

Trans pupils: guidance for schools in Scotland on the Equality Act 2010 – Confidential DRAFT

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Contents – Placeholder awaiting finalisation of text

Foreword

Gender and gender-related topics are pivotal societal issues that are increasingly prominent in public and political discourse throughout Great Britain. Heated debate about the interplay between sex and gender– particularly about transgender rights – features in daily news and across social media. This barrage of information and opinion can lead to confusion and misinformation about individual rights and protections.

As the debate continues, we believe that there is a growing need for clarity on what the law says. In seeking to answer questions about how stereotypical approaches to gender can affect children and young people, we must look closely at the role of schools in ensuring that every child can flourish and fulfil their potential. The Equality Act 2010 (Equality Act) gives individuals protection against discrimination. It sets out the legal requirements with which employers, businesses, service providers and education providers must comply. The Equality and Human Rights Commission (EHRC) has a key role to play in informing people about the Equality Act, as well as enforcing it. We are committed to the vision of a modern Britain in which everyone is treated with dignity and respect, and has an equal chance to succeed.

This guidance outlines the Equality Act requirements for schools in Scotland in relation to the provision of education, and access to benefits, facilities or services, to pupils with the protected characteristic of gender reassignment. It complements the upcoming Scottish Government guidance.

Equality law cannot tell us exactly how to deal with all the situations that might arise in practice, and each situation should be assessed on a case by case basis taking account of a wide range of factors. So, this guidance includes a set of straightforward, good practice tips to help schools to understand how best to meet their responsibilities under the Equality Act. While good practice may mean doing more than the law requires, we believe that schools will find our guidance useful in helping them to support all children to flourish.

A young person's gender identity may not be fixed, and it is important that the needs of all pupils are considered and met – whether they are confident in their birth gender, have a clear trans identity or identify as non-binary. This will help all pupils to participate fully in school life, free from discrimination and bullying, without always needing to set firm boundaries based on gender.¹

Our guidance is not an affirmation of every request an individual child may make; nor is it a declaration that teachers must always accept such requests. Schools should be tolerant and open-minded – not only to avoid reinforcing gender stereotypes but to also acknowledge there are many ways a child can explore their sense of self without necessarily impacting on their future. A range of those we consulted in preparing this guidance emphasise that, where possible, schools should reflect on these matters with both the child and their parents.

In view of EHRC's statutory remit, this guidance does not and cannot deal with all the considerations that schools need to take into account, such as safeguarding, data protection, confidentiality and maintaining a delicate balance between school and parental responsibilities. The Scottish Government is producing guidance on the full range of issues applicable to schools, including on the Equality Act. There is a list of useful sources and guidance on **p X** in this guide.

We have discussed this guidance and consulted with [to be added]

More information about the full range of Equality Act guidance can be found on the EHRC website (www.equalityhumanrights.com).

Introduction

What is this guidance about?

This guidance explains what the law says about protection from discrimination for pupils in primary and secondary schools in Scotland who have the **protected characteristic** of **gender reassignment**. We refer to these pupils in this guidance as '**trans pupils**'.

In this guidance you can find:

- information about the relevant law in the EA 2010, including the Public Sector Equality Duty (PSED)
- practical advice for **schools** on how to apply anti-discrimination law
- illustrative examples to help schools understand their legal obligations
- good practice tips to help schools support all their pupils
- a glossary of the words and key ideas you need to understand this guide. All words highlighted in **bold** can be found in the glossary. They are highlighted the first time they are used in each section and sometimes on subsequent occasions.

Schools have legal obligations under the EA 2010 not to discriminate against pupils because they have, or are perceived to have, or associate with someone who has, the protected characteristic of gender reassignment.

The PSED requires state-funded schools to consider how they can positively contribute to eliminating discrimination, advancing equality of opportunity and fostering good relations between different groups. Regardless of whether your school is subject to the PSED, you can use this approach to help you comply with your other legal obligations under the EA 2010.

By following the good practice set out in this guidance, schools will be able to cultivate an inclusive environment where all pupils are respected and can thrive and learn free from discrimination, regardless of their gender identity.

Who is this guidance for?

This guidance is for **schools** providing primary or secondary education in Scotland. The legal obligations described apply to all schools including publicly funded schools, grant-aided schools, independent schools and special schools, with the exception of the PSED and the Human Rights Act 1998 which only apply to public authorities and bodies carrying out a public function.

What is not covered in this guidance?

This guidance focuses on the EA 2010. It does not cover all the issues that may arise when addressing trans issues and the needs of all pupils. Schools should refer to their existing policies and guidance from other relevant statutory authorities, including Scottish Government. In particular, we recommend that schools take account of their data protection, school management systems, data monitoring and safeguarding obligations when developing their approach on trans issues.

We recognise that teachers are not the only adults with responsibilities towards pupils who may be exploring their gender identity. How teachers and pupils interact on these issues is often shaped by the age and competence of a child, the views of **parents**, and religious and cultural beliefs and practices. Difficult situations may arise where there are conflicting views, and schools may find it challenging to strike the right balance. Our guidance encourages best practice that engages both pupils and parents where possible, but it does not set out parents' legal rights or obligations.

Schools also have an obligation not to discriminate in providing services to the public, for example renting out sports halls and holding fund-raising events. This guidance does not cover school services to the public. For further information on discrimination in service provision, please refer to the Commission's Code of Practice.

Other guidance

This guidance is focused on the practical application of the legal requirements in the Equality Act. We recommend that it is used in conjunction with other guidance and information, such as:

Ethos and culture

<https://www.gov.scot/publications/developing-positive-whole-school-ethos-culture-relationships-learning-behaviour/>

Bullying

<https://www.gov.scot/publications/respect-national-approach-anti-bullying-scotlands-children-young-people/>

Inclusion

<https://www.lgbtyouth.org.uk/media/1299/addressing-inclusion.pdf>

Inclusive education

<https://www.gov.scot/publications/lgbti-inclusive-education-working-group-report/>

Relationships

<https://www.gov.scot/publications/conduct-relationships-sexual-health-parenthood-education-schools/>

Who we are

The Equality and Human Rights Commission exists to protect and promote equality and human rights in Britain. We stand up for freedom, compassion and justice in changing times. Our work is driven by a simple belief: if everyone gets a fair chance in life, we all thrive.

We use a wide range of different methods to tackle discrimination, disadvantage and human rights abuses, work with other organisations and individuals to advance fairness, dignity and respect, and are ready to take action against those who abuse the rights of others. Our statutory powers give us a range of tools with which to do this.

We are a statutory non-departmental public body established by the Equality Act 2006. As such, we operate independently and are recognised as an expert and an authority on equality and human rights law, evidence and analysis. Policymakers, businesses and public bodies turn to us for guidance and advice.

We are also Britain's national equality body and have been awarded an 'A' status as a national human rights institution (NHRI) by the United Nations. In Scotland, we share our human rights mandate with the Scottish Human Rights Commission.

Legal framework

Equality Act 2010

All **schools** in Scotland have legal obligations under the Equality Act 2010 (Equality Act), irrespective of how they are funded or managed, and whether they are independent or state schools.

The EA 2010 makes it unlawful for a school to discriminate against a pupil or prospective pupil by treating them less favourably because of seven **protected characteristics**.²

The protected characteristics relevant to this guidance are:

- **sex**, which means being male or female
- **gender reassignment**, which means proposing to undergo, undergoing or having undergone a process, or part of a process, for the purpose of reassigning a person's sex. A pupil of any age could have the protected characteristic of gender reassignment, and they need not have undergone any form of medical intervention to be protected. Protection from discrimination extends to individuals treated less favourably because they are perceived to have, or are associated with, the protected characteristic of gender reassignment.

For the purposes of this guidance, a pupil who has the protected characteristic of gender reassignment is referred to as a trans pupil. In practice, individuals who do not meet the legal definition of gender reassignment – for example those who are simply exploring their gender identity - may identify as trans. Because protection from discrimination also extends to those perceived to have the protected characteristic of gender reassignment, it is important to guard against discriminating against all pupils, regardless of how they define their gender identity.

What does the Equality Act 2010 prohibit?

The EA 2010 defines four kinds of unlawful behaviour: **direct discrimination**, **indirect discrimination**, **harassment** and **victimisation**. The EA 2010 does not apply to the content of the curriculum.

Direct discrimination occurs when a pupil is treated worse than another pupil because:

- they have a protected characteristic

These examples are provisional pending further discussion and should not be relied on until published

Example A school asks pupils to volunteer to assist at an open day. A trans pupil volunteers but the teacher does not choose them to assist because she is worried that this will give the wrong impression to prospective students and teachers. This could amount to unlawful direct discrimination because of gender reassignment.

- they are wrongly thought to have that protected characteristic (known as perception discrimination)

Example A female pupil has short hair and wears stereotypically male clothing. A supply teacher mistakenly assumes she is trans and jokes about this with another teacher outside the classroom. Some students hear this, causing embarrassment to the pupil in front of some of her classmates. This could amount to unlawful perception discrimination because of gender reassignment.

- they are connected to someone with that protected characteristic, for example family or friends (known as association discrimination)

Example A pupil does an assignment about their father who is trans. The teacher tells them it is not a suitable subject, making the pupil feel they have done something wrong. This could amount to unlawful association discrimination because of gender reassignment.

Direct discrimination is always unlawful unless a specific exception, such as the exception for single-sex schools, applies.³ This guidance covers the single-sex schools exception and the communal accommodation exception on **p. X**.

Indirect discrimination occurs when a provision, criterion or practice is applied in the same way, for all pupils or a pupil group, but has the effect of putting pupils

sharing a protected characteristic at a particular disadvantage. It does not matter that the school did not intend to disadvantage the pupils.

‘Disadvantage’ is a very broad term and can take many different forms. In the school context, it could include the denial of an opportunity or a choice open to other pupils, or exclusion from activities.

‘Provision’, ‘criterion’ or ‘practice’ include:

- school policies
- the way that education, or access to any benefit, service or facility, is offered or provided
- one-off decisions
- directions to do something in a particular way.

Indirect discrimination is unlawful unless it can be shown that the treatment or practice is justified as a proportionate means of achieving a legitimate aim. To be legitimate, the aim of the provision, criterion or practice must represent a real need that is not discriminatory. Legitimate aims might include maintaining academic or other standards or ensuring the health, safety and welfare of pupils.

Even if the aim is legitimate, the provision, criterion or practice must be proportionate, meaning it is appropriate and necessary to achieving the aim. If there are alternative ways of achieving the aim that have less, or no, discriminatory effects, the treatment or practice is unlikely to be proportionate.

Schools need to balance their often limited resources against a variety of competing needs. Cost can be taken into account as part of the justification for implementation of a particular provision, criterion or practice, if there are other good reasons for adopting it. However, financial cost alone cannot be a justification for failing to take alternative steps that could have avoided or minimised the discriminatory effect on a certain group or individual. The more serious the disadvantage caused by the discriminatory provision, criterion or practice, the higher the threshold for justifying it. Schools should take care when applying blanket policies and consider whether an exception can be made to reduce disadvantage.

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Example: A secondary school has a policy of dividing pupils on the basis of sex for Personal and Social Education (PSE) classes, as they consider this helps meet the different needs of boys and girls in this subject. A trans girl is placed in the boys’ class because the school thinks the law requires that pupils must be separated by their birth sex for these classes. This would be unlawful

indirect discrimination because of gender reassignment, unless the school can justify applying its policy in these circumstances.

Harassment arises where a person is subject to unwanted behaviour related to a protected characteristic, which has the purpose or effect of:

- violating a person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

'Unwanted' means unwelcome or uninvited. It is not necessary for the person to say that they object to the behaviour for it to be unwanted.

Unwanted behaviour could include spoken or written abuse, offensive emails, comments on social media, images and graffiti, physical gestures and 'banter' that is offensive to the individual.

The EA 2010 does not provide protection against harassment relating to gender reassignment in schools.⁴ However, behaviour relating to gender reassignment that causes a pupil a detriment could amount to direct discrimination.⁵ Schools must therefore ensure that their staff do not harass trans pupils.

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Example A trans pupil has approval for absence from school to attend medical appointments related to her transition. However, a teacher draws attention to this by commenting in front of the class when she arrives late or leaves early for an appointment, causing her to feel upset. While the Equality Act does not protect the pupil from harassment related to gender reassignment, she could bring a claim of direct discrimination as she has been subjected to a detriment that other pupils have not and so has been treated less favourably because of gender reassignment.

Schools are not liable for the actions of third parties, such as other pupils, parents or (unless they are acting as agents of the school) external service providers. However, if the school fails to deal with bullying or harassment relating to gender reassignment by third parties, the school itself may be directly discriminating.

Example A trans pupil at school has been teased by other pupils. Staff have not addressed this because they think the pupil's decision to reassign their gender is not the right choice for them. The school's failure to act could constitute direct discrimination against the trans pupil.

Victimisation means treating someone badly because they have done a 'protected act' or because it is believed they have done or are going to do a protected act. The reason for the treatment does not need to be linked to a protected characteristic.

A protected act is:

- making a claim or complaint of discrimination under the EA 2010
- helping someone else to make a claim by giving evidence or information
- making an allegation that someone has breached the EA 2010
- doing anything else in connection with the EA 2010.

This protection applies to anyone making a claim or allegation of discrimination or helping someone else to do so, for example a parent or friend of a pupil. It is irrelevant whether the protected act relates to an actual act of discrimination, as long as the person doing the protected act genuinely believes that discrimination has taken place.

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Example A trans boy begins to transition in school. While his form teacher agrees to call him by his preferred name and pronoun, she feels uncomfortable around him and ignores his efforts to contribute in class. The pupil makes a complaint about his teacher to the school. His form teacher removes his prefect status as a result of the complaint. This amounts to unlawful victimisation

How does the Equality Act apply to schools?

The responsible body for a school is liable for acts of discrimination, harassment and victimisation carried out by their employees in the course of their employment or by their agents – that is, people who act on the school's behalf. It does not matter whether the school knew about or approved of the acts of discrimination; a school is legally responsible unless it can show that it took all reasonable steps to prevent employees or agents from acting unlawfully.

An employee is personally responsible for their own acts of discrimination, harassment or victimisation carried out during their employment, whether or not their employer is also liable.

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Example A teacher removes a trans pupil from the school's quiz team as she is concerned about reputational impact if a trans pupil represents the school. The teacher will be liable for direct discrimination, and the school may also be liable if it did not take reasonable steps to prevent the teacher from acting unlawfully.

Positive action under the Equality Act 2010

Pupils who share certain protected characteristics may be at a disadvantage for reasons of past or present discrimination. The EA 2010 contains provisions that enable schools to take action to address the particular disadvantage, different needs or disproportionately low participation of a particular pupil group, provided certain conditions are met.⁶

These are known as 'positive action provisions' and allow, but do not require, schools to take proportionate action to remedy the disadvantage experienced by particular groups of pupils. Such action could include targeted provision, more resources or putting in place additional or bespoke provision to benefit a disadvantaged student group.

Positive action is not the same as positive discrimination, which is preferential treatment on the basis of a protected characteristic and is generally unlawful discrimination.⁷

In practice, 'proportionate' means that the need for the action must be balanced against its impact on others, taking into account factors like:

- the seriousness of the disadvantage experienced by the group
- the degree to which the needs of the group are different from the needs of others
- the extent of low participation in a particular activity
- the success or failure of other remedial measures
- whether there are any alternative ways to address the needs or disadvantage or encourage participation which are less likely to disadvantage others.

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Example A school becomes aware of a recent report from an LGBT organisation featuring statistics that demonstrate poor mental health and educational attainment among gender-variant young people. Within the school, a trans pupil has recently stopped attending. The school decides to provide gender-variant pupils with access to a specialised counselling service when they are struggling to maintain attendance at school. This is lawful positive action.

The Public Sector Equality Duty:

All bodies responsible for state-funded schools must meet their obligations under the Public Sector Equality Duty (PSED). The purpose of the PSED is to build equality considerations into decision-making and to drive improvement by identifying the most significant inequalities relevant to a school's responsibilities, setting outcomes in relation to those and implementing targeted plans to improve equality outcomes for affected groups. Such bodies must take into account how pupils with different protected characteristics can be affected in different ways. They must also consider how schools they are responsible for can positively contribute to the advancement of equality of opportunity for, and good relations between, different groups. By complying with the PSED, such bodies will also be better equipped to train staff to prevent, identify and deal with unlawful discrimination within the school environment.

The PSED requires that bodies responsible for schools must have 'due regard' to three needs:

- eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the EA 2010
- advancing equality of opportunity between people who share a relevant protected characteristic and people those who do not
- fostering good relations between people who share a relevant protected characteristic and those who do not.

To 'have due regard' means consciously considering these needs in day-to-day activities. Responsible bodies will also need to meet their specific duties set out in The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

In summary, those regulations require responsible bodies to:

- report on mainstreaming the equality duty
- publish equality outcomes and report progress
- assess and review policies and practices
- gather and use employee information
- publish gender pay gap information (where they have at least 20 employees)
- publish statements on equal pay (where they have at least 20 employees)
- consider award criteria and conditions in relation to public procurement

A responsible body will therefore be required to carry out an Equality Impact Assessment for example when developing new policies and reviewing existing ones, appointing staff, making budgetary decisions and in procurement.

Advancing equality of opportunity involves a school considering whether it could:

- take steps to remove or minimise disadvantage encountered by a particular protected characteristic
- meet the needs of that group where they differ from the needs of others
- encourage certain protected characteristic groups to participate in activities where participation is disproportionately low.

Schools may implement a positive action strategy to advance equality of opportunity.

A school may currently have few or no trans pupils but to comply with the PSED it must still formulate appropriate policies by identifying and balancing the needs of trans pupils and other pupils.

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Example A secondary school is reviewing its current changing room facilities. The school consults with pupils and parents to ensure that they have collected enough information about pupils' needs, including male and female pupils, disabled pupils, pupils with different religious beliefs and trans pupils. Feedback suggests that pupils would prefer the school to have both shared single-sex changing facilities and individual cubicles to allow for increased privacy. The school cannot afford to reconfigure the current changing facilities to provide this. It decides to convert a nearby accessible toilet into a gender neutral private changing room and explains that any student who has a particular need for privacy may use it if they wish. The school also explains that unless there are clear reasons why this would not be appropriate, trans boys and trans girls can use the single-sex facilities that align with their gender identity if they wish to do so. A trans girl pupil opts to use the girls' changing room, and most of her fellow pupils are happy with this arrangement. However, one pupil is uncomfortable with this arrangement, so chooses to use the private changing room instead. The school monitors the impact of having one fewer accessible toilet on disabled pupils and enters the need for a better longer-term solution into its budget planning for the next three years.

For more information, see [our suit of Scottish PSED guidance on the EHRC website](https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-scottish-public-authorities) <https://www.equalityhumanrights.com/en/advice-and-guidance/guidance-scottish-public-authorities>

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Supporting difference

Gender stereotypes are strongly entrenched in most societies and place expectations on how people look and behave and what they aspire to achieve. Many young people experiment with their appearance, behaviour, values and beliefs – this is a normal part of how we develop into adults. Polarised ideas about gender are increasingly being challenged, and it is important that outdated stereotypes do not limit young people's experiences, ambitions, well-being and prospects of success. Schools can help all children move beyond gender stereotypes by allowing different choices and should encourage a culture of acceptance of the differences between individuals.

Not all gender non-conforming feelings and behaviours in children and young people will lead to a young person being transgender as an adult. Teachers should therefore not make assumptions about children being transgender, gay, lesbian or bisexual, if they make choices that are not typical of their gender.

However, some pupils will come to the conclusion that their gender identity does not match their sex recorded at birth. Transitioning to a different gender is a significant decision for anyone. Some pupils may reach out to teachers when exploring their gender identity, while others may only inform their school once their social transition has begun. This can be a difficult situation for teachers to navigate, particularly where a trans pupil is seeking support in confidence, sometimes away from their parents or carers.

As is the case in relation to any pupil with particular needs, the EA 2010 does not require teachers to accept or accommodate all requests involving trans pupils. However, schools must ensure that trans pupils can participate fully in school life. Schools must support all pupils to thrive and achieve their potential. This section looks at key areas of concern for schools and sets out the legal requirements, examples to show how the law might apply and ideas for best practice.

Generally, when issues or concerns arise relating to the trans status of an individual pupil, before decisions are made, schools should engage closely with the pupil and, wherever possible, their parents. Teachers should also consider signposting a range of support including access to school nurses, counsellors, educational psychologists and other professionals. It is important that schools and teachers do not make assumptions about what a pupil may want or need.

In developing or making changes to any policy, all bodies responsible for state-funded schools must comply with the PSED (see p. X). This is a legal requirement when creating or updating policy in relevant areas. Schools must take steps to understand how a policy impacts – both directly and indirectly – on pupils with different protected characteristics.

In this section we consider some of the most common issues that arise in practice. In each case, we set out what is legally required, followed by examples of good practice, to help build an inclusive environment for all pupils.

Please note that we use the terms:

- **must** – where a school has a legal duty
- **can** – where a school has a power (not a duty) under statutory or common law
- **should or could** – for guidance on good practice.

Change of name and pronoun

Schools should understand that a pupil's decision to change their name and pronoun is an important step in their social transition. While a pupil under 18 cannot obtain a Gender Recognition Certificate, they do not have to follow a legal process to start using a new name at school. When a pupil or their parent advise the school that they want to change their name, the school will then change their name on the official administration recording system (SEEMiS). However, they may need to provide evidence of a change of name by recording their change of name with the Registers of Scotland to apply or register for official documents in their new name or to change their name on existing documents such as their passport or driving license. A pupil aged 16 and over can record their change of name without parental consent. Pupils under 16 would need to have either parental consent or a court order to change their name.

Discriminatory treatment such as persistent and continued use of the wrong name and pronoun should be distinguished from a slip made when changes have just been made and a teacher is still adjusting to the pupil's new name and pronoun. When developing or amending a policy on the change or use of names and pronouns, schools must consider carefully the reasons for any policy.

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There is nothing in law that prevents any child from being known at school by a different name from that given to them at birth. If a school does not change the name and pronouns they use to refer to a pupil after discussing the request with them (and where possible their parents) or make legitimate attempts to do so, it would amount to direct discrimination if similar changes unrelated to gender reassignment are made for other pupils. A general policy of not changing pupils' names could amount to indirect gender reassignment discrimination unless it was justified.

Example A school uses the forenames affirmed by pupils even though these may be different from those recorded on the school register. However, it refuses to use names that involve a change from a female to a male name and vice versa. This is direct discrimination because of gender reassignment.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices.

- Staff should approach requests by pupils of all gender identities to change their name and / or pronoun by engaging with the pupil to understand the nature of and basis for the request. Changes to the school records will affect the reference to the pupil on internal and external documentation, so schools should endeavour to discuss the request with both the pupil and their parents to explore the implications of the name and / or pronoun change, and to understand what other support may be needed.
- Although a pupil may not have formal evidence of a name change, this does not prevent a school from recognising a pupil's new name. The support organisations listed at the end of this guidance are able to provide more information on name change for children.
- If a pupil has legally changed their name, then the school must use the pupil's new name and relevant pronouns
- Pupils should be reassured that staff will be updated and trained but that occasional and genuine slip-ups may happen, particularly in the early stages of effecting the change.
- Schools should make staff aware of the changes and the need to be consistent in using pupils' affirmed names and pronouns, refreshing training as appropriate. This should include support staff and supply teachers.

- A pupil's sex should not be recorded where it is irrelevant – for example, on a pupil's exam schedule.
- Concerns about repeated or deliberate use of a previous name or pronoun should be investigated and appropriate steps taken to address the issue.
- Requests for changes of pronouns and names to reflect non-binary gender identity should be treated like any other name change, creating an inclusive school environment for all pupils.
- Schools should update and reissue school documents and certificates in the pupil's new name where possible.
- When required, a strategy should be agreed with the pupil (and, where appropriate, the pupil's parents) for presenting information in an agreed form for examination board registration and certification of results. When required, the examination officer should contact the SQA to discuss their processes for registration and issue of exam certificates in the pupil's new name without disclosing the pupil's gender history. The SQA should be contacted to discuss making changes to certificates already issued, and the examination officer should assist the pupil do so where the pupil is still at the school.
- Where possible, schools should ensure that the name and information concerning a pupil's gender reflects the pupils' wishes on all data being shared with third parties.
- Schools should refer to relevant Scottish Government guidance to ensure changes are correctly reflected on SEEMiS and adequate record keeping is maintained.

Uniforms

There is no legislation that deals with school uniform and so it is up to the school to decide its own policies. In formulating a uniform policy a school must consider potential discriminatory impacts that may arise on the grounds of race, sex, disability, sexual orientation, religion and belief, gender reassignment, or pregnancy and maternity. The policy may include rules, such as on hair length or wearing jewellery, as long as they don't discriminate against certain pupils. This means that rules must not disadvantage pupils with different protected characteristics, including trans pupils, unless there's a legitimate reason for a particular rule and it can be justified.

In developing a uniform policy, or when making changes to it, relevant schools must comply with the PSED (if it applies to them) by considering carefully the reasons for any policy.

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Example A school consults with staff, pupils and parents about its uniform policy and consequently decides to extend the range of approved sports uniform to allow netball skirts or tracksuit bottoms for all pupils. The policy respects the needs of trans pupils, faith groups and gender non-conforming pupils and fosters an inclusive school environment.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices.

- Schools should consult with staff, pupils and parents to gain an understanding of any barriers and adverse impacts of school uniform to develop a policy that is inclusive of all pupils.
- Schools should consider reasonable requests for flexibility in the uniform for an individual pupil to accommodate particular social and cultural circumstances. Bodies responsible for state funded schools should have due regard to the needs of the PSED when considering a request or changing a policy and should complete an Equality Impact Assessment.
- Pupils may use clothing to express themselves or explore their identity. Schools should not make assumptions about children being transgender if they make uniform choices that are not typical of their gender.
- It is advisable to set out and keep records of the evidence taken into account, what adverse impacts were identified and what consideration was given to mitigating those. It is good practice to monitor and evaluate the policy regularly.
- Schools should set out the objectives and rationale behind their uniform policy or changes to it.
- Schools should consider adopting a uniform policy that simply lists the approved items of clothing by type for all pupils, leaving it open for pupils to

choose which item they feel most comfortable wearing, creating an inclusive school environment for pupils of all gender identities. This can also be beneficial for pupils with other protected characteristics, such as those from particular faith groups or with certain physical impairments who may have practical or religious reasons for making a different choice.

Participation in sport and physical education

Single-sex competitive sporting events or activities are lawful when physical strength, stamina or physique would give members of one sex an advantage as a competitor. Other than competitive sports, the EA 2010 does not permit schools to exclude trans pupils from participating in single-sex sport, such as team training or physical education (PE) lessons. A blanket policy of always excluding trans pupils from participating in a single-sex sporting activity based on their gender identity would be discriminatory.

The EA 2010 allows schools to exclude trans pupils from competitive sport if this is necessary to maintain fair competition or the safety of competitors.⁸ If considering excluding a trans pupil as a competitor, schools should consider on a case-by-case basis objective evidence about whether inclusion would result in unfair competition. If schools rely on assumptions and stereotypes this could amount to direct discrimination. The school is legally required to take into account the age and stage of physical development of the pupils when assessing fairness and safety.

When formulating or changing policy on PE lessons, the school must have due regard to the needs of the PSED and complete an Equality Impact Assessment.

These examples are provisional pending further discussion and should not be relied on until published

Example A school selects a girls' athletics team to represent it at a regional competition. A trans girl wishes to compete. The school decides this could be an activity where the trans pupil is at a physical advantage so consults with the relevant sporting governing bodies when assessing whether her strength gives her an unfair advantage as a competitor. After careful consideration of the fairness to other competitors and whether there were other alternatives to enable the pupil to compete, the school decides that she would have an advantage and it would be unfair for her to participate as a competitor. However, she is invited to participate during team practice. This would not be discriminating against the pupil.

Example: A secondary school reviews its current policy on providing single-sex PE lessons. It considers its duty to eliminate discrimination and foster good relations between all pupils, taking into account the potential needs of and impact on students with different protected characteristics. It consults with the relevant governing bodies of sport to identify appropriate sporting activity which could be modified to enable the school to provide mixed-sex PE lessons and competitive team sports. After consultation with parents and students, the school makes most PE lessons mixed-sex. It maintains single-sex competitive sports lessons for rugby, cricket, netball and hockey, but it introduces a flexible approach to the policy to enable any pupil to make a reasonable request to participate in their preferred sport.

Example A trans girl at a primary school had participated in gymnastics before she transitioned. She wishes to compete for the girls' gymnastics team at an inter-regional event. The school refuses to allow her to compete, assuming that as a trans girl she will have a competitive advantage. They do not take account of her physical strength or age, nor do they take any steps to test this assumption by looking at the age and development stage of the children who are likely to be competitors. This decision would be unlawful gender reassignment discrimination as the school has failed to consider whether this was an activity where it was necessary to exclude the trans girl to secure a fair competition or for the safety of the competitors.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices.

- When competing on other premises, schools should enquire about the adequacy of the facilities for its pupils (both participants and supporters). It should discuss arrangements with pupils beforehand to ensure adequate and satisfactory preparations are in place at the host school to facilitate the pupil's involvement. Where arrangements at a host venue are not adequate, the school must consider the discriminatory impact arising from the decision to continue with the activity and balance the needs of all pupils attending to find an appropriate, evidence-informed way forward. This may include giving a pupil a choice to attend. However, it is best practice to discuss this with the pupil, and where possible their parents, to find a solution and not to proceed on assumptions.

- When organising events in which pupils are participating in competitive sport, schools should consult the relevant sporting association rules to establish if there is any specific guidance on the issue, or contact their national governing sports body for more information.
- Schools should consider ways of enabling all pupils to participate in sports, including competitive events that align with their gender identity.

Toilets, showers and changing rooms

The EA 2010 prohibits a school from discriminating in the way it provides access to services, benefits and facilities. This includes toilets, showers and changing rooms. The law on the provision of these services for trans pupils by schools has not been considered by the courts in Great Britain.

The EA 2010 does not explicitly make provision for separate changing facilities or toilets for girls and boys in schools.

However, schools must comply with the School Premises (General Requirements and Standards) (Scotland) Regulations 1967, which provide that in every school which is not designed exclusively for girls, half the toilet accommodation should be for boys; and the EA 2010 when developing policy on the use of toilets by trans pupils. There is nothing in law preventing schools taking an inclusive approach by supporting trans pupils to use single-sex facilities that align with their gender identity, unless such an approach puts another pupil at a detriment. If a school adopts a policy that all pupils must use the facilities of the sex that was recorded at birth, they should be aware that this could amount to indirect discrimination against a trans pupil so they must show in each case that the decision is a proportionate means of achieving a legitimate aim. The justification for the policy must take into account the school's specific characteristics and the particular children's circumstances to balance carefully the needs of different groups of pupils, and include consideration of whether a less discriminatory approach, such as providing gender neutral or private facilities, is feasible. Schools must always consider making exceptions to their policies in individual cases.

In line with their PSED obligations, when developing or updating a policy about access to single-sex facilities and the provision of gender neutral options, schools must consider any disadvantage or adverse impact and identify, where possible, alternatives to address those and avoid any discriminatory effect on different groups and individuals with protected characteristics. While accessible toilets in schools can be used by non-disabled users, schools must always ensure that if they are also

used as gender neutral facilities there are no negative consequences for disabled pupils. To assist with compliance, schools should consult all pupils so that they fully understand the impacts of their policies.

These examples are provisional pending further discussion and should not be relied on until published

Example A school has no policy on the use of single-sex facilities so it consults with all pupils to develop one. The consultation reveals a number of concerns from girls about sharing single-sex facilities with trans pupils due to a wish for privacy, in some cases because of religious beliefs. A few concerns are also raised about the use of the limited number of accessible toilets by non-disabled students. The school decides to adapt one of the single-sex blocks of toilets in the main school building into gender neutral facilities for use by all pupils, balancing the concerns against the needs of all pupils.

Example A state funded primary school decides to have a policy about access to its single-sex toilets and its changing facilities for pupils. The school consults pupils and parents, which reveals girls in years 5 and 6 have requested more privacy when changing. The school decides to re-designate one girls' block and one boys' block of toilets near the playground to unisex. Each toilet is already in an individual, internally locking cubicle. The school puts up posters to explain which toilets are unisex. To meet the girls' need for privacy, the school allows pupils in years 5 and 6 to request to change for PE lessons in a toilet cubicle in the unisex block. The school must demonstrate that it has met its PSED obligations and its policy has a legitimate aim that will not discriminate against pupils with certain protected characteristics, or that appropriate steps have been taken to minimise any discriminatory impact on these pupils.

Example A pupil tells their teacher that they are uncomfortable with being either a stereotypical girl or boy and don't know how to fit in at school as a consequence. The pupil expresses reservations about sharing toilets or changing facilities with boys or girls and wants more privacy. The teacher explains that they have gender neutral toilets next to the staffroom, IT suite and in the PE block that can be used by all pupils. Each cubicle has its own wash basin and sanitary facilities. The teacher also explains that students may request to use these facilities as changing rooms if required. In view of the pupil's concerns, the school increases awareness about the availability and location of all toilets in the school.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices.

- All gender-neutral toilets cubicles should have sanitary waste facilities. Schools should engage with national and / or local support organisations when considering new policies, or changes to existing policies.
- Where requests are made to vary school policy, assumptions should not be made about what the pupil wants. Staff should discuss with the pupil and, when appropriate, their parents and carers, what their views and needs are when using changing rooms and toilets.
- Where current school policy does not meet the needs of a pupil, alternatives to accommodate their needs should be explored – for example, curtained-off changing areas, use of different facilities such as a nearby office, or allowing the pupil to change at a separate time to other pupils.
- Where gender neutral and single-stall toilets, showers and changing rooms are provided as an additional inclusive option, they should be to the same standard as other facilities.

Trips and shared accommodation

It is unlawful for schools to discriminate in how they facilitate trips and arrange shared accommodation. Exclusion of trans pupils from day trips or extracurricular activities because of gender reassignment will be directly discriminatory.

In respect of shared accommodation, the EA 2010 permits schools to arrange single-sex communal accommodation (including linked facilities such as toilets and showers) for reasons of privacy. Schools can lawfully take an inclusive approach to generally accommodate trans pupils in single-sex communal accommodation that aligns with their gender identity. While there may be occasions where a school identifies a need for a trans pupil not to share single-sex communal accommodation that aligns with their gender identity, or their sex recorded at birth before deciding on sleeping arrangements schools must consider whether the exclusion or separation of a trans pupil is justified as being a proportionate means of achieving a legitimate aim.⁹

In line with their PSED obligations, and when developing a policy about the school's approach to communal accommodation that meets the needs of pupils with different protected characteristics, schools must consider any potential disadvantage or

adverse impact and identify alternatives where possible. To assist schools to develop a non-discriminatory policy, they should consult pupils about their needs when on school residential trips.

Schools may be required to have regard to other relevant guidance such the Scottish Government *Registration of independent schools in Scotland: guidance* which contains information guidance notes for proprietors of new and existing independent schools including boarding schools.

These examples are provisional pending further discussion and should not be relied on until published

Example A group of pupils go on a school trip to an outdoor activities centre. Shared tents are usually used by participants. A trans girl wishes to stay in a single tent. The school considers the age group, privacy risks from sharing tents and the lack of awareness that the pupil is trans. It confirms with the activity centre that there are enough single tents for all the pupils and that they can be positioned close to the staff block. This has cubicle toilets and individual shower facilities which the pupil can use. The trans pupil is satisfied that her trans status will not be disclosed by the arrangements.

Example: A school is arranging a trip to France. A trans boy pupil wants to share accommodation with his three male friends. He agrees for the school to speak to his mother, who is supportive of his request, and to his friends and their parents, who confirm they are happy to share the dorm but some feel uncomfortable changing and showering with no privacy. The school proposes that the trans pupil can sleep in a dorm with his three friends and use the linked toilet cubicles during bed time but must use the separate toilet, changing and shower facilities at all other times. All pupils are satisfied that their needs are met by the arrangement.

Example A group of pupils go on a school trip to Moscow. A trans boy pupil wishes to sleep in a shared room with his male friends. The school considers the relevant factors, including serious bullying by other pupils which has continued in spite of their efforts to address it, the views of other pupils and parents who are concerned about privacy and the fact the group are travelling to a country that is not LGBT-friendly. The school decides, given the safety and privacy issues involved, to provide a single room for the pupil and allow him to use the private staff toilet and shower.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices.

- When organising residential trips, schools should assess the needs of all pupils attending to make appropriate arrangements and avoid disadvantage to any pupil. Schools should make assessments in a consistent way across all protected characteristics. To avoid discrimination, schools should take a case-by-case approach to requests from trans pupils for communal accommodation.
- Where requests to vary school policy are made, staff should not make stereotypical assumptions about what the pupil wants but discuss with the pupil and where appropriate parents, what their needs are. Schools should explore options to accommodate these needs and balance this with the needs of other pupils. Schools should be proactive in seeking to meet the needs of and include all pupils, including non-binary and gender-questioning pupils.
- When visiting other countries, schools should carry out research to ensure that pupils and staff are not exposed to risk of harm. In some countries it is illegal to be a part of the transgender community and in others it is an offence not to report a transgender person to the authorities.¹⁰
- Staff should consider in advance whether there may be searches or identity checks during the trip and what steps can be taken to ensure that trans pupils are not disadvantaged.
- Schools should ensure that any venue visited has toilets, showers and changing facilities that are suitable for all pupils, and check the venue's policy on the use of communal single-sex facilities.
- Boarding schools should discuss with trans pupils how they would like to be accommodated and consider carefully what is in the best interests of all pupils. They may need to consider allocating a single room to trans pupils to ensure adequate privacy for all pupils.
- Where there is an additional cost to providing facilities for trans pupils, for example a single room instead of a shared room, the school should consider meeting the cost and justifying it on the basis of positive action.

Vaccinations

The EA 2010 does not expressly deal with vaccinations. However, schools must not discriminate in the way they provide vaccinations available to pupils.

Sex and age may determine eligibility for specific vaccination, and this may change over time. For example, the government has recently extended the vaccine for human papillomavirus (HPV) to boys as well as girls. A school must not discriminate against a trans pupil by not providing a service to them if they meet the eligibility requirements. When developing or updating a vaccination policy, schools must have due regard to the potential impact of providing the service.

The school must ensure that a trans pupil is not discriminated against when arrangements are made for the vaccination.

These examples are provisional pending further discussion and should not be relied on until published

Example A school is arranging to provide vaccinations for girls in accordance with government health advice. In making the arrangements, the school must ensure that trans boys are not excluded from receiving the vaccination – for example, missing them because their gender and name have been updated on the register.

Example A school is arranging to provide vaccinations for girls in accordance with government health advice. The school should not give the vaccination to a trans girl but should make suitable arrangements so that, if her birth sex is not widely known, it is not inadvertently revealed because she does not get the vaccination at the same time as other girls.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices:

- Trans pupils should not be required to join single-sex queues for vaccinations as this may make them uncomfortable or disclose their birth sex to other pupils.

- Schools should discuss arrangements with trans pupils and take steps to accommodate their needs, for example to be vaccinated before or after other pupils, or alternatively at their GP's surgery.

Work experience placements

There are no specific legal requirements in the EA 2010 concerning schools' responsibilities for work experience placements. However, where schools encourage participation in work experience, schools must not discriminate against a pupil by treating them less favourably because they are, or are perceived as being, trans.

Compliance with the PSED will ensure that work experience placement policies contribute to the elimination of discrimination, advance equality of opportunity, and foster good relations between pupils with different protected characteristics.

These examples are provisional pending further discussion and should not be relied on until published

Example A school sixth-year coordinator reviews the school's work placement scheme for pupils in sixth year to ensure he is satisfied that all employers are aware of their responsibilities under the EA 2010. He knows that some of the employers in the scheme require Disclosure Scotland checks for pupils attending on work placement. He holds a short training session with teachers where he explains Disclosure Scotland process for trans applicants, which gives transgender applicants the choice not to have any gender or name information disclosed on their certificate that could reveal their previous identity. He asks teachers to ensure they discuss this process with trans pupils so they can use it if they wish to.¹¹ He also revises the work placement guidance to include this information.

Good practice tips

To foster an inclusive environment that respects the needs of all pupils, including those who are questioning their gender identity or who are trans, schools should consider the following good practices.

- Discuss the options available with trans pupils and explore any concerns or worries the pupil may have. Staff should discuss with the pupil what support they may need while on placement and how information should be dealt with to meet any legal requirements or confidentiality obligations.
- Schools should ensure that employers are aware of their obligations under the EA 2010 and should carry out any risk assessment for placements in an

appropriate way across all protected characteristics.

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Single-sex schools

The EA 2010 permits single-sex schools.¹² Mixed-sex boarding schools are also permitted to restrict admission as a boarder to pupils of a particular sex. However, a single-sex school is permitted to admit pupils of another sex in certain circumstances without losing their single-sex status.¹³

A refusal to admit a trans pupil to a single-sex school which is the same as the trans pupil's sex recorded at birth would be direct sex discrimination. Admitting such a pupil will not affect the school's single-sex status. A pupil who has transitioned, or wants to, must be allowed to continue to attend the school; to remove them would amount to direct gender reassignment discrimination.

An admission policy of only admitting pupils in accordance with their sex recorded at birth would particularly disadvantage trans pupils, and would be indirectly discriminatory against trans pupils, unless it could be demonstrated to be a proportionate means of achieving a legitimate aim.

Bodies responsible for state-funded schools must comply with the PSED when developing an admissions policy, regardless of whether it is a single-sex school. Schools must take steps to understand how the policy and admissions criteria impact on pupils with different protected characteristics and consider how it can:

- eliminate discrimination and other conduct that is prohibited by the Equality Act
- advance equality of opportunity between people who share a protected characteristic and people who do not share it
- foster good relations across all characteristics – between people who share a protected characteristic and people who do not share it.

These examples are provisional pending further discussion and should not be relied on until published

Example A trans pupil seeks admission to a single-sex school that matches their gender identity, not their sex recorded at birth. The school refuses to admit the trans pupil on the basis that it is a single-sex school in accordance with the EA 2010 and its admissions policy reflects this. The school is likely to be discriminating against the trans pupil unless it can demonstrate its decision is a proportionate means of achieving a legitimate aim.

Good practice tips

- To meet the needs of and avoid disadvantage to trans pupils, schools should take a case-by-case approach to admission requests by trans pupils.
- It is advisable to set out and keep records of the evidence taken into account, what impact on protected characteristics was identified and what consideration was given to mitigate the impact.
- When adopting an admissions policy, schools may wish to set out the objectives and rationale for the policy.
- It is good practice to monitor and evaluate an admissions policy regularly.

External support organisations

Below is a list of organisations that may provide further support and information to school educators, parents and pupils on building an inclusive school environment. This is a guide on the type of support available and the Equality and Human Rights Commission does not verify or endorse content by any external organisation unless expressly stated otherwise.

Equality Network
Scottish Trans Alliance
Stonewall Scotland

Glossary

This guidance focuses on the protection provided by the EA 2010. Terminology can evolve but the key terms used at the time of publication that are relevant to schools considering their obligations under the EA 2010 are:

Sex A protected characteristic under the EA 2010, protecting individuals from being discriminated against or harassed because of sex. In UK law, 'sex' is understood as binary – male or female – with a person's legal sex determined by the sex recorded on their birth certificate. A trans person aged 18 years or over can change their legal sex by obtaining a Gender Recognition Certificate (GRC).¹⁴ A trans person who does not have a GRC retains the sex recorded on their birth certificate for legal purposes. The Equality Act 2010 permits an inclusive approach of treating trans people according to their gender identity, although it also makes provision allowing them to be excluded from single-sex services in limited circumstances.

Gender Socially constructed characteristics generally associated with women and men. These vary in different societies and can change over time. Individuals are taught socially appropriate norms and behaviours, usually according to their sex as recorded at birth, as they grow up. The term 'gender' is often used interchangeably with 'sex'. However, someone's legal sex does not necessarily determine their gender.

Gender identity An individual's self-conception of their gender, which may not align with the sex recorded at birth. This may be expressed in a variety of ways, such as a masculine or feminine (binary identities), non-binary, gender fluid or non-gendered identities. When individuals or groups do not 'fit' established gender norms they often face stigma, discrimination or social exclusion. It is therefore important to be sensitive to different gender identities that do not necessarily align with an individual's sex or fit into binary male or female categories.

Affirmed gender A term used to refer to the gender that a trans person presents to the world and which does not align with the sex recorded at birth.

Gender reassignment A protected characteristic under the EA 2010, providing individuals with protection from being discriminated against or harassed because they are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex. No legal or medical process is required, nor is there an age threshold to meet the definition of gender reassignment. Protection from discrimination also extends to those treated less favourably because they are perceived to have, or are associated with, the protected characteristic of gender reassignment. Protection from gender reassignment discrimination exists irrespective of the sex of the person.

Non-binary: An umbrella term for a range of gender identities whereby a person's gender identity is neither solely male nor female.

School An educational institution for providing primary and / or secondary education, whether or not the institution also provides further education.

Parent This includes biological parents and non-biological parents who have parental responsibility or care for a child. A person typically has care of a child or young person if they are the person with whom the child lives, either full or part time, and who looks after the child, irrespective of their biological or legal relationship to the child.

Protected characteristic A term used in the EA 2010 to describe the characteristics that people have in relation to which they are protected from

discrimination. Under the EA 2010, there are nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.

Trans / transgender Terms used to describe a person whose gender identity does not align with the sex assigned to them at birth. It can also include someone who does not identify as male or female (**non-binary**) or someone who is outside any gender definition (non-gender). Both terms cover many different identities, but 'trans' can be perceived as broader, and therefore more inclusive, than 'transgender.' In this guidance we use the term 'trans' to refer to a person with the protected characteristic of **gender reassignment**.

Trans girl A child whose sex was recorded as male at birth but who identifies and lives as a girl.

Trans boy A child whose sex was recorded as female at birth but who identifies and lives as a boy.

Transitioning The steps a trans person may take to live in the gender with which they identify. The process of transitioning is unique to the individual and covers a range of changes, which can include some or all of the following: name change; change of pronoun; change in dress; change in behaviours; investigating and starting hormonal therapy. These changes can occur throughout a child's school life. Protection from gender reassignment discrimination starts when the child proposes to make changes and continues after changes have been made, irrespective of whether there are any new or additional changes in the future.

Transsexual The term used in the EA 2010 to describe someone who has the protected characteristic of gender reassignment. Transsexual is now generally considered to be an outdated term and is not used by most trans people. Please see definition of **trans / transgender** for more information.

¹ For information about the trans population see page 14 of the LGBT survey:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721704/LGBT-survey-research-report.pdf

² Seven of the nine protected characteristics in the EA 2010, namely disability, gender reassignment, race, religion or belief, sex, sexual orientation, and pregnancy and maternity, apply to education in schools. Age, and marriage and civil partnership do not.

³ Relevant exceptions in relation to schools are set out in the EA 2010, Schedule 11. General exceptions are in Schedule 23.

⁴ The harassment provisions are also not applicable to the protected characteristics of sexual orientation or religion or belief, in the school context.

⁵ Schools should be aware that legal protection from harassment also exists under the Protection from Harassment Act 1997.

⁶ Part 11 Chapter 2 Equality Act 2010

⁷ Not undergoing gender reassignment isn't a protected characteristic, so it's not unlawful to treat trans pupils more favourably, although schools should consider good relations.

⁸ See section 195 of the EA 2010.

⁹ [Para 3 of Schedule 23 of the EA 2010](#)

¹⁰ Schools should check FCO travel advice before travel <https://www.gov.uk/foreign-travel-advice>
The ILGA Trans Mapping Report may also be useful:
https://ilga.org/downloads/ILGA_Trans_Legal_Mapping_Report_2017_ENG.pdf

¹² [Schedule 11 Part 1 Equality Act 2010](#)

¹³ [Schedule 11 para 1\(3\) Equality Act 2010](#)

¹⁴ <https://www.mygov.scot/transgender-disclosure-application/>