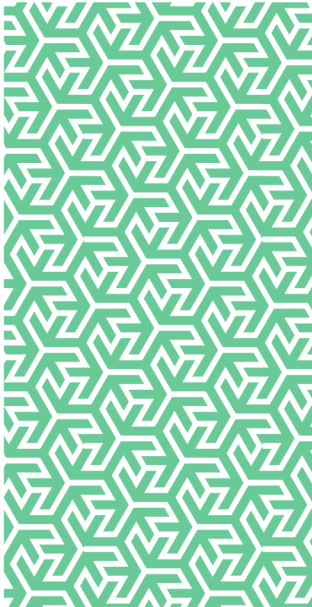




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Social Care Resilience Planning beyond the Pandemic



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Social Care Resilience Planning beyond the Pandemic

Introduction

When you have operated in the local authority liability insurance field for any great length of time the spectre of receiving a large children's services claim can never be discounted too easily, and whilst the current legal window for such claims has been narrowed considerably by the decision of *CN v Poole*, a threat they remain. Thankfully such claims are few and far between, but it was this concern which prompted us at RMP to consider how the pandemic may have impacted on the ability of children's services teams up and down the country, to discharge their duties.

To get an expert view on this complex and dynamic situation we turned to Kate Prestidge, a partner at the leading Public Sector law Firm Plexus and asked for her thoughts on this subject. The article which follows is the work of Kate Prestidge, Andrew Caplan and the Abuse Team at Plexus Law. In our view it represents an excellent contribution, covering the risks, legal issues and offering up some sound risk management advice. We hope you enjoy the read and can take something from the information and please read the detail with the thought in mind that you/us could be dealing with a claim very easily in say the year 2031, for a set of events which occurred during the pandemic

Social Care Resilience Planning beyond the Pandemic

With the end almost in sight for lockdown measures, it is hoped the difficulties encountered in the past year will soon become a distant memory, although the damage it has caused for vulnerable individuals and families may not be such an easy fix. Local Authorities and their social workers have understandably been overwhelmed with not just the workload, but the pressures of operating during variable lockdown conditions and intermittent freedom to perform their crucial everyday duties.

This briefing note will look at:

1. The difficulties faced by local authorities and their social care teams during the coronavirus pandemic;
2. How these difficulties may translate into legal challenges for local authorities for years to come; and
3. Our suggested actions that local authorities can take to minimise the risk of future legal claims.

Pandemic Difficulties

Behind closed doors

Local authorities have various legal duties to promote the wellbeing of vulnerable individuals in their area and to identify individuals who are in need. Social workers are at the front line for local authorities in discharging these duties, working with children, families and vulnerable adults to identify needs and provide services. Where local authorities need to exercise their statutory powers (e.g. applying for care orders), social workers will often be the public face of decisions responsible for working with families and assessing when and the nature of what further action becomes necessary. We explore some of the challenges faced by Local Authorities and their social services teams.

Staffing issues – a variety of factors will have put an inevitable strain on resources and social worker staffing levels during the pandemic. Most local authorities will have been adversely affected by staff absences due to illness, staff being forced to quarantine, self-isolate, shield, childcare commitments as well as other pandemic-related factors. In February 2021, Community Care reported that 6% of local councils reported, in January 2021, that more than 10% of their social workers were absent due to the pandemic (<https://www.communitycare.co.uk/2021/02/10/number-councils-reporting-high-numbers-social-workers-work-due-covid-rises-sharply/>). It is inevitable that these difficulties will have been compounded by social distancing in offices and an increased number of social workers working from home. Zoom calls will only take you so far, the nature of case reviews in bringing together all the affected parties often including a number of health experts and statutory bodies, cannot be as effective remotely or indeed coach and mentor the less experienced social care workers. Structured calls are of course essential but we have all come to recognise the value of being in and around a physical team.

The impact of this is likely to be that local authorities will have had fewer social workers available to deal with new referrals or to work with families already known to social services, adding an additional burden onto professionals who may have already had challenging caseloads.

Rise in issues due to the pandemic – the media has regularly reported on an increase in domestic violence and safeguarding notifications during the pandemic. In April 2020, the *NSPCC* reported a 20% increase in calls about child abuse (<https://www.bbc.co.uk/news/uk-wales-52473453>). During a similar period, *Refuge* reported a 25% increase in calls about domestic violence. Childline has reported that it has provided more than 50,000 counselling sessions to children since the start of the first lockdown

(<https://www.nspcc.org.uk/about-us/news-opinion/2021/childline-press-release/>). Whilst the cause of these increases is beyond the scope of this note, a number of obvious factors spring to mind:

- financial stresses due to furlough and job losses
- anxiety of living during stressful and uncertain times
- restrictions on crucial support services including mental health, and alcohol and drug treatment
- frustration with lockdown restrictions, and
- a lack of an escape outlet / the protective factor of school for children.

Against this backdrop, it seems inherently possible that children and vulnerable people who were previously at risk or just managing to cope, may have fallen off the radar of professionals. Families and children who were previously unknown to social services may have become at risk, but not been identified by professionals in the absence of regular interaction with front line services such as schools and GP's. Difficulties in carrying out face to face assessments or visiting homes is likely to have restricted social workers in their ability to carry out effective risk assessments or identify individuals in need of services.

Threat of technology – technology has undoubtedly been a blessing and a curse during the pandemic. On the one hand, it has brought together socially isolated friends and family, allowed virtual learning to take place and enabled people to work from home. This has, however, created a divide as those who are most in need are also most likely to lack access to technology, which will have inevitably made it more difficult for social workers to keep in touch, assess needs and provide services. Not all things technology related are a blessing though and sadly, the NSPCC reported in November 2020 that there were 1,220 online grooming offences recorded during the first three months of lockdown.

Protective factor of schools, youth clubs, sports clubs, etc. – schools and youth clubs are widely recognised as a protective factor for vulnerable children and a means of identifying those who are at risk of neglect and abuse. In April 2020, the Department for Education (DfE) reported that only 5% of vulnerable children were attending school (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883173/COVID-19_attendance_in_education_settings_170420.pdf). In June 2020, DfE further reported that only 18% of children with an Education, Health and Care Plan or an allocated social worker were estimated to be attending school. It is of concern that as many as 82% of vulnerable children were unable to attend school and may have been locked down at home in an unsafe environment with a lack of other

services. Rather concerning, and notwithstanding the fact that child protection concerns have increased, the NSPCC reported that referrals to social services dropped by around 50% during lockdown

(<https://www.hsj.co.uk/coronavirus/fears-over-vulnerable-children-after-50pc-drop-in-referrals/7027490.article>). The assumption is therefore that many safeguarding concerns are going unreported and those who would typically act as the voice of vulnerable children are not currently able to do so.

Virtual visits – A large part of a social worker's role when working with families and children at risk is to visit the family to assess, monitor and observe the home environment. The guidance provided by the British Association of Social Workers (BASW) advises visits should only be made:

- When risk assessment deems it absolutely necessary to prevent significant harm; and/or
- To fulfil a statutory duty which cannot be fulfilled in any other way; and/or
- When risks of infection to staff and people visited have been mitigated in accordance with this guidance and national protocols.
- <https://www.basw.co.uk/professional-practice-guidance-home-visits-during-covid-19-pandemic>)

Clarity was also provided by the Government on their COVID-19 guidance for local authorities (<https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care#main-changes-to-previous-guidance>) which advised social workers to “*do their best to meet statutory duties*”. The updated guidance suggests virtual visits should be the exception, where public health advice or practicalities prevent face-to-face visits taking place.

The BASW has reported that the majority of its members are worried about missing something because they are physically unable to visit vulnerable individuals and their families. As many as 77% of social workers have said that they are concerned about their ability to safeguard and protect adults and children as a result of coronavirus restrictions

(https://www.basw.co.uk/system/files/resources/basw_social_working_during_the_covid_19_pandemic_initial_findings_26.01.21.pdf). Anecdotal evidence from social workers supporting these concerns references them having to undertaking contact sessions via Zoom with everything appearing in order until the screen is knocked to a different position showing another child in the room sleeping on a mattress on the floor. Social workers later attended the

property and found the house in poor condition and the house littered with animal excrement. Other accounts include social workers being denied access to a home due to fears about COVID-19 and having to carry out assessments in gardens. These testimonies illustrate the painfully obvious point that virtual contact cannot replicate face to face assessment in someone's home.

Easing of lockdown – A Tsunami of needs

Both the BBC and the BASW have recently reported that social workers fear the easing of pandemic restrictions will lead to a “tsunami of needs” putting social services resource under unprecedented pressure. A [survey of 1,119 social workers](#) found that the majority experienced an increase in referrals and larger caseloads after lockdown restrictions were eased in Summer/Autumn 2020. This coincided with increasing numbers of children returning to schools. As above, teachers and schools play a crucial role in identifying children in need and it is anticipated that the easing of the current lockdown and return to schools on 8 March 2021 will lead to a similar surge in referrals.

It is inevitable that with an increased workload and ongoing lack of resources / restrictions on services, the risk of mistakes arising from an inability to pro-actively review each family in need, increases. The survey by BASW found that 77% of social workers were concerned about their ability to safeguard and protect vulnerable adults and children during lockdown. Almost a third of social workers said they were unable to carry out their duties with the confidence and support they needed during the pandemic. These difficulties are likely to come under increased scrutiny and pressure as lockdown restrictions are eased and social workers wrestle with the full force of the tsunami of needs.

Staff mental health

The BASW has spoken of the “heavy toll” social workers have experienced during the pandemic (https://www.basw.co.uk/system/files/resources/basw_social_working_during_the_covid_19_pandemic_initial_findings_26.01.21.pdf):

- 67% of social workers said their case load had increased when lockdown was lifted;
- 58% advised that working during the pandemic had negatively impacted their mental health;
- 63% reported finding it more difficult to switch off whilst working from home;
- 30% of social workers felt under pressure to work whilst unwell; and
- 15% felt they had not been provided with adequate PPE and risk management advice, suggesting that significant

numbers have been left feeling physically unsafe whilst carrying out their duties.

The BASW have suggested that facing “highly emotive issues” on a daily basis will take a “large toll” on social workers which is compounded by the lack of safe space in the workplace with trusted colleagues, to share and reflect. These factors increase the “likelihood of burnout” and put social workers at risk of mental health issues and absences from work at a time when local authorities can scarcely afford this. It remains to be seen what impact the anticipated tsunami of needs could have on this.

Legal Challenges

The question that many Local Authorities will be looking to explore, is how the difficulties cited above could translate into legal claims over the coming years.

Marcus Aurelius (and Russell Crowe in *Gladiator*) famously said “*What we do in life, echoes in eternity*” and whilst we don’t suppose he was commenting on local authority insurance matters from his vantage point of 180AD, these words have practical application which resound to this day. It certainly can’t have escaped the attention of anyone with an interest in local authority insurance matters that it often takes years (if not decades) for the effect of social worker decisions to ripple out into civil claims. The potential implications of the pandemic on civil claims arising out of alleged social work failings are as follows:

- I. **Human rights challenges** – in the short term (over the next 1-3 years), local authorities can expect to see more human rights challenges arising out of social work decisions. These could be presented either as claims for judicial review or as standalone civil claims. The Supreme Court decision in *CN v Poole UKSC 2018/0012* has led to an increase in claimant lawyers alleging breaches of the Human Rights Act 1998 (HRA) alongside allegations of social work negligence, as attempts are made to distinguish cases from *CN*. This approach is likely to continue as the initial tranche of decisions interpreting *CN* and, in turn, what amounts to an *assumption of responsibility* begin to filter through the first instance courts and the landscape becomes more uncertain for claimants – see *HXA v Surrey CC* [2021] EWHC 250 (QB) (<https://www.bailii.org/ew/cases/EWHC/QB/2021/250.html>).
- II. **Social workers and local authorities** should be mindful of their duties under the *Human Rights Act 1998* and *European Convention on Human Rights* whilst providing services during the coronavirus pandemic. It is predicted that the following areas will offer potential causes of action for claimant lawyers:

- **Article 3 – prohibition on inhuman treatment and torture** – in *DSD v Commissioner of Police for the Metropolis* [2018] UKSC 11 the Supreme Court held that operational and investigative failings by the police into serious sexual assaults by taxi driver, Jon Worboys, breached the rights of Worboys's later victims. The court held that a breach of Article 3 would be actionable where serious and egregious errors had led to complainants suffering ill-treatment. It is easy to see how, in a world where social workers are restricted in their ability to visit and investigate cases, where there are shortages of staff/resources/normal services, and where social workers may not have access to complete files and case notes, the potential for serious errors and systemic failings increases.
- **Article 4 – prohibition on slavery** – local authorities (as first responders) are responsible for referring those who are at risk of trafficking into the National Referral Mechanism which provides support to victims of trafficking. Where the potential victim is a child, the local authority has additional duties to safeguard the child and protect their welfare. Examples of children who may need to be referred into the NRM include those involved in child sexual exploitation or county lines drug dealing. Again, the difficulties social workers have faced during lockdown pose practical difficulties in identifying those at risk of exploitation and trafficking, referring them into appropriate services and ensuring their availability of services and encouraging engagement with the same.
- **Article 8 – right to respect for private and family life** – Article 8 is rarely invoked in claims arising out of social care provision as there is generally no duty to provide treatment. However, in *McDonald v UK* (4241/12), Strasbourg held that the withdrawal of services/treatment by a local authority could constitute a breach of an individual's Article 8 rights. Lockdown restrictions have changed the way in which social workers work and the services which local authorities are able to offer to people in need. It is possible that withdrawing or changing the services being provided to people in need could give rise to an actionable breach of Article 8 rights. This will particularly be the case for people with serious physical and mental health issues who may rely on services to meet their immediate needs.

III. **Negligence** - in the longer term, local authorities could see an increase in social worker negligence/failure to remove claims. One can see that with a *tsunami of needs* approaching, social workers will be required to do more, with less resources, increasing the risk of mistakes and negligence. Social work during the pandemic presents numerous challenges that could filter through as legal

claims. An example of this is the use of virtual visits outlined above – on the one hand Government guidance suggests that virtual visits should be an exception which should not replace face to face meetings. On the other hand, social workers are grappling with the reality of a situation where it is more difficult to see people in person and individuals are reluctant to have face to face contact. The guidance issued to social workers is unfortunately a precarious tightrope which creates an inevitable risk for mistakes. The full impact of the pandemic on negligence claims may not be known for many years, and for this reason, it is vitally important that social workers are able to justify and explain the decisions they have taken during the pandemic. The limitation period for a claim in negligence is generally 3 years from the date of the alleged breach of duty/date of knowledge of harm. However, where the individual involved is a child, limitation will not begin to run until the child turns 18, or from the date the individual knew they had suffered harm (which can be significantly later where the individual has suffered psychiatric harm caused by the alleged negligence). It is therefore possible that local authorities could still be facing claims arising out of the pandemic for many years to come.

IV. **Claims by staff** – as above, social workers are likely to be experiencing difficult working conditions and high levels of stress. Moving to home working and difficulties with supervising and supporting staff, could increase vulnerability to mental health issues. This is likely to be further exacerbated if social worker caseloads increase dramatically (as is expected) when children return to school in March. The upshot of this is that unless carefully managed, local authorities could be at risk of claims for *stress at work*. Employers have a duty of care to ensure, as far as is reasonably practicable, the health, safety and wellbeing of employees. It is important that local authorities look at the measures they have in place to identify and support social workers during this difficult period, particularly during periods of remote working where managers have less contact with staff and may be unable to pick up on signs of stress and poor mental health.

All of the above is tempered by the fact that none of us know what the landscape for local authority claims is going to look like in the future. The years leading up to the Supreme Court decision in *CN v Poole* demonstrates the speed and nature of this developing area of the law.

First instance decisions in the 18 months since *CN v Poole* have shown judges taking different approaches to social work claims – it seems that *failure to remove* claims will be ripe for appeal and further judicial guidance will be needed in due course. The application of judicial discretion in claims where limitation has expired has remained relatively static since *A v Hoare* [2008] UKHL 6 in 2008 and this too could be an area for further challenge.

We will have to wait and see how Parliament responds to developments and current affairs. There is a possibility that the *Independent Inquiry into Child Sexual Abuse (IICSA)* could make recommendations to reform the law on limitation in England and Wales. The Scottish Parliament has previously reformed the law on limitation in relation to claims arising out of child abuse / neglect, effectively removing time limits for claims and shifting the burden of proving a limitation defence on to the Defendant. Recent Conservative governments have also expressed a desire to reform or repeal portions of the Human Rights Act 1998. Just what duties may exist in 5-10 years' time is currently very difficult to predict.

Practical Guidance for Local Authorities and Social Workers

What can local authorities do to try and protect themselves from future claims and provide the best possible chance of defending claims that do arise? Our suggestions below give local authorities practical steps they can take now:

1. **Staff wellbeing** is crucial not only as a matter of employment law but in making life easier for local authorities when claims are presented in the future. This briefing note has covered the anticipated tsunami of needs and the risk of burnout and stress for social workers. Defending historic claims nearly always requires the co-operation of social workers who were involved in the index decisions, who may need to explain their decision-making process or provide witness evidence at any trial. For solicitors, being able to speak to social workers makes assessing liability and plotting a proactive way forward exponentially easier. Keeping staff healthy, happy and engaged with their local authority is therefore of crucial importance to defending claims. Where social workers move on to pastures new, they are more likely to remain co-operative where they have departed on good terms.
2. **Documents, documents, documents** – the most important tool in defending any claim relating to alleged social work negligence is contemporaneous and comprehensive social care records evidencing all interactions with a family/child and explaining the decisions and steps taken. With working from home becoming near universal and social workers not having access to tools and resources in the office, it is important that they continue to keep files up to date and organised. Increased workloads (and the tsunami of needs) could lead to poorer record keeping with social workers' time stretched more thinly. Local authorities should consider issuing guidance to social workers which impresses upon them the importance of keeping full and accurate records evidencing all risk assessments and their decision-making

processes. Where appropriate, references should be made to covid-19, lockdown restrictions and how this has impacted on decisions. Historically, social work practices have evolved and changed over time in response to high profile cases and changes in the law. Examples of this include a greater emphasis on keeping families together where possible following the *Cleveland Child Abuse Scandal* in the 1980s, and an emphasis on a more joined up approach between agencies following the deaths of Peter Connelly and Victoria Climbié in the 2000s. It is always advisable to ensure that records and documents reflect high profile events so social work decisions can be put in a social context and judged in accordance with the standards of the time.

3. **Get documents in order now** – where record keeping has suffered due to lockdown, it is not too late for this to be addressed now. Managers should be encouraged to audit and review files as soon as possible to ensure that records are up to date and record the impact of the pandemic. Where records are not up to date, they should be updated as soon as possible. Claims arising from current social work practice may not be presented for 5-10 years, and if the social workers' decision process is not recorded in detail, it will be difficult for local authorities to comment on the impact of the pandemic on social work practice years later. It would be useful for social workers to include a list of the most recent guidance and restrictions for their area and update this as and when guidance changes. The most recent guidance for children and young people services is available on GOV.UK - <https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care#main-changes-to-previous-guidance>. All of this will become more difficult when workloads increase, so there really is no time like the present for local authorities to address this. Putting the decisions taken into social context and government guidance is a crucial part of satisfying the test that the decisions taken were reasonable when judged against reasonable social care best practice at the time.
4. **Virtual visits and assessments**– In the absence of external protective factors, advice has been published to assist social workers in their duty to safeguard and protect children in need in their area, including video calls in which the child is asked to show the social worker their room/environment to ensure they are being seen alone (<https://www.basw.co.uk/media/news/2020/jun/top-tips-virtual-direct-work-children-families-during-covid-19>). The importance of this is evidence in a report to the BBC in January 2021 (<https://www.bbc.co.uk/news/education->

55825991), regarding an occasion where a family contact was undertaken via Zoom. The computer was knocked to a different position and a child was seen sleeping on a mattress on the floor, following which an emergency visit was undertaken and the house was found in extremely poor condition with animal excrement on the floor and broken windows. Social workers are legally required under the **Children Act 1989** to ascertain the child's wishes and feelings about the provision of services and the **working together to safeguard children guidance** states that children should be seen alone, wherever possible – the challenges of complying with this requirement/guidance are increased significantly where virtual assessments are taking place. Social workers should ensure they document these virtual assessments to include recording whether it was possible to see the child alone and if not, the reasons for this.

5. **Repository of changing pandemic guidance** – in addition to keeping files up to date with the most recent guidance and restrictions, local authorities would be well placed to keep a central repository of changing coronavirus guidance, this is particularly important for the period May 2020 to January 2021 when different areas had restrictions lifted and imposed at different times. Civil claims often require expert evidence from an independent social work expert who will invariably have worked in a different part of the country and may have no particular knowledge of the restrictions and measures in place in another location. A repository of guidance and restrictions could be a crucial tool for helping experts comment on the reasonableness of steps taken.
6. **Evidencing the impact of the pandemic** – it is perhaps understandable that visits and contact sessions will be restricted during the life of the pandemic. Where claims arise, local authorities will have to explain why sessions have been restricted and what social workers did to work around this. Social workers should clearly record why any visits have been cancelled (e.g. was this due to staff shortages or was this due to the family / vulnerable person). If this was due to staff shortages / illness, was there anyone else who could have carried out the visit? If it was due to the family / vulnerable person, what alternatives were considered? Could the session have been carried out virtually (although social workers should be concerned if repeated sessions need to be carried out virtually)? There may have been times when social care teams have been severely short staffed due to outbreaks of coronavirus and enforced self-isolating – this will need to be clearly evidence in records.
7. **Availability of services** – support services for families and vulnerable individuals will have inevitably been restricted during lockdown. They may have moved online

or they may have been cancelled altogether. Social workers should document any changes to the services being provided to individuals and explain why this has happened and what alternative services are available or can be accessed. Where services have moved online, social workers would be well placed to ask and document whether individuals have access to technology and the internet to ensure that they are able to continue to engage with the services they were receiving pre-lockdown.

8. **Schools and social workers** – whilst it is understandable that local authorities may have struggled to identify vulnerable adults and children during lockdown, with restrictions set to be gradually lifted over the coming months it is vital that local authorities have in place effective systems of identifying (and in some cases re-engaging with) vulnerable individuals. This briefing note has discussed how important schools and teachers are in identifying vulnerable children and referring them into social services. With children set to return to school in March, it is vitally important that teaching staff are able to recognise signs of abuse and neglect and are aware of the correct reporting channels to raise any concerns. Prudent local authorities will encourage collaboration between schools and social workers and may consider stationing social workers at local schools at set periods to streamline referrals and advise on concerns at source.
9. **Paperless future** – the coronavirus pandemic has ushered in hitherto unseen levels of working remotely which has in turn required people to work without paper files. To avoid the risk of mistakes and uninformed / incomplete decisions local authorities should ensure that social workers have access to complete case notes wherever they are (preferably in paperless form). This could help to protect local authorities against the type of serious and systemic failings which could give rise to judicial review and claims under the Human Rights Act 1998. As an added bonus, paperless files benefit insurers and lawyers as it should make it considerably quicker, easier and more cost effective to collate, review and disclose the records to interested parties and experts.
10. **A pre-emptive strike** - There will be many more important considerations for directors of social services currently, but when the dust has settled a little, it would be an excellent discipline to engage with RMP to assist in taking a detailed statement of all the disruptions to services, changing guidance and steps the local authority took to fulfil its statutory duties in these most challenging of times. Such evidence should be contextualised and impress upon insurers that local authorities are exercising a proactive approach to future claims defensibility.

Conclusion

As local authorities, through virtue of their children's services teams, face the difficult challenge of keeping children and vulnerable adults safe throughout and after the pandemic, there are practical steps and changes that social workers can make in responding to the challenges during these unprecedented times.

The challenges for Local Authorities are wider than their obligations owed to Looked After Children and vulnerable adults, as they grapple with the difficult balance of protecting their own front-line workers for whom they have a duty of care, with ensuring those most at risk in society continue to receive monitoring and intervention.

Social worker procedures and practices will inevitably require adaptation to respond to these challenges. Our advice to Local Authorities and those providing front-line safeguarding is to ensure all decisions are documented and supported by relevant risk analysis and justification. These risk assessments will need to be kept under regular review and should be appropriately peer reviewed.

Even when the world returns to a new '*normal*', these challenges are unlikely to immediately diminish: increased volumes of work, on-going challenges with social distancing and intolerable pressures on families who have struggled during the pandemic are all factors that are likely to impede social worker practice in the immediate future. As the pandemic continues to unfold and a new sense of normal emerges, all any professional can be expected to do is follow statutory and regulatory guidance, risk assess and record all of the decision-making processes.

Further information

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the RMP Resources or RMP Articles pages on our website. To join the debate follow us on our LinkedIn page.

Get in touch

For more information, please contact your broker, RMP risk control consultant or account director.

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