

The Green Party of England and Wales

Guidance on the Equality Act 2010 – gender reassignment and gender critical beliefs

Background and what this guidance covers

1. The purpose of this note is to provide guidance on the following:
 - (i) how the law, which has recently changed, seeks to protect persons with the protected characteristic of gender reassignment and persons with gender critical beliefs;
 - (ii) identifying lawful manifestations of gender critical beliefs; and
 - (iii) how to approach complaints or disputes concerning gender critical members and transgender members.
2. The contents of this note is as at 28 February 2023 and ought to be kept under regular review to ensure that it is consistent with any changes to the law.

Guidance on protections under the EqA

3. The Green Party is an “association” within the meaning of the EqA. The EqA provides protection from discrimination, harassment and victimisation based on certain protected characteristics, including sex, gender reassignment, sexual orientation, religious and philosophical beliefs.
4. Therefore, the Green Party cannot discriminate against, harass, or victimise members with the protected characteristic of gender reassignment or members with gender critical beliefs.

Gender reassignment and gender critical beliefs

5. Under the EqA “sex” is understood as binary, being a man or a woman, and “man” is defined as a “male of any age” and woman is defined as a “female of any age”.
6. The definition of gender reassignment at section 7 of the EqA is broad. It requires a process of transition from one sex to the other. This can be purely social. It does not require a person to have a Gender Recognition Certificate or medical intervention.
7. Section 7 of the EqA provides: “A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”.
8. Following the case of *Forstater v CGD Europe* (June 2021), a “gender critical belief”, is a protected belief under the EqA and a person with gender critical beliefs has the right of freedom to express their beliefs (in line with Articles 9 and 10 of the ECHR), so long as they do not seek to destroy the rights of others. They also have the right not to manifest or express a belief that they do not hold. In *Forstater*, the Claimant’s gender critical beliefs were summarised as follows by the Employment Tribunal: “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. That is the belief that the Claimant holds”.

9. More recently, in the case of *Bailey v Garden Court Chambers and Stonewall* (July 2022), Allison Bailey, a criminal barrister, sued her chambers and Stonewall (an LGBTQ+ UK charity) for direct and indirect discrimination and victimisation. Complaints had been made about tweets she posted about her gender critical beliefs. Her chambers issued a public statement noting that she was under investigation, which the Employment Tribunal agreed was direct discrimination, and her chambers upheld one of the complaints, which the Employment Tribunal agreed was victimisation.

10. In this case, the Employment Tribunal held that her protected belief went beyond the belief that women are defined by biological sex rather than gender identity. It also found that her views that Stonewall sought to reclassify “sex” with “gender identity” and that its campaigning on gender self-identity made it complicit in threats against women, and eroded women’s rights and lesbian same-sex orientation, amounted to beliefs protected by the EqA.

Discrimination

11. An association must not discriminate against applicants for membership, members, associates or guests but for the purposes of this note, we will refer to members only.

12. There are two types of discrimination: direct discrimination and indirect discrimination.

Direct discrimination

13. An association is liable for direct discrimination if it treats a member less favourably than another member or other members (in similar circumstances) because they have a protected characteristic.

14. For example, the Green Party cannot apply a sanction to a member for any reason that relates to the fact that they are trans or hold gender critical beliefs.

15. However, this does not mean that the Green Party cannot apply a sanction to a member with gender critical beliefs if they express those beliefs in a way that would lead to a sanction under its policies, procedures etc., irrespective of the beliefs behind the behaviour.

This is often a fine distinction, which we discuss further below.

Indirect discrimination

16. Indirect discrimination arises when there is a provision, criterion, or practice (PCP) (e.g. a policy or procedure) that applies in the same way for all members of an association but (whether intentionally or not) disadvantages people with a protected characteristic,

without justification i.e. it cannot be shown that the PCP is “a proportionate means of achieving a legitimate aim”.

17. For example, in another Employment Tribunal case, MacKereth v DWP (June 2022), a doctor, Dr MacKereth, had applied to be a health and disabilities assessor for the Department for Work & Pensions (DWP). During his induction he noted that he would refuse to use a transgender person’s preferred pronouns and names, as required by the DWP, on the basis of his Christian religious beliefs. Dr MacKereth did not succeed in his claims for direct discrimination, indirect discrimination and harassment, as the DWP had legitimate aims of (i) ensuring that its service users were treated with respect and in accordance with their rights under the Act and did not suffer discrimination when using its services and (ii) providing a service complying with an overarching policy of commitment to equal opportunities.

18. In order to lawfully apply a PCP that disadvantages members with gender critical beliefs, the Green Party would need to be able to demonstrate that the application of the PCP was prescribed by its constitution and relevant policies/procedures and “necessary in a democratic society” “for the protection of the rights and freedoms of others” and proportionate i.e. had regard to the need for a fair balance between the rights of all members affected.

Harassment

19. Harassment under the EqA includes subjecting someone to unwanted conduct related to a protected characteristic which has the purpose or effect of violating their dignity or creating an environment that is intimidating (e.g. bullying), hostile, degrading, humiliating or offensive.

20. “Related to” includes situations where the person on the receiving end of the unwanted behaviour does not have the protected characteristic themselves, provided there is a connection between the behaviour and a protected characteristic e.g. where the person receiving the unwanted behaviour is associated with someone who has a protected characteristic or is wrongly perceived as having a particular protected characteristic.

21. In assessing the effect of unwanted conduct, the perception of the alleged victim of the harassment will be relevant, along with the general circumstances and whether it is reasonable for the conduct to have had the effect claimed.

22. The Green Party has been accused of harassment by both trans members and gender critical members in the past, typically owing to the conduct of other members on the opposite side of the gender identity debate, or the handling of a complaint made against them or brought by them, or sanctions applied to them.

Victimisation

23. Victimisation is treating someone badly because they have done a “protected act” (or because you believe that a person has done or is going to do a protected act).

24. A “protected act” is (i) making a claim or complaint of discrimination (under the EqA); (ii) helping someone else to make a claim by giving evidence or information; (iii) alleging that you or someone else has breached the EqA; (iv) or doing anything else in connection with the EqA.

25. Examples of victimisation could be:

(a) investigating a complaint about a member of the Green Party for publishing a social media post regarding the member's views on what it perceives to be discriminatory behaviour by the Green Party;

(b) or sanctioning a member following a complaint from them accusing the Green Party of harassment;

if the reason for investigating/sanctioning is motivated by the member's protected characteristic (or the Green Party cannot prove that it is not motivated by their protected characteristic).

Identifying lawful manifestations of gender critical beliefs

26. It is important to remember that members do not have a right not to be offended. As highlighted in *Forstater*, beliefs which are offensive, or even disturbing to others, can still be protected as long as they do not seek to destroy the rights of others.

27. Therefore, in that case, a person with gender critical beliefs could manifest those beliefs, which may be offensive to some, provided that the way in which they do so does not interfere with the rights of trans persons e.g. their rights not to be discriminated against or harassed.

28. Further, in the context of an association like the Green Party, if a member expresses their gender critical beliefs in a way that is in breach of your constitution, code of conduct etc. and you sanction them as a result, provided you sanction them in the same way that you would sanction anyone else who committed the same breaches i.e. provided you are sanctioning the behaviour (rather than the beliefs driving the behaviour), you will not be liable for breach of the EqA.

29. In practice, where the line is drawn between manifestation of belief and behaviour that interferes with the rights of another is not always clear and we understand that this is a challenge that the Green Party faces when considering complaints brought by and against gender critical members, particularly given that the issues are contentious.

30. In *Bailey*, the Employment Tribunal stated:

"[...] expressing hostility to Stonewall campaigning on the basis of gender self-identity did not seek to destroy the rights of others, in a way that would not be worth of respect in a democratic society. It was part of the "dust and heat" (Milton: *Areopagitica*) generated by the conflict of opinion that must nonetheless be tolerated to avoid the greater evil of censorship".

31. In the *Forstater* case, the claimant did consultancy work for CGD. She posted various tweets which reflected her gender critical beliefs. Colleagues complained that her tweets were transphobic, and she was not offered further work by CGD. CGD could not demonstrate that it took this decision for reasons other than the claimant's gender critical beliefs. Given that these gender critical beliefs are protected by the EqA, she won her claim and CGD was liable to her for direct discrimination and harassment.

32. The following are some examples of her tweets and, therefore, tweets which have been found by the Employment Appeal Tribunal to be lawful manifestations of gender critical beliefs:

"I honestly don't see the difference between Rachel Dolezai's internal feeling that she is black and a man's internal feeling that he is a woman (i.e. and adult human female). Neither has basis in material reality."

"I am perfectly happy to use preferred pronouns and accept everyone's humanity and right to free expression. Transwomen and transwomen. That's great. Enforcing the dogma that transwomen are women is totalitarian."

"The majority of transwomen are intact males (i.e. social not surgical transition). Being forced to share sleeping accommodation, showers, changing etc. or be subject to intimate searches by a transwoman will be just as humiliating and scary as if it was any other man."

33. Statements like those cited above are expressions of gender critical beliefs that the court considers are unlikely to interfere with the rights of others.

34. By contrast, if a gender critical member behaves in a way that is hostile or hateful towards a trans person, this is likely to constitute unlawful harassment (depending on a careful assessment of all factors, including the perception of the trans person).

35. There are other situations where it might be less clear cut. For example, if a gender critical member misgenders a trans member. In Forstater, the Employment Appeal Tribunal stated: "Referring to a trans person by their pre-GRC gender in any of the settings in which the EqA applies could amount to harassment related to one or more protected characteristics; whether or not it does will depend, as in any claim of harassment, on a careful assessment of all relevant factors, including whether the conduct was unwanted, the perception of the trans person concerned and whether it is reasonable for the impugned conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the trans person. A simple example of a situation where referring to a trans person by their pre-GRC gender would probably not amount to harassment is 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".

36. If there is a specific prohibition on misgendering within the Green Party's rules that can be justified as a proportionate means of achieving a legitimate aim, the position may be more straightforward. However, in circumstances where the situation is not clear cut or, at least, you are unsure, it is vital to seek legal advice as soon as possible so as to avoid an unlawful decision being made.

How to approach complaints or disputes concerning gender critical members and transgender members

37. When handling complaints or disputes concerning gender critical members and transgender members, it is recommended that the following steps are taken:

(a) Decision-maker(s) conduct a careful balancing exercise and approach all decisions with all relevant parties in mind. For example, transgender people and people with gender critical beliefs.

(b) All those involved in handling any complaints, investigations or other disciplinary matters (including decision-maker(s)) remain independent and follow all relevant policies, rules, regulations and/or procedures and processes carefully. They should also ensure that there is written evidence of them doing so.

(c) All PCPs (policies, rules and so on) and decisions relating to members are justified with robust, non-discriminatory reasons, and that careful, written, contemporaneous records are kept of these reasons.

(d) Decisions are made calmly and following appropriate and balanced consideration of the issues, and without being influenced by those with strong feelings about the issues.

(e) If you receive reports of discrimination or harassment, address those proactively. Ensure that everyone understands your inclusion policies and, whether someone is making a complaint or are the subject of it, make sure you support them and you are neutral in your consideration of the issue.

(f) Where you are unsure as to how to appropriately handle a particular situation, tread carefully and seek legal advice as soon as possible.

38. We hope that this note is helpful. Please do let us know if you have any questions, we are happy to discuss.

*Mindy Jhittay & Natalia Brownlie
Bates Wells
28 February 2023*