



House of Commons

House of Lords

Joint Committee on Human  
Rights

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# Care homes: Visiting restrictions during the covid-19 pandemic

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**Fifteenth Report of Session 2019–21**

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to the report*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

Since the start of the covid-19 pandemic, official guidance on care home visiting has prioritised the duty to protect residents' right to life (Article 2 ECHR), even where this has severely impacted the right to respect for private and family life (Article 8 ECHR). Over the last 14 months, family members—many of whom perform essential care giving roles—were either banned from visiting their loved ones or faced very significant limitations on their ability to be with them.

The human cost of the visiting restrictions has been vast. Despite the efforts of the hard-working and dedicated people who work in social care, we heard numerous reports of people suffering rapid declines in their physical and mental health as they were isolated from their families for over a year. It has been a powerful reminder of why the right to family life is so important. Of course the Government has a duty to protect the lives of residents in care homes. But it also has an obligation to uphold their right to family life and ensure that this is facilitated in practice.

As restrictions have started to ease in recent months, the Government's guidance, which applies in England only, has begun to reflect the importance of allowing care home residents to be with their families. As we called for earlier this year, the guidance now makes clear that care home providers should not impose blanket bans on visiting, but instead conduct individualised risk assessments for each resident.

But the Government's guidance does not have statutory force—it is not underpinned by legislation. As such, many care home providers are arguing that it is not yet safe to follow the guidance, denying care home residents these important family links as part of their right to family life. This is completely unacceptable.

This report focuses on the visiting restrictions in care homes that have been enforced in England. However, given the similarities of some of the restrictions and the shared challenges, many of our conclusions may well also be of relevance in Wales, Scotland and Northern Ireland. The report reiterates our call for legislation to require that individualised risk assessments are undertaken for each resident, and to ensure that procedures are in place so that such assessments can be queried where they have omitted relevant factors or not made adequate efforts to consider how covid-secure visits might be facilitated. We have prepared a draft statutory instrument to make sure this happens; the Government must now lay it before Parliament.

It is also clear that public authorities do not have a clear enough view of the scale of the non-adherence to the visiting guidance. It was astonishing to hear the Care Quality Commission claim that they were not aware of any care home in England that was not following the guidance, despite clear evidence to the contrary from residents and their families. The CQC urgently needs to put in place better processes for collecting data on visiting and monitoring adherence with the guidance.

# 1 Introduction

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1. The last 14 months have been some of the most difficult many of us have ever experienced. The Government has imposed extensive restrictions on our freedom in an effort to keep the most vulnerable in our communities safe from the covid-19 virus. For much of the year, we have all been stopped from being with people we love; we have seen family visits cancelled, celebrations postponed, and farewells missed. But few people have endured more over the last year than residents of care homes and their families.

2. In a future public inquiry, much will be written about decisions to discharge hospital patients back into care homes at the beginning of the pandemic, exposing those people most susceptible to the virus to such significant risk.<sup>1</sup> What is already clear is that the human cost of these decisions has been high, with the Office for National Statistics (ONS) estimating more than 29,000 excess deaths in care homes since March 2020.<sup>2</sup> Behind each of these premature deaths, there will be family and friends who grieve a painful loss, many denied the chance to say a proper goodbye. Thousands more families have suffered the uncertainty of waiting to find out whether their loved ones would also be lost to the virus.

3. While care home residents were left on the inside, families have been forced to wait on the outside. For much of the last year, there have been strict limitations on visits to care homes, particularly in parts of the country hardest hit by the pandemic. The ONS estimated that between 26 May and 20 June 2020, 97% of care homes in England were closed to visits.<sup>3</sup> As the year went on, areas in England which found themselves in the High (tier 2) or Very High (tier 3) alert level were advised that people should not visit except in exceptional circumstances.<sup>4</sup> Current guidance, which applies in England only, advises that residents should be allowed two named visitors who are able to enter care homes for regular visits, accompanied by babies and toddlers, while those with the highest care needs should also be allowed to nominate an essential care giver.

4. However, questions remain as to whether, without statutory underpinning, care home providers are actually implementing the Government's guidance in practice. When asked on the BBC's Today Programme in March 2021 whether care home providers were implementing it, the Chief Executive of Care England—a representative body for independent care providers—said, honestly but revealingly, “Well, of course, it is guidance, it's not mandatory”, arguing that the safety of residents was a higher priority.<sup>5</sup> Indeed, we are still aware of reports of blanket bans on visiting care homes, while other providers have imposed restrictions on visiting to just 30 minutes a week or forced families to endure ‘prison-like’ visits, permitted only to speak to their relatives through telephones behind plastic screens.<sup>6</sup>

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1 This Committee called for a public inquiry: [The Government's response to COVID-19: human rights implications](#), Joint Committee on Human Rights, Seventh Report of Session 2019–21 (HC 265; HL Paper 125), para 97 and the Prime Minister has said that one will happen “as soon as it is right to do so”, [HC Deb, 24 March 2021](#)

2 [ONS: Weekly death registration data](#), and [ONS: Average weekly deaths by place of occurrence 2015 to 2019](#)

3 ONS, [Impact of coronavirus in care homes in England: 26 May to 19 June 2020](#), 3 July 2020.

4 DHSC, [Local COVID alert level: high](#), 27 October 2020; DHSC, [Local COVID alert level: very high](#), 30 October 2020.

5 [Today Programme](#), BBC Radio 4, 10 March 2021

6 [Care homes: Anger as families kept apart as the watchdog fails to act](#), Daily Express, 1 April 2021

## Human rights engaged

5. Care home visiting restrictions engage human rights—in particular the right to life under Article 2 of the European Convention of Human Rights (ECHR), the right to liberty and security under Article 5 ECHR, and the right to respect for private and family life under Article 8 ECHR.

6. Article 2 ECHR imposes an obligation on the State to secure the right to life. It has two aspects: the substantive obligation to take appropriate steps to safeguard the lives of those within the state’s jurisdiction; and the procedural obligation to carry out an effective investigation into alleged breaches of the substantive obligation.<sup>7</sup> Although the right to health is not, as such, among the rights guaranteed under the ECHR, elements of it are protected by ECHR rights. For example, the European Court of Human Rights in Strasbourg recognises that some elements of the right to health fall within the positive obligation to secure the right to life.<sup>8</sup>

7. Article 8 ECHR protects the right to private and family life. This includes the right to maintain family relationships, for families not to be separated without due process and to permit regular contact. The issuing of guidance by Government intended to guide or direct providers—whether private or public—to limit visiting undoubtedly constitutes an interference with the Article 8 ECHR rights of both care home residents and family members. Article 8 is, however, a qualified right, and can be restricted in accordance with the law, where it is necessary and proportionate to do so. Such circumstances would include the protection of public safety, the protection of health, national security, the economic wellbeing of the country and the protection of the rights of other people, each of which are highly relevant to the situation in which we find ourselves. Article 8 also imposes a positive obligation upon the State to secure respect for the right to private and family life where the restrictions on that right are being placed not by State agents but by private actors.<sup>9</sup>

8. The question is how to balance these rights during a global pandemic. While protecting the right to life should always be a priority, the denial of the right to maintain meaningful family relationships, particularly over such an extended period, is likely to be in contravention of the right to family life under Article 8 ECHR.

9. Whilst the general lockdown restrictions have not generally been so restrictive as to engage Article 5 ECHR (deprivation of liberty), some specific restrictions could do so. This is particularly the case when there are not adequate exemptions to a rule restricting movement. There are concerns that the requirement for residents to isolate for 14 days following a visit outside of a care home, as set out in the Government’s guidance could engage the right to liberty under Article 5 ECHR.<sup>10</sup>

10. In order for an interference with Article 5 or 8 ECHR rights to be a lawful interference, it must be ‘in accordance with the law’. Therefore, given that this 14-day isolation ‘rule’<sup>11</sup>

7 Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania [2014] ECHR 972.

8 Lopes de Sousa Fernandes v Portugal [2017] ECHR 1174 at paragraph 166; for further information on the scope of Article 2, see our report: Chapter 4, [The Government’s response to COVID-19: human rights implications](#), Joint Committee on Human Rights, Seventh Report of Session 2019–21 (HC 265; HL Paper 125)

9 See for instance *Evans v United Kingdom* [2006] ECHR 200 at paragraph 75.

10 [Visits out of care homes](#), Department of Health and Social Care, updated 7 April 2021, and as discussed in Chapter 2

11 It is not, in fact, a ‘rule’ in a statutory sense, but rather a recommendation in guidance. It is, however, commonly referred to as a rule, so we use that term here.

is guidance rather set out in law, any attempts to enforce it would arguably not be ‘in accordance with the law’. It is therefore doubtful that this rule could be a lawful interference with a person’s Article 5 or Article 8 ECHR rights.

11. In general, only publicly-funded residents in care settings are able to raise arguments based upon the Human Rights Act 1998 (HRA) directly against the providers in those settings. The HRA only applies to care homes to the extent to which they can be said to be public authorities. This means, broadly, that the HRA only applies to care homes where they are run by a public authority. There is a clarification in the Care Act 2014 that the HRA applies where the care is local authority-funded. However, this means that those who are self-funders in care homes, or whose care is funded by the NHS, cannot directly rely on the HRA to raise human rights concerns in respect of the actions of the care home.

12. By contrast, a privately funded resident in a facility run by a private care provider would have to find a way in which to identify an organ of the State which is in some way responsible for failing to discharge its positive obligation to ensure that they are able to enjoy their right to private and family life in the face of interference by that provider. In reality, that privately funded resident could be in the next bedroom to a person whose case is funded by a local authority. These complexities emphasise the challenges faced by a privately-paying care home resident, or their family, seeking effectively to rely upon the HRA in a private care home.

13. Care home residents and their families can rely upon the HRA to challenge guidance issued by the Government and we outline specific problems with different guidance documents issued below. In practice, however, it is often the case that the real problem lies less with the guidance than the decisions taken by care homes and care providers themselves.

14. Importantly, to the extent that legislation relating to care providers sets standards for all facilities, then those standards will need to be respected for all residents. Further, the facilitation of visits to care homes is crucial to ensure compliance with human rights standards in care homes more generally. As with any closed environment, regular access for families and regulatory bodies helps to ensure that poor practices cannot go unchecked.

## **Our work on residential care homes**

15. In our report on the human rights implications of the Government’s response to covid-19, published in September 2020, we raised concerns about the impact of visiting restrictions on those living in residential care homes and said that blanket visiting bans for those deprived of their liberty were contrary to the rights of residents and their families under the ECHR.<sup>12</sup> We said that restrictions on visiting rights must only be implemented on the basis of an individualised risk assessment and such risk assessments must take into account the risks to the person’s emotional wellbeing and mental health of not having visits.

16. This report forms part of a broader inquiry into the Government’s response to covid-19 and the human rights implications of long lockdown. We have published two reports under this inquiry so far: first, on freedom of assembly and the right to protest;

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12 [The Government’s response to COVID-19: human rights implications](#), Joint Committee on Human Rights, Seventh Report of Session 2019–21 (HC 265; HL Paper 125), para 136

and second, on fixed penalty notices.<sup>13</sup> We have held three public evidence sessions on visiting in care homes, with an initial session in January 2021 and two further sessions in April 2021. We are grateful to everyone who gave evidence to the Committee and to our Specialist Adviser, Alex Ruck Keene.

17. This report focuses on the visiting restrictions in care homes that have been enforced in England. However, given the similarities of some of the restrictions and the shared challenges, many of our conclusions may well also be of relevance in Wales, Scotland and Northern Ireland. The report sets out how the Government's guidance on visiting care homes has evolved since the start of the covid-19 pandemic. We reflect on how the restrictions have affected residents and their families over the last year, including the specific challenges faced by younger care home residents with learning disabilities. The report considers the challenges that have been faced by care home providers as they have sought to balance the right of families to meet together with the need to protect the lives of residents. We note the inconsistent application of the guidance within the care home sector and consider whether the CQC has been effective in defending the rights of residents in care homes and their families. Finally, we reiterate our call for legislation to require that care home providers undertake individualised risk assessments before placing restrictions on visits.<sup>14</sup>

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13 [The Government response to covid-19: freedom of assembly and the right to protest](#), Joint Committee on Human Rights, Thirteenth Report of Session 2019–21 (HC 1328; HL Paper 252) and [The Government response to covid-19: fixed penalty notices](#), Fourteenth Report of Session 2019–21 (HC 1364; HL Paper 272).

14 As set out in the [Letter from the Chair to the Secretary of State](#), 3 February 2021

## 2 Government guidance during the pandemic

“We relatives all feel that we have had to watch for over a year now as our loved ones have deteriorated. **It has been like grieving for people who were still alive.** We watched them from windows, pods and the other side of the screen. People do not sleep. They are anxious, their jobs are affected, they have suicidal thoughts. They are constantly anxious about their loved one in a care home.”<sup>15</sup>

— Jenny Morrison, Co-founder, Rights for Residents

### Restrictions on visiting care homes during the pandemic

18. The UK entered its first national lockdown in response to the covid-19 pandemic on 23 March 2020. Government guidance setting out restrictions on care home visiting was published shortly after, in April 2020.<sup>16</sup> The guidance said that “family and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life.” It added that, “alternatives to in-person visiting should be explored, including the use of telephones or video, or the use of plastic or glass barriers between residents and visitors.”

19. In July, the Government’s advice was revised to permit limited visits to care homes, and in October further guidance was published, which applied only to areas under the Medium (Tier 1) alert level:<sup>17</sup>

[...] the first priority must remain preventing infections in care homes [however] care homes can now develop a policy for limited visits [...] on the basis of a dynamic risk assessment which takes into account the significant vulnerability of residents in most care homes, as well as in compliance with obligations under the Equality Act 2010 and the Human Rights Act 1998, as applicable.

[The decision on whether or not to allow visitors] is an operational decision and therefore ultimately for the provider and managers of each individual setting to make. [The] decision should be based on the advice from the [director of public health], as well as any additional advice or guidance from the local infection-control lead from the CCG, and the [Public Health England local health protection team].

20. This ‘Tier 1’ guidance also set out a number of factors that should be considered as part of the risk assessment, including that visits should be limited to a single visitor wherever possible, “with an absolute maximum of 2 constant visitors per resident”, visits should take place outside or in a well-ventilated room, appropriate Personal Protective Equipment (PPE) should be worn, and visitors should be supervised “at all times to ensure

15 [Q43](#) (Jenny Morrison, Rights for Residents)

16 DHSC, Coronavirus (COVID-19): admission and care of people in care homes, 2 April 2020.

17 DHSC, Visiting care homes during coronavirus, 22 July 2020, and DHSC, Visiting care homes during coronavirus, 15 October 2020.

that social distancing and infection control measures are adhered to.” For areas in the High (tier 2) or Very High (tier 3) alert level, the Government continued to advise that people “should not visit a care home except in exceptional circumstances, e.g. to visit someone who is at the end of their life.”<sup>18</sup> It is important to note that some parts of the country have been in either lockdown or Tier 2 (or above) since the beginning of the restrictions in March 2020.

21. As the second national lockdown began in November 2020, the Government updated its guidance on visiting care homes to say that “receiving visitors is an important part of care home life” and that “maintaining some opportunities for visiting to take place is critical for supporting the health and wellbeing of residents and their relationships with friends and family.”<sup>19</sup> It added that: “Care home providers, families and local professionals should work together to find the right balance between the benefits of visiting on wellbeing and quality of life, and the risk of transmission of covid-19 to social care staff and vulnerable residents as we enter national restrictions.”

22. Ahead of the transition to the new Tier system in December 2020, amended guidance was published, stating that “visiting should be supported and enabled wherever it is possible to do so safely—in line with this guidance and within a care home environment that takes proportionate steps to manage risks.”<sup>20</sup> A third national lockdown began on 5 January 2021, with ‘Stay at Home’ guidance setting out that “Visits to care homes can take place with arrangements such as substantial screens, visiting pods, or behind windows. Close-contact indoor visits are not allowed. No visits will be permitted in the event of an outbreak.”<sup>21</sup>

23. As the third national lockdown restrictions began to ease, amended guidance came into force in March 2021, advising care home providers that every care home resident should be able to nominate a single named visitor who will be able to enter the care home for regular visits. Residents with the highest care needs would also be able to nominate an essential care giver. Care homes could continue to offer visits to other friends or family members with arrangements such as outdoor visiting, substantial screens, visiting pods, or behind windows. The guidance made clear that individualised risk assessments should be completed for residents where necessary, including in respect of specific vulnerabilities set out in the resident’s care plan. Further changes to the guidance came into force on 12 April 2021, permitting care home residents to have two named visitors, accompanied by babies and toddlers who would not count towards the limit.<sup>22</sup> Visitors and residents should be able to hold hands, but visitors must be tested and wear PPE.

**24. Since the start of the pandemic, official guidance on care home visiting has prioritised the Government’s obligation to protect residents’ right to life (Article 2 ECHR), even where this has severely impacted on the right to respect for private and family life (Article 8 ECHR). While this may have been understandable in the short term, it is unacceptable to place draconian restrictions on the right to family life of those in residential care and their families for over a year. Of course the Government should seek to protect residents in care homes, but it also has an obligation to uphold their right to family life and ensure that it is facilitated in practice.**

18 DHSC, Local COVID alert level: high, 27 October 2020; DHSC, Local COVID alert level: very high, 30 October 2020.

19 Guidance on care home visiting, Department of Health and Social Care, November 2020

20 Guidance on care home visiting, Department of Health and Social Care, December 2020

21 [\(COVID-19\) Coronavirus restrictions: what you can and cannot do](#), Cabinet Office

22 [Guidance on care home visiting](#), Department of Health and Social Care, updated 6 April 2021

## Adequacy of the guidance

### *Families as essential care givers*

25. The emotional and physical support provided by families is vital to the health and wellbeing of care home residents. Professor Martin Green, Chief Executive of Care England—a representative body for independent care providers—described how care homes had a long-standing commitment to making sure that residents are supported by their families, which he described as “the most important relationship in their life” and no less their carer than the homes’ paid staff.<sup>23</sup> Jenny Morrison, co-founder of Rights for Residents—an organisation that campaigns to end the restrictions that prevent families from visiting residents in care homes—emphasised that family members were often “essential carers [...] who should be viewed as an extension of the care staff”, not an “added extra”:

It is not an added extra for somebody to help somebody who has dementia, who is in distress every day, or a child who is separated from a parent or parents who used to see them virtually every day or every weekend. Previous to the pandemic, they were just part of the care team. They offered a different sort of care.<sup>24</sup>

26. But the Government’s guidance during the pandemic continues to make a distinction between paid care staff and family members providing essential care giving roles. Ms Morrison questioned the scientific basis of this decision and noted that agency care staff had been permitted to travel between care homes, despite the level of risk that this posed to the health of residents compared to individual family members.<sup>25</sup> Indeed, a recent court case relating to lockdown restrictions said that a person’s physical needs could be met by paid carers, but their wider emotional and psychological need was to be seen and be cared for by their parents:

Further, care from a loving family is not a one-way street in which the focus is only on the person being cared for. Both NDG and AG plainly feel that they “need”, in the sense that it is important both to them and to NG, to provide NG with care. The very nature of this bond is undermined by the somewhat mechanistic approach of considering that there is no need for the parents to provide care because someone else can be paid to do so.<sup>26</sup>

27. Explaining the rationale for limiting access for family members with essential care roles, the Minister for Care, Helen Whately MP, told us that there was a need to keep the numbers of people in care homes to a minimum, while care home staff were given regular testing and PPE:

With each additional person who comes into a care home, there is a risk that they may bring covid in [...] Of course, some people have to go into the care home. Your care staff have to go into the care home. Someone is living in a care home because they need a substantial level of personal care, so you

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23 [Q47](#) (Professor Martin Green, Care England)

24 [Q46](#) (Jenny Morrison, Rights for Residents)

25 [Q42](#) (Jenny Morrison, Rights for Residents)

26 *NG (By His Litigation Friend, the Official Solicitor) v Hertfordshire County Council & Ors* [2021] EWCOP 2, paragraph 51.

have to enable your staff to be there [...] We have introduced regular testing for staff and training for staff in their use of PPE to reduce the risk of staff giving residents covid.<sup>27</sup>

**28. Close family members who provide care can be their relatives' most important care givers. They provide the emotional and physical support that a paid carer could never hope to replicate. The Government's guidance over the last year has not adequately acknowledged the importance of families to residents' wellbeing. It was wrong to deny essential care givers the right to see their relatives, especially when they could have played a crucial role in supporting the over-stretched care home staff during the crisis. Care home providers say they understand the importance of families to residents' care and wellbeing; they must show this in practice.**

### ***Consultation with key stakeholders***

29. Care England has been critical of the Government's processes for drafting guidance for the care home sector throughout the pandemic.<sup>28</sup> In evidence to this Committee, Professor Green admitted to ongoing frustration with the Department for Health and Social Care (DHSC). He told us there had been insufficient consultation with the care home sector and too short timescales between publication and implementation.<sup>29</sup> Jenny Morrison described her frustration at the "breakdown of communication" with the DHSC and the lack of consultation with residents groups prior to the publication of new or amended guidance:

It is very frustrating. We feel that the people who are involved in drafting the guidance are much further removed from the situation than they ought to be. Many of the large charities are invited to the meetings and committees where guidance is worked out, and they are sent drafts which are then sent back. At no point are people from relatives' groups or residents' groups invited to those discussions, and we feel that that should change.<sup>30</sup>

**30. The Department for Health and Social Care has not consulted widely enough when preparing new guidance for the care home sector or provided sufficient notice to families and providers when announcing significant changes to visiting procedures. Greater involvement for residents groups in the preparation of guidance would ensure that strong advocates for the right to private and family life are heard when key decisions are made.**

### **Restrictions on visiting out of care homes during the pandemic**

31. The Government has also issued guidance on visits out of care homes, which applies to residential care homes and care home residents of all ages and relates to visits where the resident leaves the care home premises.<sup>31</sup> The most recent update to the guidance was made in April 2021. In the guidance, the Government notes the importance of visiting out of care homes for residents' health and wellbeing. However, it also notes the potential risks of

27 [Q66](#) (Helen Whately MP, Minister for Care)

28 [Visiting Care Homes](#), Care England, 7 July 2020

29 [Q48](#) (Professor Martin Green, Care England)

30 [Q48](#) (Jenny Morrison, Rights for Residents)

31 [Visits out of care homes](#), Department of Health and Social Care, updated 7 April 2021

doing so and sets out that any resident who makes a visit out of the care home—including for exercise in a park or to sit outside at a hospitality venue—should be required to isolate for 14 days. This ‘rule’ therefore seems designed to deter not just, for instance, overnight visits to family homes, but also a short walk out from a care home by a person who is entirely capable of maintaining social distancing. It is also, in many situations, likely to give rise to restrictions upon liberty which the residents either cannot or—perhaps even more troubling—do not consent to. We note that the Government’s national lockdown guidance which has applied since 12 April does not place any restrictions on care home workers making such visits, despite the similar levels of risk involved.<sup>32</sup>

32. The Government acknowledges that, in practice, the requirement to isolate would mean that many residents would not want to make a visit outside of their home. Indeed, Lord Bethel of Romford, Parliamentary Under Secretary of State at the DHSC, told the House of Lords that it was, “entirely right that the protocols are in place in order to deter external visits”.<sup>33</sup>

33. Jenny Morrison expressed her view that the 14-day isolation ‘rule’ was “a blatant human rights abuse”, explaining:

It seems incredible to us that people, including carers who are looking after our loved ones, are now meeting up in gardens in groups of six and households of two, getting their hair cut, going to gyms, and yet our loved ones—let us remember that they have spent 13 months in isolation, virtually—cannot go out and enjoy a spring afternoon for two hours where there are no other people, maybe in a local park, unless they agree to come back to the care home and isolate on their own in their own room for 14 days. It is inconceivable, because most of them have been vaccinated.<sup>34</sup>

34. Professor Martin Green told us that the 14-day rule was “frankly ridiculous”, noting that this was particularly an issue for people with learning disabilities who often go and stay with relatives or students who go out to colleges or workplaces.<sup>35</sup> Zac Taylor, Director of Quality and Practice at Mencap—a charity for people with a learning disability—agreed, describing the rule as “unnecessary” and “very inhibiting” for many people.<sup>36</sup> He emphasised the importance of ensuring that people continue to have access to their communities:

The people we work with are of working age. Such people have lost access not only to people coming into their homes. In many cases, because they may need to shield, they have lost access to participation in the communities they live in. They may have lost jobs or significant valued roles in the community. People have a significant need to be out and to be part of the community again and not be seen only through the eyes of their vulnerability.<sup>37</sup>

35. Dr Éamonn O’Moore, a medical doctor and senior public health consultant specialising in the prevention and control of communicable diseases in closed and specialised settings at Public Health England, explained why this rule had been put in place:

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32 [\(COVID-19\) Coronavirus restrictions: what you can and cannot do](#), Cabinet Office, updated 16 April 2021

33 HL Deb (21 April 2021), Vol. 811

34 [Q48](#) (Jenny Morrison, Rights for Residents)

35 [Q49](#) (Professor Martin Green, Care England)

36 [Q49](#) (Zac Taylor, Mencap)

37 [Q54](#) (Zac Taylor, Mencap)

The challenge for visiting out for us, and what gives us pause to think about the risks that we may be managing, is that we will not have a perfect sight or understanding of the experience a person has when they leave the care setting. This is problematic, because there may be many examples where we could agree that some of those activities are probably low risk. The challenge has been trying to define that in a way that enables the intention to be delivered, which is to protect care homes and care settings that are at high risk of outbreaks, have experienced outbreaks, and have had severe experiences of outbreaks from incursion of infection from a person who has visited out and may have become exposed to a risk.<sup>38</sup>

The Minister for Care made clear her desire to see these rules reviewed at the earliest opportunity, acknowledging the importance of outside visiting to the wellbeing of care home residents.<sup>39</sup> Dr O'Moore said he was also conscious of the harm and impact that isolation has had on people in care homes and told us that the Government was currently consulting to see if there were ways to appropriately delineate activities that would not require extended periods of self-isolation. He told us he expected new guidance on out of care home visiting to be in place in May 2021.<sup>40</sup>

**36. There are clear benefits to residents' health and wellbeing from being able to visit a park or sit outside at a hospitality venue. There are specific concerns about the impact of isolation on younger residents with learning disabilities from their valued roles in the community. However, Government guidance requiring residents to self-isolate for 14 days if they choose to leave their care home—for even the shortest period—is excessive and clearly designed to discourage such visits.**

**37. It is difficult to understand how this 14-day self-isolation rule can be a proportionate interference with the rights of residents and their families to respect for private and family life under Article 8 ECHR. In many cases, it is likely to give rise to difficult questions of deprivation of liberty under Article 5 ECHR. It is not obvious how the resulting deprivation of liberty can be said, at present, to be necessary and proportionate for purposes of Article 5 ECHR.**

**38. Further, it is doubtful that self-isolation imposed on the basis of guidance would be 'in accordance with the law' and, therefore, were such self-isolation to be imposed, it does risk constituting an unlawful interference with residents' right to liberty and right to family life.**

**39. *It is right that the Government has committed to reviewing this guidance in May 2021. As the rest of us benefit from reduced lockdown restrictions, residents of care homes—the vast majority of whom have already been fully vaccinated against this virus—must not be left behind.***

## Residents and families: effect of restrictions

40. As we set out in our report on the human rights implications of the Government's response to Covid-19, published in September 2020, the impact of visiting restrictions on

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38 [Q73](#) (Dr. Éamonn O'Moore, Public Health England)

39 [Q73](#) (Helen Whately MP, Minister for Care)

40 [Q74](#) (Dr. Éamonn O'Moore, Public Health England)

care home residents during the pandemic has been profound.<sup>41</sup> Jenny Morrison of Rights for Residents told us the restrictions had taken a significant toll on the most vulnerable residents, many of whom—particularly those with dementia or learning disabilities—simply could not understand why they were being denied the right to be with their loved ones.<sup>42</sup> She described what had happened to her mother during the initial stages of the pandemic:

I was an essential part of Mum’s care before she went into a care home. My partner, my two sisters and I cared for her at home, and when she went into care that care did not stop. We had busy lives, and I ran my own business, but we still found afternoons and full days in the week to go and visit Mum. We gave her mental health support—sharing memories, playing music, singing, reading poetry, doing her nails [...] In the first lockdown, my Mum stopped eating. She could not feed herself, she could not drink, she stopped speaking. She was constantly anxious and cried a lot—all things, to be fair, that we had never really seen before—and the speed of that setting in was unbelievable.<sup>43</sup>

41. Jenny expressed her view that, for many older people in care homes—particularly those in the last years of life—“the quality of that life is just as important as the quantity of life”, but that the regulations had led to many older people “just existing... getting through the days”:

They are isolated, often for 24 hours a day, in a tiny room. People like my mum cannot watch television, switch on a radio or read a book or a magazine. She cannot walk out of a room or feed herself. She really has no rights to choose anything. The one thing that would make her life better would be to see a member of her family, and that right has to be balanced against the rights of other people who do not want visitors to come into a care home.<sup>44</sup>

Responding to the argument that some residents placed greater emphasis on their quality of life, the Minister for Care, Helen Whately MP, said:

I would say two things. I, too, recognise the limited time left. One thing is that, throughout the pandemic, we have always said that visits towards the end of life should absolutely be supported, recognising the importance of that particularly for the family members who visit their loved one [...] That should be in not only the weeks, but the months, leading up to what could be the end of somebody’s life to try to make sure that people would have the chance to spend that time together. [Secondly] You have different views as to what people want. The responsibility for the care home as well is to think not only about the individual, but about all the other individuals who could be affected [...] This is a very difficult situation in which we need to think about the whole of the care home, all the residents and staff, and therefore try to have visiting done in a way that really does mean that there is a very low risk of visiting introducing covid.<sup>45</sup>

41 [The Government’s response to COVID-19: human rights implications](#), Joint Committee on Human Rights, Seventh Report of Session 2019–21 (HC 265; HL Paper 125), para 135

42 [Q42](#) (Jenny Morrison, Rights for Residents)

43 [Q43](#) (Jenny Morrison, Rights for Residents)

44 [Q45](#) (Jenny Morrison, Rights for Residents)

45 [Q67](#) (Helen Whately MP, Minister for Care)

42. **The Government and care home providers have had a difficult job balancing the right of residents to a family life with the need to protect the right to life of all residents and staff. However, many providers have erred too far on the side of caution, to the significant detriment of residents and their families. Both the Government and providers should have done more to recognise the importance of quality of life for care home residents.**

### *Younger adults with learning disabilities and/or autism*

43. While care homes primarily support older people, it is important to remember that there are also thousands of young people in residential care settings, many of whom have learning disabilities and/or autism, who will have faced unique challenges over the last year—although, in many respects, their experiences will have been similar to older residents. Zac Taylor of Mencap explained that one of the main challenges is the nature of the care home settings for people with learning disabilities, some of which are more akin to family homes. This had made it a lot harder to put in the covid-secure protections that would be expected to facilitate visiting in those circumstances. Mr Taylor told the Committee:

There are various ways to be creative, but they are not available to everyone and it is particularly difficult for some people. Learning how to use new technology, such as video, to speak to your family member is particularly tricky for some people [...] There has been a distinct loss of connection with family, although organisations across the country have done the best they can to sustain it. It has definitely had an impact on people’s emotional well-being, and people are worn out by it.<sup>46</sup>

## Implementation of the guidance

### *Challenges for care home providers*

44. Care home providers and staff have faced difficult decisions over the last year, balancing the rights of residents to be with their families with the need to make sure that everyone is kept as safe as possible from the virus. Dr Éamonn O’Moore of Public Health England was absolutely right to describe all those people working in care homes as having achieved “heroic stuff in the truest sense of the word”.<sup>47</sup> **We admire the hard work and dedication of the thousands of care staff across the country who do such a brilliant job in very difficult circumstances.**

45. But care home providers and staff have nevertheless had to make these difficult decisions against the background of significant criticism of the sector, including from the Prime Minister, who in July 2020 said, “Too many care homes didn’t really follow the procedures in the way that they could have.”<sup>48</sup> Professor Martin Green of Care England told us he was “very confused and somewhat annoyed” by the Prime Minister’s comments and described how, at the start of the pandemic, care homes had been “pretty much abandoned” by other parts of the care system, including the NHS.<sup>49</sup> He explained that this

46 [Q43](#) (Zac Taylor, Mencap)

47 [Q73](#) (Dr. Éamonn O’Moore, Public Health England)

48 [Media interview with Rt Hon. Boris Johnson MP](#), Prime Minister, 6 July 2020

49 [Q42](#) (Professor Martin Green, Care England)

experience had made care home providers cautious about the reintroduction of visiting:

We saw over 30,000 deaths, as I said earlier, and in some care homes staff were having to deal with the fact that they were losing perhaps six or eight of their residents within a very short time [...] That was extremely traumatic for families, but it was also traumatic for the care home staff. At the start of the pandemic, we had all these different issues and we were all struggling to see how we were going to work our way through them, because the death toll was significant.<sup>50</sup>

46. There have also been other significant challenges for providers and staff. We heard that access to insurance had been a particular challenge for care home providers in facilitating visits for family members during the pandemic. Professor Green described the lack of access to insurance a “major issue” that the sector has been discussing with the Government for some time, but there had not yet been a resolution.<sup>51</sup> He explained that, while some providers had benefited from multi-year insurance agreements that were not affected by covid-19, others faced significant difficulties in arranging insurance during the pandemic. Care home staff have also needed to make profound personal sacrifices throughout the pandemic, with many living isolated from their own families for prolonged periods to avoid spreading the virus.

### ***Reports: care home providers not following the guidance***

47. We are aware that a large number of care home providers are still not following the Government’s guidance on visiting in care homes. Earlier this year, the Committee expressed concerns around the imposition of blanket bans on visiting and said that they were contrary to the rights of residents and their families under the ECHR.<sup>52</sup> We were pleased, therefore, to note that the most recent updates to the Government’s visiting guidance have made clear that individualised risk assessments should be completed for all residents when determining who should be able to visit them and how those visits should take place. The Care Quality Commission have reported that the incidence of providers imposing blanket bans, contrary to the Government’s guidance, is now much diminished, with the organisation aware of just 18 such cases at the start of April.<sup>53</sup> Of course, any blanket bans remain unacceptable and must be thoroughly investigated.

48. However, we are concerned with much more than just blanket bans. Any blanket restrictions would be contrary to the Government’s guidance that individualised risk assessments should be undertaken for all residents. Unfortunately, there have been several examples of draconian restrictions regularly reported in the media. In April 2021, for example, the Express described how some relatives have only been allowed to see their sick and dying loved ones from behind screens and talk to them on phones in what were described as ‘prison-like’ visits.<sup>54</sup>

49. When asked whether blanket restrictions like these were acceptable, the Minister told us that, while it would be acceptable for a care home to have a general policy on

50 [Q42](#) (Professor Martin Green, Care England)

51 [Q46 and Q47](#) (Professor Martin Green, Care England)

52 [The Government’s response to COVID-19: human rights implications](#), Joint Committee on Human Rights, Seventh Report of Session 2019–21 (HC 265; HL Paper 125), para 136

53 Reported in [Care homes: Anger as families kept apart as the watchdog fails to act](#), Express, 1 April 2021

54 [Care homes: Anger as families kept apart as the watchdog fails to act](#), Express, 1 April 2021

visiting, they should still undertake an individualised risk assessment to determine how that general policy might be varied for each care home resident:

I would understand that a care home may choose to share with its family members, for instance, “This is the policy that we are following”, but I would expect it to make exceptions from a general policy in line with an individual risk assessment that, if some individuals within the home needed something different, that would be appropriate to do.<sup>55</sup>

### ***The nature of the guidance: rules or advice***

50. The Government’s guidance is not underpinned by legislation. The uncertainty of its status means that care homes have not necessarily felt bound by it. Jenny Morrison of Rights for Residents, expressed her concern that many providers would continue to disregard the guidance or “cherry pick the parts that they want to run with and ignore the other parts”.<sup>56</sup> These fears appear to be well-founded. Professor Martin Green told us that individual providers should be the ones to decide the visiting rules for their care homes:

Because of the diversity of the sector, the differences in various parts of the physical estate and so on, and the differences in the level of frailty of some of the residents, some decisions have to be made by providers, but the starting point should always be that they will do everything they possibly can to reinstate visiting at the point when it is safe to do so.<sup>57</sup>

Professor Green described the Government’s guidance as providing “a framework within which people can aspire to making sure that the objective of the guidance is delivered in the most effective way possible”. He pointed to the “range of other things that are not guidance but law, which care providers have to comply with”, such as safety. Professor Green said that, where guidance conflicted with the law, it would be the responsibility of the care provider to comply with the law, not the guidance.

51. Ms Morrison said these comments summed up her frustrations with the guidance and told us that the views of families continued to be ignored in these decisions:

Many providers say that the things that we are asking for, meaningful visits, cannot be done because there is this issue and that issue, that this setting is different and that setting is not appropriate or, as Martin said, they will allow visits when it is safe to do so. They will allow people to provide care when they feel it is safe to do so, but that is a subjective view of somebody who is not related to the person who has the human right to a family life.<sup>58</sup>

52. Rights for Residents provided us with evidence of care home providers which had recognised the importance of allowing families to visit with their relatives and provided opportunities for meetings beyond the minimum required during the pandemic. Donna Pierpoint is the Registered Manager of the Broomgrove Trust Nursing Home in Sheffield. Broomgrove was one of the first homes in the country to allow family members to visit residents, allowing visits since July 2020. Ms Pierpoint said:

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55 [Q72](#) (Helen Whately MP, Minister for Care)

56 [Q50](#) (Jenny Morrison, Rights for Residents)

57 [Q50](#) (Professor Martin Green, Care England)

58 [Q51](#) (Jenny Morrison, Rights for Residents)

Many residents took very quickly to using Skype and FaceTime and other technology, but others didn't. The original lockdown proved there really is no replacement for face-to-face visits and we're determined to continue. Planning and managing them in a safe manner is hard, but these visits are so important. Relatives have been incredibly supportive of our decision.<sup>59</sup>

53. Professor Green explained that there were circumstances in which guidance from directors of public health in local government might differ from national guidance and there was insufficient clarity from Government about which guidance should take priority.<sup>60</sup> Dr Éamonn O'Moore of Public Health England told us that the Government had a "partnership approach" with local directors of public health, with the national approach informed by local experiences.<sup>61</sup> He told us that there were some places where local advice was given that was less enabling of visiting, but that he would be concerned if that advice was "diverting people away from the intention of national guidance to enable visiting when we believe that the conditions that we have identified to make that as safe as possible have been met". He said that, in such circumstances, there would be reasonable grounds for a challenge to those local rules.

54. The Chair of the Care Quality Commission (CQC)— the independent regulator of health and social care in England—Peter Wyman, told us that, "right the way through the pandemic that we expect guidance from the Government to be complied with."<sup>62</sup> The Minister for Care, Helen Whately MP, agreed, telling us:

[...] it is very carefully thought-through guidance on what is safe and balances the importance of visiting with protecting residents in care homes from the risk of covid. Therefore, I would expect care homes to follow that guidance. I recognise that some relatives of residents, for instance, may choose to wait until their relative has had their second dose of the vaccine and a few weeks after that to build up immunity before they, for instance, do an indoor visit, but that should be the resident and the relative's choice. I would expect care homes to follow the guidance as set out and give residents and their relatives the opportunity to visit in line with that.<sup>63</sup>

**55. It is right and proper for the Government to be challenged on the content of its guidance, as we have done so before and do so again here. But the Government's guidance should not be second guessed or selectively applied by care home providers, absent a cogent and clearly explained basis for doing so. If care homes are to depart from the guidance at any point, they must do so on the basis that it sets the floor, rather than the ceiling, in terms of supporting residents and their families to enjoy their Article 8 ECHR rights. It is also important that there is clarity as to whether national guidance should take priority over local guidance from a Director of Public Health.**

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59 [Correspondence from Jenny Morrison](#), Rights for Residents, 19 April 2021

60 [Q44](#) (Professor Martin Green, Care England)

61 [Q71](#) (Dr. Éamonn O'Moore, Public Health England)

62 [Q63](#) (Peter Wyman, Care Quality Commission)

63 [Q69](#) (Helen Whately MP, Minister for Care)

### ***Care Quality Commission: monitoring and complaints***

56. In March 2021, we wrote to the Chair of the Care Quality Commission, Peter Wyman, seeking information on the implementation of the new guidance by care home providers.<sup>64</sup> We asked about how many care homes are now fully complying with the new guidance, how many were not allowing visits (but within the guidance), and how many providers had introduced more restrictive visiting procedures since the introduction of the new guidance. We also asked about the number of complaints the CQC had received about visits, including: where visits have not been allowed at all; where visits have been permitted, but in a way which is unsatisfactory or not in accordance with the guidance; where complaints have been resolved in the complainants favour; and where complaints have not been resolved. We were disappointed that the CQC was not able to provide us with the information we sought. Professor Martin Green told us that the fact that the CQC did not have this information suggested “a real problem with data in social care”, and that this should be the sort of data that the CQC collected.<sup>65</sup>

57. When we asked Mr Wyman why the CQC was unable to tell us how many care homes were complying with the guidance, he apologised for any lack of clarity in his letter and explained that the CQC did indeed collect some data on care homes, but not quantitative data on the number of visits taking place in each care home.<sup>66</sup> When asked what form this data took, Mr Wyman said he was confident the CQC had a clear picture through reporting and inspections:

We are very interested in qualitative data that we can verify. This is not just asking for data from the homes that may or may not give you a complete picture. We are very much taking a qualitative view of whether what the home is providing at any point in time is appropriate to the circumstances of that home at that moment. This is constantly changing [...] We are much more interested in being sure that there are appropriate visitation rights—“appropriate” is obviously the key word—at a point in time. When we do an inspection, we will obviously look at wider data. If we are following up and we are concerned that there may not have been appropriate visiting because a resident’s family may have told us that, we can absolutely seek the data that you have suggested.<sup>67</sup>

58. The Government told us that they did collect data on visiting in care homes. The Minister for Care described how the Government built a view of whether the sector was adhering to its guidance:

We have two main ways of getting a sense of the situation. One is through the work that the CQC does [...] The other is the data collection system that we have established during the pandemic called the capacity tracker, which is filled in by social care providers. It up to them to do it. We strongly encourage it, I should say, and a significant proportion of care providers do fill it in frequently. That gives us a sense of the extent that visiting is going on. For instance, I have been looking at that since the latest guidance has

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64 [Letter from the Chair to Peter Wyman CBE DL, Chair of the Care Quality Commission](#), 12 March 2021

65 [Q53](#) (Professor Martin Green, Care England)

66 [Q60](#) (Peter Wyman, Care Quality Commission)

67 [Q61](#) (Peter Wyman, Care Quality Commission)

been published and have been seeing a steady increase in the number of care homes that say that they are supporting visiting, including supporting indoor visiting.<sup>68</sup>

59. We note that, despite the CQC having responsibility for monitoring and regulating care in England, such significant responsibility for collecting data resided with the DHSC. It was concerning that the CQC did not mention the Government's capacity tracker when we asked about their data sources. Responding to our suggestion that detailed, localised data be collected on adherence with the governments guidance and published on an accessible dashboard, the Minister said:

I would also like that, but I am aware of needing to be conscious of the sector that we are talking about here. We have around 15,000 care homes, some of which may have 100 or so residents and administrative staff and IT. They may be well set up to be able to report a substantial amount of data. Other care homes will only have a handful. They might be converted houses with five or six people living in them. Some will not even have a computer [...] Another thing that we have heard during the pandemic is quite a lot of resistance on the administrative and reporting requirements which the department has made of care homes.<sup>69</sup>

60. Despite the lack of reliable data, and in contradiction to the evidence we heard from residents and families across the country, both the Government and the CQC reported that there was no significant evidence of non-adherence to the guidance on visiting by care home providers. The Minister for Care said local authorities had told the Government that there were "only small handfuls of care homes that are not supporting visiting", and this was usually due to an outbreak of the virus.<sup>70</sup> Similarly, the Chair of the CQC told us "We are not aware of any home that is not providing appropriate visiting rights".<sup>71</sup>

**61. It is clear that public authorities do not have a clear enough view of the care home sector's adherence to the guidance on visiting. It was astonishing to hear the Care Quality Commission (CQC) claim that they were not aware of any care home in England that was not following the guidance, despite clear evidence to the contrary from residents and their families. The CQC needs to get a grip on what is going on in the care home sector and put in place more robust processes to monitor adherence with the Government guidance by the end of May 2021.**

**62. *The CQC urgently needs to establish better processes for collecting data and monitoring the right of care home residents to receive visitors. It should collect and publish live data on levels of visiting in every care home, the number of complaints that have been received and how these have been resolved. The CQC should immediately look at a sample of care homes to help it assess the sector's compliance with the government's visiting guidance.***

63. We heard that many residents found it difficult to report to the CQC about their care home provider's adherence to the Government's guidance. Jenny Morrison told us that many residents were worried that, even where it might be technically possible to make an

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68 [Q68](#) (Helen Whately MP, Minister for Care)

69 [Q68](#) (Helen Whately MP, Minister for Care)

70 [Q68](#) (Helen Whately MP, Minister for Care)

71 [Q60](#) (Peter Wyman, Care Quality Commission)

anonymous report, they would be identified by the provider and face retaliatory eviction:

[...] the CQC has a feedback form on its website, so if people have concerns about anything, including visits, they can fill in a feedback form. Some of the responses to the feedback form are, as we have said: “If you’re not prepared to name the care home or you want to remain anonymous, we can’t escalate this as a complaint”. We have a situation where relatives are absolutely terrified to be named or to name the care home, because while there are some amazing, brilliant care homes and care home managers, companies and staff, evictions from care homes are unfortunately on the increase.<sup>72</sup>

Ms Morrison reported that several members of Rights for Residents who had complained about visiting restrictions during the pandemic had been told by care home managers that they can “no longer meet the needs of their loved one, or that if they do not like the rules perhaps it would be better if they found another care home for their loved one.”

64. In response, the Chair of the CQC told us he did recognise the difficulties that many residents faced in raising concerns, particularly in smaller care settings:

I really understand why the families feel this way. Very often, the homes are quite small. They probably have raised their concerns already with the manager or the staff. I understand why they worry that, even if they have anonymously given this information, when we turn up asking questions the home will assume that they have been in touch with us. I understand the concern.<sup>73</sup>

The Minister for Care agreed that it would be difficult for residents in smaller care homes to make complaints, but told us that the CQC had been doing an “admirable job during the pandemic” and had worked “extremely hard and extensively to inspect and have oversight of care homes” despite the challenges they have faced.<sup>74</sup>

***65. It can be very difficult and intimidating for residents and families to escalate complaints about care home providers, particularly in small care settings. This is acknowledged by both the Minister and CQC. The Government and CQC must urgently work together to implement a new process for residents that guarantees anonymity and provides families with confidence that their relatives will not face retaliation for raising valid concerns.***

## **Statutory Instrument: individualised risk assessments**

66. In February 2021, we wrote to the Secretary of State for Health and Social Care concerning visiting in care homes and mental health hospitals. We warned that there was a significant risk that providers would reimpose unlawful blanket bans on visiting care homes during the third lockdown and called on the Government to put the requirements into legislation:

72 [Q53](#) (Jenny Morrison, Rights for Residents)

73 [Q60](#) (Peter Wyman, Care Quality Commission)

74 [Q75](#) (Helen Whately MP, Minister for Care)

We do therefore now believe that there is an urgent need for legislation to require that individualised risk assessments are done in relation to each resident or patient, and to ensure that procedures are in place so that such assessments can be queried where they have omitted relevant factors or not made adequate efforts to consider how covid-safe visits might best be facilitated.<sup>75</sup>

We drafted a Statutory Instrument for this purpose (which we have reproduced in an Annex to this report), ready for the Government to lay before Parliament at the earliest opportunity.

67. In response to our letter, the Minister for Care told us that the Government would pursue non-legislative routes where visiting was more restrictive than set out in the guidance, but that she had “an open mind about how best to make sure appropriate levels of visiting are taking place”:

To date we have been pursuing non-legislative routes where visiting is much more restrictive than our guidance, for instance, discussions with Directors of Public Health (DsPH) and targeted interventions by CQC. This approach recognises local knowledge of DsPH and that every care home will have specific circumstances. In the months ahead we will continue to monitor the level of visiting happening in practice. I have an open mind about how best to make sure appropriate levels of visiting are taking place.<sup>76</sup>

68. Several organisations have supported our call for legislation to clarify the status of the Government’s guidance. The Equality and Human Rights Commission has supported the Committee’s call for the Government’s visiting guidance to be made mandatory.<sup>77</sup> Jenny Morrison of Rights for Residents also supported our legislation.<sup>78</sup> Professor Martin Green of Care England told us he would support it, subject to clarification of rights, responsibilities and accountability within the sector:

I am in favour of it if you put it in the context of being clear about which bits of current legislation, responsibility and accountability need to change... I am absolutely in favour of this as long as it goes through all the contradictory pieces of legislation, pulls them all together and identifies which thing will take priority over other things in the legislative context.<sup>79</sup>

69. In evidence to us in April 2021, the Minister for Care reiterated her position that she would not rule out legislation:

I would absolutely keep an open mind on this. If we do not see visiting continue to open up in line with the current guidance, and, I hope, as we can encourage greater flexibility in future stages of the road map to open up further, we should continue to keep an open mind about the best way to make sure that people get to visit as they should.<sup>80</sup>

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75 [Letter from the Chair to the Secretary of State](#), 3 February 2021

76 [Letter from the Minister of Care to the Chair](#), 22 February 2021

77 [Letter from Baroness Kishwer Falkner, Chair of the Equality and Human Rights Commission](#), 21 April 2021

78 [Q52](#) (Jenny Morrison, Rights for Residents)

79 [Q52](#) (Professor Martin Green, Care England)

80 [Q70](#) (Helen Whately MP, Minister for Care)

*70. In February of this year we called for legislation to require that individualised risk assessments are undertaken for each resident, and to ensure that procedures are in place so that such assessments can be queried where they have omitted relevant factors or not made adequate efforts to consider how covid-safe visits might be facilitated. Since then, it has become apparent that our fears were well-founded. We have prepared a draft statutory instrument to address these concerns; the Government must now lay it before Parliament.*

## Conclusions and recommendations

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### Government guidance during the pandemic

1. Since the start of the pandemic, official guidance on care home visiting has prioritised the Government's obligation to protect residents' right to life (Article 2 ECHR), even where this has severely impacted on the right to respect for private and family life (Article 8 ECHR). While this may have been understandable in the short term, it is unacceptable to place draconian restrictions on the right to family life of those in residential care and their families for over a year. Of course the Government should seek to protect residents in care homes, but it also has an obligation to uphold their right to family life and ensure that it is facilitated in practice. (Paragraph 24)
2. Close family members who provide care can be their relatives' most important care givers. They provide the emotional and physical support that a paid carer could never hope to replicate. The Government's guidance over the last year has not adequately acknowledged the importance of families to residents' wellbeing. It was wrong to deny essential care givers the right to see their relatives, especially when they could have played a crucial role in supporting the over-stretched care home staff during the crisis. Care home providers say they understand the importance of families to residents' care and wellbeing; they must show this in practice. (Paragraph 28)
3. The Department for Health and Social Care has not consulted widely enough when preparing new guidance for the care home sector or provided sufficient notice to families and providers when announcing significant changes to visiting procedures. Greater involvement for residents groups in the preparation of guidance would ensure that strong advocates for the right to private and family life are heard when key decisions are made. (Paragraph 30)
4. There are clear benefits to residents' health and wellbeing from being able to visit a park or sit outside at a hospitality venue. There are specific concerns about the impact of isolation on younger residents with learning disabilities from their valued roles in the community. However, Government guidance requiring residents to self-isolate for 14 days if they choose to leave their care home—for even the shortest period—is excessive and clearly designed to discourage such visits. (Paragraph 36)
5. It is difficult to understand how this 14-day self-isolation rule can be a proportionate interference with the rights of residents and their families to respect for private and family life under Article 8 ECHR. In many cases, it is likely to give rise to difficult questions of deprivation of liberty under Article 5 ECHR. It is not obvious how the resulting deprivation of liberty can be said, at present, to be necessary and proportionate for purposes of Article 5 ECHR. (Paragraph 37)
6. Further, it is doubtful that self-isolation imposed on the basis of guidance would be 'in accordance with the law' and, therefore, were such self-isolation to be imposed, it does risk constituting an unlawful interference with residents' right to liberty and right to family life. (Paragraph 38)
7. *It is right that the Government has committed to reviewing this guidance in May 2021. As the rest of us benefit from reduced lockdown restrictions, residents of care*

*homes—the vast majority of whom have already been fully vaccinated against this virus—must not be left behind.* (Paragraph 39)

8. The Government and care home providers have had a difficult job balancing the right of residents to a family life with the need to protect the right to life of all residents and staff. However, many providers have erred too far on the side of caution, to the significant detriment of residents and their families. Both the Government and providers should have done more to recognise the importance of quality of life for care home residents. (Paragraph 42)
9. We admire the hard work and dedication of the thousands of care staff across the country who do such a brilliant job in very difficult circumstances. (Paragraph 44)
10. It is right and proper for the Government to be challenged on the content of its guidance, as we have done so before and do so again here. But the Government's guidance should not be second guessed or selectively applied by care home providers, absent a cogent and clearly explained basis for doing so. If care homes are to depart from the guidance at any point, they must do so on the basis that it sets the floor, rather than the ceiling, in terms of supporting residents and their families to enjoy their Article 8 ECHR rights. It is also important that there is clarity as to whether national guidance should take priority over local guidance from a Director of Public Health. (Paragraph 55)
11. It is clear that public authorities do not have a clear enough view of the care home sector's adherence to the guidance on visiting. It was astonishing to hear the Care Quality Commission (CQC) claim that they were not aware of any care home in England that was not following the guidance, despite clear evidence to the contrary from residents and their families. The CQC needs to get a grip on what is going on in the care home sector and put in place more robust processes to monitor adherence with the Government guidance by the end of May 2021. (Paragraph 61)
12. *The CQC urgently needs to establish better processes for collecting data and monitoring the right of care home residents to receive visitors. It should collect and publish live data on levels of visiting in every care home, the number of complaints that have been received and how these have been resolved. The CQC should immediately look at a sample of care homes to help it assess the sector's compliance with the government's visiting guidance.* (Paragraph 62)
13. *It can be very difficult and intimidating for residents and families to escalate complaints about care home providers, particularly in small care settings. This is acknowledged by both the Minister and CQC. The Government and CQC must urgently work together to implement a new process for residents that guarantees anonymity and provides families with confidence that their relatives will not face retaliation for raising valid concerns.* (Paragraph 65)
14. *In February of this year we called for legislation to require that individualised risk assessments are undertaken for each resident, and to ensure that procedures are in place so that such assessments can be queried where they have omitted relevant factors or not made adequate efforts to consider how covid-safe visits might be facilitated. Since then, it has become apparent that our fears were well-founded. We have prepared a draft statutory instrument to address these concerns; the Government must now lay it before Parliament.* (Paragraph 70)

# Annex: The JCHR's draft Statutory Instrument

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Statutory Instruments

**2021 No. xxxx**

National Health Service, England

Social Care, England

Public Health, England

*Made*

*[Date]*

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 8, 20(1) to (5A), 35, 86(2) and (4), 87(1) and (2) and 161(3) and (4) of the Health and Social Care Act 2008<sup>(81)</sup>.

In accordance with section 20(8) of that Act, the Secretary of State has consulted such persons as the Secretary of State considers appropriate.

A draft of these Regulations was laid before Parliament in accordance with section 162(3) of the Health and Social Care Act 2008, and was approved by a resolution of each House of Parliament.

- (1) **1.**—These Regulations may be cited as the Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2021.
- (2) These Regulations come into force on the day after the day on which these Regulations are made.
- (1) **2.**—Regulation 9 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 is amended as follows.
  - (2) After Regulation 9, paragraph (3), sub-paragraph (i), insert –
    - (j) “facilitating face to face contact between the service user and persons significant to the service user so as to meet the service user’s needs and preferences, having particular regard to their emotional and psychological needs;
    - (k) where the registered person determines following an individualised risk assessment that unrestricted face to face contact between significant persons and the service user is not possible, facilitating face to face contact with the significant person or persons whom the registered person reasonably believes best meets the needs and preferences of the service user;

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81 [2008 c. 14](#). Section 20 of the Health and Social Care Act 2008 (“the 2008 Act”) was amended by section 81 of the Care Act [2014 \(c. 23\)](#). Section 161(3) of the 2008 Act was amended by section 294(4) of the Health and Social Care Act [2012 \(c. 7\)](#).

(l) where the registered person determines following an individualised risk assessment that no face to face contact between any significant persons and the service user is possible, facilitating contact with significant persons in such other ways as best meets the needs and preferences of the service user and is in accordance with the individualised risk assessment.”

(4) After Regulation 9, paragraph (6). insert –

(7) In this regulation –

“face to face contact” means contact without fixed physical barriers between the service user and the significant person, but includes contact where the service user and/or relevant person or persons are wearing appropriate personal protective equipment if such is required to prevent or control the spread of infections, including those that are health care associated.

“an individualised risk assessment” means a risk assessment which considers:

- (a) The risks to the health and well-being of the service user both of having and not having face to face to contact with either two or more significant persons (for purposes of paragraph 3, sub-paragraph (k)) or one relevant person (for purposes of paragraph 3, sub-paragraph (I));
- (b) The risks to the health and well-being of other service users arising from the registered person facilitating face to face contact between the service user and a person or persons significant to that service user; and
- (c) The risks to the health and well-being of the service user (and to other service users) of alternative options for contact to minimise the risks identified in (a) and (b).

“significant person” means any person falling within section 4(7) sub-paragraphs (a) to (d) of the 2005 Act (whether or not the service user lacks capacity for purposes of the 2005 Act to decide whether or not to have face to face contact with them) and “person significant to the service user” is to be read accordingly.

Signed by the authority of the Secretary of State for Health.

*xxx*

Minister of State,

Department of Health

[Date]

## Declaration of Interests

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### **Lord Brabazon of Tara**

No relevant interests to declare

### **Lord Dubs**

No Interests declared

### **Lord Henley**

A family member in a care home, impacted by Government guidance.

### **Baroness Ludford**

No relevant interests to declare

### **Baroness Massey of Darwen**

No relevant interests to declare

### **Lord Singh of Wimbledon**

No relevant interests to declare

# Formal minutes

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**Wednesday 28 April**

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Lord Brabazon

Joanna Cherry MP

Lord Dubs

Baroness Massey of Darwen

Lord Singh of Wimbledon

Draft Report (*Care homes: Visiting restrictions during the covid-19 pandemic*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 70 read and agreed to.

Annex and Summary agreed to.

*Resolved*, That the Report be the Fifteenth Report of the Committee to both Houses.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 12 May at 2.40pm.]

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Wednesday 13 January 2021

**John**, husband of a care home resident; **Helen Wildbore**, Director, Relatives and Residents Association [Q1-8](#)

**Alison**, mother of young person detained in an assessment and treatment unit; **Matt Clifton**, Chief Executive, bemix; **Alexis Quinn**, Rightful Lives [Q9-15](#)

**Sarah Burrows**, Founder and Director, Children Heard and Seen [Q16-20](#)

### Wednesday 14 April 2021

**Professor Martin Green**, Chief Executive, Care England; **Jenny Morrison**, Rights for Residents; **Zac Taylor**, Director, Quality and Practice, Mencap [Q42-57](#)

### Wednesday 21 April 2021

**Peter Wyman CBE DL**, Chair, Care Quality Commission; **Kate Terroni**, Chief Inspector of Adult Social Care, Care Quality Commission. [Q58-64](#)

**Helen Whately MP**, Minister of State (Minister for Care), Department of Health and Social Care; **Dr Éamonn O'Moore**, SRO Adult Social Care C-19 Response, Public Health England [Q65-77](#)

# List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

## Session 2019–21

| Number             | Title   | Reference           |
|--------------------|---|---------------------|
| 1st                | Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report   | HC 146              |
| 2nd                | Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report  | HC 148              |
| 3rd                | Human Rights and the Government's Response to Covid-19: Digital Contact Tracing   | HC 343              |
| 4th                | Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report   | HC 256              |
| 5th                | Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities                | HC 395<br>(CP 309)  |
| 6th                | Human Rights and the Government's response to COVID-19: children whose mothers are in prison  | HC 518<br>(HC 518)  |
| 7th                | The Government's response to COVID-19: human rights implications  | HC 265<br>(CP 335)  |
| 8th                | Legislative Scrutiny: The United Kingdom Internal Market Bill   | HC 901<br>(HC 901)  |
| 9th                | Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill   | HC 665<br>(HC 1120) |
| 10th               | Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill   | HC 847<br>(HC 1127) |
| 11th               | Black people, racism and human rights   | HC 559<br>(HC 1210) |
| 12th               | Appointment of the Chair of the Equality and Human Rights Commission  | HC 1022             |
| 13th               | The Government response to covid-19: freedom of assembly and the right to protest   | HC 1328             |
| 14th               | The Government response to covid-19: fixed penalty notices  | HC 1364             |
| 1st Special Report | The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019                        | HC 313              |
| 2nd Special Report | Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21 | HC 1127             |

| <b>Number</b>            | <b>Title</b>  | <b>Reference</b> |
|--------------------------|---|------------------|
| 3rd<br>Special<br>Report | Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21 | HC 1120          |
| 4th<br>Special<br>Report | Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21  | HC 1210          |
| 5th<br>Special<br>Report | Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019        | HC 1317          |