

## **The Nursing and Midwifery Council's response to the Government Equality Office's consultation on reform of the Gender Recognition Act 2004**

### **About us**

We welcome the opportunity to respond to this consultation on the reform of the Gender Recognition Act 2004 (GRA). Our response sets out our role and remit as the professional regulator for nursing and midwifery, and highlights where the suggested reforms may have a practical impact on our regulatory approach and activities.

We exist to protect the public by regulating nurses and midwives in the UK. We do this by setting standards of education, training, practice and behaviour so that nurses and midwives can deliver high quality healthcare throughout their careers. We maintain a register of nurses and midwives who meet these standards, and we have processes to investigate nurses and midwives who fall short of our standards. In July 2018, we also became the regulator for the new profession of nursing associate in England and the first nursing associates will join our register in January 2019.

As of 31 March 2018 there were 690,278 nurses and midwives on our register, which means that we hold one of the largest professional registers in the world (this is as compared to the 1,064,283 full time equivalent of all staff working for the NHS in England<sup>1</sup>). We collect data from nurses and midwives on protected characteristics, including a question on whether their gender identity completely matches the sex they were registered with at birth. Of those 690,278 nurses and midwives 3,789 answered no to this question, which represents 0.5 percent of people on our register (13.2 percent are unknown).

We are not responsible for regulating hospitals or other healthcare settings, nor are we responsible for representing or campaigning on behalf of nurses and midwives.

Below we set out the context that shapes our response to this consultation and our wider trans policy, as well as providing responses to certain questions where appropriate. The consultation raises a number of issues that fall outside our remit and we do not address these in our response.

### **The GRA in the context of professional regulation**

Our response is shaped by our role as the regulator of individual nurses and midwives, and our over-arching objective, which is the protection of the public via our regulatory activities. Our most relevant activity in this context is our register of those capable of safe and effective practice as a nurse or midwife in the UK. In order to maintain the integrity of our register we need to be able to identify all nurses, midwives (and in the

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<sup>1</sup> NHS Digital (2018), [NHS Workforce Statistics – March 2018](#), NHS Digital. Professionally qualified staff make up just over half of this number.

future nursing associates) at any point in their registered careers. This also allows patients, the public, employers, and colleagues etc. to identify individuals. Related to this is our ability to investigate those whose conduct and/or capability falls short of our standards via our fitness to practise processes.

We also recognise the need to maintain the privacy of registrants who have changed their legally recognised gender. As an independent regulator exercising public functions, we are bound by the prohibition on disclosure of information in Section 22 of the GRA. This provision is intended to protect the privacy of people who are seeking or have a GRC where this information is acquired in an official capacity. The prohibition is subject to some specific exemptions which are relevant to our regulatory role, for example where disclosure is made for purpose of investigating a crime or for the purposes of court or tribunal proceedings or other statutory duties.

It is worth noting that, while our response is specific to the NMC, similar objectives, structures and considerations apply to many other organisations that hold registers.

## **Responses to specific questions**

### **Question 5**

This question relates to the proposal to reform the GRA to change the evidence requirements for individuals to obtain a gender recognition certificate. We (and other stakeholders) must be able to confirm the identity of those applying to join and those already on our register. This is particularly important when considering those facing allegations in respect of their fitness to practise, both at the point of referral and throughout their subsequent careers. To do this we rely on official documentation, and in asking for and holding official documentation as evidence in our registration and fitness to practise processes we may have knowledge of any previous gender status of registrants and referrers. We must maintain this knowledge (with controls on internal dissemination) for identification and therefore public protection purposes.

If individuals could change their legally recognised gender more quickly, without having to prove that they have lived in their acquired gender for at least two years, this would reduce the time during which their gender identity did not match their legally recognised gender. We welcome any reform which means that official documentation would more often match gender identity. This could reduce the likelihood of queries during our identity checks of individuals that would lead to disclosure to third parties or to staff who may not otherwise require knowledge of the former identity, or of inadvertent disclosure by a third party to whom we make a query.

### **Question 9**

Question 9 asks whether the privacy and disclosure provisions (Section 22) currently in the Act are sufficient. We agree that the current provisions are sufficient, as they appear to protect the privacy of individuals without inhibiting our regulatory activities.

In common with other similar register-holding organisations, we hold public fitness to practise hearings for nurses and midwives. We would welcome further clarity about how professional regulators should manage knowledge of an individual's previous legally recognised gender in such regulatory proceedings e.g. documents, advice to witnesses

and publication of outcomes. This is an example of the tension between our overarching objective of protecting the public which includes a need for transparency in our proceedings and our decision-making, and the legal obligation in the GRA for us to protect the privacy of those who have changed their legally recognised gender. In general we would welcome more guidance and clarity about capturing and sharing data that could identify the former legally recognised gender of individuals, taking into account the need to balance the individuals' rights to privacy with potential patient safety concerns. For example, if a registered nurse or midwife has changed their legally recognised gender since the incident which has led to their fitness or practise being investigated or during the course of such proceedings, then whilst the exemptions in section 22 will apply, we are still keen to ensure that we strike the balance right between these potentially conflicting duties.

## **Question 20**

Question 20 offers potential wider consideration for accommodating individuals who identify as non-binary. From a regulatory policy perspective we do not have a view on whether any gender other than male and female should be recognised. However, we need to understand the public and registrant population in order to fulfil our equality duty to ensure our services are relevant to the population they serve. We offer the only route to registration for nurses, midwives and nursing associates in the UK and as such we need to make sure that our standards lead to nursing and midwifery care that is relevant to the UK population for whom it is provided.

Over the last year we have included 'non-binary' as a category in our gender identity monitoring of those who took part in some of our consultation and research activities. For example, in Feb-March 2018 when we surveyed nurses and midwives who had lapsed from the register our question on gender included 'non-binary' as an option. Seven respondents (out of 3,496) identified as non-binary. From this evidence it appears that there is a small number of people who want to identify as other than male or female, and we would welcome more clarity about how to monitor this group in a consistent and sensitive way.

## **Wider points**

### **Four country factors**

We understand that this consultation only relates to the future operation of the gender recognition system in England and Wales. We also note that the GRA currently imposes broadly the same system for recognition of an acquired gender across the UK, and a person whose gender is recognised for the purposes of the law of England and Wales also has that gender recognised as a matter of the law of Scotland and the law of Northern Ireland. As a four country regulator we would support similar approaches to gender recognition across the four countries.