Free speech protection at colleges and other constituent institutions of English universities:

The requirements post HE(FOS)A

Important: please see the important notice at page 14.

www.bfsp.uk

PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at 1 August 2024, when the main provisions of the Higher Education (Freedom of Speech) Act 2023 come into effect.

1. Introduction

Best Free Speech Practice ("**BFSP"**) is a non-partisan campaign to clarify and disseminate what the legal requirements and their implications in practice actually are for protecting free speech and academic freedom at UK universities and other registered higher education providers (**"HEPs"**).

Recent amendments (which will come into effect on 1 August 2024) made to the **Higher Education and Research Act 2017** ("**HERA**") by the **Higher Education (Freedom of Speech) Act 2023** have introduced new free speech duties on the constituent institutions ("**CIs**") of HEPs in England, which are independent of the duties of their HEPs. CIs are colleges, schools, halls or other institutions of English registered HEPs.[1] As confirmed and clarified in recent case law, freedom of speech and academic freedom are also protected under the **Human Rights Act 1998**, as are various viewpoints under the **Equality Act 2010**.

This document is a brief statement of the relevant law for English CIs, with an explanation of what is required to be done in practice to comply with both the letter and the spirit of the law, and any additional best practice.

Alumni for Free Speech (www.affs.uk) will be monitoring and liaising with HEPs to ensure that they are free speech compliant, and if necessary following this up with Freedom of Information Requests. It will be publicising any continuing failures by them to comply with their free speech obligations under the law.

2. Relevant law and requirements

Requirements in HERA

***Primary obligation to secure free speech*:** The governing body of a CI must take "*the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take*" to secure freedom of speech (within the law) for the staff, members and students ("**Participants**") of and visiting speakers to the CI.[2] This is a demanding requirement and **requires active, positive steps to** be taken[3]. The obligations are stated in objective terms,

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1 HERA, **Section A4**.

2 HERA **Sub-sections A1(1)-(2) , as applied by Section A4.**.

3 The OfS recently put it thus (in respect of HEPs): "*this is likely to entail a wide range of steps needing to be taken in practice. In our view, it is unlikely to be sufficient for a university only to make public statements in favour of free speech*". (Insight publication *Freedom to question, challenge and debate*, December

giving no material discretion to a CI as to what steps it needs to take. It results in various requirements in practice, which are discussed in detail in Part 3. Free speech obligations override other considerations, subject only to the following:

a. the relevant speech must be lawful: unless the relevant expression of views is so extreme as to be unlawful, whether under criminal or civil laws – for instance because amounting to unlawful harassment under the Equality Act 2010 (see below) or because it is defamatory – it is protected under HERA; and

b. CIs are only required to take the steps that are reasonably practicable for them to take (the Office for Students ("**OfS**") interprets this to include deciding not to take a step which would have an adverse impact on freedom of speech[4]). Various points are relevant.

- If a CI is required to do (or not do) something under a legal obligation – including a CI's requirements to the extent that they reflect a legal obligation on it – then it is not practicable for it to take a step which is inconsistent with that obligation. The duty to act under HERA will, though, usually override duties to "think" such as under the PSED (of which more below).

- The existence of policies, programmes and requirements of the CI which may conflict with the duty to secure free speech will not render relevant steps not reasonably practicable unless those policies etc are themselves legally mandated. (Indeed, those conflicting policies etc would normally need to be qualified so as to ensure future compliance with this primary obligation.) This is a matter of compliance with an objective legal requirement, and the conflicting subjective views and priorities of an HEP are likely to carry little relevant weight.

- Cases relating to the protection of "protected viewpoints" under the Equality Act (see below) are likely to be relevant in identifying the sorts of actions that the courts will consider to be "reasonably practicable". See a discussion at Appendix 2.

- The OfS states that factors which may be relevant to an assessment of whether steps are "reasonably practicable" include the extent to which a step would prevent restrictions on free speech; the financial and other costs which would be incurred in taking the step; and the extent to which it would directly disrupt other lawful

2022 (the "**OfS December 2022 Publication**"). https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf.)

[4] OfS Consultation on its approach to regulating students' unions, December 2023 ("**SU Consultation Paper**"), para 201H.

activities[5], it being noted that these factors must be assessed objectively and in the context of the requirement to "have particular regard to the importance of freedom of speech", which is clearly intended to give it particular weight in relevant calculations; it must be that the costs would need to be severely disproportionate to the likely free speech benefit for the step to be unreasonable in these circumstances. CIs will be complying with an objective standard they may be held to: they do not have much discretion here.

Interpreting potentially contrary laws and requirements correctly is going to be vital for CIs, as over-interpretation creates major risks for them. See the Appendix for further discussion. The OfS has stated that it "*stands for the widest possible definition of free speech within the law*", and "*the starting point is that speech is permitted unless it is restricted by law*".[6]

***Academic freedom*:** Academic staff must be free (within the law) to question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without facing the risk of losing their jobs or privileges at the CI or the likelihood of their securing promotion or different jobs at the CI being reduced. Applicants for academic positions must not be adversely affected because they have previously exercised their rights to academic freedom, i.e. questioned received wisdom *etc.* as described above[7].

Duty to promote free speech: CIs must now positively promote the importance of freedom of speech (within the law) and academic freedom in the provision of higher education.[8] This requires active steps to be taken.

***Meetings*:** CIs must also use all reasonably practicable steps to secure that the use of their premises is not denied to any individual or body on the grounds of their ideas, beliefs or views; and the terms on which those premises are provided must not be based on such grounds. This has many implications in practice. CIs must also now ensure that, save in exceptional circumstances, they must secure that use of their premises is not on terms that require the organiser to bear some or all of the costs of security[9].

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5 SU Consultation Paper, paragraph 201I. It being noted that it would appear that other activities which would cause an HEP a legal compliance failure (so should have been prevented in order for that failure not to have occurred) should not be regarded as "lawful" in this context.

6 OfS December 2022 Publication.

7 HERA **Sub-sections A1(5)-(9)**.

8 HERA **Section A3**.

9 HERA **Sub-sections A1(3) and (10**). The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects, with activists threatening physical force and noisy disruption, being cancelled.

Codes of practice and free speech statements: CIs must maintain a *"code of practice"* which sets out: the CI's values relating to freedom of speech; the procedures to be followed by both staff and students of and any students' union at the CI in connection with the organisation of meetings and other activities at the CI's premises and the conduct required of such persons in connection with those meetings and activities; and the criteria applied by the CI in deciding whether to allow the use of premises and on what terms. A CI must bring the code to the attention of its students at least once a year and must itself take all reasonably practicable steps to secure compliance with their code, including where appropriate the initiation of disciplinary measures.[10]

***Complaints and the new statutory tort*:** HERA contains new legal remedies against CIs for failures of free speech protection. These are important changes, and are discussed under "*Risk, accountability and liability*" below.

Equality Act 2010, PSED and the *Forstater* and other important recent cases

Under the **Equality Act 2010** (the "**Equality Act**"), CIs must avoid unlawful discrimination against and harassment of people, including academics and students, who have the *"protected characteristic"* of holding (or not holding) particular religious or philosophical views. The Equality Act specifies various contexts in which unlawful actions can occur, including employment and further and higher education.

"Discrimination" includes an employer or other relevant person subjecting a relevant person to a detriment on account of their protected viewpoint. In summary, "harassment" means unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity; or creating an intimidating, hostile, degrading, humiliating, or offensive environment, and has an objective element[11]. This has very wide implications, with many consequent detailed requirements for protecting "protected viewpoints".

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[10] HERA **Section A2**.

[11] **Section 26**. Under **Section 26(4)**, in deciding whether conduct has this effect, each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

The landmark *Forstater* case[12] established that holding gender-critical views is a *"protected characteristic"*. In the subsequent *Corby*[13] case, views which challenged aspects of Critical Race Theory were ruled to be protected. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, CIs need to work on the basis that advocacy for free speech and human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including, for example, in relation to other aspects of Critical Race Theory and moves to "decolonise the curriculum"[, and lawful views in relation to relation to Israel/Palestine]), must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. See BFSP's detailed *Statement about what sorts of beliefs are protected following the Forstater case*.

Section 109(1) provides that anything done by an employee in the course of their employment, or an agent on behalf of their principal, must be treated as also being done by their employer or principal; it does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer has a defence (the "**Section 109(4) Defence**") if it can show that it took all reasonable steps to prevent an employee from doing the alleged act or anything of that description.[14] CIs have no duty under the Equality Act in respect of the behaviour of Participants *acting in capacities which do not give rise to such responsibilities on the CI's part* (other than limited duties under parts of the PSED as discussed below), so, for instance, opinions expressed by the CI's staff via their private social media are not the CI's problem under the Equality Act.

The **Public Sector Equality Duty** ("**PSED**") imposed on public authorities[15] requires HEPs, in the exercise of their functions, to have due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express a protected viewpoint, to

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12 *Forstater v. CGD Europe et al.* (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

13 *Corby v ACAS*, September 2023; note that this was a first instance judgement, so is not a binding precedent. Mr Corby was ordered to remove posts on an internal communications system which were critical of aspects of Critical Race Theory ("**CRT**"). He successfully claimed that this was discriminatory under the Equality Act. Whether views critical of CRT were protected had already been litigated and subject to a substantial payment, albeit not a formal judgement. In May 2023, the Department For Work and Pensions paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns relating to the DWP's adoption of aspects of CRT.

14 Recent cases have given a vivid examples of how this area of the law has effect in practice, and the detailed requirements in practice on an employer for it to come within the Section 109(4) Defence. See Appendix 2 for further information.

15 Under **Section 149** of the Equality Act.

advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it. "Have due regard" is a duty to think and give appropriate weight in context, not to act; contrary duties to act are likely to be overriding.

CIs therefore need to act on the basis that they must work to protect the their employees and others in respect of a wide range of opinions held, not held or expressed by them, including from attacks by their colleagues, and to avoid discriminating against or harassing such people through their own policies and requirements, for instance their disciplinary processes being unlawfully used to suppress legitimate free speech. Given that many people hold protected viewpoints about a wide range of currently controversial issues, this creates a major risk area for CIs. This is likely to require greatly increased institutional neutrality in relation to many issues.

It is important that CIs do not misinterpret the requirements under the Equality Act, in particular over-interpret the meaning of 'harassment' for these purposes, or to succumb to pressure to treat the expression of an unpopular viewpoint as unlawful harassment. Such missteps can lead to severe compliance failures.

Human Rights Act

The free thought and speech rights of academics and students are protected under the **European Convention on Human Rights**[16], as enacted in the UK by the **Human Rights Act 1998** (the "**HRA**") [17]. These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful[18]. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression. Any interference by a CI with the expression of opinions and academic freedom of its academics and students will require exceptional justification.

Resolving competing claims: dealing with conflicts of requirements and agendas

There are times when there can be a perceived overlap or conflict between requirements to protect free speech and other legal obligations, or a CI's programmes or priorities, which are

[16] Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

[17] As most CIs are "public authorities" for the purposes of the Convention and the HRA.

[18] See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 9.

asserted to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. However, the situation is often simpler than appears to be appreciated. We set out detailed information in Appendix 1 about the necessary approach in order to resolve such perceived conflicts appropriately.

Criminal matters: the Protection from Harassment Act 1997 (the "PHA")

Taking various types of action against a person is criminalised, and this is relevant where they are taken in connection with that person's viewpoints. Most relevantly, under the PHA, a person must not pursue a course of conduct which amounts to, and which he knows or ought to know amounts to, harassment of another person. Harassment in this context includes alarming a person or causing a person distress. The PHA may give rise to both civil and criminal liability. Intent does not have to be proved. Other potentially relevant offences include putting a person in fear of violence and malicious communications and improper use of public electronic networks.

There are many ways in which illegal activity by staff or students "on its watch" can harm a CI, from reputational damage, to regulatory/compliance failures, to unlawfulness and liability on its own part. Illegal activity by a member of staff will give it acute problems, which will be even worse if the perpetrator is apparently acting within the scope of authority conferred by the CI. If a CI discovers that illegal activity has or may have occurred, it will need to act promptly and carefully. This will likely involve taking and following timely legal advice.

Requirements as to governance

The OfS now has a role in the free speech-related regulation of CIs. It is required to promote the importance of freedom of speech within the law and academic freedom for staff of CIs and to identify and advise CIs about good practice relating to how to support freedom of speech and academic freedom[19]. The OfS also manages the new statutory complaints scheme (see below).

A CIs' regulatory status will depend on its legal status and structure. Many CIs are educational purpose charities. They will need to operate within their charters/constitutions/rules and relevant law and other requirements. In the past, the Charity Commission was the regulator of CIs, and will likely continue to have primary regulatory oversight of them, although we await information about how the interrelationship between the functions of the OfS as regards free speech protection and those of the Charity Commission will work in detail now that the OfS has regulatory functions in respect of their free speech obligations.

[19] Sub-sections 2(aa) and (ab) and 69A(1) and (2) of HERA.

A new Director of Free Speech and Academic Freedom has responsibility for overseeing and performing the OfS's functions in respect of free speech and academic freedom, including the new complaints procedure.

Risk, accountability and liability

Free speech failures create risk for CIs, including of financial cost, reputational damage and embarrassment (the OfS will publish information about free speech failures), regulatory problems, wasted management time and internal strife. They also involve personal risk for individuals.

***Complaints, claims and statutory tort*:** Complaints and claims have been successfully brought under the Equality Act for discrimination against and harassment of people with protected viewpoints (see more at Appendix 2). HERA now supplements existing legal remedies with a right to make formal free speech complaints against CIs to the OfS and a right to bring civil proceedings against CIs for damages for loss caused by breach of their statutory duty to protect free speech.[20] These are important changes, and will greatly increase CIs' accountability and their risks of legal liability.

Personal liability: There are various potential sources of liability for individuals involved with free speech protection failures. Officers of organisations who, through default or negligence, cause their organisations to breach the law and thereby suffer loss can be at risk of personal liability for that loss. An employee or agent of a CI contravenes **Section 110** of the Equality Act if he or she does something which is treated as having been done by the relevant CI and the doing of that thing amounts to a contravention of the Equality Act by the relevant CI. Under **Section 111** of the Equality Act, a personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act.

HEPs' duties in respect of CIs

It is likely the case that the primary obligations in HERA require that an HEP itself takes such steps as are reasonably practicable for it to take to procure that its CIs are aware of the relevant legal requirements and adopt, comply with and enforce their own policies, rules and practices so as to give appropriate effect to the relevant legal requirements. There are likely, though, to be significant limitations on some HEPs' ability to do this in practice, not least as a result of their separate establishment and some colleges' long-standing operational independence, although this has significant limits so should not be used an unjustifiable excuse for inaction by the HEP concerned, as has happened. In any event, the availability of soft power (e.g. through conference of colleges and the like) might, at the least, require HEPs to provide thought leadership on free speech and academic freedom and to promote best practice and the like.

[20] HERA sections **A7, and Section 69C and Schedule 6A**.

3. Requirements and implications in practice

The primary obligations under HERA to secure free speech and academic freedom involve a CI taking the following steps, which are all "*reasonably practicable*". The need to avoid discrimination against and harassment of people with protected viewpoints under the Equality Act, and qualify for the Section 109(4) Defence, also involve a CI taking most, if not all, of these steps (see the detailed discussion at Appendix 2). Each CI will need conduct a thorough audit of its policies, practices and requirements, and identify the changes that are required to ensure its compliance with the revised legal and regulatory regime, and make those changes, before the changes to HERA come into effect.

- **Not having policies, practices or requirements which unjustifiably prevent or restrict free speech**, or which mis-state or exaggerate legal obligations on them which may conflict with their obligations to secure free speech.

- **Taking a positive approach** in relation to the creation, promotion and enforcement of policies, practices and requirements relating to securing free speech. Working to ensure that its staff do likewise.

- **Creating rules to ensure compliance** with the free speech obligations, including prohibiting material actions against people in respect of their viewpoints; having appropriate disciplinary processes in order to secure compliance with those rules; and having appropriate and effective processes for remedying activity which is contrary to free speech related requirements.

- **Having appropriate governance arrangements**, including:

    - taking these issues seriously at senior levels and, which will involve free speech protection being a sufficiently regular agenda item for its governing body and having an appropriately constituted and empowered committee of its governing body or other senior working group to ensure proper compliance with its free speech obligations;

    - appointing an appropriately senior (sufficiently so to participate in governing body meetings), empowered, available (although this does not necessarily have to be a full-time position), experienced and non-conflicted[21] **free speech officer** to be its internal advocate for free speech and academic freedom, with responsibility for ensuring that it complies with its legal obligations and follows and enforces its own rules appropriately;

[21] Given that controversies around aspects of diversity agendas appear to give rise to many of the free speech problems in recent years, it is hard to see how a free speech officer can also have material functions in a CI's EDI department without insuperable conflicts of interest.

- ensuring that its risk officers and functions are aware of these issues and the risks they create, and that significant free speech risks are on its risk register and given an appropriate level of seriousness; and

- having an appropriate and effective reporting and complaints systems in respect of free speech issues and complaints. Ensuring they will be structured and staffed so as to deal with issues and complaints promptly and effectively; appropriately addressing the fact that many complaints with be against the CI and its staff, so will need to be resolved by people who are sufficiently independent of the CI and its management.

- **Ensuring that relevant staff are properly trained** and understand the nature of the requirements to protect free speech; and making compliance with free speech related requirements express duties of relevant staff.

- **Taking active and effective action to ensure that it and its Participants comply** with applicable obligations, including its code of practice and related rules, and enforcing compliance with disciplinary action where appropriate.

- **Dealing with controversies effectively; protecting Participants; resisting pressure:** How HEPs deal with controversies – as in social media storms, demands for disciplining or that meetings not be held and the like – will be the sometimes very public face of how well (or not) they are securing free speech in practice.

  - Where a Participant is under attack for expressing their lawful opinions, the primary HERA obligation requires a CI to take such action as it can to stop various types of hostile actions that are being taken against the Participant because of their lawful viewpoint, especially where they are in possible breach of the CI's own relevant rules and requirements.

  - This is likely to involve some or all of: identifying the Participants who are, or may be, taking those actions, and informing them directly where they are or are likely to be in breach of its relevant rules and requirements and requiring them to stop taking the relevant actions; taking disciplinary action against the relevant Participants, where and to the extent appropriate, and such other action as is likely to help remedy the situation; and, if the relevant actions involve likely criminality, considering seriously (with advice) whether they should involve the police (see further below).

  - HEPs must not succumb to pressure from Participants or others (a) to take actions which suppress or restrict free speech or which materially disadvantage another Participant or visiting speaker in connection with their holding or expressing certain opinions, or (b) not to take steps to enforce its rules and requirements regarding free speech protection. Succumbing would very likely give rise to a breach of the primary obligations under HERA, and this pressure would itself be a breach by Participants of a CI's rules and requirements.

CIs need to have practices, policies and requirements in place to enable them to do the above.

- **Not allowing its complaints and disciplinary functions to become instruments of free speech suppression**, contrary to HERA, the Equality Act or the HRA. A CI must assess any complaints or allegations for whether they are made in respect of people's protected viewpoints. If they are, it must exclude them or at least treat them with great caution. It must not proceed with any complaints or disciplinary proceedings which are likely to constitute unlawful discrimination or harassment, and in any event, conduct complaints and disciplinary proceedings in such a way as to avoid unlawful discrimination and harassment. [22]

- **Institutional neutrality:** If an institution takes sides, in an area of passionate and polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a very obvious risk of disadvantaging (i.e. discriminating against) or creating a hostile environment for (i.e. harassing) people who hold that other viewpoint[23], and creating or tolerating environments in which attacking people for their viewpoints is acceptable. A number of recent public failures have been indicated by the Employment Tribunal to have largely arisen as a result of failures of objectivity[24]. CIs and their representatives therefore need to maintain sufficient institutional neutrality on matters of polarised public debate (the safe option), i.e at least take an approach which is very careful to avoid actions or language which risk counting as discrimination or harassment under the Equality Act or suppress free speech contrary to HERA, while of course complying with their wider relevant legal obligations.

- **Not enforcing controversial agendas; the curriculum:** Whenever CIs promote certain viewpoints in respect of areas which are the subject of debate or controversy, to (directly or indirectly) require or exert pressure for the endorsement of or acquiescence to those viewpoints, or suppress the expression of lawful dissenting viewpoints, will be a clear breach of the primary requirements under HERA, unless they are legally obliged to take the relevant actions, and risks constituting harassment under the Equality Act[25]. CIs must therefore not impose ideologies or viewpoints (such as a "decolonisation" agenda) as part of the curriculum, to the extent that to do so would (among other things) contravene their

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22 See the *Meade* case, described in Appendix 2.

23 In the *Fahmy* case (described in Appendix 2), the convener of a meeting was criticised by the Employment Tribunal for expressing personal views in solidarity with one side of a passionate debate. The Tribunal stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment in the *Fahmy* case.

24 A failure of neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy*, *Meade* and *Phoenix/Open University* cases, described in Appendix 2.

25 See the *Fahmy* case, described in Appendix 2.

obligations to secure free speech and academic freedom or their obligations as charities, or unlawfully discriminate against or harass people in respect of their views which count as "protected characteristics".

- **Avoiding and reducing an oppressive atmosphere**: Research strongly evidences that an atmosphere exists at many CIs or among their Participants in which many Participants (including both academic staff and students) feel intimidated about expressing their opinions. This can arise as a result of the attitude of colleagues or online aggression, or the fear that job prospects may be hindered, or assessments of performance may be downgraded, in connection with their expressing certain opinions. Given that the existence of such an atmosphere gives rise to obvious risks of self-censorship and very harmful effects on free speech at CIs, CIs are required by the primary HERA obligation to take all reasonably practicable steps which might stop such an atmosphere developing in the first place or persisting if it already has; the Section 109(4) Defence also requires this. This will involve being vigilant to prevent, identify and stop free speech transgressions; and firmly enforcing its code of conduct and rules.

- **Ensuring that any staff or student courses, "tests" or "training**", for instance for new arrivals, do not wrongly inhibit or suppress free speech.

- **Avoiding or restructuring any association or relationship with any organisation** where that relationship requires it to take sides in relation to contested issues, or requires or encourages it to suppress the expression of views which dissent from the agenda being promoted by any such organisation.

- **Having an appropriate free speech statement and a code** containing specified procedural and other information regarding the holding of meetings and events; and providing specified information to Participants about relevant free speech requirements as well as its own obligations in relation to free speech.

- **Taking all reasonably practicable steps to ensure that the use of its premises is not denied** to anybody because of their viewpoint, including as to the requirements imposed in relation to hiring and using venues, and taking various specified steps to ensure that meetings are conducted appropriately. Save in exceptional circumstances, not requiring the organiser of an event to bear any of the costs of security relating to the event.

- **Including appropriate free speech related requirements in all relevant employment or appointment contracts** and in the job specification for all appointments of senior staff and in their contracts with students.

Information on free speech implications for various topics

BFSP's website provides detailed information on free speech compliance requirements in various contexts, including the following:

- **Statements for HEPs and for students' unions** of the new legal requirements and their implications.
- **The Equality Act after the *Forstater* case: protected viewpoints**.
- **Liability of employers for harassment by their staff of people with protected beliefs under the Equality Act: after the *Fahmy* case.** And **Liability of employers for allowing their disciplinary processes to be used to suppress free speech: the *Meade* case**.
- **Know your free speech rights.**
- **Introductory EDI courses: potential free speech problems**.
- **"Decolonizing the curriculum": potential free speech problems.**
- **Requirements re governance and appointing a free speech officer**.

Best Free Speech Practice

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Details of the Committee (authors) and Editorial and Advisory Board of BFSP are on the BFSP website.

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Important: *This document is a short summary of a complex area of law, and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: HEPs and others should consult their legal and other advisers in respect of all matters relating to free speech in connection with their institution, including those referred to in this document. It does not seek to prescribe detailed policies and practices. These will have to be developed by HEPs themselves, in the context of their own particular circumstances.*

Appendix 1 – resolving competing claims; the scope of contrary laws

There are times when there can be a perceived overlap or conflict between requirements to protect free speech and other legal obligations or a CI's programmes or priorities which are asserted to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. Allegations of harassment and other assertions of offence and insult often create apparent problems in the context of CIs' freedom of speech obligations.

However, if speech is contrary to other laws (such as those preventing specified types of discrimination or harassment and defamation), it is not protected under HERA. If it is not, then all reasonably practicable steps must be taken to protect it. The situation is often simpler than is appreciated.

We set out below some of the processes that need to be gone through to ensure that mistakes are not made.

The necessary analytical process in the event of competing claims

In order to resolve appropriately what can appear to be difficult issues, it is necessary to approach apparent conflicts as follows.

1. The primary free speech obligation under HERA to take all reasonably practical steps to secure free speech within the law is overriding, subject to its inherent qualifications. The need to take actions so as to qualify for the Section 109(4) Defence will also carry very significant weight.

2. When an incident raises considerations of both protection of freedom of speech and other potential legal issues (e.g. in relation to assertions of unlawful harassment under the Equality Act by reason of (say) someone's opinions or a proposed meeting), CIs must review carefully whether any laws ("**contrary laws**") are contravened by the relevant statement, opinion, action or event ("**relevant view or event**"). If they are not contravened, reasonably practicable steps must be taken to protect the relevant view or event. In this review, HEPs must be careful not to over-interpret the contrary laws, i.e. treat them as having wider application than they actually have in law. Subjective and incorrect interpretation of contrary laws is a real risk area for HEPs, and their staff personally.

3. Issues may arise as to "reasonable practicability" and, in particular, whether other legal obligations on a CI render an action not reasonably practicable. Again, great care will be required to avoid over-interpreting any apparent or claimed contrary obligations. For instance, the obligation under the PSED to have due regard to the need to eliminate unlawful discrimination and harassment (and achieve other ends) does not in effect extend more widely than what counts as "unlawful" discrimination or harassment and is a duty to think not to act, so is overridden by contrary duties to act such as under HERA.

Interpreting contrary laws, requirements and policies

Identifying the limits to the scope which it is appropriate to give to duties and laws which appear to be inconsistent with the free speech obligations, such as the anti- discrimination and harassment provisions in the Equality Act (including pursuant to the PSED), and the PHA, requires care, but there is relevant case law and other information to refer to, which severely limits the extent to which they may be used to limit the speech and opinions of others. See Appendix 2 for a detailed discussion of this.

CIs will have policies and rules reflecting their obligations under the Equality Act and the PSED, although in many cases they extend beyond what is actually required of the CIs. In the context of their relationship with the obligations to protect free speech, it is only those policies and rules that reflect their legal obligations as they actually are that are relevant as likely limitations on CIs' obligations to secure free speech. To the extent that policies and rules go beyond this, treating them as overriding will put the relevant CI at risk as regards its obligations to secure free speech.

Not misrepresenting or overstating the effect of contrary laws

CIs need to be very careful to word any materials so they do not overstate the contrary laws and thus unlawfully restrict free speech.

A key example of a misleading statement, which we see regularly, is that the Equality Act outlaws discrimination and harassment. It actually only outlaws them when done by specified parties in specified contexts in specified categories of situation, such as employment and education. It applies to actions of CIs, and their employee in the course of their employment and agents when performing functions for the CI, but not to those of their students, or staff in other circumstances. These misapprehensions – and resultant misrepresentations – often result in inappropriate restrictions on Participants' behaviour.

While CIs can make such rules as they see fit (while complying with their legal obligations), they must not assert that such rules reflect a requirement of the Equality Act where they do not do so. This is misleading, and quickly leads to free speech protection failures.

Appendix 2 – Defining harassment etc; recent Equality Act cases and the consequent requirements to prevent discrimination and harassment

Harassment, offence and free speech

People's actions and statements are often (indeed indiscriminately) claimed to be "harassment". But harassment is very specifically defined under the Equality Act, and has been subject to extensive case law, so identifying the correct interpretation of "harassment", and applying it appropriately to particular circumstances, require care.

In summary, harassment means unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment[26]. In relation to this:

- It must be remembered that *"discrimination"* and *"harassment"* (as defined in the Equality Act) are not themselves unlawful: this only arises in the various circumstances (such as employment and the provision of education) specified later in the Equality Act.
- The perception of the person claiming that an action was harassment is relevant in the context of the *"effect"* of the conduct, as are the circumstances and, crucially, an objective test of whether it is reasonable for the conduct to have that effect[27]. This last consideration operates to exclude assertions of harassment by the hypersensitive. In relation to taking all circumstances of the case into account, the Court of Appeal has stated that other statutory provisions (for instance the obligations in HERA) are relevant.[28]
- Further, the Employment Tribunal has stated that the relevant threshold will not be met by things said or done that are *"trivial or transitory, particularly if it should have been clear that any offence was unintended"*, and the courts have emphasised the importance of not encouraging "*a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*"[29]; and that "*beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society*"[30].
- Save in respect of the second and third elements of the PSED, CIs have no duty in respect of the behaviour of students or their staff acting in their own capacities (as opposed to

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26 **Section 26**.

27 **Section 26(4).**

28 *Pemberton v. lnwood* [2018] EWCA Civ 564; [2018] l.C.R. 1291.

29 *Dhaliwal v. Richmond Pharmacology* [2009] ICR 724, [2009] ILRL 336 at paragraph 22.

30 *Forstater* (see Note11 above) at paragraph 116.

when they also have some role with the CI, such as employee, in the context of which the relevant event occurred).

In this context, the Equalities and Human Rights Commission has stated in its publication *Freedom of Expression: a Guide for [HEPs] and [SUs] in England and Wales* (the "**EHRC Guide**"):

"Everyone has the right to express […] opinions, including those that may 'offend shock or disturb others'."

(Re the Human Rights Act 1998) *"The courts generally say that the right to free expression should not be restricted just because other people may find it offensive or insulting." "Speech that is intended to inform rather than offend attracts greater protection, even if it could be seen as discriminatory. An intolerant point of view, which offends some people, is likely to be protected if it is expressed in a political speech or a public debate where different points of views are being exchanged and are open to challenge. However, speech may lose the protection of Article 10 if it is used to abuse the rights of others, for example by inciting hatred."*

The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.

Views expressed in teaching, debate or discussion on matters of public interest, including political or academic communication, are therefore unlikely to be seen as harassment, even if they are deeply offensive to some of the people who are listening, as Article 10 will protect them."

What constitutes harassment (and discrimination) in respect of protected viewpoints under the Equality Act?

Recent case law under the Equality Act has dramatically strengthened the protections under the Equality Act for various viewpoints as "protected characteristics". The following are 3 crucial cases which define in detail what constitutes "discrimination" and "harassment" for these purposes.

- The *Fahmy* case[31]: an institution was found guilty of harassment as a result of not having taken reasonably practicable steps (so as to qualify for the Section 109(4) Defence) to prevent its employees from harassing their colleague for her viewpoints by way of a very hostile online "petition". Further, the convener of a meeting was criticised for expressing personal views in solidarity with one side of a toxic debate: while the Tribunal concluded that his actions did not cross the threshold for itself creating an intimidating etc environment, it stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment in that case.

  The following were stated as (together) constituting harassment: describing gender-critical views as "bigotry", a "cancer that needs to be removed", "should not be tolerated"

[31] *Ms D Fahmy v Arts Council England* (2023) ET case no 6000042/2022.

and "discriminatory, transphobic", and likening them to racism and sexism; and calling the LBG Alliance (which promotes gender-critical viewpoints and which Ms Fahmy was defending) a "cultural parasite and a glorified hate group that has [….] supporters that also happen to be neo-nazis, homophobes and Islamophobes".

- The *Meade* case[32]: an employer and a regulatory body were found guilty of harassment as a result of inappropriate disciplinary action against an employee for expressing dissenting views on a matter of controversy. In particular, they had both subjected her to harassment related to her beliefs as follows.

    - The regulator subjected her to a prolonged investigation into her beliefs, and "fitness to practise" proceedings, and sanctioned her for misconduct. The Tribunal stated that the regulator's "failure to check if [the complainant] could be malicious, and not checking his previous social media history, is indicative of a lack of rigour in the investigation, and an apparent willingness to accept a complaint from one side of the gender self-identification/gender critical debate without appropriate objective balance of the potential validity of different views in what is a highly polarised debate."

    - The employer subjected her to a disciplinary process; suspended her on charges of gross misconduct; issued an investigation report which was hostile in tone and content; and issued a final written warning. Importantly, the Tribunal ruled that the employer's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing the final warning, and its continued restraint on her freedom of expression, themselves constituted harassment; and that a staff member conducting the disciplinary process "labelling [Ms Meade's] Facebook posts as being transphobic was …sufficient…to constitute harassment."

  In the *Meade* case, it was actions by the employer and regulator themselves which were the primary events of harassment, rather than failing to prevent employees attacking their colleagues.

- The *Phoenix/Open University* case[33]: attacks on a senior member of staff for her viewpoints, including an aggressive open letter and an online pile-on, were held to be unlawful harassment and/or discrimination attributable to the Open University. There were more than 25 counts of discrimination and harassment, and more than 395 individual events of harassment as a result of individuals signing the open letter being found to be harassment. Again, equating gender-critical views with transphobia was repeatedly found to be harassment.

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[32] *Ms R Meade v Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022).

[33] *Ms J Phoenix v The Open University* (2024) ET Case No: 3322700/2021 & 3323841/2021.

It is useful to list some of the things that were ruled to constitute harassment: as in the *Meade*[34] case, equating gender-critical views with transphobia, as was calling the Open University's Gender Critical Research Network a 'hate group'; now famously, a senior colleague telling Professor Phoenix that having her in the department was like having a racist uncle at the Christmas dinner table; an open letter signed by 368 people (all the signatories bar two were found to have harassed Professor Phoenix by signing the letter); calling on people to sign the open letter; a number of tweets, and retweets of hostile statements and information; a key feature of many of the events which were harassment was that they were considered to be inviting people to join a pile-on: this can in itself can be harassment, and rightly so; and, finally, leaving a statement on the Open University's website, despite requests to remove it, itself constituted a separate act of harassment from the issuing of the statement itself. It is worth mentioning that various actions were held not be harassment, including: admonishing Professor Phoenix for swearing a lot during a meeting; not praising Professor Phoenix's success in obtaining a big grant, although this was held to be discrimination; a statement which was found to have a purpose of reassuring the trans and non-binary community, even though it was unwanted conduct related to Professor Phoenix's gender-critical beliefs. This helps illustrate where the bar is likely to be set in future cases.

- It is also worth mentioning in passing that Lloyds Banking Group recently had to pay damages and costs under the Equality Act which are likely to exceed £800,000 for mistreating an employee over something he said (the recent *Mr Carl Borg-Neal v Lloyds Banking Group* case).

See BFSP statements explaining the findings in the *Fahmy* and *Meade* cases.

Requirements in practice to prevent discrimination and harassment following these cases

The key direct implications of these cases are that the following actions by an employer are required to avoid breaches on their own part or to qualify for the Section 109(4) Defence as regards their employees.

- take all reasonably practicable staps **to prevent its staff from attacking people** for their viewpoints, including by writing or signing aggressive open letters, joining social media pile-ons, making unjustified complaints and the like.

- Its **complaints and disciplinary functions** must not be allowed to become instruments of free speech suppression.

- Not allow **inappropriate enforcement of contested viewpoints as this will itself be discrimination and harassment.** The *Meade* case was about exactly that; the *Fahmy* and *Phoenix/Open University* cases were in essence about attacks by colleagues made to harm

[34] *Ms R Meade v Westminster City Council and Social Work England* (2024) ET Case No: 2201792/2022 & 2211483/2022).

and distress a person for her views which dissented from the ideology held by the attackers constituting harassment.

- Maintain sufficient **institutional neutrality** on contested issues so as to ensure it satisfies its duties under the Equality Act: all the failings in these cases arose from an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate.

These primary requirements have many necessary secondary or associated implications, which are listed in Part 3 of this Statement. They include that employers must:

- update their rules to make sure they give proper effect to their duties to protect free speech, including defining harassment correctly, and not giving inappropriate emphasis to concepts such as "hurt" or "harm", which are of low legal relevance;

- ensure that their employees are sufficiently trained about free speech and their duties;

- properly enforce their rules, bringing disciplinary proceedings where appropriate; and

- restructure or terminate relationships with external activists where they have caused or may cause the employer to go down the path to unlawfulness.

Equality Act cases relevant for identifying requirements in practice under HERA

As explained above, employers can qualify for the Section 109(4) Defence if they can show that they took "all reasonable steps" to prevent an employee from doing the alleged act or anything of that description.

This wording is strikingly similar to Section of A1 of HERA, which requires a CI to take "the steps that are reasonably practicable to take" (i.e., all such steps) to secure freedom of speech, and they are aimed at ensuring similar things: so it must be likely that relevant rulings by the Employment Tribunal in respect of failures to qualify for the Section 109(4) Defence would have strong persuasive power to the Courts as to how to interpret Section of A1 of HERA for the purposes of the new statutory tort under HERA as revised, and we suggest that it would be unwise not to act on the basis that it will be thus.

The actions which are necessary to secure compliance with the Equality Act (at least those where a failure to qualify for the Section 109(4) Defence is relevant) will therefore also be relevant under HERA. The action in practice which we identify (in Part 3) as following from the legal obligations under HERA contain many of the requirements in practice to prevent discrimination and harassment which we identify above. Part 3 is supported by specific case law.