

The Reindorf Review

Our analysis of allegations in the Reindorf Review that the University of Essex's 'Supporting Trans and Non-Binary Staff' policy misrepresented equalities law concludes that it contains misunderstandings and serious errors.

Introduction

Around Christmas 2019, two 'gender critical' feminists were disinvited from speaking events at the University of Essex. First, in December 2019, Professor Jo Phoenix was excluded from a seminar on "*Trans rights, imprisonment and the criminal justice system*"¹. Then, on or before 9 January 2020, Professor Rosa Freedman was excluded from an event to which she had been invited, to mark Holocaust Memorial Week because of her views on gender identity. After writing to her MP and giving an interview to the Sunday Times, she was then reinvited to the event on the 27 January².

Following the withdrawal of these invitations, the Vice Chancellor of the University, Professor Anthony Forster, commissioned³ an independent review by barrister Akua Reindorf which led to a written report⁴ ('the Report').

The Report refers to examples of discrimination under the Equality Act 2010 ('EA 2010') contained in the University's 'Supporting Trans and Non-Binary Staff' policy ('the STNBS Policy'):

*"Under the Equality Act 2010, it is unlawful to discriminate against or treat someone unfairly because of their gender identity or trans status. Examples of discrimination include outing someone as trans without their permission, refusing to use someone's preferred name and correct gender pronouns and denying someone access to appropriate single-sex facilities"*⁵

It then challenges these examples:

¹ A. Reindorf *Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020* ('Reindorf Review'). 21 December 2020. Executive Summary. Available from <https://www.essex.ac.uk/blog/posts/2021/05/17/-/media/68d046276d734918a74785c035d6f2c9.ashx> [Last accessed 5 July 2021]

² Ibid.

³ A. Forster *Review of two events involving external speakers* (University of Essex, 17 May 2021) Available from <https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers> [Last accessed 5 July 2021]

⁴ *Reindorf Review*

⁵ Ibid. para. 225

“This does not accurately state the law [...] it cannot be said that the examples given would invariably amount to unlawful discrimination (or, in some cases more accurately, harassment)”⁶.

The Report also notes an almost identical example of harassment in the University’s ‘Harassment and Bullying Zero Tolerance’ policy (‘the HBZT policy’) which states that conduct amounting to harassment includes:

“denying a trans person or people access to the appropriate single sex facilities such as toilets or changing rooms”⁷

and refers to the criticism of the example in the STNBS Policy.

The Report later notes:

“It is worth noting that the examples of harassment in [the STNBS Policy] might lend credence to the idea that [letters to the Guardian and Sunday Times signed by Prof Phoenix] could amount to or lead to unlawful harassment [presumably of trans and non-binary people at the University]. This policy is founded on an erroneous understanding of the law (see §§225–226 above). The policy is reviewed annually by Stonewall, and its incorrect summary of the law does not appear to have been picked up by them. In my view the policy states the law as Stonewall would prefer it to be, rather than the law as it is. To that extent the policy is misleading”⁸

and recommends:

“The University should give careful and thorough consideration to the relative benefits and disbenefits of its relationship with Stonewall, bearing in mind the issues raised in this report. In particular, it should consider that this relationship appears to have given University members the impression that gender critical academics can legitimately be excluded from the institution [...] If the University considers it appropriate to continue its relationship with Stonewall, it should devise a strategy for countering the drawbacks and potential illegalities described above”⁹

The Report appears to be making the following argument:

1. The STNBS policy contains an incorrect summary of the law.
2. Stonewall are responsible for the incorrect summary of the law as they reviewed the STNBS Policy and the STNBS Policy is consistent with Stonewall’s objectives.
3. The STNBS Policy has given credence to the incorrect idea that writing letters to newspapers can amount to unlawful harassment.
4. As a result of the STNBS Policy, members of the University felt it was lawful to exclude Professors Phoenix and Freedman.
5. Going forward the University should carefully consider its relationship with Stonewall.

⁶ Ibid. para. 226

⁷ Ibid. para. 230

⁸ *Reindorf Review* para. 243.11

⁹ *Reindorf Review* Recommendation 28

The publicly available Report (on which our conclusions here are inevitably based) is heavily and unhelpfully redacted and it is possible that the redaction has distorted the argument made in the report. If this is the case, then the University should seek to minimize the redactions so the report can be understood correctly by the wider public.

However, Stonewall has firmly denied it had anything to do with the decision to exclude the two academics stating:

“A recent report on free speech at University of Essex referenced Stonewall’s membership of the Diversity Champions programme, suggesting that our advice on the Equality Act was incorrect, and recommended that University of Essex review their membership of the Diversity Champions programme. These claims have no basis. Stonewall staff had no involvement at all in the decision that was reviewed by the report.”¹⁰

Nonetheless, the allegation that Stonewall has given bad legal advice to the University of Essex caused a media storm¹¹. In this article we examine the allegations in the Report that the STNBS Policy fails to accurately reflect the law and that this led to the exclusion of the two gender critical academics.

Stonewall

Stonewall is an LGBT rights advocacy organisation, not a law firm. As far as we know, it does not purport to offer ‘legal advice’ as opposed to general information about the law. We would expect the University’s Human Resource professionals to have drafted the policy and that the University would have taken legal advice *specific to its own circumstances* from either internal counsel or from an outside firm of practising lawyers.

Not all the correspondence between Stonewall and the University of Essex is in the public domain, but feedback provided by Stonewall on the STNBS Policy as part of their ‘Diversity Champion Program’ is available.

Stonewall stated:

“Your transitioning at work policies, however are excellent and have been noted as best practice. They are accessible, contain excellent information, including a range of often overlooked considerations and give clear instruction for the individual transitioning, their managers, HR and colleagues. Furthermore, the fact that they

¹⁰ Stonewall *Stonewall statement on the Diversity Champions programme* (Stonewall, 24 May 2021) Available from <https://www.stonewall.org.uk/about-us/stonewall-statement-diversity-champions-programme> [Last accessed 5 July 2021]

¹¹ See for example N. Woolcock *Stonewall ‘gave bad advice’ to university in free speech row* (The Times, 20 May 2021) available from <https://www.thetimes.co.uk/article/stonewall-gave-bad-advice-to-university-in-free-speech-row-z6b27jdkh> [Last accessed 5 July 2021], S. Sodha *The Observer view on the right to free expression: Observer editorial* (The Observer, 27 June 2021) available from <https://www.theguardian.com/commentisfree/2021/jun/27/the-observer-view-on-the-right-to-free-expression> [Last accessed 5 July 2021] and D Penna *Equalities watchdog pulls out of Stonewall diversity scheme amid row over transgender activism* (Telegraph, 23 May 2021)

*have been devised with trans individuals on staff, student reps, and trans community groups means that it is well considered and appropriate to your context. Well done!*¹²

Major allegations made in the Report are that the STNBS Policy contained an incorrect summary of the law and also that it was unlawful. It was not. However, before even exploring this question, it is important to point out, perhaps counterintuitively, that, a policy can be unlawful, *but still represent best practice*. This is because a policy that represents best practice is consistent with a professional consensus that this is the best way for organisations to achieve certain goals. Nonetheless, there might be legal or factual factors *specific to an organisation* that means that the accepted consensus approach is unlawful and that an idiosyncratic approach has to be taken.

A policy can contain an incorrect summary of the law, but *still* represent best practice for the following reasons:

1. The summary of the law might be just for information purposes and hence not affect the operation of the policy.
2. Even if the incorrect summary of the law is part of the operation of the policy, provided the policy *exceeds* the legal requirements it could still be best practice.

As a result, determining if a policy represents best practice is different to providing legal advice on the lawfulness of a policy for a specific organisation or determining if the policy contains an incorrect summary of the law.

It seems clear that Stonewall reviewed the STNBS Policy to see if it represented best practice, not to see if it contained an accurate summary of the law; in Stonewall's opinion the policy represented best practice.

Akua Reindorf

Ms Reindorf is not a judge or a QC. She is a barrister specialising, to our knowledge, in employment and discrimination law¹³. However, *gender reassignment* discrimination is a specialised subfield of discrimination law. If she has specialist knowledge *of gender reassignment* discrimination then we might expect this experience to appear on her publicly available CV¹⁴. It does not. Indeed, Ms Reindorf appears to acknowledge her limitations in this area as she writes in the Report that "*The [STNBS Policy] should be reviewed by a specialist lawyer and if necessary amended to ensure that it offers adequate protection and is lawful.*"¹⁵

For this reason alone, it is unwise to conclude that the STNBS Policy is unlawful based purely on Ms Reindorf's opinion. However, further examination of her conclusions leads to deeper difficulties with her analysis.

¹² Stonewall *Workplace Equality Index 2020: University of Essex* Available from https://www.whatdotheyknow.com/request/726751/response/1740465/attach/4/Doc%204.WEI%202020%20Written%20Feedback%20Report%20UoE.pdf?cookie_passthrough=1 [Last accessed 5 July 2021]

¹³ See <https://www.cloisters.com/barristers/akua-reindorf/?pdf=4086> [Last accessed 5 July 2021]

¹⁴ *Ibid.*

¹⁵ *Reindorf Review Recommendation 20*

The STNBS Policy

The Report takes the following quote from the STNBS Policy

“Under the Equality Act 2010, it is unlawful to discriminate against or treat someone unfairly because of their gender identity or trans status. Examples of discrimination include outing someone as trans without their permission, refusing to use someone’s preferred name and correct gender pronouns and denying someone access to appropriate single-sex facilities.”¹⁶

It then makes a number of allegations that this part of the STNBS Policy does not accurately state the law.

Failure to refer use the term *gender reassignment*

The Report states

“This does not accurately state the law, since “gender identity or trans status” are not protected characteristics under the Equality Act 2010; rather, the protected characteristic is gender reassignment [...]”¹⁷.

Given both the practical purpose of and the lay audience for the STNBS Policy, using the terms “*trans status*” and “*gender identity*” in a summary of law instead of *gender reassignment* is understandable. *Gender reassignment* is a legal term of art. A lay person might easily think that *gender reassignment* covers just those people who have undergone surgery, but in fact the term goes far wider. It covers those who have not transitioned but propose to do so¹⁸, those who are not undergoing a medically supervised transition¹⁹ and those who are changing only non-physiological attributes of sex²⁰. Anyone who is *perceived* to have the characteristic of *gender reassignment* is also protected²¹.

The term was recently expanded by the Employment Tribunal to cover those who are non-binary²² and it is possible that it might be expanded further in the future. Despite the objection to their usage, the Report provides no evidence nor makes any allegations that use of the terms “*trans status*” and “*gender identity*” in the policy caused any confusion as to the scope of who is protected under the Equality Act 2010.

Examples given would not always be unlawful discrimination

The Report states that the examples given in the STNBS Policy of discrimination towards trans people

1. would not “*invariably amount to unlawful discrimination*”,

¹⁶ Ibid. para 225

¹⁷ Ibid. para 226

¹⁸ Equality Act 2010 (‘EA 2010’) s. 7(1)

¹⁹ Ibid.

²⁰ Ibid.

²¹ Note the broad language in EA 2010 s. 13(1) and see the Court of Appeal case *Chief Constable of Norfolk v Coffey* [2019] EWCA Civ 1061

²² Taylor v Jaguar Land Rover (ET case no. 1304471/2018)

2. notes that “*denying someone access to appropriate single-sex facilities is a contested issue*”; and
3. notes that the EA 2010 contains “*sex-based exceptions relating to this (see §187 above)*”.

The Report has chosen an interpretation of “*appropriate single-sex facilities*” that seems to be the single-sex facilities that match a trans person’s gender identity. However, the choice of wording used in the policy is significant. It could have said “*single-sex facilities that match their gender identity*” or “*single-sex facilities that match their presentation*”.

In the Court of Appeal case of *Croft v Royal Mail*²³, it was held that a trans person has the right to use the toilet that matches the gender in which they present once they have made sufficient progress in their transition; when this occurs is to be determined on a case-by-case basis. A trans person can of course, with the consent of their employers, use the facilities that match their lived gender prior to the right arising. But once the right has arisen, it is unlawful discrimination to continue to deny a trans person access to these facilities.

The expression “*appropriate single-sex facilities*” could mean the facilities *appropriate* to the point reached in the person’s transition. If this is the case, then the policy is correct in stating that denying access to these facilities would be *unlawful* discrimination.

Further, a handful of ‘gender critical’ legal academics and professionals may consider trans people’s access to single-sex facilities in the course of their employment ‘a contested issue’ but it is not. The matter was settled by *Croft*²⁴ nearly 20 years ago.

Referring to the “*single-sex exceptions*” in the EA 2010 is particularly misleading. From the context of the policy, facilities refer to toilets, showers and changing rooms. However, *none* of the EA 2010 exceptions referenced in para. 187 of the Report allow trans people to be excluded from these facilities in the course of their employment. The Report might mistakenly be referring to the single and separate *service* exception in para. 28 sched. 3 EA 2010, but this exception only applies to *services to the public* and *services provided in the course of executing a public function*. In our opinion, this indicates either a lack of specialised knowledge or a lack of care by the author of the Report.

The STNBS Policy potentially breaches health and safety legislation

The Report states

*“Later in the policy it is said that the University “will not tolerate staff being questioned inappropriately about the facility they choose or being denied access to that facility”. This is a problematic provision. Insofar as its effect is that single sex facilities may be used by whoever chooses to use them in accordance with their gender identity rather than their sex, it is a potential breach of health and safety legislation, which requires employers to provide toilets and changing rooms either on a single-sex basis or in individual lockable rooms”*²⁵

²³ *Croft v Royal Mail* [2003] EWCA Civ 1045

²⁴ *Ibid.*

²⁵ *Reindorf Review* para. 226

Suggesting a potential breach of health and safety legislation is a very serious allegation as it indicates potential criminal liability. No factual or legal analysis is offered to back this up.

The STNBS Policy prohibits “*staff being questioned inappropriately about the facility they choose or being denied access to that facility*”. It thus indicates that *appropriate* questioning of staff is permitted, by implication allowing the denial of access if necessary; the policy does not allow the free-for-all approach the Report suggests.

We have extensively analysed²⁶ the legal situation regarding the health and safety regulations and include a summary below.

In terms of toilets, the legal authorities are consistent with the notion that allowing trans people to use the toilets that match their presentation does not breach the regulations.

The regulations only cover changing rooms where “*the person has to wear special clothing for the purpose of work*” (Regulation 24(1)(a) The Workplace (Health, Safety and Welfare) Regulations 1992). They do not cover changing rooms provided as employee perks, for example for cyclists or attached to gyms. Even where a changing room is required under the regulations, the duty to provide “*separate facilities for, or separate use by, men and women*” only applies “*where necessary for the reasons of propriety*”. Even if a court were to interpret this based on the birth certificates of trans people, which is unlikely as the jurisprudence of the CJEU applies, an employer can meet its obligation by ensuring “*propriety*”.

There is a broad obligation not to discriminate against transgender people under the EA 2010²⁷. Notwithstanding the arguments given above, to the extent that there is a potential breach of the health and safety legislation, a well-advised firm would seek to avoid it through physical measures to ensure propriety rather than risk breaching the EA 2010.

The Report provides no factual analysis to see if the University provides changing facilities under the regulations nor any to see if propriety is ensured either through physical design (e.g. cubicles) and/or policies (e.g. a changing room etiquette policy).

Allowing transgender staff to use the facilities appropriate to the gender in which they present has been best practice for a number of years. The Government and Equalities Office guidance, ‘The recruitment and retention of transgender staff: Guidance for employers’ has stated for at least the last six years that “*a trans person should be free to select the facilities appropriate to the gender in which they present*”²⁸.

In summary, the STNBS Policy does not allow inappropriate use of facilities and the Report does not offer any factual analysis to determine if any potential breach of the regulations is possible. The Report’s suggestion that possible criminal offences might be being committed is irresponsible scaremongering.

²⁶ Trans Legal Project *Should employers discriminate against trans people in the workplace?* (Trans Legal Project, 5 June 2021) Available here <https://www.translegalproject.org/workplacediscrimination05-06-21> [Last accessed 2 July 2021]

²⁷ See for example *Taylor v Jaguar Land Rover*

²⁸ Government Equalities Office *The recruitment and retention of transgender staff: guidance for employers* (Government Equalities Office, Nov 2015) page 14. Available from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/484855/The_recruitment_and_retention_of_transgender_staff-guidance_for_employers.pdf [Last accessed 4 June 2021]

Suggested links between the STNBS Policy and the exclusion of the academics

The Report suggests that the examples of harassment in the STNBS Policy “*might lend credence*”²⁹ to the erroneous idea that the letters that were written to national newspapers³⁰ could amount to or lead to unlawful harassment. However, the Report presents no evidence that this actually happened. As we have explained above, we believe the examples represent the law correctly. Even if the examples misrepresented the law for the reasons given in the Report, no evidence is presented that this led to the erroneous idea. All the examples in the STNBS Policy concerned potential actions taken *directly* against trans and non-binary members of the University’s staff; this is entirely different from writing to a national newspaper.

Furthermore, the Report indicates that the STNBS Policy was somehow uniquely influential in the decision to disinvite the two academics. This forms part of Ms Reindorf’s point of view that Stonewall was somehow culpable in this action. However, she admits the HBZT Policy contains an almost identical example of harassment. Clearly Stonewall had nothing to do with the HBZT Policy, yet the Report does not make it clear why the STNBS Policy is the unique inspiration for the actions taken against the two academics. It is difficult to conclude that this was not due to bias in Ms Reindorf’s approach and analysis.

Policy changes following the Reindorf Review

No change to the HBZT Policy has been made and the version dated July 2020, which was considered in the Report is still current³¹.

The University has now updated its STNBS Policy³², as of April 2021. The policy is largely the same, but it no longer refers to “*gender identity*” or “*trans status*”, instead referring to the protected characteristic of *gender reassignment*. It also provides an explanation of what this means.

*“Under the Equality Act 2010, it is unlawful to discriminate against or treat someone unfairly because of the protected characteristic ‘gender reassignment’, defined as ‘where person has proposed, started or completed the process to change his or her sex’. Individuals do not have to be under medical supervision to be protected by the law. The University’s policies go beyond the requirements of legislation and protect a broader group of people than those covered by the term ‘gender reassignment’. Our policies cover all trans people, including those with non-binary gender identities.”*³³

²⁹ Reindorf Review para. 243.11

³⁰ See for example K Stock et al. *Letters: Academics are being harassed over their research into transgender issues* (Guardian, 16 October 2018) Available from <https://www.theguardian.com/society/2018/oct/16/academics-are-being-harassed-over-their-research-into-transgender-issues> [Last accessed 5 July 2021]

³¹ University of Essex. *Harassment and Bullying: Our Zero Tolerance Approach* (University of Essex, July 2020) Available from <https://www.essex.ac.uk/-/media/documents/directories/equality-and-diversity/zero-tolerance.pdf> [Last accessed 2 July 2021]

³² University of Essex. *Supporting Trans and Non-Binary Staff* (University of Essex, April 2021) Available from <https://www.essex.ac.uk/-/media/documents/directories/human-resources/supporting-trans-non-binary-staff.pdf> [Last accessed 2 July 2021]

³³ Ibid. Page 3

The policy continues to state

“Examples of discrimination include outing someone as trans without their permission, refusing to use someone’s preferred name and correct gender pronouns and denying someone access to appropriate single-sex facilities”³⁴

and also

“The University will not tolerate staff being questioned inappropriately about the facility they choose or being denied access to that facility.”³⁵

Given the date of the review and the change from *gender identity or trans status* to gender reassignment, the revision was clearly made in response to the Reindorf Review and would very likely have involved specialist legal advice. The only change that appears to have been made to the policy is changing *gender identity or trans status* to *gender reassignment* and the provision of an explanation of what *gender reassignment* means. In our opinion, the operational effect of the STNBS Policy is unchanged.

Conclusion

The Report makes no allegation that Stonewall was directly involved in the decision to exclude the two academics and indeed Stonewall has denied it had anything to do with it. Yet the report seems to follow a process of tortuous conflation to pin the blame on Stonewall for this decision. It does this by alleging that the examples in the STNBS Policy were contrary to the law, that Stonewall had some responsibility for this and that this is some way led to the decision to exclude the two academics. Our analysis shows no unlawfulness in the examples in the policy or indeed the policy itself and the latest version of the policy created after the report remains the same in every material sense.

For at least the last couple of years ‘gender critical’ feminists have campaigned to ‘get Stonewall out of universities’³⁶. Based on the analysis set out in this article, in our opinion, the Report, with its paucity of evidence, unfairly blames Stonewall for the exclusion of the two academics and even tries to convince the University to sever its ties to Stonewall. The University has declined to do so³⁷ and as of March 2021 intends to continue its membership of the Stonewall Diversity Champions scheme³⁸. We congratulate the University of Essex on its continuing commitment to trans and non-binary people and for recently apologising “*for anyone having been made to feel unsafe as a result of the Review*”³⁹.

³⁴ Ibid. Page 10

³⁵ Ibid. Page 6

³⁶ E Somerville and S Griffiths *Stonewall is using its power to stifle trans debate, say top academics* (The Sunday Times, 16 June 2019) Available from <https://www.thetimes.co.uk/article/stonewall-is-using-its-power-to-stifle-trans-debate-say-top-academics-dtswlcl0n> [Last accessed 3 July 2021]

³⁷ University of Essex *Actions that will be taken in response to the recommendations contained in the Reindorf Report* (University of Essex, 17 May 2021) Available from <https://www.essex.ac.uk/blog/posts/2021/05/17/-/media/Of8aee312785417e95b2d559202bdc7a.ashx> [Last accessed 7 July 2021]

³⁸ C Chatfield *Letter to S Dixon dated 8 March 2021* (University of Essex, 8 March 2021) Available from https://www.whatdotheyknow.com/request/information_about_your_dealings_527#incoming-1740465

³⁹ A Forster *Our commitment to our trans and non-binary staff and students* (University of Essex, 2 July 2021) Available from <https://www.essex.ac.uk/blog/staff/posts/2021/07/02/our-commitment-to-our-trans-and-non-binary-community> [Last accessed 5 July 2021]

Given the media circus caused by the Report, we have written to Ms Reindorf setting out our concerns about her report and asking her to release an amended version which is fair and accurate. To date, we have received no reply.

Trans Legal Project
7 July 2021