

BIHR's response to the Department of Health & Social Care's Consultation on Changes to regulations relating to the Care Quality Commission

June 2024

Do you agree or disagree with the proposal?

Don't Know

Question: Please explain your answer. (Do not include any personal information.) (maximum 300 words)

Our response is written together with Lived Experience Experts who have experience of inpatient mental health services or are practitioners working in mental health settings.

We agree with the principle of introducing a measure to report the use of all forms of restraint within 72 hours with the aim of increasing the accountability of registered providers. Accountability and learning are key elements of the procedural duty under the Human Rights Act which all public officials are bound by. We do however, have concerns that:

- a reporting duty alone will not effectively decrease the use of restraint. Reporting focuses only on the use of restraint after it has happened. Key to achieving recommendation 4 in the CQC's [Out of sight](#) report is the embedding of human rights within health and care services. To do this, staff must be supported to use human rights frameworks to make rights respecting decisions that are less likely to lead to restraint in the first place.
- the proposed data set misses key opportunities for learning. Importantly, it does not include qualitative data about what happened post restraint e.g. if there was a debrief or changes to care planning and if the person was involved in this. If there is no requirement to report on this, the CQC cannot fully assess if a mental unit has culture in which practitioners are supported to review, reflect and learn from approaches to restraint.
- Within the data there is no opportunity for the person who experienced the restraint to have their views heard. We know that restraint often has a

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serious and long-term impact on a person. Without the perspective of the person and data which understands the impact on them, potential breaches of a person's human rights may be missed.

Word count 288

Question: Do you agree or disagree with the proposal that the regulations should apply to all patients in CQC-registered mental health units

Agree

Question: Please explain your answer. (Do not include any personal information.) (maximum 300 words)

Human rights are universal. All people no matter who they are should have equal access to individualised rights respecting care in mental health units. Where it cannot be objectively or reasonably justified, people should not be treated differently or be subject to different standards solely because of their health or disability (in line with the [Article 14](#) human right to be free from discrimination).

From our direct work with both people with lived experience of restraint and practitioners working in inpatient mental health settings, we know that in reality not everyone is able to equally access their rights, and that certain groups of people disproportionately experience restraint. Reporting on the use of restraint for all people in mental health units would provide useful data that is likely to evidence that restraint is often experienced by some groups of people more than others.

“I think it is in good in terms of measuring bias if you collect data for everyone”
Lived Experience Expert

“We know that autistic people are over restrained and overmedicated but actually there is such a limited amount being done about that. Reporting the use of restraint for everyone will give us much better data”. Lived Experience Expert

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Using this data to understand patterns in decision making about restraint can help to improve practice and protect people's right to be free from discrimination in mental health units.

Our lived experience experts also argue that for the data to be more accurate and to inform future practice and training needs, the report should include if a person is suspected of being autistic but is not currently diagnosed.

Word count 263

Question: Do you agree or disagree that this proposal will affect providers registered with CQC who operate mental health units?

Agree

Please explain your answer. (Do not include any personal information) (maximum 300 words)

If you said 'Agree', please explain how you think the proposal will affect providers.

From our direct work with people accessing mental health services and staff delivering them we know that this proposal is highly likely to affect providers registered with the CQC. We are concerned that an unintended impact of adding an additional reporting requirement to the administrative workload of staff could be a reduction in the quality of the care provided. Additional bureaucracy within the context of understaffed and over stretched units will exacerbate existing issues and may have unintended consequences for people's human rights.

The consultation proposal suggests that it won't be much of an additional burden to mental health units as they will be required to report this data (and more) by the Mental Health Units (Use of Force) Act from 2025. Whilst this is the case, it is important to note that mental health units are already required to have accurate and up to date records on a person's care, including incidents of restraint and seclusion. For example, the procedure for seclusion set out in chapter 26 of the [Mental Health Code of Practice](#) requires a documented report by the person monitoring every 15 minutes and nursing reviews every two hours.

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Despite existing requirements on reporting, we know from our direct work with practitioners and those who have used inpatient mental health services that not all providers accurately record and report on their use of restraint. As the CQC have often flagged, "[closed cultures](#)" exist in some services. These are services in which people are at increased risk of harm, including human rights breaches. An additional reporting requirement is unlikely to lead to a change in practice or accurate data about the use of restraint in services operating in a closed culture.

Word count 281

Question: If you have any suggestions for how these impacts can be mitigated, please give details. (Do not include any personal information.) (maximum 300 words)

A way to mitigate the impact would be to focus on reducing rather than only reporting the use of restraint. If practitioners are supported to understand and use the legal framework of the Human Rights Act, they will be able to make rights respecting decisions about the use of restraint. Where restraint is used as a last resort to keep a person or others safe and where this is done in the least restrictive way, this may be compliant with the HRA. However, all too often, restraint is used despite there being appropriate but less restrictive options. In some instances, the restraint itself may violate the right to be free from inhuman treatment, which is never permitted under the law (Article 3). If staff are confident in using human rights to navigate decision making around restraint it will lead to better outcomes for everyone. Ultimately, embedding human rights practice within units will lead to less incidents of restraint that have to be reported to the CQC.

We spoke to staff working in an NHS Mental Health Trust who told us, "Units are already required to record data around the use of restraint and many providers submit this to the [NHS Mental Health Services Data Set](#). This data includes qualitative information providing insight into the clinical narrative as to how restraint was used e.g. why it was used, was it part of care planning, discussed with the person and reviewed. A more proportionate way to achieve informative accurate data would be to integrate it into existing recording and monitoring

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processes, rather than creating an additional reporting duty. This would require a focus on making it mandatory for providers to submit to the Mental Health Data Set and adjusting the timelines for submitting data and when the CQC has access to it.”

Word count 300

Question: Do you agree or disagree that mental health units have the capacity to record and report this information to CQC within 72 hours?

Disagree

Question: Do you have any suggestions for how units can be supported to do this? (Do not include personal information.) (maximum 300 words)

We know from working directly with practitioners in mental health units that staffing is a huge issue. In its 2023 report on the [Progress of Improving Mental Health Services](#), the National Audit Office notes “particular concerns about shortages of medical and nursing staff, and psychologists”. Our lived experience experts also report there is a particularly high level of understaffing and use of bank staff at weekends. In this context, there is a risk that the use of severe restrictive practice increases because there are not enough experienced and trained staff familiar with the units and the people being supported in them and reporting is likely to be more of a challenge. There needs to be a focus on recruiting but also retaining experienced staff, trained in human rights who can promote and support good practice within mental health units, including approaches to restraint.

Trusts could also be supported with this by establishing clear processes for checking that the use of all forms of restraint is being properly recorded and reported and by putting in place more joined up working with the CQC. One option, (although we recognise this would depend on CQC capacity) might be that providers have regular visits from a CQC staff member to discuss and review the data. A regular visit would provide accountability and increase the likelihood that providers will report data accurately and on time. Discussing the data and asking

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clinically curious questions would provide the CQC with a better understanding of how and why restraint is being used in a particular unit and could lead to earlier identification of patterns of restraint that breach human rights and towards informed solutions to reduce restraint. Both our lived experience experts and staff working in an NHS mental health trust agreed that this would be an effective and achievable approach.

Word count 279

Question: If you have any additional information in relation to the proposal on notification of the use of RSS, please provide this. (Do not include any personal information.) (maximum 300 words)

This could include information to inform the analysis of the impact of this proposed amendment to the regulations. Or it could be an opportunity to raise concerns or highlight potential unintended consequences of this proposed amendment

“The use of restraint is systemic, you won’t get rid of that with reporting within 72 hours. It might be something that makes people step back and reflect...but it is not real change.” Lived Experience Expert

A reduction in the use of restraint in mental health units cannot be achieved through a reporting duty alone. This can only be achieved through systemic change. The proposals must sit alongside a mandatory requirement for staff to be trained in human rights and supported to use a framework to make individualised and proportionate decisions. Both the CQC’s [Out of sight](#) Report and the Mental Health Units (Use of Force) Act: Statutory Guidance articulate the importance of supporting staff to embed human rights within their practice. We know from working directly with many NHS trusts that human rights capacity building leads to less restrictive interventions and promotes a practice that focuses on working in partnership with people to provide individualised person-centred care that upholds rights.

We are also concerned that under this proposal, providers are being asked to share detailed confidential information to the CQC, including an individual’s name. There

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are potential risks to the [Article 8](#) rights of patients if their personal data is being recorded and shared in this way. [Article 8](#) of the Human Rights Act protects people's right to confidentiality and to have a say about what personal information is shared about them. Any restrictions to this right must be lawful, legitimate and proportionate. The proposal does not explain how people's personal data will be kept safe or why it is essential that the CQC have access to people's names.

Word count 268

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