

Article on Maya Forstater verdict for *The Australian* | 19th December 2019

A judge in a UK Employment Tribunal case has declared that the belief that people can't change their sex is "absolutist" and "incompatible with human dignity and fundamental rights of others". The belief that a person born male is not (and cannot become) a woman was found to be "not worthy of respect in a democratic society". Incredibly, the judge also said that a lack of belief in gender understood as identity is not protected under the Equality Act 2010. The judgement is bad news for claimant Maya Forstater, and more broadly for people everywhere who are sceptical of the new gender ideology.

To backtrack a little, across a number of countries, a war over words is raging: what is a 'woman'? This question led to angry protests at the University of Melbourne earlier this year, when the Victorian Women's Guild hosted an event to discuss legislation proposing to make 'woman' a category anyone can identify into, by making legal sex a matter of mere statutory declaration. Those opposing the bill argued that it undermines women's spaces and services, while those supporting the bill argued that it was a progressive step in the fight for trans rights. The bill passed in August and will come into effect by May 2020. In Victoria, a 'woman' is now anyone who declares themselves a woman.

Similar legislation has been proposed in New Zealand and the United Kingdom, leading to vociferous debate over the meanings of 'female' and 'woman' and the increasingly contested concepts of sex and/or gender they refer to. Women are fighting not only against legislation that fundamentally changes what it means to be a woman (from a biological fact to an identity category) but against surreal attempts at policing their political and philosophical beliefs about womanhood and feminism.

Women expressing what have come to be known as "gender critical" beliefs—chief among them the belief that a woman is an adult human female—are now routinely subject to social media pile-ons, letters to employers, harassment, protest, doxxing, and worse. For 'misgendering' (using sexed pronouns for a trans person), 'deadnaming' (referring to a trans person by their former name), and using allegedly offensive terms, women in the UK have been subject to police interview or investigation. Twitter bans the accounts of women who use the wrong pronouns for trans people. But the gender wars had yet to be fought in a courtroom. This changed with the Forstater case, put forward by lawyers Slater & Gordon and supported by £82,060 (\$156,029 AUD) in crowdfunding.

Maya Forstater is a woman whose beliefs about what a woman is brought her into a conflict with her employer that led to her not being offered another contract. Forstater had been engaged as a consultant on a number of fixed-term contracts starting in 2015, with the Centre for Global Development, an international development think tank. She was working for the centre during the period in which the UK government was consulting over changes to the Gender Recognition Act 2004 (GRA), and tweeted openly about her opposition to it.

The UK's GRA awards applicants with a Gender Recognition Certificate, effectively changing their legal sex. Successful applications require a diagnosis of gender dysphoria, and evidence of having lived in the 'acquired gender' for at least two years. The consultation was over whether to change this to a single-step statutory declaration, colloquially 'sex self-identification'. This change divorces the concept of sex from a physiological reality, and turns it into an identity. This is the change that Tasmania and Victoria have gone ahead and introduced; British women were able to mobilise a more effective resistance.

Forstater opposed the reforms to the GRA on the grounds that it is impossible to change sex, that sex is politically important and should not be conflated with gender identity, and that the reforms would be likely to undermine the provision of women-only spaces, services, and protections by making them *de facto* mixed sex. She said in her live evidence that she did not consider a Gender Recognition Certificate to make a significant difference to the importance of sex classification. In her witness statement, she wrote that "avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries as to who gets to see and touch their bodies".

The judge's judgement hinged on the balance between freedom of expression and protection of belief, on the one hand, and protection of rights and dignity, and against harassment, on the other hand. He granted that Forstater's understanding of sex and gender, and her conception of a woman, counted as a 'philosophical belief' on four out of five of the criteria established in a 2010 case and known as 'the Grainger Criteria'. These are that the belief is genuinely held; is a belief rather than an opinion or viewpoint; is about a weighty or substantial aspect of human life; and attains a level of seriousness and importance.

But he denied that the belief met the fifth criterion, namely "it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the human rights of others". In the judge's ruling, Forstater's beliefs were found to be incompatible with the human dignity and fundamental rights of others (implicitly, of transwomen). Thus they ultimately do not count as a philosophical belief, and are not protected by the Equality Act 2010.

The implications of this case within the UK are that women may be fired for expressing gender critical beliefs. Forstater's claim was that her employer had engaged in direct discrimination on the basis of her philosophical beliefs, and indirect discrimination on the basis of sex (because women are more likely to hold gender critical views). The judge found against her, which means there is now a precedent that this kind of alleged discrimination is permissible.

In the UK, where there is still some gatekeeping around legal change of sex, this leaves room for the expression of scepticism about the status of merely self-declared transwomen as being women. But were judges in Victoria or Tasmania to follow suit, the implications could be totalitarian indeed, given that legal change of sex is possible on the basis of declaration alone. Do we really want to live in a society in which women can be fired from their jobs for denying that a 6'2" bearded male is a 'woman'?