



Leadership Starts with the Law

**Briefing for universities on
The Reindorf Review**

JUNE 2021

The sexmatters logo, with "sexmatters" in black and a blue stylized "x".

sexmatters

**"In my view the policy states
the law as Stonewall would
prefer it to be, rather than the
law as it is."**

**Akua Reindorf
Barrister**



Foreword

In May 2021 the University of Essex published a review by barrister Akua Reindorf concerning the “deplatforming” of two academics because of their “gender critical” views. It captures a glimpse of statutory compliance and academic freedom under fire: university policies captured by internal and external lobby groups, and cultures of fear where academics and students can be hostages to groundless charges of transphobia.

The Essex report exposes and challenges a widespread phenomenon: accusations of transphobia deployed first to curtail academic freedom, and then to prevent people talking about the curtailment of academic freedom. It should be a wake-up call for university leadership.

Sex Matters is a UK based not-for-profit organisation. We campaign, advocate and produce resources to promote clarity about sex in public policy, law and language.

This briefing contains highlights from the Reindorf report, and an update in light of the judgment of the Employment Appeal Tribunal in the case of Forstater v CGD.

It is written in particular to support university leadership in undertaking robust reviews of their policies, and in withstanding further pressure to discriminate against, harass and victimise gender-critical scholars. Given the circumstances of the Essex report, this briefing considers issues of academic freedom. However, both the Essex report and the case of Forstater v CGD have significant implications for universities when carrying out all their responsibilities as employers, education providers, and service providers. Although aimed at universities, it is also relevant to student unions and organisations that provide services on a university’s behalf.

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KEY MESSAGES

Influential groups within universities have acted on the mistaken belief that gender-critical views can legitimately be excluded from academia. Witch-hunts and a culture of fear have become the norm. The Reindorf Review (R) and the Forstater Judgment (F) confirm that it is unlawful to persecute staff and students because of their beliefs about sex and gender. They provide key points of clarity and urgent focus for university leadership as they seek to rebuild cultures of academic freedom and legal compliance:

1. **Gender-critical belief is not controversial.** The “gender-critical” belief that men are male and women are female aligns with the law, and is widely held. (F)
2. **A plurality of different belief systems about sex and gender are protected under the Equality Act.** People with ordinary beliefs about sex are protected against discrimination, as are people with beliefs in gender fluidity. (F)
3. **Everybody has equal protection from harassment.** Universities must consider the effect of their policies on those with gender-critical views as well as transgender people. (F)
4. **Universities should bring their policies back into line with the Equality Act,** taking into consideration all nine protected characteristics and objective tests of harassment. (R)
5. **Offence taken does not mean that unlawful harassment has occurred.** Strong feelings that gender-critical beliefs violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment do not make it so. (F)
6. **Academic debate expressing gender-critical viewpoints is not harassment or hate speech.** Ordinary standards of courtesy and academic conduct apply. (R)
7. **There is no specific law against “misgendering”, nor any obligation on private individuals to respect gender identity.** Ordinary laws in relation to harassment apply. (F)
8. **Universities should set up working groups to repair relationships** between groups on different sides of the gender debates. (R)
9. **Universities should reconsider Stonewall membership.** Stonewall’s advice is not in line with the Equality Act, and undermines academic freedom. (R)

2018: PROLOGUE - THE *GUARDIAN* LETTER

Published in the *Guardian* 18 October 2018. We represent a newly formed network of over 100 academics, most of whom are currently employed in UK universities. We are concerned, from a range of academic perspectives, about proposed governmental reforms to the Gender Recognition Act, and their interaction with the Equality Act.¹

Members of our group have experienced campus protests, calls for dismissal in the press, harassment, foiled plots to bring about dismissal, no-platforming, and attempts to censor academic research and publications. Such attacks are out of line with the ordinary reception of critical ideas in the academy, where it is normally accepted that disagreement is reasonable and even productive.

Our subject areas include: sociology, philosophy, law, criminology, evidence-informed policy, medicine, psychology, education, history, English, social work, computer science, cognitive science, anthropology, political science, economics, and history of art.

Many of our universities have close links with trans advocacy organisations who provide “training” of academics and management, and who, it is reasonable to suppose, influence university policy through these links. Definitions used by these organisations of what counts as “transphobic” can be dangerously all-encompassing and go well beyond what a reasonable law would describe. They would not withstand academic analysis, and yet their effect is to curtail academic freedom and facilitate the censoring of academic work. We also worry about the effect of such definitions on the success rates of journal submissions and research grant applications from governmental bodies such as the AHRC and ESRC.

We maintain that it is not transphobic to investigate and analyse this area from a range of critical academic perspectives. We think this research is sorely needed, and urge the government to take the lead in protecting any such research from ideologically driven attack.

¹ <https://www.theguardian.com/society/2018/oct/16/academics-are-being-harassed-over-their-research-into-transgender-issues>

2019: THE UNIVERSITY OF ESSEX AFFAIR

Professor Jo Phoenix, Chair in Criminology of the Open University, was one of a hundred signatories to that letter. A year later she was preparing to give a seminar at the University of Essex's Centre for Criminology (part of the Department of Sociology), scheduled for 5 December 2019, on the subject of "Trans rights, imprisonment and the criminal justice system".² The day before the seminar, allegations started circulating on social media that Phoenix was a "transphobe" who was likely to engage in "hate speech". Evidence for this included that she had signed the *Guardian* letter, and spoken at a Woman's Place UK (WPUK) meeting.

WPUK is a grassroots group that was established to enable women to meet and discuss proposed changes to the Gender Recognition Act in the face of strong opposition to debate. Phoenix's talk was prompted by the cancellation of two events at the Open University because of accusations of transphobia leveled at the organisers, the Centre for Crime and Justice Studies. Her talk at the WPUK meeting was on the topic of academic freedom. She began: "I absolutely wholeheartedly support and stand side-by-side with my trans brothers and sisters in their fight to be free to express their sense of self as they will."³



"the accusation of transphobia is enough to taint individuals organisations and it's enough to stifle debate about matters of justice far removed from the issue of trans rights"

Professor Jo Phoenix



**A WOMAN'S PLACE
IS MADE TO LAST**


**LEICESTER
MONDAY 15 APRIL**

² Jo Phoenix "Woman's Place is Made to Last" (15 April 2019) https://www.youtube.com/watch?v=eY_fHMkwRnI

³ <https://www.insidehighered.com/news/2019/03/21/british-university-calls-conference-amid-protests-transgender-activists>

On learning of Phoenix's seminar, the University of Essex "LGBTQ Forum & Allies" peppered administrators with emails accusing her of being "a vocal member of the transphobic lobby that has emerged in academia". A flyer was circulated which bore a violent image and the words "SHUT THE FUCK UP, TERF". (TERF stands for "Trans Exclusionary Radical Feminist; it is used as a term of abuse.) There was a credible threat that students planned to barricade the room.

Exhibit 1: Text and graphics of the flyer

<p>Jo Phoenix is a transphobe who should not be invited to this university. You can't call yourself a feminist if you don't respect trans women!</p> <p>Delegitimising trans people is part of a misogynistic, colonialist and violent ideology.</p> <p>Jo Phoenix has been (wrongly) accusing "trans politics" of reinforcing gender stereotypes. In actual fact, it is her kind of trans-exclusionary feminism that reinforces rigid roles for women (they must be able to give birth, must have XX chromosomes, etc) – but women outside of these roles have existed for all of history.</p> <p>She is covering up her bigotry in academic jargon and claiming to just "raise questions", but this is a typical disguise for prejudice.</p> <p>Along with other bigoted academics, Jo Phoenix signed a letter to the Guardian claiming that "research into transgender issues" (i.e. academic transphobia) is being silenced.</p> <p>It isn't but it should be!</p>	
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Security concerns meant the seminar was cancelled, on the basis that it would be rearranged. However, the university then asked Phoenix to provide a copy of her talk for the purposes of vetting its content. She refused. The Department of Sociology then voted to rescind the invitation, and to blacklist her from future invitations.

On 18 December the LGBT Forum and Allies sent an open letter to the vice-chancellor calling for "a preventative strategy" against inviting visiting speakers such as Phoenix in future. It stated that there should be no place in academia for discussion or debate on "the existence of Trans/nonbinary communities and identities". The letter said this debate in itself is discriminatory and creates an offensive and unsafe environment for those who are Trans/nonbinary, and should be subject to zero tolerance as a hate crime.

“As a zero-tolerance approach, this ‘debate’ is not welcome here at our campus. The safety and wellbeing of a marginalised community, our Trans/nonbinary community, is paramount above that of the need to express bigoted views.”



ESSEX
LGBTalliance

A month later, in January 2020, another signatory of the *Guardian* Letter, Rosa Freedman, Professor of Law Conflict and Global Development at the University of Reading, was due to take part in a roundtable discussion on antisemitism as part of the Holocaust Memorial Week event at the University of Essex. Gender identity was not a topic of debate, but Freedman had previously spoken at a WPUK event and at other events, about the intersection between the human rights of transgender people and of women and girls.⁴

The University again received complaints about “TERF viewpoints” and “hate speech” and Freedman was disinvited. She wrote to her MP and the Universities Minister and gave an interview to the *Sunday Times*. In response, after several weeks, the University added her back onto the panel, denying that her gender-critical views were the reason for the earlier omission.

⁴ <https://forwomen.scot/wp-content/uploads/2019/02/Rosa-Freedman-FWS.pdf>

2020: REINDORF'S FINDINGS

Akua Reindorf, a barrister at Cloisters Chambers, was commissioned by the University of Essex to investigate the treatment of the two academics. The Reindorf Review, completed in December 2020 and published in May 2021, found that the University was in breach of its statutory duty to ensure freedom of speech for visiting speakers, as well as its regulatory obligations, duties under charity law and potentially the Public Sector Equality Duty. (A summary of the legal frameworks referred to in the review are included as an annex to this briefing.)

In her interviews with staff and students, Reindorf heard of a wider “culture of fear” amongst those whose views on gender deviate from those of trans-rights advocates.

The image is a composite graphic. On the left, there is a white box containing the 'sexmatters' logo in blue and black text. Below the logo is a large blue rectangle with a white quote. At the bottom left, a white box contains the name 'Akua Reindorf' and her title 'Barrister' in bold black text. On the right side of the graphic is a portrait of Akua Reindorf, a Black woman with short dark hair, wearing a black top, looking directly at the camera with a slight smile.

sexmatters

“the mere discussion of what ‘trans rights’ entail cannot be regarded as a violation of those rights in a context where the proper extent of those rights is clearly not settled either in law or in public opinion”

Akua Reindorf
Barrister

Reindorf considered whether the situation risked discrimination or harassment on the basis of three protected characteristics: sex, gender reassignment and belief.

Exhibit 2: Three relevant protected characteristics



SEX

Whether someone is a man (male) or a woman (female)



GENDER REASSIGNMENT

Going through or having gone through a gender transition



RELIGION OR BELIEF

Includes the belief that human beings can/ cannot change sex

Includes the belief that gender identity is/ is not more important than biology

Reindorf found that:

- **There was no risk whatsoever that Professor Phoenix's seminar might amount to "hate speech",** nor any reasonable basis for thinking that Professors Phoenix or Freedman might engage in harassment contrary to the Equality Act 2010 or any other unlawful speech.
- **There was no reasonable basis for thinking that harassment or discrimination would be perpetrated against trans or non-binary people.** Although people who complained *felt* that the presence of the gender-critical professors would violate their dignity or create an intimidating, hostile, degrading, humiliating or offensive environment, there was no objective evidence that this was the case.
- **While the University does not have the same direct Equality Act obligations to visiting speakers as it has to its staff and students, its treatment of Professor Phoenix might contribute to unlawful indirect sex discrimination *against***

women at the university, on the basis that more women than men tend to publicly express gender-critical views.

- **Anticipating the Employment Appeal Tribunal case of Maya Forstater, there was potential belief discrimination against gender-critical members of the university.** The judgment in Forstater has since confirmed that beliefs such as those held by Professors Phoenix and Freedman qualify as protected beliefs under the Equality Act.

Reindorf highlights that what is being presented as harmful speech is **debate on potential changes to the law** (i.e. defence of the law staying as it is), and arguments that **there is a conflict of rights between women (based on sex) and transgender people**. She notes that, given that the principle of a conflict of rights is enshrined in law, the articulation of views about where the boundaries lie would have to be very extreme to amount to harassment or “hate speech”.

“Logically, arguing that the law should remain as it is cannot be an attack on trans rights, unless one takes the view that the law itself fails to enshrine rights which exist independently of it. If that is the case, then academic research and discussion would appear to be a good starting point for driving a change to the law. Indeed, it is difficult to see how the enhancement of trans rights in law is to be achieved without such inquiry and discussion.”

THE IMPACT

In May 2021 the University of Essex issued open apologies to the two academics. It apologised to Professor Phoenix for failing to manage security risk, failing to take action on the threatening flyer, cancelling her seminar, inappropriately demanding to vet her lecture and then blacklisting her. It apologised to Professor Freedman for threatening to infringe her freedom of speech without justification between 9 and 27 January 2020 and causing distress. In response to the Reindorf Review, the university stated:⁵

The report makes clear that we have made serious mistakes and we need to do our very best to learn from these and to ensure they are not repeated. The review notes the particular responsibility placed on universities to protect freedom of speech within the law, and to ensure that a diversity of voices and views can be heard on our campuses.



"I was deeply concerned to read the input into the review from some staff and students who said that they felt constrained to self-censor their speech and activity because of concerns about how we manage the balance between freedom of speech and our commitment to diversity, equality and inclusion"

Professor Anthony Forster
Vice-chancellor, Essex University



⁵ <https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers>

Professor Anthony Forster, vice-chancellor of the University of Essex, said that the University must “recommit to providing a supportive and inclusive environment within which people can expect to learn, grow and develop through challenge.”

Professor Phoenix told *Lesbian and Gay News* that she welcomed the report, but that “waiting for 18 months for this apology has been very painful”. She suspects that living under suspicion has impacted on her career. Whereas once, she said, she would receive around 10-15 invitations to speak at various universities each year, “since Essex cancelled my talk, I have had only two invitations.”



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"waiting for 18 months for this apology has been very painful. I have had to endure other people's accusations of me being transphobic on the grounds that I was cancelled by Essex University"

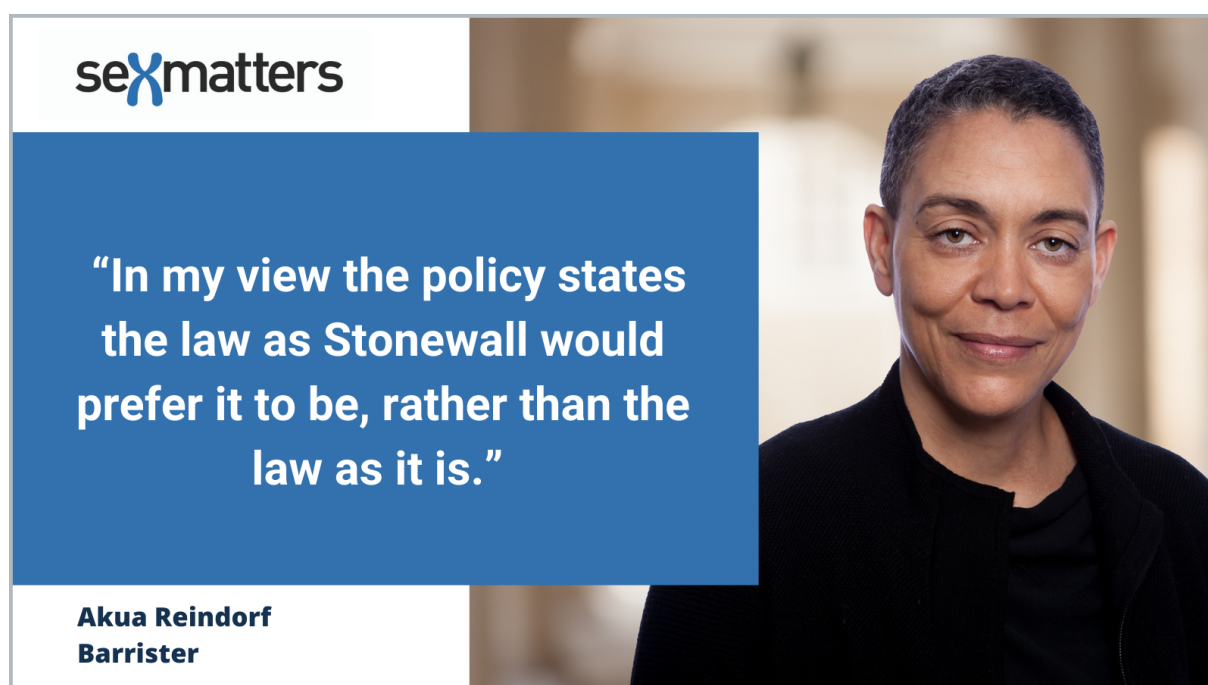
Professor Jo Phoenix
Open University

“TRANS RIGHTS”: GOING BEYOND THE LAW

In addition to specific procedural failures, Reindorf pointed to explicit policies that caused the University to actively undermine academic freedom and risk discrimination.

The University of Essex, like most UK universities, is a member of Stonewall's Diversity Champions scheme. Its policies are reviewed annually by Stonewall, and it seeks to be in the “Top 100” employers by going “beyond the law”.

Reindorf's review confirmed what the academics had raised in their 2018 letter to the *Guardian*: that the Stonewall-endorsed policies included an erroneous understanding of the law and undermined the rights of others.



The University of Essex's policy on supporting transgender and non-binary staff states that under the Equality Act 2010, it is unlawful to discriminate against or treat someone unfairly because of their *gender identity* or *trans status*. Examples of discrimination it cites include:

- “Outing” someone as trans without their permission,
- Refusing to use someone's preferred name and gender pronouns,
- Denying someone access to “appropriate single-sex facilities”.

The Harassment and Bullying Zero-Tolerance policy similarly states that the university “will not tolerate staff being questioned inappropriately about the facility they choose or being denied access to that facility”. Under hate incidents or crimes, it states as examples “abuse, such as offensive leaflets and posters, unfounded and malicious complaints and bullying”. It says that “neither academic freedom nor freedom of expression can be used as an excuse for subjecting an individual or group to bullying or harassment or for committing a hate incident or crime”. The Reindorf Review finds that these policies do not accurately state the law.

Exhibit 3: University of Essex policies reviewed

University of Essex Policy	Reindorf Review Findings
It is unlawful to discriminate against or treat someone unfairly because of their <i>gender identity or trans status</i>.	“Gender identity or trans status” are not protected characteristics under the Equality Act 2010; rather, the protected characteristic is gender reassignment, which is more narrowly defined.
“Outing” someone as trans without their permission is harassment.	This would not invariably amount to unlawful discrimination or harassment.
Refusing to use someone’s preferred name and correct gender pronouns is discriminatory.	This would not invariably amount to unlawful discrimination or harassment.
Denying someone access to “appropriate single-sex facilities” is discriminatory.	Access to single-sex facilities is a contested issue and the Equality Act 2010 contains specific “sex-based exceptions” relating to this.
The University will not tolerate staff being questioned inappropriately about the facility they choose or being denied access to that facility.	Allowing single-sex facilities to be used by whoever chooses to use them is a potential breach of health and safety legislation.
Offensive leaflets and posters, unfounded and malicious complaints, and bullying are hate crimes	The hate-crime examples are misleading. There is no standalone crime of inciting hatred on grounds of transgender identity. Nor is there a crime of bullying or making offensive comments on grounds of transgender identity.

Stonewall argues that its guidance is based on the Code of Practice (COP) published by the Equality and Human Rights Commission. However, that guidance is not consistent with the COP.

A recent judicial review case, *AEA v EHRC*, considered whether the phrase in the COP **“should treat transsexual people according to the gender role in which they present”** in relation to single-sex services had wrongly led service providers to think that they **must** allow people to use services according to their self-identified gender.

The EHRC said that

- the COP said “should,” not “must,”
- exceptions were available, and
- a policy that said a service provider “must” treat people according to the role in which they present would be “directly inconsistent” with the COP.

The judgment accepted this and found that any policy saying “must” would be contrary to the Equality Act. The judge suggested that such a policy would be a good candidate for challenge in court.⁶

The Essex University policy – vetted by Stonewall – said that trans people **must** be given access to single-sex spaces according to their gender identity. It is therefore not by any interpretation analogous to the EHRC CoP.

⁶ <https://legalfeminist.org.uk/2021/05/10/aea-v-ehrc-an-explanation/>

Criticising Stonewall is Enough to Get Academics Targeted for Deplatforming

It is notable that in its open letter to the university on 18 December 2019, the LGBT Forum complained that Jo Phoenix criticised Stonewall, as signatory to the *Guardian* letter. It argued:

“Jo Phoenix is thus not just tacitly but openly hostile to the proclaimed inclusivity policies of our institution which have been carefully and collectively arrived at. Huge amounts of institutional energy and collective goodwill was put towards recognition that this community supports the Diversity Champions initiative. **It is therefore contradictory that someone who is openly hostile to our stated community position on this issue was invited to speak.**”

Thus simply registering disquiet about the role of Stonewall in setting university policy is seen as reason enough to be deplatformed.

Addressing this culture of discrimination against gender-critical staff and students, and rebuilding a culture of respect for academic freedom and robust collegiate debate, require grasping the nettle of these policies and the organisations promoting them.

All universities must comply, and be seen to comply, with current anti-discrimination legislation in full. This will require an intense focus on reviewing any institutional relationships, policies, guidance documents, or case and complaint management protocols that are found to be inconsistent with the anti-discrimination legislation now in force.

REINDORF'S RECOMMENDATIONS

Reindorf's recommendations to the University of Essex include:

Align policies with the Equality Act: The University's equality, diversity and inclusion policy documents, Charter and Strategic Plan should be standardised so that they all accurately describe the protected characteristics in the Equality Act 2010, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Any additional characteristics in respect of which the University wishes to extend protection should be clearly identified as such.

Set up a working group to repair relationships: The University should set up a working group to devise and implement a strategy for repairing relationships between trans and non-binary university members and those with gender-critical views, in particular women. In doing so it should bear in mind its duty to pay due regard to the need to foster good relations among people with different protected characteristics.

Reconsider Stonewall membership: Reindorf recommended that the university should give careful and thorough consideration to the relative benefits and disbenefits of its relationship with Stonewall. In particular, it should consider:

- That this relationship appears to have given university members the impression that gender-critical academics can legitimately be excluded from the institution;
- The potential effect of this on the university's obligations to uphold freedom of expression;
- The effect on university members' understanding of the values of the institution;
- The effect on those members of the university who hold gender critical views.

If the university considers it appropriate to continue its relationship with Stonewall, it should devise a strategy for countering the drawbacks and potential illegalities described above.

THE FORSTATER JUDGMENT

Since the Reindorf Review was published, the judgment in the case of Forstater v CGD Europe and Others has been handed down.⁷ Its findings are consistent with and reinforce Reindorf's recommendations.

The Employment Appeal Tribunal found that **gender-critical beliefs count as protected under the Equality Act 2010**. Those who hold such beliefs are legally protected from discrimination and harassment. So too are those who hold the opposing view.

The specific beliefs that were pleaded, and recognised as being protected, include:

Gender-Critical Beliefs (Forstater)

- There are only two sexes in human beings: male and female. This is fundamentally linked to reproductive biology.
- Males are people with the type of body which, if all things are working, is 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.
- Women are adult human females. Men are adult human males.
- Sex is determined at conception, through the inheritance (or not) of a working copy of a piece of genetic code which comes from the father (generally, apart from in very rare cases, carried on the Y chromosome).
- It is impossible to change sex or to lose your sex. Girls grow up to be women. Boys grow up to be men. No change of clothes or hairstyle, no plastic surgery, no accident or illness, no course of hormones, no force of will or social conditioning, no declaration can turn a female person into a male, or a male person into a female.
- Under the Gender Recognition Act 2004, a person may change their legal sex. However this does not give them the right to access services and spaces intended for members of the opposite sex.

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<https://www.gov.uk/employment-appeal-tribunal-decisions/maya-forstater-v-cgd-europe-and-others-uk-eat-slash-0105-slash-20-slash-joi>

The judgment directly contradicts the view of Stonewall and of those who deplatformed the two academics invited to the University of Essex that any belief other than “Trans Women Are Women” is inherently bigoted, hateful and illegitimate.

Mr Justice Choudhury noted:

The Claimant’s gender critical belief is not unique to her; it is a belief shared by others who consider that it is important to have an open debate about issues concerning sex and gender identity.

The judgment emphasises that everyone continues to be subject to the same prohibitions on discrimination and harassment. Choudhury J stressed that his judgment does not mean that “those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of EqA will be for a tribunal to determine in a given case.”

The judgment clarifies several important points:

- **The belief that sex is immutable and binary is not controversial.** It is widely held, including by respected academics, and reflects the legal definition of sex in common law.
- **The protected characteristic of gender reassignment under s.7, EqA would be likely to apply only to a proportion of trans persons.** There are other protected characteristics (such as belief) that could potentially be relied upon to protect the rights of trans and non-binary people.
- **There is no specific law against “misgendering”.** Refusing to refer to a trans person by their preferred pronoun, or refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, but it would not always have that effect. Like any claim of harassment, it would depend on a careful assessment of all relevant factors.
- **The Gender Recognition Act does not bind private citizens.** A Gender Recognition Certificate changes a person’s sex in law. But it does not compel other people to believe something that they do not. The effect is not to erase memories or impose recognition of the acquired gender in private, non-legal

contexts. The GRA makes it an offence to disclose information acquired in an official capacity as to a person's gender before it became the acquired gender (s.22, GRA). But there is nothing in the Act that requires a person acting in any private capacity to refer to a person's acquired gender or to refrain from referring to their sex as they know or perceive it.

2021: ANOTHER ATTACK ON ACADEMIC FREEDOM

On 16 June 2021 the Gender Critical Research Network was launched at the Open University, convened by Professor Jo Phoenix and Dr Jon Pike.⁸

Despite the recent steps forward in clarity about the legal status of gender-critical beliefs, and about academic freedom, its launch set off another round of calls to shut down debate. An open letter by a group of OU staff and postgraduate students⁹ calls on the vice-chancellor to withdraw support from the network, stating that:

- Gender-critical feminism is a strand of thought and belief that is fundamentally hostile to trans, non-binary and genderqueer people.
- The OU's decision to approve and promote this network is in conflict with its responsibilities under the Equality Act 2010 and particularly the Public Sector Equality Duty regarding gender reassignment.
- The existence of the Gender Critical Research Network directly impedes the duty of care of the university to trans, non-binary and gender non-conforming students.
- Misgendering a trans person in a context covered by the Equality Act would likely amount to unlawful discrimination.
- Staff have a responsibility to respect the self-identified gender status of all students (as set out in the OU's current Gender Identity Policy and Guidance).

The findings of the Reindorf Review and the Forstater judgment should help university administrators recognise that these claims are not supported in law, and that to act on them by withdrawing support for the Network would undermine the University's lawful obligations to uphold academic freedom. They would be at risk of facing a claim of belief discrimination.

The letter misstates the findings in the Forstater case, claiming that the judgment states that "misgendering or harassing a trans people in a context covered by the Equality Act would likely amount to unlawful discrimination". What the judgment actually says is that the Equality Act protects people against harassment, and it would depend on the circumstances whether "misgendering" would amount to harassment.

⁸ <https://healthwellbeing.kmi.open.ac.uk/special-interest-groups/ou-gender-critical-research-network>

⁹ https://docs.google.com/document/d/1v1rck-opPCcjKuEER_kaV_EyOvn_zIRfG5it1G6iE0/view

The letter notes that the OU's current Gender Identity Policy and Guidance states that "staff have a responsibility to respect the self-identified gender status of all students". However, as both the Reindorf Review and the Forstater judgment highlight, there is no such legal responsibility. Staff have a responsibility not to engage in unwanted conduct related to any protected characteristic that has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment. Self-identified gender status is not a protected characteristic. While gender-identity beliefs are protected by the Equality Act, this does not require that others profess to share them.

The letter states: "We do not believe that freedom of speech or academic freedom should come at the expense of marginalised groups, such as those possessing protected characteristics under the law." It should be noted that everyone possesses several protected characteristics (such as age, sex, race, beliefs/lack of belief), and no one protected characteristic is more important than another. Academic freedom is fundamental to the life of universities.

An even more extraordinary letter has been written by the Gender Studies Department at the London School of Economics and published on its website.¹⁰ It states:

- The Gender Critical Research Network is an explicitly anti-intellectual attack on Gender Studies, trans, non-binary, and gender-nonconforming people;
- Proponents of the "gender-critical" perspective, including the Members and Affiliated Members of the Network, are adamantly and openly opposed to recognising trans people's rightful and valid claims to their gender and their rights;
- Those espousing gender-critical perspectives routinely make transphobic, discriminatory, inaccurate, and harmful claims about trans people specifically, and gender more broadly, that have profoundly negative effects on social and political life;
- Their unfounded viewpoints are inimical to intersectional feminisms and scholarly debate, and they contribute to the ongoing "anti-gender" attacks on the field;

¹⁰

<https://www.lse.ac.uk/gender/news/june-2021/Statement-of-Solidarity-with-Open-University-Staff-and-Postgraduate-Research-Students>

- The gender-critical perspective runs counter to decades of scholarship from across the social sciences, humanities, and medical fields, and it relies on and invests in racist, colonial understandings of sex/gender.

It claims that providing an institutional platform for this network creates a learning environment that is openly hostile to the urgent projects of equity, diversity, and inclusion at the OU. It asserts that by giving the Gender Critical Research Network institutional support, the OU is in breach of its aims aligned to its Public Sector Equality Duty.

This character assassination of the gender-critical scholars on the LSE's corporate website, issued by a department of the university, is likely to create a hostile environment (i.e. be harassment) of any gender-critical scholars in the department.

ANNEX: RELEVANT LEGAL FRAMEWORKS

Human Rights

As public authorities, universities have obligations under the European Convention of Human Rights (also enshrined in UK Law in the Human Rights Act 1998), notably:

- **Article 9: Freedom of thought, conscience and religion.** Everybody has the right to freedom of thought, conscience and religion. The freedom to hold a particular belief is absolute, but the right to manifest the belief is subject to similar restrictions to freedom of expression. Article 9 protects non-religious beliefs as well as religious ones. A recent Employment Appeal Tribunal judgment confirmed that this includes beliefs about sex and gender identity.
- **Article 10: Freedom of expression.** This includes freedom to hold opinions and to receive and impart information and ideas. It is a qualified right and can be restricted by law where “necessary in a democratic society” for reasons of public safety, prevention of disorder or crime, protection of health or morals and the protection of the rights of others. Any restriction on free speech must be proportionate, in that it must not go further than is reasonably necessary to achieve the aim of the restriction.
- **Article 11: Freedom of assembly and association.** This provides for the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of one’s own interests. It imposes a positive obligation on public authorities to take reasonable and appropriate measures to facilitate peaceful assembly. However, it does not require an absolute guarantee.
- **Article 17:** This removes protection from activities or acts aimed at the destruction of any of the other rights in the Convention. The Article is applicable, only on an exceptional basis, to speech which stirs up hatred or violence. This may be termed “hate speech” (although there is no stand-alone law on hate speech in the UK). Importantly, there is a difference between speech that may be merely offensive, shocking or disturbing, or even dangerous or irresponsible, and that which seeks to destroy the rights of others.

Academic Freedom

Academic Freedom is a fundamental principle of university life and its purpose in the pursuit of knowledge and progress.

- **The S.43 Duty:** Higher-education providers are subject to an enhanced duty to protect and promote freedom of expression under Section 43 of the Education Act (No. 2) 1986. They must take reasonably practicable steps to ensure that freedom of speech within the law is secured for members, students, employees and visiting speakers. Universities must issue and enforce a **code of practice** in relation to meetings and other activities on its premises and the conduct required of attendees at those meetings and events.
- **Article 13 of the Charter of Fundamental Rights of the European Union** provides that “The arts and scientific research shall be free of constraint. Academic freedom shall be respected”. This right is closely associated with the right to freedom of expression. It protects freedom of speech as well as “freedom...of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction”.
- **The Office for Students (OfS):** Universities in England are regulated by the OfS. This requires that universities uphold “public interest governance principles”, which include a commitment to academic freedom and freedom of speech. In its guidance on freedom of speech, the OfS states: “We stand for the widest possible definition of freedom of speech: anything within the law.” Academic staff must be able to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the university.
- **The Higher Education Funding Council for Wales (HEFCW)** is the HE regulator in Wales and has obligations under Section 48 of the Higher Education (Wales) Act 2015 to take into account the importance of protecting academic freedom. S.43 of the Education Act (No. 2) 1986 (described above) also applies in Wales.

- **Section 26 of the Further and Higher Education (Scotland) Act 2005** requires institutions in Scotland to aim to uphold academic freedom, including, among other responsibilities, ensuring so far as is reasonable that staff appointments held or sought, and entitlements or privileges, are not adversely affected by their exercise of academic freedom. Academic freedom is defined to include freedom within the law to hold and express opinions, question and test established ideas or received wisdom, develop and advance new ideas or innovative proposals, and present controversial or unpopular points of view.
- **Article 3 of the Education (Academic Tenure) (Northern Ireland) Order 1988** requires the Department of the Economy, in exercising its functions under that Order, to have regard to the need to uphold academic freedom in institutions in Northern Ireland.

Duties under the Charities Act 2011

The vast majority of universities are charities and must comply with charity law obligations. Universities must act only in ways that further their objects for the public benefit. The University's trustees must not promote political positions, unless they are doing so in order to advance the University's charitable objects. They must ensure that the University complies with its legal obligations to protect freedom of speech and to protect students, employees and workers from harassment, discrimination and other unlawful acts.

The Equality Act 2010

The Equality Act protects people from discrimination, harassment and victimisation in relation to nine protected characteristics. Three characteristics are particularly relevant here; sex, gender reassignment and religion or belief.

- **Harassment:** The Equality Act prohibits harassment related to a protected characteristic. Harassment consists of engaging in unwanted conduct related to the protected characteristic which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment. The EHRC's guidance says: "The harassment provisions cannot be used to undermine academic freedom.

Students' learning experience may include exposure to course material, discussions or speakers' views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010."

- **Direct and indirect discrimination:** Direct discrimination consists of treating a person less favourably because of a protected characteristic (such as gender reassignment, sex or religion and belief). Indirect discrimination occurs where a person is subject to a provision, criterion or practice ("PCP") which is applied to people generally but which puts, or would put, people with the protected characteristic at a particular disadvantage by comparison to others. If the PCP is a proportionate means of achieving a legitimate aim there is no discrimination.
- **Public Sector Equality Duty (PSED).** As public authorities, universities must have due regard to the need to eliminate discrimination, harassment, victimisation and other conduct prohibited under the Equality Act, the need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it, and the need to foster good relations similarly.