

## Philosophical beliefs protected under the Equality Act: After the *Forstater* case

1. The **Equality Act 2010** (the “**Equality Act**”) contains extensive provisions to prevent discrimination, harassment and other unlawful actions in specified contexts in respect of people with the “*protected characteristics*” identified in **Section 4**. “*Religion or belief*” is one such characteristic and is defined in **Section 10**.<sup>1</sup>
2. Contexts in which people’s religious or philosophical beliefs (or lack of such beliefs) must be protected, and which are or may be relevant to UK universities and other Higher Education Providers (“**HEPs**”) and their “constituent institutions” and students’ unions, include: the provision of services and exercise of public functions<sup>2</sup>, employment<sup>3</sup>, further and higher education<sup>4</sup> and membership associations<sup>5</sup>. In such contexts, discrimination or harassment based on such beliefs (or lack of them) is

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<sup>1</sup> **Section 10** provides:

**“10 Religion or belief**

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

[...]”

<sup>2</sup> **Sections 28** and **29**.

<sup>3</sup> **Sections 39** to **41**.

<sup>4</sup> **Sections 90** to **94**.

<sup>5</sup> **Sections 101** and **102**.

unlawful under the Equality Act. The Equality Act applies to both direct and indirect discrimination.<sup>6</sup> Harassment is defined in **Section 26**.<sup>7</sup> Victimisation is also prohibited.<sup>8</sup>

3. People whose rights under the Equality Act are infringed may bring proceedings against HEPs (including for damages for unfair dismissal).
4. The Equality Act thus imposes effective freedom of speech protection obligations on HEPs to the extent that holding (or not holding) certain religious or philosophical beliefs is a “*protected characteristic*”. People who hold (or do not hold) those beliefs must not be discriminated against (or harassed or victimised) for their views, including in respect of appointments, promotions and disciplinary matters.
5. In the landmark *Forstater* case in 2021<sup>9</sup>, the Employment Appeal Tribunal decided that holding gender-critical views (i.e., disagreeing with aspects of Trans ideology) is a “*philosophical belief*” and, therefore, within the protected characteristic of “*Religion or belief*”. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and other human rights, and holding (or not holding) viewpoints (whether religiously or

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<sup>6</sup> Defined in **Sections 13 and 19**.

<sup>7</sup> **Section 26** defines harassment as follows:

- “(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B [...]
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—  
[...] religion or belief;”

<sup>8</sup> **Section 27**. Defined as subjecting a person to detriment because they bring proceedings or give evidence in proceedings brought under the Equality Act.

<sup>9</sup> *Forstater v. CGD Europe et al.* (Appeal No. UKEAT/0105/20/JOJ): [https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya\\_Forstater\\_v\\_CGD\\_Europe\\_and\\_others\\_UKEAT0105\\_20\\_JOJ.pdf](https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf)

philosophically based) in respect of other currently contested areas (including, for example, in relation to aspects of Critical Race Theory and programmes to “*decolonise the curriculum*”), must logically also be treated as protected beliefs and will, in time, be confirmed as such. (See further discussion of why this is the case in the Appendix.) HEPs should therefore act on the basis that they have duties not to discriminate against, harass or victimise people on the basis of a wide range of lawful opinions held or expressed by them and, effectively, to take steps to avoid this happening, such as ensuring that their staff are properly trained and do not take unlawful actions on their behalf.

6. The Public Sector Equality Duty (“**PSED**”) imposed under **Section 149** of the Equality Act requires public authorities, in the exercise of their functions, to have due regard to the need to eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act of or against people who hold or express those protected beliefs, to advance equality of opportunity for those people and to foster good relations between people who have a protected characteristic (i.e. these views) and those who do not. HEPs are public authorities for this purpose, and in many cases their colleges and other constituent institutions are also public authorities or operate on the basis that they are. Students’ unions are not generally public authorities for this purpose (if at all).
7. HEPs will be vicariously liable under the Equality Act for the acts or omissions of their employees and agents where they are acting within the scope of their employment or authority, respectively. HEPs are not responsible for the conduct of their students (unless they are acting as representatives of the HEP or in some other capacity which gives rise to duties or liabilities on the HEP’s part). The extent to which HEPs are responsible for the actions of their academics and other staff acting in their personal rather than official capacities is somewhat unclear.
8. An employee or agent of an HEP contravenes **Section 110** of the Equality Act if he or she does something which is treated as having been done by the relevant HEP and the doing of that thing amounts to a contravention of the EA by the relevant HEP. Under **Section 111** of the Equality Act, a personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act. Further, officers of organisations who through default or negligence cause their organisation to breach the law and thereby suffer loss can be at risk of personal liability for that loss.

## Best Free Speech Practice

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[www.bfsp.uk](http://www.bfsp.uk) / [info@bfsp.uk](mailto:info@bfsp.uk)

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## Appendix: the *Grainger* tests and likely categories of protected viewpoints

There have been several judicial decisions about what beliefs are protected by the protected characteristic of “*Religion or belief*”. These are usefully summarised in *Grainger v Nicholson*<sup>10</sup>, in which five criteria were identified as characteristic of beliefs qualifying for protection:

- (i) the belief must be genuinely held;
- (ii) it must be a belief, and not simply an opinion based upon the present state of information;
- (iii) it must concern a weighty and substantial aspect of human life and endeavour;
- (iv) it must attain a level of cogency, seriousness, cohesion and importance; and
- (v) it must be worthy of respect in a democratic society and not conflict with the fundamental rights of others.

In the *Forstater* case in 2021<sup>11</sup>, the Employment Appeal Tribunal decided that holding gender-critical views (i.e., disagreeing with aspects of Trans ideology) is a “*philosophical belief*” and, therefore, within the protected characteristic of “*Religion or belief*”. The principles established in the *Forstater* case were reinforced by the *Bailey* case<sup>12</sup> in July 2022, in which an Employment Tribunal found that a barristers' Chambers which stated that they were investigating the claimant and considering appropriate action following complaints about her expression of gender-critical views on social media had acted unlawfully in doing so, and that views which were critical of the Stonewall campaign's Trans ideology were protected viewpoints. The *Anna Thomas* case strongly indicates that further widening of the application of these principles is highly likely<sup>13</sup>.

Consistent with the above principles, and the judgements in the *Forstater* and *Bailey* cases:

- (i) while each case will depend on its particular facts, it appears highly likely that the following viewpoints are capable of satisfying the criteria in *Grainger v Nicholson*

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<sup>10</sup> *Grainger v. Nicholson* (2010) ICR 360.

<sup>11</sup> *Forstater v. CGD Europe et al.* (Appeal No. UKEAT/0105/20/JOJ): [https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya\\_Forstater\\_v\\_CGD\\_Europe\\_and\\_others\\_UKEAT0105\\_20\\_JOJ.pdf](https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf)

<sup>12</sup> See: *Bailey v. Stonewall Equality Ltd and others*, Case No: 2202172/2020 [https://assets.publishing.service.gov.uk/media/62e1307c8fa8f5649a40110a/Ms\\_A\\_Bailey\\_vs\\_Stonewall\\_Equality\\_Limited\\_Reserved.pdf](https://assets.publishing.service.gov.uk/media/62e1307c8fa8f5649a40110a/Ms_A_Bailey_vs_Stonewall_Equality_Limited_Reserved.pdf)

<sup>13</sup> See footnote 14.

constituting protected beliefs for the purposes of the Equality Act 2010, including the Public Sector Equality Duty under it, and will, in time, be confirmed as such; and

- (ii) in order not to find themselves acting unlawfully, universities (and their constituent institutions and students' unions), businesses and other bodies to which the Equality Act applies would be ill-advised not to act on the basis that this is the case.

Category of likely protected characteristics

Belief in the importance of and advocacy for free speech and other human rights.

Holding views about, and questioning of or disagreement with ideologies, assertions, viewpoints, campaigns, proposals and programmes (together, "**relevant viewpoints**") relating to, certain matters associated with race or racial history and their implications, and in particular:

- (i) aspects of so-called Critical Race Theory<sup>14</sup> (for instance in respect of the existence or otherwise of so-called "white privilege" or "white guilt") or of the Black Lives Matter movement;
- (ii) "decolonising" curriculums; and
- (iii) history and the behaviour and moral character of peoples and countries, in particular in connection with the British or other empires, colonies, slavery and such matters.

Holding views about, and questioning of or disagreement with, religious beliefs and dogma and their effects in practice.

Holding views about, and the questioning of or disagreement with relevant viewpoints relating to, significant aspects of politics, society and social and international relations which are matters of public controversy or debate, where such views satisfy the *Grainger* tests. There is case law to the effect that left-wing democratic socialism counts as protected for these purposes, so, logically, other political viewpoints, at least non-extreme ones, must qualify for equivalent protections. Another example of such an aspect of politics etc would be Brexit.

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<sup>14</sup> This has already been litigated and subject to a substantial payment, albeit not yet a formal judgement. In May 2023, the Department For Work and Pensions paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns that (inter alia) the DWP's adoption of aspects of Critical Race Theory, in particular the distribution of materials asking white employees to "assume" they were racist, was a breach of the Civil Service Code requiring them to be politically impartial and could lead to discrimination against white people.