Joint Committee on Human Rights
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From Rt Hon Harriet Harman MP, Chair

Rt Hon Matt Hancock MP
Secretary of State for Health and Social Care

By email.

3 February 2021

Dear Matt,

I am writing about the urgent situation in care homes and mental health hospitals regarding visiting. As we set out in our report last year, blanket visiting bans are contrary to the rights of both patients and their families under the European Convention on Human Rights, the Code of Practice to the Mental Health Act 1983, and NHS England guidance. Failure to adopt an individualised approach to the safety of visits risks breaching the right of patients, residents and their families to family life (Article 8 ECHR).

We said at that point that we feared that *"if nationwide visiting restrictions are brought back at some point in the future, […] this could result in the widespread re-imposition of unlawful blanket visiting bans which fail to take account of the individual circumstances of young people in mental health settings."* Last month we took evidence from relatives of those currently detained in mental health settings and care homes which demonstrated that this fear has sadly been realised.

Alison, the mother of a young women detained in an Assessment and Treatment Unit told us:

"We are not allowed to visit her. I have even asked for a window visit. That is excluded. […] That girl needs her mum and her dad. She went in with trauma, and she is further traumatised and in such a state that I do not know if we will ever get her back. She is seriously ill."

John, whose wife has dementia and is in care home, has only been able to have restricted visits over the past 11 months and is currently unable to visit at all as the home is closed due to an outbreak of covid-19 among the staff. He told us about their experience of visits taking place with a glass partition between them:

"Whether she knew I was there or not in those circumstances I do not know, but it was not a great deal of benefit to me. I could see how she looked and that was about it. They were not meaningful visits."

Helen Wildbore, Director of the Relatives and Residents Association and Matt Clifton, Chief Executive of Bemix and member of the Right2home campaign, confirmed that Alison and John's experiences are not isolated. Helen told us about the impact of visiting restrictions on those with dementia:

"It is also having a profound impact on people's well-being, which is protected by the right to a private life. Isolation is impeding people's mental health, particularly those living with dementia. It is causing distress and increased confusion. People think that they have been abandoned by their families. Too many people are passing away without the support and love of their families."

And Alexis Quinn who represents Rightful Lives and is an autistic woman who has experience of being in mental health detention told us about the profound impact that not having visitors would have on autistic people:

"[…] even if you have been in hospital for a short time, the effects of not seeing family and friends can be enormous. It can literally be the difference between having the will to live and wanting to give up. It can be the straw that breaks the camel's back, so to speak."

Article 2 and Article 8 rights

The families we spoke to and who have submitted written evidence to the Committee are acutely aware of the need to protect the right to life (Article 2 ECHR) for those living and working in care homes and hospitals. The very high number of deaths from covid-19 in care homes is a matter of the deepest concern and the Committee has previously called for a thorough investigation into these deaths in order to meet the state's procedural obligations under Article 2. The high rate of deaths from covid-19 for people with a learning disability, which is up to six times higher than for the general population, is also very concerning and must be investigated further.

In this context, some interference with the right to family life (Article 8 ECHR) is undoubtedly justified but this must be proportionate and only made on the basis of an individualised risk assessment. Such risk assessment must take into account the risks to the person's emotional wellbeing and mental health of not having visits. The evidence we have heard suggests that in some instances this is not happening consistently.

Need for legislation

Government guidance on visiting does stress the need for individualised risk assessment when considering visiting. For example, guidance to care homes updated on 12 January 2021 states that "[w]hen developing their visiting policies, providers should undertake individual risk assessments where necessary, to assess the rights and needs of individual residents, as well as any specific vulnerabilities which are outlined in the resident's care plan, and to consider the role that visiting can play in this."

We also welcome the fact that that in response to our previous recommendations, NHS England and NHS Improvement have written on a number of occasions to direct providers of mental health, learning disability and autism inpatient care stating that they must allow families to visit unless a risk assessment has been carried out that indicates it would be unsafe to do so.

Nevertheless, as outlined above we have continued to hear far too many examples of people being denied meaningful visits, where these might be safely facilitated, contrary to their right to family life (Article 8 ECHR). **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.**

We urge you to look at how other countries are tackling this, such as Canada, where in Ontario they have changed the law to allow access to care homes for a relative who is a designated care-giver, provided they test negative before each visit. This acknowledges that it takes a team to care for someone; dedicated staff in the home or hospital and loving family visiting.

We have appended to this letter our proposed legislative model for achieving a similar outcome in England. This would require that individualised risk assessments must be undertaken to facilitate face-to-face contact, where possible, with family and friends whose support is significant to resident in a care home or hospital setting. Where the risks posed by face-to-face contact were too great, the legislation would require that careful thought be given to alternatives to meet residents' needs, including their emotional and psychological needs.[1]

I would be very grateful if you could consider our proposal as a matter of urgency and respond to us by 17 February.

Yours sincerely

Harriet Harman

Rt Hon Harriet Harman MP
Chair of the Joint Committee on Human Rights

[1] This draft legislation covers all service providers regulated by the CQC. However, due to the scope of the Health and Social Care Act 2008, it would not cover those individuals in supported living accommodation who do not receive "personal care" as those providers are not regulated by the CQC. We are aware that the right to family life of people living in supported living accommodation has also been impacted upon by visiting restrictions. Although this group has not been the focus of the work we have undertaken, we urge the Government to ensure that measures taken to facilitate visits for care home residents, hospital patients and those receiving personal care in supported living accommodation are also applicable to all those living in supported living settings.

S T A T U T O R Y I N S T R U M E N T S

2021 No. xxxx

NATIONAL HEALTH SERVICE, ENGLAND

SOCIAL CARE, ENGLAND

PUBLIC HEALTH, ENGLAND

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2021

Made

xx February 2021

Coming into force in accordance with regulation 1

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([1]).

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.

Citation and commencement

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.

Amendment of Regulation 9

2.— (1) 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 –

[1] 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).

“(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;

(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 (l));

(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.

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Minister of State,

Department of Health

xxx February 2021