

# IN THE MATTER OF THE LIBERAL DEMOCRATS AND IN THE MATTER OF THE EQUALITY ACT 2010

## SUPPLEMENTARY ADVICE

### Background

1. In the Spring I was asked to advise the Liberal Democrats about a number of inter-related matters concerning transgender rights and the Party's ability to take disciplinary action against persons who engaged in "transphobia" according to the definition adopted by the Party's Federal Board. I produced a lengthy written Advice dated 27th May 2022 which considered the implications of the EAT's judgment in *Forstater v GD Europe* [2022] ICR 1 ("Forstater") and the Court of Appeals judgment in *R(Miller) v College of Policing* [2021] EWCA Civ 1926 (Miller").
2. Following that advice, I was subsequently involved in a Teams Meeting in July to follow up on these issues and a further Teams Meeting in mid-September, at which point I learnt that a Party member had commissioned another legal advice from Karon Monaghan KC on the same issues. On 21st September, I was sent the questions I have been asked to address in this advice and on 23rd September I was sent some statistics relating to disciplinary processes. On 3rd October I was sent Ms Monaghan's advice. I understand that the Party is keen to receive my further advice as soon as possible so I have made it my top priority.
3. By way of background, my previous advice was that the central finding of the *Forstater* and *Miller* judgments was that "gender-critical views" (views expressing the view that sex is biological and immutable) are a philosophical belief protected under s.10 of the Equality Act 2010 and the Human Rights Act 1998, engaging both Article 9 ECHR (the right to freedom of thought, conscience and religion) and Article 10 ECHR (the right to freedom of expression). The Party's definition of transphobia, however, does not recognize these rights and indeed a number of the examples given in the policy expressly prohibit the expression of gender-critical views. For this reason, I advised that

(while the Party is free to adopt any definition of transphobia that it likes) if the Party wishes to enforce that policy through disciplinary action that is likely to result in decisions that would amount to unlawful discrimination against persons with gender-critical views.

4. Referring to the Forstater judgment, I stated at [39] that: "The message of the EAT therefore is that both trans persons and persons with gender critical views are protected under the EqA. Persons with gender-critical views have a right to express them, even if doing so causes offence to trans people. However if the expression of those views turns into discrimination or harassment, that is another matter and in those circumstances action can be taken against the maker of those statements. It should be borne in mind that under the law of harassment the behaviour said to amount to harassment must reach a level of seriousness that takes it beyond the irritations, annoyances and even upset that arise occasionally in everyone's life.
5. Referring to the judgment in Miller, I stated at [33] that: "Of course, the Court of Appeal was not required to opine on what the definition of transphobia should be and it did not do so. But the effect of its judgment is that persons expressing gender-critical views are entitled to the protection of Article 10 even if their views are unwelcome to, or perceived as hostile by, the trans community. The Court's message is that in a democratic society everyone has to be prepared to tolerate hearing views that they don't like, which is part and parcel of living in a free and pluralistic society."
6. On this basis, I recommended inter alia that "The Complaints Panels need guidance on how to deal with postings on social media that engage the right to freedom of expression. In relation to the expression of views alleged to be transphobic, they need to know that gender-critical views are protected under EqA s.10(2) and Articles 9 and 10 ECHR. Postings expressing such views should not be the subject of disciplinary action unless they amount to discrimination or harassment."

#### **Karon Monaghan KC's advice**

7. Given that Ms Monaghan's advice traverses the same ground as my earlier advice, I have been asked to review her advice and identify any point of disagreement or significant differences that may be relevant to the Party's decisions on these issues.

For the avoidance of doubt, I agree with Ms Monaghan's analysis and I cannot discern any significant difference between her advice and my own.

8. Ms Monaghan's main recommendation is that the Party's policy "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." I agree with that recommendation and indeed it is consistent with my own recommendation set out at paragraph 6 above, which is another way of achieving the same objective.

### **The Questions posed**

- **Clear transphobia definition - is dropping the examples enough?**
  - **Is the definition OK to be used by the Complaints Process as guidance?**
9. My answer to both of these questions is no. I don't believe that simply dropping the examples is enough to make the Party's policy on transphobia legally defensible. It is true that the examples given under the definition of transphobia are particularly problematic, for the reasons I set out in my earlier advice. But even if you drop the examples, the fundamental difficulty is that the definition makes no reference to the rights of persons to express gender-critical views. Under the policy as it stands, those views, which are protected as a matter of law by the Equality Act, Articles 9 ECHR and Article 10, are totally ignored. That position is legally unsustainable in the light of the *Forstater* and *Miller* judgments. It is also in my view inconsistent with the Party's values, as the Preamble to the Federal Constitution asserts that "We will at all times defend the right to speak, write, worship, associate and vote freely"
  10. Under the existing policy, anyone expressing a view which might be considered to show fear or dislike towards trans persons is labelled transphobic and the policy states without qualification that "Disciplinary action is taken against members who exhibit transphobic behaviour". The implication is that any instance of transphobic behaviour will automatically lead to disciplinary action. But as the case law demonstrates, it is a feature of this debate that trans rights proponents will readily label as transphobic any speech which causes them offence. Gender critical views such as that "trans women aren't women" are offensive to trans people, but freedom of expression includes the

right to express views that other people find offensive. As the European Court of Human Rights stated in *Handyside v United Kingdom* [1979-80] 1 EHRR 737:

*"Freedom of expression constitutes one of the essential foundations of a ["democratic society"], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10. it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."*

11. Obviously there are limits to legitimate free speech. People cannot engage in unlawful conduct such as harassment or discrimination. Nor is it acceptable for people to express their views in ways that vilify or express hatred towards any minority group. Nor is it acceptable for someone to single out individuals for intimidation or insults. However, the expression of gender critical views is an exercise of freedom of expression that is protected by law and the policy must make it clear that members will not be penalized simply for expressing gender critical views.
12. In such cases where the Party does decide to take action it should be doing so not on the basis that the speaker holds or expresses gender critical views, but only where the way they have chosen to express those views involves conduct that would be unacceptable for a Lib Dem member or a Lib Dem representative whatever issue they were debating. Harassment, hate speech and vilification form no part of proper political debate and can be acted on whatever the context in which they occur.
13. As to making the policy more legally defensible, in my view the policy needs to be rewritten to (1) remove the examples and (2) qualify the definition with wording that makes it clear that holding and expressing gender critical views, whether in internal debates or publicly, is not a breach of the policy and is permitted.
14. In addition, there should be internal guidance to Complaints Panels that explains clearly that: (1) The expression of gender critical views is protected by law under the Equality Act, Article 9 ECHR and Article 10 ECHR; (2) Disciplinary action should only be taken for conduct that involves discrimination or harassment, hate speech or vilification or other serious abuses of the right to freedom of expression; (3) When disciplinary action is taken, the focus should be on the misconduct itself i.e. the way someone has acted or expressed themselves, not the underlying views of the speaker.

### **Clearer definition of bringing the party into disrepute?**

15. I think it is probably helpful to the Party in practice to have some broad definition of misconduct, as the range of situations to which the definition must apply is very wide and a degree of flexibility is desirable. However, the phrase "bringing the party into disrepute" is in my view old-fashioned and out-of-date and I think it would be preferable to have more modern wording that captures the same idea, such as "engaging in conduct which is likely to harm the Party's reputation". If that definition was felt to be too narrow it could be widened slightly to include "engaging in conduct which is likely to harm the Party's reputation or cause significant prejudice to the Party's interests"

- **How do we define fundamental values and objectives for the process?**
- **What can we do if there is a disagreement with values and objectives?**
- **Do we create a separate candidates code of conduct which is more stringent to enforce policy decisions?**

16. I think the starting point here is to recognize that the Party has a choice about how much latitude it wishes to allow its elected representatives and candidates to depart from official party policy when their personal views conflict with that of the Party. This is a policy decision for the Party. I would note however that outside collective Cabinet responsibility it is routine for MPs to express different positions from the official policy of their party, particularly where the Party's policy would be highly unpopular in their constituency. In addition, parties have long recognized that some social issues are highly contentious and reasonable people can have different views on them e.g. abortion and euthanasia. Generally, MPs are given a free vote when these issues are debated. It would be surprising therefore if a Party committed to liberal values and freedom of expression wanted to adopt anything other than a liberal approach to this issue.

17. The phrase "fundamental values and objectives" is however very vague and the preamble to the Constitution gives only the most general guidance as to what those

values and objectives are. The Conservative Party Code of Conduct describes the Party's objects and values in this way:

*"These are set out in the Party Constitution. The test we use to identify an object and value is objective based on relevant evidence. That evidence may be common or historical knowledge, or common sense, Conservative Party manifestos past and present, guidance notes from the Party Board, Government policy and speeches from senior Party spokesmen including the Party leader, and so on."*

18. This is still pretty vague, but is better than simply referring to the preamble of a Constitution. Alternatively, the Party could draw up a list of key principles and key Party policies that all its candidates and elected representatives must agree to champion.
19. I can readily see the logic of creating a separate Code of Conduct that sets out more detailed standards for political representatives and candidates than those that apply for Party members. After all, representatives and candidates are the public face of a Party in a way in which members are generally not. The Conservative Party Code of Conduct does this by making the Nolan Principles (which includes such principles as Honesty and Integrity) a code which all Conservative representatives are expected to follow (one can debate how strictly this code has been enforced!) Which standards should apply to Liberal MP is a matter for Party policy, not legal advice.
20. One area that has not yet been tested so far as I am aware is how the Courts would approach questions of a political party taking disciplinary action against its representatives or candidates over policy differences. I think the starting point would be that (subject to the general law) a political party, which is a member's association, is entitled to insist that its candidates must support the Party's main policies. For example, it must be right that in 2016 Party could have deselected a candidate who turned out to be pro-Brexit. The Party's position would be - you have every right to freely express your views on Brexit, but not as a Lib Dem candidate, as this Party is for people who oppose Brexit.
21. What is trickier is how the balance would be struck on an issue which is a religious or philosophical belief of the person concerned and hence protected as a matter of law under the Equality Act and the Human Rights Act (Article 9 (freedom of thought)

and Article 10 (freedom of expression)). In those cases, the general law is engaged and the starting point is that of the human rights of the person concerned, which can only be restricted in so far as that (a) serves a legitimate aim (b) is necessary in a democratic society and (c) is proportionate.

22. Given that the European Convention on Human Rights regards freedom of conscience and freedom of expression as the "foundations of a democratic society" and has repeatedly emphasized the need for "tolerance and broadmindedness" when it comes to contested social issues, I think that a Court would need a great deal of persuading that it was legitimate for a Party to restrict the expression of personal views on issues such as trans rights, even if they are contrary to the official party position. The same applies to the alternative scenario of requiring candidates to adopt a view with which they did not agree. I must emphasise however that we are in uncharted legal waters and of course it would all depend on the facts.
23. As I said earlier, I think when it comes to these issues of conscience it is helpful to distinguish between holding a belief, expressing it and the manner of expressing it. Article 9 as it relates to the holding of such views is unqualified, which means that there is no lawful justification for restricting this right. The expression of such beliefs is however qualified, subject to tests of necessity and proportionality, including by reference to the rights and freedoms of others. So once again the focus should be on the way in which such views have been expressed. The expression of gender critical views is protected, but serious abuses of free expression may well justify disciplinary action.
24. Likewise, if the misconduct of the representative is such that it was unacceptable regardless of the underlying belief, for example if representative was repeatedly rude and demeaning and insulting towards e.g. trans people, that misconduct would warrant disciplinary action, although the cause of that disciplinary action would not be the underlying beliefs of the person concerned, but their conduct. Such distinctions may seem like fine ones in this context, but they can be important when it comes to successfully defending an Equality Act claim.
25. Please don't hesitate to contact me if there are any further questions arising from this advice.

GUY VASSALL-ADAMS KC

MATRIX

5th October 2022