Visiting and the law
A guide for care homes during COVID-19

The Relatives & Residents Association
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About 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 information 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 in 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The Government guidance on visiting in care homes has been withdrawn and replaced with guidance on infection prevention and control, available here (published on 31 March). The guidance covers a wide range of issues and contains a section on visiting arrangements in care homes.

The guidance says that “contact with relatives and friends is fundamental to care home residents’ health and wellbeing and visiting should be encouraged. There should not normally be any restrictions to visits into or out of the care home”. The guidance emphasises that the right to private and family life is protected by law (Article 8 of the Human Rights Act – more info on this in the next section). Even in the event of an outbreak, or where a resident has confirmed covid, every resident should continue to have access to a minimum of one visitor at a time.

Types of visiting

Under the guidance, all care homes should be encouraging visiting. This includes:

- **Regular visits**: friends and family should be able to visit normally; untimed, indoors, without physical barriers or restrictions on physical contact
- **Visits during outbreaks**: visiting should continue following an individual risk assessment, and a minimum of one visitor at a time per resident should always be able to visit inside the home
- **End-of-life visits**: should “always be supported” without restrictions, regardless of outbreaks
- **Visits out**: there are no longer restrictions on visits out, nor the need to isolate or test on return

To be lawful, any restrictions on visiting must be a proportionate response to an identified risk, i.e. the least restrictive option – more information on this on page 8.

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Key question: are you encouraging visiting?

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.
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

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 consider the risk to the person’s health and wellbeing of being isolated
- Acting reasonably when making decisions about visiting: 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 or law 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.

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.

“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

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

Kate Terroni, Chief Inspector of Adult Social Care, CQC
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 or friends, 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 because you consider it to be unwise
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, supporting more contact with family to offer emotional or practical support with their nutrition, hydration or 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 physically or emotionally, appears to be in pain but is unable to communicate why, is losing weight or starting to refuse food, drink or medication, supporting more contact with family to offer emotional or practical support
- where a person is at the end of their life, taking action to support them to have as dignified a death as possible, including being able to spend quality time with the people important to them in their final year

Right to liberty (Article 5)
This right prohibits restrictions on people’s movement without a fair legal process.
Relevance to visiting decisions includes:
- where a person is prevented from leaving their care home or required to stay in their room for significant periods, the restriction on their movement must follow the process under the Mental Health Act or the Mental Capacity Act, including that they are able to challenge this deprivation of their liberty

Right to private life (Article 8)
This includes:
- protecting people’s wellbeing
- respecting people’s autonomy and choices
- respecting people’s privacy
Relevance to visiting decisions includes:
- undertaking individual risk assessments to consider the risk to wellbeing from isolation
- 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, supporting more contact with family to offer emotional or practical support
- ensuring individual risk assessments take into account a person’s wishes and choices about visiting
- 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 option?**

If your home is putting restrictions on visiting, these will be interfering with your residents’ right to family life. Therefore, to be lawful, all restrictions must pass the **three-stage test above**. This will include restrictions such as:
- only allowing a certain number of visitors
- timed slots
- not allowing visits at weekends
- not allowing visits to take place in residents’ own rooms

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?
- Have we considered how to manage the risk of the virus in a less restrictive way?

For more information on ensuring proportionate responses, see the worked examples below.

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, should you need to evidence this.

For more information, see BIHR’s [resources](http://www.relres.org).
Worked examples

**Restrictions on the number of visitors inside the home**

A care home is only allowing one visitor per resident.

**Outcome:** this is restricting resident’s right to family life (Article 8, Human Rights Act). Therefore, to be lawful this restrictions must pass the three-stage test…

**Outside of an outbreak:**

1. **Lawful:** is there a law or policy which allows this restriction?
   - Is there a lawful basis to restrict residents’ access to family and their autonomy to choose?
   - Without this, the restriction falls at the first hurdle and is an unlawful interference with residents’ rights. Government guidance now says contact with relatives and friends should be encouraged.

**During an outbreak:**

1. **Lawful:** is there a law or policy which allows this restriction?
   - Whilst government guidance advises that changes to visiting may happen during an outbreak, this advisory guidance does not override your legal duties under the Human Rights Act: you must still ensure a restriction on the number of visitors is necessary and proportionate…

2. **Meeting a legitimate aim:** what is the reason for restricting residents’ right to family life?
   - Can you demonstrate that this rule is necessary to protect health or the rights of others (such as other residents or staff)?
   - Can you show that you have identified the risk to health/the rights of others?
   - Have you considered the risk to wellbeing caused by the restriction?

3. **Proportionate:** is this rule the least restrictive action you can take to achieve that aim?

Restricting all residents to just one visitor is a blanket rule and therefore not permissible. Regardless of whether there is an outbreak, you must carry out individual assessments to consider the impact on residents.

   - Has a risk assessment been undertaken with your local health protection team to see if outbreak management measures are even needed?
   - Have you carried out individual risk assessments with each resident to consider the risk of the virus to them?
   - Have you included the resident and their representatives in this assessment and asked them their views on the identified risk, to protect their right to autonomy? (using the Mental Capacity Act where necessary – see above)
   - Have you considered the impact of the restriction on residents and whether it breaches their other rights to wellbeing and autonomy, or puts them at risk of isolation?
   - Have you considered all other options in consultation with the resident and their representatives that might achieve the same aim but be less restrictive? For example, if you have identified a resident is at particularly high risk from the virus, using less restrictive measures, such as increasing ventilation, use of PPE as appropriate in order to support visits to protect their wellbeing and prevent harm from isolation.
   - Have you assessed which residents might be at the end of life (defined as the final year of life) and therefore restricting access to the number of visitors may interfere with their right to be free from inhuman or degrading treatment – this right is ‘absolute’ which means it cannot be restricted
   - Have you taken into account the need for some visitors to be accompanied on visits, such as children or adults who need support, which you must facilitate as a reasonable adjustment under the Equality Act

**Acting proportionately means you mustn’t use a sledgehammer to crack a nut!**
**Restrictions on visits out**
A care home is not allowing residents to leave for visits out.
Outcome: preventing a person from leaving the place they live will interfere with their right to liberty (Article 5, Human Rights Act).

To be lawful, a restriction on liberty must:
- be for specific reasons set out in the right itself, this includes:
  - detaining a person under the Mental Health Act
  - depriving a person of their liberty under the Mental Capacity Act
- Procedural safeguards must be in place, including the person being able to:
  - challenge or appeal the decision
  - comment on all relevant documents which led to the deprivation of liberty

Blanket rules are not permissible. Individual assessments must be carried out, involving the resident and their representative, to ensure you are respecting their right to liberty.

Rights-respecting outcome:
The home reviews the care plans of all residents detained under the Mental Health Act or under a Deprivation of Liberty Authorisation. Individual assessments are carried out involving the resident/their representative and individual plans are put in place about visits out to respect their autonomy and liberty as far as possible. Remember the 5 principles of the Mental Capacity Act (above) particularly supporting individuals to make their own decisions and considering whether an outcome can be achieved in a less restrictive way.

For all other residents, the home amends its visiting policy to make it clear that visits away from the home will be supported, in order to protect people’s rights to liberty and autonomy.

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**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 6pm-8pm on Thursday)
Email: helpline@relres.org
Webchat: available at [www.relres.org](http://www.relres.org)