

## Philosophical beliefs protected under the Equality Act: 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**.<sup>1</sup> “*Religion or belief*” is one such characteristic and is defined in **Section 10**.<sup>2</sup>
2. Contexts in which people’s religious or philosophical beliefs (or lack of such beliefs) must be protected and which are relevant to Higher Education Providers (“**HEPs**”), include: the provision of services and exercise of public functions<sup>3</sup>, employment<sup>4</sup>, further and higher education<sup>5</sup> and membership associations<sup>6</sup>. In such contexts, discrimination

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<sup>1</sup> **Section 4** identifies the full list of “*protected characteristics*” as: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, **religion or belief**, sex and sexual orientation (emphasis added).

<sup>2</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.
- (3) In relation to the protected characteristic of religion or belief—
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
  - (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”

<sup>3</sup> **Sections 28** and **29**.

<sup>4</sup> **Sections 39** to **41**.

<sup>5</sup> **Sections 90** to **94**.

<sup>6</sup> **Sections 101** and **102**.

or harassment based on such beliefs (or lack of them) is unlawful under the Equality Act. The Equality Act applies to both direct<sup>7</sup> and indirect<sup>8</sup> discrimination. Harassment of people because of their “*protected characteristics*” is defined in **Section 26** of the Equality Act.<sup>9</sup> Victimisation of people which “*protected characteristics*” (e.g. by subjecting

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<sup>7</sup> **Section 13** relevantly provides:

**“13 Direct discrimination**

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

<sup>8</sup> **Section 19** relevantly provides:

**19 Indirect discrimination**

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are —
- [...] religion or belief;”

<sup>9</sup> **Section 26** relevantly provides:

**“26 Harassment**

- (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—

them to detriment because they bring proceedings or give evidence in proceedings brought under the Act) is also prohibited.<sup>10</sup>

3. In summary, therefore, the Equality Act imposes effective freedom of speech protection obligations on HEPs to the extent that expressing or holding (or not holding) certain religious or philosophical beliefs is a “*protected characteristic*” under Section 10. In such cases, 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 and promotions and disciplinary procedures).
4. In the *Forstater* case in 2021<sup>11</sup>, the Employment Appeal Tribunal decided that holding gender-critical views is a “*philosophical belief*” and, therefore, within the protected characteristic of “*Religion or belief*”. Although the law in this area is still evolving, in order to avoid finding themselves in breach of the law, HEPs should work on the basis that advocacy for free speech, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including, for example, in relation to aspects of Critical Race Theory or in respect of the existence or otherwise of so-called White Privilege or Unconscious Bias), must logically also be treated as protected beliefs and will, in time, be confirmed as such. HEPs should therefore act on the basis that they have duties to work to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them.
5. In addition to the obligations imposed on HEPs in relation to Section 10, the Public Sector Equality Duty (“**PSED**”) imposed under **Section 149** of the Equality Act requires public authorities, in the exercise of their functions having due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express those beliefs, and advance equality of opportunity for those people and foster good relations between people who have a protected characteristic (ie these views) and those who do not. HEPs and in most cases their colleges and other constituent institutions, are public authorities for this purpose.

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- (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>10</sup> **Section 27.**

<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)

6. People whose rights under the Equality Act are infringed may bring proceedings against HEPs (including for damages for unfair dismissal). HEPs will be vicariously liable under the Equality Act for the acts or omissions of their employees and agents where acting within the scope of their employment or authority respectively. Universities are not responsible for the conduct of their students (unless they are acting as representatives of the university or in some other capacity which gives rise to responsibilities on the universities part). The extent to which universities are responsible for the actions of their academics and other staff acting in their personal rather than official capacities is somewhat unclear. Employees and agents of HEPs may also be personally liable for acts or omissions prohibited under the Equality Act.<sup>12</sup>
  
7. 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.

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<sup>12</sup> Section 110.