

17 February 2021

To Directors of Education/Children's Services

Covid-19 – Phased Reopening of Schools from 22 February 2021

Dear Colleagues

I am writing to you on behalf of members of the NASUWT (The Teachers' Union) in relation to the announcement by the Scottish Government regarding the proposal for the staged reopening of schools from 22 February 2021 involving pre-school, Primary 1 to Primary 3 pupils and some pupils in the senior phase of secondary schools.

The purpose of my letter is to ask you to not require schools to resume face to face teaching whilst mainland Scotland and some islands remain at Protection Level 4 (very High Risk) with stay at home guidance, pending further evidence of virus suppression and the introduction of additional workplace and public health mitigations to minimise the spread of the virus amongst teachers. It is also the Union's contention that any wider reopening of schools must also be subject to the satisfaction by the individual employer of its health and safety duties to its staff.

It is also worth mentioning that the extension of the Level 4 restrictions on 2 January underscores the high level risk on contracting Covid-19. In fact, the 'Stay at home guidance which came into effect on 5 January 2021 (as last updated on 11 February) states:

“Working from home protects the NHS and saves lives. If you are able to work from home, you must do so wherever possible ... By law, employers must take all reasonable steps to minimize the risk of the incidence of the spread of coronavirus. This includes supporting staff to work from home for those roles that can be undertaken remotely”.

The position was reinforced in the statutory guidance published on 19 January 2021 (as last updated on 2 February), which states *“Organisations should make every reasonable effort to make working from home the default position”.*

Although the Scottish Government has it within its power to require schools to be reopened, it must exercise its powers consistently with Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life) of the European Convention on Human Rights (ECHR). The NASUWT's position on its members' Convention Rights is clear and unambiguous, namely:

1. If any of its members died from contracting Covid-19 having been required to return to school pre-vaccination, his or her **Article 2** rights would be infringed. This is particularly the case since the Scottish Government has it within its power to provide early vaccination to teachers, including NASUWT members.
2. Having its members placed at risk of catching and transmitting a serious disease to their families/support bubble is a material infringement of their right to family and private life.

The Union has written to the Scottish Government to remind it of its obligations and duties.

In addition to the above, an important aspect for you as Employers is that your obligations under the Health and Safety legislation are non-delegable. I refer you to section 2 of the Health and Safety at Work Act 1974.

Under this provision, it is for the employer to satisfy itself (and its liability insurer) that there is no unreasonable risk to the health and safety of staff, including NASUWT members, and it cannot be absolved from this duty, which is found in primary legislation by an order made, or action taken, under the Coronavirus (Scotland) Act 2020: *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants [1997] 1 WLR 275*, which was cited with approval and applied by the Supreme Court in *R (on the application of Unison (Appellant) v Lord Chancellor (Respondent) [2017] 3 WLR 409 at paragraph 103*.

Therefore, primary legislation merely sets out a statutory power, which cannot abrogate the duty placed on Employers by section 2 of the Health and Safety at Work Act. It is noteworthy that a breach of the general duties under this provision is a criminal offence. Your duties under the Management of Health and Safety at Work Regulations 1991 must also be borne in mind.

It is therefore not sufficient for an Employer simply to follow the Government decision or guidance to reopen and assume it has met its health and safety obligations or, indeed, rely on that decision as justification for reopening schools without compliance with its statutory obligations.

As stated in our correspondence of July 2020, the NASUWT's expectation is that all local authorities must ensure that all maintained schools and settings have completed their pre-opening health and safety checks, including the equality impact.

In that context, you must ensure that:

1. our members are not obliged to attend work until you provide a safe place and safe system of work in compliance with your legal obligations;
2. you will take all steps necessary to comply with your legal obligations (including equality impact assessment) and notify the NASUWT of the date by which this will be achieved;
3. our members are not obliged to attend work until such compliance has been evidenced to their satisfaction.

Given the importance and immediacy of these issues, I trust that this matter will be given your immediate attention and that you will reply as a matter of urgency to the point set out above. Should you fail to do so, all legal rights are expressly reserved, including that of NASUWT members. Therefore, it may be appropriate to share this correspondence with your liability insurers.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Patrick Roach', written in a cursive style.

Dr Patrick Roach
General Secretary