

# PROTECTING CHILDREN'S RIGHTS THROUGH THE LAW

Advocacy services ensure children and young people's views, wishes and feelings are known, understood and acted upon. They champion and protect the rights of children and young people. Knowledge and understanding of the legal framework that protects children's rights is an indispensable resource for every independent advocate.

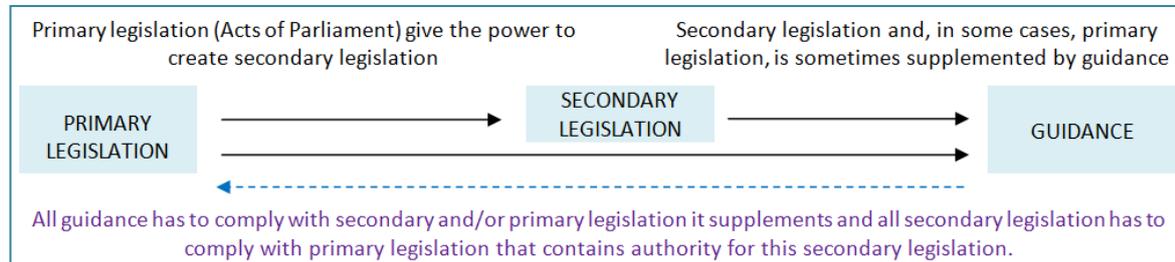
This guide sets out the different types and sources of law that protect children's rights in England.

There are several sources of law in the UK: domestic legislation, common law (also known as case law), European Union (EU) law<sup>1</sup> and international law. The European Convention on Human Rights is part of international law but due to its importance within the UK legal system we examine it separately.

## Domestic Legislation

There are two types of domestic legislation – primary and secondary. Once they have come into force, they are equally binding and must be complied with.

Primary and secondary legislation is sometimes supported, or supplemented, by government guidance, as illustrated below. Further on in this section, you will find examples of the relationship between primary legislation, secondary legislation and government guidance.



### a. Primary legislation

Primary legislation includes Acts of the UK Parliament and Acts of the devolved parliamentary bodies in Wales, Scotland and Northern Ireland.

Acts of Parliament, also known as 'statutes', either create new laws or change existing laws. Before becoming law, they are introduced to Parliament as Bills and have to be approved by both Houses of Parliament – the House of Commons and the House of Lords. Before being approved, they are debated, scrutinised and can be amended, all of which form important elements of ensuring transparency and accountability. There are circumstances when Bills

pass through Parliament much quicker and outside of the normal debate and scrutiny timetable. This is usually in response to an urgent need to change the law and is known as 'emergency legislation' or 'fast-track legislation'. Before Bills become Acts, they require Royal Assent (formal agreement by the Queen).

Each Act specifies exactly when it comes into force (i.e. when it starts to apply) and different sections of the same Act may come into force at different times. Some Acts, or sections of Acts, come into force immediately; some specify an exact future date; and some leave it to the discretion of the relevant Secretary of State to decide when an Act

will come into force. This latter process involves the publication of commencement orders specifying the date on which sections will come into force.

**Examples of primary legislation in England** include the Children Act 1989, the Mental Health Act 1983, the Human Rights Act 1998, the Care Act 2014 and the Children and Social Work Act 2017.

## b. Secondary legislation

Secondary legislation (also known as subordinate or delegated legislation) is created by government ministers or public bodies based on powers granted to them in primary legislation. Secondary legislation cannot be created without authority from at least one Act of Parliament. The Act that provides for secondary legislation to be created becomes the so-called parent Act.

Secondary legislation is used to introduce detailed provisions that elaborate on the content of the parent Act. The main and most commonly used type of secondary legislation is a statutory instrument (SI).

The process for introducing and scrutinising an SI is very different from that of the process for Acts of Parliament. The parent Act specifies what kind of parliamentary procedure is required to turn an SI into law – some need to be approved by Parliament (this is called affirmative procedure) and some become law straight away but can be annulled by Parliament within a specified period (this is called negative procedure). All SIs have to be considered by Parliament's Joint Committee on Statutory Instruments to ensure that they follow the powers granted in the parent Act.

**Examples of secondary legislation in England** include the Advocacy Services and Representation Procedure (Children) (Amendment) Regulations 2004; the Care Planning, Placement and Case Review (England) Regulations 2010; and the Children's Homes (England) Regulations 2015.

## Primary and secondary legislation and how they connect - examples:

**The Children Act 1989** is an Act of Parliament. It is primary legislation. ➡

**Care Planning, Placement and Case Review (England) Regulations 2010** is secondary legislation (the Children Act 1989 is its parent Act). It is legally binding in the same way as the Children Act 1989 but the process for making it law was different. It was created by the (then) Secretary of State for Children, Schools and Families, in exercise of the powers granted by the Children Act 1989 (the parent Act to the Regulations).

The Regulations provide more detail to specific provisions of the Children Act 1989. For example, Regulations 28-30 of the Regulations set out: the frequency of local authority (social worker) visits to children and young people in care; how the visits should be conducted; and the action to be taken afterwards if there are concerns about the child or young person's welfare.

**The Care Standards Act 2000** is an Act of Parliament. It is primary legislation. ➡

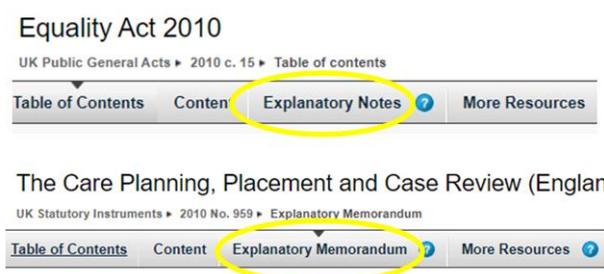
**The Children's Homes (England) Regulations 2015** is secondary legislation (the Care Standards Act 2000 is its parent Act). The Regulations set out the quality standards for children's homes. Every children's home registered with Ofsted must follow these standards.

## Tips

- ➔ All primary and secondary legislation can be found here: <http://www.legislation.gov.uk/>
- ➔ In the case of secondary legislation, look at the 'introductory text' of a statutory instrument to find out which Act is the parent Act ([see example](#) here).
- ➔ It can be very helpful to read the explanatory notes that accompany primary legislation (though not every Act) and explanatory memoranda that accompany statutory instruments. These supplementary documents typically offer useful policy context and explain the law in accessible language.

For instance, when trying to understand the meaning of 'race' for the purposes of the Equality Act 2010, explanatory notes offer a more accessible overview and practical examples ([see here](#)).

You will see a link to explanatory notes and memoranda (where available) on the legislation.gov.uk pages:



*Remember, explanatory notes should be read alongside, not instead of, the text of the actual Act or Regulations.*

## Guidance

### What is guidance?

Primary and secondary legislation can be supplemented by guidance issued by the relevant government department. Sometimes legislation requires it. In broad terms, the purpose of government guidance is to provide further details and direction so that legal obligations can be fulfilled. Individual guidance documents (which are not always called 'guidance' – for instance the IRO Handbook) usually specify their purpose and legal basis. Some examples of this include:

- ***Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children*** (2018) is issued by the Department for Education (DfE) under authority contained in a number of Acts (primary legislation) and Regulations (secondary

legislation).<sup>2</sup> It sets out legislative requirements related to safeguarding and promoting the welfare of children, and gives further advice and instruction.

- ***Getting the best from complaints: Social care complaints and representations for children, young people and others*** (2006) was issued by the (then) Department for Education and Skills under authority contained in a number of Acts and supports the implementation of The Children Act 1989 Representations Procedure (England) Regulations 2006.
- ***Guide to the children's homes regulations including the quality standards*** (2015) is issued by the Department for Education under authority granted by the Care Standards Act 2000 to explain and elaborate the requirements contained within the Children's Homes (England) Regulations 2015.<sup>3</sup>

- **Code of practice: Mental Health Act 1983** (2015) is issued by the Department of Health and Social Care, and provides guidance to professionals on how to carry out their responsibilities under the Mental Health Act 1983.

### Status: statutory or non-statutory guidance?

Individual guidance documents specify whether they are statutory or non-statutory.<sup>4</sup> Statutory guidance is legally binding and should be followed unless there are very good reasons not to. Non-statutory guidance is effectively good practice advice from government.

In *Rixon v London Borough of Islington*,<sup>5</sup> the High Court considered the extent to which a local authority is required to follow statutory guidance. The Court determined that the local authority has “liberty to deviate from [statutory guidance] where [it] judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course”. This essentially means there must be very good reason for a public authority not to follow statutory guidance.

Non statutory guidance does not carry the same legal weight, though public authorities are expected to take it into account when discharging their duties.

Primary legislation, secondary legislation and statutory guidance and how they connect– examples:

#### Example 1: children’s social care representations including complaints

**PRIMARY LEGISLATION:** Children Act 1989 →  
**SECONDARY LEGISLATION:** The Children Act 1989 Representations Procedure (England) Regulations 2006 →  
**STATUTORY GUIDANCE:** *Getting the best from complaints: Social care complaints and representations for children, young people and others 2006*<sup>6</sup>

#### Example 2: NHS complaints

**PRIMARY LEGISLATION:** Health and Social Care (Community Health and Standards) Act 2003 →  
**SECONDARY LEGISLATION:** The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009

# Common Law

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Common law, unlike primary or secondary legislation, is created by the courts. More commonly known as ‘case law’, common law requires judges to take into consideration earlier court decisions made in similar or relevant cases. Common law is continuously evolving as courts can reach decisions that either follow or override earlier decisions, creating ‘new’ rules (precedents) which have to be considered in future cases.

Many landmark judgments have very positively shaped our welfare services, including the care system and child protection. Some notable examples that will be of particular relevance to those working with children include:

- ***Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7 (17 October 1985)** – the ground-breaking judgment reached by the House of Lords (the UK’s highest court prior to the establishment of the Supreme Court in 2009) which established the so called ‘Fraser guidelines’ for determining whether a child under the age of 16 is ‘Gillick competent’, meaning able to understand information and the consequences of different care / treatment options. Lord Fraser gave the leading judgment in the case, which is where the ‘Fraser guidelines’ come from.
- ***Howard League for Penal Reform), R (on the application of) v Secretary of State for the Home Department & Anor* [2002] EWHC 2497 (Admin) (29 November 2002)** – the High Court judgment which confirmed that the Children Act 1989 applies to children in prison (contrary to the idea that “children’s rights stop at the prison gates”).<sup>7</sup>
- ***C, R (on the application of) v Secretary of State for Justice* [2008] EWCA Civ 882 (28 July 2008)** – the Court of Appeal judgment which found that the use of restraint for good order and discipline within secure training centres breaches children’s human’s rights (Articles 3 and 8 of the European Convention on Human Rights).
- ***R (on the application of G) (FC) (Appellant) v London Borough of Southwark (Respondents)* [2009] UKHL 26** – the case in which the House of Lords (the UK’s highest court prior to the establishment of the Supreme Court in 2009) ruled that 16 and 17 year-olds who are homeless must be accommodated as looked after children by local authorities (rather than assisted under homelessness or children in need duties).<sup>8</sup>
- ***ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011)** – the judgment by the UK Supreme Court which confirmed the requirement to give a primary consideration to children’s best interests in immigration cases.

# European Convention on Human Rights

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The European Convention on Human Rights (ECHR) protects the civil and political rights of people (children and adults) who live in the countries which have ratified the Convention. It protects, for example, the right to liberty, a fair trial and to respect for private and family life, as well as protection from torture or inhuman or degrading treatment, freedom of expression, and freedom from discrimination. It was agreed by the Council of Europe in 1950.

The European Court of Human Rights (ECtHR), based in Strasbourg in France, is the highest court for considering alleged violations of rights in the ECHR. UK courts and tribunals “must take into account any judgment, decision, declaration or advisory opinion” of the ECtHR.<sup>9</sup> In this way, ECHR case law and domestic case law are inextricably linked. Only individuals can take cases to the European Court of Human Rights and they can only do so once they have exhausted domestic remedies: this means they have taken the case to the highest court in their country but failed to achieve the desired outcome or redress.

Unlike most other international treaties, the ECHR has direct effect in UK law because it has been incorporated into domestic law through the Human Rights Act 1998 (HRA). Therefore, breaches of the rights set out in the ECHR can be challenged in domestic courts, all the way to the Supreme Court. Where individuals have not succeeded in obtaining a remedy for alleged breaches through our domestic courts, they can apply to take their case to the ECtHR. For example, a ECtHR case decided in 2019 looked at the UK government policy of cutting housing benefit for those living in social housing classed as having a spare bedroom (the ‘bedroom tax’). One of the claimants, A, was a woman living in a three-bedroom property specially adapted by the police to enable her and her son, who were at serious risk of domestic violence, to live safely. The

ECtHR held that the bedroom tax unlawfully discriminated against A and those in her position.<sup>10</sup>

Under the HRA it is unlawful for a UK public authority (which includes courts, tribunals and any persons or bodies performing public functions – schools, children’s social care, hospitals and prisons for example) to act in a way which is incompatible with the rights and freedoms set out in the ECHR.

UK's withdrawal from the EU has no bearing on the ECHR and its status as a source of law in the UK. This is because the ECHR is connected to UK's membership of the Council of Europe, not the European Union.

# International Law

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The UK has signed up to many international treaties (often known as 'conventions'). Some examples include: the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984; the UN Convention on the Rights of the Child 1989 (UNCRC); and the UN Convention on the Rights of Persons with Disabilities 2006.

For a country to be bound by an international treaty and its provisions, it has to be 'ratified' by the government. In the UK, this is done by the government after being laid before Parliament. The status and 'power' of ratified international treaties within individual countries depends on their legal system. The UK is a dualist country which means that the ratification of an international treaty does not automatically make that treaty part of domestic law. Therefore, violations of the rights in those treaties cannot be directly challenged in domestic (UK) courts - unless there is an equivalent or similar provision in domestic legislation (for example Section 11 Children Act 2004 which has been interpreted as broadly equivalent to Article 3 UNCRC – the duty to treat the child's best interests as a primary consideration in all actions concerning them).

To incorporate a treaty means to embed it into the domestic legal framework so that it becomes a part of it; this is done through an Act of Parliament. As explained above, the ECHR is incorporated into our domestic law through the Human Rights Act 1998.

However, even unincorporated treaties, such as the UNCRC, are meant to be implemented under international law. They play an important role in our domestic legal system because:

- Cases brought before our domestic courts concerning children are often strengthened by reference to international treaties, especially the UNCRC. In 2006, the House of Lords (when it was our highest domestic court) stated: "Even if an international treaty has not been incorporated into domestic law, our domestic

legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations [...] are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child".<sup>11</sup>

- The European Court of Human Rights has said that the "Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law" and in particular the rules concerning the international protection of human rights.<sup>12</sup> This has been echoed by the UK Supreme Court.<sup>13</sup>
- Governments are periodically assessed<sup>14</sup> on measures taken to give effect to their obligations under international treaties. This, firstly, enhances states' accountability by shining a light on gaps or inaction and, secondly, pushes governments to strengthen existing or introduce new rights protections through domestic laws and policies. For example, in 2004 the Children Act 1989 was amended to require local authorities to ascertain and give due consideration to the child's wishes and feelings during child protection investigations. When children's rights campaigners argued for this change, they argued it was necessary to fulfil Article 12 UNCRC obligations – the child's right to be heard and taken seriously.

Some statutory guidance seeks to assist the implementation of the UK's obligations under international law. For example, *Statutory guidance on the roles and responsibilities of the Director of Children's Services and the Lead Member for Children's Services*<sup>15</sup> states that "Directors of Children's Services should have regard to the general principles<sup>16</sup> of the United Nations

Convention on the Rights of the Child (UNCRC) and ensure that children and young people are involved in the development and delivery of local services". It also says the "Lead Member for Children's Services should have regard to the UNCRC and ensure that children and young people are involved in the development and delivery of local services".

Along with many others, Article 39 wants the UN Convention on the Rights of the Child (UNCRC) to be incorporated into UK law, as a standalone Act of Parliament. This would provide much stronger protection of children's rights in England and would enable children, and those who support them, to seek redress through domestic courts. Perhaps most importantly, incorporation would have a significant cultural effect on organisations and decision-makers – helping to ensure their actions and decision-making reflect the values and obligations of the treaty.

In September 2020, a Bill<sup>17</sup> was introduced into the Scottish Parliament which will incorporate the UNCRC into Scots law – a fantastic development for children in that country.

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At Article 39, we are committed to supporting independent children's rights advocates to uphold the legal and human rights of children and young people in England through excellent advocacy. We hope this explainer helps advocates to better understand the law and that this will lead to even more change achieved for and with children and young people.

We rely on your **feedback** to understand the impact of our work.

Please send comments or feedback on this explainer to Karolina Kozłowicz, our Programme Manager (Advocacy Services), at [karolina.kozlowicz@article39.org.uk](mailto:karolina.kozlowicz@article39.org.uk). We are particularly keen to receive short case studies describing how this resource helped advocates successfully bring about the change or changes sought by children and young people.

The logo for Article 39 features the words "Article 39" in a bold, purple, sans-serif font. The text is set against a background of several horizontal, overlapping brushstrokes in a bright yellow color, creating a dynamic and artistic effect.

## Endnotes

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<sup>1</sup> The UK's transition period for leaving the European Union (EU) will come to an end on 31 December 2020, which is when the UK's membership of the EU will cease. This will also result in EU law no longer applying to/within the UK. Some EU law has been brought into domestic law based on the provisions within the EU (Withdrawal) Act 2018.

<sup>2</sup> HM Government (2018) [Working Together to Safeguard Children](#), pp.6-7.

<sup>3</sup> Department for Education (2015) [Guide to the Children's Homes Regulations](#), pp.4-5.

<sup>4</sup> For example, [see here](#) and [here](#) for statutory guidance, and [here](#) and [here](#) for non-statutory guidance.

<sup>5</sup> [Rixon, R \(On the Application Of\) v London Borough of Islington \[1996\] EWHC 399 \(Admin\) \(15 March 1996\)](#).

<sup>6</sup> Department for Education and Skills (2006) [Getting the Best from Complaints. Social Care Complaints and Representations for Children, Young People and Others](#).

<sup>7</sup> Howard League for Penal Reform (2019) [Children's rights in prison routinely overlooked and ignored](#).

<sup>8</sup> Article 39 (2019) [30 children's rights changes 1989 – 2019](#).

<sup>9</sup> Section 2, Human Rights Act 1998.

<sup>10</sup> [J.D. and A v. the United Kingdom \(applications nos. 32949/17 and 34614/17\)](#).

<sup>11</sup> [Smith v. Secretary of State for Work and Pensions & Anor \[2006\] UKHL 35 \(12 July 2006\)](#).

<sup>12</sup> [Case of Neulinger and Shuruk v. Switzerland, no 41615/07](#), para. 131.

<sup>13</sup> [Cameron Mathieson, a deceased child \(by his father Craig Mathieson\) \(Appellant\) v Secretary of State for Work and Pensions \(Respondent\) \[2015\] UKSC 47](#).

<sup>14</sup> Examples of periodic assessments and associated reporting duties include Article 44 of the [UN Convention on the Rights of the Child](#) and Articles 21 and 24 of the [European Social Charter](#).

<sup>15</sup> Department for Education (2013) [Statutory guidance on the roles and responsibilities of the Director of Children's Services and the Lead Member for Children's Services](#).

<sup>16</sup> There are four general principles of the UNCRC: non-discrimination (Article 2); best interests (Article 3); life, survival and development (Article 6) and participation (Article 12). General principles are of relevance to all provisions of the UNCRC and therefore they guide the interpretation and implementation of all rights set out in the UNCRC.

<sup>17</sup> United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.