Consultation response

AMPLIFYING LIVED EXPERIENCE

BIHR's response to the Department of Health & Social Care's consultation on visiting in care homes, hospitals and hospices

The British Institute of Human Rights

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> Visits from family members, friends and carers are not only protected by the Human Rights Act, but also serve invaluable purpose in boosting spirits, aiding recovery, and helping with transition back into the community. Hospitals need to open their eyes to the pros, instead of just seeing the cons.
>
> Hanna, Lived Experience Expert

What has the Department of Health and Social Care proposed?

The British Institute of Human Rights ("BIHR") recently provided a response to the UK Government's consultation on visiting in care homes, hospitals and hospices. The Department of Health and Social Care asked whether they should bring in new secondary legislation "to ensure that visiting (including accompanying people to hospital appointments) is protected and that it remains a priority for health and care providers so that patients and residents can receive visitors whenever it is reasonable and safe."

What did BIHR say?

Our consultation response was co-written with Lived Experience Experts (LEEs) who contributed their direct experiences of visitation issues in hospital settings before the COVID-19 pandemic. BIHR also drew on our extensive work with individuals and staff in care homes and hospitals both pre- and post-pandemic to inform our submission.

We said the UK Government needs to listen to lived experience voices in deciding whether further legislation in this area is the solution. If so, this should also include how such legislation should be designed, implemented and enforced to best ensure the rights of those accessing care homes, hospitals and hospices and their loved ones are met in practice. Specifically:

1

We asked for evidence that new legislation is indeed the solution to ending visiting restrictions which are not rights-compliant.

BIHR supports making existing rights protections explicit across any new legislation, guidance and policy. We saw through the Coronavirus Act the importance of placing the requirement to act compatibly with rights enshrined in the European Convention on Human Rights on the face of the Act (these are the rights in our Human Rights Act). However, the consultation doesn't say why new secondary legislation has been identified as the solution to the very real issues with visiting restrictions faced by people and their loved ones in practice.

Our work supporting public bodies to implement existing human rights law has demonstrated that simply adding more legislation to an already complex maze of legislation is not always the solution. We believe that supporting public bodies (and those delivering public functions) to put existing laws into practice is key. The Human Rights Act already protects the Article 8 right to private and family life, including the right to visitors, and it is important that staff know this is a legal duty which they must respect, protect and fulfil across all decisions and actions. If staff are not meeting their existing legal duties under the Human Rights Act, there is a duty to properly investigate why and put measures in place to rectify this.

New legislation is not a magic wand for addressing rights issues; resource is better used to support proper implementation of current human rights legislation.

Our research during Covid-19 revealed that 76% of health and care staff who answered our surveys were not provided with legal training or clear information about upholding human rights law.

2 We asked that new legislation mirrors existing human rights legal protections.

If the consultation reveals that new secondary legislation is required, this legislation must mirror the existing legal protections in the Human Rights Act. The right to private and family life ensures that any restriction on visits which impacts a person's contact with loved ones (and their autonomy, well-being and/or participation in the community) must meet a three-stage test set out in the Human Rights Act. If CQC regulations are amended to include a new standalone right to visitors, any permitted restriction of that new right must align with existing legislation. If the standard sits in contrast to existing human rights legislation and instead asks staff to make decisions based on broader terms such as "reasonable" or "appropriate", this will lead to confusion which leads to worse outcomes for individuals and their loved ones.

"Reasonable" as a term is weaker than this three-stage test [in the Human Rights Act] and leaves it up to individual staff members to decide where the lines are."
- BIHR's consultation response

3 We asked that long-term planning and resources are given to implementation.

Staff must be given mandatory human rights training and supported to use a framework to make individualised and proportionate decisions. If new secondary legislation is introduced, there must also be long-term planning and resources provided to ensure its effective and rights-compliant implementation.

"A human rights approach has allowed us to develop new policies. We used it to tackle the difficult use of mobile phones and the internet on our inpatient ward. It allowed us to approach complex issues with more confidence using the proportionality principles. This resulted in reaching a decision about giving patients access to phones and the internet in a way that was safe, not banning access altogether." - NHS worker who attended BIHR's human rights training

Of NHS workers surveyed after a BIHR human rights learning programme:

100%

would challenge blanket approaches to care and treatment

would apply, develop or review internal policy and guidance

would challenge rights-risking decisions about care and treatment

"Building up these relationships of trust are an essential part of the care and discharge pathway. This cannot and shouldn't be done around standard visiting hours, this needs to be flexible and prioritised to ensure an effective discharge from hospital." - Kirsten, Lived Experience Expert

4 We asked that no one-size-fits-all approach is taken.

All public bodies have the same duties under the Human Rights Act. While the consultation asks if different restrictions should be in place in care homes versus hospitals and hospices, people's experiences of these settings often overlap and the individuals accessing these services will have very different circumstances. Across all settings, decisions should be made compatibly with the legal rights of the individual and their loved ones on a case-by-case basis. There is no one-size-fits-all approach to applying human rights in any setting and this makes blanket exceptions of the kind suggested in some of the consultation's questions unworkable in practice.

> "Many young people live in care homes; many people with mental health needs will access physical health hospitals and need appropriate support; many people will live in hospitals for long periods of time; and many people who have lived in care homes can be better supported to live in the community. There is no one-size-fits-all approach to applying human rights". - BIHR's consultation response

5 We asked that serious thought is given to enforcement.

We would like to better understand how providers and CQC will enforce the new right and what any changes will mean in practice.

In particular, individuals should have recourse to CQC when their rights are not being upheld and any restrictions on non-absolute rights should be justified to individuals and their loved ones as well as CQC, following the three-stage test in the Human Rights Act.

> “It is difficult to raise concerns about unreasonable or unjustified restrictions because CQC often won’t investigate individual complaints because it is considered disproportionate”. - BIHR's consultation response

Read more about the importance of visitors and real-life stories of patients, residents and their loved ones, including examples of poor practice and positive practice, here.