



We support all maternity service users to navigate the system as it exists, and campaign for a system which truly meets the needs of all

To: Matthew Taylor, Chief Executive, NHS Confederation

24th August 2023

Dear Matthew Taylor

AIMS is a charity that has been campaigning for improvements to the maternity services in the UK since 1960. AIMS works towards better births for all by campaigning and information sharing, protecting human rights in childbirth and helping everyone to know their rights, whatever birth they want, and wherever they want it.

AIMS recognises the discrimination and harassment that trans and non-binary (TNB) people may experience either as staff or as users of the maternity services. We welcome the NHS Federation's decision to publish guidance on 'Supporting trans and non-binary healthcare staff' and hope that its adoption by providers of maternity services will lead to greater understanding of and respect for the needs of TNB maternity service users as well as staff.

However, whilst we feel that much of the guidance is helpful and proportionate, there is one area about which we are deeply concerned, and this is in respect of a patient's right to decline care from a member of staff if they are not of the same sex.

Women, and especially those using the maternity services, may have many reasons for wanting same-sex care. These may include having suffered domestic abuse, sexual, physical or obstetric violence from a man; religious or cultural reasons; or their personal sense of privacy and decency. However, they may not wish to disclose these reasons, nor should they be required to do so in order to have their request for same-sex care respected. Your guidance, in stating that "It would likely be discriminatory for the patient to refuse to be treated or cared for by a trans person, unless clear and evidenced clinical harm may result to the patient," wrongly places the onus on the patient to prove this 'clinical harm' even though being forced to do so could in itself be emotionally damaging to them.

Article 8 of the Human Rights Act guarantees the 'Right to respect for private and family life' and the courts have interpreted this to include the 'principle of autonomy'. This right is also protected under the common law of England, Wales, Scotland and Northern Ireland. The principle of autonomy means that every person has the right to make decisions about their body for themselves, including who they will or will not permit to see or touch any part of their body. Therefore, legally everyone has the right to decline care from any person for any reason and should not be required to give their reason or be threatened with care being withdrawn or delayed if they continue to decline. Such a threat would invalidate their consent to treatment, meaning that the care provider would then be acting illegally.

Your guidance rightly says that "When a patient requests an employee to be a woman or a man, the needs and safety of both staff and patient should be considered" but then goes on to say that "the comfort of the staff member should be prioritised" and to effectively ignore the needs and safety of the patient. This is in contrast to the priority given to patients' needs in the NHS Constitution, which states that "Patients come first in everything we do" and "You have the right to receive care and treatment that is appropriate to you, meets your needs and reflects your preferences."

**Association for Improvements in the Maternity Services**

**Registered Charity No. 1157845**

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AIMS is concerned that in your understandable desire to protect TNB staff from distress you have ignored the severe distress that women in pregnancy and labour (who are often already in an anxious and emotionally vulnerable state) might suffer in being forced to receive care from someone who is, or who they perceive to be, not of the same sex as themselves. As your own guidance states, genuinely held 'gender critical' beliefs are protected under the Equality Act 2010, yet your guidance says, "Beliefs about trans and non-binary people that may be considered offensive are not valid grounds to refuse treatment from a trans or non-binary person." This means that a woman expressing her genuine belief that a TNB member of staff does not meet her requirement for same-sex care could "be informed of the potentially discriminatory nature of their request, that such behaviour is unacceptable, and that their request cannot be accommodated as it has no reasonable clinical benefit." This is not patient-centred care.

We recognise that it may be difficult to balance protection of TNB staff from comments that are offensive to them with the rights of patients to assert their needs. However, whereas the guidance says that if the TNB person "no longer feels safe treating the patient" another member of staff should be assigned, there is no corresponding recommendation to assign another member of staff if the patient does not feel safe being cared for by a TNB person. A patient placed in this position might well be driven to express a belief "that may be considered offensive" (e.g., telling a transwoman "You are not a woman") in order to explain their objection. We feel that the guidance, rather than casting blame on the patient, should recommend a respectful conversation with them to explore how their needs for safe and respectful care can be met within any staffing constraints.

We see from your website that you are seeking legal advice with a view to updating your guidance. We very much hope that this review will lead you to redraft your guidance to reflect the need to respect patients' requests for same-sex care without requiring them to prove 'clinical harm.' In the meantime, we suggest that you withdraw this flawed version, or at least those sections relating to the issue of same-sex care. We also suggest that in the interests of transparency you should state on your website which sections are under review and invite all stakeholders to comment on these.

It appears that you did not seek input from any service users or service user support organisations before issuing this guidance. Had you done so, these concerns might have been identified and addressed before publication. You say that your organisation aims "to ensure local organisations and systems work in the best interests of service users, citizens and staff" but we do not see how you can expect to achieve this without including service users in the discussion along with other stakeholders. We urge you to consider setting up your own Patient Panel, or at least a collaboration with a service-user body such as The Patients Association or National Voices, to ensure that in future guidance full weight is given to the patients' perspective.

We note that because your organisation's title includes 'NHS' some people have wrongly assumed that this guidance represents official NHS policy. To us, this makes it all the more important that you ensure that any guidance or other documents that you issue that have the potential to affect patients' rights or their experience of care must be subject to a suitable patient-focussed and transparent sign-off procedure. We hope you can reassure us that you will be putting such a process in place and will not update this guidance without proper patient input. AIMS will be happy to provide comments and suggestions as part of this process.

Yours sincerely

The AIMS Campaigns Team

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