

NHS Constitution Consultation – NHS Providers response

NHS Providers is the membership organisation for the NHS acute, mental health, community and ambulance services that treat patients and service users in the NHS. It helps those NHS trusts and foundation trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in England in voluntary membership, collectively accounting for £115bn of annual expenditure and employing 1.4 million people.

The [NHS Constitution](#) brings together the principles, values, rights, and responsibilities that underpin the NHS. It sets out the enduring character of the NHS and aims to empower patients, staff and the public to know and exercise their rights both to help drive improvements in its quality, efficiency, and responsiveness, and to support sustainable delivery of services.

The Constitution has a framework in primary legislation, established by the Health Act 2009. The Health Act 2009 places a statutory duty on NHS England, ICBs, local authorities, NHS trusts and foundation trusts, special health authorities, NICE, CQC, HSSIB and other providers of NHS and public health services (including independent providers and GPs) in England to have regard to the NHS Constitution in performing health service functions. The Health Act 2009 requires that every 10 years the Secretary of State must carry out a [review of the NHS Constitution](#).

We welcome the opportunity to respond to the Department of Health and Social Care's (DHSC) formal consultation to update the NHS Constitution. This formal response is based on information and perspectives shared by members over the last few years. We appreciate that DHSC's ability to engage on the Constitution consultation has been restricted due to the pre-election period, so we strongly encourage DHSC to continue engagement with staff and the public after the close of the consultation period and the end of the pre-election period.

Responding to Deterioration

We propose adding the following new pledge for patients and the public under 'Involvement in your healthcare and the NHS':

The NHS pledges to provide patients (and their families, carers and advocates) who are in acute or specialist provider sites a structured approach to providing information about their or their loved one's condition at least daily and if they have concerns about physiological deterioration that are not being responded to, access to a rapid review by appropriate clinicians from outside their immediate care team.

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

Agree

We support the inclusion of this pledge into the Constitution, and that the importance of listening to patients and their loved ones has been specifically noted within the pledge.

As this change is a pledge, and 'pledge' has been defined within the consultation as aiming to 'express an ambition to improve going beyond legal rights', we would suggest that this pledge could be made more ambitious. It currently only references specialist and acute provider sites, but this could include future expansion into other settings, and in particular mental health inpatient care. This would also help to achieve parity of esteem between mental and physical health.

Health Disparities

Under the NHS Act 2006, NHS England and ICBs are required, in the exercise of their functions, to have regard to the need to reduce inequalities between persons with respect to their ability to access health services, and outcomes (including outcomes that show the quality of the patient experience). These and other duties on health bodies were strengthened in the [Health and Care Act 2022](#). The Levelling Up White Paper and subsequent [Levelling-up and Regeneration Act 2023](#) established the Levelling Up health mission to narrow the gap in healthy life expectancy by 2030 and increase healthy life expectancy by 5 years by 2035.

The NHS Constitution currently sets out, under the value 'Everyone counts', that:

We maximise our resources for the benefit of the whole community, and make sure nobody is excluded, discriminated against or left behind. We accept that some people need more help, that difficult decisions have to be taken - and that when we waste resources we waste opportunities for others.

We propose adding the following sentence to the value 'Everyone counts' to provide further detail on how the NHS works to understand the needs of different people and reduce disparities:

NHS organisations work with statutory and non-statutory partners, using the best data available, to understand the range of healthcare needs within and between local communities and how to tailor services accordingly and fairly, reducing disparities in access, experience and outcomes for all.

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

Agree

We are supportive of this addition, as it provides a useful step forward regarding the importance of NHS organisations working to tailor services to reduce health inequalities. However, as the Constitution aims to 'empower patients, staff and the public to know and exercise their rights', we would suggest that more accessible language is used here. As opposed to 'health disparities' we would use language such as 'equity in access, experience and outcomes'.

In addition to the line on 'using the best data available', we suggest that there needs to be an ambition to improve data collection to ensure a full and robust evidence base for decision making.

The wording 'waste opportunities for others' is negatively framed. This should be rephrased so that the potential benefits of maximising resources are emphasised. More could also be made of the anchor institution role of NHS organisations and the ICS' core purposes on addressing inequalities.

Environmental Responsibilities

As the hosts of the United Nations Climate Change Conference of the Parties (COP26) in 2021, the government further committed to updating the NHS Constitution to reflect its environmental responsibilities, while guaranteeing transparency for patients and the public on how this work aligns with the NHS's core principles and the government's overall environmental strategy.

*We are therefore proposing to add a new NHS value of 'Environmental responsibilities':
We play our part in achieving legislative commitments on the environment. We do this by improving our resilience and efficiency, while always prioritising value for money. We will never compromise standards of care or the needs of patients in pursuit of these targets.*

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

Neither agree nor disagree

While we support including a value on environmental responsibilities, we would suggest that the current wording should be reviewed.

It is unclear how resilience will help achieve environmental commitments, and the suggestion within the proposed wording is that less environmentally friendly processes will always be selected if they are cheaper. This therefore negates the point of including a value about environmental responsibilities.

The wording 'we will never compromise standards of care or the needs of patients in pursuit of these targets' also unhelpfully suggests that historically, patient care has not been prioritised whilst pursuing environmental targets.

To ensure simplicity and coherence, it may be more useful to echo guidance that already exists, and that providers are already following. For example, current wording in the provider licence states, 'the licensee shall have regard to such guidance on tackling climate change and delivering net zero emissions as NHS England may publish from time to time, and take all reasonable steps to minimise

the adverse impact of climate change on health'. The CQC uses the wording 'we understand any negative impact of our activities on the environment, and we strive to make a positive contribution in reducing it and support people to do the same'.

All current guidance on environmental responsibilities should be mapped, so that the Constitution aligns with what is statutory.

Patient responsibilities

Currently, the NHS Constitution asks patients in 'Patients and the public: your responsibilities':

Please keep appointments or cancel within reasonable time. Receiving treatment within the maximum waiting times may be compromised unless you do.

We propose strengthening this responsibility, to make it clearer that patients should cancel or rearrange appointments when they are unable to attend. We also propose strengthening the responsibility on the NHS to communicate appointment information clearly with patients and consider accessibility needs.

Therefore, we propose changing this sentence to:

Please keep appointments or reschedule or cancel as soon as you know you will not be able to attend the appointment. Receiving treatment within the maximum waiting times, as well as care to other patients, may be compromised unless you do. The NHS will communicate information about your appointment in a clear and timely way, including in alternative formats when this is appropriate and reasonable.

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

Neither agree nor disagree

We would like to see a commitment to addressing the barriers for patients that leads to non-attendance and which better supports them to be engaged and informed partners in their care. For example, data shows that there are inequalities in non-attendance and cancellation rates, with those from more deprived areas more likely to not attend. The particular health needs of an individual may also limit their ability to manage appointments, and reasonable and appropriate adjustments should be made to support people to attend appointments or deliver interventions in alternative ways if attending appointments in person is difficult. It is important to meaningfully understand why patients do not attend appointments or are otherwise unable to share in the responsibility for their care, and what health inequalities these reasons indicate and create.

It would be useful to see an additional commitment around training for staff on accessible communication. The proposed wording could also include a reference to the accessible information standard, which providers of NHS care must meet, as the 2017 review of the standard noted low awareness among patients and the public.

Research

In partnership with the NHS, the National Institute for Health and Care Research (NIHR) has recently launched the Be Part of Research service to help support the discharge of these duties. Members of the public can sign up to the service and get in touch with researchers to discuss eligibility for participation in particular research studies. NHS England has also integrated the Be Part of Research service into the NHS App.

To better support our aim to embed research in the NHS, we propose strengthening the existing pledge ("to inform you of research studies in which you may be eligible to participate").

Health research and the offer to be part of research should be integrated into health and care across the NHS.

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

Agree

Leadership

The NHS Constitution and the [Staff handbook](#) already include an extensive set of rights and pledges that are focused on ensuring staff have rewarding roles and feel supported in the workplace. These could be reinforced by reflecting the important role that leaders and senior managers can play in creating good workplace culture.

To achieve this, it is proposed that we add the following wording near the beginning of 'Staff: your rights and NHS pledges to you':

Both the handbook to the NHS Constitution and the Staff handbook outlines the rights and pledges that are central to creating a positive and supportive culture in the NHS workplace. Strong and effective leadership, management and governance of NHS organisations is central to the delivery of high-quality care, will support learning and innovation and promote an open and fair culture.

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

Agree

We support the inclusion here as an acknowledgement of the link between good leadership and an open and just culture.

Equality, diversity and inclusion (EDI) is also essential to improved workplace cultures and leadership, enhanced recruitment and retention, and optimal patient care and outcomes. We would like to see a commitment to act on improving diversity in senior leadership.

It would also be useful to triangulate the wording in this pledge with the Leadership competency framework and the Messenger review.

The wording in the pledge could also go further in illustrating the importance of different bodies working together collaboratively across the system to create an effective, supportive and consistent governance and oversight structure to ensure that leaders working in the NHS providers are supported to be courageous and compassionate leaders.

Sex and gender reassignment

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".

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.

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

Neither agree nor disagree

It is important to support and enable the dignity and safety of all patients and staff, and we welcome steps within the Constitution to reflect societal changes and what this means for NHS care. It is important to acknowledge, discuss and clarify how the right to single sex spaces interacts with a broader spectrum of gender identity. Ensuring an inclusive and respectful approach is paramount, and we would suggest that there are a number of further issues and questions to consider here. These include:

- Providing a clear definition of biological sex.
- Assessing the implications for the care of and provided by intersex people.
- Developing guidance to support the NHS in navigating its responsibilities as an employer of and care provider to trans, non-binary and gender diverse people, including with reference to the expectations set out in the Constitution regarding the provision of same- or single-sex care.
- Working with the NHS to understand how it currently approaches requests of this nature and how we can develop appropriate, practical, respectful and inclusive national guidance.
- Considering the implications of these proposals for the NHS, its staff and patients across all protected characteristics, including intersectionalities.

- A commitment to supporting the essential EDI skills, expertise and capabilities within the NHS, and supporting inclusive, open and compassionate cultures.
- Reconciling the existing legal frameworks and guidance with the expectations set out within the Constitution. For example, to date 'gender' has often been used interchangeably with 'sex' within legislation and guidance, and this will need to be reviewed and made consistent to be clear and workable.

Same-sex 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.

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.

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

Neither agree nor disagree

As set out in our answer to (7), it is important to have clear and consistent national frameworks for NHS care which properly support the dignity and safety of all patients and staff. This proposal again raises a number of questions which need due consideration ahead of being finalised. These include:

- Ensuring alignment between this proposal and other frameworks (such as the Equality Act and its Code of Practice, and NHS England guidance) with regards to transgender, non-binary and gender diverse patients and avoiding their unlawful exclusion, including those who do not have a Gender Recognition Certificate.
- Ensuring an inclusive approach which respectfully considers and addresses the breadth of patient and staff needs.
- Ensuring consideration of existing guidance, such as the Public Sector Equality Act Code of Practice, and ensuring alignment and consistency of language and expectations.
- The practical implications of implementation. For example, providers have limited private rooms and already find it challenging to ensure the patients with most need of the room are able to use the room. Further consideration of how the NHS can reasonably and appropriately deliver this proposal is needed.

- The potential for staff to face challenge from patients should also be considered, with support, skills development and guidance provided.
- Carrying out meaningful engagement with NHS bodies, staff, patients and communities to understand their concerns and how to ensure the safety and dignity of all.

Access to health services

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".

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.

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

Neither agree nor disagree

This has been added into the Constitution as a 'right', (defined in the Constitution as 'entitlements protected by law'), but there is currently no statutory right for a patient to request that their care be delivered by a clinician of their own sex, as all guidance and legislation refers to same-gender care. It is essential for legislation, policies and guidance to be aligned to enable proper and consistent implementation.

The term 'proportionate means of achieving a legitimate aim', although it appears elsewhere in extant Codes of Practice, is not clear and accessible wording. One of the stated aims of the Constitution is that the updates are 'concise and accessible' and 'meaningful to individuals'. The wording within this pledge does not meet these aims, and it is unclear who decides what a legitimate aim is, and what proportionate means to achieve it would be. This may lead to considerable variation in the delivery of care.

Technical change

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.

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

Neither agree nor disagree

This proposal would mean the wording in the Constitution echoes the wording that already exists in law. The Equality Act 2010 states that the following are protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

However, patients would need a Gender Recognition Certificate (GRC) to achieve protection under this pledge. The process of getting a GRC can take up to 22 weeks and only applies to 18+ year olds which will leave some transgender, non-binary and gender diverse patients unprotected under this principle.

Unpaid carers

Within 'Patients and the public: your rights and the NHS pledges to you', we propose referencing unpaid carers explicitly. The aim is also to reinforce the principle that the NHS has specific

responsibilities towards unpaid carers as part of recent legislation and to capture duties and entitlements that have been introduced in the last 10 years relevant to unpaid carers and young carers.

We propose to add an additional pledge to 'Involvement in your healthcare and the NHS':

'We pledge to recognise and value your caring responsibilities'.

In line with the measures introduced for unpaid carers and the people they are caring for within the Health and Care Act 2022, we propose to add an additional right and pledge to 'Involvement in your healthcare and the NHS':

'The NHS pledges to provide you the opportunity to give feedback, make suggestions and raise concerns about the care we provide for the person you care for. We pledge to respect your expertise, listen and to involve you in decisions (with the consent of the patient)'.

We propose to add an additional right to 'Involvement in your healthcare and the NHS':

'You have the right to be involved (with patient consent) at the earliest available opportunity when plans are being made to discharge the person you care for from hospital'.

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

Agree

We support this inclusion, as it rightly acknowledges the vital role of unpaid carers.

We would also like to see a consideration for young carers specifically, as (according to the 2021 ONS census) there are around 120,000 known young carers in England, and they may have different support needs from those of adult carers.

We would welcome an additional pledge that the NHS will act on the feedback and concerns raised, and consideration of pledges offering support to unpaid carers in recognition of their own needs and the importance of enabling them to live their lives with dignity and helping others to do so.

Volunteers

While volunteering sits inside a different legal framework to employment, volunteers still have important legal duties and responsibilities. Therefore, we also propose inserting a sentence at the end of the responsibilities for staff section to reflect the responsibilities all volunteers have to the public, patients, fellow volunteers and staff.

We propose adding a new pledge to the staff section:

The NHS recognises the incredibly important work volunteers undertake in making a difference to staff, patients and their families. Volunteers complement the NHS workforce; they do not replace it. The NHS will support and encourage volunteers in all aspects of their roles.

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

Agree

Health and work

The government has an ambitious package of support to help people with health conditions and disabled people to start, stay and succeed in work. In the Spring Budget 2023 and the Autumn Statement 2023, we announced new investment to improve access to joined-up work and health support.

The only reference to employment in the current NHS Constitution is with regard to NHS employees' rights and this does not reflect the NHS's key role in supporting people to work.

We propose adding the following wording to the NHS value 'Improving lives':

We support people to remain in, and return to, work, reflecting the good impact that work can have on a person's health and wellbeing.

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

Neither agree nor disagree

This proposal could be more helpfully positioned around the role of health in living fulfilling lives. The NHS is a key player in driving a healthy and productive society.

Person-centred care

We propose amending the existing pledge in 'Access to health services' from:

make the transition as smooth as possible when you are referred between services, and to put you, your family and carers at the centre of decisions that affect you or them

to:

support a co-ordinated approach to your care and make the transition as smooth as possible between services, including physical and mental health services, particularly if you have a number of health conditions, and to put you, your family and carers at the centre of decisions that affect you or them

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

Neither agree nor disagree

We support the premise of the change, as fragmented care has a direct impact on quality of care and patient safety. Additionally, the transition from children and young people (CYP) services to adult services is a known issue, especially within mental health and community services.

The specific acknowledgement of the need to address movement between mental and physical health services is welcome. We would also like to see additional wording around improving the physical health of those with mental health conditions, as trust leaders continue to emphasise the importance of health promotion at an earlier stage.

Finally, we would welcome a pledge committing to tackling the underlying causes of multiple conditions. We know that discrimination and disadvantage increase the likelihood of multiple conditions, and services must be tailored to meet the needs of local communities, especially those facing the greatest disadvantage.

Any other comments about the NHS Constitution

The enduring nature of the Constitution

The consultation introduction includes the wording 'We propose a limited set of specific changes to improve the current content, reflect important changes to government policy and to keep both the NHS Constitution and the handbook legally up to date'. We are concerned about the inclusion of 'reflect important changes to government policy', as this is not the purpose of the Constitution. The Constitution is intended to be 'a high level and enduring document'. We are cognisant of the current societal conversations around gender identity and the associated rights but the Constitution should not take any position on the different beliefs and experiences that fuel these conversations.

The consultation process

National Voices and the Richmond Group of Charities have issued a joint statement calling for the NHS Constitution consultation process to be paused, amid concerns regarding accessibility and the disruption to this process following the General Election announcement. They have estimated that as much as a quarter of the population is excluded from being able to respond and have their say on a document that will directly impact their experience of healthcare.

This is particularly emphasised by the fact that, when the Constitution was initially published in 2009, it was the product of extensive discussions with patients, staff and the public about what mattered most to them (as stated in the 2022 Report on the effect of the NHS Constitution). The Constitution itself notes that 'any government which seeks to alter the principles or values of the NHS, or the rights, pledges, duties and responsibilities set out in this Constitution, will have to engage in a full and transparent debate with the public, patients and staff'.

DHSC also published a report on the impact of the NHS Constitution in January 2022 which showed low levels of awareness of the Constitution among both staff and the public. Considering the feedback on the Constitution, DHSC stated, within the concluding remarks of the report, 'we will use the findings from this report to shape the consultation and to explore how to increase awareness and use of the NHS Constitution across all public and staff groups'. Due to the timing of the consultation, DHSC will not be fulfilling its aim to use the consultation as 'the relaunch needed to raise awareness again'.

We agree that the consultation process has fallen short of meeting the engagement standards required for such an important and fundamental document, particularly as some of the proposed changes need proper discussion. We would encourage DHSC to continue engagement with staff and the public after the close of the consultation period to manage the impact of the reduced engagement period.

Alignment with existing law, regulation, guidance and evidence

It is unclear the extent to which the proposed new pledges align with what is already enshrined in law, regulation and guidance (for example, in the Equality Act Code of Practice, or in CQC assessment frameworks). Further work likely is needed to map relevant rights and requirements and ensure clarity for the NHS, staff and patients as to expectations. Whether equality impact assessments are required for all or any of the proposals should also be considered, as well as where a sufficient evidence base has been considered.

The Constitutional standards

We are concerned that no attention has been paid within this consultation to the Constitutional standards, to providers' ability to meet them, and patients' ability to expect them. The standards play a key role in the provision of effective, quality care, and in regulation, performance management and oversight, as well as in planning, prioritisation, and resource allocation. The standards also enable taxpayers to hold both the government and NHS leaders to account for the performance of a publicly funded service. The standards that providers are currently being asked to meet are not currently appropriate or reflective of the current pressures on providers.

Parity of esteem

We would like to see the pledge on parity of esteem between physical and mental health strengthened. The definition has now been agreed between DHSC and NHSE and does not currently feature in the Constitution.

Evidence base

Any proposed changes to the Constitution must be grounded in a robust and rigorous evidence base. In particular, as the Cass Review made clear, this is critical to quality of care and patient safety

and the evidence base for proposals regarding sex-based care and gender identity has not been set out.