

“All day, every day”

**Legal obligations on schools to prevent
and respond to sexual harassment
and violence against girls**

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About the End Violence Against Women Coalition

EVAW is a leading coalition of specialist women's support services, researchers, activists, survivors and NGOs working to end violence against women and girls in all its forms.

Established in 2005, we campaign for every level of government to adopt better, more joined up approaches to ending and preventing violence against women and girls, and we challenge the wider cultural attitudes that tolerate and condone this abuse.

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Introduction

What is this briefing and who is it for?

This legal briefing has been prepared by solicitor Louise Whitfield and Sarah Green and Rachel Kryss of the End Violence Against Women Coalition. It sets out legal obligations for schools, central government and other public bodies under the Human Rights Act and the Equality Act (EA), including the Public Sector Equality Duty (PSED). It is intended to be used by all those concerned with improving responses to violence against women and girls, including girls and young women, school leaders, governing bodies, school authorities, parents and carers, women's groups and local activists.

Sexual harassment and violence in schools

There are endemic levels of sexual violence and harassment in schools. 5,500 sexual offences were reported to the police as having taken place in UK schools over a three-year period to July 2015, including 600 rapesⁱ. That may equate to a rape in school every day of the school year.

YouGov research carried out for the End Violence Against Women Coalition in 2010ⁱⁱ found that:

- Almost one in three (29%) 16-18 year-old girls had experienced 'groping' or other unwanted sexual touching at school;
- 71% of 16-18-year-olds said they heard sexual name-calling such as "slut" or "slag" towards girls at school daily or a few times per week;
- 24% 16-18-year-olds said that their teachers had never said unwanted sexual touching, sharing of sexual pictures or sexual name calling is unacceptable;
- 40% of 16-18-year-olds said they didn't receive lessons or information on sexual consent, or didn't know whether they did.

GirlGuiding's annual survey of thousands of their members in 2014/15 found that 59% of girls had experienced some form of sexual harassment in school or collegeⁱⁱⁱ.

In society more broadly, girls and young women experience much higher levels of rape and sexual assault than older women. The Office for National Statistics published a report in February 2016 which showed that nearly a third of all female rape victims recorded by the police are girls aged under 16^{iv}.

With all of this in mind, we must ask if schools are doing enough to protect girls from sexual bullying, harassment and violence, and if the government is doing enough to guide schools and ensure they are providing a safe education for our young people.

Our findings

This report shows that, despite the requirements on them under the Human Rights Act, international human rights treaties and the Equality Act, schools and the government are failing to meet their obligations and are failing to keep girls safe in school. In particular, we find that current school safeguarding and child protection policies and practices do not enable schools to ensure girls have equal access to a safe education and may be unlawful.

When a school fails to address sexual harassment and violence effectively there can be serious long-term consequences for individual pupils and for the whole school community. Girls and boys may learn that such abuse is not regarded as important by adults, that the perpetrators of such abuse are rarely challenged and have significant impunity, and that perhaps such behaviour is a 'normal' part of the conduct of relations between adult men and women. If a school fails in this area, individual girls may find it difficult to continue with their education and many drop out of school altogether. This discriminates against girls, and the school is likely to be in breach of its legal obligations and the positive duties to protect pupils which are placed on schools.

EVAW members responding to the Women and Equalities Select Committee inquiry into sexual violence in schools highlighted the lack of a coordinated and effective approach taken by schools:

“Young people I work with speak about sexual harassment as something they expect in school and feel that when they say something to teachers nothing happens. The peer harassing them will start to call them names or see them as a challenge which can lead to more unwanted touching or attention.”

Rape Crisis England and Wales

“There is a lack of guidance for schools on what constitutes sexual harassment and sexual violence and how this should be recorded and responded to. This problem is further compounded by the high levels of sexual harassment occurring in schools, with one teacher saying; *“If I acted on every incident of sexual bullying or sexting that took place in school, it would be all I would do all day, every day.”*”

Rape Crisis South London

The government urgently needs to provide schools with clear and specific guidance on their legal obligations towards girls. Schools must review how they respond to sexual harassment and violence experienced by girls and should put in place new policies and practices.

To meet the challenges set out in this report we recommend that the government considerably revises the current statutory guidance to

schools on safeguarding and child protection; legislates to make high quality, age appropriate sex and relationships education (SRE) compulsory in all schools - primary and secondary and of all funding statuses; make clear to all schools that it is inappropriate and unlawful to respond to an allegation of sexual assault by agreeing to act only in the event of a police investigation; develop a plan to improve teacher training in this area. We recommend that without waiting for legislation school leaders and their governing bodies put in place policies addressing violence against women and girls, including a zero tolerance policy towards abuse of girls; build links with local women and girls support services; introduce high quality, age appropriate sex and relationships education (SRE); involve girls and boys in the schools' ongoing response to abuse. We recommend that Ofsted begins to inspect schools specifically for their performance in this area as a matter of great interest to parents and young people.

If significant changes aren't made, we will see abuse of girls in schools continue at alarming rates and with impunity, girls will continue to be failed and some will leave school and/or not achieve the best education they might have had, and the government, the Department for Education, schools and their governing bodies will be failing in their legal obligations and will be at continuing risk of legal challenges.

What is covered in this briefing

In this briefing we detail schools' obligations under the Human Rights Act and the Equality Act, including the anti-discrimination and harassment provisions and the public sector equality duty. We also look at other legal obligations on schools, the role of central government in this and using the law to support individuals. We conclude with clear recommendations for changes to government's, schools' and Ofsted's response to sexual harassment and violence in schools.

“Our inquiry has revealed a concerning picture. We have heard girls talk about sexual bullying and abuse as an expected part of their everyday life; with teachers accepting sexual harassment as “just banter”; and parents struggling to know how they can best support their children.”^v

Maria Miller MP, Chair Women and Equalities Select Committee on report into sexual violence in schools

Schools and the Human Rights Act

The Human Rights Act 1998^{vi} (the HRA) makes it unlawful for a public authority, including the governing bodies of schools, local authorities and central government departments, to act in a way that is incompatible with a number of the rights included in the European Convention on Human Rights^{vii}. These rights include:

- Article 3 – the right to freedom from inhuman and degrading treatment
- Article 8 – the right to respect for private and family life
- Article 14 – the prohibition of discrimination in relation to the enjoyment of the rights and freedoms in the Convention
- Article 2 of the first protocol – the right to education.

Some of the rights are qualified, such as Article 8, which means the state can interfere with this right in certain limited circumstances. Some rights are absolute such as Article 3, which means there is no circumstance in which someone can be subjected to inhuman or degrading treatment. Article 3 also puts positive obligations on the state to protect people from having this right breached and to investigate allegations of such breaches. For example, the duty on the police and other state bodies to protect people from a serious assault has meant that a failure to do so has been found to be a breach of Article 3; a failure to investigate allegations can also amount a breach of Article 3. Whilst it is ordinarily the police that can be held responsible for a failure to protect an individual or failure to investigate an alleged breach, a school (which is also a state body) must still take appropriate steps to ensure that girls in school are protected from a breach of their Article 3 right to freedom from inhuman and degrading treatment (such as rape), and to ensure that allegations of such breaches are appropriately investigated.

In relation to Article 8, the right to protection of private and family life, this includes the duty on state bodies to protect an individual's physical and psychological integrity. Case law has also established that this includes freedom from physical and sexual assault. The state must take practical and effective measures to protect someone's private life, including effective protection to exclude the possibility of interference. When considering cases in this area, the European Court of Human Rights has stressed that the right to physical and moral integrity protected by Article 8 comes into play even though the breach is not so severe as to amount to inhuman treatment under Article 3. It is clear that in appropriate cases the state body (e.g. a school) may be required to take positive action to prevent interferences with Article 8 rights by private individuals.

This means if sexual harassment or sexual violence goes unchecked in the school setting, the school's governing body is likely to be liable for a

breach of Article 8 by failing to take steps to protect the physical and psychological integrity of the individual pupil.

Under Article 2 of Protocol 1, the Convention states that: "no person shall be denied the right to education". The concept of "education" for human rights purposes is not confined to teaching or instruction; it covers the whole social process whereby beliefs, culture and other values are transmitted and therefore includes all school-related activities not just what happens in the classroom. If a child is denied the right to education because sexual harassment or sexual violence that they experience prevents them from attending school or any school-related activities, the governing body could be liable for a breach of the HRA based on a breach of Article 2 of the First Protocol.

In addition, the right to education is a right to *effective* education which should be interpreted in line with the UN Convention on the Rights of the Child ("UNCRC") which also covers the right to education and prohibits discrimination. The UN Committee on the Rights of the Child clarified its interpretation of the UNCRC on these points in the following terms: "*gender discrimination can be reinforced by practices such as a curriculum which is inconsistent with the principles of gender equality, by arrangements that limit the benefits girls can obtain from the educational opportunities offered, and by unsafe or unfriendly environments which discourage girls' participation*". So a failure to provide effective education, in terms of both teaching and other activities, by creating an environment in which girls perform less well or are deterred from engaging in opportunities provided by their school, is likely to be a breach of Article 2, Protocol 1 of the European Convention on Human Rights and therefore a breach of the HRA.

In addition, Article 14 of the European Convention prohibits discrimination in relation to the enjoyment of the rights and freedoms set out in the Convention. If girls in school are treated less favourably than boys when exercising their right to education, their right to respect for their private life, or their right to freedom from inhuman and degrading treatment because the school fails to address sexual harassment and sexual violence effectively, the school is likely to be in breach of Article 14. This overlaps with the domestic legislation prohibiting discrimination under the Equality Act 2010 dealt with below.

Specifically, Article 14, with Article 3, imposes positive obligations on state bodies to investigate and protect against gendered forms of violence. This reflects the obligations contained in the Convention on the Elimination of All Forms of Discrimination Against Women: "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".

Governing bodies should therefore ensure that all policies and procedures dealing with how the school addresses sexual harassment and sexual violence - in terms of both proactive steps to prevent it and reactive steps to investigate allegations - comply with the HRA in their approach. In addition, when dealing with an allegation of sexual harassment or sexual violence, the school must ensure that it protects and promotes the human rights of the victim of the incident and does not ignore these in favour of the human rights of the alleged perpetrator.

Emma's story: HRA breaches when a school fails to investigate

Emma attends a local secondary school. She is sexually assaulted on school premises during the school day by a male pupil. She reports this to a teacher and she tells her mum. Her family support her to report it to the police who investigate but decide not to take any action after interviewing various witnesses; they have been advised by the Crown Prosecution Service that the evidence is not strong enough to justify bringing criminal proceedings because the test for establishing guilt in a criminal case is "beyond reasonable doubt".

When the police investigation is concluded, Emma and her family ask the school what action they will take to ensure Emma is safe from future sexual assaults and/or to punish the perpetrator. The school refuses to investigate because they say that the police decided not to press charges; they also refuse to take any steps to address the behaviour of the male pupil involved in the incident asserting that there is no risk of it happening again. Emma's attendance rate at school drops off; she begins feeling unwell and her family and some staff think this is due to the psychological impact of the assault and her fears that it may happen again.

The school's decision would be unlawful for several reasons. Firstly, under the HRA, the school has a duty to protect Emma from inhuman and degrading treatment and a duty to investigate incidents (under Article 3 of the Convention). It is well-established in case law that where the state or other relevant public body (in this case the school) is aware of a real risk of harm to a person of a type that would fall within Article 3, it is under an obligation to take reasonable and effective steps to prevent that harm, even when the harm comes from another individual and not the state body. An effective investigation must be conducted with a view to establishing both the identity of the perpetrator and any systemic failings, so that these can be addressed and future protection ensured. The school has therefore arguably breached Article 3 of the Convention – and therefore its obligations under the HRA – by refusing to even investigate the allegation. They are also possibly failing to protect Emma as they appear to have no basis for their assertion that she is not at risk of a further assault.

Secondly, the school must also protect Emma's rights to private and family life, which includes protecting her physical and psychological integrity. Article 8 requires respect for human dignity and quality of life. Even if the assault is not so serious as to breach the Article 3 threshold of inhuman and degrading treatment, it is likely to be a breach of Article 8, the right to protection of your private and family life. In addition, this right must not be looked at in isolation but should be read in conjunction with the right to education under Article 2 of the First Protocol. If Emma is missing school because of the failure to investigate the assault and protect her from future assaults, the school may be in breach of her right to an effective education. They should be taking steps to enable her to access the education and related services that are available to all pupils. A failure to do so would be a breach of the HRA.

Thirdly, Emma has the right to enjoy her human rights without being discriminated against on the basis of her sex. A failure to investigate or protect her from gender-based violence is therefore sex discrimination in breach of Article 14 of the European Convention. This cannot be justified by the school as their failure to investigate and protect her cannot be a proportionate means of achieving a legitimate aim, which is the only basis on which such discrimination can be justified.

Emma could therefore bring a claim for a breach of her human rights against the school's governing body. She could ask the court to make a declaration that her human rights had been breached and that the school should pay damages.

In their response to the Women and Equalities Select Committee inquiry into sexual violence in schools 2016, Coventry Rape and Sexual Abuse Centre said;

"Incidents are rarely recorded and rarely reported. Teachers are reluctant to record it unless it reaches a level at which it is 'serious' or affects the school's absentee targets. E.g. a girl who had reported incidents of sexual violence at school did not receive any interventions until she stopped coming to school."

The school's approach in this example is unlawful.

Schools and the Equality Act

The Equality Act 2010^{viii} (EA) prohibits discrimination (direct and indirect), harassment and victimisation in education on the grounds of certain protected characteristics including sex.

Under section 85, the responsible body of the school must not discriminate against pupils:

- in the way it provides education for them;
- in the way it affords them access to a benefit, facility or service;
- by not providing education, access to a benefit, facility or service to them;
- by excluding them or by subjecting them to any other detriment.

As is clear from the breadth of the wording of section 85, this covers not only the provision of education itself, but also access to facilities and services, as well as ensuring that girls are not subjected to “any other detriment” as a result of their sex. “Detriment” is given a very wide meaning in the Equality Act: it will protect against any disadvantage whether or not the person subjected to the discriminatory treatment was aware of it at the time. In particular, it is not necessary to establish any tangible disadvantage but instead, a mere loss of opportunity, even if only valued by that individual, may amount to a detriment. If a reasonable pupil might take the view that they had been disadvantaged in the circumstances in which they were required to study, for example if sexual harassment or sexual violence was not addressed and allegations not investigated, this would constitute a detriment.

Direct discrimination (see section 13 EA 2010) regulates less favourable treatment because of a protected characteristic, in this case sex. Direct discrimination can never be justified; there is no defence provided for in the legislation. This means the imposition of a condition which is inherently discriminatory (for example a policy of refusing to investigate gender-based complaints such as sexual harassment or sexual violence) will be direct discrimination, for which there can be no justification in law.

In addition, if schools fail to address sexual harassment or sexual violence, i.e. incidents that disproportionately affect girls, this is also likely to amount to indirect discrimination (under section 19) and be a breach of the Equality Act. Indirect discrimination is defined in terms of a school having a provision, criterion or practice which when applied to girls, puts them at a particular disadvantage when compared with boys, which the school cannot justify as a proportionate means of achieving a legitimate aim. If a school can objectively justify a provision, criterion or practice that disproportionately affects girls, it may be lawful; but there is unlikely to be any objective justification for failing to address sexual violence or harassment.

The responsible body of the school must also not harass a pupil, harassment being defined in section 26 as unwanted conduct related to a relevant protected characteristic (in this situation sex) and where that conduct has the purpose or effect of violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. A failure to investigate an allegation of sexual harassment or violence may have the effect (particularly if the perpetrator is allowed to remain in school) of "creating an intimidating, hostile, degrading, humiliating or offensive environment", and therefore amount to harassment in breach of section 85 by the school.

This means if a school has a blanket policy of (or a practice of) never investigating sexual harassment or sexual violence and simply refers such gender-based incidents to the police, this may amount to direct discrimination as girl pupils are being treated less favourably than boy pupils. It is likely to be indirect discrimination in that it is a provision, criterion or practice that puts girls at a particular disadvantage when compared to boys and it cannot be justified in terms of being a proportionate means of achieving a legitimate aim. It may also amount to harassment. Similarly, a failure to take proactive steps to ensure girls can access education, and the other benefits, facilities and services that the school offers, may amount to subjecting them to detriment such as to be in breach of section 85 of the Act.

How schools can get it wrong: breaches of the Equality Act through policies and practices

Part 1: practice/informal "policy"

A secondary school has no written formal policy about how to deal with sexual harassment or violence. It has policies about bullying, homophobia and how to deal with racist incidents.

The school has received a number of complaints from girls about a particular boy who has sexually assaulted them. The school has reported each incident to the police who have decided against taking any further action saying that they believe the girls' accounts as to what happened, but they consider the incidents are relatively minor. The police have spoken to the boy involved and they do not think there is a risk of further incidents; they base their decision on what they consider to be in the public interest and decide against charging him with any offences. The school takes no further action stating that they cannot do so because the matter has been dealt with by the police and it should end there. This is their standard response to all such matters - they say that they should not be judge and jury on such issues if the police have decided not to take it any further as this would be unfair to the alleged perpetrator.

The school's decision is likely to be unlawful and amount to indirect discrimination (as well as being a breach of the HRA for the reasons set out in Emma's story above). The school has a practice of not taking any action against pupils accused of sexual assault once the police have been informed. This puts girls at a substantial disadvantage when compared to boys because they are disproportionately affected to their detriment by such a practice. The school is trying to argue that there is objective justification for this by saying that they should not adjudicate on a matter already dealt with by the police; they would presumably say that treating the alleged perpetrator fairly is a legitimate aim, and that not investigating such matters at all is a proportionate means of achieving this legitimate aim. This argument is unlikely to succeed as an adequate defence to the indirect discrimination that the girls are facing. The school can still have a fair process by which they protect the perpetrator's rights and investigate the incidents appropriately. They also have duties to protect the girls under the HRA (see above) and not to discriminate against them in the way that they provide education for them. The school must therefore undertake a balancing act to ensure safe education for the girls and a fair process for anyone facing allegations but they cannot simply rely on the police's position to justify not doing anything.

A failure by the school to investigate the allegations may also amount to harassment which would also breach the Equality Act 2010. Harassment in this context ordinarily means unwanted sexual conduct (the sexual assault by the male pupil) which has the purpose or effect of violating the dignity of the girl pupils, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. However, a failure by the school to take action in respect of such harassment may in itself have the effect of violating the girls' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the girls, even though it is not the school or any staff member that has perpetrated the assault or directly harassed the girls. The school is the education provider, so must not harass in the context of providing education; they must also make sure no-one else harasses girl pupils when they provide them with education.

The girls involved could bring a claim against the school for breaches of the Equality Act 2010, seeking damages for the injury to feelings that they have suffered and other losses; they can ask the court to declare that the school is in breach of the Equality Act and they may also be able to ask the court to make specific orders requiring the school to take steps to avoid further discrimination against them.

It would be equally unlawful for the school to have a practice of not investigating allegations at all, regardless of whether they had been reported to the police.

Part 2: written policy

At the same school, and following a number of incidents where girls have made allegations against boys which have been reported to the police, but no further action taken, the school decides it needs to clarify its position on whether they will then take any action once the police matter is concluded. They feel that this will give everyone involved certainty and will avoid ongoing disputes with pupils and parents that think the school should have an internal procedure to investigate such incidents.

The school prepares a formal written policy which states: "If an allegation of sexual assault or harassment is made by a pupil against another pupil, this matter will be referred to the police. Once the police matter is concluded, if there is a criminal conviction arising from the incident in question, the school will consider what further steps to take in relation to that pupil. If there is no prosecution, or a prosecution ends in an acquittal, the school will not take any steps in relation to the incident in question."

This policy directly discriminates against girls. Sexual assault is gender-based violence and any policy by a school that confirms they will not investigate or take any action in relation to such incidents, treats girls less favourably than boys: this is direct discrimination in the provision of education, in breach of section 85 of the Equality Act. There is no justification defence for direct discrimination and thus the school is acting unlawfully. The written policy could also amount to indirect discrimination for the reasons set out in part 1 of this case study. The girls affected by the policy could bring a claim for direct and indirect discrimination, and possibly harassment (for the reasons set out above), as in part 1 as well.

Other legal obligations on schools

Schools owe their pupils a duty of care to provide them with a safe environment whilst on school premises or undertaking activities arranged by the school. If there is any breach of this duty which causes an injury, the school would be liable in negligence, and a pupil can bring a claim for damages. The most common example in this area which people will be familiar with – and which schools will have insurance cover for - is a claim arising from a personal injury to a pupil. If the school provides for example faulty PE equipment and the child has an accident and is injured as a result, the school could be held liable in negligence and would have to pay the pupil compensation.

This duty of care extends to ensuring pupils are safe from the behaviour of other pupils. Whilst there are few reported cases in this area, analogous claims decided in the claimant's favour make clear the duty of care that schools owe their pupils even in relation to the actions of other pupils. It is a school's duty to take reasonable and proper steps, bearing in mind the known behaviour of children, to prevent any pupil suffering injury including from the actions of fellow pupils.

In a case about bullying, the judge said: "It is common ground that there is a duty of care in the school and the LEA owed to pupils at the school. I find that in this case it was to take reasonable care to protect pupils from bullying **and other mistreatment by other pupils when at school.**" [emphasis added]. This applies equally in the context of sexual violence and sexual harassment by pupils: a school owes a duty of care to its female pupils to protect them from sexual assaults by other pupils. A school must have effective policies and practices to ensure a generally safe and secure environment for its pupils or it is likely to be in breach of its duty of care, and liable in negligence if a child suffers an injury as a result of that breach. If the school knew of assaults or the risk of assaults but failed to take steps to prevent them, then it is likely to be liable.

Emma's story continued: negligence claim

Based on the same facts set out in Emma's story above, Emma could also sue the school in negligence if she could establish that they were aware of the risk of further assaults and they did not take reasonable steps to ensure she was safe in school. If she was then assaulted, she may be able to bring a claim for damages for the injuries she suffered as a result of that assault.

The school clearly owes Emma a duty of care to keep her safe in school. If it was reasonably foreseeable that she would be assaulted again after the earlier incidents, and the school failed to have reasonable systems and arrangements in place for discipline and to counteract sexual violence

and harassment, they would be liable to pay her compensation for the injuries she suffered as a result of the breach of their duty of care.

A duty of care is owed to all pupils, not just someone who has already been assaulted and reported it. If the school was aware of the risk a particular boy presented, but failed to take steps to protect all pupils, and it was reasonably foreseeable that he would assault someone else, then a different victim of a further assault may be able to bring a claim against the school.

Schools and the public sector equality duty

Under section 149 of the Equality Act all public bodies including schools must have due regard to the need to eliminate discrimination and harassment of girls, to advance equality of opportunity for girls and to foster good relations between girls and boys.

Having due regard to the need to advance equality of opportunity for girls includes having due regard to the need to remove or minimise disadvantages they suffer; the need to take steps to meet girls' needs that are different from the needs of boys; and the need to encourage girls' participation in any activity in which their participation is disproportionately low.

The Equality & Human Rights Commission has published guidance^{ix} on how public bodies should meet the public sector equality duty and describes the "due regard" test in the following way: "*How much regard is 'due' will depend on the circumstances and in particular on the relevance of the aims in the general equality duty to the decision or function in question. The greater the relevance and potential impact, the higher the regard required by the duty.*" Decisions concerning sexual violence and harassment are clearly highly relevant to gender equality for girls in school; thus the regard necessary will be particularly high when schools look at these issues, both in terms of individual decisions and policies and procedures.

The duty is ongoing and non-delegable. It is an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation. The duty bites on all functions that the school exercises, not just when devising or developing policies, but also when taking individual decisions for example whether to investigate a particular allegation or not.

Schools must also undertake sufficient enquiry when meeting the equality duty. They need to work out how relevant a decision or policy is to gender equality and identify what information they need to assess its impact on the three statutory needs of eliminating discrimination and harassment, advancing equality of opportunity and fostering good relations between different groups. Gathering the right information might mean a school has to consult its pupils and/or organisations working in the field of violence against women and girls so that they can properly assess any adverse impact on gender equality their decision, policy or practice might have.

The equality duty is not only about assessing negative impact and trying to avoid, minimise or mitigate that adverse outcome. It is also about looking at how decisions and policies can have a positive impact on gender equality. Schools should see decisions and policy development as

opportunities to enhance and improve equality for girls in school, and not just interpret the duty as having to avoid an adverse impact.

This means when a governing body develops a policy or procedure on how to deal with, for example, discipline, bullying or safeguarding/child protection (which may include sexual harassment or sexual violence), it must have a high level of regard to the need to eliminate discrimination and harassment of girls and to advance their equality of opportunity. Similarly, when a governing body decides whether or how it will investigate an allegation of sexual harassment or sexual violence, it must comply with the public sector equality duty with rigour and an open mind, and should keep a record of how it has done so to reflect that it has thought carefully about the impact on equality for girls in the school when taking a particular decision.

If schools have policies, practices or procedures, or routinely make decisions which result in a failure to investigate allegations or a failure to address sexual harassment or violence, it would seem highly likely that they have failed to have due regard to the need to eliminate discrimination and advance equality of opportunity of their female pupils. Anyone affected by their decision-making could bring a legal challenge by way of judicial review and ask the judge to rule that the decision, policy or practice was unlawful as it was in breach of the public sector equality duty.

Are schools given the right guidance: Department for Education statutory guidance governing schools' policies and practices in this area - is it lawful?

The public sector equality duty also bites on decisions and policies of central government: a minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy. This includes developing and revising guidance.

The key current piece of statutory guidance for English schools in this area is the DfE's "Keeping children safe in education: statutory guidance for schools and colleges^x" (KCSE) which all heads, teachers and governing bodies are obliged to read. In order to meet the public sector equality duty, statutory guidance like this should be developed and revised taking into account all relevant equality considerations, placing appropriate weight on the evidence of known prevalence and threat, as well as undertaking sufficient enquiry to answer the right questions to meet the duty: how can this guidance contribute to eliminating discrimination and harassment of girls, and advance equality of opportunity for them? What must this guidance say in order to help protect girls in school from sexual harassment and sexual violence?

Reflecting on the HRA and EA obligations set out above, this key piece of statutory guidance is wholly inadequate in terms of the Department for Education's duty to have due regard to the need to eliminate discrimination against and harassment of girls in schools, and to advance their equality of opportunity. The guidance hardly refers to gender at all, even though it enumerates a considerable summary of different forms of gender-based violence. It fails to say that sexual harassment and assaults are experienced very disproportionately by girls and women; it makes no reference to sex discrimination and has only one reference to the Equality Act (in terms of interview questions for staff). It fails to set out how sexual assaults should be responded to and prevented on a gendered basis.

While there is acknowledgement in the KCSE guidance that other children as well as adults may be the perpetrators of abuse, the mentions are minimal and the document does not spell out the disproportionality with which girls experience sexual harassment and assault. Part One of the guidance, which is the only section all school staff are required to read, makes only one reference to 'peer on peer' abuse and says this may include sexual assaults and sexting, and that staff should be clear on policies. There is no reference in this single 57-word paragraph to the prevalence of sexual harassment and violence in schools experienced by girls and the very significant negative impact on their education as a result.

The other reference to 'peer on peer' abuse in the guidance is in a subsequent part of the document (which governors, designated senior and school leaders only are required to read) but this still fails to refer to the disproportionate detriment and risk which girls experience. For example, it says schools' child protection policies should set out how a school will respond to sexting, without reference to the extremely gendered nature of this phenomenon. It somewhat delicately refers to "the different gender issues that can be prevalent when dealing with peer on peer abuse" without spelling these out. It should be remembered that the intended readers of this section include school governors, who hold great responsibility for school compliance in this area but who are also usually committed but lay local people from a wide variety of backgrounds, the majority are non-teachers and therefore have no teacher training or experience in this area. The document is as such a poor attempt to ensure such a person understands specific risks and is able to ensure a school is doing what it can to reduce them.

The guidance also fails to recognise that the biggest risk of sexual harassment or violence faced by girls in schools is from their peers. Almost a third of 16 to 18 year-old girls have experienced sexual assaults in school, but this 76-page guidance devotes only four paragraphs to addressing the fact that such assaults are primarily perpetrated by male pupils in school. There is no mention of gender discrimination in the

guidance and no reference to gender equality (or the need to advance it), despite it being highly relevant in this context.

On the face of it, it appears that there has been a failure by the DfE to comply with the public sector equality duty in the preparation of this guidance, which is an extremely significant document such that it is under constant review and is the basis of education staff and school governors' safeguarding and child protection training. The guidance, and school policies and practice which are built on its framework, are arguably *unlawful and open to legal challenge*.

The role of central government and its legal obligations

All state bodies, including government departments and agencies and ministers of state, must comply with the Human Rights Act. They are also bound by the public sector equality duty in all their functions. When exercising public functions or providing services, they must not discriminate on the basis of sex.

All public bodies – including schools – must make rational decisions taking into account relevant information and ignoring irrelevant information. These are part of the principles of public law that govern public body decision-making. Public bodies must place appropriate weight on any evidence before them, particularly evidence from experts or those most affected by the policy or decision in question. They must ask themselves the right question when deciding an issue and make sure they have the right information to help them make their decision or develop their policy.

Sometimes public bodies must consult people affected by their decision-making, before they take a decision. There may be a duty to consult in order to comply with the equality duty as outlined above, or because there has been a history of consultation. A lawful consultation must take place when the proposals are at a formative stage; consultees must be given enough time and information to enable them to make an intelligent response; and the results of any consultation must be conscientiously taken into account by the decision-maker.

Thus key decisions and policy development in this area must all reflect the government's legal obligations under the HRA and the Equality Act. Any decisions must be taken in accordance with the public law principles outlined above.

Introducing sex and relationships education: decision on compulsory PSHE/SRE by Secretary of State for Education, February 2016 – was it lawful?

Following considerable campaigning and extensive consideration by a number of different bodies, the then Secretary of State for Education made a decision on 10 February 2016 in a letter addressed to the Chair of the Education Select Committee in which she confirmed that the government would not make PSHE/SRE compulsory^{xi}. Whilst only the letter is available as to how the SSE reached this decision, it is possible to analyse the aspects of her decision which may have rendered it unlawful.

Firstly, the decision is contrary to the advice of a number of expert bodies including a number of select committees who have presumably considerable expertise in this area and who heard from a number of experts themselves. The Children's Commissioner, OFSTED and women's organisations campaigning on VAWG all recommended that PSHE/SRE be

made compulsory. The SSE's decision therefore suggests that she ignored all this expert advice for no other reason than "making PSHE/SRE statutory would...do little to tackle the most pressing problems with the subject, which are to do with the variable quality of its provision". The decision may therefore be unlawful if she failed to consider the expert evidence before her, placed too little weight on it, or unreasonably concluded that everyone else was wrong.

Secondly, there is no mention here – and the SSE has never confirmed it to be the case – that she considered the equality duty when taking this decision. As set out above, a decision like this is highly relevant to gender equality and therefore the necessary "due regard" she had to have to the three statutory needs was particularly high. The SSE should have specifically considered, in a focussed way, the need to eliminate discrimination and harassment of girls in schools, and the need to advance equality of opportunity for them. She should have thought about the need to minimise or remove the disadvantages girls face, how their needs in school are different to boys' needs and how compulsory PSHE/SRE could address these needs.

Thirdly, the only reason she gives for not making it statutory is the concern that that would do little to tackle the most pressing problems of variable quality. This is arguably an illogical conclusion to reach, given that making PSHE/SRE statutory could be a key part of addressing quality and such a reason does not – on the face of it – outweigh the need to make it statutory. As set out above, a wide range of experts and interested parties have said PSHE/SRE will help make girls safer in school and later life. This is incredibly important; the adverse impact on girls is very grave so the SSE's response must be proportionate. If it isn't, it will be unlawful.

Using the law to protect girls in school

All the legal rules outlined above can be used to protect girls in school in two main ways: through court cases or through lobbying and campaigning.

Litigation

In terms of bringing a court case, importantly, legal aid remains available – if the individual who wants to bring the case is financially eligible^{xiii} – for cases against state bodies, including discrimination claims, breaches of the HRA and judicial reviews. There is generally no legal aid available any more for the personal injury/negligence type of claims referred to above, but when a claim involves serious wrong-doing by a state body, it might still be possible to secure legal aid. Without legal aid, the majority of cases are too expensive for individuals to bring although in some instances, a no-win no-fee agreement may be possible. It is very important to find the right kind of solicitor who has experience in bringing the type of case you want to bring.

There are strict time limits for bringing different types of cases. A judicial review claim – to challenge a decision by a public body – needs to be started promptly and within three months of the date of the decision you want to challenge. A discrimination claim must be started within six months of the discriminatory act, and a claim for a breach of the HRA must begin within a year of the breach. These are strict time limits and can only be extended by the court in exceptional circumstances. There is a lot of work to do to prepare a claim before the court case starts so it is very important to get legal advice as soon as possible.

Anyone thinking about starting a court case also has to think about other ways they could sort out the dispute without going to court: is there a complaints procedure they could use, or should they suggest mediation to the other party involved? This might sort the problem out more quickly and might also get you more what you want than through a court case.

All litigation begins with the claimant setting out in writing through their solicitor why they think the school or other body involved has acted unlawfully. This initial letter will also set out what the individual wants the other party to do to put it right: for example, withdraw an unlawful decision, change an unlawful policy, or apologise and pay compensation. This gives the parties a chance to sort out the dispute without going to court, which can be expensive and unpredictable. Many cases settle at an early stage and do not result in a court ruling that other people rely on. Sometimes, cases are heard by the court at a full trial and the decision the judge makes then sets a precedent that other people can rely on.

Campaigning and lobbying

All schools and other public bodies should be familiar with their duties under the HRA and the Equality Act 2010. If you think they are in breach of the rules and obligations set out in this briefing, you can simply point this out to them and ask for a response, whether it's in relation to an individual decision or person, or in relation to a wider issue affecting lots of people. The school or public body should be asked to explain why they think what they are doing is lawful; you should give them a deadline for responding to your queries and you should ask them to send you relevant documents to justify what they say in their response. For example, if you are asking them how they have complied with the public sector equality duty when they made a decision, or developed a policy, ask them to provide you with a copy of their equality impact assessment relating to the decision or policy, or whatever record they have to show they complied with this important statutory duty.

If they fail to respond, or refuse to reply, you should pursue a formal complaint. All schools and public bodies will have complaints procedures that will have a set format of steps to follow. You need to make sure you are dealing with the right person under their complaints procedure, and it is worth sending a copy of your complaint to other people who might be involved. For example, if you are complaining to a school about how they are not tackling sexual violence against girls, and you are writing to the head teacher, there might be a governor who is responsible for equality and diversity and they should be sent a copy of your complaint.

If you want to get a school to change how they do something, then you can explain their obligations under the HRA and the Equality Act and how they are in breach if they carry on with their current approach. You don't have to wait for a specific incident to complain about. If they refuse to make the changes you suggest, they should explain why and tell you what they have taken into account when making their decision. You could ask them whether they consulted pupils or parents about this and point out why they might need to do this to meet their equality duty. If they decide not to make the changes you think are necessary, you could get legal advice on bringing a judicial review claim against them if their decision is unlawful.

Sources of help

Equality & Human Rights Commission www.equalityhumanrights.com

Rights of Women www.rightsofwomen.org.uk

Rape Crisis England and Wales www.rapecrisis.org.uk

Southall Black Sisters www.southallblacksisters.org.uk

Conclusion and recommendations

The government urgently needs to provide schools with clear and specific guidance on their legal obligations towards girls, and schools must review how they respond to sexual harassment and violence experienced by girls and should put in place new policies and practices. If they fail to do so both may face credible legal challenges.

To improve the school response to the reality and risk of sexual harassment and abuse of girls we recommend that:

Government

- DfE should consult on and considerably revise the key statutory schools safeguarding guidance: Keeping Children Safe in Education, such that the recognition of the prevalence and risk of sexual harassment and abuse of girls in school is made clear to readers (as well as the connections between this abuse and 'sexting', online harassment and abuse in relationships) and appropriate responses suggested, including monitoring the prevalence of these forms of abuse; including sexual harassment and abuse of girls explicitly in safeguarding and child protection training; adopting a zero tolerance policy towards sexual harassment which is cross referenced in bullying, equality and code of conduct policies; recommending that schools make links with and seek advice from local specialist preventing violence against women and girls organisations.
- The DfE should also make clear to schools, in KCSE and directly, that schools approaching reports of sexual assault in the way described in this briefing – deferring action until the conclusion of a police investigation and/or refusing to take further action unless there is conviction for a sexual offence – is unlawful, wholly inappropriate and constitutes discrimination against girls.
- Legislate to make high quality, age appropriate sex and relationships education (SRE) compulsory in all schools.
- Consult with teachers, parents, young people and experts on how teacher training, both vocational and continuous professional development, can be improved in this area in order that all teachers and all school workers are enabled to respond appropriately to sexual harassment.

Schools

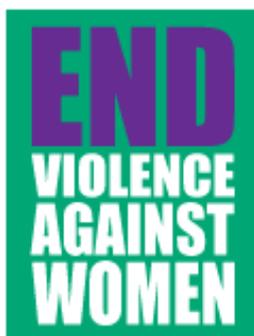
With or without legislative and statutory guidance changes, we recommend that the leaders and governors of all primary and secondary schools, and colleges:

- examine the prevalence of sexual harassment and assault in their schools and develop a zero tolerance policy; ensure other existing school policies (including bullying, equalities and code of conduct) cross refer and are consistent with this;

- introduce high quality, age appropriate sex and relationships education (SRE);
- build links with local women and girls support services;
- involve girls and boys in the schools' ongoing response to abuse; peer education is known to work well in this area.

Ofsted

- should ensure that all school inspections specifically examine the way schools respond to sexual harassment and assaults against girls, including whether a school has a sound policy to prevent, whether incidents are recorded, whether school leaders and all staff are informed and prepared to intervene and whether pupils feel safe from this form of abuse.



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References

- i <http://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/inquiry1/>
- ii <http://www.endviolenceagainstwomen.org.uk/2010-poll-on-sexual-harassment-in-schools>
- iii <https://www.girlguiding.org.uk/social-action-advocacy-and-campaigns/research/girls-attitudes-survey/>
- iv <http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2015/experimentalstatistics1newdataonpolicerecordedviolentandsexualoffencesyearendingmarch2015>
- v http://www.publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/9103.htm?utm_source=91&utm_medium=sumbullet&utm_campaign=modulereports
- vi <http://www.legislation.gov.uk/ukpga/1998/42/contents>
- vii http://www.echr.coe.int/Documents/Convention_ENG.pdf
- viii <http://www.legislation.gov.uk/ukpga/2010/15/contents>
- ix <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty>
- x https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/526153/Keeping_children_safe_in_education_guidance_from_5_September_2016.pdf
- xi https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499338/Nicky_Morgan_to_Education_Select_Committee_-_10_Feb_2016--_.pdf
- xii I.e. on mean-tested benefits or a very low income; in some circumstances the means of the parents will be taken into account when assessing the means of the child.