

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, Care 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
- Guidance on COVID-19 and vulnerable children and young persons

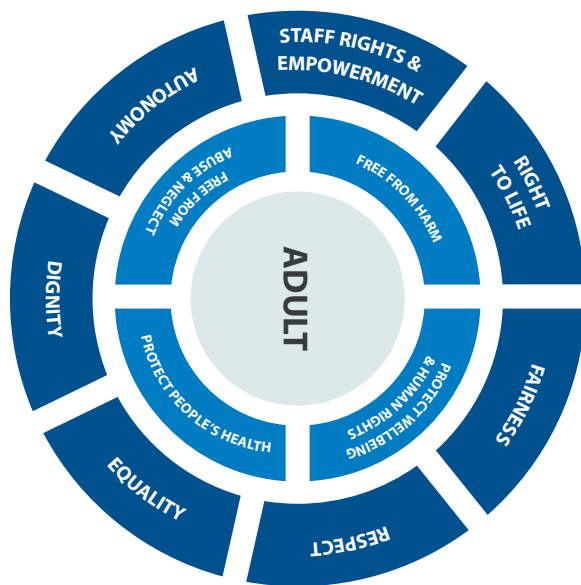
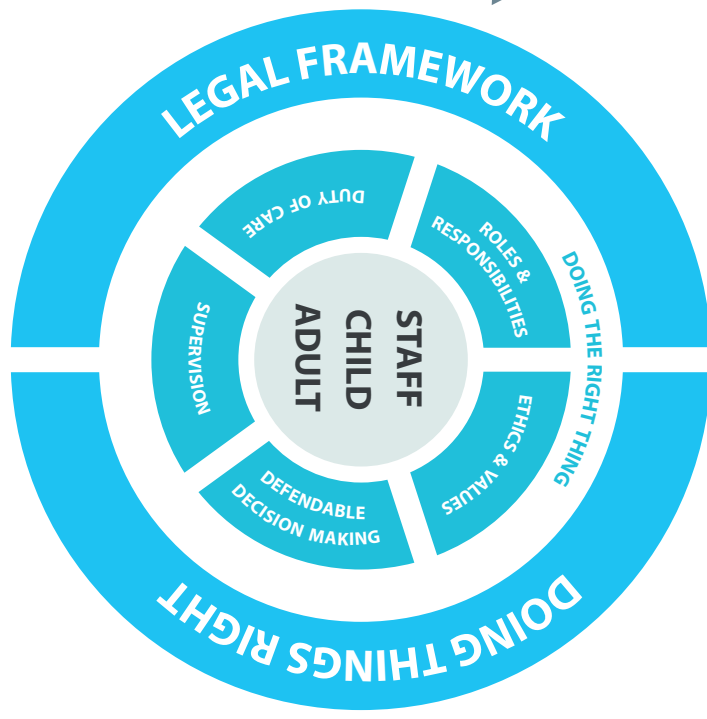
- Responding to COVID-19: the ethical framework for adults social workers
- NICE guidance and amended guidance on critical care

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 • NHS CHC – failure to assess/meet complex needs 	<ul style="list-style-type: none"> • Young carers • Critical frailty scale • Domestic Homicide • Shortage of protective kits, protective clothing, masks, soap, sanitiser & testing kits 	
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 	
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 	
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 	
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 	<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 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"> • Living care packages suspended • Audio/video link for court & tribunal hearings • Stigma against those with the virus • Disproportionate impact 	
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 	



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

Measure	Requirement
Care Act 2014	
Promoting Wellbeing	
S.1 - Promoting Individual Wellbeing	This is a general duty of the local authority in exercising a function under Part 1 to promote an individual's wellbeing which includes: (a) personal dignity (including treating a person with respect), (b) physical and mental health and emotional wellbeing, (c) protection from abuse and neglect. This duty is a positive duty. LA has an obligation to promote wellbeing when exercising their powers.
Assessing needs for care and support	
S.9 – Assessment of an adult's needs for care and support	The duties to assess and meet eligible need for adults and carers, child's needs for care and support, child's carers needs for support, young carers needs for support, are downgraded to a power unless in England a failure to provide care and/or support would give rise to a breach of the person's human rights.
S.10 – Assessment of a carer's needs for support	
S.11 – Refusal of an assessment	
S.12 (1) (2) – Further provision about assessments under s 9 and 10	
S.12 (3) (4) – duties to give written records of assessments	
S.13 – Determination of whether needs meet eligibility criteria	
S.58 – Assessment of a child's needs for care and support	
S.59 –	
S.60 – Assessment of a child's carer's needs for care and support	
S.61	
S.63 – Assessment of a young carer's needs for support	
S.64	
S.65 (1) – Further provision about assessments under s 58 to 64	
Duties and Powers to meet needs for Care and Support	
S.18 – Duty to meet needs for care and support	The duties of the local authority to meet an adult's needs for care and support have been reduced to a power where (a) the adult is ordinarily resident in the authorities area or is present in its area but of no settled residence, (b) the authority considers that is necessary to meet those needs for the purpose of avoiding a breach of the adult's Convention rights (Human Rights Act 1998), and (c) there is no charge under Section 14 for meeting the needs, or an adults resources are under the financial limit, are over the limit but the adult wishes the local authority to meet them, or lacks capacity and no other person has legal power to make arrangements

Measure	Requirement
S.19 – Power to meet needs for care and support	Power remains
S.20 – Duty and power to meet a carer's needs for support	The duty to assess and meet a carer's needs is downgraded to a power to meet needs if the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the carer's Convention rights (Human Rights Act 1998)
S.30 – Cases where adult expresses preference for particular accommodation	Duty suspended
S.62 – Power to meet child's carer's needs for support	Duty to assess is reduced to a power
S.47 (2) – Duty to prevent or mitigate loss or damage to property of adults being cared away from home	Duty suspended
Charging for meeting needs during emergency period	
S.18, 19, 20, 62	If Local Authority begins to meet needs under these sections during the emergency period and would have been able to charge under s 14, but decided not to undertake a financial assessment it can decide retrospectively to financially assess and charge after the emergency period
Care and Support Plans	
S.24 – Duty to prepare care and support plan or support plan	Duties suspended
S.25 – Duties relating to plans	
S.27 – Duty to review care plans	Duty to review Care plan suspended however power to revise care and support plan not disappplied therefore duty to involve adult and others in revision of plan remains so care package cannot be cut without person or nominated person being involved. Human Rights Article 8 requires involvement of person.
Direct Payments	
S.31-33 - direct payments Care and Support (Direct Payments) Regulations 2014 3a-f	Duties in respect of direct payments. An adult can request a direct payment. There are restrictions in the act as to who a person may pay. The Regulations restrict who a person can pay and typically this not be family members. However in (2) a local authority if they consider it necessary to do so, may use the direct payment to pay one of these persons if PA falls ill.

Measure	Requirement
Safeguarding Duty	
S.42	Duty of LA to make or cause to make an enquiry in safeguarding situation remains
Advocacy	
S.67, S.68	Duty to provide independent advocacy remains for involvement in assessments, plans, reviews and safeguarding enquiries
Human Rights	
S.73	Human Rights 1998: extends the reach of human rights to registered providers so they are taken for the purposes of s 6 (3) (b) to be a public authority if the LA arranges, pays wholly or partly for the care and support. This would extend to health funded care so NHS CHC and Nursing Care.
Discharge of Hospital Patients with care and support needs	
Sch 3 para 3	Duty to carry out needs assessment and where applicable a carer's assessment is suspended once it has received an assessment notice from the hospital. The duty to inform the NHS if the patient or carer has needs for support still remains but the duty to meet need is downgraded to a power to meet need and the notice requires the local authority to advise which (if any) of those needs they plan to meet and how they plan to meet the need.
Transition for children to adult care and support	
S.2A(2) to (4) or (6) Chronically Sick and Disabled Persons Act 1970 – Transition for children to adult care and support S.17ZH (2) to (4) or (6) of the Children Act 1989 – section 17 services: transition for children to adult care and support	Duties suspended
Guidance	
Secretary of State may issue guidance on how local authorities are to exercise functions under Care Act 2014 and local authority must have regard to and comply with the Guidance. This guidance must be read in consequence of Coronavirus. Old care and support guidance will need to be disregarded as it is trumped by the CA 2020 guidance	

Measure	Requirement
NHS Continuing Healthcare	
CCG – Duty to assess and provide NHS CHC under The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012	
21 (2) (a) (b) – Duty to take reasonable steps to assess where there may be a need for NHS CHC or a review of NHS CHC	Duty downgraded to a power
21 (12) – Duty to have regard to the National Framework	Duty downgraded to a power
28 – Duty to Assess for Nursing Care	Duty only applies if CCG chooses to comply with 21 (2) (a) (b) above
NHS Trust – Duty to ensure assessment for NHS CHC is carried out in consultation with local authority under The Delayed Discharges (Continuing Care) Directions 2013	
2 (2) – Duty to take reasonable steps to ensure that assessment of eligibility for NHS CHC is carried out before trust gives notice to local authority	Duty downgraded to a power
2 (10) – Duty to have regard to National Framework	Duty only applies if Trust chooses to comply with duty to assess in 2 (2) above
Care and Support (Discharge of Hospital Patients) Regulations 2014 Regulation 3 – Contents of Assessment Notice	
1 (1) Where a hospital patient is likely to have care and support needs after discharge and NHS body considers that it is not likely to be safe to discharge the patient unless arrangements for meeting the patient's needs for care and support are in place, it must give notice to the local authority which must contain.... 3 (1) (f) (iii) that the NHS body has considered whether or not to provide the patient with NHS continuing health care and the result of that consideration	Duty suspended

Measure

Requirement

<p>Mental Capacity Act 2005</p>	<p>No amendments to the MCA 2005 or the Deprivation of Liberty Safeguards so the current MCA and DoLS structures remain in place.</p> <p>Government to issue emergency guidance to achieve significant improvement to the process.</p> <p>Two relevant DHSC guidance documents which reference the MCA and DoLS are</p> <p>“Responding to COVID-19: the ethical framework for adult social care” (19th March 2020)</p> <ul style="list-style-type: none"> • First Principle “Respect” requires that “where a person may lack capacity, ensure that a persons best interests and support needs are considered by those who are responsible or have relevant legal authority to decide on their behalf” • Fifth Principle “Accountability” states that professionals should “be transparent about how and which decisions need to be made and on what basis; and prepared to justify which decisions are made and why, ensuring that appropriate records are kept” <p>NHS COVID-19 Hospital Discharge Service Requirements (19th March 2020) states that the MCA continues to apply during Pandemic, so MCA assessments must be undertaken before decision is made, best interests made in line with usual processes. If the proposed arrangements amount to a deprivation of liberty, DoL Safeguards in care home arrangements and orders from the Court of Protection for community arrangements still apply but should not delay discharge</p>
<p>Courts and Tribunals</p>	<p>Four sets of Guidance have been issued by Mr Justice Hayden, Vice President of the Court of Protection on how video-conducted capacity assessments are to be considered by Judges has been issued.</p> <p>Summary of the key messages can be found in: The Covid-19 Pandemic, the Coronavirus Bill and the Mental Capacity Act 2005 dated 25th March 202</p>

The Mental Health Act 1983

Measure	Requirement
<p>S2 & S3 – A recommendation from one Registered Medical Practitioner is sufficient.</p>	<p>Only occurs if the AMHP considers compliance with the requirement for two recommendations is either impractical or involves undesirable delay.</p>
<p>S4 - Section remains unchanged.</p>	
<p>SS(2) - Any Registered Medical Practitioner can furnish a report. -The maximum length of detention is increased to 120 hours.</p>	<p>Only occurs if the furnishing of the report by the Clinician in charge of treatment is impracticable or would cause undesirable delay.</p>
<p>SS(4) - The maximum length of detention is increased to 12 hours.</p>	
<p>S35 & S36 - The "upper limit" of 12 weeks is removed.</p>	
<p>S37, S38, S45A & S51 - A report from one Registered Medical Practitioner is sufficient.</p>	<p>If the court is satisfied that involving two Registered Medical Practitioners is impracticable and would involve unreasonable delay and is satisfied that the evidence of that single Registered Medical Practitioner is sufficient for the matter in hand.</p>
<p>S47 & S48 - A report from one Registered Medical Practitioner is sufficient.</p>	<p>If the Secretary of State is satisfied that involving two Registered Medical Practitioners is impracticable or causes unnecessary 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.</p>
<p>S35, S40 & S45(B) - The time limit increases to 28 days.</p>	<p>Only applies to hospital orders made after the measure has been activated.</p>
<p>S135 & S136 - Maximum period increased to 36 hours</p>	<p>Which can be extended for 12 hours, provided the criteria are met.</p>
<p>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</p>	<p>If the AC feels that complying 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.</p>

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 Children Act 1989
- The Children Act 2004
- The Children & Social Work Act 2017
- The Children & Families Act 2014 (SEND)
- The Chronically Sick & Disabled Persons Act 1970
- The National Framework for Children & Young People's Continuing Care 2016
- Working Together to Safeguard Children July 2018

Amendments/suspension to current legislation & guidance

- The Coronavirus Act 2020 & Schedules
- DfE & PHO – Coronavirus (COVID19) : Guidance on vulnerable children & young persons
- Ofsted : coronavirus (COVID 19) rolling update –
- Guidance & information for schools, early years, children's social care & further education & skills

Relevant sections of the Children Act 1989

- S.17 – child in need
- S.20 – voluntary accommodation
- S.25 – secure accommodation
- S.31 - care order & S.35 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.50 – recovery order
- S.100 – inherent jurisdiction of the High Court

Impact on the Child

- General downgrading of social care provision by prioritising support to the most vulnerable children – definition of vulnerable children - those who have a social worker & those children & young people up to the age of 25 with EHC plans. (DfE Guidance)
- All statutory visits under CIN, child protection plans / children under care & supervision orders to continue
- However, some statutory visits being undertaken by video link
- Suspension 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 & responsibilities for children leaving care
- 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
- Routine Ofsted inspections suspended & no publishing of reports
- 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

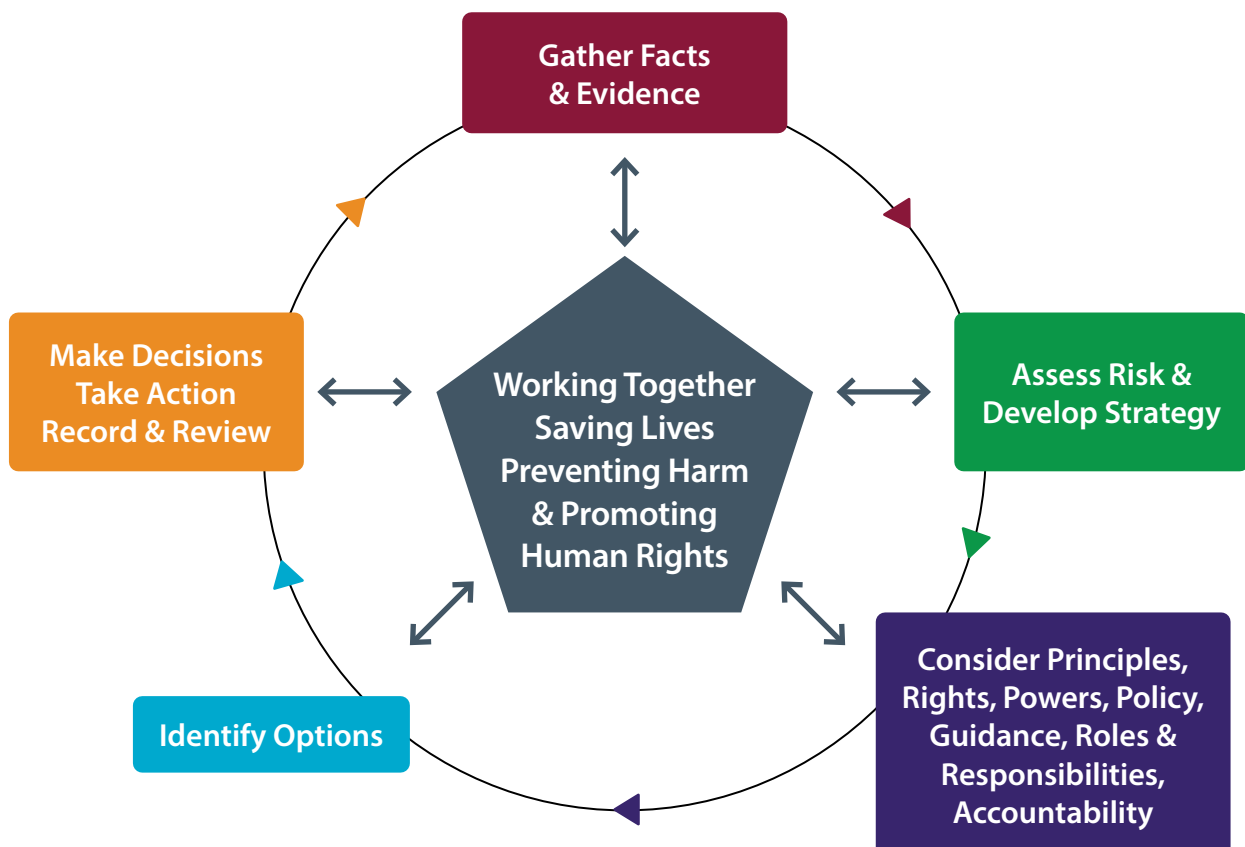
Top tips:

- 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

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



Reference List

Statute

Coronavirus Act 2020

Case Law

The Queen on the Application of Bernard v. London Borough of Enfield, [2002] EWHC 2282 (Admin)

Price v UK 33394/96 [2001]

McDonald v UK 4241/12 [2014]

MIV v LB of Newham [2019] EWHC 3298

Regulations

Coronavirus Act Commencement Regulations 2020

Health Protection (Coronavirus) Regulations 2020

Guidance

Human Rights (Joint Committee)

COVID-19: Court of Protection issues guidance on visiting P and hearings

COVID-19: guidance for primary care

Human Rights Dimensions of COVID-19 Response

Parliament Memorandum on Human Rights Implications to the Coronavirus Act 2020

Guidance on COVID-19 and vulnerable children and young persons

COVID-19: ethical framework for adult social care

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

NICE COVID-19 rapid Guideline; critical care in adults

NICE updates rapid COVID-19 guideline on critical care

Articles

Coronavirus and MCA 2005

Managing Mental Health and Covid-19