FWS response to EHRC Technical Guidance for schools in Scotland
30 September 2026

NB. This is an incomplete copy of our response. Unfortunately the missing parts were not saved before submission.

The guidance covers the experiences and needs of pupils with different protected characteristics. Tell us whether there is any information missing in relation to the following protected characteristics.
We chose **Yes there is information missing** for:
gender reassignment
sex

Tell us more about your response. For example, what protected characteristic information is missing from the guidance?

The guidance on Gender Reassignment:

3.245 Gender reassignment is a protected characteristic (section 7). People who are proposing to undergo, are undergoing or have undergone a process to reassign their sex by changing physiological or other attributes of sex have the protected characteristic of gender reassignment.

3.246 The Act uses the term 'transsexual' for individuals who have the protected characteristic of gender reassignment. We recognise that many people consider this term outdated, so we have used the term 'trans' to refer to a person with the protected characteristic of gender reassignment. This refers only to people who fall within the Act's specific definition of gender reassignment. It does not include people who may identify as trans or transgender but are outside of this definition.

3.247 A trans person is protected against gender reassignment discrimination at any stage in their transition process.

3.248 A pupil can have the protected characteristic of gender reassignment. There is no minimum age for the protected characteristic of gender reassignment. This means that pupils under 18 are protected if they are proposing to undergo, are undergoing, or have undergone a process of gender reassignment.

3.249 Pupils with the protected characteristic of gender reassignment may also be protected against discrimination by perception. Read paragraphs 3.25 to 3.27 for more information on discrimination by perception.

3.250 A person who dresses and presents in ways which are commonly associated with the opposite sex will be protected where they do so as part of a process of reassigning their sex. The Act does not define what is meant by reassigning sex. It does not have to be a medical process, but it is likely to at least involve more permanent changes, such as changing one's pronouns and consistently dressing and presenting as the opposite sex. A person presenting as the opposite sex for some other reason does not have the protected characteristic of gender reassignment. However, they may be protected against harassment, and discrimination based on perception. For more information, read chapter 2 of our Services, public functions and associations: Code of Practice. For information on school uniforms, read paragraphs 5.14 to 5.20.

3.251 A male pupil attends school wearing a female pupil's school uniform. If this is part of the process of reassigning their sex, then they will be protected from direct or indirect gender

reassignment discrimination. If they are not proposing to undergo, or undergoing, the process of reassigning their sex, then they will not be protected in this way.

However, they would be protected under the Act from discrimination by perception, if, for example, they are perceived to be trans and experience less favourable treatment because of it. Further, the school has a duty to have measures in place which aim to prevent bullying and the pupil is likely to be able to rely on these.

3.245
It is essential it is clear that holding the protected characteristic of gender reassignment does not change a child's sex and schools should not treat a pupil as the opposite sex.

For safeguarding reasons everyone in a school should know what a child's sex is. Contested terms (used elsewhere in the guidance) "trans girl" and "trans boy" should be avoided.

3.246
Avoiding the statutory word "transsexual" by using "trans" is a poor choice. This broad identity category then must be restricted for a narrow legal use. Gender reassignment is generally poorly understood and this only serves to confuse.

It is also a value judgement that the term "transsexual" is outdated. Some people think so, others do not. Calling the legal word used for a protected characteristic "outdated" implies that the statute itself is lagging, which is not the EHRC's role.

An alternative could be to use "a person with the protected characteristic of gender reassignment".

3.248
Although the Equality Act has no minimum age, the Age of Legal Capacity (Scotland) Act 1991 is relevant for acts that constitute the s7 "process". Under 16s have no legal capacity to enter a transaction, subject to listed exceptions; 16 and over have full capacity.

Roddy Dunlop KC gave a legal opinion stating: "A child of 12 or under would, as a basic matter of law, have no capacity to undergo or propose to undergo any such process".

The exceptions that may be relevant for a child of 13-15 are limited:
-consent to medical treatment, where judged capable of understanding the procedure by a medical practitioner (s2(4A)–(4B)).
-ordinary transactions of a kind commonly entered into by children of that age, on reasonable terms (s2(1)).
Neither of these apply as medical procedures (puberty blockers etc) are not available for under 18s, and a social process (changing name, official records) is not an everyday transaction.

Running all this together tells schools something false in practice: that the legal position of a Primary 1 pupil and a sixth-year pupil is the same once the word "trans" is used.

3.249

The point about perception applies to all protected characteristics and is detailed at paragraph 3.25. There is no need to repeat it here, particularly when not used under the individual sections of any other protected characteristic.

3.250
This is confusing, unnecessary and seriously risks straying beyond the law. Pronouns are a linguistic convention, not an attribute of sex. The implication here is that the protected characteristic can only be achieved if other people consistently say certain words. Clothing can be argued as an "other attribute" only in a loose sense and consistency is a matter of degree and duration that is not specified. If the point is to exclude a passing whim, AA v NHS England already had a better formula: a settled decision with a case-specific assessment exercising particular caution.

The harassment claim is misleading as s85(10) states gender reassignment is not a relevant protected characteristic.

3.251
The comparator here is another male pupil who is not proposing reassignment. He too must wear the boys' uniform. Same rule, same sex, same treatment. That is not direct gender reassignment discrimination. It is a sex-based uniform rule applied to a male pupil. The comparison the paragraph wrongly invites is a girl in the girls' uniform. Again, the perception point does not need repeating.

There is a clear justification for bright line rules (s135 FWS3) and uniform rules are commonplace and justifiable in schools.

The guidance on Sex:

3.271 Sex is a protected characteristic (section 11) and refers to a male or a female of any age. In relation to a group of people it refers to either men and / or boys, or women and / or girls (section 11(a) and (b) and section 212, paragraph 1).

3.272 The Supreme Court in the case of For Women Scotland v The Scottish Ministers 12 ruled that 'sex' under the Act means the sex of a person at birth, which the judgment referred to as 'biological sex'. Earlier case law 13 has set out what are indicators of biological sex.

3.273 A comparator for the purposes of showing sex discrimination will be a person of the opposite sex.

3.274 Sex is distinct from gender reassignment (read paragraphs 3.245 to 3.251) or sexual orientation (read paragraphs 3.276 to 3.279).

3.275 There are specific provisions which apply where the treatment of a woman (or a girl) is because or her pregnancy and maternity, or because she is breastfeeding (read paragraphs 3.28 to 3.35)

3.272
Perhaps a small point, but these are the wrong way round. The Supreme Court used "biological sex" as the operative term, not "the sex of a person at birth".

Footnote 13 would be stronger by referring to Corbett rather than the Bellinger case that followed it. The Corbett criteria are essential markers of sex, not “indicators” in the sense of clues that schools consider alongside pronouns and clothes.

Given the longstanding errors and misunderstandings under this protected characteristic, a technical guide should say clearly that sex is binary and biological, it is not changed by holding the protected characteristic of gender reassignment, a GRC or self-identification, and refusing to treat a pupil as the opposite sex is not sex discrimination. It should also state separate and single-sex toilets, changing rooms, admissions, communal accommodation and sport follow biological sex.

3.273
This needs the rest of s23: “there must be no material difference between the circumstances”.

Does the guidance clearly explain the important concepts in the Equality Act 2010, such as protected characteristics, discrimination, harassment, and victimisation?
No

Tell us how we could improve the way we define important concepts in the guidance.

3.50
“It is enough that a pupil can reasonably say that they would have preferred to be treated differently.” This is not the same as “particular disadvantage” to a group. A pupil’s preference is evidence of impact on that pupil. It does not, by itself, establish that people who share the characteristic are put at a particular disadvantage.

The discrimination section lacks any sex examples. The legitimate aim list and four-stage proportionality test is a useful addition to the guidance and could be used to show how a sex-based rule survives the test.

Paragraphs 3.123 and 3.124 should be removed as the recommendations are not connected to the Equality Act. Firstly, it assumes a school may decide that a pupil will be addressed as the opposite sex, and that this decision then binds staff and other pupils. The Act does not require that decision. Sex remains biological and needs to be referred to for safeguarding and upholding sex-based rules and provision. Gender reassignment does not impose a speech duty.

Second, it treats refusal to use opposite-sex pronouns as acting “contrary to” a school decision, and therefore as a problem to be managed or punished (which has happened due to, still current, Scottish Government advice to treat it as “transphobic bullying”). For staff, that is a religion or belief issue (Forstater, Higgs). For pupils, it is the same characteristic the harassment duty deliberately does not cover (s85(10)).

Third, “avoiding the direct use of a pronoun” is offered as the rights balancing solution. It is not neutral. It is a workaround adopted after the school has already granted the opposite-sex pronoun. The pupil who wants sexed language has already lost and been silenced.

The guidance explains the obligations that the Equality Act 2010 places on schools. Tell us whether the explanations are clear in relation to the following areas:
We chose **No, the explanation is not clear** for:
Admissions
The provision of education and access to benefits, facilities and services for pupils
The positive action provisions of the Act
Exceptions that apply generally across the Act and how they apply specifically to schools

Tell us how we could explain schools’ responsibilities under the Equality Act 2010 more clearly.

School Premises Regulations should be cited, just as they are in the English guidance, with reference to recent case law (Hurley, DE & FG).

The guidance consistently takes the position that expecting a child to follow ordinary sex-based rules may be gender reassignment discrimination. That does not necessarily follow, bright line rules are permissible and are for the protection of all pupils. Complying with statutory Regs cannot be classed as discrimination.

The example at 5.69 is poor. It is not clear that the “trans pupil” is a boy. Asking a boy to use the boys’ room is applying a sex-based rule and is not direct gender reassignment discrimination: other boys are in the same room. It can only be framed as indirect gender reassignment discrimination if “wanting the girls’ room” or “not wanting the boys’ room” is a measure of particular disadvantage. It may not be and the school is entitled to justify the rule on, for example, standards, wellbeing or health and safety, or lack of alternative facilities or available supervision. Suggesting a staff changing room is not appropriate as it compromises safeguarding and staff privacy. The use of “mixed sex” is misleading when we still have at least 128 schools with unlawful mixed sex facilities. Single-user or unisex is a better choice.

For sports, it is not correct to say at 10.38 that the law is not settled. 10.27 only refers to s195 and does not take into account the more relevant Part 6 on education where, in a school, the specific gender reassignment sport exception s195(2) does not apply in terms. Single sex sport may be justified as a proportionate means of achieving fairness and safety, and a failure to provide it (many schools now only provide mixed sex settings) is likely to be indirect discrimination against girls.

How clearly does the guidance explain the duties that the Public Sector Equality Duty (PSED) places on schools?
Not very clearly

How could we improve the explanation of the PSED in the Technical guidance for schools in Scotland? Select all that apply.
Other (please specify)

Does the guidance take account of the law in relation to schools as the law applies for the start of the 2026 / 2027 academic year?
No

Tell us more about your answer.

How much do you agree or disagree with the following statements?
We chose **Disagree** for the following:
The examples in the guidance are helpful
The examples in the guidance are realistic
The examples in the guidance are accurate

Tell us how we could improve the examples used in the guidance.

As well as the examples previously discussed:

3.122
A staff member repeatedly tells a pupil that “he” should not dress like a girl and that “he” looks silly. The draft says this is not harassment, because gender reassignment is excluded, but “could constitute discrimination on the grounds of gender reassignment.” Two different acts are glued together. Saying a male pupil is male, and using “he,” is a statement of sex and is the correct legal position. Mocking his appearance, or humiliating him in front of the class, is a different act and may be a detriment. A technical guide that cannot separate accurate sexed language from ridicule/bullying will train schools to treat both as the same risk. Correct pronouns should not become a disciplinary matter.

3.125
A teacher says homosexuality is “unnatural” and will cover only opposite sex relationships. A bisexual pupil is upset. “This may be direct discrimination on the grounds of sexual orientation.” Maybe, if the teacher is targeting that pupil or excluding him from the lesson because he is bisexual. Teaching a contested moral or religious proposition in RE is not, without more, less favourable treatment of bisexual pupils as a class. The example never asks whether the comment was part of a lawful curriculum, whether opposing religious views were also taught, or whether any bisexual pupil was treated differently from a heterosexual one. Offence is not the same as a comparator test.

8.37
This is not an example of a positive measure as there is no shared protected characteristic in the combined group of “LGBT” pupils and LGBT parents. It is worrying that EHRC

suggests a remedy outwith the professional support system and potentially introduces political and safeguarding risks.

Is any information missing from the guidance?
Yes, there is a lot of information missing

Tell us what information should be added to the guidance.

Tell us what other support we could offer to help schools understand and comply with the Equality Act 2010.

Tell us about any further comments you have about the Technical guidance for schools in Scotland.