



# Separate But Equal: Is Segregated Schooling (Still) Good for Girls?

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## Abstract

The UK's Equality legislation prohibits formal segregation with limited exemptions. Single-sex schools are one such exemption. No rationale for this was provided at the time of the legislation, and it was not until 2017 in the case of *Al Hijrah* that the question arose of whether and when sex-segregation in schools is lawful. We take up this question, reviewing the equality costs and benefits of sex-segregated schools conceptually and empirically. We highlight the incoherence of equality law regarding schools, and the limited evidence of their benefits. Drawing on feminist theory, we recommend improvements that may be useful in future cases where sex-segregation is contested in the context of faith-based schools. Lastly, we note that these legal questions may one day be challenged by a deeper source of instability if there is a breakdown in the binary sex categories on which sex-segregation in schools currently depends.

**Keywords** Education · Equality law · Gender · Segregation · Sex

## Introduction

Towards the end of the twentieth century, perceptions of girls-only schools changed in the UK. For feminists and educational reformers, they came to be seen less as an anachronism and more as an equality measure, enhancing girls' academic achievements, career opportunities and confidence. In the decades since, educational outcomes for girls and boys have changed significantly. Yet policymakers and scholars have not asked whether there is (still) an equality rationale for single-sex schooling.

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This article addresses that question, interrogating the now longstanding assumption that single-sex education is both a legitimate form of segregation and a means to promote equality for girls and women. Our focus is on formal segregation, which we define as the lawful restriction of access to spaces, activities and roles on the basis of identity, specifically sex/gender, whether regulated by the state or with state approval. Segregation in this sense may involve separate provision for both sexes/genders or single sex/gender provision where there is no equivalent provision for the other sex/gender. We do not address the role of informal segregation, a book club for example, without denying its importance for discussions of gender equality.<sup>1</sup>

Segregation is generally unlawful in the UK and the word is rarely used in the legislation and policy materials discussed here. This is probably because it has negative associations with racism, most obviously in relation to apartheid and with segregation in the US and the Supreme Court ruling against segregated schools in *Brown v. Board of Education* (1954). Despite this, sex-segregation in UK secondary schools persists but it has generally attracted little attention from politicians, lawyers, scholars or the wider public.<sup>2</sup> While the number of single-sex schools declined in the twentieth century, they survived, remaining clustered in the selective and fee-paying school sector from which professionals and policymakers are disproportionately drawn. The creation of the first anti-discrimination legislation posed a potential problem in prohibiting formal segregation on the basis of direct discrimination. However, the Sex Discrimination Act (SDA) 1975 circumvented the problem by explicitly exempting single-sex schools from the provisions relating to discrimination, an exemption that was retained in the Equality Act 2010 (EqA). In 2017, the legislation was tested for the first time in a high-profile case concerning a voluntary aided school in Birmingham that educated boys and girls separately.<sup>3</sup> The decision exposed problems in the way the provisions relating to sex-segregation in schools are structured and highlighted the absence of a clear equality-based rationale for the exemption of single-sex schools. The case addressed the question of discrimination in the specific context of a segregation in a faith-based school, but it gave rise to the wider question addressed here: whether and in what contexts segregated education promotes gender equality for girls and women.<sup>4</sup>

Our question is a timely and important one for a number of reasons. Firstly, research needs to recognise and address the changes that have taken place since the first equality legislation—the SDA—formally recognised sex-segregation in schools. The gender-based inequality in society that was part of the justification for single-sex schools in the post-war period still exists but the visible underachievement of girls compared to boys in education that was also a part of the rationale does

<sup>1</sup> For discussion of segregation in education based on other grounds, specifically religion and disability, see Harris 2020, Chs 7 and 9.

<sup>2</sup> In the UK, single-sex schools are rare at primary school level covering children aged 5–11 (UNESCO 2020, 260).

<sup>3</sup> *HM Chief Inspector v Interim Executive of Al Hijrah School* [2017] EWCA Civ 1426.

<sup>4</sup> While the protected characteristic of sex in the EqA applies to men and women, and equality and educational outcomes are concerns for boys and men, these raise difference questions which we hope others will address.

not. Furthermore, the educational landscape has changed significantly this century, mainly due to the introduction of academies, resulting in less central regulation and different kinds of schools (Harris 2020). At the same time, while there are fewer single-sex schools, they remain the preferred option of many parents and there is no evidence they will disappear or even decline further. In this context, it is important to clarify what is lawful and what is desirable in terms of both single-sex schools and single-sex education in mixed schools. We attempt this clarification from an equality perspective, recognising that this is only one measure of the benefits of different forms of education, but an important one for feminist scholars.

Secondly, increased contestation about the distinction and relationship between sex and gender is obviously the context for this article. In the context of education, there is much inconsistency in the use of either 'sex' or 'gender' to identify school-girls and schoolboys. Some material refers exclusively to 'sex', some to 'gender', and some slips from one to the other with no clear rationale for doing so. The EqA refers largely to 'sex' (s 11) and 'single-sex services' (Sch 3(7)), however it also states that 'A person does not contravene this Act, so far as relating to sex, only by doing anything in relation to the participation of another as a competitor in a gender-affected activity' (s 195(1)). Ofsted refers to both sex and gender (*School Inspection Handbook*, updated October 2021, paras 132 and 312). We adopt the terminology used in the material referred to with appropriate referencing and this is often 'sex' and 'single-sex schools' following the language of the EqA. Elsewhere we use the terms 'sex/gender' for ease of reference and without further definition.

The question we ask is likely to become pressing in light of the disruption of traditional binary gender norms on which segregation in schools has to date been founded. Increasingly, the terms 'sex' and 'gender' are now sites for intense contestation (Renz 2020; Ryan and Rivers 2003; Bower-Brown, Zadeh and Jadva 2023; Cooper et al. 2022). Claims for equal recognition of non-binary and trans identities have raised potential challenges for a system based on the need for pupils to be located in stable binary sex categories. To date, single-sex schools have managed to navigate the problems on a case-by-case basis (see Pitcher 2022). But if the trend to gender fluidity amongst young people becomes more widespread, this will intensify the pressure to articulate and clarify the prior rationale for sex-segregation in schools. This context makes the lack of interest by researchers in questions of the value of single-sex/gender schooling for girls surprising.<sup>5</sup>

Lastly, asking whether segregation is a legitimate practice from an equality perspective in the focused context of English schools has value in informing wider debate and developing principles for testing the law in other areas, potentially informing research about segregation in other sectors, beyond sex/gender to other equality grounds, and beyond England or the UK to other jurisdictions. It is notable that some forms of segregation are prohibited (most obviously racial segregation), others are unremarked (separate wards for men and women in hospitals for example), while others are explicitly allowed under the law (single-sex schools). We hope this article will prompt discussion of these questions, particularly in the context of ongoing gender debates (Cooper 2019; Cooper et al. 2022).

<sup>5</sup> Exceptions include the work of Warrington and Younger, and of Sullivan et al. 2010, 2012

In what follows we briefly summarise the development of single-sex schooling in the UK, and evidence of changes in educational outcomes based on sex/gender. We go on to analyse the legal basis for determining that some forms of segregated schooling are lawful and some are unlawful, first in law—the Equality Act 2010, and then in case law—the case of *Al Hijrah* school. We highlight the doctrinal problems raised in this case because of the lack of a clear underlying rationale for the current legislative provisions, and go on to expose the incoherence in the current legislative distinction between segregation in mixed versus single-sex schools. We then consider the equality-based justifications for segregated schooling that are implicit or explicit in legislation and case-law. Drawing on feminist theoretical conceptions of equality, we argue that the EqA reflects a narrow outcomes-based approach to equality, while the *Al Hijrah* majority ruling better reflects a substantive understanding of equality in embracing diversity, but from a feminist perspective falls short in failing to recognise gender inequality. In our conclusion, we argue that current law in relation to sex/gender segregation in schooling is both incoherent and—our main argument—fails to meet equality objectives based on an expansive approach to equality that values diversity alongside a commitment to reducing gender-based discrimination. We speculate on the potential issues that might be raised in future cases where sex/gender-segregation is contested in the context of faith-based schools, giving rise to a collision between freedom of religious practice with gender-equality in this sphere. We note that these specific legal questions may one day be challenged by a more profound source of instability if there is a breakdown in the traditional binary sex categories on which sex-segregation schools currently depend.

## Historical Developments

Until the middle of the twentieth century, single-sex schools were the norm in England, based on assumptions of different natural abilities and social roles for boys and girls. The education provided for girls and young women was intended primarily to equip them to be well-informed, competent and skilled wives, homemakers and mothers rather than equal participants in public life or paid employment. This perspective was widely shared by traditionalists and progressives and can be dated back to the eighteenth century. Mary Wollstonecraft, for example, advocated better female education for reasons that included “to prepare women to become chaste wives and sensible mothers” (Wollstonecraft and Tomaselli 1995, 171). She recommended that boys and girls “intended for domestic employments, or mechanical trades” be instructed separately in the afternoons after the age of nine ‘to prepare them for their respective employments’ (Wollstonecraft and Tomaselli 1995, 264). This segregation continued largely unquestioned into the twentieth century, and well after the 1944 Education Act ostensibly introduced universal education, schooling continued in sex/gender silos, taking the form of single-sex schools or separation within schools with separate entrances and activities in a shared building (Smithers and Robinson 2006).

The social disruptions of both the world wars inevitably strained these traditional views on the separate role of men and women and so the need for segregated

education for boys and girls. After the 1944 Education Act in England, co-education developed as part of the move towards comprehensive schools (Harris 2020; Sutherland 1985). However, radical change came only after 1965 with the phasing out of most, though not all, selective grammar schools in favour of non-selective comprehensive secondary schooling which was almost exclusively co-educational. It may have been the assumption that single-sex schools would decline to the point of extinction but that was not the case. Single-sex schools now constitute a minority in an increasingly diverse and complex mix of educational provision, both in state and fee-paying schools (BESA 2022; Danechi 2020; West and Wolfe, 2018; Eyles and Machin 2019).<sup>6</sup> Fee-paying and selective state schools account for a disproportionate number of single sex-schools, with approximately 10 per cent being single-sex compared with 2 per cent of state schools (DfE 2022). This group of schools is small but significant, particularly given that the political and economic elite are disproportionately educated in fee-paying and selective schools, schools which lead in the performance tables, whether they are independent or government-funded (Social Mobility Commission and Sutton Trust 2019).

The gradual shift to co-educational schools from the 1960s was not underpinned by a developed rationale for the change. Dale's work in the late 1960s and 1970s was particularly influential in establishing a new status quo—the belief that co-education is the more 'natural' state in reflecting the world outside education (Dale 1969, 1971, 1974). But in 1985, the Swann report attributed the decline in single-sex schools to the move to larger comprehensive schools rather than any conscious government policy or philosophy on segregated education (Department for Education and Science 1985). The development of feminist arguments for separate girls' schools arose to a large extent after the trend towards co-education and in the face of a decline in single-sex schools. Particularly influential was research in the 1980s showing that in mixed classes, girls receive significantly less of the teacher's attention than boys and that teachers' had higher expectations for boy students than girls (Spender and Sarah 1980; Stanworth 1983). Concern about girls' relative underachievement in maths and science subjects was the basis for liberal feminist arguments for girls' schooling as a compensatory mechanism for discrimination in the wider world, providing a supportive space for girls to develop academically and in broader terms such as confidence and aspiration (Iverson and Murphy 2007; Burgess 1990).

At one time, evidence of girls' educational underachievement might have supported feminist arguments for teaching girls separately, but this was before the empirical picture changed dramatically, leading to a concern with boys' underperformance (Epstein 1998; Iverson and Murphy 2007; Ringrose 2007; Younger and Warrington 2006). As early as the 1990s, a discourse of 'moral panic' around boys' comparative failure emerged (Ringrose 2007, 472), and some years later, then Education Secretary, David Blunkett, proposed that single-sex classes in mixed schools might be needed to address boys' underachievement—a provision that would now

<sup>6</sup> See also 'Types of school' at <https://www.gov.uk/types-of-school>. Accessed 4 February 2022. There is anecdotal evidence to suggest a move to mixed-sex education in the independent sector specifically at sixth-form level (ages 16–18) (Jackson and Bisset 2005, n 1),

be unlawful as we discuss below (Warrington and Younger 2003, 339). In 2010, the Equality and Human Rights Commission’s headline finding on education in its state of the nation report was that “girls outperform boys routinely at aged 5, at age 16 and at degree level throughout Britain” (EHRC 2010, Executive Summary). This stark statement may give a false impression, as girls still find STEM subjects relatively less appealing and relevant to their careers than boys (DfE 2019).<sup>7</sup> However, recognition of the many variables that contribute to different outcomes in formal education makes it impossible on the basis of current data to isolate the role of sex/gender vis-à-vis formal markers of educational achievement.<sup>8</sup> For example, the fact that single-sex schools are concentrated in more prosperous southern and urban areas is also a variable which may be responsible for girls’ generally higher performance (Hannay 2016). The fact that we do not have reliable research on longer-term life outcomes between girls in single-sex and mixed schools which has controlled for ethnicity and class is particularly striking given that the general educational data on the effects of different ethnicities and socio-economic background shows that these variables are both complex and highly significant in relation to educational outcomes at aged 16 (Ali 2003; Strand 2021).

Against this background, it is now rarely argued that girls’ schools are needed to close the achievement gap in relation to standard measures of educational outcome. As one research team stated: “There are excellent single-sex schools and excellent co-educational schools. Our conclusion is that they are excellent for reasons other than that they separate, or bring together, the sexes for their education” (Smithers and Robinson 2006, 31). In light of the absence of evidence of an achievement gap for girls, the focus has shifted onto the potential benefits of sex-segregation in terms of wider flourishing both within and after school. Here the empirical evidence is more problematic and the limited research which has been conducted has reached contradictory conclusions (Peck 2020). We pick up this debate in the penultimate section below.

## Equality Legislation

Since its inception in the 1970s through to the Equality Act 2010, UK equality law has managed to reconcile two apparently conflicting approaches to equality: equality as parity of treatment—the prohibition on direct discrimination, and equality based on differential treatment where appropriate—measures on indirect discrimination, the Public Sector Equality Duty, and positive action.<sup>9</sup> Parity of provision is the norm with differential treatment generally having or requiring a rationale. For example, the Equality Duty stems from the Race Equality Duty which came from the Stephen

<sup>7</sup> STEM subjects are Science, Technology, Engineering and Maths.

<sup>8</sup> Codioli, for example, identifies disparities in uptake of STEM subjects in relation to gender in conjunction with socio-economic status. (Codioli 2015). See also Richardson, Mittelmeier and Rienties 2020.

<sup>9</sup> EqA, s 19 Indirect Discrimination; s 20–22 Adjustments for disabled persons; s 149–157 Public sector equality duty; s 158–159 Positive action.

Lawrence inquiry's recognition that institutional racism in the police could not be tackled on an individual case-by-case basis (EHRC, Background to the Equality Duty).

More generally in law there is the mechanism of a 'proportionate means to achieve a legitimate aim' which sets the criteria for divergence from equal treatment. Thus, providing separate services for each sex is not unlawful sex discrimination if:

- (a) Joint service for persons of both sexes would be less effective, and
- (b) The limited provision is a proportionate means of achieving a legitimate aim (EqA, Sched 3 s 7).<sup>10</sup>

This reflects the recognition that laws should exist for a reason. However, there are two exceptions relating to segregation in the EqA where there is no justification or rationale provided. The first is segregation on the grounds of race which always constitutes direct discrimination and is therefore prohibited.<sup>11</sup> No rationale is given in the legislation, guidance or explanatory notes accompanying the Act<sup>12</sup> for this blanket prohibition which is likely to be rooted in the history of formal and informal racial segregation in the UK and elsewhere.<sup>13</sup> This is also the only explicit use of the word segregation.

The second instance relates not to a protected characteristic but to education, and not to a blanket prohibition but a blanket exemption, where the Act specifies that while a school 'must not discriminate against a person in the arrangements it makes for deciding who is offered admission as a pupil,' single sex schools are exempt from this provision.<sup>14</sup> Differential treatment in school admissions on the basis of sex is allowed and it does not need to be justified by any reference to proportionality or ends. Here the Act replicates almost verbatim the measures in the Sex Discrimination Act 35 years earlier.<sup>15</sup>

This exemption for single-sex schooling relates only to the point of admissions, creating an anomaly which to our knowledge has not been remarked upon. While the legislation allows for single-sex schools as a complete exemption to the provision against sex discrimination, it is silent on the question of sex/gender segregation within mixed schools. Elsewhere however, the Department for Education, states that it is unlawful for mixed schools to separate pupils on the basis of any protected characteristics with some small and specific exceptions (DfE 2018, 3). The anomaly and

<sup>10</sup> EqA, Sch 3 s 7.

<sup>11</sup> 'If the protected characteristic is race, less favourable treatment includes segregating B from others' (EqA, s 13(5)). See also Harris 2020, 212.

<sup>12</sup> Available at <https://www.legislation.gov.uk/ukpga/2010/15/notes>. Accessed 22 October 2022.

<sup>13</sup> In post-war Britain, some landlords posted signs saying 'No Coloureds, No Irish, No Dogs' (Huttman et al. 1991, 67).

<sup>14</sup> EqA, s 85 (1) and Sch 11. There are qualifications to this exemption in allowing for flexibility in what constitutes a single-sex school for these purposes. For example, schools that admit the opposite sex in the sixth form can still count as single-sex.

<sup>15</sup> Sex Discrimination Act 1975, s 26(1)



potential confusion for educational providers that this has created is explored in the next section.

## Case Law: The *Al Hijrah* Case

Case law has an important role in complementing and interpreting primary legislation in the area of equality as elsewhere.<sup>16</sup> In relation to single-sex schooling, the leading case is *HM Chief Inspector v Interim Executive of Al Hijrah School*, decided by the Court of Appeal in 2017.<sup>17</sup> *Al Hijrah* school was a faith-based state secondary school in Birmingham, in which girls and boys were segregated from the age of nine, however as it was nominally a co-educational school, it fell outside the general exemption for single-sex schools provided by the EqA. In 2016 the school sought judicial review of an Ofsted report that held that the school's segregation policy amounted to unlawful discrimination, at odds with "fundamental British values"<sup>18</sup>. The primary issue addressed by both the High Court and the Court of Appeal was whether different provision for boys and girls within a mixed school could and did constitute discrimination under the EqA. The High Court found that it did not: the treatment of both boys and girls was of an equivalent nature and character, with equivalent consequences for both sexes, and so it could not be said that one sex was being treated less favourably than the other.<sup>19</sup>

Ofsted's submission effectively applied a diversity and inclusion rationale in citing the lack of opportunity both boys and girls had to learn and socialise together, but also articulating the harm this caused to girls *specifically*:

The very fact of segregation constitutes less favourable treatment *of girls* as it amounts to an expressive harm caused by the necessary implication that girls are inferior or otherwise relevantly different to boys in day-to-day social and working contexts on leaving the school.<sup>20</sup>

The Appeal Court overturned the High Court decision, adopting the same diversity and inclusion rationale as Ofsted but with an important difference. The majority judges in the appeal did not focus on the harm suffered by girls in the differences in treatment between girls and boys. Instead, they held that Ofsted could reasonably conclude that *both* girls and boys suffered 'less favourable treatment' because of their sex:

An individual girl pupil cannot socialise and intermix with a boy pupil because, and only because, of her sex; and an individual boy pupil cannot

<sup>16</sup> See for example, the sharp change in employers' contractual responsibilities under equality law as a result of the Employment Tribunal case of *Forstater v CGD Europe & Anor* in 2019 and the subsequent ruling of the Employment Tribunal Appeal in 2022 reversing the earlier decision (*Forstater v CGD Europe & Anor* [2019] UKET and *Forstater v CGD Europe & Ors* [2021] UKEAT).

<sup>17</sup> *HM Chief Inspector v Interim Executive of Al Hijrah School* [2017] EWCA Civ 1426.

<sup>18</sup> *Supra* n 14 at para 24.

<sup>19</sup> *Supra* n 14 at para 35.

<sup>20</sup> *Supra* n14 at para 39, emphasis added.



socialise and intermix with a girl pupil because, and only because, of his sex. Each is, therefore, treated less favourably than would be the case if their sex was different.<sup>21</sup>

The basis of the decision was therefore that separation leaves both boys and girls less prepared for participation in contemporary social and public life outside school when deprived of the opportunity to mix with the opposite sex. In contrast, Gloster LJ in her minority opinion focused on the detriment to girls, arguing that they had been particularly disadvantaged because ‘the evidence showed a disrespectful, and non-accepting, attitude to the equal position of women in the home and society’.<sup>22</sup>

The majority decision in *Al-Hijrah* is difficult to reconcile with the framework of the UK equality legislation which explicitly requires a comparator in order to determine whether a group has suffered a disadvantage and so unlawful discrimination.<sup>23</sup> As such, Gloster LJ’s minority decision is not only more satisfactory in recognising gender inequality, it is also more consistent with the law in recognising that the girls had been treated unfavourably *compared to the boys* as the basis for finding unlawful discrimination.

The judgment is also significant in highlighting the anomaly in the law relating to segregation depending on whether a school is classified as single-sex or mixed. The case was concerned with the law in relation to mixed schools. However, the logic of the judgement applies equally to single-sex schools. By definition, all boys and all girls in single-sex schools are deprived of the opportunity to benefit from mixing with the opposite sex. It remains to be seen how a court would respond if faced with equivalent facts in relation to the educational provision in two single-sex schools operating on the same site. If such a case arises, the court will be faced with the challenge of reconciling the statutory exception with the reasoning in *Al Hijrah*. This question may not be academic given that the response of some Muslim and Jewish faith mixed-schools to the judgement, acting in anticipation of a legal challenge along the lines of the *Al Hijrah* case, was not to desegregate the educational provision within the school, but instead to prepare to separate into two nominally single-sex schools while still operating from one site, so bringing the school within the EqA’s single-sex exception (BHA 2021; Rucker 2019). This pre-emptive action is anticipated in Ofsted guidance (2021):

Inspectors may find that a school is intending to remedy the unlawful discrimination by de-amalgamating into separate girls’ and boys’ schools, with separate unique reference numbers (URNs).

As this phenomenon indicates, it is no accident that the key case relating to segregated schooling concerns a school with a religious ethos, and a minority religious ethos at that, with the risk of confusing educational concerns with a narrative that

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<sup>21</sup> Supra n14 at para 51.

<sup>22</sup> Supra n14 at para 162.

<sup>23</sup> As Fredman points out, this is an inadequate basis for equality, in requiring only that two individuals who are in a similar situation be treated alike with no substantive basis—fairness is simply consistency meaning they could both be treated equally badly. Using the example of the gender pay gap, this could be addressed by reducing men’s pay not raising women’s (Fredman 2011, 9).

positions Muslim beliefs and practices in opposition to ‘Fundamental British Values’ (Richardson 2015). It is also probably no coincidence that it came soon after the ‘Trojan Horse’ affair in which educators and school governors were charged with plotting to ‘Islamise’ schools in Birmingham (Abbas 2017). However, by framing the issue as one of disadvantage to both sexes, rather than addressing the evidence of girls’ disadvantage compared to boys raised by Ofsted, the majority in *Al Hijrah* side-stepped the potential conflict between the rights of families and girls to choose to be educated in sex-segregated schools and classes and the general legislative prohibition on segregation unless justified. That potential conflict remains, based in part on the co-existence of religion or belief with sex as protected characteristics in the EqA, a further reason for seeking a better rationale for segregation-related exemptions within equality law as this article seeks to do.

## Discussion

The rationale for exempting single-sex schools from equality law on segregation reflects a ‘separate but equal approach’ best summed up the head of the education inspectorate Ofsted, Amanda Spielman:

I have been asked how Ofsted can defend the existence of single-sex schools. The easy answer is that single-sex schools are given a specific exemption in legislation. But there is a more fundamental point, which is the purpose of the segregation in question. If women are to take their full place in a world which is, to some degree, loaded against them, then it is reasonable for parents to choose single-sex schools, to stop girls from selecting themselves out of some areas of education. That is why most single-sex girls’ schools emphasise tackling gender stereotypes, and push girls to pursue their interests in “typically male subjects” (Spielman 2017).

Claims that girls do better in single-sex schools often focus on their relative outcomes compared to boys in relation to formal educational provision, including the range and type of subjects studied and the outcomes in terms of standard measures of educational achievement.<sup>24</sup> They also identify the more general potential for flourishing, both while at school and in later life. In relation to the latter, supporters of girls’ schools highlight that women and girls continue to live in a world which, as Amanda Spielman (2017) noted, “is to some degree, loaded against them” in the sense of their status, wealth and power relative to men at both a global level and in UK society generally. The continuing gender pay gap alone should be sufficient to support the claim that girls belong to an identity group which continues to be “disadvantaged, demeaned, excluded, or ignored” in important respects (ONS 2022; Fredman 2016, 712). Girls’ schools have explicitly or implicitly referred to these arguments in support of the single-sex education they offer (Stannard 2021).

More specifically, supporters of single-sex schools for girls have argued that girls-only spaces and activities enrich their senses, imagination and thought, promote

<sup>24</sup> Equally, there is evidence that both boys and girls do better in single-sex schools (McCall 2021).

their ability to express their ideas freely and to develop free from the oppressive presence of a group who are dominant in wider society. In short, that they can flourish in an environment in which they are, even if only temporarily, the first rather than the second sex.<sup>25</sup> Moreover, this claim may be particularly relevant when thinking about the experiences of girls and women of colour. Evidence suggests that they often do better than white girls in traditional measures of educational achievement (Strand 2021), which may mask the fact that they disproportionately occupy subordinated social and political positions and are subjected to greater stigma and stereotyping, as Solanke's work has highlighted (2011).

Arguments about the benefits of safe segregated spaces have been made that are applicable to all girls, for example that in a girls' school there will be a reduced risk of physical or sexual abuse by boys. In November 2021, Donna Stevens, Chief Executive of the Girls' School Association (GSA), said parents could see it as 'a risk' to move their girls to co-educational schools at age 16 in light of the Everyone's Invited movement (Busby 2021; Anonymous 2022). Similar arguments have been made in relation to girls' voices: in single-sex schools, by definition, girls will not be competing against boys for space to be heard.

Against such claims for single-sex schooling as a form of positive action, an alternative strand of feminist thinking contends that gender equality for girls and women will be advanced if they engage with boys and men in the same way that different religious and cultural groups are assumed to benefit from interaction with other groups (for example, Cooper 2004).<sup>26</sup> These arguments draw on feminist and multiculturalism arguments which prioritise the need to recognise and value difference to ensure full social inclusivity, including on the basis of gender (Benhabib 2003, 2016; Fredman 2011; Kukathas 2003; Phillips 2010). Importantly for our argument, valuing diversity is increasingly seen as a dimension of equality: it is critical to Sandra Fredman's expansive theory of gender inequality. She explains how narrow definitions of equality may perpetuate disadvantage and fail to secure the radical change needed for meaningful gender equality. Mere equality of outcome, for example, assumes that individuals have the same aspirations—equal numbers of women and men on boards perhaps—without fundamentally questioning the status quo (Fredman 2011, 8–19). Fredman argues that for substantive equality to be achieved, a four-dimensional framework must be applied, the dimensions being: reducing disadvantage; redressing stigma and stereotyping; promoting participation, voice and social inclusion; and finally valuing difference—removing the detriment experienced by some groups without seeking to eliminate the difference that is the basis of the detriment (Fredman 2011).

This turn towards valuing diversity and inclusion as a means to promote gender equality is now increasingly common in organisational policies and employment

<sup>25</sup> See, for example, The Girls' Day School Trust: <https://www.gdst.net/education/our-ethos/>. Accessed 12 November 2022.

<sup>26</sup> See Casey for claims that '[w]e know that where communities live separately, with fewer interactions between people from different backgrounds, mistrust, anxiety and prejudice grow' and 'Conversely, social mixing and interactions between people from a wider range of backgrounds can have positive impacts; not just in reducing anxiety and prejudice, but also in enabling people to get on better in employment and social mobility' (2016, 8).

practice. It is also widely acknowledged as an underpinning value in education.<sup>27</sup> Schools are today expected to give pupils the opportunity to develop a range of social skills and experience, including how to engage with people who are different from themselves. Given that girls in single-sex schools will be spending the school day removed from boys they will, by definition, have less opportunity to interact with them. The practice of segregation therefore can be argued to leave girls socially and emotionally unprepared for the challenges and richness of a world in which men and women live and work together (Fabes et al. 2015). This argument holds that segregated education reinforces the idea that women and girls are indeed the second sex through the message that they need to be protected from competition and engagement with boys. Similarly, the suggestion that girls will ‘find their voice’ in a segregated space can be countered with the claim that if they have not been used to participating with boys in school, they are more likely to lose their voice once they move into higher education or employment in a mixed environment.

Lastly, it has been argued that the negative effect of segregation on boys also has an indirect impact on girls and women in that boys educated separately may be more likely to enter adulthood with the view that girls and women do not, and perhaps should not, participate equally in public life (Bhardwaj 2015). They are therefore less likely to identify as allies in supporting feminist struggles for gender equality. This may be a particularly pertinent argument in relation to those boys educated in single-sex selective and fee-paying schools who will disproportionately occupy positions in policymaking as adults and in powerful sectors where women are still significantly under-represented (Sutton Trust and Social Mobility Commission 2019).

While diversity is increasingly coupled with equality in employment and organisational settings, it does not appear in the EqA. Governments have arguably rejected an intersectional approach that would promote recognition of the specific needs of girls of colour for example.<sup>28</sup> Moreover, in the context of education and looking across the protected characteristics, if arguments for diversity are the basis for dismantling hierarchy and silos in UK education, progress has been limited. Using standard indicators of educational outcome, those for children from some minoritised ethnic and religious communities are worse, and children from poorer families are disproportionately clustered in the most disadvantaged schools (Casey 2016; Gorard 2023). The segregation of children in schools extends beyond sex/gender as “[d]e facto segregation on the basis of religion, ethnicity and socio-economic status continues to arise from school admissions policies and criteria” (Harris 2020, 518). While it is no longer the presumption that children with Special Educational Needs (SEN) and/or disabilities are schooled separately, arguments for mainstream

<sup>27</sup> For example, Roedean—a private girls’ school in the South of England—has an ‘Equality, Diversity and Inclusion Policy’ (see <https://roedean.co.uk/policies/>. Accessed 22 October 2022); ‘A commitment to equality, diversity and inclusion is one of the cornerstones of Altrincham Grammar School for Boys (AGSB)’, a school in the North West of England (see <https://www.agsb.co.uk/page/?title=Diversity%2C+Equality+and+Inclusion+at+AGSB&pid=132>. Accessed 22 October 2022).

<sup>28</sup> S 14 of the Equality Act, Combined discrimination; dual characteristics, has not been implemented in England and Wales. <https://www.gov.uk/guidance/equality-act-2010-guidance>. Accessed 1 August 2023. See also, Solanke 2011.

inclusion include financial as well as educational and human rights considerations (Harris 2020).

Recognition of diversity and the value of an inclusive approach in education may still be a work in progress, however, as we have shown, it was the basis for the finding that the *Al-Hijrah* school *had* discriminated, suggesting that UK law does now recognise diversity as a necessary dimension of equality. As we also highlighted, that judgement is problematic in failing to recognise, other than in the minority opinion, the specific disadvantage to girls, instead finding that both boys and girls experienced discrimination equally. A preferable judicial opinion, and one that reflects current equality law in taking a comparative approach to inequality, was that of Gloster J in the minority, who located the school's policies and practices within the wider social context of gender inequality as:

If men and women find it more natural and comfortable to form exclusive and different social networks around working life only with those of their own sex, women lose out more than men, because women are disproportionately excluded from networks of power and influence in later life.<sup>29</sup>

While bracketing equality and diversity together would strengthen arguments for prohibiting all forms of segregation, it would not help assess situations where there might be a legitimate basis for allowing segregation rather than a blanket ban. Anne Phillips' feminist approach to equality is helpful here, based on the recognition that inequality is gendered. Phillips proposes abandoning attempts to find a universal definition of equality to which all women aspire, a project that is impossible and alienating to many, for example Muslim women denied the right to choose what to wear in the name of gender equality. Rather "[w]hat matters is not so much being able to delineate equality or justice as being able to identify inequality and injustice" (Phillips 2021, 106). Recognising and combatting discrimination should be feminists' focus and thus 'Reframing "For Equality" as "Against Inequality"' (106).

Building on the work of Phillips and Fredman, as well as Solanke and others, we propose a new 'test' for any practice, policy or law assessing it based on a substantive conception of equality that prioritises diversity and includes a commitment to identifying *inequality*. We suggest this would help create a consistent basis for decision-making in relation to segregation. For example, it would be the basis for providing separate swimming lessons for girls for whom cultural or religious-based practices and beliefs concerning privacy and modesty require gender separation and who would otherwise not attend classes (EHRC 2014, 116).<sup>30</sup> This form of segregation would be acceptable as it would promote participation in accord with Fredman's substantive model. At the same time, segregation in the form of girls taking their breaks after boys, as was referenced in the *Al Hijrah* case (at para 111),<sup>31</sup> would not be consistent with equality principles. It would be a clear instance of inequality, perpetuating stigma and inhibiting diversity. Our conclusion is that if diversity

<sup>29</sup> Supra n14 at para 144.

<sup>30</sup> See *Osmanoğlu and Kocabaş v. Switzerland* (Application no. 29086/12) 2017 for an alternative approach based on values of living together and social integration (discussed in Trotter 2018).

<sup>31</sup> Supra n14 at para 111.

is recognised as a good in itself, but importantly coupled with a commitment to address gender-based discrimination, the burden should then shift to those who support single-sex schooling to justify their continuation.

## Conclusion

This article set out to address the question of whether single-sex schools promote equality for girls. Along the way, we identified an inconsistency in the law that complicates the situation and is likely to undermine equality objectives. We start by discussing this inconsistency before summing up our findings in relation to our main question.

Analysis of the EqA measures on single-sex schooling and of the key legal case of *Al Hijrah* highlight the fact that the legal framework in relation to education, sex/gender and equality has two different pathways: while a single-sex school may discriminate on the basis of sex/gender at the point of admissions—in fact, needs to in order to be a single-sex school and that of course means boys and girls continue to be educated separately after the point of admission, a mixed school may not discriminate on the basis of sex/gender at any point unless it is to address disadvantage or where a joint service would be less effective. Schools may choose to distinguish boys and girls at the point of admission by catering only for one sex/gender. Children in these schools will then be educated only with those of the same sex/gender and this is lawful. Alternatively, a school that does not differentiate boys and girls at the point of entry must justify any subsequent segregation in provision on grounds that may include equality (DfE 2014, at para 2.2). This creates the basis for a legal judgement that says denying boys and girls the opportunity to mix is unlawful in one school but lawful in another.<sup>32</sup>

This anomaly matters in undermining the coherence and credibility of the legal framework, and it matters in terms of our specific question in creating a situation in which there is inconsistency as to whether girls may experience segregated education based on the type of school they attend.

Turning to our original question, there is limited empirical evidence to support the competing claims that sex-segregation schools is, in itself, better or worse for girls. The factors determining educational outcomes, whether narrowly or widely defined, are many and complex and much of the empirical evidence in this area is limited, outdated and inconclusive. We suggest that more granulated research and analysis of the benefits of single-sex versus mixed schooling, disaggregated by key variables including but not restricted to sex/gender, race, religion and socio-economic status would be valuable. Lacking that, the best we can say from the evidence we do have is that sex-segregation would appear to be a relatively minor variable in determining girls' outcomes one way or the other, particularly when compared to the known and significant effect of socio-economic factors.

<sup>32</sup> Prompting—to give a fictitious example—the Chiswick academy for boys and girls to reconstitute itself as the Chiswick boys academy and the Chiswick girls academy perhaps building separate doors for boys and girls to enter by but perhaps not even that.

In contrast, we have clear empirical evidence that the standard measures of educational outcome of girls compared to boys have dramatically improved in recent years in almost all subjects across all types of schools. This may undermine the primary feminist rationale for supporting separate girls' schools, but it may also mean that sex-segregation in schools is likely to continue to remain relatively uncontroversial and unscrutinised. As long as girls are seen to do better than boys in school overall, more nuanced questions about the cost and benefits of sex-segregation are unlikely to attract much attention. Moreover, it is not surprising if women (and men) who have achieved success in public and professional life after being educated in elite single-sex schools are less motivated to question the conceptual and evidential justification for their existence.

The exception to this is likely to remain sex-segregation where there is concern that the ethos and practices of a school do not value girls and boys equally. This is most likely to arise in a small number of orthodox faith-based schools, with the result that the courts may be faced with a conflict between faith-based rights and the underpinning, if unarticulated, rationale of equality law. However, under the legislation as currently framed and as applied in *Al Hijrah*, this question will, in theory, only arise in the context of discrimination in mixed-sex schools, since segregation in single-sex schools may exist for any reason, however discriminatory, without falling foul of the EqA.

More fundamentally, the legal status quo we identify assumes that the binary sex categories on which the legislation depends remain stable enough for questions around the rationale of sex-segregation to be meaningfully posed. A future world in which these binary categories fracture might pose many problems, legal and otherwise. But one potential benefit would be the opportunity to reformulate the equality legislation governing education from a position of principle in which the rationale for any form of sex-segregation is explicitly stated to be the promotion of girls' substantive equality in school in the light of the historical and ongoing disadvantage experienced by women in society.

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## Declarations

**Conflict of interest** The authors have no conflicts of interest to declare.

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