TransActual response to NHS Constitution consultation

Responding to deterioration

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**
  We think this proposed change is important and is necessary. It formalises what is known as Martha's rule, which is already being rolled out within the NHS. We note that this approach has the backing of a number of organisations, but wish to highlight that The Royal College of Nursing have stated that "Safe and effective levels of nursing staff will be crucial to the implementation of Martha's Rule". As such, we hope that NHS staffing levels will be such that trusts are able to meet the pledge for all patients.

Health disparities

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

TransActual's Trans Lives Survey 2021 reported that:

- When accessing general healthcare services, our trans respondents told us they experience discrimination. 70% reported being impacted by transphobia, 74% of our disabled respondents told us they were impacted by ableism, and 69% of Black respondents and respondents of Colour were impacted by racism.
- 57% of trans people reported avoiding going to the doctor when unwell.
- 14% of trans people reported that they were refused GP care on account of being trans on at least one occasion.
- Of those trans people who had attempted to access care considered gender/sex-related, 29% had been refused
- 27% of trans people always or often avoid visiting their GP for care that's typically associated with people of a certain gender.

We therefore welcome the addition to the Everyone Counts value and hope that it acts to encourage more partnership working and to emphasise the importance of tackling health inequalities. All too often trans people face discrimination when seeking medical care, which adds to the other barriers to accessing diagnosis, screening and treatment.

Environmental responsibilities

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

We welcome the addition of this new value. Everyone has a part to play in reducing their impact on the environment and in protecting it for generations for come. By including the value in the constitution it sets out a clear expectation for NHS services.

Patient responsibilities

- **To what extent do you agree or disagree with this proposal?**
  Disagree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

The changed sentence places the emphasis too strongly on patients without talking about the barriers that could have prevented a patient from attending or cancelling in a timely manner. People with mental health conditions or in mental health crisis would be negatively impacted by this change. A person in mental health crisis may not be well enough to attend their appointment, but may also be unable to cancel it because they're unable to communicate with others, cannot use the phone or email, or are experiencing symptoms that may impact their ability to keep track of time or appointments.

The proposal needs to be changed to highlight the need for NHS staff to follow up with people after non-attendance at appointments. It might be that they discover that the patient has health or care needs that need to be addressed.

The process of rearranging appointments needs to be easy and accessible. We note that the difficulties that many patients face with this has been highlighted by Healthwatch in their report about outpatient appointments.

Research

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

We welcome the emphasis on a need for research to be conducted by NHS providers. It's particularly useful when seeking to understand health inequalities and different healthcare needs, so we feel that more research on trans people's health needs will be beneficial.

However, all research must be conducted ethically. Participation in research must be consensual and no patient should feel coerced into taking part. It's also important that patients are clear about who will have access to their personal information and what it will be used for as part of the research.

TransActual have a number of concerns about the planned research into puberty suppressing medication for young people experiencing gender dysphoria/gender incongruence. With the newly introduced ban on such medication for new patients outside of the research project, we are concerned that the young people in question will have a choice of taking part in the research or not getting treatment. When the medication had previously been available to them outside of a research context, we feel that this approach is coercive and is unethical.

Leadership

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

TransActual are pleased to see the emphasis on high quality care and on openness and fairness within this proposed change. As highlighted in our response to the Health Disparities section, trans people often do not experience fairness when accessing care and can also find they experience a poorer quality of care as a result. Furthermore, trans staff report being treated unfairly. NHS Confederation's 2023 Trans and Non-Binary Allyship in NHS Organisations Survey found that 55% of trans NHS staff had experienced transphobia at work.

Sex and gender reassignment

Intimate care

- **To what extent do you agree or disagree with this proposal?**
  Disagree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

This proposal is unworkable, contradicts several NHS Constitution values and could lead to NHS providers acting unlawfully.

The DHSC has not offered a definition of 'biological sex' in the consultation documentation or when asked to provide one verbally. We are unclear as to whether 'biological sex' refers to chromosomes, hormones, genitals, sex assigned at birth, or something else entirely. As such, it makes it impossible to make an informed response to this proposal. What is clear from the

consultation documentation, is the intention to use the phrase 'biological sex' in order that trans members of NHS staff will be treated differently than colleagues who aren't trans.

It is unclear how this policy would be compatible and workable with the Gender Recognition Act 2004 or with the Equality Act 2010, given that this has not been addressed by the DHSC and that no EHIA has been provided for review. The Gender Recognition Act 2003 and Equality Act 2010 support NHS employers to protect the privacy and dignity of their staff, but implementation of this proposal would undermine that.

The proposed change is a departure from already established guidance.

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 British Medical Association states that a trans person's assigned sex at birth is irrelevant to their working life and that a patient has no right to be told a healthcare worker's sex assigned at birth.

We are not aware of any issues or complaints around trans members of NHS staff providing personal care to others, and none have been highlighted in the consultation document or offered by the DHSC when asked about the rationale for the proposed changes. There appears to be no evidence that trans members of staff need different policies applied to them than other members of staff in relation to providing intimate care for patients. Thus, the use of the phrase 'biological sex', however defined, needs to be revisited and the proposal needs to be reworded.

A reworded and improved proposal will enable the constitution to set out a commitment to patient choice around intimate care whilst also ensuring that the privacy and dignity of staff members is maintained and that NHS providers are acting in a legally compliant manner.

Single-sex hospital accommodation

- **To what extent do you agree or disagree with this proposal?**
  Disagree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

This proposal, if enacted, will have the impact of creating additional barriers to accessing medical care and will thus act to further exacerbate health inequalities for trans people. The implementation of the pledge is likely to lead NHS providers to act unlawfully as well as breaking some of the other pledges within the constitution.

As with our response to the previous question, we reiterate that it is not possible to make fully informed response to this proposal based on the failure to provide a definition of 'biological sex' or to publish the draft EHIA. However, the constitution documentation makes it clear that for this proposal, as with the previous, the phrase 'biological sex' has been used in order to treat trans people differently from others.

The Equality Act 2010 makes it clear when the single-sex exceptions may or may not be applied to trans people and it's long established that the exceptions may only ever be made on a case by case basis. The review offers no information on how NHS staff will be able to comply with the Act whilst also delivering on the pledge. Additionally, 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 proposed updated Constitution would be compliant with the relevant provisions of the Equality Act 2010. Had we been able to access the EHIA, some clarity may have been offered on this matter.

In 2023, 44,000 breaches of that policy were reported. These related to cis women and cis men sharing accommodation due to capacity issues within the NHS which mean there are not enough beds. This is not something that Preventing trans and non-binary people from accessing the ward of their affirmed gender will not solve existing capacity issues.

The proposed change is explained in relation to ensuring the 'privacy, dignity and safety of all patients'. NHS England's Delivering Same Sex Accommodation policy gives clear guidance around the accommodation of trans patients in a way that balances the needs of trans people and those who aren't trans, whilst also maintaining legal compliance. The policy has been in place since 2019 and practice recommended in this policy predates it by a number of years.

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 DHSC, neither in the consultation documentation or when asked for the rationale for the change to the pledge, have not offered any evidence of an issue. A series of FOI requests found that, from 2020 to 2023, across 282 NHS Trusts, there was just a single complaint (categorised as a 'minor' complaint via the trust) made about sharing accommodation with a trans woman.

The Review recommends housing trans people in side rooms, without assessing the capacity for this. At a time in which the NHS is experiencing a crisis around capacity and well documented bed shortages, it is unclear how side rooms will be made available in practice. If the proposal is to build more side rooms specifically for trans people, we have concerns that is not the best use of taxpayers' money and the implementation of the proposed changes could lead NHS providers failing to comply with Principle 6 of the Constitution.

It is important to note that decisions around a trans person's hospital accommodation, if this proposed change were to be implemented, could lead to a breach of their privacy that has significant impacts beyond their stay in hospital. Many trans people keep their transgender status private for safety reasons and/or to minimise the risk that they will experience discrimination.

TransActual's Trans Lives Survey 2021 found that trans people experience transphobia:

- When seeking housing - 40% of respondents
- When looking for work - 63% of respondents
- When trying to access goods and services – 72% of respondents
- From strangers on the street - 85% of trans women, 71% of trans men, 73% of non-binary people
- From carers – 53% of respondents for whom it was relevant

In the past 12 years, transphobic hate crime has increased by 1426%.

Trans people's gender histories being revealed to other patients or visitors, by virtue of their hospital accommodation, could place them at increased risk of such discrimination or event harassment and violence. This may be a particular risk for those receiving treatment in smaller hospitals or in rural or community facilities. Because no EHIA has been provided, we don't know whether any consideration has been paid to these factors.

We also note that non-binary and intersex people are not mentioned in the review. Their needs must be considered along with the needs of men and women and we consider it a troubling oversight that they have not been. With that in mind, we recommend that the only change to the original wording of the pledge ought to be to amend the phrase 'the opposite sex' to read 'a different sex'.

Meeting patients' biological needs

- **To what extent do you agree or disagree with this proposal?**
  Disagree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

TransActual welcome the assertion in this pledge that 'You have the right to expect that NHS services will reflect your preferences and meet your needs'. Trans people regularly report that healthcare professionals are unable or unwilling to respect their preferences or meet their needs and that this is particularly the case when accessing care typically associated with people of a certain sex/gender:

- 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.

Despite welcoming the opening phrasing of the pledge, we are deeply concerned that the phrasing around 'differing biological needs of the sexes' may act to exacerbate health inequalities for trans people.

The Review appears to have included the terminology around 'biological sex' in this pledge based on a misconception that healthcare providers have been asked to stop using terms like 'breastfeeding' and 'mother' for all patients. Changes to the NHS Constitution ought to be based on facts, not misconceptions. What healthcare professionals have been asked to do is use different language when talking directly to individual trans patients and to use additive language when talking to or about groups of patients.

We note that the consultation documents states that it is permissible and desirable to make positive adjustments to support trans people when accessing healthcare. Additive and/or inclusive language (for example changing 'pregnant women' to 'pregnant women and other pregnant people' in policy documents) is proportionate in that it tends to constitute small changes and justifiable on the grounds of reducing the barriers to care faced by trans people. It's well documented that trans people face additional barriers to certain types of care. For example, 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.

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. It does not prevent people who aren't trans from accessing the care that they need and no evidence is offered in the consultation documentation to suggest that it does. We are aware that some people have expressed concern that inclusive language may confuse those who do not speak English fluently. This is one of the reasons we advocate for additive language when it would be more appropriate to use it. If a patient is unable to understand a language such as 'women and anyone else with breasts', then it's very clear that they would be unlikely to understand other, more complex health information. This is why it's so important that health promotion information is available in community languages, that patients have easy access to interpretation services and that Easy Read and video format information is made available too.

When inclusive or additive language is used on documentation or in health promotion materials, the benefits can extend to those who aren't trans. For example, the inclusive use of language on paperwork relating to perinatal care will benefit lesbian couples too.

Given the data already referenced around refusal to offer certain types of care to trans people, we worry that this proposed change could exacerbate pre-existing issues. It could lead to misunderstandings about what care trans people can or can't access, such as trans women being told that they're not allowed to have a mammogram as part of the screening programme.

We suggest that the new pledge is amended to read 'You have the right to expect that NHS services will reflect your preferences and meet your needs. You can expect to be able to access information and care tailored to the needs of people with whom you share a protected characteristic, if doing so would be a proportionate means of achieving a legitimate aim. This

includes having access to information about your health and care that is presented in a way that you can access and understand.'

Technical changes to reflect the Equality Act

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

We agree with this proposal because it's important that the phrasing used in the NHS Constitution accurately reflects the law. This change will enable to NHS Constitution to mirror the language used in the Equality Act 2010.

We do, however, note that the changes proposed in the 'Sex and Gender Reassignment' section of the consultation contradict the statements highlighted as requiring this technical change. In particular, they act in opposition to the rights of patients to not be discriminated against on the basis of gender reassignment.

Unpaid Carers

Recognition of caring responsibilities

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

TransActual welcome this additional pledge. It is important that unpaid carers are both recgnised and valued by NHS staff and by NHS providers.

Raising concerns

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

We recognise the role that unpaid carers often play in advocating for the person for whom they are caring. For this reason, we feel that this pledge is a useful addition to the Constitution.

Discharge arrangements

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

This pledge, as with the other new pledges in this section, is a welcome addition to the Constitution. It is clear that, for practical reasons, unpaid carers ought to be involved in discharge planning.

Volunteers

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

TransActual recognise the value that volunteers bring to the health and social care sector and are glad to see that the DHSC do too. As such, we feel that this new pledge is welcome and appropriate.

Health and work

- **To what extent do you agree or disagree with this proposal?**
  Disagree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

We agree that people who are well enough to work and who are ordinarily able to work should be supported to do so, and we are aware that the NHS already run a number of valuable initiatives around this. However, we have a number of concerns about the proposed change to this value.

We are worried that there is nuance missing from the proposed change to the pledge and that there are issues that have not been appropriately addressed by the Review.

Some people are unable to work due to disability or because they have parental or caring responsibilities. For some people, fear of being pressured into work could act to create new and additional barriers to accessing healthcare. The people most impacted may already face multiple barriers to accessing care.

Additionally, the work that people are encouraged to return to or remain in needs to be suitable. For example, if someone has taken extended time off work due to the working conditions or the particular role, it might be that it's not a suitable job for them to return to.

Person centred care

- **To what extent do you agree or disagree with this proposal?**
  Agree

- **If you have any further views on the proposal, please provide these in up to 250 words, if possible.**

TransActual welcome the amended wording in this pledge. Trans people face specific difficulties when services do not communicate well enough with each other or when they refuse to work with each other. In particular, we note an increasing trend in GPs refusing to share care with NHS Gender Clinics despite guidance from the GMC advising that they ought to. Commonly cited reasons include:

- Practices, PCNs and/or ICSs not having a policy on the matter
- Not being funded to do so
- Not feeling competent to do so
- Personal beliefs of the GP

This is incredibly stressful and upsetting for trans people and acts to exacerbate the general health inequalities faced by this group as well as further delaying access to transition-related care.

Other areas

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

We have a number of concerns relating to this consultation process, some of which are detailed in the joint letter to the DHSC from members of National Voices. We wish to stress that the fact that we have responded to the consultation questions is without prejudice to our position that the consultation is flawed.

In particular:

1. No definition is offered of 'biological sex' has been offered in the consultation documentation. 'Biological sex' could refer to one, a combination, or none of the following:
    - 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 sex trans people know themselves to be – for example, many trans men state that they know themselves to be male. Knowledge and thought processes arise as a result of biological processes within the brain.
2. No draft Equality and Health Impact Assessment has been published. This makes it impossible to know whether or not concerns around compliance with the Equality Act 2010 have been considered and mitigated against.
3. The consultation was neither paused nor extended upon the announcement of the General Election, despite the impact of restrictions on the DHSC publicising consultations during the pre-Election period. We anticipate that this will result in a lower than expected response rate to a consultation that impacts every person in England.
4. A number of barriers are in place to people responding to the consultation, but because the draft EHIA was not published, we do not know if they have been considered:
    - The language used in the consultation documentation is technical and estimated to require a reading age of 15-18 years, yet the Easy Read version was not made available until half way through the consultation process. This failure to have an Easy Read version available upon launching the Consultation has limited the time available to promote the consultation to people with poorer literacy skills and particularly to people with learning disabilities.
    - No translated versions of the consultation are available and no support for BSL users has been provided by DHSC.
    - The consultation is only being conducted online, which excludes those with poor digital literacy or without easy access to a device and/or internet access.

The combined result of these issues is that many members of the public will have been unable to respond to the consultation at all, and those that have done have been unable to respond in a meaningful way.

In addition to these concerns, we feel it is important to reiterate that some of the proposed changes are incompatible with the Equality Act 2010 and the Gender Recognition Act 2004.

The proposed changes within the 'Sex and Gender Reassignment' section of the consultation undermine or contradict several principles of the NHS Constitution, having the effect of making the draft Constitution inconsistent with itself:

- The proposed change around hospital wards could result in trans people simply not seeking medical attention. This will mean that their clinical needs will not be met and that the hospital care will functionally be unavailable to them. This would lead to NHS providers failing to follow Principle 1 or 2 of the constitution in relation to trans patients.
- The proposed changes to the consultation may result in trans people receiving a lower standard of care than other patients and in professionals feeling unable to follow best practice in relation to trans-inclusive healthcare. As a result, the changes will make it

harder for NHS staff to maintain high standards of excellence and professionalism, when caring for trans patients. This undermines Principle 3 of the Constitution.

- Principle 4 states that 'the patient will be at the heart of everything the NHS does'. It does not state that there is an exception for trans people. 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. As such, the proposed changes act contrary to Principle 4 of the Constitution.

When asked to define 'biological sex', the DHSC indicated that they hoped to come to a definition as a result of the consultation. As detailed above, this has had the result that the public have been unable to respond to the consultation in a meaningful way. However, we suggest that 'sex' rather than 'biological sex' is used within the constitution. This would be in line with the language used in the Equality Act 2010. The Act 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.

With these additional considerations in mind, plus the factors highlighted at the start of the response to this question (and throughout our consultation response), we suggest that further consultation should take place following the General Election and before the implementation of any changes to the NHS Constitution.