

## Contact in Care and Protection of the Public

1. On 3 April 2020, the Department for Education published “Coronavirus (COVID-19): Guidance for Local Authorities on Children’s Social Care”.
2. Within this DfE Guidance, under the heading, ‘What about court orders related to contact for children in care?’ the following is stated:

“We expect that contact between children in care and their birth relatives will continue. It is essential for children and families to remain in touch at this difficult time, and for some children, the consequences of not seeing relatives would be traumatising.

Contact arrangements should therefore be assessed on a case by case basis taking into account a range of factors including the government’s [social distancing](#) guidance and the needs of the child. It may not be possible, or appropriate, for the usual face-to-face contact to happen at this time and keeping in touch will, for the most part, need to take place virtually. We expect the spirit of any contact orders made in relation to children in care to be maintained and will look to social workers to determine how best to support those valuable family interactions based on the circumstances of each case”.

3. As the DfE Guidance makes clear, contact arrangements must be considered on a case by case basis. However, it contemplates that, in many cases during the current public health emergency, face-to-face contact will be replaced by virtual contact. Framed within the language of section 34 of the Children Act 1989 (“CA 1989”), the statutory duty to allow “reasonable” contact may be fulfilled at the present time by putting in place such alternative measures.
4. The passage quoted specifically instructs local authorities to bring into account the Government’s social distancing guidance as well as the needs of the child when addressing the arrangements for contact for children in care.
5. This Note addresses how such an approach is to be squared with decision-making which is rooted in the welfare of the individual child. It explains how the wording of Article 8.2 of the European Convention on Human Rights (“ECHR”) and the provisions of section 34 and section 22 of the CA 1989 (and matching Welsh legislation) allow for wider public health considerations to be brought into account in addressing what is “reasonable” contact in the context of the Covid 19 health emergency.
6. Article 8 of the ECHR provides that:

“8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.

8.2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

7. The wording of Article 8.2 means that **public safety, the protection of health and the protection of the rights and freedoms of others** are all specifically identified as legitimate reasons for interference with the right stipulated in Article 8.1. The Covid 19 health emergency falls squarely within that qualifying wording provided any measures taken meet the test of necessity/proportionality: "The notion of necessity implies that the interference **corresponds to a pressing social need** and, in particular, that it is proportionate to the legitimate aim pursued"; *Johansen v Norway* (1996) 23 EHRR 33 at para 83 (emphasis added).

8. As to the wording of the Children Act 1989, the general duty on local authorities to allow reasonable contact is prescribed in section 34(1) which reads:

“(1) Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section and their duty under s.22(3)(a) or, where the local authority is in Wales, under s.78(1)(a) of the Social Services and Well-being (Wales) Act 2014) allow the child reasonable contact with—

(a) his parents ...”

[and others as set out in sub-paragraphs (b), (ba), (c) and (d)]

9. The wording of section 34 cross-refers to the local authority’s duty under section 22(3)(a) of the CA 1989 which provides:

“It shall be the duty of a local authority looking after any child—

(a) to safeguard and promote his welfare ...”

10. Section 78(1)(a) of the 2014 Act (Wales) is to like effect. It reads:

“A local authority looking after any child must—

(a) safeguard and promote the child's well-being”

11. Clearly, as part of that duty, a local authority must take steps to protect the child against risks to the child’s health.

12. As to wider public protection, section 22(6) of the CA 1989 provides:

“(6) If it appears to a local authority that it is necessary, **for the purpose of protecting members of the public from serious injury**, to exercise their powers with respect to a child whom they are looking after in a manner which may not be consistent with their duties under this section, they may do so”.

(Section 22(7) also provides that the Secretary of State may give directions to a local authority for the same reason).

13. Section 78(4) of the 2014 Act (Wales) is worded in like manner:

“If it appears to a local authority that it is necessary, **for the purpose of protecting members of the public from serious injury**, to exercise its powers with respect to a child whom it is looking after in a manner which may not be consistent with its duties under this section or section 6, it may do so”.

14. Accordingly, the legislation permits a local authority to make a decision that is necessary for the purposes of protecting others from serious injury even if so acting may be *inconsistent* with its duty to safeguard and promote the child’s welfare. In the context of the current public health emergency, where Covid 19 risks causing serious injury to the lungs or the death of others, such public protection considerations may be brought into account by local authorities applying these legislative provisions.

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