

Clinical and Professional Advisory Group for Care Homes

By email: CareHomesCPAG@gov.scot

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To whom it may concern,

Visiting Guidance for Adult Care Homes in Scotland

The Scottish Human Rights Commission (the “Commission”) has recently been contacted by members of the public expressing their ongoing concern at the arrangements for visiting residents of Scotland’s care homes during the pandemic. It is also an issue which has been repeatedly raised through our impact monitoring work on social care throughout the pandemic of recent months. Many people have not seen their family members or friends since the start of lockdown, some 5 months ago.

The Commission notes that revised [guidance](#) was issued on 8 August 2020 containing updated advice with the aim of allowing indoor visiting to be re-introduced whilst minimising the risks to residents, staff and visitors. Garden visiting has been permitted since the beginning of July, although for some residents and families this has not been possible due to a variety of factors. We recognise that the guidance is evolving and welcome the opportunity to provide feedback.

The Commission acknowledges the stated aim of the guidance, which is to “balance the risk associated with more people coming into the care homes alongside the potential harm associated with the loss of contact with family and friends”. Indeed, the Commission has previously stressed that, as COVID-19 presents a threat to public health and a danger to life, particularly for older people or those with underlying health conditions, the state has positive obligations to minimise the risk

to life posed by the current outbreak.ⁱ The guidance is said to be based on a number of principles, for example taking a person-centred and evidence based approach and the acknowledgement that flexibility will be required. **The Commission stresses that the human rights of residents and their families, as well as staff, should be a foundational principle around which decisions on visiting are based and that this should be explicitly reflected in guidance and decision making.**

Article 8 ECHR protects the right to respect for private and family life, home and correspondence, and is particularly relevant to the issue of care home visiting. Article 8 is a qualified right, which means interferences with the right can be justified as long as they are: in accordance with the law; in pursuit of a legitimate aim; and necessary in a democratic society. Generally, interferences will be considered necessary in a democratic society for a legitimate aim if they answer a “pressing social need” (such as public health reasons), if they are proportionate to the legitimate aim pursued and if the reasons given by national authorities to justify the interference are relevant and sufficient. It is important to note that a measure that was once accepted as proportionate may cease to be, both having regard to the evolving nature of the pandemic and the changing health and wellbeing of individuals.

Article 5 ECHR protects against arbitrary or unjustified deprivations of liberty. Deprivations of liberty may take numerous forms, and determining whether someone is deprived of their liberty within the meaning of Article 5 requires an assessment of facts on a case by case basis. The Commission highlights that the degree of social contact available to a person is one factor, taken within the wider context, that will be relevant to the question of whether a person is deprived of their liberty. The Commission notes that other restrictions have been experienced by care home residents, for example reduced social contact in communal areas of care homes and restrictions on movement within the care home itself. The Commission therefore recommends that the relevance of Article 5 ECHR is taken into account in visiting guidance.ⁱⁱ

The latest guidance on visiting seeks to provide further information on essential visits, which have been permitted throughout the pandemic. The guidance states an essential visit is “one where it is imperative that a friend or relative is supported to see their loved one in the circumstances where their loved one may be dying or where they may help to ease significant personal stress or other exceptional circumstances. This should be facilitated by care homes throughout all stages of the visiting pathway.” As described above, the concepts set down by Article 8 ECHR provide a clear presumption against blanket decision-making. The Commission is concerned that the current definition leaves open the potential for wide variations in practice and suggests that further resources, for example case studies drawing on human rights principles, are developed to support care home managers when arriving at decisions.

The Commission recommends that the assessment of whether a visit is essential be linked specifically to human rights law, as outlined above, and that care home managers are supported to make these decisions. This means that cases should be assessed on an individual not a blanket basis, taking into account not only the risk posed by COVID-19 but also the circumstances of individual residents and their families.

The Commission is in the process of completing a report focusing on the impact of COVID-19 on human rights in social care, which is due to be published later this year. Interviewees representing a wide range of different actors and organisations in relation to social care contributed to the report. In relation to care homes, some interviewees highlighted the dynamic nature of the risk posed by COVID-19, fearing that the impacts on residents’ health and wellbeing was now disproportionate: “... *We have had a blanket infection control approach and it hasn’t been sufficiently distinctive.*” When asked about the various pieces of guidance that have been published relevant to social care, interviewees also expressed frustration that people who know and understand social

care, including disabled people and older people, had had very little opportunity to inform development of guidance.

The Commission therefore recommends those with direct experience, including residents and their families, should be involved in the development of guidance going forward. This is particularly important in planning for future crises, including a resurgence of COVID-19.

The above analysis is not intended to be exhaustive, and other rights including the right to non-discrimination on grounds such as age and disability (Article 14 ECHR and reflected across UN human rights treaties including the CRPDⁱⁱⁱ), the right to autonomy and participation in decision-making (Article 8 ECHR and Article 12 CRPD) and the right to health (Article 12 ICESCR^{iv}) are all relevant. The Commission has also published a number of [briefings, statements and reports](#) which highlight the range of human rights that are relevant to the response to the COVID-19 pandemic. The Commission hopes the above input is helpful, and we would be happy to discuss any points in further detail should that be useful.

Yours faithfully,



Judith Robertson
Chair

ⁱ Article 2 ECHR. See SHRC Briefing: COVID-19 Emergency Legislation Scotland, March 2020. Available at: <https://www.scottishhumanrights.com/covid-19/>

ⁱⁱ The Commission has previously addressed that some people in Scotland's care homes are in circumstances that may amount to a deprivation of liberty under Article 5 ECHR, for example people being moved from hospitals to alternative care settings. The Commission has highlighted the importance of procedural safeguards, particularly when people are moved from hospitals to alternative care settings, such as care homes.

ⁱⁱⁱ [Convention on the Rights of Persons with Disabilities](#)

^{iv} [International Covenant on Economic, Social and Cultural Rights](#)