

An Antidote
To trans parts
of...



EHRC
Technical
Guidance
for Schools
(2023 revision)



A Commentary
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Introduction

The Equality Act 2010 applies to the operation of schools: their foundation, admissions policies, the treatment of students in teaching and social activities, and their staff.

The Equality and Human Rights Commission was formed in 2007 by the amalgamation of other separate bodies previously focused on individual protected characteristics. It had, until recently, a fine tradition of encouraging and, on occasion, taking action to enforce equalities legislation.

Unfortunately, in recent times, many Equality, Diversity and Inclusion practitioners have despaired of the Commission. That despair was put into words by Victor Madrigal-Borloz, United Nations Independent Expert on sexual orientation and gender identity who said in his report in May 2022 that:

"... the objective of the EHRC was to offer the Government a formula through which it could carry out discriminatory distinctions currently unlawful under UK law, and that will remain so under international human rights law. The Independent Expert is of the opinion that this action of the EHRC is wholly unbecoming of an institution created to “stand up for those in need of protection and hold governments to account for their human rights obligations”.

And so it appears to be with the 2023 Schools Technical Guidance revision. As will be seen, the revisions or deletions appear to be designed to facilitate or make a space for discrimination, particularly against pupils with the protected characteristic of gender reassignment.

It is important to say that **the law has not changed**. What was unlawful before 22 September 2023 remains unlawful. Removing guidance or examples from the Technical Guidance does not change what was (and is) unlawful. The guidance is not ‘statutory guidance’ which would have to be laid before parliament and so having standing to be referred to before a court, as are the workplace and services guidance to the Equality Act 2010 provided in 2011.

In April 2022 the EHRC published non-statutory guidance on the provision of services which appears to contradict both the 2010 Act and the 2011 statutory guidance. The EHRC's own Board minutes acknowledge that the 2022 guidance has been widely ignored.

Press Comment

Unsurprisingly, the trans-hostile press and other organisations picked up on the publication of the revised Technical. Their comments have been singularly (perhaps in some cases deliberately?) misleading:

Daily Mail

‘Teachers who ‘misgender’ trans pupils are not guilty of discrimination, says the equality watchdog as they urge the government to give clarity on schools’ guidance.

- In fact the EHRC have said no such thing.

Times

‘Guidance that ‘misgendering’ is direct discrimination has been withdrawn’

- This is more accurate, but misleading, the implication being that misgendering is fine.

‘Schools can ignore pupils’ gender choices’

- The EHRC has not said this.

‘Schools will no longer be breaking the law if they refuse to refer to children by their chosen name or gender, Britain’s equalities watchdog has ruled’,

- This is inaccurate – there has been no ‘ruling’, nor does the EHRC have any power to make a ruling. It is also a misleading rendering of even the EHRC’s position.

Maya Forstater of Sex Matters:

‘Schools must provide changing rooms for pupils based on sex – not gender identity says EHRC’

- This is misleading, as we shall see. The EHRC made no reference to gender identity or how (or how not) to accommodate trans pupils.

The Law

A good place to start.

A person has the protected characteristic of 'gender reassignment' if they satisfy the definition in section 7(1) of the Equality Act 2010:

'A person 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.

It will be seen that:

- there is no requirement that a reassignment process be completed
- it refers to 'physiological or other' attributes of sex
- there is no age minimum

'Physiological' is plainly a reference to *biological* aspects of sex.

'Other' (i.e., non-physiological, that is *non-biological*) aspects include, in our society, gendered name and pronoun use, clothing and other aspects such as hair style or make-up.

Even if a trans person is prevented from changing their name or pronoun or other aspects of sex, if they have proposed to do so, they have the protected characteristic.

School pupils who have expressed a settled intention to live in a gender different from their birth sex, clearly have the protected characteristic of gender reassignment and the legal protections that brings.

What does 'sex' mean in the Equality Act 2010?

The new guidance says (paragraphs 5.125 and 5.128):

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'A person's sex refers to the fact that he or she is a male or female of any age'.

'Sex' is understood as binary – being male or female – with a person's legal sex being determined by what is recorded on their birth certificate, based on biological sex. A trans person aged 18 or over can change their legal sex by obtaining a Gender Recognition Certificate through procedures set out in the Gender Recognition Act 2004.'

The second paragraph - including references to 'biological sex', 'birth certificates' and this being 'understood' - is an entirely new addition in the 2023 guidance by the EHRC.

However, the Equality Act makes no reference to 'biological sex' nor any reference to birth certificates. The EHRC have never explained who has the 'understanding' they claim or where it comes from.

These matters were recently considered by a Scottish Judge, Lady Haldane, in the case of *For Women Scotland Ltd* [2022] CSOH 90. She noted these points but found that 'sex' in the Equality Act is a legal, not a biological, concept. It is surprising that EHRC does not refer to Lady Haldane's ruling in the Technical Guidance although it is acknowledged as 'helpful' on their website. (Note, this case is under appeal, that appeal due to be held on 19/20 October 2023).

Equality Act 'sex' being not just biological is, of course, consistent with the 'physiological and other' formulation from section 7 referred to above.

The gender recognition process established by the Gender Recognition Act

2004 is not available in the UK to persons under 18.

Before GRA existed, in the case of *A v Chief Constable of West Midlands* [2004] UKHL 21, the Supreme Court ruled that someone who had:

‘... done everything that she possibly could do to align her physical identity with her psychological identity ..’

must be taken to have changed sex. This was repeated in the case of *MB v Secretary of State for Work and Pensions* C-451/16 [2019] ICR 115

‘..for the purposes of the application of Directive 79/7, persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.’

It will be remembered that use of the Gender Recognition Act is barred to those under 18, as is gender confirmation surgery. Cross sex hormones are not prescribed in the UK below the age of 16 and puberty blocking hormones are increasingly restricted. All of the above are only available via the NHS after a waiting list of some years. So it seems to your author that it is an open question how a court would regard a pupil who had transitioned some years before and was accepted in their affirmed gender role having ‘done everything they could’. It must be at least arguable that they have changed ‘legal sex’ for Equality Act purposes. This proposition remains to be tested in court.

Misgendering

One of the most commented upon changes is the removal of the example from the 2014 guidance about misgendering:

“A previously female pupil has started to live as a boy and has adopted a male name. Does the school have to use this name and refer to the pupil as a boy?”

Not using the pupil’s chosen name merely because the pupil has changed gender would be direct gender reassignment discrimination. Not referring to this pupil as a boy would also result in direct gender reassignment discrimination.’

No explanation by the EHRC is offered for the removal of this example. Its removal has been interpreted by trans-hostile groups such as ‘Sex Matters’ as permitting discrimination. Sex Matters say:

‘This deletion seems to be an admission that it would not be direct gender reassignment discrimination to refuse to refer to a female pupil as a boy (so called “misgendering”). Nor does the EHRC try to raise the spectre of indirect discrimination here, presumably recognising that referring to boys as boys and girls as girls is not indirect gender reassignment discrimination.’

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But referring to a trans pupil by the name or pronouns they have rejected would clearly appear to be subjecting them to a detriment by reason of their protected characteristic and so unlawful *direct* discrimination.

It could also be interpreted as *indirect discrimination*. A practice of referring to all pupils by birth pronouns or names would appear to be a practice disadvantageous to those with the protected characteristic of gender reassignment and so unlawful indirect discrimination.

It is to be noted that the EHRC have not included an example saying that misgendering is lawful, and the following three examples remain in the Guidance:

“A co-educational school excludes a pupil because he has declared his intention to undergo gender reassignment and is beginning to present in the style of the opposite sex. This would be direct gender reassignment discrimination,”

“A member of school staff repeatedly tells a transsexual pupil that ‘he’ should not dress like a girl and that ‘he’ looks silly, which causes the pupil great distress. This would not be covered by the harassment provisions, because it is related to gender reassignment, but could constitute direct discrimination on the grounds of gender reassignment.”

“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.”

Note that the first of these three examples has altered ‘school’ (In the 2014 Guidance) to ‘co-educational school’. It is entirely unclear why.

The second example clearly appears to include deliberate misgendering as part of discrimination.

In the third example it is to be noted that the Guidance *does not* say that the trans girl may not change with her cis fellow pupils.

The lack of clarity about the changes or the reasons for them is, perhaps, one of the most troubling aspects of the EHRC’s . They have brought obfuscation, not clarity.

Toilets and changing rooms

This is an area where clarity is most clearly needed – and is not provided.

The 2014 guidance said:

“Gender segregation is permitted for a few specifically defined purposes. For example there is an exemption permitting gender segregation in certain situations where it is necessary to preserve privacy and decency. However, unless a specific exemption applies, segregation connected to gender will be unlawful.”

The 2023 guidance says:

“Sex segregation is permitted in certain situations, such as where it is necessary and appropriate to preserve privacy and decency. The law requires schools to provide single sex toilet facilities for children over eight and single sex changing facilities for children over 11. These may be either in sex-segregated communal facilities or in single-user lockable rooms.”

But there is no guidance or example given about how / where trans pupils are to be accommodated.

Trans-hostile organisations have interpreted the change in a way that suits their narrative. Sex Matters say:

‘This is helpful, as combined with the clarified definition of sex it makes clear that boys (male) use the boys’ facilities and girls (female) use the girls’ facilities.’

However, this is wrong, as exclusion of a trans person from facilities which match their gender identity is highly likely to be direct discrimination (which cannot be justified).

If it is *indirect* discrimination, justifying it requires that the relevant step must be '*a proportionate means of achieving a legitimate aim*'. That would seem very unlikely where a pupil has declared themselves trans and so their circumstances are known to the school and there is no evidence of inappropriate behaviour in the use of toilets or changing rooms.

Trans-hostile organisations often say that trans people should be using third or segregated spaces. But the principles of discrimination law require that justification requires the least discriminatory means to be applied. That might require a person troubled by the presence of a trans person to use the segregated or third space, not the trans person.

Useful reference might be made to the Code of Practice on the provision of services and the Equality Act. This Code is statutory and so has some legal effect. This provides (para 13.57) that:

'If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present. However, the Act does permit the service provider to provide a different service or exclude a person from the service who is proposing to undergo, is undergoing or who has undergone gender reassignment. This will only be lawful where the exclusion is a proportionate means of achieving a legitimate aim.'

Surrounding paragraphs in the Code may also be useful.

There seems no good reason to believe that the general principles of equality law should operate differently between the provision of services to persons in a shop and to pupils in a school.

Non-binary pupils.

Since the case of Taylor v Jaguar Land Rover (Birmingham ET 1304471/2018) most commentators accept that non-binary gender identities are also protected by the Equality Act as the tribunal ruled in that case.

Such identities pose particular challenges for service providers generally - and schools are no different - as the needs of non-binary individuals do not fit easily into the binary analysis that society often adopts.

It is disappointing that the EHRC has offered no help in this area, not even mentioning non-binary identities in the updated guidance. It hardly shows a commitment to supporting equality.

Summation

Forces in society have combined in recent times to make the lives of trans people both more controversial and more difficult. It is particularly disappointing that this appears to include the EHRC and especially disappointing that trans young people should be so targeted.

It is hoped that these remarks are helpful. Discrimination matters are, by their nature, fact sensitive and nothing in this document should be taken to be legal advice on a particular circumstance.

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