

Responding to the NHS Constitution consultation

On 30th April 2024, the Department for Health and Social Care published its proposed changes to the NHS Constitution and opened its consultation entitled 'NHS Constitution: 10 year review'. These guidelines are designed to help you respond to the 'Sex and Gender Reassignment' section of the consultation. There are other changes that may be relevant to you or your loved ones, please do respond to those questions too. It might be that there are changes that you'd like to see made to the NHS Constitution that haven't been proposed. You can include those suggestions in the 'Other Areas' section at the end of the consultation survey.

The consultation is open until 11:59 on 25th June 2024.

What we'll be responding to other proposed changes

Responding to deterioration: **Agree**

Health disparities: **Agree**

Environmental responsibilities: **Agree**

Patient responsibilities: **Disagree**. The emphasis is placed too strongly on patients and does not talk about the need for the NHS staff to follow up with people after non-attendance at appointments. For example, a person in mental health crisis may not be able to cancel but may be in need of support. Additionally, the NHS need to provide patients with easy and accessible ways to cancel and rearrange appointments.

Research: **Agree** but we intend to reiterate that participation in research must be consensual and that no patient should feel coerced into taking part.

Leadership: **Agree**

Unpaid carers: **Agree** to all three proposals

Volunteers: **Agree**

Health and work: **Disagree**. Whilst we agree that people who are well enough to work should be supported to do so, this proposal ignores people who have parental or caring responsibilities, or who are unable to work. For some people, fear of being pressured into work may create additional barriers to accessing healthcare as and when they need it.

Person-centred care: **Agree** and we intend to highlight the challenges faced by trans people when their GP refuses to share care with their NHS gender clinic.

What is the NHS Constitution?

The NHS Constitution sets out rights for patients, public and staff. It outlines NHS 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.

Things to know about this guidance

We've included bullet points of key issues for each question. These are suggestions of things you might want to consider including in your response.

Remember to:

- Respond in your own words.
- Relate it to your own lived experiences.
 - If you're trans, it might be to talk about your experiences accessing non-transition related healthcare.
 - If you're a trans health and social care professional, it might be about your experiences providing care to patients or service users.
 - If you're not trans, it might relate to the experiences of your trans friends and family members.
- Explain what you think the consequences of the proposed changes might be.

It's important that you don't copy and paste from these guidelines as your response is less likely to be counted if you do so.

These guidelines have been co-produced by LGBT Foundation, TransActual, and The Trans Learning Partnership.

Response guidelines

About You

This section asks you about your identity. If you feel able to, it will be useful for you to share the details of your different characteristics. This is because it will influence the writing of the Equality Health Impact Assessment associated with the consultation report. However, the questions are optional and you don't have to disclose anything you don't want to.

Intimate care

There is a proposal to add 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."

- *To what extent do you agree or disagree with this proposal?*
- *If you have any further views on the proposal, please provide these in up to 250 words, if possible.*

We disagree with this proposal.

When you respond, you could raise some of the following points:

- All patients have the right to care that makes them feel safe and comfortable, and ensuring individuals have a level of choice in who provides their care is important.
- The DHSC has not provided a definition of 'biological sex', and there is also no explanation as to how the 'biological sex' of NHS staff will be monitored or regulated. It is therefore impossible to respond to this in an informed way. However, broadly it is difficult to see how this proposal would achieve its aim while maintaining the privacy and dignity of all NHS staff.
- It is unclear how this policy would be compatible and workable with the Gender Recognition Act 2004 given no explanation has been provided by the NHS. It is unclear how this policy would be compatible and workable with the Equality Act 2010 given no explanation or reassurance has been provided by the NHS. The NHS is significantly underfunded and understaffed. This proposal assumes that services will have the staffing capacity to fulfil these requests: in practice, this is unlikely and there is no further information that offers any alternative reassurance.
- The NHS Confederation has guidance regarding requests for intimate care to be provided by someone of the same sex. It states that, where possible and reasonable, requests for such care to be provided by individuals of a particular sex should be accommodated, but that patients do not have a right to demand that their care is or is not provided by a specific member of staff or group. Patients with capacity can refuse care, but the implications of refusing treatment should be explained to them. The proposed change to the Constitution does not provide any evidence for a case for change.

- The British Medical Association states that a trans person's assigned sex at birth is irrelevant to their working life. They conclude that a patient has no right to be told a healthcare worker's assigned sex.
- Share something about your own experiences or feelings. What is important to you in a care provider? Their skill and expertise, their availability, or their sex? Does this represent a priority to you in how you receive NHS care?

Single-sex hospital accommodation

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."

There is a proposal to add the following wording:

"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."

- *To what extent do you agree or disagree with this proposal?*
- *If you have any further views on the proposal, please provide these in up to 250 words, if possible.*

We disagree with this proposal.

Currently, the NHS Constitution states that

"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."

Sleeping accommodation includes admission and assessment units, day surgery etc, even if you are not staying overnight. It does not include spaces such as A&E, where patients have not yet been admitted.

The Review changes 'opposite sex' to 'opposite biological sex', intending to functionally ban trans and non-binary people from being housed in 'sleeping accommodation' of their affirmed gender. It states that this is appropriate and in accordance with the Equality Act 2010, on the grounds of being a 'proportionate means of achieving a legitimate aim'.

When you respond, you could raise some of the following points:

- NHS England already has robust policy that balances the needs of trans and non-binary, and cis patients.
- No definition of 'opposite biological sex', or 'women only-space' is provided which makes it impossible to respond to this proposal in an informed way. . As stated in the consultation introduction, 'any changes [to the constitution] should be clear and compelling', however it is unclear how NHS staff should interpret 'biological sex' in the context of sleeping accommodation.
- The consultation summary states that the NHS Constitution 'does not create new rights or replace existing ones'. By preventing trans and non-binary people from accessing accommodation of their affirming gender, it is difficult to see how the Constitution would be compliant with the relevant provisions of the Equality Act 2010.
-
- The key issue facing the NHS is capacity; there are not enough beds for patients.
 - 44,000 breaches were reported in 2023, in which cis women and cis men shared accommodation due to lack of availability of suitable accommodation. Preventing trans and non-binary people from accessing the ward of their affirmed gender will not solve existing capacity issues.
 - From 2020 to 2023, across 282 NHS Trusts, one single complaint was made about sharing accommodation with a trans woman.
 - Half a million A&E patients were turned away in 2022/3 due to bed shortages across the NHS, and by January 2024, 14,436 beds were filled with patients no longer needing hospital care).
 - Clearly capacity is the key issue, not trans people.
- The proposed change is explained in relation to ensuring the 'privacy, dignity and safety of all patients'. However, no evidence has been provided to show that trans people on single-sex wards are the cause of any issues around the privacy, dignity or safety of other patients. The Review states that there should be 'a sufficiently good reason for limiting or modifying a transgender person's access' to a single sex space but fails to provide such a reason.
- The Review does not provide examples of when it would be appropriate for people of different sexes to share accommodation, which would seemingly leave NHS staff to interpret the Constitution and the Equality Act 2010 without sufficient guidance to ensure a lawful response.
- The Review recommends housing trans and non-binary people in side rooms, without assessing the capacity for this, nor addressing the financial costs of creating more side rooms. Principle 6 of the Constitution states that 'The NHS is committed to providing best value for taxpayers' money'. It is arguable that building side room capacity is not a priority for taxpayers, given the crisis of bed shortages across the NHS.
- Trans people receiving treatment, particularly in rural or community facilities, may be outed without consent to their peers if they are treated differently than cis people while receiving this care. This may be a safety concern for trans and non-binary people living in communities where they are not known to be trans, and may constitute a violation of the Gender Recognition Act 2004 and their obligations under the Equality Act 2010. The DHSC have failed to provide reassurance and an explanation in this regard to date.

- Non-binary and intersex people are not mentioned in the Review. The needs of both non-binary and intersex patients must be considered before any changes to accommodation policy are made.

Meeting patients' biological needs

There is a proposal to add:

"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."

- *To what extent do you agree or disagree with this proposal?*
- *If you have any further views on the proposal, please provide these in up to 250 words, if possible.*

We disagree with this proposal.

When you respond, you could raise some of the following points:

- The assertion that NHS services will reflect trans people's preferences and meet their needs is welcome. Currently, trans people's find healthcare professionals unable or unwilling to meet their needs or respect their preferences:
 - The National LGBT Survey 2018 found that 21% of trans respondents had reported that their specific needs had been ignored or not taken into account.
 - The Trans Lives Survey 2021 reported that, of those trans people who had attempted to access care considered gender/sex-related, 29% had been refused.
 - LGBT Foundation's ITEMS report 2022 found that:
 - Only 41% of trans and non-binary people felt they were spoken to in a way which respected their gender all the time during antenatal care.
 - 28% of trans and non-binary people did not feel they were treated with dignity and respect during labour and birth.
 - Less than half of trans and non-binary people felt their decisions around feeding their baby were always respected by midwives.
- The consultation document states that it is permissible and desirable to make positive adjustments to support trans people when accessing healthcare. The use of additive or inclusive language is proportionate in that it typically involves using gender neutral pronouns and/or adding a couple of words to a sentence, such as changing 'pregnant

women' to 'pregnant women and other pregnant people'. It is justifiable due to the significant barriers to care faced by trans people:

- o TransActual's Trans Lives Survey 2021 reports that 27% of trans people always or often avoid visiting their GP for care that's typically associated with people of a certain gender.
- o LGBT Foundation's ITEMS report 2022 found that 30% of trans and non-binary people did not access NHS or private support during their pregnancy/pregnancies.
- There is a misconception that healthcare providers have been asked to stop using terms like 'breastfeeding' and 'mother' for all patients. This is not what healthcare providers have been asked to do. They've been asked to use different language when talking directly to individual trans patients [and to use additive language](#) when talking to or about groups of patients.
- The use of inclusive language in health promotion materials, in information leaflets, on forms, and by clinicians plays an important part in reducing trans people's barriers to care.
- Inclusive or additive language does not prevent men and women who aren't trans from accessing the care that they need. No evidence has been offered in the preamble to the proposed change to suggest otherwise.
- Everyone ought to have access to health promotion information that they can understand - for example, through short video clips or by having access to a translated copy. If a patient is unable to understand language such as 'women and anyone who could be pregnant', then this is an indication that they are unlikely to understand other information provided and that they ought to be given other ways to access it.
- The use of inclusive or additive language is beneficial for many people and not just trans people. For example, the inclusive use of language on paperwork relating to perinatal care will benefit lesbian couples too.
- The discourse around the guidance may cause misunderstanding. For example, trans women over the age of 50 need access to breast cancer screening if they have breasts. Whilst there's nothing in this proposed change that indicates they should be prevented from accessing it, there's a risk that healthcare professionals may misinterpret what is being recommended.
- In summary, the language used in this proposed change has the potential to increase the barriers faced by trans people when accessing healthcare.

If you're trans, it would be useful to talk about:

- Your own experiences accessing healthcare that's generally considered 'for men' or 'for women' – what made them positive or negative?
- Why the use of trans-inclusive language is important to you. What is the impact on you when you're misgendered?
- If you've ever seen a trans-inclusive health promotion poster or leaflet. How did it make you feel? Did it make you feel any differently about your healthcare?

If you're cis, it would be useful to mention:

- Your own views on trans inclusive language in relation to healthcare. It would be particularly useful to state that the use of trans inclusive language has had no negative impact on you and that you find it accessible.
- The experiences of the trans people in your life in relation to healthcare that's generally considered 'for men' or 'for women'.

Technical changes to reflect the Equality Act

The current NHS Constitution refers to "gender, race, disability, age, sexual orientation, religion, belief, gender reassignment, pregnancy and maternity or marital or civil partnership status".

In order to bring the language into line with that used in the Equality Act 2010, the proposal is to change the wording to:

"sex, race, disability, age, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity or marriage and civil partnership status".

- *To what extent do you agree or disagree with this proposal?*
- *If you have any further views on the proposal, please provide these in up to 250 words, if possible.*

We agree with this proposal.

When you respond, you could raise some of the following points:

- This change reflects the language of the Equality Act 2010 – it's important that the NHS Constitution accurately reflects the law.
- The changes proposed in the 'Sex and Gender Reassignment' section of the consultation act in opposition to this assertion of patients' rights not to be discriminated against on the basis of gender reassignment.

Other areas

At the end of the consultation survey, there's space to add any other comments about the NHS Constitution.

- *If you have any other comments about the NHS Constitution, please provide these.*

You might wish to comment on how the proposed changes to the 'Sex and Gender Reassignment' section work to undermine the principles of the NHS Constitution:

- **Principle 1: The NHS provides a comprehensive service, available to all**
- **Principle 2: Access to NHS services is based on clinical need, not an individual's ability to pay**

If a trans person feels unable to access medical care for fear that they will be put on the wrong ward or have inaccurate and inappropriate language used against them, the NHS will have failed to meet their clinical need or truly have made their service available to all.

- **Principle 3: the NHS aspires to the highest standards of excellence and professionalism**

Instructing healthcare professionals to stop taking actions to promote trans people's wellbeing and to take actions that could place that wellbeing in jeopardy, is in effect asking them not to follow best practice. These changes will make them unable to maintain high standards of excellence and professionalism.

- **Principle 4: the patient will be at the heart of everything the NHS does**

This principle does not specify that only cis people ought to be centred in decisions about their care. However, the changes that impact trans people will make it impossible for healthcare professionals to place their needs as central to the provision of their care.

You might also wish to expand on the issues around the definition of 'biological sex':

- No definition of 'biological sex' has been offered, which means it is unclear as to whether it refers to:
 - Chromosomal sex - this is often unknown and can't be observed without a blood test, so will place additional financial burden on the NHS. It's unclear what would happen for people whose chromosomal make-up differs from XX and XY.
 - Hormonal sex - this could result in some trans people being accommodated on wards that align with their gender and in some not having access to that. Some trans people cannot access hormone replacement therapy due to disability, so it may lead to instances of discrimination based on the protected characteristic

of disability. It's unclear what would happen for people with people who aren't trans that have differences in hormonal balance.

- Genital sex - this could result in some trans people being accommodated on wards that align with their gender and in some not having access to that. Some trans people cannot access hormone replacement therapy due to disability, so it may lead to instances of discrimination based on the protected characteristic of disability. It's also how it would apply to intersex people.
- Sex assigned at birth - some countries outside the UK enable intersex people to be recorded as such on their birth certificate. There has been no mention of accommodations for intersex people, so it is unclear what would happen in this instance.
- The Equality Act 2010 states that sex relates to being a man or a woman. The most practical and sensible option would be for the NHS Constitution to take sex to mean whether someone is a man, woman, or neither.
- It is unclear how the 'biological sex' of staff and patients would be checked and monitored. For example, would everyone be checked or just those perceived to be trans? If the latter, this could lead to other forms of discrimination such as racism and homophobia.

[View this resource as a webpage](#)

[Read the about the proposed changes to the NHS Constitution](#)

[Respond to the NHS Constitution consultation](#)