

Acting lawfully & ethically under the Coronavirus Act 2020

Legal and Ethical Framework for Decision Making

What are the limits of your authority WITH THE CRISIS WE FACE ?

Principles: Lawful, Fair, Reasonable, Necessary, Proportionate, Justified,



Statute: Coronavirus Act 2020, Human Rights Act 1998, Equality Act 2010, Social Services and Well-being (Wales) Act 2014, Mental Capacity Act 2005, Mental Health Act 1983, Children Act 1989, Chronically Sick and Disabled Persons Act 1970, Public Sector Equality Duty

Statutory Code and Government Guidance



Ethics and Values

Standards of Practice

Accountability – Organisational and Individual



Staff Rights: Respect, Stress, Anxiety, Courage, Resilience, **SUPERVISION**



Defendable Decision Making: Creating, Collating, Analysing facts, Assess risk, Consider powers, policies, procedures, Identifying Options, Making Decision, Recording and Evidencing outcome

Duty of Care: Protect from Harm and Promote Human Rights

The Human Rights implications:

- Human Rights Act 1998
- European Convention on Human Rights
- United Nations Convention on Rights of the Child

- United Nations Convention on Rights of Persons with Disabilities
- Memorandum to the joint committee on Human Rights

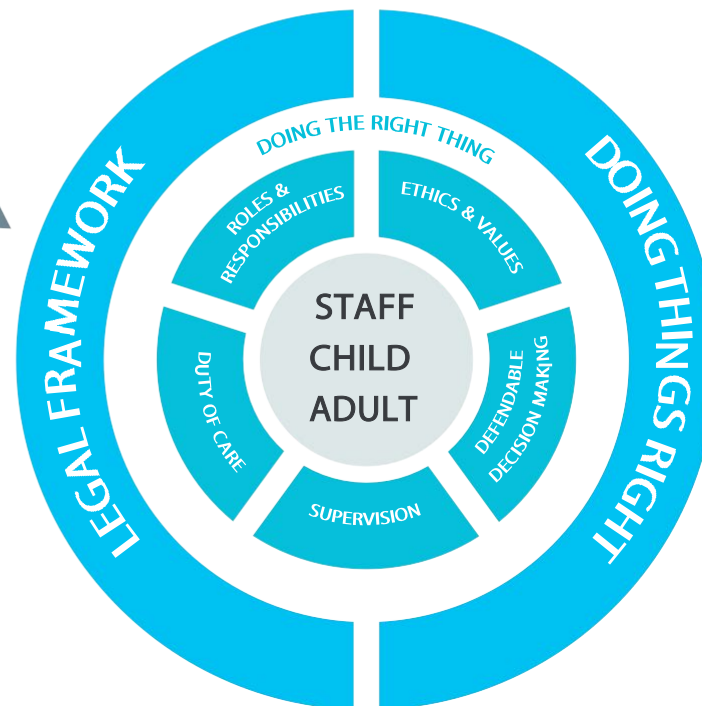
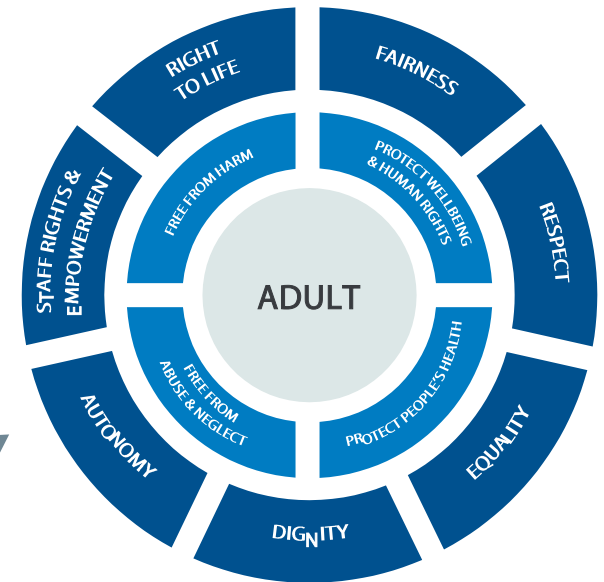
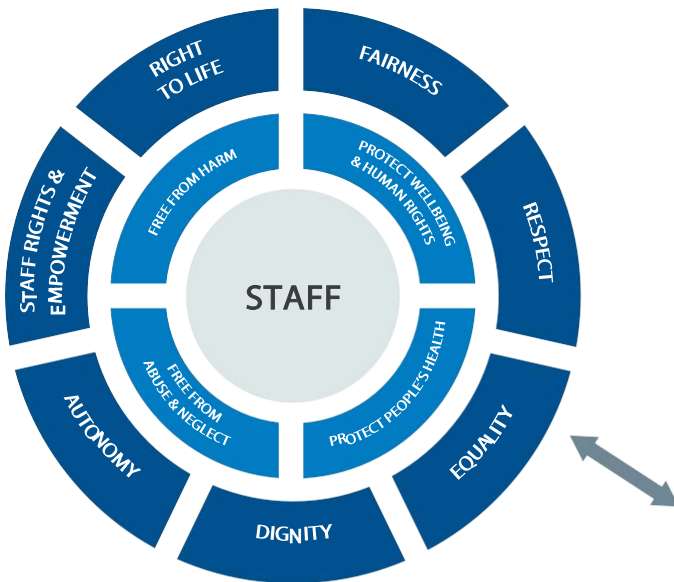
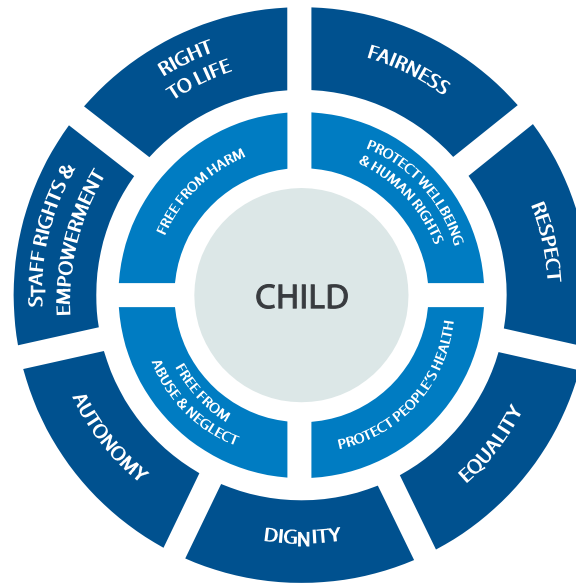
- Responding to COVID-19: the ethical framework for adults social workers
- NICE guidance and amended guidance on critical care

Key principles

- Fairness, Respect, Equality, Dignity, Autonomy, Empowerment, Right to life, Staff rights

Relevant Human Rights

Article 2 Right to life	<ul style="list-style-type: none"> • Large number of deaths from those who contract coronavirus • Impact on others that require life saving operations, treatment & care • Impact on mental health of staff & general population – increase in suicide 	<ul style="list-style-type: none"> • NHS CHC – failure to assess/meet complex needs • Young carers • Critical frailty scale • Domestic Homicide • Shortage of protective kits, protective clothing, masks, soap, 	<ul style="list-style-type: none"> • sanitiser & testing kits • Lack of psychological support for staff • Staff working at personal risk, long hours, fatigue, distress
Article 3 Prohibition in relation to torture, inhumane or degrading treatment	<ul style="list-style-type: none"> • Self isolation at home, lockdown of prisons, care home, hospital wards, children's homes – suspension of visiting times • People not being treated with dignity when dying • Burials & cremations 	<ul style="list-style-type: none"> • Self neglect • Children not at school being fed school meals, hunger, starvation, neglect • Suspension of supervised contact for children in care 	<ul style="list-style-type: none"> • Young carers • NHS CHC inappropriate care • Increase of domestic abuse/domestic homicide • Adults social care needs not met
Article 5 Right to liberty & security	<ul style="list-style-type: none"> • Deprivation of liberty – suspension of professional & family visits, RPR visits, contact, stat visits, reviews & appeals, BIA visits postponed • Suspension of criminal court cases prisoners on remand/ suspension of prisoner rights for visits, suspension of monitoring of sexual offenders 	<ul style="list-style-type: none"> • Lockdown in many prisons, immigration centres, care homes, hospital wards, residential schools & children's homes • Quarantine, isolation, social distancing • Mental health – extension to the timing of detention • Young carers 	<ul style="list-style-type: none"> • Suspected coronavirus sufferers – powers to detain for screening and assessments • Police can take or bring back if abscond using reasonable force • Stay home – self isolation – all people/over 70's
Article 6 Right to a fair trial	<ul style="list-style-type: none"> • Mental capacity/mental health assessment • Failure to assess/meet need/meet statutory plans/ review/adequate recording • Withholding public health information 	<ul style="list-style-type: none"> • Critical care lists • Sharing of information • Access/lack of access to information • Under reporting of cases of infection 	<ul style="list-style-type: none"> • Inquests for deaths in custody • Appeals against coronavirus detention • Audio/ video link for court & tribunal hearing • Access to justice
Article 7 No punishment without law	<ul style="list-style-type: none"> • Criminal offence of breach of imposed screening, assessment, treatment, restrictions, absconding, providing false information 		
Article 8 Right to respect for private & family life	<ul style="list-style-type: none"> • Foster carers/social workers not promoting contact between families & children in care • Mobile apps used to track infection with risk of private data being gathered 	<ul style="list-style-type: none"> • Video assessment of mental capacity • Protection of physical integrity and wellbeing • Imposed screenings - blood samples • Separated parents rights – grandparents rights 	<ul style="list-style-type: none"> • MCA, IMHA, IA, RPR, MHA visits impacted • End of life, supported living, care homes, suspension of family visits
Articles 9 & 10 Freedom of thought, conscience & religion & expression	<ul style="list-style-type: none"> • Wishes and feelings, values and beliefs for incapacitated persons • Burials/cremations 	<ul style="list-style-type: none"> • Places of worship closed, faith based congregations suspended • CHC-preferences to where to live suspended • No gatherings no public meetings & no political protests 	
Article 14 Prohibition of discrimination	<ul style="list-style-type: none"> • Culture, identity, life style choices – homeless • Any person with physical mental or learning disability • Critical frailty scale • Information not accessible in different formats for health 	<ul style="list-style-type: none"> • Stigma against eg. Chinese people/racism • Lack of supportive care for marginalised groups – lower income, remote areas, immigrants • Children – no recourse to funds 	<ul style="list-style-type: none"> • Living care packages suspended • Audio/video link for court & tribunal hearings • Stigma against those with the virus • Disproportionate impact



What is the Coronavirus Act 2020 ?

On the 25th March 2020 the UK government gave Royal Assent to legislation in response to the Covid-19 virus. The new powers in the Act can be used for up to 2 years with two conditions aimed at ensuring the Act is proportionate in light of the significant human rights impacted by the Act and protected under the **Human Rights Act 1998**.

However, not all of the measures have come into force immediately. The Summary states that the Act allows the 4 governments across the UK (of Northern Ireland, Scotland, Wales and the UK) to switch on these new powers when they are needed (and to switch them off again once they are no longer necessary). This decision will be, "based on the advice of Chief Medical Officers of the 4 nations". There is also provision for early termination of the measures referred to as "sunsetting".

What new powers does the Coronavirus Act 2020 give the government relevant to health and social care for adults & children ?

The Coronavirus Act 2020 is intended to address 5 key areas, which in summary are:

1. Increasing available health and social care workforce
2. Easing burden on frontline staff, enabling local authorities to prioritise care for people with the most pressing needs
3. Containing and slowing the virus by reducing unnecessary social contacts and strengthening quarantine powers of police and immigration officers
4. Managing deceased with respect & dignity
5. Statutory sick pay adjustments

It is essential that staff promote dignity, human rights and fundamental freedoms in this public health crisis.

We will focus on 1,2 & 3 for this session.

Impact on adults

Statute	Easement
Social Services and Wellbeing Act 2014	
Promoting Wellbeing – Part 2	
s 5 – Promotion of individual wellbeing	Remains unchanged - This is general overarching duty when exercising functions under the Act to promote the wellbeing of the people who need care and support and carers who need support. Wellbeing is defined in s2 to include (a) physical and mental health and emotional wellbeing, (b) protection from abuse and neglect, (d) domestic, family and personal relationships The duty is a positive duty.
S7 – Other Overarching duties: UN Principles and Conventions	Remains unchanged - A duty to have due regard to the UN Principles for Older Persons
S15 – Preventative services	Remains unchanged - Duty to provide or arrange of preventative services
S17 – Duty to provide information, advice and assistance	Remains unchanged - Duty to provide people with information, advise and assistance relating to care and support, and assistance in accessing care and support
Assessing the Needs of Individuals – Part 3	
S19 – Duty to assess the needs of an adult for care and support	LA would be relieved of their duty to assess needs for care and support for adult
S20 – Refusal of Needs assessment for adult	If LA relieved of s19 duty then this duty does not apply
S24 – Duty to assess needs of carer for support	LA would be relieved of their duty to assess needs of carer for support
S25 – Refusal of needs assessment for carer	If LA relieved of s24 duty then this duty does not apply
Meeting Needs – Part 4	
S 32 (1) (a) – determination of eligibility and consideration of what to do to meet needs S32 (1) (b) – determination if needs do not meet eligibility criteria, whether to meet needs in order to protect the person from abuse or neglect or a risk of abuse or neglect, and consideration to provide either information and advise or preventative services	LA would be relieved of their duty to determine whether needs meet eligibility criteria <i>NB LA would have a power to carry out assessments or make a determination if appropriate for the purposes of exercising the functions under s35 (Duty to meet needs for care and support) or s40 (Duty to meet needs for adult carer) if the LA considers it necessary to meet the carer's needs in order to protect the carer from abuse or neglect or risk of abuse or neglect"</i>
S 33 – Disapplication by Welsh Ministers of DBS provision	Welsh Ministers may by notice make provision (a) disapplying health and social care DBS provision (b) modify health and social care DBS provision under s 22 Care Standards Act 2000 and s27 Regulation and Inspection of Social Care (Wales) Act 2016. They must explain why appropriate and proportionate and it must relate to Coronavirus and must not exceed one month. Welsh Ministers can issue cancellation notice and another notice can be issued. This must be communicated and published.

Impact on adults

Statute	Easement
S35 – Duty to meet care and support needs of an adult	The duty under s 35 (3) (a) to meet an adults needs where they “meet the eligibility criteria” only arises when the LA “considers it necessary to meet those needs to protect the individual from abuse or neglect or risk of abuse or neglect”
S40 – Duty to meet need for support for adult carer	The duty under s 40 to meet need for support for adult carer where carers “meet the eligibility criteria” only arises when the LA “considers it necessary to meet those needs to protect the individual from abuse and neglect or risk of abuse or neglect”
S54 – Duty to prepare and maintain care and support plans and support plans	LA is relieved of the duty to prepare and maintain a care and support plan or support plan
S56 – Portability of Care and Support	LA is relieved of its duty around portability of care and support
Charging and Financial Assessment – Part 5	
S63 (2) – Duty to carry out a financial assessment	LA is relieved of its duty to financially assess. If LA begins to meet need under s35 or s40 and LA would have been entitled to charge under s59 but have not carried out a financial assessment under s 63 (2) the LA can subsequently carry out an assessment and retrospectively charge. NB Provisions are made that all assessments which have been postponed should commence after the expiry period.
S126 Adults at risk	Duty remains
S127 Adult Protection and support orders	Duty remains
S128 Duty to report adults at risk	Duty remains
Regulations	
The Coronavirus Act 2020 (Commencement No 1) (Wales) Regulations 2020 Regulation 3 – Section 15 and Schedule 12 Part 2	In force from 1 st April 2020

Please Note

Whilst they have not yet done so, the Welsh Ministers may issue **Guidance under Coronavirus Act 2020** under s 35 (2), which you must have regard to and comply with. The **COVID 19: Ethical Framework for Adult Social Care** has been issued in England but referenced on WAG as guidance in England and Wales

Impact on adults

Continuing NHS Healthcare	
<p>The NHS in Wales, through local health boards (LHBs), is responsible for the delivery of CHC.</p> <p>Currently delivered under the Continuing NHS Healthcare – National Framework for Implementation in Wales – June 2014</p> <p>However, it was proposed in April 2020 that the new revised Framework, The Continuing NHS Healthcare, the National Framework for Implementation in Wales 2020 (Proposed) Framework would be published however due to the Pandemic the timetable for publication is being revised.</p> <p>Section 4: Actions for Councils & Adult Social Care Services, which sets out the assessments for eligibility for CHC during Pandemic and Other Emergency Situations is implemented with immediate effect.</p> <p>Read in conjunction with COVID 19 : Hospital Discharge Service Requirements Annex F</p>	<p>Continuing NHS Health Care (CHC) assessments for individuals on the acute hospital discharge pathway and in community settings will not be required until the end of the COVID-19 emergency period.</p> <p>The Welsh Government has commissioned a rapid analysis of the resources required to enable health and social care communities to fund the cost of new or extended out of-hospital health and social care support packages.</p>



Mental Capacity Act 2005	
Statute/Context	Easement
S1 Core Principles	Still applies
S2/S3 Assessing Incapacity	Still applies
S4 Best Interests	Still applies
S5 Statutory defence	Still applies
S6 Restrictions	Still applies
S9 Lasting Power of Attorney	If a person has an LPA for personal welfare with specific authority who is refusing proposed treatment, it cannot be provided
S19 Deputy	If a person has a Court appointed Deputy with specific authority who is refusing proposed treatment it cannot be provided But if it is life sustaining see S 20(5) – Restrictions on Deputies
S24 – Advance Decision to refuse treatment	If a person has a valid and applicable advance decision to refuse specific treatment (including COVID19)
Guidance	Mental Capacity Act 2005 (MCA) and Deprivation of Liberty Safeguards (DOLS) during the Coronavirus (COVID-19) Pandemic
Deprivation of Liberty Safeguards	
Life sustaining treatment in hospital or care home	No Deprivation of Liberty – DoLS process will not apply. Apply Ferreira Judgment (ICU) instead
Additional measures plus life sustaining treatment	If additional measures are being put in place for a person who lacks capacity when they are receiving life sustaining treatment, ie to stop them leaving then the “acid test” should be applied
In non-life sustaining treatment cases	If a person is objectively confined and unable to consent, it is imputable to the state then legal authorisation is required either through DoL Safeguards (care home/hospital) or through the COP for community DoL in the usual way
For persons with a DoL authorisation in place without additional restrictions being added	In most cases changes to the persons arrangements for care and treatment during this period will not constitute a new DOL and existing authorisation will cover
For persons with DoL authorisation in place with additional more restrictive care being added	A Part 8 review is required
If current authorisation does not cover new arrangements	Refer for new standard authorisation or s21A appeal to COP
DoLS Authorisation or COP order with new arrangements within parameters of authorisation or Order	No need to alter
If Urgent Authorisation Required during Pandemic	Use shortened Form at Annex B in Guidance
Move of person within setting	If an authorisation (urgent or standard) is in force and a person moves within the setting to a new ward no need to apply for new authorisation
Move of person outside setting	If an authorisation is in place and person moves to totally new setting a new authorisation will be needed
End of Life Care	Decision maker should use their professional judgment as to whether DoLS are appropriate and can add any value to the person’s care and treatment
Supervisory Bodies in England and Wales	Use prioritisation method and proportionate approach
Remote techniques for assessments	Use as far as possible, consider previous relevant and appropriate assessments when conducting current assessments
Other Issues	
Emergency Public Health Powers under Coronavirus Act 2020	May be used to screen isolate, treat a person with COVID 19 – have special regard for people who may lack capacity
DNR CPR Orders	Clinical decision CPR would not work, be futile or not in best interests, must be personalised
Advance Statement/Care Planning	Care and treatment rather than medical treatment

The Mental Health Act 1983

Measure	Requirement
S2 & S3 – A recommendation from one Registered Medical Practitioner is sufficient.	Only occurs if the AMHP considers compliance with the requirement for two recommendations is either impractical or involves undesirable delay.
S4 - Section remains unchanged.	
S5(2) - Any Registered Medical Practitioner can furnish a report. - The maximum length of detention is increased to 120 hours.	Only occurs if the furnishing of the report by the Clinician in charge of treatment is impracticable or would cause undesirable delay.
S5(4) - The maximum length of detention is increased to 12 hours.	
S35 & S36 - The “upper limit” of 12 weeks is removed.	
S37, S38, S45A & S51 - A report from one Registered Medical Practitioner is sufficient.	If the court is satisfied that involving two Registered Medical Practitioners is impracticable and would involve undesirable delay and is satisfied that the evidence of that single Registered Medical Practitioner is sufficient for the matter in hand.
S47 & S48 - A report from one Registered Medical Practitioner is sufficient.	If the Secretary of State is satisfied that involving two Registered Medical Practitioners is impracticable or causes undesirable delay And if the Secretary of State is satisfied that a report from one Registered Medical Practitioner would be sufficient for the matter in hand.
S35, S40 & S45(B) - The time limit increases to 28 days.	Only applies to hospital orders made after the measure has been activated.
S135 & S136 - Maximum period increased to 36 hours	Which can be extended for 12 hours, provided the criteria are met.
Medication for Patients under section After 3 months, the Approved Clinician can certify treatment without consent. The duty to consult is reduced to one person	If the AC feels that complying with the standard requirement would be impracticable and involve undesirable delay. If the AC feels that consulting with two persons would be impracticable or involve undesirable delay.

Inquests - Covid-19 is not a notifiable disease, therefore the Coroner does not have a duty to hold an inquest with a Jury where there is reason to suspect the person died from it. This applies irrespective of the person’s legal status. Inquests with Juries can occur in all other cases (such as where a patient dies whilst detained under section).

Impact on Children

Current legislation & guidance

- The Social Services & Well-being (Wales) Act 2014
- The Children Act 1989 - Parts IV & V
- All Wales Child Protection Procedures
- The Education Act 1996 (SEND)
- SEN Codes of Practice for Wales 2004
- Additional Learning Needs & Educational Tribunal (Wales) Act
- ALN Codes 2018
- Children & Young People's Continuing Care 2012
- Children & Young People's Continuing Care 2019

Amendments/suspension to current legislation & guidance

- The Coronavirus Act 2020 & Schedules
- Coronavirus (COVID-19): Guidance for local authorities on children's social care
- Public Health Wales & Welsh Government
- Department for education & skills
- Guidance & information for schools, early years, child care

Relevant sections of the SSWB(W)A 2014

- s.2(2)&(3) – meaning of well being including children
- s.5 and 6 – wellbeing duties
- s.21 – duty to assess a child for care & support
- *s.24 – duty to assess the needs of a carer for care & support (Local Authority is relieved of its duties to assess care and support)*
- s.32(1)(c) – could trigger Part IV & V of Children Act 1989
- s.34 – how to meet needs
- s.37 – duty to meet care & support needs of a child
- s.38 – power to meet care & support needs of a child
- s.39 – duty to maintain family contact
- Part 6 – Looked after children & Care leavers

Note: Essentially, all provisions of the SSWB(W)A remain the same, with the exception of s.24

Relevant sections of the Children Act 1989

- s.31 - care order & supervision order
- s.34 – contact to a child in care
- s.38 – interim care order & supervision order
- s.43 – child assessment order
- s.44 – emergency protection order
- s.46 – police powers to remove a child
- s.47 – duty to Investigate
- s.50 - recovery order

Impact on the Child

- General downgrading of social care provision by prioritising support to those most "vulnerable children" in need of protection or who have particular support needs. This includes children who have a statement of SEN or a co-ordinated support plan. It also includes children who are in alternative provision (AP) or receiving education other than in school (EOTAS) or be in need of protection or other support needs
- All statutory visits under S21, child protection plans / children under care & supervision orders to continue
- However, some statutory visits being undertaken by video link
- Suspension/amendment of supervised contact to children in care - SW's not willing to supervise / Foster Carer's not agreeable to children moving around
- Temporary suspension of key duties for care leavers
- Young carers being ignored
- Provision of respite suspended
- If child's parents are in prison /detained under MHA/ immigration centres – all visits are suspended
- Equally if child placed in children's home, other residential setting or foster care – visits by birth family & SW suspended
- Temporary closure of educational institutions inc schools, nurseries, early care & child care premises save for key workers & vulnerable children. This could leave other children more vulnerable from neglect & other types of harm with no monitoring, no school meals, no education provision
- EHC plans – children will fall two categories (i) not safely supported at home or (ii) needs can be met at home
- Serious Case Review's suspended

Courts & tribunals

By email, telephone or 'live video link' unless where fairness & justice require it & it is safe to do so, then a court-based hearing should take place. A small network of priority courts will stay open

HMCTS guidance - Coronavirus (COVID 19): courts and tribunals planning and prep.

National guidance for the Family Courts - telephone & video hearings during coronavirus outbreak

Safeguarding

Safeguarding is core business – it is the way work is done.

The Coronavirus Act 2020 does not suspend your duties to safeguard children and adults during this difficult time.

Safeguarding means protecting the "human's health and wellbeing and reducing risk, to protect their human rights to enable them to live free from harm, abuse and neglect"

Evidencing difficult decision making

Record keeping & defensible decision making by staff &/or their organisation

Key purpose:

- Identify context
- Assess risk
- Develop strategy
- Assist in reaching & justifying a decision
- Consider reviews
- To provide an audit trail
- To avoid complaints and legal action from being upheld

Top tips:

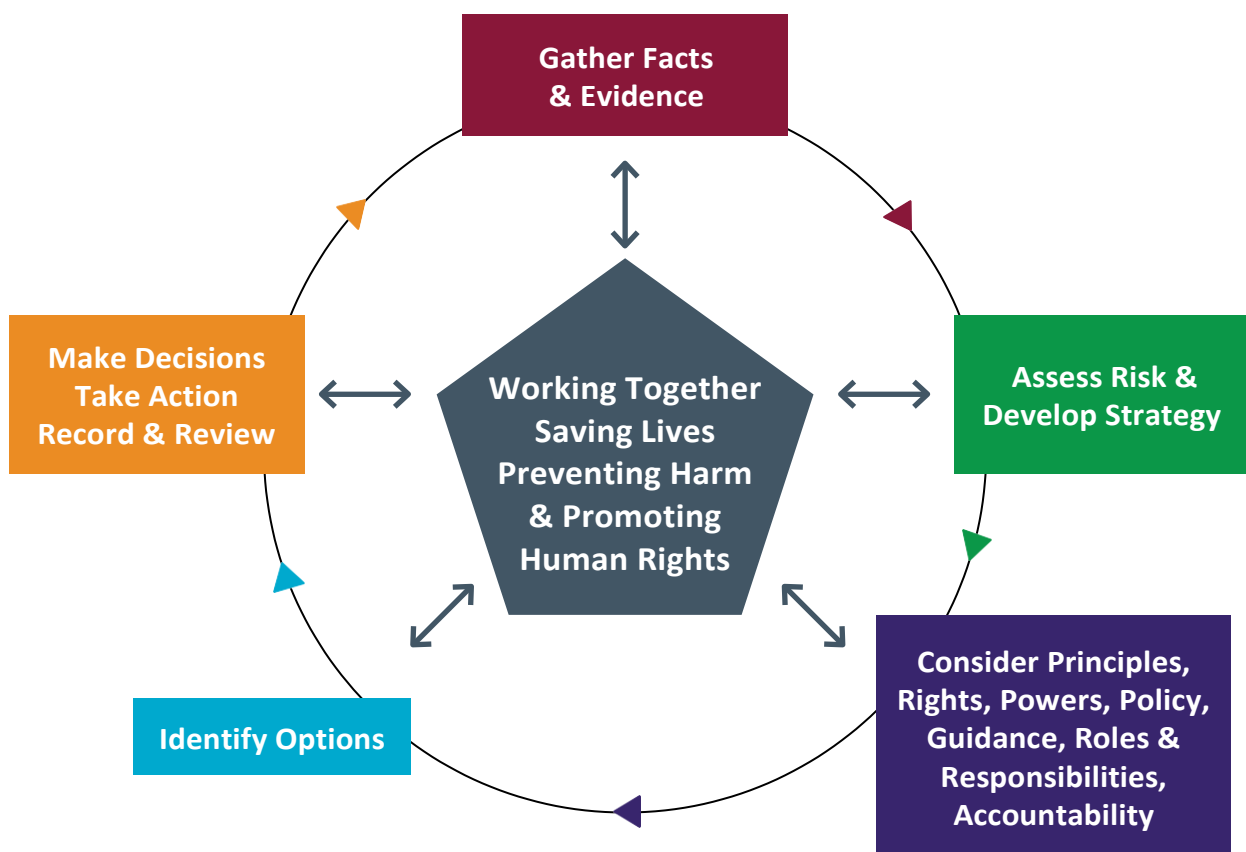
- Start with a clear articulated question i.e what is the decision or omission?
- Identify the realistic options
- Identify the decision
- Can the decision be delayed? If not make the decision

Bare essentials to be recorded:

- Record the decision with date & time
- Record all relevant facts/ evidence to support the decision
- Record all options considered
- Record rationale/reason for that decision

Your notes should be written contemporaneously (at the time of the event) or as soon thereafter as was reasonably practicable, when events were still fresh in the memory.

Notes can be written on your behalf, but you must check them before you adopt them as your own. You can add to your notes later, provided you make this clear, and can justify why.



You are now invited to provide typed Questions via the right hand column on the Zoom page on any of the topics referenced in the presentation. The trainer will then choose a selection of those questions to then answer.

Please note for this last session the aim is to provide you with accurate, authoritative information & comment on this session's subject matter. But this is provided on the understanding that Bond Solon Training is not in the business as legal advisers. If you need legal advice you will need to consider seeking it from an independent legal advisor.

Reference List

Statute

- Coronavirus Act 2020

Regulations

- The Coronavirus Act 2020 (Commencement No 1) (Wales) Regulations 2020
- Health Protection (Coronavirus) (Wales) Regulations 2020

Guidance – General

- WHO Guidance
- BMA Guidance on Covid-19 ethical issues
- Coronavirus : ethical values & principles for healthcare delivery (Welsh Gov)
- Coronavirus (Covid-19): Support for victims of domestic abuse
- Coronavirus (COVID-19) : guidance for services for perpetrators of violence against women, domestic abuse & sexual violence

Guidance – Court of Protection

- COVID-19: Court of Protection guidance on visiting P and hearings
- Remote Access to The Court of Protection Guidance - 31 March
- NHS and Social Care Staff guidance on how to check if a Covid-19 patient has an attorney or deputy

Guidance – Adult Health and Social Care

- COVID-19: hospital discharge service requirements (Wales) Guidance April 2020
- COVID-19: ethical framework for adult social care
- NICE – Covid 19 Rapid Guideline: Critical Care in Adults
- DH&SC - MCA and DoLS Covid-19 Guidance for Hospitals, Care Homes and Supervisory Bodies

Guidance - Mental Health and Mental Capacity

- Chief Coroner's Guidance No 34
- Mental Health Tribunal for Wales Practice Direction (Covid-19)

Guidance - Children and Young People's Care

- Vulnerable children & young people : Coronavirus (Welsh Gov)
- Coronavirus (Covid-19): Guidance for children's social care services (England)
- Family Court Guidance Covid 19
- Coronavirus (COVID-19) Vulnerable children & young people (Wales) - NASUWT

Useful websites

- NSPCC – Coronavirus safeguarding and child protection
- Women's Aid: Safety Advice for Survivors
- Department for Education & Skills (Wales)
- Public Health Wales
- Gov.Wales
- NHS Wales