What does the law say about "gender-questioning children" in schools?

– an analysis of the Equality and Human Rights Commission's response to the Department for Education's guidance for schools on gender-questioning children

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Sex Matters is a human-rights organisation campaigning for clarity about sex in law, policy and language

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Introduction

The Equality and Human Rights Commission has published its response[1] to the Department for Education's draft guidance for schools in England on gender-questioning children[2].

It says that the broad approach of the guidance "is compatible with equality and human rights law". But it criticises the guidance for giving too brief an explanation of the legal concepts underpinning it.

This is a fair point. We agree it would be helpful to give a clear explanation of the law. This should include the statutory obligations on schools in relation to safeguarding and the best interests of children as well as the Equality Act 2010 and the Human Rights Act 1998.

But in its response the EHRC misdirects itself and others about the law that is its mandate to uphold. This is very concerning.

Where does the EHRC go wrong in its response?

The subject of "transgender" has a tendency to confuse people, and the EHRC gets its framing of the Equality Act back to front.

It loses sight of the reality and purpose of what schools are and what pupils are. Pupils are children. Schools are part of a system in which those children are educated, together with their cohort, from age five to age eighteen. The primary responsibilities of school leaders are to keep children safe and to educate them.

Protected characteristics are not "central" to decision-making

The EHRC response says (page 3 paragraph 1) that:

> "provisions in the Equality Act, particularly those related to direct and indirect discrimination and protected characteristics, **are central** to the factors schools must consider when making decisions about gender-questioning children."

This is the wrong place to start. The **best interest of the child** is the central factor ("paramount" as stated in the UN *Convention on the Rights of the Child*) that schools must

[1] Equality and Human Rights Commission (2024). *Response to the Department for Education's consultation on gender questioning children (12 March 2024).*

[2] Department for Education (2023). *Gender Questioning Children Non-statutory guidance for schools and colleges in England.*

consider when making individualised decisions about any child. The best interests of the child are prioritised in *Keeping Children Safe in Education* (KCSIE) and in the statutory guidance on supporting pupils at school with medical conditions (issued under the Children and Families Act 2014).

The fundamental obligation under the Equality Act is to treat people the same, irrespective of their protected characteristics. An approach that treats children with a particular protected characteristic as exceptions risks direct discrimination, which cannot be justified however benign the motives of the discriminator. Such an approach is particularly concerning if it exempts children with a particular protected characteristic from general rules whose purpose is to keep children safe.

In general, schools do not make individualised decisions about day-to-day matters. They have rules and policies that aim to keep all children safe, enable them to access education and achieve their full potential. General rules and policies will often affect children who share protected characteristics differently, but that is not in itself unlawful or even undesirable provided the rules and policies themselves are justified. In other words, schools must not indirectly discriminate by adopting general rules which are not justified, but this does not make protected characteristics *central* to decision-making about a child.[3]

Imagine guidance which said that provisions related to protected characteristics of race, sexual orientation or religion were the *central factor* that schools should consider when making decisions about black pupils, gay pupils or Muslim pupils. This would rightly be rejected: schools should treat all pupils equally, applying rules to keep them safe and to treat them fairly.

The major exception to this is age. Age is a central factor in decision-making, and policies in schools often relate to age groups. Not surprisingly, the Equality Act provides that age is not a relevant protected characteristic when it comes to education.

Sex is generally not a central factor (most school rules and policies are the same for boys and girls), but there are areas where sex-based rules are justified. And sex is a key risk factor relevant in safeguarding.

[3] Schools do have to consider how their rules and policies impact on children who share protected characteristics such as around holidays, hair and uniform in relation to religion and race, but a child's religion or race is not central to decisions about their education. See Department for Education (2023). *School uniforms*.

The Equality Act does not create "transgender children"

The EHRC rightly says that case law has found that the protected characteristic of gender reassignment can relate to children. But it then goes on to encourage schools to think about "transgender children" and to assume that school rules must apply differently to those children.

This is a misinterpretation of the Equality Act.

As Dr Hilary Cass has observed transgender identification is uncertain in children and young people.[4] Children may meet the definition of "gender reassignment" in s.7 of the Equality Act and be protected against discrimination. But this does not mean they are "transgender children", or that they will grow up to be "transgender" or "transsexual" adults. They are perhaps more likely to grow up to desist, especially if they are not encouraged to make early decisions.

Survey data does not justify an exceptional approach

The EHRC and the DfE are right that all children should be protected against bullying.

In its response the EHRC appeals to survey data to suggest that children who may have the protected characteristic of gender reassignment are particularly vulnerable. However, these data are not robust. The one report applicable to England (the *National LGBT Survey*[5]) does not distinguish sexual orientation from transgender identification, and does not focus on children, so it is really very difficult to draw anything useful from it as regards the incidence of bullying.

If any child is experiencing bullying or distress they should be supported, and any bullying should be dealt with under the school's anti-bullying policy. But many schools have been wrongly led to believe that referring to a child as the sex they are, if they wish they were the opposite sex, is bullying. The EHRC's response does not challenge this, even though it recently revised its own guidance to remove this misunderstanding.[6]

In contrast, a recent Ofsted report on the scale and nature of sexual harassment in schools found that sexual harassment is an extremely common experience for girls. 73% had pictures or videos shared without their knowledge or consent; 59% had been photographed or videoed

[4] The Cass Review (2022). *Interim report.*

[5] Government Equalities Office (2018). *National LGBT Survey.*

[6] Sex Matters (2023). *'What is new in the EHRC guidance?'.*

without their knowledge or consent; 68% had experienced feeling pressured to do sexual things that they did not want to and 64% had experienced unwanted touching. These figures should reinforce recognition that single-sex spaces and the ability to clearly recognise and articulate what sex people are in schools should be non-negotiable.[7]

The Equality Act and Human Rights Act do not require "balancing rights between groups"

The EHRC says in the introduction to its response that it concerns a sensitive matter:

> "which engages the rights of several **protected characteristic groups** including sex, gender reassignment, and religion or belief. Sometimes it is necessary to **balance the rights of these groups**. This is often challenging and requires good judgement and a full understanding of the law by decision-makers. It is therefore crucial that schools and colleges have the information and guidance they need to make decisions which, as far as is possible, fairly **balance the rights of these groups** and avoid discriminatory practices."

This shorthand is an inaccurate account of the law. Groups do not have rights, and neither the Equality Act nor the Human Rights Act is based on the balancing of rights *between groups*.

Individuals have human rights. These rights are universal. The freedom to exercise these rights can be subject to restrictions that are a proportionate means to a legitimate aim, such as respecting the the rights of others, or are wider community aims such as "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals".

Local authorities in England are required to provide "suitable education" in relation to a child or young person, which means "**efficient education** suitable to his age, ability and aptitude and to any special educational needs he may have" (Education Act 1996, s.19). The Children and Families Act 2014 section 39 (4) provides that where a child has specific education, health and care needs, the local authority must secure a plan that provides for the child or young person to be educated in a mainstream institution, unless that is incompatible with the provision of **efficient education for others**.

In the context of education, it is clear that the "efficient education" of a child and the "efficient education of others" constitute legitimate aims. Maintaining the health, morals and

[7] Ofsted (2021). *Review of sexual abuse in schools and colleges.*

protection of the child and of other children are also a legitimate aim and part of every school's responsibility.

If a rule, policy or practice undertaken or imposed by the state engages a fundamental right, then any restrictions that it places upon the exercise of that right must be able to meet the test of whether it is a "proportionate means to a legitimate aim". This test is set out in *Bank Mellat v Her Majesty's Treasury (No. 2)*[8]:

i. whether its objective is sufficiently important to justify the limitation of a fundamental right
ii. whether it is rationally connected to the objective
iii. whether a less intrusive measure could have been used
iv. whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

Schools have lots of rules and policies which restrict the freedom (and privacy) of children in order to provide efficient education and keep children safe, and which are lawful. Some of these rules and policies apply differently to boys and girls (either obliging children of one sex to do something, or excluding them from doing something).

A child with the protected characteristic of gender reassignment has not changed sex, either in reality or for the purposes of the Equality Act, or any other law.

The basic legal question that the schools guidance seeks to answer is this: how to respond when a child asks to be treated differently from other children with regard to a school's lawful rules and policies in relation to their sex, which are designed to keep children safe?

The basic problem with the EHRC's response is that it assumes that Article 8 gives a child a right to keep their sex private at school, when this is both impossible and not a fundamental right.

This leads the EHRC to suggest that schools need to consider requests that gender-questioning children be subject to different rules than their peers, and that rather than simply say "no" they must undertake complicated legal arguments and individualised assessments in order to decline the request. This thinking, though not made explicit, is also discernible in the DfE draft, which we think should be made simpler, as we set out in our response[9] to the government consultation.

[8] The Supreme Court (2013). *Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39.*

[9] Sex Matters (2024). *Response to Department for Education draft guidance for schools on gender-questioning children.*

The EHRC then compounds this error by ignoring the fact that maintaining clarity about a child's sex is necessary for safeguarding and promoting the welfare of children and for communicating rules inherent in providing efficient education for a group of children.

It also fails to point out that excluding children from facilities that are provided for their sex or from ordinary risk assessment and safeguarding would be direct discrimination.

Specific issues and questions

Name changes

The question of name changes is different from the others in the guidance, because here a child is asking to be treated *in the same way* as other children in school with regard to an existing policy.

Most schools allow children to be known by a different name from the one on their birth certificate, as long as the school believes it is in the best interests of the child to do so (usually this means with agreement of parents). If a school accommodates children using "known-as" names (for example by having a field to record informal name changes), then the EHRC is right that schools need to be mindful of the risk of a discrimination claim if they treat gender-questioning children differently from others.

We think this is correct.

A change of name is not a change of status, but schools should remain curious about why a child is seeking to make any change and consider safeguarding risks.

Pronouns

The EHRC quickly segues from names to pronouns, stating that "once a decision has been taken to recognise a change of name or pronouns it should be implemented consistently within the school" and that "our recommended approach regarding requests to change a child's pronouns is similar to that in respect of name changes".

"A change of pronouns" is not at all a similar kind of thing to a change of name, either in relation to it being a usual practice or in relation to its meaning or psychological effect. "Her legal name is Ruth but she goes by Ngozi" is quite a different statement to "He is a boy but he wants to be referred to as 'she'." The EHRC's lack of curiosity about the idea of "changing pronouns" is concerning, and leads it to take the wrong approach.

The word “she” relates to female people, and the word “he” relates to male people. A boy who asks to be called “she” or a girl who asks to be called “he” is asking to be treated differently to other children, who are referred to accurately by their sex.

We do not think any fundamental right is engaged here. Therefore there is no need for the school to consider making an exception to its usual policy that pupils and teachers communicate using ordinary English grammar and vocabulary.

The EHRC suggests that Article 8, which concerns the right to respect for private and family life, is engaged, but does not explain how. Enrolling a child in a school means accepting limitations to that child’s privacy: details about their identity such as their name, age and sex will be recorded in the school’s information systems and referred to routinely by staff and other pupils. The idea that there is a breach of privacy involved in referring to a boy as a boy or a girl as a girl does not stand up to examination. There is no fundamental right to be referred to by the pronouns of the opposite sex; still less to have others actively deceived about one’s sex.

Furthermore, if a school were to try to accommodate a boy’s wish to be referred to as “she” or as a “girl” (and vice versa), it would cause staff and other pupils to become confused about the child’s sex. They might reasonably think that a child referred to as “she” is a girl. This puts both the child being referred to inaccurately, and other children, at risk of safeguarding breaches.

For example, a boy who is referred to as a “girl” and “she” might think it was appropriate for him to use the girls’ changing rooms. Other people might also think that this is a girl trying to use the girls’ changing rooms. Of course it is inappropriate for a boy to use the girls’ changing rooms.

The DfE made a similar mistake in its guidance by suggesting that it may exceptionally be justified to refer to some boys as “girls” or “she”, and some girls as “boys” or “him”. It does not specify what these exceptional circumstances are, but we understand that schools often face pressure from pupils, parents and activists telling them that if they do not treat a child as the opposite sex then the child will undertake self-harm or even commit suicide. The government’s suicide prevention advisor, Dr Louis Appleby, says in relation to debates over treatment of children with gender dysphoria “invoking suicide in this debate is mistaken & potentially harmful”.

The EHRC’s response to the guidance shows the danger of suggesting that the law requires that some children are referred to as if they were the opposite sex. The EHRC immediately says that the practice the DfE had allowed as “exceptional” should be routine, and ignores the safeguarding issues of doing this altogether.

As for teachers' Article 9 and 10 rights to freedom of religion and freedom of expression, these are a red herring here. Teachers are required as part of their job to explain and follow school rules and policies, and to enforce school rules fairly and clearly. This requires referring to the concepts of boy and girl, and male and female, and accurately referring to the sex of individual children.

The EHRC says that case law suggests that employers can apply policies which require *staff* to recognise a trans person's preferred pronouns, providing that this is done proportionately so as to respect the rights of all affected groups.

This is obviously true. For example, a specialist dressing service for transvestites and transsexuals may require its staff to call male customers "she". This is clearly necessary to deliver the service it is offering its customers. A hospitality business may have a policy of calling customers "sir" and "madam" according to their preference.

But a school is not a specialist service for transsexuals or a hospitality business; it is an educational establishment with a duty of care to keep pupils safe. This requires that it does not become confused about what sex children are.

Children are not employees. They are not adults.

The EHRC states that:

> "a school may legitimately take action to prevent 'deliberate misgendering' which causes distress or humiliation to a trans child, whilst giving reasonable consideration to other factors such as protected beliefs of staff or the level of comprehension of other children (particularly those who are younger or neurodiverse and may have difficulty distinguishing concepts of sex and gender identity)."

This whole paragraph is problematic. It describes the ordinary act of referring to a male child as male and a female child as female, which is necessary for safeguarding and enforcing everyday rules, as "deliberate misgendering".

The EHRC then introduces the concept of "gender identity". This does not come from the Equality Act or from any other laws that relate to schools.

Both the DfE schools guidance and the EHRC should be clear that a school referring to a boy as a "girl", "daughter" or "she" (or a girl as a "boy", "son" or "he") is inappropriate, because schools need to be able to communicate unambiguously and accurately.

Single-sex spaces

The EHRC states:

> "We agree that school children should not be allowed into opposite sex facilities and that this approach is likely to be required both under the School Premises (England) Regulations 2012 but also in respect of a school's safeguarding duties under Section 175 of the Education Act 2002."

We agree with this.

However, this understanding is incompatible with the EHRC's statement in the previous section that schools may "may legitimately take action to prevent 'deliberate misgendering'" (by which it means accurately referring to a child by their sex).

For a school to explain to pupils and parents that children are not allowed to use opposite-sex facilities, it must be able to recognise and refer to each child's sex.

The EHRC suggests that a failure to make alternative provision available for a gender-questioning child where this is practicable could be indirectly discriminatory or a breach of the child's Article 8 privacy rights, or both.

But it fails to point out that it would be **direct discrimination** to exclude a gender-questioning child from the facilities the school provides for children of their sex and age, for example by making them feel uncomfortable or bullied in these facilities.

For example, an effeminate boy with gender dysphoria and long hair has as much right to use the boys' toilets as any other boy, and the school must make sure that all children understand this. A girl who styles herself as a "trans boy" and is referred to as "he" among her friendship group has every right to use the girls' facilities.

The school must not allow these children to be excluded from the facilities provided for children of their sex. This means they must be clear to other children that these children are a boy and a girl respectively.

When a girl who has adopted a boy's name and has short hair is using the girls' changing rooms, the girls are not being asked to share with a "boy". The idea that stating this clearly is "deliberate misgendering" which should be censured would enable and encourage unlawful discrimination.

A child who is gender-distressed may prefer to use alternative "gender neutral" provision, and this may sometimes be possible. But a unisex alternative will not always be available in every situation throughout a child's school career. Encouraging a child to feel uncomfortable using

ordinary facilities is not in their best interests. Schools must remember that they should ensure that facilities provided for boys are inclusive to all boys, and those they provide for girls are inclusive of all girls, whatever other protected characteristics they have (and whatever words they use about themselves). This is a responsibility under the Equality Act.

The EHRC is wrong to encourage schools to view "individual lockable toilet cubicles" as suitable "gender neutral" (mixed-sex) provision. Toilet cubicles with particle-board dividers provide limited privacy and are therefore conventionally provided within separate-sex rooms wherever possible.

Uniform

The EHRC suggests that there are legal risks inherent in a school not applying discretion if a boy wants to wear the girls' uniform or a girl wants to wear the boys' uniform.

It says there is a risk of indirect discrimination if a school requires all children to adhere to a sex-based uniform policy, if such a policy puts a child with the protected characteristic of gender reassignment at a disadvantage. It says that if a disadvantage was demonstrated then a justification would be needed.

This is a straightforward description of indirect discrimination. However, the EHRC does not state what the disadvantage would be.

The DfE should explain that school uniforms have an informational aspect. In a school where there is a boys' uniform and a girls' uniform, this is how a child will be read. (Similarly, a person wearing a police uniform will be read as a police officer, and a person wearing a nurses' uniform in a hospital will be read as a nurse.)

It is inappropriate in these circumstances for a child to wear the uniform of the opposite sex because they are likely to be mistaken for that sex (and may believe that they are or have the right to be seen as the opposite sex). This will make it hard for other rules to be enforced.

Sport

The EHRC states:

> "In our view, the considerations set out on page 17 for making case-by-case decisions about a gender-questioning child's request to participate in single-sex sporting activities correctly reflect section 195 of the Equality Act 2010."

Section 195 of the Equality Act does not require individualised case-by-case decisions about whether males can participate in female sports. Nor is this what page 17 says.

As the UK's *Sports Councils Guidance for Transgender Inclusion in Domestic Sport* states:

> "'Case-by-case' assessment is unlikely to be practical nor verifiable for entry into gender-affected sports."[10]

The EHRC itself has previously clarified that:

> "Section 195 (1) creates a **general exemption** to enable sporting organisations to discriminate on grounds of sex in relation to sporting activity".[11]

The DfE draft guidance, in line with this, states that for all sports where physical differences between the sexes threaten the safety of children, schools and colleges **should adopt clear rules which mandate separate-sex participation. There can be no exception to this**.

Even for sports where safety is not risked by mixed-sex participation, schools and colleges should ensure that sports are fair. For competitive sports, schools and colleges should be aware that without separate sex participation, **it is unlikely that they will be offering equal opportunities to boys and girls**.

For non-competitive sport, schools and colleges should continue to prioritise safety. Where a child requests to participate in PE lessons or sporting competitions that are intended for the opposite biological sex, schools and colleges should therefore consider:

- the age of the child making the request
- how safe it would be to allow mixed-sex participation
- how fair it would be to allow mixed-sex participation.

[10] The UK's Sports Councils (2021). *Guidance for Transgender Inclusion in Domestic Sport.*

[11] Equality and Human Rights Commission (2023). *'Statement on UK Athletics' position on trans people's participation in athletics'.*

The DfE should make clearer in its guidance that it is not encouraging schools to make individualised case-by-case decisions, but to consider whether a particular sporting activity for a particular age group should be organised on a same-sex or mixed-sex basis.

Single-sex schools

The EHRC says:

> "The guidance at page 18 is correct in recognising that single sex schools can lawfully **choose** to admit or refuse a learner of the opposite birth sex (including a child who is questioning their gender, or who identifies and/or is living as the opposite sex)."

This is not an accurate reflection of what page 18 says: it says that single-sex schools can refuse to admit pupils of the other biological sex, regardless of whether the child is questioning their gender.

This is not the school making a "choice" at the level of the individual child; it is a school having an admission policy that only admits children of one sex, and being able to defend it using the express provision in the Equality Act.

The EHRC states that a school "may be at risk of indirect gender reassignment discrimination if it applies a blanket policy stating that it will not accept children of the opposite birth sex in any circumstances". It goes on to say: "That does not mean that such a policy would necessarily be unlawful. However, the school would need to be able to objectively justify the policy as a proportionate means of achieving a legitimate aim."

This is incorrect. Single-sex schools have an express exception in the Equality Act. There is no requirement to consider children of the opposite sex, whatever other protected characteristics they have. Maintained schools are required to operate according to the Admissions Code, and many single-sex independent schools are charities whose objects are to provide education to one sex or the other. If an independent single-sex school decides to become mixed sex, this is a "material change" which may precipitate an inspection commissioned by the Secretary of State.

In any case, in order for a policy to be indirect gender-reassignment discrimination there must be a detriment. Children often have to be refused things that they want in their own best interests. Refusing to indulge a child's wish for something harmful is not a detriment.

It would of course be inappropriate to admit a boy to a girls' school on the basis that everyone in that school must treat them as a girl (and vice versa). Such an approach would

be inconsistent with safeguarding and promoting the welfare of children, providing an efficient education and respecting the rights of others.

A child may not understand this, but the adults around them should. Adults upholding rules designed to keep a child safe are not inflicting a detriment on that child.

Public-sector equality duty

The EHRC says that the guidance should make clear that a child **can** have the protected characteristic of gender reassignment, even though they are not old enough to legally change their sex by acquiring a gender-recognition certificate under the Gender Recognition Act (2004).

We agree. But we think that the EHRC loses sight of the safeguarding implications of this.

As we wrote to the EHRC in November 2023:

> "It is a critical gap that the EHRC's governance manual does not mention safeguarding or include a process for due diligence over recommendations and guidance in this regard. The EHRC should have a published safeguarding policy, and a process for assessing the safeguarding implications of guidance and recommendations it produces.
>
> "The EHRC together with the relevant education regulators could issue guidance to prevent misunderstandings about the Equality Act and inclusion being promoted into policies that undermine safeguarding. This could be produced as a sex and gender identity supplement to the statutory safeguarding frameworks KCSIE and GIRFEC, and then incorporated into the following year's update."[12]

[12] Sex Matters and Transgender Trend (2023). Letter to Kishwer Falkner, Chair of the Equality and Human Rights Commission, 17th November 2023.

Conclusion and recommendations

The EHRC fails to highlight that it would be direct discrimination to treat a child differently with respect to the rules and policies that apply in school to keep children safe and treat them fairly.

- A boy who may have the protected characteristic of gender reassignment should not be excluded from any provisions or facilities for boys.
- A girl who may have the protected characteristic of gender reassignment should not be excluded from any provisions or facilities for girls.
- A child who may have the protected characteristic of gender reassignment should not be treated differently with regard to safeguarding, which requires that no one is made confused about their sex.

The EHRC's response shows how the law is likely to be misunderstood and misapplied, even by well-intentioned and legally qualified people.

- **The DfE should publish a clear model policy for schools backed by legal analysis.**
- **The EHRC should recall this response to the guidance and reconsider it.**

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