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13 December 2019

Our ref: PC/[REDACTED]

Dear Madam,

Re: Proposed Claim for Judicial Review

1. The Claimant

[REDACTED]
Mrs A, the parent of Miss B (a 13 year old child), c/o

[REDACTED]
Miss C, a teacher, c/o [REDACTED]

[REDACTED] is the parent of a 12 year old boy who attends a mainstream co-educational secondary school.

Mrs A is the parent and proposed litigation friend of Miss B. Miss B is 13 years old and attends a single sex girls' school.

Miss C is a qualified teacher who, after 14 years in a school, is now working in an educational company. She would like to be able to return to teaching. She has two children (aged 11 and 14).

Mrs A and Miss B seek anonymity as this matter will draw unwelcome and potentially hostile attention to Miss B at school.

Miss C seeks anonymity to protect her children from unwanted and potentially

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hostile attention.

2. The Defendant's reference details

Lucy Butler, Director or Children's Services, lucy.butler@oxfordshire.gov.uk

3. The Claimants' legal advisers

Paul Conrathe
Sinclairs Law
32 Candler Mews
Twickenham
TW1 3JF
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4. Details of the matter being challenged

The "Trans Toolkit for Schools" which we understand was issued by Oxfordshire County Council on 7 November 2019 ('the Toolkit')

5. The details of any Interested Parties

None

6. The issue

Process

We note that the Council published a previous version of the Toolkit in 2017 following a consultation process. We note that in the Toolkit you have stated that you only took into account the views of trans-affirming groups and not those who hold different perspectives.

We consider that there may be grounds for contending that you have carried out an unfair consultation in the production of the Toolkit. Please explain:

- a. Who you consulted and engaged, if anyone, beyond those identified within your document;
- b. What questions you asked them;
- c. What, if any, representations you considered from any other party; and
- d. How, if at all, you conscientiously took all such representations into account.

We consider that subject to your answers, there may be grounds for considering you have breached the *Gunning* principles in relation to your consultation.

At all events, your apparent failure to receive views from a balanced range of groups appears to have influenced the many mistakes as to the law which pervade the Toolkit.

Content

There are well-established principles of public law that:

- i. Policies or guidance that misstate the law or are predicated upon an erroneous understanding of the law will be unlawful see e.g. *Gillick v West Norfolk Health Authority* [1986] AC 112 HL 193 *per* Lord Bridge.
- ii. Policy or Guidance, which if followed, would result in unlawful acts or decisions (or which purports to permits or encourages such acts) will be unlawful. See again *Gillick* at 177 and 181 *per* Lord Scarman and 206 *per* Lord Templeman.

We regard it as clear that numerous aspects of the Toolkit are unlawful.

This is even more striking given the stated purpose of the toolkit which on page 5, at Section 1.3 under the heading 'How to Use the Toolkit' states that the Toolkit is a guide which provides schools and other educational settings with the information and resources required to become a trans inclusive environment and to ensure they are compliant with relevant law.

The Toolkit purports to provide legal advice, much of which is either plainly wrong on its own terms or significantly misleading by omission.

We invited your specific response to the following:

1) Toilets

On page 25 in Section 5.2 (Toilets) the Toolkit states that "*Children and Young People are supported through the Equality Act 2010 to access the toilet that corresponds to their gender identity, so trans girls because they are girls, can use the girls' toilets and boys' toilets*". You go on to state in the same section that "*Schools and education settings will want to discuss with trans and gender questioning young people and if appropriate their families, which toilet provision they would feel safest using and support them in doing so*". This misstates the law for a number of reasons including the following.

First, the Equality Act 2010 (the 'Act') contains no protected characteristic of "gender identity". Whilst it does include protected characteristics of "sex" and "gender re-assignment" (the latter as specifically defined in section 7(1) of the Act) neither of these concepts are the same as "gender identity". Throughout the Toolkit, you have referred to the concept of a "trans child", and claimed that absolute legal protections exist for such children, apparently in pursuit of a

particular ideology of gender contested by many. You have defined a concept of “trans” at page 47 of the Toolkit as *“an umbrella term to describe people whose gender is not the same as or does not sit comfortably with, the sex that they were assigned at birth”*. Such a definition, which, we note, is broad enough to include any child who may be confused about their “gender”, even if fleetingly, does not correspond to any group protected by the Act. This definitional confusion pervades the toolkit. The sentence relating to toilets above is merely one example.

Section 5.2 of the toolkit, equally typically of a theme pervading the Toolkit, contains no reference to the legislative provisions which may entitle or indeed require a school or other institution to deal with matters in a different way, having regard to the rights and interests of *all* children (and not merely those the Toolkit defines as “trans”). In relation to toilets, for instance, schools are required to have single sex toilet facilities (subject to an exception effectively for cubicled toilets of a particular sort). We note that you referred to such in an earlier version of this toolkit published in 2017, page 11 of which referred to regulations requiring the provision of separate toilet facilities for children aged 8 years of age or over. Put shortly, the Toolkit ideologically focuses exclusively on the rights of children defined in the Toolkit as “trans”. There is no recognition of the rights plainly held by other children, relating most particularly to their safety, privacy and dignity. Such rights will obviously be engaged when using toilets.

2) Changing Rooms

Paragraph 5.3 of the Toolkit on page 26 contains the statement that *“In all cases, trans children and young people should have access to the changing room that corresponds to their gender identity”*. Again, this misstates the law. It shows no recognition of the fact that the law may entitle if not require the provision of separate changing facilities for girls and boys. Again the Toolkit shows no recognition of the rights held by other children particularly relating to their safety, privacy and dignity in regard to changing facilities.

3) PE & Sport

In Section 5.4, PE & Fitness, the Toolkit states that *“trans children and young people should be supported to equally access PE and where lessons are segregated by gender should be enabled to participate in the lesson which corresponds to their gender identity if this is what they request”*. Yet again, that is legally wrong. The Toolkit omits to mention the express exception in section 195 of the Equality Act 2010 which (in summary) permits the separation of the sexes in relation to sport. It is a misrepresentation of the law to advise schools that they are unable to avail themselves of that provision. There is no recognition of the interference of the rights of other children which the participation of a “trans” child in a single sex sport may entail.

4) Residential Trips

Paragraph 5.5 (Residential Trips) advises schools that *“as far as possible, trans children and young people should be able to sleep in dorms appropriate to their gender identity”* The same points made above apply.

- 5) The section on the school curriculum again fails to state the law correctly, including because curriculum content is a matter specifically excluded from the scope of the Act.
- 6) It is a general theme of the Toolkit, identifiable in numerous places, that it is or may be harassment or direct discrimination contrary to the Equality Act 2010 to explore or question the basis of a child’s wish to be identified in a particular way. The Toolkit omits to mention, however, that (consistently with the importance of freedom of expression in areas in which opinion may be deeply divided) the duty not to harass pupils in schools does not apply where the unwanted conduct is related to certain protected characteristics, one of which is gender reassignment.
- 7) Freedom of expression, and the corresponded right protecting against compelled speech, find no mention anywhere in the Toolkit (or do so only in relation to the child defined by the Toolkit as “trans”). Many other pupils and teachers will hold views which contrast with that on which the Toolkit is based. A balancing of rights will be required. The Toolkit shows no such balance.
- 8) Nor is there any reference to the legal duties on professionals working in schools to safeguard all children. Our clients are deeply concerned that by constraining the way in which professionals may respond to a child’s wish to be identified in a particular way, they may put themselves in breach of their general legal duties including to safeguard. One aspect of this is the Toolkit’s discouragement of talking to the parent of a child about gender identification issues with which the child may be struggling. Not involving a parent, who will usually know their child best, may be flatly contrary to the child’s welfare.
- 9) Relatedly, our clients are concerned that following the advice in the Toolkit may lead to a breach of the rights of those children the Toolkit defines as “trans”. By way of example, there may be certain instances in which a failure to appropriately explore with a trans child the circumstances of their self-identity may be contrary to their welfare. The Toolkit shows no recognition whatever of the complexity of such issues.

In those and all the circumstances our clients consider that all such aspects of the Toolkit would fall to be quashed by the Court.

7. The details of the action the Defendant is expected to take

We expect you to publicly withdraw the Toolkit (and not to substitute for it any equivalent guidance making the same errors) by 3/1/2020, failing which our client will apply for Judicial Review.

8. The details of any information sought

Please answer the questions asked above.

9. The details of any documents that are considered relevant and necessary

Please provide any document you consider germane to the resolution of the above issues.

10. The address for reply and service of court documents

Paul Conrathe, Sinclairs Law, 32 Candler Mews, Twickenham, TW1 3JF
Ref: PC/Edwards Email: p.conrathe@sinclairslaw.co.uk

11. Proposed reply date

4pm 3/1/2020

Yours faithfully

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