

## **The proposed new NHS constitution. Implications for trans people needing in patient treatment and for trans NHS employees.**

Recent alarmist news stories about proposed changes to the NHS Constitution seem to have caused some panic in the UK trans community, and especially amongst trans women. We'd like to bring some clarity to this and explain exactly what the NHS (at the government's behest) seems to be suggesting, and what it is not - from a legal standpoint.

Despite the fact that the new constitution suggests a range of changes, media coverage has, as usual, focused on the never-ending culture war against trans people and ranged from the demented, to the misleading, to the (perhaps deliberately) wrong. The *Daily Telegraph*, predictably, started doing victory laps about a 'ban [of] trans women from female-only wards'. The *Guardian* went with 'Transgender people will be treated in single rooms in hospitals in England' and the *BBC* with 'Transgender women should not be put on single-sex female NHS wards, the government is proposing'.

None of this is accurate.

Although we have major concerns about some other parts of the proposed new NHS Constitution (see below), the part that addresses single sex wards is in fact broadly in line with the Equality Act 2010 (EA 2010). The tone and the inferences may feel hostile (remember which government is trying to do this), but our hunch is that some lawyers have become involved to prevent NHS England from trying to do something that would simply fail in the courts from day one - under current legislation at least.

The proposed change states '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.'

The word 'appropriate' is doing a lot of heavy lifting here. There will still be many times when it will remain appropriate for a trans woman to be located in a woman's ward. And trans women will still ONLY be excluded from a female hospital ward 'if it is a proportionate means of achieving a legitimate aim' - consistent with the EA 2010.

This is because it will still be very hard to demonstrate it is 'proportionate' to exclude a trans woman from a female ward. Individual cases will be assessed \*individually\* and the bar to exclude remains high. Further, what does 'proportionate' to exclude actually mean when on a staggering 44,000 occasions in the last year cisgender people were placed in opposite sex wards (a statistic that has nothing at all to do with the current culture war against trans people and everything to do with NHS underfunding and government neglect). The NHS in each of these cases will have had to consider questions of dignity, safety and privacy, and on each occasion, it will have decided that it could in fact manage these factors.

With respect to trans women, previous policy (for over 50 years) has been for them to be accommodated on female wards. This puts into relief any attempts by hostile voices to claim that it cannot be done, revealing the truth of their argument - which is often pure prejudice.

On this aspect of the proposed constitution, our hope is that trans people do not take what is written in newspapers by bigoted, lazy, or sometimes, genuinely stupid, journalists as the final word.

All this said, there are proposed changes to the constitution that are very unwelcome and problematic. These include the following:

(1) The draft fails to define what so-called 'biological sex' is - causing confusion as to the precise impact on trans, intersex, and non-binary people.

(2) According to the EA 2010 Statutory Code the default position is that trans people should be placed in wards that match their gender presentation. 'Denial of a service' to a transgender person, (i.e. refusing to place a trans woman in a female ward), 'should only occur in exceptional circumstances.' But by attempting to make denial of service the default position, the risk is that hospitals will be misled into unlawfully discriminating against trans people. At the moment trans people are placed in wards matching their gender presentation even in situations where this may \*not\* be 'required' by the EA 2010 (Annex B), unless there is a very good reason not to. The proposal changes the balance of this, to encourage the hospital to try to exclude, unless there is a legal reason why they cannot.

(3) Proposals to give cisgender patients the right to have treatment from a clinician of the same 'biological sex' are sinister and likely unlawful. To operationalise this, all relevant NHS trans staff would have to out themselves to their colleagues - such a requirement runs straight into the Gender Recognition Act 2004 and the Human Rights Act 1998. Further, a potential EA 2010-breaching violation of a trans woman's dignity also arises should she, for example, arrive for an appointment that involves an intimate examination – perhaps a breast examination – to be confronted by a male clinician. Whereas a cisgender woman is to be given the right to be seen by a 'biological woman' in such a situation, the trans woman is to be offered no such right. In fact, under the proposal, the only professional she could demand to see would in fact *be* a 'biological man'.

The public consultation over the NHS Constitution runs until June 25th and can be accessed at: <https://consultations.dhsc.gov.uk/en/660d21db9ecc4223dd0174bf>

**Trans Legal Project**

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