

# Liberty, Proportionality and Human Rights in Locked-Down Care Homes

Wayne Martin, Director  
The Autonomy Project  
University of Essex

<http://autonomy.essex.ac.uk>

Switalskis MCA Webinar Series  
4 March, 2021

News

**Covid-19: UK records first death, as world's cases exceed 100 000**

*BMJ* 2020 ; 368 doi: <https://doi.org/10.1136/bmj.m943> (Published 06 March 2020)

Cite this as: *BMJ* 2020;368:m943

One Year Later:

World Cases:	115,795,007
UK Deaths:	123,783

14 Mar., 2021 – 5 Feb., 2021

	<b>Deaths of care home residents</b>
Covid-19	37,895

## Judicial Review

*R (Gardner & Ors) v (1) Secretary of State for Health and Social Care (2) NHS England (3) Public Health England*



Dr Cathy Gardner's father Michael Gibson died in a care home in Oxfordshire

Judge: Thomas Linden, QC; status: leave to seek judicial review was granted Nov., 2020.

# Non-Judicial Review



Instron Universal Strength-Testing Machine

COVID-19 as Stress Test on our Systems  
(including our methods for making and reviewing care decisions)

Level 3: Applying a Human Rights framework in conditions of global pandemic.

Level 2: Reviewing Level 1 policy decisions to ensure human rights compliance.

Level 1: On-the-ground decisions about restrictive practices in care home settings.

### Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 2797 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



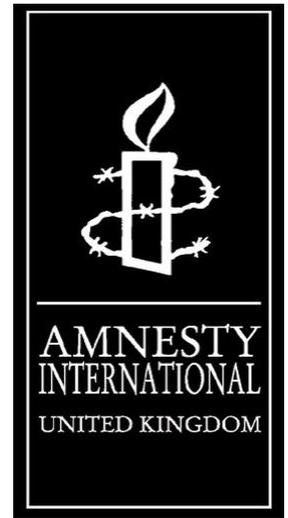
John, whose wife has dementia and is in care home, has only been able to have restricted visits over the past 11 months and is currently unable to visit at all as the home is closed due to an outbreak of covid-19 among the staff. He told us about their experience of visits taking place with a glass partition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

*Joint Committee on Human Rights, Letter to Matt Hancock, Feb. 2021*

## Level 1 Restrictive Practices

For five and a half months I only had window visits and during the last window visit I touched my mum's hand through the small window opening, having first used hand sanitizer. I did so because mum was in pain and was crying. A carer saw this and my mum was put in isolation for two weeks. My mum already had COVID two months earlier and both my mum and I tested negative two days after the incident, but despite this she was still kept in isolation for the full two weeks. This is unnecessary and cruel. Before lockdown my mum was mobile and I used to take her out often, but since lockdown she has been kept in a wheelchair and has deteriorated sharply. Yesterday I had the first garden visit and for the first time she could no longer have a conversation.

Amnesty International, *As If Expendable*



# Human Rights in Care Homes

## An **EAP Survey**



Essex Autonomy Project

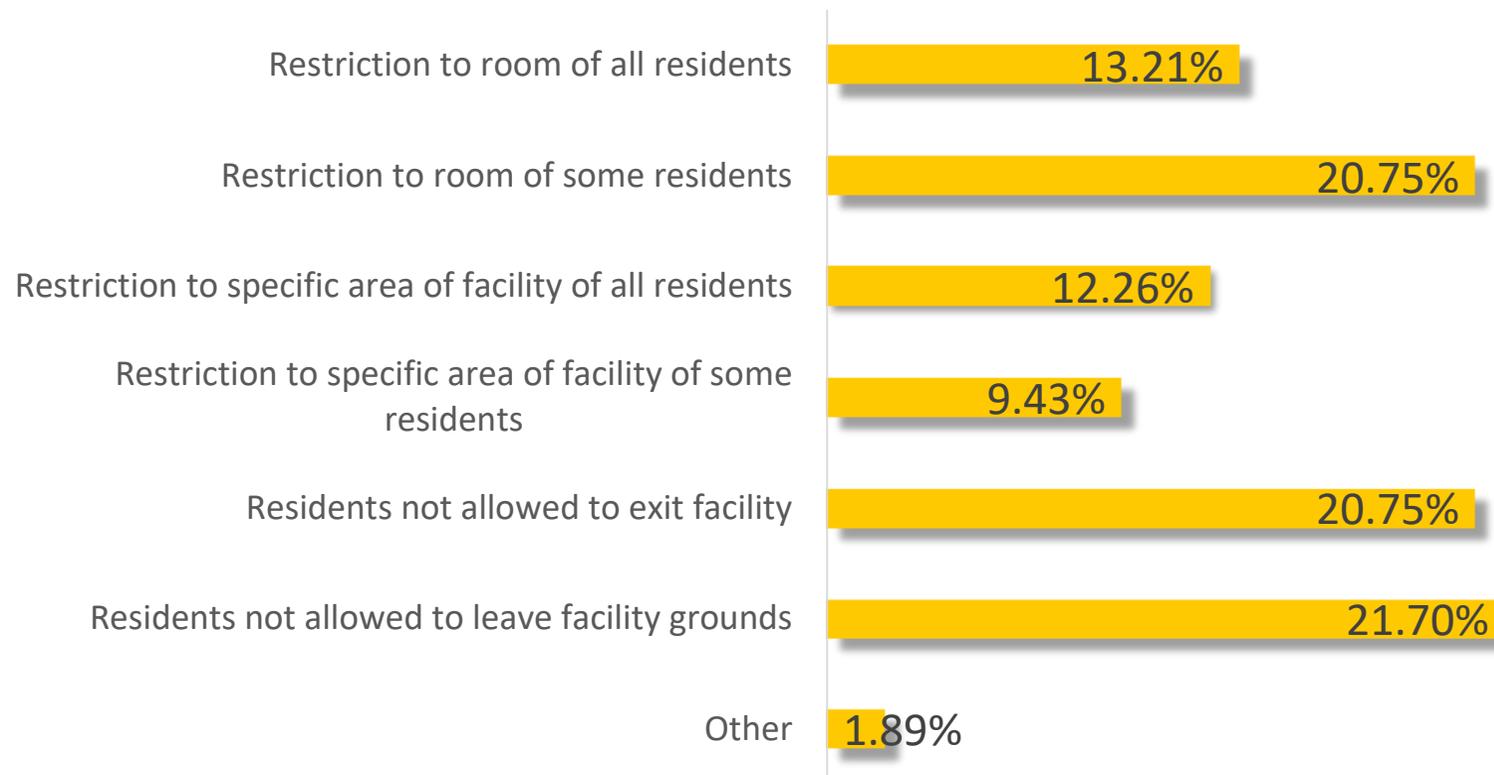
- Four themes:
  - (1) Restrictive measures
  - (2) Use of guidance
  - (3) Access to services
  - (4) Use of DNACPR orders



Arts & Humanities  
Research Council

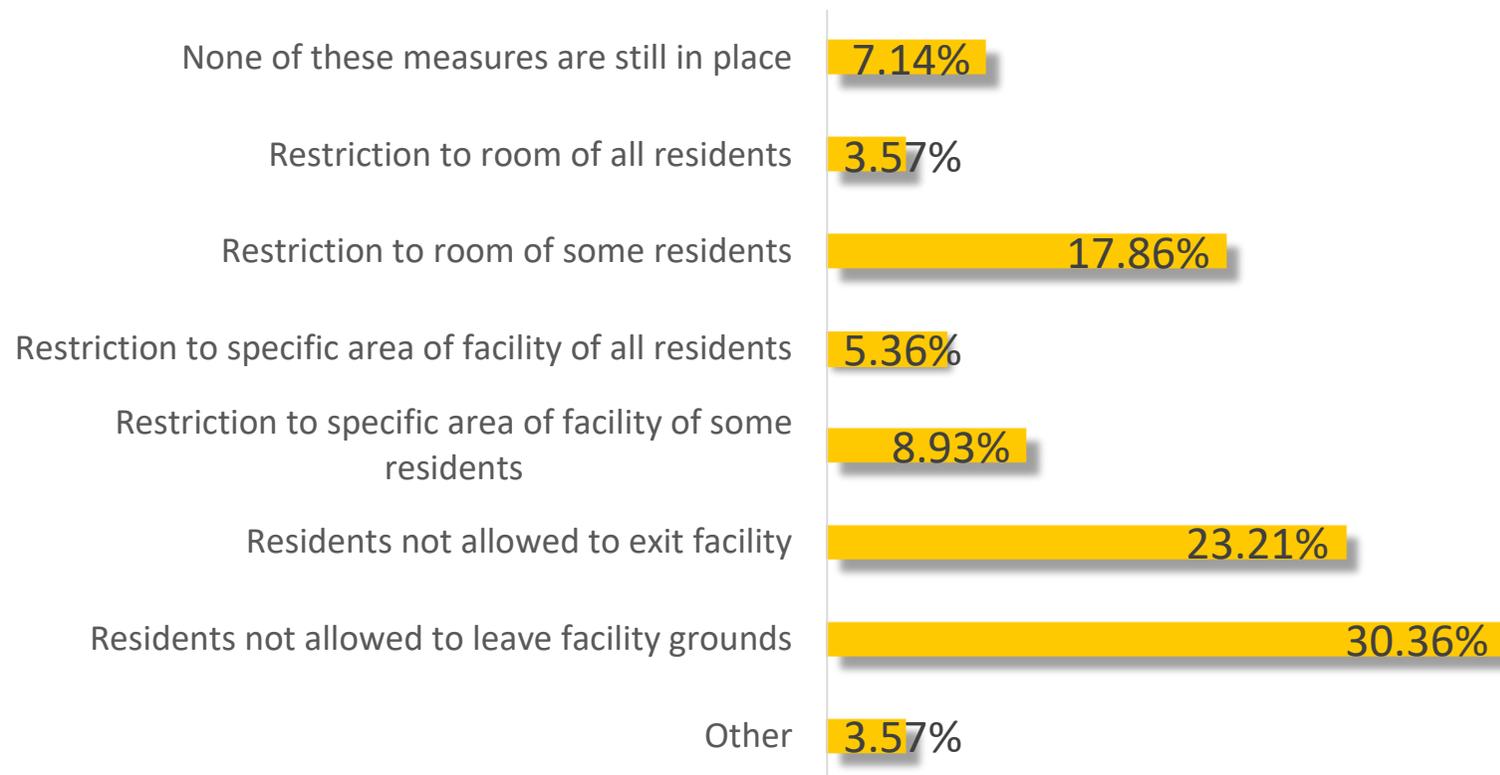
## Room restrictions

Which measures were implemented to restrict the movement of residents **at any point during the pandemic?**



## Room restrictions

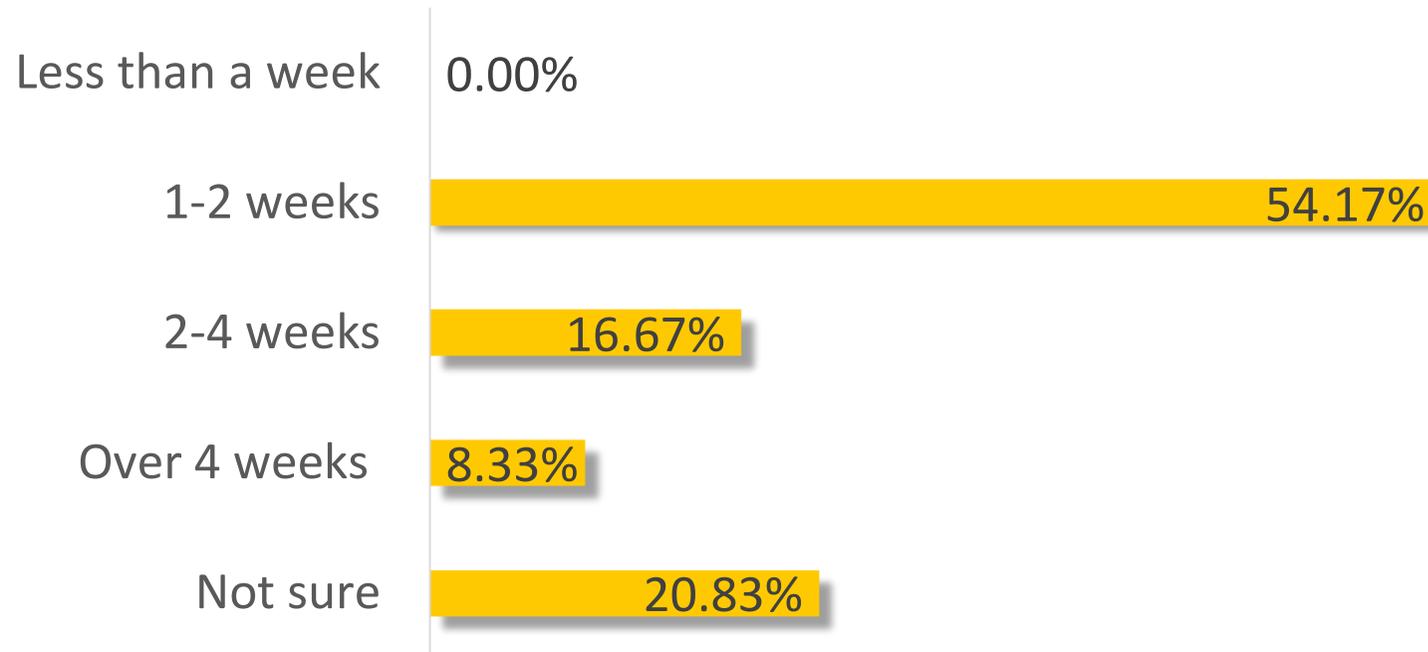
Which measures to restrict the movement of residents **are still in place** at this point in time? (March 2021)





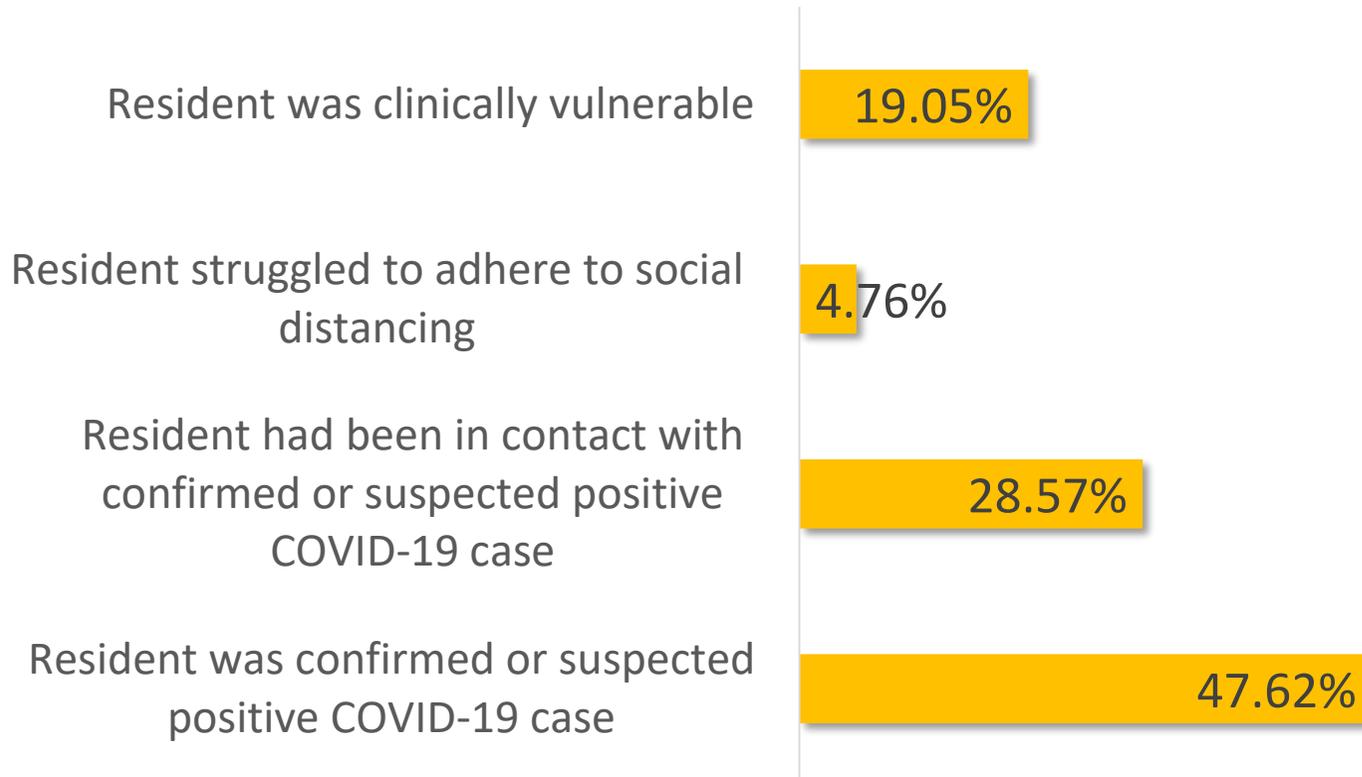
## Room restrictions

What was, approximately, the longest period of time that you saw a resident being restricted to their room?



## Room restrictions

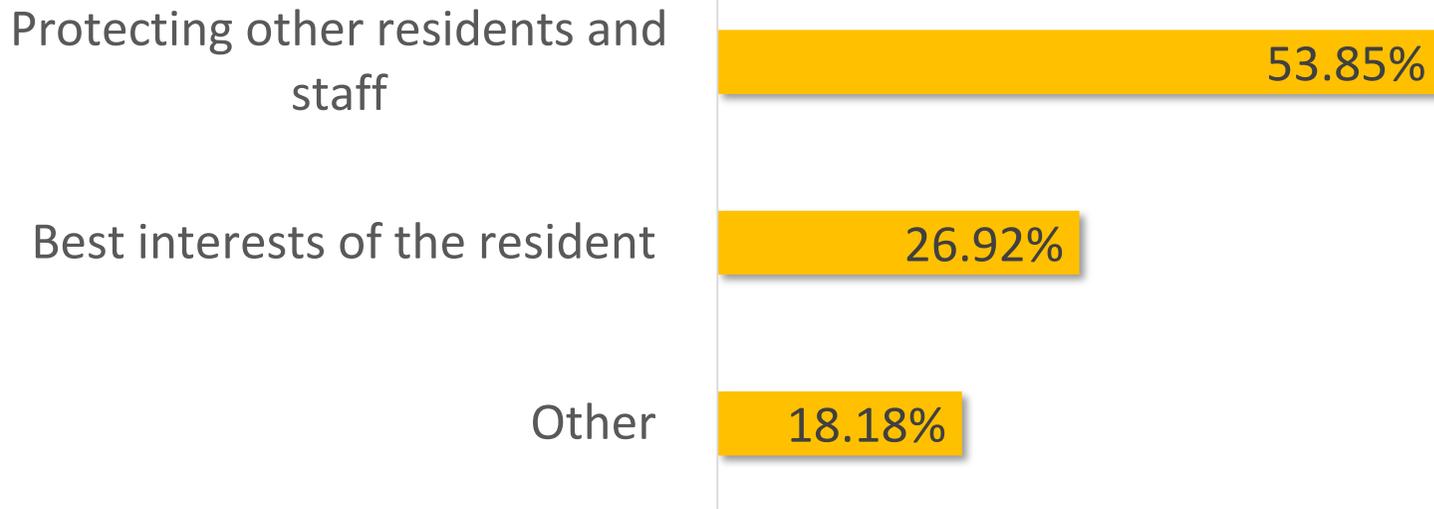
In your experience, on what basis were residents confined to their room? Tick all that apply.





## Room restrictions

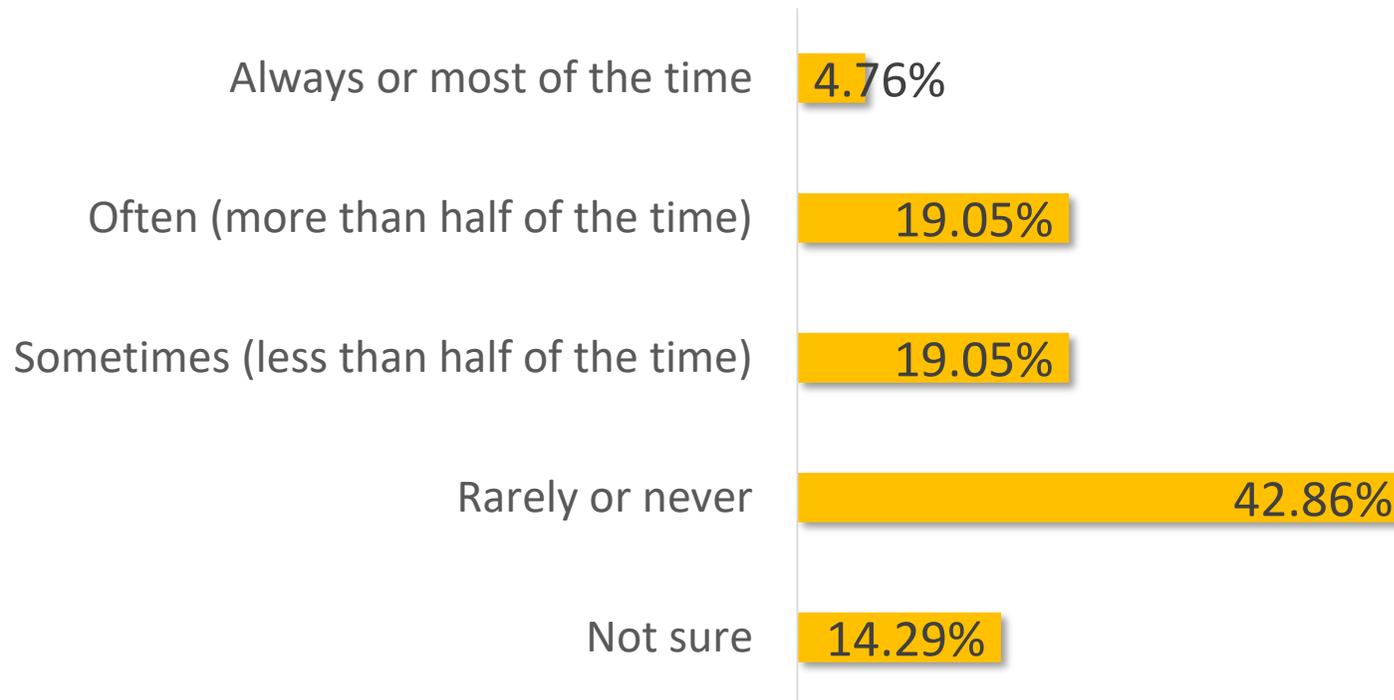
When residents were restricted to their room, what was generally the most important consideration?





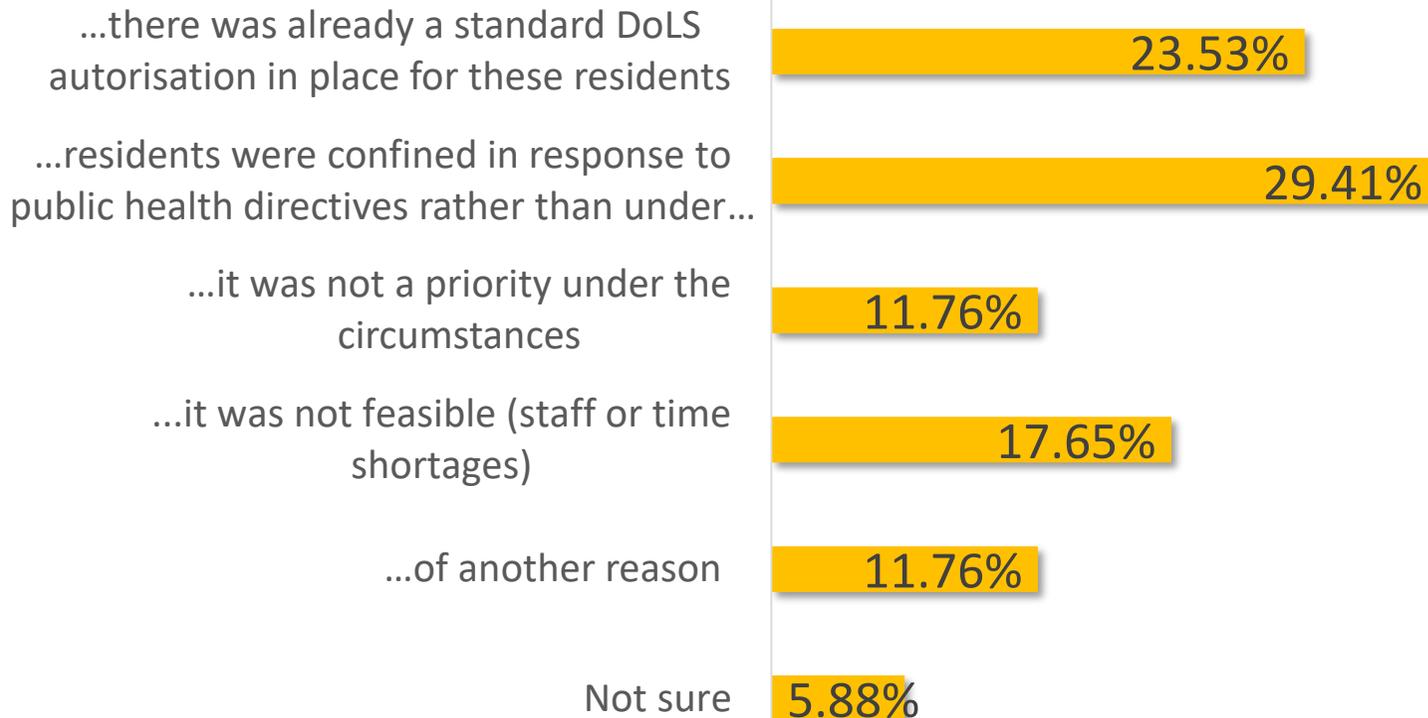
## DoLS authorisations

When residents with impaired decision-making capacity were confined to their room, how often was a new DoLS (Deprivation of Liberty Safeguards) authorisation provided?



## DoLS authorisations

When a new DoLS authorisation was not provided, this was usually because...



# Human Rights in Care Homes An **EAP Survey**



Essex Autonomy Project

To take the survey:

Send an email with the subject line “SURVEY” to

[autonomy@essex.ac.uk](mailto:autonomy@essex.ac.uk)



Arts & Humanities  
Research Council

Level 3: Applying a Human Rights framework in conditions of global pandemic.

Level 2: Reviewing Level 1 policy decisions to ensure human rights compliance.

Level 1: On-the-ground decisions about restrictive practices in care home settings.

- Restrictions on visitors
- Restrictions on residents' movements
- Confinement/Isolation

Level 3: Applying a Human Rights framework in conditions of global pandemic.

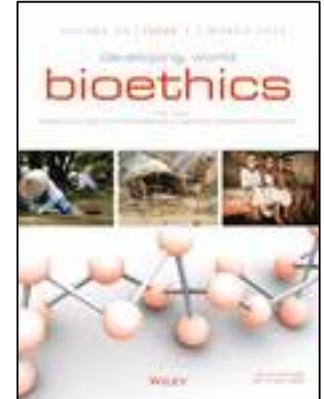
Level 2: Reviewing Level 1 policy decisions to ensure human rights compliance.

Level 1: On-the-ground decisions about restrictive practices in care home settings.

- Restrictions on visitors
- Restrictions on residents' movements
- Confinement/Isolation

Typically, the way triage system is structured especially during pandemic incidents often serve the goal of **utilitarianism**. That is, it aims at producing the greatest benefits for the greatest number of people.

Okorie 2019: 80



The aim of pandemic triage as set out in these protocols is primarily **utilitarian**. They seek to maximize the number of patients who survive.

Kaposy and Khraishi 2012: 73



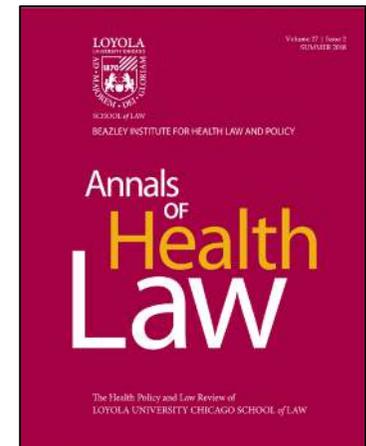
In the event of a pandemic influenza or other public health emergency, the demand for healthcare resources and services will dramatically increase. Out of necessity, scarce resources and patient care will have to be allocated so as to “do the **greatest good for the greatest number**”.

Florida Dept of Health 2009: 1



Triage relies on the utilitarian rationale and goal of achieving the maximum amount of good. In a purely utilitarian approach, actions are judged based on their benefits and whether they provide maximum utility to the general welfare, with little or no regard for moral rights.

Smith 2009: 11





INDEPENDENT

**Lord Falconer ‘very sorry’ for saying Covid is ‘gift that keeps on giving’ for lawyers**

### Level 3: Applying a Human Rights framework ...

Distinguish:

- ❖ Human Rights as a set of legal obligations.
  
- ❖ Human Rights as a tool for ethical reflection/analysis ...

... and as an *essential supplement to and qualification of* utilitarianism/consequentialism in responding to an emergency.

Level 3: Applying a Human Rights framework in conditions of global pandemic.

Level 2: Reviewing Level 1 policy decisions to ensure human rights compliance.

Level 1: On-the-ground decisions about restrictive practices in care home settings.

Level 2: Reviewing Level 1 policy decisions to ensure human rights compliance.



Mental Capacity Act 2005

**DoLS**

Deprivation of Liberty  
Safeguards

**LIBERTY PROTECTION  
SAFEGUARDS**

INSTRON

Proportionality

INSTRON



# DoLS

## Deprivation of Liberty Safeguards



Mental Capacity Act 2005

The relevant person meets the best interests requirement if all of the following conditions are met.

The first condition is that the relevant person is, or is to be, a detained resident.

The second condition is that it is in the best interests of the relevant person for him to be a detained resident.

The third condition is that, in order to prevent harm to the relevant person, it is necessary for him to be a detained resident.

The fourth condition is that it is a proportionate response to—



(a) the likelihood of the relevant person suffering harm, and

(b) the seriousness of that harm,

for him to be a detained resident. ]



## Mental Capacity Act 2005

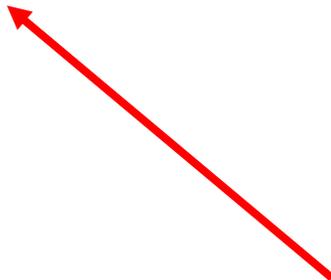
## LIBERTY PROTECTION SAFEGUARDS

### PART 2 AUTHORISATION OF ARRANGEMENTS

#### *The authorisation conditions*

13 The authorisation conditions are that—

- (a) the cared-for person lacks capacity to consent to the arrangements,
- (b) the cared-for person has a mental disorder, and
- (c) the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.



# DoLS

## Deprivation of Liberty Safeguards

## LIBERTY PROTECTION SAFEGUARDS

Is the deprivation of liberty:

In P's best interests?

Necessary?

Proportionate?

Is the deprivation of liberty:

In P's best interests?

Necessary?

Proportionate?



## Necessity and Proportionality:

### A Collaborative Socio-Legal Approach

**Aim:** To articulate and refine the standards of necessity and proportionality used in practice by DoLS Assessors.

**Method:** Iterative facilitated group work with BIAs and §12 doctors.



## Results:

### NECESSITY

- “Necessary” means required, essential, vital, ‘a must,’ something that has got to be done.
- “Necessary” means that something is borne out of need and that there would be harm without it.
- If something is necessary, it is for a purpose and proposed measure is the only way to address relevant risks.



## Results:

### PROPORTIONALITY

- The concept of proportionality suggests the idea of balance: rights versus harm, safety versus independence.
- The proportionality assessment is where the (potentially negative) impact of protective measures on the person must be considered.
- In assessing proportionality, the question must be asked: Does the end justify the means?



## Results:

### *VIA NEGATIVA*

- A useful strategy in assessing proportionality is to reverse the question.
- Don't ask: Is the measure proportionate?
- Ask instead: Is the measure *disproportionate*? Is it "overkill"? Is it "worth the candle"?

## Problem 1: The Limits of the *Via Negativa*



Where the stakes are sufficiently high, nothing seems disproportionate!



Problem 2: Both DoLS and LPS focus (narrowly?) on risk of harm to P.

## DoLS

### Deprivation of Liberty Safeguards

The fourth condition is that it is a proportionate response to—

- (a) the likelihood of the relevant person suffering harm, and
- (b) the seriousness of that harm,

**LIBERTY PROTECTION  
SAFEGUARDS**

(c) the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.

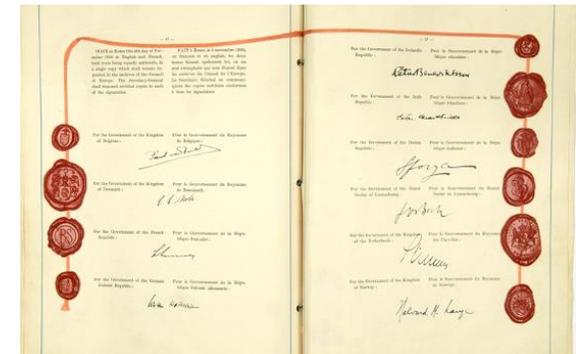
COVID-19 as Stress Test on our Systems  
(including our methods for making and reviewing care decisions)

Level 3: Applying a Human Rights framework in conditions of global pandemic.



Level 2: Reviewing Level 1 policy decisions to ensure human rights compliance.

Level 1: On-the-ground decisions about restrictive practices in care home settings.



## A Four-Step Proportionality Test

- 1) whether the measure's objective is sufficiently important to justify the limitation of a fundamental right;
- 2) whether it is rationally connected to the objective;
- 3) whether a less intrusive measure could have been used; and
- 4) whether a fair balance has been struck between the rights of the individual and the interests of the community.

*Huang v Secretary of State for the Home Department and Kashmiri v Secretary of State for the Home Department [2007] UKHL 11*

## Broad Proportionality Concept



### A Four-Step Proportionality Test

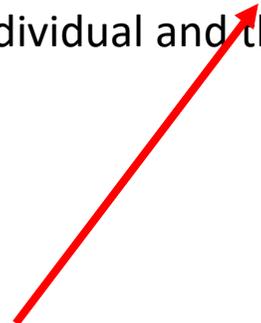
- 1) whether the measure's objective is sufficiently important to justify the limitation of a fundamental right;
- 2) whether it is rationally connected to the objective;
- 3) whether a less intrusive measure could have been used; and
- 4) whether a fair balance has been struck between the rights of the individual and the interests of the community

No problem passing first step for restrictive COVID measures.



A lot of heavy lifting can be done with (2) & (3)

& implicates interests of the community



Narrower Concept is normatively laden

Narrower Proportionality Concept

## Conclusions:

- Restrictive measures continue to be a highly significant human rights issue in care homes during the pandemic.
- The MCA/DoLS/LPS legislation is a critical part of the system for ensuring respect for human rights in care homes impacted by COVID.
- The MCA/DoLS/LPS system has been “stressed” by the challenges of COVID, particularly in applying proportionality tests to restrictive measures.
- Some tried-and-true methods for operationalizing the proportionality test under DoLS (e.g., the *via negativa*) may not be sufficiently robust for meeting the challenge.
- But the broader tradition of human rights jurisprudence is a well of resources that may help in navigating the challenge.

# EAP COVID/Care Homes Research team



**Prof. Wayne  
Martin**  
EAP



**Prof. Sabine  
Michalowski**  
School of Law



**Dr. Vivek Bhatt**  
EAP



**Dr. Margot  
Kuylen**  
EAP



**Dr. Aaron Wyllie**  
School of Health  
and Social Care

# Human Rights in Care Homes

## An **EAP Survey**



Essex Autonomy Project

To take the survey:

Send an email with the subject line “SURVEY” to

[autonomy@essex.ac.uk](mailto:autonomy@essex.ac.uk)



Arts & Humanities  
Research Council