IN THE MATTER OF:

THE BRIGHTON AND HOVE CITY COUNCIL
TRANS INCLUSION SCHOOLS TOOLKIT

ADVICE

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1. Introduction and Summary

1. I am instructed to advise on the lawfulness of the guidance contained in the Brighton and Hove City Council's (BHCC) "Trans Inclusion Schools Toolkit 2021: A Guide to Supporting Trans Children and Young People in Education Settings" (Toolkit).

2. In this Advice, I have used the terms "trans identified boys" to refer to male children who identify as girls and "trans identified girls" to refer to female children who identify as boys. Language in this area is contested and controversial and some might find these terms objectionable. However, sex is relevant and significant for the purposes of the matters covered in this Advice, and using these terms ensures that the sex of a child and / or children can be readily identified. Given the complexity of many of the matters addressed below, clarity is particularly important.

3. In summary, I advise that:

   3.1. The Toolkit does not explain the Equality Act 2010 (EqA), and what it does and does not allow, and its impact on decisions in relation to trans inclusion.

3.2. The Toolkit does not explain the Human Rights Act 1998 (HRA) and the Convention rights, and the human rights' implications of decisions on trans inclusion.

3.3. The Toolkit barely addresses the position of girls and boys who do not identify as trans and the impact upon them of trans inclusion.

3.4. The Toolkit does not address the position of pupils and members of staff who hold particular religious or philosophical beliefs, including "gender critical beliefs".

3.5. The Toolkit gives a misleading account of the law on single sex spaces, in particular,

a. It contains guidance indicating that a trans identified pupil has the right to choose to use single sex facilities designated for use by pupils of the opposite sex. This is incorrect as a matter of law.

b. It contains guidance indicating that a trans identified pupil may use toilets designated for use by pupils of the opposite sex. This is incorrect as a matter of law.

c. It contains guidance on the use of changing rooms by trans identified pupils which is misleading in law since it takes no account of the possibility of indirect sex and religion and belief discrimination, and harassment, under the EqA against pupils using changing rooms designated for members of their own sex.

d. It contains guidance on the use of changing rooms by trans identified pupils which is misleading in law since it takes no account of the possibility of a breach of Articles 8 and 9 and Article 2, Protocol No.1 and Article 14, in the case of pupils using changing rooms designated for members of their own sex.

e. It contains guidance on the use of communal accommodation by trans identified pupils which is misleading in law since it takes no account of the possibility of indirect sex and religion and belief discrimination, and harassment, under the EqA against pupils using changing rooms designated for members of their own sex.

f. It contains guidance on the use communal accommodation by trans identified pupils which is misleading in law since it takes no account of the possibility of a breach of the Articles 8 and 9 and Article 2, Protocol No.1 and Article 14 in the case of pupils using changing rooms designated for members of their own sex.

g. It takes no account of the strong likelihood that allowing a pubertal or post-pubescent trans identified boy to use girls' changing rooms and communal accommodation will violate the girls' rights under the EqA and the Human Rights Act 1998 (HRA).

3.6. The Toolkit gives a misleading account of the law on freedom of belief and expression. In particular,

a. It contains guidance on the use of pronouns which is misleading in law since it takes no account of the possibility of indirect religion and belief discrimination under the EqA, and under Articles 9 and 10 and Article 2, Protocol No.1 and Article 14, HRA.

b. It contains guidance on the contents of Relationships Education, Relationships and Sex Education (RSE) and Health Education lessons (most boys have a penis and testicles, and most girls have a vulva and vagina) which is misleading in law since it takes no account of the possibility of indirect religion and belief discrimination and the impact on freedom of speech, under the EqA and under Articles 9 and 10 and Article 2, Protocol No.1 and Article 14, HRA.

c. It takes no account of the possibility that a requirement to follow the guidance on the use of pronouns will violate the rights of those who hold gender critical philosophical, or similar religious, beliefs, under the EqA and under the EqA and under Articles 9 and 10 and Article 2, Protocol No.1 and Article 14, HRA.

d. It takes no account of the likelihood that a requirement to follow the guidance on RSE and health education lessons (most boys have a penis and testicles, and most girls have a vulva and vagina) will violate the rights of those who hold gender critical philosophical, or similar religious, beliefs under the EqA and the HRA.

3.7. The Toolkit gives a misleading account of the law on participation in sports. In particular,

a. It contains a misleading account of the law in so far as it indicates that excluding trans identified boys from girls' sports competitions would be discriminatory.

b. It does not take account of s.195, EqA.

c. It does not take account of the likelihood that not having sex-based categories for gender-affected sporting competitions will indirectly discriminate against girls in breach of the EqA.

3.8. The Toolkit gives a misleading account of the law on participation in RSE and health education lessons. In particular,

a. It contains guidance that there must be a clear need for single sex groups if they are to be permitted under the EqA. This is incorrect as a matter of law.

b. It contains guidance indicating that trans identified pupils have the right to access single sex groups for pupils of the opposite sex. This is incorrect as a matter of law.

c. It contains guidance on trans identified pupils joining RSE and health education classes which is misleading in law since it takes no account of Article 8, and Article 14 read with Article 8, HRA.

d. It contains guidance on trans identified pupils joining RSE and health education classes which is misleading in law since it takes no account of indirect religion and belief discrimination under the EqA and under Article 9 and Article 2, Protocol No.1 and Article 14, HRA.

e. It takes no account of the likelihood that permitting trans identified pupils of the opposite sex into single-sex RSE and health education classes, will breach the EqA and violate the rights under Article 8, 9, Article 2, Protocol No. 1 and Article 14 read with Articles 8, 9 and Article 2, Protocol No. 1 of the other pupils in the class.

3.9. The Toolkit's guidance on trans inclusion and the Public Sector Equality Duty is inadequate.

3.10. The Toolkit's guidance on the safeguarding duty is inadequate, with the risk that schools will fail to properly discharge their safeguarding duty in respect of all children, including trans identified children.

4. Accordingly, a school that implements the guidance in the Toolkit in the respects described above, is likely to act unlawfully. Further, the Toolkit encourages and sanctions such unlawful conduct and/or misdirects schools as to their legal obligations and as such and to this extent, it is itself unlawful (*R (Bell and another) v Tavistock and Portman NHS Foundation Trust* [2022] PTSR 544, 53-54).

2. The Law

5. The principal legal measures relevant to this Advice are those contained in,

5.1. The Equality Act 2010 (EqA).

5.2. The Human Rights Act 1998 (HRA).

5.3. The Education Act 2002 and related provisions.

6. Also relevant is the case law addressing legal competence in the case of children (*Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *R (Bell and another) v Tavistock and Portman NHS Foundation Trust* [2022] PTSR 544) and ordinary public law principles.

The Equality Act 2010 (EqA)

Protected characteristics

7. The EqA makes discrimination connected to the "protected characteristics" unlawful in certain contexts.

8. The relevant protected characteristics are "gender reassignment" (s.7, EqA), "belief" (s.10, EqA) and "sex" (s.11, EqA).

9. A person, including a child, "has the protected characteristic of gender reassignment if the 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". As can be seen, for this protected characteristic a person must be *changing* (or intending to change) the physiological or other (social) attributes of sex. This means that the characteristics of being non-binary, gender fluid or identifying as gender queer, both male and female, neither male or female, a third gender or as having "a gender identity which we do not yet have words to describe" (Toolkit, p.12), do not fall within the scope of s.7, EqA.[1]

10. For the purposes of the EqA, "a reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment" (s.7(2), EqA).

[1] The non-binding first instance employment tribunal decision in *Taylor v Jaguar Land Rover Limited* (2020), Case No: 1304471/2018, to the extent that it found that the characteristic of gender reassignment embraced the characteristic of being non-binary or gender fluid, is wrongly decided as a matter of law.

11. "Belief" means "any religious or philosophical belief and a reference to belief includes a reference to a lack of belief" (s.10, EqA). As well as covering all the main and minority religions (those with a clear structure and belief system[2]), this covers many philosophical beliefs.

12. Philosophical beliefs that are protected by the EqA include "gender critical beliefs" (*Forstater v CGD Europe* [2022] ICR 1). Gender critical beliefs embrace the core belief "*that biological sex is real, important, immutable and not to be conflated with gender identity [and that] …statements such as "woman means adult human female"* or "*trans women are male", are statements of neutral fact and are not expressions of antipathy towards trans people or "transphobic""* (*Forstater*, §1; see too *Pheonix v The Open University* (3322700/2021 & 3323841/2021), §613ff.).[3] Accordingly, for those holding gender critical beliefs, a trans woman is a man and a trans man is a woman. These beliefs accord with the law, so far as legal status is concerned (absent a gender recognition certificate (GRC), see below). Whether one holds those beliefs or not, they are not to be stigmatised as transphobic or bigoted (see, for example, *Phoenix*).

13. A lack of belief in gender critical beliefs is also protected (s.10(2), EqA). Similarly, a belief that primacy should be given to gender identity and that sex may be changed, depending on one's gender identity, will also be protected. Gender, in this context, is commonly understood by those not sharing gender critical beliefs as referring to "a person's innate sense of their own gender, whether male, female or something else… which may or may not correspond to the sex assigned at birth". [4] For many, perhaps most, of those who hold these beliefs, a person who self-identifies as a member of the opposite sex *is* a member of that sex (e.g. a trans woman is a woman).

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[2] https://www.equalityhumanrights.com/equality/equality-act-2010/your-rights-under-equality-act-2010/religion-or-belief-discrimination#:~:text=The%20Equality%20Act%202010%20says,known%20as%20discrimination%20by%20perception) [accessed 19 March 2023].

[3] This decision is not binding but illustrative of the approach a court is likely to take.

[4] Stonewall glossary: https://www.stonewall.org.uk/list-lgbtq-terms [accessed 19 March 2024].

14. These contrasting beliefs are hotly contested and discussion around them in recent years has become polarised. They are the subject of political controversy, with politicians and political parties taking different positions in relation them.[5] This means that adopting a position in relation to sex and gender identity is one that can be properly characterised as "political" in some circumstances.

15. As to "sex", this means being a "man" or a "woman" (s.11, EqA). Being a "man "or a "woman" means being a "male" or a "female", respectively, "of any age". This characteristic, therefore, covers boys and girls. "Sex" under the EqA means biological sex ("male" and "female"), save where a person has a GRC when their "sex" will be that recorded on their GRC (*For Women Scotland Ltd v Scottish Ministers* [2024] IRLR 138). Since an application for a GRC can only be made by someone aged 18 or over (s.1(1), Gender Recognition Act 2004), male and female will always refer to biological sex in the case of boys and girls i.e. those under the age of 18.

Schools

16. Discrimination connected to one of the protected characteristics is made unlawful in the context of schools by s.85(2) and (3), EqA. These provide that,

> (2) The responsible body of such a school must not discriminate against a pupil—
> (a) in the way it provides education for the pupil;
> (b) in the way it affords the pupil access to a benefit, facility or service;
> (c) by not providing education for the pupil;
> (d) by not affording the pupil access to a benefit, facility or service;

[5] See, for example, Hansard 742, Col 359ff. (https://hansard.parliament.uk/commons/2023-12-06/debates/E7306EC2-EFCB-4331-BD82-F01FDF67CCBF/GenderRecognition [accessed 19 March 2024]). See, too the political controversies over the Gender Recognition (Scotland) Bill (proposing to introduce a new system for the grant of a GRC, close to self-identification, and passed by the Scottish Parliament on 22 December 2022 but prevented from proceeding to Royal Assent by an order under section 35 of the Scotland Act 1998, made by the Secretary of State for Scotland (https://www.gov.scot/policies/lgbti/gender-recognition/#:~:text=The%20Gender%20Recognition%20(Scotland)%20Bill,Secretary%20of%20State%20for%20Scotland [accessed 19 March 2024]).

(e) by excluding the pupil from the school;
(f) by subjecting the pupil to any other detriment.
(3) The responsible body of such a school must not harass—
(a) a pupil…

17. This means that a school must not discriminate against, or harass, a pupil in the broad circumstances described in s.85(2) and (3), EqA (subject to the exceptions described below).

18. Nothing in the prohibitions against discrimination and harassment apply to anything done in connection with the content of the curriculum (s.89(2), EqA [6]). The effect of this is that schools "are not restricted in the range of issues, ideas and materials that they use, and they have the academic freedom to expose pupils to a range of thoughts and ideas, however controversial. Even if the content of the curriculum causes offence to pupils with certain protected characteristics, this will not make it unlawful".[7] However, the way in which the curriculum is taught is covered by the non-discrimination provisions of the EqA. Further, the contents of the curriculum and their delivery must not breach the prohibitions in ss.406 and 407, Education Act 1996 on the promotion of partisan political views, and where political issues are brought to the attention of pupils , pupils must be offered a balanced presentation of opposing views.

Discrimination and harassment

19. As to the meaning of discrimination, this includes direct and indirect discrimination. Separately, harassment is addressed in the context of schools.

Direct discrimination

[6] See too Sch 3, para 11, EqA ("Section 29 [services and public functions] so far as relating to religious or belief-related discrimination, does not apply in relation to anything done in connection with— (a) the curriculum of a school"). This will rarely be relevant because section 28, EqA provides that s.29, EqA does not apply to discrimination, harassment or victimisation— (a) that is prohibited by …Part 6 (education), or (b) that would be so prohibited but for an express exception."). However, it ensures that policies and practices which relate to things which schools are allowed to do under the Act do not become unlawful when carried out by public authorities (see, Explanatory Notes to the EqA, §695), including relating to the curriculum.

[7] Technical Guidance for Schools (2014) EHRC (https://www.equalityhumanrights.com/equality/equality-act-2010/technical-guidance-schools-england [accessed 19 March 2014]).

20. Direct discrimination occurs where a school treats a pupil less favourably because of a protected characteristic (s.13, EqA); here, gender reassignment, religion or belief and/or sex.

21. This requires that a comparison be undertaken as between a pupil with the characteristic in issue and pupils who do not have that characteristic. This means that:

    21.1. In the case of gender reassignment discrimination, the comparison will be between a pupil who has the characteristic of gender reassignment (s.7, EqA) and a pupil of the same sex who does not have that characteristic.

    21.2. In the case of direct religion and belief discrimination, the comparison will be between a pupil holding the relevant religious or philosophical belief and a pupil who does not.

    21.3. In the case of direct sex discrimination, the comparison will be between a girl and a boy (in each case whether trans or not).

Indirect discrimination

22. As to indirect discrimination, this is defined by s.19, EqA as follows,

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

23. The relevant protect characteristics include gender reassignment, religion and belief and sex (s.19(3), EqA).

24. In summary, this means that a policy or a practice that disadvantages one group with a particular characteristic as compared to other groups (i.e. disadvantages children with the protected characteristic of gender reassignment, or children holding particular religious /philosophical beliefs, as compared to children without those characteristics, or disadvantages girls as compared to boys or vice versa), though applied to all pupils, may be unlawful if it is not shown to be a proportionate means of achieving a legitimate aim. In assessing whether there is any such disadvantage, it is not necessary to undertake a complex statistical analysis. It will sometimes be obvious from the circumstances (*Homer v CC of West Yorks Police* [2012] IRLR 601). In deciding whether it can be shown that a policy or practice is a proportionate means of achieving a legitimate aim, Articles 8, 9, 14 and Article 2, Protocol No. 1, Sch 1, Human Rights Act 1998 (HRA) (the Convention rights) will be taken into account[8] (see below).

Harassment

25. Harassment against pupils is also outlawed in schools (s.85(3), EqA). However, the prohibition on harassment does not apply to the protected characteristics of gender reassignment and religion or belief (s.85(10), EqA). It does, however, apply to the protected characteristic of sex.

26. Harassment, within the meaning of the EqA, occurs where a school engages "in unwanted conduct related to a relevant protected characteristic" (here, sex) and "the conduct has the purpose or effect of- (i) violating [a pupil's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment" for a pupil (26(1), EqA, emphasis added). A school also harasses a pupil if it "engages in unwanted conduct of a sexual nature" and "the conduct

[8] *Higgs v Farmor's School (No. 3)* [2023] IRLR 708.

has the purpose or effect" "of- (i) violating [a pupil's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment" for a pupil (s.26(2), EqA). Further, a school harasses a pupil if—"it or another person engages in unwanted conduct of a sexual nature or that is related to... [9]sex" and "the conduct has the purpose or effect" "of- (i) violating a pupil's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment" for a pupil and "because of [the pupil's] rejection of or submission to the conduct..[the school] treats [the pupil] less favourably than [the school] would treat [the pupil] if [the pupil] had not rejected or submitted to the conduct" (s.26(3), EqA). As can be seen above, in the first case, the unwanted conduct need not be done *because* of sex. It need only be related to it. For example, allowing a boy into a girl's changing room, may amount to unwanted conduct *related* to sex and if it has the proscribed effect, it will in all likelihood amount to harassment. I return to this below.

27. In deciding whether "the conduct has the purpose or effect of- (i) violating [a pupil's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment" for a pupil, each of the following must be taken into account— (a) the perception of the pupil; (b) the other circumstances of the case and (c) whether it is reasonable for the conduct to have that effect (s.26(4), EqA). It is therefore a mixed subjective/objective test.

Sport

28. The EqA includes exceptions relating to sport (s.195, EqA). As is relevant here they include exceptions that apply to sex and gender reassignment discrimination. The exceptions acknowledge the different physiques and differences in the relative strength, of males and females. These exceptions apply in the case of a "gender-affected activity" (s.195(1), EqA): "A gender-affected activity is a sport, game or other activity of a competitive nature in circumstances

[9] Words "gender reassignment" omitted because this characteristic does not apply in the case of harassment and schools (s.85(1), EqA).

in which the physical strength, stamina or physique of average persons of one sex would put them at a disadvantage compared to average persons of the other sex as competitors in events involving the activity" (s.195(3), EqA). In considering whether a sport, game or other activity is gender-affected in relation to children, "it is appropriate to take account of the age and stage of development of children who are likely to be competitors" (s.195(4)). Plainly, pubertal and post-pubescent girls are likely to be disadvantaged if competing against pubertal and post-pubescent boys in those competitive sports where physical strength, stamina or physique are important. The same is unlikely to be true in the case of pre-pubescent children. This means that schools can introduce and maintain sex categories for gender-affected competitive sports, so excluding boys from girls' competitions, where the children have reached the age at which the strength, stamina etc. of the average girl would put them at a disadvantage compared to the average boy. This will be around the usual age for the commencement of puberty.

29. Provision is also made addressing the exclusion of trans people with the characteristic of gender reassignment (within the meaning of s.7, EqA), but this does not apply in the context of schools. [10]

30. A school is not legally bound to make use of the sports exceptions. However, if it chooses not to separate boys from girls but to opt for mixed sex sports, games and activities where boys (whether identifying as trans or otherwise) will be advantaged because of the differences in physique and strength, this may well result in indirect discrimination against girls unless that practice can be shown to be a proportionate means of achieving a legitimate aim. I address this below.

Single sex spaces

[10]Section 195(2), "A person does not contravene section 29, 33, 34 or 35, so far as relating to gender reassignment, only by doing anything in relation to the participation of a transsexual person as a competitor in a gender-affected activity if it is necessary to do so to secure in relation to the activity— (a) fair competition, or (b) the safety of competitors.

31. The EqA allows for single sex spaces where certain conditions are met.[11]

Toilets and changing rooms

32. Statutory provision is made for the provision and allocation of toilets and changing rooms in schools. Though these do not fall under the EqA, it is convenient to deal with them here.

33. Regulation 4(1) of the School Premises (England) Regulations 2012 (SI 2012/1943) made under the Education act 1996, provides that "suitable toilet and washing facilities must be provided for the sole use of pupils". Regulation 4(2) provides that *separate* toilet facilities for boys and girls aged 8 years or over *must* be provided except where the toilet facility is provided in a room that can be secured from the inside and that is intended for use by one pupil at a time. No exception is made in relation to children who identify as trans. The EqA does not affect the operation of these Regulations because the EqA contains an exception in relation to sex discrimination and schools so that anything done by a school that must be done pursuant to a requirement in an enactment (including in subordinate legislation: s.212(1)), will not be unlawfully discriminatory.[12] For these reasons, trans identified girls or boys cannot be permitted to use toilets designated for use by pupils of the opposite sex and if they are permitted to do so, the school will be acting unlawfully.[13]

34. Further, by Regulation 4(4), "Suitable changing accommodation and showers must be provided for pupils aged 11 years or over at the start of the school year who receive physical education." The EHRC gives the following guidance,

[11] This Advice does not deal with single -sex schools.

[12] Schedule 22, para 1.

[13] Except where the toilet facility is provided in a room that can be secured from the inside and that is intended for use by one pupil at a time. Such facilities are unusual in schools (and elsewhere) because of the cost of such arrangements. They will generally be unisex, and so not designated for use by one sex or another, because they are in a room that can be secured from the inside and intended for use by one pupil at a time.

> A school fails to provide appropriate changing facilities for a transsexual pupil and insists that the pupil uses the boys' changing room even though she is now living as a girl. This could be indirect gender reassignment discrimination unless it can be objectively justified. A suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space. (Technical Guidance for Schools (2014)).

Communal accommodation

35. Where certain conditions are met, a school will not contravene the EqA so far as sex or gender reassignment discrimination is concerned, by doing anything in relation to (a) the admission of pupils to communal accommodation, (b) the provision of a benefit, facility or service linked to the accommodation (Sch 23, para 3(1), EqA). This is particularly relevant where school trips take place, and children will be sharing accommodation (and, of course, in the case of boarding schools).

36. "Communal accommodation" is residential accommodation that includes dormitories or other shared sleeping accommodation, which, for reasons of privacy, should be used only by pupils of the same sex (Sch 23, para 3(5), EqA).

37. It can also include residential accommodation that should be used only by pupils of the same sex because of the nature of the sanitary facilities serving the accommodation (Sch 23, para 3(6), EqA).

38. This exception only applies where the accommodation is managed in a way which is as fair as possible to both girls and boys (Sch 23, para 3(2)).[14]

[14]Also, account must be taken of "whether and how far it is reasonable to expect that the accommodation should be altered or extended or that further accommodation should be provided, and the frequency of the demand or need for use of the accommodation by persons of one sex as compared with those of the other." But these will not be relevant to school trips and residential accommodation; they will apply to the providers of the accommodation.

39. A benefit, facility or service is linked to communal accommodation if it cannot properly and effectively be provided except for pupils using the accommodation. It can be lawfully refused only if the pupil can lawfully be refused use of the accommodation (Sch 23, para 3(7), EqA). Thus, for example, "it would be lawful to restrict access to the bathrooms in a single-sex boarding block to those living in the boarding block".[15]

40. Where a person refuses to admit another to communal accommodation because of gender reassignment, account must be taken as to whether this is a proportionate means of achieving a legitimate aim (Sch 23, para 3(4)).

The Public Sector Equality Duty

41. Section 149, EqA enacts the Public Sector Equality Duty (PSED) provides that,

> A public authority must, in the exercise of its functions, 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.

42. The PSED applies to local authorities and to the governing bodies of schools.

43. As to (b) ("having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it"), this involves having due regard, in particular: to the need to (a) remove or minimise disadvantages suffered by persons who share a relevant

[15] Technical Guidance for Schools (2014) EHRC (https://www.equalityhumanrights.com/equality/equality-act-2010/technical-guidance-schools-england [accessed 19 March 2014]).

protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.[16]

44. As to (c), "having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it"[17] requires having due regard, in particular, "to the need to (a) tackle prejudice, and (b) promote understanding".[18]

45. In the context of policy formulation, the PSED must be taken into account early on. However, the duty is a continuing one. This means that, when making inquiries, formulating policy, consulting, or making ultimate decisions (whether in an individual's case or when developing policy or otherwise), "due regard" must be had to the equality objectives in section 149(1), EqA.

46. There has been a voluminous amount of case law on the requirements of the PSED. The guidance emanating from those cases is now sufficiently authoritatively set down in *Bracking v Secretary of State for Work and Pensions* [2014] Eq LR 60, §26 (see, *Hotak v Southwark London Borough Council and O'rs* [2016] AC 811, §§73-75). I will not set it out here, but it includes the following,

    46.1. Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

    46.2. A decision-maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption

[16] EqA 2010, s 149(3).
[17] EqA 2010, s 149(1)(c).
[18] EqA 2010, s 149(5).

of a proposed policy and not merely as a "rearguard action", following a concluded decision.

46.3. The decision -maker must be aware of the duty to have "due regard" to the relevant matters.

46.4. The duty must be "exercised in substance, with rigour, and with an open mind".

46.5. General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

46.6. A decision-maker will have to have due regard to the *need* to take steps to gather relevant information and make appropriate inquiries in order that it can take steps to ensure that due regard is properly had to the matters in the PSED (*Bracking v Secretary of State for Work and Pensions* [2014] Eq LR 60, §26), and this may require that due regard is had to the need to consult with a variety of people and/or organisations to obtain that information.

47. Specific equality duties have been enacted under s.153, EqA (Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353)). These apply to the governing bodies of schools and provide (among other things) that schools prepare and publish one or more objectives it thinks it should achieve to do any of the things mentioned in the PSED. The objectives must be published 4-yearly. Any objective must be specific and measurable (regulation 5).

Human Rights Act 1998 (HRA)

48. Section 6(1), HRA provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right". By s.3(1), "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

49. This means that schools must act in conformity with the Convention rights and legislation must be interpreted consistently with them so far as it is possible to do so.[19]

50. The relevant Convention rights are Articles 8, 9, 10, Article 2, Protocol No. 1 and Article 14 (Sch 1, HRA).

51. Article 8 guarantees the right to respect for "private and family life".

52. As to family life, and children, "in all decisions concerning children their best interests are of paramount importance. (...) It follows that there is an obligation on States to place the best interests[20] of the child, and also those of children as a group, at the centre of all decisions affecting their health and development" (*Vavřička and Others v the Czech Republic* (2021) (Applications nos. 47621/13), §§ 287-288). Article 8 requires that the domestic authorities strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child. Those interests, depending on their nature and seriousness, may override those of the parents (see *Abdi Ibrahim v Norway* (2021) (Application no. 15379/16) § 145).

53. The right to respect for private life covers the physical and psychological integrity of a person (see *Pretty v. the United Kingdom* (2002) (no. 2346/02), § 61).

54. Further, the concept of "private life" in Article 8 protects personal choices as to desired appearance - for example haircuts, beards, dress - whether in public or in private, and other expressions of personality (*Biržietis v Lithuania* (2016) (Application no. 49304/09), §§54 and 57-58).

55. Interferences in the rights contained in Article 8 can be justified, and lawful, so where the interference is "in accordance with the law and is necessary in a

[19] *Higgs v Farmor's School (No. 3)* [2023] IRLR 708.
[20] See too, s.1, Children Act 1989 and Article 3(1), UN Convention on the Rights of the Child.

democratic society in the interests of …public safety …for the protection of health…, or for the protection of the rights and freedoms of others".

56. Article 9 provides that "everyone has the right to freedom of thought, conscience and religion." Again, this is a qualified right so whilst the right to hold a belief is absolute, the right to manifest that belief may be limited "where any limitation is prescribed by law and is necessary in a democratic society … for the protection of the rights and freedoms of others" (Article 9(1)).

57. Article 10(1) provides that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority". Again, this is a qualified right so that the exercise of the right to freedom of expression, "since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, …, for the protection of the reputation or rights of others" (Article 10(2)).

58. Articles 9 and 10 are closely linked. In this regard, it is important to note that the European Court of Human Rights (ECtHR) has attached high importance to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy (*Forstater v CGD Europe* [2021] IRLR 706, §55). Further, it regards freedom of religion as "one of the most vital elements that go to make up the identity of believers and their conception of life" ("Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion" (2022) ECtHR, §10). Further, freedom of expression is regarded one of the "essential foundations of democratic society" (ibid.).

59. The right to freedom of religion and belief under Article 9 and the right to freedom of expression under Article 10 also include the right *not to* manifest or express a belief that one does not hold (i.e. not to be compelled to say something one does not believe) (*Lee v Ashers Baking Co and O'rs* [2020] AC 413, §§50, 52, 55). This is relevant to instructions or encouragement to use preferred pronouns

even where they do not reflect a child's sex, or to give an account of biology that does not reflect one's belief as to the same. For those holding gender critical beliefs or similar religious beliefs, a requirement to use a pronoun which does not match the sex of the pupil concerned may be objectionable since it suggests that one's sex can be chosen and changeable. Similar objections may be made about a requirement to give an account of biology that suggests that sex is a matter of self-identity or is changeable. I return to this below.

60. Article 2, Protocol No. 1 provides that: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." The rights under Article 2, Protocol No. 1 are enjoyed by parents and children. This means that Article 2, Protocol No. 1 read in the light of the second sentence of that provision and of Article 9 of the Convention guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe, although within limits (*Perovy v. Russia,* 2020, §§ 49 - and they may too rely on Article 9 alone for these purposes, *ibid*. §§49 - 50). Article 2, Protocol No. 1 is generally regarded by the ECtHR, as the Convention's *lex specialis* in relation to religion and education. Generally, therefore, where complaint is made of an interference in the right of a parent or child to education and teaching in conformity with their own religious and philosophical convictions, it will be dealt with under Article 2, Protocol No. 1, not Article 9 (although generally read with Article 9). In reality, there is significant variation in the way the ECtHR addresses overlaps of the Convention rights; sometimes addressing more than one Convention right where more than one is engaged, sometimes treating one as dispensing with the application without the need to go on to decide whether an interference has occurred in respect of another Convention right; sometimes deciding that one right must be read "in light of" another and sometimes taking a different approach where children are relying on the Convention in their own right (as opposed to their parents). This is typified by the way in which Article 2, Protocol No. 1 and the

overlap with other rights is dealt with by the ECtHR.[21] In any event, the case law indicates that it is very likely that the outcome of complaints concerning interferences in the rights under Article 2, Protocol No. 1 would be the same if considered under Article 8, 9, 10 and 14.

61. For the purposes of Article 2, Protocol No. 1, the setting and planning of the curriculum fall in principle within the competence of the state, and in this regard, the school (*Valsamis v Greece* (1996) (Application no. 21787/93) § 28). There is nothing, then, to prevent a school from providing information or knowledge of a religious or philosophical nature as part of the curriculum (*Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) (Application no. 5095/71; 5920/72; 5926/72) § 53) (*Valsamis v Greece*, § 28). This is so even in the face of parental objection, so long as care is taken to ensure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner and not with the aim of indoctrination (*Kjeldsen, Busk Madsen and Pedersen*, § 53).

62. Although Article 8(2), 9(2) and 10(2) are differently framed, for the purposes of this Advice, the approach to satisfying these limbs (justification) is in essence the same. It will be necessary to show that any interference (a) is prescribed by law: this has an extended meaning, requiring that the impugned measure or limitation should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences- this could be a policy where clearly articulated (it does not need to be formal law) (*Huvig v France* (App no 11105/84) (1990) 12 EHRR 528, [1990] ECHR 11105/84; *Kruslin v France* (App no 11801/85) (1990) 12 EHRR 547, [1990] ECHR 11801/85; *R (on the application of Purdy) v DPP* [2010] 1 AC 345). (b) pursues a legitimate aim: this will generally, as relevant here, be concerned with the protection of "public safety", "health" (Article 8(2)) and "the rights "the rights and freedoms" of others (Article 8(2), 9(2) and 10(2)) (c) is "necessary in a democratic society"

[21] Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights Right to education (2022) EctHR.

(Article 8(2), 9(2) and 10(2)): it must meet some "pressing social need" (*Vogt v Germany* (App 17851/91) (1995) 21 EHRR 205 (§52)). This is not "synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' … One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given relevant and sufficient" (*R v Shayler* [2003] 1 AC 247, §53) (d) is proportionate: 4 questions arise (i) is the objective of the measure sufficiently important to justify the limitation of a protected right; (ii) is the measure rationally connected to the objective; (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter *(Bank Mellat v HM Treasury (No 2)* [2014] AC 700, §74). The proportionality threshold is generally where the assessment of legality takes place given that the other elements of the test are more readily satisfied. As can be seen, determining proportionality requires that a balancing exercise be undertaken.

63. Although justification is not specifically dealt with in Article 2, Protocol No. 1, as I have said, where there is an overlap, the likelihood is that the outcome of a case will be the same, with the ECtHR addressing justification (in essence and in broad terms) through interpreting the scope of Article 2, Protocol No. 1.

64. Article 14 provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

65. Article 14 applies where the facts fall within the ambit of a Convention right (its application does not presuppose a breach of another "substantive" right)

(*Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, §71; *Wandsworth v Michalak* [2002] EWCA Civ 271; [2003] 1 WLR 616, §20, per Brooke LJ). The Convention rights that may be relevant here are Articles 8, 9, 10 and Article 2, Protocol No. 1.

66. Discrimination, for the purposes of Article 14, takes many forms, including, broadly defined, direct and indirect discrimination. Indirect discrimination occurs where "a general policy or measure has disproportionately prejudicial effects on a particular group… notwithstanding that it is not specifically aimed or directed at that group" (*Jordan v United Kingdom* (2003) 37 EHRR 2, at para 154. See also *Pretty v United Kingdom* (2002) 3 EHRR 1, para 88–9 and *DH & Ors v Czech Republic* (2008) 47 EHRR 3).

67. Whether a difference in treatment, or indirect discrimination, amounts to objectionable discrimination will depend upon whether there is an objective and reasonable justification for the discriminatory effect of the measure (*A v Secretary of State for the Home Department* [2005] 2 AC 68, §68). The test for determining whether justification is made out is fourfold: "(i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?" (*R (Tigere) v Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening)* [2015] 1 WLR 3820, §33), and so is similar to the test for justification under the other Convention rights.

68. Sex is a protected characteristic under Article 14. "Other status" will cover trans status.

Safeguarding

69. By s.175 Education Act 2002, a local authority must make arrangements for ensuring that their education functions are exercised with a view to safeguarding and promoting the welfare of children. Further, the governing body of a maintained school must make arrangements for ensuring that their functions relating to the conduct of the school are exercised with a view to safeguarding and promoting the welfare of children who are pupils at the school.

70. Safeguarding and promoting the welfare of children is defined in *Keeping Children Safe in Education 2023: Statutory Guidance for Schools and Colleges* (2023) DfE as:

> • protecting children from maltreatment
>
> • preventing the impairment of children's mental and physical health or development
>
> • ensuring that children grow up in circumstances consistent with the provision of safe and effective care, and
>
> • taking action to enable all children to have the best outcomes (§4).

71. *Keeping Children Safe in Education* requires that governing bodies be aware of their obligations under the EqA, (including the PSED) and the HRA (§82). As to the PSED, it states that: "The PSED helps schools and colleges (which are subject to it) to focus on key issues of concern and how to improve pupil and student outcomes. Some pupils or students may be more at risk of harm from specific issues such as sexual violence, homophobic, biphobic or transphobic bullying or racial discrimination. Such concerns will differ between education settings, but it is important schools and colleges are conscious of disproportionate vulnerabilities and integrate this into their safeguarding policies and procedures" (§93).

72. *Keeping Children Safe in Education* gives extensive guidance on sexual conduct and abuse. Among other things, it advises schools that,

"sexual violence and sexual harassment can occur between two or more children of any age and sex, from primary through to secondary stage and into college. ….Schools and colleges should be aware of the importance of: • making clear that there is a zero-tolerance approach to sexual violence and sexual harassment, that it is never acceptable, and it will not be tolerated... • recognising, acknowledging, and understanding the scale of harassment and abuse and that even if there are no reports it does not mean it is not happening, it may be the case that it is just not being reported. ..Children who are victims of sexual violence and sexual harassment wherever it happens, may find the experience stressful and distressing…Whilst any report of sexual violence or sexual harassment should be taken seriously, staff should be aware it is more likely that girls will be the victims of sexual violence and sexual harassment and more likely it will be perpetrated by boys. (§§448-50).

73. Further, schools must comply with the guidance in *Working Together to Safeguard Children 2023: A guide to multi-agency working to help, protect and promote the welfare of children* (2023) HM Govt ("this document should be complied with unless exceptional circumstances arise" (§6)). It provides that "anyone working with children should see and speak to the child, listen to what they say, observe their behaviour, take their views seriously, and work with them and their families and the people who know them well when deciding how to support their needs" (§14). The approach "sits within a whole family culture in which the needs of all members of the family are explored as individuals and how their needs impact on one another is drawn out." (§15). As the guidance states, the PSED "applies to the process of identification of need and risk faced by the individual child and the process of assessment. No child or group of children must be treated any less favourably than others in being able to access effective services which meet their particular needs. To comply with the Equality Act 2010, safeguarding partners must assess and where appropriate put in place measures ahead of time to support all children and families to access services, overcoming any barriers they may face due to a particular protected characteristic." (§16).

74. As children get older, they will have increasing capacity to make decisions on their own behalf and their parents' preferences and choices may have to give way to those of their children. Whether or not a child has the capacity to make a particular decision alone (that is, without parental consent and/or in the face of parental opposition), will depend upon what is general known as *Gillick* competency. As the House of Lords in *Gillick* (*Gillick v West Norfolk and Wisbech AHA and A'or* [1986] A.C. 112) concluded, the parental right to control a minor child deriving from parental duty is a "dwindling right" which exists only in so far as it is required for the child's benefit and protection; that the extent and duration of that right could not be ascertained by reference to a fixed age, but depended on the degree of intelligence and understanding of that particular child and a judgment of what was best for the welfare of the child. Where a child has "achieved sufficient intelligence and understanding" to make the decision in issue, it may be made by that child without parental consent, or knowledge. Factors that will be relevant in deciding whether a child has capacity to make the decision in issue will include; the child's age, maturity and mental capacity; their understanding of the issue and what it involves - including advantages, disadvantages and potential long-term impact; their understanding of the risks, implications and consequences that may arise from their decision; how well they understand all aspects of any advice or information they have been given; their understanding of any alternative options, if available their ability to explain a rationale around their reasoning and decision making; the child cannot be persuaded to inform their parents or allow someone else to inform them; unless the child's choice were respected their physical or mental health were likely to suffer and it was in the best interests of the child to be able to make the choice it wishes to make without parental consent or notification (*Gillick*, *supra*, *R (Axon) v Secretary of State for Health (Family Planning Association intervening)* [2006] 2 WLR 1130).

Legality

75. A policy document, or guidance such as the Toolkit, may be regarded as unlawful in itself (as opposed to in its application) if it permits or encourages unlawful

conduct, in which case it can be "set aside as being the exercise of a statutory discretionary power in an unreasonable way" (*Gillick*, 181F), " "Permitting" unlawful conduct means "sanctioning" it (*R (Bayer plc) v NHS Darlington Clinical Commissioning Group* [2020] PTSR 1153 §§199–200, §214)). Further, a policy "will be unlawful if it misdirects officials as to their legal obligations" (*R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, §44).

3. The Toolkit

76. It is against that background the lawfulness of the Toolkit and guidance given in it must be assessed.

Background

77. The Toolkit is described on BHCC's website as "a Brighton and Hove City Council document". The Toolkit defines its "target audience" as[22]:

> …staff and governors in Brighton & Hove primary, secondary and special maintained schools, free schools and academies. Some of the content and principles will also be of use to Further Education and Early Years Settings. Independent schools within our city are welcome to access it.

78. The first iteration of the Toolkit was issued in 2013. The most recent iteration, the fourth, was issued in 2021.

79. Although the Toolkit states that "[e]ducation settings will decide if the guidance is supportive of their values and ethos," the fact is it is the only guidance available to schools in BHCC on trans inclusion or support for gender distressed children. As BHCC anticipate, it is very likely to be followed by schools in the BHCC area.

80. I note from *R (AI) -v- Wandsworth (SoS for Education intervening)* [2023] EWHC 2088 (Admin), that Wandsworth promoted a document for a period that was, it appears, in very similar terms to the Toolkit but then withdrew it from circulation (§13(c)). This was apparently because of "controversy at the time

[22] Toolkit, para 1.3

about the legal status of similar guidance" (§50)). However, my instructions indicate that other local authorities and organisations continue to signpost the Toolkit as an example of best practice and that at least one other local authority is in the process of preparing a toolkit based upon it. It has become a very influential document, therefore.

81. I shall deal with the legal errors and problems with the Toolkit thematically below. However, there are some general points that can be made at the outset.

82. Although the Toolkit refers to the EqA several times, it does not explain to schools what the EqA does and does not allow. At p.14, it identifies the protected characteristics and states that the EqA provides protection from direct and indirect discrimination. It does not explain what direct and indirect discrimination are in law. Nor does it mention unlawful harassment or victimisation[23]. It does not explain the human rights implications of decisions on trans inclusion, and the need for proportionality. It barely addresses the position of trans identified girls and boys and the impact upon them of trans inclusion. Nor does it take account of those whose protected beliefs are such as to cause them to reject changes in pronouns or the promotion of ideas that suggest sex is changeable or secondary to gender identity in importance. There is, then, a lack of legal context which makes the likelihood of schools falling into legal error significant. There are also legal errors and misleading statements of the law within the Toolkit which if acted upon by schools will likely result in them acting unlawfully.

83. Further, the choice of language in the Toolkit reflects a highly contentious understanding of "gender" and "sex". While at one point the Toolkit states that it "uses the phrase 'sex registered at birth' to bring the Toolkit in line with the

[23] Section 27, EqA "A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. (2) Each of the following is a protected act— (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act". This in essence protects a child against retaliatory action in response to making complaints of discrimination.

Census 2021, aside from when quoting other sources" and that "a person's sex registered at birth is based on physical characteristics in utero and at birth"[24] (p.4), it goes on to repeatedly refer to sex as something "assigned at birth" (see, for example, pp. 8, 9, 11, 12, 50).

84. The Toolkit also states that there is "[t]here is more than one way to be a boy or a girl" (pp.7 and 25). This is true if it is to be taken to refer to gender norms, but for those with gender critical and some religious beliefs, this will certainly not be the case if it is said to relate to sex (biology).

85. Further, the Toolkit states that: "'[t]ransgender' or 'trans' is an umbrella term for people whose gender identity is different from the sex assigned [registered] at birth" (p.4). A reader has to look hard to spot that the EqA protects only trans children who are transsexual within the meaning of s.7, EqA. It is not until p.14, after "trans" has been defined expansively to include, for example "gender queer", "gender fluid", a third gender", that a reader is informed of the meaning of gender reassignment under the EqA, in a section headed "Legal Context and Ofsted Framework". It is not explained that the descriptions or characteristics set out earlier under the banner "trans" are not covered by the EqA at all. Further, the Toolkit, though setting out s.7, EqA (p.14) and purporting to apply it, adopts a meaning of gender reassignment which does not meet the conditions in s.7, EqA. Thus, having set out the terms of s.7, EqA, it cites the DfE's advice for schools that s.7, EqA means that "in order to be protected under the Act, a pupil will not necessarily have to be undertaking a medical procedure to change

[24] See too, the Office for Statistics Regulation (the independent regulatory arm of the UK Statistics Authority) that states that: "When we use the term 'sex' in this guidance, we are referring to a binary variable categorised as female or male. In the UK, an individual's legal sex is recorded at birth based on their biological characteristics." https://osr.statisticsauthority.gov.uk/publication/collecting-and-reporting-data-about-sex-and-gender-identity-in-official-statistics-a-guide-for-official-statistics-producers/pages/2/#lg_terminology-used-in-this-guidance [accessed 19 March 2024]. Reference is made to the legal effect of a GRC but that is of no relevance to children. The Office for National Statistics recent summary update on the 2021 census states that those returning the census were given the options "Female" and "Male" https://www.ons.gov.uk/datasets/TS008/editions/2021/versions/4#summary [accessed 23 March 2024]. Thus the dataset provides Census 2021 estimates that classify usual residents in England and Wales by "sex".

their sex but must be taking steps to live in the opposite gender, or proposing to do so."[25] It is correct to state that a child does not need to be undergoing any medical procedure to fall within s.7, EqA; however, a child does need to be proposing to undergo, is undergoing, or has undergone, a process for the purpose of reassigning sex. The Toolkit, however, proceeds on the basis that protection under the EqA is provided to "trans children and young people who have taken 'steps to live in the opposite gender" (p.36). It requires more than that.

86. Thus, in its guidance on "[e]nabling access to single sex provision in schools such as toilets, changing rooms, residential accommodation and competitive sport", the Toolkit refers "only to trans children and young people who have taken "steps to live in the opposite gender" (p.42, emphasis in the original).

87. The Toolkit is therefore misleading when it uses "sex assigned" at birth and related terms since it does not reflect the census categories the Toolkit suggests it adopts. Nor does the Toolkit reflect in its guidance the meaning of sex in the EqA (which holds sex to be biological, not a matter of assignation), though the Toolkit purports to give guidance on the impact of the EqA (for example, p.5).

88. The importance of the language used is that it informs the approach taken by the Toolkit which misstates the law in several significant respects.

Single sex spaces

89. The Introduction to the Toolkit states,

> Children and young people who have undergone a process of gender reassignment as described under the Equality Act may access facilities in line with their gender identity should they wish to (p.7).

[25] "The Equality Act 2010 and schools Departmental advice for school leaders, school staff, governing bodies and local authorities" (2014), p.17 (https://assets.publishing.service.gov.uk/media/5a7e3237ed915d74e33f0ac9/Equality_Act_Advice_Final.pdf) [accessed 25 March 2024).

90. This is a misstatement of the law. A child who has undergone a process of gender reassignment even where that falls within the scope of s.7, EqA has no entitlement to access facilities in line with their "gender identity". A child whether identifying as trans or not has no right to choose which facilities to use. As I have advised above, in law a boy who identifies as trans is male, and a girl who identifies as trans is female, and as such the default is that they should use the facilities designated for boys and girls respectively.

91. Section 6 of the Toolkit deals more fully with single sex spaces. It states that,

> Enabling access to single sex provision in schools such as toilets, changing rooms, residential accommodation and competitive sport refers only to trans children and young people who have taken 'steps to live in the opposite gender.'

92. It does not, therefore, point to any requirement that a child meets the definition in s.7, EqA before "enabl[ing] access to single sex provision" (p.36), merely that they have taken steps to live in the opposite gender. At p.30, the Toolkit states that "social transition"" in schools "could include… the option of using toilets and changing rooms appropriate to [a pupil's] gender identity", without any reference to the EqA.

93. In any event, even where a pupil does have the characteristic of being transsexual (gender reassignment) for the purposes of s.7, EqA, s/he has no entitlement to access single sex spaces designated for children of the opposite sex.

94. The Toolkit states that the EqA "allows providers to offer single-sex services that exclude transgender people if it is proportionate to do so and it achieves a legitimate aim." (p.36). The single sex *service* provisions in the EqA do not apply to schools (Sch. 3, EqA) and to the extent that this section suggests otherwise, it misstates the law. The Toolkit sets out the EHRC's explanation as to the "significant requirements to prove objective justification" for excluding transgender people from single sex services including, that "there must be no alternative measures available that would meet the aim without too much

difficulty and would avoid such a discriminatory effect: if proportionate alternative steps could have been taken, there is unlikely to be a good reason for the policy" (p.36). The Toolkit links to what presumably is said to be EHRC guidance, but the link is broken[26] and so one cannot be sure where it comes from.

95. Even if the single sex service provisions applied, and they do not, the requirements set out do not adequately explain the factors to be taken into account in determining whether objective justification (that the practice is a proportionate means of achieving a legitimate aim) is made out. They take no account of the rights under the EqA, Articles 8 (privacy and family life), 9 (religion and belief), Article 2, Protocol No. 1 (education and religion) and 14 (discrimination) of the children of the sex for whom the space is reserved, or the PSED and the safeguarding duty under s175, Education Act 2006 (see above). These are largely not referred to in the Toolkit.

Toilets

96. As to toilets, the Toolkit states that:

> The use of toilet facilities by trans children and young people should be assessed on a case-by-case basis in discussion with the individual child or young person. Brighton & Hove recommends that in making that assessment schools should consider the fact that for some trans children accessing the toilet which corresponds to their gender identity can be extremely important (p.37).

97. Allowing a child who identifies as trans, or not, to use a toilet designated for children of the opposite sex would breach the requirements of regulation 4 (2), School Premises (England) Regulations 2012, set out above. The 2012 Regulations are referred to in the Toolkit (p.37) but since the Toolkit has already misstated the law, it proceeds on the premise that justification under the EqA is

[26] A Google search of the sentence brings up a page of the EHCR website entitled "Terms used in the Equality Act" and gives generic guidance: https://www.equalityhumanrights.com/equality/equality-act-2010/your-rights-under-equality-act-2010/terms-used-equality-act [accessed 23 March 2024].

required if a child who identifies as trans is not to be permitted to access single sex spaces and the mandatory effect of the 2012 Regulations is overlooked. [27]

Changing rooms

98. I have already referred to the general errors in the guidance in relation to single sex spaces.

99. As to changing rooms specifically, the Toolkit refers to the EHRC's Technical Guidance. This provides as follows:

> A school fails to provide appropriate changing facilities for a transsexual pupil and insists that the pupil uses the boys' changing room even though she is now living as a girl. This could be indirect gender reassignment discrimination unless it can be objectively justified. A suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space.[28]

100. The Toolkit states that,

> The use of changing rooms by trans children and young people should be assessed on a case-by-case basis in discussion with the individual child or young person. The goal should be to maximise social integration and promote an equal opportunity to participate in physical education classes and sports, ensuring safety and comfort.
> Brighton & Hove City Council recommends that in making an assessment, schools should consider the fact that for trans children accessing the changing room which corresponds to their gender identity can be extremely important. We would therefore encourage schools to enable this wherever possible. (p. 38).

101. A trans pupil who is not transsexual (within the meaning of s.7, EqA) does not have any protection against indirect gender reassignment discrimination and so reference in the Toolkit to "trans" children (a terms which has already been defined as including gender fluid and gender queer children, p.12) and indirect discrimination under the EqA, is misleading in law.

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[27] If the Regulations did not apply, and they do, the advice under changing rooms below would apply equally.

[28] Technical Guidance for Schools in England (2012, updated 2023), p.43. available at https://www.equalityhumanrights.com/equality/equality-act-2010/technical-guidance-schools-england [accessed 22 March 2024].

102. Further, though apparently purporting to do so, the Toolkit does not follow the EHRC Technical Guidance and recommend that consideration be given to a suitable alternative space such as "the staff changing room or another suitable space" but instead "encourages schools to enable" trans children to access the changing room "which corresponds to their gender identity" (p.38). A school following this recommendation would be acting unlawfully, even taking account of the recommendation that there be a case-by-case assessment. This is because it ignores the legal duties on a school under the EqA, the HRA and the Education Act 2006 that would affect the lawfulness of a decision to permit children to use changing rooms designated for use by children of the opposite sex.

103. The proper approach in deciding whether to permit a child who identifies as trans access to a single sex changing room designated for pupils of the opposite sex is to first ask whether it would be lawful to do so. This requires a school to consider whether it might result in,

    103.1. Unlawful indirect sex, religion and belief, and/or gender reassignment, discrimination (ss.19, 7, 10, 11 and 85(2), EqA).

    103.2. Harassment related to sex (ss.26 and 85(3), EqA).

    103.3. A breach of the Convention rights (Articles 8, 9, Article 2, Protocol No. 1, and 14, Sch 1, HRA).

104. None of these matters are considered in the Toolkit.

105. As to each of these of these matters:

106. Indirect sex discrimination: A practice of permitting trans identified children into changing rooms designated for children of the opposite sex is likely to disproportionately disadvantage girls. Statistical data is not required for these purposes; the impact is obvious. This is because the presence of trans identified boys in a girls' changing room is likely to subject them to a greater risk of harm

than the presence of trans identified girls in a boys' changing room (ss.11, 19 and 85(2), EqA). The greater risk arises from the fact that, firstly, girls are more likely to be subject to sexual violence and sexual harassment from boys than the other way round (see above). Therefore, the presence of trans identified boys in a girls' changing room presents an increased risk to girls. Secondly, allowing a trans identified boy to use a girls' changing room would inevitably result in a serious interference with the girls' privacy and dignity. The invasion of privacy is particularly stark in the case of girls because removing sports tops after PE will expose girls' bras and sometimes (at least partially) their breasts. The same is not true of boys. (Girls may also have to remove shorts or track suit bottoms, exposing their knickers making them additionally vulnerable).

107. This *prima facie* indirect discrimination will be unlawful (s.19 and s.85(2), EqA) unless a school were able to show that the practice was a proportionate means of achieving a legitimate aim. The approach to justification will broadly reflect that under Articles 8, 9 and 14 (see above). Subject to the arrangements it has in place, a school may find it relatively easy to overcome the hurdle of establishing that there is some legitimate aim for the practice ("trans inclusion" i.e. public safety, health and rights and freedoms of others and health) and that it is prescribed by "law" (pursuant to a policy). However, it will also need to demonstrate that the practice is "necessary in a democratic society" and "proportionate". These will require that the following, at least, are taken into account,

    107.1. The impact of a practice of allowing trans identified boys into girls changing rooms on girls' safety, privacy and dignity. The impact will be severe. Many girls will be caused deep distress and/or humiliation at having to undress in front of a boy.

    107.2. The increased risk of sexual violence and sexual harassment to girls arising from the presence of boys.

    107.3. The best interests of girls using girls' changing rooms.

107.4. The safeguarding duty under s.175 Education Act 2006.

107.5. The impact on trans identified boys of having to use a boys' changing room which may cause them discomfort and distress.

107.6. Whether a "less intrusive" practice could be adopted without unacceptably compromising the achievement of the aim of trans inclusion. This can plainly be achieved in the way anticipated by the EHRC guidance; that is, by providing a suitable alternative for trans identified children where they do not wish to use changing rooms designated for children of their own sex. Indeed, the Toolkit states that "any pupil …who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area or with a separate time to change. Any alternative arrangement should be provided in a way that protects the child or young person's ability to keep their trans status confidential" (p.38). The Toolkit itself, therefore, identifies a solution.

108. In view of these matters, it is difficult to see how indirect sex discrimination resulting from a practice of allowing trans identified boys into changing rooms designated for girls could be justified, particularly in the case of pubertal and post-pubescent children when it is difficult to conceive of any circumstances in which it would be lawful.[29] In the case of prepubescent children, the position will be less clear. Some of the considerations above (the risk of sexual violence) will weigh less heavily, if at all, in the case of young children.

109. Indirect religious discrimination: A practice of permitting trans identified children into changing rooms designated for children of the opposite sex may disproportionately disadvantage children from some religious groups where those groups adopt certain dress norms as a matter of faith (ss.10, 19 and 85(2),

[29] Except perhaps if access to the changing room were given at a time when girls were not using it.

EqA). These might include Muslim or orthodox Jewish girls (see p.116 of the EHRC's Technical Guidance for an analogous example), and where relevant dress norms apply to boys (not to be in a state of undress in front of females), the same will be true.

110. This is not referred to in the Toolkit at all.

111. As with indirect sex discrimination, this *prima facie* indirect discrimination will be unlawful (s.19 and s.85(2), EqA) unless a school were able to show that the practice was a proportionate means of achieving a legitimate aim. The factors above apply equally. Additionally, the interference in a child's ability to manifest her religious identity through compliance with dress codes (to be covered in front of children of the opposite sex, particularly in the case of girls) should be accorded great weight in the proportionality assessment because of the importance the ECtHR places on freedom of religion which in turn informs the approach that must be taken under s.19, EqA (indirect discrimination) (see above).

112. Again, it is difficult to see how indirect religious discrimination resulting from a practice of permitting trans identified children into changing facilities designated for children of the opposite sex could be justified, particularly in the case of pubertal and post-pubescent children when again it is difficult to conceive of any circumstances in which it would be lawful.

113. <u>Harassment:</u> Allowing trans identified children to use changing facilities designated for children of the opposite sex will most likely be unwanted, at least by some children who are members of the sex for whom the changing room is designated. For many of these children, it will also have the effect of violating their dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (s.11 and s.26(1), EqA). Any perception by a pupil to that effect will plainly be reasonable in the circumstances. Allowing trans identified children to use changing facilities designated for children of the opposite sex will also be *related to* sex since it is the sex of the children that is the

cause of the effect (violating dignity, creating an intimidating etc environment). This will be so for boys and girls, though there will be additional reasons why girls will experience the proscribed effects.[30] A school is likely to be acting unlawfully, therefore, if it permits trans identified children access to changing rooms designated for children of the opposite sex.

114. Further, the admission of trans identified boys into girls changing rooms, in particular, creates the obvious and real risk that sexual harassment will occur (s.26(2) and 26(3), EqA). This is not because trans identified boys are any *more* likely to sexually harass a girl in a changing room than a boy who does not identify as trans. It is because there is an equal risk; that is, trans identified boys are no *less* likely to sexually harass a girl in a changing room than a boy who does not identify as trans. The Toolkit makes no reference to this possibility at all.

115. The Toolkit states more than once that coming out as trans is not in itself a safeguarding issue (p.16, p.29, p.62). However, it may be a safeguarding risk to girls if boys come out as trans and pursuant to a school practice are permitted to use girls' changing rooms. No account is taken of this.

116. Human Rights: Article 8 (privacy) and Article 9 (religious freedom), Article 2, Protocol No. 1 (education) and Article 14 (discrimination) when read with Article 8, Article 9 and Article 2, Protocol No. 1, will also be engaged.

117. Allowing a trans identified boy into a girls' changing room will almost certainly violate the girls' right to respect for privacy, psychological integrity and may put them at physical risk. This will invariably amount to an interference in the girls' Article 8 rights, absent justification. The approach to justification is the same as described above under indirect discrimination and, for the same reasons as above, allowing trans identified boys to use changing rooms designated for girls, is likely to breach the right of many, perhaps most, of the girls' right to respect

[30] Harassment related to gender reassignment and religion and belief is not prohibited under the EqA: s.85(10)) (see above).

for private life. The same will be true of a trans identified girls using boys' changing rooms, in particular in the case of risk, though if they choose to do so that may be relevant to justification.

118. Further, Article 9 will be engaged in the case of those children who adhere to religious practice that requires compliance with certain dress codes (not to be in a state of undress in front of persons of the opposite sex, especially in the case of girls), including Muslim and orthodox Jewish girls. Permitting trans identified boys access to girls' changing rooms, and probably the other way round, will interfere with those rights. This means that absent justification, such a practice is likely to amount to a breach of those children's Article 9 rights (and probably Article 2, Protocol No. 1 too). Again, justification will be addressed in the same way as above and for the aforesaid reasons a school is unlikely to establish that such a breach is justified.

119. Article 14 and its prohibition on discrimination when read with Articles 8 and 9, and Article 2, Protocol No. 1, will also be engaged. The "disproportionately prejudicial effects" (see Article 14 above) on girls and girls from some religious groups, that will likely flow from permitting trans identified boys into girls' changing rooms will also be unlawful under Article 14, absent justification. In the case of indirect religious discrimination, where relevant dress norms apply to boys (not to be in a state of undress in front of females), the same will be the case where trans identified girls are permitted access to boys' changing rooms. However, the effect on girls of admitting boys is more serious for reasons given above. Again, justification will be addressed in the same way as above and for the same reasons a school is unlikely to establish that such breaches are justified.

120. The Toolkit does not identify or address the human rights implications of allowing trans identified boys into girls' spaces (and depending on religious practice, the other way round) at all. Indeed, human rights is mentioned only once in the Toolkit and that is in a quote from the Ofsted Education Inspection Framework (2019) (p.18). The Toolkit does not refer to human rights in any of

the guidance it provides. This is so notwithstanding that all schools are bound by the Convention rights and acts that breach a child's Convention rights will be unlawful under s6, HRA (see above).

121. Gender reassignment discrimination: A practice that prohibits children from using changing rooms designated for children of the opposite sex will not directly discriminate against trans children. This is because in requiring them to use changing rooms that match their sex, they are being treated in precisely the same way as all other children, including children of the same sex without the characteristic of being trans. Thus, trans identified boys will be treated in the same way as other boys; they will be required to use boys changing rooms.

122. Where trans identified children (who meet the definition under s.7, EqA) are not permitted to use changing rooms designated for children of their *own* sex, because they identify as trans, this will be direct gender reassignment discrimination. This means that children who identify as trans should always be the given the choice of using rooms designated for children of their own sex.

123. However, a practice that prohibits children from using changing rooms designated for children of the opposite sex may indirectly discriminate against trans identified children. This is because they may be particularly disadvantaged by a requirement that they use changing rooms allocated to children of their own sex since they may feel discomfort and even distress in having to do so. The prohibitions on indirect gender reassignment discrimination (s.7, s, 19, s.85(2), EqA) will only apply where a child is a transsexual child within the meaning of s.7, EqA. Otherwise, the EqA does not apply.

124. Further, not allowing a trans identified child to use a changing room designated for children of the opposite sex to them, may interfere with that child's Article 8 right to respect for private life. This is because it may intrude upon a child's privacy, psychological integrity, and personal choice as to the way in which they express their personality. Absent justification, therefore, such a practice is likely to breach the child's Article 8 rights. Further, since it is likely also to amount to

indirect discrimination within the meaning of Article 14 against trans identified children, then absent justification it will violate Article 14 when read with Article 8 and Article 2, Protocol No. 1. Again, the Toolkit does not mention the HRA (except as above) and the protections it gives to trans identified children.

125. Nevertheless, given the serious matters above in particular the impact on girls, and, where such children attend the school, children adhering to religious based dress codes, a school is very likely to establish that refusing trans identified children permission to use changing rooms designated for pupils of the opposite sex, is justified. Importantly, account will be taken of the EHRC's Technical Guidance advising that "[a] suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space." (Technical Guidance for Schools (2014)) and the Toolkit's own guidance that "any pupil …who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area or with a separate time to change" (p.38).

126. In summary, having regard to the matters above, it is difficult to conceive of any circumstances in which it would be lawful to admit a pubertal or post-pubescent boy identifying as trans into a girls' changing room (and in the case of religious discrimination, the same may be true of boys).[31] In the case of prepubescent children, the position will be less clear. Some of the considerations above (the risk of sexual violence) will weigh less heavily, if at all, in the case of young children.

Residential accommodation

127. The EqA includes an exception in relation to residential accommodation. The EqA will not apply in the case of sex or gender reassignment (Sch. 23, para 3) "to

[31] The only way that I can conceive of is where a child who identifies as trans is permitted to use them at different times i.e. when there are no girls in there.

anything done" in relation to the admission of pupils[32] to communal accommodation. The same is true in relation to the provision of a benefit, facility or service linked to the accommodation (bathrooms, toilets etc) (see above). "Communal accommodation" includes dormitories or other shared sleeping accommodation which for reasons of privacy should be used only by persons of the same sex. [33] In the case of gender reassignment discrimination, "account must also be taken of whether and how far the conduct in question is a proportionate means of achieving a legitimate aim." [34] This is peculiarly drafted because it only requires that "account" be taken of these matters. However, for the purposes of this Advice, I shall I assume that the exception is intended to apply, in the case of gender reassignment, only where it can be shown that the conduct in question – that is, requiring that all children use sleeping accommodation and linked facilities designated for the members of their own sex (whatever their trans status)- *is* a proportionate means of achieving a legitimate aim. This again only applies in the case of a pupil where s/he has the characteristic of gender reassignment within the meaning of s.7, Eq (is transsexual).

128. The Toolkit states that:

> Brighton & Hove City Council recommends that as far as possible trans children and young people should be supported to be able to stay in residential accommodation appropriate to their gender identity.
> However, discussion should be had with the trans child or young person, and their parents prior to residential trips to firstly identify what the trans child or young person wants and needs, and how this can be accommodated in discussion with appropriate others including relevant friendship groups in a way in which confidentiality is protected. Risk assessments can be carried out prior to residential trips in order to make

[32] And others caught by the EqA, but given the context for this Advice, I shall refer to pupils.
[33] Schedule 3, para 5.
[34] Schedule 3, para 4.

> reasonable adjustments which would enable the participation of trans children and young people. (p.39).

129. The DfE Guidance *Health and Safety on Education Visits*[35] does not deal with managing girls' and boys' sleeping accommodation, or arrangements for children who identify as trans. It does, however, signpost readers to the Outdoor Education Advisers' Panel (OEAP) guidance. The OEAP has published guidance on *Transgender Young People and Visits*[36] (2023). Further, the Toolkit refers to the OEAP (p.40).

130. Unlike the Toolkit, the OEAP does not advise that "as far as possible trans children and young people should be supported to be able to stay in residential accommodation appropriate to their gender identity." Instead, it states that,

> It is important not to dictate someone's gender when making accommodation, changing, toilet and showering arrangements. A solution should be agreed with the individual participant.
> Practical solutions could include:
> • Access to disabled/neutral gender toilets and showers;
> • Showers used at alternative times;
> • A separate bedroom (although this may introduce other safeguarding /safety issues);
> • A shared bedroom with other transgender young people, or with friends, where there is trust and understanding, with appropriate safeguarding arrangements;
> • Private individual changing areas.

131. The focus of the OEAP guidance is, then, on "solutions" through finding alternative arrangements to sleeping in accommodation allocated for children of the opposite sex.

132. As with changing rooms, in deciding whether to refuse to admit, or alternatively, to admit a trans identified child to sleeping accommodation designated for children of the opposite sex, consideration must be given to whether it would be lawful to do so. This requires a school to consider whether it might result in,

[35] https://www.gov.uk/government/publications/health-and-safety-on-educational-visits/health-and-safety-on-educational-visits [accessed 24 March 2024].
[36] https://oeapng.info/download/5451/?tmstv=1707994691 [accessed 24 March 2024].

132.1. Unlawful indirect sex, religion and belief, or gender reassignment discrimination (ss. 7, 10, 11, 19 and 85(2), EqA).

132.2. Harassment related to sex (ss.26 and 85(3), EqA).

132.3. A breach of the Convention rights (Articles 8, 9, Article 1, Protocol No. 1, and 14, Sch 1, HRA).

133. None of these matters are considered in the Toolkit.

134. As to each of these of these matters:

135. Indirect sex discrimination: Where a school instructs all children that they are to use the communal accommodation allocated to children of their own sex, there will be no direct sex discrimination under the EqA because the boys are treated in exactly the same way as the girls, whether trans identified or not. In any event, such an instruction would be lawful because of the communal accommodation exception. Further, any indirect sex discrimination will, for the purposes of the EqA, fall outside the unlawful acts because of the communal accommodation exception.

136. Indirect religious discrimination: The exception under the EqA does not apply to discrimination related to religion and belief. As above, in relation to changing rooms, a practice of permitting boys who identify as trans to sleeping accommodation is likely to amount to *prima facie* indirect discrimination under the EqA, subject to justification. The factors that will be relevant to justification under the EqA will reflect those relevant to justification under the Convention rights and so are addressed below.

137. Harassment: The communal accommodation exception only applies to sex (and gender reassignment) discrimination and not to harassment since harassment is not a form of discrimination under the EqA (s.25, EqA).

138. Allowing trans identified children to use sleeping accommodation designated for children of the opposite sex will, as with changing rooms, most likely be

unwanted at least by some children who are members of the sex for whom the sleeping accommodation is designated. Again, as with changing rooms, for many of these children, it will also have the effect of violating their dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them (s.11 and s.26(1), EqA). Any perception by a pupil to that effect will plainly be reasonable in the circumstances. Indeed, the impact is likely to be more severe than in the case of changing rooms given the length of time during which children will be sharing the space, and the fact that they will be sleeping and so additionally vulnerable. It will also be *related to* sex since it is the sex of the children that is the cause of the effect (violating dignity, creating an intimidating etc environment). This will be so for boys and girls, though, again, there will be additional reasons why girls will experience the proscribed effects. A school is likely to be acting unlawfully, therefore, if it permits trans identified children to stay in sleeping accommodation designated for children of the opposite sex.[37]

139. Further, the admission of trans identified boys into girls' sleeping accommodation creates the obvious and real risk that sexual harassment will occur (s.26(2) and 26(3), EqA). Again, this is not because trans identified boys are any *more* likely to sexually harass a girl in a changing room than a boy who does not identify as trans. It is because there is an equal risk; that is, trans identified boys are no *less* likely to sexually harass a girl in a changing room than a boy who does not identify as trans. The Toolkit makes no reference to this possibility at all.

140. While, as mentioned above, the Toolkit states more than once that coming out as trans is not in itself a safeguarding issue (p.16, p.29, p.62), it may be a safeguarding risk to girls if boys are permitted to stay in girls' sleeping accommodation and no account is taken of this.

[37] Harassment related to gender reassignment and religion and belief is not prohibited under the EqA: s.85(10)).

141. Human rights: Articles 8, 9, Article 2, Protocol No. 1 and 14 read with Articles 8, 9 and Article 2, Protocol No. 1 will be engaged and the exception under the EqA will not affect that.

142. Allowing a boy who identifies as trans into girls' sleeping accommodation will almost certainly violate the girls' right to respect for privacy, psychological integrity and may put them at physical risk. This will invariably amount to an interference in the girls' Article 8 rights, absent justification. The approach to justification is the same as described above (under changing rooms).

143. Again, a school may find it relatively easy to overcome the hurdle of establishing that there is some legitimate aim for such a practice ("trans inclusion" ie. "public safety", "health" and the "rights and freedoms of others") and that it is prescribed by "law" (pursuant to a policy). As to proportionality, this will require that the following, at least, are taken into account,

    143.1. The impact of a practice of allowing trans identified boys into girls' sleeping accommodation on girls' safety, privacy and dignity. The impact will be severe. Many girls will be caused deep distress and/or humiliation at having to undress and sleep with boys present. The impact is likely to be more severe than in the case of changing rooms because of the duration of the intrusion and the increased vulnerability given that the girls will be asleep.

    143.2. The increased risk of sexual violence and sexual harassment to girls arising from the presence of boys.

    143.3. The best interests of girls using girls' sleeping accommodation.

    143.4. The safeguarding duty under s.175 Education Act 2006.

    143.5. The impact on trans identified boys of having to use boys' sleeping accommodation which may cause them discomfort and distress.

143.6. Whether a "less intrusive" practice could be adopted without unacceptably compromising the achievement of the aim of trans inclusion. The OEAP provides potential solutions for trans identified children who do not want to use communal accommodation allocated to children of their own sex (see above).

144. In view of these matters, allowing trans identified children to use sleeping accommodation designated for children of the opposite sex, is likely to breach the girls' (or many of them) right to respect for private life under Article 8. The same will be true of trans identified girls using boys' sleeping accommodation, in particular so far as risk is concerned, though if they choose to do so again that may be relevant to justification.

145. Article 9 and Article 2, Protocol No. 1 will be engaged in the case of those children who adhere to religious practice that requires compliance with certain dress codes (not to be in a state of undress in front of persons of the opposite sex, especially in the case of girls), including Muslim and orthodox Jewish girls. Permitting trans identified boys to stay in girls' sleeping accommodation, and sometimes the other way round, will interfere with those rights. This means that absent justification, such a practice is likely to amount to a breach of those children's Article 9 and Article 2, Protocol No. 1 rights. Again, justification will be addressed in the same way as above and for the same reasons a school is unlikely to establish that such breaches are justified.

146. Further, Article 14 and its prohibition on discrimination when read with Articles 8 and 9, and Article 2, Protocol No. 1, will also be engaged. The "disproportionately prejudicial effects" (see above) on girls and children from some religious groups that will likely flow from permitting trans identified boys into girls' sleeping accommodation, will also be unlawful under Article 14, absent justification. In the case of indirect religious discrimination, where relevant dress norms apply to boys (not to be in a state of undress in front of females), the same is likely to apply where trans identified girls are permitted

access to boys' changing rooms. However, the effect on girls of admitting trans identified boys into girls' sleeping accommodation is more serious for reasons given above. Again, justification will be addressed in the same way as above and for the same reasons a school is unlikely to establish that such a breach is justified.

147. Given the impact on girls and children from some religious groups, and more emphatically than in the case of changing rooms, it is difficult to conceive of any circumstances in which it would be lawful to admit a pubertal or post-pubescent trans identified boy into girls' sleeping accommodation. In the case of young children, the position may be different dependent on age and circumstances.

148. As mentioned above, the Toolkit does not identify or address the human rights implications of allowing trans identified boys into girls' spaces (and depending on religious practice, the other way round) at all.

149. Gender reassignment discrimination: As stated above, the exception in relation to communal accommodation only applies in the case of gender reassignment discrimination where the requirement is a proportionate means of achieving a legitimate aim.

150. As mentioned above, where a school requires that all children use the communal accommodation allocated to members of their own sex, there will be no direct gender reassignment discrimination. This is because in such a case it is not because of gender reassignment that a trans identified child is required to use sleeping accommodation designated for pupils of their own sex; it is because of their sex.

151. Where trans identified children (and meet the definition under s.7, EqA) are not permitted to use sleeping accommodation designated for children of their *own* sex, because they identify as trans, this will be direct gender reassignment discrimination. In that case, it will only be lawful if the refusal is a proportionate means of achieving a legitimate aim. This means that trans identified children

should be given the choice of using accommodation designated for children of their own sex (Sch 23, para 3(4), EqA).

152. Further, a requirement that all children use communal accommodation designated for children of their own sex, may indirectly discriminate against trans identified children for the reasons given above in relation to changing rooms (s.19 and s.85(2), EqA). This means that requiring them to do so must be justified; that is, it will have to be shown that the requirement is a proportionate means of achieving a legitimate aim. This is the same test that applies for determining whether the exception in relation to residential accommodation applies and so they can be taken together (Sch 23, para 3(4), EqA).

153. Not allowing a trans identified child to use a changing room designated for children of the opposite sex to them, may also interfere with that child's Article 8 right to respect for private life. This is because it may intrude upon their privacy, psychological integrity, and personal choice as to the way in which they express their personality. Absent justification, therefore, such a practice is likely to breach the child's Article 8 rights. Further, since it is likely also to amount to indirect discrimination within the meaning of Article 14 against trans identified children, then absent justification it will violate Article 14 when read with Article 8 and Article 2, Protocol No. 1. Again, the Toolkit does not mention the HRA (except as above) and the protections it gives to trans children.

154. Nevertheless, given the serious matters above, in particular the impact on girls, and, where such children attend the school, children adhering to religious based dress codes, a school is likely to establish that refusing trans identified children permission to use communal accommodation designated for pupils of the opposite sex, is justified. Importantly, account will be taken of the solutions suggested by the OEAP in the case of children who identify as trans who do not want to use communal accommodation designated for pupils of their own sex.

155. In summary, having regard to the matters above, and the impact on girls and children from some religious groups, and more emphatically than in the case of

changing rooms, it is difficult to conceive of any circumstances in which it would be lawful to admit a pubertal or post-pubescent boy who identifies as trans into girls' sleeping accommodation. In the case of young children, the position may be different dependent on age and circumstances.

Freedom of belief and expression

156. The Toolkit states that,

> All staff need to be provided with training which develops trans awareness and confidence in terminology and vocabulary e.g. correct use of pronouns and names, and in challenging gender stereotypes, sexism and transphobia. Staff working with individual trans and gender exploring children and young people will need additional, specialist training to provide pastoral support.

157. Further, the Toolkit states that,

> Respecting a child or young person's request to change name and pronoun is a pivotal part of supporting and validating their identity as evidenced in research. Some people who consider their gender identity as not fitting into a binary (boy/girl or man/woman) and may use gender neutral pronouns (for example, 'they' or 'zie').
> It is important to consistently use correct pronouns and names to protect a child or young person's confidentiality and to not 'out' them in ways that may be unsafe and exposing. If a mistake is made with a name or pronoun then this can be apologised for.
> Where staff become aware that an adult or child is deliberately calling someone by their name registered at birth, after they have changed their name, or misgendering them (using the wrong pronoun or referring to them as their previous name) then appropriate challenge and if necessary action should be made with reference to the settings equality and anti-bullying policies.
> Staff will need to work with the trans child or young person, to agree how to communicate any changes to names and pronouns to their wider staff team (p.40-41, see too p.63)

158. The Toolkit therefore makes clear that teachers and other adults are expected to use a child's chosen pronouns, as are children.

159. Further, the "ideas" the Toolkit promotes for making relationships education, relationships and sex education (RSE) and health education trans inclusive

include: "Consider using the language that most, rather than all boys have a penis and testicles and most, rather than all girls have a vulva and vagina" (p.26).

160. This guidance takes no account of those who hold gender critical philosophical beliefs, or analogous beliefs rooted in religious belief. A requirement to use chosen pronouns and to express the idea that some girls have a penis and testicles, and some boys have a vulva and vagina (p.26), will be in direct conflict with the beliefs of teachers, other members of staff and children who hold gender critical philosophical or similar religious beliefs. For some, and perhaps most, it will cause offence to have to use chosen pronouns and promote ideas that conflict with their beliefs.

161. If imposed on teachers, staff or pupils, these requirements would in all likelihood disadvantage those teachers, staff and pupils, holding gender critical philosophical or similar religious beliefs and, accordingly, amount to indirect religion and belief discrimination under the EqA (ss.10 and 19, EqA), absent justification. This would be unlawful if it arises in a context covered by the EqA; here, schools in the case of pupils (s.85(2)) and as employees in the case of members of staff (s.39(2), EqA). Justification will be approached in the same way as under the Convention rights and so is addressed below.

162. Imposing these requirements would also be likely to interfere in the rights of teachers, members of staff and pupils, under Articles 9, 10 and Article 2, Protocol No. 1 and Article 14 when read with Articles 9, 10 Article 2, Protocol No. 1 (the latter in the case of parents and children), absent justification. This is because a requirement to express words or ideas that conflict with a person's beliefs will interfere with the right to freedom of belief and the right to free expression. Since a requirement to use chosen pronouns and present the ideas about biology set out above, will disadvantage those holding gender critical philosophical or similar religious beliefs, it would also amount to indirect discrimination for the purposes of Article 14, read with Articles 9 and 10 and Article 2, Protocol No. 1 (the latter in the case of parents and children), absent justification.

163. As to pronoun use, in *Forstater v CGD Europe* [2021] IRLR 706, Choudhury J made the following observations (this was not central to his holding but may be instructive):

> The second error was in imposing a requirement on the Claimant [who holds gender critical beliefs] to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the Claimant's right to freedom of expression insofar as they relate to her beliefs. However, that right applies to the expression of views that might 'offend, shock or disturb'. The extent to which the State can impose restrictions on the exercise of that right is determined by the factors set out in art 10(2), ie restrictions that are 'prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others …' It seems that the Tribunal's justification for this blanket restriction was that the Claimant's belief 'necessarily harms the rights of others'. As discussed above, that is not correct: whilst the Claimant's belief, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect In our judgment, it is not open to the Tribunal to impose in effect a blanket restriction on a person not to express those views irrespective of those circumstances.
>
> That does not mean that in the absence of such a restriction the Claimant could go about indiscriminately 'misgendering' trans persons with impunity. She cannot. The Claimant is subject to same prohibitions on discrimination, victimisation and harassment under the EqA as the rest of society. Should it be found that her misgendering on a particular occasion, because of its gratuitous nature or otherwise, amounted to harassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the EqA. The fact that the act of misgendering was a manifestation of a belief falling with s 10, EqA would not operate automatically to shield her from such liability. The Tribunal correctly acknowledged… that calling a trans woman a man 'may' be unlawful harassment. However, it erred in concluding that that possibility deprived her of the right to do so in any situation (§§103-4).

164. Parliament has chosen not to prohibit gender reassignment harassment in schools. It is not unlawful to harass a child for reasons connected to gender reassignment under the EqA and so the observations (made in the context of employment where harassment for reasons connected to gender reassignment is outlawed) do not formally apply. However, harassment of a child for reasons

relating to their trans status is likely to violate Article 8 , Article 2, Protocol No.1, and Article 14, unless justified. Whether a deliberate refusal to use chosen pronouns where they do not reflect a child's sex will violate Article 8 (private life) will be fact specific, but it is possible that it may do so, absent justification, because it will interfere with the child's desire to express themselves, their personality and identity in a particular way. Further, refusing to use pronouns that do not reflect a child's sex may indirectly discriminate against trans children under the EqA to the extent that they are covered by s.7, EqA, and under Article 14, read with Article 8, since it may disadvantage trans identified children who wish to change their pronouns, absent justification.

165. In determining whether a requirement to impart or receive education in conflict with one's beliefs is justified under the Convention rights, having regard to, among other things, the rights of trans identified children, account must be taken of case law from the ECtHR indicating that schools may include within curricula contents that conflict with a child's or parents' beliefs (see above). This is subject only to schools taking care to ensure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner and not with the aim of indoctrination (see above). This means that a child who identifies as trans is unlikely to have any basis for a complaint under Convention rights in relation to the teaching of biology in a way that reflects the biological differences between males and females. As seen above, and as is referred to below, this reflects the exception in the EqA.

166. As to justification for the interferences in the rights of members of staff and pupils holding gender critical philosophical, or similar religious, beliefs resulting from a requirement to use chosen pronouns and promote ideas that conflict with their beliefs, a school may find it relatively easy to overcome the hurdle of establishing that there is some legitimate aim for the practice ("trans inclusion" i.e. rights and freedoms of others), although this will be less compelling in respect of the contents of a curriculum because under the Convention schools may include within curricula contents that conflict with a child's or parents'

beliefs. Assuming a legitimate aim were identified, the school will need to demonstrate that the practice is "necessary in a democratic society" and "proportionate". As to proportionality, the following matters will be taken into account,

166.1. The discretion afforded schools as to curricula contents even where they conflict with a child's or parents' beliefs, under the Convention rights.

166.2. The very significant weight afforded by the ECtHR to the rights under Article 9 and 10, including the prohibition (absent justification) on compelled speech.

166.3. The requirement of political impartiality (ss.406 and 407, Education Act 1996). The uniform compulsion of speech which is in itself politically controversial may breach that requirement.

166.4. The impact on trans identified children, including the *prima facie* indirect gender reassignment discrimination, that might result from a refusal to use chosen pronouns or from imparting knowledge that they might find hurtful.

166.5. The best interests of the trans identified child.

166.6. The importance for trans identified children of the "use of pronouns and gender identifiers" (Toolkit, p.41, fn. 49). According to the Royal College of Royal College of Paediatrics and Child Health (cited in the Toolkit, p.41, fn. 49): "When health care professionals use identifiers inappropriately, or don't ask children and young people in the first place, they lose trust in those caring for them. Additionally, administrative items and processes like sign in screens and name call outs are often pre-fixed with Mr or Miss, which creates anxiety about appointments."

166.7. The best interests of children who hold gender critical beliefs or similar religious beliefs.

166.8. The best interests of all children affected.

166.9. The safeguarding duty under s.175 Education Act 2006.

167. In my view, the question whether compelling a teacher or a member of staff to use a child's chosen pronouns is more fact specific and, therefore, justification may be more finely balanced in an individual case than in the examples above (toilets, changing rooms, residential accommodation). In these earlier examples, it is possible to reach the generally applicable conclusion that accommodating trans identified children in single sex spaces reserved for children of the opposite sex is unlikely to be justified. But the impact on other children is more severe in such cases. In the case of pronoun use, the impact on other children, parents and staff, including those who hold gender critical philosophical or similar religious beliefs, will generally be less severe. It may be uncomfortable, confusing and sometimes offensive. But it will not put children at the degree of risk of serious harm to their privacy, dignity and potentially to their physical safety, that will arise in sharing changing rooms and sleeping accommodation with children of the opposite sex. Further, a persistent failure to use chosen pronouns may indirectly discriminate against trans identified children under the EqA and the Convention rights, as referred to above, in some circumstances. Any requirement to use chosen pronouns is, therefore, likely to prove easier to justify but will require a more fact specific assessment.

168. The same would not be true of a requirement to state that some girls have a penis, and some boys have a vulva and vagina. This would amount to a serious affront to those who hold gender critical philosophical or similar religious beliefs. It would amount to a requirement to express a matter of fact that they do not believe to be true. Having regard to all of the matters above, such interference is very unlikely to be justified, given the severity of the intrusion. Further, and in any event neither the EqA nor the Convention rights will prohibit schools from

teaching that boys have a penis, and girls have a vulva. Section 89(2), EqA[38] makes clear that schools are not restricted in the range of issues, ideas and materials that they use, and they have the academic freedom to expose pupils to a range of thoughts and ideas, however controversial, even if the content of the curriculum causes offence to pupils with certain protected characteristics,[39] so long as the way in which the curriculum is taught is not discriminatory (and see above in relation to the Convention rights). The Explanatory Notes to EqA give the following example: "A school curriculum includes teaching of evolution in science lessons. This would not be religious discrimination against a pupil whose religious beliefs include creationism" (§303).

169. For these reasons, were a requirement to be imposed on teachers, members of staff or pupils with gender critical philosophical, or similar religious, beliefs to use the language that most, rather than all, boys have a penis and testicles and most, rather than all, girls have a vulva and a vagina, it is very likely that it would violate the prohibition on indirect religion and belief discrimination under the EqA (ss.10, 19 and s.39(2) (in the case of employees) and s.85(2) (in the case of pupils), EqA) and Articles 9, 10 and Article 2, Protocol No. 1 (the latter in the case of parents and children) and Article 14, read with Articles 9 and 10 and Article 2, Protocol No. 1 (the latter in the case of parents and children).

Sport

170. The Toolkit states that:

> All children and young people have the right to take part in sports and physical education in education settings. Trans children and young people (who fit the gender reassignment protected characteristic under Equality Act and have taken 'steps to live in the opposite gender') should be able to take part in lessons or teams in accordance with their gender identity as

[38] See too Sch 3, para 11, EqA ("Section 29 [services and public functions] so far as relating to religious or belief-related discrimination, does not apply in relation to anything done in connection with— (a) the curriculum of a school" though this is will rarely be relevant because section 28, EqA provides that s.29, EqA does not apply to discrimination, harassment or victimisation— (a) that is prohibited by …Part 6 (education), or(b) that would be so prohibited but for an express exception.").

[39] Technical Guidance for Schools (2014) EHRC (https://www.equalityhumanrights.com/equality/equality-act-2010/technical-guidance-schools-england [accessed 19 March 2014]).

appropriate to their age, stage of development and guidance from sporting bodies.
Schools and educational settings should avoid stereotyping sports as being for one sex or the other. PE teachers, as part of their usual practice, should take account of the range of size, build and ability of individuals in the class and differentiate accordingly to keep all pupils and students safe. Some activities may be segregated for example providing opportunities for girls to develop their football skills.
There should be few issues at primary level where most lessons will be mixed sex. At secondary level lessons are more often segregated by sex. The issue of physical risk within certain sports should be managed properly within the lesson context rather than by preventing young trans people from participating, which would be discriminatory. The exception to this is where their exclusion is "a proportionate means to achieve a legitimate aim (p.38-9).

171. As can be seen, the focus is on the safety of children. The Toolkit makes no mention of fair competition. Self-evidently, having pubertal and post-pubescent trans identified boys play in gender-affected competitive girls sports will disadvantage the girls and undermine fairness for them.[40] A trans identified boy will have a competitive advantage and that will be unfair to the girls.

172. The Toolkit states that "[i]n the case of competitive secondary school sports, schools may need to seek advice from the relevant sporting body. For example: The *FA Guide to Including Trans People in Football* (developed with Gendered Intelligence); *UK Athletics Transgender Policy* and the *England Rugby Transgender Policy*. The links in the Toolkit to these policies are broken.

173. However,

    173.1. "*The Football Association Policy on Trans People in Football* " (2015) provides that its "policy is based on the fact that during the growth period, leading up to puberty, there is little difference in male and female strength

[40] Section 195, EqA requires that "In considering whether a sport, game or other activity is gender-affected in relation to children, it is appropriate to take account of the age and stage of development of children who are likely to be competitors.". Since puberty brings changes in physique and strength etc, commencement of puberty will invariably put boys at an advantage bearing in mind the average strength etc of boys as compared to girls.

development. Mixed football is allowed until the U18 age group and under 18's are entitled to play in boys' or girls' teams regardless of their birth sex." It then says that "However, hormonal changes brought about by puberty may result in: a. safety issues, due to a general distinction between males and females in sport as a result of different muscle strength caused by testosterone; and b. fair play issues, due potentially to differences between the sexes, and the fact that oestrogen and testosterone which is often taken as part of an individual's gender reassignment, can also have physical effects which may lead to competitive advantage." This is very difficult to understand since the average age for the commencement of puberty is 11 for girls and 12 for boys.[41] The policy recognises that football is "a gender affected sport of a competitive nature where the physical strength, stamina or physique of average persons of one sex could put them at a disadvantage compared to average persons of the other sex as competitors in a football match" but nevertheless provides that a child in the age ranges from Under 7 to Under 18 (if I have understood the guidance correctly) may play in a match involving boys and girls.[42] This only applies to footballing competitions covered by the F.A; that is, it appears not to cover ordinary school competitions. I have not been able to find a policy that applies to schools and the Toolkit does not signpost the reader to one.

173.2. The England Athletics' "processes for transgender women"[43] (2023) states that if an athlete's "gender is different from the sex … observed at birth" that athlete is not allowed to compete in the female category from 1 April 2023 unless approved by UK Athletics as complying with the

[41] https://www.nhs.uk/conditions/early-or-delayed-puberty/ [accessed 24 March 2024].
[42] https://www.thefa.com/football-rules-governance/policies/equality/lgbt-football#:~:text=FA%20Trans%20Policy,barrier%20to%20participation%20in%20football [accessed 24 March 2024].
[43] https://www.englandathletics.org/take-part/transgender-athletes/#:~:text=If%20your%20gender%20is%20different,compete%20in%20the%20female%20category [accessed 24 March 2024].

World Athletics Regulations to be able to compete in the female category. As to school age-based competition, the policy applies to Home Country National School Championships and those events where athletes can qualify for Home Country National School Championships. The regulations do not apply to other local school competitions.

173.3. The England Rugby "Gender Participation Policy"[44] effective from 1 August 2022 provides that for contact rugby under 11s, only, may play in mixed games. Children aged 12 to 18 are only permitted to play in the sex category that was recorded in their case at birth "irrespective of gender identity" unless, in the case of trans identified girls seeking to play in the male rugby category, the parents of the child provide written consent to the relevant school in a form prescribed by England Rugby and an appropriate risk assessment is carried out. In the case of the female category, for girls under 12 to under 18, only children whose sex was recorded at birth as female, "irrespective of gender identity", can play. This means that while subject to certain conditions being met, trans identified girls can play in the boys' games, trans identified boys can never play in the girls' games. This reflects the differences in physique, strength, stamina etc. as between boys and girls that begin to emerge once puberty has commenced.

174. This means that the default position where the sports' governing bodies (or those referred to in the Toolkit) have made provision for trans inclusion in sports, only one (the oldest: 2015) indicates that children under the age of 18 may play in mixed competitive sport; football.

175. The Toolkit does not refer to Sports Councils' advice. The UK Sports Councils has issued guidance: "The UK's Sports Councils Guidance for Transgender

[44] https://www.englandrugby.com//dxdam/67/6769f624-1b7d-4def-821e-00cdf5f32d81/RFU%20GENDER%20PARTICIPATION%20POLICY%202022.pdf [accessed 24 March 2024].

Inclusion in Domestic Sport" (2021). This contains guiding principles. These include,

175.1. Categorisation within the sex binary is and remains the most useful and functional division relative to sporting performance. This categorisation acknowledges the broad ranging and significant performance differences between the sexes. Hence, sports should retain sex categorisation, along with age and disability (and weight as appropriate) categories.

175.2. Evidence indicates it is fair and safe for transgender people to be included within the male category in most sports. This is on the assumption that the transgender person will generally be using testosterone supplementation, for which a Therapeutic Use Exemption (TUE) will be required in many sports. The NGBs and SGBs of contact, collision or combat sports in which size may impact safety considerations may consider further parameters to ensure safety of transgender people, including transgender men, non-binary and gender fluid people recorded female at birth.

175.3. Competitive fairness cannot be reconciled with self-identification into the female category in gender affected sport. This principle is in keeping with the provisions of the Equality Act, and acknowledges the average differences in strength, stamina, and physique between the sexes. Self-identification through the 'acceptance of people as they present' may be appropriate in those sports which are not gender-affected. In this instance, for clarity and inclusion, these sports may appropriately be considered 'mixed' or 'universal' sports, in which everyone may participate and compete together.

175.4. 'Case-by-case' assessment is unlikely to be practical nor verifiable for entry into gender-affected sports. Case-by-case analysis may fall outside of the provisions of the Equality Act (whereby provision is for average advantage not individual advantage) and may be based on criteria which

cannot be lawfully justified. Some transgender people will be included, some will be excluded through criteria outside of their own control.

176. The Sports Council guidance provides advice on decision making and the models that might be adopted. But the guiding principles make clear that for reasons of fairness and safety, males (whether trans identifying or not) should not play in female competitive gender affected sports: The Sports Councils guidance says of "transgender inclusion", "no current method of inclusion of transgender people can guarantee sporting fairness for the female category. Hence, this option is considered appropriate for a sport which has determined that inclusion rather than fairness is the objective of the category".

177. Except in the case of the FA guidelines, the sport bodies' guidance was not published at the time Toolkit was issued (in any of its iterations). Nevertheless, they remain instructive.

178. As referred to above, a school or sports body is not bound to rely on the sports exception in s.195, EqA. However, if a school decides not to introduce or maintain sex-based categories for gender-affected sporting competitions, but instead has a practice of maintaining mixed sex teams, it may indirectly discriminate against (pubertal and post-pubescent) girls as compared to (pubertal and post-pubescent) boys. This is because of the significant differences in strength, stamina etc. between the sexes, on average, following commencement of puberty (ss.11, 19 and s.85(2), EqA). This disadvantage will affect safety but also fairness. If a decision not to introduce or maintain sex-based categories is not to be unlawful, it will have to be shown to be a proportionate means of achieving a legitimate aim. Given the advice from the sporting bodies above and that which is generally known (that commencement of puberty brings changes in the physiques of girls and boys which result on average in boys having a competitive advantage, at least, and sometimes create a risk to girls' safety), failing to introduce sex based categories where the conditions in s.195, EqA are met is unlikely to be justified.

179. The Toolkit makes no mention of this at all.

180. Instead, the Toolkit suggests that there could be mixed sex sports, segregated by size, build and ability. This will not promote proper competition or fairness in the case of pubertal and post-pubescent children since differences in development between boys and girls are such that, on average, boys will always be at an advantage. Further, mixed sex sports will not encourage or provide the training for entry into sporting competitions outside of school such as inter schools' competitions. It is unfair and liable to deprive both boys and girls at secondary school of access to sporting opportunities.

181. Though the Toolkit acknowledges that "at secondary level lessons are more often segregated by sex", it nevertheless suggests that "physical risk within certain sports should be managed properly within the lesson context rather than by preventing young trans people from participating, which would be discriminatory". It is not clear what is meant by managing risks within lessons. How that will protect girls in mixed sex gender-affected contact sports, is unclear. Further, it states that trans identified children should not be prevented from participating "which would be discriminatory". Again, it is not clear what this means. If it is to suggest that it could be unlawful, this is not so. Sports' sex categories are lawful where the conditions in s.195, EqA are met. This is misleading as a matter of law.

182. It might be said that a practice of requiring children who are trans identified (where they fall within s.7, EqA) to play in teams designated for members of their own sex could conceivably be indirectly discriminatory against them, unless justified (ss. 7, 19 and 85(2), EqA). This may be because they would experience discomfort in participating in teams with members of their own sex. The exception under s.195, EqA in relation to gender reassignment does not apply to schools. However, given the effect on girls of trans identified boys joining girl's categories and the likely indirect discrimination against girls that would result, any such indirect gender reassignment discrimination will almost

certainly be justified. Regard can be had to the very clear guidance from the sporting bodies.

183. The Toolkit, therefore, gives misleading advice about sports and a school that follows it, is likely to act unlawfully.

Relationships Education, Relationships and Sex Education (RSE) and Health Education

184. The Toolkit states that "some settings may very occasionally use single sex groups to support teaching about puberty for example. Trans pupils and students can access the group in line with their gender identity if they wish to" (p.43).

185. Similarly, the Toolkit states that,

> Some teaching and learning approaches may make trans children and young people feel confused, excluded or uncomfortable.
> Putting children and young people into single sex groups may be one of these times. There may be times when single sex groups are needed. This may include aspects of relationship and sex education or to support the learning needs of groups (e.g. boys and literacy). Providing a clear need is identified, the Equality Act allows for such provision.
> However, it is recommended that school staff only group by sex when it is educationally necessary.
> Speak to the trans child or young person in advance to see how they would like to be accommodated in single sex groups and decide whether any additional support is needed. Pupils undergoing gender reassignment should be allowed to attend the single sex class that accords with the gender role in which they identify (p.24).

186. There is no legal basis for the guidance that trans identified children can choose to join single classes for pupils of the opposite sex. Further, the statement that "providing a clear need is identified, the Equality Act" allows for single sex groups is misleading and misstates the law. There is nothing in the EqA that prevents single sex classes (or makes them upon demonstrating a "clear need") except where they would be directly or indirectly discriminatory as against trans identified pupils (falling within s.7, EqA) or other pupils.

187. A practice of permitting trans identified children to join RSE and health

education single-sex classes designated for children of the opposite sex, is likely

to affect girls and boys equally. There is unlikely to be direct or indirect sex discrimination flowing from such a practice, therefore. However, it may disadvantage pupils from particular faith groups for whom discussing sex and bodies with children of the opposite sex is prohibited and, accordingly it may be indirectly discriminatory as against such pupils, unless justified (ss.10, 19, and 85(2), EqA). Justification is dealt with below.

188. Permitting a trans identified child to join a single sex RSE and health education class designated for children of the opposite sex, may very well cause discomfort and embarrassment to the other children in the class. This is because discussions, lessons and the delivery of information in these single sex classes will cover sex, reproductive health, menstruation, among other very intimate and sex related, and sex specific, matters.

189. Further, the statutory guidance on RSE and health education (*Relationships Education, Relations and Sex Education and Health Education Guidance*[45] (2019)) provides that:

    189.1. "Pupils should be taught the facts and the law about sex, sexuality, sexual health and gender identity in an age-appropriate and inclusive way. All pupils should feel that the content is relevant to them and their developing sexuality" (§75).

    189.2. "The onset of menstruation can be confusing or even alarming for girls if they are not prepared. Pupils should be taught key facts about the menstrual cycle including what is an average period, range of menstrual products and the implications for emotional and physical health. In addition to curriculum content, schools should also make adequate and sensitive arrangements to help girls prepare for and manage menstruation including with requests for menstrual products. Schools

[45] https://assets.publishing.service.gov.uk/media/62cea352e90e071e789ea9bf/Relationships_Education_RSE_and_Health_Education.pdf accessed 24 March 2024].

will need to consider the needs of their cohort of pupils in designing this content." (§89)

190. The guidance appears to anticipate, then, that classes will be truly single sex. The impact on the girls of permitting boys, whether or not trans identified, to join their classes on, for example, sexuality and menstruation is likely to deter full participation, and the same will be so the other way round (trans identified girls joining boys' RSE and health education classes).

191. Since the subjects taught in these classes relate to the most intimate aspect of a child's developing sexual life and maturing body, permitting a trans identified child to join a single sex RSE and health education class designated for children of the opposite sex may interfere in those children's right to respect for their private life under Article 8, and so require the practice to be a proportionate means of achieving a legitimate aim if it is not to be unlawful. The Toolkit makes no mention of this or the impact on the children who might be affected by having a trans identified child of the opposite sex in their RSE and health education class. The trans identified child is apparently given complete autonomy over the choice of lessons they will attend.

192. In deciding whether or not there is an unlawful interference in the children's right to respect for private life under Article 8, the same test for justification as above will apply (a proportionate means of achieving a legitimate aim). Again, the aim of "trans inclusion" is likely to be regarded as legitimate and assuming there is some policy in place, it is likely that the practice will satisfy the requirement to be prescribed by law. As to proportionality, this will require that the following, at least, are taken into account,

    192.1. The discomfort and embarrassment of the children in the RSE and health education lessons that will likely be experienced by them if a trans identified child of the opposite sex were to be admitted into the class.

192.2. The impact on the effectiveness of these very important lessons given that in all probability discussion and inquiry will be impaired by the presence of a trans identified child of the opposite sex, because of the discomfort and embarrassment that would most likely result.

193. Further, permitting trans identified children of the opposite sex to join single-sex RSE and health education classes, may interfere with a child's rights under Article 9 and Article 2, Protocol No. 1, and Article 14 read with Article 9 and Article 2, Protocol No. 1, where that child holds religious or other beliefs which are such as to prohibit a child discussing sex and sex matters with children of the opposite sex. This will only be lawful if justified. The matters above will need to be taken into account when considering justification.

194. None of these matters are addressed in the Toolkit. Instead, it is assumed that trans identified children have the absolute right to choose which class to join. This is misleading as a matter of law. Indeed, it is very likely that allowing trans identified children to join RSE and health education classes for children of the opposite sex, will not be justified in view of the above

195. For completeness, and although not referred to in the Toolkit, requiring all children, whether trans identified or not, to attend single sex RSE and health education classes designated for children of their own sex, may, in the case of children who meet the definition in s.7, EqA, indirectly discriminate against them. This is because trans identified children may be particularly disadvantaged by a requirement to attend such classes since they may experience discomfort and embarrassment at having to do so. If so, again a school would have to demonstrate that such a practice was justified as a proportionate means of achieving a legitimate aim. For the reasons above, this is likely to turn ultimately on the question of proportionality. Given the matters above, it is very likely that a school would establish that such a requirement was justified and, therefore, lawful, unless separate arrangements could be made

(that is, other than allowing the trans identified child to join an RSE and health education class for members of the opposite sex).

196. Finally, *The Equality Act 2010 and Schools Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities* (2014) DfE[46] provides that, "Pupils undergoing gender reassignment should be allowed to attend the single sex class that accords with the gender role in which they identify." (§3.19). However, this non-statutory advice is now ten years old and more particularly, it does not take account of the Convention rights. Further, there is a friction between this advice and the statutory guidance; *Relationships Education, Relationships and Sex Education (RSE) and Health Education Guidance*[47] (2019). This statutory guidance states (emphases added):[48]

> It is important that the starting point for health and wellbeing education should be a focus on enabling pupils to make well-informed, positive choices for themselves. In secondary school, teaching should build on primary content and should introduce new content to older pupils at appropriate points. This should enable pupils to understand how **their bodies** are changing, how they are feeling and why, to further develop the language that they use to talk about their bodies, health and emotions and to understand why terms associated with mental and physical health difficulties should not be used pejoratively. This knowledge should enable pupils to understand where normal variations in emotions and physical complaints end and health and wellbeing issues begin. It is important that the starting point for health and wellbeing education should be a focus on

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46 https://assets.publishing.service.gov.uk/media/5a7e3237ed915d74e33f0ac9/Equality_Act_Advice_Final.pdf [accessed 24 March 2024].

47 https://assets.publishing.service.gov.uk/media/62cea352e90e071e789ea9bf/Relationships_Education_RSE_and_Health_Education.pdf accessed 24 March 2024].

48 The Guidance also states that "Lesbian, Gay, Bisexual and Transgender (LGBT) "In teaching Relationships Education and RSE, schools should ensure that the needs of all pupils are appropriately met, and that all pupils understand the importance of equality and respect. Schools must ensure that they comply with the relevant provisions of the Equality Act 2010, (please see The Equality Act 2010 and schools: Departmental advice), under which sexual orientation and gender reassignment are amongst the protected characteristics. Schools should ensure that all of their teaching is sensitive and age appropriate in approach and content. At the point at which schools consider it appropriate to teach their pupils about LGBT, they should ensure that this content is fully integrated into their programmes of study for this area of the curriculum rather than delivered as a standalone unit or lesson. Schools are free to determine how they do this, and we expect all pupils to have been taught LGBT content at a timely point as part of this area of the curriculum. "Relationships Education, Relations and Sex Education and Health Education Guidance" (2019), §§36-37. However, this is largely about the content of the teaching and not the composition of the class.

> enabling pupils to make well-informed, positive choices for **themselves**. In secondary school, teaching should build on primary content and should introduce new content to older pupils at appropriate points. This should enable pupils to understand how **their** bodies are changing, (§97)

197. The references to "themselves" and "their bodies" appears to anticipate that RSE and health education should be arranged so that children (including trans identified children) receive information and teaching relevant to their sex, regardless of gender identity, and this is most likely to be achieved through single-sex classes.

198. For these reasons, it is very likely that permitting trans identified children of the opposite sex into single-sex RSE and health education classes, will breach the EqA and violate the rights under Article 8, 9, Article 2, Protocol No. 1 and Article 14 read with Articles 8, 9 and Article 2, Protocol No. 1 of those children for whom the classes are reserved.

The Public Sector Equality Duty (PSED)

199. The Toolkit refers to the PSED in its introduction (p.3), in so far as it applies to BHCC. It provides no guidance as to its contents or its implementation. It refers, although inadequately, to limb (b) (advancing equality of opportunity) but not to limb (a) (eliminating discrimination) or (c) fostering good relations. In Appendix 4, the Toolkit sets out the terms of the PSED and states that it requires education settings to have equality objectives and information published on their websites. It says nothing about how the PSED should be implemented or the formulation of objectives or publication. It does not refer to the guidance in the case law set out above, including the need to undertake enquiries for the purposes of gathering information.

200. The Toolkit refers again to the PSED when dealing with RSE and health education (p.26). It states that: "Education providers under the Public Sector Equality Duty should foster good relationships between different protected characteristics, and between certain protected characteristics and those without them" (limb (c) of the PSED). It also states that "the religious background of all

pupils must be taken into account when planning teaching [of Relationships, Sex and Health Education]," (citing the statutory guidance; *Relationships Education, Relationships and Sex Education (RSE) and Health Education Guidance*[49] (2019), §20). The Toolkit does not include the second sentence in the paragraph from the statutory guidance which reads "Schools must ensure they comply with the relevant provisions of the Equality Act 2010, under which religion or belief are amongst the protected characteristics." The relevant provisions would include indirect discrimination against children from particular religious faiths that might find discussing sex and related matters in front of children of the opposite sex particularly offensive or difficult. No mention is made of this in the Toolkit.

201. The Toolkit says nothing about the relevance of the PSED to girls, in particular, and little about those who may be affected by the matters within the Toolkit because of their religious or philosophical beliefs.

202. It does not reflect the guidance in *Keeping Children Safe in Education* on implementing the PSED, by taking account of sexual violence, or being conscious of disproportionate vulnerabilities and the need to integrate this into their safeguarding policies and procedures (§93).

203. The Toolkit states that schools should "include an equality objective (Public Sector Duty of the Equality Act) which supports the needs of trans children and young people" (by which it must be referring to the specific statutory equality duties[50]). It makes no reference to girls or children with specific religious or philosophical beliefs such that they may be particularly disadvantaged by some of the steps identified in the guidance.

204. The Toolkit contains guidance on carrying out an equality impact assessment (pp.55-59) which covers all the protected characteristics, but this is plainly

[49] https://assets.publishing.service.gov.uk/media/62cea352e90e071e789ea9bf/Relationships_Education_RSE_and_Health_Education.pdf accessed [24 March 2024].

[50] Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353).

generic and does not identify any of the issues that are likely to arise in relation to trans inclusion, or indicate the rigour with which the PSED should be exercised. Nor does it reflect the obligation to take account of the *need* to take steps to gather relevant information and to make appropriate inquiries in order that it can properly take steps to have due regard to the matters in the PSED, though this may require consultation.

205. This means that there is inadequate guidance in the Toolkit on discharging the PSED in the context of trans inclusion.

Safeguarding

206. The Toolkit barely touches upon safeguarding and where it does, the central and almost sole focus is on trans children.

207. There is no mention of the impact of trans inclusion on girls and the risk of sexual violence and harassment. Nor is there any focus on children from particular religious groups and there is no mention of the impact on children holding gender critical philosophical or similar religious beliefs. This is so notwithstanding the matters above, all of which affect the welfare and mental and physical, including sexual, health of these children. The absence of any such guidance means schools are liable to overlook the interests of these children and fail to comply with their safeguarding duty.

208. As mentioned above, the Toolkit states that coming out as trans is not in itself a safeguarding issue (p.16, p.29, p.62). However, it may be a safeguarding risk to girls if boys come out as trans and pursuant to a school practice are permitted to access to girls' toilets, changing rooms, residential accommodation, sports and RSE and health education lessons. No account is taken of this.

209. As to trans children, there is a worrying lack of appropriate guidance on safeguarding in the Toolkit. As can be seen above, firstly, there is an emphasis on supporting children through social transition (see, p.30, in particular),

without highlighting any of the risks that may be associated with that. As the interim report of the Cass Review[51] stated,

> Social transition – this may not be thought of as an intervention or treatment, because it is not something that happens within health services. However, it is important to view it as an active intervention because it may have significant effects on the child or young person in terms of their psychological functioning. There are different views on the benefits versus the harms of early social transition. Whatever position one takes, it is important to acknowledge that it is not a neutral act, and better information is needed about outcomes.

210. This is not reflected in the Toolkit at all. Instead, the Toolkit states that, "[o]nce school staff understand the areas in which a child or young person is planning to transition, they can think about how to support these changes at school. It is vital that the staff team provides informed and consistent support to individuals who are transitioning" (p.31). It further assumes that the child will enjoy considerable autonomy in deciding when to transition ("The right time to transition will be when a child or young person feels they are ready" p.32). It does not highlight the potential significant impact on psychological functioning. It provides significant autonomy to trans identified children, in relation to, pronouns and access to RSE and health education. It anticipates that trans identified children will access single sex toilets, changing rooms and residential accommodation designated for children of the opposite sex. These are key milestones in social transitioning and there is no guidance on establishing the appropriateness of these steps, or any indication that external support from a clinician should be sought first. And nor is there any recognition or understanding of the best interests and welfare of the child who may be psychologically impacted by social transition.

211. Further, while the Toolkit refers to working with parents (p.29), the guidance on the treatment that will be afforded a trans identified child, and the degree of

[51] The Cass Review Independent review of gender identity services for children and young people: Interim report February 2022 https://cass.independent-review.uk/wp-content/uploads/2022/03/Cass-Review-Interim-Report-Final-Web-Accessible.pdf [accessed 24 March 2024].

autonomy they will enjoy, does not assume that there will always be parental involvement (for example, as mentioned above, as with a child's choice as to which RSE and health education class to join). Further in relation to pronoun changes, the Toolkit states that "[o]ften this will be supported by and in communication with parents and carers, if this is not the case, the school will need to offer additional support and if necessary, seek further advice" (p.40). This assumes it will not be necessary to seek further advice sometimes, even where a parent objects to a change in pronoun use. This is so notwithstanding the guidance in *Working Together to Safeguard Children 2023* (§6)), referred to above, that emphasises the important role parents play in the care of children so that "anyone working with children should see and speak to the child, listen to what they say, observe their behaviour, take their views seriously, and work with them and their families and the people who know them well when deciding how to support their needs" (§14).

212. The guidance in *Gillick* on the competency of a child to make decisions on serious matters even where they conflict with those of their parents, makes clear that "the parental right to control a minor child deriving from parental duty" is a "dwindling right" and the older the child becomes, the more likely it will have the degree of intelligence and understanding to make decisions by itself. But there is no guidance in the Toolkit on the matters to be taken into account in deciding whether a child is *Gillick* competent in respect of a particular decision.

213. Further, again as mentioned above, *Working Together to Safeguard Children 2023* makes clear the importance of the PSED and the Convention rights in safeguarding and states that those responsible for safeguarding "must assess and where appropriate put in place measures ahead of time to support all children and families to access services, overcoming any barriers they may face due to a particular protected characteristic." (§16). Compliance with the PSED and the Convention rights is critical therefore to meeting the safeguarding duty. This is not reflected in the Toolkit.

214. The guidance in the Toolkit on safeguarding is, then inadequate, with the risk that schools will fail properly to discharge their safeguarding duty in respect of all children, including trans identified children.

4. Conclusion

215. In conclusion, a school that implements the guidance in the Toolkit is very likely to act unlawfully in the respects set out above. Further, the Toolkit encourages and sanctions such unlawful conduct and/or misdirects schools as to their legal obligations and as such and to this extent, it is itself unlawful (*R (Bell and another) v Tavistock and Portman NHS Foundation Trust* [2022] PTSR 544, 53-54).

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