

SINGLE-SEX SAFE SPACES FOR NHS STAFF

GUIDANCE TO NHS TRUSTS

Introduction

1. This Guidance is issued pursuant to the general power of the Secretary of State for Health and Social Care under s. 2(1) of the National Health Service Act 2006.
2. The purpose of this Guidance is to assist the NHS Trusts in ensuring that provision of single-sex safe spaces such as changing rooms, toilets, showers, etc. for the staff complies with the legal requirements and protect the rights, dignity and welfare of all NHS staff.
3. Conditions and available resources will vary between NHS Trusts and specific places of work. This guidance outlines the principles and minimal requirements of the law and good practice. The precise means of complying with those principles and requirements will depend on the specific circumstances of each NHS Trust.

The legal requirements

4. In providing single-sex safe spaces for staff, NHS Trusts must make sure they comply with:
 - 4.1. Staff's privacy right under Article 8 of the European Convention on Human Rights;
 - 4.2. The Workplace (Health, Safety and Welfare) Regulations 1992;
 - 4.3. Equality Act 2010.
5. All members of staff have a right to respect for their private and family life. Denying a member of staff a basic level of privacy for such everyday activities as changing clothes, using toilets or showers is likely to be a violation of Article 8 of the European Convention on Human Rights.
6. The Workplace (Health, Safety and Welfare) Regulations 1992 requires all employers to provide suitable and sufficient sanitary conveniences, washing facilities and facilities for changing clothing. All such facilities must either include separate facilities for men and women, or provisions must be made for a separate use of facilities by men and women. "Men" and "women" are defined in accordance with their biological sex.
7. The Equality Act 2010 prohibits direct or indirect discrimination of any member of staff because of any of the following **protected characteristics**: age; disability; gender reassignment;

marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; or sexual orientation.

8. The Act also prohibits harassment related to any of the protected characteristics, as well as sexual harassment. Harassment is defined as unwanted conduct which has the purpose or the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.
9. There is no hierarchy between the protected characteristics. Each of the nine characteristics enjoys full legal protection. Discrimination or harassment related to one characteristic may never be justified by the need to protect another characteristic.
10. In exercising their functions all NHS Trusts are subject to the Public Sector Equality Duty to have due regard to the need to—
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
11. In navigating the issues which arise around single-sex spaces, the two protected characteristics which are most likely to be impacted are (1) sex and (2) gender reassignment.
12. The protected characteristic of **sex** refers to a person's **biological sex** as a man or a woman.¹
13. A person has the protected characteristic of **gender reassignment** if that person "*is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex*".² "Proposing to undergo" is an ambiguous term which needs to be applied with care. When introducing the legislation, the government made it clear that the concept of 'gender reassignment' is "intended to apply to people who make a commitment over a period of time to live permanently in their non-birth gender" and "permanently make a transition to a new sex opposite to their birth sex."³ Persons who meet that definition are known in law as "**transsexual**".⁴
14. Some people believe that they have a '**gender identity**' which is distinct from, and overrides, their biological sex as a man or a woman. There are people who identify as members of the

¹ Equality Act 2010, s. 11

² Equality Act 2010, s. 7(1)

³ Hansard, Equality Bill: Volume 716 (11 January 2010), at: <https://hansard.parliament.uk/Lords/2010-01-11/debates/10011139000077/EqualityBill>

⁴ Equality Act 2010, s. 7(2), 7(3)

opposite sex or as non-binary, gender-neutral, gender fluid or other identities. Such subjective 'gender identity' is not to be confused with either sex or gender reassignment.

15. People's genuine feelings about their identity must always be treated with respect and sensitivity. However, 'gender identity' is **not** a protected characteristic recognised by the law, and compliance with the legal requirements in relation to biological sex and in relation to gender reassignment must always take priority.

Privacy

16. The issue of single-sex spaces arises in situations which by their nature require privacy – changing rooms, toilets, showers, etc. Those are not communal spaces whose functions include interaction between people and which should therefore be expected to be inclusive.
17. Where it is impractical to provide individual private spaces to everyone, some sharing of spaces between staff may be acceptable. However, it is important to remember that privacy, within reason and practicality, remains the goal of the arrangement. Having to share private spaces such as changing rooms is a necessity, not an ideal.

Sharing private spaces

18. If some degree of sharing private spaces is necessary, the following requirements must be complied with:
19. Sharing private spaces may only take place between persons of the same biological sex. Requiring staff to share changing rooms, toilets or showers with members of the opposite sex fails to meet the clear requirements of Workplace (Health, Safety and Welfare) Regulations 1992 and amounts to sex-related harassment and indirect discrimination against women, contrary to the Equality Act 2010.
20. While sharing between persons of the same sex is generally acceptable, it remains good practice to ensure, insofar as possible, greater individual privacy by using cubicles, curtains, screens, etc.
21. It should be expected, especially within a large hospital, that using single-sex shared spaces, whilst acceptable for the majority, will still be inappropriate or uncomfortable for certain individual members of staff. Reasons may involve gender reassignment, physical or mental health, cultural or personal reasons. In all such cases, the employer must accommodate any well-founded requirements by providing an individual private space (see below).

Individual private spaces

22. What will amount to a good reason for requiring an individual private space such as a changing room may often be a matter of judgement based on individual circumstances.

23. In all cases of gender reassignment, it will be inappropriate (and likely unlawful) to require the transsexual member of staff to use private spaces shared either with men or with women.
24. Therefore, in all cases of gender reassignment, providing individual private spaces should be the norm.
25. It may be permissible for more than one person to use the same space as their individual private space at different times, provided that it does not have to be shared at the same time.
26. Offering individual private spaces to members of staff means treating them more favourably than requiring them to share such spaces with others. Therefore, providing individual private spaces for use by transsexual members of staff does not amount to discrimination or harassment on the grounds of gender reassignment.

Confidentiality

27. It must be acknowledged that in many cases where a member of staff has good reasons for requiring individual private spaces, those reasons are likely to be sensitive and confidential. That applies to gender reassignment as well as other potential reasons. Staff's privacy and confidentiality must be respected at all times.
28. NHS Trusts must ensure that they have arrangements in place for staff to be able to raise the need for an individual private space freely and confidentially. The staff must be confident that such requests will be handled with appropriate sensitivity and discretion.
29. It is hard to envisage any circumstances where it is genuinely necessary for most other staff to know (a) that a particular member of staff uses individual private spaces at all, or (b) the reasons why that member of staff requires an individual private space. Such information may only be shared with other staff on a need to know basis, **and** only with the person's consent.

Conclusion

30. This Guidance provides simple and workable principles which should ensure that the facilities for changing and hygiene of NHS staff comply with the relevant legal requirements and ensure privacy, dignity and safety of all members of staff.