



## EXPOSURE DRAFT

# Requirements for staff and student behaviour

## English HEPs' free speech compliance obligations

**PRELIMINARY NOTE:** this Statement sets out the position as at 1 August 2024, when the main provisions of the Higher Education (Freedom of Speech) Act 2023, which amends HERA so as to have the effects described below, comes into effect.

**IMPORTANT – THIS EXPOSURE DRAFT STATEMENT has been issued to assist HEPs and others in their planning in preparation for the legal changes on 1 August. IT WILL BE REVISED AFTER THE OFS' GUIDANCE IS FINALISED. Note that the OfS guidance to which it refers is in draft form and will be revised before it is finalised. THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end. SEE ALSO the important notice at page 19.**

Best Free Speech Practice (“BFSP”) is a non-partisan campaign to clarify and publicly share what the legal requirements and their implications in practice actually are for the protection of free speech at UK Universities and other Higher Education Providers (“HEPs”). References in this document to free speech should also be taken to refer to academic freedom, where applicable.

This is a statement of the legal obligations for English HEPs as regards the necessary policies/rules regarding staff and student behaviour in order to protect free speech, and the consequent requirements in practice. 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 certain students’ unions.

### Relevant law

English HEPs must have in place an appropriate level of core prohibitions and associated disciplinary procedures and sanctions (“**Relevant Prohibitions**”) in order to secure compliance with the following requirements.

**HERA:** Their legal obligations under Section A1 of the Higher Education and Research Act 2017<sup>1</sup> (“**HERA**”), that registered HEPs take “*the steps that, having particular regard to the*

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<sup>1</sup> With effect from 1 August 2024.

*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 ("**Visiting Speakers**") to the HEP or to its premises<sup>2</sup>, and to secure academic freedom for academic staff (which is defined with a free speech emphasis, namely questioning and testing received wisdom and putting forward new ideas or controversial /unpopular opinions) and protect meetings.

The OfS, as regulator of HEPs under HERA, has issued various schemes and statements implementing and enlarging on the compliance regime under HERA. Its draft guidance ("**OfS Guidance**") explaining the requirements in practice consequent on the legal obligations in HERA is particularly significant, as it contains detailed information about how the 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.

**Equality Act:** The Equality Act 2010 ("**Equality Act**") (see further below), so far as it relates to viewpoints which count as "protected characteristics" for the purposes of that Act. As is now well known, various viewpoints on currently contested issues had been ruled to be protected philosophical beliefs under the Equality Act. These include "gender-critical" viewpoints and ones which contest aspects of "critical race theory". Employers and education providers need to avoid discrimination against and harassment of people with such viewpoints in certain specified contexts. There can be "inappropriate (sometimes expressed as "objectionable") manifestations" of protected beliefs which do not qualify for protection<sup>3</sup>.

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. This is a high bar.

Of particular relevance to the subject at hand are various Tribunal judgements in respect of the protection of protected viewpoints under the Equality Act, under which employers have been held liable for actions of their employees, including personal attacks and online pile-ons. Detailed statements on these cases can be found at <https://bfsp.uk/universities-and-free-speech>.

It is worth noting that, in general, HEPs are not responsible under the Equality Act for the behaviour of their students, other than a duty to give thought to the matters specified in their Public Sector Equality Duty<sup>4</sup>. This has the implications discussed below.

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<sup>2</sup> 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. It is limited only by reference to the speech being "*within the law*" and by what is "*reasonably practicable*". Free speech obligations otherwise override other considerations.

<sup>3</sup> See *Wastenev v East London NHS Foundation Trust* [2016] ICR 643.

<sup>4</sup> Under **Section 149**.

*The Human Rights Act 1998* (“HRA”, and together with HRA and the Equality Act, the “**Relevant Law**”): see further below.

**Their own statements, codes and requirements** relating to the protection of free speech (together with the above, “**Relevant Requirements**”).

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Further details of the relevant legal and regulatory requirements and their implications can be found in BFSP’s Statement *Free speech protection at English universities: The law and requirements in practice* (the “**Principal Statement**”), which can be found at <https://bfsp.uk/universities-and-free-speech>.

This is a statement of what appear to be the best currently available approach to creating the Relevant Prohibitions necessary to ensure that HEPs comply with the Relevant Requirements. These steps are reasonably practicable and would make a significant contribution to the protection of free speech at HEPs. The rules set out below are specimens only; specific rules will have to be developed by HEPs themselves, in the context of their own particular circumstances. What additional prohibitions will be appropriate for a particular HEP will depend on all the circumstances.

### **Key factors in relation to the creation of appropriate Relevant Prohibitions**

HERA requires the protection of all lawful speech, subject to the “reasonable practicability” limitation and to requirements in the HRA for (e.g.) proportionality as discussed below and in the Appendix. It is clear that a “reasonably practicable step” to secure free speech required under HERA is to create requirements to ensure appropriate behaviour by Participants in the context of free speech protection<sup>5</sup>, including by prohibiting material actions by Participants against people in respect of their viewpoints, such as bullying, discrimination, harassment and severe personal attacks, online pile-ons<sup>6</sup> and making inappropriate complaints and allegations.

These are obligations under HERA, separate from and in parallel to existing obligations under the Equality Act (and the need to qualify for the Section 109(4) Defence in particular), under which an HEP will need to prevent actions by its employees including personal attacks (whether in person, in writing, by email or social media) against and other actions which disadvantage another Participant in respect of their viewpoints which are such as would constitute unlawful discrimination or harassment under the Equality Act. What this means in practice is discussed at Appendix 2 of the Principal Statement.

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<sup>5</sup> This is a clear requirement in order to qualify for the Section 109(4) Defence and, BFSP considers, is also a clear obligation under HERA which will be confirmed as such as jurisprudence develops. This requirement underlies paragraphs 75 to 86 of the OfS’ Guidance.

<sup>6</sup> 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.

The difficult issue is what the form of these rules should be, not whether there should be such rules. These restrictions will themselves need to be written in a way that is compliant with the free speech rights of Participants. 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.

Formulating prohibitions on Participant behaviour as regards attacking or disadvantaging people for their viewpoints has become very difficult for HEPs as a result of the matters mentioned below, which are discussed in more detailed in the Appendix.

- We are of the view that the level of preventive action require to qualify for the Section 109(4) Defence is also likely to be at least the level/standard at which HEPs would be required to prevent attacks and other actions under HERA, once the courts rule on cases alleging failures to secure free speech under it.

This above helps HEPs, to a degree, in that it would lead to insuperable complexities, and consequent legal problems, if they had to operate two different sets of restrictions to reflect different legal requirements.

- It is necessary to try to set relatively simple, consistent Relevant Prohibitions which Participants, especially students, will have a hope of understanding and following. This can, however, create legal issues as the underlying laws are complicated and hard to summarise simply.
- There can be a “conflict of free speech rights” in these cases: i.e., the potential for it to be contrary to Participant A’s free speech rights to have rules (such as the Relevant Prohibitions) against Participant A attacking Participant B for their viewpoint, and to enforce those rules. The following points are applicable.

- Unlawful speech is not protected under HERA.
- HEPs can (as a general point) have to comply with relevant laws which are inconsistent with taking the relevant steps, and (more specifically to this case) legitimately have rules to protect people from wrongful behaviour (e.g. anti-bullying, or to stop personal attacks against people for their viewpoints pursuant to the obligations under HERA), which are themselves pitched so as to be compliant with HERA and the HRA, which it operates and enforces in a proportionate and consistent way. It will not be “reasonably practicable” to take steps to protect Participant A’s speech where this would be contrary to relevant laws, rules or need to take action as discussed above.

But see the detailed discussion in the Appendix of the implications of the need to protect Participant A’s speech under HERA and the HRA, and the need for relevant rules restricting that speech to be “prescribed by law”<sup>7</sup> and “proportionate”. The suggested form of Relevant Prohibitions below endeavours to achieve this balance.

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<sup>7</sup> 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.

- HEPs are not liable under the Equality Act if they impugn or do not protect "inappropriate manifestations" of protected viewpoints, so are not effectively required under that Act to work to prevent attacks on people to the extent that they express them. The obligations under HERA do not extend to protecting opinions and their expression which are unlawful.

These are not identical limitations. HERA does require protection of people with "inappropriate"-but-lawful viewpoints, unless it is not reasonably practicable to take the steps which might be available to give this effect, for instance because the relevant expression of the viewpoint is prohibited under an HEP's anti-bullying rules where those rules are themselves compliant with HERA and the HRA.

Even where relevant viewpoints or their expressions are unlawful, protections such as an HEP's general anti-bullying rules would still be likely to apply, and it must be appropriate to enforce them: an HEP turning a blind eye to bullying against someone who has made a mis-step will look terrible and could lead to disaster such as criminal activity or a mental health collapse on its watch and/or liability for the HEP. Whether the Relevant Prohibitions should be written so as to protect/not protect unlawful viewpoints is a delicate matter, but up to HEPs to decide for the reasons explained in the Appendix.

- BFSP has developed the suggested form of Relevant Prohibitions below as an example of what appears to be the best (least bad?) currently available approach to dealing with this complex area. With the legal requirements quite likely to change, what is appropriate for the detail of these prohibitions could also potentially change, so HEPs will need to stay alert to the evolving situation and be ready to make adjustments as appropriate.

*See the Appendix for a detailed discussion of the above matters, and what they mean for the Relevant Prohibitions.*

### ***Constituent institutions and students' unions***

The above factors and considerations apply in respect of those constituent institutions which are "public authorities" for the purposes of the HRA.

In respect of those constituent institutions which are not directly subject to the HRA, and students' unions, the HRA does not formally apply, so their Relevant Prohibitions are not subject to the requirement for proportionality. It must, however, be remembered that the courts/tribunals and the OfS are bound by the HRA when assessing compliance with the Relevant Law. In practical terms, therefore, they are indirectly subject to the HRA and there is likely to be little material difference in the nature of the Relevant Prohibitions which are appropriate for them.

## **Suggested form of Relevant Prohibitions**

Actions of the sort described below should be prohibited. Taking or doing such actions by a Participant should be a potential disciplinary matter. The rules set out below are, however, specimens only; there isn't one fixed way of achieving compliance, and specific requirements will have to be developed by HEPs themselves, in the context of their own particular circumstances and their existing requirements.

Many of these actions will already be prohibited (at least in part) at most HEPs, for instance under anti-harassment and anti-bullying requirements. To the extent that they are, the existing requirements do not need to be duplicated, and the rules below can be set out and harmonised with those existing requirements, but this would need to be done so as to ensure that their wordings and enforcement are sufficient to satisfy the Relevant Law, and in particular are "proportionate" for the purposes discussed in this statement, and information about these requirements would need to be available with other free speech requirements. But those requirements will need to be appropriately and proportionately enforced to ensure compliance with the Relevant Law. We suggest that "unified" requirements may be complex and not user-friendly, and that self-contained Relevant Prohibitions may be the best course, even though that would involve a degree of overlap.

Many of the publicised failures of the recent past have been failures of desire to act to protect free speech (or perhaps failures to appreciate the nature of their obligations), and thus failures of enforcement, rather than not having relevant requirements in place.

Protecting lawful v unlawful speech and anti-bullying requirements: See the discussion above and in the Appendix, about how it must be appropriate to enforce an HEP's general anti-bullying rules so as not to allow bullying of people who happen to have said (or are accusing of saying) something unlawful. Unlawful speech should be dealt with under (e.g.) appropriate disciplinary procedures – it is not a licence to in turn bully that speaker. We discuss in the Appendix the relationship between anti-bullying provisions in the Relevant Prohibitions and an HEP's its general anti-bullying provisions, and issues around it unifying those anti-bullying requirements. HEPs have similar to make about issues regarding parallel or unified requirements prohibitions regarding discrimination and harassment. The draft Relevant Prohibitions in this statement maintain flexibility for HEPs to make a decision.

Relevant Prohibitions regarding discrimination and harassment not limited to viewpoints which are "protected characteristics"? It must be highly likely that the courts would import the established definitions (and interpretation) of discrimination and harassment in the Equality Act when they decide on what is required in the way of Relevant Prohibitions pursuant to the duty under HERA. However, HERA requires the protection of all lawful speech, and there is no convincing reason why these protections (under HERA) should be artificially restricted so as to protect the limited range of viewpoints which constitute "protected characteristics" as identified pursuant to complex case law under the Equality Act. The implications of this are discussed in detail in the Appendix.

### ***Introduction: application and proportionality***

[HEP name] promotes and supports robust debate as part of the fundamental purpose and benefit of higher education. Protecting free speech and, where applicable, academic

freedom (and thus that debate) requires appropriate restrictions on certain types of attacks on and other detrimental actions (even if they are technically lawful) against Participants and Visiting Speakers, because of their viewpoints. This particularly applies to actions which count as harassment. These restrictions need to be mindful of all sides' right to lawful free speech, with the aim that free speech is not overall suppressed. The purpose of these Rules is to encourage more free speech, not less.

Some forms of attack of a personal nature (especially those that are gratuitous or extreme) on Participants and Visiting Speakers because of their viewpoints are inappropriate in principle and attract little free speech protection. They can also lead to unlawfulness<sup>8</sup>, for instance as harassment or discrimination under the Equality Act where the relevant viewpoints are protected philosophical beliefs: [HEP] needs to prevent this. [HEP] is required by law to take all reasonably practicable steps to secure people's free speech and this requires active, positive steps to be taken. These obligations mean that [HEP] must have requirements which prevent our Participants from harassing/discriminating against, and making certain types of personal attacks on and/or taking other hostile action against, other Participants and Visiting Speakers in connection with their [lawful] viewpoints as expressed by them. And enforcing those requirements. The following Rules are those requirements, which endeavour to protect free speech in a proportionate way, while allowing vigorous debate. [HEP] requires Participants to comply with these Rules.

People who express viewpoints with which others may disagree strongly should expect potentially strong reactions, although those reactions must comply with these Rules. These Rules are not intended to encourage a culture of hypersensitivity: we reiterate that robust debate is encouraged at [HEP].

[These Rules do not protect Participants for unlawful expressions of viewpoints. Participants should note, though, the [HEP's] general rules against bullying still apply in such cases.<sup>9</sup>]

These Rules have been written so as to create specimen restrictions which are proportionate for these purposes. They are not intended to prevent Participants from expressing disagreement with, opposition to or dislike or mockery of viewpoints in a manner compatible with the laws which protect free speech and [HEP's] obligations under them. [HEP] will therefore monitor their application in particular factual circumstances and will apply and enforce these Rules in a way that is proportionate in the applicable

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<sup>8</sup> Keeping in mind that employers are liable under the Equality Act for discrimination and harassment committed by their employees in the course of their employment.

<sup>9</sup> [*Drafting note for HEPs, not part of Rules*: See the discussion above and in the Appendix about whether Relevant Prohibitions should protect Participants for their unlawful expressions of viewpoints. This text will need to reflect the course adopted.]

circumstances. Where speech is not unlawful, these Rules and other internal policies or rules of [HEP] regarding bullying and harassment will therefore be interpreted and applied by [HEP] so as to have appropriate regard to:

- all relevant Participants' rights to compliant free speech and the need to ensure that any restriction on lawful speech must be proportionate (acknowledging that the proportionality of any restriction will be harder to establish in an academic context and especially where academic free expression is concerned);
- the need to maintain consistency and objectivity; and
- the benefits of, and need to maintain and balance, both robust debate at [HEP] and the avoidance or reduction of inappropriate or unlawful personal attacks on Participants and an atmosphere which is chilling for free speech at [HEP],

all in the context of the aim of maximising not reducing Participants' overall free speech and an atmosphere which is conducive to that.

1. ***Harassment, bullying, personal attacks and actions attributable to [HEP]:***

No Participant may:

- harass or discriminate against (each as defined below) a Participant or Visiting Speaker in connection with [lawful<sup>10</sup>] viewpoints held or expressed by them, including by way of a personal attack (as defined below);
- issue, make, send or share a severe personal attack (as defined below) against or about a Participant or a Visiting Speaker in connection with [lawful] viewpoints held or expressed by any such person; or
- otherwise bully (as defined below) another Participant or Visiting Speaker in connection with [lawful] viewpoints held or expressed by that Participant.

No Participant who is an officer or member of staff or other representative of [HEP] may:

- make any personal attack on a student, or any Participant who is materially their junior or in respect of whom they hold a position of authority, in connection with viewpoints expressed or held by them<sup>11</sup>; or

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<sup>10</sup> [*Drafting note for HEPs, not part of Rules:* See the discussion above and in the Appendix about whether this and other Relevant Prohibitions should protect Participants for their unlawful expressions of viewpoints.]

<sup>11</sup> Note that the nature of the power balance is likely to be a significant aggravating factor such that a personal attack needs to be viewed as having a severe effect. This imbalance also means that such conduct could quickly reach a level which constitutes harassment under the Equality Act if related to a protected characteristic, and also more general bullying. Latitude is, however, allowed for minor, one-



- express opposition or disapproval or hostility to or of a viewpoint (or expression of it) in a way which:
  - holds that opposition (etc.) out as (or could be reasonably taken to be holding it out as) the official position of [HEP] (rather than their own personal view) including as a result of being stated or implied by that Participant in the course of their acting within the scope of their responsibility or authority as an officer, employee or other representative of [HEP] (“**Attributable Capacity**”) <sup>12, 13</sup>; or

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off comments: these Rules are not intended to encourage hypersensitivity. Comments which relate to, and disagreement with, a person’s viewpoints are both in principle legitimate and themselves protected, unless they are of such a nature as to be contrary to these Rules.

<sup>12</sup> [*Drafting note for HEPs, not part of Rules:* An HEP stating or implying opposition, disapproval or hostility to or of a protected viewpoint carries a high risk of counting as harassment or even discrimination (under the Equality Act) on the part of that HEP, as illustrated by the *Fahmy, Meade* and *Phoenix* cases, which are discussed in Appendix 2 of the Principal Statement; and also of contravening its obligations under HERA. Note that, where the relevant viewpoint in question (or its expression) is actually unlawful (e.g. as itself harassment under the Equality Act) or contrary to its own rules (for instance these Rules, or anti-bullying rules more widely provided that they are themselves pitched at a level which complies with HERA and the HRA), an HEP may well decide, indeed need, to express disapproval of or opposition to it, and it may decide it is necessary to do so in other circumstances, but this needs to be done carefully by the appropriate authorised officer and not by others, so as to avoid compliance failures.]

<sup>13</sup> [HEP] stating or implying opposition, disapproval or hostility to or of a protected viewpoint carries a high risk of counting as unlawful harassment or even discrimination (under the Equality Act) on the part of [HEP], and such opposition (etc) to any viewpoint may also contravene its other legal duties relating to free speech. Participants must therefore avoid actions which carry a high risk of counting as harassment of or discrimination against people, or causing [HEP] to contravene its legal duties, or otherwise breach these Rules, when acting, or speaking publicly, in a professional or Attributable Capacity on behalf of [HEP]. Instead, when acting in such capacity, Participants should be mindful of [HEP’s] positive duties to support and protect free speech, including by supporting other Participants whose lawful free speech is under attack.

<sup>13</sup> [HEP] stating or implying opposition, disapproval or hostility to or of a protected viewpoint carries a high risk of counting as unlawful harassment or even discrimination (under the Equality Act) on the part of [HEP], and such opposition (etc) to any viewpoint may also contravene its other legal duties relating to free speech. Participants must therefore avoid actions which carry a high risk of counting as harassment of or discrimination against people, or causing [HEP] to contravene its legal duties, or otherwise breach these Rules, when acting, or speaking publicly, in a professional or Attributable Capacity on behalf of [HEP]. Instead, when acting in such capacity, Participants should be mindful of [HEP’s] positive duties to support and protect free speech, including by supporting other Participants whose lawful free speech is under attack.

“Course of employment” is construed broadly for these purposes.

- (in respect of a senior manager<sup>14</sup>) is otherwise communicated in a way which would be associated with [HEP] by a reasonably person, for instance by using [HEP's] communications channels or their own social media in a way will be widely seen and which renders it clearly associated with [HEP],

provided that the above does not apply to statements made or information issued in good faith in accordance with the HEP's policies or procedures, where such making or issuance is intended to be made on behalf of [HEP] and/or doing so is within the powers and scope of duties and authority of that senior manager<sup>15</sup>.

Notes on the above sub-paragraph:

*Opposition, disapproval or hostility to or of a viewpoint made by an HEP's staff or representatives in an Attributable Capacity, or by senior managers in a way which is likely to be widely seen and will be associated with the HEP, is likely to have a chilling effect on the willingness of people who hold the viewpoints being criticised (etc.) to express that viewpoint; it will also potentially encourage people to publicly hold a particular approach to an issue of controversy, or make personal attacks on or take hostile actions against people who hold the relevant viewpoint<sup>16</sup>. This prohibition is therefore required both by the need to prevent harassment under the Equality Act and pursuant to the duty under HERA to secure free speech, and is likely to be a proportionate restriction on those Participants' actions, provided that it is enforced in a proportionate manner in particular circumstances.*

Notes on this Rule:

*This Rule 1 is particularly relevant to single-instance attacks. If a Participant makes repeated personal attacks, or an attack which is part of a wider campaign or collective or concerted action, that will be likely to be covered by Rule 2 as well as this Rule.*

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<sup>14</sup> Being senior administrators or managers of [HEP], including heads of a department or other function or significant unit.

<sup>15</sup> [Drafting note for HEPs, not part of Rules: this proviso is intended to prevent bona fide actions in an official capacity, even though mistaken, resulting in a breach of this rule by the relevant Participant: this does not mean that other rules or requirements, for instance in relevant employment contracts, will not be breached by a Participant doing something which cause an HEP to act unlawfully or otherwise suffer loss.]

<sup>16</sup> In the *Fahmy* case (see Appendix 2 to the Principal Statement for details), the convener of a meeting was criticised by an Employment Tribunal 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 (i.e. harassment) in itself, it stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the unlawful harassment in that case.

*The nature of the audience for the attack or other action will be relevant to whether it is viewed as contravening this Rule. An in-person outburst during an argument between equals is much less likely to contravene it than an aggressive personal attack on a mass channel of communication seen by many people. The latter is also at risk of starting a campaign or course of action falling within Rule 2, and Participants are recommended to avoid such behaviour.*

*Personal attacks may well be spontaneous, for instance as an argument develops. Meetings inherently involve spontaneity (so carry 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. If a person puts forward views which people dislike, a possibly strong response must be expected. The fact that a lawful statement is a one-off comment in the heat of an argument will be relevant when [HEP] decides whether applying this Rule and enforcing it would be proportionate.*

- *[HEP] will assess whether a genuinely spontaneous, non-repeated, attack made in person or by direct communication such as email or on a limited-membership chat group as part of a discussion or argument should, in the relevant circumstances, be treated as contrary to this Rule. [HEP] would be likely to take a less lenient view this differently where the attack is on a chat group with wide participation or on social media, or where the attack is not part of a current series of communications.*
- *Meetings involve an inherent element of necessary restraint, so, while attacks made at a meeting (physical or online) generally may deserve an element of latitude for spontaneity, Participants are expected to maintain a level of restraint as to what they say about other people. Planned or co-ordinated personal attacks, severe personally-directed barracking and the like made at a meeting will not be viewed as spontaneous and will also be likely to fall within Rule 2.*

*See also the definitions below, and the notes to them about achieving proportionality.*

*If a person wishes to make a complaint or allegation against a Participant, it must be made in private to [HEP] in accordance with Rule 3.*

*Personal attacks on other Participants or a Visiting Speaker related to viewpoints expressed or held by them could also breach other elements of these Rules. See also Rule 6 (as regards actions in official capacities).*

2. **Campaigns and concerted courses of action:** No Participant may conduct, or organise or join or participate in, a campaign or collective or concerted course of action (a hostile online pile-on is for these purposes deemed to be a campaign and such a course of action) which includes personal attacks or other hostile actions against or about any other Participant or a Visiting Speaker related to viewpoints expressed or held by that Participant or Visiting Speaker. No Participant should do any of the above anonymously; doing so is likely to be an aggravating factor in any disciplinary proceedings.

Notes:

See also Rule 3 (as regards making complaints and allegations).

*Such campaigns and courses of action can quickly (indeed, in cases where the target holds a protected philosophical or religious belief, would be likely to) amount to unlawful harassment under the Equality Act [Drafting note for HEPs, not part of Rules: see for example the Fahmy and Phoenix v Open University cases, discussed in Appendix 2 to the Principal Statement] and may amount to criminal harassment or other criminal activity (see below).*

*Online pile-ons, open letters, petitions and the like are at high risk of being unlawful harassment under the Equality Act if related to a protected viewpoint, and are in principle undesirable in the context of avoiding people (whether that Participant or others) being afraid to voice their views because of a hostile general atmosphere, creating a general chilling effect for free speech.*

*[HEP] recognises that a social media attack which is contrary to this Rule can evolve from acceptable early criticism of someone's viewpoint. Participants are warned to take care not to join in or exacerbate something which is evolving towards crossing the threshold into being contrary to this Rule.*

*[HEP] will monitor the application of this Rule, in respect of particular factual circumstances, and will not apply or enforce this Rules to the extent that, in those circumstances, to do so would be a disproportionate interference with Participants' free speech.*

3. **Complaints and other detrimental action:** Subject to the below, no Participant may take any action or course of action which is, or is likely to be, detrimental to the interests of a Participant or a Visiting Speaker in connection with viewpoints expressed or held by any such person. This includes:
- (subject to the below) making a complaint or allegation against or about such person to the extent that it is based on, or made in consequence of opposition to or dislike of, the viewpoint of such person or its expression<sup>17</sup>;
  - making a frivolous, malicious, vexatious or knowingly false allegation against such person; calling for their sacking, suspension or disciplining, if based on untrue assertions, or unless the consequences called for are proportionate to the actions or events which form the basis of the complaint made<sup>18</sup>; and

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<sup>17</sup> The Principal Statement goes into great detail (in Part 3) about HEPs' obligations not to allow complaints and disciplinary functions to become instruments of free speech suppression, contrary to the Relevant Requirements. See the sections of the OfS Guidance it cites.

<sup>18</sup> See Note 16 above.

- regarding or treating their work less favourably, treating them less favourably in assessment, promotion or recruitment processes and/or otherwise discriminating against them, as a consequence of the viewpoint of such person or its expression<sup>19</sup>.

A complaint or allegation may be made on the basis that the Participant or Visiting Speaker has acted unlawfully or contrary to [HEP's] policies and requirements, but it must – in accordance with [*relevant complaints policy*] – be made to [identify HEP officer] privately and not made publicly. The complainant will otherwise remain subject to these Rules, for instance if the allegation turns out to be malicious or untrue. [HEP] will assess any such allegations carefully. If it decides that the allegation is correct, it will take such action as it considers appropriate in the circumstances, which may include a public announcement and/or disciplinary or other appropriate and compliant action against the person who is the subject of the allegation. [*Drafting note for HEPs, not part of Rules: the rationale for this paragraph is in part to prevent trial by social media or public opinion, which is in itself a punishment for holding a viewpoint even if an HEP finds that the target has done nothing wrong, and thus carries with it a materially increased risk of an inappropriate chilling effect for free speech being created.*]

Notes:

*[HEP] will monitor the application of this Rule and will only apply and enforce this Rule, in respect of particular factual circumstances, in ways that would be proportionate. It is likely not to be applied or enforced, or done so in full, where the action complained of creates no material detriment: complaints of breaches of this Rule in respect of inconsequential matters are not encouraged.*

4. **Not prevent or hinder meetings:** Save to the extent provided below, no Participant may, in contravention of [HEP's] code of practice on free speech (and any associated procedures, policies and requirements), take any action intended<sup>20</sup> to:
  - prevent or hinder a meeting, event or other activity (“**Meeting**”) from happening at the premises of [HEP] (or any of its constituent institutions or its related students’

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<sup>19</sup> See the Principal Statement (in Part 3), and, for instance, OfS Guidance paragraphs 45 and 57 and Examples 4 and 9. This is a requirement pursuant to the primary duty under HERA as well as (in many cases) the Equality Act. While OfS Guidance paragraphs 45 and 57 are stated to apply in respect of applicants for academic positions only, the obligations apply more widely, potentially in respect of all applicants for employment and promotion.

<sup>20</sup> An action or course of action which has the prohibited effect will be deemed to be intended as provided above, and because of the intended subject-matter of the Meeting, if no other convincing explanation for it is provided.

Prohibited actions will include: knowingly making misrepresentations or exaggerated claims of the likely negative consequences of holding the Meeting, for instance making claims of likely violent protest which are not supported by real and credible evidence; acting on such misrepresentations or exaggerated claims in the knowledge that they are misrepresentations or exaggerated; and threatening violent protest or other adverse consequences in connection with the holding of the Meeting.

union), or elsewhere in circumstances where the Meeting will be attended, in part at least, by Participants;

- render the Meeting or activity impossible or impracticable to hold or more difficult or expensive to organise or publicise than that Meeting would otherwise be; or
- hinder the progress of the Meeting to a degree which effectively renders its primary purpose unachievable or fundamentally undermined by actions including organised aggressive barracking,

because of the intended subject-matter of the Meeting or the statements or expressions made or beliefs or opinions held or expressed of any persons organising or intended to participate in that Meeting. If a Participant believes that the said subject-matter, statements, expressions, opinions or beliefs are unlawful or involve unlawfulness or are contrary to [HEP's] policies and requirements, this must be stated privately to [identify HEP officer] privately and not made publicly, in accordance with [HEP's appropriate policy]. The complainant will otherwise remain subject to these rules, for instance if the allegation turns out to be malicious or untrue. [HEP] will assess any such allegations carefully; if it decides that the allegation is correct, it will take such action as it considers appropriate in the circumstances, which may include a public announcement and/or disciplinary action against the person who is the subject of the allegation, and could involve cancellation of or restrictions on the Meeting.

*Note: see also the notes to Rule 1 as regards behaviour at meetings.*

5. **Not pressurise staff:** No Participant may pressurise [HEP's] staff to do anything which could contravene the Relevant Requirements, such as:
  - indicate that they or [HEP] regard a person's [lawful] viewpoint or its expression, or the lawful content of or lawful materials about a Meeting, as "harmful" or otherwise not worthy of tolerance or even-handed treatment; or
  - not share information about such (a) Meeting(s) or not publicise it in the same way [HEP] re relevant staff would usually publicise meetings of a similar kind.

If a Participant has a concern about another Participant's or Visiting Speaker's behaviour or views or their expression, they should report this privately to [HEP] as contemplated in Rules 3 and 4.

6. **Official capacities:** No Participant may, in their capacity as an officer or other representative of [HEP], take actions which would be likely to cause [HEP] to fail to comply with the Relevant Requirements.

7. ***Intimidation and other prohibited actions:*** No Participant may, in relation to, or in consequence of dislike of or opposition to, viewpoints expressed or held<sup>21</sup> by any person:
- take any action not referred to elsewhere, such as non-verbal threats and intimidation;
  - take steps to prevent or hinder, or exert inappropriate pressure on others to prevent or hinder, lawful viewpoints being expressed<sup>22, 23</sup>; or
  - do anything which is illegal or otherwise contrary to [HEP's] statements, codes and requirements<sup>24</sup>.
8. ***Not harass family etc:*** No Participant may take any action which are prohibited in these Rules, anywhere or at any time, in respect of any of the family, friends, colleagues and associates of any Participant or Visiting Speaker in connection with, or in consequence of dislike of or opposition to, viewpoints expressed or held by that Participant or Visiting Speaker.
9. **Not encourage others:** No Participant may help, support, encourage or procure any other person or persons to take any of the above prohibited actions.

For the purposes of these Rules:

- **“Bully”** means unwanted behaviour connected to a [lawful] viewpoint held or expressed by an individual that is either: offensive, intimidating, malicious or insulting; or, an abuse

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<sup>21</sup> An action which is prohibited below would be deemed to be related to the relevant viewpoints if no other convincing explanation for it is provided.

<sup>22</sup> An action or course of action which has the above effect would be deemed to be related to the relevant statements, beliefs or opinions if no other convincing explanation for it is provided.

<sup>23</sup> An example: efforts to get a magazine closed down – not an action against specific people for their viewpoints, but still very harmful to free speech.

If a Participant has a concern about another Participant's or Visiting Speaker's behaviour or views or their expression, they should report this privately to [HEP] as contemplated in Rules 3 and 4.

<sup>24</sup> [*Drafting note for HEPs, not part of the Rules:* Although these actions are, obviously, prohibited anyway and ignorance of the law would be no excuse, as part of their Relevant Requirements, HEPs would do well to include this provision (if they do not already have such a prohibition in place) so that they are able to take disciplinary action in respect of illegal acts; they could then usefully provide information to Participants about the sorts of illegality which could arise in this context of opposition to another person's statements or opinions. For example, in addition to unlawful harassment under the Equality Act, they could refer to criminal harassment under the Protection from Harassment Act 1997, offences relating to putting a person in fear of violence and malicious communications and improper use of public electronic networks, including sending grossly offensive, menacing and threatening communications under the Communications Act 2003.]

or misuse of power that undermines, humiliates, or causes physical or emotional harm to them<sup>25</sup>.

*Note: This definition is objectively worded: an allegation that a Participant feels that they have been bullied will not give rise to bullying for this purpose unless the behaviour is at a level or of a nature which a reasonable person would regard as going significantly beyond robust but acceptable debate or discourse and to be bullying. These Rules are not intended to encourage a culture of hypersensitivity: we reiterate that robust debate is encouraged at [HEP]. As with the other definitions, [HEP] will apply this definition in a way that is proportionate in the applicable circumstances, having appropriate regard to the considerations and objectives described in the Introduction above. See also the notes to Rule 1.*

“Bullying” shall be interpreted accordingly.

- “**Discriminate**” means a person (A) treating another person less favourably than A treats or would treat others because of [lawful] viewpoints held or expressed by them [which constitute a protected characteristic under the Equality Act<sup>26</sup>].

“**Discrimination**” shall be interpreted accordingly.

- “**Harassment**” means unwanted conduct related to [lawful] viewpoints held or expressed by them [which constitute a protected characteristic under the Equality Act<sup>27</sup>] which has:
  - the purpose; or
  - effect (where, viewed objectively, it would be reasonable for the conduct to have that effect with regard to the relevant circumstances),

of violating a person’s dignity; or creating an intimidating, hostile, degrading, humiliating, or offensive environment for that person. This includes:

- personal attacks of sufficient severity (in the relevant context) as to cross the threshold to qualify as harassment;
- protests or a hostile presence near a person’s home; and
- expressing opposition or hostility to or disapproval of a viewpoint (or expression of it) in a way which would, because of the way it is expressed or other relevant

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<sup>25</sup> *[Drafting note for HEPs, not part of the Rules: This definition of “bully” is derived from the commonly used ACAS definition. HEPs are likely to already have anti-bullying requirements, and may wish to harmonise the two definitions, or indeed the entire rules. This is discussed in detail in the Appendix.]*

<sup>26</sup> *[Drafting note for HEPs, not part of the Rules: HEPs are likely to already have anti-discrimination and harassment requirements, and may wish to harmonise the two definitions, or indeed the entire rules. This is discussed in detail in the Appendix.]*

<sup>27</sup> See Note 26 above.



circumstances, be treated as a personal attack in circumstances which would constitute harassment as defined above<sup>28</sup>.

Harassment also includes unlawful conduct which contravenes the Protection from Harassment Act 1997 and similar criminal offences.

*[Note for HEPs, not part of the Rules: HEPs could consider explaining the meaning/interpretation of "harassment" further in a note or technical guidance.]*

"**Harass**" shall be interpreted accordingly.

- [HEPs need to define "**Participant**" to include applicants for staff or other positions or to be students, consistent with (eg) academic freedom provisions.]
- "**Personal attack**" means an attack (whether verbal, online, on social media or in writing) directed at a person, and/or their character or attributes, rather than (save as provided below) the position that they are maintaining, and includes:
  - attributing negative characteristics or traits to such a person;
  - making false statements about the relevant person;
  - making complaints or allegations against the relevant person (other than a complaint or allegation which is made in accordance with Rule 3);
  - threats and intimidation, whether of violence or of any action or course of action which is or is likely to be detrimental to the reputation or interests of the relevant person;
  - calling for sanctions or other adverse consequences for that person; and
  - expressing opposition or hostility to or disapproval of a viewpoint (or expression of it) in a way which would, because of the way it is expressed or other relevant circumstances, be treated as a personal attack in circumstances which would constitute harassment or discrimination as defined above<sup>29</sup>.

For the avoidance of doubt, a "**personal attack**" does not include statements of disagreement with or challenge or argument against viewpoints expressed or held by a relevant person, even if strongly expressed, as long as they are not made or expressed in such a way as to constitute harassment/discrimination or otherwise contravene these Rules.<sup>30</sup>

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<sup>28</sup> This has happened in cases under the Equality Act, for instance the *Fahmy* and *Meade* cases (see Appendix 2 of the Principal Statement for details).

<sup>29</sup> See Note 28 above.

<sup>30</sup> See Note 28 above.

- “**Severe personal attack**” means a personal attack which is unlawful or, even if lawful, is, in the relevant circumstances, at a level or of a nature which a reasonable person would regard as going significantly beyond robust but acceptable debate or discourse[, including because it is at a level or of a nature which would constitute harassment or discrimination if the relevant provisions of the Equality Act applied (for instance because the relevant viewpoint constituted a “protected characteristic” for the purposes of the Equality Act)<sup>31</sup>].

Notes:

*[HEP] will apply all the definitions above in a way that is proportionate in the applicable circumstances, having appropriate regard to the considerations and objectives described in the Introduction above.*

*See Appendix 2 to the Principal Statement for examples of personal attacks which have been held by the Tribunal as (in the relevant context) constituting unlawful harassment and would thus constitute a severe personal attack. The following are some examples of these:*

- *a senior colleague telling Professor Jo Phoenix that having her in the department was like having a racist uncle at the Christmas dinner table; and*
- *describing gender-critical views held by a person as a “cancer that needs to be removed”, “should not be tolerated” and “discriminatory, transphobic”, and likening them to racism and sexism; and calling the LBG Alliance (which promotes gender-critical viewpoints and which a victim of the attack was defending) a “cultural parasite and a glorified hate group that has [...] supporters that also happen to be neo-nazis, homophobes and Islamophobes”. (It should be noted that these statements were in the same petition, so whether they would individually constitute harassment in a single-attack incident would very much depend on the circumstances and relationships involved. But they indicate the level at which a personal attack becomes a severe one.)<sup>32</sup>*

## **Appropriate sanctions**

Increasingly serious sanctions should apply, depending on the seriousness and/or repetition of prohibited conduct.

Depending on the facts, sanctions could range from informal warnings, to compulsory free speech training (where appropriate and thought to be potentially beneficial), to recording a breach of these Rules, to written warnings, to temporary suspension from attendance or work at HEPs, and, ultimately, to expulsion, exclusion, or dismissal in the case of very serious or repeated instances of prohibited conduct. Before applying any disciplinary sanction, due regard should be had to the [HEP’s] relevant internal policies and requirements, relevant employment considerations, and the need to protect the compliant free speech of all Participants: in particular, regard needs to be had to the requirement that the application and

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<sup>31</sup> *[Drafting note for HEPs, not part of the Rules: these words are only necessary if the definitions of discrimination/harassment are so limited. See the discussion above.*

<sup>32</sup> In the *Phoenix/Open University* and *Fahmy* cases, which are discussed in Appendix 2 to the Principal Statement.

enforcement of the rules be proportionate so far as it is restricting the free speech rights of other Participants.

It may be appropriate for differing sanctions to apply depending on whether the perpetrator is academic or other staff, or a student.

An HEP can legitimately give itself flexibility to treat spontaneous single-incident attacks – relatively leniently: see the notes to Rule 1.

Aggravating factors in identifying appropriate sanctions should include:

- the severity or malicious intent of an attack;
- organising or, less seriously, joining a campaign or collective or concerted course of action;
- organising or joining a campaign or collective or concerted course of action using a pseudonym (i.e. under a name or in a way which means it is not reasonably easy to identify or find out the identity of the relevant person who has taken these actions); and
- prohibited conduct on the part of academic or other staff against or in respect either a person who is materially their junior or against of a student.

What the sanctions for breaches of the Relevant Prohibitions may be, and the intention of the HEP to enforce its rules and apply sanctions where appropriate, should be made known to Participants.

## Best Free Speech Practice

June 2024

*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 and practices for particular HEPs: the rules set out above are specimens only, and specific rules 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 – detailed considerations regarding the appropriate nature or the Relevant Prohibitions

Formulating prohibitions against attacking or disadvantaging people for their viewpoints has become very complicated for HEPs as a result of the matters discussed below.

### Requirements under HERA and Equality Act: harmonising strands: HERA protections wider than Equality Act ones

HERA requires the protection of all lawful speech, subject to the "reasonable practicability" limitation and to requirements in the HRA for (e.g.) proportionality. It must surely be that "reasonably practicable steps" requires that action be taken to restrict attempts to treat an individual less favourably because of their lawful views (subject to appropriate balancing of all parties' free speech rights, where relevant) and, more specifically avoiding bullying, discrimination and harassment against Participants for their viewpoints. These are obligations under HERA, separate from and in parallel to the existing obligations under the Equality Act (and the need to qualify for the Section 109(4) Defence in particular).

A more technical argument which leads to the same result is as follows. An HEP must, in order to qualify for the Section 109(4) Defence, take all reasonable steps to prevent attacks (whether in person, in writing, by email or social media) and other actions against or disadvantaging another Participant in respect of their viewpoints when doing so would amount to unlawful discrimination or harassment under the Equality Act. What this means in practice is discussed in Appendix 2 to the Principal Statement.

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.

- Employers can qualify for the Section 109(4) Defence from liability for harassment and discrimination by their employees under the Equality Act 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 wording 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 Section A1 demands a wider range of actions than those required to qualify for the Section 109(4) Defence (for instance, the protection of all lawful speech, rather than those limited range of viewpoints which qualify as “protected characteristics” under the Equality Act). It would appear that, 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 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 be wider: in Venn Diagram terms, the larger circle within which the circle of actions required for the Section 109(4) Defence sits. One clear example is that HERA requires the protection of all lawful speech, rather than the more limited range of viewpoints which qualify as “protected characteristics” under the Equality Act. 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<sup>33</sup>? 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 the extent to which the requirements under HERA are more wide-ranging than the Equality Act has yet to be established. It would lead to insuperable complexities, and consequent legal problems, if HEPs had to operate two different, non-overlapping, sets of restrictions to reflect different legal requirements.

Students: A qualification of the above is that HEPs are not generally responsible for the behaviour of their students (unlike employed staff) under the Equality Act, so less likely to be held liable for their behaviour and the Section 109(4) Defence is not relevant in such circumstances. The duty under HERA, however, makes no distinction between types of Participants as regards the protections it affords, although there may be some in practice under the “reasonable practicability” qualification. It would appear to be unlikely that the courts would impose materially different standards under HERA, as this would appear inappropriate in principle and would be likely to cause confusion and inconsistency (although what is required in respect of students may differ in the applicable circumstances).

Visiting Speakers: The position regarding Visiting Speakers is different from Participants. HEPs will not normally have a relationship with them of a nature which gives rise to liability

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<sup>33</sup> 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.

to them for discrimination or harassment under the Equality Act. The primary Relevant Requirement which applies in respect of them will therefore be under HERA. While some Visiting Speakers may have professionally thick skins – politicians and controversialist come to mind – it is unrealistic to try to set different levels of protection for different types of Visiting Speaker. While they may not have positions or relationships within the relevant HEP which make them as vulnerable to being attacked and disadvantaged for their free speech within the context of that HEP as Participants might be, attacks on them through other channels or in respect of other positions could be just as harmful. The duty under HERA makes no distinction between Visiting Speakers and Participants as regards the protections it affords, although there may be some in practice under the “reasonable practicability” qualification. It is therefore not appropriate for HEPs to have less demanding prohibitions in respect of Visiting Speakers from these in respect of Participants, even if the applicable circumstances may demand a tailored approach.

We have to qualify all the above by emphasising that, until the requirements under HERA are litigated and the subject of court decisions, all of the above is speculative, although with a strong logical base, so must not be taken as more than BFSP’s current view of what is most likely to be the outcome. We cannot guarantee that it will turn out this way, and organisations involved in this issue, from HEPs to the OfS to free speech campaigns, will need to be flexible and ready to respond to changing information. The position is not ideal, to say the least.

Relevant Prohibitions regarding discrimination and harassment not limited to viewpoints which are “protected characteristics”?

It must be highly likely that the courts would refer to the established definitions (and interpretation) of discrimination and harassment in the Equality Act when they decide on what is required in the way of Relevant Prohibitions pursuant to the duty under HERA. However, HERA requires the protection of all lawful speech, and there is no convincing reason why these protections (under HERA) should be artificially restricted so as to protect the limited range of viewpoints which constitute “protected characteristics” as identified pursuant to complex case law under the Equality Act. This cannot, however, be asserted with certainty until this is addressed by the courts.

HEPs’ safest course must be to apply the prohibitions against discrimination and harassment which should be included in the Relevant Prohibitions so as to protect all viewpoints, and not just those protected by the Equality Act, so as to be consistent with what is in principle protected under HERA (while being mindful of ensuring that all Participants’ rights to lawful free speech are appropriately balanced on a case-by-case basis, as discussed elsewhere).

Most HEPs, however, already have requirements which prohibit discrimination and harassment, but these tend (reasonably) to be tied to the limited range of viewpoints which count as “protected characteristics” for the purposes of the Equality Act. Such HEPs therefore face having two sets of inconsistent requirements preventing discrimination and harassment in respect of viewpoints. They may wish to harmonise these requirements, and therefore limit the protections in the Relevant Prohibitions to viewpoints which constitute “protected characteristics”. This would, though, risk their turning out to have limited their protections

pursuant to HERA in a way which the courts consider to be inappropriate (i.e. a compliance failure), although it may be that this is unlikely to create a major problem in practice as long as they also have (as BFSP recommends) wider-extending anti-bullying requirements which can protect all speech – and so long as they enforce those appropriately (and in accordance with applicable requirements for "proportionality" pursuant to the HRA). Taking this approach will, though, put the onus onto staff and students of understanding what viewpoints they are not allowed to discriminate or harass in respect of, with obvious risks. But this is already an issue to the extent that an HEP's general anti-bullying requirements are thus. This is not easy.

### **Complexity of the law versus the need for comprehensible requirements**

There have been recent, highly relevant, legal cases regarding the protection of protected viewpoints under the Equality Act, in particular the *Fahmy, Meade* and *Phoenix/Open University* cases which are described in some detail in Appendix 2 of the Principal Statement. This case law is complex and hard to reflect in simple, comprehensible rules, especially as the cases involved subtle distinctions and very specific circumstances.

It is, however, very desirable to try to set as simple and consistent rules as possible, so that Participants, especially students, will have a hope of understanding and following them. This inevitably creates complexities.

- HEPs already have detailed anti-bullying and anti-harassment policies, with harassment often defined by reference to the Equality Act definition (and sometimes that in the Protection From Harassment Act 1997), although it is all too often stated inaccurately (itself a compliance risk). So, they already have rules which are complicated, but which frequently do not go into great detail about the interpretation of "harassment". In the context of free speech protection and the recent case law, it is desirable to give some more detail beyond the bald definition of harassment, to make the restrictions more comprehensible and more compliant-with.
- Simple and consistent prohibitions, on personal attacks and online mobbing in particular, would:
  - have to be set at a fairly low level (in some aspects, at least) in order to prohibit actions which are highly likely to give rise to harassment under the Equality Act. (For instance, it appears that any personal attack by a staff member on a junior colleague would very quickly become harassment, whereas it would be less likely to do so if between students.) But an inappropriately low bar could suppress robust-but-still-acceptable debate, which HEPs absolutely should not do, and which would be likely not be proportionate under the HRA (see below); and
  - inevitably fail to reflect the complexity (we would argue subtlety in dealing with delicate and complex questions) of the recently evolving case law under the Equality Act as discussed above, so would in one way or another be inconsistent with aspects



of it. But this is also the case with existing rules against discrimination/harassment and is very hard to avoid in all such cases.

- Suppressing viewpoints which are hostile to the position of another Participant, but which do not themselves cross the threshold to count as harassment or as otherwise unlawful, might itself be contrary to the Equality Act if the viewpoints expressed are themselves “protected” under the Equality Act; and also to HERA and the HRA. See the detailed discussion of conflicts of rights and the need to achieve “proportionality” below.
- Generally, personal attack (i.e., on a person’s character) is bad and more likely to lead to unlawfulness (e.g. under the Equality Act if connected to a protected viewpoint), whereas objecting strongly to viewpoints should generally be more acceptable: if you are willing to voice viewpoints which may annoy or upset others, you need to accept that you will get strong disagreement in return. But it is not always thus: recent cases have, for instance, ruled that equating gender-critical views with transphobia will, in some circumstances, be harassment under the Equality Act (for instance where the comment was such as to be in effect a criticism of the claimant personally, and especially where the implied criticism is attributable to an employer or regulator).

We see no easy solution. The area of most difficulty is that covered by suggested Relevant Prohibition 1: what are the appropriate limits for what individuals can or cannot do in the way of personal attack on others for their viewpoints. This has been rendered a great deal more complicated by the recent dramatic-but-complex cases under the Equality Act.

### **Conflicts of free speech rights: restricting attacks on people for their viewpoints can comply with HERA and the HRA**

There can be a “conflict of free speech rights” in these cases: i.e., the potential for it to be contrary to Participant A’s free speech rights to have rules (such as the Relevant Prohibitions) against Participant A attacking Participant B for their viewpoint, and to enforce those rules. The following points are applicable.

Unlawful speech not protected under HERA: If Participant A’s attack is of such a nature as to be unlawful under the Equality Act (if the speech is purposefully harassing, the bar is not especially high, as the recent cases show) or under other laws<sup>34</sup>, the HEP is not required under HERA to protect Participant A’s speech.

HEPs can legitimately have anti-bullying rules which prohibit attacks on people, which will operate to make it not “reasonably practicable” to take steps to protect Participant A: An HEP can:

- (as a general point) have to comply with relevant laws, or need to take action so as to qualify for the Section 109(4) Defence or otherwise avoid liability under the Equality Act<sup>35</sup>; and

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<sup>34</sup> Such as the Protection From Harassment Act 1997.

<sup>35</sup> See the discussion above and at Appendix 2 to the Principal Statement about the recent case law under the Equality Act and what it means for requirements in practice to avoid liability for (e.g.) personal attacks and online pile-ons – i.e. to take sufficient “reasonable steps” to stop them).

- (more specifically to this case) legitimately have rules to protect people from wrongful behaviour (e.g. anti-bullying rules, or to stop severe personal attacks against people for their viewpoints pursuant to the obligations under HERA), which are themselves pitched so as to be compliant with HERA and the HRA (see the discussion below), which it operates and enforces in a proportionate (with reference to the alleged perpetrator’s free speech rights), fair and consistent way. Such rules and enforcement operate for the general good, to improve atmospheres at HEPs: they seek to achieve a balance and, so long as carefully worded in order to do so, do not in principle limit free speech inappropriately. It must be likely that a Court would be unwilling to rule that restricting unpleasant personal attacks is unlawful if this is done proportionately in accordance with an appropriate anti-bullying policy.

Subject to the below, it will not be “reasonably practicable” to take steps to protect Participant A’s speech where such speech, even though technically lawful, has been proportionately restricted in accordance with an appropriate anti-bullying policy or rules to protect free speech.

Participant A’s free speech is potentially protected under the European Convention on Human Rights<sup>36</sup>, as implemented in the UK by the HRA. These freedoms include the freedom to offend, shock and disturb<sup>37</sup>. These rights may be subject to restrictions prescribed by law<sup>38</sup>, although this is subject to a “proportionality” test<sup>39</sup>. Participant A’s right to lawful free speech can be restricted by rules made pursuant to the primary obligation in HERA (and wider anti-bullying policies) and related provisions in their employment contract, to the extent that this is proportionate in the interests of, e.g., protecting the rights of others. Where the purpose of such restrictions is to protect free speech (e.g. to prevent someone being bullied into silence in accordance with its duty under HERA), and given that cases under the Equality Act have operated to treat attacks on people for their protected viewpoints as unlawful (and inappropriately drafted policies and a lack of training regarding protection of viewpoints have been held to have debarred an employer from qualifying for the Section 109(4) Defence),

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<sup>36</sup> Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

<sup>37</sup> But the exercise of that right “carries with it duties and responsibilities. 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 debate capable of furthering progress in human affairs” (see *Giniewski v France* (2006) 45 EHRR 23 at paragraph 43).

<sup>38</sup> 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.

<sup>39</sup> I.e., the restrictions must be appropriate and no more than necessary to address the issue in order to protect the wider interests of society.

appropriately drafted rules of this sort have a strong chance of being regarded by the tribunals as suitably “prescribed by law” and as having restricted free speech in a proportionate way. Of course, this is provided they are applied and enforced proportionately on any given set of facts. If the relevant attack (which is contrary to appropriately drafted anti-bullying rules) has the purpose or effect of, directly or indirectly, restricting Participant B’s or others’ free speech or willingness to speak their minds (or amounts to an “inappropriate manifestation”), then it is more likely to be proportionate to restrict it.

These considerations operate to qualify the duty under HERA to take reasonably practicable steps to protect Participant A’s lawful free speech. This is referred to (obliquely) in paragraph 35 of the draft OfS Guidance, although we have recommended that the OfS makes this point clearer as a general matter.

### **Inappropriate manifestations and unlawful expressions of viewpoints: what protections?**

HEPs are not required under HERA to protect unlawful expressions of viewpoints. Under the Equality Act, individuals cannot claim protection for expressions of their otherwise protected beliefs if they are considered to be “*inappropriate (sometimes expressed as “objectionable”) manifestations*”. Not all inappropriate manifestations are necessarily going to be unlawful (e.g. as defamatory or amounting to unlawful harassment), but by virtue of being deemed “inappropriate” (which is also determined with reference to a proportionality assessment), it is likely that interference with them (e.g. under an anti-bullying policy) is in turn going to be proportionate.

HERA does require protection of people who make “inappropriate”-but-lawful expressions of viewpoints, unless it is not reasonably practicable to take the steps which might be available to give this effect, for instance because the relevant expression of the viewpoint is prohibited under an HEP’s anti-bullying rules where those rules are themselves compliant with HERA and any interference with rights under the HRA is proportionate. This does, of course, require an HEP to protect people whose views are distasteful or unpopular: but some would argue that that is its most important purpose – viz. “*I disapprove of what you say, but I will defend to the death your right to say it*”<sup>40</sup>.

Even where relevant viewpoints or their expressions are unlawful, so not required to be protected under the Relevant Law, protections such as an HEP’s general anti-bullying rules would still be likely to (indeed, should) apply, and it must be appropriate to enforce them. For example, consider an HEP turning a blind eye to a bullying campaign against the academics whose attacks on Jo Phoenix at the Open University strayed into unlawful harassment, or a student who said something in the heat of a row which got out of control and constituted harassment under the Equality Act: this will look very bad and could lead to disaster such as criminal activity or a mental health collapse on its watch and/or (deserved) liability for the HEP. It appears in these circumstances to be right to enforce those anti-bullying protections if they are themselves compliant with HERA and the HRA. In other words, unlawful speech should be dealt with by the HEP (for instance under appropriate disciplinary

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<sup>40</sup> Attributed to Voltaire.

procedures): it should not create a licence to in turn bully that speaker (not least because the issue of unlawfulness can often be hard to judge).

This lawful/unlawful distinction is one which shapes HEPs' duties under the Relevant Law: the law does not, however, require them to make this distinction part of rules they impose on Participants (for instance in their general rules against bullying, which may go wider than technical harassment contra the Equality Act). If Relevant Prohibitions were stated as only applying to unlawful expressions of viewpoints, not only would risks arise of the HEP concerned failing to stop bullying as discussed above, but difficult questions would arise: who is to decide which expressions of viewpoints are unlawful in particular circumstances? Participants will never be in a position to decide definitively what are unlawful expressions of viewpoints, but HEPs will be unlikely to hear about issues so as to reach a view until problems have arisen. All this would create obvious risks of confusion and compliance failures. BFSP recommends that this approach should only be pursued where an HEP has effective anti-bullying rules which it can apply in any event.

The alternative is to be clear that the Relevant Prohibitions, or at least the majority of them, do not just apply to protect speech which is lawful and may also apply in respect of unlawful speech, on the basis that they contain anti-bullying requirements, and otherwise operate as supplements to, and are analytically comparable to, their general anti-bullying requirements (bearing in mind that those requirements and their application it must themselves be lawful and proportionate when interfering with a Participant's speech in making the attack). Participants will, of course, still be entitled to disagree (strongly, in most cases) with the viewpoints expressed and the offender will be likely disciplined for their unlawful expressions. This is the approach which BFSP recommends, although the suggested Relevant Prohibitions in this statement maintain flexibility for HEPs to make a decision.

In summary:

- HERA requires the protection of people with "inappropriate"-but-lawful viewpoints, unless it is not reasonably practicable to take the steps which might be available to give this effect;
- where relevant viewpoints or their expressions are unlawful, so not required to be protected under the Relevant Law, protections such as an HEP's general anti-bullying rules would still be likely to (indeed, should) apply, and it must be appropriate to enforce them for the reasons explained above, to the extent that it is "proportionate" to do so; and
- HEPs have a choice as to whether their Relevant Prohibitions apply only to protect "lawful" free speech. Excluding unlawful speech from these protections has significant risks, and BFSP recommends that this approach should only be pursued where an HEP has effective anti-bullying rules which it can (and should) apply appropriately in any event. The alternative approach is that they do apply so as to protect unlawful speech, on the basis that they contain anti-bullying provisions, or operate as supplements to, and are analytically comparable to, their general anti-bullying requirements. But this is up to HEPs to decide. The suggested Relevant Prohibitions in this statement maintain flexibility for HEPs to make a decision.

### (Parallel or unified anti-bullying/harassment requirements?)

If an HEP maintains anti-bullying provisions in the Relevant Prohibitions which are separate from its general anti-bullying provisions, it has more of a choice as to whether or not the version in the Relevant Prohibitions operates so as to prohibit bullying of people whose speech has been unlawful. An argument that the underlying legislation (HERA) only protects lawful speech, and it is consistent to reflect this in the Relevant Prohibitions, has cogency. But that would require an HEP to maintain two sets of inconsistent anti-bullying requirements, and remind Participants in the Relevant Prohibitions that its general anti-bullying requirements apply in any event in respect of unlawful (as well as lawful) speech.

If an HEP unifies the anti-bullying requirements in the Relevant Prohibitions with its general anti-bullying requirements, it does not have such a choice (it will have to make those requirements apply irrespective of whether the person who is being bullied themselves acted unlawfully), and will also need to (a) ensure that the wording and enforcement of these requirements are “proportionate” for the purposes discussed in this statement to the extent they apply in respect of a Participant’s verbal attack on another Participant for what they have said (though this may be nuanced to the extent HERA does not protect unlawful speech), (b) ensure that information about those anti-bullying requirements is available with the other Relevant Prohibitions, and (c) actually enforce those requirements when and as appropriate.

As discussed above, HEPs are likely to have prohibitions on discrimination and harassment in its general requirements about behaviour, and need to have them as part of their Relevant Prohibitions as well. HEPs have a similar choice, which needs to be carefully made, as to deal with the issue of parallel or unified requirements. The draft Relevant Prohibitions in this statement maintain flexibility for HEPs to make a decision.

### **Conclusion**

The situation is as a result of the above currently complicated and difficult for HEPs, and BFSP will be recommending to the OfS and the EHRC that they endeavour to provide guidance to HEPs on this matter. They will themselves, however, face the same complexities and difficulties, and it may be appropriate to work for clarificatory legislation. It would also be appropriate that the OfS takes a lenient approach to HEPs which have carefully endeavoured to implement rules which are simple enough to be comprehensible but which protect free speech appropriately, and enforce them proportionately, yet still end up with compliance problems.

BFSP has developed the suggested Relevant Prohibitions as an example of what appears to be the best (least bad?) currently available approach to dealing with this problem. We hope that HEPs find this helpful. With the underlying requirements quite likely to change, as discussed above, what is appropriate for the detail of these prohibitions could also potentially change, so HEPs will need to stay alert to the evolving situation and be ready to make any adjustments as become appropriate.