EXPLANATORY MEMORANDUM TO

THE GENDER RECOGNITION (DISCLOSURE OF INFORMATION) (ENGLAND) ORDER 2022

2022 No. 742

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (DHSC) in respect of the Gender Recognition (Disclosure of Information) (England) Order 2022 ("the instrument") and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Gender Recognition Act 2004 ('the Act') enables people to change their legally recognised sex, shown on their original birth certificate, by obtaining a Gender Recognition Certificate (GRC). This allows for someone to apply for a new birth certificate, so the sex shown on their new birth certificate matches their gender identity.

2.2 Section 22(1) of the Act states that it is an offence to disclose protected information acquired in an official capacity. 'Protected information' is information about a person's sex as recorded on their birth certificate before an application for a GRC was made or information about their application for a GRC. Section 22(4) lists circumstances where it will not be an offence under section 22(1) to disclose protected information. That list includes circumstances that have been prescribed in an Order made by the Secretary of State.

2.3 The purpose of the instrument is to prescribe additional circumstances in which it is not an offence to disclose protected information under section 22(1). The circumstances are where such disclosure is necessary for the purposes of undertaking, assisting or facilitating research to support the Cass Review and where disclosure takes place in England between specified persons listed in the instrument.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of the instrument is England and Wales.

4.2 The territorial application of the instrument is England.

5. European Convention on Human Rights

5.1 As this instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Section 1 of the Act enables a person to obtain a Gender Recognition Certificate (GRC) so that, if they wish, they may obtain a new birth certificate so that the sex recorded on that certificate reflects for the future how that person lives.

6.2 Section 22 of the Act makes it an offence to disclose protected information acquired in an official capacity. 'Protected information' is defined in the Act as information about the previous legally recognised gender of someone with a GRC, or their application for one. 'Protected information' therefore means information revealing that they have changed or are in the process of changing how the law recognises their legal sex.

6.3 Specifically, section 22 (2) defines 'protected information' as information which relates to a person who has made an application for a GRC under the Act, and concerns either:

- the fact of having made that application; or
- the person's legally recognised gender before the application for a GRC was granted.

6.4 Section 22(4) lists circumstances in which it is not an offence to disclose protected information in an official capacity. For instance, an offence is not committed where disclosure is for the purpose of preventing or investigating a crime, or where the person agrees to the disclosure.

6.5 The listed circumstances also include circumstances prescribed in an Order made by the Secretary of State under section 22(5). Section 22(7) provides that such circumstances can be prescribed by reference to disclosure of protected information by or to a specified person, disclosure for a specified purpose or disclosure of a specified description of information.

6.6 This instrument, which applies only in England, prescribes a new set of circumstances for the purposes of section 22(4). The circumstances are where protected information is disclosed by an authorised person to another authorised person, the disclosing and receiving person is in England at the time disclosure is made, and the disclosure is necessary for the purposes of facilitating, assisting or undertaking relevant research.

6.7 Authorised persons for this purpose are listed in the Schedule to the instrument. Relevant research means research requested by NHS England for the purposes of the Cass Review (see paragraph 7.2 for further detail) but only in respect of certain people. Those are people who have been referred to Tavistock and Portman NHS Foundation Trust's Gender Identity Development Service for assessment or treatment and who were aged under 18 at the time of that referral.

6.8 This instrument has no impact on other legislative safeguards protecting personal data, such as the UK General Data Protection Regulation (GDPR) and the Data Protection Act 2018. The limited exception from the circumstances in which it is an offence to disclose protected information under section 22(1) of the Act is made subject to a time limit of five years after it comes into force, after which point, the exemption will come to an end.

7. Policy background

What is being done and why?

7.1 Gender identity services for children and adolescents are provided through the Children and Young Person's Gender Identity Development Service (GIDS) at the Tavistock and Portman NHS Foundation Trust.

7.2 Dr Hilary Cass was commissioned by NHS England (NHSE) to review the provision of these services. NHS England have on behalf of the Cass Review commissioned a research project which is primarily being taken forward by researchers at the University of York. The commissioned research aims to build a better understanding of the clinical outcomes from treatments offered through the children's gender identity service by analysing the health outcomes of the patients who have used the GIDS service between 2009-2020. As part of their work, the research team will need to access confidential patient data in controlled environments, including information that may be protected information under the Act.

7.3 If the research was completed without access to information protected under the Act, then a significant portion of the available data on health outcomes would have to be removed from the study. This would subsequently prevent the research project from being able to provide robust recommendations rooted in the best available clinical evidence regarding how this care can best be provided. This instrument is therefore necessary to help ensure that the provision of clinical services is rooted in the best possible clinical evidence, to improve patient outcomes.

7.4 This instrument will make a provision prescribing circumstances in which the disclosure of protected information is not to constitute an offence under the Act, to allow this research project to take place. As such, it removes the risk of staff at the University of York, NHS Digital, or the NHS Trusts which provide England's gender identity clinics and associated endocrine clinics committing an offence under section 22 of the Act when undertaking, assisting or facilitating the research project.

7.5 In addition to the University of York, NHS Digital, and the NHS Trusts which provide England's gender identity clinics and associated endocrine clinics are covered by this instrument. This is because as they are the controllers and collectors of data which will be used by the research team from the University of York. As such they will be required, as part of the research, to disclose protected information to other authorised persons.

7.6 This instrument also differentiates between those employed by an authorised body, and those who are authorised in writing to act on behalf of that body. The latter relationship has been specified where necessary to ensure that the range of contractual relationships beyond employment held by those working at organisations listed in the schedule are captured in the instrument.

7.7 This instrument will be in force for a period of 5 years only, ceasing to have effect at the end of 27th July 2027. The rational reason for this is that the policy rational relates only to the need for the relevant research that has been commissioned by NHSE to proceed. Once this has taken place and allowing a period of time for peer-reviewing of the research, then there is no longer any need for the change to be in place and it will automatically expire. Furthermore, there will be no requirement for those authorised in the instrument to hold the data for the entire 5-year period, so if the

research team no longer need access to data containing protected information at any point before July 2027 then it will be destroyed at that point.

7.8 In all scenarios any disclosures will only be permitted to be made to other authorised persons, and only when it is necessary for the purpose of the Cass Reviews commissioned research project. Under the terms of the instrument any such disclosure must take place where the disclosing and receiving party is in England. Any information that the research subsequently makes public will be fully anonymised. This instrument does not permit publication in the public domain of protected information disclosed for the purposes of the Cass Review. Finally, disclosure of protected information or any other personal data for the purposes of the Cass Review remains subject at all times to the additional overarching protection provided by the Data Protection Act 2018, the Human Rights Act 1998 and, where appropriate, the common law duty of confidence.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union/trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 This instrument does not amend any other instrument.

10. Consultation outcome

10.1 There is no statutory obligation to consult on this instrument and, as the subject matter of the instrument is operational in nature, no discretionary public consultation has been carried out. As a separate exercise unrelated to this instrument, the Cass Review has conducted extensive engagement and consultation with stakeholders interested in their review and the outcomes of this research project.

10.2 The power under which this instrument is made does not require consultation with the devolved administrations. This instrument applies in relation to England only.

11. Guidance

11.1 Guidance covering the legislative requirements of this statutory instrument will be developed by DHSC and shared with the research team, to ensure a clear understanding of the instruments effect.

12. Impact

12.1 There is no significant impact on business, charities, or voluntary bodies.

12.2 There is no significant impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because no impact on business is expected.

12.4 An Equalities Impact Assessment has been prepared for this instrument and is available on gov.uk. It has also been published alongside this explanatory memorandum at Legislation.gov.uk.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 This instrument will be time limited so it is in force for a period of 5 years only. This will allow it to remain in force for the extent of the research project and any subsequent peer-reviewing of the research.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Jack Price (email Jack.Price1@dhsc.gov.uk) at DHSC can be contacted with any queries regarding the instrument.

15.2 Matthew Henry, Deputy Director for Urgent and Emergency Care Policy at DHSC can confirm that this explanatory memorandum meets the required standard.

15.3 Sajid Javid MP, Secretary of State for Health and Social Care at DHSC can confirm that this explanatory memorandum meets the required standard.