



# Visiting and the law

## A guide for care homes during COVID-19

**The Relatives & Residents Association**

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### R&RA

The Relatives & Residents Association (R&RA) champions the rights of older people needing care in England. We provide information, advice and support to empower older people and their families/friends, and use their unique perspective to raise awareness and to influence policy and practice.

The R&RA Helpline provides advice and support to older people, and those who support them, about any care issue. We have been supporting people at the sharp end of the pandemic, giving us daily insights into the experiences of families dealing with coronavirus and measures taken to manage it.

### About this guide

This guide provides a summary of the current Government guidance on visiting inside care homes in England and the relevant legal duties on care providers. **It is not, and should not be taken as, legal advice.**

### Definition of terms

#### Visiting

We use this term to mean face-to-face contact for care home residents with relatives or friends. People who play such a key role in resident's lives should be recognised as more than 'visitors'. The term is used for ease of reference only.

#### Families

We use this term throughout to encapsulate the people important to the resident. This includes both relatives and friends.

#### Representatives

We use this term to mean the people a resident has chosen to represent their interests. It could include relatives, friends, someone with Power of Attorney, a Relevant Person's Representative or a formal advocate.

#### Care homes

Whilst this guide focuses on care homes – residential and nursing homes – much of the content will be relevant to other care settings, such as supported living.

## Visiting guidance

The Government guidance on visiting in care homes is available [here](#) (as updated on 21 June). It sets out the “default position” that all care homes should enable the different types of visiting outlined below. It recognises how vital visiting is for the resident, and for family and friends, to maintain relationships and contribute to residents’ care and support. Whilst recognising that visiting brings risk of transmission, it says “these risks can be managed and mitigated” and should be balanced against the importance of visiting and its benefits.

“Visiting is a central part of care home life. It is crucially important for maintaining the health, wellbeing and quality of life of residents.”

Government guidance on visiting

### Types of visiting

All care homes should enable:

- **Nominated visitors:** regular visits from up to five named people, indoors
- **Essential caregivers:** every resident can choose an essential caregiver for additional, more regular support to maintain health and wellbeing
- **Additional visits:** with other family, outdoors, behind screens/windows or in pods
- **Exceptional circumstances:** for residents nearing the end of life (now defined as the last year of life) or where there are other 'exceptional circumstances'

**? Key question: are you facilitating all four types of visiting ?**

### Individual assessments

Individual assessments are key for all four types of visiting. The guidance makes clear that when developing visiting policies, care homes should undertake individual risk assessments, taking into account the rights and needs of the individual residents. To do this, residents and their families should take part in the assessments. These assessments are also required by law – more on this below.

“The individual resident, their views, their mental capacity, their needs and wellbeing should be taken into account.”

Government guidance on visiting

The risk assessment is no different in principle to any other risk assessment a home would need to carry out in other situations, such as if someone is prone to falling. In this case, it should look at who is important in the resident’s life, the impact on their wellbeing of restricting access and balance this against the risk of infection from an additional person coming into the home.

**? Key question: have you completed individual assessments for each resident to determine their visiting needs and wishes ?**

### Mapping the guidance to your legal duties

The table below identifies which of your legal duties or standards are relevant to each type of visiting. It identifies the key standard/right in each case, but remember there will be cross-over. For example, the right to family life and the duty to respect individual needs are relevant to each type of visiting.

Visiting type	Key CQC Regulation	Key legal right
Nominated visitors	Regulation 9 – supporting informed choices	Family life (Article 8, Human Rights Act)
Essential caregivers	Regulation 9 – personalised visiting plan, individual needs met	Wellbeing (Article 8, Human Rights Act) Respecting individual needs (Equality Act)
Additional visits	Regulation 12 – act reasonably when managing risk	Family life (Article 8, Human Rights Act)
Exceptional circumstances	Regulation 10 – ensure resident’s dignity	Dignity (Articles 8/3, Human Rights Act)

## Legal duties

### CQC Regulations

The regulator for care services, the Care Quality Commission (CQC), assesses care providers against a set of legal regulations: the [Health and Social Care Act 2008 \(Regulated Activities\) Regulations](#). These include a set of ‘fundamental standards’, below which care must never fall, including:

#### Regulation 9 – person-centred care

For visiting, this includes:

- Individual assessments to determine a person’s needs and preferences
- Visiting decisions and policies must take into account the above
- Supporting the person to understand and make informed decisions about visiting
- Involving the person (and their representative) in decisions about visiting
- Ensuring the person has the support they need to take part in decisions, such as their family or an advocate

“The individual must be at the centre of decisions around visiting.”

Kate Terroni, Chief Inspector of Adult Social Care, CQC

#### Regulation 10 – dignity and respect

For visiting, this includes:

- Individual assessments to determine a person’s needs and wishes
- Supporting the person to make their own decisions and choices about visiting as far as possible
- Ensuring visits happen in private

#### Regulation 12 – safe care and treatment

For visiting, this includes:

- Individual assessments to weigh the risks and benefits to the person’s health and wellbeing of visiting
- This should also take into account the risk to the person’s health and wellbeing of not having visits from family
- Acting reasonably when carrying out this balancing exercise: this standard recognises that some risks are inherent to carrying out care, which won’t be considered unsafe where providers take reasonable steps to manage risks

The CQC are assessing care homes' visiting policies and practice against these fundamental standards. Where they have concerns about care homes not complying with the guidance, they will investigate.

As a member of staff, if you have concerns that your care home's visiting policy or practice is not complying with the guidance or the law, you can report this anonymously to the CQC [here](#).

“We expect providers to follow government guidance on visiting... where we are made aware that this is not happening we will follow up with the provider and inspect if we consider that there is risk.”

Kate Terroni, Chief Inspector of Adult Social Care, CQC

## Equality Act

The [Equality Act](#) prohibits discrimination on certain grounds, including age and disability. It also prohibits indirect discrimination, which is where a practice or policy applies to everyone in the same way but has a worse impact on some people. This requires care homes to carry out individual assessments about visiting. Blanket decisions will not be permissible as homes are required to consider individual needs and apply different rules for different residents depending on their individual circumstances.

## Care Act

The [Care Act](#) contains an underpinning principle of wellbeing, which is reflected in the eligibility criteria for care and support used by local authorities. This includes:

- personal dignity, including treating the person with respect
- physical and mental health and emotional well-being
- protection from abuse and neglect
- control by the person over their day-to-day life
- participation in recreation
- family and personal relationships

The eligibility criteria is outcome focused, so how a resident will be supported to maintain personal relationships, for example, should be agreed with them, their representatives and the local authority and reflected in their Support Plan under the Care Act. Any changes to the agreed outcome and the plan will need to be agreed with all parties.

For more information see the SCIE [website](#).

## Mental Capacity Act

Where you have concerns about a resident's capacity to make a decision about visiting, you must ensure you are adhering to your legal duties and the process outlined in the [Mental Capacity Act](#). This requires a mental capacity assessment to take place and the home to make every effort to support the person to make the decision for themselves.

Where the person is found to lack capacity on a particular decision, the Mental Capacity Act sets out how to make a decision in their best interests. You must involve the resident as fully as possible, and consult as far and widely as possible including with their representatives and family to find out the person's values or wishes around contact with those important to them.

You must take the least restrictive option. This means that if you are restricting the person's access to their family, you must consider their rights and act in a way which respects and protects their right to family contact as far as possible. The decision should be about what is best for the person.

### Remember the 5 principles

Five principles underpin the Mental Capacity Act, which you should use to guide your work:

1. You must assume a person has capacity, unless proven otherwise
2. You must support individuals to make their own decisions by giving them all practical help to do so
3. People have the right to make unwise decisions, you must not treat someone as incapable of making a decision for this reason
4. Where a person is assessed as lacking capacity over a decision, you must act in their best interests
5. Before making a best interests decision on someone's behalf, you must consider whether the outcome could be achieved in a less restrictive way

For more information see the SCIE [website](#)

For residents who are subject to a Deprivation of Liberty authorisation, the home must adhere to any conditions attached to the authorisation. For example, if the authorisation has been made on the condition that the person is supported to have visits from a family member.

## Human Rights Act

Decisions about visiting engage several of residents' rights under the [Human Rights Act](#), as set out below. In the Act, rights are called 'Articles'.

### Right to life (Article 2)

This includes a positive obligation: where you know a person's life is at immediate risk, you must take reasonable steps to protect it.

Relevance to visiting decisions includes:

- ensuring the care home has adequate procedures in place to protect people from a known risk of the virus e.g. undertaking individual risk assessments, agreeing appropriate infection prevention and control procedures with visitors
- where a resident's life is at risk from isolation, taking reasonable steps to protect them e.g. if a resident has stopped eating, drinking or taking medication, allowing more/closer contact with family to offer emotional or practical support with their nutrition, hydration and health needs

### Right to be free from inhuman or degrading treatment (Article 3)

This includes a positive obligation: where you know a person is at serious risk of harm or neglect, you must take reasonable steps to protect them (better known as 'safeguarding')

Relevance to visiting decisions includes:

- where a resident is at risk of serious harm from isolation, taking reasonable steps to protect them e.g. if a resident is in severe distress, suffering emotionally, appears to be in pain but is unable to communicate why, is losing weight or starting to refuse food, drink or medication, allowing more/closer contact with family to offer emotional or practical support

### Right to private life (Article 8)

This includes:

- respecting and protecting people's wellbeing
- respecting people's autonomy and choices
- respecting people's privacy

Relevance to visiting decisions includes:

- undertaking individual risk assessments to balance the risk of the virus against the risk to wellbeing from restrictions on visiting
- where a resident is at risk of harm from isolation, taking reasonable steps to protect them e.g. if a resident is distressed or their mental or physical health is deteriorating, allowing more/closer contact with family to offer emotional or practical support

- ensuring individual risk assessments take into account a person's wishes and choices about visiting and their wellbeing needs are given due weight
- ensuring visits happen in private, so that conversations can take place without being overheard by staff or other residents/visitors

### Right to family life (Article 8)

This includes:

- respecting family relationships, which includes close friends as well as relatives
- protecting family relationships by taking reasonable steps to support on-going contact

Relevance to visiting decisions includes:

- ensuring visiting policies respect and protect resident's right to family life
- ensuring individual assessments take into account the importance of maintaining relationships significant to the resident

The right to private and family life is not an 'absolute right' which means that it can be restricted if the following three stage test is met:

1. lawful: there must be a law or policy which allows the restriction – this means the home's visiting policy must be clear, up-to-date and communicated to residents and their families
2. legitimate aim: you must have a legitimate reason for restricting this right, which can include the protection of health or protecting the rights of others (including other residents and staff)
3. proportionate: you must take the least restrictive action necessary to achieve that aim

### ? Key question: can you justify your visiting rules as the least restrictive alternative ?

The onus is on care homes to justify that their restrictions on visiting are proportionate. Some questions to explore:

- Have we carried out individual risk assessments?
- Have we taken into consideration the individual resident's rights, needs and wishes?
- Have we considered all the alternative options?
- Are there logistical barriers preventing access which can be overcome by using alternative approaches? (see worked example below)
- Have we considered how to manage the risk of the virus in a less restrictive way?

"The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance...What good is it making someone safer if it merely makes them miserable?"

Justice Munby in *X v MM*, 2007

For more information on ensuring proportionate responses, see the worked examples in the next section.

The duty under the Human Rights Act applies directly on care homes where a person's care is arranged or paid for (in any part) by the local authority (see section 73 of the Care Act). Public authorities – like the local authority and the CQC – have a duty to all residents, including a positive obligation to act where they know someone's rights are at risk. This means that if a resident/their representative/family has a concern that the care home is putting the resident's rights at risk, they can alert these types of bodies which have a duty to investigate.

Given this, and the fact that you are likely to have a mixture of residents whose care is arranged/paid for in different ways, good practice is to deliver a rights-respecting service to all residents. Taking residents' rights into account when devising the care home's visiting policy and implementing it will

allow you to demonstrate how rights have been considered and balanced, should you need to evidence this.

For more information, see BIHR's [resources](#).

## Worked examples

### Timed visits

A home is only allowing nominated visitors to attend for 30 minutes once a week in a designated visiting room, to give all residents chance to have a visit each week.

Some questions to explore:

- Is this policy based on individual risk assessments for the residents?  
This blanket approach fails to take into account individual needs, so is not permissible. Individual assessments are needed to consider the impact of a 30 minute visit for each resident, including whether such timed visits are appropriate for them and meet their wellbeing needs.
- Have you considered allowing visits to take place in residents' own rooms?  
This would allow the visits to be as long as appropriate for each resident, to better meet their wellbeing needs. It would also create a more natural, relaxing environment for the visit which will be more beneficial for the resident. Infection prevention and control processes can be agreed with visitors in advance.
- Are you allowing visitors to take tests at home and bring proof of negativity on their visit (as permitted now in the Government guidance)?  
This would reduce your admin burden for 'processing' visitors on arrival.

A proportionate outcome: the home conducts individual assessments for all residents which takes into account their needs and wellbeing. The home's infection prevention and control procedures are reviewed to put in place an agreement with nominated visitors about visiting in resident's rooms. The home's visiting policy is amended to allow nominated visitors to take a test at home, show a negative result on arrival, and proceed to the resident's room for the visit which has no time limit. The policy is circulated to relatives/friends along with the infection prevention and control procedures for visitors.

### Essential caregivers

A home is not allowing essential caregivers as it says residents' health and wellbeing needs are met by the care staff.

Some questions to explore:

- Is this policy based on individual risk assessments for the residents?  
This blanket approach fails to take into account individual needs, so is not permissible. Individual assessments are needed to consider the wellbeing needs of each resident and how an essential caregiver could assist with those.
- Have the individual assessments taken into account the views of the resident and their family?  
The visiting guidance is clear that a resident can now choose to nominate an essential caregiver. The resident's views and wishes should be identified via an individual risk assessment which involves their family. A copy of the outcome should be shared with them.
- Have the assessments considered residents emotional wellbeing needs?

The visiting guidance is clear that essential caregivers are intended to allow support from someone with a “unique personal relationship” with the resident. This is different from the support staff are paid to provide. It may be that the mere presence of an essential caregiver is beneficial for the resident. This is about respecting resident’s right to autonomy in the Human Rights Act, to choose an essential caregiver, and their right to wellbeing which covers physical *and* psychological wellbeing.

Remember essential caregivers are subject to the same testing, PPE and infection prevention and control measures as staff. Therefore, they will pose no greater risk to the resident than a member of staff – in fact, it is likely they will pose less of a risk as they will only be in contact with one resident (whereas staff have contact with multiple residents).

A proportionate outcome: the home notifies all residents, and their families, that they are able to nominate an essential caregiver. It conducts individual assessments for all residents which takes into account their physical and emotional wellbeing needs. Residents and families are invited to be involved in the assessments and give their views. Outcomes of the assessments are shared with the individual residents and their families, but the home communicates their policy and approach to all residents and families.

### More support

If you would like further information please get in touch with us. The Relatives & Residents Association [Helpline](#) can help you to explore how to implement the visiting guidance and meet your legal duties to residents.

Tel: 020 7359 8136 (9.30am – 1pm Monday to Friday, and 6-8pm on Thursday)

Email: [helpline@relres.org](mailto:helpline@relres.org)

Webchat: available at [www.relres.org](http://www.relres.org)