

# Article 39

## COMMITTEE ON THE RIGHTS OF THE CHILD DAY OF GENERAL DISCUSSION CHILDREN'S RIGHTS AND ALTERNATIVE CARE (2021)

### Introduction

1. We welcome the Committee on the Rights of the Child's commitment to producing "guidance on what constitutes quality alternative care for children, including the basis for meaningful participation of children and young people who are care experienced, as well as best practice from diverse country contexts" following its Day of General Discussion on Alternative Care in September 2021. We very much look forward to contributing to this.

### About us

2. Article 39 fights for the rights of children living in state and privately-run institutions in England. A registered charity, we take our name from Article 39 of the United Nations Convention on the Rights of the Child (UNCRC), which grants every child who has been abused or suffered other violations of their rights to recover in environments where their health, self-respect and dignity are nurtured. Our work runs across four complementary areas: legal education; practice development (our national network of independent advocates has nearly 300 members); policy advocacy, research and strategic litigation; and awareness-raising of the rights, views and interests of children.
3. We have identified three overarching priorities for protecting and promoting children's rights in alternative care:
  - a. Having a wide, inclusive definition of alternative care
  - b. Developing a statutory purpose of alternative care founded on UNCRC principles and provisions
  - c. Ensuring children's views and experiences are central, and that being listened to and respected, and having choices and influence, are an everyday, constant experience.
4. Below we set out our starting points for each of these priorities, which are derived from what we know matters to care experienced children and adults, and others who have spent periods (or the whole) of their childhood separated from their families.

### Defining alternative care

5. Article 20 of the UNCRC (the only provision to explicitly refer to alternative care) requires the state to give two main groups of children "special protection and assistance":
  - a. Children who have been temporarily or permanently deprived of their family environment
  - b. Children who cannot remain in their family environment because to do so would not be in their best interests.

6. The UNCRC further provides that alternative care be available for these two groups of children in accordance with national law. Based on Article 20 alone, alternative care therefore encompasses all of the places where children separated from their families live for whatever reason, and for however long – including children who are deprived of their liberty within health, criminal justice and immigration contexts and children who are attending boarding and residential schools. It would also include children who have moved out of the family home for work or training.
7. However, the United Nations guidelines on alternative care<sup>1</sup> take a narrower approach, in focusing on the child welfare system and children who are in the care of the state – where the state has taken on legal responsibility for the child’s well-being and development. The guidelines distinguish between care arrangements decided by the child, their parents or others, and arrangements decided by bodies like children’s social care and family courts. They also distinguish between two different environments where a child receives ‘alternative care’ – within a family or a residential setting.
8. **Our first recommendation to the Committee on the Rights of the Child is that it develops a definition of alternative care that is rooted in children’s individual circumstances and needs, and the universality of protection offered by the UNCRC, rather than the different systems, professions and services which interact with and affect children. This would mean having a wide definition of alternative care as encompassing the variety of settings and places where children live when they are separated from their parents and family of origin.**
9. Having a wide, inclusive definition of alternative care does not mean that the state always takes on legal responsibility for the child’s well-being and development – this usually remains with the child’s parents when children are in hospital, or living away from home for education, training or work for example. But there are UNCRC rights and protections which all children are entitled to under the UNCRC, and therefore they apply within all settings. UNCRC obligations across all settings include:
  - a. Always treating the child’s best interests as a primary consideration (or the basic concern when the state has parental responsibility for the child)<sup>2</sup>
  - b. Arrangements to ensure every child can enjoy all of their rights without discrimination and to guarantee the rights of disabled children to a “full and decent life”
  - c. Arrangements to ensure children’s views are heard and given due weight
  - d. Arrangements to ensure children can maintain and/or rebuild their family and other relationships of importance to them
  - e. Arrangements to preserve and protect the child’s identity, including their nationality, name and family relations and to uphold their right to freedom of thought, conscience and religion
  - f. Arrangements to ensure every child enjoys the highest attainable standard of health and equal access to health care services
  - g. Equal access to and enjoyment of education, which is aimed at developing each child’s personality, talents and mental and physical abilities to their fullest potential

---

<sup>1</sup> United Nations General Assembly (2010) Guidelines for the alternative care of children.

<sup>2</sup> Children’s wishes, views and feelings are central to any assessment of their best interests. See Committee on the Rights of the Child (2013) General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration. United Nations.

- h. Arrangements to ensure children enjoy their right to play, leisure and the arts;
- i. Environments which help children recover from abuse, neglect and other rights violations through nurturing their health, self-respect and dignity
- j. Effective systems to protect children from all forms of mental and physical violence, sexual and other forms of exploitation, trafficking and inhuman and degrading treatment or punishment.

10. In addition to Article 20's "special protection and assistance", the UNCRC provides the following rights and protections for children who are deprived of their family environment:

- a. Right to participate in proceedings where separation for the child's best interests is being considered
- b. Presumption that the (separated) child maintains direct relations and contact with both parents
- c. Parents and other members of the child's family to be provided with information about where the child is living
- d. Periodic review of the child's treatment and circumstances
- e. Informed consent to adoption is based upon available counselling
- f. Where a child who is seeking refugee status cannot be reunified with their family, they receive the same protection as other children temporarily or permanently deprived of their family environment
- g. The deprivation of liberty of children (as a criminal justice measure) must be a last resort and for the shortest possible period of time. Alternatives to institutional care must be available for such children.

11. In England we have different mechanisms and arrangements for safeguarding children who are separated from their family environment, which arbitrarily depend on where the child lives rather than on a coherent framework of rights and protections guaranteed to all children. Some headline anomalies are:

- a. Children who are in the care of the state can be placed by local authorities in unregulated accommodation where the adults working there are not legally allowed to provide them care
- b. Children who are in contact with social care have the right to help from an independent advocate to express their views and protect their rights on any matter of concern to them, yet within health settings this is restricted to when the child is making a complaint or has been detained under mental health legislation. There is no statutory right to help from independent advocates for children who live in boarding or residential schools<sup>3</sup>
- c. Arrangements have been put in place, backed up by law, to enable children who live in foster care to stay with their carers until the age of 21. No such provision has been made for children who live in residential care
- d. In the criminal justice context, children are never detained in institutions with adults whereas children are detained alongside adults in mental health units
- e. Children in young offender institutions are routinely subject to the use of force to make them follow orders ('good order and discipline') yet this treatment is prohibited in other custodial institutions.

---

<sup>3</sup> Article 39's summary of the statutory framework for children and young people's advocacy services can be found here: <https://article39.org.uk/rights-to-advocacy>

12. When children are deprived of their liberty through the criminal justice system, parents (and local authorities when the child is in their care) are profoundly and drastically stopped from parenting their children in any meaningful, routine way. For children serving long sentences, or entering custody as teenagers and staying there into adulthood, the state effectively takes responsibility for the remainder of that child's childhood – but this is not how the child's detention is conceived of legally, or experienced in practice. We believe these children should be the responsibility of the child welfare system, not the criminal justice system. This is not, however, to diminish the importance of parents being able to retain and fulfil their parenting responsibilities.<sup>4</sup>

13. Remanded children in England are automatically granted looked after child status – through legislation passed in 2012.<sup>5</sup> A government document explained the purpose of this:

*Conferring looked after status on all such vulnerable children will place a duty on the authority responsible for their care to assess their needs, co-ordinate services on their behalf and maintain a link with their home communities, including offering support to their families to keep in contact with them.*<sup>6</sup>

14. There is a longstanding duty on local authorities to prevent children's involvement in crime and to prevent them from being detained in secure accommodation.<sup>7</sup> Recent research on children who are detained in secure children's homes through a welfare or a (criminal) justice route confirmed that they have very similar backgrounds and health needs as well as comparable experiences of instability and trauma.<sup>8</sup>

15. Children in care often experience stigma and prejudice because of their care status.<sup>9</sup> We recognise that extending looked after status (or other legal arrangements carrying equivalent protection) to more children in the criminal justice system could exacerbate this. In response, we advocate understanding, compassion and respect for all children and reject the notion that there are 'good' and 'bad' children. Promoting understanding of the needs and rights of all children, without discrimination, is one of the many strategic responsibilities of governments which emanate from UNCRC ratification.<sup>10</sup>

### **Purpose of alternative care**

16. After persistent and widespread revelations of abuse and neglect in alternative care in England during the 1980s and 1990s, the term 'corporate parent' became to be used by policy makers to emphasise the moral and legal obligations of local authorities and other agencies. This was a very important endeavour at the time. However, today the term is widely seen as impersonal and unhelpful in focusing attention on what children need as they

---

<sup>4</sup> Article 39 co-ordinates the 'End Child Imprisonment' campaign which has produced two publications – Principles and minimum expectations for children deprived of their liberty (2019) and The case for ending child imprisonment. Questions and answers (2020): <https://article39.org.uk/endchildimprisonment/>

<sup>5</sup> Section 104 Legal Aid, Sentencing and Punishment of Offenders Act 2011.

<sup>6</sup> <https://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/ia-sentencing-punishment-laspo.pdf>

<sup>7</sup> Paragraph 7 of Schedule 2, Children Act 1989.

<sup>8</sup> Hart, D. and La Valle, I. (May 2021) Secure children's homes: placing welfare and justice children together Research report. Department for Education.

<sup>9</sup> Morgan, R. (2009) Care and prejudice. A report of children's experience. Office of Children's Rights Director, Ofsted.

<sup>10</sup> See especially the Committee on the Rights of the Child (2003) General comment no. 5. General measures of implementation of the Convention on the Rights of the Child. United Nations.

grow up, just like all other children, and what they need in addition as children separated from their parents and wider family. We believe the concept of ‘corporate parenting’ encourages detached and dispassionate language and terminology<sup>11</sup>, and works against what children consistently say they want from care – to feel loved, secure, to understand their identity and their past and to be connected to people who appreciate and value them, and stay in their lives.<sup>12</sup>

17. In 2017, without any prior public consultation, legislation was passed by the UK Parliament which set out corporate parenting principles for the first time. Local authorities must have regard to these principles when carrying out their functions in relation to children in their care, and adults (up to age 25) who were formerly in their care. The principles are:
- *To act in the best interests, and promote the physical and mental health and well-being, of those children and young people*
  - *To encourage those children and young people to express their views, wishes and feelings*
  - *To take into account the views, wishes and feelings of those children and young people*
  - *To help those children and young people gain access to, and make the best use of, services provided by the local authority and its relevant partners*
  - *To promote high aspirations, and seek to secure the best outcomes, for those children and young people*
  - *For those children and young people to be safe, and for stability in their home lives, relationships and education or work*
  - *To prepare those children and young people for adulthood and independent living.*<sup>13</sup>
18. **There are vital provisions from the UNCRC which were not included in the statutory principles above – such as: nurturing children’s family relationships (including with their siblings) and supporting reunification with their parents wherever possible, and as quickly as possible; ensuring all children can enjoy their rights without discrimination<sup>14</sup>; providing environments where children feel loved, secure, respected, understood and can thrive and pursue their individual interests and goals; helping children recover from experiences which have caused them significant pain, distress and anguish; and being reliably there for them for as long as is needed throughout their adult life. We would also like to see a commitment to challenging inequality and prejudice arising from the child’s care status.**

---

<sup>11</sup> TACT Fostering and Adoption (2019) language that cares. Changing the way professionals talk about children in care.

<sup>12</sup> Children’s Commissioner for England (2019) Children’s voices: children’s experiences of instability in the care system. Office of the Children’s Commissioner for England.

<sup>13</sup> Section 1 Children and Social Work Act 2017.

<sup>14</sup> This relates not only to children’s care and treatment once in alternative care but in the co-ordinated efforts and resources required to prevent children’s separation from their families. Children from deprived communities, children from black, Asian and minority ethnic communities and disabled children are disproportionately separated from their families (there is overlap across these three groups, and the same disproportionate separation of children from their families within our child welfare system is also entrenched within our criminal justice system).

19. A reimagining of the purpose of alternative care would, we believe, greatly help to keep the focus where it should be – on the child’s happiness, well-being and development. Some years ago, following consultation and partnership with children and young people and others, a blueprint was published for a child-centred approach to public care. Its title summed up the fundamental change envisaged: ‘Start with the child, stay with the child’.<sup>15</sup> Setting out the purpose of alternative care from a children’s rights perspective would help us achieve that. Connected to this is the need to commit to being there for children as they enter adulthood, and beyond – for as long as they need it.
20. A major conference run by and for care experienced children and adults in England in 2019 urged policy makers to reimagine care from the growing child’s perspective – and not to sever relationships at 18, 21 or 25 years, simply because of age, but to continue caring, supporting, guiding and helping for as long as is needed.<sup>16</sup> Children and adults who report most positively on their time in the care of the state invariably cite individual adults who loved them, believed in them and were there for them through good times and bad.<sup>17</sup>

### **Children’s views and experiences at the heart of alternative care**

21. Systems and structures are necessary to ensure that children’s views and experiences are known, understood and acted on throughout all of their time in alternative care, and in wider policy and practice development.
22. In England, we have a well-developed mechanism of supporting children’s right to be heard, through the appointment of independent advocates and children’s rights officers, and wider participation initiatives including children in care councils. However, expenditure on children’s rights and participation services at a local level are highly variable<sup>18</sup>, and national government has still not championed and funded UNCRC education, training and awareness-raising among different professional groups and key constituencies such as elected members (councillors). Thirty years after the UK ratified the UNCRC, there is little sense that children’s views and experiences are systematically influencing policies, services and decision-making which affect them profoundly (and are often claimed to be transforming their lives). We have arrangements in place for children in care to be interviewed privately when they have run away, but there are no comparable, routine systems for inviting children and young people to share their reflections on living in a particular setting, or receiving a particular service, once they have moved from that place or stopped using the service. Similarly, we are not aware of any employer scheme which recognises and validates social workers and other professionals who have stayed in their roles in order to maintain very significant relationships with children.

---

<sup>15</sup> Voice for the Child in Care and National Children’s Bureau (2004) Start with the child, stay with the child: A blueprint for a child-centred approach to children and young people in public care. Voice for the Child in Care.

<sup>16</sup> The Care Experienced Conference (2019) The conference for care experienced people Liverpool Hope University, 26th April 2019. Summary report.

<sup>17</sup> The importance of relationships with social workers, of having stability and permanence and being able to understand and connect to their individual roots were the three principal recommendations made by children and young people taking part in a national inquiry: The Care Inquiry (2019) The views and recommendations of children and young people involved in the Care Inquiry.

<sup>18</sup> The Children’s Commissioner found that expenditure on advocacy service varied between £21.20 and £3,018.84 per child being helped in England in 2018/19 (data from 68 of 152 local authorities): Children’s Commissioner for England (2019) Advocacy for children. Children and young people’s advocacy services in England.

23. At a national level, there is no Cabinet-level Ministerial position leading on all aspects of children’s rights and welfare, or the UK’s implementation of the UNCRC.
24. **Formal structures and systems, which are properly funded and have real influence nationally and locally, are vital in ensuring children are properly heard, know their rights and can raise concerns. This includes ring-fenced funding for self-advocacy groups and organisations run by and for care experienced people. However, these formal mechanisms can only ever enhance and build upon what children need, and have a right to receive and experience, in their everyday lives. Everyone who works within alternative care settings, and everyone whose work and decision-making impacts upon children, must strive to ensure that children feel listened to, understood and respected – not as a by-product of a project or an event or a particular initiative but because this is the environment in which they are growing up.**
25. Too often children’s rights are associated with conflict and complaints, with children having to ‘fight’ for their basic needs to be met through adversarial procedures. Whilst it is critical that children have access to tailored information, help and remedies when they are being (or have been) ignored, silenced and/or mistreated, it is a misunderstanding and misapplication of the UNCRC to view this as the start and end of a children’s rights approach.
26. A children’s rights approach to alternative care is about valuing children as human beings with integrity and agency, and doing everything we can to help them feel loved, safe, secure, respected, fulfilled and hopeful for the future<sup>19</sup> – by ensuring they have equal access to all of the wonderful, life-enriching experiences and opportunities available to other children whilst also making up for the rights violations they have endured in their past.

**Contact:**

Carolyne Willow  
Article 39 Director

[carolyne.willow@article39.org.uk](mailto:carolyne.willow@article39.org.uk)

June 2021

---

<sup>19</sup> Another way of looking at this is, what makes children’s lives good – Coram Voice and The Rees Centre (2020) The voices of children in care and care leavers on what makes life good: Recommendations for reviewing the care system.