

LIBERAL DEMOCRATS
AND
THE ADOPTED DEFINITION OF TRANSPHOBIA

ADVICE

Introduction and Summary

1. I am asked to advise Lord Strasbuger on the following:
 - a. Whether or not the Liberal Democrats' (Lib Dems) Definition of Transphobia ("DoT") is compliant with equalities legislation following the *Forstater* judgment;
 - b. If the DoT is not compliant, how must it be altered to become so?
 - c. Does the fact that the Liberal Democrat Party is a membership organisation affect how equalities law applies to the Party and the DoT?
 - d. Are there any other matters about the DoT on which Counsel could make observations?

2. In summary I advise that:
 - a. There is no definition of "transphobia" in law. It will have its ordinary dictionary definition; that is, extreme or irrational fear, or dislike of trans people.
 - b. The Lib Dems are an "association" within the meaning of the Equality Act 2010 (EqA). This means that they (as an association) must not discriminate against or harass its members for reasons connected to protected beliefs or gender reassignment.
 - c. The EqA will be read and applied in way which is consistent with Articles 9 and 10 of the European Convention on Human Rights ("ECHR").

- d. Gender critical beliefs (that sex is immutable, biological, different from gender, and related beliefs) are protected beliefs under the EqA and under Articles 9 and 10 of the ECHR.
- e. The Lib Dems are legally entitled to adopt a policy on transphobia according to their own definition.
- f. However, treating a member less favourably because they hold protected beliefs that are not consistent with that policy (for example, gender critical beliefs) will be direct discrimination and unlawful.
- g. Further, a policy that subjects members to disciplinary action, or a threat of disciplinary action, for expressing beliefs that are contrary to that policy, or requiring members to express support for it, will impact most adversely on members with gender critical beliefs. As such it will be unlawful unless it is justified. In deciding whether any such policy is justified, a person's right to hold protected beliefs and freedom of expression will be given great weight.
- h. A policy prohibiting the mere expression of gender critical beliefs, or compelling a member to express support for the Lib Dems policy on transphobia contrary to their beliefs, is unlikely to be justified.
- i. An association that engages in conduct that has the purpose or effect of violating a member's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them for reasons relating to their protected beliefs or because of gender reassignment will in so doing subject that member to harassment under the EqA. In assessing whether the conduct should be treated as having the prescribed effect (violating dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment), the perception of the member will be relevant, as will the general circumstances and whether it is reasonable for the conduct to have that effect. The mere expression of gender critical beliefs, including, for example, views on changes to the Gender Recognition Act, access to single - sex spaces, trans people and sport etc is very unlikely to constitute harassment connected to gender reassignment under the EqA.

- j. The expression of hostility or hate towards a member because they hold gender critical beliefs or because they are trans is likely to amount to harassment under the EqA.
- k. “Deadnaming” a trans member and/or refusing to use their chosen pronouns may amount to harassment connected to gender reassignment under the EqA depending on the circumstances.
- l. The Lib Dems’ policy on transphobia should be modified, or qualified by a further document, indicating that the holding of gender critical views, their expression, and contribution to debates on related issues, do not breach the policy and are permissible.

The DoT

3. The Lib Dems’ Federal Board have recently unanimously adopted a definition of “Transphobia”. Under the Lib Dems’ constitution, the Federal Board is responsible for directing, co-ordinating and overseeing the implementation of the Party’s strategy and the work of the Federal Party (Art 9.1), comprising the Scottish Liberal Democrats, the Welsh Liberal Democrats and the Liberal Democrats in England.
4. The DoT is contained in Schedule 1 to my instructions. Material parts include the following:

“‘Transphobia’ is the fear or dislike of someone based on the fact they are trans. Transphobia, whether through words or action, may be targeted at people who are, or who are perceived to be, trans or trans allies.

‘Trans’ is an umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may describe themselves using one or more of a variety of terms. Trans people are not required to have undergone any medical or social transition to be considered trans. Other examples are set out in the [Stonewall Glossary](#).

Transphobic behaviour may include (i) attempting directly or through advocacy to remove trans people's rights, (ii) misrepresenting trans people, (iii) abuse of trans people, and (iv) systematically excluding trans people from discussions about issues that directly affect them."

Genuine errors or misunderstandings about a trans person's gender identity, or about the nature or effect of a policy or practice, do happen, and genuine errors or misunderstandings should not be considered intentionally transphobic. Some people may have had little or no experience or engagement with issues affecting trans people. Genuine errors and misunderstandings can still have potentially harmful effects, but the action taken to address them should take into account the lack of intention. Where accidental offence or harm has been caused the most appropriate course of action will generally be an apology, retraction or similar.

However, where an individual repeatedly does things which might be viewed as transphobic, it is unlikely this is in genuine error. This is especially true if they have been challenged by others, and they have been pointed to resources to help them learn about trans rights and transphobia. Indeed, disingenuous feigned ignorance of trans issues is a common tactic of committed opponents of trans rights. A history of transphobic actions or behaviours should be taken into account when considering whether someone is being intentionally transphobic.

Appendix of Examples

To help members understand how transphobia manifests, here

are a few common examples of transphobic actions which you may come across both inside and outside the Party. This list is not exhaustive and behaviours which constitute transphobia may change over time. Members may seek further guidance on patterns of transphobic behaviour from [LGBT+ Liberal Democrats](#).

Denying trans people's gender identity or refusing to accept it

For example:

“deadnaming” ...

“misgendering” ...

Mockery or dismissal of new names and pronouns and the identity they reflect....

Using phrases or language to describe trans people which are designed to suggest that trans people are a separate category of person from the gender they identify as or that their gender identity is not valid. Current examples include referring to a trans woman or non-binary person as a “biological man” or a trans man or non-binary person as a “biological woman”, which eradicates the trans person's gender identity in favour of their biology at birth.

Misrepresenting and excluding trans people

For example:

- Accusing trans people, as a group, of being responsible for real or imagined wrongdoing committed by a single trans person or even non-trans people.
- Positioning trans people as a threat to individual rights or safety or as a threat to society as a whole, for example by equating trans people with paedophiles, rapists, sex offenders or grooming gangs.
- Making mendacious, dehumanising, demonising, or stereotypical allegations about trans people or their cisgender allies. This includes spreading the idea of a “trans conspiracy”

which asserts undue influence over media or government or claiming that cisgender allies support trans rights initiatives out of fear or bribery rather than a genuine belief that trans rights are human rights.

- Applying double standards by requiring of trans people behaviours that are not expected or demanded of any other groups in society - for example criticising both trans women who do not conform to female stereotypes for not being feminine enough and trans women who do conform for perpetuating sexism.

Knowingly promoting policies and practices that actively discriminate against trans people

For example:

- Requiring trans people to be separate from society, using segregated facilities, or denying them access to facilities which would be required in order for them to fully participate in public life.
- Calling for, aiding, or justifying the killing or physical or mental harming of trans people because of their gender identity.
- Knowingly promoting the idea that gender dysphoria is a form of, or is caused by, mental illness, which directly contradicts NHS guidance (available [here/](#)).
- Advocating the withdrawal or defunding of access to transition-related medical treatment for trans people or advocating or facilitating any kind of therapy that tries to change a person's gender identity.

We encourage members who are interested in learning more to engage with LGBT+ Liberal Democrats and specialist organisations such as Stonewall.

5. Stonewall, to which the DoT refers, defines transphobia as:

The fear or dislike of someone based on the fact they are trans, including denying their gender identity or refusing to accept it. Transphobia may be targeted at people who are, or who are perceived to be, trans.

6. The purpose of the DoT is to “help guide members who want to support the trans community and call out transphobic behaviour. It will also be key to supporting the Party’s disciplinary processes.”
7. I cannot see the disciplinary procedure (as opposed to the complaints procedure) in the Lib Dems’ constitution but no doubt there will be one, and no doubt disciplinary action might result in serious sanction (presumably including expulsion). Further, the Constitution provides that membership may be revoked where there is “material disagreement”, evidenced by conduct, with the fundamental values and objectives of the Party; conduct which has brought, or is likely to bring, the Party into disrepute; a breach of the standards set out in Article 3.1(b) (must treat others with respect and must not bully, harass, or intimidate any Party member); or discrimination against another person on the basis of a protected characteristic as defined in the Equality Act 2010” (See, Lib Dem constitution Art 3).

Trans/transphobia: definitions

8. There is no definition of trans or transphobia in the law. Its ordinary, dictionary, definition will be an extreme or irrational fear, or dislike of trans people (Concise Oxford English Dictionary).
9. As to the definition of “trans” (the description the DoT adopts), there are a number sources that shed some light on its meaning.
10. The Equality Act 2010 contains limited provision in relation to “transsexual” people (s. 7(2)). A “transsexual” is a 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" (s.7(1)). It does not extend any further; that is, to gender identity more broadly.

11. The Crown Prosecution Service defines trans and transphobia for the purposes of s.66, Sentencing Act 2020 which treats hostility related to transgender identity as an aggravating factor for sentencing purposes. It defines "trans" or "transgender" as "terms for people whose gender identity does not correspond with their birth gender. The terms 'transgender' is used in, and the concept of 'transgender identity' recognised by the hate crime legislation and include references to being transsexual, or undergoing, proposing to undergo, or having undergone a process or part of a process of gender reassignment." Thus, it covers those identified as "transsexual" (generally the term transgender is now used) as well as a wider group being those whose "gender identity does not correspond with their birth gender".

12. The Lib Dems' definition of trans goes further still, as can be seen above. It is of note that it refers to Stonewall's Glossary. That Glossary states the following:

[Trans is] An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth.

Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois

13. This gives a very wide meaning to "trans".

14. As to "transphobia", this is not defined in law. The Crown Prosecution Service defines transphobia for the purposes of s.66, Sentencing Act 2020 as:

“Any incident/crime which is perceived by the victim or any other person, to be motivated by hostility or prejudice towards a person because of their sexual orientation or transgender identity or perceived sexual orientation or transgender identity by the victim or any other person.” (Public Statement 3 March 2022)

And

"Any incident/criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender".

...

S.66 SA 2020 is also relevant to cases where the offender has made assumptions about a person's presumed sexual orientation or being transgender, whether or not that assumption is correct.

Hostility is not defined in the Act. Consideration should be given to ordinary dictionary definitions, which include ill-will, ill-feeling, spite, prejudice, unfriendliness, antagonism, resentment, and dislike.

In all dealings with cases involving a homophobic, biphobic or transphobic element whether in writing, in verbal communication or at court, it is essential that prosecutors adopt a style of address or reference that demonstrates respect for the sexual orientation, gender identity and lifestyle of the individuals concerned. When dealing with members of the LGBT communities, prosecutors should avoid making

stereotypical assumptions, either about the way in which they lead their lives or about how they wish to be addressed.

If there is in any doubt about how to refer to the sexual orientation or gender of the victim or witness, the person concerned should be asked how they wish to be addressed.

In cases involving transgender victims or witnesses, prosecutors should be sensitive to the risk of inadvertent disclosure of previous gender identity. Whilst court procedures are protected under the Gender Recognition Act 2004, it is good practice to ensure that when attending court the witness is treated according to their affirmed gender role e.g. in terms of address, access to appropriate toilet facilities, personal searches by officers of the same gender. (Homophobic, Biphobic and Transphobic Hate Crime - Prosecution Guidance)

15. Stonewall defines transphobia:

“The fear or dislike of someone based on the fact they are trans, including denying their gender identity or refusing to accept it. Transphobia may be targeted at people who are, or who are perceived to be, trans.”

16. To be clear, these definitions are not set down in law (as opposed to Guidance) and while they are principally based on a subjective assessment (the “perception” of the victim), a court will impose an objective threshold in determining whether any act or speech violates Articles 9 and 10, ECHR and the EqA (see below).

17. The Lib Dems own definition has a very wide reach.

Protected Beliefs and Freedom of Expression

18. The EqA protects against discrimination connected to a “philosophical belief” (s.10, EqA) (a “protected characteristic”). As the Employment Appeal Tribunal (“EAT”) concluded in *Forstater v CGD Europe* [2022] ICR 1, protected beliefs include those that are generally described as “gender critical” beliefs. These embrace the core belief that “that biological sex is real, important, immutable and not to be conflated with gender identity [and that] ...statements such as “woman means adult human female” or “trans women are male” are statements of neutral fact and are not expressions of antipathy towards trans people or “transphobic”” (*Forstater*, §1). Those beliefs might be expressed by some who hold them through refusing to use preferred pronouns on occasions if considered relevant to do so, eg in a discussion about a trans woman being in a women-only space (*Forstater*, §49).

19. The EAT’s judgment in *Forstater* was informed by the fact that s.10 , EqA had to be read conformably with Articles 9 and 10, ECHR. Article 9 provides that:

Freedom of thought, conscience and religion

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

“2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

20. Article 10 provides that:

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart

information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

21. These rights are closely linked. In this regard, it is important to note that the European Court of Human Rights (ECtHR) has attached high importance to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy (see reference to the same in *Forstater*, §55). Freedom of expression is one of the “essential foundations of democratic society” (*ibid.*).
22. The right to freedom of expression under Article 10 includes the right *not to* manifest or express a belief that one does not hold (*Lee v Ashers Baking Co* and O’rs [2020] AC 413, §§50, 52, 55).
23. Since gender critical beliefs are protected beliefs under s.10, EqA and under Article 9, ECHR, the right to freedom to manifest and express those beliefs arises under Article 9 and Article 10. Whether or not an interference in the manifestation or expression of such a belief violates Articles 9 or 10 and / or the EqA will depend upon whether any interference is justified under Article 9(2) or 10(2) and whether, therefore, it amounts to discrimination or harassment under the EqA.
24. A claim under Articles 9 and/10 against the Lib Dems will not directly arise under the Human Rights Act 1998 (“HRA”). This is because any claim for a breach of the

Convention rights under the HRA can only be brought against a public authority (s.6, HRA). However, by s.3, HRA, “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” This means that the EqA will be read conformably with Articles 9 and 10 so far as it is possible to do so (*Lee v Ashers*, §56).

Equality Act 2010: Discrimination and Harassment

(i) Associations and Discrimination

25. Part 7, EqA addresses “associations”. An association for this purpose is an association of persons (a) which has at least 25 members, and (b) admission to membership of which is regulated by the association's rules and involves a process of selection (s.107(2), EqA). The Liberal Democrats are, then, an association.

26. An association must not discriminate¹ against a member in the way it affords them access, or by not affording them access, to a benefit, facility or service; by depriving them of membership; by varying the terms of their membership; or by subjecting them to any other detriment. An association must not harass a member. (Similar provision is made in relation to applicants for membership and guests). These prohibitions apply to discrimination and harassment connected to protected beliefs and trans status. Protected beliefs are addressed above. “Trans” is defined very narrowly under the EqA and accordingly gender reassignment discrimination protects a limited group of people defining themselves by reference to gender identity (see above).

27. Relevant forms of discrimination for the purposes of this Advice are:

- a. Direct discrimination
- b. Indirect discrimination
- c. Harassment²

¹ Any claim against the association will be against its members (as it is an unincorporated association it appears). Usually, proceedings are brought against the association in the name of its Leader on behalf of all members except the claimant.

² Not technically described as a form of discrimination under the EqA but to the same effect.

(ii) Direct Discrimination

28. Direct discrimination occurs where an association treats a member less favourably because of a protected characteristic (s.13, EqA); here, belief and/or gender reassignment.
29. This means that treating a member less favourably because they *hold* gender critical beliefs will be unlawful direct discrimination. This does not necessarily mean that less favourable treatment of a member because they have manifested/expressed a particular belief (eg verbalising or writing about the belief in some way) will be direct discrimination. Depending on the circumstances, an association may establish that they would have treated a person whatever their belief in the same way, and it was not the belief but the way in which it was expressed that led to the less favourable treatment. An association might, for example, discipline a person for expressing a belief in a gratuitously offensive or bullying way and, so long as they would treat a person expressing any other belief in the same way, this will not be direct discrimination.

(iii) Indirect Discrimination

30. Even where an association does not treat a member less favourably because they hold a protected belief, it may nevertheless act unlawfully if it penalises the manifestation/expression of those beliefs. This is because this may amount to indirect discrimination.
31. Indirect discrimination occurs where an association applies, or would apply, a provision, criterion or practice (including a policy) to all members (or members of a particular class) whatever their beliefs, but it puts, or would put, persons with particular beliefs at a particular disadvantage when compared with other people, and that provision, criterion or practice is not justified.
32. For example, a policy that prohibited members from expressing the view that sex is immutable would put members with gender critical views at a particular

disadvantage. If not justified, the application of that policy to a member with gender critical views would be unlawful indirect discrimination.

33. Justification requires that it be established that the policy is a proportionate means of achieving a legitimate aim. Given the effect of Article 9(2) and 10(2), the application of any such policy will only be justified if:

- d. The application of the policy is prescribed by the Lib Dems constitution/disciplinary procedure (the “law” for these purposes).
- e. The application of the policy is necessary in a democratic society for the protection of the rights and freedoms of others.
- f. The application of the policy is proportionate; that is, it has regard to the need for a fair balance between the rights of all groups/members affected (*Miller v The College of Policing* [2021] EWCA Civ 1926, §107). These other rights will include the rights enjoyed by trans people for respect for their private lives; that includes respecting them as trans people in the way they choose to live.

34. Case law makes clear that there is “little scope” (*Miller*, §73) for justifying interferences in the expression of beliefs in the context of political speech and debates on questions of public interest (*Miller*, §73): “Such are the demands of ...pluralism, tolerance and broadmindedness without which there is no ‘democratic society’” (*Handyside v UK* (App. no. 5493/72) [1976] ECHR 5493/72; *Miller v The College of Policing* [2021] EWCA Civ 1926, §68).

35. As such the application of a policy, including by way of disciplinary action,³ or even the threat of such action (given its “chilling effect”; *Miller*, §68), by the Lib Dems for the mere expression of gender critical views and for engaging in discussions, even robust discussions, around these matters, is unlikely to be justified. Accordingly, such a policy when applied to a particular member with gender critical beliefs is very likely to amount to unlawful indirect discrimination

³ Including the revoking of membership.

(if it is not direct discrimination). The same will be true in the case of criticising the Lib Dems' policy on transphobia and, for example, on changes to the Gender Recognition Act, access to single – sex spaces, sport etc and the expression of concern as to their impact on females, all apparently falling within the scope of the Lib Dems' policy on transphobia.

36. A need to protect the interests of trans people and to put their rights into the balance can be achieved by ensuring that any expression of views, even if robust, is respectful and does not demonstrate hate or hostility towards trans people.
37. For completeness, not all interferences in the right to hold and express beliefs, even in a political party, will violate Articles 9, 10 or the EqA. Expulsion from the Lib Dems for membership of or support for another political party in Great Britain, is likely to be justified for obvious reasons; it is centrally in contradiction to Lib Dems political objectives and aspirations for election to Government. But the subject of this Advice is not of the same sort.

(iv) Harassment

38. Harassment under the EqA occurs where an association (a) engages in unwanted conduct related to a relevant protected characteristic (including belief and gender reassignment), and (b) the conduct has the purpose or effect of – (i) violating the member's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for a member. In assessing whether any conduct should be treated as having the prescribed effect (violating dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment), the perception of the member will be relevant, as will the general circumstances and whether it is reasonable for the conduct to have that effect. There is, then, an objective element (reasonableness); the perception of the member will be important, but it is not conclusive.
39. Given the importance that the law gives to the protection of beliefs and freedom of expression, it is very unlikely that a court would find that the mere expression of gender critical beliefs would amount to harassment of a trans person, even if a

trans person perceived that as violating their dignity or creating an intimidating etc environment for them. Any such perception is likely to be outweighed by the right of a member to exercise their highly protected right to manifest their belief and exercise their right to freedom of speech.

40. However, this does not mean “that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person” (*Forstater*). Gratuitous and deliberately demeaning deadnaming is likely to amount to harassment in law and, in some circumstances, the same may be true of refusing to use the chosen pronoun of a trans member. The latter will depend on the circumstances – it does not follow that it will always be so. Further, as referred to above, expressing views on, for example, changes to the Gender Recognition Act, access to single – sex spaces, trans people and sport etc are very unlikely to constitute harassment.
41. The expression of hostility or hate towards a member because they hold gender critical beliefs or because they are trans is likely to amount to harassment under the EqA.

Conclusion

42. The Lib Dems are entitled to define trans and transphobia in the way they decide. However, they must accommodate the beliefs and the manifestation of beliefs that are contrary to those contained in the DoT, specifically gender critical beliefs. The same will apply where any criticism of the DoT does not rise from gender critical beliefs but instead beliefs that the policy should go further in promoting the rights of trans people.
43. The Lib Dems’ policy on transphobia should be modified, or qualified by a further document, indicating that the holding of gender critical views, their expression, and contribution to debates on related issues, do not breach the policy and are permissible.

44. I hope this Advice is of assistance to those instructing me and if I can of any further assistance, I hope they will not hesitate in contacting me.

KARON MONAGHAN QC

1 September 2022