

Transgender inclusion and beliefs

Some employees, volunteers and beneficiaries who object to a charity's transgender inclusion policies say that their objections are based on their 'gender critical beliefs'.

In the second of our series of articles on transgender inclusion and the law, **Mindy Jhittay** explores the relationship between transgender inclusion and beliefs.



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I am a dispute resolution lawyer advising charities on contentious matters relating to their transgender inclusion policies.

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What are 'gender critical beliefs'?

A belief that 'transwomen are not women' or that 'there is no such thing as gender identity' is a gender critical belief. If a charity seeks to investigate or sanction someone for acting on such a belief, they may claim discrimination on the grounds of their belief.

Are gender critical beliefs protected by law?

Section 10 of the Equality Act 2010 protects people who belong to a religion or hold a religious or philosophical belief, as well as those who don't. Gender critical beliefs are not a religious belief, and in order to qualify for protection as a philosophical belief, the belief must (among other things) not be incompatible with human dignity and not conflict with the fundamental rights of others (*Nicholson v Grainger plc* [2010] IRLR 4).

At the time of writing, there have been two reported cases on gender critical beliefs and in each case the court held that these tests were not met because the belief conflicted with the human dignity and fundamental rights of transgender people. This meant that neither claimant could rely on their 'gender critical beliefs' to bring a claim for discrimination. One of the claimants has sought permission to appeal and, if she wins, the law in this area could change.

What happens when belief and policy collide?

The law draws a distinction between a belief, which is protected, and the manifestation of the belief, which is not.

The leading case concerns a registrar who refused to conduct same-sex civil partnership registrations (the case predates same-sex marriage) because she said this was incompatible with her religious beliefs. She was dismissed by her employer and at first the court found that this amounted to direct discrimination. However, on appeal this

finding was overturned because the reason for dismissal was not the fact that she held the belief as such, but rather the consequences of the belief – that is, the fact that she refused to do part of her job (*Ladele v London Borough of Islington* [2009] EWCA Civ 1357).

If the law changes and gender critical beliefs do become protected under the law, then a claimant would also need to show that any unfavourable treatment they have suffered (for example, being investigated or dismissed) was due to their belief, and not the way they had chosen to manifest those beliefs.

FIND OUT MORE

The first article in this series is at:
<https://bateswells.co.uk/2020/03/charity-social-enterprise-update-spring-2020/>

If you have any queries about transgender inclusion in your charity, whether legal or practical, please contact Mindy Jhittay on m.jhittay@bateswells.co.uk or 020 7551 7853.

