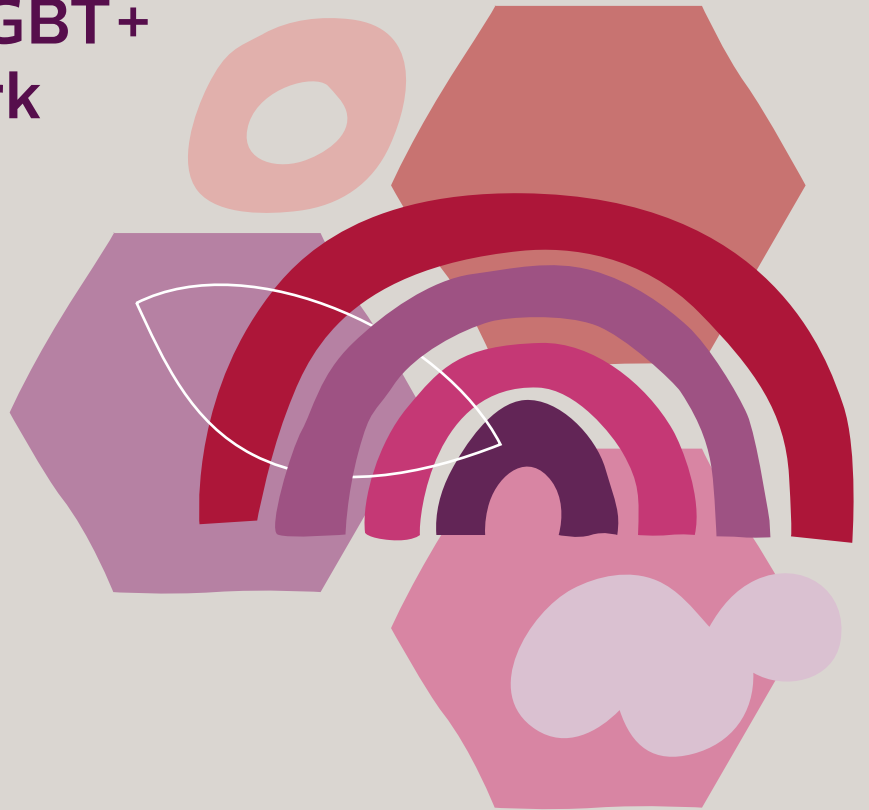


# Be a better business

Reviewing the current legal  
landscape on LGBT+  
inclusion at work



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# Reviewing the current legal landscape on LGBT+ inclusion at work



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At Bates Wells we see it as vital to act as an LGBT+ ally. We demonstrate this by providing full-service, compassionate advice to charities, businesses and individuals on LGBT+ issues, rights and inclusivity.

We know the issues around LGBT+ inclusion have become contentious and can be confusing so we've put together a list of recent Employment Tribunal cases in the UK to help explain the implications for LGBT+ inclusion at work.



# The Equality Act – who is protected?

The Equality Act 2010 provides protection from discrimination, harassment and victimisation based on certain protected characteristics.

These include sex, gender reassignment, philosophical beliefs and sexual orientation.

It is the interplay between these characteristics that has defined the legal developments – and the associated public debate – in recent times.

According to the World Economic Forum, dictionary.com searches for the word “woman” increased by 1,400% in 2022. Section 9(1) of the Gender Recognition Act 2004, states: “*where a full Gender Recognition Certificate (GRC) has been issued to a person that their acquired gender is female, the person’s sex is that of a woman...*” and it’s the same for men too. Proposals to relax the requirements for obtaining a GRC, sometimes referred to as “self-identification”, have proved controversial.

# Gender reassignment – who is protected?

The definition of gender reassignment at section 7 Equality Act 2010 is broad. It requires a process of transition from one sex to the other.

This can be purely social. It does not require a person to have a GRC or medical intervention.

## **Section 7, Equality Act 2010:**

*“A person has the protected characteristic of gender reassignment if the 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.”*

## Case Study

### **V v Sheffield (July 2022)**

The Claimant was a catering assistant at a hospital. She was in the process of transitioning and had agreed with her employer that she could use a cubicle in the women’s toilet. A concern was raised about her using the women’s changing room as there were reports that she had been seen naked from the waist down. During the investigation, her employer specifically asked about her wearing of underwear at work. The Employment Tribunal agreed with the Claimant that this was direct discrimination on the grounds of gender reassignment because it was unlikely that a concern about a cisgender women (a woman who was born female) would be raised in the same context. The decision has attracted some criticism that the correct comparator should be a cisgender man (a man who was born male), in which case it might have been decided differently.

### Case Study

#### Taylor v Jaguar Land Rover (2020)

The Claimant was an information engineer who informed her employer that she was transitioning and at that time regarded herself as gender fluid and non-binary. She was subject to sustained harassment about this and told her employer, without naming names. She was told to be less sensitive and those who had harassed her were not subject to disciplinary action. She brought successful claims for harassment, direct discrimination and victimisation related to her gender reassignment. This was the first case in which the court held that gender fluid and non-binary people were protected too.

### Case Study

#### Elan-Cane v Home Secretary (2020)

In this case, the claimant applied for a judicial review of HM Passport Office's (HMPO) decision requiring passport applicants to declare their gender as male or female. The claimant was assigned female at birth but adopted a "non-gendered" identity later in life. The High Court refused the application, holding that there is a balancing act between the interests of the individual and those of the community as a whole. While the claimant's non-gendered identity was important to them, the secretary of state was entitled to say that a change in HMPO's policy should not be considered in isolation but as part of a more fundamental policy review. The law could do more for non-binary people.

# Gender critical beliefs – who is protected?

The law protects those with religious and philosophical beliefs under section 10 Equality Act 2010. This includes gender critical beliefs.

## Case Study

### Forstater v CGD (June 2021)

Maya Forstater did consultancy work for CGD. She posted various tweets which reflected her belief that it is not possible to change whether you are male or female, and that biological sex is fundamentally important, rather than “gender” or “gender identity”. She does not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. Various colleagues complained that her tweets were transphobic and she was not offered further work by CGD.

Ms Forstater brought claims for direct discrimination and harassment on the basis of her gender critical beliefs. The Employment Tribunal did not agree that these beliefs were protected in law, but the Employment Appeal Tribunal did. This means that beliefs which are offensive, or even disturbing to others, can still be protected as long as they do not seek to destroy the rights of others. In practice, of course, it is a fine line and it is not always clear for employers where it should be drawn.



### Case Study

#### MacKereth v DWP (June 2022)

Dr MacKereth had applied to be a health and disabilities assessor for the Department for Work & Pensions (DWP). During his induction he noted that he would refuse to use a transgender person's preferred pronouns and names, as required by the DWP, on the basis of his Christian religious beliefs. Dr MacKereth did not succeed in his claims for direct discrimination, indirect discrimination and harassment, as the DWP had legitimate aims of ensuring that its service users were treated with respect and did not suffer discrimination when using its services.

### Case Study

#### Bailey v Garden Court Chambers (July 2022)

Allison Bailey, a barrister, sued her chambers for direct and indirect discrimination and victimisation. Complaints had been made about tweets she posted about her gender critical beliefs. Her chambers then issued a public statement noting that she was under investigation, which the tribunal agreed was direct discrimination, and her chambers upheld one of the complaints, which the tribunal agreed was victimisation.

Ms Bailey was awarded £22,000 plus interest for injury to feelings, a large award which took into account hostility and lack of support from members of chambers, who paid little heed to her reports of death threats and suggested that she had brought matters on herself.

# Are women's rights under attack?

One theme running through the cases mentioned in this overview is a concern that women's rights are under attack.

## Case Study

### Roe v Wade 1973 (June 2022)

In a completely different context, last summer the Supreme Court in the United States overturned the landmark 1973 ruling Roe v Wade which had legalised abortion across the country. This means that individual US states can now decide their own abortion laws. Some have already started restricting what had been, for nearly 50 years, a constitutional right for women.

## What does this mean for LGBT+ rights?

The Gay & Lesbian Alliance Against Defamation (GLAAD), a prominent LGBT+ advocacy organisation in the US, commented: "The anti-abortion playbook and the anti-LGBTQ playbook are one and the same. Both are about denying control over our bodies and making it more dangerous for us to live as we are."

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Returning to the UK, there are divisions within the LGBT+ movement too.

### **Equality Act 2010 definition of “woman” includes a woman with a Gender Recognition Certificate (December 2022)**

The highest court in Scotland ruled in December 2022 that transgender women who hold a GRC should be included in legislation aimed at improving gender balance on public boards. This has clarified the way that the Equality Act and the Gender Recognition Act work together – a transgender woman with a GRC is included in the definition of woman – but it is controversial if you hold gender critical beliefs.

### **LGB Alliance (est. November 2019)**

The LGB Alliance, formed in November 2019 and registered as a charity in 2021, is established to tackle discrimination against LGB people and to support them. But some people think it goes further than that. One of Allison Bailey’s controversial tweets was about the LGB Alliance. She said: “this is an historic moment for the lesbian, gay and bisexual movements. The LGB Alliance launched in London tonight, and we mean business. Spread the word, gender extremism is about to meet its match.”

In Ms Bailey’s court case, the tribunal held that her protected belief went beyond the belief that women are defined by biological sex rather than gender identity. The law also protects her belief that gender theory, as proselytised by Stonewall, is severely detrimental to women (in that it denies them female-only spaces) and to lesbians (in that it labels them as bigoted for being same-sex attracted, rather than same-gender attracted). The tribunal stressed that this was not to say that the Claimant was right about her beliefs, but that they were protected.



# Are trans rights under attack?

There are also concerns that trans rights are under attack.

In September 2022, Mermaids, a transgender youth support charity, challenged the Charity Commission's decision to register LGB Alliance as a charity. This is the first case where one charity has attempted to strip another of its charitable status. Mermaids argues that LGB Alliance is not simply advancing the rights of LGB people, as it professes to do, but instead has an 'anti-trans' focus. It says this is not a charitable purpose and does not serve the public interest. The tribunal decided that Mermaids did not fall within the category of people which are permitted to challenge a charity's registration in law, and so dismissed the case. Although as a result the tribunal did not have to make a decision as to whether LGB Alliance is a charity, the judges noted that they had been unable to reach agreement on this question.

As we saw in the Bailey case, as well as protecting LGB rights, another key issue for people with gender critical beliefs is protecting women's rights. In particular, access to female-only spaces, for example, in toilets, changing rooms, hospitals, refuges and prisons. In April 2022, the Equality and Human Rights Commission (EHRC) issued guidance to separate and single sex service

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providers to clarify when and how they could use exemptions in the Equality Act which would effectively exclude transgender people. The guidance gives useful, practical examples, though it has been criticised too for obvious reasons.

### Concerns about children

In December 2022, the Charity Commission reopened a regulatory compliance case into Mermaids, the transgender youth charity, in relation to alleged poor governance. The original case was triggered by an article in The Telegraph raising concerns about the charity being involved in the supply of chest binders to young people without their parents' consent.

Another area of controversy is the supply of puberty blockers. Keira Bell was a patient at the Tavistock's gender identity clinic as a teenager. She started with puberty blockers, progressed to cross-sex hormones and began surgical intervention as an adult to transition from female to male. Ms Bell later changed her mind and ended the treatment. She brought a challenge to the Tavistock's policy of treating patients aged 18 and under if it assessed them as having capacity to consent to puberty blockers. Ms Bell's

challenge failed because the court held that it was appropriate for doctors (not judges) to decide on the capacity of a young person, particularly where the facts were controversial and subject to change.

However, following an independent review into its services, the Tavistock will be closing in Spring 2024 to be replaced by new regional centres which will be run in conjunction with leading children's hospitals including Great Ormond Street Hospital and Alder Hey.



# Top tips: What can you learn from these cases?

The recent cases included in this guide show how the law protects women, children, LGB and trans people. However, there is little clarity where their rights potentially conflict because the law is constantly changing and often through first instance decisions which may be overturned at a later date. As an employer or organisation, you should tread carefully.

## What can you learn from these cases?

Our top tips are:

- 1. Carry out a balancing exercise** and approach all decisions with all parties in mind. For example, consider both transgender people and people with gender critical beliefs.
- 2. Be able to justify your decisions** – especially about complaints, investigations and sanctions – with robust, non-discriminatory reasons. Keep calm and don't jump the gun or pander to those who shout the loudest as any knee jerk reaction may come back to haunt you.
- 3. If you receive reports of discrimination or harassment, address these proactively.** Take positive steps to include people. We advise having inclusion policies and making sure that everyone understands them. And, whether someone is making a complaint or are the subject of it, make sure you support them and you are neutral in your consideration of the issue.
- 4. Always make a record** of these things which you can rely on should you ever need to.



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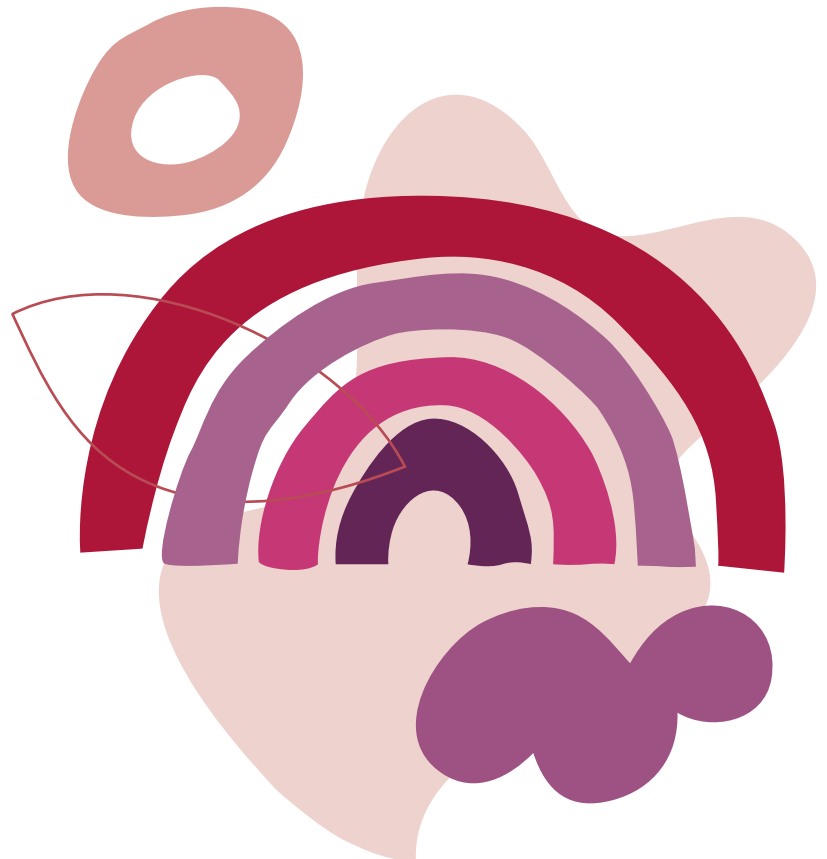
If you have any questions or would like to find out how our LGBT+ team could help you, do not hesitate to get in touch.



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Making a profit is core to all businesses but our goal is to combine this with a real social purpose. Our values are pivotal to us, they shape our decisions and the way we live and work.

We focus on positive social impact as much as we focus on being a successful law firm. Our top tier legal advice is coupled with a real desire to drive change and we were the first UK law firm to achieve B Corp certification, awarded to businesses that balance purpose and profit.

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