all except Ofsted) publicly denied they were consulted about the legal changes soon after the regulations were published. This remains at odds with the statement in the Explanatory Memorandum:

The Department has consulted informally with the sector <u>who have asked for these changes to be in force as a matter of urgency</u>.[10] [Emphasis added]

17. Having spent a considerable amount of time deciphering the email correspondence between the Department and those it selected to 'consult', I am staggered by the scale of amendments to children's social care regulations which received Ministerial sign-off in the absence of:
    - An explanation as to why the Department had decided to review "all relevant children's social care regulations" – was this something all government departments were urgently undertaking, for example;
    - A document which sets out the aims of the consultation process, who was to be consulted and why, and the principles and criteria for decision-making;
    - A report of the information obtained from organisations; specifically how COVID-19 was affecting their ability to meet their statutory duties; and why there was no alternative to amending the regulations in each instance;
    - An explanation as to why the statutory body for children's rights (the Children's Commissioner for England), which has a particular duty to have regard to the children affected by these regulatory changes and for whom the Department is the 'sponsor department', was not to be consulted;
    - An impact assessment for each regulatory change, and what (if any) measures could be put in place to mitigate any increased risk and detriment to children;

[10] Explanatory memorandum to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 no. 445, paragraph 3.1.

- A proposal for how the Secretary of State would review the changes to regulations, including a framework for how local authorities, children's homes providers, Ofsted and others whose statutory duties were to be 'relaxed' would be expected to implement and report on the changes;
- Any explanation as to how existing statutory guidance may need to be amended following the changes to regulations;
- How the changes would be communicated to children, families and the professionals working with them.

18. Had the Chief Social Worker for Children and Families, seemingly the most senior official involved in the 'consultation' on the regulatory changes, been required by Ministers to give an account of the process followed, and the information elicited, it seems to me the paucity of support for the regulatory changes would have been immediately evident. It is upsetting to see how apparently easy it was for safeguards for vulnerable children, incrementally built up over seven decades, to be dismantled in a matter of weeks.

19. As indicated above, the most obvious omission from the 'consultation' process was the Children's Commissioner for England, whose statutory function is to promote and protect the rights of children, with a requirement that she has particular regard to the rights of children living away from home or receiving social care services.[11] The Children's Commissioner is required by law to "take reasonable steps to involve children in the discharge of [her] primary function"[12] so any attempt by the Department to consult her would have necessarily triggered a consultation process with affected children (however limited due to time and other pressures).

20. The first contact with the Children's Commissioner was on 16 April 2020, a week after the Ministerial deadline for signing off the Regulations, She was sent an email informing her of the impending legislative changes. As with other government communications on these Regulations, vulnerable children's legal protections were characterised as "burdens" and "procedural". A member of staff in the Children's Commissioner's office made nine separate comments on the table, which was sent with the email, seven of which raised queries or expressed concern. It would appear these specific queries/concerns were never answered by the Department.

21. The Commissioner's duties relating to children in care and care leavers (and others in regulated settings) were inserted into the legislation in 2014, when Ofsted's Children's Rights Director post was simultaneously deleted. That statutory post had been created in 2001 following serious and widespread abuse in the care system. When its functions moved to the Children's Commissioner's office, it was with the express policy intention that this role would now champion the rights and protection of vulnerable children in regulated settings. As someone closely involved in the evolution of both statutory posts, and acutely aware of how they were intended to counteract children's invisibility and powerlessness, I consider the lack of consultation with the Children's Commissioner about these regulatory changes as a very significant failure. In the event, the Children's Commissioner issued a statement on 30 April, calling for the Regulations to be revoked:

I would like to see all the regulations revoked, as I do not believe that there is sufficient justification to introduce them. This crisis must not remove protections from extremely vulnerable children, particularly as they are even more vulnerable at this time. As an urgent priority it is essential that the most concerning changes detailed above are reversed.

[11] Part 1 Children Act 2004; see s2(4).
[12] Section 2B Children Act 2004.

22. Both former Children's Commissioners for England, Sir Al-Aynsley Green (in post 2005-2010) and Dr Maggie Atkinson (in post 2010-2015), have publicly opposed the Regulations.

23. Many specialist organisations concerned with the rights and welfare of children in care were similarly not consulted, including but not limited to: Alliance for Children in Care and Care Leavers, Become, British Association of Social Workers England, The Care Leavers' Association, Coram Voice, Just for Kids Law, Nagalro, National Association of Independent Reviewing Officers, National IRO Managers Partnership and the National Youth Advocacy Service. Indeed, I am not aware of a single organisation outside central or local government which has either publicly supported the Regulations or stated they were consulted and asked for any of the legal changes. This was echoed by John Simmonds, Director of Policy, Research and Development at Coram BAAF recently, when in an online Coram debate he said:

    Although the government said it was, that it did consult, I know of nobody that really felt that they were either consulted at all, or only in a very limited way. You know, with a view then that those regulations are not what was needed, and that there are another important range of issues which should have been addressed which were more child-focused.[13]

24. Rita Waters, the Chief Executive of NYAS (National Youth Advocacy Service) has similarly written to the Children's Minister:

    I am not aware of any colleagues in children's rights charities who have been consulted, and am disappointed that our engagement on protecting rights prior to the new regulations was not taken as an opportunity for the DfE to consult with us or at least inform us of the true nature of planned legislation.

25. What is also striking is that those directly affected by the substantial changes to secondary legislation were not consulted. As well as the many non-governmental organisations working with, and on behalf of children in care and care leavers at both national and local level, local authorities have children in care councils and care leaver forums which could have been consulted ahead of the Regulations being drafted.

26. I uploaded a summary of the legal changes made by the Regulations on Article 39's website around 10.30pm on 23 April 2020. During the week that followed, this was viewed more than 45,000 times on our website – I believe this shows the very high level of public interest and concern.

Core safeguarding duties

27. It is my firm professional opinion that the following six sets of legal protections are core safeguarding duties for looked after children who, by definition, are extremely vulnerable. Prior to them being removed overnight on 23/24 April 2020, this was also the government's view – as shown by its statutory guidance (which remains in place). The six areas of legal protections are:

    - Regulation 8(11) and 8(5) – removal of senior officer scrutiny of looked after children being placed in temporary foster placements outside their home area;
    - Regulation 8(13) – removal of minimum timescales for social worker visits to looked after children;

[13] The debate between Coram's CEO Dr Carol Homden and ADCS President Jenny Coles took place on 20 May 2020 and the video can be accessed here: https://www.coram.org.uk/news/coram-hosts-webinar-past-present-and-future-childrens-services

- Regulation 8(14) – removal of minimum timescales for statutory reviews of the welfare of looked after children (after the second review);
- Regulation 8(18) and 9(13) – removal of safeguards for children in short breaks;
- Regulations 4 and 8(8) – removal of mandatory adoption panel (including for intercountry adoption) and other safeguards in adoption (pre-court stage);
- Regulation 11(6) – dilution of duty on children's homes providers to ensure independent persons visit and write a welfare report each month.

Regulation 8(11) and 8(5) – removal of senior officer scrutiny of looked after children being placed in temporary foster placements outside their home area

28. Regulation 8(11) amends Regulation 24 of The Care Planning, Placement and Case Review (England) Regulations 2010, permitting the temporary approval of foster parents for 24 weeks (pending a full assessment process).

29. Before 24 April 2020, this temporary approval was permissible only if those being approved as temporary foster parents were 'connected persons', that is part of the child's wider family and friendship circle. (This followed from Section 22C(6) of the Children Act 1989). The temporary approval period was 16 weeks (with provision for an 8-week extension in Regulation 25, which remains unchanged). Statutory guidance (which has not been amended) states:
These provisions in the 2010 Regulations are intended to be used exceptionally and where there are clearly identified reasons why the full assessment process … cannot be undertaken before a placement is made.[14] [Emphasis added]

30. I believe the current health crisis falls within the "exceptional" circumstances provided by the statutory guidance. The changes imposed by the Regulations – moving away from 'connected persons' and extending the initial temporary period – therefore significantly weaken children's safeguards. A looked after child can now be placed with foster parents who have not undergone the full assessment process for a total period of 32 weeks (eight months).

31. What is further extremely alarming (bearing in mind that the risk to children from the dilution of safeguards will be cumulative) is the removal of senior local authority oversight when a child in such circumstances is to be placed outside their home area.

32. In the White Paper that preceded new safeguards being introduced around 'close to home' placements, the former government explained in 2007 that amendments to care planning regulations would:

    Set out a rigorous process that must be followed so that any decision to place a child out of their authority is scrutinised and agreed at a senior level of the local authority's children's services.[15]

33. This rigorous, statutory, process (in place from 2010) was removed overnight on 23/24 April 2020:

    - Before 24 April 2020, a local authority nominated officer had to approve temporary foster placements when a looked after child was to be placed with foster parents who

[14] Department for Education (June 2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, page 69.
[15] Department for Education and Skills (June 2007) Care matters: time for change, page 61.

were not approved by that local authority and were located in an adjoining local authority. This requirement has gone;

- In addition, the local authority's director of children's services ('DCS') had to approve temporary foster placements when a looked after child was to be placed with foster parents who were not approved by that local authority and they were located further than the adjoining local authority (including outside England). This requirement has gone.

34. In respect of emergency placements outside the child's home area, statutory guidance sets out:

An emergency placement occurs when a placement is necessary without any forewarning. This could occur when a placement must be arranged urgently to protect a child for example from sexual exploitation or gang involvement; if a placement is made out of hours by the emergency duty team; or when a placement must be made immediately (on the same day) because of the breakdown of the child's current placement. Emergency placements may also be required at very short notice when a child becomes looked-after because they have been remanded by the youth court.

In such circumstances, it will not be possible to complete all the actions set out in regulation 11(2). However, as a minimum, the nominated officer or the DCS (for distant placements), must be satisfied of the following before approving a decision:

- *the child's wishes and feelings must have been ascertained and given due consideration [regulation 9(1)(b)(i)]; and*
- *the placement is the most appropriate placement available consistent with the care plan [regulation 11(2)(b)].*[16] [Emphasis added]

35. The removal of the requirement for nominated officer / DCS approval therefore takes away a vital mechanism for checking that the placement is right for the child, and that the child's wishes and feelings have been taken into account.

36. The Department states in its response to our letter before claim that this "is intended to cater for a scenario in which, for example, there are no known relatives or connected people able to provide emergency care for a child, where parents contract COVID-19 and needed to be hospitalised, or in the eventuality of their death". It states dispensing with senior officer approval gives flexibility "in cases where additional scrutiny… would delay a child from being placed with an appropriate and approved carer".

37. We are therefore here contemplating the very tragic circumstances of a child entering the care system because their parents have contracted COVID-19 and are hospitalised, or have died, and there are no known family members or family friends available to be temporarily approved for the child, and the child is be moved outside their home area, possibly even outside England.

38. As a social worker, I consider it shocking that the Department has seen fit to remove the safeguard of senior officer approval from children whose parents are critically ill or have died from COVID-19. However, Regulation 8(5) hasn't been drafted in this way – it removes senior officer approval from all children placed with temporarily approved foster parents outside their home area.

[16] Department for Education (June 2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, pages 58-59.

39. While I appreciate the current global pandemic was not imagined when the 2010 regulations were drafted, other very serious circumstances were, and I believe senior officer approval would have been sought (pre-24 April) in comparable life-changing health crises – a child entering care in an emergency after their parents have suffered a catastrophic car crash, or their primary carer has died of cancer, for example.

40. It is further relevant to note that the DCS is a statutory role under s18 of the Children Act 2004. This has not been amended so all local authorities are required to have such a postholder (including in the event of sickness).

41. The history of this core safeguard is important. Section 22C(7)(b) of the Children Act 1989 requires local authorities to "comply, so far as is reasonably practicable in all the circumstances of [the child's case" with a number of requirements – including that the placement allows the child to live near their home. This 'close to home' provision was introduced through the Children and Young Persons Act 2008. Then, 34 per cent of looked after children were placed outside their local authority area and the Minister at the time, Lord Adonis, told the House of Lords:

Because of this high level—we believe it to be unacceptably high—we think it right to strengthen the duties on local authorities to help to reduce the current reliance on distant placements, both outside the local authority or at some distance within it. Children have told us that they can feel isolated in distant placements and miss contact with their friends and local communities. Local authorities find it harder to be attentive corporate parents to children who are in distant placements and they have less leverage over the relevant services in that area.

In general, children placed out of area do less well than those placed closer to home. We know that children placed out of their local authority area are more likely to achieve poor outcomes and to be in very expensive placements, which are spot-purchased and do not always justify their costs.[17] [Emphasis added]

42. A decade after the 'close to home' provision came into force, latest official data shows that 44 per cent of looked after children were placed outside their local authority boundary on 31 March 2019. In December 2019, the Children's Commissioner published a report, 'Pass the parcel', about children placed many miles from home. She acknowledged that there can be strong safeguarding reasons for placing a child outside their home area. However, she warned:

… decision-making is now beholden to even stronger forces. In many areas, local placements are scant; a consequence of local authorities being squeezed by drastic funding cuts, affecting their ability to commission critical care services. They cannot match the level of need and are unable to cope with the rising numbers of older children going into care. Local authorities have become reliant on private care providers which operate in cheaper regions and rarely prioritise local children. This means that children – and particularly older children – are pushed away from home not because it is best for them, but because there is nowhere else for them to go. [Emphasis added]

43. The family courts have similarly been extremely critical of the lack of suitable placements for children in care.[18] As a consequence of the dire shortage of suitable placements (more

[17] Children and Young Persons Bill, House of Lords Grand Committee, 16 January 2008 : Column GC509.
[18] In two recent cases, concerning children who required specialist secure care which was not available for them, judges sent copies of their judgments to Rt Hon Gavin Williamson CBE MP, Secretary of State for Education, to Sir Alan Wood, Chair of the Residential Care Leadership Board, to Vicky Ford MP, Minister for Children, and to Isabelle Trowler, Chief Social Worker

than 6,000 children are in unregulated settings), I fear the removal of safeguards around placing children outside their home areas will lead to this practice becoming normalised, rather than being conceived of as exceptional, as Parliament intended. This would be extremely detrimental to children for all the reasons above. Moreover, it removes a level of senior manager accountability, which would be especially relevant in the event of a child's case being before the courts.

Regulation 8(13) – removal of minimum timescales for social worker visits (which can now be by telephone, video call or other electronic means) to looked after children

44. Regulation 8(13) amends Regulation 28 of The Care Planning, Placement and Case Review (England) Regulations 2010, thereby removing minimum timescales for social worker visits to children in care.

45. Visits to looked after children are a mainstay of children's social work. To suggest that this is not a core safeguarding duty[19] is to seriously misunderstand the importance of such visits in safeguarding and promoting children's welfare (s22(3)(a) Children Act 1989). It is deeply regrettable that Ministers were not briefed on the long history of this safeguard when they were asked to dilute the statutory timescales. Moreover, the commentary provided to Ministers only alerted them to timescales changing for children who are privately fostered; there is no mention in the main briefing of the removal of minimum timescales for visiting looked after children; it is only referenced in the Annex.[20]

46. Statutory requirements around visiting children in care go back to the 1940s. When Sir Walter Monckton carried out a public inquiry into the death of 12 year-old Dennis O'Neill, at the hands of his foster parents,[21] he observed differences in the statutory visiting rules in respect of children placed under the Children and Young Persons Act 1933 and boarded-out Poor Law children.[22] He suggested these two sets of rules should be assimilated. Apart from this, he made no recommendations for changes to the law, instead asserting:

    What is required is rather more than the administrative machinery should be improved and informed by a more anxious and responsible spirit … The boarding out rules ought plainly to be obeyed in the letter and in the spirit. Their requirements should be treated as a minimum, not a barely attainable maximum.[23] [Emphasis added]

47. The statutory timescales in force before 24 April 2020 were:
    - A child had to be visited within one week of the start of any new placement;
    - Then at least every 6 weeks for the first year;
    - Then every 6 weeks unless it was agreed that the child would live in this same placement until they are 18, in which case they had to be visited at least once every 3 months.
    - For children who had been living with the same foster carers for a year, where the plan was for them to stay with this foster family until they leave care, visits could be reduced to at least twice a year but only if the child agreed to this.

([2020] EWHC 1012 (Fam), 28 April 2020) and to the Secretary of State for Education and the Children's Commissioner ([2020] EWHC 1098 (Fam), 2 May 2020).

[19] See 6 April 2020 briefing to Ministers, paragraph 3.

[20] Page 17.

[21] Reginald and Esther Gough were convicted of manslaughter and neglect respectively in March 1945.

[22] Children placed under the Poor Law had to be visited every 6 weeks; those placed under the Children and Young Persons Act 1933 had to be visited every 3 months after the first month.

[23] Report by Sir Walter Monckton of the circumstances which led to the boarding out of Dennis and Terence O'Neill at Bank farm, Minsterley and the steps taken to supervise their welfare. Home Office, paragraph 54.

48. From 24 April 2020, where the local authority is unable to meet any of the above statutory timescales, they must simply ensure visits take place as soon as is reasonably practicable. This is despite a further change to the regulations allowing telephone calls, video calls and other electronic communications (presumably including text and Facebook messages) to count as a visit. I consider that this relegation, to visit as soon as is reasonably practicable, reflects a mindset which sees statutory timescales as a "barely attainable maximum" rather than the absolute minimum, to echo Sir Walter Monckton's warnings.

49. The Department has provided no evidence that there are local authorities who are unable, because of COVID-19, to simply make a telephone call (of whatever duration) to a child for whom they are responsible (75% of looked after children are the subject of a care order, and the local authority therefore has parental responsibility for them). In my view, it is arguable that a local authority in such a parlous state that it does not have the capacity to telephone a looked after child every 6, 12 or 26 weeks is not fit to take on the corporate parenting role.

50. It is my strong professional view that social worker visits to looked after children are as vital to the care and protection of looked after children as routine temperature and blood pressure observations are to nursing. More than four pages of the care planning statutory guidance is devoted to visits to looked after children. This notes "A strong relationship with a social worker is an important protective factor for the child" and "An important aspect of visiting is to provide a measure of child protection". The guidance explains the importance of social workers recording what they elicited during visits, thus enabling "a continuing assessment of the progress of the child in the placement". It sets out the actions to be taken after a visit when there are concerns about a child's welfare, and stresses that:

    Children cannot always describe unhappiness so understanding what the child's daily life in the placement is like – routines, mealtimes, whether people in the household eat together – and whether the child in the foster family is treated in the same way as birth children, is key to understanding what may be having a negative impact on the child. The views of others in the team around the child such as the teacher will also be able to provide information about the way the child presents in school and whether there have been recent changes in his/her mood or behaviour.[24]

51. The duty to visit looked after children entered primary legislation in 2008, which introduced new s23ZA Children Act 1989. The White Paper preceding it promised that the quality of placements for all children in care would be improved through, among other things:

    Introducing an explicit requirement for all children in care to be visited by their social worker, regardless of their placement type. Visits can make a real difference to the children concerned, but we know that at present they do not always take place as often as they might.[25]

52. It is important to note that even apparently stable placements require careful oversight by local authorities – family dynamics can significantly change (over time or abruptly) due to a number of factors, including ill-health, unemployment, a child entering puberty and becoming more curious or wanting to renew relationships with parents or siblings, or new additions to the family or residential setting. It is furthermore a very regrettable reality that every year looked after children experience placement moves, for which a valued and trusting relationship with a social worker can ease the child's trauma and distress. During

[24] Department for Education (June 2015) The Children Act 1989 guidance and regulations. Volume 2: care planning, placement and case review, pages 99-104.
[25] Department for Education and Skills (June 2007) Care matters: time for change, page 9.

2018/9, 56,080 placements of looked after children in England ended – the majority (33%) as a result of a change in the child's care plan, though 11 per cent followed a request by the carer to end the placement due to the child's behaviour. Eleven hundred placements ended last year following a child protection or standard of care concern.[26]

Regulation 8(14) – removal of minimum timescales for statutory reviews of the welfare of looked after children (after the child's second review)

53. Regulation 8(14) removes the duty on local authorities in Regulation 33(2) of The Care Planning, Placement and Case Review (England) Regulations 2010 to review a child's care every six months, once they have been looked after for three months and 20 days. (The requirement to hold the first review continues at 20 days, and the second within three months). The six-monthly timescale has been deleted and replaced with "where reasonably practicable".

54. No evidence has been produced by the Department that local authorities were unable to fulfil their statutory reviewing duties because of COVID-19. It is very significant that neither of the two organisations representing independent reviewing officers and their managers – the very professionals who chair these reviews – were consulted before these legal changes were introduced. Both organisations have called for the withdrawal of the Regulations. On 27 April 2020, the National Association of Independent Reviewing Officers (NAIRO) issued a press release which stated:

    NAIRO Is highly concerned about the Statutory Instrument (The Adoption and Children (Coronavirus) (Amendment) Regulations 2020) that came into force on 24.4.20. Since the measure contains important changes for the responsibilities of IROs, we were disappointed not to be consulted on the matter.[27] [Emphasis added]

55. On 4 May 2020, the National IRO Managers Partnership (NIROMP) published a response to the Regulations on its website which included these statements:

    We do not believe the changes to the regulations are justified. We wish to see them revoked. If the Government refuses to revoke these Regulations, we wish to be fully involved in producing necessary guidance.

    We are very troubled by the lack of consultation about these changes. We would wish to know why people with lived experience and IROs were not consulted. We believe we should be involved in any decisions about changes to rights and services for children living in care.[Emphasis added]

56. Statutory reviews are another mainstay of children's social work, with the duty to undertake six-monthly reviews of children in foster care first being introduced in 1946,[28] after the death of Dennis O'Neill. Statutory guidance explains the purpose and importance:
    Care planning and reviews are about bringing together children who are looked after, their families, carers and professionals, in order to plan for the care of the child and to review that plan on a regular basis. Effective care planning and review is underpinned by careful assessment of the needs of a child and making the right decisions about how best to meet those needs. This is a fundamental part of social work, which not only requires an understanding of the importance of planning, but also the relevant conceptual and practice

[26] Department for Education (January 2020) Children looked after statistics: Table B4: Reason for placement change for children who moved placements in the year.
[27] NAIRO press release, 27 April 2020, Coronavirus Statutory Instrument.
[28] Rule 20, Children and Young Persons (Boarding Out) Rules 1946.

frameworks.[29] [Emphasis added]

57. The statutory guidance further sets out the development of the independent reviewing officer role:

A House of Lords judgement in 2002 [Re S and Re W [2002] UKHL 10] concluded that a local authority that failed in its duties to a looked after child could be challenged under the Human Rights Act 1998, most likely under article 8 of the European Convention on Human Rights relating to family life. The judgement recognised that some children with no adult to act on their behalf may not have any effective means to initiate such a challenge.

In response, the Government made it a legal requirement for an IRO to be appointed to participate in case reviews, monitor the local authority's performance in respect of reviews, and to consider whether it would be appropriate to refer cases to the Children and Family Court Advisory and Support Service (Cafcass). This is set out in section 26 of the 1989 Act, as amended by the 2002 Act.[30]

58. The Department's response to our letter before claim states that "early reviews are considered critical to ensuring that the local authority is able to meet the child's needs".[31] This suggests that children's third and subsequent reviews are not similarly critical. Having spent more than 30 years working in and around the care system, I have never encountered anyone who distinguishes reviews in this way. Certainly the same legal considerations are required whether it is the child's first, second, third or thirtieth review, see schedule 7 to the Care Planning Regulations 2010.

59. There was enormous professional opposition (among social workers and lawyers) to attempts by the government in 2016/17 to pursue legislation which would have allowed local authorities to opt out of their children's social care duties for up to six years. Forty-seven organisations and individual experts made submissions to the parliamentary committee examining the legislation (only one of which supported the government). Evidence from the National Association of Independent Reviewing Officers (NAIRO) contained several anonymised case studies which powerfully showed how the reviewing process, and action by the child's independent reviewing officer, had safeguarded the child's welfare, including when a child's allegations about abuse by foster carers were not being taken seriously, when a teenager was being forced (for financial reasons) to move out of the area she was settled in, and when a 15 year-old girl was told she had to move 100 miles away, disrupting her education and weekly sessions with a mental health service.

60. The 6 April Ministerial briefing promised a "robust media Q and A for any potentially tricky responses".[32] This appears to be the blog published on 1 May 2020. In relation to the loss of six-monthly statutory reviews, the blog states:

[29] 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, paragraph 2.2.
[30] 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, paragraphs 1.15 and 1.16.
[31] Page 3.
[32] Paragraph 32.

Claim: Timescales for review plans for children in care have been relaxed, meaning children's care is not being independently scrutinised.
Regulations remains unchanged wherever a child raises a concern, or others raise concerns that a child may be at risk – including an Independent Reviewing Officer. In these circumstances, reviews must still be carried out as before.

61. The provision for additional reviews to be held is an extra safeguard for the child; it is not meant to replace the six-monthly minimum interval. The Department must also be aware that one of the triggers for these extra reviews emanates from the social worker visit, whose statutory basis has also been diminished. Regulation 30 of the Care Planning Regulations states that:

    Where, as the result of a visit carried out in accordance with this Part, [the social worker's] assessment is that [the child's] welfare is not adequately safeguarded and promoted by the placement, the responsible authority must review [the child's] case… [Emphasis added]

62. It is correct that local authorities "must carry out a review before the time specified in paragraph (1) or (2)" if the independent reviewing officer or the child requests one (Regulations 33(3)(a) and 33(3)(ac) respectively). However, Regulation 32(3) now reads:

    The second review must be carried out not more than three months after the first, and subsequent reviews must be carried out where reasonably practicable thereafter.

63. This means there is no specified time after the child's second review, to which the independent reviewing officer or the child can pinpoint their request.

Regulations 8(18) and 9(13) – removal of safeguards for children in short breaks

64. Regulation 8(18) amends Regulation 48 of The Care Planning, Placement and Case Review (England) Regulations 2010, relating to short breaks. Regulation 9(13) amends Regulation 42 of the Fostering Services (England) Regulations 2011.

65. Children may be provided short breaks either under s17 or s20 of the Children Act 1989 – it is only where short breaks are provided under s20 that the child becomes 'looked after'. The safeguards removed overnight from children in short breaks relate only to those accommodated / looked after under s20. Whereas before all of the safeguards relating to care planning, reviews and social worker visits applied when a looked after child had a single short break placement which exceeded 17 days, or the total number of placements in a year exceeded 75 days, from 24 April 2020 they only apply from day 76. This is a very significant loss of safeguards for a highly vulnerable group of children.

66. The Department does not publish data on the number of disabled children who are looked after. However, its annual data does show primary categories of need which includes "Child's disability". As at 31 March 2019, there were 2,290 children looked after in England whose primary category of need was disability.

67. The statutory duty to provide short breaks was introduced through an amendment to the Children and Young Persons Bill in 2008, jointly tabled by the then Minister Lord Adonis and the President of Mencap, Lord Rix. It came into force in 2011.

68. In determining which legal basis short breaks are provided, the statutory guidance explains:

The key question to ask is how to promote and safeguard the welfare of the child most effectively. The assessment, planning and review processes for children in need may be appropriate or the additional requirements for looked after children may be more appropriate, depending on the circumstances of the child and family.

69. It continues to set out the kind of circumstances where the child would be "best safeguarded by being a looked after child":

There will be some children whose package of short breaks will be such that their welfare will be best safeguarded by being a looked after child for the periods in which s/he is away from home i.e. by providing the services under section 20(4) rather than 17(6). This will include children:

- *who have substantial packages of short breaks sometimes in more than one setting; and*
- *whose families have limited resources and may have difficulties providing support to their child while s/he is away from home or monitoring the quality of care s/he is receiving.*[33] [Emphasis added]

70. Support and monitoring for disabled children living away from home are especially critical given the level of vulnerability and the higher risk of abuse. The statutory guidance explains:

Disabled children are three to four times more likely than non-disabled children to be abused or neglected. They are more susceptible to bullying and to mental health disorders. Their families are more susceptible to higher levels of stress, lower levels of parental wellbeing and poverty. It is therefore particularly important that good services are available to these families and that the services are provided with appropriate safeguards.[34]

71. The government's response to our letter before claim states the removal of these safeguards is necessary because children may not be able "to return to their full time carer as a result of the pandemic" due to their parent or carer becoming unwell, or not fully recovering. Alternatively, it states that a child may require a short break "due to illness of a parent or carer which endures for longer than 17 days".

72. Both of these explanations miss the point that the short break safeguards only apply when a local authority has deemed it necessary to safeguard and promote the child's welfare for them to be looked after during their short break/s. In such circumstances, I am shocked that the Department would consider a child's parent being seriously unwell with COVID-19, perhaps critically ill, as a justification for removing the safeguards.

Regulations 4 and 8(8) – removal of mandatory adoption panel (including for intercountry adoption) and other safeguards in adoption (pre-court stage)

73. Adoption has the most profound and long-term impact on a child's identity, relationships and family life. Lady Hale in the Supreme Court[35] reiterated that the test for severing a relationship between a parent and child is very strict and therefore should occur:

[33] Department for Children, Schools and Families (2010) Short breaks. Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks, paragraph 2.12.
[34] Department for Children, Schools and Families (2010) Short breaks. Statutory guidance on how to safeguard and promote the welfare of disabled children using short breaks, paragraph 1.7.
[35] Giving a dissenting judgment.

only in exceptional circumstances and when motivated by overriding requirements pertaining to the child's welfare, in short, when nothing else will do. In many cases and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore and attempt alternative solutions.[36]

74. It is within this context that adoption panels (a legal requirement since 1984) and other pre-court safeguards exist.

Adoption panels

75. The pre-24 April 2020 safeguards ensured that every prospective adopter, and the subsequent placement of a particular child with that family, was considered by an adoption panel which was required to have members (including the Chair) who were independent of the agency concerned. Now the panels are discretionary.

76. Panels make recommendations to the adoption agency which are required to take into account the panel's recommendation before making their decision. Where the adoption agency is a local authority, panels must further consider the local authority's proposals for support for the adoptive family post-adoption. All panels are required to consider the agency's proposals for contact arrangements – which could be with distant family members or adult siblings, post-adoption. Panels have the power to give advice to the adoption agency about both these matters (support and contact), which is an incredibly important aspect of scrutiny and safeguarding. Statutory guidance explains:

Adoption panels perform an important role in assisting the agency to reach the best possible decision in respect of:

- *whether a child should be placed for adoption, where there is parental consent … in respect of the changes made in respect of cases where there is no parental consent),*
- *the suitability of prospective adopters or the termination of approval of a prospective adopter, and*
- *whether a child should be placed for adoption with a specific prospective adopter.*

They are intended to be multi-disciplinary bodies with a considerable element of independence from the agency. This independence means that they cannot themselves make decisions but make recommendations to the agency's decision-maker in respect of cases referred to it. Panels play an important quality assurance role, providing objectivity and having the ability to challenge practice which is felt not to be in the interests of children or fall short of the Regulations or NMS [National Minimum Standards]. Panels are required to give regular feedback to the agency...[37] [Emphasis added]

77. The government's response to our letter before claim states that adoption panels have been made discretionary "to prevent adoptions being unnecessarily delayed due to lack of availability of panels during the pandemic". It is relevant that the 17 March 14.42 email from the Department to local authorities and adoption agencies asked for views on suspending the need to have adoption panels "Since panel members are not essential to the process". In the event, there were five responses to this email which specifically answered the question about adoption panels continuing (or not) to be mandatory: two expressed support for removing the requirement, whereas two wanted to keep the panels and a third said they wished to try virtual meetings.

[36] *Re B (A Child)* [2013] UKSC 33 [198].
[37] Department for Education (July 2013) Statutory Guidance on Adoption For local authorities, voluntary adoption agencies and adoption support agencies, paragraph 1.19.

78. Panels were quorate (pre-24 April):
    - If the chair or vice-chair was present
    - The experienced social worker member was present, and
    - Three other members were present (four if the panel was jointly run between two or more local authorities).

    (If the chair was not present, and the vice chair was not independent of the adoption agency, at least one other independent member was required to be present.)

79. This means five panel members (or six in the case of joint panels) were required to be present for a meeting to be quorate.

80. CoramBAAF's guidance on effective adoption panels notes that "many agencies appoint six or seven members to each panel"[38] which allows for absences not affecting the quoracy of the panel. Of course this was referring to ordinary circumstances, not the health crisis our country is in today. But even before the pandemic, there would be occasions when panels would have to meet to make recommendations urgently – for instance, to enable a local authority to move a very young child to approved adopters as soon as possible. In any case, as well as making the panels themselves discretionary, the Regulations have substantially reduced the quorate requirements, irrespective of whether or not COVID-19 has affected the panel's work. Panels can now undertake their business with just the following in attendance:
    - Independent chair or vice chair (who does not have to be independent),
    - Experienced social worker, and
    - One other independent person.

81. In such circumstances, there is no justification for making the existence of the panels themselves discretionary, including in intercountry adoption. This is a very significant policy change, which has serious implications for children's rights, especially their right to respect for family life. CoramBAAF has recently commented:

    At a time when agencies are having to re-design their current systems to ensure that adopters and foster carers are recruited, prepared and assessed, children are matched and placements are made, CoramBAAF believes that <u>the role of panels could not be more important</u>. We have heard many examples where agencies have continued to hold their panel meetings virtually. These panels have been playing a vital role in providing independent scrutiny of the evidence, and providing recommendations to the agency decision-maker to assist them in what are life-changing decisions.[39] [Emphasis added]

82. It is my understanding that adoption agencies responded quickly to COVID-19 by holding virtual meetings. It is notable that the government did not elect to clarify in the Regulations that such meetings could take place by video call (as they have done for social worker visits to children, independent persons visits to children's homes and registered provider visits to residential family centres), despite the feedback it gained from its urgent correspondence with local authorities and adoption agencies.

[38] CoramBAAF (2012) Effective adoption panels: guidance on regulations, process and good practice in adoption and permanence panels in England, page 9.
[39] CoramBAAF, 1 May 2020, Key Issues for Agencies in Developing Best Practice for Adoption and Fostering Panel Virtual Meetings during the Coronavirus Pandemic.

Fostering for adoption placements

83. Regulation 8(8) removes the requirement in Regulation 22A of The Care Planning, Placement and Case Review (England) Regulations 2010 for the approval of a senior officer before a child can be placed with a local authority foster parent who is also an approved prospective adopter. It also removes the requirement in Regelation 22B of the 2010 Regulations that a placement plan must be prepared before a child may be placed in a fostering for adoption placement. These are two very significant safeguards. Statutory guidance explains:

Before approving the decision [to place a child in a fostering for adoption placement], the nominated officer must be sure that the placement is the most appropriate one for the child; ensure that the child's wishes and feelings have been considered in the decision making process and that the Independent Reviewing Officer has been informed … The nominated officer must also ensure that the child's parents (including fathers without parental responsibility) or guardian (if their whereabouts is known) are notified about the proposed placement. This notification should be in writing and as soon as the nominated officer is asked to approve the placement decision. Where the child is voluntarily accommodated under section 20 of the Act, the notification should remind the birth parents of their right to remove the child from the local authority's care and should provide advice on access to legal advice and appropriate advisory bodies. The local authority may also consider commencing care proceedings … The local authority may also wish to notify family and friends who may then decide to come forward as a potential carer for the child. In such circumstances, the local authority must assess their suitability. [Emphasis added]

84. It is usually infants and very young children who are placed in fostering for adoption placements. These types of placements, whatever the circumstances of the infant, inevitably increase the likelihood that by the time a child's case comes before the family court they will have developed bonds and relationships with their carers which will reduce the prospect of rehabilitation with their birth parents. For such life-changing decision-making, senior officer approval and the placement planning process ensured robust scrutiny and accountability. The Family Rights Group explains:

Whatever the route by which a child's case ultimately come before the court, one of the key considerations courts take into account is the early bonds and attachment that the child has made. This responsibility on the courts to take such bonds into account has been reinforced in section 9 of the Children and Social Work Act 2017 which adds to the list of matters to which court is to have regard in coming to a decision relating to the adoption of a child, the relationship with any person who is a prospective adopter with whom the child is placed. An early and insufficiently scrutinised foster for adoption arrangement can have the effect of enabling a child to form those bonds with the prospective adopter but conversely prevent, frustrate or otherwise deprioritise the child forming bonds with birth parents and family.

85. The charity's briefing on two changes to adoption law (loss of the panel and senior officer approval) made by the Regulations sets out some of the circumstances which the families it works with are facing during this pandemic, including:
    - Reduction in support services before and after a child's birth – including face-to-face domestic abuse and substance misuse support services. Domestic abuse has been shown to have increased during the health crisis;
    - It is young women, especially those who have been in care, who are most likely to have their infants placed in fostering for adoption placements;

- The “great majority’ of families contacting the charity’s advice line report that pre-birth conferences and child protection conferences are being held by telephone (rather than through video call). It reports that, “parents have often not seen any documents which should be prepared ahead of the conference (for example, the social work report), may not understand who is on the call, the nature of concerns or decisions made. Their ability to ensure their voice is heard and to challenge (where needed) the information set out by the professionals is severely compromised”;
- There are fewer places available in mother and baby facilities, residential family centres, and mother and baby foster care placements at the present time;
- Contact is now more difficult for infants separated from their birth mothers – whereas breastfeeding may have continued before, it is now much more challenging;
- Support networks are not as readily available to parents, and the capacity of children’s social care to “fully assess parenting capacity and engage with wider family and other protective factors may also be compromised during the crisis”;
- Some local authorities have delayed assessment of family and friends as potential carers for newborns, and the charity is aware “of cases where the newborn is geographically far from the prospective kinship carers and contact has not been facilitated during the crisis. This can mean that a placement outside of the family network becomes more likely”.

86. The Family Rights Group concludes that the current pandemic demands “greater, not less, scrutiny in respect of foster for adoption [placements] to ensure that there are rigorous checks and balances to protect the human rights of children and their families and fair process”. [Emphasis added].

Regulation 11(6) – dilution of duty on children’s homes providers to ensure independent persons visit and write a welfare report each month

87. Regulation 11(6) amends Regulation 44(1) of The Children's Homes (England) Regulations 2015, diluting a requirement on registered persons of children’s homes to ensure independent visits to “use reasonable endeavours”. This is despite an additional change (to Regulation 22) which allows visits to take place by telephone, video call or other electronic means.

88. There is a longstanding tradition of children’s homes receiving monitoring visits each month, with the legislation dating back to at least 1951.[40]

89. In 2015, the visiting duty was strengthened by requiring that the person making the welfare visits is independent of the home. This followed critical reports both from the Children’s Commissioner for England (concerned with child sexual exploitation in gangs) and a Parliamentary inquiry[41] into children who go missing from care.[42]

90. Before 24 April 2020, the registered person of a children’s home was required to ensure that an independent person visits a children’s home at least once a month, speaks to children in private (unless they object) and inspects the premises. At the end of the visit, the independent person must write a report with their opinion as to whether (a) children are effectively safeguarded; and (b) the conduct of the home promotes children’s well-being.

[40] Regulation 2, The Administration of Children’s Homes Regulations, 1951.
[41] Conducted by the All Party Parliamentary Group for Runaway and Missing Children and Adults and the All Party Parliamentary Group for Looked After Children and Care Leavers.
[42] Both reports were cited in the government’s consultation document which proposed making the monthly visits more robust – Department for Education (June 2013) Reforming children's homes care: consultation on changes to The Children's Homes Regulations 2001 (as amended) and The Care Standards Act 2000 (Registration) (England) Regulations 2010.

This report is sent to Directors of Children's Services (in the locality and in the placing authorities of children who are living outside their home area) and Ofsted.

91. The government's response to our letter before claim states that:

During the period of the pandemic emergency, it may not be possible to arrange for an independent person to visit every children's home every month, whether due to a lack of availability of suitable independent persons or, potentially, an outbreak of COVID-19 at the home.

92. Reg 44 visits (as they are known) occur as a matter of routine in children's homes; they are not something managers have to proactively arrange themselves each month. Providers have contracts with organisations or individuals working freelance who undertake the visits. In the case of new providers, or providers needing to cover for absences, a simple web search produces a whole host of potential independent persons. As far as I am aware, the National Youth Advocacy Service, which makes Reg 44 visits to 420 children's homes a month, has continued to provide this service throughout the current pandemic, though following social distancing rules and visiting virtually.

93. It is important to note that the Regulations have additionally deleted timescales for Ofsted inspections of children's homes, including for those homes judged 'requires improvement to be good' or 'inadequate' at their last inspection. Nearly one in five of children's homes were judged 'requires improvement to be good' (15%) or 'inadequate' (3%) in 2018/19. Reg 44 visits are a critical monitoring mechanism for Ofsted who can then respond to safeguarding concerns – especially important now that routine inspections have been suspended.

Rule of law

94. I am deeply concerned that that the narrative of emergency flexibilities by both government and a few local authority spokespeople creates the impression that there are two statutory frameworks in place – the pre-24 April position and, in tandem, the 'relaxations' permitted by the Regulations.

95. The Department's response to our letter before claim sets out the results of "conversations" with around half of England's local authorities (there are 152 in total), as follows:

- 38 are reported to be planning <u>not</u> to implement the regulatory changes ("use the flexibilities"), or were not currently applying them on 18 May but may do so in future;
- 17 are reported to be implementing the regulatory changes, or would consider using them, in relation to fostering;
- 7 are implementing the Regulations in other, non-specific ways; and
- 14 are using virtual meetings / visits.

96. Besides assumptions which can be drawn about virtual meetings/ visits, the information above does not reveal anything about the impact of COVID-19 in the local authorities contacted by the Department, nor whether decisions to apply or not to apply the new regulatory framework are directly linked to the health crisis. The Regulations were not drafted in this way, so the 'flexibilities' are permissible for any number of reasons.

97. This epitomises the confusion surrounding the Regulations. The coronavirus social care guidance, for example, states:

The overarching approach to making use of these legislative flexibilities should be approved at chief officer level in local authorities, and top tier management level in other services and providers. Where it becomes necessary to utilise any of these flexibilities, it is important that this is properly recorded, along with the reasons for doing so. Each local authority should set out the local circumstances that have given arise to the need to use the flexibilities they have been afforded.

98. Notwithstanding that senior officer approval has been deleted for very significant decision-making in relation to individual vulnerable children, the administrative processes described above are not required by the Regulations.

99. The President of the Association of Directors of Children's Services, Jenny Coles, similarly told Parliament's Education Select Committee that the "flexibilities will only be used in an emergency":

***Ian Mearns**: Good morning, everyone. Do you agree with Anne Longfield, the Children's Commissioner, that the Government's recent changes to adoption and coronavirus regulations are unnecessary and lack any real consultation?*

***Jenny Coles**: The flexibility to the Adoption and Children Act came out before the guidance. The guidance came after it and put it in context, so that is the first thing I would say. The second thing is that it was done at a time when lockdown had just happened. People did not know what was going to happen, particularly around the workforce and children's services, and in an emergency those sorts of flexibilities may well be required to keep our services running. We have to keep running. We have to keep children in care being looked after and we need to respond to families, but I really want to emphasise that <u>those flexibilities will only be used in an emergency and not frequently, and they will be frequently reviewed. I think it is necessary to have those in the background</u>, but they need to be very carefully monitored, which they will be by the local authorities and, I am sure, by the DfE as well*. [Emphasis added]

100. On 3 June 2020, two individuals – Mr Pete Bentley, policy officer at Nagalro (the professional association for children's guardians, family court advisers and independent social workers) and formally the independent chair of a number of local authority adoption panels, and Dr Mark Kerr, managing partner of The Centre for Outcomes of Care (which works with local authorities and others to improves children's services), received identical responses from Ofsted to Freedom of Information (FOI) Act requests they had separately made in respect of information relating to the Regulations, specific to Ofsted's contact with the Department for Education during the preparation of this legislation. They support Article 39's work in challenging the Regulations, and shared the responses they received with me.

101. In setting out the reasons for not providing information considered to fall under s35 of the FOI Act as an exemption, the response refers to ongoing discussions between Ofsted and the Department. In contrast to the Defendant's response to the letter before action, in which the Secretary of State for Education stated that it is not his intention that the amendments effected by the Regulations should become permanent, Ofsted stated to both Mr Bentley and Mr Kerr that:

The latest regulations are due to expire on 25 September 2020. Ofsted and the DfE will be engaged in continuing discussions to develop suitable regulations to succeed these. No final decision has yet been made on the content of those future regulations. As such we believe the policy making process, associated with the information you have requested, to be ongoing until such time as replacement regulations have been implemented.

Previous attempts at deregulation

102. The Department states that it is a "misconception" to draw parallels between what has been achieved through The Adoption and Children (Coronavirus) (Amendment) Regulations 2020, and what was previously attempted through primary legislation in 2016/17 (the Children and Social Work Bill) and a 'myth busting' guide in 2018/19. I am afraid there are too many parallels for me to accept the similarities as coincidental. Without going into the history, it is relevant to note that four of the six policy areas subject to deregulation which we challenge in this claim were previous candidates for deregulation through the exemption clauses in the Children and Social Work Bill (2016/17) and/or the 'myth busting' guide (2018/19), as follows:
    - Removal of independent reviewing officers for "low risk" children in care (achieved through Regulation 8(14), though via a different route);
    - Disbanding adoption and fostering panels (achieved through making the panels discretionary – Regulations 4(2)(a) and 9(6)(a));
    - Removal of care planning and review process from children in short breaks (achieved through Regulation 8(18));
    - Removal of social workers from children in stable and long term foster placements (achieved through Regulation 8(13) which would permit very minimal visits from social workers to children in such placements);
    - Social workers being able to visit children in "stable and long term care" less frequently than every six weeks (achieved through Regulation 8(13)).

Conclusion

103. All of the safeguards in our claim were introduced to protect children; some have been in place since the 1940s. They are vital and necessary; children rely on them. Successive governments have communicated the importance of each of the safeguards through statutory guidance.

104. Local authorities were already under immense pressures before COVID-19, due to funding cuts and increased demand on statutory children's social care services. They have been saying for several years that they have had to direct their limited resources to meeting their statutory duties. The five largest children's charities recently published an analysis of funding pressures for children's services, reporting a 23 per cent reduction in children's services funding between 2010/11 and 2018/19 – a loss of £2.2 billion.[43]

105. Half of local authorities children's services were judged by Ofsted as requires improvement to be good (38%) or inadequate (12%) in 2018/19.[44] The likelihood is that many of these councils would have been failing to meet duties which now no longer exist due to the Regulations.

106. We count 65 losses or dilutions of statutory duties in the Regulations. By the Department's own admission, they were developed "in confidence" without the knowledge, involvement or contribution of key organisations – including those which exist, like Article 39, to singularly promote and protect the rights of children. Not consulting the Children's Commissioner for England on such substantial changes, affecting a constituency of children for whom she has particular statutory functions, is, in my view, especially grave.

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[43] Action for Children, National Children's Bureau, NSPCC, The Children's Society and Barnardo's (May 2020) Children and young people's services: funding and spending 2010/11to2018/19, page 2.
[44] Ofsted (January 2020) The annual report of Her Majesty's Chief Inspector of Education, Children's Services and Skills 2018/19, page 32.

107. Article 39 has nothing to gain financially from this claim; and we are taking a considered financial risk.

108. We are pursuing the claim because it goes to the heart of our charitable objects, and the children we serve. No other organisation or individual supporting us – either professionally or financially – has anything to gain in monetary terms: the focus is on protecting children's rights.

Carolyne Willow
Article 39 Director
3 June 2020