

UPDATE ON EQUALITY ACT 2010 (MARCH 23)

BACKGROUND

The main advisory body on the Equality Act is the Equality and Human Rights Commission. They provide this useful summary of our obligations under the Act as a membership association:

<https://tinyurl.com/ymjvat99>

This document has been produced to help the Disciplinary Committee, Disputes & Complaints Referral Group and Green Party Regional Council when considering complaints or issues regarding membership that arise out of the expression of Gender Critical beliefs.

GENDER CRITICAL BELIEF AS IN FORSTATER VS GCD EUROPE

Maya Forstater's belief was summarised by the Employment Tribunal in her case as follows.

"Sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male or female. It is impossible to change sex.

Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than "gender", "gender identity" or "gender expression". She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man."

It is not necessarily the case that all people holding Gender Critical beliefs will agree with this statement exactly, and it is not relevant whether they do so or not. This belief, and beliefs like it, is a protected philosophical belief under UK law.

PROTECTED CHARACTERISTIC OF PHILOSOPHICAL BELIEF

In addition, the following is some guidance on the current position on the protected characteristic of philosophical belief as it pertains to gender critical belief. The situation is evolving.

One critical issue with this which we need to address rapidly is that the party has no definition of transphobia in the Framework of Ethics and Conduct: this is being addressed.

The Green Party is an association within the meaning of the Equality Act. The Equality Act provides protection from discrimination, harassment and victimisation based on defined protected characteristics. The addition of a belief into the philosophic belief protected characteristic is retroactive e.g. once defined as such the belief is deemed to have always been protected. This is unusual in law.

As an association the party is liable for claims of direct discrimination if it treats a member less well than another because they have a protected characteristic. **We cannot apply a disciplinary sanction**

to a member, enact a no-fault suspension or expel via 4.8 of the Constitution because they hold a philosophical belief at odds with party policy.

We can apply a disciplinary sanction to a member, enact a no-fault suspension or expel member via 4.8 of the Constitution who holds such a belief if they express those beliefs in a way which breaches the Code of Conduct. Broadly speaking “sanctioning behaviour, not belief”.

In this we need to consider that there is **no right not to be offended**. Protected beliefs can include those that are disturbing or offensive to others so long as they do not seek to destroy the rights of others.

MANIFESTATION OF PROTECTED BELIEFS

A person with gender critical beliefs may manifest them in a way in which is offensive to some so long as it **doesn't interfere with the rights of a trans person not to be discriminated against or harassed**.

Rulings in *MacKereth v DWP* (June 2022) made it clear that deliberate mis-gendering does not create an atmosphere of respect for those with the protected characteristic of Gender Reassignment accessing the services that DWP were delivering and DWP would be failing to protect against discrimination through allowing this.

In *Forstater* the Employment Appeal tribunal made specific reference to mis-gendering as harassment and also outlined that mis-gendering NOT being harassment where “the trans person in question is happy to discuss their trans status or is sympathetic to or shares the Claimant’s gender-critical-belief”. This wasn’t an exclusive definition of when mis-gendering is not harassment.

PRACTICAL RAMIFICATIONS FOR DISPUTES & COMPLAINTS REFERRAL GROUP, DISCIPLINARY COMMITTEE, AND GREEN PARTY REGIONAL COUNCIL

Things to do when considering complaints against those holding gender critical beliefs or those criticising an expression of a protected belief:

- You must consider both parties when considering these decisions e.g. transgender people and people with gender critical belief.
- You must remain independent and follow all relevant policies and procedures.
- Your decisions must be justified with robust, non-discriminatory reasons and that careful written contemporaneous records are kept of these reasons.
- Decisions are made calmly and following appropriate and balanced consideration of the issue and without being influenced by those who have strong feelings on the issues.
- Where you are unsure as to how to appropriately handle a particular situation, tread carefully and seek advice from the Chair of your body, who will consult appropriate staff and governance colleagues.

Mary Clegg, CEO

Andreas Christodoulou, Chair of the Disciplinary Committee

APPENDIX 1 – PRACTICAL ADVICE

PURPOSE OF THIS APPENDIX

This is a short advisory checklist developed for situations where a complaint is received regarding a person making allegedly transphobic statements or when criticising an expression of a protected belief.

It should be used when considering breaches of the Code of Conduct to assess whether we are correctly balancing the rights of those holding the protected belief of Gender Criticism with those holding the protected characteristic of Gender Reassignment.

The protected characteristic of Gender Reassignment¹ includes people who have not undergone any physical surgery as well as those who do not plan to undergo such surgery. It does not require a person to have a Gender Recognition Certificate.

DOCUMENTATION FOR CODE OF CONDUCT

- Do the statements made constitute discriminatory remarks against transgender people or a particular transgender person?
 - If so, which categories of discrimination (direct, indirect, harassment or victimisation) does this constitute (as below)?
 - **Record this conclusion, and the categories of discrimination, with reasons, on the consideration of the breach of the Code of Conduct.**
- Do the statements made constitute discriminatory remarks against a protected philosophical belief or an individual expressing that belief?
 - If so, which categories of discrimination does this constitute (as below)?
 - **Record this conclusion, and the categories of discrimination, with reasons, on the consideration of the breach of the Code of Conduct.**
- Do the statements made seek to destroy the rights of others?
 - Who are the people whose rights these statements are seeking to destroy?
 - How is it that the statements seek to destroy these rights?
 - **Record this conclusion, with clear reference to *which* comments are being considered, against the alleged breach of the Code of Conduct.**

DOCUMENTATION FOR SETTING SANCTIONS

If a breach of the Code of Conduct is found, then when setting sanctions, we must ensure that these are not set in such a way as to discriminate against people with Gender Critical beliefs or against people with the protected characteristic of Gender Reassignment.

- What is the “legitimate aim” of setting sanctions in this case? **Record this conclusion before discussing the sanctions to be set.**
- What are the aggravating and mitigating circumstances relevant to this matter, if any? **Record this conclusion before discussing the sanctions to be set.**

¹ <https://www.legislation.gov.uk/ukpga/2010/15/section/7>

- Why does the committee consider its conclusion to be proportional?
- Why would a less harsh sanction have been inappropriate?

CATEGORIES OF DISCRIMINATION

DIRECT DISCRIMINATION²

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

INDIRECT DISCRIMINATION³

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.

A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- A applies, or would apply, it to persons with whom B does not share the characteristic,
- 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,
- it puts, or would put, B at that disadvantage, and
- A cannot show it to be a proportionate means of achieving a legitimate aim.

HARASSMENT⁴

A person (A) harasses another (B) if—

- A engages in unwanted conduct related to a relevant protected characteristic, and
- The conduct has the purpose or effect of—
 - Violating B's dignity, or
 - Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

A also harasses B if—

- A engages in unwanted conduct of a sexual nature, and
- The conduct has the purpose or effect of—
 - Violating B's dignity, or
 - Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

A also harasses B if—

- A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
- The conduct has the purpose or effect referred to in subsection (1)(b), and

² <https://www.legislation.gov.uk/ukpga/2010/15/section/13>

³ <https://www.legislation.gov.uk/ukpga/2010/15/section/19>

⁴ <https://www.legislation.gov.uk/ukpga/2010/15/section/26>

- Because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- The perception of B;
- The other circumstances of the case;
- Whether it is reasonable for the conduct to have that effect.

VICTIMISATION⁵

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

- B does a protected act, or
- A believes that B has done, or may do, a protected act.

Each of the following is a protected act—

- Bringing proceedings under this Act;
- Giving evidence or information in connection with proceedings under this Act;
- Doing any other thing for the purposes of or in connection with this Act;
- Making an allegation (whether or not express) that A or another person has contravened this Act.

Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

⁵ <https://www.legislation.gov.uk/ukpga/2010/15/section/27>