sexmatters

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The Attorney General clarifies the law on single sex services

On 10 August 2022 the Attorney General Suella Braverman gave a speech at the think tank Policy Exchange. She noted that both public and private bodies are struggling to understand their obligations in relation to single sex services and the protected characteristics of sex and gender reassignment. Her speech aimed to provide clarity on the law.

This is the transcript of the relevant section of the speech (headings and links added by Sex Matters)

What does the law say about sex, gender and single sex services?

In law, single sex services are intended for one sex only: that is the very thing permitted by schedule 3. It follows that it is not possible to admit a biological male to a single-sex service for women without destroying its intrinsic nature as such: once there are XY chromosome adults using it, however they define themselves personally, it becomes mixed-sex.

The existence of a Gender Recognition Certificate can create a legal position but cannot change biological reality. The operation of the Equality Act is such that the permission to discriminate on grounds of gender reassignment is permission to discriminate against someone who may be the 'right' biological sex for a particular activity but has the protected characteristic of gender reassignment.

By way of example a 'women-only' rule for a women's judo class excludes all men and will be lawful under paragraph 26 if a joint service would be less effective, and it is a proportionate means of achieving a legitimate aim. It will no doubt put people with the protected characteristic of gender reassignment (e.g. trans-women, by that I mean a biological male who identifies as a female) at a disadvantage compared to those without that characteristic. But in my view if the benefit that it confers is sufficient to justify direct discrimination against the whole class of men, it will in almost all circumstances be sufficient to justify indirect discrimination against a much smaller class of trans-women.

This interpretation is in fact supported by the explanatory notes to the Equality Act. Those notes give an example of a group counselling service for female victims of sexual assault. In that case, it is clear that an individual with the protected characteristic of gender reassignment (e.g. a trans-woman) could be lawfully excluded, if organisers believed that otherwise, women would be unlikely to attend the session. This position has also been upheld by recent guidance from the Equality and Human Rights Commission as well as case law such as the *Elias* case in the Court of Appeal, approved in *Homer* in the Supreme Court.

So if one group incurs a modest particular disadvantage and another group incurs a more serious particular disadvantage, justification for exclusion can be lawfully established.

What does this mean for schools?

The challenge is particularly acute in schools and for those whose professional responsibilities are to child welfare. Obviously school staff are highly motivated to do their best for children. To do this, they need to understand their legal obligations, understand the evidence about how best to support gender questioning children and know how to make a best interest decision for each and every child under their care.

The problem is that many schools and teachers believe – incorrectly – that they are under an absolute legal obligation to treat children who are gender questioning according to their preference, in all ways and all respects, from preferred pronouns to use of facilities and competing in sports. All this is sometimes taking place without informing their parents or taking into account the impact on other children. Anyone who questions such an approach is accused of transphobia. In my view, this approach is not supported by the law.

For the sake of clarity, I will set out my view on the legal position under the Equality Act.

By way of preliminary note, under 18s are unable to obtain a Gender Recognition Certificate and schools will generally be dealing with children whose sex for the purposes of the Equality Act is that registered at birth.

As used by Dr Hilary Cass in her interim report, I use the terms trans-boy to mean a biological female who identifies as a male and trans-girl to mean a biological male who identifies as a female. I use both as shorthand to include all those claiming protection under the characteristic of 'gender reassignment', as referred to under the Equality Act. Taking each issue in turn:

- **Yes, it is lawful for a single sex school to refuse to admit a child of the opposite biological sex who identifies as transgender.** This can be a blanket policy to maintain the school as single sex. This does not constitute unlawful direct discrimination on grounds of sex under schedule 11 nor does it constitute unlawful indirect discrimination on grounds of gender reassignment. This is clearly a proportionate means of achieving a legitimate aim.

- **Yes, it is lawful for a mixed school to refuse to allow a biologically and legally male child, who identifies as a trans-girl, from using the girls' toilets.** This does not constitute direct sex discrimination and is not unlawful indirect discrimination on grounds of gender reassignment. Indeed, if the school did allow a trans-girl to use the girl's toilets this might be unlawful indirect discrimination against the female children. Further, in law, there is a duty to provide separate single sex toilets, a breach of which would be unlawful under the School premises (England) Regulations 2012 and the Education (Independent School Standards) Regulations 2014.

- **Similarly, yes, it is lawful for a mixed school to refuse a biologically and legally male child who identifies as a trans girl from using a single sex girls' dormitory.** This is neither direct sex discrimination or unlawful indirect discrimination on grounds of gender reassignment. Sufficient comparable accommodation must be provided to both girls and boys. Protecting girls' privacy, dignity and safety are eminently legitimate aims.

- **Yes, it can be lawful for schools to refuse to use the preferred opposite-sex pronouns of a child.** This does not necessarily constitute direct discrimination on grounds of sex, particularly if unsupported by the child's parents or by medical advice. Nor is it necessarily indirect discrimination on grounds of gender reassignment where a school has considered and can justify the approach. As set out in the interim Cass report, this is 'social transitioning' and is not a neutral act. It is a serious intervention and should only be done upon the advice of an independent medical practitioner. Furthermore, schools and teachers who socially transition a child without the knowledge or consent of parents or without medical advice increase their exposure to a negligence claim for breach of their duty of care to that child.

- **Yes, it can be lawful for a school to refuse to allow a biologically male child, who identifies as a trans girl, to wear a girls' uniform.** This will be a significant part of social transition and the inherent risks of that could present an ample legitimate aim. Therefore, this does not necessarily constitute unlawful direct sex discrimination nor is it likely to constitute unlawful indirect discrimination on grounds of gender reassignment. Court of Appeal authority permits different dress codes for male and female employees and no rational distinction can be made for school uniforms.

- **Yes, it is lawful for a school to refuse a biologically and legally male child who identifies as a trans-girl from participating in girls' single sex sporting activities.** This does not constitute unlawful direct sex discrimination nor is it unlawful indirect discrimination on grounds of gender reassignment. This single sex exception is based on the average performance of male and female participants.

- **And lastly, yes parents have a right under the Freedom of Information Act 2000 to request access to teaching materials used in their children's state funded schools.** They could also make an internal complaint followed by referral to the Department for Education and ultimately via judicial review. But parents do have the right to know what is being taught to their children.

It is therefore wrong for schools to suggest that they have legal obligations which mean that they must address children by their preferred pronouns, names, or admit them to opposite sex toilets, sport teams, or dormitories.

A right not to suffer discrimination on grounds of gender reassignment is not the same thing as a right of access to facilities provided for the opposite sex. The exceptions in Schedule 3 and 11 create a mechanism whose sole purpose is to ensure that even though there is a general prohibition of sex discrimination, schools are legally permitted to take a single sex approach.

This is supported by the case law. Parliament could not have plausibly intended for these specific exceptions to be subject to collateral challenge by way of complaints of indirect discrimination by other protected groups such as those with reassigned gender. This would be to risk the Equality Act giving with one hand, and promptly taking away with the other.

What should schools do if a child declares a transgender identity?

Schools should consider each request for social transition on its specific circumstances, and individually, and any decision to accept and reinforce a child's declared transgender status should only be taken after all safeguarding processes have been followed, medical advice obtained and a full risk assessment conducted, including taking into account the impact on other children.

I hope that understanding the law will free up schools to act in each and every child's best interest rather than being driven by a generic misunderstanding of legal duties.

This legal view is supported by the emerging evidence. As the interim Cass Report points out, 'it is important to acknowledge that it is not a neutral act' to socially transition a child and there are different views on the benefits versus the harms and 'better information is needed about the outcomes'. Given – I quote – the 'lack of agreement, and in the many instances the lack of open discussion' among clinicians there are very real legal dangers of schools 'socially transitioning' children in this way.

Since the interim Cass report, schools must be sensitive to the fact that gender distress may be a response to a range of developmental, social and psychological factors- that something else may be going on. The fact that there has been an enormous increase in the number of cases, in addition to a complete 'change in the case-mix' of those with gender distress within the last decade, from predominantly boys presenting in early childhood to teenage girls with no prior history, the fact that 'approximately one third… have autism or other types of neurodiversity' and 'there is over-representation' of looked-after children, should illustrate the complexity of what schools are dealing with. Schools have a duty of care in relation to the health, safety and welfare of their children and they risk breaching this duty when they encourage and facilitate a child's social transition as a blanket policy; or take the decision to do so without medical advice. Given the emerging nature of the evidence and the fact that even clinical professionals find it challenging to know whether transition is the right path for a child, it is not reasonable or fair for teachers to have to make this onerous decision alone. This is a decision that can have lifelong and profound consequences for the child.

This is particularly so when the child is harmed as a consequence, especially if social transition were to lead subsequently to binding, or medical or surgical procedures, and even more so if done without the knowledge or consent of the child's parents.

To emphasise again, before going ahead with social transition, schools should get the best multi-disciplinary team around the table – including clinical professionals – and parents. In children's healthcare the legal presumption is that parents act in the best interests of their children, until and unless there are strong grounds to suggest otherwise. There is no other situation where a school would make a significant life changing decision about a child without involving the parents – these children should not be treated any differently.

I understand that my comments may make those experiencing gender distress anxious, particularly when they may be waiting to access support from the NHS. More needs to be done to ensure that children do receive that support in a timely fashion, and more generally that being gender non-conforming is accepted and supported. Stereotypes of what it means to be a boy or girl can be challenged. But it is important that we take a prudent approach, particularly as we await the full Cass report.

Schools should not be promoting gender ideology

Interpretations that support unthinking and absolute approaches to gender are rooted in new political ideologies outside the intention or scope of the Equality Act. They undermine other rights which do merit protection under the Act; including protecting those who attempt to question the dogma. These ideologies propagate the view that a person's biological sex is quite distinct from their gender. These theories are premised on an assumption that regardless of biological sex, children must be assisted to decide their gender. This highly-contested outlook presupposes that gender is subjective and binary approaches to sex are exclusionary. To assert that a person's biological sex is objective and cannot be changed is now a risk to someone's employment status. Freedom of thought, belief and conscience are often set aside in this debate.

These ideas are pervading the public sector and are being taught in some schools without any democratic scrutiny or consideration of the consequences. It is a highly politicised agenda promoted under the guise of 'diversity, tolerance and inclusion'. This is despite the DfE guidance published in February this year which makes clear that where partisan political views are covered, schools ensure that these are presented with the appropriate context, which supports a balanced presentation of opposing views. It is important to be clear what are scientifically tested and established facts, and what are questionable beliefs.

In my view, a primary school where they are teaching Year 4 pupils, aged eight and nine, 'key words' such as transgender, pansexual, asexual, gender expression, intersex, gender fluid, gender dysphoria, questioning or queer, would be falling foul of government guidance. Nor is it not age-appropriate to teach 4 year olds that people can change sex or gender. In line with Department for Education Guidance, primary schools do not need to set exercises relating to childrens' 'self-identified gender'.

In these instances, schools – who may be well-intentioned but misinformed – are breaching their duty of impartiality and indoctrinating children into a one-sided and controversial view of gender. Age appropriateness is the critical factor, the younger the child and the more simplified the explanation, the greater the risk that schools won't achieve the right balance.

Further, no child should be made to fear punishment or disadvantage for questioning what they are being taught, or refusing to adopt a preferred pronoun for a gender questioning child, or complaining about a gender questioning child using their toilets or changing rooms, or refusing to take part in activities promoted by Stonewall or other such organisations. The right to freedom of belief, thought, conscience and speech must be protected.

True diversity and equality are at risk when, as a society, we divide everyone into separate groups and then silence views which may challenge those groups. This is not what democracy is about and it is not what the law requires. Of course this is a complex and emerging area of the law, but I hope to provide legal clarity to schools and parents today.