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Scottish Government Legal Directorate
Litigation Division
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Our Ref: [redacted]

Your Ref:

29 May 2018

Dear Sirs

Our client: The Christian Institute
Re: "Supporting Transgender Young People: Guidance For Schools in Scotland"

We write in relation to the above mentioned guidance developed by LGBT Youth Scotland working with the Scottish Trans Alliance. The guidance was funded by the Scottish Government's Equality Unit and carries the endorsement of the Scottish Government.

Our client has significant concerns about the guidance. Those concerns cover the following:

1. The guidance contains key errors in relation to the operation of the Equality Act 2010.
2. The guidance demonstrates that no regard has been had to crucial exceptions in the Equality Act.
3. The guidance does not adequately address the privacy rights of staff and other learners in schools where trans-pupils are seeking to express their gender identity.
4. The guidance has given no regard to the rights of parents.

The Equality Act 2010

The Equality Act 2010 is engaged in any guidance relating to transgender people. Gender reassignment is one of the nine protected characteristics under the Act and section 7(1) of the Act provides that:

> *"A person has the protected characteristic of gender reassignment if the person is* ***proposing to undergo****, is undergoing or has undergone a process (or part of a process)* ***for the purpose of reassigning the person's sex*** *by changing physiological or other attributes of sex."* (emphasis added)

As its lowest threshold, a person must be proposing to undergo part of a process for the purpose of reassigning their sex in order to be protected under the Act. The word "proposing" makes clear that it is necessary that the person *purposes* to reassign their sex. However, on page 44 of the guidance it is stated that a young person would have the protected

characteristic of gender reassignment if he is merely "exploring" his gender identity. This is incorrect.

Our client is therefore concerned that the guidance is misleading schools and teachers about the circumstances in which the Equality Act may be engaged.

The guidance also incorrectly states at page 18 that:

> *"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".*

However, this does not correctly reflect the case law (of which there has in any event been very little recent authority). The most authoritative judgment in this regard would still appear to be the English case of *Croft v Royal Mail Group Plc [2003] EWCA Civ 1045*, in which in an employment context, the Court of Appeal held (at paragraph 42) that:

> *"the [protected] category includes persons at all stages of gender reassignment...but it does not follow that all such persons are entitled immediately to be treated as members of the sex to which they aspire. Nor does it follow that, until the final stage is reached, they can necessarily be required, in relation to lavatories, to behave as if they were not undergoing gender reassignment."*

Ultimately, whether a transgender person has a right to use the toilet facilities relating to their acquired gender will turn on the precise facts. A decision to prevent a transgender person using the toilet facility of their choice may be justified, depending on the circumstances. A minor at school will always be at a very early stage of transitioning, if at all, given the legal constraints in treating a person under the age of 18.

Exceptions in the Equality Act

The guidance has no regard to the fact that the Equality Act 2010 includes several exceptions which may well be applicable to school life.

Firstly, the guidance does not acknowledge that the 2010 Act has provision for single sex services or separate services for the sexes, as well as a general exception to discrimination on grounds of gender reassignment which applies if a restriction can be objectively justified. The lack of any reference in the guidance to these exceptions means that teachers and schools will be misled into thinking that equality law gives absolute rights to transgender people to the exclusion of the rights of other service users.

Secondly, the guidance suggests that schools must abide by the wishes of a transgender learner in relation to use of accommodation on trips and residential activities. The guidance states (at page 21):

- *"If a transgender young person wants to share a room with other young people who share this gender identity, they should be able to do so".*
- *"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"*

This is misleading. Although it comes under the heading of "Good practice", these statements imply that it would be unlawful to refuse a request from a transgender young person to share a room with another person of their gender identity. This is not correct. The Equality Act 2010 (at schedule 23, paragraph 3) contains an exception which disapplies the prohibition on gender reassignment discrimination in relation to communal accommodation where the conditions set out in that paragraph are satisfied. The exception envisages that service providers will have regard to a range of factors, including the rights and privacy of other service users.

Likewise, in relation to PE and sport, the guidance states (at page 20) that "a transgender young person should be allowed to compete in the category which matches their gender identity". Again, the absence of any reference to section 195 of the Equality Act (which provides for an exception to discrimination on grounds of gender reassignment in the area of sport) is misleading. The guidance wrongly implies that it would amount to unlawful discrimination if a transgender pupil could not compete in their acquired gender.

Rights of staff and other pupils

It is well established that as a public authority, it is unlawful for a school to act in any way that is incompatible with a Convention right (section 6 Human Rights Act 1998). This includes the following Convention rights: article 8 (right to respect for family and private life), article 9 (freedom of thought, conscience and religion) and article 10 (freedom of expression).

As articles 8, 9 and 10 are all qualified rights, these may be restricted in so far as it is necessary in a democratic society to do so for, for example, the protection of the rights and freedom of others. This is so whether those rights are being prayed in aid by a person seeking to live in their chosen gender identity or indeed by another person who might be *affected* by that person's choice. The failure of the guidance to have any regard to this is very stark.

In terms of article 8, the guidance exposes other learners to a breach of their privacy as the result of prescribing that transgender young people should self-determine their choice of changing and toilet facilities. For example:

> *"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****". (emphasis added)*

The guidance selectively ignores the fact that for other learners the feeling of discomfort may have an entirely understandable basis. It should be stressed that a person cannot apply for a Gender Recognition Certificate until they are 18 or indeed have surgical gender reassignment. And so, a trans young person, although he or she may have a right to self identify their gender, is not yet able to legally or biologically change their birth sex. This has significant implications in terms of the privacy rights of others. For many young people, being forced to use toilet or changing facilities with trans young people who retain the genitalia of the opposite sex raises a concerning disregard for personal privacy.

The guidance suggests that other learners who might feel uncomfortable should 'out' themselves by using the accessible facility or using changing facilities *after* they have been used by a transgender learner. However, many young people will find themselves facing a dilemma. If they use the facilities at the same time as a trans learner, there is an interference with their privacy rights; but if they use the accessible facility or wait to use the toilets later, they may well be communicating their discomfort and concerns to everyone else around them. The guidance thus seems to encourage a breach of the privacy rights of the many in order to uphold the 'rights' of the few. This cannot be a proportionate interference with the article 8 rights of the majority.

The guidance highlights that trans pupils might suffer with implications for their health and wellbeing by avoiding drinking and using the bathroom. But other learners themselves may suffer as a result of not feeling comfortable using the same facilities.

Likewise, it seems not to have occurred to those who have produced the guidance that being compelled to refer to a trans learner by their chosen name and pronoun might raise fundamental issues of freedom of conscience and/or freedom of expression. Whilst all transgender people must be protected from bullying, it is wrong to suggest, as the guidance does, that "deliberately using the wrong name and/or pronoun" (page 12) necessarily amounts to transphobic bullying. Although a *gratuitous* use of a trans learner's original name and related pronoun *might* amount to bullying, the guidance assumes that it would always be wrong to use such names and pronouns unless the use is merely "accidental".

In reality, a school would be most ill-advised to *compel* all staff and pupils to address a trans learner using their acquired name and pronoun. For many people, using a name or pronoun which does not denote a person's sex amounts to speaking a falsehood. This is particularly the case in relation to addressing or referring to minors, given that the law explicitly prevents them from changing their sex. Imposing an absolute requirement on all staff and pupils to refer to a transgender person in that person's acquired gender identity may well amount to a case of compelled speech and therefore breach the article 10 rights of those staff and pupils.

Furthermore, it may also breach the article 9 rights of staff and pupils if they are compelled to use names and/or pronouns when they have conscientious objection to doing so (whether or not their objection is informed by a religious belief). Any such interference with article 9 must be justified. But in the absence of any other options available to the person being compelled to use words he or she believes are manifestly false, it is difficult to see how the interference *could* be proportionate. For example, pupils who have a genuine conscientious objection to referring to a trans peer according to a gender identity other than the person's sex cannot move to a different class.

In short, the guidance seeks to make windows into the consciences of anyone who, on an objective basis, does not agree with a transgender pupil's feelings about themselves.

Rights of parents

Finally, the guidance encourages schools to side-line parents and indeed to breach the rights of parents. We have already quoted the reference to parents not being told if their son or daughter will be sharing a bedroom on school trips with members of the opposite sex. This clearly breaches the right of parents to raise their children in accordance with their beliefs. Indeed, for many parents – religious or otherwise – allowing such a practice would be viewed

as unsafe. Yet, the first a parent would know about it would be after the trip has taken place, if indeed at all.

Likewise, a constant refrain in the guidance is the suggestion that schools should not disclose to parents information about a pupil's gender identity. Reference is made to article 16 of the UNCRC, which relates to a child's right to privacy. However, the wider context of the UNCRC, which underscores the importance of the child's family, is ignored. For example, the preamble to the Convention states:

> *"Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding".*

Moreover, although the UNCRC may underpin the approach to children's rights in Scotland, the more immediate legal requirement in Scots law is article 8 ECHR, which is incorporated by way of the Human Rights Act 1998 and the Scotland Act 1998. As well as protecting the rights of children, article 8 (taken with article 9 and article 2 of the First Protocol) uphold the rights of parents to raise their children and have their children educated in conformity with their own religious or philosophical convictions. Parents have the right to be kept informed by a school of matters relating to their child's development and wellbeing. Yet, the guidance states (at page 10, in relation to primary schools), where pupils may be as young as four:

> *"If a child in the school say 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".*

The guidance discourages teachers from notifying parents about a life-changing decision which the school and the child are making. Similarly, the guidance repeatedly anticipates that teachers and schools will share information about a child or young person with third parties outside the school without parental consent. For example:

- "Put the young person at the centre and keep them there: let them know that you will not share their information with anyone **unless they give their permission** or there is a risk to themselves or others" (page 28)
- "Do not disclose the gender history or any sensitive information about a trans young person to anyone inside or outside the school, **without the consent of the young person**".

However, notwithstanding section 2 of the Age of Legal Capacity (Scotland) Act 1991, there may well be circumstances where the consent of parents to sensitive disclosures about their children will be necessary under data protection law, otherwise explicit consent to the processing of personal data will not be deemed have been given. In such circumstances, the processing of information may breach the Data Protection Act and the article 8 rights of the child, notwithstanding that the child apparently "consented" to the disclosure being made.

The silence in the guidance about the rights and responsibilities of parents is liable to cause schools to inadvertently interfere with the article 8 rights of children, young people and their parents.

The Government's statutory duties

Although the guidance has been developed by LGBT Youth Scotland working with the Scottish Trans Alliance, it has nevertheless been funded by the Scottish Government's Equality Unit and it also carries the endorsement of the Scottish Government. In other words, the guidance carries the Scottish Government's mark of approval and owes its existence to the Government's Equality Unit signing off on the application for funding of those who produced the guidance. As a condition of funding, it would be expected that the Government Equality Unit has taken an overseeing role in developing the guidance.

Section 149 of the Equality Act 1998 places a duty on the Scottish Government in the exercise of its function to, amongst other things:

- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, which includes removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic (s149(1)(b) and 149(3)).
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it. This includes tackling prejudice and promoting understanding (s149(1)(c) and 149(5)).

The section 149 duty applies to all the protected characteristics apart from Marriage and Civil Partnership.

For the reasons set out in this letter, there is no suggestion that those producing the guidance have any regard to the needs of those whose relevant protected characteristic is religion or belief or sex. Clearly, given the negative impact on those of particular beliefs should the guidance be followed by schools, due regard should have been given to issues of conscience and freedom of expression. Likewise, the guidance could negatively impact on other pupils on account of their sex, but there is scant evidence in the document that any regard has been had to sex as a protected characteristic.

By failing to balance the rights of transgender young people with the rights of others, the guidance demonstrates a serious disregard for the need to foster good relations between transgender persons and others who do not share the protected characteristic of gender reassignment. It is difficult to see how guidance can promote good relations if it insists on the rights of the transgender person in every circumstance to the exclusion of the rights of others. Similarly, the guidance does not foster good relations between those who share a particular faith or belief and others who do not share it. Rather, the guidance sends the clear signal that those who may hold to beliefs about gender identity that do not align with this document are not worthy of respect and that any expression of those beliefs will amount to a case of bullying.

In light of the concerns of our client, please would you:

1. Confirm what steps the Government Equality Unit took to ensure the guidance reflected a correct understanding of the law.
2. Confirm to us what steps the Government Equality Unit took to comply with its section 149 duty in relation to all protected characteristics (including religion of belief):
    a. When making the decision to fund the guidance, and

b. When making the decision to endorse the guidance.

3. Confirm what steps were taken to ensure that the Government Equality Unit was acting compatibly with the Human Rights Act 1998 in the exercise of its functions in making decisions about funding and endorsing the guidance.
4. Confirm that the Scottish Government will withdraw its endorsement of the guidance pending further consideration of the above matters.

Our client reserves it position in terms of challenging the guidance and the failure of the Government Equality Duty to comply with its statutory obligations.

Yours faithfully

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For and on behalf of Balfour+Manson LLP