

Options Appraisal for Toilet Provision in East Lothian

Context

East Lothian Council have been installing non-designated toilet areas in schools and in public areas, for a number of years. This would include Dunbar Grammar, Wallyford Primary School and Letham Primary school. Our existing costed plans for projects at Ormiston Primary School, Ross High School, Wallyford Learning Campus, Whitecraig Primary School all include a continuation of non-designated spaces in the toilet and changing village areas. Previously, the rationale behind these designs was predicated on our interpretation of the Equalities Act 2010 and guidance such as the LGBT Scotland 'Supporting Transgender Young People' in Schools Guidance. We have already defended similar challenges to the design of public toilets across East Lothian.

In discussion with architects from Hub SE (who are leading projects, on behalf of Councils, across Scotland) they stated that they hadn't built traditional blocks of designated male/female toilets, in a number of years. Scottish Government confirmed that there is a wide range of toilet provision design across Scottish schools.

This matter has escalated, in response to challenges made by a small number of parents, affiliated to 'Women in Scotland' (a group representing women's rights), to the proposed design of toilets at Musselburgh Grammar School. They have received over 1500 supporters in a worldwide petition, with regards to the toilets in Musselburgh Grammar School.

Following the conclusion of a pupil led consultation, the final preferred option is presenting a range of challenges with regards to completion of the United Nations Convention on the Rights of the Child (UNCRC) Children's Rights Assessment. The UNCRC is not yet legislation, but it is potentially a 'game changer' in terms of decision making and could carry retrospective financial and legal risks to Councils across Scotland- all of whom, have been using the current LGBT 'Supporting Transgender Young People Guidance', because this is the only document that is currently available.

It should be noted that the original request for non-designated toilet spaces came from the Pupil Council, in the initial independent consultation that was led by Architectural Design Scotland. The additional cubicles, with dedicated sinks were also added to the design, in response to stakeholder feedback.

The definition of the term 'toilet' is also central to this decision. There is no legal definition and therefore we have to rely upon the Oxford Dictionary definition:

'A fixed receptacle into which a person may urinate or defecate, typically consisting of a large bowl connected to a system for flushing away the waste into a sewer or a septic tank'.

The dictionary continues:

'1.1 A room, building or cubicle containing a toilet or toilets'

There is no mention of wash basins in this definition. We could conclude that wash basins can therefore be shared, whilst the actual 'toilet' is completely private; giving us firm grounds to conclude that we are not proposing any toilet spaces that are shared.

The challenge will be that boys and girls are expected to share the toilet spaces at different times and we shall have to conclude as whether this constitutes an infringement of rights. Although section 32 of the Scottish Government consultation on the update to the School

Premises Regulations 1967, suggests that there should be flexibility applied to ratios involving single private cubicles.

LGBT Youth Scotland have been made aware that certain groups online have been encouraging their social media followers to send letters to individual schools and local authorities regarding our guidance on 'Supporting Transgender Young People'. They have issued the statement:

'Contrary to misinformation around the Scottish Government's approach, our guidance has never been withdrawn, and they have highlighted that it can be used to positively support pupils'.

In response to requests for clarification the Scottish Government has stated:

"The guidance produced by LGBT Youth Scotland, in conjunction with the Scottish Trans Alliance, has not been withdrawn and remains available... The guidance is already being used in schools and education authorities across Scotland as it provides practical advice to support them to respond positively to meet the needs of their pupils. It is one of a number of tools which help education authorities and schools to prevent discrimination of pupils."

The Scottish Government plans to update this guidance by the end of this year and has committed to working closely with LGBT Scotland and other key stakeholders. This will ensure that there is consistent practice in schools across Scotland.

A decision is required with regards to the corporate view on toilet provision across the county. The information below presented to inform a final CMT decision on this matter.

Equalities and Children's Rights (UNCRC)

Equality Act

- The Equality Act (2010) and the public sector Equality duty (2011) ensure that as a public body East Lothian Council (ELC) tackle discrimination, provide equality of opportunity for all and foster good relationships between people who share a protected characteristic and those who don't.
- With regards to this options appraisal the protected characteristics in scope are sex, gender reassignment and religion.
- In designing toilet space due regard is required to consider the needs of young people who are male, female, transgender, non-binary and those who hold religious beliefs. It is noted that there are competing interests amongst these groups.
- It should not be assumed that all rights in a school can be met in the toilet space alone. The definition contained within the introduction to this paper, should also be considered. Traditional, unsupervised toilet spaces, were well known problem areas with regards to bullying and poor behaviour. The right to recover from abuse does not need to be designated to an unsupported toilet area. Designated support zones could be provided elsewhere in the school.

- It is important to note that the Equality duties do not require ELC to treat everyone the same, do not require us to ignore differences between people and do not require disproportionate actions.

UNCRC

- The 54 articles in the UNCRC are underpinned by the four general principles: non-discrimination; the best interests of the child; the right to life, survival and development; and the child's right to have their views given due weight. The UNCRC sets out that 'every child is entitled to the protection, provision and participation' that these rights seek to uphold.
- Child Rights and Wellbeing Impact Assessment (CRWIA) is a process through which you can identify, research, analyse and record the anticipated impact of any proposed law, policy or measure on children's human rights and wellbeing. It is essential that a CRWIA is completed prior to decisions being made and should help inform and guide the decision by ELC.
- With regards to this options appraisal the following UNCRC articles are in scope:
 - Article 2 Non-discrimination
 - Article 3 Best interests of the child
 - Article 4 The protection of rights
 - Article 12 Respect for the views of the child
 - Article 14 Freedom of thought, conscience and religion
 - Article 16 The right to privacy
 - Article 28 The Right to Education
 - Article 39 Recovery from abuse
- The UNCRC is not yet legislation and may not be passed in its current form. Because we are the first Local Authority to apply the CRWIA, any decision that we take based on this assessment will have implications for all other Scottish Councils.

Pupil Led Consultation at Musselburgh Grammar School- The Options

Commentary provided by Dr Lynne Binnie

Option (1) – universal, non-designated

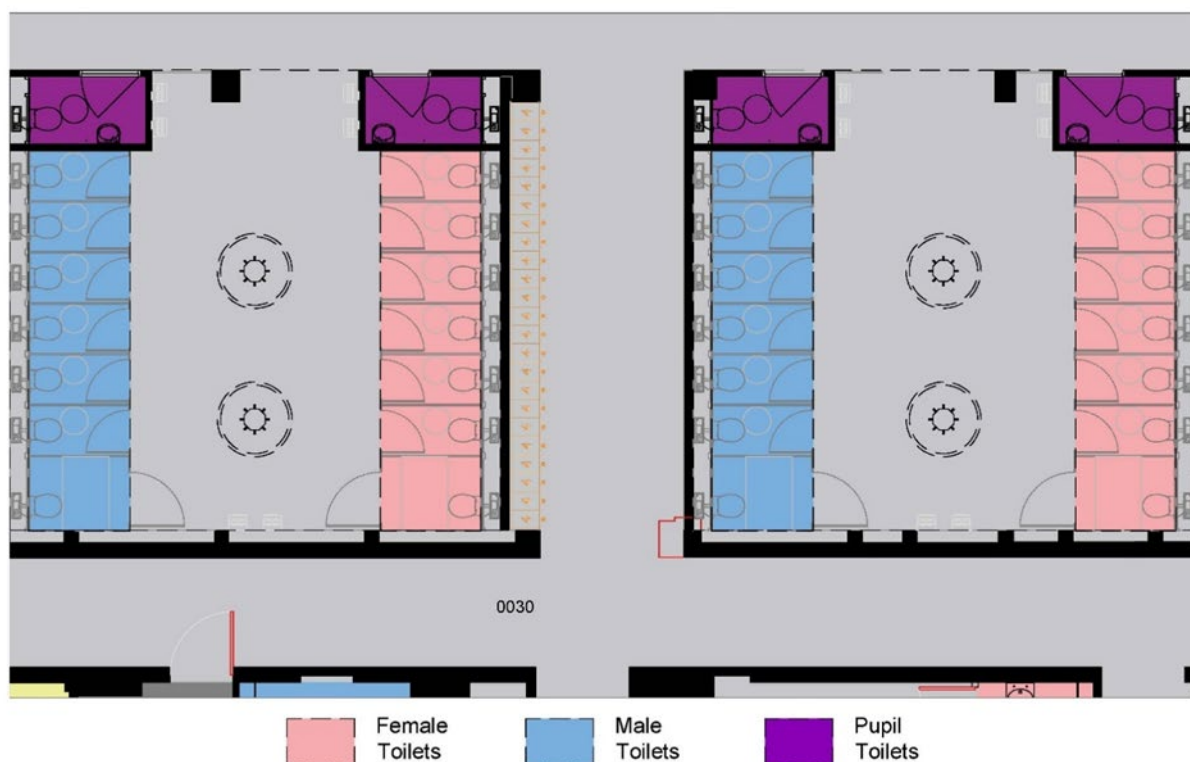
Toilet Designation Option 1



Universal, non-designated toilets are beneficial to young people who are transgender who would feel included and able to use the toilets comfortably without the need to associate with the male or female sex. However, a non-designated space may particularly affect girls who arguably benefit most from single-sex provision in intimate settings for reasons of privacy, dignity and safety especially when dealing with menstruation. Girls are also overwhelmingly the victims of sexual harassment, assault and abuse, and this also compounds the likely impact of mixed sex intimate spaces on them. Other groups of young people that may be affected are those whose religion would prevent them from being able to share facilities with members of the opposite sex for religious reasons. Option 1 does provide 2 designated toilets within the area that can be accessed exclusively by males and females and there are designated toilets within other areas of the school. The impact of this option on two protected characteristics e.g. sex and gender needs to be considered. Specifically, the impact on the majority of young people who attend the school (e.g. those who are male and female) need to be considered proportionally to those who are transgender who make up smaller numbers of the school population.

Option (2) - Designed male and female within each block

Toilet Designation Option 2



Designated toilets within a mixed sex space have no benefits in progressing equality duties or children's rights. This option has no benefits to any groups with protected characteristics in that it neither protects girls nor young people who are transgender. Option 3 was the option that received the highest number of votes from a pupil survey (from a choice of options 1-3). There are inherent risks associated with progressing with this option and basing such a decision on the votes of a small number of pupils and parents without fully considering the wider legislative requirements of the Equality Act and UNCRC.

Option (3)- One block designated male/female and one block undesignated

Toilet Designation Option 3



Option 3 offers both a designated toilet space within a mixed sex space and a universal non-designated toilet space. Designated toilets within a mixed sex space have no benefits in progressing equality duties or children's rights. This option has no benefits to any groups with protected characteristics in that it neither protects girls nor young people who are transgender. Universal, non-designated toilets are beneficial to young people who are transgender who would feel included and able to use the toilets comfortably without the need to associate with the male or female sex. Both spaces are essentially non-designated spaces that may particularly affect girls who arguable benefit most from single-sex provision in intimate settings for reasons of privacy, dignity and safety especially when dealing with menstruation. Girls are also overwhelmingly the victims of sexual harassment, assault and abuse, and this also compounds the likely impact of mixed sex intimate spaces on them. Other groups of young people that may be affected are those whose religion would prevent them from being able to share facilities with members of the opposite sex for religious reasons. Option 3 provides 1 designated toilet within the area that can be accessed exclusively by males and females and there are designated toilets within other areas of the school. Option 3 provides 2 non-designated toilets within the area that can be accessed by all young people including those who are transgender and there are non-designated toilets within other areas of the school. The impact of this option on two protected characteristics e.g. sex and gender needs to be considered. Specifically, the impact on the majority of young people who attend the school (e.g. those who are male and female) need to be considered proportionally to those who are transgender who make up smaller numbers of the school population.

Option (4) - Designated male and female separate blocks

Toilet Designation Option 4



Designated toilets are particularly beneficial to girls who arguably benefit most from single-sex provision in intimate settings for reasons of privacy, dignity and safety especially when dealing with menstruation. Girls are also overwhelmingly the victims of sexual harassment, assault and abuse therefore this option reduces the potential impact of mixed intimate spaces on them. Other groups of young people who benefit from this option are those whose religion would prevent them from being able to share facilities with members of the opposite sex for religious reasons. However, a designated male and female space could impact on young people who are transgender who may feel discriminated by needing to access toilets designed to a sex that they do not associate themselves with. Option 4 provides 4 non-designated toilets within the area that can be accessed by all young people including those who are transgender and there are non-designated toilets within other areas of the school. The impact of this option on two protected characteristics e.g. sex and gender needs to be considered. The impact of this option on the majority of young people who attend the school (e.g. those who are male and female) need to be considered proportionally to those who are transgender. Option 4 was not provided as an option to the pupils and parents. It has been described as not being in line with our lawful obligations under equalities legislation. This needs to be considered further and a stronger legal interpretation and rationale provided before a decision is made. This interpretation has not been designed into new school buildings for a number of years, according to architects from Hub SE. It was also advised against in best practice visits to other schools across Scotland and it is not in line with the design that ELC has put into recent new build schools.

Comments

- Equality and children's rights need to be viewed across the totality of toilet provision within a school; not individual spaces. This would allow proportionate facilities to be in place protecting all children and young people.
- The inclusion of non-designated single occupancy facilities with toilet and wash hand basins would progress equality and children's rights for all.
- Consultation activities should consider seeking views of young people across the range of protected characteristics especially those from minority groups.
- The CRWIA is a new process that brings into sharp focus children's rights. Article 16 – the right to privacy needs particular attention in any discussion regarding intimate spaces particularly with respect to girls. Any failure to properly address this issue could lead to significant risk for ELC.

Infrastructure

- East Lothian Council has facilitated significant engagement with all key stakeholders from the outset of this project to provide significant improvements to social space and toilets.
- Architecture & Design Scotland (A&DS), a national government-funded 'design champion' worked with all parties at the inception of the project to help the school and Education community to achieve the best outcomes. The vision of A&DS is for 'A Scotland whose places are healthy, sustainable and thriving, where everyone works together to shape their future.'
- There are a number of key reference documents which apply to the project, in terms of guidance and compliance, including The Scottish Building Standards Technical Handbook for Non-Domestic Buildings, the Council's policies on access and inclusion, The Equality Act 2010 and 'Supporting Transgender Young People – Guidance for Schools In Scotland'.
- The project team have drawn on their substantial experience on recent projects, also incorporating best practice from case studies completed in East Lothian and throughout the country.
- The main desired outcomes for the design of the proposed toilet layouts are: a more welcoming and uplifting environment, better access for all, less incidents of bullying and anti-social behaviour, improved hygiene, a reduction in vandalism, a safer place, an area which is easier for the school to manage and well-received by pupils.
- The Architecture & Design Scotland case study document states that the 'Toilet Design In The Learning Environment' supports the positive outcomes achieved by this type of design, with shared wash areas open to the circulation area of schools.
- Responses by East Lothian Council Education, supported by the project team, to the challenges received from one of the stakeholder groups have been courteous, well-informed, comprehensive and transparent.
- The returned pupil vote was unfortunately a low percentage of the total number of pupils and parents
- The preferred option, voted for by pupils and parents, was option 2. The assigned cubicles are all full-height, so do offer privacy. The wash areas are shared, so those who do not wish to share a wash area can use the end cubicles, which contain private wash basins, within the cubicle.
- There is very little difference in the physical design of the three options presented for vote, as the choices are a matter of designation. There is no difference in cost between the three options. Should an option with a row of assigned toilets be chosen, this could be achieved by signage at the entrance to the toilets, so this could be easily altered in

future, should there be a change in view. Signage on each cubicle would not be essential. Additional cost would only be generated if a decision was made to place a wash basin in every cubicle.

- The public consultation on the update to the School Premises Regulations 1967 (which is live), suggest that every cubicle should contain sanitary facilities. This is not currently within the design.
- In space restricted extension projects (such as Ormiston), there may not be the space or the budget to build traditional male/female designated toilets.

Communications

The media environment surrounding shared/non-designated facilities and the rights of women and girls is particularly febrile at the moment. This means that any discussions on this issue could attract widespread attention.

The current situation presents a significant risk to the reputation of the council.

- Options 1 (fully universal) and 4 (fully designated) are not the preferred options of the consultees. Choosing either of these options will likely lead to criticism of our genuine commitment to engagement on this issue and to listening to the school community. Longer-term it could also undermine future consultation on any issues.
- Further, option 4 was previously described as not meeting our lawful obligations under equalities legislation. If this is to be progressed we need to be clear on emerging information that means this is no longer the case, and to be sure that this is a lawful option. The EQIA would be critical in this however it doesn't clarify why it was previously considered unsuitable and therefore not included.
- From social media monitoring of the debate at the time, it is likely that option 4 (designated) would be better received by the school community than a move to option 1 (fully universal) however it is important to ensure that this does meet our equalities legislations.
- To date, the Parent Council and Pupil Voice team – as well as local members – have been very supportive of our position regards the requirement for universal facilities.

- Complete clarity is required on the option that is being progressed and the legal/rights approaches underpinning any decision. A cohesive narrative will require to be developed, to address the points above, depending on the approach taken.

- The Children's Rights Assessment is new. We can be clear that the Council is caught between two conflicting pieces of guidance (The School Premises Act 1967 and the UNCRC), therefore highlighting a wider issue. However, this could lead to criticism of us from Scottish Government and other authorities who have successfully navigated these issues.
- In progressing a programme of ongoing work, clarity and governance will be essential to avoiding these types of situation. There is a real need establish robust policies and processes that will ensure that the council meets its responsibilities across all of its facilities. This will be critical to ensure compliance with legal requirements and rights to provide a consistent approach across our estate – particularly as our existing non-designated facilities may be called into question by members and public.
- Sensitive briefing will be required for local members, the Parent and Pupil Councils, and the School's Management Team.
- Any public statements must emphasise that it remains the case that the Council is committed to meeting its lawful commitments to its users, and to respecting the rights of all pupils.

Legal

Finance

Scottish Government

The Scottish Government are committed to ensuring all children and young people are supported in school and are able to reach their full potential, including transgender young people, and are committed to developing guidance to support schools to do this. Due to the significant impact of the Covid-19 pandemic, schools are very focused on supporting pupils and are working hard on the phased return of schools. Consequently, we feel it would not be the best time to provide this guidance when attention is on ensuring the continued safety and wellbeing of pupils and staff during the pandemic. Therefore guidance will be published at the earliest opportunity in the new Parliamentary term. Education Authorities and schools should continue to use resources and guidance they have determined responds positively to the needs of all pupils.

It is the statutory responsibility of local authorities, under the Education (Scotland) Act 1980, to manage their school estate. Therefore, decisions regarding the provision of sanitary facilities in schools are a matter for local authorities, provided that they comply with the School Premises Regulations.

However, under current plans to update these regulations, greater flexibility will be permitted to meet the needs of modern schools, including in the case of non-designated and accessible toilet facilities. This follows a public consultation:

www.gov.scot/publications/consultation-document-updating-school-premises-general-requirements-standards-scotland-regulations/pages/6/.

We are hearing that in many new schools, after consultation with the school community, local authorities have chosen to provide non-designated toilet facilities. One of the guiding principles from our Learning Estate Strategy is good consultation about learning environments, direct engagement with learners and communities about their needs and experiences, and an involvement in decision making processes should lead to better outcomes for all.

I hope this is helpful.

Thanks,

Matthew Rennie

Matthew Rennie | School Funding, Infrastructure & Organisation Unit | Scottish Government

Public Consultation on School Premises Act 1967

Sanitary accommodation for pupils

Regulation 15 and 16 ^[6]:

30. The existing Regulation provides a higher number of appliance per pupil than is required for employees within the Technical Handbook for non-domestic buildings. This is because of the unique circumstances surrounding schools where access to facilities may have peaks at break times. In addition, the School Premises Regulations do not prescribe standards for accessible sanitary facilities for persons with a disability or refer to unisex toilets that could address gender issues. Therefore, the Regulation needs to be updated and simplified to meet current expectations.

31. That said, the number of toilets and wash hand basins as prescribed in the current Regulations should be retained as it ensures a greater provision than the Technical Handbook and the school provision recommended in British Standard 6465-1: 2006. This is particularly important in smaller schools, which are prevalent in Scotland, where the existing Regulations provision may be double that prescribed in the British Standard.

32. However, the provision can also be updated to reflect the needs of modern schools. Currently the Regulation states that half the accommodation shall be for boys and the other half for girls and does not refer to unisex toilets. Flexibility should be permitted within this Regulation to allow the provision of separate toilet facilities for boys and girls except where they are provided for use by one pupil at a time. Urinals in these circumstances may no longer be necessary and therefore the provision of urinals should be optional if replaced with a toilet.

33. Accessible sanitary facilities for pupils who are disabled should be provided in accordance with the guidance to standard 3.12 Sanitary Facilities within the Technical Handbook. As the provision of wash hand basins is related to the number of toilets provided,

it seems appropriate that this issue is provided for in this Regulation. However, it is considered that the current Regulation also needs to be updated to provide that sanitary disposal units should be provided in all cubicles used by girls aged 8 or over which is a requirement within the British Standard 6465-1: 2006.

34. The current Regulations cover changing accommodation and showers, given the term "educational accommodation" includes references to both terms. It is considered that for clarity, the new Regulations should provide that showers must be provided for the use of pupils aged 11 years or over engaged in physical education and should be accessible from the changing rooms for all users. British Standard 6465-1: 2006 details that there should be one shower per 10 pupils or part thereof engaged in physical education.

35. As the intention is that nursery schools and nursery classes will be regulated by the Care Inspectorate then the provision that applies to nursery schools and nursery classes within a primary school will be removed.

Question 9: Do you agree that this covers the requirements for toilet and washing facilities? If not, why not?

Scottish Borders (undesignated toilets at Jedburgh and Kelso)

The toilet debate is a good one. I am not aware of anything we did officially re IIAs, but when planning the new schools there was a bit of resistance and suspicion from parents, staff and even some pupils. All we did was reinforce that we were creating enough flexibility in the toilets and the changing spaces, to support everyone to have a facility that was appropriate and comfortable for them. We have then let the schools work out the best way to make use of these – still a way to go on this.

I am happy to put you in touch with Jed and Kelso to give you someone to talk through the "lived experience".

Proposed Next Steps-

- A holding statement has gone out to MGS Parent Council through the HTs newsletter, to say that we are awaiting professional advice, which will help us to complete the impact assessments. We will not be announcing the decision on the final designation, until these assessments are complete.
- This matter does not affect the timeline for the design and build project, as the design will remain the same.
- A holistic CMT decision on the agreed direction of travel is required, based on the information that has been presented in this report.