Free speech protection at English universities:

The law and requirements in practice

From 1 August 2024

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.

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. Note that the OfS guidance to which it refers is in draft form and will be revised before it is finalised. IT MAY BE OUT OF DATE: see its publication date at the end. ***SEE ALSO the important notice at page 23.***

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"**).

The legal obligations of English HEPs in relation to freedom of speech are extensive. Recent amendments to the **Higher Education and Research Act 2017** ("**HERA**")[1] both strengthen existing duties and add new obligations**.** As confirmed and clarified in recent case law, viewpoints on many areas of current controversy are protected under the **Equality Act 2010** ("**Equality Act**"). Freedom of speech and academic freedom are also protected under the **Human Rights Act 1998** ("**HRA**"). (HERA, the Equality Act and the HRA are together referred to as the "**Relevant Requirements**".)

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

The same legal duties and legal remedies under HERA now also apply to colleges, halls, and other "constituent institutions" of HEPs, with minor adjustments. Similar legal duties and legal remedies now also apply to certain students' unions. This is a major change.

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 HEPs to comply with their free speech obligations under the law.

2. Relevant law and requirements

Requirements in HERA and codes/rules re free speech and academic freedom

***Primary obligation to secure free speech*:** The governing body of an English HEP 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

[1] By the **Higher Education (Freedom of Speech) Act 2023**, with effect from 1 August 2024.

students ("**Participants**") of and visiting speakers to the HEP.[2] This is a demanding requirement and requires active, positive steps to be taken. The obligations are stated in objective terms, giving no material discretion to an HEP as to what steps it needs to take[3]. 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.

- The relevant speech must be lawful, i.e. not restricted by laws "made by, or authorised by the state, or made by the courts[4]". This includes criminal and civil laws – for instance the Equality Act (see below) and laws relating to defamation, confidentiality and privacy. Unless the relevant expression of views is so extreme as to be unlawful, it is protected under HERA.

- HEPs are only required to take the steps that are reasonably practicable for them to take (the Office for Students ("**OfS**") interprets this to include refraining from taking a step which would have an adverse impact on freedom of speech without compelling justification[5]). Various points are relevant.

    - If an HEP is required to do (or not do) something under an effective obligation – including the HEP's own requirements to the extent that they reflect a legal obligation on it – or other restrictions on behaviour under, for instance, anti-bullying rules which are themselves written so as to be compliant with the Relevant Requirements[6], then it is not reasonably 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 Public Sector Equality Duty (of which more below).

    - The existence of policies, programmes and requirements of the HEP 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, and otherwise written so as to be compliant with the Relevant Requirements. This is a matter of compliance with a legal requirement, and the conflicting views and priorities

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2 HERA **Sub-sections A1(1)-(2)**.

3 Per the OfS' draft Regulatory advice 24: Guidance related to free speech (the "**OfS Guidance**"), paragraph 41, "Where a step is reasonably practicable for an organisation, it must be taken."

4 OfS Guidance, paragraph 13.

5 OfS Guidance, paragraph 35.

6 Such contrary laws or other requirements are, so far as they themselves restrict Participants' free speech, subject to a "proportionality" test under the HRA, as discussed below.

of an HEP are likely to carry little relevant weight. This is supported by the OFS Guidance[7].

- 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 the detailed discussion at Appendix 2.

- The OfS states that factors that are relevant to an assessment of whether steps are "reasonably practicable" may include the extent to which taking the step, or not taking it, would secure or restrict freedom of speech; the practical costs (time, money, personnel) of taking the step, or not taking it; and financial constraints[8]. 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 interpreting the obligations under HERA; it must be that the costs would need to be severely disproportionate to the likely free speech benefit for the step not to be reasonably practicable. HEPs will be complying with an objective standard they may be held to: they do not have much discretion here.

There are times when there can be a perceived overlap or conflict between requirements to protect free speech under HERA and other legal obligations, or HEP programmes or priorities, which are asserted to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. Interpreting potentially contrary laws and requirements correctly is going to be vital for HEPs, as over-interpretation creates major risks for them. We set out detailed information in Appendix 1 about the necessary approach in order to resolve such perceived conflicts appropriately. 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*".[9]

Academic freedom: The primary duty above extends to securing that academic staff are 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 HEP or the likelihood of their securing promotion or different jobs at the HEP being reduced. Applicants for academic positions must not be adversely affected because they have

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[7] See paragraph 75d.

[8] OfS Guidance, paragraph 36. A step may be reasonably practicable for a large provider but not for a small relevant students' union (OfS Guidance, paragraph 39).

[9] Insight publication *Freedom to question, challenge and debate*, December 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.)

previously exercised their rights to academic freedom, i.e. questioned received wisdom etc as described above[10].

Duty to promote free speech: HEPs must now positively promote the importance of freedom of speech (within the law) and academic freedom in the provision of higher education.[11] This requires active steps to be taken.

***Meetings*:** HEPs 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. HEPs 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[12].

Codes of practice and free speech statements: HEPs must maintain a *"code of practice"* which sets out: the HEP's values relating to freedom of speech; the procedures to be followed by both staff and students of and any students' union at the HEP in connection with the organisation of meetings and other activities at the HEP's premises and the conduct required of such persons in connection with those meetings and activities; and the criteria applied by the HEP in deciding whether to allow the use of premises and on what terms. An HEP 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.[13]

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

OfS requirements and guidance: The OfS, as regulator of HEPs under HERA, has issued various schemes and statements implementing and enlarging on the compliance regime under HERA, including about its complaints scheme and the requirements for students' unions. Its draft OfS Guidance explaining the requirements in practice consequent on the legal

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[10] **Sub-sections A1(5)-(9)**.

[11] **Section A3**.

[12] **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.

See BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for detailed information about the requirements relating to meetings.

[13] **Section A2**. Detailed consequential requirements under the OfS Guidance are discussed in Part 3.

obligations in HERA is particularly significant, as it contains detailed information about how OfS expects HEPs to implement the requirements. Further, the courts will be likely to make reference to it when deciding civil cases brought under HERA. The OfS Guidance is discussed extensively in Part 3.

Equality Act 2010, PSED and the *protection of "protected viewpoints"*

Under the **Equality Act 2010** (the "**Equality Act**"), HEPs 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" occurs where a person (A) treats another person less favourably than A treats or would treat others, and includes an employer subjecting an employee to a detriment because of their protected viewpoint[14]. 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; the question of whether there has been such an "effect" has an objective element[15]. This has very wide implications, with many consequent detailed requirements for protecting "protected viewpoints".

The landmark *Forstater* case[16] established that holding gender-critical views is a *"protected characteristic"*. Views which challenged aspects of critical race theory were subsequently ruled to be protected, as were anti-Zionist ones[17]. The law in this area is still evolving and, in order

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[14] **Section 13**. Under **Section 19**, indirect discrimination may occur where a practice, policy or rule applies to many people in the same way (ie, apparently neutrally) but it puts people with a protected characteristic (including a claimant) at a particular disadvantage (eg it has a worse effect on them) when compared with people who do not share that characteristic, and the HEP concerned cannot show it to be a proportionate means of achieving a legitimate aim. This can have real effects in practice, regarding, for instance, rules which equate "gender-critical" views with transphobia, training which insists that all white people should assume they are inherently racist and recruitment or promotion processes which require applicants to demonstrate support for particular viewpoints or agendas.

[15] **Section 26**. See detailed discussion of this in Appendix 2.

[16] *Forstater v. CGD Europe et al*., 2021 (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

[17] *Corby v ACAS*, September 2023 (ET No: 1805305/2022) and *D. Miller v University of Bristol*, February 2024 [ET no: 1400780/2022]. It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that the Mr Miller made "manifestations" of this which were antisemitic and thus not protected.

to avoid finding themselves in breach of the law, HEPs 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, must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. (These would include, for example, in relation to other aspects of critical race theory and moves to "decolonise the curriculum", and lawful views in relation to religions and their effects and the Palestinian cause.) See BFSP's detailed ***Statement about what sorts of beliefs are protected following the Forstater case***. There can be "inappropriate manifestations" of protected beliefs which do not qualify for protection[18], and this appears to generally work to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

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. HEPs 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 HEP's part* (other than limited duties under parts of the PSED as discussed below).

Recent cases have held employers – including the Open University – liable for discrimination against and harassment of employees in connection with their viewpoints, including liability for their employees attacking their colleagues by online petitions and pile-ons. They provide 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.

The **Public Sector Equality Duty** ("**PSED**") imposed on public authorities[19] 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 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.

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[18] See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643.

[19] Under **Section 149**.

HEPs thus need to work to protect their employees and others in respect of a wide range of opinions held, not held or expressed by them, including by:

- avoiding discriminating against or harassing such people through their own actions, policies and requirements, for instance through their disciplinary processes being used to suppress legitimate free speech; and

- taking all reasonable steps to prevent attacks and other actions by their employees and other representatives which would constitute discrimination or harassment attributable to them under Section 109.

Given that many people hold protected viewpoints about a wide range of currently controversial issues, this creates a major risk area for HEPs. This is likely to require greatly increased institutional neutrality in relation to many contested issues, as discussed in Part 3.

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

Human Rights Act

The free thought and speech rights of academics and students are protected under the **European Convention on Human Rights**[20], as enacted in the UK by the **HRA**[21]. These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful[22]. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.

The right to free expression is subject to the qualification that the "exercise of these freedoms, since it carries with it duties and responsibilities[23], may be subject to such formalities,

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

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

[22] 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.

[23] "Amongst them — in the context of religious opinions and beliefs — may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public

conditions, restrictions or penalties as are prescribed by law[24] and are necessary in a democratic society" for various specified purposes, including for the protection of the rights of others, although this qualification is subject to a "proportionality" test[25]. Contrary restrictions can thus operate to restrict free speech rights to a limited extent. This can be particularly relevant in cases of conflicts of free speech rights, for instance where Participant A attacks Participant B for their viewpoints. Participant A's right to do so can be restricted by rules made pursuant to the primary obligation in HERA and the need to prevent harassment by employees under the Equality Act, to the extent that this is proportionate. Given that the purpose of such restrictions is to protect free speech overall, and that cases under the Equality Act have operated to treat attacks on people for their protected viewpoints as unlawful, appropriately drafted rules of this sort are likely to satisfy this proportionality test.

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[26] 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 an HEP, 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 HEP. If an HEP discovers that illegal activity has or may have occurred, it

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debate capable of furthering progress in human affairs" (*Giniewski v France* (2006) 45 EHRR 23 at paragraph 43).

[24] "It is well established that "law" in this sense has an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law."

[25] In Article 10(2) (there is a similar provision in Article 9(2)). Public authorities can only restrict this right if they can show that their action is lawful, necessary and proportionate (i.e. appropriate and no more than necessary to address the issue) in order to protect the wider interests of society.

[26] There is an objective element to this.

will need to act promptly and carefully. This will likely involve taking and following timely legal advice.

Requirements as to governance

HEPs are required by their conditions of registration (E1 and E2) to have governing documents that uphold, and to have in place adequate and effective management and governance arrangements to deliver in practice, the public interest governance principles that apply to it. These include principles relating to securing freedom of speech and academic freedom.

The OfS has stated[27] that, in considering whether an HEP complies with condition of registration E1, it may consider questions such as whether those governing documents provide for reasonable steps that facilitate securing lawful speech or include content that provides for steps that may undermine free speech. In the same publication, the OfS stated that, in considering whether an HEP complies with condition of registration E2, it may consider questions such as:

- Does the HEP have robust decision-making arrangements, which require it to consider the impact of its decisions on free speech and academic freedom as part of the decision-making process?

- Does the HEP have checks and balances to ensure that its policies and processes do not adversely affect free speech or academic freedom?

Pursuant to **Section 8A** of HERA[28], the OfS must also ensure that HEPs' conditions of registration include a requirement that:

- their governing documents are consistent with compliance with their duties under Sections A1 to A3 of HERA to take reasonably practicable steps to secure and promote freedom of speech, including via a Code;

- HEPs must have in place adequate and effective management and governance arrangements to secure compliance with those duties[29]; and

- the governing body of the HEP complies with its primary obligations under HERA described above.

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27 OfS December 2022 Publication.

28 Due to come into force on 1 September 2025.

29 See also the OfS's *Securing student success: regulatory framework for higher education in England*.

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.

Complaints, risk, accountability and liability

Free speech failures create risk for HEPs, 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*:** 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 HEPs to the OfS and a right to bring civil proceedings against HEPs for damages for loss caused by breach of their statutory duty to protect free speech.[30] These are important changes, and will greatly increase HEPs' 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 an HEP contravenes **Section 110** of the Equality Act if he or she does something which is treated as having been done by the relevant HEP and the doing of that thing amounts to a contravention of the Equality Act by the relevant HEP. 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.

Constituent institutions and students' unions

The same legal duties and remedies under HERA now also apply to colleges, halls, and other "constituent institutions" of HEPs, with minor adjustments. Similar legal duties and remedies now also apply to students' unions of certain HEPs[31], with similar effects in practice to the above, save that the protections for academic freedom do not apply to students' unions. This is a major change. The Equality Act regime also applies to constituent institutions and students' unions, but the PSED does not apply to students' unions, and nor does the HRA. HEPs' own duties require them to take their own steps, to the extent reasonably practicable

[30] HERA sections **A7, and Section 69C and Schedule 6A**. HEPs are expected to have their own appropriate free speech complaints schemes.

[31] Of HEPs in England that are eligible for financial support.

given the nature of their structures and relationships, to ensure compliance by their constituent institutions and students' unions. BSP has produced detailed statements about the requirements in respect of constituent institutions and students' unions.

3. Requirements and implications in practice

The primary obligations under HERA to secure free speech and academic freedom, and the duty to promote free speech, involve an HEP taking the following steps, which will all enhance free speech protection and are all "*reasonably practicable*"[32]. HEPs' current and future conditions of registration will also require these steps to the extent that the above is correct[33]. 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 an HEP taking many of these steps (see the detailed discussion at Appendix 2). Each HEP 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.

Key general obligations

- **Not to discriminate or harass in connection with viewpoints**: A key general obligation, which underlies many of the other obligations in practice below, is not to discriminate against or harass Participants or visiting speakers in connection with their viewpoints.

  This is required in order to avoid compliance failures (in respect of "protected viewpoints") under the Equality Act. HEPs also need to take all reasonable steps to prevent their employees doing this in order to qualify for the Section 109(4) Defence. This will make a very substantial difference to securing free speech, and must in principle be reasonably practicable, so is in principle also required under the obligations in HERA, subject, of course, to the detailed circumstances of each case.

  The OfS Guidance contains an obligation on HEPs not to treat a student unfavourably, or less favourably than it treats or would treat another student, on the grounds of that student's opinions or ideas in various specified contexts[34]. This follows anti-discrimination concepts in the Equality Act. Similar obligations apply in respect of employees under the Equality Act, which also prohibits harassment of Participants in various circumstances.

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[32] The majority of the detailed requirements are set out or evidenced in the OS Guidance.

[33] Not least under the requirement, due in effect on 1 September 2025, for a condition that the governing body of the HEP complies with its primary obligations under HERA described above.

[34] Paragraph 112.

Rules, governance and training

- **Duty to promote free speech**: active steps to positively promote the importance of freedom of speech (within the law) and academic freedom in the provision of higher education.[35] More generally, **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.

- **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[36].

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- Ha**ving an appropriate free speech code of practice** containing the HEP's values relating to freedom of speech together with an explanation of how those values uphold freedom of speech[37], and specified procedural and other information regarding the holding of

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[35] HERA, Section A3.

[36] Specifically, the OfS Guidance says, at paragraph 64: "The terms of any code, contract or policy should not be so broad that they suppress the lawful expression of a particular viewpoint or of a wide range of legally expressible content"; at paragraph 65: "Policies and other statements should not discourage lawful speech by misrepresenting a provider's legal duties. This may include oversimplification – for instance, by omitting the importance of freedom of speech"; and, at paragraph 62: "If any code, contract or policy that regulates speech, or has the effect of regulating speech, identifies a category of restricted speech (such as 'harmful speech'), then:

a. such a category should be defined in a way which is not capable of restricting freedom of speech within the law, or academic freedom; and

b. that definition should explain that the interpretation of that category includes an objective element (so that it does not depend only on the perception of the alleged victim)."

See also Examples 10 to 13, which illustrate these requirements well.

Paragraphs 66 and 67 say: "Policies that regulate protests and demonstrations, posting or distributing written material (such as flyers), or recruitment activities, should not restrict these activities because they express or support a particular legally expressible viewpoint" and "Any other regulation of these activities should not be unnecessarily onerous". These are well illustrated by Examples 14 to 16.

[37] OfS Guidance, paragraph 76; it goes on to state (at paragraph 77) that HEPs should consider including: a statement about the overarching value of freedom of speech within the law for the HEP; a statement about how those values uphold freedom of speech within the law at the HEP; a statement emphasising the very high level of protection for the lawful expression of a viewpoint and for speech in an academic context; and a statement that freedom of speech within the law may include speech that is offensive.

meetings and events (of which more later); and providing specified information to Participants about relevant free speech requirements as well as its own obligations in relation to free speech. It should also have a clear and simple **statement** about the code, which should summarise its contents and make clear how to access it.

The OfS Guidance contains detailed information about publication, including that: the code must be easily accessible online; and the statement must be communicated to staff and students at least annually and contained in in any prospectus, staff and student handbooks, and included prominently in any other document stating or explaining any policy that may affect free speech or academic freedom, along with a statement that nothing in that other document should be read as undermining or conflicting with the free speech code of practice and that in case of any conflict the free speech code of practice will take precedence[38].[39] Information on the OfS' free speech complaints scheme must also be published in various specified ways[40].

- **Creating rules to ensure compliance** with the free speech obligations[41], including by prohibiting material actions by Participants against people in respect of their viewpoints, such as harassment and severe personal attacks, online pile-ons[42] and making inappropriate complaints and allegations. These restrictions will themselves need to be written in a way that is compliant with the free speech rights of Participants[43]. HEPs will need to have appropriate disciplinary processes in order to secure compliance with those rules and appropriate and effective processes for remedying activity which is contrary to free speech related requirements.

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

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[38] This includes all policies relating to: admission, appointment, reappointment and promotion, disciplinary matters, employment contracts (that may include conditions on speech),equality or equity, diversity and inclusion, including the Public Sector Equality Duty, harassment and bullying, IT, including acceptable use policies and surveillance of social media use, the Prevent duty, principles of curricular design, research ethics, speaker events and staff and student codes of conduct.

[39] In paragraphs 74 and 75 of the OfS Guidance.

[40] In paragraphs 96 to 98 of the OfS Guidance.

[41] This is a clear requirement in order to qualify for the Section 109(4) Defence, and will be likely to become a clear obligation under HERA as jurisprudence develops: see Appendix 2 for more on this. This requirement underlies paragraphs 73 to 86 of the OfS Guidance.

[42] OfS Guidance, paragraph 50, states that these may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns.

[43] To the extent that these rules, or enforcement of them, themselves restrict the rights of Participants to express their views about other Participants or visiting speakers, they will need to be 'proportionate' in order to comply with the HRA and HERA. See the discussion of proportionality under "Human Rights Act" in Part 2.

- ensuring that it has taken all actions required to comply with its conditions of registration as described above;

- taking these issues seriously at senior levels, which will involve; free speech promotion and protection being a sufficiently regular agenda item for its governing body; 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; and having a senior free speech officer as discussed below;

- ensuring that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact[44];

- ensuring it has an effective accountability structure: all staff with responsibilities relating to areas that could affect compliance with free speech duties should have clear responsibilities for promoting and securing free speech within those areas, and understand those responsibilities. This will particularly apply in respect of leaders in areas such as EDI and some academic disciplines, by or in respect of which controversial agendas may be enforced, such as requiring compliance with contested values in induction, training, recruitment or promotion processes, and in respect of the curriculum. There should be a chain of responsibility and supervision between those staff members and the governing body;

- 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;

- having 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; and appropriately addressing the fact that many complaints will be against the HEP and its staff, so will need to be resolved by people who are sufficiently independent to avoid material conflicts of interest; and

- recording all decisions that could directly or indirectly (and positively or negatively) affect free speech within the law. These records should demonstrate how the HEP has had particular regard for the importance of free speech within the law[45].

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[44] OfS Guidance paragraph 102: this includes a list of committees responsible for various specified matters. This will apply more widely that just in respect of obligations under HERA: for instance obligations to protect "protected viewpoints" under the Equality Act.

[45] OfS Guidance paragraph 100.

- Appointing a **free speech officer** to be its internal advocate for free speech and academic freedom, with responsibility for ensuring that the HEP complies with its legal obligations and follows and enforces its own rules appropriately. That officer should be appropriately senior (sufficiently so to participate in governing body meetings), empowered, available (although this does not necessarily have to be a full-time position, particularly if they have other staff to help them fulfil their role), experienced and trained, and non-conflicted[46].

- **Ensuring that Participants have adequate induction and training** (in the context of the nature of their involvement with the HEP) about protection of free speech and academic freedom, and understand the nature of the requirements to protect free speech[47]. This particularly applies in respect of staff who are involved in functions which could create free speech risks or have free speech implications, including anyone involved in appointments, promotions and disciplinary processes.

<u>Action required to protect free speech and stop suppression of viewpoints</u>

- **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[48].

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[46] Given that controversies around aspects of diversity agendas appear to have given 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 an HEP's EDI department without insuperable conflicts of interest.

[47] The OfS Guidance states that:

- "adequate induction" means that all staff and students will have at least an up-to-date understanding of: the free speech code of practice and how it applies in practice; *their own free speech rights under HERA, the HRA and the Equality Act*; the free speech rights of members, members of staff, students and visiting speakers under HERA, the HRA and the Equality Act; and the free speech complaints scheme and their own right to use it. (Paragraph 117.)

- "adequate training" means that staff will have an up-to-date understanding of: the free speech code of practice and how it applies in practice, including its application in detail to the member of staff's role in the organisation; the requirements of HERA, the HRA and the Equality Actin relation to freedom of speech and how they apply in detail to the member of staff's role in the organisation; and the OfS' free speech complaints scheme and its relevance to the member of staff's role in the organisation. This should further extend to understanding their duties. (Paragraph 116.)

[48] These are key lessons of the *Fahmy* and *Phoenix* cases, described in Appendix 2. And see Example 2 in the OfS Guidance. See also Note 49 below.

- **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 and, often, the need to qualify for the Section 109(4) Defence[49] require an HEP to take such action as it can to stop (or stop recurrence of) various types of hostile actions, including harassment, personal attacks and online pile-ons, that are being taken against the Participant because of their lawful viewpoint, especially where those actions are in possible breach of the HEP's own relevant rules and requirements.[50]

  - This is likely to involve some or all of: identifying the Participants who are, or may be, taking those actions, and informing them 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. This can also involve monitoring its internal communications systems (whether email, online meetings, chat or others means), making prompt and effective interventions where needed, including requiring suspensions or deletions of messages.

  - 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

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[49] The *Fahmy* and *Phoenix/Open University* cases were in essence about attacks by employees made to harm and distress a colleague for her views which dissented from the ideology held by the attackers constituting harassment by the employer.

[50] The OfS Guidance says that HEPs "should promptly reject public campaigns to discipline, expel or fire a student or member of staff for lawful expression of an idea or viewpoint. These may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns. […] Depending on the circumstances, rather than publicly distancing itself, it may be more helpful for [an HEP] to reiterate the importance of free speech for all staff and students, including the person affected. It may also be especially important for the response to be timely." (paragraphs 50 and 51. See also Examples 6 and 7). This is very useful clarification as far as it goes, but insufficiently wide if they are to have done enough to comply with their obligations under HERA and qualify for the Section 109(4) Defence (see more at Appendix 2), HEPs need to be active in stopping attacks and, if appropriate, bringing disciplinary action.

obligations under HERA, and this pressure would itself be a breach by Participants of an HEP's rules and requirements if they are appropriate to comply with HERA.[51]

HEPs need to have practices, policies and requirements in place to enable them to do the above[52]. This would include, for instance, ensuring that their internal communications systems are controllable and monitorable; and being ready to actively do so, and to make prompt and effective interventions, when necessary.

- **Not allowing its complaints and disciplinary functions to become instruments of free speech suppression**, contrary to the Relevant Requirements. Every complaints process should include a fair, objective and rapid triage process for complaints relating to speech, and this should reject vexatious, frivolous or obviously unmeritorious complaints relating to speech; an HEP should also not pursue vexatious complaints or trivial investigations into other matters against an individual because of their lawful expression of a viewpoint.[53]An HEP must treat all complaints relating to speech with caution. Complaints processes should be concluded as rapidly as is reasonably practicable, compatibly with the interests of justice[54]. An HEP 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[55]. HEPPs should not encourage students or staff to report others over speech that could include the lawful expression of a particular viewpoint[56].

- **Not enforcing controversial agendas; the curriculum; research:** Whenever HEPs 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[57]. They also risk constituting harassment under the Equality Act;

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51 See Note 49 above.

52 See the *Fahmy* case, described in Appendix 2: a failure to have the right rules was cited as one of the reasons why it could not escape liability for harassment by its employees.

53 See OfS Guidance paragraphs 70 and 72, which are well illustrated by Example 18.

54 See OfS Guidance paragraph 71.

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

56 OfS Guidance paragraph 69 and Example 17.

57 Examples 4, 7, 9, 10, 11, 14, 15, 22, 28 and 30 in the OfS Guidance illustrate this well.

an institution disapproving of a viewpoint has been held to be sufficient to constitute harassment[58].

HEPs 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 obligations under the Relevant Requirements, or unlawfully discriminate against or harass people in respect of their views which count as "protected characteristics". In particular, an HEP "should ensure that decisions about the curriculum and the way it is delivered safeguard the ability of academics to teach and communicate ideas that may be controversial or unpopular but lawful, and opportunities for students to be exposed to such ideas" and "academic staff should not be constrained or pressured in their teaching to endorse or reject particular value judgements"[59]. See BFSP's statement ***"Decolonizing the curriculum": potential free speech problems*** for more detailed information.

Participants should be free to undertake academic research within the law. This freedom should not be restricted or compromised in any way because of a perceived or actual tension between any conclusions that the research may reach or has reached or the viewpoint it supports, and the organisation's policies or values. Nor should it be restricted or compromised in any way because of any external pressure connected with those conclusions[60].

- **Sufficient institutional neutrality**[61]: The above requirements and risks lead inevitably to an underlying issue: 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, and creating or tolerating environments in which attacking people for their viewpoints is acceptable. A number of recent public failures (with unlawful harassment and discrimination found by the Employment Tribunal) have largely arisen as a result of an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate[62].

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58 In the Meade case (see Appendix 2). See also the *Fahmy* case, described in Appendix 2.

59 OfS Guidance, paragraphs 103 and 112 and Examples 28 and 29.

60 OfS Guidance, paragraph 105 and Examples 22 and 23.

61 "The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other…", per Choudhury P in *Forstater v CHG (Europe)* [2022] ICR 1, at paragraph 55. How have institutions so badly lost sight of this principle?

62 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.

HEPs and their representatives therefore need to maintain sufficient institutional neutrality on matters of polarised public debate, i.e. at least take an approach which is very careful to avoid actions and language which risk counting as discrimination or harassment under the Equality Act or suppressing free speech contrary to HERA, while of course complying with their wider relevant legal obligations. This is also the effective expectation of the OfS: its Guidance has several examples of the consequences of failures of neutrality[63]. Achieving sufficient neutrality on a piecemeal basis will be difficult, as it will be hard to be sure of complying in the context of the great variety of factual circumstances and legal requirements that may apply. It will involve risk and a lot of time from senior staff – and inevitably expensive legal advice. We therefore recommend that a general policy of maintaining institutional neutrality on controversial issues is the safest way forward for HEPs.

- **Avoiding and reducing an oppressive atmosphere**: Research strongly evidences that an atmosphere exists at many HEPs 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 HEPs, HEPs 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; qualifying for the Section 109(4) Defence can also require this. This will involve being vigilant to prevent, identify and stop free speech transgressions; firmly enforcing its code of conduct and rules; and taking the other steps set out elsewhere in this Part 3. BFSP recognises that this is an such a protean problem that it is not going to be easy to address, and there may not be many further steps which HEPs can realistically take.

- **Ensuring that any staff or student courses, "tests" or "training**", for instance for new arrivals, do not wrongly inhibit or suppress free speech. See BFSP's statement ***Introductory EDI courses: potential free speech problems*** for detail about the relevant legal requirements and their effects in practice[64].

- **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.[65]

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[63] Examples 4, 5, 6, 7, 9, 10, 14, 22, 23, 28, 29 and 30.

[64] See OfS Guidance paragraph 118.

[65] The policies or requirements of HEPs are sometimes written in ways which reflect the viewpoints or desired outcomes of campaign organisations but which misrepresent relevant legal

Meetings

- **Meetings:** Taking all reasonably practicable steps to ensure that the use of its premises is not denied to any person or body because of their viewpoints, policies or objectives, 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. This applies both to internal meetings and ones with external speakers (including participants in debates or discussions). Save in exceptional circumstances, not requiring the organiser of an event to bear any of the costs of security relating to the event[66].

  The free speech code should contain specified procedural and other information regarding the holding of and conduct at meetings and events[67].

  See BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for detailed information about the requirements relating to meetings.

Admissions, appointments, promotions and termination

- **Admissions**: An HEP should not discriminate against a person in connection with their viewpoints, for instance by refusing them admission, marking them down in the admissions assessment process or revoking or changing the terms of their admission to the HEP. It should not admit students or visiting academics on the basis of funding arrangements or other criteria that have the effect of restricting their or others' free speech or academic freedom within the law. They should be proactive about checking that those applying to be visiting academics do not pose risks to academic freedom.[68]

- **Employment, appointments and promotions**: An HEP should not discriminate against a person in respect of their viewpoints in connection with their employment generally. An HEP should secure that, where a person applies to become a member of staff or for

requirements or the nature of the HEP's and Participants' obligations and/or operate to suppress dissenting viewpoints. Free speech issues with training and tests regarding diversity matters have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

66 The OfS Guidance contains detailed requirements about security costs at paragraphs 87 to 94.

67 The OfS Guidance contains detailed requirements, including about the procedures for organising and required conduct at meetings, at paragraphs 78 to 86.

68 See OfS Guidance paragraphs 43 and 44 and Example 3.

promotion, the applicant is not adversely affected in relation to the application, or the appointment or promotion process, because of viewpoints held or previously expressed or because (in the case of applicants for academic positions) they have exercised their academic freedom within the law.[69]

- **Termination**: HEPs should not terminate employment for, or deny reappointment to, any member of staff because they hold or have expressed a particular viewpoint, and must secure that no member of academic staff is at risk of losing their job or any privileges because they have exercised their free speech rights under HERA.[70]

- **No EDI commitments or statements:** HEPs should not require employees, or applicants for positions or promotions, to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate who holds, or has expressed, particular viewpoints, or for having exercised, or exercising, their academic freedom within the law[71]. More widely, seeking information on people's viewpoints/alignment with values at all in connection with employment, appointments or promotions risks being seen as being done in preparation to discriminate based on their viewpoints, and more generally is likely to have an intimidating/chilling effect. This should not happen.

- **Records**: An admissions, appointment, promotion, disciplinary or dismissal process should include a sufficiently detailed record of all decisions. This record should include evidence that the relevant process did not penalise a candidate or member of staff in connection with their viewpoints or for their exercise of free speech academic freedom.[72]

- **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

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[69] See OfS Guidance paragraphs 45 and 57 and Examples 4 and 9. The OfS Guidance focuses exclusively on academic freedom, and does not expressly refer to the wider free speech protection obligations in respect of all staff.

[70] All derived from the OfS Guidance, paragraphs 52 and 53. See also Example 8. Paragraph 53 focuses exclusively on academic freedom, although in principle similar protections should apply in respect of all staff.

[71] See OfS Guidance paragraphs 48, 54 and 58 and Example 9. These paragraphs focus exclusively on academic staff, although in principle similar protections should apply in respect of all staff.

[72] See OfS Guidance, paragraphs 47, 55 and 59, which focus exclusively on academic positions although in principle similar protections should apply in respect of all staff.

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

- Statements about the new legal requirements and their implications for **colleges and other constituent institutions** and for **students' unions**.
- **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**. And **Liability for discrimination and harassment by staff against people with protected beliefs under the Equality Act: The Phoenix case**.
- **Know your free speech rights.**
- **Meetings at English HEPs: Free speech requirements and risks.**
- **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 its implications, 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;*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular HEPs, will have to be developed by HEPs themselves, in the context of their own particular circumstances;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE****: see its publication date above.*

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 under HERA and other legal obligations or an HEP'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 HEPs' 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 necessary analytical process in the event of competing claims

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

- The primary free speech obligation under HERA to take all reasonably practical steps to secure free speech within the law is overriding[73], subject to its inherent limitations. The need to take actions so as to qualify for the Section 109(4) Defence will also carry very significant weight.

- When an incident raises considerations about whether the speech in question is "lawful" so as to fall within the obligations in HERA (e.g. in relation to assertions of unlawfulness such as harassment under the Equality Act by reason of (say) someone's opinions or a proposed meeting), HEPs must review carefully whether any laws ("**contrary laws**") are contravened by the relevant statement, opinion, action or event ("**relevant view or event**") so as to render the relevant view or event unlawful. If the relevant view or event is not unlawful, 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.

- Issues may arise as to whether there are steps that can be "reasonably practicable" to take in the relevant circumstances[74] and, in particular, whether other legal obligations on an HEP 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

[73] Of, for instance, the PSED and the HEPs' policies and agendas as discussed below, but not of the HRA.

[74] See the discussion of "reasonable practicability" in Part 2.

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. The EHRC has said "The harassment provisions [of the Equality Act 2010] 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."[75]

Interpreting contrary laws, requirements and policies; the HRA

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.

HEPs 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 HEPs. 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 will be relevant as likely limitations on HEPs' obligations to secure free speech. To the extent that policies and rules go beyond this, treating them as overriding will put the relevant HEP at risk as regards its obligations to secure free speech.

There can be claims that rules restricting the ability of Participant A to attack other Participants or visiting speakers in respect of their viewpoints infringe Participant A's rights to free speech under the HRA and HERA. Under HRA, Participant A's free speech rights are, however, subject to HEPs being entitled to impose restrictions on their attacking other Participants or visiting speakers in respect of their viewpoints, so long as those restrictions are themselves written so as to be 'proportionate'[76]. The same applies in respect of enforcing those rules. Similar considerations would apply under HERA: appropriately written rules prohibiting Participant A from attacking other Participants or a visiting speaker in respect of their viewpoints, which were made so as to satisfy obligations under HERA, would not be likely to be held to offend the rights of those Participant A.

Not misrepresenting or overstating the scope or effect of contrary laws

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[75] EHRC's *Guide Freedom of Expression for HEPs and SUs in England and Wales* (the "**EHRC Guide**").

[76] See the discussion of proportionality under "Human Rights Act" in Part 2.

HEPs need to be very careful to word any materials so they do not overstate the scope or effect of contrary laws and thus have the effect of unlawfully restricting free speech.[77]

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 HEPs, and their employees in the course of their employment and agents when performing functions for the HEP, 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 HEPs 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.

[77] See the OfS Guidance, paragraphs 62 to 67 and associated examples.

Appendix 2 – Defining harassment etc; recent Equality Act cases and the consequent requirements to prevent discrimination and harassment in respect of people's viewpoints

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 for that person[78]. 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 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[79]. 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.[80]
- Further, Employment Tribunals have 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 have emphasised the importance of not encouraging "*a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*"[81]; 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*"[82].

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78 **Section 26**.

79 **Section 26(4).**

80 *Pemberton v. lnwood* [2018] EWCA Civ 564; [2018] lCR 1291.

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

82 *Forstater* (see Note 15 above) at paragraph 116.

- Save in respect of the second and third elements of the PSED, HEPs have no duty in respect of the behaviour of students or their staff acting in their own capacities (as opposed to when they also have some role with the HEP, such as employee, in the context of which the relevant event occurred).

In this context, the EHRC Guide states the following:

(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 which count as "protected characteristics". The following are three crucial cases which define in detail what constitutes "discrimination" and "harassment" for these purposes.

- The *Fahmy* case[83]: an institution was found guilty of harassment as a result of not having taken reasonable 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 an earlier 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"

[83] *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".

It is also worth noting that comments at the earlier online meeting were hostile and quite strongly expressed, but these were held not to constitute harassment. BFSP applauds this, in that encouraging and protecting robust debate is essential, meetings are inherently spontaneous (so with a risk of spontaneous expressions which would not be uttered in a different environment), and meetings on a contentious topic are inherently likely to involve strongly expressed views. The outcome could well have been different had the meeting involved co-ordinated, extreme attacks, barracking and the like. This is, more generally, a reminder that comments and statements, even strongly expressed ones, which a recipient may find offensive, do not necessarily constitute harassment. The bar is not low.

In connection with the Section 109(4) Defence, the Tribunal noted that the employer had taken disciplinary action, but ruled that having an anti-harassment policy which omitted protected beliefs from a list of protected characteristics, and not having effected staff training about protected beliefs, led to it not having qualified for the Section 109(4) Defence.

- The *Meade* case[84]: an employer and a regulatory body were found guilty of discrimination and 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

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

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 colleague.

- The *Phoenix/Open University* case[85]: personal 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.

  It is useful to list some of the things that were ruled to constitute harassment: as in the *Meade*[86] 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 (almost all the signatories were found to have harassed Professor Phoenix by signing the 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 the pile-on; and, finally, leaving a hostile 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.

  The Open University did not even attempt to claim it had qualified for the Section 109(4) Defence.

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

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

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

There are detailed BFSP statements explaining the findings in the *Fahmy*, *Meade* and *Phoenix* cases.

Requirements in practice to prevent discrimination and harassment following these cases

It appears that many HEPs are very behind on their understanding of this aspect of the Equality Act, and need to bring their practices up to date urgently, to ensure they comply with their duties as recently clarified. This means a profound change of mindset as regards e.g. campaigns and complaints against a person for expressing a viewpoint.

The key direct implications of the issues/failures addressed in 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 reasonable steps **to prevent its staff from attacking people** for their viewpoints in ways that would be likely to constitute harassment, including by writing or signing aggressive open letters, joining social media pile-ons, making unjustified complaints and the like. This means:

  - **having appropriate policies and requirements** prohibiting attacks on other employees (etc); and

  - **enforcing them** appropriately, bringing disciplinary proceedings against employees who harass their colleagues.

- Ensure that their employees are **sufficiently trained** about protecting viewpoints, and their duties not to harass and discriminate against their colleagues for their viewpoints and the boundary between robust but legitimate debate and bullying or harassment.

- Not allow **inappropriate enforcement of contested viewpoints**, as this will itself be discrimination and harassment, and in particular **not allow its complaints and disciplinary functions to become instruments of free speech suppression.** The *Meade* case was about wrongful disciplinary actions by institutions against someone for her viewpoints and included a ruling that labelling her gender-critical views as being transphobic was enough to itself constitute harassment; the *Fahmy* and *Phoenix*/*Open University* cases were in essence about attacks by employees made to harm and distress a person for her views which dissented from the ideology held by the attackers constituting harassment attributable to the employer.

- 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 which have so far become clear have many necessary secondary or associated implications, which are listed in Part 3 of this Statement. They include that employers need to do the following.

- Have **appropriate systems** in place for reporting and management of problems, and for review and improvement of its policies, practices and requirements; and **update their policies, practices and requirements** to make sure they are consistent with their duties under the Equality Act, including by avoiding unjustifiably preventing or restricting the expression of protected viewpoints, for instance by mis-defining "harassment", by giving inappropriate emphasis to concepts such as "hurt" or "harm" so as effectively to justify suppressing unpopular viewpoints, or by mis-stating or exaggerating legal obligations on them which may conflict with their obligations to secure those viewpoints.

- Ensure they have appropriately senior, experienced, empowered and non-conflicted **personnel with responsibly** to carry the above into effect.

- Ensure that their **internal communications systems** (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed.

- **Restructure or terminate relationships** with external activists where they have caused or may cause the employer to go down the path to unlawfulness, for instance by requiring "no debate" policies or conflating gender-critical views with transphobia in its policies or official pronouncements.

Equality Act cases relevant for identifying requirements in practice under HERA

As explained above, employers have a defence under Section 109(4) from liability for harassment and discrimination by their employees if they can show that they took "all reasonable steps" to prevent an employee from doing the alleged act or anything of that description. (While the principal duties under the Equality Act are negative ones (not to discriminate, harass etc), the Section 109(4) Defence requires positive action to be taken in order to qualify for it. It is hard to qualify for in practice, with a high level of action required, particularly for large employers.)

This is also likely to be the level/standard (at least) at which HEPs would be required to prevent attacks and other actions under HERA, once the Courts hear cases alleging failures to secure free speech under it, for the following reasons.

The wording in Section 109(4) is strikingly similar to Section of A1 of HERA, which requires an HEP to take "*the steps that are reasonably practicable to take*" (i.e., all such steps) to secure freedom of speech, although it is worth noting that the duty under HERA is a positive one, so in principle more demanding than the "qualifying for exemption" structure of Section 109(4), which is limited by its focus on preventing the range of actions which would constitute a breach of the negative "underlying" duties under the Equality Act.

These provisions are intended to ensure very similar outcomes, so it must be likely that rulings by the Employment Tribunal in respect of matters which have given rise to failures to qualify for the Section 109(4) Defence (e.g. by failing to prevent attacks on colleagues for their viewpoints) would have strong persuasive power to the Courts as to how to interpret the positive Section of A1 of HERA for the purposes of the new statutory tort under HERA as revised, although it may be that Section A1 demands a wider range of actions than those required to qualify for the Section 109(4) Defence. In the absence of guidance or emerging case law, it would be unwise not to act on the basis that it will be thus.

It therefore appears to be wise, until guidance or case law emerges, to act on the basis that the level of action which is necessary to secure compliance with the Equality Act (at least those needed to qualify for the Section 109(4) Defence) should also be treated as relevant under the possibly more wide-ranging duty under HERA, so reference should be made to relevant Tribunal rulings for these purposes.

The action required to qualify for the Section 109(4) Defence is, however, limited to what will prevent harassment, discrimination etc by employees under the Equality Act, whereas the requirement under HERA to "secure free speech" must in principle be wider: in Venn Diagram terms, the larger circle within which the circle of actions required for the Section 109(4) Defence sits. What is unclear is: how much larger is the range of actions which are required under HERA than that of those which are required to qualify for the Section 109(4) Defence[87]? This will become clearer as case law, regulatory precedent and guidance evolve. It may be that it is not materially different in practice, as regards controlling the actions of Participants, but this distinction needs to be kept in mind in principle.

The above helps HEPs, to a degree, in that it gives them information about the sorts of actions that will need to be taken to comply with HERA, although it is as yet unproven whether (and to what extent) the requirements under HERA may be more wide-ranging in practice. It would lead to insuperable complexities, and consequent legal problems, if HEPs had to operate two very different sets of restrictions to reflect different legal requirements.

[87] The requirements in HERA (in particular, the legitimacy of rules under it restricting the freedoms of Participants to attack each other) will also be subject to the limitations in the Human Rights Act 1998 discussed below.