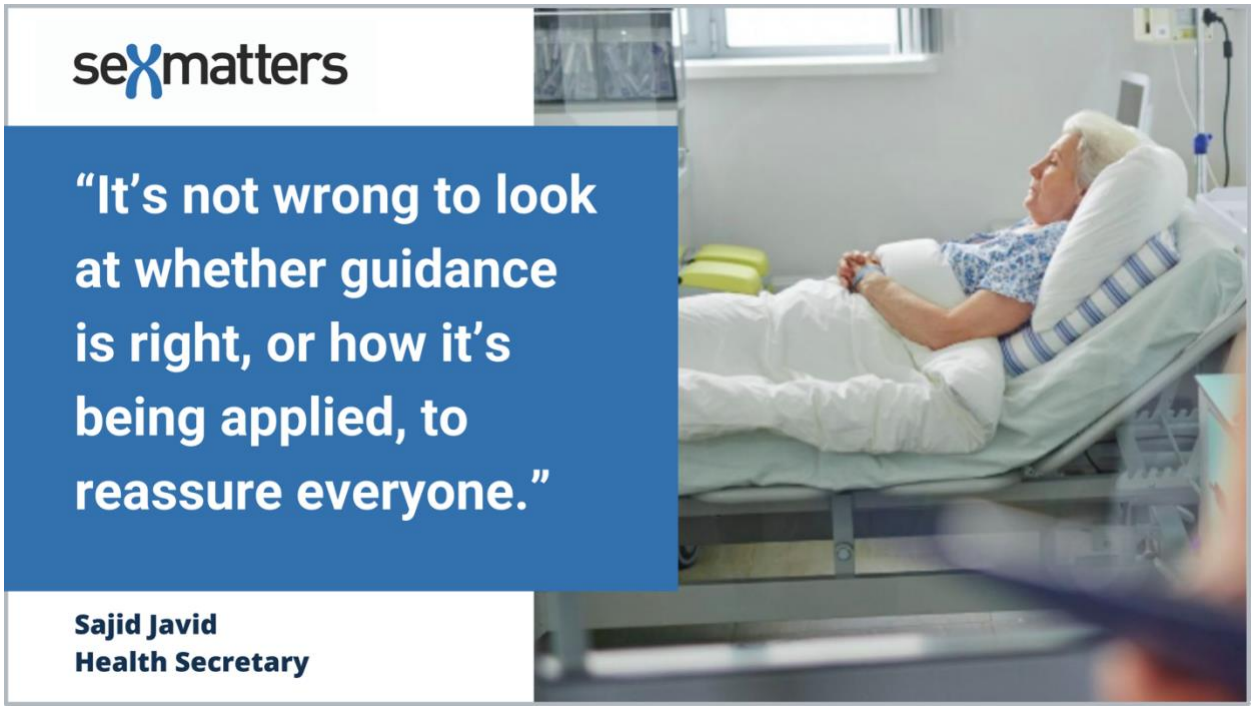
Reviewing Annex B

How can the NHS fulfil its promise of dignity and privacy for all on single-sex hospital wards?



A briefing reviewing Annex B and suggesting principles and a draft text for revising the policy.

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Sex Matters is a human-rights organisation campaigning for clarity about sex in laws, policies and language

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Introduction

In 2010, the Government made a commitment that the NHS would provide single-sex hospital accommodation for all patients to avoid patients suffering the indignity of being cared for in mixed-sex accommodation.

Andrew Lansley, the then Health Secretary, said:

> "Patients should be in single-sex accommodation, meaning that all of their period that they are admitted they should be in a bed or a bay which only consists of people of the same sex. And they should be able to come and go, for example to all their washing and toilet facilities, without having to pass through a part of the ward or another ward where there might be people of a different sex… so to that extent they would have the kind of privacy and dignity people have a right to expect."

The policy sets out strict reporting requirements and financial penalties for hospital trusts who breach these standards.

However, in practice the policy is operated on the basis of gender self-identification, based on an annex to the policy, 'Annex B', which tells hospitals that they must allow people to chose to be in opposite-sex wards if they identify as transgender or non-binary.

This means that male patients who identify as trans or non-binary must be housed with women if that is their preference. This includes convicted sex offenders, and patients in locked mental-health wards. The risk to the safety, dignity and mental wellbeing of other patients was not considered.

On 2nd August 2021 the current Health Secretary, Sajid Javid, said that this policy would be reviewed. He added on Twitter:

> "It's not wrong to look at whether guidance is right, or how it's being applied, to reassure everyone. I've asked the Department of Health and Social Care for fresh advice."

This briefing reviews Annex B and suggests principles and a draft text for revising the policy.

Annex B

The NHS England document: *Delivering same-sex accommodation*[1] states:

- All providers of NHS-funded care are expected to prioritise the safety, privacy and dignity of **all patients**.
- Providers of NHS-funded care are expected to have a **zero-tolerance approach to mixed-sex accommodation**, except where it is in the overall **best interest of all patients affected**.
- Patients should not normally have to share sleeping accommodation with members of the opposite sex.
- Patients should **not have to share toilet or bathroom facilities with members of the opposite sex**.
- Patients **should not have to walk through an area occupied by patients of the opposite sex** to reach toilets or bathrooms; this excludes corridors.
- **Women-only day rooms** should be provided in mental health inpatient units.
- Patient choice for mixing must be considered and may be justified. **In all cases, privacy and dignity should be assured for all patients**.
- **There are no exemptions** from the need to provide high standards of privacy and dignity at all times.

[1] https://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2021/05/NEW-Delivering_same_sex_accommodation_sep2019.pdf

In particular in Annex A it states that breaches of the single-sex commitment should almost never happen in **inpatient wards, mental health inpatient wards** and **women-only areas in mental health wards**, and in **situations where patients' modesty is compromised** such as when wearing hospital gowns or nightwear.

Annex B: Delivering same-sex accommodation for trans people and gender variant children is inconsistent with this and does not consider the privacy and dignity of all patients. It results in:

- patients having to share sleeping accommodation, toilet and bathroom facilities with members of the opposite sex
- breaches (mixed-sex situations) not being recorded
- healthcare providers facing potential financial penalties if they place patients in same-sex accommodation if it differs from their self-identified gender.
- healthcare staff being pushed to maintain a fiction with patients ("There is a man in the next bed!"; "No, madam, that is a woman.")
- risk assessment being undermined by preventing staff from recording patients' sex (since to do so would trigger a report).

Principles for revising Annex B

Revision of Annex B should be based on agreed high-level principles. Proposed are:

1. Annex B should be consistent with the rest of the policy – in language, meaning and outcomes.
2. It should be clear to staff and patients what to expect and what situations they are being put in when they are told they are in a same-sex or mixed-sex setting.
3. The policy should prioritise the safety, privacy and dignity of all patients.
4. The policy should not force staff to misrecord a patient's sex on medical records, risk assessments or administrative records.
5. The policy should consider the needs, privacy and dignity of trans patients, recognising that there are difficult situations, and decisions need to be made flexibly.
6. The policy should generate data on where trans patients are accommodated, without fining healthcare providers for complying with same-sex accommodation.

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Proposed revised text

Definitions

Providers of NHS-funded care are expected to have a zero-tolerance approach to **mixed-sex** accommodation, except where it is in the overall best interest of all patients affected.

This requires clear definitions.

Sex means whether someone is male or female. For almost all individuals, this is recorded at birth on the birth certificate, and is ordinarily readily perceptible to others.

While there are rare complex disorders of sexual development, in most cases sex characteristics are clearly delineated and straightforward.

The two sexes:

A person who is **male** is a man or a boy. They were born with a male reproductive system typically including penis and testicles. Males have the potential to produce germ cells of the male line (sperm). A person who is or could become a father is male.	A person who is **female** is a woman or a girl. They were born with a female reproductive system typically including ovaries, womb, vagina. Females have the potential to produce germ cells of the female line (ova). A person who is or could become a mother is female.

This corresponds with '**Person Phenotypic Sex**' in the NHS data dictionary.[2]

> "A classification of the observed sex of a person, relating to the biological, physiological and physical characteristics that

[2] https://datadictionary.nhs.uk/classes/person_phenotypic_sex.html

differentiate men and women, determined by endocrine influences.

It also in almost all cases corresponds with the **legal definition of sex**: including the protected characteristic of sex as defined in s.11 of the Equality Act 2010 and the definition of sex in common law.[3]

Opposite sex – people who are male are the opposite sex of people who are female.

Same sex – a ward, bay or other facility is same sex when it is only used by male patients or female patients and not shared with members of the opposite sex. This can include:

- a ward that is single sex
- a bay of beds with access to single-sex toilets and washing facilities in a mixed-sex ward
- an individual room with access to individual toilets and washing facilities which can be used by a man or a woman.

Mixed sex – a ward, bay or other facility is mixed sex where it is shared by one or more patients of the opposite sex at the same time.

Trans – Transgender, or trans, is a broad, inclusive term referring to anyone who identifies as transgender (including identifying as the opposite sex or as non binary). This can mean that they:

- use a name or pronouns not typically associated with their sex
- wear clothing not typically associated with their sex
- adopt other aspects of appearance such as make up and hairstyle not typically associated with their sex
- have cosmetic surgery to change aspects of their facial appearance to appear more like the opposite sex
- have chest surgery to mimic the opposite sex (mastectomy or breast enhancement)

[3] The biological basis for this was clarified in the case of Corbett v Corbett [1970] 2 WLR 1306 as relating to a person's chromosomes and endogenous sex organs (internal and external), which are generally congruent. This was reconfirmed by R v Tan [1983] QB 1053 and Bellinger v Bellinger [2003] 2 AC 467).

- take hormones to change aspects of their secondary sexual characteristics (such as voice, hair and body shape) to appear more like the opposite sex
- have genital surgery to appear more like the opposite sex (this is sometimes called 'reassignment surgery').

Some people seek to live as if they were the opposite sex. This is termed an **'acquired gender'**. These people are termed 'transsexuals' under the Equality Act 2010 s.7 and are protected against discrimination and harassment. A **'transsexual'** person does not need to have had, or be planning, any medical gender reassignment treatment to be protected under the Equality Act: it is enough if they are undergoing a personal process of changing gender.

- People who identify as 'trans men' are female.
- People who identify as 'trans women' are male.
- People who identify as non-binary may be either male or female.

It is critical for healthcare that medical professionals are able to understand, record and communicate patients' sex.

Gender dysphoria is a term that describes a sense of unease that a person may have because of a mismatch between their biological sex and their sense of gender identity. This sense of unease or dissatisfaction may be so intense it can lead to depression and anxiety and have a harmful impact on daily life.

Under the Gender Recognition Act ('GRA') 2004, a person can obtain a Gender Recognition Certificate ('GRC') and a replacement birth certificate if they have a diagnosis of gender dysphoria, have lived in the identity of someone of the opposite sex for two years (for example changing the name on their bills and payslips) and declare that they intend to live in this new identity permanently. No specific surgery or other body modification is required. Thus the legal sex of around 5,000 people does not align with their biological sex. Many more people have changed the administrative record of their sex on their passport or drivers license.

Neither **identifying as transgender** nor having a **gender recognition certificate** changes a person's biological sex, or other people's perception of their sex. Few people are reliably perceived as being the opposite sex.

Thus a space which is shared by a **biological female** and a **biological male** (whatever their gender identity) is a **mixed-sex** space. It should be recorded as such and addressed by the policy.

General principles for same-sex accommodation

NHS records should accurately record a person's sex in the field 'Sex' (or 'Phenotypic sex') – this should be used to allocate people to accommodation, also taking account of other needs including clinical needs and transgender identity or gender reassignment.

Healthcare professionals must consider the safety, privacy and dignity of all patients and act in their best interests

While the same-sex policy applies to both male and female wards, female patients are particularly vulnerable. Allowing a male patient to be housed in a female ward is a risk to the dignity, wellbeing and safety of the female patients. A female patient who wishes to be housed in a male ward would be exposed to risks to her safety. The particular vulnerability of female patients is recognised by the need for women-only day rooms in mental-health units.

People who are gender non-conforming in their dress or appearance or who identify as trans or transsexual should not be subject to harassment or discrimination by staff or other patients and should be treated with professional courtesy and care, and subject to the same safeguards as others.

People who identify as trans may feel uncomfortable sharing same-sex communal accommodation. Where they have undertaken intensive body modifications such as long-term use of hormones and genital surgery they may also be alarming to others of the same biological sex as they may appear to have changed sex.

The information privacy of person who identifies as trans or who has had surgery or hormone treatment to change their sexed appearance should be considered – doctors and healthcare professionals need to be able to access information on a patient's sex, and any treatments they have had or medication they are taking, quickly and accurately, but sensitive details of gender dysphoria or surgery should not be discussed within the hearing of other patients.

People who identify as transgender may express a desire to be accommodated with members of the opposite sex. However, this is not consistent with the policy, which takes a zero-tolerance approach to mixed-sex accommodation.

Where a patient identifies as trans their needs and concerns for privacy should be discussed in determining their accommodation and care. They may need additional privacy such as curtains drawn or a side room. Consideration also needs to be given to how they will access washing and toilet facilities with dignity and without undermining the privacy of others.

They should not be transferred to an opposite-sex ward or bay based on their preference (except in cases of overriding medical need or unavoidable lack of capacity which would be reported as medically justified or breaches in the normal way).

The privacy and dignity of transgender people and of other patients cannot be maintained by putting people into opposite-sex wards and pretending that they are the same sex. Other patients have a right to know whether they are in a same-sex or mixed-sex situation. All breaches should be recorded.

> A person's preference to be accommodated with members of the opposite sex **does not overrule** the obligation of healthcare professionals to accurately record sex, to use this information for ward allocations, to consider it in risk assessments and in reporting breaches, and to strive to meet the same-sex accommodation commitments.

In practice this means that in many cases a hospital will determine that it is in the best interests of a person who identifies as transgender or transsexual is to be accommodated in a side room in a mixed-sex ward where one is available, to protect their privacy (including their information privacy) and the privacy and dignity of other patients in same-sex bays within the ward.

Hospitals and healthcare trusts should have policies and care plans to deal with transgender patients in each setting.

- There will need to be a degree of flexibility as the number of side rooms is limited and there are other clinical and social needs which may need to be prioritised.

- A person who is clearly one sex or the other and who has had no physical changes is unlikely to cause discomfort to others of the same sex, whereas someone who has had them will.
- Where admission or triage staff are unsure of a person's sex, they should ask, making clear what the definition of sex is, or if the person is unconscious use their clinical judgement.
- Self-defined gender should not be recorded in the sex field as this can lead to dangerous outcomes.
- Where a child or vulnerable person identifies as transgender, care should be taken that they are not removed from ordinary safeguarding.

Proposed approach for recording and reporting breaches

All instances of mixing should be recorded locally based on the sex of patients.

In a situation where it would be an unjustified breach for a patient to be housed in a mixed-sex situation it should also be reported as a breach if that person identifies as transgender.

A person's choice is not a justification for accommodating them with the opposite sex. These breaches should be reported. For example if someone male who identifies as a 'transwoman' or 'non binary' is accommodated in a full six-bed 'female' bay, five breaches have occurred – as the five women have had to share mixed-sex accommodation. These are not justified breaches as they are not in these patients' best interests.

A separate line of recording and reporting should be opened up for transgender people accommodated in communal same-sex accommodation and whether this is against their preference (and where a single-occupancy room has not been available). This does not need to be justified, and there should be no financial penalty (as no sex mixing has occurred), but it should be recorded and reported and used to feed back into the development of trans-responsive services that meet every patient's need for privacy and dignity.

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APPENDIX: Line-by-line review of Annex B

This section considers statements in Annex B and rates them as **RED** (dangerous, incompatible with the rest of the policy), **AMBER** (confusing, problematic) or **GREEN** (correct)

Definitions		
Transgender, or trans, is a broad, inclusive term referring to anyone whose personal experience of gender extends beyond the typical experiences of their assigned sex at birth. It includes those who identify as non-binary.		Sex is not assigned at birth. Expecting men and women to be confined to 'typical experiences' of gender is sexist.
Under the Equality Act 2010, individuals who have proposed, begun or completed reassignment of gender enjoy legal protection against discrimination.		This is true, but so are people with other protected characteristics – this is not mentioned in Annex B.
A trans person does not need to have had, or be planning, any medical gender reassignment treatment to be protected under the Equality Act: it is enough if they are undergoing a personal process of changing gender.		Correct.
In addition, good practice requires that clinical responses be patient-centred, respectful and flexible towards all transgender people whether they live continuously or temporarily in a gender role that does not conform to their natal sex.		Clinical responses to ALL patients should be patient-centred and respectful. Impacts on other patients are not considered in Annex B.

General key principles		
Trans people should be accommodated according to their presentation: the way they dress, and the name and pronouns they currently use. This may not always accord with the physical sex appearance of the chest or genitalia. It does not depend on their having a gender recognition certificate (GRC) or legal name change.		This makes wards mixed sex. It is not required by the Equality Act 2010 or the Gender Recognition Act 2004.
It applies to toilet and bathing facilities (except, for instance, that preoperative trans people should not share open shower facilities).		This makes toilets and bathing facilities mixed sex.
Views of family members may not accord with the trans person's wishes, in which case, the trans person's view takes priority.		Other parts of the policy consider family members' views.
Those who have undergone transition should be accommodated according to their gender presentation. Different genital or breast sex appearance is not a bar to this.		The document does not define "undergone transition" or "gender presentation".
Sufficient privacy can usually be ensured through the use of curtains or by accommodation in a single side room adjacent to a gender appropriate ward.		This is inconsistent with the rest of the policy which does not say that curtains are adequate separation to avoid breaching the same-sex standard.
This approach may be varied under special circumstances where, for instance, the treatment is sex-specific and necessitates a trans person being placed in an otherwise opposite gender ward.		This is confusing. The policy is about "same sex wards". Here it talks about a trans person being placed in a ward with people who are the same sex as "opposite gender".

Where admission or triage staff are unsure of a person's gender, they should, where possible, ask discreetly where the person would be most comfortably accommodated. They should then comply with the patient's preference immediately, or as soon as practicable.		"Gender" is not defined. The policy is about same-sex wards. This makes wards mixed sex.
If, on admission, it is impossible to ask the view of the person because he or she is unconscious or incapacitated then, in the first instance, inferences should be drawn from presentation and mode of dress. No investigation as to the genital sex of the person should be undertaken unless this is specifically necessary to carry out treatment.		The policy is about single-sex wards.
In addition to the usual safeguards outlined in relation to all other patients, it is important to take into account that immediately post-operatively, or while unconscious for any reason, those trans women who usually wear wigs, are unlikely to wear them in these circumstances, and may be 'read' incorrectly as men. Extra care is therefore required so that their privacy and dignity as women are appropriately ensured. Trans men whose facial appearance is clearly male, may still have female genital appearance, so extra care is needed to ensure their dignity and privacy as men.		Other people are able to perceive sex. Reading a male person as a man is not "incorrect".
Non-binary individuals, who do not identify as being male or female, should also be asked discreetly about their preferences, and allocated to the male or female ward according to their choice.		This allows anyone to self-identify into an opposite-sex ward.
Trans men and non-binary individuals can become pregnant and should be treated with dignity while using maternity services.		Yes. Everyone who needs maternity services should be treated with dignity.

Children and young people		
Gender variant children and young people should be accorded the same respect for their self-defined gender as are trans adults, regardless of their genital sex.		Children are not adults. Social transition is a significant move.
Where there is no segregation, as is often the case with children, there may be no requirement to treat a young gender variant person any differently from other children and young people.		Safeguarding demands that caregivers know the sex of young people.
Where segregation is deemed necessary, it should be in accordance with the dress, preferred name and/or stated gender identity of the child or young person.		This makes wards mixed sex.
In some instances, parents or those with parental responsibility may have a view that is not consistent with the child's view. If possible, the child's preference should prevail even if the child is not Gillick competent.		Children are not adults. Social transition is a significant move.
More in-depth discussion and greater sensitivity may need to be extended to adolescents whose secondary sex characteristics have developed and whose view of their gender identity may have consolidated in contradiction to their sex appearance. It should be borne in mind that many trans adolescents will continue, as adults, to experience a gender identity that is inconsistent with their natal sex appearance, so their current gender identity should be fully supported in terms of their accommodation and use of toilet and bathing facilities.		This makes wards mixed sex.
It should also be noted that, although rare, children may have conditions where genital appearance is not clearly male or female and therefore personal privacy may be a priority.		All children's genital privacy should be protected.