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Dr Navina Evans
Chief Workforce Officer
NHS England

Dear Navina,

Re: Concerns regarding the impact of the Supreme Court ruling on biological sex

Following the Supreme Court ruling on biological/birth sex, we are writing to highlight the significant concerns raised by our members over the ruling's impact, particularly for trans, intersex, non-binary and gender non-conforming individuals. In the absence of guidance from EHRC, NHSE has an important role to play in addressing some of these concerns and providing much needed clarity about what should and should not be happening in NHS trusts.

It is important to recognise that we will not hear from many trans individuals who have lived their lives in their acquired gender without scrutiny. This includes trans men who, although not often mentioned in the ruling, are affected by it. Any guidance or policy must take account of the lived experience of diverse trans staff and trans patients, with explicit consideration of how they will have dignified access and experiences of the healthcare environment.

We ask NHSE to:

- In the absence of EHRC guidance provide clarity about what should and should not be happening in NHS trusts.
- Develop policies that minimise the risk of discrimination while promoting inclusion and maintaining a balance of respect and dignity for all individuals.

The feedback we have received from members, in reaction to the Supreme Court ruling fits into the following themes:

- Rising discrimination and harassment against trans, non-binary and gender non-conforming people.
- Confidentiality and safety in managing data, single-sex spaces and same-sex health care
- Some women doctors and medical students who want to limit access to single-sex spaces, based on concerns of sexual assault or sexual violence.

Discrimination against trans, non-binary and gender non-conforming people

In 2022 the BMA and GLADD published a report which found that almost half (49%) of trans respondents working in the NHS had directly experienced transphobia themselves at least once in the past two years.

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Registered office: BMA House, Tavistock Square, London, WC1H 9JP.
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We received reports of restricted access to facilities such as toilets, including where individuals are actively 'policed' and questioned about their sex at birth by both employers and service users. We have heard an example of one individual who is so fearful of this enforcement that they restrict their intake of water to reduce their need to use toilet facilities. These experiences are degrading, harmful and likely constitute indirect discrimination in law.

We ask NHSE to:

- Take immediate action to stop instances of discrimination and harassment against trans, non-binary and gender non-conforming individuals.
- Communicate to all trusts that there should be no reactionary policies implemented by trusts before the final updated Code of Practice is published
- Ensure all staff can access appropriate services and facilities with dignity

Confidentiality and safety in managing data, single-sex spaces and same-sex health care

Members have expressed their deep distress over the possibility of being forced to disclose their sex at birth – an issue the ruling does not clarify, particularly in relation to Section 22 of the Gender Recognition Act. The proposed updates to the Code of Practice suggest how to 'sensitively' ask a person their sex at birth, but this overlooks the vast diversity of trans and non-binary individuals, and complexities of how sex and gender interplay. Forcing a person to disclose their sex at birth is undignified, impractical and risks increased incidents of harassment, and potentially violence, against trans, non-binary and gender non-conforming individuals.

The EHRC's proposals suggest it might sometimes be appropriate to request individuals' birth certificates. This suggestion is highly concerning given that there is a lack of guidance on when such a request is proportionate and is typically viewed as intrusive. There is no guidance on how to handle cases where an employer or authority suspects an individual with a GRC has changed their birth certificate, given requesting proof of a GRC is illegal. Furthermore, requiring a birth certificate for access to services would disproportionately affect immigrants, asylum seekers and refugees who may not have access to these documents.

The BMA firmly believes that such requests could lead to serious overreaches in authority by service providers, employers and public authorities.

- NHSE must provide explicit guidance stating that organisation wide monitoring of sex at birth must remain confidential and that in the vast majority of situations there is no right to know a person's sex at birth (unless for the direct safety and protection of individuals on a case-by-case basis).

Access to single-sex spaces, based on concerns of sexual assault or sexual violence.

There is irrefutable evidence that sexual assault and sexual violence is prevalent in the NHS and we have received feedback from our women members in response to the ruling who have expressed feelings of unsafety due to instances of sexual assault within the NHS. More needs to be done to address the causes of sexual violence, which disproportionately affects women. Our 2021 Sexism in Medicine survey report found that many women (66%) and men (43%) did not report issues of sexism and sexual harassment because they believed no action would be taken.

We are aware that although the right to accommodation in a single-sex hospital ward has been enshrined in the NHS Constitution since 2010, this rule was reportedly breached 44,000 times in

2023 because appropriate beds were not available. Neither the ruling nor guidance from the EHRC will change the problem of lack of available facilities in the NHS and may put more pressure on services to find alternative accommodations for trans patients who could not be accommodated safely or with dignity in accommodations that align with their biological sex. Greater resources are needed for the NHS in order to guarantee the privacy of each patient.

We ask NHSE to:

- Ensure that programmes, such as the Domestic Abuse and Sexual Violence (DASV) Programme, which currently sit in NHSE, are fully funded and transitioned after the closure of NHSE. Additionally, there should be enforcement against trusts who do not support victims and survivors to feel safe to report incidents without fear of inaction or threats to their careers.
- Ensure that any guidance confirms what steps service providers should take if they are unable to provide single-sex spaces. Ensuring that these steps do not affect the quality of care for patients based on their gender identity.

The health sector is limited in resources but access to care should not be determined by a perceived hierarchy of rights. At the practical level we support informed, respectful discussion by medical professionals of the best ways to manage individual patients, taking a patient-centred approach, which respects their dignity, autonomy, and human rights.

We ask NHSE to:

- Promote a similar practical approach and support trusts using risk-assessment and equality impact assessments in their policy development. This should include encouraging respectful, informed discussions among medical professionals on patient-centred care that respects dignity, autonomy, and human rights.

Thank you for your attention to this matter. We look forward to your response and action.

Yours sincerely,

Dr Latifa Patel
BMA Representative Body Chair