

# Children's Rights Impact Assessment



Women and Girls in Scotland

## Foreword

Women and Girls in Scotland is a grassroots, feminist, women's campaign group set up to protect the sex-based rights of women and girls. Current UK equality legislation recognises that women and girls need legal protections on the basis of sex. However, these protections are in danger of being undermined by current policies and proposed legislative changes. As such, we are undertaking a process of reviewing policies and proposals in order to identify where the needs of women and girls are not being met or where their rights are not being upheld.

We identified the document *Supporting Transgender Young People: Guidance for Schools in Scotland* as one such proposal that merited review. We have assessed this proposal using a children's rights-based approach, with an impact assessment model developed by the Children and Young People's Commissioner Scotland. This model was developed to offer policy and decision makers a tool to help them "*fulfil their responsibilities to respect the rights of children and young people set out in national and international law*".<sup>1</sup>

We are currently waiting for a formal response from the CYPCS in relation to our Children's Rights Impact Assessment. This version has been submitted to the CYPCS; we have removed the few sections where we did not make a submission. We may update this Children's Rights Impact Assessment once we have heard back from the CYPCS, at which time we will also issue our assessment as a report that we will then move to share with schools, local authorities and other stakeholders.

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<sup>1</sup> [https://www.cypcs.org.uk/uploaded\\_docs/children's%20rights%20impact%20assessment.pdf](https://www.cypcs.org.uk/uploaded_docs/children's%20rights%20impact%20assessment.pdf)

# Children’s Rights Impact Assessment

When completing an assessment please refer to *Children’s Rights Impact Assessment: the SCCYP model, section 2.3*

<b>1. Identify</b> <i>Name of proposal</i>	
“Supporting Transgender Young People: Guidance for Schools in Scotland”  (Throughout this Children’s Rights Impact Assessment, the proposal will be referred to as <i>the guidance</i> and quotes from this guidance will be used throughout this assessment, with page numbers cited.)	
<b>2. Map</b> <i>Describing what is proposed, its consequences and goals</i>	
2.1. What is being proposed?  This guidance is aimed at primary and secondary schools in Scotland, in order to help them support transgender children and young people. It is vital that transgender young people receive appropriate support given some of the statistics surrounding their wellbeing, such as for example the fact that 96% of transgender young people have experienced mental health problems. <sup>1</sup>  However, it is imperative that schools consider how to best meet the needs of <i>all</i> young people in their care, and to balance sometimes competing needs without prejudice to any group of young people. There are several aspects in the guidance that may have a negative impact on other groups of children and young people who are not transgender, and who are therefore outside the remit of the guidance, as acknowledged in its aim. These are detailed below.  <ul style="list-style-type: none"><li>• The guidance recommends that transgender young people be allowed to use the toilets and changing facilities that they are most comfortable with. This means that male-bodied young people could be sharing intimate spaces with female young people, potentially compromising their right to privacy and dignity.</li></ul>	<input type="checkbox"/> Policy <input type="checkbox"/> Programme <input checked="" type="checkbox"/> Guidance <input type="checkbox"/> Other <input type="checkbox"/> Existing <input type="checkbox"/> New

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*"It is ... important that trans young people are able to use the facilities they feel most comfortable with."*

(p. 17)

*"Respect a young person's gender identity and the facilities they want to use"* (p. 17)

*"Not banning them from using any particular facilities"* (p. 17)

*"Support the transgender young person to use the toilet facilities they feel most comfortable with"*

(p. 53)

- The guidelines recommend that transgender young people be allowed to compete in their sporting category of choice, so male-bodied young people should be allowed to compete with female young people. The guidance makes no mention of any fairness or safety implications this may have.

*"If school competitions or classes are organised by gender, a transgender young person should be allowed to compete in the category which matches their gender identity. For a non-binary young person, check which group they would feel most comfortable being with"* (p. 20)

*"For inter-school competitions not governed by national sports bodies, the same standards should apply. It may be helpful to a young person if you speak to the equivalent staff in the other school(s) to let them know there is a trans learner in your team/competition, but only with the young person's consent"* (p. 20)

- The guidance does not acknowledge any objections that young people or their parent(s)/carer(s) may have to sharing facilities with a transgender young person, other than suggesting their objections may be

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a result of 'misconceptions' and framing them as antithetical to inclusion, equality and respect. The use of the word "respect' is particularly concerning, as it implies that the healthy boundaries girls may have around who sees them undressed could be considered "disrespectful".

*"If parents of other children voice concerns about their child sharing toilets and/or changing rooms with a trans learner, they should be reminded of the school's ethos of inclusion, equality and respect."* (p. 17)

*"If other young people, or their parent(s)/carer(s), express concerns about sharing toilets or changing rooms with a transgender young person, it can be because they think that the trans young person will behave inappropriately. In this instance, schools should dispel any misconceptions: a trans young person's presence does not constitute inappropriate behaviour"* (p. 18)

- The guidance recommends that transgender young people should be allowed to share overnight accommodation with young people of the opposite sex, without due regard given to the views of those young people, and also recommends that their parents do not need to be informed of this.

*"If a transgender young person wants to share a room with other young people who share their gender identity, they should be able to do so"* (p. 21)

*"If a transgender young person is sharing a room with their peers, there is no reason for parents or carers of the other young people to be informed"* (p. 21)

- As can be seen, the goal of the guidance is to ensure the transgender young person feels

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comfortable in the learning environment:

*"It is ... important that trans young people are able to use the facilities they feel most comfortable with. (p. 17) and "Support the transgender young person to use the toilet facilities they feel most comfortable with" (p. 53).*

However, the guidance also recognises that by adopting the recommended measures to ensure the transgender young person's comfort, discomfort among other learners is likely to be an outcome.

*"When considering safety concerns for both transgender young people and all learners, it is useful to distinguish between what feels uncomfortable and what is unsafe." (p. 18)*

*"If a learner feels uncomfortable sharing facilities with a transgender young person, they can be allowed to use a private facility such as an accessible toilet, or to get changed after the trans young person is done. A transgender young person should not be forced to use alternative facilities simply to make other young people feel more comfortable" (p. 18)*

- While it states that being transgender is not a child protection concern, the guidance suggests that parents will need to come to terms with a child's chosen gender identity, and if they are struggling to do this, then the local authority could be approached.

*"Being transgender is not a child protection or wellbeing concern" (p. 8)*

*"If parents/carers are struggling to come to terms with their child's identity, teachers should make sure, that there is a plan to support the young person in school. It may also be useful to approach the local authority for additional guidance." (p. 24)*

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<ul style="list-style-type: none"><li>• The guidance recommends confidentiality be maintained when a child discloses that they may be transgender.</li></ul> <p><i>"If a child in the school says that they want to live as a different gender, it is important to provide support and listen to what they are saying. Teachers and schools should be confident in discussing this with the child and, with the child's consent, their family."</i> (p. 10, in relation to primary aged children)</p> <p><i>"A transgender young person may not have told their family about their gender identity. Inadvertent disclosure could cause needless stress for the young person or could put them at risk. Therefore, it is best to not disclose information to parents or carers without the young person's permission."</i> (p. 23)</p>	
<p>2.2. What is the aim, objective or purpose of the proposal?</p> <p>The guidance states that it <i>"aims to help primary and secondary education staff in Scotland support transgender children and young people. It is based on the experiences of transgender young people"</i> (p. 8)</p>	
<p>2.3. Who initiated the proposal?</p> <p>The guidelines were developed by LGBT Youth Scotland, working closely with Scottish Trans Alliance.</p>	
<p>2.4. Who will be responsible for implementing the proposal?</p> <p>Individual Primary and Secondary schools</p>	
<p>2.5. What is the legal, policy and practice context of the proposal?</p> <p>The guidance mentions case law in support of transgender young people using their chosen facilities and advises that certain situations may be "unlawful".</p> <p><i>"Schools should ... not refuse to let a trans young person use a facility. This could be viewed as unlawful conduct"</i> (p. 53)</p>	

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*"Discrimination case law has established that transgender people who have started living in accordance with their gender identity must not be banned from using the facilities matching their gender identity." (p. 18)*

The Equality Act 2010 legally protects people from discrimination, however it also makes it lawful to discriminate on the basis of sex and gender reassignment in order to protect single-sex spaces, services, roles and activities, as long as it is a proportionate means of achieving a legitimate aim. This part of the law, which makes it legal to make provision for females only (and exclude transgender people even if they identify as women or girls), is generally referred to as the single-sex exceptions.

The Equality Act 2010 is accompanied by explanatory notes, which help to further understand the issues relating to discrimination and the single-sex exceptions. An example below highlights the single-sex exception with regards to transgender people and sport, where the exclusion is proportionate and the aim, of fair and safe competition, is legitimate:

*614: This section allows separate sporting competitions to continue to be organised for men and women where physical strength, stamina or physique are major factors in determining success or failure, and in which one sex is generally at a disadvantage in comparison with the other. It also makes it lawful to restrict participation of transsexual people in such competitions if this is necessary to uphold fair or safe competition, but not otherwise.<sup>2</sup>*

Therefore, when schools are considering which sporting category a transgender young person should be allowed to compete in, it would be legitimate to exclude them from their preferred category if they would have an unfair advantage due to their sex, and therefore their taking part may threaten the fairness or safety of the competition, but not for any other reason.

The guidance, in contrast, states that transgender young people *"should be allowed to compete in the category which matches their gender identity"* (p. 20) and makes no mention of the need to evaluate their inclusion on the basis of fairness and safety for the benefit of **all** young people taking part.

Discrimination case law mirrors the Equality Act; so far it has found that it may be discriminatory to exclude an adult who fulfils the medical criteria to be legally recognised as the opposite sex, if this exclusion is not proportionate or the result of a



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legitimate aim. However, there has been minimal case law in this area involving people who are not legally considered the opposite sex. This is important as most young people automatically fall into this category, not having reached the age of 18 years, which is a requirement when applying for a Gender Recognition Certificate (the legal document which permits the holder to be considered as the opposite sex for most purposes). As well as being at least 18 years old, it is useful to note here that the criteria to obtain a GRC also requires a diagnosis from a medical professional and to have lived in the chosen gender role for a minimum of 2 years.

The comments of HHJ Jeremy Richardson QC in *R (Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin) are pertinent to this issue of discrimination. In this case the Court was dealing with an application by a male prisoner who had murdered his wife and who then wished to be treated as female while in prison. Green did not meet the requirements in order to be legally considered the opposite sex, but was granted the courtesy of being referred to as 'she' by the court. HHJ Richardson stated that:

*"A comparator has to be found in order for there to be discrimination or for the claimant to show she has had less favourable treatment. The claimant asserts the comparator should be a female prisoner; whereas the governor contends it should be a male prisoner. There can be no doubt the claimant has a protected characteristic – gender reassignment. The claimant is, however, male. The only possible comparator is to a male prisoner who is not undergoing gender reassignment ... Frankly, it is almost beyond argument that the only comparator is a male Category B prisoner at HMP Frankland."*<sup>3</sup>

This judgement finds that, where a person has the protected characteristic of gender reassignment but has not legally changed their sex, their comparator class in looking at a discrimination claim is other members of their birth sex who are not proposing reassignment, rather than members of the opposite sex. In other words, when assessing a claim of discrimination, the judge must consider whether this male prisoner has been treated any less fairly than a male prisoner without the characteristic of gender reassignment. The assessment of discrimination does **not** come from looking at whether the male claimant with the protected characteristic of gender reassignment has been treated differently to a female.

The Equality and Human Rights Commission (EHRC) seem to concur with this judgement. The EHRC is responsible for overseeing and enforcing the Equality Act

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and as such, produce written code and guidance in order to assist with the interpretation and application of the law. The EHRC recently released a statement to clarify the legal protections and language with regards to this issue, stating very clearly that “a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions”<sup>4</sup>.

It is imperative, therefore, when schools are assessing how to best manage the inclusion of a transgender young person under 18 years old and thus without a GRC, that they must not treat them any less fairly than the other members of their birth sex who do not share the protected characteristic of gender reassignment.

An example of this might be that a girl who identifies as a boy, and therefore has the protected characteristic of gender reassignment, must not be required to use alternative changing facilities unless this has been specifically requested, otherwise this may be considered gender reassignment discrimination. Young people must be treated in the same way as their peers who share the same birth sex (in this instance, female), unless different treatment comes at their own request. The guidance is also helpful on this aspect, reminding schools to ask themselves:

*If the young person is being treated differently from their peers, is this at their own request?* (p. 18)

This does **not** mean that the school must insist that a female pupil who identifies as a boy must use the female changing facilities. If the transgender young person expresses discomfort about using the facilities for their birth sex, then this should be accommodated by allowing them to use alternative facilities, such as the staff changing room.

The EHRC publication *Technical Guidance for Schools in Scotland*, which was written specifically in order to help schools in Scotland understand their responsibilities under the Equality Act 2010, is relevant here.

According to the EHRC, it may be discriminatory to insist a transgender young person use the facilities of their birth sex, unless this can be objectively justified. From *Technical Guidance for Schools in Scotland*:

**“Example:** A school fails to provide appropriate changing facilities for a transsexual pupil and insists that the pupil uses the boys’ changing room even though she is now

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*living as a girl. This could be indirect gender reassignment discrimination unless it can be objectively justified. A suitable alternative might be to allow the pupil to use private changing facilities, such as the staff changing room or another suitable space.”<sup>5</sup>*

It is important to note here that the Equality and Human Rights Commission do not give **any** consideration to the possibility that this male transgender pupil be allowed to use the female changing room.

The provision recommended by the EHRC in *Technical Guidance for Schools in Scotland* is the use of alternative facilities, such as the staff changing room. The courts have said that a body (such as a school) subject to the equality duty that fails to follow non-statutory guidance, such as *Technical Guidance for Schools in Scotland*, will need to justify why it has not done so.<sup>6</sup>

2.6. Which articles of the UN Convention on the Rights of the Child (UNCRC) are relevant?

In this section, relevant quotes are selected from the Implementation Handbook for the Convention on the Rights of the Child<sup>7</sup>.

### Article 2: non-discrimination

*“[G]ender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality, by arrangements which limit the benefits girls can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage girls’ participation.”<sup>8</sup>*

A girl in a school environment where:

- her right to compete fairly and safely in sport is not upheld
- a transgender young person is met with support and respect when choosing which facilities to use, while her own request for privacy is attributed to “misconceptions” that are subject to being “dispelled”
- her objection to sharing facilities with a male-bodied young person is framed as ‘disrespectful’
- the transgender young person’s comfort seems to take precedence over her own (she must wait until *after* a transgender young person is done before she can use the facilities that were previously solely for the use of females)

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could limit the benefits she can obtain from the educational opportunities offered to her and result in an unsafe and unfriendly environment which discourages her participation.

The framing of the right of girls to privacy, dignity and to boundaries around their own bodies as a set of fundamentally unreasonable requirements that are in conflict with inclusion, equality and respect is particularly concerning. Not only does this ignore the existence of these rights and the needs that give rise to them, but it ignores that these rights are crucial to female inclusion. Failure to recognise and respect these rights for girls could be discriminatory.

Furthermore, placing girls in the position where they have to single themselves out if they are distressed at being expected to forgo their rights and their boundaries, at the same time as issuing a directive to remind anyone objecting to these guidelines about the school's ethos of 'inclusion, equality and respect', is unlikely to foster a safe and friendly environment in which girls are supported to make their needs known.

It is also important to note that while the negative consequences of this guidance are likely to befall both boys and girls, it is girls who benefit most from the single-sex exceptions provided by the Equality Act, and therefore it is girls who are likely to be most adversely impacted. For example, a boy's right to a fair and safe sporting competition is unlikely to be affected by the inclusion of a trans identifying young person who is female. However, for a girl who is competing against a transgender young person who is male-bodied, and therefore likely to be physically stronger, with greater lung capacity and a different physique, the impact is likely to be much more significant in terms of fairness and safety.

*Thus, under article 2 and article 14, the child must not suffer discrimination because of the child's right to have a religion, or to have no religion, nor over the child's right to manifest his or her religion.<sup>9</sup>*

Children with religion/belief may also be affected by the negative consequences of this guidance as the manifestation of their religion may conflict with some of the aspects included in this guidance that relate to sharing facilities with members of the opposite sex. If this prevents them from participating then this may also be discriminatory.

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### Article 3: the best interests of the child

*"[T]here may be competing or conflicting human rights interests, for example, between individual children, between different groups of children and between children and adults. The child's interests, however, must be the subject of active consideration; it needs to be demonstrated that children's interests have been explored and taken into account as a primary consideration."*<sup>10</sup>

This Children's Rights Impact Assessment demonstrates that the recommendations made in the guidance have the potential to conflict with the rights of other young people. Indeed the guidance itself anticipates this conflict by providing suggestions as to how it should be addressed, such as by allowing a girl whose right to privacy is compromised by sharing a changing room with a male-bodied transgender young person, to get changed "*after the trans young person is done*". (p. 18)

The guidance undoubtedly has the best interests of transgender young people as its primary consideration, however it is not at all clear that the interests of other young people who are not trans have also been given due consideration. Women and Girls in Scotland were unable to ascertain what, if any, consultation was carried out by the authors in regard to this. James Morton, manager of Scottish Trans Alliance (who co-authored the guidance) has said that no impact assessment has been undertaken, but also that "I'm sure [an impact assessment] would show that there isn't any negative impact on other pupils."<sup>11</sup> This does not suggest that there has been a formal undertaking to ensure that all children's best interests have been explored and taken into account as a primary consideration when developing this guidance. James Morton has previously been involved in undertaking an Equality and Human Rights Impact Assessment for a similar trans inclusive policy in the Scottish Prison Service, in order to allow male trans prisoners to be housed in the female estate. This impact assessment did not acknowledge any potential impact on women.<sup>12</sup>

### Article 4: the protection of rights

*"While it is the State which takes on obligations under the Convention, its task of implementation – of making reality of the human rights of children – needs to engage all sectors of society and, of course, children themselves."*<sup>13</sup>

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At present, and under the Equality Act 2010, young people are entitled to single-sex provision in order to protect their right to privacy, dignity and safety. In recommending a blanket policy where transgender young people are allowed to use the facilities they are most comfortable with, take part in the sporting category they are most comfortable with, and to share overnight accommodation with young people of the opposite sex, this guidance could jeopardise these rights.

The relevant rights identified are:

- Article 2, the right not to be discriminated against
- Article 3, the right to have all children's best interests taken into account as a primary consideration
- Article 5, the right for children to have parental support to aid them in exercising their rights, and to have their evolving capacities taken into account
- Article 6, the right to life, survival and development
- Article 12, the right for children to have their views respected
- Article 14, the right for children to have a religious affiliation without this hindering their rights to non-discrimination or privacy
- Article 16, the right to privacy
- Article 18, the right for children to have their parents take primary responsibility for their best interests, and the right of children to have the state assist their parents in fulfilling this responsibility
- Article 28, the right to education
- Article 39, the right to recover from abuse

### Article 5: parental guidance and a child's evolving capacities

Parents have responsibilities, in the terms of article 5, to appropriately support *"the exercise by the child of the rights recognized in the present Convention."*<sup>14</sup>

This support must take into account the evolving capacities of the child:

*"Article 5 draws on the concept of 'evolving capacities' to refer to processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized ... Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child's*

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*interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests.*"<sup>15</sup>

The recommendations in the guidance state that parents do not need to be informed if a transgender young person (of the opposite sex) is sharing accommodation with their child. This may contravene article 5, because if a parent is unaware then they are unable to support their child to exercise their rights in relation to this. The rights the child may wish to exercise are: the right to privacy (article 16), the right not to be discriminated against (article 2), the right to have their best interests taken into account (article 3), the right to have their view respected (article 12), the right to have a religious affiliation without this hindering their rights to non-discrimination and to privacy (article 14), the right to have their parents take primary responsibility for their best interests (article 18), their right to education (article 28) and the right to recover from abuse (article 39).

The guidance makes no recommendation that consideration be given to the other children sharing accommodation with the transgender young person, and neither does it make any provision for any potential objections. In this context, and with the burden of responsibility to raise concerns placed solely on the child (without the support of a parent), even an assertive, confident girl may find it difficult to advocate on her own behalf. It may be next to impossible for a shy or anxious girl to defend her rights.

Furthermore, the recommendation not to inform parents may also affect the concept of 'informed consent' as universally understood by local authorities when obtaining parental permission for school trips and activities.

*"Parents/carers must be able to make an informed decision on whether their child should go on a visit"* and therefore it is imperative that the information provided about a planned activity *"must be full and explicit"* in order to *"enable parents to make an informed decision about their child's participation."*<sup>16</sup>

There is also an important point to be made in relation to the guidance as a whole and the necessity to take into account the evolving capacities of the child.

The UNICEF commissioned study into the Evolving Capacities of the Child<sup>17</sup> recognises that *"childhood is not an undifferentiated period."* (p. vii)

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*"It is obvious, for example, that small children do not have the same capacities as older children or adults"* (p. xiv)

*"children with intellectual, physical or sensory impairments will often develop their capacities through different routes and with differing outcomes"* (p. xiii)

and further:

*"direction and guidance, provided by parents or others with responsibility for the child, must take into account the capacities of the child to exercise rights on his or her own behalf."* (p. ix)

The guidance states that it is *"applicable to Primary School settings"* (p. 10) and therefore the recommendations within apply equally to children aged four as they do to young people aged seventeen. However, the guidance makes no provision for and takes no account of the difference in attainment of capacities between these age groups, or of children with disabilities. This means that, for example, the disclosure of a transgender identity is given the same response with regards to information sharing whether the child in question is four or seventeen, which may in turn have implications for a child's wellbeing. This is discussed further under article 18.

By allowing opposite sex children to share rooms without informing parents, schools who adopt this guidance may be failing to obtain informed consent and failing to protect the child's right to parental support in the exercising of their rights. In addition, by not differentiating the recommendations in the guidance to take into account the evolving capacities of the child, the guidance may be contravening the principle of article 5.

### Article 6: life, survival and development

*"States Parties shall ensure to the maximum extent possible the survival and development of the child"*<sup>18</sup>

*"Article 6 encompasses all aspects of development"*<sup>19</sup>

With regard to clothing a transgender young person might wear for PE, the guidance states:



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*A trans boy or non-binary young person who has developed unwanted breasts might bind their chest to flatten it, so they might need to wear a loose-fitting shirt or sweatshirt. Binders can lead to shortness of breath and can be painful during physical exertion. Binders can, however, have a positive impact on a young person's mental health so staff should allow a young person to decide for themselves about whether or not to wear a binder, and help them join in. (p. 19)*

The National FGM Centre highlights that breast binding can cause health issues: *“some adolescent girls and boys may choose to bind their breast using constrictive material due to gender transformation or identity, and this may also cause health problems.”*<sup>20</sup>

Research by The Binding Health Project<sup>21</sup>, which examined the practice of breast binding among transgender people, has found that over 97% of the 1,800 people surveyed reported at least one out of 28 negative outcomes attributed to breast binding. The research findings *“offer evidence of how binding practices may enhance or reduce risk”* and the researchers recommend that *“clinicians caring for transmasculine patients should assess binding practices and help patients manage risk.”*

The negative outcomes and risks include back, chest, shoulder, breast and abdominal pain, overheating, shortness of breath, muscle wasting, dizziness, swelling, skin infections, scarring, spine changes and rib fractures.

When advising on the care of fractured ribs – which increase the risk of a punctured lung – the NHS states that the chest should not be wrapped tightly and any sports or exercise that makes the pain worse should be avoided.<sup>22</sup>

It is important to emphasise here that breast binders are not licensed medical devices supplied and monitored by clinicians. They are a commercial product available for purchase online and some are also donated for free by LGBT organisations.<sup>23</sup>

Breast binding presents potentially serious health consequences for children's health and development, and researchers recommend that breast binding practices should be risk assessed by clinicians. The guidance however infers that pain and shortness of breath in a young person who is binding their breasts is not necessarily a cause

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for concern and recommends that a young person, while experiencing pain and shortness of breath, should be encouraged to participate in physical exercise. This is particularly concerning given the NHS guidance noted above, and the fact that even organisations which actively support the practice of breast binding recommend that binders be removed if they are painful or breathing is difficult.<sup>24</sup>

Accepting pain and shortness of breath as no cause for concern in a child who is practicing breast binding and encouraging them to participate in PE, without any form of risk assessment or further investigation into their wellbeing, may contravene article 6 – to ensure the development of the child.

The guidance mentions the positive impact that binding may have on a young person's mental health, and this is also supported by The Binding Health Project research, which found that breast binding reduced gender dysphoria and anxiety while increasing self-esteem and the *"ability to go out safely in public."*<sup>25</sup>

When considering the approach schools might take with regards to this issue, it is useful to consider other activities which also seek to reduce psychological pain but result in harm to the body. For example, breast binding raises some of the same issues and conflicts that self-harm does, namely the balance between respecting a child's right to privacy and autonomy over their body, and the principle of article 6 – to ensure the development of the child. In this respect, it is useful to consider some of the principles and best practice guidelines for dealing with self-harm as they may also be pertinent to the issue of breast binding.

Good practice for staff regarding self-harm in young people includes:<sup>26</sup>

- refraining from telling the young person to stop;
- explaining your role and the limits of your confidentiality;
- following procedures when responding to any injury;
- addressing safety issues;
- involving the child or young person in the assessment around risk;
- assessing if/how and when parents will be involved;
- ensuring there is ongoing support for the child or young person and reviewing and reassessing them at agreed intervals

These principles might form the basis upon which schools could address the issue of breast binding in young people, in particular the need to assess risk with the young

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person. Again, this may merit a differentiated approach based on acquired capacities as described under article 5.

### Article 12: respect for the views of the child

*"[E]ducation must be provided in a way that respects the inherent dignity of the child, enables the child to express his or her views freely in accordance with article 12(1) and to participate in school life. ... Compliance with the values recognized in article 29(1) clearly requires that schools be child friendly in the fullest sense of that term and that they be consistent in all respects with the dignity of the child."*<sup>27</sup>

The state should *"[s]trengthen its efforts to promote within the family, schools, and other institutions respect for the views of children, especially girls, and facilitate their participation in all matters affecting them"*<sup>28</sup>

The guidance states:

*"If other young people, or their parent(s)/carer(s), express concerns about sharing toilets or changing rooms with a transgender young person, it can be because they think that the trans young person will behave inappropriately. In this instance, schools should dispel any misconceptions: a trans young person's presence does not constitute inappropriate behaviour" (p. 18)*

This recommendation in the guidance conflates two separate concerns. The first is a concern that a trans young person may behave inappropriately. The second is a concern about a trans young person's presence.

If a young person is concerned that a transgender young person will behave inappropriately then this implies that they are concerned with a specific (and inappropriate) behaviour, rather than just a presence. As 59% of girls have faced some form of sexual harassment at school or college in the past year<sup>29</sup>, it is hoped that all concerns that girls may have in relation to inappropriate conduct are respected and taken seriously, with the nature of the concerning behaviour being determined, investigated and, if necessary, addressed.

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If she is concerned about a male-bodied trans young person's presence while she is in a state of undress, then this is also a valid concern and should be respected and taken seriously.

In either case, these are not *misconceptions* to be addressed. However, the action proposed is one which seems to infer that a young person's privacy and safety concerns are not likely to be valid. Attributing any concerns to *misconceptions* does not specifically take into account the views of other young people who have genuine concerns that are at odds with the recommendations in the guidance.

To put it another way, there is no suggestion of how to address concerns from young people and their parents that relate to privacy, dignity, safety, or that may manifest as a result of religious belief or as a result of sexual harassment, assault or abuse. These are very real and valid reasons that children may have against sharing facilities with young people of the opposite sex and they are not mentioned once in this guidance.

To imagine addressing concerns coming from parents or young people that relate to sexual harassment and assault using the recommendations in the guidance is particularly revealing:

*If a learner feels uncomfortable sharing facilities with a transgender young person, they can be allowed to use a private facility such as an accessible toilet, or to get changed after the trans young person is done (p. 18)*

Excluding a girl from what were previously female only facilities because she has suffered a sexual assault and is distressed at sharing with someone with a male body should not be considered acceptable.

The lack of acknowledgement of this situation by the guidance is notable, particularly as such a large number of girls have suffered sexual assault and are likely to be in this position. Indeed, the Scottish Human Rights Commission reports that "school girls across Scotland are being subject to an alarming level of sexual harassment on a daily basis."<sup>30</sup>

By not acknowledging or addressing potential concerns and objections of this nature, it is not clear how the views of young people affected by these issues are being respected and taken into account.

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### Article 14: freedom of thought, conscience and religion

*"The Committee recommends that the State Party ensure that a child's religious affiliation, or lack of one, in no way hinders respect for the child's rights, including the right to non-discrimination and to privacy"*<sup>31</sup>

It is important to monitor the potential for school policies to have an adverse effect on children with other protected characteristics, including those with religion and belief. As many religions have strict protocols regarding the opposite sex, it is possible that the recommendations in this guidance could exclude or marginalise children from these religious backgrounds.

There is an additional point to make about religion/ belief as it relates to privacy, noted in the Implementation Handbook for the Convention on the Rights of the Child:

*"The Committee notes that although an opting-out system exists for children ... this requires their parents to submit a formal request exposing the faith of the children involved and as such may be felt to be an infringement of their right to privacy."*<sup>32</sup>

This comment could also be relevant to young people 'opting-out' of sharing facilities with transgender young people. If parents raise objections and the directive is to remind them of inclusion, equality and respect, rather than to accept their objection in the first instance, then they may be under pressure to disclose their children's faith as a reason for their objection. As noted above, this could be an infringement of their right to privacy.

### Article 16: the right to privacy

*"Article 16 requires that the child's right to privacy is protected by law. Hence, in institutions there should be minimum requirements on space, including private space, design of toilets and bathrooms, and so on."*<sup>33</sup>

From the UNESCO 2018 Gender Review, review director Manos Antoninis states that:

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*"to address adolescent girls' concerns over privacy, particularly during menstruation ... single-sex toilets are desperately needed"*<sup>34</sup>

There is no evidence that girls in Scotland are exempt from these privacy concerns, therefore there is no reason to expect that girls in Scotland do not also desperately need single-sex toilets to provide bodily privacy at school, especially when dealing with menstruation.

Privacy is a fundamental right and as such Women and Girls in Scotland reject any attempt to require the justification of why privacy is required from people of the opposite sex. Single-sex provision is standard throughout Scotland, the UK and most of the world, whenever people are in intimate or vulnerable settings. If privacy from opposite-sex bodies is to be removed, then the onus should be on those removing it to provide evidence of why it is not needed.

Furthermore, it is unclear why segregation on the basis of gender identity should supersede segregation on the basis of sex.

Particularly, in the case of young people, where no reassignment surgery will have taken place, it is important to consider the situation from all perspectives. If gender identity is internal and subjective, what is the difference between a male-bodied young person and a male-bodied young person with a female gender identity, from the perspective of a girl sharing a changing room with them? What are the qualities manifested in gender identity that mean a girl would be protected from sharing a changing room with a male-bodied young person, but if that male-bodied young person has a particular subjective, internal gender identity, she is expected to share?

### Article 18: parental responsibilities and state assistance

*"[P]arents have primary responsibility for securing the best interests of the child as their 'basic concern' ... The State must take appropriate steps to assist parents in fulfilling their responsibilities"*<sup>35</sup>

The guidance states that:

*"Being transgender is not a child protection or wellbeing concern"* (p. 8)

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With regards to wellbeing, it is important to be aware that there are risk factors and vulnerabilities associated with being transgender that are not found (or not found to the same degree) with other young people.

- There is a 96% correlation between being trans and experiencing mental health problems.<sup>36</sup>
- Transgender young people need access to appropriate and specialist support. It was highlighted in the Scottish Trans Healthcare Report that excessive delay when waiting to access medical care can lead to “*significant psychological harm*.”<sup>37</sup> In this regard, disclosure of a trans status can be likened to disclosure of a medical issue.
- Other factors that are beginning to come to light are regarding the support that many trans young people are finding online. This brings its own risks, such as the potential for grooming, or the ability to purchase hormones for self-medication, something which is “endemic” according to Susie Green, head of Mermaids, a charity that works with trans children in the UK.<sup>38</sup>
- We also learn from the guidance the extent to which young people who are struggling with their identity benefit from parental support. The guidance devotes a page to the statistics comparing the stark contrast between the wellbeing of transgender young people with parental support to those without. It finds for example, that life satisfaction reported for trans youth with parental support is 70%, whereas without parental support this falls to only 33% (p. 25).

However, the guidance seems to take the position that there is no wellbeing concern and uses this assertion as the basis for recommendations surrounding disclosures, confidentiality and information sharing with parents. Hence, the guidance states the following, with regard to children as young as four:

*If a child in the school says that they want to live as a different gender, it is important to provide support and listen to what they are saying. Teachers and schools should be confident in discussing this with the child and, with the child's consent, their family. (p. 10)*

And further:

*A transgender young person may not have told their family about their gender identity. Inadvertent disclosure could cause needless stress for the young person or could put them at risk. Therefore, it is best to not disclose information to parents or*

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*carers without the young person's permission.* (p. 23)

National Guidance for Child Protection in Scotland 2010<sup>39</sup> states:

*"[P]arents/carers have ultimate responsibility for ensuring that their child's needs are met"* (p. 6) and that it is *"especially important ... that practitioners strive to achieve a good working relationship with parents/carers to ensure the best welfare of the child."* (p. 23)

*"All services that work with children and/or their carers are expected to identify and consider the child's wellbeing, and to share appropriate information collaboratively with the child, their family and other services."* (p. 6)

*"Parental rights are necessary to allow a parent to fulfil their responsibilities, which include looking after their child's health, development and welfare, providing guidance to their child ... In order to fulfil these responsibilities, parental rights include the right to have their child live with them and to decide how their child is brought up."* (p. 12)

In addition, guidance on information sharing advises:

*"All practitioners working with children and young people must play their part in supporting the wellbeing of children and young people to ensure they are safe, healthy, achieving, nurtured, active, respected, responsible and included ... Best practice is to work in partnership with the young person and the family, discussing the wellbeing concerns and sharing appropriate information with the family (unless this puts the child at immediate risk) in order to facilitate a support network."*<sup>40</sup>

A face-value acceptance that disclosures of transgender identities do not present any wellbeing concerns and thus merit a blanket policy of confidentiality is relevant to article 18, as the routine withholding of information from parents without further investigation may prevent them from fulfilling their responsibilities in securing the best interests of their child.

Given the risk factors associated with a child's trans status, such as the importance of obtaining appropriate and specialist support in a timely manner, and the increased risk of health and wellbeing problems for unsupported children, it is of paramount



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importance that the initial action of a teacher, when faced with a child disclosing a trans identity, must be to first assess if there are indeed any wellbeing issues. Only once this has been determined can there be any certainty about the best way to proceed for each child.

This also relates to article 5 and the evolving capacities of the child. As noted in the study undertaken by UNICEF referenced previously, younger and older children have very different capacities and therefore *"when children are young, most of the individual decisions made for their protection are taken by the adults with responsibility for them. The rationale for giving parents rights and responsibilities in this regard is that children lack the competence to exercise judgement in their own best interests."*<sup>41</sup>

Making recommendations in regard to information sharing with parents without taking into account the differing capacities between older and younger children, or children with disabilities or additional learning needs, may contravene the principle of article 5.

The guidance also mentions the potential "risk" posed by the child's parents in relation to information sharing.

If a school believes that a child is at risk from their parents, for any reason, then they should take action in line with local child protection procedures. While 'inadvertent' disclosure should always be avoided, in terms of information sharing, the primary consideration must be the safety and wellbeing of the young person, and vital to this is the facilitation of a support network, particularly when a *lack* of parental support is a known risk factor.

In the absence of any child protection issues, it is questionable that it would ever be in a younger child's best interests to withhold information regarding a trans disclosure from their parents. In which case, the directive to seek consent from the child may be misplaced, as *"consent should only be sought when the individual has a real choice over whether the information should be shared"*.<sup>42</sup>

In line with article 5 and the evolving capacities of the child, it should be recognised that older children and young people will begin to exercise their rights (for example, to privacy) on their own behalf. This stage, during which young people are still

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dependent and in need of protection but are increasingly autonomous and competent to exercise their own rights, is recognised as “*perhaps the most difficult and controversial issue in children's rights.*”<sup>43</sup>

Even with this in mind, and with no immediate wellbeing concerns, in the first instance, information sharing with parents by the young person themselves should be encouraged, in order to assist parents to fulfil their responsibilities to their child as advised by article 18 and to facilitate a support network for the young person. If there are reasons why parents may not be best placed to support their child, then investigation of alternative support for the young person should be encouraged, such as from a grandparent.

Article 18 and child protection guidance underscore the importance of parental involvement, as parents have the primary role in safeguarding and protecting their children's best interests and wellbeing. Routine maintenance of confidentiality from parents, who may be a crucial source of support, without further investigation with regards to wellbeing or differentiation on the basis of evolving capacities, may contravene article 18.

Additionally, the guidance states:

*“If parents/carers are struggling to come to terms with their child's identity, teachers should make sure that there is a plan to support the young person in school. It may also be useful to approach the local authority for additional guidance. (p. 24)*

It is important to note that many children who question their gender will desist. Dr James Barrett, a consultant psychiatrist at the Charing Cross clinic, the oldest gender identity service in the UK, says:

*“If you wait until puberty has got a little way along, a fair proportion of the children change the clinical presentation and feel more like straightforward lesbian and gay kids. They don't seek social role change any more and will end up with no need for lifelong medical intervention, surgery and with no loss of natural fertility should they want children.”<sup>44</sup>*

A leading article in the British Medical Journal states that “[a]round 35% of referred young people present with moderate to severe autistic traits.”<sup>45</sup> This is significant as only 1.1% of the UK population are estimated to be on the autistic spectrum<sup>46</sup>. The

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article also states, with regards to The Gender Identity Development Service (GIDS), a highly specialised clinic and part of the Tavistock and Portland trust in London:

*"[T]he total number of children and young people referred to the GIDS has risen exponentially since 2011. A striking feature of this increase is the large proportion of birth-registered females from 2011 onwards. This increase and the change in sex ratio is also seen in other countries. The reasons are not fully explicable, and a number of questions arise. Is this increase due mostly to the greater tolerance of gender-diverse expression in westernised society? Is male status still regarded as preferable? Are all referrals to a specialist service appropriate and do all these young people have ascertainable GD? What are the benefits, as well as the possible harms, in supporting and helping these young people at different stages of development?"<sup>47</sup>*

Polly Carmichael, the lead clinician at the Tavistock clinic acknowledges *"The reality is we still don't have the long-term outcome data ... What's happening is our society is moving faster than the evidence base."*<sup>48</sup>

The Royal College of Psychiatrists *"acknowledges the need for better evidence on the outcomes of pre-pubertal children who present as transgender or gender-diverse, whether or not they enter treatment. Until that evidence is available, the College believes that a watch and wait policy, which does not place any pressure on children to live or behave in accordance with their sex assigned at birth or to move rapidly to gender transition, may be an appropriate course of action when young people first present."*<sup>49</sup>

Bernadette Wren, consultant clinical psychologist at GIDS has said that some schools are moving too fast in acting to affirm children querying their gender identity. With regards to best practice in schools she states:

*"Schools might wait for the parents to approach them before changing things like names in the register [and] pronouns. If a school gets just a whisper of a child who may be querying their gender and within minutes they are doing everything to make sure that child is regarded as a member of the opposite sex right from the word go – that may not be the best for that child."*<sup>50</sup>

Furthermore, the information published by GIDS with regards to the evidence base at present contains the following:

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*“Quantitative and qualitative follow-up studies by Steensma et al (2011; 2013) present evidence to strongly suggest that early social transition does not necessarily equate to an adult transgender identity. The qualitative study reports on two girls who had transitioned when they were in elementary school and struggled with the desire to return to their original gender role. Fear of teasing and feeling ashamed resulted in a prolonged period of stress. One girl even struggled to go back to her previous gender role for two years.*

*“As such, in our approach, we would encourage exploration of gender roles in this younger cohort, with a view to keeping options open and not having any pre-conceived ideas as the longer term outcome.”<sup>51</sup>*

Lastly, the Government has recently ordered an investigation into why so many girls in particular are seeking gender reassignment after a rise in referral of more than 4,000% in less than a decade, as so little is known about why this is happening.<sup>52</sup>

It is therefore clear among clinical experts that there is not enough known about the reasons behind the vast increase in referrals (among girls in particular), or why the presence of autistic traits is so high amongst the young people referred. Further, it is clear that “coming to terms with a child’s gender identity” may not necessarily be the most appropriate way forward, and that a ‘watch and wait’ policy in which children are neither dissuaded against nor affirmed in their chosen gender role, may be preferable.

### Article 28: the right to education

As already evidenced, UNESCO is urging governments around the world to prioritise providing single-sex toilets in schools because this is such a barrier to girls attending school. There is no reason to suggest this would not also be a barrier for girls in Scotland. More than 9 in 10 girls in the UK already worry about going to school when on their period because of a fear they will be shamed. In all, 350,000 girls miss school every year because of their periods, which adds up to 2.1 million hours of lost education.<sup>53</sup>

The right to an education can only be achieved if the needs of **all** children are respected and included in the school environment.

According to the guidance, if a girl is uncomfortable sharing toilets, changing rooms or overnight accommodation with a male-bodied young person, she must make her

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objections known in a setting which may not support these objections. As already established, the guidance does not spend any time considering her point of view; characterising any potential objections as based on 'misconceptions'. It is not forthcoming with solutions as to how a school should manage children's needs specifically in relation to privacy, dignity and safety, or indeed how to manage the needs of children which arise as a result of religious beliefs, or sexual harassment, assault or abuse.

In making her objections known, a girl will have to go against the expectations that she comply from adults in authority and she may also have to go against peer expectations. Currently, Stonewall define transphobia<sup>54</sup> not just as "*the fear or dislike of someone based on the fact they are trans*" which is uncontroversial, but also "*the denial/refusal to accept their gender identity.*" The requirement for validation in the definition of transphobia means that if a girl is unable to accept the gender identity of a male-bodied young person (demonstrated by declining to share facilities with this young person), she could be deemed 'transphobic'.

In an environment in which she must "respect everyone's gender identity" (stipulated on the posters designed for use in schools on p. 56 of the guidance) and where there is no clear line of support for her to say "no", it is likely that a girl who feels embarrassed or distressed at sharing facilities with someone of the opposite sex will choose to endure any adverse impacts to her own wellbeing, including self-excluding where she can, rather than fight for her needs to be taken into account.

### Article 39: recovery from abuse

*"Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs."*<sup>55</sup>

It has been established that sexual violence against girls is *endemic* in schools. Almost a third (29%) of girls aged 16-18 have experienced some form of unwanted sexual touching at schools in the past year.<sup>56</sup> One rape a day is committed against girls in UK schools.<sup>57</sup> As well as being subject to violence in schools, two thirds of girls say they have experienced unwanted sexual attention in public, with girls as young as eight describing witnessing or experiencing harassment.<sup>58</sup>

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The guidance does not acknowledge any sex-specific needs that girls, including those who have been victims of abuse, may have with regards to transgender inclusion.

The first response to any objection to the recommendations in the guidance is a reminder of inclusion, equality and respect. It is difficult to imagine any context in which a reminder of "respect" could be viewed as an appropriate response to a girl who is uncomfortable or distressed at undressing in front of a male-bodied person. But certainly, a reminder of "respect" is a highly concerning response to objections raised on behalf of a girl who has been a victim of abuse. The solution, to allow her to use a private changing area, or get changed after the transgender young person is done, excludes her from her own changing room and peer group.

A school environment where a victim of abuse, objecting to sharing facilities with male-bodied people, is to be reminded of "respect" and then excluded from her own space and peer group if she will not acquiesce, is not likely to be one that is fostering her health, welfare, self-respect, dignity and autonomy, or taking into account her sex-specific needs.

*"The Committee has noted the importance of respect for the child victim's right to privacy, in particular in cases involving abuse"*<sup>59</sup>

As noted previously under article 14, having an opt-out protocol endangers the right to privacy, as girls (or parents/carers on their behalf) may feel compelled to disclose the abuse in order to excuse their 'exclusionary' and 'disrespectful' objections.

2.7. Has a UNCRC analysis been undertaken when developing the proposal?

This is unknown. LGBT Youth Scotland have stated that they have not undertaken an Equality Impact Assessment as "this would not be expected"<sup>60</sup> but have declined to provide any information regarding the preparation of this guidance when this was requested by Women and Girls in Scotland.

It should be noted here that schools are legally obliged to assess impact when adopting a new policy, in line with the public sector equality duty.

The guidance makes no mention of this duty and does not make clear that, while the guidance has been funded and supported by the Scottish Government and endorsed by many local authorities, it has not been assessed for any adverse impact by the

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government, by Education Scotland or by any local authority.<sup>61</sup>

2.8. What are the resource implications of the proposal?

There are no resource implications

### 3. Gather

*Pulling together relevant information and evidence*

3.1. What relevant information or evidence is available internally?

N/A

3.2. What relevant information or evidence is available externally?

According to the most recent Scottish Government publication *Summary Statistics for Schools in Scotland*, dated 12th Dec 2017, there are 688,959 pupils in primary, secondary and special schools in Scotland, and 338,004 of these are girls.<sup>62</sup>

*"There is ample evidence from a wide variety of sources now available which shows endemic levels of abuse and harassment of girls in schools"* according to the written submission from the End Violence Against Women Coalition (SVS0058) to the Sexual Harassment and Sexual Violence in Schools Enquiry.<sup>63</sup>

*"In 2015 Girl Guiding UK found that 75% of girls and young women said anxiety about potentially experiencing sexual harassment affects their lives in some way."*<sup>64</sup>

- 59% of girls and young women aged 13–21 said in 2014 that they had faced some form of sexual harassment at school or college in the past year.
- Almost a third (29%) of 16–18-year-old girls say they have experienced unwanted sexual touching at school.
- 41% of UK girls aged 14 to 17 who reported an intimate relationship experienced some form of sexual violence from their partner.
- 22% of young girls aged 7–12 have experienced jokes of a sexual nature from boys.<sup>65</sup>

There is a great deal of evidence regarding the importance of single-sex opportunities in sport. For example, there are sex-specific programmes such as *Fit for Girls*, which have been set up to promote physical activity among girls. As Sports Minister Aileen Campbell stated, *"many women and girls still face additional barriers*

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*when it comes to getting involved in sport. As a government, we recognise that further action is required*<sup>66</sup>

Some examples of the importance of sex specific provision in sport:

*“Some of the most positive aspects of the programme include improved consultation with girls, increased numbers of girls-only activities, and increased perceptions of health, fitness and physical activity levels among girls.”*<sup>67</sup>

*Fit for Girls* also included asking girls’ views on PE. At one pilot school,

*“[t]he girls wanted better changing rooms and some single-sex PE, especially for swimming. ‘The boys generally changed faster than the girls and were sitting at the edge of the pool waiting for the girls to appear - they had to walk in past the boys before getting into the water ... We ask girls to wear PE kit and run around at a time when they feel the most self-conscious about their bodies.’*<sup>68</sup>

It is difficult to get an accurate figure for the number of young people in Scotland identifying as transgender. There were 150 young people referred to the Young People’s Gender Service at Sandyford in 2016.<sup>69</sup> However, there is likely to be many more young people who identify as transgender in Scotland, as only 56% of transgender people have “come out” to their GP.<sup>70</sup>

There has been a 4000% rise in referrals to gender identity clinics in less than a decade.<sup>71</sup>

3.3. Is further information or evidence required?

Women and Girls in Scotland could find no evidence to suggest that single-sex provision is no longer desired or required, or that segregation by gender identity is more appropriate than segregation by sex.

### 4. Consult

*Asking children and young people and other stakeholders and experts for their views*

4.1. Have children and young people or any stakeholders been consulted in the development of the proposal?

LGBT Youth Scotland have stated that this guidance is “*based on the experiences of transgender young people*” (p. 8) and that they have taken the experiences of other young people into account when writing the document.<sup>72</sup> However, they have declined to provide any further information about this to Women and Girls in Scotland, or indeed to make this information publicly available.



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They did state, though, that the development of this guidance was a collaborative approach involving the following additional organisations as co-authors and reviewers, and that it would not be appropriate to credit any one of these organisations over another:

- Scottish Trans Alliance
- Children and Young People's Commissioner Scotland
- Barnardo's Scotland
- Children in Scotland
- Enquire
- Equality Network
- Glasgow City Health and Social Care Partnership
- Healthy Respect
- NHS Lothian
- Respect Me
- Stonewall Scotland
- Tie
- Together: Scottish Alliance for Children's Rights
- Waverley Care

4.2. Is consultation necessary or appropriate?

Yes. These are recommendations that have the potential to directly and profoundly affect all young people's experiences in education, not just transgender young people. If significant consultation has not been undertaken with children from different groups, then this should happen at a national level as part of a review of these and any other such guidelines. As the guidance states; *"young people should be involved in all decisions affecting them and understand what is happening and why"* (p. 23).

Consultation should also happen on a local level if schools wish to implement any of the recommendations from the guidelines in the meantime. This could form part of an assessment on impact which schools are legally obliged to perform when adopting a new policy, in line with the public sector equality duty.

4.3. If yes to above, who should be consulted?

All young people at school should be consulted in an age appropriate manner. Parents should also be consulted.

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4.4. Should we consult particular groups of children and young people for their views?

LGBT Youth Scotland have stated that they have already consulted with transgender young people, so further consultation with children from other groups should take place e.g. children of either sex who are not trans, children with religion and belief, children with disabilities, looked after children, children who have been the victim of abuse or exploitation.

4.5. What format should the consultation take?

It is very important that young people feel safe and comfortable to express their views, and on that subject, it is important to reiterate the climate in which this guidance is published. As noted in section 2.6, Stonewall's definition of transphobia extends to "*the denial/refusal to accept [someone's] gender identity.*" An objection to sharing facilities with a trans person of the opposite sex could be interpreted as a refusal to accept their gender identity and could therefore be considered transphobic by anyone who subscribes to Stonewall's definition.

Consequently, it is recommended that young people's views be sought anonymously so that they are able to be completely honest without fear of negative reactions. This is especially important for vulnerable groups such as victims of abuse or exploitation.

There is an extensive example from the Scottish Human Rights Commission about the impact assessment recommended when a school is introducing a new uniform policy that includes the kind of consultation that would also be useful in this instance:

*"The primary protected groups who could be affected by this policy are: boys and girls (in terms of having a gender neutral or gender specific dress code); certain religious groups (who may be required to wear symbols or adhere to dress codes as a requirement of the faith); disabled pupils who may need adjustments to be made to comply with the dress code; and pupils who may be in transition between genders.*

*The school therefore needs to develop a [uniform] policy, using a thorough equality and human rights impact assessment process, to take account of all these different and complex factors.*

*To do this effectively they would need to carry out extensive consultation about their policy and they would need to make sure that they create a process whereby everyone feels safe to give their view. They might wish to consult with pupils in the school, the staff and management of the school, the local community including any*

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*parents' organisations and representatives of the local faith and belief organisations and other equalities groups.*

*It is also important to note that a policy which is perceived to be either "preferential" or unfair by or to any groups could have a negative impact on good relations both within and outside the school. This highlights the importance of a robust consultation process so that all those affected by the policy understand how the decision was arrived at."<sup>73</sup>*

4.6. What questions should be asked?

As all the evidence and official recommendations point towards the option of alternative facilities, it is the implementation of this that should form the basis of the consultation in schools. The details will vary depending on the estate and budget of each school but the focus should be on how best to provide unisex facilities, (sometimes called a 'third space') while still retaining sufficient male, female and dedicated disabled facilities in order to ensure the privacy and dignity of all young people is protected. If applicable, consultation could also cover whether to install universal single occupancy unisex facilities across the school campus. It is recommended that if all toilet provision is to be altered, then it should be "*at least matching workplace legislation*" as the Children and Young People's Commissioner Scotland recommends.<sup>74</sup> This would mean toilets housed in self-contained rooms rather than having multi-occupancy rooms containing cubicles/ urinals, in order to ensure privacy and dignity.

It may be useful to highlight here that a school in England recently and without consultation, changed all toilet facilities to mixed-sex (these were cubicles in a shared room with common sinks rather than single occupancy, self-contained rooms with sinks). This was met with an outcry from female pupils and the toilets were eventually changed back, with a small provision kept unisex for those that required them.<sup>75</sup>

Furthermore, two schools in East Renfrewshire were also met with a similar outcry when unisex toilets were installed over the summer, with parents saying they were not consulted.<sup>76</sup> These toilets meet workplace legislation, with toilets housed in individual rooms, however there is still concern over privacy for female pupils sharing washing facilities with male pupils due to issues surrounding menstruation.

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As stated in international standards developed by UNICEF’s Water, Sanitation and Hygiene (WASH) programme, “WASH facilities must consider the specific needs of girls and women. When adolescent girls attend school during menstruation, they need ... a water supply to wash in privacy ... If such facilities are not available, adolescent girls may be unable to remain comfortably in class.”<sup>77</sup>

It can therefore be seen that consultation with pupils and parents is vital in order to make sure the needs of all young people are met.

If schools decide to implement recommendations from the guidance, the questions asked should be:

- what they think of the current situation;
- what they think of the proposal and its aims;
- what they think will be the effect of the proposal;
- if necessary, how they think the proposal could be improved; and
- whether they are aware of other means of achieving the aims of the proposal that will reduce adverse impacts or will lead to the greater promotion of children’s rights.

Consultation Action Officer:  
[Click here to enter text.](#)

Date consultation to be completed by:  
[Click here to enter text.](#)

### 5. Analyse

#### *Assessing the proposal for its impact on children and young people’s rights*

5.1. What impact will or might the proposal have on the rights of children and young people?

If implemented by schools, this guidance has the potential to negatively impact the rights of many children and young people. It may hinder the observance and implementation of the Convention on the Rights of the Child in schools in Scotland.

5.2. Will the rights of one group of children in particular be affected?

Yes, from the analysis we would predict that children who are not transgender may be particularly affected, most notably girls who benefit most from single-sex provision in intimate settings and in sports, for reasons of privacy, dignity, safety and fairness. Girls are also overwhelmingly the victims of sexual harassment, assault and abuse, and this also compounds the likely impact on them. Other groups of children 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.

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5.3. Are there competing interests between the groups of children, or between children and other groups?

Yes, it would appear from the analysis that the guidance sets up a conflict of interests, particularly between male-bodied transgender young people and girls.

5.4. How does the proposal relate to, promote, or inhibit the provisions of the UNCRC, other relevant international treaties and standards, or domestic law?

If implemented in schools, the guidance may inhibit the provisions of the UNCRC by undermining the following articles:

### Article 2: non-discrimination

The framing of the right of girls to privacy, dignity and to boundaries around their own bodies as a set of fundamentally unreasonable requirements that are in conflict with inclusion, equality and respect ignores that these rights are crucial to female inclusion. Failure to recognise and respect these rights and to facilitate safe and fair sporting competition for girls may be discriminatory.

### Article 3: the best interests of the child

There is no evidence that the best interests of all children have been taken into account when preparing this guidance, and there is evidence that many measures in this guidance may not promote the best interests of all children.

### Article 4: the protection of rights

Under the Equality Act 2010, young people are entitled to single-sex provision in order to protect their right to privacy, dignity and safety. In recommending a blanket policy where transgender young people are allowed to use the facilities they are most comfortable with, take part in the sporting category they are most comfortable with, and to share overnight accommodation with young people of the opposite sex, this guidance may jeopardise these rights for young people who are not transgender.

### Article 5: parental guidance and a child's evolving capacities

The recommendations in the guidance state that parents do not need to be informed if a transgender young person of the opposite sex is sharing accommodation with their child. If a parent is unaware, then they are unable to support their child to exercise their rights in regard to this issue. In addition, the guidance does not contain

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*When completing an assessment please refer to Children's Rights Impact Assessment: the SCCYP model, section 2.3*

any differentiation with regard to the evolving capacities of the child and recommends the same approaches for children aged 4 as for those aged 17.

### Article 6: life, survival and development

The rights a child has to privacy and bodily autonomy must be balanced with the responsibilities that adults have to protect them. Failing to risk assess potentially harmful practices like breast binding may jeopardise the development of the child.

### Article 12: respect for the views of the child

By not acknowledging or addressing potential concerns and objections that may relate to privacy, dignity, safety, or that may manifest as a result of religious belief or as a result of sexual harassment, assault or abuse, the guidance does not clearly demonstrate respect for the views of the young people who are affected by these issues.

### Article 14: freedom of thought, conscience and religion

As many religions have strict protocols regarding the opposite sex, it is possible that the recommendations in this guidance could exclude or marginalise children coming from these religious backgrounds.

### Article 16: the right to privacy

Privacy from the opposite sex is a fundamental right and standard throughout Scotland, the UK and most of the world, whenever people are in intimate or vulnerable settings.

### Article 18: parental responsibilities and state assistance

Parents have the primary role in safeguarding and protecting their children's best interests and wellbeing. A blanket policy of confidentiality, of withholding important information from parents without further investigation to assess wellbeing or differentiation with respect to the child's evolving capacities, could contravene article 18.

### Article 28: the right to education

The right to an education can only be achieved if the needs of **all** children are respected and included in the school environment. If the needs of girls are not respected and included it is likely that a girl who feels embarrassed or distressed at sharing facilities with someone of the opposite sex will choose to endure various

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adverse impacts, including self-excluding where she can, rather than fight for her needs to be taken into account.

### Article 39: recovery from abuse

A school environment where a victim of abuse, objecting to sharing facilities with male-bodied people, is to be reminded of "respect" and then excluded from her own space and peer group, is not likely to be one that is fostering her health, welfare, self-respect, dignity and autonomy, or taking into account her sex specific needs.

5.5. How does the proposal contribute to the achievement of national goals for children and young people?

As stated in the guidance (p. 42):

*"Getting it Right for Every Child (GIRFEC) aims to ensure that all children and young people get the best start in life and can succeed as adults. The practice model is:*

- *Child-focused: ensuring the child or young person, and their family, are at the centre of decision-making, and building solutions to support them*
- *Holistic: looking at the whole picture of a child or young person's wellbeing so that appropriate and effective support is offered at the right time*
- *Preventative: identifying a need as early as possible to avoid it developing into a concern or growing into a problem*
- *Joined-up: the child or young person, their family and professionals work together to consider what help is required, involve only the services needed to support them, and minimise unnecessary interruption in family life"*

*"As part of the GIRFEC framework, all young people should be safe, healthy, achieving, nurtured, active, respected, responsible and included (SHANARRI indicators)." All of these wellbeing indicators have the potential to be negatively impacted by the guidance.*

As this Children's Rights Impact Assessment relates to the school environment, it is also important to consider the Curriculum for Excellence (CfE) and how this policy will affect the benchmarks, experiences and outcomes expected by the CfE.

In **health and wellbeing: principles and practice**,<sup>78</sup> practitioners are reminded that, *"Children and young people should feel happy, safe, respected and included in the school environment"* (p. 1). For girls to feel happy, safe, respected and included, they

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must feel able to make their needs known to school staff and they must know that their appropriate boundaries regarding their bodies will be acknowledged and accepted. The following outcomes listed in ***health and wellbeing: experiences and outcomes***<sup>79</sup> are relevant:

- I am aware of the need to respect personal space and boundaries and can recognise and respond appropriately to verbal and non-verbal communication. (p. 16)
- I am learning about respect for my body and what behaviour is right and wrong. I know who I should talk to if I am worried about this. (p.18)

As the ***health and wellbeing: experiences and outcomes*** guidelines assert on page 1, it is the responsibility of all adults to meet the child's expectations that their school environment enables them to:

- develop [their] self-awareness, self-worth and respect for others
- understand and develop [their] physical, mental and spiritual wellbeing and social skills
- understand that adults in [their] school community have a responsibility to look after [them], listen to [their] concerns and involve others where necessary

The following CfE Benchmarks are also relevant<sup>80</sup>:

- Demonstrates modesty and privacy through, for example, closing toilet doors.
- Manages personal space with respect towards self and others.
- Demonstrates an understanding of the concept, 'my body belongs to me'.
- Explains about own and others' needs for privacy.
- Gives examples of how peer, media and other pressures can influence decision making.
- Describes the concept of consent.

The NSPCC underwear rule,<sup>81</sup> which is designed to raise children's awareness around privacy and boundaries, is also relevant here.

*"Your body belongs to you. No-one should ever make you do things that make you feel embarrassed or uncomfortable. No means no and you always have the right to say "no". You're in control of your body and the most important thing is how YOU feel. If you want to say 'NO', it's your choice".*



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*When completing an assessment please refer to Children's Rights Impact Assessment: the SCCYP model, section 2.3*

5.6. Is there disagreement as to the likely impact of the proposal on the rights of children and young people?

So far the guidance has been endorsed by many organisations (listed in section 4.1). There has been no acknowledgement of any possible negative impact from any of these organisations. There is currently a legal challenge underway regarding this guidance.<sup>82</sup>

5.7. Is the proposal the best way of achieving its aims, taking into account children's rights?

No. Transgender young people must be safe and comfortable at school, but this should not come at the expense of the safety and comfort of others. As recommended by the EHRC in section 2.5, the use of alternative facilities and private sleeping accommodation would enable the rights of all children to be upheld.

5.8. Has the do-nothing option been considered?

Due to the rapid increase in the number of young people now identifying as transgender in Scotland, the do-nothing option is not realistic. These young people may be uncomfortable using the facilities of their birth sex and should not be forced to use them – this is what Women and Girls in Scotland would understand as the do-nothing approach in this context.

5.9. Can alternatives to the proposal be suggested?

Yes, and they are suggested by EHRC guidelines. In most instances, the aims of the guidance can be met and all children's rights can be accommodated through the use of third/unisex spaces as suggested here.

With regards to sports, schools should evaluate the inclusion of transgender pupils of the opposite sex based on fairness and safety. If fairness or safety are an issue, then the trans young person could compete in their birth sex or in an alternative sport. Alternatively, where fairness may be impacted but not safety, schools could consider designating male sports as 'open'. This can provide an excellent opportunity to include all children, while at the same time retaining the female category to ensure that girls are not unfairly disadvantaged. Schools should avoid restricting the sporting activities of girls to only those that can include a transgender young person safely and fairly, as this could be viewed as discriminatory against the girls.

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5.10. What compensatory measures may be needed to avoid/mitigate a negative impact?

Alternative solutions are preferable to compensatory measures.

### 6. Recommend

*Drawing together conclusions and making recommendations*

6.1. What overall conclusions have been reached?

The guidance has been written with the intention of supporting transgender young people in schools but there is no evidence that it has fully taken into account the needs of other protected groups of young people.

The following children's rights are affected:

- Article 2, the right not to be discriminated against
- Article 3, the right to have all children's best interests taken into account as a primary consideration
- Article 4, the protection of rights
- Article 5, the right for children to have parental support to aid them in exercising their rights and for their evolving capacities to be taken into account
- Article 6, the right to life, survival and development
- Article 12, the right for children to have their views respected
- Article 14, the right for children to have a religious affiliation without this hindering their rights to non-discrimination or privacy
- Article 16, the right to privacy
- Article 18, the right for children to have their parents take primary responsibility for their best interests, and the right of children to have the state assist their parents in fulfilling this responsibility
- Article 28, the right to education
- Article 39, the right to recover from abuse

Writing about the single-sex exceptions written into the Equality Act, the EHRC underline that *"it is permissible to treat someone differently because of their sex or gender reassignment, for reasons of public policy or to protect the rights of others."*<sup>83</sup>

Male people can be legitimately excluded from female-only spaces such as toilets, changing rooms and overnight accommodation, in order to protect the rights of females.

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By including male people in female-only provision, as this guidance recommends, this not only jeopardises the rights of females but, under the banner of 'inclusivity', it risks *excluding* females from their own spaces.

6.2. What recommendations should be made?

*Where an assessment is being undertaken ... steps should be taken to eliminate negative impacts and, where this is not possible, the policy maker should set out why it is necessary to proceed with the policy. The policy maker should outline why the policy is justified, despite its adverse impact on children ... If this is the case, the policy maker should set out what remedial action, if any, is being taken to address the impact on children.*<sup>84</sup>

Women and Girls in Scotland would recommend that this proposal be amended so that it no longer conflicts with the rights of young people who are not transgender. We would welcome the opportunity to work with LGBT Youth Scotland to make the necessary edits to the guidance in order to ensure that it upholds the rights of all young people. Alternatively, Women and Girls in Scotland recommends that new non-statutory guidelines addressing these issues be developed for schools by an independent organisation using a children's rights based approach.

In the meantime, Women and Girls in Scotland recommends that if schools are considering adopting the policy recommendations the guidance suggests, it would be pertinent for them to consider why single-sex provision exists in the first place.

Why, for example, would a school not usually permit mixed-sex sleeping accommodation on residential trips? The reasons are likely to include safeguarding procedures as well as young people's right to privacy. Once the school has analysed the reasons for having single-sex spaces, it can then move to analyse policy changes in regard to these factors.

For example, if one of the reasons that mixed-sex sleeping accommodation is not permitted is due to the possible risk of pregnancy/conception occurring while the school is in loco parentis, then the school can conclude that an individual's gender identity has no bearing on their ability to impregnate or be impregnated and therefore it is not a mitigating factor in this particular risk. The school may therefore choose to offer a transgender young person single occupancy sleeping accommodation if they are uncomfortable sharing with other young people of the same sex.

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Another reason mixed-sex accommodation is not usually permitted, is to uphold the right to privacy, which has been highlighted by UNESCO as a particular concern for girls in education. It is therefore vitally important to consider the impact in any change in policy from the perspective of other children, as well as from the perspective of the transgender young person the policy aims to support. For example, as gender identity is entirely internal and subjective, a school may ask: what is the difference between a male young person and a male young person who identifies as female *from the perspective of a girl sharing a bedroom with them?*

While it is just as important that the transgender young person's right to privacy is respected, it is not advised that this should take precedence over the right of other young people and their parent(s)/carer(s) to give informed consent when there are ways to ensure the rights of both young people are upheld. For example, if a transgender young person does not want to disclose their trans status, then as the guidance suggests, they could be allocated their own room (p21). This would protect the privacy and dignity of all young people involved while still maintaining the integrity of informed consent.

The Equality Act recognises that an increase in the risk of injury to girls is a foreseeable consequence of permitting a male-bodied transgender young person to participate in a single-sex activity such as contact sport, hence it advises to assess inclusion on the basis of safety. If a school does not properly assess the risk to girls, it may find itself legally liable for any consequent injury and discrimination claim.

To reduce or restrict the general levels of participation of girls in sports in order to facilitate the participation of male-bodied transgender young on girls teams, for example by deciding not to offer specific contact sports to girls on the grounds that transgender pupils cannot safely or fairly participate, may be viewed as discriminatory. This is why the Equality Act advises that inclusion be assessed on the basis of fairness.

In order to comply with the public sector equality duty, a school will have to show at the very least that it has correctly identified any potential adverse consequences for female pupils of any proposed or existing policy relating to transgender inclusion and fairly balanced those consequences against any identified adverse consequences for transgender pupils of not implementing a given policy. The guidance makes no mention of these responsibilities, which schools must legally fulfil.

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Women and Girls in Scotland also cautions that any change in policy in this area, which is sensitive and unprecedented, should be undertaken in consultation with lawyers and insurance underwriters.

With regard to the disclosure of a transgender identity by a young person, Women and Girls in Scotland recommend that guidelines be drawn up which support staff to assess the level of risk to the child. This may involve asking questions to ascertain:

- If the child is experiencing any mental health difficulties
- If the child is engaging in breast binding or is self-medicating with hormones purchased online
- The child's level of distress
- The current level of support the child is receiving and from whom (including asking about online friendships)

The answers to these kinds of questions will allow staff to make informed judgements as to how to proceed, and these ways of proceeding should be properly developed and take into account the evolving capacities of the child. With younger children this would almost certainly involve notifying parents, unless there are exceptional circumstances where other sources of support for the child are more appropriate.

### 6.3. Who should be informed of the recommendations?

A copy of the assessment will be sent to those responsible for initiating the proposal. The assessment will be disseminated to relevant stakeholders: local authorities and individual schools as well as parent stakeholder groups.

### 6.6. Are there any other relevant issues?

Scottish Trans Alliance, who co-authored this guidance, submitted evidence to the Transgender Equality Inquiry that is pertinent to this Children's Rights Impact Assessment.

In their written submission, Scottish Trans Alliance recommends that:

*The Equality Act 2010 should be amended to:*

- *Remove the exception that allows single-sex services to discriminate against trans people*

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- *Remove the genuine occupational requirement (GOR) allowing some jobs to require applicants must [not be transgender] and replace it with a GOR allowing posts delivering trans-specific services to require applicants must be transgender*<sup>85</sup>

As stated in section 2.5, the Equality Act 2010 is the law which protects people from discrimination, and which allows for single-sex provision. It is this Act which makes it lawful to exclude all male people, no matter how they identify, from areas such as women and girl's overnight accommodation and sports, in order to protect the privacy, dignity and safety of women and girls. In addition, it allows for employers to require that some employees be a particular sex when this is crucial to the post (this is the GOR referred to by Scottish Trans Alliance above). For example, the explanatory notes that accompany the Equality Act state:

*"A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress."*<sup>86</sup>

Removing this provision in the Equality Act 2010, as Scottish Trans Alliance have advocated for, would be removing existing legal rights and protections from women and girls, and as recognised by the Act, is likely to cause them distress.

Responding to concern about this threat to the Equality Act, the UK government made a statement:

*"We are clear that we have no intention of amending the Equality Act 2010, the legislation that allows for single-sex spaces. Any ... reform will not change the protected characteristics in the Equality Act nor the exceptions under the Equality Act that allow provision for single and separate sex spaces."*

*The Government does not intend to change the safeguarding processes that are currently used in refuges and healthcare services. Providers of women-only services can continue to provide services in a different way, or even not provide services to trans individuals ... The same can be said about toilets, changing rooms or single-sex activities. Providers may exclude trans people from facilities of the sex they identify with, provided it is a proportionate means of meeting a legitimate aim."*<sup>87</sup>

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Women and Girls in Scotland would like to note with regards to the Equality Act 2010 single-sex exceptions:

- they are recognised by the government to form part of a legal mechanism to uphold safeguarding processes as well as protecting privacy, dignity and safety
- Scottish Trans Alliance are actively seeking to remove them
- they are highly relevant to how schools may choose to handle providing, as the government noted, “toilets, changing rooms or single-sex activities” to transgender children and young people
- they are not once mentioned in *Supporting Transgender Young People: Guidance for Schools in Scotland*, which Scottish Trans Alliance co-authored

Gender dysphoria is an extremely distressing condition which for many people, is alleviated by presenting as the opposite sex and having other people accept them as that sex. Indeed this acceptance as the opposite sex is so important that it forms part of the definition of transphobia:

*“The fear or dislike of someone based on the fact they are trans, including the denial/refusal to accept their gender identity.”<sup>88</sup>*

It is understandable that a law which says

*“[a] counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress”<sup>89</sup>*

may feel hurtful to someone whose wellbeing is dependent upon them being treated as a woman, even though they are male. However, while Women and Girls in Scotland have every sympathy for the hurt caused by making distinctions between trans people and those of the sex they identify with, it is simply not possible to make an assessment such as this Children's Rights Impact Assessment without giving due consideration to the rights and differences in the needs and interests of other protected groups of young people. As difficult as it may be, it can be seen from the above-mentioned example of the rape counsellor that if distinctions are removed, then women and girls lose rights, such as the right to be counselled after rape by someone who is not male.

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As a recent editorial in the Guardian states:

*"UK law acknowledges circumstances where there is a conflict of interests ... Gender identity does not cancel out sex ... concerns about sharing dormitories or changing rooms with "male-bodied" people must be taken seriously. These are not just questions of safety but of dignity and fairness."*<sup>90</sup>

It is vital that conflicts of interest are acknowledged, even if the acknowledgement that there is such a conflict of interest is painful in itself. Publicly funded organisations working in this area must be able to be objective and rational in order to find solutions that meet the needs of **all** young people.

### 7. Publicise

*Making the results of the impact assessment known*

7.1. Should the assessment be made available publicly? If not, why not?

Yes, this assessment should be available publicly, for schools, parents and young people themselves to review.

*In addition, the completion and publication of children's rights impact assessments can act as a public commentary on the implementation of children's rights and the CRC in Scotland, and can inform the UK's report to the UN Committee on the Rights of the Child.*<sup>91</sup>

7.2. If yes, in what formats?

It will be made public in a digital format and will be available in other formats on request.

7.3. Should particular individuals or groups be made aware of the assessment?

Those who authored, reviewed and endorsed the guidance will be made aware of this assessment. Schools and parent stakeholder groups will also be made aware directly and through local authorities.

7.4. Has the assessment and additional feedback been provided to those consulted during the assessment process?

Yes

No



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When completing an assessment please refer to *Children's Rights Impact Assessment: the SCCYP model, section 2.3*

8. Monitor	
<i>Monitoring and evaluating impact of the proposal</i>	
<p>8.1. Is follow-up evaluation/monitoring of the proposal and its implementation required?</p> <p>Through publishing and promoting this Children's Rights Impact Assessment Women and Girls in Scotland aims to open up dialogue with local authorities/ schools. This will enable Women and Girls in Scotland to monitor any implementation of the guidance and if necessary, start the process of undertaking evaluation of its impact.</p>	<p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
<p>8.2. Have the recommendations made as a result of the impact assessment been considered or acted upon?</p> <p>This is the first and only impact assessment undertaken to assess the guidance that Women and Girls in Scotland is aware of, therefore the recommendation made have not yet been considered or acted upon at the time of writing.</p>	
<p>8.3. Should the progress of the proposal be monitored?</p> <p>Yes, Women and Girls in Scotland undertake to ascertain whether this guidance is being implemented in Scottish schools.</p>	<p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
<p>8.4. Should the implementation of the proposal be monitored?</p> <p>Yes, if schools implement this guidance then Women and Girls in Scotland will undertake to monitor the impact.</p>	<p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
<p>8.5. Is research required to assess the proposal's impact on children once implemented?</p> <p>Yes, if implemented.</p>	<p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
<p>8.6. As a result of monitoring of the proposal, are further recommendations required?</p> <p>Not applicable at present</p>	
<p>8.7. Who should be informed of the recommendations?</p> <p>Not applicable at present</p>	

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Children's Rights Impact Assessment by:  Women and Girls in Scotland	Date of CRIA:  23 <sup>rd</sup> January 2019
Reviewed by: <a href="#">Click here to enter text.</a>	Date of review: <a href="#">Click here to enter text.</a>

### References:

- <sup>1</sup> <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>, p. 6
- <sup>2</sup> <http://www.legislation.gov.uk/ukpga/2010/15/notes>
- <sup>3</sup> <http://www.bailii.org/ew/cases/EWHC/Admin/2013/3491.html>
- <sup>4</sup> <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>
- <sup>5</sup> [https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-schoolsinscotland-2015\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/equalityact2010-technicalguidance-schoolsinscotland-2015_0.pdf), p. 36
- <sup>6</sup> <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-act-technical-guidance>
- <sup>7</sup> *Implementation Handbook for the Convention on the Rights of the Child*, [https://www.unicef.org/publications/files/Implementation\\_Handbook\\_for\\_the\\_Convention\\_on\\_the\\_Rights\\_of\\_the\\_Child.pdf](https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf)
- <sup>8</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 1 (2001), Article 29 (1), The aims of education*, 17 April 2001, CRC/GC/2001/1, <https://www.unicef-irc.org/publications/pdf/crcgencommen.pdf>
- <sup>9</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 193
- <sup>10</sup> *ibid*, p. 38
- <sup>11</sup> <http://www.heraldscotland.com/news/16311379.schools-forget-girls-in-rush-to-adopt-pro-trans-guidance-campaigners-claim-as-christian-group-threatens-legal-action/>
- <sup>12</sup> Equality and Human Rights Impact Assessment of the policy *Gender Identity and Gender Reassignment Policy for Prisoners* obtained by Freedom of Information request: <https://www.whatdotheyknow.com/request/496110/response/1200987/attach/html/3/Annex%201%20EHRIA%20Gender%20Identity%20and%20Gender%20Reassignment%20Policy%20March%202014%20002.pdf.html>
- <sup>13</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, <https://www.unicef-irc.org/publications/pdf/crcgencommen.pdf>, paras. 1 and 2
- <sup>14</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 76
- <sup>15</sup> *ibid*, p. 77-78
- <sup>16</sup> [https://evolve.edufocus.co.uk/evco/assets/midlothian/5\\_5\\_out\\_of\\_school\\_visits.pdf](https://evolve.edufocus.co.uk/evco/assets/midlothian/5_5_out_of_school_visits.pdf), p. 22, p. 7 and appendix 10
- <sup>17</sup> <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf>
- <sup>18</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 83
- <sup>19</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 84
- <sup>20</sup> <http://nationalfgmcentre.org.uk/breast-flattening/>
- <sup>21</sup> <https://transfigurations.org.uk/filestore/binding-project-postprint.pdf>
- <sup>22</sup> <https://www.nhs.uk/conditions/broken-or-bruised-ribs/>
- <sup>23</sup> <http://morfmanchester.blogspot.com/p/binder-scheme.html>
- <sup>24</sup> <https://morf.org.uk/binder-scheme/>
- <sup>25</sup> <https://transfigurations.org.uk/filestore/binding-project-postprint.pdf>
- <sup>26</sup> [http://www.pkc.gov.uk/media/19224/Supporting-Children-and-Young-People-at-risk-of-Self-Harm-and-Suicide-Booklet/pdf/Supporting\\_Children\\_and\\_Young\\_People\\_at\\_risk\\_of\\_Self\\_Harm\\_and\\_Suicide\\_Booklet](http://www.pkc.gov.uk/media/19224/Supporting-Children-and-Young-People-at-risk-of-Self-Harm-and-Suicide-Booklet/pdf/Supporting_Children_and_Young_People_at_risk_of_Self_Harm_and_Suicide_Booklet)
- <sup>27</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 1, 2001*, CRC/GC/2001/1, para. 8
- <sup>28</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 152

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When completing an assessment please refer to *Children's Rights Impact Assessment: the SCCYP model*, section 2.3

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- <sup>29</sup><http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-and-sexual-violence-in-schools/written/33537.pdf>
- <sup>30</sup><http://www.scottishhumanrights.com/media/1781/shrc-cedaw-submission-june-2018.docx>
- <sup>31</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 192
- <sup>32</sup> *ibid*
- <sup>33</sup> *ibid*, p. 206
- <sup>34</sup> <https://www.independent.co.uk/news/world/single-sex-toilets-unesco-un-international-womens-day-period-a8244776.html>
- <sup>35</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 231
- <sup>36</sup> <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>, p. 6
- <sup>37</sup> <https://www.scottishtrans.org/wp-content/uploads/2013/11/Scottish-Trans-Health-Conference-Report.pdf>, p. 8
- <sup>38</sup> <https://www.theguardian.com/society/2016/jul/11/transgender-nhs-doctor-prescribing-sex-hormones-children-uk>
- <sup>39</sup> <https://www2.gov.scot/Resource/Doc/334290/0109279.pdf>
- <sup>40</sup> [https://www.midlothian.gov.uk/downloads/download/475/self-harm\\_and\\_suicide\\_prevention](https://www.midlothian.gov.uk/downloads/download/475/self-harm_and_suicide_prevention) p. 6
- <sup>41</sup> <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> p. 34
- <sup>42</sup> *ibid*
- <sup>43</sup> <https://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> p. 16
- <sup>44</sup> <https://www.theguardian.com/society/2016/jul/11/transgender-nhs-doctor-prescribing-sex-hormones-children-uk>
- <sup>45</sup> <https://adc.bmj.com/content/103/7/631.full?ijkey=HsMwyZDRtsKu83z&keytype=ref>
- <sup>46</sup> <https://www.autism.org.uk/about/what-is/myths-facts-stats.aspx>
- <sup>47</sup> <https://adc.bmj.com/content/103/7/631.full?ijkey=HsMwyZDRtsKu83z&keytype=ref>
- <sup>48</sup> <https://www.theguardian.com/society/2016/jul/11/transgender-nhs-doctor-prescribing-sex-hormones-children-uk>
- <sup>49</sup> [https://www.rcpsych.ac.uk/pdf/PS02\\_18.pdf](https://www.rcpsych.ac.uk/pdf/PS02_18.pdf)
- <sup>50</sup> <https://www.thetimes.co.uk/article/schools-rushing-on-whisper-to-label-pupils-as-transgender-Qd8zm53qs>
- <sup>51</sup> <http://gids.nhs.uk/evidence-base>
- <sup>52</sup> <https://www.thetimes.co.uk/article/inquiry-into-surge-in-gender-treatment-ordered-by-penny-mordaunt-b2ftz9hfn>
- <sup>53</sup> <https://www.tes.com/news/nine-ten-girls-fear-period-shaming>
- <sup>54</sup> <https://www.stonewall.org.uk/help-advice/glossary-terms#t>
- <sup>55</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 593
- <sup>56</sup> <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/91.pdf>, p. 7
- <sup>57</sup> <https://www.thetimes.co.uk/article/boy-rapists-expect-girls-to-cry-during-sex-says-activist-7z7r06lqr>
- <sup>58</sup> <https://www.bbc.co.uk/news/amp/uk-45777787>
- <sup>59</sup> *Implementation Handbook for the Convention on the Rights of the Child*, p. 593
- <sup>60</sup> <https://www.lgbtyouth.org.uk/news/2018/june/a-statement-regarding-our-guidance-for-schools/>
- <sup>61</sup> <http://www.heraldsotland.com/news/16311379.schools-forget-girls-in-rush-to-adopt-pro-trans-guidance-campaigners-claim-as-christian-group-threatens-legal-action/>
- <sup>62</sup> <http://www.gov.scot/Publications/2017/12/3099>
- <sup>63</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-and-sexual-violence-in-schools/written/33527.html>
- <sup>64</sup> <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/91.pdf>, p. 7
- <sup>65</sup> <https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/91.pdf>, p. 7
- <sup>66</sup> <https://news.gov.scot/news/encouraging-more-girls-into-sport>
- <sup>67</sup> <https://sportscotland.org.uk/schools/active-girls/fit-for-girls/>
- <sup>68</sup> <https://www.tes.com/news/who-says-girls-dont-pe>
- <sup>69</sup> <http://www.bbc.co.uk/news/uk-scotland-40716736>
- <sup>70</sup> <https://www.lgbtyouth.org.uk/media/1354/life-in-scotland-for-lgbt-young-people.pdf>, p. 29
- <sup>71</sup> <https://www.thetimes.co.uk/article/inquiry-into-surge-in-gender-treatment-ordered-by-penny-mordaunt-b2ftz9hfn>
- <sup>72</sup> <https://www.lgbtyouth.org.uk/news/2018/june/a-statement-regarding-our-guidance-for-schools/>
- <sup>73</sup> <http://eqhria.scottishhumanrights.com/eqhriacs2socialcare.html>
- <sup>74</sup> <https://www.cypcs.org.uk/ufiles/Toilets-Literature-Review.pdf>, p. 30
- <sup>75</sup> <https://www.thetimes.co.uk/article/genderneutral-toilets-my-daughter-was-called-selfish-for-wanting-girls-only-loos-at-school-cwth60b2c>

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*When completing an assessment please refer to Children's Rights Impact Assessment: the SCCYP model, section 2.3*

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<sup>76</sup> <https://www.thescottishsun.co.uk/news/3104261/furious-parents-renfrewshire-schools-gender-neutral-toilets/>

<sup>77</sup> [https://www.unicef.org/publications/files/CFS\\_WASH\\_E\\_web.pdf](https://www.unicef.org/publications/files/CFS_WASH_E_web.pdf) p. 16

<sup>78</sup> <https://education.gov.scot/Documents/health-and-wellbeing-pp.pdf>

<sup>79</sup> <https://education.gov.scot/Documents/health-and-wellbeing-eo.pdf>

<sup>80</sup> <https://education.gov.scot/improvement/documents/hwbpersonalsocial%20educationbenchmarkspdf.pdf>

<sup>81</sup> <https://www.nspcc.org.uk/preventing-abuse/keeping-children-safe/underwear-rule/>

<sup>82</sup> <http://www.heraldsotland.com/news/16311379.schools-forget-girls-in-rush-to-adopt-pro-trans-guidance-campaigners-claim-as-christian-group-threatens-legal-action/>

<sup>83</sup> <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>

<sup>84</sup> [https://www.cypcs.org.uk/uploaded\\_docs/children's%20rights%20impact%20assessment.pdf](https://www.cypcs.org.uk/uploaded_docs/children's%20rights%20impact%20assessment.pdf), p. 25

<sup>85</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/written/19659.pdf>

<sup>86</sup> <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26/1/1>

<sup>87</sup> <https://petition.parliament.uk/petitions/214118>

<sup>88</sup> <https://www.stonewall.org.uk/help-advice/glossary-terms#t>

<sup>89</sup> <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/16/26/1/1>

<sup>90</sup> <https://amp.theguardian.com/commentisfree/2018/oct/17/the-guardian-view-on-the-gender-recognition-act-where-rights-collide>

<sup>91</sup> [https://www.cypcs.org.uk/uploaded\\_docs/children's%20rights%20impact%20assessment.pdf](https://www.cypcs.org.uk/uploaded_docs/children's%20rights%20impact%20assessment.pdf), p. 10