FOR WOMEN SCOTLAND LTD.

re the

the Equality Act 2010 and the provision, on a sex-segregated basis, of toilets for school pupils in schools in Scotland

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ADVICE

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1. Introduction

1.1 I refer to the consultation with my instructing solicitors and with the clients, For Women Scotland (FWS), held on 16 May 2022. FWS was established as a women's rights group in June 2018 and was subsequently incorporated as a private company whose purpose is to seek to protect and strengthen the rights of women and of children in Scotland, both under both Scots law and wider GB/UK wide law.

1.2 In the course of the 16 May 2022 consultation I was asked to produce a formal written Advice concerning the Equality Act 2010 and the provision on a sex-segregated basis of toilets for school pupils.

2. Sex and the Equality Act 2010

2.1 The decision of the Second Division of the Inner House of the Court of Session in *For Women Scotland Ltd v Lord Advocate* [2022] CSIH 4, 2022 SLT 289 confirms that the Equality Act 2010 (EA 2010) recognises *only* two sexes – male or female [1] - in providing in Section 11 EA 2010:

> **"11 Sex**
>
> In relation to the protected characteristic of <u>*sex*</u>—
>
> (a) a reference to a person who has a particular protected characteristic is a reference *to a man or to a woman*;
>
> (b) a reference to persons who share a protected characteristic is a reference persons of the same sex."

[1] UK law does *not* recognise as a distinct status in law those who would identify themselves as "non-binary" and/or as "non-gendered": qv *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 [2022] 2 WLR 133

2.2 The Inner House further confirmed in *For Women Scotland Ltd*. that Section 212(1) EA 2010 - which defines "woman" as meaning "a female of any age" and "man" as meaning "a male of any age" - means that for the purposes of understanding and applying the EA 2010 prohibitions against discrimination, victimisation and harassment, the protected characteristic of "sex" refers to an individual's *biology* (rather than, say, any "gender identity" by which they might choose to identify themselves). [2] As was noted by Lord Reed *R (Elan-Cane) v Home Secretary* [2021] UKSC 56 [2022] 2 WLR 133 at para 3:

> "The term 'gender' is used in this context to describe an individual's feelings or choice of sexual identity, in distinction to the concept of 'sex', associated with the idea of biological differences which are generally binary and immutable."

2.3 The "biological sex" of an individual is, in principle determined as a matter of law according to that person's chromosomes and their endogenous sex organs (internal and external). [3] The EA 2010 provisions on *sex* discrimination are predicated on the existence of two, and only two, *biological* sexes: female or male. [4] No recognition is given, and no provision is made, in the EA 2010 for the *biologically* intersex or those diagnosed as DSD (Differences in Sex Development) - for example, those extremely rare

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[2] See *R (Elan-Cane) v Home Secretary* [2018] EWHC 1530 (Admin) [2018] 1 WLR 5119 per Jeremy Baker J at §§ 96-97

> "96 Over the years science's understanding of the intertwined issues of sex and gender has become broader and more sophisticated; a snap-shot of which is evident from the development of medical and other evidence upon which courts have reached their decisions in cases such as *Corbett v Corbett* (or *Ashley*) [1971] P 83, *W v W (Physical Inter-sex)* [2001] Fam 111 and *Bellinger v Bellinger* [2002] Fam 150.
>
> Although at one time the terms 'sex' and 'gender' were used interchangeably (and confusingly still are on occasions), due to an increased understanding of the importance of psychological factors (albeit these may be due to differences in the brain's anatomy), sex is now more properly understood to refer to an individual's physical characteristics, including chromosomal, gonadal and genital features, whereas gender is used to refer to the individual's self-perception.
>
> 97 The established concepts of both sex and gender are based upon a binary differentiation between male and female. Certainly, as the defendant points out, this is the basis for current UK legislation relating to gender, hence the effect of a recognition certificate under the Gender Recognition Act 2004 enables the individual to acquire for all purposes either the male or
> female gender."

[3] *Corbett v Corbett* [1971] P 83, followed by *R v Tan* [1983] QB 1053 and *Bellinger v Bellinger* [2003] 2 AC 467

[4] Section 11 EA 2010 provides so far as relevant as follows:

> **"11 Sex**
> In relation to the protected characteristic of sex—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

individuals whose sex chromosomes are not congruent with their endogenous sex organs (internal and external).

2.4 In its judgment in *For Women Scotland Ltd.*, the Inner House further noted (at paras 34, 36, 40):

> "34. … [I]t is important to recognise one aspect of the Equality Act 2010 which cannot be modified [by the Scottish Parliament], namely the definition of "protected characteristic", which for the purpose of any exceptions has the same meaning as in the Equality Act 2010.
> …
> 36. … So far as the characteristic of sex is concerned, it would be open to the Scottish Parliament to make provision only for the inclusion of women, since a reference to a person who has a protected characteristic of sex is a reference *either to a man or to a woman.*
>
> For this purpose a man is a male of any age; and a woman is a female of any age. Section 11(b) indicates that when one speaks of individuals sharing the protected characteristic of sex, one is taken to be referring to one or other sex, *either male or female.*
>
> Thus an exception which allows the Scottish Parliament to take steps relating to the inclusion of women, as having a protected characteristic of sex, is limited to allowing provision to be made in respect of a "female of any age". *Provisions in favour of women, in this context, by definition <u>exclude</u> those who are biologically male.*
> …
> 40. ….[T]he definition of woman adopted in the legislation includes those with the protected sex characteristic of women, but only some of those with the protected characteristic of *gender reassignment*. It qualifies the latter characteristic by protecting only those with that characteristic who are also *living as women.*
>
> The Lord Ordinary stated that the 2018 Act did not redefine "woman" for any other purpose than "to include transgender women as another category" of people who would benefit from the positive measure.
>
> *<u>Therein lies the rub: "transgender women" is not a category for these purposes; it is not a protected characteristic</u>* and for the reasons given, the definition of "woman" adopted in the Act impinges on the nature of protected characteristics which is a reserved matter.
>
> Changing the definitions of protected characteristic, even for the purpose of achieving the Gender Representation Objective, is *<u>not</u>* permitted and in this respect the 2018 Act is outwith legislative competence.

2.5 The decision in *For Women Scotland Ltd.* also makes clear that the EA 2010's provisions are predicated on the *biological* protected characteristic of "sex" being a quite distinct category from the protected characteristic of gender reassignment. The court notes (at para 37, 38):

> "37 …. Protected characteristic includ[es] that of gender reassignment. A person has that protected characteristic 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': section 7(1) EA 2010.
A reference to a person having such a characteristic is a reference to a transsexual person (section 7(3)(a) EA 2010), and no distinction is made between those for whom the relevant process would involve reassignment male to female or *vice versa*.

This is emphasised by the fact that section 7(3)(b) EA 2010 specifies that in relation to gender reassignment a reference to those who share the characteristic is a reference to "transsexual persons".

In other words, it is the attribute of proposing to undergo, undergoing or having undergone a process (or part of a process) for the purpose of reassignment which is the common factor, not the sex into which the person is reassigned. It is reasonable to assume that at some stage of the process in question the individual will start living as a member of the sex to which they are seeking to transition, *but it is <u>not</u> a specified requirement for the acquisition of the protected characteristic*.
...
38. ... Whilst it [the CJEU decision in Case C-13/94 *P v S and Cornwall CC* EU:C:1996:170 [1996] ECR I-2143] recognised that discrimination on the basis of gender reassignment was most *likely* to be sex discrimination, neither it nor *Chief Constable of West Yorkshire v A* [2004] UKHL 21 [2005] 1 AC 51, which anticipated the Gender Recognition Act 2004, is authority for the proposition that a transgender person possesses the protected characteristic of the sex in which they present.

These cases do *not* vouch the proposition that sex and gender reassignment are to be conflated or combined, particularly in light of subsequent legislation on the matter in the form of the Equality Act 2010 *which maintained the distinct categories of protected characteristics*, and did so in the knowledge that the circumstances in which a person might acquire a gender recognition certificate under the Gender Recognition Act 2004 were limited."

2.6 Section 9 of the Gender Recognition Act 2004 (GRA 2004) provides as follows:

"9 General

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, *if the acquired gender is the male gender, the person's <u>sex</u> becomes that of a man and, <u>if it is the female gender, the person's sex becomes that of a woman</u>*).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but *it does operate <u>for the interpretation of enactments passed</u>, and instruments and other documents made, before the certificate is issued (as well as those passed <u>or made afterwards</u>).*

(3) Subsection (1) is subject to provision made by this Act *or any other enactment* or any subordinate legislation.

2.7 On the face of it, the wording of Section 9(1) GRA 2004 seem to be stating that the obtaining of a full gender recognition certificate (GRC) means that in law not just one's (social) gender but one's (biological) sex is deemed – albeit in the latter case by the

application of a legal fiction – to be changed. [5] However, the approach taken by the Inner House in its decision *For Women Scotland* proceeds on the basis that the apparently general words of Section 9(1) GRA and their confusion/conflation of the otherwise distinct concepts of sex and gender have now to be read subject to (as envisaged by Section 9(3) GRA 2004) the statutory schema of the subsequently enacted

[5] See e.g. *R (FDJ) v. Justice Secretary* [2021] EWHC 1746 (Admin) [2021] 1 WLR 5265 for an example of the Prison Estate in England distinguishing between persons with the protected characteristic of gender reassignment depending on whether they do or do not hold a Gender Recognition Certificate (GRC). Swift J notes in this judgment on this as follows:

> "[T]ransgender woman prisoners who do *not* have a GRC .... will not be placed into a women's prison other than following a decision of a Transgender Complex Case Board ('CCB'. As Holroyde LJ explains, the Care and Management Policy provides that every such decision depends on a comprehensive process of identification and assessment of risk - both from the point of view of the transgender woman and from the point of view of the non-transgender women with whom she will be held if the CCB's decision is that she should move to a women's prison. Para 4.18 of the Care and Management Policy requires 'all available evidence and intelligence' to be considered and states that the objective is an 'outcome that balances risks and promotes the safety of all individuals'. Although it is correct to say that risk or likelihood of non-physical harm is not one of the matters expressly listed under the heading 'Potential risks presented by the [transgender prisoner]', consideration of such risks is the necessary consequence of taking account of the matters that are listed. For example, a number of the listed matters concern the transgender prisoner's past behaviour: considering these matters necessarily requires regard to be had as much to the risk of non-physical harm to other prisoners as to the risk of physical harm. *In this way, the policies, read as a whole, will not result in decisions to place a transgender woman without a GRC into a women's prison unless the particular disadvantages that could arise for relevant non-transgender women have been assessed, and to the extent necessary, addressed by measures to be put in place in the women's prison for that purpose.* A decision that did not do this could not be one that 'promoted the safety of all individuals' a requirement under the Care and Management policy.
>
> 102 *The position of transgender women prisoners with GRCs is different.* For this group the overarching rule is at para 4.64 of the Care and Management Policy they 'must be placed in the women's estate ... unless there are exceptional circumstances, as would be the case for biological women'. *Exceptional circumstances is a high bar; the working assumption must be that transwomen prisoners with a GRC will be placed in women's prisons.*"

EA 2010. [6] This is consistent with the approach taken by the Court of Appeal of England and Wales. [7]

[6] Cf *Hamnett v Essex County Council* [2017] EWCA Civ 6 [2017] 1 WLR 1155 the Court of Appeal held that in the event of a conflict between the provisions of the EA 2010 and the provisions of an earlier statute (which allowed for the possibility of statutory review under the Road Traffic Regulation Act 1984 of local authorities' experimental traffic regulation orders) the provisions of the EA 2010 prevailed. Gross LJ noted:

> "25 There is thus a conflict as to the forum in which a claim for contravention of section 29 of the 2010 Act must be pursued. Is it the High Court or the county court? What is the solution to the conundrum?
>
> 26 To my mind, the answer lies in the well-known common law doctrine of implied repeal: where the provisions of two statutes cannot stand together, the later provisions prevail and the earlier provisions are treated as repealed by implication or amended to the extent necessary to remove the inconsistency. As expressed in Bennion, *Statutory Interpretation*, 6th ed (2013), para 87:
>
> > '(1) Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriors priores contrarias abrogant* (later laws abrogate earlier laws). This is subject to the exception embodied in the maxim *generalia specialibus non derogant* ...'
>
> It must be underlined that the court will not lightly invoke the doctrine of implied repeal; necessary repeals are usually effected expressly:
>
> > The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together ...' (Halsbury's *Laws of England*, 5th ed, vol 96 (2012), para 698.)
>
> See too *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590, 595-596, 597 and *Thoburn v Sunderland City Council* [2003] QB 151, esp, para 42 and following and para 60, per Laws LJ (a decision dealing with 'constitutional statutes', with which we are not concerned). As to the exception or qualification spoken of by Bennion, *the doctrine is inapplicable or more difficult to apply where the earlier enactment is particular and the later general, in nature*: see *Pattinson v Finningley Internal Drainage Bd* [1970] 2 QB 33, 37-39.
>
> 27 In the present case, as I have sought to demonstrate, the claimant, in so far as she alleges that the ETROs contravene section 29 of the 2010 Act, faces irreconcilable provisions as to jurisdiction: the RTRA 1984 providing for the High Court and the 2010 Act providing for the county court. Those provisions cannot be made to stand together. Nor can it be said that the RTRA 1984 provisions were 'special' and the 2010 Act provisions 'general' in nature. They are either both 'general' or, *if anything, the provisions of the 2010 Act are more __special__ in nature, dealing as they specifically do with discrimination*. In my judgment, therefore, the High Court jurisdiction provided for in Schedule 9 to the RTRA 1984 must, to the extent necessary, be regarded as impliedly repealed by the provision for county court jurisdiction contained in Part 9 of the 2010 Act."

[7] In *R. (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 [2020] 3 WLR 683 a transsexual person, originally a woman but who had the additional protected characteristic of gender reassignment and who had duly obtained a full gender recognition certificate, thereafter retained woman's reproductive biological capacity to become pregnant and after artificial insemination carried and gave birth to a child. Notwithstanding the apparent unlimited terms of Section 9(1) GRA 2004 which appeared to require that he be recognised in law as a man *for all purposes*, the Court of Appeal held that he still required to be registered as the "mother" of his child." The UK Supreme Court subsequently refused his application for permission to appeal to it against this decision.

2.8 What these decisions of the two appellate courts operating respectively north and south of the border mean is that the apparently general words of Section 9(1) GRA 2004 have, in a discrimination law context, to be read subject to the EA 2010's *reaffirmation* of the fundamental distinction between the objectively biologically determined protected characteristic of "sex" and the concept of gender reassignment.

2.9 This means that the acquisition of a final gender recognition certificate does *not* have the effect, as the Scottish Ministers had wrongly advised in their original Guidance on the operation of Gender Representation on Public Boards (Scotland) Act 2018 (and which the Inner House in its decision in For Women Scotland then ordered to be reduced/quashed) that "a trans woman with a UK Gender Recognition Certificate or with gender recognition from another EU Member State is legally a woman".

2.10 Accordingly when the Division alludes in its judgment in *For Women Scotland Ltd.*to Section 9 GRA 2004 it rephrases it to use only the terminology of (social) "gender" rather than suggesting any change of (biological) "sex", in noting as follows (at para 14):

> *Gender Recognition Act 2004*
> 14. Generally speaking, a gender recognition certificate must be provided (section 2) where a gender recognition panel is satisfied that the applicant has or has had gender dysphoria; has lived in their acquired gender throughout a period of two years prior to the application; intends to continue to live in the acquired gender until death, and otherwise complies with the evidential requirements.
>
> Subject to other provisions in the Act, or other enactments, section 9 provides that where a full gender recognition certificate is issued to a person, the person's *gender* becomes for all purposes the acquired *gender*."

Single sex services

2.11 It is against the background of the EA 2010 protected characteristic of "sex" being an immutable biological referent which is wholly distinct from the (by definition) mutable medico-social referent of the protected characteristic of "gender reassignment" (which may be claimed regardless of whether the individual has obtained a gender recognition certificate under the GRA 2004 which has, as one pre-requisite, their prior diagnosis

with the medical condition of gender dysphoria or gender incongruence [8]) that the provisions of the EA 2010 on the possibility of making provisions for separate services for the sexes has to be understood and applied.

2.12 In Part 3 EA 2010 which concerns Services and Public Functions, the following provision, so far as relevant to the matter at hand, is made in Section 29 EA 2010:

> **"29 Provision of services, etc.**
> (1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> (2) A service-provider (A) must not, in providing the service, discriminate against a person (B)—
> (a) as to the terms on which A provides the service to B;
> (b) by terminating the provision of the service to B;
> (c) by subjecting B to any other detriment.
>
> (3) A service-provider must not, in relation to the provision of the service, harass—
> (a) a person requiring the service, or
> (b) a person to whom the service-provider provides the service.
> ...

2.13 Schedule 3 EA 2010 is headed "Service and Public Functions: exceptions". Part 7 of Schedule 3 bears the heading "Separate, single and concessionary services, etc." and contains the following provisions, among others:

> **"26 Separate services for the sexes**
> (1) A person does not contravene section 29, so far as relating to sex discrimination, by providing *separate services* for persons of each sex if—
> (a) a joint service for persons of both sexes would be less effective, and

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[8] cf *Re JR111's Application for Judicial Review* [2021] NIQB 48 per Scoffield J:

> **"Conclusion**
> [157] Accordingly:
> (a) The applicant fails in her claim that, in principle, the general requirement for a diagnosis set out in a specialist medical report under sections 2(1)(a) and 3(1) of the Gender Recognition Act 2004 is a breach of her Article 8 ECHR rights. The UK's Parliament's determination that *an applicant for a gender recognition certificate must provide a report with specialist medical input in support of their application strikes a fair balance between her interests and those of the community having regard to the discretionary area of judgment available to Parliament on this issue and the aims which that requirement is designed to pursue.*
>
> (b) The applicant succeeds in her claim insofar as the Gender Recognition Act 2004 imposes a requirement, through sections 2(1)(a) and 25(1), that she prove herself to be suffering or to have suffered from a "*disorder*" in order to secure a gender recognition certificate. Within the context of the scheme adopted by the UK Parliament, that specific requirement is now unnecessary and unjustified, particularly in light of diagnostic developments. *Even taking into account the UK Parliament's discretionary area of judgment and the legitimate aims which the requirement for medical input pursues, the requirement to provide a specific diagnosis which is defined as "a disorder" fails to strike a fair balance between the interests of the applicant and those of the community generally.*"

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) A person does not contravene section 29, so far as relating to sex discrimination, by providing *separate services differently for persons of each sex* if—

(a) a joint service for persons of both sexes would be less effective,

(b) the extent to which the service is required by one sex makes it not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex,

and

(c) the limited provision is a proportionate means of achieving a legitimate aim.

(3) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

27 Single-sex services

(1) A person does not contravene section 29, so far as relating to sex discrimination, by providing a service *only to persons of one sex* if—

(a) *any* of the conditions in sub-paragraphs (2) to (7) is satisfied, and

(b) the limited provision is a proportionate means of achieving a legitimate aim.

(2) The condition is that only persons of that sex have need of the service.

(3) The condition is that—

(a) the service is also provided jointly for persons of both sexes, and

(b) the service would be insufficiently effective were it only to be provided jointly.

(4) The condition is that—

(a) a joint service for persons of both sexes would be less effective, and

(b) the extent to which the service is required by persons of each sex makes it not reasonably practicable to provide separate services.

(5) The condition is that the service is provided at a place which is, or is part of—

(a) a hospital, or

(b) another establishment for persons requiring special care, supervision or attention.

(6) The condition is that—

(a) the service is provided for, or is likely to be used by, two or more persons at the same time, and

(b) the circumstances are such that a person of one sex might reasonably object to the presence of a person of the opposite sex.

(7) The condition is that—

(a) there is likely to be physical contact between a person (A) to whom the service is provided and another person (B), and

(b) B might reasonably object if A were not of the same sex as B.

(8) This paragraph applies to a person exercising a public function in relation to the provision of a service as it applies to the person providing the service.

28 Gender reassignment
(1) A person does not contravene section 29, so far as relating to gender reassignment discrimination, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—
(a) the provision of separate services for persons of each sex;
(b) the provision of separate services differently for persons of each sex;
(c) the provision of a service only to persons of one sex.

2.14 It is of some interest (because confirmatory of the analysis of the structure of the EA 2010 which was the basis for the decision of the Inner House in *For Women Scotland Ltd.*) that the very terms of paragraph 28 of Schedule 7 EA 2010 are predicated on there being a clear distinction between "sex" as a biological category (and sex discrimination being done under reference to that biological category) and "gender reassignment" as a distinct medico-social category which may apply to persons of either sex.

Toilets and separate sex provision

2.15 In April 2022 the Equality and Human Rights Commission (EHRC) published its statutory guidance on these provisions: *Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment exceptions.* This contains the following passages, among others:

Who this guide is for
This guide is for service providers (anyone who provides goods, facilities or services to the public) who are looking to establish and operate a separate or single-sex service.

Separate or single-sex service providers are those who provide a service where some element or all of the service is available:
- only to one sex, or
- separately to each sex, or
- differently to people of each sex.

These could include but are not limited to:
- separate or single-sex toilets
- domestic violence refuges
- separate or single-sex changing rooms
- hospital wards

We refer to these services as separate or single-sex services throughout.

Summary
The Equality Act allows for the provision of separate or single sex services in certain circumstances under 'exceptions' relating to sex.

To establish a separate or single-sex service, you must show that you meet at least one of a number of statutory conditions (set out in this section of the guide) **and** that limiting the service on the basis of sex is a proportionate means of achieving a legitimate aim. For example, a legitimate aim could be for reasons of privacy, decency, to prevent trauma or to ensure health and safety. You must then be able to show that your action is a proportionate way of achieving that aim.

There are circumstances where a lawfully-established separate or single-sex service provider can prevent, limit or modify trans people's access to the service. This is allowed under the Act. However, limiting or modifying access to, or excluding a trans person from, the separate or single-sex service of the gender in which they present might be unlawful if you cannot show such action is a proportionate means of achieving a legitimate aim. This applies whether the person has a Gender Recognition Certificate or not.

When considering how your service is provided to trans people, you must balance the impact on all service users and show that there is a sufficiently good reason for excluding trans people or limiting or modifying their access to the service. Some service providers may find it helpful to have a policy for how services are provided to trans people. Where this is the case we recommend you develop a policy but this is not a legal requirement. If you do have a policy you should be prepared to consider whether particular circumstances justify departing from the policy.

What the Equality Act says about the protected characteristics of sex and gender reassignment

Under the Equality Act 2010, 'sex' is understood as binary, being a man or a woman. For the purposes of the Act, a person's legal sex is their biological sex as recorded on their birth certificate. A trans person can change their legal sex by obtaining a Gender Recognition Certificate. A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for the purposes of the Act.

The Equality Act protects individuals from discrimination and harassment on the basis of a protected characteristic. Protected characteristics include sex (being a man or a woman) and gender reassignment (being an individual who is 'proposing to undergo, is undergoing or has undergone a process or part of a process to reassign their sex').

There is no requirement for a trans person to have any kind of medical supervision or intervention in order to be protected from gender reassignment discrimination. A person does not need a Gender Recognition Certificate to be protected under the characteristic of gender reassignment.

There are two types of discrimination, indirect and direct discrimination It is generally against the law to discriminate against someone because of a protected characteristic. However, there are certain circumstances when services can be provided either:

• exclusively to one sex, or
• differently to each sex or
• separately to each sex.

Service providers must meet a number of conditions to lawfully establish a separate or single-sex service. These conditions are set out under exceptions relating to sex in the Act.

There are circumstances where a lawfully-established separate or single-sex service provider can exclude, modify or limit access to their service for trans people. This is allowed under provisions relating to gender reassignment in the Act.
...
Separate sex services
A separate-sex service is one which is provided to both sexes, but separately or differently.

You can only provide a separate-sex service if a joint service would be less effective and providing that separate service is a proportionate means of achieving a legitimate aim. For example, a legitimate aim could be the health and safety of others. You must then show that your action is a proportionate way to achieve that aim. This requires that you balance the impact on all service users of providing services separately.
...
Points to consider
You must be able to demonstrate that providing a separate or single-sex service is a proportionate means of achieving a legitimate aim. It is therefore good practice to record the reasons why you have taken the decision to provide a separate or single-sex service, along with any supporting evidence.
...
Gender reassignment provisions in the Equality Act (Schedule 3, para. 28)

If you have met the conditions set out above and have established a separate or single-sex service, you should consider your approach to trans people's use of the service. In considering your approach and when taking decisions you must meet the conditions set out under the gender reassignment provisions.

Under these provisions, your approach must be a proportionate means of achieving a legitimate aim. This will depend upon the nature of the service and may link to the reason the separate or single-sex service is needed. For example, a legitimate aim could be the privacy and dignity of others. You must then show that your action is a proportionate way to achieve that aim. This requires that you balance the impact upon all service users.

- *Example*: A gym has separate-sex communal changing rooms. There is concern about the safety and dignity of trans men changing in an open plan environment. The gym therefore decides to introduce an additional gender-neutral changing room with self-contained units.

- *Example*: A small cafe with limited space and facilities for public use has separate lockable, self-contained male and female toilets with hand basins in single units. To ensure they are fully inclusive, and to make the most effective use of the available facilities, the cafe decides to make them all gender neutral.

- *Example*: A community centre has separate male and female toilets. It conducts a survey in which some service users say that they would not use the centre if the toilets were open to members of the opposite biological sex, for reasons of privacy and dignity or because of their religious belief. It decides to introduce an additional gender-neutral toilet. It puts up signs telling all users that they may use

either the toilet for their biological sex or to use the gender neutral toilet if they feel more comfortable doing so.

If the toilets you provide for service users are also used as staff toilets, you will also need to take account of the Workplace (Health, Safety and Welfare) Regulations 1992 which require employers to provide a certain number of toilets and to provide separate toilet and washing facilities for men and women in some circumstances. [9] Guidance can be found on the Health and Safety Executive website.

2.16 Simply from the point of view of completeness (given the last point from the EHRC Guidance about toilet provision within workplaces – which will of course include schools) it may be noted that in relation to toilets to be provided for school pupils in Scotland, Regulation 15 of the School Premises (General Requirements and Standards) (Scotland) Regulations 1967 makes the following provision:

15.— Sanitary accommodation for pupils
(1) Subject to paragraph (1A) of this regulation, in every school sanitary accommodation shall be provided for the pupils by appliances on a scale not less than that specified in Table VIII:

Provided that, except where paragraph (1A) of this regulation applies, in every school which is not designed exclusively for girls half the accommodation shall be for boys and not more than one third of the appliances for boys shall be water closets and the remainder shall be urinals, each 610 mm length of urinal being counted as one appliance for the purposes of Table VIII.

TABLE VIII

Number of pupils	**Number of appliances**
Every 15 pupils up to a total of 60	2
Every additional 30 pupils up to a total of 300	2
Every additional 60 pupils over 300 pupils	2

(1A) Every nursery school and every nursery class in a primary school shall have not less than 1 water closet for every 10 pupils.

(2) In every school providing for pupils beyond stage P IV in the sanitary accommodation for girls there shall be suitable provision for the disposal of sanitary towels.

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[9] Regulation 20 of Workplace (Health, Safety and Welfare) Regulations 1992 provides so far as relevant as follows:

20.— Sanitary conveniences
(1) Suitable and sufficient sanitary conveniences shall be provided at readily accessible places.

(2) Without prejudice to the generality of paragraph (1), sanitary conveniences shall *not* be suitable unless—
(a) the rooms containing them are adequately ventilated and lit;
(b) they and the rooms containing them are kept in a clean and orderly condition; and
(c) separate rooms containing conveniences are provided for men and women except where and so far as each convenience is in a separate room the door of which is capable of being secured from inside."

(3) In every school every sanitary appliance or group of sanitary appliances shall be situated near to a wash basin or wash basins.

(4) In every school every water closet shall be provided with a partition sufficient to secure privacy and, except in relation to a nursery school or nursery class in a primary school, with a lockable door."

2.17 We may summarise the foregoing provisions by saying that it is in principle 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. Indeed it is almost impossible to envisage circumstances in which the provision of separate toilets for persons of each sex for such reasons as respecting privacy, preserving decency, preventing trauma and/or ensuring health and safety might be found to be disproportionate.

2.18 Once the proportionality of the measure is established or accepted from the viewpoint of lawfulness of the apparent sex discrimination, then it is difficult to see how this provisions can nonetheless be stigmatised as constituting unlawful gender reassignment discrimination if persons of a different sex from that to which the particular toilet is assigned are, notwithstanding their protected status of gender reassignment, still refused the right to use the other sex's assigned toilet on grounds such as respecting the privacy, preserving decency or preventing trauma to its other users. It may be that the more proportionate response would be that - in addition to, but separately from, the provision of communal sex-segregated toilets for pupils - schools may consider it advisable also to provide for a number of self-contained individual gender neutral toilets to cater to the needs of those pupils with the protected characteristic of gender reassignment. [10]

Schools' EA 2010 obligations to avoid or desist from creating an intimidating, hostile, degrading, humiliating or offensive environment for their pupils

2.19 Although the provision of sex segregated toilets in schools would in principle appear to be compatible with the requirements of the EA 2010, the question I am asked to consider

[10] See e.g. *Croft v Royal Mail Group* [2003] EWCA Civ 1045 [2003] ICR 1425 where the lawfulness of a policy of an employer that an individual with the protected characteristic of gender re-assignment should have access to a toilet designated for disabled persons, rather than to use the women's toilet facilities (being female being the gender with which the employee now identified) was upheld at all stages of the litigation up to and including the Court of Appeal on the basis that the employers could not be held to be acting unlawfully when they had provided adequate toilet facilities in a context where they were obliged to provide separate sex-segregated facilities to their workforce.

is whether there may be said to be an *obligation* by virtue of the EA 2010 for schools to provide sex-segregated toilets.

2.20 In this regard I would refer first to the provisions of Section 26 EA 2010 which so far as relevant provides as follows:

> **"26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, *or*
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ....
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following _*must*_ be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
> age;
> disability;
> gender reassignment;
> race;
> religion or belief;
> sex;
> sexual orientation.

2.21 In the case of schools this Section 26 EA prohibition against, among other things, against conduct has the purpose or effect of (i) violating another's dignity, *or* (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for that other has then to be read together with Section 85, 87 and 89 all in Chapter 1 of Part 6 EA 2010 headed "Education: Schools" and which so far as relevant to Scotland provide as follows

> **"85 Pupils: admission and treatment, etc.**
> (1) ...
> (2) The responsible body of such a school [to which this section applies] 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;*
> (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;*_
> _*(b) a person who has applied for admission as a pupil.*_

…
(8) In relation to Scotland, this section applies to—

(a) a school managed by an education authority;
(b) an independent school;
(c) a school in respect of which the managers are for the time being receiving grants under section 73(c) or (d) of the Education (Scotland) Act 1980.

(9) The responsible body of a school to which this section applies is—

(a) …
(b) …
(c) if it is within subsection (8)(a), the education authority;
(d) if it is within subsection (8)(b), the proprietor;
(e) if it is within subsection (8)(c), the managers.

(10) In the application of section 26 for the purposes of subsection (3), *none* of the following is a relevant protected characteristic—

(a) *gender reassignment*;
(b) religion or belief;
(c) sexual orientation.

…

87 Application of enforcement powers under education legislation

(1) …. Section 70 of the Education (Scotland) Act 1980 (powers to give directions where responsible body of school in default of obligations, etc.) apply to the performance of a duty under section 85 EA 2010. [11]

(2) But … section 70 of the Education (Scotland) Act 1980 does *not* apply to the performance of a duty under that section by the proprietor of an independent school

…

89 Interpretation and exceptions

(1) This section applies for the purposes of this Chapter.

(2) Nothing in this Chapter applies to anything done in connection with the content of the curriculum.

(3) "Pupil" —

(a) …

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[11] Section 70(1) of the Education (Scotland) Act 1980 relevantly provides as follows:

70. Powers to enforce duty of education authorities and other persons.

(1) If the Secretary of State is satisfied, either on complaint by any person interested or otherwise, that an education authority, the managers of a school or educational establishment, or other persons have failed to discharge any duty imposed on them by or for the purposes of this Act or of any other enactment relating to education, the Secretary of State may make an order declaring them to be in default in respect of that duty and requiring them before a date stated in the order to discharge that duty. If by the said date the education authority, managers or other persons have not discharged the duty, one or other of the following steps may be taken to secure the discharge thereof—

(a) the Secretary of State may make such arrangements as he thinks fit for the discharge of the duty, and all expenses incurred by the Secretary of State in so doing shall be recoverable as a debt due by the authority, managers or other persons to the Secretary of State; or
(b) the Court of Session may, on the application of the Lord Advocate, order specific performance of the duty."

(b) in relation to Scotland, has the meaning given in section 135(1) of the Education (Scotland) Act 1980. [12]

(4) "Proprietor" —
(a) ...
(b) in relation to a school in Scotland, has the meaning given in section 135(1) of the Education (Scotland) Act 1980. [13]

(5) "School" —
(a) ...
(b) in relation to Scotland, has the meaning given in section 135(1) of the Education (Scotland) Act 1980. [14]

...
(8) "Independent school" —
(a) ...
(b) in relation to Scotland, has the meaning given in section 135(1) of the Education (Scotland) Act 1980. [15]

....
(11) "Education authority", in relation to Scotland, has the meaning given in section 135(1) of the Education (Scotland) Act 1980. [16]

(12) Schedule 11 (exceptions) has effect."

2.22 What we can draw from these provisions is the EA 2010 prohibition against harassment creates a positive obligation on schools in Scotland not to follow (or to desist from) any course of conduct which can be said to be related to the pupils' biological sex

[12] Section 135(1) of the Education (Scotland) Act 1980 defines "pupil", where used without qualification, as meaning a person of any age for whom education is or is required to be provided under this Act; and a pupil shall be deemed to be attending or in attendance at a school if he is shown by the register of admission and withdrawal kept at the school in accordance with regulations made under this Act, or by any other register approved by the Secretary of State and kept for a similar purpose, to have been admitted to, but not to have been withdrawn from, or to have been readmitted to, and not thereafter to have been withdrawn from, the school; and similar expressions, whether relating to schools or to other educational establishments, shall be similarly interpreted

[13] Section 135(1) of the Education (Scotland) Act 1980 defines "proprietor" in relation to an independent school as meaning the managers of such school, and for the purposes of the provisions of this Act relating to applications for the registration of independent schools includes any person or body of persons proposing to be the managers;

[14] Section 135(1) of the Education (Scotland) Act 1980 defines "school" as meaning an institution for the provision of primary or secondary education or both primary and secondary education being a public school, a grant-aided school or an independent school, and includes a nursery school and a special school; and the expression "school" where used without qualification includes any such school or all such schools as the context may require

[15] Section 135(1) of the Education (Scotland) Act 1980 defines "independent school" as meaning a school at which full-time education is provided for pupils of school age (whether or not such education is also provided for pupils under or over that age), not being a public school or a grant-aided school

[16] Section 135(1) of the Education (Scotland) Act 1980 defines "education authority" as meaning a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 , and "area" in relation to an education authority shall be construed accordingly;

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.

2.23 It also follows from, in particular the terms of Section 85(10)(a) EA 2010 that schools do *not* have a parallel positive obligation not to follow (or to desist from) any course of conduct which can be said to be related to any pupil's protected characteristic of gender reassignment, notwithstanding that the conduct in question which can be perceived by those pupils with the protected characteristic of gender reassignment as having the effect either of violating their dignity *or* of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

3. CONCLUSION

3.1 In the light of the above provisions of the EA 2010 we may conclude that there can be said to be 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.

3.2 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 (in the light of their Section, 26(1)/85(3) EA 2010 non-harassment obligations to avoid or desist from unwanted conduct related to a sex) to make separate toilet provision for boys and girls. As noted above, the effect of paragraph 28 of Schedule 7 EA 2010 is that since the provision of such sex-segregated toilet provision for school pupils may be said to be a proportionate means of achieving a legitimate aim it cannot then be said to be in contravention of Section 29 EA 2010, so far as relating to gender reassignment discrimination. And further and in any event, the duty of schools Section 26(1)/85(3) EA 2010 to avoid or desist from unwanted conduct does *not* extend to the schools' conduct related to gender reassignment.

3.3 The enforcement of any breach of this obligation to make provision for separate toilets for boys and girls pupils being derived from the provisions of the EA 2010 - rather than from general public law regulatory obligations such as those set out in Regulation 15 of the School Premises (General Requirements and Standards) (Scotland) Regulations 1967 or in Regulation 20 of Workplace (Health, Safety and Welfare) Regulations 1992 – is that the 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.

3.4 The scheme of the EA 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 (which might be difficult to quantify) but for losses in respect of injury to feelings and aggravated damages (*solatium*), which would not be achievable under the claim of indirect sex discrimination. A further key difference relevant to remedy in that on a claim of indirect sex discrimination the court

or tribunal had to determine whether the indirect discrimination was or was not *intentional* before moving to a consideration of compensation. By contrast, however, on a claim of harassment, the court or tribunal 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 for the loss, pain, injury, upset and damage attributable to the school's having created or permitted an intimidating, hostile, degrading, humiliating or offensive environment to exist in breach of its non-harassment obligations related to the (biological) sex of its pupils. [17]

3.5 I have nothing more to add at this stage. I trust that the foregoing is sufficient at this stage for the purposes of my instructing solicitor and clients.

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[17] See *Bessong v. Pennine Care NHS Trust* [2020] ICR 849, EAT for a fuller discussion by Choudhury P of the remedies associated with harassment claims under the EA 2010.