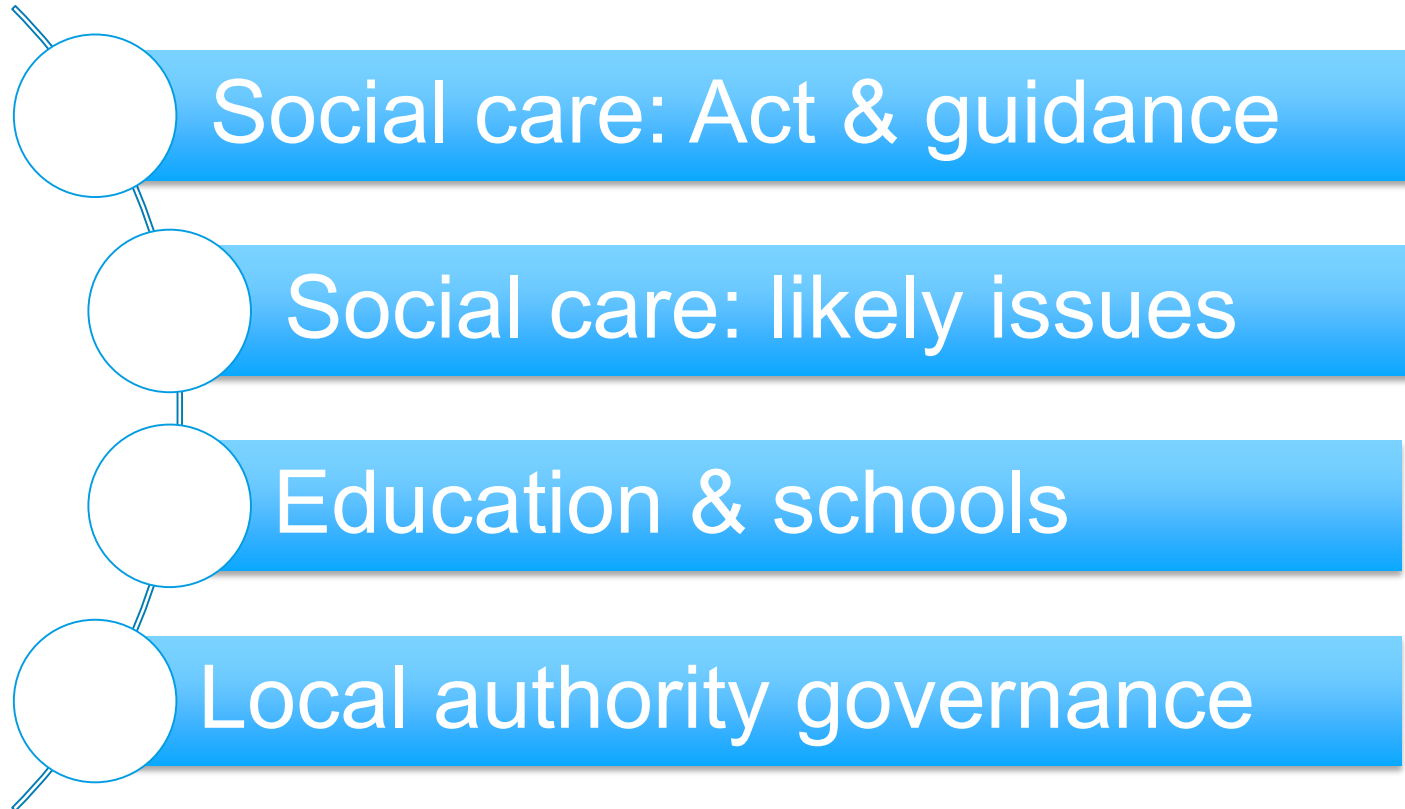


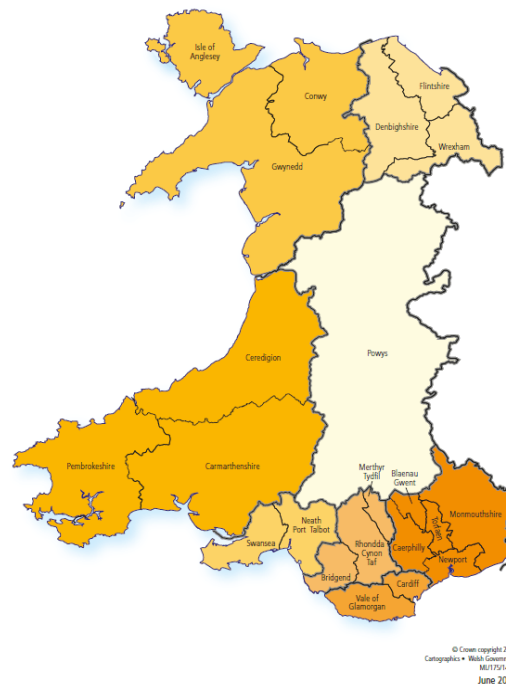
Coronavirus Act 2020 and the implications for Wales

Jonathan Auburn & Joanne Clement
2 April 2020



Scope of webinar

- Wales only
- Separate webinar on England earlier in the week
- Specific issues only
- Information as of 1 April 2020



SOCIAL CARE

ACT & GUIDANCE

The Act & commencement

Coronavirus Act 2020

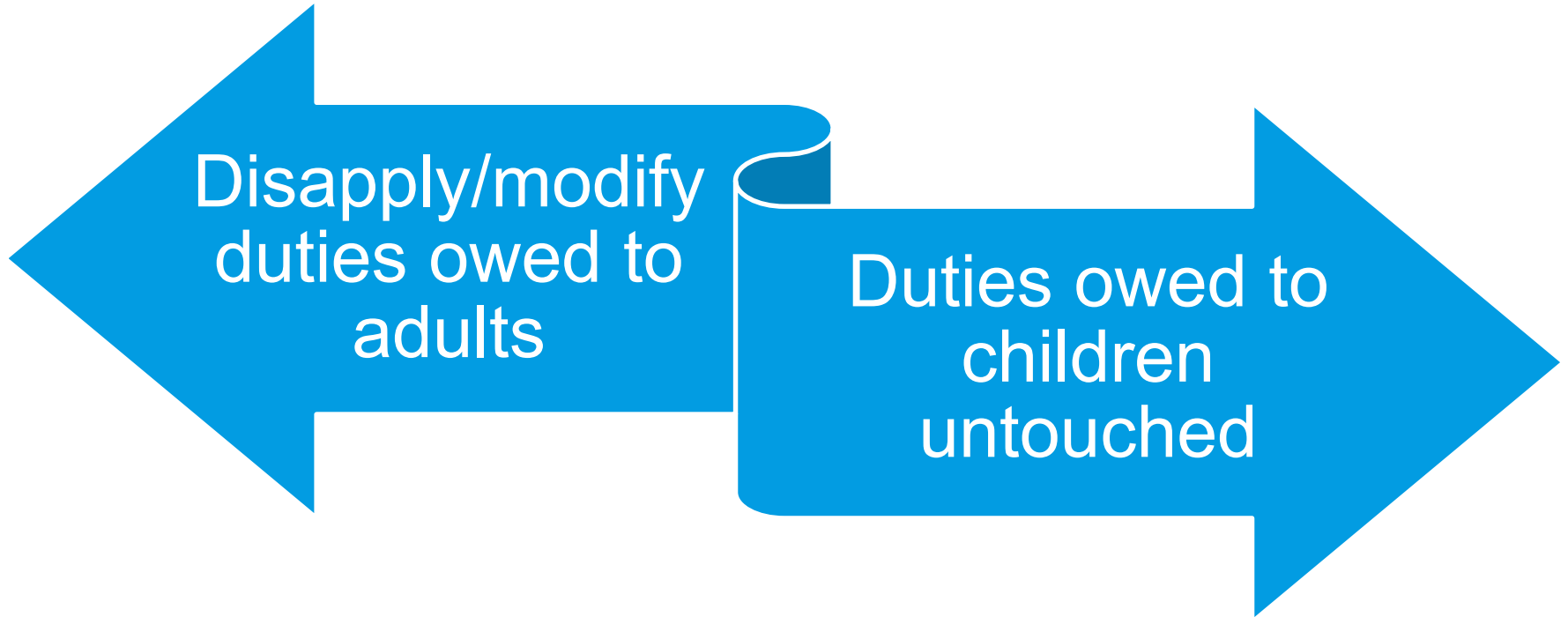
<http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted/data.htm>

Commencement: s.87

Most provisions came into force immediately

education - Sch 16, 17 temp closures
- power to disapply / modify education law duties
IN FORCE

Social care : Section 15/Sch 12
Disapply / modify SSWB(W) Act –
in force as of yesterday
SI 2020/366



Sch 12: SSWB(W) Act duties disapplied or modified

- s.19 assess'ts, s.24 carers assess'ts, associated regs
- s.32(1)(a) determination of eligibility
- s.32(2)(b) determination of charge
- s.35(3)(a) duty to meet eligible needs of adult
- ss.40: duty to meet eligible needs of adult carer
- ss.54: care and support plan

-
- Section 32(1)(b): “Where a LA is satisfied that a person has needs for care and support, or if the person is a carer, needs for support, the authority must determine whether it is necessary to meet the needs in order to protect the person from abuse or neglect or a risk of abuse or neglect”
 - Section 35(3)(b) – duty to meet needs where LA considers it necessary to meet needs in order to protect adult from abuse or neglect or risk of abuse or neglect
 - Section 40(3) - Duty to meet needs of adult carer if necessary to protect carer from abuse/neglect or risk abuse/neglect
 - Abuse/neglect defined in s197 – failure to meet basic physical, emotional, social or psychological needs, likely to result in impairment of person’s well-being

- Section 5 – seek to promote well being. Plus other duties in ss6-7
- Section 15 – preventative services
- Section 145(3) – a local authority **must**, when exercising social services functions, **act in accordance** with any **relevant requirements** contained in a Code of Practice (subject to s147) and have regard to any relevant guidelines in it
- Codes not disapplied. Problem when you impose statutory duties by way of a Code of Practice. Can revoke by issuing new Code, or direction laid before Assembly
- Para 35(5) of Sch 12 – **may** disregard provision of Code so far as inconsistent with guidance issued under para 35

Duties arising before commencement 11KBW

Sch 12, para 34:

The disapplications & modifications in Sch 12 are applicable to duties arising before the commencement of Sch 12 as they would be after commencement

Dearth of guidance in Wales

- Care Act easements: guidance for local authorities
- Ethical Framework for Adult Social Care
- Guidance for Residential Care, Supported Living and Home Care
- Hospital Discharge Service Requirements

Easements guidance in England

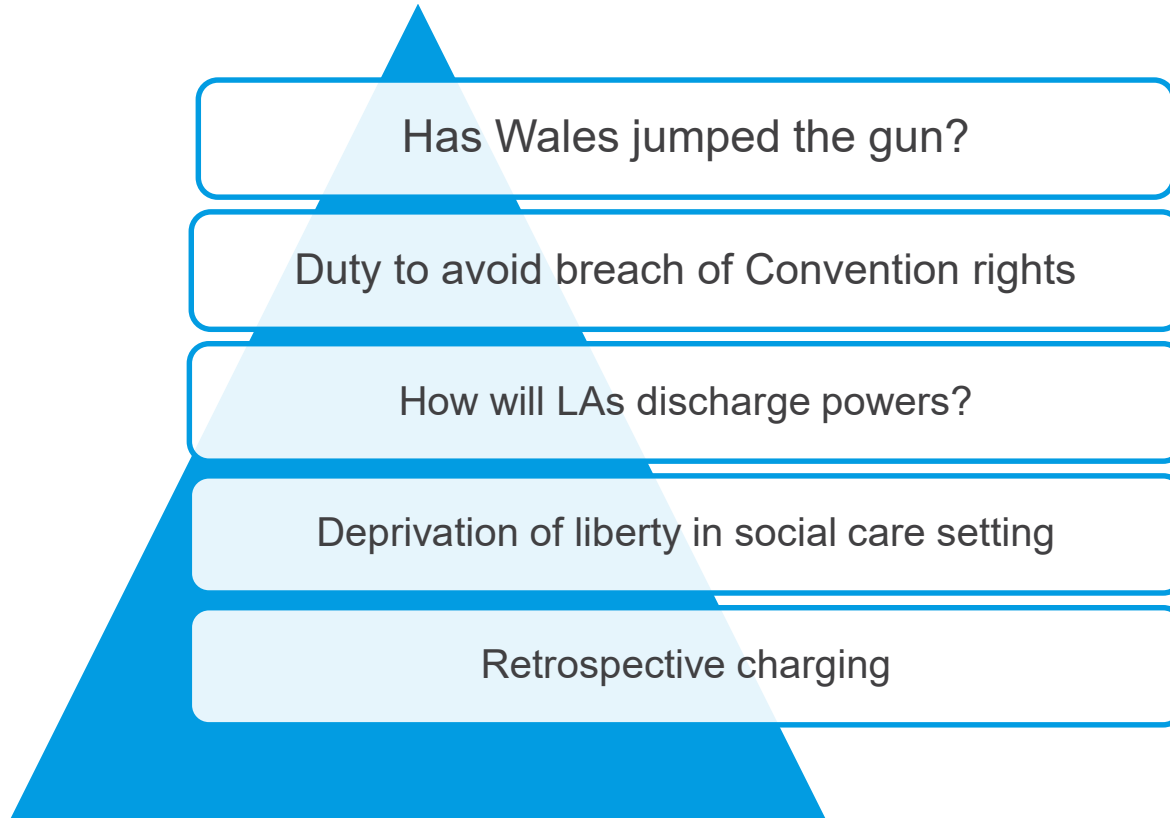
- For LA to take decision whether to stop complying with duties
- Only where not “reasonably practicable” to comply with CA
- Detailed guidance on evidence, decision making, reporting before do it
- Guidance on prioritising, duties etc

COVID-19: social or community care and residential settings guidance

- 9 March 2020 – lifetime ago
- No need to do anything differently in any care setting other than good practice on routine infection control

SOCIAL CARE

LIKELY ISSUES



1. Has Wales jumped the gun?

-
- Secretary of State – hope the powers never have to be used. But will not hesitate to act if that is what the situation requires. Activate powers when needed, deactivate them when they are not
 - Will relinquish the powers as soon as the threat to life from coronavirus has passed. Will do the right thing, at the right time, guided by the best possible science
 - Measures only activated **”in circumstances where staff numbers were severely depleted”**
 - When there is a shortage of social care workers, those who need social care to live their their everyday life get it and can be prioritised ahead of those for whom it is not a matter of life and death

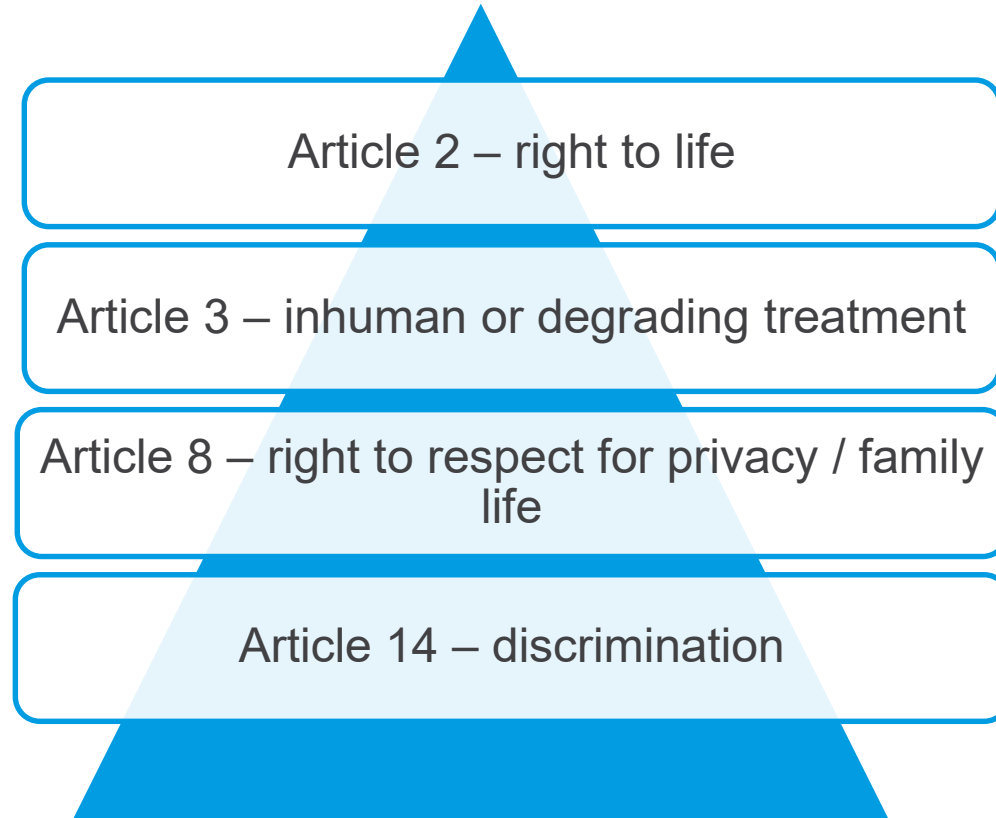
1. Has Wales jumped the gun?

- HL: Triggered “only to keep people safe and on the basis of expert clinical advice”. Will active “only on the basis of scientific advice”
- Legislative Consent Memorandum – intended to reduce operational burden. LA in Wales need to develop and undertake new processes, including organisation of urgent evaluations of basic care needs and ethical and consistent prioritisation of care down to level of basic requirements.
- WG made SI 2020/366 on 27 March, brought into force on 1 April 2020. No analysis why thought necessary to bring into force
- No guidance about how it should be applied.

2. Convention Rights

No express duty to avoid breach of Convention rights in Pt 2 of Schedule 12

BUT have to do this anyway to avoid breach of s6 of HRA



2. Convention Rights: Article 2

-
- Positive obligation under Article 2 – effective regulatory framework for the protection of life
 - Also duty operational duty - take steps to safeguard the lives of those within its jurisdiction (e.g. *Osman v UK*; *Rabone v Pennine Care NHS Foundation Trust*)
 - When the State knows, or ought to know, of a real and immediate risk to the life of an identified individual
 - Acute vulnerability of ind /assumption of responsibility by the state
 - Failure to take steps within their powers, which, judged reasonably, might have been expected to avoid that risk

2. Convention Rights: Article 3

-
- Article 3: inhuman or degrading treatment
 - Minimum level of severity
 - *Price v UK* (2001) / *R (Bernard) v Enfield LBC*
 - Property not wheelchair accessible, couldn't access toilet/bathroom. Entirely dependent on her husband
 - Living in deplorable conditions, but in her own home, surrounded by her family
 - No breach: corporate neglect, not deliberately inflicted by LA

2. Convention Rights: Article 8

Bernard - breach Article 8

- Positive obligation to provide care and support?
- Will it apply if not sufficiently serious to engage Art 3?
- Failure to provide suitable adapted accommodation
- Breach of statutory duty

Anufrijeva [2004] QB 1125

- Accommodation for family with SEN
- No breach: accommodation not ideal, but not enough. Good faith, reasonable efforts

R(MIV) v *Newham*

- Failure provide benefit under public law
- Element of culpability
- Impact on private/family life of public law failure is serious, caused substantial prejudice

2. Convention rights: Article 8

- *Macdonald v UK* – interference with Article 8(1) rights – human dignity and control of bodily functions
- Not “in accordance with the law” as breach of domestic law duties. Would no longer apply. No public law right to have needs met
- If interference is “in accordance with the law” then likely to find justified under Article 8(2)
- Necessary for economic well-being of the LA and interests of other service users
- Proportionate response to needs - personal feelings and desires properly balanced against LA’s concerns and resources

2. Convention rights: Article 14

- Within ambit of Convention right – Article 8
- Difference in treatment based on disability or medical conditions
- Lack of objective and reasonable justification – legitimate aim and proportionality
- Resources of LA, prioritising needs

3. Discharging Powers

“Expectations” in England – apply in Wales?

- LAs “expected” to do as much as they can to meet needs
- May not meet all assessed care needs in full
- LCM – LA need to develop and undertake some new processes, including urgent evaluation of basic care needs

Prioritising

- Prioritise to meet the most urgent and serious needs and keeping people safe
- LCM – ethical and consistent prioritisation of basic care needs
- Minimum HR obligations

No “reasonably practicable” qualification

- Tabled, but amendment not put to vote
- BUT is in English stat guidance – not depart from CA obligations unless not reasonably practicable to comply

3. Discharging Powers

- “Fair, pragmatic and sensible distribution and prioritisation” – Govt commitment of resources? Filter through to Wales?
- WM power to issue guidance. Must have regard, WM power to direct compliance
- Ethical Framework for Adult Social Care – apply by analogy?
- What will assessments look like? Suggestions in Annex B Easements Guidance (England)
- Policies on how prioritise? Working with residential care / dom care providers

3. Discharging Powers

- Section 29 of the Equality Act 2010 – duty not to discriminate in the exercise of public functions
- Discrimination – direct discrimination, indirect discrimination, duty to make reasonable adjustments if PCP puts disabled person at substantial disadvantage in comparison to person who is not disabled
- Section 149 of the Equality Act 2010 – public sector equality duty

4. Deprivation of Liberty

- No derogation from ECHR – Article 5 still applies
- DoL regime must still apply (section 64(5) of MCA)
- Leaving all statutory duties relating to DoLS fully in place
- Lord Bethell – “can achieve significant improvements to the process through emergency guidance”
- Make clearer when DoLS authorisation necessary, basis on which assessment can be made, including phone/video calling for assessment

5. Retrospective charging

No duty to carry out financial assessment under 63(2) of SSWB(W) Act

No charge may be made without having carried out an assessment

Existing placement – continue charging

New package – what if not suitable, not meeting needs?

Can carry out assessment later, retrospectively apply the charges (para 30)

EDUCATION & **SCHOOLS**



s.37 + Sch 16: Temporary closure of educational institutions & childcare premises

s.38 + Sch 17: Temporary continuity directions

provisions are in force – but no notices made yet

Sch 16: Temporary closure of educational institutions



para 1(2): Welsh Ministers have power to give closure directions


para 1(3): “requires responsible body ... to take reasonable steps to secure that persons do not, for a specified period, attend premises ...”

para 1(8): enforceable by court order / injunction

para 3: when direction in force, school attendance provisions and s.19 EA 1996 (education at PRUs or elsewhere) do not apply

para 4(2): Welsh Ministers may authorise CC or CBC to exercise its functions re school closures and Higher Education Funding Council for Wales in relation to higher education institutions

Sch 17: Temporary continuity directions (TCDs)



para 2(2)(b): “requires that body or institution to take steps specified in the direction”

para 2(3): “must be satisfied that giving the direction is a necessary and proportionate action”

para 2(4): TCD may require institution to stay open, admit certain children etc

para 3: WM may authorise a CC or CBC to exercise that function

Sch 17, para 7: WM has power to DISAPPLY OR MODIFY legislative provisions

DISAPPLICATIONS para 7(5)
e.g. school meals, attendance,
basic curriculum

also: s.324 EA 96 statements
of SEN, s.328(5) reviews of
SEN

MODIFIED TO REASONABLE
ENDEAVOURS

para 7(6) e.g. school meals,
collective worship, s.324(5) SEN
provision, s.328

English
guidance
signals
intent to
relax
timescales;
Wales?

Temporary continuity directions (ctd)

effect: WM issues notice – duty re schools & SEN is only “reasonable endeavours”

Sch 17, para 7(4): done by notice; notice “must state why the WMs consider that the issuing of the notice is an appropriate & proportionate action in the circumstances”

threshold for notice; none in Act other than Sch 17, para 7(4) “approp & proportionate”
Vicky Ford letter 24.3.20: “powers will only be exercised where necessary ...”

para 7(7): notice must not exceed one month

Modifications / disapplications – *AT PRESENT* 11KBW

No notices yet.
So no duties disappplied / modified yet.

SEN: as of today, still s.324(5)
1996 Act = absolute duty

assessments

Annual
Reviews

finalising
plans

Other Welsh Govt guidance

Educational Settings Guidance: written pre-lockdown; for school covering what to do if child has symptoms, managing the spread etc

Key (critical) workers: <https://gov.wales/coronavirus-key-critical-workers>

School staff and their employment: <https://gov.wales/school-staff-and-their-employment-coronavirus> – very useful; nb schools open over Easter for key workers

Other: <https://gov.wales/education-coronavirus> Free school meals, Childcare etc

Nb no equivalent of English [Guidance on Vulnerable Children and Young People](#)
(answers most Qs on SEN provision)

Meeting SEN needs: school or home?

nb: all answered in Eng Guidance on Vulnerable Children and Young People; query Wales?

many with SEN can safely remain at home

parent, school, LA make a risk assessment

school & LA “should decide together who is best placed to undertake the risk assessment, noting that the duty to ensure provision remains with LA”

Guidance lists factors for risk assessment

Eng Minister’s 24.3.20 letter: “schools, colleges & LAs have discretion to use the same risk judgement to decide ... important that as many children as possible remain at home during this time in order to help reduce transmission rates”

Do special schools stay open?

children with statements are within the group who still
can access school places

BUT that does not mean special schools must stay
open

WMs have power to order closing or opening
can also authorise CC or CBC to make those decisions

School admission appeals

What happens to them?

Pause & wait? Continue?

No clear statement by WMs
(or English)

Is physical attendance
required?

Act s.78(8)(j): admission appeals panels are included in
definition of “local authority” for purpose of power to make
Regs for remote meetings

LOCAL
AUTHORITY
GOVERNANCE

Conduct of meetings

Local Gov't (Wales) Measure 2011, s.4 - provides for remote attendance at meetings **BUT** s.4(4): requirement of at least 30% physical presence for quorum

Coronavirus Act s.78: WMs may provide for requirements to hold local authority meetings, inc "manner in which persons may attend, speak at, vote in ...meetings"

s.78(2): this includes provision to attend, speak, vote " without any of the persons, being together in the same place"

s.78(4)(a): WMs may disapply or modify any provision of enactment / subord legislation

Welsh Government, 2014 Statutory Guidance made under Section 4 of the Local Government (Wales) Measure 2011: Remote attendance at council meetings



Postponement of elections: ss.65-68

6 month attendance rule in LGA 1972, s.85

Eng Ombudsman suspended all work. Public Services Ombudsman for Wales says will continue but “taking full account of the current context in assessing and investigating complaints”

Q&A

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