sex matters
in life | in law

NHS Constitution 10-year review

Response to the consultation

Sex Matters is a human-rights charity

We campaign for clarity about sex in law, policy and language

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Introduction

The NHS Constitution for England sets out rights for the public, patients, and staff. It outlines commitments to patients and staff, and the responsibilities that the public, patients and staff owe to one another to ensure that the NHS operates fairly and effectively. All NHS bodies and private and third-sector providers supplying NHS services are required by law to take account of the constitution in their decisions and actions.

The Health Act 2009 requires that every 10 years the Secretary of State must carry out a review of the NHS Constitution. As part of the 2024 10-year review, new provisions have been proposed on sex and gender.[1]

1. **Same-sex intimate care**. Adding a commitment that:

   > "Patients can request intimate care be provided, where reasonably possible, by someone of the same biological sex".

2. **Single-sex accommodation**. Adding a clarification to the provision on same-sex accommodation to say:

   > "If you are admitted to hospital, you will not have to share sleeping accommodation with patients of the opposite biological sex, except where appropriate. The Equality Act 2010 allows for the provision of single-sex or separate-sex services. It also allows for transgender persons with the protected characteristic of gender reassignment to be provided a different service – for example, a single room in a hospital – if it is a proportionate means of achieving a legitimate aim."

3. **Sex-based language**. Adding a right to 'Access to health services' to state that:

   > "You have the right to expect that NHS services will reflect your preferences and meet your needs, including the differing biological needs of the sexes, providing single and separate-sex services where it is a proportionate means of achieving a legitimate aim."

4. **The Equality Act 2010**. Changing the language where protected characteristics in the Equality Act are listed:

   a. "gender" becomes "sex"

   b. "religion, belief" becomes "religion or belief"

   c. "marital or civil partnership status" becomes "marriage and civil partnership status"

[1] UK Government, Department of Health & Social Care (2024). *NHS Constitution: 10 year review*.

So that the amended text will read as follows:

Under principle 1:

"It is available to all irrespective of sex, race, disability, age, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity or marriage and civil partnership status."

Under 'Access to health services':

"You have the right not to be unlawfully discriminated against in the provision of NHS services including on grounds of sex, race, disability, age, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity or marriage and civil partnership status.

We broadly welcome these changes, which support clarity about sex in the NHS to protect patients' rights.

This response from Sex Matter was submitted on 25th June 2024.

We have only answered the questions on sex and gender reassignment as this is our focus and mandate.

Question 1

In the NHS Constitution, 'Access to health services' includes a right for patients to "receive care and treatment that is appropriate to you, meets your needs and reflects your preferences".

We want patients to feel confident asking for care that meets their needs and preferences, including requests for intimate care to be carried out by someone of the same sex. We also want patients to have confidence that any such request will be accommodated, where reasonably possible.

Same-sex care is recognised through accompanying CQC statutory guidance to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. The guidance sets out how providers should act when providing intimate or personal care, and make every reasonable effort to make sure that they respect people's preferences about who delivers their care and treatment, such as requesting staff of a specific sex. We are defining sex as biological sex.

We are defining intimate care as an examination of breasts, genitalia or rectum, and care tasks of an intimate nature such as helping someone use the toilet or changing continence pads. This definition aligns with that used by the General Medical Council.

The NHS Constitution does not currently reference same-sex intimate care. We want to introduce a new pledge to reinforce NHS healthcare providers' responsibilities to accommodate requests of this nature where reasonably possible.

We propose adding a pledge to 'Access to health services' to state that:

> "Patients can request intimate care be provided, where reasonably possible, by someone of the same biological sex."

Our response

AGREE.

Our polling, research and case studies show that most people want the option of same-sex care, and many people prefer it in practice. **See Sex Matters (2022). 'Why do single-sex services matter?'**

Respecting these preferences, and providing information to enable people to consent to care, is a matter of fundamental human rights.

Article 3 of the European Convention on Human Rights provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Being forced or coerced to submit to intimate contact such as to breasts, genitalia or rectum from a member of the opposite sex, including being told that you must pretend that they are the same sex (or being misled that they are) is degrading treatment. Protection against this is an absolute right.

Article 8 ECHR protects the right to personal autonomy, dignity, physical and psychological integrity. Acts undertaken in relation to the care and treatment of a person engage this right whether they are "intimate" or not. If the person does not have the capacity to consent (including that they have not been given the information to provide informed consent, or that they have been coerced) will almost invariably interfere with these rights sufficiently to engage Article 8, even if the acts are considered to be in the individual's best interests.

An act that engages Article 8 must be necessary and proportionate.To be proportionate, an act must satisfy the following principles (as set out in *Bank Mellat v HM Treasury (No 2) [2014] AC 700*, paragraph 20):

- the objective of the act is sufficiently important to justify the limitation of a fundamental right
- it is rationally connected to the objective
- the act is no more than necessary to accomplish the objective – which includes consideration of whether a less intrusive measure could have been used
- having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

It should be recognised that while opposite-sex care may be acceptable (with consent or in an emergency) it is NEVER proportionate to mislead a patient about the sex of a HCP in order to obtain apparent consent for personal and bodily contact that would engage Article 8, since this vitiates consent. This has been established in relation to sexual consent in the case of *R v McNally [2013] EWCA Crim 1051*.

Transgender people also have the same rights under Article 8 and Article 3. Their privacy and bodily autonomy should be respected. However as the McNally case demonstrates the limited right to privacy about your sex does not extend to situations where other people's consent is required. In any healthcare situation the right of a person to keep their sex as private information is readily limited by the legitimate aims of providing safe healthcare and operating a healthcare system effectively.

Ideally for clarity the wording of this section should say:

> "Patients can request intimate care be provided, where reasonably possible, by someone of the same sex (this means being male or female)."

The reason for this is that when patients ask for someone of "the same sex", or a woman asks to be treated by "a woman", "a female doctor", "a lady doctor" or similar, they mean the same thing. There is not a different category of "biological sex". It must be clear to staff in the NHS that reference to sex means a person's actual sex, not their gender identity.

"Biological sex" is sometimes a useful clarification, but it is not, and does not need to be defined as, something different from the ordinary common-law understanding of the two sexes.

The CQC statutory guidance to the Health and Social Care Act 2008 is not clear on this and says:

> "When providing intimate or personal care, providers must make every reasonable effort to make sure that they respect people's preferences about who delivers their care and treatment, such as requesting staff of a specified gender/sex."

Confusion like this must be avoided. For example, a healthcare professional who is male and who identifies as a woman (whether or not they have a gender-recognition certificate) is not the **same sex** as a female patient; they are the opposite sex.

It must be made clear to trans-identifying healthcare staff that their identity does not give them the right to override the consent of patients or their colleagues (in situations such as changing rooms), and they will be expected to be clear and honest about their sex as part of their professional conduct. A healthcare professional who is not willing to be straightforward and transparent about their sex and to understand that this is necessary in order to respect other people's consent and privacy is not a fit and proper person demonstrating the necessary character and competence for the work to be performed by them, in particular in relation to the requirements on dignity and respect, consent, safeguarding and safe care and treatment under Section 2 of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

Neither the Equality Act 2010 nor the Gender Recognition Act allows a person with a transgender identity to override other people's rights.

If a patient is unable to consent or to communicate her preference, same-sex care should be the default option.

Question 2

The NHS Constitution contains a pledge that states:

> "If you are admitted to hospital, you will not have to share sleeping accommodation with patients of the opposite sex, except where appropriate, in line with details set out in the handbook to the NHS Constitution."

This means that patients should not have to share sleeping accommodation with patients of the opposite sex and should also have access to segregated bathroom and toilet facilities. Patients should not have to pass through opposite-sex areas to reach their own facilities. Women in mental health units should have access to women-only day spaces.

Sleeping accommodation includes areas where patients are admitted and cared for on beds or trolleys, even when they do not stay in hospital overnight. It therefore includes all admissions and assessment units (including all clinical decision units), plus day surgery and endoscopy. It does not include areas where patients have not been admitted, such as accident and emergency cubicles.

Single-sex accommodation can be provided in:

- single-sex wards (this means the whole ward is occupied by men or women but not both)
- single rooms with adjacent single-sex toilet and washing facilities (preferably en-suite)
- single-sex accommodation within mixed wards (for instance, bays or rooms that accommodate either men or women (not both), with designated single-sex toilet and washing facilities preferably within or adjacent to the bay or room)

In considering how the provision of single-sex accommodation for men and women should apply to transgender people – a term used to refer to people whose gender identity is different from their biological sex – the needs of each patient in a ward or clinical area should be considered on an individual basis to understand how best to protect the privacy, dignity and safety of all patients. When making these decisions it is important to balance the impact on all service users and show that there is a sufficiently good reason for limiting or modifying a transgender person's access.

Recognising the concerns that patients may have about sharing hospital accommodation with patients of the opposite sex, we propose to amend the pledge to reflect the legal

position on the provision of same-sex services and on which transgender patients can be offered separate accommodation as a proportionate means to a legitimate aim.

Specifically, the Equality Act 2010 expressly allows for the provision of single-sex or separate-sex services if certain conditions are met. Such provision must be a proportionate means of achieving a legitimate aim. The act also allows for persons with the protected characteristic of gender reassignment to be provided a different service in this scenario, provided such an approach is a proportionate means of achieving a legitimate aim. This could, for example, mean a transgender patient is provided with a single room in a hospital setting (provided other clinical priorities are considered). Any decision relating to accommodation of transgender patients should always consider the privacy, dignity and safety of all patients in a ward or bay.

We propose adding additional wording to the pledge on sleeping accommodation to state:

> "If you are admitted to hospital, you will not have to share sleeping accommodation with patients of the opposite biological sex, except where appropriate. The Equality Act 2010 allows for the provision of single-sex or separate-sex services. It also allows for transgender persons with the protected characteristic of gender reassignment to be provided a different service – for example, a single room in a hospital – if it is a proportionate means of achieving a legitimate aim."

Our response

AGREE.

Currently the commitment to "single-sex accommodation" is not being adequately delivered because the Annex B policy directs NHS bodies to allow people to use opposite-sex spaces on the basis of their gender identity.

For more detailed comments on Annex B see Sex Matters (2021). 'NHS Hospitals: "single-sex" accommodation cannot be mixed sex'.

Annex B will need to be revised. A person's sex as recorded within NHS systems should always be accurate. The NHS must protect the dignity and safety of all patients, and treat them with respect. It cannot do this while pretending that some male patients are female and vice versa.

The NHS should be clear that every patient is male or female in order to protect everyone's rights and safety. It should be recognised that it is not safe to mis-record information about a person's sex in relation to their medical care or while they are in hospital – they might receive the wrong diagnosis or treatment. Nor is it appropriate for NHS staff to misreport a person's sex to other patients who are sharing sleeping accommodation or sanitary facilities, or in record-keeping.

As discussed in the previous answer, ECHR Article 8 is engaged, and avoiding breaching this right depends on being clear about what sex people are when placing people in accommodation together.

Given that there have been 10 years of obfuscation about the single-sex accommodation policy and that many healthcare professionals are nervous about applying same-sex rules, this provision needs to be backed up by communication from the top which makes clear that in order to provide single-sex accommodation, male patients must be accommodated in beds, bays, wards or rooms that are designated for men, and female patients must be accommodated in beds, bays, wards or rooms that are designated for women. Having a transgender identity does not change this.

The statement that the Equality Act "also allows for transgender persons with the protected characteristic of gender reassignment to be provided a different service" is not an accurate summary and will lead to misunderstanding of the Act.

Schedule 3 Part 7 of the Equality Act allows the provision of single-sex and separate-sex services where they are a proportionate means to a legitimate aim (including in hospital). In order to allow for this it provides a statutory defence against both sex-discrimination claims and gender-reassignment discrimination claims against service providers. This means that if a "transwoman" (someone whose sex is male and who has the protected characteristic of gender reassignment) is dissatisfied about being allocated a space shared with other men and brings a legal claim of either sex discrimination or gender-reassignment discrimination, the hospital will be able to use these defences and defeat the claim.

A male patient who identifies as transgender, non-binary, gender-fluid, transfemme, transwoman or any other gender identity who is placed in male accommodation is NOT being treated differently from other male patients or being provided a different service because of being transgender. They are being provided the SAME service as other males (and vice versa for female patients who identify as transgender).

It would be clearer to say:

> "Having the protected characteristic of gender reassignment does not give someone the right to access services and spaces for the opposite sex."

Maintaining a clear recognition of the reality of the two sexes is important in being able to communicate and enforce policies consistently, fairly and lawfully.

Placing male patients in female accommodation (and vice versa) and misleading other patients about their sex could lead to claims of sex-based harassment and discrimination by the other patients, and of belief discrimination.

Patients who identify as transgender should in general be treated the SAME as other patients – that is, provided a service designed to improve, prevent, diagnose and treat both physical and mental health problems with equal regard. Within male and female accommodation

patients should be allocated to particular spaces (such as side rooms) based on clinical need, not with the objective of keeping their sex secret, or the concern that it is unlawful to place them in a communal space shared with people of the same sex (it is not).

Question 3

In the NHS Constitution, 'Access to health services' includes a right for patients to "receive care and treatment that is appropriate to you, meets your needs and reflects your preferences". Meeting the needs of patients includes respecting the biological differences between men and women, such as sex-specific illnesses and conditions.

If these biological differences are not considered or respected, there is the potential for unintended adverse health consequences. Language, therefore, is very important when communicating with patients. Patients may be unclear about whether a specific condition applies to them and may not come forward for treatment if language is ambiguous. Clear terms that everyone can understand should always be used.

To this end, we propose adding a new right to 'Access to health services' to make clear patients have a right to expect that NHS services will reflect their preferences and meet their needs, including the differing biological needs of the sexes.

The wording we are proposing for the new right is related to the legal obligations on the NHS through the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936 about providing person-centred care. It also aligns with the Equality Act 2010, specifically paragraphs 26, 27 and 28 of schedule 3 relating to separate services and single-sex services respectively.

We propose adding a right to 'Access to health services' to state that:

> "You have the right to expect that NHS services will reflect your preferences and meet your needs, including the differing biological needs of the sexes, providing single and separate-sex services where it is a proportionate means of achieving a legitimate aim."

Our response

AGREE.

We would add to this:

> "You have the right to expect that NHS services will record your sex accurately and will be clear and transparent in presenting the sex of relevant other people where relevant. It is necessary to enable us to care for you safely and reflect your preferences and meet your needs, including different needs of men and women, and to provide single and separate-sex services where it is a proportionate means of achieving a legitimate aim."

This accurate information underpins the commitments being made in the constitutions.

For more about the problem of corrupted sex data in the NHS read: Sex Matters (2024). '<u>Imported gender ideology is damaging the NHS</u>'.

While it is not always justified or possible to provide separate-sex accommodation (such as in Accident and Emergency (A&E) or intensive care) it is ALWAYS a proportionate means of achieving a legitimate aim to record sex accurately and to be clear and transparent to patients about the sex of healthcare professionals and anyone they are sharing sleeping accommodation with. This is necessary for consent, for risk assessment and for safe management and treatment of patients.

Consistency and reliability is important in data systems and policies. Having a policy of sometimes misleading patients about sex or sometimes mis-recording sex undermines the integrity of the whole system. If an NHS body does not record sex accurately for some people this is a problem for the whole dataset, such that the records and the policy implementation cannot be trusted. For example, if 0.5% of people recorded as "male" in NHS records are really female then healthcare professionals have to ask all recorded "males" if they could be pregnant where this is a risk factor. Misrecording some people's sex undermines the safety of their care and the care of others, wastes time and undermines trust.

Similarly if an NHS service promises women that they will only be treated by women in a female-only environment (for example, in advertising a breast-cancer screening service) this promise needs to be trustworthy. If patients know that the NHS sometimes misrepresents the sex of healthcare professionals, then women cannot trust the promise that it will be a female-only environment.

The NHS must be clear that misrepresenting healthcare professionals' sex undermines safeguarding. It must be clear to healthcare professionals who identify as transgender that they are not able to misrepresent their sex to patients, as this vitiates consent. Staff networks and other organisations such as Stonewall that refuse to accept this should not be tolerated within the NHS, as they are advocating for patient abuse.

Data systems commissioned by the NHS should be clear about sex. Currently they are not.

Read more about this problem

See Sex Matters (2023). 'An Epic crisis is unfolding in the NHS'.

Question on technical changes to reflect the Equality Act 2010

The Equality Act 2010 establishes protection by references to the characteristic of sex as defined in the act. We therefore propose to change the language in the NHS Constitution from 'gender' to 'sex' to align with legislation where appropriate.

> Additionally, we propose changing the language 'marital or civil partnership' to 'marriage and civil partnership' and 'religion, belief' to 'religion or belief' to align with the wording in the Equality Act 2010.

Under principle 1, the NHS Constitution currently sets out that:

> "It is available to all irrespective of gender, race, disability, age, sexual orientation, religion, belief, gender reassignment, pregnancy and maternity or marital or civil partnership status."

Changing this or any other principle in the NHS Constitution would require the government to introduce secondary legislation.

Under 'Access to health services', the NHS Constitution currently sets out that:

> "You have the right not to be unlawfully discriminated against in the provision of NHS services including on grounds of gender, race, disability, age, sexual orientation, religion, belief, gender reassignment, pregnancy and maternity or marital or civil partnership status."

We propose changing the language from 'gender' to 'sex', 'religion, belief' to 'religion or belief', and 'marital or civil partnership status' to 'marriage and civil partnership status' so that the amended text reads as follows.

Under principle 1:

> "It is available to all irrespective of sex, race, disability, age, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity or marriage and civil partnership status."

Under access to health services:

"You have the right not to be unlawfully discriminated against in the provision of NHS services including on grounds of sex, race, disability, age, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity or marriage and civil partnership status."

Our response

AGREE.

This is a welcome change. The use of "gender" as a synonym for sex is common, but it is now unsafe to use as it is often understood as relating to subjective feelings of "gender identity". It is a good decision to list the protected characteristics in a logical order which covers the larger groups before the smaller ones, rather than alphabetically.

Within the NHS, training on the Equality Act should make clear that sex (male or female) and gender reassignment ("transsexual") are two separate protected characteristics and having the protected characteristic of gender reassignment does not change a person's sex, or the comparators that should be considered in relation to discrimination.That is, the comparator for a male trans person (a "transwoman") is a male person who is not trans.

This needs to be understood by human resources and diversity personnel across the NHS and covered in training concerning the Equality Act, since many people make the mistake of thinking the comparator is "another woman who is not trans" and this misunderstanding has been encouraged by activists.

The employment tribunal case involving Sheffield Hospital illustrates the problems caused when the question of comparators becomes confused. See Sex Matters (2023). 'If you can't say sex, how can you say sexual harassment?'.

This is also important to understand for anyone undertaking an equality impact assessment. EIAs should address the impact of policies on men and women (male and female) and on people with other protected characteristics (including gender reassignment). Trans-identifying males ("transwomen") are not part of the same group as women, as they do not share similar life experiences and policies will not impact on them in the same way. Where there is a conflict between the interests of women and transwomen it is particularly important that they are clearly recognised as separate groups with distinct interests and needs.

Recognising that there are two sexes does not preclude treating people who identify as transgender with respect. This respect includes being clear to them about rules and policies designed for their own safety and the dignity and privacy of members of the opposite sex.

The protected characteristic of religion or belief includes the "gender critical" belief that there are two sexes, that human beings cannot change sex and that this is important. This does not mean that these statements are only beliefs (or even minority beliefs). These statements

reflect material reality and the law. Recognition of this is important for operating NHS bodies fairly and safely.

NHS bodies are currently not working based on a clear understanding of the protected characteristics in the Equality Act but have instead adopted concepts from gender ideology (such as that being a man or a woman, male or female is a matter of self-determined identity). Those who challenge this are often smeared and harassed as “transphobes” and “bigots”.

Organisations that do not accept the Equality Act, the material reality of the two sexes and the need to record and respond accurately to sex (including for the purposes of safeguarding) should not be allowed to influence NHS bodies or determine their policies.

For more information on schemes undermining clarity about sex in the NHS see:
Sex Matters (2024). ‘What is the indelible mark left by the NHS Rainbow Badge scheme?’

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