



EDI and similar courses, training and tests

Free speech requirements and risks for English universities

PRELIMINARY – this Statement sets out the currently applicable legal obligations under the Education (No. 2) Act 1986 and other legal requirements for free speech protection at English HEPs, and their implications in practice. This Statement is also an accurate statement in most material respects of the effects in practice of the main provisions of the Higher Education (Freedom of Speech) Act 2023, were these brought into effect. Those requirements are more demanding than is currently the case, so this Statement would be updated to reflect them in time.

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. IT MAY BE OUT OF DATE: see its publication date and also the important notice at page 13.

Introduction

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 protecting free speech and academic freedom at UK universities and other Higher Educational Providers (“HEPs”). These requirements are generally much more demanding than institutions appear to appreciate.

Most if not all English HEPs have courses, training and/or tests, often compulsory, for staff and students regarding matters (often associated with equality, diversity and inclusion (“EDI”) agendas) such as behaviour and language, diversity and attitudes to racial and sexual matters. These can be part of formal matriculation or induction processes, or more general training. We refer to these courses, training and tests as “**EDI Training**” although their scope may be wider than just EDI topics.

Aspects of EDI Training have become controversial, particularly where certain viewpoints are required to be agreed with in order to have successfully completed training or “passed” tests. This may be a consequence of HEPs acquiring courses or modules from activist organisations whose purpose is to advocate for a particular viewpoint.

This statement provides information about the legal and regulatory requirements for securing free speech as they apply in respect of EDI Training.

Alumni for Free Speech (“AFFS”) will be monitoring and liaising with HEPs to ensure that their EDI Training is free speech compliant. In the meantime, it asks anyone who has first-hand experience of EDI Training which may not be compliant to contact it at info@affs.uk.

Part 1: Relevant law

BFSP has provided detailed information about the relevant legal and regulatory requirements for the protection of free speech and their implications in its 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>.

Section 43 and related guidance

Under **Section 43** (“Section 43”) of the Education (No.2) Act 1986 (the “Education Act”) English HEPs¹ have an overarching statutory duty to take all steps as are reasonably practicable to secure freedom of speech within the law for members, students and employees (“Participants”) and for visiting speakers.

This primary duty is demanding and involves the taking of positive steps rather than paying lip service. It is stated in objective terms, giving limited discretion to an HEP as to what steps it needs to take. The two key limitations are that the relevant speech must be lawful, and the relevant step must be one which is, as a matter of fact, a reasonably practicable one for the HEP to take.

The duty to act under Section 43 will usually override duties to “think” such as under the PSED (of which more below). The fact that there are policies, programmes and requirements of the HEP which may conflict with this duty will not render relevant steps not reasonably practicable unless those policies etc are themselves required by law². This is a matter of compliance with an objective legal requirement, and the conflicting subjective views and priorities of an HEP are likely to have little relevance. Interpreting potentially contrary laws and requirements correctly is going to be vital for HEPs, as over-interpretation creates major risks for them.

The amendments to the Higher Education and Research Act 2017 (“HERA”) introduced by the Higher Education (Freedom of Speech) Act 2023 (“HEFSA”) included enhancements of

¹ Under Section 43(1). All the obligations under Section 43 strictly speaking fall on “Every individual and body of persons concerned with the government and management of any establishment” (See: Sub-section 43(1)). For convenience, however, we refer to them in this Statement as obligations of the HEP.

² “Required by law” has an extended meaning for these purposes, and includes by the HEP’s own requirements to the extent that they reflect its legal obligations or are necessary to secure a legitimate end and are proportionate in their application in accordance with principles under the HRA discussed below.

the free speech duties under Section 43 which were due to come into force on 1 August 2024. Following the General Election, however, the new government revoked the commencement provisions pending a review of HEFSA (including its potential repeal). By then, though, pursuant to provisions of HEFSA already in force, the Office for Students (“OfS”) had already issued draft guidance (“**Draft OfS Guidance**”)³ which includes provisions which are relevant to EDI training. We consider that the Draft OfS Guidance generally correctly reflects the relevant legal requirements under HEFSA.

Many of the core duties in HEFSA are substantially identical or very similar to the core duties in Section 43, so it appears that the Draft OfS Guidance continues (to that extent) to be an accurate reflection of the requirements in practice under Section 43 as well as being likely still to reflect the OfS’s expectations for HEP compliance. Compliance with the relevant provisions of the Draft OfS Guidance is therefore both prudent and best practice. Relevant sections of the Draft OfS Guidance are reflected in this Statement, which will require updating when a final version of the OfS’ guidance as to compliance with Section 43 or HERA (as the case may be) is brought into effect.

The Draft OfS Guidance specifically states:

“54. Providers [...] should not require holders of any academic position to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage them for exercising their academic freedom within the law.”

We consider that this is a correct reflection of the requirements in Section 43, although it is important to note that the obligations under Section 43 apply more widely, so include all staff and students and not just holders of academic positions.

Equality Act

As is now clearly established in case law, various viewpoints on currently contested issues are protected philosophical beliefs (“**Protected Viewpoints**”) under the **Equality Act 2010** (“**Equality Act**”). These include so-called "gender-critical" viewpoints and viewpoints which contest aspects of so-called "critical race theory". Employers and education providers must avoid discrimination against and harassment⁴ of people with Protected Viewpoints in certain contexts, including employment and further and higher education.

Employers are liable for discrimination and harassment committed by their employees in the course of their employment, unless they can establish the defence provided under Sub-section 109(4) by proving that they took all reasonable steps to prevent this happening (“**the Section 109 Defence**”). This has given rise to some now well-known embarrassments and liabilities on the part of employers for failing to take sufficient steps to prevent harassment of their

³ I.e. “*Regulatory advice 24: Guidance related to freedom of speech*”.

⁴ Which includes creating a hostile environment.

employees by their colleagues because of their Protected Viewpoints. See Appendix 2 to the Principal Statement for detailed discussion of this.

HEPs otherwise 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*⁵. In general, HEPs are not responsible under the Equality Act for the behaviour of their students. See the Principal Statement for more detail about this aspect.

HEPs should therefore act on the basis that they must work to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them.

HEPs' Public Sector Equality Duty ("PSED") imposed under **Section 149** of the Equality Act requires them to have due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express those beliefs, to advance equality of opportunity for those people and foster good relations between people who have a protected characteristic (i.e. these views) and those who do not. The PSED is not a duty to act and has been described as a "process duty not an outcome duty". Positive duties to take action (such as those imposed under Section 43 and the need to avoid discriminating against or harassing people with protected viewpoints under the Equality Act) are, therefore, likely to override the PSED. Furthermore, the PSED is very specifically worded, and does not require (or justify) consideration of an HEP's wider EDI related programmes or agendas beyond the specific stated aims.

Human Rights Act

Given that most (if not all) HEPs are "*public authorities*", the fact that the freedom of thought and expression of Participants and visiting speakers are specifically protected under the **European Convention on Human Rights** (the "**Convention**")⁶, as enacted in the UK by the Human Rights Act 1998 ("**HRA**"), is an obviously relevant consideration for these purposes. Again, further detail about the relevance of the HRA in the university context is to be found in the Principal Statement.

These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic freedom. Any interference by an HEP with the expression of opinions and academic freedom of its academics and students will require exceptional justification. Compelled thought and no doubt speech are unlawful.

⁵ Other than limited duties under parts of the PSED as discussed below.

⁶ Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of 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, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”* for various specified purposes, including for the protection of the rights of others; this qualification is, though, itself subject to a requirement that such restrictions be accessible, clear and precise, and to a *“proportionality”* test. Contrary laws and legal obligations can thus operate to restrict free speech rights, to a limited extent.

While the Convention rights are primarily worded as negative obligations, i.e. not to interfere with freedom of thought or expression unless that is justified, HEPs are also under positive obligations to "create a favourable environment for participation in public debates for all concerned, allowing them to express their opinions and ideas without fear, even if these opinions and ideas are contrary to those defended by the official authorities or by a large part of public opinion, or even if those opinions and ideas are irritating or offensive to the public".⁷ The nature and extent of these positive obligations are, however, unclear. They must include making it clear that Participants are expected not to take actions which materially interfere with other Participants' free speech rights, training them appropriately and ensuring that its own policies and requirements are not such as restrict Participants' free speech rights (this is discussed in detail elsewhere).

Key requirements in practice consequential on the Relevant Requirements

There is a large range of actions which are required in practice by the Relevant Requirements (which are discussed in detail in the Principal Statement), the most relevant of which are the following.

- **Not enforcing controversial agendas:** In recent years, some HEPs have promoted certain viewpoints in respect of areas which are the subject of debate or controversy. This gives rise to various free speech issues and concerns and, in order to avoid unlawful actions, HEPs and their representatives need to avoid enforcing controversial agendas as discussed in detail in Part 2 below.
- **Not allowing its administrative, EDI and other functions to become instruments of free speech suppression.** For instance, by pursuing inappropriate (often unlawful) disciplinary processes relating to expressions of viewpoints, or taking the actions described below.
- **Maintain sufficient institutional neutrality:** In order to avoid unlawful actions, HEPs and their representatives need to maintain sufficient institutional neutrality on matters of polarised public debate, as discussed in detail in Part 2 below.

⁷ *Dink V Turkey*, judgement of 14 September 2010 in French only, at 137.

- **Avoiding and reducing an oppressive atmosphere:** Given that the existence of an atmosphere in which Participants feel intimidated about expressing their opinions gives rise to obvious risks of self-censorship and very harmful effects on free speech at HEPs, HEPs are required by their primary Section 43 obligations 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 under the Equality Act can also require this. BFSP recognises that this is not easy to address, but HEPs need to give this careful thought and take available action.
- **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.⁸
- **Ensuring that Participants have adequate induction and training** about protection of free speech, and that they understand the nature of the requirements to protect free speech.⁹ This will likely be particularly important and extensive for staff who are involved in functions which could create free speech risks or have free speech implications.

Regulatory requirements: conditions of registration

HEPs are required by their condition of registration E2 to have in place adequate and effective management and governance arrangements to deliver in practice the public interest governance principles that apply to them. These include principles relating to securing freedom of speech and academic freedom.

A new condition of registration E6, relating to (inter alia) harassment, will be coming into effect on 1 August 2025. This contains important provisions about the interaction of policies relating to harassment with the Relevant Requirements.

These are discussed in detail at Appendix 2 to the Principal Statement.

Free speech codes and related rules

⁸ 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 requirements or the nature of the HEP's and Participants' obligations and/or operate to suppress dissenting viewpoints, for instance through now-infamous "no debate" policies. Free speech issues with EDI Training 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.

⁹ The Draft OfS Guidance contains detailed requirements in this regard, which are discussed in detail in the Principal Statement.

HEPs must maintain a free speech code of practice (“**FS Code**”), and must have rules to ensure compliance with its free speech obligations, which should expressly prohibit material actions by Participants against people in respect of their viewpoints.

Colleges and students’ unions

Section 43 does not apply directly to colleges or other “constituent institutions” (such as schools and halls) of HEPs or to their associated students’ unions, to the extent that they are separate legal entities. The Equality Act regime applies to constituent institutions and students’ unions, but the PSED does not apply to students’ unions. The HRA does not apply in respect of constituent institutions which are not themselves public authorities, or students’ unions.

The obligations of HEPs in respect of constituent institutions and students’ unions are discussed in the Principal Statement.

Part 2: What the law requires in practice

HEPs must not conduct EDI Training to the extent that this, or its contents or materials, contravene the Relevant Requirements or their conditions of registration or their own FS Codes or related rules.

There is a key distinction between EDI Training which is legally mandated, and that which is effectively voluntary. This is explored below.

Legally mandated requirements for training: limited application

Some EDI Training is legally mandated: everything else is voluntary

EDI Training can be required in order for an HEP to comply with its legal obligations (we call this “**legally mandated**”), and in particular: so as to ensure compliance under the Equality Act, for instance by avoiding or preventing unlawful discrimination or harassment; so as to qualify for the Section 109(4) Defence; and, to limited degree pursuant to its PSED, which as a duty to think is likely to be overridden by obligations to act, such as under the Relevant Requirements.

Further, training which, while one cannot point to a specific law which requires it, addresses legitimate concerns and is “proportionate” for the purposes of the HRA, should be treated as mandated for these purposes to the extent it is focused exclusively on those legitimate aims. The main examples of this would be general training against bullying and harassment and to encourage mutual tolerance.

It should be remembered that HEPs have limited obligations under the Equality Act in respect of the behaviour of students (as opposed to employees), so it will be unusual for student-

focused EDI Training to be legally mandated, other than pursuant to the need to give general training against bullying and harassment and to encourage mutual tolerance as discussed above and the weak requirements of the PSED referred to below.

Legally mandated EDI Training can legitimately override some free speech protections, just as it is legitimate (because legally justifiable) to have (carefully-constructed) anti-bullying and anti-harassment rules which can restrict some free speech.

To the extent that the nature and extent of EDI Training goes beyond what is strictly necessary to deliver what is legally mandated, it is voluntary and reflects wider programmes, agendas or ideologies. This distinction is crucial.

Identifying the scope of legally mandated EDI Training

In order to count as legally mandated (as opposed to voluntary), the nature and extent of EDI Training will need to be such as are required for compliance with relevant legal obligations, and no more.

The following are some relevant requirements and factors.

- HEPs will need to be very careful to understand, interpret and apply the Equality Act correctly, and must not over-interpret the application of concepts such as harassment (see the discussion of this subject in the Appendices to the Principal Statement) so as, for instance, to create “risks” or “requirements” to address that are not supported by legal reality. The new condition of registration E6, referred to above, will be significant in this regard.
- It will be important to keep the Relevant Requirements in mind, and ensure that the interaction of the EDI Training and the Relevant Requirements is managed successfully. HEPs will need to act to minimise any negatives for free speech while delivering what is legally mandated.
- The PSED is relevant to decisions as to what may need to be included in Diversity Training. The PSED is, however, a duty to consider and not to act, so is usually overridden by contrary duties or needs to act (such as under Section 43 and the Section 109(4) Defence). In reaching decisions relating to EDI Training, an HEP will be required to take account of the overriding duties to protect Participants’ free speech and thought. It will be highly risky to treat the PSED as justifying EDI Training which contravenes the Relevant Requirements and is not legally mandated pursuant to other requirements.

Even where EDI Training is legally mandated, the Relevant Requirements still apply, to the extent not overridden or modified by the “legal mandate”. This means that, while HEPs may:

- be required by applicable law to give adequate focused EDI Training;
- need to require attendance and expect Participants to attend to and endeavour to understand the requirements that apply to them; and

- legitimately test Participants' understanding of the information imparted and require confirmation of an intention to comply with the HEP's requirements as to behaviour, so long as those requirements only limit free speech to an extent that does not contravene the Relevant Requirements (this is consistent with requirements which are often found in employment and student contracts),

HEPs must not:

- require expressions of support for, or penalise legitimate expressions of dissent from aspects of, what is being taught at the training;
- present views which legitimately disagree with aspects of what is being taught at the training in a negative light; or
- use contents or materials which go beyond what is legally mandated.

In our experience, EDI Training is seldom structured and focused so as to be defensible as legally mandated. But, with appropriate focus and discipline, this is in principle achievable.

EDI training which is not legally mandated: compliance limitations

Most EDI Training goes beyond what is legally mandated, so is effectively the voluntary promotion and enforcement of wider programmes and agendas. This is severely restricted by the Relevant Requirements, as explained below. As a result, some HEPs appear to have been acting contrary to their legal obligations by doing (or not doing) some or all of the following.

EDI Training must not pressurise Participants to endorse or acquiesce in specific viewpoints (compelled speech), penalise dissent, harass or create a hostile atmosphere

Requiring expressions of support or tests to be passed, or penalising dissent at the training

Requiring specific viewpoints to be expressed, supported or acquiesced to in order: to have "correctly" answered certain questions, or to have "passed" the training or any test; or to avoid having to retake a course test (or to answer specific questions again) until they give the "right" answer or enough "right" answers:

- effectively disallows or suppresses opinions which are contrary to the ones being promoted; and
- is likely to create or contribute to an intimidating or hostile environment (whether at the training or more generally) for those Participants who disagree with those viewpoints or aspects of them,

and will be contrary to some or all of the Relevant Requirements, and/or HEPs' own FS Codes or rules.

The same obviously applies in respect of penalising dissent from the viewpoints being promoted or the contents of or materials for the training.

Presenting particular programmes/agendas as the only legitimate view, and differing views in a negative light; inappropriate materials; discrimination or harassment

To the extent that non-legally mandated EDI Training or any of its delivery, contents or materials:

- presents the programmes or agendas which are the subject of the EDI Training, or the ideas behind them, as the only legitimate way of seeing a subject;
- presents viewpoints which are contrary to those being put forward in the training as inappropriate or in a hostile or negative light;
- has the effect of sending a message to Participants that there are views which it is effectively compulsory to hold and express, and unacceptable to dissent from; or
- creates or contributes towards an intimidating or hostile environment (whether at the training or more generally) for Participants who hold certain viewpoints,

it is highly likely to be contrary to some or all of the Relevant Requirements, and/or HEPs' own FS Codes or rules.

A good example of non-compliant subject matter or materials is that an organisation which officially equated gender-critical views with transphobia has been held to committed harassment for the purposes of the Equality Act¹⁰.

Subject matter and materials will have to be very carefully monitored to ensure that they will comply with the Relevance Requirements.

Compulsory training, or presenting non-attendance negatively

Forcing Participants to attend EDI Training (which is not legally mandated), on subjects aspects of which they disagree with and which they do not want to attend or at which they will feel pressure to agree with viewpoints being promoted, is highly likely to be contrary to some at least of the Relevant Requirements, and/or HEPs' own FS Codes or rules.

To the extent that the fact that EDI Training is compulsory (or non-attendance is presented negatively):

- has the effect of sending a message to Participants that there are views which it is effectively compulsory to hold and express, and unacceptable to dissent from; or
- is likely to create or contribute to an intimidating or hostile environment (whether at the training or more generally) for those Participants who disagree with those viewpoints or aspects of them,

¹⁰ *Meade v Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022).

such compulsory training is also highly likely to be contrary to some or all of the Relevant Requirements, and/or HEPs' own FS Codes or rules.

Make right to dissent clear

It is likely that the primary duty under Section 43 requires that HEPs should, in the context of EDI Training that seeks to promote particular programmes, agendas or viewpoints on areas of public controversy, refer to their FS Code and to Participants' rights to hold (or not hold) and to express their beliefs and viewpoints (or lack of them) about those issues. This may also extend to informing Participants that the HEP has legal obligations to protect Participants' free speech, and that those obligations are backed up by rules and complaint and disciplinary processes to which the Participants may resort if concerned about aspects of the training they are being required to undertake. This is in any event best practice.

The above may also help HEPs demonstrate that they have done enough to qualify for the Section 109(4) Defence.

The Draft OfS Guidance¹¹ requires that a statement about an HEP's FS Code should be included prominently in any document stating or explaining any policy that may affect free speech, along with a statement that nothing in that other document should be read as undermining or conflicting with the FS Code; and that in case of any conflict the FS Code will take precedence. This includes all policies relating to equality or equity, diversity and inclusion, harassment and bullying and staff and student codes of conduct. While the Draft OfS Guidance does not make express reference to EDI Training content or materials, this is strong indication of the likely expectations of the OfS in this regard.

HEPs responsible for contents and materials: risks of acquiring from campaign groups

Courses and materials acquired from (or otherwise designed or approved by) campaign groups or activists will involve increased risks as regards compliance with an HEP's freedom of speech obligations, unless they have been carefully vetted by the HEP to ensure that they comply with its free speech obligations. Accordingly, if HEPs wish to provide EDI Training in areas of potential public controversy, they should either design them themselves having regard to their free speech obligations or ensure that materials provided by third parties are properly vetted to ensure that they are compliant.

Stating inappropriate requirements for Participant behaviour

HEPs must ensure that their own requirements for Participants, particularly about on-campus behaviour and attitudes, are compliant with the Relevant Requirements. In designing relevant courses and materials, they must make sure that these compliance requirements are correctly reflected. This will ensure that they do not unlawfully mislead Participants about the nature of the limitations on forms of expression which are available to them.

¹¹ Paragraph 75d.

Not misrepresenting or overstating the scope or effect of contrary laws

Identifying the limits to the scope which it is appropriate to give to duties and laws which appear to be inconsistent with the Relevant Requirements and other free speech obligations, such as the anti-discrimination and harassment provisions in the Equality Act, requires care.

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

A common example of a misleading statement, which we see regularly, is that the Equality Act outlaws discrimination and harassment. In fact, however, that legislation only outlaws discrimination and harassment perpetrated by specified parties in specified contexts, such as employment and education, with respect to specified protected characteristics including certain protected viewpoints. It applies to actions of HEPs, and their employees in the course of their employment and their agents when performing functions for the HEP, but generally not to actions of students, or staff in other circumstances. Another common misrepresentation is about what falls within the “protected characteristic” of gender reassignment¹². These misapprehensions – and resultant misrepresentations – often result in inappropriate (and potentially unlawful) restrictions on Participants’ rights for free speech and expression.

Key underlying compliance need: not enforcing controversial agendas

In recent years, some HEPs have promoted certain viewpoints in respect of areas which are the subject of debate or controversy. This gives rise to various free speech issues and concerns. Whenever such promotion (directly or indirectly) requires or exerts pressure for the endorsement of or acquiescence to those viewpoints, or suppresses the expression of lawful dissenting viewpoints, there will be a clear breach of the primary requirements under Section 43, unless an HEPs’ actions are legally required.¹³ Such taking of sides also risks creating a hostile environment which constitutes harassment under the Equality Act and a failure under the HRA. An institution’s disapproval of a particular lawful viewpoint has already been held to be sufficient to constitute harassment.¹⁴ HEPs must therefore avoid imposing or enforcing controversial programmes and agendas, and in particular must not require Participants to commit (or give evidence of commitment) to values, beliefs or ideas being promoted by them, to the extent that to do so would (among other things) contravene their obligations under the Relevant Requirements, and this is reflected in the Draft OfS Guidance as discussed above.

¹² Which then leads to other errors and unlawfulness. A lawyer puts it well: “I have seen universities carelessly incorporate Stonewall’s definition of transphobia into their rules, which results in holding gender-critical views being a disciplinary offence.”

¹³ Examples 4, 7, 9, 10, 11, 14, 15, 22, 28 and 30 in the Draft OfS Guidance illustrate this well. In the *Meade* case (see Appendix 2 to the Principal Statement). See also the *Fahmy* case (also described in Appendix 2 to the Principal Statement).

¹⁴ In the *Meade* case (see Appendix 2 to the Principal Statement). See also the *Fahmy* case (also described in Appendix 2 to the Principal Statement).

Key underlying compliance need: sufficient institutional neutrality

The above requirements and risks point 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 tribunals) 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.¹⁵

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, statements and language which risk counting as discrimination or harassment under the Equality Act or suppressing free speech contrary to Section 43 and the HRA, while of course complying with their wider relevant legal obligations. 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, and indeed it is being adopted by various institutions.

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;*

¹⁵ 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 to the Principal Statement.

- *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.*