Prejudging the transgender controversy?

Why the Equal Treatment Bench Book needs urgent revision

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Foreword by Charles Wide QC

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Foreword

Charles Wide QC, former Senior Circuit Judge sitting at the Old Bailey

In 2019, an Employment Tribunal ruled that Maya Forstater's belief (held and expressed by her as a private individual) that sex is an immutable biological fact is 'not worthy of respect in a democratic society'. Reading this, many thousands of reasonable people must have scratched their heads in bewilderment. Such a belief may have become, in very recent times, the subject of controversy, but how could it possibly be 'not worthy of respect'? This decision has been overturned on appeal. The flawed reasoning which led to it is meticulously analysed in this new Policy Exchange paper by barrister, Thomas Chacko. Further, his analysis led him to an issue of wider and deeper concern than one tribunal's legally incorrect decision: the nature and use in court of the *Equal Treatment Bench Book* (ETBB) - a document issued by the body responsible for training judges, the Judicial College.

The work of the Judicial College is invaluable, keeping judges up to date with law and practice, and providing materials (such as the *Crown Court Bench Book* – an important source of, for example, specimen directions to juries). The key to the purpose of such publications is in the name '*Bench Book*' – they should be accessible, practical guides to which judges can refer when pressed, 'on the bench', by the multiple exigencies of trying cases.

The ETBB used to be a booklet, the brevity of which greatly enhanced its utility in ensuring that those who might otherwise be disadvantaged could participate effectively in the legal process. It has grown into a gargantuan work of more than 500 pages. Its size alone risks compromising its usefulness. However, a deeper problem lies in the development of its content which has strayed beyond crisp, practical advice, for a well-defined purpose, into an attempt to give a socio-political account of the problems faced by every 'community' of disadvantaged minorities.

Focusing on *Chapter 12 Trans People*, as this was relied on by the Employment Tribunal, this paper describes the ETBB's potential for tilting the balance in proceedings against those, for example, who do not accept certain terminology. Further, it identifies the risk of the ETBB being relied on as a source of law and evidence, thus playing a part in judicially decided outcomes, short-circuiting the rules of evidence and the necessary conventions concerned with hearing competing submissions by the parties to litigation. Readers of Chapter 12 may perceive a lack of balance in its general tone and trajectory. Statements of fact are made without

citing sources. Numerous research papers, reports, and articles are cited but there is no critical evaluation of them nor are the criteria for their selection explained. The extent of legitimate controversy is unrepresented. The risk of language being used as a campaigning tool is unacknowledged. The ETBB comes close to putting participants (i.e. people involved in a court case) in control of the language the judge may use. However, judges will find little help in resolving a practical difficulty such as that which arises if a rape complainant wishes to say 'he' of a trans defendant who wants to be referred as 'she'. It is hard to avoid the impression that, in relation to what is 'acceptable' terminology, the ETBB has taken its tone from activists. None of this is to criticise those whose publications are cited in ETBB (and who may have contributed in other ways). It is to note the problems which are caused by the Judicial College straying into complex, contested socio-political areas and, advancing on a vastly broad front, creating a document which is unsuited to what should be a narrow but important purpose.

Finally, there is the issue of transparency. This paper reveals that the Judicial College has refused to disclose the identities of the experts and organisations which have contributed to the preparation of the ETBB. Inevitably, people will wonder whether they include partisan campaigners and, if so, which and what was their role. If those before a court do not know how material, which may affect the outcome of a case, has been produced and who may have influenced it, what effect could that have on the participants' confidence in the court? And what effect might it have on public confidence in the judicial system as a whole?

The issues explored in this paper could so easily have slipped under the radar of public attention. Thomas Chacko and Policy Exchange are to be commended for bringing them into the light.

Executive Summary

Transgenderism is the focus of vigorous public debate at present. Questions as to the relative significance of gender identity and physical sex and what it means to be trans are at the heart of arguments about whether transwomen should compete as women in sports, whether medical intervention is appropriate for young teenagers who don't identify with their sex, who should be in women's prisons and how public debate should be conducted. The courts are increasingly asked to grapple with these questions. However, guidance produced by the Judicial College is surprisingly committed to some of the ideas and claims that are in dispute.

The Lord Chief Justice exercises his responsibility to train the judiciary through the Judicial College,[1] which publishes the "Equal Treatment Bench Book", intended to "to increase awareness and understanding of the different circumstances of people appearing in courts and tribunals… [to help] enable effective communication and suggests steps which should increase participation by all parties," and contain "practical guidance aimed at helping make the court experience more accessible for parties and witnesses who might be uncertain, fearful or feel unable to participate…"[2]

However, in its current form it aims to do a great deal more. It attempts to provide a guide to the life of minorities in the UK: an enormous task that explains its great length (561 pages). However, where the subjects it covers are in dispute in legal proceedings, the Judicial College having produced a guide telling judges what they should believe is dangerous.

The problems with this are demonstrated by the *Forstater* litigation. Maya Forstater is a researcher who was refused employment because she had expressed the view that physical sex was immutable and in many situations more important than gender identity, i.e. that a transwoman should not be treated as a woman for all purposes. The Employment Tribunal found that Ms. Forstater's opinions were not protected by the Equality Act as they were incompatible with human dignity and not worthy of respect in a democratic society. The Employment Appeal Tribunal reversed this. Both Tribunals, though, based their understanding of transgenderism on the Bench Book.

Chapter 12 of the Bench Book covers transgenderism. It goes well beyond advising judges how to help a trans litigant take full part in proceedings. Rather, it attempts to give an authoritative explanation of what transgenderism is and the problems trans people face in society. It does this in a partisan and didactic fashion. Major ideological claims, such as gender being "assigned at birth", are assumed without warning judges that they are hotly contested. It makes startling legal assertions without

1. Courts and Tribunals Judiciary website, "The Judicial College", https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/
2. Courts and Tribunals Judiciary website, Announcement of a new edition of the Equal Treatment Bench Book, 24 February 2021, https://www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/

reference to authority, such as that it may breach Article 8 of the ECHR to ask questions about someone's gender identity. Most seriously, it warns judges against anyone who disagrees with the claims being made. The authors blame "negative responses to the civil rights protections" of trans people for a rise in hate crime, though they must have been aware of the vigorous debate as to what civil rights protections are appropriate.

Both Tribunals assumed that they could simply adopt Chapter 12's explanation of the position of trans people in the UK, quoting parts of it. However, this is not a document that has been produced in an open or tested process. FOI requests as to how the Bench Book is put together are refused.

The surprising confidence that the Employment Tribunal had in dismissing Ms. Forstater's opinions as outside the scope of civilised debate can perhaps be explained by the fact that her opinions differed from judicial guidance. The didactic nature of this guidance (with its warnings against dissent) may also explain cases like that of Maria MacLachlan, who, after being assaulted, was criticised by the judge at the criminal trial of her attacker for failing to refer to her (male) attacker as "she".

This paper is focused on Chapter 12. However, other parts of the Bench Book also make strange reading. The guidance on race and religion seems more interested in a general explanation of minority life in the UK than providing a targeted guide to helping people take part in legal proceedings. This being a truly enormous task, it leaves the guidance somewhat random in its focus, being more interested (for example) in the opinions of Jewish people about the State of Israel than in any other aspect of Jewish belief or culture, despite that hardly being likely to affect someone's ability to appear in court. It gives a potted summary of world religions that veers between extreme simplifications and descriptions so vague that it is hard to see who they are supposed to help. The opaque way this guidance is produced makes it hard to tell how thoroughly the more startling claims (for example, that Roma lack the vocabulary to express emotions) were investigated.

The Bench Book needs urgent revision. Partisan explanations, such as Chapter 12, should not be clothed with the authority of the Judicial College. It needs to be made much clearer that this is a guide to helping judges hear cases fairly: it is not a guide to the underlying facts about any particular minority. The Judicial College should not be producing such a guide, which is inherently likely to prejudice court proceedings in any area where those facts are relevant. A revised version needs to be produced in a more open manner, with public consultation and disclosure of the process by which decisions are taken. As well as avoiding the situation where the Judicial College has effectively taken a side in a matter of vigorous controversy, this might reduce the difficulties that the drafters have clearly found in working out which aspects of minority life in Britain are impeding access to justice.

Introduction

1. In *Forstater v CGD Europe and others*,[3] ("*Forstater ET*") the Employment Tribunal (Judge Tayler) found that Ms Forstater's belief that biological sex is objective and cannot be changed was incompatible with human dignity and therefore not protected by discrimination law: that is, employment could be refused to someone holding that belief without consideration of whether such refusal was justified or proportionate. That was recently overturned by the Employment Appeal Tribunal ("*Forstater EAT*"). However, the decision of Judge Tayler revealed concerning aspects about what judges are encouraged to believe about matters of public controversy in official guidance produced by the Judicial College, which is supposed to provide training for the judiciary.
2. This paper is not about the way Judge Tayler applied discrimination law. That has been written about elsewhere,[4] and his decision has been overturned. This paper is rather about the way the Judge seems to have come to a position of such strong conviction regarding transgender issues that he was ready to declare Ms. Forstater's views incompatible with human dignity. As the EAT noted at [85], Judge Tayler's reasoning "*implicitly [made] a value judgment based on [his] own view as to the legitimacy of the belief…*" noting with surprise at [87] that he had, for example, felt able to give his opinion on the scientific merits of the chromosome-based nature of human sex (which he said biological opinion was moving away from) "*despite there being little in the way of expert evidence about that issue and really little more than an article in the New York Times…*"
3. This paper suggests that the source of the Judge's confidence is that he was given surprisingly confident guidance by the Equal Treatment Bench Book, a document that is in theory produced to tell judges how to help minorities take full part in judicial proceedings. Judge Tayler appears to have used this guidance in the Equal Treatment Bench Book to make findings as to the underlying context of the dispute before him, being the correct understanding of gender and the needs and difficulties of transgender people. Where (as here) the subject matter of the dispute is a matter of vigorous public controversy, there are serious problems in terms of judicial independence if official bodies such as the Judicial College tell judges how to understand the underlying facts.

3. [2019] UKET 2200909/2019, on appeal [2021] UKEAT 0105_20_1006
4. See, for example, Karon Monaghan QC, *The Forstater Employment Tribunal Judgment: a critical appraisal in the light of Miller*, 19 February 2020 https://uklabourlawblog.com/2020/02/19/the-forstater-employment-tribunal-judgment-a-critical-appraisal-in-light-of-miller-by-karon-monaghan/ and Andrew Hambler, *"Beliefs unworthy of respect in a democratic society: a view from the Employment Tribunal"* Ecclesiastical Law Journal 2020, 22(2), 234-241.

Maya Forstater's involvement in the transgender controversy

4. Maya Forstater is a tax and sustainable development researcher. Until 2019 she worked for the Centre for Global Development, a think tank. While her professional output is and was about tax reform, she regularly commented publicly on issues of feminist concern, in 2012 co-founding the Let Toys be Toys campaign calling on toy companies to stop classifying toys into girls' and boys' categories.
5. In 2017 and 2018, she began to take an interest in proposed changes to the Gender Recognition Act 2004 ("the GRA"), the legislation which provides for individuals to change their legal records from showing them to be a man to a woman, or vice versa. At present there are a series of tests which must be satisfied before such a change (by way of a Gender Recognition Certificate, a "GRC") is permitted, including living in the assumed gender for 2 years and demonstrating a stable intention to adopt that gender. There were proposals to change these tests, including proposals to introduce a "Self-ID" system whereby a statement by the individual concerned would be sufficient by itself for them to be recorded as a woman or a man. This comes from the position taken by some commentators on transgender issues that status as a woman or a man is primarily (or entirely) a question of internal perception and that therefore a system of assessment is unnecessary and intrusive. Following consultation, the government announced on 22 September 2020 that they would not be introducing Self-ID, but that was still in doubt at the time of Ms. Forstater's hearing before Judge Tayler.[5]
6. Ms. Forstater was concerned by this and in late 2018 she began to write publicly about it online and on Twitter. Issues she commented on included:[6]
    a. The fact that very few male to female trans people have surgery altering their genitals, which had implications for women's safety and privacy if changing rooms, dormitories or prisons were required to treat them as women for all purposes;
    b. The case of Stephen Wood, a convicted child rapist who later identified as a woman, took the name Karen White and was moved to a female prison and sexually assaulted other inmates;
    c. The inclusion of Phillip Bunce, a director of Credit Suisse, in the Financial Times' list of Top 100 Women in Business on the basis that he dresses as a woman and uses the name "Pips" two or three days each week.

5. Rt Hon Elizabeth Truss MP and Government Equalities Office, Written Ministerial Statement: Response to Gender Recognition Act (2004) consultation https://www.gov.uk/government/speeches/response-to-gender-recognition-act-2004-consultation
6. Maya Forstater, 5 May 2019, article on Medium "*I lost my job for speaking up about women's rights*" https://medium.com/@MForstater/i-lost-my-job-for-speaking-up-about-womens-rights-2af2186ae84

7. It should be noted that these issues are matters of significant public debate. The way in which the law should accommodate those who do not identify with their physical sex has been written about extensively in recent years in newspapers and magazines ranging from the Spectator to the Times to the Morning Star. Attention has been drawn to the current position where some bodies appear to have adopted a practice of Self-ID voluntarily, giving rise to questions as to whether it was right for the Guides to change their policy of only allowing female staff to lead groups of teenage girls so as to permit males who identified as women to do so (whether or not that staff member had had any kind of sex-change surgery),[7] or various cases of male sex offenders later deciding that they identified as women and being put in women's prisons.[8] Lesbian writers have expressed concern that the sort of "typically male" desires and behaviour that are being identified as evidence that a female child is transgender and should be medicalised are the same sort of feelings that they had as teenagers,[9] and have argued against the claim that a male-bodied individual who identifies as a woman but does not have any form of genital surgery should be treated as a lesbian if they are attracted to women, and that lesbians who are sexually uninterested in that person are in some way bigoted.[10] An organisation, Women's Place UK, which was set up to promote meetings where changes to the GRA could be debated, was then met with accusations of transphobia and serious attempts to prevent such meetings, including bomb threats.[11]
8. However, Ms. Forstater's employers took the view that her public comments were unacceptable, and subjected her to a review as to whether she had violated their bullying and harassment policy. While it was found that she had not, she was told that her contract would not be renewed.
9. It should be noted that there was no suggestion that Ms. Forstater was arguing about these issues at work or in the course of her work. She was writing in a private capacity.

7. Andrew Gilligan, *"Girl Guide leaders expelled for questioning trans policy"*, The Sunday Times 23 September 2018 https://www.thetimes.co.uk/article/girl-guide-leaders-expelled-for-questioning-trans-policy-550x7m55r
8. Nazia Parveen, *"Karen White: how "manipulative" transgender inmate attacked again"*, The Guardian, 11 October 2018 https://www.theguardian.com/society/2018/oct/11/karen-white-how-manipulative-and-controlling-offender-attacked-again-transgender-prison; BBC, *"Transgender rapist moved to women's prison after sex change"* 21 March 2017 https://www.bbc.co.uk/news/uk-39337805
9. Katie Gibbons, *"Gay groups clash over 'homophobic policies'"* The Times 26 October 2019 https://www.thetimes.co.uk/article/gay-groups-clash-over-homophobic-policies-t95958fmn
10. Andrew Gilligan, *"Lottery thousands pay for former trans stripper to sway public opinion"* The Sunday Times 23 December 2018 https://www.thetimes.co.uk/article/lottery-thousands-pay-for-former-trans-stripper-to-sway-public-opinion-6lw9xbwgr; Will Humphries, *"Lesbian fury at Stonewall over 'trans agenda'"* The Times, 17 July 2018 https://www.thetimes.co.uk/article/lesbian-fury-at-stonewall-over-trans-agenda-pm-m03kw05
11. Judith Green, *"The real war on women"* The Spectator 10 March 2018 https://www.spectator.co.uk/2018/03/transgender-activists-and-the-real-war-on-women/; Rebecca Lush, *"Women have every right to discuss changes to the law that could affect them"* Morning Star, 4 May 2018 https://morningstaronline.co.uk/article/women-have-every-right-discuss-changes-law-could-affect-them

The Employment Tribunal proceedings

10. Ms. Forstater made a claim in the Employment Tribunal that she had been discriminated against on the basis of her philosophical belief, contrary to section 10 of the Equality Act. If she had established that, then the question would have moved to questions such as whether CGD had discriminated against her because of that belief, and whether there was any possible justification for their doing so.
11. Ms. Forstater had some difficulty in even bringing her claim, as two law firms refused to act for her, and the Solicitor's Regulation Authority told her there was nothing wrong "if a firm declined to act because the client's views conflicted with its own principles and values, as long as these were not discriminatory…"[12]
12. The belief, as set out by the Judge at [77], is this:

> *"The core of the Claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that is a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, are able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than "gender", "gender identity" or "gender expression". She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the Claimant holds."*

13. Put more simply, the belief at stake was whether (as JK Rowling phrased it) "sex is real".[13] Ms. Forstater's view was that it is: that humans are male or female as a question of physical reality and that this is a fact that persists whether the individual's perception of their gender aligns with that or not; and that describing a transwoman as if they were a woman is a matter of politeness (which will sometimes need to be disregarded) rather than recognition of an underlying truth.
14. The test the Judge in *Forstater* was applying was primarily the fifth limb of *Grainger v Nicholson*, where the Court of Appeal (in paragraph 24) set out five limitations on the scope of protection for philosophical beliefs:

12. Maya Forstater, *One's sex can't change. The story of my fight to ensure that this view, held by so many, is judged "worthy of respect"* Conservative Home website, 14 June 2021, https://www.conservativehome.com/platform/2021/06/maya-forstater-my-belief-that-sex-is-real-and-immutable-is-worthy-of-respect-heres-the-story-of-my-struggle-to-get-a-court-to-say-so.html
13. BBC, "*JK Rowling responds to trans tweets criticism*" 11 June 2020 https://www.bbc.co.uk/news/uk-53002557

> *"(i) The belief must be genuinely held. (ii) It must be a belief and not … an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others…"*

15. The Judge decided that her belief was "not worthy of respect in a democratic society." This was surprising. The belief that the Judge decided was outside all reasonable discourse is one that a very large number of people (probably the overwhelming majority) hold in some form or other, and (as noted above) is the subject of vigorous public debate at present: as the High Court said in *R (Miller) v The College of Policing and ors* [2020] EWHC 225 (Admin) at [250] that "*there is a vigorous ongoing debate about trans rights*", including serious voices who do not agree that "trans women are women" (see [241]). As the EAT explained at [113] when overturning Judge Tayler's decision, while "*the popularity of a belief does not necessarily insulate it from being one that gravely undermines the rights of others… a widely shared belief demands particular care before it can be condemned as being not worthy of respect in a democratic society.*"

"Disagreeing with the law"

16. Judge Tayler criticised Ms. Forstater's belief for two main reasons: that it is inconsistent with English law, and that it causes distress. At [84] he said the following:

> *"However, I consider that the Claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others. She goes so far as to deny the right of a person with a Gender Recognition Certificate to be the sex to which they have transitioned. I do not accept the Claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on the assessment of the various interrelated convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as the being of the sex to which they have transitioned. In Goodwin a fundamental aspect of the reasoning of the ECHR was that a person who has transitioned should not be forced to identify their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for "all purposes". Therefore, if a person has transitioned from male to female and has a Gender Recognition Certificate that person is legally a woman. That is not something that the Claimant is entitled to ignore."*

17. As the EAT explained, the Judge was wrong about what English law provides: he says that "the change of sex applies for "all

purposes"…", taking that from s 9 of the GRA, but as the EAT said at [97], this can only mean "*all "legal purposes." That the effect of s 9 GRA is not to erase memories of a person's gender before the acquired gender or to impose recognition of the acquired gender in private, non-legal contexts is confirmed by the comments of Baroness Hale in* **R(C) v Secretary of State for Work and Pensions** *[2017] 1 WLR 4127…*"

18. In fact there are legal purposes for which the change of sex is not recognised. As s 9(3) states, this applies only subject to contrary provision, and considerable contrary provision does exist.
19. Section 12 provides that status as a mother or father is unchanged by the issue of a certificate; section 16 that a woman cannot become eligible for a male-line peerage by acquiring a Gender Recognition Certificate ("GRC") (or a man lose eligibility).
20. Most significantly, as noted by Baroness Hale in *C v SSWP* at [23], s 9(2) provides that the holder of a GRC is only treated as being of the acquired gender prospectively: a male who acquires a GRC in 2019 is treated as male up until that date and female afterwards. This strongly suggests that the point of a GRC is not to recognize some underlying reality (according to which this apparent man is in fact a woman) but is rather more limited: to allow official documents to match the gender that someone presents as, so as to avoid embarrassment when they show those documents to other people. If a transwoman is really and in all senses a woman, it does not make sense that the law should treat them as a man until the date on the certificate and a woman afterwards.
21. There is also contrary provision in other legislation: the Equality Act 2010 explicitly provides that single-sex services can discriminate against transgendered individuals where that serves a legitimate aim (Schedule 3 para 28), whereby (for example) a woman's refuge can exclude transwomen. The same applies for employment (Schedule 9 para 1) which, as explained in the Explanatory Notes to the Equality Act, allows for situations such as "*A counsellor working with victims of rape might have to be a woman and not a transsexual person, even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.*"
22. Irrespective of the Judge's mistakes as to the meaning of the GRA, it is also surprising that the Judge thought that Ms Forstater (who is a private individual) was "*not entitled to ignore*" the GRA.
23. This seems to suggest that disagreeing with legislation, even legislation that takes a firm position on a question relevant to human rights, is necessarily outside the protection of discrimination law. There is at present vigorous debate on the terms of the Police, Crime, Sentencing and Courts Bill and whether it provides sufficient protection for freedom of expression: if the bill passes in its current form, would protestors against it be unable to invoke their freedom of expression because Parliament has decided what the correct balance is and they are "not entitled to ignore" that? Such a winner-takes-all approach to legal decisions, where the

losing side in a debate becomes semi-outlawed (that is, they are not eligible for the law's protection), sounds more totalitarian than rights-based as a legal order.

"Causing distress"

24. The second aspect of the Judge's reasoning focused on the distress caused by Ms. Forstater's belief that transwomen are not women.
25. The Judge repeatedly refers to "harassment", and if you read paragraphs to 87 to 91 quickly you could be forgiven for thinking that Ms Forstater had been picking fights with people at work or deliberately upsetting trans people.
26. However, Ms Forstater had explained that she did generally address trans people using the pronouns they requested and endeavoured to be polite: at paragraph 41, "*She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to…*"
27. In fact, (with one exception, that of Gregor Murray, dealt with below), the Judge did not base his decision on any expectation that Ms. Forstater would be rude to individual trans people, target them or say anything intended to upset them. Rather, he took the view that refusing to conceal a belief that (for example) transwomen are not actually women in all senses was something that in itself caused serious distress to any trans person who realised that this was what Ms. Forstater believed.

> [85], "*Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The Equal Treatment Bench Book notes the TUC survey that refers to people having their transgender status disclosed against their will. The Claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a persons [sic]…*"
>
> [87] "*Human Rights law is developing. People are becoming more understanding of trans rights. It is obvious how important being accorded their preferred pronouns and being able to describe their gender is to many trans people. Calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.*"
>
> [88] "*… While the Claimant will as a matter of courtesy use preferred pronouns she will not as part of her belief ever accept that a trans woman is a woman or a trans man a man, however hurtful it is to others…*"
>
> [91] "*I do not accept that this analysis is undermined by the decision of the*

> *Supreme Court in Lee v Ashers that persons should not be compelled to express a message with which they profoundly disagreed unless justification is shown. The Claimant could generally avoid the huge offense caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person sex at all. However, where it is, I consider requiring the Claimant to refer to a trans woman as a woman is justified to avoid harassment of that person…"*
>
> *(Underlining is added)*

28. What seems to be meant by Judge Tayler is that simply expressing the opinion, however politely, that someone does not believe trans women are genuinely women, is itself harassment, even if published to the world online rather than in conversation to a particular individual. The Judge seemed to see trans people as exceptionally vulnerable to language and to the perception of others.
29. However, he did not point to evidence for this: none of the passages underlined above are explained by reference to evidence before him.
30. It is not unknown for a court to rely on facts established otherwise than before it. With matters of common knowledge, the court may take "judicial notice", unless the parties insist that the fact be proved. That applies to facts "*so notorious or well-established to the knowledge of the court that they may be accepted without further enquiry*"[14] but that could hardly apply to the nature of transgenderism. Similarly, judicial notice can be taken from learned works where the matters are "*indisputable*" "*and may be taken from accepted writings, standard works and serious studies and enquiries…*", though the parties are expected to demonstrate to the court that the facts are indisputable in this sense and that the learned works do speak with one voice on the matter. However, the meaning of sex and gender is not a settled area of undisputed knowledge in that way.
31. What he did point to is a document called the Equal Treatment Bench Book ("the Bench Book") (at paragraphs 8 to 14 and 85 of his decision). Chapter 12 of the Bench Book concerns transgenderism. This document was produced by the Judicial College (the body which exercises the Lord Chief Justice's responsibility for training judges under the CRA 2005) "*to increase awareness and understanding of the different circumstances of people appearing in courts and tribunals… enable effective communication and [suggest] steps which should increase participation by all parties.*" It offers "*practical guidance aimed at helping make the court experience more accessible for parties and witnesses who might be uncertain, fearful or feel unable to participate…*"[15]
32. Judge Tayler seems to have used the Bench Book not as a guide for helping trans witnesses to take full part in proceedings, but as a guide to transgenderism in general. He begins his analysis by setting out passages from the Bench Book which he says "provides a useful summary" of the "serious discrimination and violence"

14. *Commerzbank AG v Rajput* [2019] I.C.R. 1613, Soole J quoting Phipson on Evidence
15. Courts and Tribunals Judiciary News, Equal Treatment Bench Book: new edition 2021 , 24 February 2021 https://www.judiciary.uk/announcements/equal-treatment-bench-book-new-edition/

suffered by "women and transgender people". The way he used the document is similar to the use of "country guidance" issued by the Upper Tribunal in immigration cases, which acts as a kind of factual precedent. Rather than every first-instance immigration judge having to make findings about whether gay people are in danger in Iran or whether it is safe to return a Christian to Kabul, the Upper Tribunal issues guidance on situations that come up regularly enough to warrant it. That guidance, however, is the result of contested cases where each side calls evidence and the Tribunal hears the testimony of experts who are subject to cross-examination. What the Judge appears to have done in *Forstater* is give that sort of weight to a document issued by the Judicial College, which gives no explanation as to how it was put together or who was consulted or involved.

33. As set out below, the actual guidance in Chapter 12 of the Bench Book has serious problems. It puts forward a concept of trans identity which is quite different from anything recognised in English legislation and is based on self-identification; it encourages judges to require other parties to adopt that concept and to look askance at those who fail to; it puts forward controversial ideological positions and novel legal claims; and it consistently fails to acknowledge that there is any legitimate dispute about the claims that it makes on behalf of trans people. In this paper, I generally refer to the Bench Book as it was at the time of the hearing before Judge Tayler, because it is that version which appears to have led him into error: where relevant I refer to the revision issued in February 2021.

Departing from UK law and applying Self-ID

34. Chapter 12 of the Bench Book presents a scope for "transgenderism" which is much wider and in some ways fundamentally different to anything recognised in English law.[16] This would not particularly matter if the guidance was being used purely to put people at their ease in court and assist them in participating in proceedings: but where (as here) it is being used as a reason to draw adverse conclusions about the merits of someone's argument, and to criticise their behaviour, this is more serious.
35. At paragraph 2, the version before Judge Tayler said that "*Transgender is a broad, umbrella term used to describe a wide variety of people who cross the conventional boundaries of gender…*" and then, at [4],

> *"The gender landscape is rapidly changing, as is the terminology in the field. The broader meaning of 'transgender' encompasses a wide range of gender identities and experiences which fall outside the traditional gender binary (ie categorising people exclusively as male or female). For example, increasing numbers of people identify as 'non-binary' (ie they feel neither male nor female, and may associate with elements of both or neither gender), 'a-gender' (literally 'without gender'), 'genderqueer' (a broad term increasingly popular among young people who do not identify with traditional gender categories, and often associated with a political rejection or radical subversion of conventional gender categories) and as 'gender fluid' (fluctuating between genders). Some people cross-dress on an occasional basis, some identify as 'transvestites'; they may also consider themselves transgender. UK law has not yet caught up with these social changes, and presently makes express provision only for those who wish to reassign their sex…"*

36. This has very little to do with either the Gender Recognition Act (which assumes a binary, and includes a requirement of "living in the other gender" which assumes that that has some form of identifiable quality) or the Equality Act, which does not include a protected characteristic of general "gender identity" but specifically of "gender reassignment". The GRA was introduced following the ECHR case of *Goodwin v UK* (2002) 35 EHRR 18, which held that it was necessary to allow a transgendered person to have their legal records changed to show their adopted sex. The ECHR explained that the repercussions for changing a birth certificate "*in the areas of*

16. Discussed by Maureen O'Hara, *"Compelled Speech: Gaslighting in the courtroom"* Coventry Law Journal 2019 24(1), 55-69 at 62.

access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance…" were tolerable on the basis that this was "*confined to the case of fully achieved and post-operative transsexuals…*" (para 91). It was not a case based on a wide concept of "gender identity".

37. The Bench Book accepts that what it is saying is not what English law recognises, saying "*UK law has not yet caught up …*". This was toned down a little in the February 2021 revision: that passage, now at 7, sets out the same wide explanation of transgenderism before saying "*UK law presently makes express provision only for those who wish to reassign their gender…*" The implication that UK law is eventually going to fall into line with the authors of the Bench Book remains. It is not really for the Judicial College to put forward a radically different concept of transgenderism to the one recognised by Parliament, and to instruct judges that that is how they should approach the issue on the assumption that at some stage in the future Parliament will come to the same understanding as the authors of the Bench Book. This may explain, though, why Judge Tayler was unconcerned with asserting that sex was probably not binary (and that Ms. Forstater was wrong to believe so) despite acknowledging at [83] that UK law assumed that it was. This was a point that the Employment Appeal Tribunal found particularly surprising, saying at [115], "*Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society…*"

38. The only example the Judge points to where he can criticise Ms. Forstater for upsetting a particular individual relies on this wider idea of transgenderism. The Judge criticised Ms Forstater for failing to refer to Gregor Murray as "they" rather than "he". Gregor Murray appears to be male. Gregor Murray does not claim to be a woman, but asks to be described as "they" rather than "he". The Judge said of this that Ms Forstater had refused to "*accommodate Gregor Murrays legitimate wishes…*" (para 89) but it is hard to see how this example has anything to do with transgender rights as governed by the GRA or the Equality Act.[17] It does, however, fit with the wide view of transgenderism that the Bench Book had put before the Judge: as it said at [8], "*Self-definition is the most important criteria, and respect from others for that choice.*"

17. The EAT suggests (footnote 1 to paragraph 99) that some of these wider cases may involve not discrimination or harassment on the grounds of gender reassignment, but on the grounds of belief: as Gregor Murray believes they are non-binary, repeatedly hassling them about it might in some cases be harassment on the grounds of that belief.

Requiring other people to endorse self-ID

39. On the subject of requiring "respect from others for that choice", the introduction to Chapter 12 said,

> *"The Gender Recognition Act 2004 enables some transgender people to apply for legal recognition of their gender identity. For a variety of reasons, not all transgender people apply. Everyone is entitled to respect for their gender identity regardless of their legal gender status. It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns…"*[18]

40. Further, the Bench Book advises strongly against questioning someone's gender identity: at paragraph 23 of the current version, *"It will normally be possible to accept a person's legal gender, or their gender identity, for court or tribunal purposes without further inquiry… Further inquiries may not only be intrusive and offensive, but could breach rights under Article 8 of the European Convention…"*[19]
41. As noted above, the UK does not recognise "Self-ID": this was considered recently and rejected after consultation. The Bench Book, though, describes transgender status, as a characteristic in need of recognition and protection by the courts, as something much wider than the law provides. Further, by warning judges in stark terms against even asking questions about anyone's declared gender identity, the Bench Book adopts a form of super-Self-ID.
42. To the extent that the Bench Book is being used for its stated purpose of helping people to take part in court proceedings, this guidance makes sense: there are people for whom (for example) their non-binary identity is very important and they are likely to ask the judge not to refer to them as "he" or "she". Judicial recognition and understanding of this will help them to participate fully in the court process. Similarly, as a sensitive issue, if it is not relevant to the proceedings then it will usually be appropriate for a judge to address a party or a witness in the way they ask to be addressed.
43. However, quite different concerns arise if this is expected from other people involved in the litigation. The Judge found it outrageous that Ms. Forstater failed to address the (apparently male) Gregor Murray as "they": but Gregor Murray was not seeking something recognised by the GRA or by the Equality Act.
44. It is a difficulty with Chapter 12 that, partly because (as detailed

18. The 2021 equivalent is organised slightly differently but still includes, *"It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns…"*
19. The same material was previously at paragraph 16.

below) it presents trans people as unusually vulnerable to harm through lack of endorsement by others, much of it appears to be telling judges not just how *they* ought to approach a trans person before them but how everyone ought to.

45. As well as the statement in the introduction that "it is important to respect a person's gender identity by using appropriate terms of address, names and pronouns…", when describing acceptable terminology it currently includes the following:[20]

> *71. 'Deadnaming' is a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or when their birth name is otherwise referred to, instead of their chosen name. This is highly disrespectful and may well be inhibiting and possibly humiliating to a witness, since it amounts to a reference to what may be sensitive part of their social or medical history. If done in public in court, it may also deprive them of the confidentiality protections of the Gender Recognition Act 2004 (by placing their gender reassignment in the public domain permanently).*
>
> *72. Be alert to issues about how someone prefers to be addressed: showing respect for a person's gender identity includes using appropriate titles (Mr/Ms) and personal pronouns (he/him/his; she/her/hers). Some trans people prefer gender neutral terminology (Mx/they/them/theirs), which should be accommodated if that is known*

46. This seems to have encouraged judges to take a severe view of litigants (including those women for whom it is a point of principle) who do not adopt requested pronouns. Judge Tayler saw it as evidence of Ms. Forstater's unreasonable (and intolerable) beliefs that she would not "accommodate Gregor Murray's legitimate wishes": in the sense of paragraph 68, she failed to show respect by using the word "him" instead of "them".

47. This may explain the Maria MacLachlan trial, where Ms. MacLachlan, a 61 year old feminist activist, was hit by Tara Wolf, a 26 year old male who identifies as a woman, because Ms. MacLachlan (who was with a group of feminists speaking against reform to the GRA) was filming a protest by trans activists including Tara Wolf. At Wolf's trial, the judge ordered Ms. MacLachlan to refer to Wolf as "she" and criticised her for failing to do so, this being given as a reason why the judge refused to make an award of victim's compensation.[21] This is surprising behaviour: Ms MacLachlan, the victim, was asked to spare the feelings of her attacker, and to do that by pretending to believe something that she had been attacked (by someone 35 years younger than her) for denying.[22]

48. Hopefully no judge would ask a victim of Islamophobic violence not to take the oath on the Quran in case it upset their attacker, but that is not so very far from what the judge did in that case. This starts to make sense if judges are all told in their training that trans people are highly vulnerable and that it is in all cases serious

20. This was covered in similar terms in the 2018 edition at paragraphs 67 and 68.

21. Melanie Newman, *Warning over transgender guidance to judges*, Law Gazette 24 February 2020 https://www.lawgazette.co.uk/news/warning-over-transgender-guidance-to-judges/5103196.article

22. Martin Coulter, *"Transgender activist Tara Wolf fined £150 for assaulting 'exclusionary' radical feminist in Hyde Park"* Evening Standard 13 April 2018 https://www.standard.co.uk/news/crime/transgender-activist-tara-wolf-fined-150-for-assaulting-exclusionary-radical-feminist-in-hyde-park-a3813856.html

harassment to "deadname" or "misgender" (e.g. use different pronouns to those they prefer) someone. The Bench Book at the time of the trial included the suggestion (paragraph 25) that the reported increase in "transphobic hate crime" could be because of a "*backlash against trans equality rights*". If the Judge in Wolf's trial had read this guidance, he may well have come to court seeing in the victim one of the authors of this "*backlash*" condemned in his own training materials. It is possible that this is how Judge Taylor saw Ms. Forstater.

49. The latest version of the Bench Book has taken out the reference to a "*backlash*", referring instead (at paragraph 35) to "*negative responses to civil rights protections*" as a cause of increased reports of hate crimes. This is not very much better, implying that the (predominantly) women (such as Ms. Forstater) who have been publicly arguing about trans issues in the last few years are the cause of hate crimes against trans people.
50. A more significant change is in what is now paragraph 9, which says: "*It is important to be alive to the fact that the gender history of a person may be something which an opponent* [sic] *litigant may seek to use in order to place pressure on them, such as be deliberately pleading a gender history or former names when there is no legal necessity to do so, or for example pointedly referring to a 'trans' man as 'she' in public documents…*"
51. This is notable. The authors of the Bench Book, as described above, adopt a very wide meaning of trans identity, and instruct judges to accept claims of trans status (or in fact of any gender status) without questioning. If another party to the litigation does not similarly endorse this wide form of Self-ID, the judge is warned to be suspicious of them as it might be a tactic of intimidation.
52. However, there are all sorts of reasons why other people might not adopt the current preferred names and pronouns of a trans litigant. Given the wide view the Bench Book takes, where no questions should be asked, it may be that the current name and pronouns have only recently been adopted. Further, they may not reflect the trans litigant's legal name or legal sex, and other people (especially in formal documents) are likely to try to use formal names.
53. In the criminal context, several UK police forces have stated that they will record suspects, including suspected sex offenders, according to the gender they choose (some of them specifically stating that someone arrested for rape will be recorded as female if they ask for that).[23] In the last few years, courts (and newspapers) have increasingly reported sex crimes as committed by women when the (physically male) offenders are trans, something noted in Parliament by Tonia Antoniazzi MP on 17 May 2021 in a debate on "Safe Streets for All", pointing out how in recent years the reported increase in women convicted of child sex offences was 84%, and that it was impossible to tell how many of these new "female paedophiles" were in fact (as is much more typical) male:[24]

23. Nicholas Hellen, "*Police forces let rapists record their gender as female*" The Sunday Times, 20 October 2019 https://www.thetimes.co.uk/article/police-forces-let-rapists-record-their-gender-as-female-d7qtb7953
24. Hansard, 17 May 2021, Commons debate "Safe Streets for All", 9.26pm, cols 506-507

> *"… Gender reassignment is rightly a protected characteristic and we must respect the privacy of transgender people, but in order to protect everyone when it comes to official records of offences, particularly against women and girls, we need accurate records of the biological sex of the victims and the perpetrators of crime, in addition to data on the gender identity of victims and perpetrators. Why then are police forces recording the self-identified gender of victims of suspected offenders and not their biological sex? I understand that at least 16 regional police forces now record suspects' sex on the basis of gender identity, following the advice of the National Police Chiefs' Council. Data based only on self-identified gender does not give accurate data on which to build a violence against women and girls strategy, nor to effectively plan services that support all victims and target all perpetrators whatever their sex or however they identify.*
>
> *If police records are not robust and correctly disaggregated by sex, we end up with unreliable and potentially misleading data in reporting. For example, the BBC asked 45 regional police forces in the UK for Toggle showing location of data on reported cases of female perpetrators' child sex abuse from 2015 to 2019. The data received indicated that there was an increase of 84%. Data corruption means that we cannot tell whether this large increase is due to an increase in female offenders or those identifying as women, and that detail matters…"*

54. Given that sort of approach from police forces, it is quite possible that a sex offender will be described by the authorities and the court as female when their victim (and other witnesses) perceives them as male. Should the Bench Book be suggesting to judges that a refusal by other people to accept that self-ID is evidence of bad faith or attempted intimidation? This is (though in a less serious criminal context than rape) exactly what happened to Ms. MacLachlan. Dr Maureen O'Hara (Coventry University) has raised concerns that this guidance would encourage defence counsel to challenge complainants in sexual offence trials as to their use of pronouns, as a way of confusing their evidence and intimidating them.[25]
55. As those revising the Bench Book in the last year must have been aware, there is vigorous public debate at present on many issues surrounding transgenderism, and a considerable amount of litigation. The extent to which other people are required to treat a trans individual as if they were their adopted gender for all purposes is central to much of this.
56. Parties to some of these cases may well not accept that they should be obliged to describe people according to the pronouns they choose: or even if they accept that it is sometimes appropriate, they may not accept the very wide and unquestioning deference to a trans person's choice that the authors of the Bench Book require.
57. The High Court recently overturned the conviction of Kate Scottow, who had been convicted by District Judge Margaret Dodd

25. *"Compelled Speech: Gaslighting in the court-room"* Coventry Law Journal 2019 24(1), 55-69 at 65.

of improper use of a public communications network, on the basis of various tweets that she made that were found offensive by Stephanie Hayden, a transwoman and activist.[26] The District Judge said, "*I have reminded myself of Article 10 and accept fully an individual's right to free expression and the right to take part in public debate, and that Twitter is used by many people for that purpose. However, Art 10 rights are not unfettered and I do not find your communications to be part of a debate, they are merely personal comments aimed at Ms Hayden. We teach our children to be kind to each other and not to call each other names in the playground and there is no reason why, simply because some thing is on social media, we should not follow that rule as adults and think about what is being written before sending messages, and not send 'stupid throw away comments'…*" This position was firmly rejected by the Divisional Court at [41]: "*The prosecution argument failed entirely to acknowledge the well-established proposition that free speech encompasses the right to offend, and indeed to abuse another. The Judge appears to have considered that a criminal conviction was merited for acts of unkindness, and calling others names, and that such acts could only be justified if they made a contribution to a "proper debate"*."

58. One of the complaints made by Hayden was that Kate Scottow had "misgendered" them.[27]

59. Should women such as Ms. Forstater or Ms. Scottow (who hold what are sometimes described as "gender critical" beliefs) be required to pretend that they *do* recognise someone like Gregor Murray as not being male, or someone like Stephanie Hayden as being a woman, in order to participate in litigation? Warning judges that a party who refuses to endorse a trans person's preferred pronouns might be acting in bad faith and trying to intimidate does seem to stack the deck somewhat against "gender critical" litigants, forcing them either to speak in court in a way inconsistent with the beliefs they hold and the arguments they are making, or to antagonise the Judge. It has been noted that this seems to stray close to a form of "compelled speech" inconsistent with the decision of the Supreme Court in *Lee v Ashers Baking Co* [2018] UKSC 49.[28]

60. Judge Tayler downplayed this aspect of his decision, saying that Ms Forstater was still able to argue that transwomen should not be included in all women's spaces, or to compete against women in sport even if she was forced to describe transwomen as women: indeed, he says that both of those may be permissible outcomes (paras 79 and 80), though given his belief that the GRA deemed a transwoman to be a woman "for all purposes" (paragraph 84) this seems hard to follow.

61. However, controlling the way a debate is conducted is a way of controlling the outcome. Taking Karen White's case again:[29] if no one is allowed either to give Karen's former name (Stephen Wood) or point out that Karen is physically male, it makes talking about the issue of male-born sex offenders placed in women's prisons much more difficult. While Judge Tayler said at 86 that Ms Forstater "*can legitimately put forward her arguments about the importance of some safe*

26. [2020] EWHC 3421

27. See *Hayden v Associated Newspapers* [2020] EWHC 540 at 38.

28. Maureen O'Hara (Coventry University) *"Compelled Speech: Gaslighting in the court-room"* Coventry Law Journal 2019 24(1), 55-69 at 68.

29. James Kirkup, "*Why was a transgender rapist put in a women's prison?*" The Spectator, 7 September 2018 https://blogs.spectator.co.uk/2018/09/why-was-a-transgender-rapist-put-in-a-womens-prison/. Similarly, the case of Martin Ponting/Jessica Winfield, Brendan O'Neill, *"A rapist in a women's prison? Society has lost the plot"* Spiked, 11 September 2017 https://www.spiked-online.com/2017/09/11/a-rapist-in-a-womens-prison-society-has-lost-the-plot/. Prohibiting "deadnaming" would have made it impossible to work out what crimes these people had committed, as they were reported under their former names.

spaces that are only be [sic] *available to women identified female at birth, without insisting on calling trans women men…*" it makes it much more difficult for those who want to defend women's spaces to make their case persuasively (or even comprehensibly) if they first have to pay lip service to the idea that the males in question are women. It makes it all but impossible to apply such single-sex exceptions in practice if, as Judge Tayler suggested at para 85, it is important not just to accept that a transwoman is a woman but also to avoid revealing that they are transgender at all. That suggestion is in line with the advice in the Bench Book, which stated that it was disrespectful to call someone transgender against their wishes if, after having transitioned, they "*no longer regard themselves as transgender, but simply as men or as women…*"[30] The same point is made in the most recent version, saying at 4 that describing someone as "transgender" without their agreement "*may be understood as an attempt … to treat them as in some sense a less than authentic man or woman…*"

62. Athletes (such as Sharron Davies and Martina Navratilova) have argued that transwomen have an unfair advantage in sports if they compete against women rather than men.[31] The Judge said that it was permitted to make this argument, saying at [80] "*There might be circumstances in which a trans woman is recognised as an [sic] woman, but is not permitted to compete in sport on an entirely equal basis with women assigned female at birth, if that would create an unfair advantage…*" but it is extremely hard to argue about this in an comprehensible fashion if it is not permitted to say that the reason for the unfair advantage is that transwomen are physically male.

63. For a clear recent example, Chelsea Mitchell, a teenage American girl who runs competitively, wrote an article in USA Today explaining why policies allowing transwomen to compete as women were unfair: in her state, after this policy was introduced, the same two transwomen proceeded to win 15 women's titles. She explained that her objection was that there was no point in competing as a girl, "*simply because there's a runner on the line with an enormous physical advantage: a male body*" … "*because males have massive physical advantages. Their bodies are simply bigger and stronger on average than female bodies. It's obvious to every single girl on the track…*"[32] Shortly after publication, USA Today revised her piece saying it contained "*harmful language*": what they did was remove every reference to transwomen being male. The quoted lines now read, "*simply because there's a transgender runner on the line with an enormous physical advantage…*"… "*Their bodies are simply bigger and stronger on average. It's obvious to other girls on the track…*"[33] This destroyed her ability to make her argument. Maybe she isn't right: maybe the physically male body of a transwoman doesn't create an unfair sporting advantage (though the evidence is increasingly clear that it does)[34]: but that was what the argument was about. Requiring her to make her argument while pretending to believe that transwomen do not have male bodies prevented her from explaining herself at

30. Paragraph 8.

31. BBC, "*Sharron Davies: Former British swimmer says transgender athletes should not compete in women's sport*" 2 March 2019 https://www.bbc.co.uk/sport/swimming/47428951; BBC, "*LGBT group severs links with Navratilova over transgender comments*" 20 February 2019 https://www.bbc.co.uk/news/world-us-canada-47301007

32. Chelsea Mitchell, "*I was the fastest girl in Connecticut. But transgender athletes made it an unfair fight.*" USA Today, original version, 22 May 2021 https://web.archive.org/web/20210522125611if_/https://www.usatoday.com/story/opinion/2021/05/22/transgender-athletes-girls-women-sports-track-connecticut-column/5149532001/

33. Ibid, amended version https://eu.usatoday.com/story/opinion/2021/05/22/transgender-athletes-girls-women-sports-track-connecticut-column/5149532001/

34. Harper J, O'Donnell E, Sorouri Khorashad B, et al "*How does hormone transition in transgender women change body composition, muscle strength and haemoglobin? Systematic review with a focus on the implications for sport participation*" British Journal of Sports Medicine Published Online First: 01 March 2021 https://bjsm.bmj.com/content/early/2021/02/28/bjsports-2020-103106; Hilton, E.N., Lundberg, T.R. *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage* Sports Med 51, 199–214 (2021) https://link.springer.com/article/10.1007/s40279-020-01389-3

all.

64. The Bench Book does not acknowledge that some of the accommodations it advocates for transgender people might have any negative impact on others. It made the contentious claim that a trans woman (i.e. a biological male who identifies as a woman) who is sexually attracted to women is a lesbian: at [9], "*Transgender people can be straight, gay/lesbian or bisexual, the same as everyone else. For example, a transgender woman may identify as a lesbian if she is attracted to women…*" This is in the context of a definition of transgender which includes cross-dressing "*on an occasional basis*" (para 4): it therefore seems that the authors of the guidance see it as uncontroversial to claim that a male who sometimes cross-dresses is a lesbian if they are attracted to women.[35] The statement in para 8 that, "*When some people complete their transition, they may no longer regard themselves as transgender, but simply as men or as women. It would be disrespectful to insist on calling them transgender against their wishes…*"[36] does not acknowledge that it may be significant to other people that the person in question is transgender. The February 2021 guidance warns against this not only for the judge but "*those taking part in a hearing*".[37]

65. These are all claims that are genuinely argued for in the current debate on how transgenderism should be understood, but the Bench Book does not acknowledge that any of its claims are contentious. The only acknowledgement it makes that anyone might disagree is the warning it gives its readers (para 25) that there is currently a "*backlash against transgender equality rights*", recently replaced as "*negative responses to civil rights protections*", which appears to be a warning to judges that they should take a dim view of those, like Ms. Forstater, who disagree with the claims made by the authors of the Bench Book.

35. The same point is made in the new Chapter 12 at [14], but by reference to being a gay man.

36. The same point is now made in para 4.

37. Paragraph 4.

Putting forward controversial claims as if undisputed

66. Chapter 12 of the Bench Book does not read as purely about helping judges put transgender people at ease in court: some of it is about that, but it also reads as an apparently objective guide to the phenomenon of transgenderism and to gender in general. It adopts highly contentious terminology without comment or explanation, presenting ideas which have very little purchase outside campaigning organisations as if they are uncontroversial. Given the level of public dispute on these issues, it is problematic that the Judicial College does not alert judges to the fact that some of their claims are seriously disputed: something that the authors of the 2021 revision must have been well aware of. Going further, as they do, and warning judges against people who do not adopt the wide form of self-ID and deference to language that the Bench Book recommends, does seem to present a risk of unfairness.
67. It generally refers to physical sex as "gender assigned at birth", a formulation reflecting the idea that a baby boy or girl is not "really" male or female but that their parents have chosen this on their behalf. No explanation of this concept is given: it is presented as obvious.[38] This language (which stems from a particular claim as to how sex and gender identity relate) has been pushed by some organisations but it can hardly be said to represent a mainstream view. While Dawn Butler MP, then a candidate for Labour Deputy Leader, claimed in public: "A child is born without sex…"[39] (before retracting that a few days later),[40] the more typical view is represented by the NHS guidance on "Can I find out the sex of my baby" which points out that that can be done during a 20 week scan if the hospital permits.[41]
68. Judge Tayler adopted the language of "assigned at birth" in his decision, against the objections of Ms. Forstater. She was right to object: the idea that sex is assigned is itself an endorsement of the claim that sex is *not* based on physical reality, i.e. that her beliefs were wrong.
69. Similarly, it uses the language of "cisgender", saying "*The term 'cisgender' or 'cis' is often used to describe people whose gender identity corresponds to the sex assigned to them at birth. 'Cisgender' has its origin in the Latin prefix 'cis' which means 'on this side of'…*". If this document is about putting trans people at their ease in court, it is not clear why it is instructing

38. The Bench Book does not appear to be distinguishing between the concepts of "sex assigned at birth" and "gender assigned at birth": while one might make an argument that sex is physical and real but "gender" is a social category which is separate from that, the Bench Book's chapter on sex is titled "Gender" and the distinction between women and men is generally treated as about gender, not sex. No explanation is ever actually given of "gender identity". Generally the Bench Book suffers from the problem recently noted in *R(FDJ) v Justice Secretary* [2021] EWHC 1746 at [6], of using "sex" and "gender" interchangeably whether or not they mean the same thing in that context.
39. Svar Nanan-sen *"Labour MP stuns Richard Madeley with 'insane' comment babies are born 'without sex'"* Daily Express, 18 February 2020 https://www.express.co.uk/showbiz/tv-radio/1243758/Labour-MP-Dawn-Butler-Richard-Madeley-sex-baby-ITV-Good-Morning-Britain-GMB-latest-video
40. David Atkins, *"Labour's Dawn Butler in shock U-turn after claims babies are born 'without sex'"* Daily Express, 24 February 2020
41. NHS guidance, *20 week screening scan* https://www.nhs.uk/common-health-questions/pregnancy/can-i-find-out-the-sex-of-my-baby/

judges on the proper way to refer to people who are not trans: if, rather, it aspires to educating judges about how they should think about sex and gender, then this makes more sense. There was no acknowledgement that not all women like being described as "ciswomen" rather than simply as "women", as that assumes a theory of sex and gender that many disagree with.[42] The February 2021 version acknowledges that "*the terminology may not be appropriate depending on how the person who is the object of the description wishes to be referred to, especially if it is a term they have not encountered or have not had explained to them…*"[43] but it presents this as a question of familiarity rather than disagreement. The authors of the Bench Book, here as elsewhere, do not acknowledge that anyone might understand the claim being made but disagree with it in good faith: that a woman might not want to be described as a "ciswoman" not because she does not understand the term but because she does understand it.

Unsupported assertions of law

70. While the general introduction to the Bench Book makes clear that it does not represent the law, the authors of Chapter 12 make various claims about the law without pointing to judicial decisions to support them.
71. As noted above, the Judge took the view section 9 of the GRA means that possession of a Gender Recognition Certificate changes someone's sex "for all purposes". This is a reading of that Act that is disproved simply by reading the whole of section 9, which points out that that is subject to exceptions. However, the Bench Book also adopts this view of the meaning of section 9 (para 48, now para 54).[44]
72. As mentioned above, the Bench Book warns judges not to ask questions about someone's gender identity, saying that "further inquiries may not only be intrusive and offensive, but could breach rights under article 8 of the European Convention…" This is a very surprising claim. It is quite well established that someone's gender identity is a component of their private life and that if a public body discloses it against their wishes that may be an interference with Article 8 (sometimes justified, sometimes not). Occasionally that is given as a reason for anonymising a court judgment. But there does not seem to be any judicial authority suggesting that *questioning* someone's gender identity could breach Article 8. None is pointed to by the authors of the Bench Book.
73. Similarly, the requirement that issues of gender identity should only be addressed as part of the proceedings if they are relevant to the dispute is upgraded in the Bench Book to being "relevant and necessary" (see for example paragraphs 22, 23 and 28).
74. Section 22 of the Gender Recognition Act makes it a criminal

42. Noted in respect of Ms. Forstater in the decision at 10, also, for example, https://www.mumsnet.com/Talk/womens_rights/3168124-cis-is-an-abusive-term?.
43. At 68.
44. This and the narrow reading of s 22 are commented on by Kate Colman, Director of Keep Prisons Single Sex, at https://www.conservativehome.com/thecolumnists/2021/05/radical-the-criminal-justice-system-has-been-thoroughly-captured-by-gender-identity-ideology.html.

offence if someone who knows a trans person has a Gender Recognition Certificate, and who has come to know that in an official capacity (including as employer) from disclosing that save in certain circumstances. One permitted circumstance is for the purposes of legal proceedings. The Bench Book restricts that, saying in the introduction that this should be interpreted narrowly, and (para 27 of the current version) that this must be relevant "to the fundamental purpose of the proceedings themselves". None of this seems to be based on any judicial guidance. It is not at all clear what the difference between being for the purposes of legal proceedings and the fundamental purposes of those proceedings means: the distinction appears to have been invented by the authors of the Bench Book. Given that the (for example) employer who wrongly discloses is liable to criminal conviction, this is a serious issue, and it is not really for the authors of the Bench Book to suggest that the defence to a criminal charge is narrower than it is.

75. On all these points, the legal position taken by the Bench Book is not necessarily wrong (though each seems highly doubtful). They might in due course turn out to be correct. But it is not for the Judicial College to invent new legal thresholds or tests and present that as part of their equality guidance: as the introduction to the Bench Book as a whole states at paragraph 2, "the Bench Book does not express the law".

Being harmed by the beliefs of others

76. As noted above, the Bench Book emphasises the importance of accepting a trans person's requested name and pronouns, and avoiding reference to previous names: going so far as to warn that another party to the litigation who fails to do this may be acting maliciously, in order to intimidate.
77. It is good for a judge to know that referring to a transgender person's previous name may be sensitive. But it cannot sensibly be said that third-party comment that does this is necessarily "highly disrespectful" as suggested in the current Bench Book at 71: for example, Caitlyn Jenner used to be called Bruce, and the idea that (for example, where historic Olympic victories are being discussed) some harm is being done by referring to that name or that Jenner competed as a man is implausible. More seriously, in cases like that of the convicted rapists Stephen Wood and Martin Ponting who became Karen White and Jessica Winfield, using their previous names is vital to understanding why Karen White and Jessica Winfield might be dangerous in a women's prison. Their crimes are reported under the names they held at the time, and discussing those crimes is impossible without revealing their trans status, as rape requires a penis.
78. Refusing to use someone's preferred pronouns is something that may be upsetting. If it happens repeatedly to a colleague then it might create an oppressive work environment. This is why Ms. Forstater said that she generally would adopt preferred pronouns in social interactions. On the other hand, even at work, there are limits to politeness. If someone repeatedly made an issue of saying that a transwoman co-worker was male, or kept ostentatiously referring to them as "he", that might well be harassment: but nobody is entitled to expect their co-workers to agree with them on everything that matters to them. As the EAT noted at [99], whether or not "misgendering" will be harassment is going to depend entirely on the context: "*whether it is reasonable for the impugned conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment…*". An employer cannot expect the sole atheist on their staff to pretend to go to church to avoid upsetting their religious colleagues, but they can (for example) expect them not to keep insulting those colleagues. Being described as "he" or "she",

no matter how unwelcome, is not an insult (despite the surprising conviction of a teenager with Asperger's for yelling "Is it a man or a woman?" at a transgendered police officer – he was fined £390 and ordered to pay £200 compensation, a decision which seems to have taken little account of the guidance in the Bench Book on autism spectrum conditions) [45]. As Lord Sumption has written extrajudicially, the GRA was not intended to regulate social courtesies, and "*In a democratic society we have to live with each other. That includes living with each other's beliefs. As John Stuart Mill observed 150 years ago, in a liberal society the law does not exist to force us into conformity, but to protect us from actual harm. It is not obvious that being offended by someone else's beliefs counts as actual harm.*"[46]

79. Ms Forstater in fact made clear that she did intend to use preferred pronouns as a matter of generality. The Judge held that this was not good enough: by failing to accept that a transwoman was a woman, and by maintaining that in some circumstances she might need to be clear that she thought that, she was "causing harassment" (para 91).

80. This represents a wide extension in the meaning of harassment, as the Judge seems to be suggesting that transgendered people need to be protected from *knowing* that anyone believes sex is immutable. We live in a diverse society: many of us believe things that many others find profoundly objectionable, even about intimate parts of their identity. It is not harassment of monks and nuns for someone to argue in public that there is no God (or even to claim, as Richard Dawkins has, that educating a child in a religion is a form of child abuse)[47], no matter how integral to their sense of self their religious faith is. Similarly, it would be inappropriate for the courts to require non-Catholics to pretend to believe that God is present in the Eucharist (or to kneel when a Eucharistic procession passes them), or non-Muslims to describe Mohammed as a prophet. The central importance of these beliefs to the sense of identity and way of life of those who hold them do not mean that there is any harm involved in knowing that not everyone agrees.

81. Assuming that a transwoman (for example) is aware that not everyone else thinks that sense of identity is what makes someone a woman rather than a man, and is aware of the physically male aspects of their body, then knowing that Ms. Forstater would see them as a man is not harm, any more than knowing that Richard Dawkins exists is harm to someone who has dedicated their life to prayer. It is not realistically possible that those trans people who do see a transwoman as literally and completely a woman (not all trans people do so)[48] could be insulated from knowing that not everyone agrees with the meaning that they use for "man" or "woman".

82. Even if it were possible it would be highly undesirable, in terms of the stultifying and controlled intellectual environment it would imply. We all have to accept that sometimes our most intimate

45. CPS news, *Transphobic hate crime results in increased sentence for Mold teenager* 29 January 2020 https://www.cps.gov.uk/cymruwales/news/transphobic-hate-crime-results-increased-sentence-mold-teenager; Madeline Kearns, *"Thought Police Target Teen with Asperger's"* National Review 29 January 2020 https://www.nationalreview.com/corner/thought-police-target-teen-with-aspergers/

46. Jonathan Sumption, *"Should thinking the law is wrong count as a philosophical belief?"* The Times 9 January 2020 https://www.thetimes.co.uk/article/should-thinking-the-law-is-wrong-count-as-a-philosophical-belief-xmsg75j52

47. Ian Dunt, *Dawkins: Faith schools are child abuse*, Politics.co.uk, 22 September 2009 https://www.politics.co.uk/news/2009/09/22/dawkins-faith-schools-are-child-abuse/

48. Izzy Lyons, *"Transgender woman accused of 'hate speech' after wearing t-shirt stating she is still biologically male"* The Telegraph 22 December 2019 https://www.telegraph.co.uk/news/2019/12/22/transgender-woman-accused-hate-speech-wearing-t-shirt-stating/

decisions and feelings will not be accepted by others. If those others are close to us then it can be traumatic, for example when a parent opposes a choice of spouse. Even then we would not see this as the sort of harm that the law exists to protect us from. Being in a relationship with someone where their views matter to you means that you are at risk of being hurt by those views: a situation where they were pressured to lie to you about their views to spare your feelings would be much worse, as you would never be able to know whether their approval was real. However, disapproval or rejection from people we do not know or interact with (save by choosing to read their publications) is not really harm at all.

83. It may well be, however, that demands to silence views such as Ms. Forstater's are not really about protecting trans people from encountering those views. For the reasons above, that is a barely coherent aspiration. What may actually be going on with claims of extreme fragility is an attempt to drive those arguments out of the public square: to make sure that people like Ms. Forstater know that if they try to dispute some of these claims they will be punished.

84. Judge Tayler actually went further than the Bench Book in his view of the harms caused by failing to accept someone's self-understanding. The Judge's perception of the consequences of being exposed to Ms. Forstater's opinions is dramatic: he went from "highly disrespectful" (the Bench Book's formulation) to "causing huge offence" "enormous pain" or being "profoundly distressing." The actual harms suffered by trans people described in the Bench Book at paragraphs 10 to 13 were rather more concrete complaints of "*job or home loss, financial problems and difficulties in personal relationships…*": the Judge seems to have extended this and decided that a serious component of the harm suffered by transgender people was the failure of others to agree with their self-understanding.

85. However, this approach, where trans people are treated as unusually vulnerable to the beliefs of others, seems to have spread among the judiciary. Because sentencing remarks are rarely reported (and when they are, they are not comparable to fully reasoned judgments) it is hard to find out whether the Bench Book has played a role, but there have been several recent cases where judges seem to have taken their decisions, like Judge Tayler, based on a very high view of the fragility of trans people. In June 2018, a group including three transwomen in their twenties (Tamzin Lush, Tylar-Jo Bryan and Amarnih Lewis-Daniel), who had been drinking, were insulted near Leicester Square by a 19 year old boy who said "You need a fanny to be a woman". One of them kicked him to the ground, and the three of them (joined in, it seems, by Ms Bryan's sister Hannah Bryan) proceeded to stamp on him and kick him in the head. The teenager was taken to hospital. When Lush, Bryan and Lewis-Daniel were sentenced in late 2020 for violent disorder, the Judge Nigel Seed QC avoided custodial sentencing and said,

"*I accept that what happened to you in the beginning of this incident is entirely wrong, and people like you should not be subjected to that sort of abuse in public or anywhere… You are being punished for your overreaction to someone who has escaped punishment altogether.*"[49] While the teenager's behaviour was obviously reprehensible, it is not clear why the judge saw his being knocked to the ground and then being kicked in the head by a gang of older males as "escaping punishment altogether" for insulting them. As with the MacLachlan case, it seems that examples of rather stereotypical young male violence, attacking someone weaker for failing to show sufficient respect, are treated very differently by the courts if the offender is a transwoman.

49. Joe Roberts, *"Transgender women 'regret' attacking teen who said they need female genitals"* Metro 7 December 2020 https://metro.co.uk/2020/12/07/transgender-women-regret-attacking-teen-who-said-they-need-female-genitals-13712060/

Lack of transparency

86. If the Judicial College is going to issue guidance setting out the background facts relating to any particular minority, it is important that the way that guidance is produced is transparent. Otherwise, as appears to have happened here, it is very easy for partisan explanations and claims to end up clothed in official authority and to be treated as if they have an evidential basis. That seems to have been Judge Tayler's approach. While the EAT reversed his decision, it still seems to have assumed that because something appears in the Bench Book it can be assumed to be true: they set out a passage from the Bench Book to demonstrate the difficulties faced by trans people in the UK, at [3].

87. Sadly, the Judicial College is very far from transparent in this respect. The Bench Book does not explain who wrote it, and no explanation was given in February 2021 for the changes made to Chapter 12. The Judicial College has refused to identify the external experts and organisations it had relied on to produce Chapter 12,[50] and FOI requests have been turned down on the basis that judicial training materials are outside the scope of the Freedom of Information Act.[51] Even who is responsible for the Bench Book seems not to be made public: there is an Equal Treatment Bench Book Committee,[52] but its existence and membership are not set out when describing the structure of the Judicial College, though four other committee are.[53]

88. The Judicial College is surprisingly opaque about the source, and in fact the content, of the training it gives to judges. It appears from a document called the Judicial College Prospectus 2020-21 that the general confidentiality rules for any training arranged by the Judicial College involve forbidding the disclosure of any training materials to a non-judge.[54] In 2019 Gendered Intelligence, a transgender advocacy and campaigning group, delivered training to the Employment Tribunal.[55] However, FOI requests for the content of that training have been refused.[56] Gendered Intelligence is one of the parties bringing judicial review proceedings against the Charity Commission for registering the LGB Alliance (a gender-critical campaigning organisation) as a charity: if they have also been involved in training judges, the content of that training is something that, in fairness, the LGB Alliance ought to know when resisting their application, as ought anyone else who ends up on the opposite side to this organisation (or any other organisation providing judicial training) in court.[57] If the Judicial College is going to invite campaigning organisations (who are involved in litigation about these issues) to train the judiciary, it is worrying that the content of that training is kept secret.

50. Melanie Newman, *Warning over transgender guidance to judges*, Law Gazette 24 February 2020 https://www.lawgazette.co.uk/news/warning-over-transgender-guidance-to-judges/5103196.article

51. FOI request made by Tessa McInnes to the Judicial College, published at https://www.whatdotheyknow.com/request/names_of_all_the_external_expert#incoming-1584188

52. It is identified as the author of "Good Practice for Remote Hearings", https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf

53. Webpage "Governance" in the Judicial College section of the Courts and Tribunals Judiciary website, https://www.judiciary.uk/about-the-judiciary/training-support/judicial-college/governance/.

54. Judicial College, *Judicial College Prospectus 2020-21* at pages 10 and 102.

55. Sian Davies, *Trans awareness training*, Tribunals, Edition 3 2018 https://www.judiciary.uk/wp-content/uploads/2019/06/davies-2018-trans-awareness.pdf

56. FOI request made by M Raynard to the Courts and Tribunals Service, recorded at https://www.whatdotheyknow.com/request/gendered_intelligence_training_t

57. Crowdjustice web page, https://www.crowdjustice.com/case/lgba-charity-status/ "*Mermaids, supported by LGBT+ Consortium, Gendered Intelligence, LGBT Foundation, TransActual, and Good Law Project, are appealing the Charity Commission's decision to award the so-called "LGB Alliance" charity status…*"

Conclusion and recommendations

89. The Judicial College's guidance should not make a practical difference to how cases are decided, rather than merely how they are conducted. Ms Forstater appears to have begun this case several points down, because the Judge had already been provided with a partisan explanation of the issues involved in transgenderism, which warned him that there was a "backlash against transgender equality" going on in a way that implied it was people like Ms. Forstater who were driving up hate crime. Cases like that of Maria MacLachlan suggest that this is not an isolated incident.
90. In general, Chapter 12 of the Bench Book reads surprisingly like advocacy rather than guidance, and is notable for its failure to acknowledge that many of the claims put forward are matters of serious ongoing dispute. Reading this guidance, it is easier to see why the Judge was so convinced that Ms Forstater held opinions which were outside the scope of disagreement: she held opinions that differed from those he had been provided with in his bench handbook which appeared to set out the established view on transgenderism. It is possible that the partisan tone of the Bench Book encouraged the law firms who refused to act for Ms. Forstater to think that it was appropriate to do so, and will have fed into the climate where the Solicitor's Regulation Authority could tell her that there was nothing wrong with lawyers refusing to support her claim to belief discrimination because they disapproved of her belief.[58]
91. Following the *Forstater* decision, there was questioning of the apparently ideological stance taken by Chapter 12.[59] It is troubling that a year later, the Bench Book has been revised but still presents a partisan stance with no admission that many of the claims made are hotly disputed. Indeed, as noted above, some of the changes seem liable to prejudice the judiciary against litigants who disagree with that stance.
92. While the EAT overturned Judge Tayler in *Forstater*, it still treated the explanation in the Bench Book of the position of trans people in the UK as if it was some sort of established fact, quoting it at some length at the beginning of the judgment: very much like the way immigration country guidance might be treated. It would be entirely inappropriate for the Immigration Tribunal to accept as uncontested fact a summary of the conditions for minorities in

58. Maya Forstater, One's sex can't change. The story of my fight to ensure that this view, held by so many, is judged "worthy of respect" Conservative Home website, 14 June 2021, "https://www.conservativehome.com/platform/2021/06/maya-forstater-my-belief-that-sex-is-real-and-immutable-is-worthy-of-respect-heres-the-story-of-my-struggle-to-get-a-court-to-say-so.html
59. Melanie Newman, *Warning over transgender guidance to judges*, Law Gazette 24 February 2020 https://www.lawgazette.co.uk/news/warning-over-transgender-guidance-to-judges/5103196.article; https://www.thearticle.com/trans-lobbyists-have-no-place-in-the-justice-system

(say) Iran that was produced internally and without scrutiny by the Home Office, and likewise the internal decisions of the Judicial College should not be treated as establishing facts that courts can rely upon.

93. This is not the only situation where well-intentioned guidance, supposed to create a more welcoming environment for trans people, has stretched into undermining the rights of others (particularly women who dispute some of the claims made in respect of trans identity). In 2019 the University of Essex prevented two academic women from speaking after they were denounced as "transphobes". The barrister Akua Reindorf produced a report into those incidents which led to formal apologies from the university.[60] Reindorf explained that the University had breached its obligations to ensure freedom of expression and its duties under the Education Act for a number of reasons. A key aspect was that the University's Supporting Trans and Non Binary Staff policy misunderstood the law in important respects: asserting that gender identity and trans status were protected characteristics under the Equality Act, that refusing to use preferred pronouns was unlawful discrimination, and that inappropriately questioning someone who sought to enter a single-sex space would not be tolerated by the university (the report at 225-226). This, in Ms. Reindorf's view, led to the University believing that the two academics were at risk of unlawfully harassing trans students simply because they had written letters to newspapers arguing against the proposed introduction of self-ID (see 243.9-243.11). The University's policies (like the Bench Book) took a very high view of the harm caused to trans people by encountering disagreement. Ms Reindorf pointed out that the policies had regularly been reviewed by Stonewall, but that they stated "*the law as Stonewall would prefer it to be, rather than the law as it is…*" (see 243.11).[61]

94. It should be emphasised that judicial education, carried out through the Judicial College, is not supposed to tell judges what the facts are on the very questions that are before them but is supposed rather to help them to conduct fair hearings. That is how the Bench Book has generally been used in other reported cases (not concerning transgenderism): see for example *Waraich v Ansari Solicitors* [2019] EWHC 1038 (Comm) at [45], on the need for an interpreter.

95. However, the current Bench Book, which has spread to the enormous size of 561 pages, is not focused on information judges need to help minorities take full part in the court process: rather, it seems to be attempting to provide an overview of the difficulties faced by minorities in British society generally. That is a near-impossible task, and it is unsurprising that where detailed explanations are presented (as in Chapter 12) it ends up highly partisan. The detail of any important area of discrimination of disadvantage will often be hotly contested, and internal discussions in the Judicial College are

60. Akua Reindorf, Report of 21 December 2020 / 21 May 2021, available at https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers

61. While the Bench Book does not explain how it was put together, Maureen O'Hara of Coventry University noted that the wide definition of transgenderism is very similar to ones put forward by Stonewall and the Gender Identity Research and Educations Society: *"Compelled Speech: Gaslighting in the courtroom"* Coventry Law Journal 2019 24(1), 55-69 at 62 and footnote 27.

not a suitable forum to resolve questions of sociological evidence.

96. This paper has only looked in depth at Chapter 12, where the problem is the partisan nature of the guidance. In other areas, though, the Bench Book seems rather to suffer from superficiality and an element of randomness.

97. In terms of religious minorities, one might think that groups who live conspicuously differently to the secular mainstream should be described, so that judges are less likely to misunderstand them in court or to be put off by unexpected aspects of their way of life. The significant Haredi community in London, and the (often Pentecostal) Black church are communities which might encounter the court system and where a judge might be unfamiliar with their beliefs and practices. Neither are mentioned. Antisemitism is discussed in Chapter 8 (an extremely broad chapter covering "racism, cultural/ethnic differences, antisemitism and Islamophobia" but also the right to use Welsh in court), but most of the material (around two pages, paragraphs 251 to 264) is about what the definition of antisemitism should be and the relationship between Jewish people and the state of Israel, "*Israel is important to the identity of most British Jewish people, although many disapprove of the policies of the current Israeli government…*"[62] It is very hard to imagine how any of this is relevant to helping someone Jewish take part in judicial proceedings: it might be relevant to a dispute about whether someone had suffered from antisemitic harassment or discrimination, but in a case *about* that subject the Judge should not be relying on the Bench Book's brief summary for information about the issue the parties would be seeking to prove.

98. Further, the emphasis in what is now an enormous document (561 pages) on explaining the state of life in the UK for (some) minorities seems to crowd out actual guidance on access to justice. When, for example, it is said in Chapter 8 at paragraph 54 that "*Roma have their own unique oral language, Romanes (Romani). The oral language is not as extensive or complex as English. In addition, Roma are not used to talking about emotions and may not have the vocabulary to express themselves…*", that is clearly relevant for Roma witnesses in court: but is it true? The only reference given for it is to a four page NHS pamphlet that gives no sources and doesn't make those claims.[63] It might be true, but it sounds like a racist trope, and the opaque nature of the Bench Book's production makes it difficult to know how much research has gone into this claim.

99. Appendix D attempts to set out potted summaries of the religions of the world, and makes strange reading. "*Although the Eastern Orthodox Churches – Greek, Russian, Serbian – are not in communion with the Catholic Church, they share the same core doctrine and sacraments…*" is a claim some Catholics might endorse but rather fewer Orthodox. However, as the Appendix says nothing about what Catholic doctrine is, what sacraments are or what "in communion" means, it isn't clear how

62. Introduction to Chapter 8.

63. Roma Support Group, *The Roma Community*, February 2016, https://www.england.nhs.uk/publication/the-roma-community/, which makes no comment on the range of the Romani language. It says "Cultural rules and taboos can mean that Roma lack a vocabulary related to health, state of mind and expressing feelings…" but the implication seems to be (it isn't very clear) that this is in the local (often second) language rather than in Romani.

this is supposed to help the judge reading it. In the quick summary of the variety of Christian belief (including no information about how the beliefs or practices of any denomination differ from any other), there is a somewhat random list given of Protestant denominations, "*Baptist churches, the Methodist church, the Seventh Day Adventist church, the United Reformed church, the Pentecostalist churches (the Elim church, the New Testament Church of God, the Church of the God of Prophecy, the Assemblies of God), the Society of Friends (Quakers),*" though Jehovah's Witnesses and Mormons are dealt with separately. A real examination of what is said about any of these groups is beyond this paper, but, for example, the claim that "*Marriage is very important to Mormons, for only those who are married can enter heaven…*" seems to be at least controversial, and the material on Paganism seems close to general speculation:

> *"Paganism in its innumerable forms predates many religions. The word Pagan comes from the Latin paganus meaning 'rustic or rural'. Over time it has been given other meanings and often in a pejorative context. It has been argued that Paganism only became a religion in the UK when the natural ebbs and flows of the seasons and nature that had been celebrated needed to be more formalised as a religion in a response to other religions introduced from the continent. In its current manifestations it is sometimes referred to as Neopaganism."*

100. It is not clear how a vague (and doubtful) set of brief summaries of world religions is going to help people take part in legal proceedings, but it is another example of the enormous scale of the task the Judicial College has set itself by trying to give judges descriptions of the life of minorities in the UK, as well as advice on how to help them take full part in court.
101. However, even if the Judicial College could produce such general guidance, it would not be appropriate. In any case where understanding the general social difficulties faced by a particular minority may make a difference to the outcome , the courts should not be making assumptions based on material produced by the court system itself.

Recommendations

102. Chapter 12 needs to be rewritten urgently because it prejudges questions that are before the courts at present. It uncritically endorses self-identification, despite that not being the position adopted by the UK, and while that might be appropriate when alerting judges as to how best to put a trans person at their ease, it goes further and (based on a vision of trans people as unusually fragile) encourages judges to impose it as a requirement on other parties to litigation, encouraging them to take a negative view of those who refuse. It adopts a highly contentious ideological stance on issues such as the reality of physical sex (assuming that it is assigned at birth) and takes a partisan position on legal questions

such as the effect of a GRC and the scope of the duty to avoid revealing someone's trans status.

103. Perhaps most importantly, it fails to acknowledge that many of the claims it makes are vigorously disputed, giving the impression that there is an established consensus on areas where there is not and presenting those who disagree with those claims as outside reasonable opinion. Given that Chapter 12 was redrafted in February 2021, when those working on it must have been aware of the litigation in progress on these issues as well as the state of public debate, this is extremely surprising.
104. Some of these problems stem from the extremely ambitious scope of the Bench Book, which has moved well beyond advising judges on how best to assist people to take part in the judicial process into trying to educate judges on the difficulties faced by minorities in society generally. This may simply not be an appropriate task for the Judicial College, and the result, where the guidance veers between the detailed but partisan and the superficial, may be inevitable.
105. The current lack of transparency should come to an end: if outside bodies are giving training to the judiciary on matters of public controversy (as appears to have happened with Gendered Intelligence) it is important that the content of that training is open to scrutiny. Similarly, the organisations that are consulted (or who assist with drafting) the Bench Book should be disclosed.
106. One method would be for proposed chapters to be put out for consultation: this would allow interested parties to make representations, and the final version could then record which aspects were the subject of serious dispute. It would also be helpful if, whenever changes are made, those changes are separately listed and explained.
107. It should be made very clear that the views of the Judicial College as to the underlying facts about any particular minority are not evidence and cannot be assumed to be correct if that is one of the issues a court needs to consider: at most, the material is there to alert a judge to possible difficulties for a party or witness.
108. These are serious problems. The Bench Book should provide an important resource for ensuring access to justice. However, the wide scope of the issues on which it aspires to educate judges has moved well beyond the proper business of the Judicial College into attempting to tell judges what they are supposed to think about matters of current controversy. In the *Forstater* case this seems to have contributed to the Employment Tribunal getting the law seriously wrong. Those responsible for the Judicial College should ensure that a general and transparent review takes place of the Bench Book, so that partisan claims are removed and contentious ones clearly flagged for the reader, as well as making sure that the claims made are evidenced and accurate.

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