

10 June 2022

By email from: info@forwomen.scot
to: [Chief Executive email]

Dear [Name of Chief Executive],

Provision of single-sex toilets for school pupils

I write to you as a Director of For Women Scotland, an organisation which works to protect and strengthen the rights of women and children. Earlier this year the [judgement](#) in *For Women Scotland v Lord Advocate and the Scottish Ministers* ruled that, under the Equality Act 2010, the protected characteristic of 'sex' refers to biological males and females, and is separate to 'gender reassignment'. The exception which allows the Scottish Parliament to take steps relating to the inclusion of women is limited to allowing provision to be made in respect of a 'female of any age' and by definition excludes those who are biologically male.

Following concerns raised with us by parents regarding the increased prevalence of mixed-sex toilets in schools across Scotland, which is causing great distress to many children, we sought a legal opinion on whether schools are required to provide single-sex toilets for pupils.

The written Advice from Aidan O'Neill QC is attached in full. It can be summarised as follows:

Single-sex services ([Schedule 3, Part 7, Equality Act 2010](#)):

- Section 26 allows for separate services for each sex if a joint service would be less effective and the provision is a proportionate means of achieving a legitimate aim.
- [Statutory guidance](#) from the EHRC states a legitimate aim could be for reasons of privacy, decency, to prevent trauma or to ensure health and safety.
- Section 27 states such provision does not constitute sex discrimination if the service is likely to be used by two or more persons at the same time, and a person might reasonably object to the presence of a person of the opposite sex.
- Section 28 states such provision does not constitute gender reassignment discrimination.
- The [School Premises \(General Requirements and Standards\) \(Scotland\) Regulations 1967](#) states that half the sanitary accommodation shall be for boys, and half for girls, and outlines the required number of appliances per number of pupils.

- It is therefore lawful for provision to be made for sex segregated toilets and that this will *not* constitute unlawful sex discrimination if such provision can be said to be in all the circumstances a proportionate measure seeking to realise a legitimate aim.
- Once the proportionality of the measure is established with regard to lawful sex discrimination it is difficult to see how this can constitute unlawful gender reassignment discrimination. However, schools may consider it a more proportionate response to provide (in addition to, but separately from, the provision of communal sex-segregated toilets for pupils) a number of self-contained individual gender-neutral toilets to cater to the needs of those pupils with the protected characteristic of gender reassignment.

Harassment ([Part 2, Chapter 2, Equality Act 2010](#)) and Schools ([Part 6, Chapter 1, Equality Act 2010](#)):

- Section 26(1) on harassment prohibits conduct that has the effect of violating another's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that other person (and subsection (4) says their perception must be taken into account). Sex is a relevant protected characteristic.
- Section 85(3) states the responsible body of a school must not harass a pupil.
- Section 85(10) states that gender reassignment is not a relevant protected characteristic in the application of section 26 on harassment in schools.
- The prohibition against harassment therefore creates a positive obligation on schools not to follow (or desist from) any course of conduct which can be said to be related to the pupils' biological sex and which can be perceived by those pupils as having the effect either of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. There is no parallel obligation regarding gender reassignment.

In conclusion:

- There is an enforceable legal obligation on both local authority and private co-educational schools in Scotland to make provision for separate toilets for boys and girls both in the interests of respect for privacy, preserving decency, preventing trauma and/or ensuring health and safety particularly of girl pupils; and to avoid creating what girl pupils in particular might perceive and experience as an intimidating, hostile, degrading, humiliating or offensive environment for them.
- The question of what toilet provision might properly be made for those pupils with the protected characteristic of gender reassignment cannot lawfully be relied upon to undermine the basic decision and duty on schools' non-harassment obligations to make separate toilet provision for boys and girls.
- These duties can be enforced against local authority and private schools in Scotland by wholly private enforcement actions brought by pupils (individually or collectively) alleging a breach by the schools of the non-harassment obligations related to the sex of their pupils.

- The Equality Act 2010 recognises the more serious nature of harassment involving the creation of a hostile school environment could give rise to an award of compensation to pupils not just for any pecuniary losses but for losses in respect of injury to feelings and aggravated damages, which would not be achievable under the claim of indirect sex discrimination. Furthermore, on a claim of harassment a court is not obliged to ask whether there was any intention on the part of the school to discriminate, or to consider other remedies, before awarding compensation.

In light of this legal opinion we trust that XXXX Council will use the time over the school summer holidays to review school buildings and policies to ensure compliance with the legislation. This includes:

- Building plans and warrants for new-build schools or refurbishment of toilets to provide for separate-sex toilets for pupils;
- Reinstatement or creation of separate-sex toilets for pupils where these have been removed in any refurbishments or not provided in recently built schools;
- Schools' sex and gender reassignment policies to specify that toilets provided for a particular sex are not to be accessed by pupils of the opposite biological sex. Alternative arrangements may be made for any pupil who does not feel comfortable using the toilets provided for their biological sex, such as individual self-contained gender-neutral toilets. These must be in addition to the minimum number of separate-sex toilets required for the size of the school roll.

We will be making the information in the legal opinion available to our members, parents and other interested parties and, should it become necessary, will support any legal challenge to enforce the council's legal obligations to provide separate-sex toilets in schools.

We would appreciate confirmation of safe receipt of this letter.

Yours sincerely,

Trina Budge
Co-director, on behalf of For Women Scotland