CULTURE WARS

Equality:
Hidden risks for business

AUTHENTIC EQUITY ALLIANCE

It may surprise you to learn that the EDI policies and practices of organisations, in all sectors throughout the country, contain unlawful elements. Why? Because organisations were misled by incorrect official guidance on the 2010 Equality Act – shocking but true. See our 'Equality Matters' booklet https://aealliance.co.uk/notices/

The guidance was *ultra vires*, ie outside of the law, and thereby unlawful. That guidance was also disseminated by training agencies and management consultancies. Organisations, including private sector companies, understandably followed official guidance or guidance from trusted sources. Here's an *ultra vires* extract from the policy of a household-name company:

> **'Transgender individuals who plan to make, are making or have made a permanent change to their gender must be allowed to use the toilets of their acquired gender. Insisting that a transperson uses facilities that are not of their acquired gender contravenes the Equality Act 2010.'**

That misstates the law in a number of ways, including the assertion: "*Insisting that a transperson uses facilities that are not of their acquired gender contravenes the Equality Act 2010*." Whereas, in fact, Schedule 3, Section 31, paragraph 28 of the Equality Act permits the exclusion of trans people – with or without Gender Recognition Certificate – from single-sex services, provided it is a proportionate means to achieve a legitimate aim.

AEA took the Equality and Human Rights Commission to task for promulgating incorrect guidance and succeeded in getting the guidance amended. However, EHRC refused to announce changes publicly or to directly inform organisations. So AEA undertook the task. Our booklet 'Equality Matters' has been sent to many hundreds of organisations. https://aealliance.co.uk/notices/aea-updates/

The crux of this vexatious issue is predominantly a dispute between natal women and transwomen. NW, calling for the protection of 'sex-based' rights, say that biological sex is immutable, it must not be erased in language and that single-sex services and spaces must remain protected. TW, calling for 'gender theory-based' rights, say that biological sex is a social construct, that language must be inclusive and that how you feel inside, rather than biological sex, should determine access to single sex services and spaces.

This is a quagmire for organisations, including private sector companies. More recent developments have made the situation even more precarious.

- A High Court Hearing affirmed that a policy which states that trans persons must be allowed access to single-sex spaces is "directly inconsistent with the law", even when a person has a Gender Recognition Certificate. *(AEA v EHRC, 6 May 2021)*
- Barrister Akua Reindorf's Report for Essex University noted that Essex's policies "state the law as Stonewall would prefer it to be, rather than the law as it is". *(20 May 2021 https://www.cloisters.com/reindorf-review-on-no-platforming/)*
- Setting a legal precedent, judgment in a legal case confirmed that 'gender critical beliefs' are included in the protected characteristic 'Religion or belief'. The case also established that there is *no right* to be not offended. *(Forstater v CGD, 10 June 2021)*
- Under new leadership, the Equality and Human Rights Commission has provided its staff with impartiality training. *(Daily Telegraph, 4 Sept 2021)*
- Liz Truss, Minister for Women and Equalities, reaffirmed her position: "There's a very important difference between sex and gender and the Equality Act is very clear that single-sex spaces should be provided for and organisations should be able to distinguish on the basis of biological sex." *(Sunday Times, 3 Oct 2021)*
- Baroness Kishwer Falkner, the new Chair of EHRC, announced that new guidance for hospitals and businesses, in regard to the legitimate preservation of single-sex spaces, will be issued next year. *(Telegraph, 16 Oct 2021)*

Private sector companies and other organisations need to be aware of and pay attention to these developments. The wide-ranging implications of the Forstater case, for instance, are applicable in both service-provision and employment.

Companies, rightfully concerned about inclusion, would be well-advised to revisit policies and practices to (i) ensure they are compliant with the law and (ii) assess for exposure to legal action on grounds of gender critical belief discrimination and/or harassment. Companies must be able to evidence fairness in policy-making and practice.

If you require assistance, AEA can help. We have already reviewed the EDI policies and practices of well-known companies and, in some cases, also provided training.

AEA will, impartially and in strictest confidence, appraise your policies and practices and provide you with an objective, detailed written report highlighting legal, reputational and other risks, signposting possible mitigatory measures.

AEA Consultancy and Training is rooted in the law and is impartial.
AEA can help you balance the rights of all relevant protected characteristics.

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