



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 52

P1274/25

OPINION OF LADY POOLE

in Petition of

DE and FG

Petitioners

against

WEST LOTHIAN COUNCIL

Respondent

**Petitioners: Welsh; Gilson Gray LLP**

**Respondent: Scott KC; Legal Services, West Lothian Council**

4 June 2026

**Summary**

[1] This case is about toilets, in a primary school (the “school”) for which the respondent West Lothian Council (the “Council”) is responsible. The parents of a girl at the school (the petitioners) are concerned about the main toilet areas not being single sex. The court’s decision is that the toilet provision complained about breaches the requirements of the School Premises (General Requirements and Standards) (Scotland) Regulations 1967 (the “1967 Regulations”) and is indirectly discriminatory under the Equality Act 2010 (the “2010 Act”).

[2] The court was assisted by written and oral material placed before it by both parties, all of which it has taken into account. The court did not have the benefit of submissions from the Scottish Ministers, because although the action was intimated to them, they did not become a party.

[3] This judgment sets out the factual background, on the basis of the evidence placed before the court. It then explains why the provision of toilets in the school is amenable to judicial review. Next, it considers the challenges under the 1967 Regulations and 2010 Act and explains why it accepts the petitioner's challenges based on the 1967 Regulations and indirect discrimination, but rejects the challenge based on harassment. Towards the end, the decision explains why the court did not accept various preliminary pleas raised by the Council, which if sustained might have avoided the need for the court to consider the substance of the petitioners' complaints. It finally considers the issue of remedy.

### **Factual background**

[4] The factual background, established from a combination of admissions in pleadings, and documents and affidavits lodged in evidence before the court, is as follows.

[5] The petitioners have a daughter, born in 2020. She started in primary 1 at the school in August 2025. She is called C for the purposes of this opinion. School is going well for C and overall she is happy there.

[6] C attends school in a building that was opened in August 2024. The building was developed through the Scottish Government's Learning Estate Investment Programme. The building has won various awards. It has two main floors. Plans are available showing the layout of the school. There are 16 classrooms in total in the school, over the two floors, as

well as other facilities. Distances between different points in the school can be calculated with the benefit of a scale on the plan.

[7] The school contains toilet facilities. There are 34 flushing toilets in total available for use by pupils. The toilet configuration within the school comprises two main communal toilet areas on each floor, four in total (the “main toilet areas”). There are also six other rooms across the school with toilets and wash basins in them, which can be used by any pupil. Two of these contain sanitary products for girls during menstruation. Within the four main toilet areas, there are a number of cubicles in a row. The toilet cubicles have floor to ceiling doors. They contain a toilet but do not contain washing facilities. The wash basin areas are outside the toilet cubicles.

[8] Initially all toilets in the school were gender neutral and unisex. Subsequently, stickers were put on the doors of individual cubicles within the four main toilet areas, with either a female figure on them, a male figure, or both. In the school, there are a total of ten toilet cubicles designated male, ten female, eight non-assigned cubicles, and six non-assigned accessible toilets.

[9] To get to the wash basin areas in the main toilet areas, pupils who have relieved themselves in the toilet cubicles must cross an area to which both boys and girls have access. The wash basins are shared by boys and girls. They are open to the corridor outside, which assists with supervision but reduces privacy. Both boys and girls have access to the main toilet areas, although boys are not permitted to enter cubicles within the main toilet areas with a female sign on them, and girls are not permitted to enter cubicles with a male sign on them.

[10] While in general C is happy at the school, she finds the current toilet provision distressing. She says the boys are “too noisy” and she does not like going to the toilet while

they are there. She is a young child and is unlikely to be able to express herself in as articulate a way as some older children. Her feelings about this are strong enough that she has been avoiding going to the toilet in school and holding it in until she gets home. When she gets home she has to rush to use the toilet. She regularly comes home in pain as she refuses to use the toilet in school. She has reduced her fluid intake during the day considerably to try to avoid having to use the toilet.

[11] Concerns have been raised by parents of other girls about them feeling uncomfortable sharing toilet areas with boys, at parent staff council meetings on 26 May 2025 and 4 September 2025. Issues of privacy and mess were raised. In response, the school changed the labelling on some of the doors in the main toilet areas so that there is a unisex cubicle in between cubicles designated for boys and girls, but otherwise retained the arrangements.

[12] On 10 September 2025, C's father wrote to the school by email with the subject heading "School Toilets" in the following terms:

"Hi, My daughter started primary 1 this year and has been having difficulties with the toilet situation, she feels uncomfortable sharing facilities with boys as they are 'loud' in her words. From my understanding there is no single sex bathroom facilities, would you please be able to clarify? If this is the case is there any provision in place to update this? There has been several instances of legal cases involving schools in Edinburgh and the Borders where it was deemed illegal for primary and secondary schools to only provide gender neutral toilets hopefully West Lothian Council are aware of this and are updating accordingly".

[13] The headteacher of the school responded on 11 September 2025, having sought advice from senior management, in the following terms:

"At [the school], we have taken appropriate steps to ensure we fully conform to the Equality and Human Rights Commission Interim Guidance. Although our toilets are accessed from a mixed sex area, to ensure compliance with EHRC Interim Guidance, we have labelled our single sex toilets for the use of either boys or girls. Washing accommodation is located in a mixed sex area, compliant with the 1967 regulations. In order to fully comply with the EHRC Interim Guidance,

we also ensure that there are sufficient individual toilets that may be used by transgender pupils. These may be 'accessible toilets', separate from other toilet provision, or single sex toilets accessed from a mixed sex area but which are not allocated to either boys or girls but designated 'accessible'. Education Services continue to monitor guidance as and when it is issued, and update schools accordingly to ensure we continue to comply with the guidance".

[14] The school did not change the configuration of the toilets any further in response to the concerns that had been raised. Staff have informed pupils they can use both the main toilet areas and the other toilets, other than cubicles labelled for the opposite sex. The headteacher has considered re-designating the main toilet areas as either exclusively male or female. She has concerns about some pupils having to walk further, potential issues about congestion, supervision and capacity, effects on pupils, and going against the design principles of the building. The main toilet areas have not been re-designated as either male or female in their entirety.

### **The court's supervisory jurisdiction**

[15] The Council argues that there is nothing in this case which is properly the subject of the court's supervisory jurisdiction, and that any challenge should be directed at the Scottish Ministers. It is argued that the email of 11 September 2025 challenged by the petitioners contained no decision, merely an explanation. The petitioners on the other hand argue that the policy regarding sanitary arrangements at the school as contained in the email of 11 September 2025 is properly subject to judicial review. The court is being asked to supervise the Council's exercise of its own statutory powers and duties in relation to provision of sanitary provision at the school, and rule on whether it has behaved lawfully or in breach of the 1967 Regulations and 2010 Act.

[16] The email of 11 September 2025 sent on behalf of the Council must be read in context.

It was a response to an email from the first petitioner on 10 September 2025 raising difficulties that C was having with sharing school toilet facilities with boys. Clarification was requested of an understanding there were no single sex bathroom facilities, and whether there was provision to update this. There was reference to several “legal cases involving schools” where it was “deemed illegal” to provide only gender neutral toilets. Hope was expressed that the Council was aware of that and were updating accordingly. Fairly read, the email of 10 September 2025 informed the school (for which the Council is responsible) of C’s difficulties with existing mixed sex toilet provision, expressed the view that having only gender neutral toilet facilities had been found to be unlawful, and asked what the Council was doing about this.

[17] The terms of the response on 11 September 2025, prepared after advice from senior management, and read in the light of the contents of the email of 10 September 2025 to which it was responding, give rise to reasonable inferences that (1) the Council considered that the existing toilet provision complied with EHRC interim guidance and the 1967 Regulations and (2) there were no plans to change the toilet provision in the school, unless later guidance was issued requiring this. There is no suggestion that there were changes to the configuration of the sanitary accommodation in response to the petitioners’ email. In reality, the email was not a mere explanation. It was a statement about how statutory duties and powers vested in the Council were being exercised in the school and maintaining that was lawful.

[18] The supervisory jurisdiction exists to review the lawfulness not only of decisions, but a range of actions, omissions and certain policies, in order to ensure the body responsible has acted within delegated powers and followed proper procedures (cf *R(A) v Home*

*Secretary* [2021] 1 WLR 3931 at paragraph 46). The Council is an education authority under the Education (Scotland) Act 1980 (the “1980 Act”). Parliament has conferred on the Council the duty to secure “adequate and efficient” provision of school education (section 1 of the 1980 Act). In the exercise of that duty, the Council has powers in relation to provision, maintenance and equipment of schools and other buildings (section 17 of the 1980 Act). Requirements under other statutory provisions such as the 2010 Act may affect how the Council should fulfil duties and exercise powers under the 1980 Act. Further, section 19 of the 1980 Act gives a regulation making power to the Scottish Ministers (in place of the Secretary of State, under section 53 of the Scotland Act 1998) in relation to school premises and equipment. That power replaces a similar power in section 19 of the Education (Scotland) Act 1962 (the “1962 Act”). The 1967 Regulations were made under section 19 of the 1962 Act, and by virtue of section 17(2) of the Interpretation Act 1978, the 1967 Regulations now have effect as if made under section 19 of the 1980 Act. The toilet provision in the school is therefore made in exercise of duties and powers delegated to the Council under the 1980 Act. This case concerns whether the Council has acted lawfully in performance of its statutory duties and powers, and in particular whether the toilet provision complied with the 1967 Regulations and 2010 Act. The email of 11 September 2025 held out the toilet provision in the school as complying with applicable guidance and law. The sanitary arrangements in the school, made in exercise of statutory duties and powers, are properly the subject of judicial review.

[19] The Council submits that all it was doing was following Scottish Government guidance, so any challenge should be directed at the Scottish Ministers. In particular there was Scottish Government guidance entitled Supporting Transgender Pupils in Schools of April 2021, which stated that there was no law that only people assigned male at birth could

use men's toilets, and only people assigned female could use women's toilets (page 26). Following the decision in *For Women Scotland v Scottish Ministers* [2025] UKSC 16 ("*For Women Scotland*"), the Scottish Government issued new revised guidance on supporting transgender pupils in September 2025. The revised guidance states that "Separate toilet facilities for boys and girls must be provided in schools"; "As the law stands, the facilities require to be made available on the basis of biological sex"; "Education authorities and schools should consider the toilet provision necessary for transgender pupils. This may include the use of gender neutral provision". The revised Scottish Government guidance followed an interlocutor issued of consent in a case in the Court of Session called *Hurley v Scottish Borders Council* ("*Hurley*") on 23 April 2025 about gender neutral toilets in school, reflecting the actual law in force. It is in line with EHRC Technical Guidance for Schools in Scotland dated 23 September 2025 which states at paragraph 5.10:

"Sex segregation is permitted in certain situations, such as where it is necessary and appropriate to preserve privacy and decency. The law in Scotland requires schools to provide toilet facilities for boys and for girls. Toilet cubicles are required to be partitioned and to have lockable doors".

[20] The court has a degree of sympathy for the Council's predicament. The Scottish Ministers published a consultation document on updating the 1967 Regulations as far back as July 2017, suggesting they were "somewhat out of date", with responses due by 9 October 2017. An analysis of responses was published on 10 January 2018. No change was made to the 1967 Regulations following this consultation. A new consultation on proposals to update the 1967 Regulations was launched in December 2025 by the Scottish Ministers. It states at paragraph 8 that the work on the previous consultation was disrupted by the COVID-19 pandemic (although there appears to have been a period of over 2 years between the analysis of consultation responses being available and the start of the pandemic). The

Scottish Ministers have not yet announced what they intend to do in the light of the consultation.

[21] Nevertheless, the answer to the Council's submissions is that guidance is not law.

The Council has its own duties and powers conferred on it by legislation. The Council is obliged to obey the law, not guidance if that deviates from the requirements of the law.

Whether the Council exercised powers and duties delegated to it by Parliament lawfully in relation to sanitary accommodation in a school for which it is responsible is a matter properly subject to the court's supervisory jurisdiction.

## **The 1967 Regulations**

### *The terms of the 1967 Regulations*

[22] Regulation 15 of the 1967 Regulations provides as follows:

#### **"15.— Sanitary accommodation for pupils**

(1) Subject to paragraph (1A) of this regulation, in every school sanitary accommodation shall be provided for the pupils by appliances on a scale not less than that specified in Table VIII:

Provided that, except where paragraph (1A) of this regulation applies, in every school which is not designed exclusively for girls half the accommodation shall be for boys and not more than one third of the appliances for boys shall be water closets and the remainder shall be urinals, each 610 mm length of urinal being counted as one appliance for the purposes of Table VIII.

**TABLE VIII**

<b>Number of pupils</b>	<b>Number of appliances</b>
Every 15 pupils up to a total of 60	2
Every additional 30 pupils up to a total of 300	2
Every additional 60 pupils over 300 pupils	2

(1A) Every nursery school and every nursery class in a primary school shall have not less than 1 water closet for every 10 pupils.

(2) In every school providing for pupils beyond stage P IV in the sanitary accommodation for girls there shall be suitable provision for the disposal of sanitary towels.

(3) In every school every sanitary appliance or group of sanitary appliances shall be situated near to a wash basin or wash basins.

(4) In every school every water closet shall be provided with a partition sufficient to secure privacy and, except in relation to a nursery school or nursery class in a primary school, with a lockable door”.

[23] Regulation 3 of the 1967 Regulations also contains these provisions:

“‘ancillary accommodation’ means all accommodation excluding educational accommodation.

‘educational accommodation’ means all the internal space so designed as to be suitable for educational purposes, including accommodation for assembly, dining, study, guidance, musical and dramatic activities, baths and accommodation for physical education, playroom accommodation in nursery schools, accommodation provided in association with the foregoing for storage, preparation and maintenance of educational apparatus, equipment and materials, and shower and changing rooms”.

[24] The arguments of the parties about the 1967 Regulations may be summarised as follows. The petitioners submit that when Regulation 15(1) is read in context and as a whole, it mandates a separated space for boys and girls respectively, comprising (i) sanitary appliances and (ii) wash basins. Because the arrangement in the four main toilet areas at the school fails to provide separate spaces for boys and girls containing both appliances and wash basins, and there are no urinals, the toilet provision in the school does not comply with the 1967 Regulations. The petitioners argue that conclusion is supported by clearer provisions in Regulation 20 of the Workplace (Health, Safety and Welfare) Regulations 1992 (the “1992 Regulations”) requiring separate rooms for men and women. The Council on the other hand argues that Regulation 15 requires separate provision only of toilets, and there is no requirement that there also be separate wash basins; all that is required is that wash basins be located near toilets, under Regulation 15(3). The Council argues that the current provision complies with the requirements of Regulation 15, because individual cubicles

containing toilets are designated either male, female or both, and wash basins are provided nearby.

### *Decision on the 1967 Regulations*

[25] The provisions of the 1967 Regulations regulating school toilets are not a model of clarity. Section 15(1) requires half of “the accommodation” to be for boys, and it is this provision that gives rise to a legal requirement for separate toilet provision for the two categories mentioned in section 15, of girls and boys. The word “the accommodation” is a reference to “sanitary accommodation”, because of the title of the section and the earlier wording of section 15(1). Accordingly, half of the “sanitary accommodation” must be for boys. But what does “sanitary accommodation” mean? Unfortunately, “sanitary accommodation” is not a defined term in the 1967 Regulations, and so its meaning is a question of statutory construction.

[26] The overall context is that the 1967 Regulations make provision for “general requirements and standards” in school premises. Regulation 15 sits within part 3 of the 1967 Regulations which is entitled “Standards”. Other provisions in part 3 govern matters such as sites for schools, playing fields and educational accommodation, setting standards for matters such as areas required according to numbers of pupils. Regulation 15 is within the third part of part 3 of the 1967 Regulations, headed up “Ancillary Accommodation”, a concept defined as “all accommodation excluding educational accommodation” in regulation 3. The fourth part of part 3 of the 1967 Regulations applies to “All Premises”. It makes provision for standards concerning light, ventilation, heat, acoustic conditions and insulation. The overall purpose of the 1967 Regulations is to set out standards with which

schools must comply, and the aim of Regulation 15 is to set out the standards required of sanitary accommodation within schools.

[27] The initial wording of Regulation 15 states that sanitary accommodation “shall be provided ...by appliances” on a scale set out in a table. That wording might initially suggest sanitary accommodation might be about “appliances”, but when the rest of Regulation 15 is considered, sanitary accommodation is not only about appliances. Regulation 15 sets out standards not only for appliances (numbers of which depend on numbers of pupils), but also other matters connected with toileting, such as wash basins, partitions and lockable doors for water closets, and provision for disposal of sanitary towels in sanitary accommodation for girls.

[28] It is clear that “appliances” within Regulation 15 of the 1967 Regulations include “water closets” and urinals from the wording of Regulation 15(1); and that water closets must have a lockable door (Regulation 15(4)). “Water closet” is not defined but is reasonably understood to mean a flush toilet. It is also clear that there must be wash basins “situated near” to sanitary appliances (Regulation 15(3)). There is no provision in the 1967 Regulations that wash basins must be within the water closet with a lockable door. The number of wash basins which must be in a school is specified in Regulation 16 and is related to the number of pupils. Nothing turns on the number of wash basins being regulated in Regulation 16 rather than 15; that may reflect that wash basins may be needed in schools for activities other than after toileting, such as handwashing after messy activities, so some may be located outwith toilet areas. Regulation 16 regulates overall numbers of wash basins for “every school”, which include both wash basins within sanitary accommodation and wash basins elsewhere.

[29] The conclusion from reading Regulation 15, in the context of the 1967 Regulations and as a whole, is that appliances (which include flush toilets and urinals), provision for disposal of sanitary towels, wash basins, partitions and lockable doors, are all aspects of “sanitary accommodation”. The title “sanitary accommodation” is intended to encompass the space where all regulated aspects within Regulation 15 occur. It follows that the “accommodation”, which must be half for boys, comprises not only appliances (flush toilets or urinals), but the whole area used for toileting activities within Regulation 15, including the wash basins.

[30] This reading is reinforced by consideration of some of the other definitions involving the word “accommodation” within the 1967 Regulations, because it is presumed that a word has the same meaning throughout an enactment where used more than once (*For Women Scotland*, paragraphs [13] and [176]). “Educational accommodation” is all of the space used for educational activities, which includes a number of different areas (dining, assembly, study etc). “Ancillary accommodation” is all other school accommodation other than educational, including (by reference to the third part of part 3 of the 1967 Regulations) kitchen premises, sanitary and washing accommodation, staff accommodation, storage and outdoor recreation areas. “Accommodation”, as it is used elsewhere in the 1967 Regulations, appears to be an inclusionary term used to cover the space within which a particular matter being regulated takes place. Applying that approach, Regulation 15 regulates the space in which all of the activities within it are taking place and includes wash basins as well as flush toilets or urinals. The “accommodation” which must be segregated according to sex includes not only the flush toilets, but also the wash basins which must be situated near them under Regulation 15(3).

[31] Turning to the situation in the school and applying Regulation 15 to it, the school was not designed exclusively for girls. The law currently requires half of the sanitary accommodation for pupils in the school to be for boys. In the boys' sanitary accommodation, one third of the accommodation should be flush toilets and the rest urinals. Regulation 15 does not specify what is to be done with the other half of the sanitary accommodation, but it may be inferred from the references to girls earlier in Regulation 15(1) and in Regulation 15(2) that the statutory intention was that the other half was to be provided for girls. Within that sanitary accommodation there should be flush toilets with partitions sufficient to secure privacy and lockable doors, with wash basins near to those toilets, and facilities for disposal of sanitary towels for pupils beyond primary 4.

[32] The existing provision in the school does not meet those requirements because sanitary accommodation is not provided separately for boys and girls, half for each. In the main toilet areas, only water closets are provided separately, by putting signs on doors. But under the 1967 Regulations, separate provision of "sanitary accommodation" is required for boys and girls, which comprises not only water closets and urinals, but also wash basins near them. There is also a breach of the requirement in the 1967 Regulations of the need for two thirds of the appliances in the boys' sanitary accommodation to be urinals. (For the avoidance of doubt, these conclusions have been reached without recourse to the 1992 Regulations referred to by the petitioner. The 1967 Regulations fall to be interpreted according to their own terms).

[33] The Council's provision of sanitary accommodation in the school therefore fails to comply with legal requirements in the 1967 Regulations. That finding is unlikely to come as a surprise to the Council, given the court's previous interlocutor granted in *Hurley*, and the 2017 and 2025 consultations referred to above. Indeed, the Council took steps of its own

to try to secure modification of the terms of the 1967 Regulations, so that parts directed at single sex provision of sanitary accommodation are removed. The Council applied to the Scottish Ministers on 3 February 2026 under section 133(4) of the 1980 Act, asking them to exercise powers to remove part of Regulation 15 of the 1967 Regulations. The Scottish Ministers responded in a letter dated 25 March 2026 that they will defer determination of the Council's application until after the conclusion of these judicial review proceedings.

[34] The Council and Scottish Ministers may be correct that the 1967 Regulations appear dated in various respects, but they remain the law. The Scottish Ministers have powers under section 19 of the 1980 Act to make further regulations if they choose to do so. Constitutional principles establish that legislators make the law, and the courts apply it. There are policy choices involved in decisions about what might replace the 1967 Regulations, which are for elected politicians, not judges. The duty of the courts is to apply the law in force. When that is done in this case, it is clear that the Council's toilet provision within the school is unlawful because it fails to comply with standards set under the 1967 Regulations.

## **Equality Act 2010**

### *The parties' positions*

[35] The petitioners also ask the court to find that the toilet provision in the school amounts to indirect discrimination and harassment against their daughter, contrary to the provisions of section 85 of the 2010 Act. The Council invites the court to find that there is no relevant case of indirect discrimination or harassment. In summary, the Council maintains that the claim of harassment cannot sensibly be made in a petition for judicial review, but would be better made to the sheriff under section 113 of the 2010 Act which would allow the

facts to be established; the Council says it wishes to have the opportunity to investigate and present evidence in rebuttal. Disadvantage for the purposes of the indirect discrimination claim is not known and admitted by the Council, when all that was shared were wash basins open to observation by staff (given that there were separate cubicles with toilets in them for boys and girls). The Council does not accept there has been harassment of C.

### *Governing provisions in the 2010 Act*

[36] Part 6 of the 2010 Act is entitled "Education". Chapter 1 of Part 6 applies parts of the 2010 Act in the context of schools. The Act places certain obligations on the "responsible body of a school", which in this case is the Council (section 85(9)(c)). Under section 85(2)(b), (d) and (e), the Council must not discriminate against a pupil in the way it affords the pupil access, or does not afford access, to a benefit, facility or service, or by subjecting a pupil to any other detriment. Under section 85(3), the Council must not harass a pupil.

[37] The statutory meanings of discrimination or harassment are ascertained by referring back to part 2 of the Act. The 2010 Act provides protections in relation to specified characteristics, one of which is sex. A reference to a person with the protected characteristic of sex is a reference to a man or a woman, and a reference to persons who share it is reference to persons of the same sex (section 11). (The obligations in relation to schools do not apply to protected characteristics of age or marriage and civil partnership under section 84, but that makes no difference in this case).

[38] Section 19 of the 2010 Act is headed "indirect discrimination". It applies to the protected characteristic of sex among others (section 19(3)). It provides:

- "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim”.

[39] Section 26 of the 2010 Act is headed “harassment”. It applies to the protected characteristic of sex among others (section 26(5)). It provides, so far as relevant:

- “(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B....

...

- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect”.

[40] Section 136 of the Act contains the following subsections:

- “(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision”.

*Should the claims under the 2010 Act be considered in this application to the court's supervisory jurisdiction?*

[41] Proceedings relating to a contravention of the 2010 Act must be brought in accordance with part 9 of the 2010 Act, headed enforcement (section 113(1)). Broadly speaking, the 2010 Act aims to direct particular claims towards the adjudicatory body most suited to determine them. For example, a significant number of claims under the 2010 Act in the context of work are dealt with in the employment tribunal, under chapter 3 of part 9 of the 2010 Act. In an education context, under section 116 read with schedule 17, tribunals (in Scotland, the Additional Support Needs Tribunal within the Health and Education Chamber of the First-tier Tribunal for Scotland) have jurisdiction to determine certain education claims under the 2010 Act based on disability. Other education disputes may be dealt with in the sheriff court under section 114. These bodies all have jurisdiction to hear evidence and determine claims under the 2010 Act.

[42] In its pleadings, the Council suggested that the petitioners could have brought a claim for indirect discrimination to the sheriff, under sections 113 and 114 of the 2010 Act. That observation is correct. However, section 113(3)(d) states that subsection 113(1) “does not prevent” an application to the supervisory jurisdiction of the Court of Session. The ability to bring an action in the sheriff court under section 114(1)(c) does not of itself prevent this application for judicial review.

[43] It does not follow that an application to the court's supervisory jurisdiction will always be entertained by the court where it concerns a claim of contravention of the 2010 Act. The supervisory jurisdiction has its own internal set of rules governing when it is appropriate for the Court of Session to exercise it. The supervisory jurisdiction developed to avoid injustice. The court will act in circumstances where, if it did not, injustice would

prevail. It is for that reason the supervisory jurisdiction is described as a remedy of last resort. If an alleged injustice is capable of being remedied by means other than application for judicial review, and there are no special circumstances, the court may decline to exercise the supervisory jurisdiction (*McCue v Glasgow City Council* [2014] CSOH 124 (“*McCue*”) paragraphs [49] to [51] and [61] to [62]). Other general rules may mean a court will not entertain judicial review grounds based on the 2010 Act, for example where those grounds are raised at a late stage of an action, and there has been no opportunity for the other side to investigate and lead evidence in rebuttal about them (*R(C) v Work and Pensions Secretary* [2017] 1 WLR 4127 (“*R(C)*”) paragraphs 19 and 45).

[44] A need to determine grounds based on the 2010 Act on the basis of evidence is not an absolute bar to those grounds being raised in an application for judicial review. It may be possible to determine a case on the basis of evidence lodged before the court in the form of written material and affidavits. If oral evidence is required, then there can be a second hearing for that to happen. However, applications to the court’s supervisory jurisdiction are most commonly determined without oral evidence, on the basis of written material and submissions, in keeping with the aim of a speedy procedure in the interests of good administration. If extensive oral evidence is required, that may be an indicator a case is more appropriately raised in another forum.

[45] The Council submits it should have the opportunity to investigate and lead evidence, which could happen if an action was brought in the sheriff court. That is not accepted as a good reason to refuse the petition, because those opportunities have already been afforded as part of this application for judicial review. The Council is not taken by surprise, because the 2010 Act claims have been in the petition from the outset. Both the first petitioner’s email dated 10 September 2025 and affidavit of the first petitioner (sworn on 8 December

2025 and lodged with the court on 9 December 2025) have been with the Council for some time. The Council has had ample opportunity to investigate and put evidence before the court. Both parties have lodged written evidence and affidavits, and the court has heard submissions on the basis of that evidence. It may be observed that the evidence before the court is relatively extensive and includes formal plans of the school as well as photographs of toilets and wash basins in a main toilet. The affidavits do not contain obvious conflicts that would need oral evidence to resolve. For example, the headteacher is not in a position to contradict evidence about C's presentation at home; equally C's parents are not in a position to know all aspects of the administration of the school, and whether problems identified by the headteacher with redesignation of toilet blocks are insurmountable. The evidence before the court has enabled it to make the findings set out earlier in this decision. The court considers that the written evidence lodged before the court, together with submissions, is sufficient for it to be able fairly to determine all grounds of challenge, including those under the 2010 Act.

[46] The court finds that, although the petitioners could have brought an action in the sheriff court based on grounds in the 2010 Act (under section 114 of that Act), special circumstances exist so that it is appropriate to determine the 2010 Act grounds as part of this application for judicial review. The claims under the 2010 Act are properly seen as an adjunct to the petitioners' request to the court to supervise the Council's exercise of duties and powers under the 1980 Act (and in particular compliance with the 1967 Regulations). That is a classic example of a situation within the court's supervisory jurisdiction. The challenges under the 1967 Regulations and 2010 Act are based on the same factual complaint. Injustice in a wider sense may be said to result if the court refused to consider

the 2010 Act claims as part of this action, necessitating the petitioners duplicating the challenge that has already been fully argued in this court, by going to the sheriff court.

### *Indirect discrimination*

[47] Ascertaining whether there has been indirect discrimination requires the court to work through the provisions of section 19(2) of the 2010 Act, in the light of the evidence before it. The provision, criteria or practice (“PCP”) relied on by the petitioners for the purposes of the application of the tests in section 19 is the provision of all toilet spaces in the school as unisex. Although some individual toilet cubicles in the four main toilet areas are marked for males or females (as well as some unisex), the wider toilet area outside the cubicles is not segregated. That area includes waiting space and wash basins, which the court finds to be an integral part of the toilet space. All individual toilets in the school are unisex. The court accepts the existence of the PCP relied on. The protected characteristic relied on is sex, in particular being female.

[48] Section 19(2)(a) of the 2010 Act. The PCP is applied to boys as well as girls. It is therefore applied to persons with whom the petitioners’ daughter does not share the characteristic of being female, within the meaning of section 19(2)(a).

[49] Section 19(2)(b) of the 2010 Act. Does the PCP put girls as a group at a particular disadvantage compared with boys? The petitioner relied in that regard on the experience of going to the toilet for boys and girls being different. Doors on cubicles did not prevent people outside being able to hear and smell, or girls having to wash hands after using the toilet in front of boys. It was important that girls could go to a space where they could feel safe, knowing that boys were not there. Reliance was placed on observations made by the Employment Tribunal in *Hutchinson v County Durham and Darlington NHS Foundation*

*Trust* [2026] 1 WLUK 238 ("*Hutchinson*") paragraphs 270 to 272. In those passages the tribunal found that, if required to change their clothes in a communal changing room shared by men and women, women are generally more sensitive than men, and more likely to suffer reactions of fear, distress and humiliation than men. Reasons for that finding were given, including that women are more likely to have experienced sex based harassment and sex based violence than men, and that generality gives rise to a rational reaction in females so they may have fearful, defensive and precautionary traits, even in what men might regard as normal situations. Reference was also made to the judgment of the UK Supreme Court in *R(C)* where at paragraph 1 it was said:

"'We lead women's lives: we have no choice'. Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debatable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self".

In the context of school toilets and children, the petitioner pointed to news articles dated 2 April 2026 about a male pupil filming a female in gender neutral toilets in a school in Inverness, having moved a ceiling panel to place a phone directly above cubicles. It was submitted girls were at a particular disadvantage compared with boys when toilet provision was unisex.

[50] The Council in reply maintained there was no relevant disadvantage. The school had assigned unisex toilets outside the main toilet area for menstruating girls. The main toilet areas contained a wash basin area which was open to observation by staff. Little children were involved. It was asserted in submissions that young boys would not subject

young girls to sex based harassment. It was submitted there was no clear sex based disadvantage to girls as a group from using wash basins outside a cubicle.

[51] The court begins its consideration of section 19(2)(b) of the 2010 Act in this case by noting that modern hygiene standards indicate that toileting includes not only relieving oneself but also, ordinarily, washing hands afterwards. Girls may have particular needs that boys do not have in that regard, because their anatomy means that there is a need for more frequent wiping, and consequent transfer of substances such as urine to hands, even if inadvertent. Further, the physiology of females means that in the ordinary course they will at some point start to menstruate, and when menstruating there may be transfers of blood to hands when using the toilet. (Although this case concerns a primary school, under the 1967 Regulations schools are required to have provision for disposal of sanitary towels if there are pupils beyond primary 4). Girls are therefore at a particular disadvantage having to use unisex toilet areas such as those in the main toilet areas. That is so even where there are individual cubicles with flushing toilets in them marked for girls only, because after relieving themselves they have to walk through a communal area where children may be waiting, with the particular hygiene issues relating to their hands already mentioned, and wash them at wash basins shared by boys. The fact that staff may be able to observe the wash basin areas from the open corridor does not negate these disadvantages.

[52] Further, and despite the Council's submission that young boys do not subject girls to sex based harassment, the type of factors mentioned in *Hutchinson* and *R(C)* suggest that girls may experience particular vulnerability using a unisex area for intimate activities, such as changing, or toileting including washing their hands afterwards. In this particular case, there is evidence that parents other than the petitioners have raised concerns in respect of other girls, at a parent staff council meeting on Monday 26 May 2025, to the effect that:

“some girls are feeling uncomfortable sharing toilets with boys. This could be related to feeling that they don’t have as much privacy as they would like, or related to mess that they feel boys are leaving behind...despite [the arrangements in place] some girls are continuing to report feeling uncomfortable”.

Girls may therefore be more reluctant to use unisex facilities such as those in the main toilet areas in the school than boys.

[53] The court finds that there is particular disadvantage within the meaning of section 19(2)(b) of the 2010 Act. The particular disadvantage is a combination of the additional issues for girls relating to contamination of hands due to their anatomy and physiology, and the general vulnerability of girls having to perform intimate activities in communal areas. These give rise to legitimate considerations of privacy, dignity and health and safety. The disadvantage is not negated by the small number of other toilets across the school for use of staff and pupils other than in the main toilet areas. There are 16 classrooms in the school, and a significant number of pupils, meaning that a disadvantage to all girls there cannot be negated by six single toilets across the school (Table VIII in the 1967 Regulations may provide a useful reference point for expected numbers of toilets in this regard).

[54] Section 19(2)(c) of the 2010 Act. This subsection contains a requirement that the PCP puts, or would put, the person making the complaint at the disadvantage identified in relation to section 19(2)(b). The evidence in the petitioners’ affidavit about the effect on C is accepted by the court, and findings made in paragraph [10] above on that basis. It is not in dispute that C is a girl and has the anatomy of a female. The particular disadvantage arising from provision of all toilets as unisex, relating to contamination of hands and the general vulnerability of girls having to perform intimate activities in communal areas, applies to C. Although she may be able to use one of the other single unisex toilets in the

school, as previously found, that is an insufficient answer to the disadvantage given the number of girls in the school, and might necessitate her standing out from the crowd when going to the bathroom, which can be difficult for young children.

[55] Section 19(2)(d) of the 2010 Act. This provision enables conduct which is potentially indirectly discriminatory to be justified, where it is shown to be a proportionate means of achieving a legitimate aim. The Council has not advanced a justification defence in the pleadings, in the note of argument, or in submissions before the court. There has been no identification of any legitimate aim pursued by the Council to the court, against which the court could make a proportionality assessment. The burden is on the Council to raise and prove a justification defence, and it has not done so.

[56] The court holds that section 19 of the 2010 Act is contravened by the current toilet provision at the school, and there has been unlawful indirect discrimination. There has accordingly been an unlawful exercise by the Council of its statutory duties and powers in relation to the school.

### ***Harassment***

[57] The petitioners also argue that the current toilet provision in the school amounts to harassment, within the meaning of section 26 of the 2010 Act. The Council does not accept that there has been harassment.

[58] It does not follow from the court's finding of indirect discrimination that harassment is established. It is necessary to apply section 26 of the 2010 Act according to its own terms. In approaching the claim under section 26, the court notices that harassment is a strong word, as are other words within the section such as violating, intimidating, hostile, degrading, humiliating or offensive. Section 6 is not intended to make unlawful all actions

that may cause distress, but only those meeting the strong wording in the tests in the section. As with indirect discrimination, there are a number of components in a complaint of harassment that the court must work through. Together, they seek to balance competing factors so that there is reasonable protection, but without expecting an unrealistic standard. The *Hutchinson* case contains a useful review of the requirements of section 26 (paragraph 282-288).

[59] Unwanted conduct related to a protected characteristic (section 26(1)(a)). For harassment to be established, there must be conduct, which is unwanted. The conduct in this case is the Council allowing boys in the same toilet space as girls (in the sense of space which includes both appliances and wash basins). That there has been this conduct is confirmed by the terms of the email of 11 September 2025, minutes of parent council meetings, and the affidavits. The conduct is unwanted because they are boys and C is a girl. "Related to" has a relatively broad meaning and is designed to cover all forms of conduct that, properly viewed, have a relationship to the protected characteristic. The unwanted conduct is "related to" the protected characteristic of sex within the meaning of section 26(1)(a); it is related to C being a girl and boys being of the opposite sex. The requirements of section 26(1)(a) are satisfied.

[60] The effect of the unwanted conduct (section 26(1)(b)). The petitioners do not rely on the purpose aspect of section 26(1)(b), but solely the effect of the unwanted conduct. There is no suggestion that the Council's purpose was to harass C, but unintended effects may in some circumstances amount to harassment. In this case, the petitioners argue that the conduct has the effect of violating C's dignity, and created an intimidating, hostile, degrading, humiliating and offensive environment for her. In assessing whether conduct had effects within paragraph 26(1)(b), section 26(4) provides that certain matters must be

taken into account. These include the perception of C, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

[61] Looking first at the perception of C under section 26(4)(a) of the 2010 Act, it is accepted that C is distressed about boys being allowed into the same toilet space as girls, and may hold on until she is at home rather than going to the toilet which may cause pain. Those are serious matters. Nevertheless, the court has some doubts whether C's perception goes as far as the situation of "violating" dignity, or is as extreme as intimidating, hostile, degrading, humiliating or offensive. The complaints appear to have been raised relatively soon after C started school at a time she was getting used to school routine including toilets. School is otherwise going well for C, and in general terms she is happy there.

[62] Next, the other circumstances of the case under section 26(4)(b) of the 2010 Act. It is of peripheral relevance that the court has found that the toilet provision breaches the 1967 Regulations and obligations in relation to indirect discrimination under the 2010 Act. Unlawful conduct might be more likely than lawful conduct to give rise to the type of grave effects caught by section 26; but it is still necessary to apply section 26 according to its own terms.

[63] Finally, in taking into account whether it is reasonable for conduct to have the necessary effect under section 26(4)(c), the court might have found reasonableness established if the main toilet areas were the only toilet areas available to pupils in the school. C is a young girl seeking to access the girls' bathroom without the presence of boys, and the court has already accepted that girls may experience particular vulnerability using a unisex area for intimate activities (*Hutchinson and R(C)*). Minutes of the school's staff parent council indicate C is not the only child experiencing discomfort with the toileting arrangements. However, the court has found that in this particular case C has been told she

can use both the main toilet areas and the single toilets elsewhere in the school. That does not adequately eliminate the disadvantage found for the purposes of indirect discrimination, as already explained. But it is relevant to whether it is reasonable for the toilet provision in the school to amount to violating C's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The court does not consider it is reasonable, given that the other single toilets are available, in which there are both a flushing toilet and wash basins in a space that can only be used by one sex at a time.

[64] Having taken into account the factors in section 26(4) of the 2010 Act and balanced them, the court does not find that the unwanted conduct has effects meeting the relatively high tests in section 26(1)(b). The Council has successfully shown that it did not contravene section 26 of the 2010 Act. Not all adverse conduct amounts to harassment. On the facts of this case, C has not been harassed by the toileting arrangements in the school within the meaning of section 26.

### **Other preliminary pleas**

[65] The Council argues that the petition is incompetent due to the existence of alternative remedies which have not been exhausted. The Council's argument about section 113 and 114 of the 2010 Act raised in the pleadings has already been addressed, and it has been found that those provisions do not prevent this action from proceeding. The Council also raises one further avenue, under section 70 of the 1980 Act, which is argued to provide an alternative remedy barring this petition for judicial review. The petitioners on the other hand do not accept that section 70 is an effective alternative remedy barring judicial review.

[66] Section 70 allows complaints to be made to the Scottish Ministers that an education authority has failed to discharge duties on them under enactments relating to education.

The procedure for doing so is set out in the Section 70 (Procedure) (Scotland) Regulations 2017, which among other things sets out timescales for decisions by the Scottish Ministers. After investigating, the Scottish Ministers may make an order declaring an education authority in default and requiring discharge of that duty. If the education authority does not comply with that order, either the Scottish Ministers may make arrangements for the duty to be carried out and charge the expense to the education authority, or the Lord Advocate may apply to the Court of Session, which may order specific performance of the duty. (Alternatively, the Scottish Ministers might make new regulations governing sanitary accommodation in exercise of powers under section 19 of the 1980 Act).

[67] In *McCue*, the existence of a general principle was recognised, that it is not competent to have recourse to the Court of Session when provision is made by statute for a form of review which has not been resorted to (paragraph [32]). However, as already observed, the court in *McCue* also recognised that there may be special circumstances which exclude the operation of the principle (paragraphs [61]-[62]).

[68] The alternative remedies principle is more straightforward to apply in a situation where there is a statutory appeal to a judicial body which has been ignored. But where the alternative remedy does not involve a form of judicial determination, it will be harder to persuade the courts it provides the type of effective remedy that bars judicial review. Statutory complaints procedures have not been found to bar judicial review in all cases where they exist. The court in *McCue* took care to append to its decision the particular complaints procedure it was considering, which involved various stages, including recourse to what was in effect an independent three-person tribunal to adjudicate. The complaint avenue under section 70 is of a very different nature. It is a right to make a complaint to the Scottish Ministers, but the procedure does not involve any sort of quasi-judicial

determination. In terms of section 70(1), the Scottish Ministers, even if satisfied an education authority have failed to discharge a duty, have a discretion whether or not to take further steps, because of the use of the word “may” in section 70(1). Section 70 covers only complaints about duties imposed by the 1980 Act or any enactment relating to education, and whether it extends also to issues arising under the 2010 Act is undecided. The Scottish Ministers cannot give an authoritative interpretation of the law or reduce a decision. The court finds the section 70 avenue is not a remedy of the nature that would fall within the general principle and bar judicial review. That finding is consistent with the case of *Walker v Strathclyde Regional Council* 1986 SLT 523, in which a court rejected a plea to competence relying on section 70 of the 1980 Act.

[69] Further, even if that were to be wrong, and section 70 of the 1980 Act might in appropriate cases provide an avenue of challenge that might bar judicial review, the court would have found special circumstances exist in this case, so that it is appropriate to exercise the supervisory jurisdiction. The Council applied to the Scottish Ministers on 3 February 2026 under section 133(4) of the 1980 Act for modification of the 1967 Regulations. The Council sought deletion of the passage in section 15(1) of the 1967 Regulations making provision for single sex provision of sanitary accommodation. In essence, the Council has asked for a change in the law to regularise the mixed sex provision of aspects of sanitary accommodation in the school. In a letter dated 25 March 2026, the Scottish Ministers indicate that they will defer determination of the Council’s application until after the conclusion of these judicial review proceedings. The letter also states:

“[The] Council may wish to consider drawing the Court’s attention to the fact that an application for a direction has been made and that Ministers have deferred their decision until after the proceedings; and to invite the Court to limit the petitioners’ remedies to allow proper consideration of the application once the proceedings have concluded”.

Given that the Scottish Ministers have declined to take action in this way, although they have powers to do so, and instead await the conclusion of these proceedings, the court considers this is a case where special circumstances exist. It is appropriate that the court exercise its supervisory jurisdiction, in order to prevent injustice.

[70] The Council confirmed it does not insist on an argument relating to the petition being barred by the passage of time. Given this case has reached the stage of a substantive hearing, the Council is correct not to insist on that argument; *Lauchlan and O'Neill v Scottish Ministers* 2022 SC 125 at paragraphs 16-18, *Helensburgh Community Council, Petitioner* [2025] CSOH 105 paragraphs 57-58.

### **Remedies**

[71] The court finds that the toilet provision in the school, for which the Council is responsible, breaches standards required in the 1967 Regulations. It is also unlawful because it contravenes section 85 of the 2010 Act, in that it indirectly discriminates against C, within the meaning of section 19 of the 2010 Act. The terms of the email dated 11 September 2025 about compliance with the 1967 Regulations were incorrect.

[72] The petitioner invites the court to grant remedies of declarator and reduction, reflecting those findings. The Council on the other hand asks the court to exercise its discretion to withhold remedies and refers to the letter of the Scottish Ministers dated 25 March 2025 described in paragraph [69] above.

[73] There is a discretion vested in the court to refuse remedies in an application for judicial review, even if unlawfulness is established (*King v East Ayrshire Council* 1998 SC 182, *R (Sitki) v Inner London Crown Court* 1993 WL 965925 paragraph [12], *NLEI Ltd v*

*Scottish Ministers* 2023 SLT 149 paragraph [59]). However, if something is found to be unlawful, the court will be slow not to grant remedies. The normal result is that the position should be regularised by the granting of appropriate remedies (*NLEI* paragraph [59]), *R (Corus UK Ltd) v Newport City Council* [2010] EWCA Civ 1626 paragraph 15). Accordingly, the situations in which remedies might be refused are narrow. One example is a situation in which the outcome would have been the same even if the error had not happened (*NLEI* paragraph [59]). Another is where granting a remedy is sufficiently contrary to the interests of good administration, for example where a case was brought challenging closure of a school, but the grounds on which unlawfulness were established were raised a year after the school had closed, making it practically difficult to reverse that situation (*King*).

[74] It is important to note the terms of the remedies sought in this particular action. The petition seeks three declarators and reduction of the email of 11 September 2025. The declarators are that the toilet provision is unlawful, to reflect the successful challenges under the 2010 Act and the 1967 Regulations, and also two further declarators about the meaning of the 1967 Regulations (that “sanitary accommodation” means a separated space comprising at least sanitary appliances and wash basins, and that separate sanitary accommodation is required for boys and girls). The petition does not seek any orders for specific performance. It is expected that public authorities will take necessary steps to comply with court orders and regularise a position the court has held to be unlawful. It is left for the Council to decide how it proposes to ensure compliance with the law. Further, if the Scottish Ministers consider provisions of the 1967 Regulations to be out of date (for example standards requiring particular numbers of urinals), they have powers under section 19 of the 1980 Act to change that aspect of the 1967 Regulations.

[75] This is not a case in which it can be said that the unlawfulness found can make no difference to decisions about toilet provision in the school (*NLEI*). Nor can it be said that the remedies are so contrary to good administration they should be refused (*King*). It is accepted, on the basis of the affidavit of the headteacher of the school, that if the main toilet areas are redesignated so that one on each floor is female and one is male, some children may have to walk further, and one block on each floor might end up being more heavily used than the other. It is also accepted that there is the potential for that to reduce efficiency, impact the wellbeing of some pupils who have to walk further to the toilet (for example if they are young or with additional support needs), and cause a degree of disruption to the running of the school. But those adverse effects have to be seen in the context of the evidence the court has about the primary school, which has a limited number of children attending. The school has two different floors each with two main toilet areas and other toilets. There are a number of classrooms, and it is for the school to designate which year groups use which. Plans of the school suggest the furthest any pupil would have to walk to a main toilet area is in the region of 60 metres, with most having shorter distances to walk. In short, the situation is very far removed from that of a school which had closed a year before in *King*, where good administration justified the withholding of remedies. There are no good grounds for the court to withhold remedies in this particular case.

[76] For these reasons, the court considers it should grant the orders sought by the petitioner in statements 4a to d of the petition in full. The petitioners have been substantially successful in the petition, with all of the orders sought being granted. Expenses should follow that success and be awarded to the petitioners in terms of the order sought in statement 4e of the petition.