Free speech protection at English universities:

The law and requirements in practice

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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. THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end. ***SEE ALSO the important notice at page 36.***

Part 3 indicates the legal sources of the requirements in practice.

1. 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. The legal obligations of English HEPs in relation to freedom of speech are extensive. **Section 43** ("**Section 43**") of the Education (No.2) Act 1986 (the "**Education Act**") contains key obligations on various categories of university and other higher education provider[1] in England (together, "**HEPs**"); the requirements in practice under Section 43 are reflected in parts of the Draft OfS Guidance (as defined below) for the reasons explained below. As confirmed in recent case law, viewpoints on many areas of current controversy are protected as religious or philosophical beliefs ("**Protected Viewpoints**") under the **Equality Act 2010** (the "**Equality Act**"). Freedom of speech and academic freedom are also protected under the **Human Rights Act 1998** (the "**HRA**") and the public interest governance principles with which HEPs are required to comply as an ongoing condition of their registration as HEPs. In this statement, the requirement under Section 43, the Equality Act, the HRA and the registration conditions are together referred to as the "**Relevant Requirements**".

This document contains a brief statement of the Relevant Requirements and other applicable duties, together with an explanation of what is required to be done in practice to comply with them, and some additional recommended best practice.

In relation to the requirements under Section 43 and recommended best practice, we make reference to parts of the draft guidance ***Regulatory advice 24: Guidance related to freedom of***

[1] Specifically, **Sub-section 43(4A)** provides that the establishments in England to which Section 43 applies are—

(a) any registered higher education provider;
(b) any establishment of higher or further education which is maintained by a local authority; and
(c) any institution within the further education sector.

speech of March 2024 ("**Draft OfS Guidance**") issued by the Office for Students ("**OfS**") pursuant to **the Higher Education (Freedom of Speech) Act 2023** ("**HEFSA**") even though the coming into force of that legislation is uncertain. This is on the basis that, whatever is ultimately done in relation to HEFSA, such guidance in various critical ways reflects both the requirements under Section 43 and what appears to be the OfS's own expectations of HEP actions for compliance. See the detailed discussion of this below.

2. Relevant law and other requirements

A. Requirements in Section 43 and codes/rules relating to free speech

Primary obligation to secure free speech

Section 43 of the Education Act[2] requires every individual and body of persons concerned in the government of any HEP[3] to take *"such steps as are reasonably practicable"* to ensure that freedom of speech (within the law) is secured for the members, students and employees ("**Participants**") of, and visiting speakers to, the HEP[4]. This is a demanding requirement (stated in objective terms) and requires active, positive steps to be taken.[5] This primary obligation results in various requirements in practice, which are discussed in detail in Part 3. Free speech obligations override other considerations, subject only to the following:

- The relevant speech must be lawful, i.e. not restricted by laws *"made by, or authorised by the state, or made by the courts."*[6] This includes criminal and civil laws. Among the latter are the Equality Act (see below) and laws relating to defamation, confidentiality and privacy. It can also include employment contracts and policies such as anti-bullying and harassment policies, if required by applicable legal obligations and written so as to be compliant with the Relevant Requirements (of which see more below). Extreme hate speech (such as

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2 See Sub-section 43(1).

3 All the obligations under Section 43 strictly speaking fall on these people personally and in particular., For convenience, however, we refer to them in this Statement as obligations of the HEP.

4 The duty extends to the recruitment of members, students (and logically employees, although this was not expressly stated) and to those who will in future be invited to visit and speak, rather than just those who have in fact already been invited. *R. (on the application of Butt) v Secretary of State for the Home Department [2019] EWCA Civ 256 [2019] 1 W.L.R. 3873* at [171]–[172]. At paragraph [172]: "The point is reinforced by the broad categories of persons whose freedom of speech is protected by the legislation. If the duty only extended to those already invited to speak, then could the same limitation apply to members and students? Could freedom of speech and academic freedom be said to be preserved by granting freedom of speech to existing members and students, while restricting recruitment of members and students on the ground of their political opinions? We think not."

5 Per the Draft OfS Guidance, paragraph 41, "Where a step is reasonably practicable for an organisation, it must be taken".

6 See: Draft OfS Guidance, paragraph 13.

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Holocaust Denial) which is contrary to Article 17 of the European Convention on Human Rights ("**the Convention**") is also outside the scope of protected speech on the basis that Section 43 must be interpreted compatibly with the Convention. Unless the relevant expression of views is so extreme as to be unlawful, it is protected under Section 43.

- HEPs are only required to take the steps that are reasonably practicable for them to take. The OfS interprets this to include refraining from taking a step which would have an adverse impact on freedom of speech absent compelling justification.[7] Various points are relevant here.

  - If an HEP is obliged by law (which has an extended meaning for these purposes as discussed above, 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) to do (or not do) something, such as to restrict the behaviour of its Participants (e.g. under, for instance, anti-bullying rules which are themselves written so as to be compliant with the Relevant Requirements)[8], then it is not reasonably practicable for it to take a step (pursuant to Section 43) which would be inconsistent with such obligation. On the other hand, the duty to act under Section 43 will generally override duties to "have regard to" (i.e. merely to think about) such as under the Public Sector Equality Duty ("**PSED**") under the Equality Act (in relation to which see further below).[9]

  - Policies, programmes and requirements of an HEP (such as anti-bullying and anti-harassment policies) which may conflict with the duty to secure lawful free speech must be drafted with extreme care so their requirements are accessible and clear to those bound by them and must be applied in any given case so as to not disproportionately interfere with an individual's right to lawful free speech. They will also be subject to the restrictions in new condition of registration E6 which relate to harassment, which will be coming into effect on 1 August 2025. This is discussed in detail at Appendix 2 to this Statement. The Draft OfS Guidance states that any

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7 See: Draft OfS Guidance, paragraph 35.

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

9 Actions which are implementing, or taken pursuant to, the requirements in Section 43, for instance implementing and enforcing rules prohibiting Participants from attacking each other in respect of their viewpoints, may themselves be claimed to infringe another person's rights to free speech and other protections under Section 4 and the HRA. This will require (*inter alia*) that implementation or action itself to be "proportionate" in accordance with the requirements of the HRA. This "conflict of rights" is a potentially difficult area. It is addressed in detail in BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance obligations.***

document stating or explaining any policy that may affect free speech or academic freedom (for instance a bullying and harassment policy, or research ethics policy) should include a statement that nothing in that other document should be read as undermining or conflicting with the HEP's free speech code of practice; and that in case of any conflict the free speech code of practice will take precedence[10].

- Cases relating to the protection of Protected Viewpoints under the Equality Act (see below) are likely to be relevant in identifying the sorts of actions that the courts/tribunals will consider to be reasonably practicable. See the detailed discussion in **Appendix 2** to this Statement.

- When deciding whether any particular step is reasonable practicable, an HEP must engage in an evidence-based assessment of options and costs, the risks and benefits, the relative rights and then perform a balancing exercise.[11] The OfS states that factors that are relevant to an assessment of whether steps are reasonably practicable may include: the extent to which taking the step (or not taking it) would secure or restrict freedom of speech; the practical costs (time, money, personnel) of taking the step (or not taking it); and financial constraints.[12] These factors must be assessed objectively and in the context of the particular importance given to academic freedom of speech by the HRA, of which more below.

- Section 43 is a duty "to ensure, so far as is reasonably practicable, that those whom [an HEP] may control, that is to say its members, students and employees, do not prevent the exercise of freedom of speech within the law [….] *in places under its control*".[13] This makes clear that there is a positive duty to control the behaviour of such people (which must include by having appropriate rules, and enforcing them); and that it is recognised that there are limitations on HEPs controlling the behaviour of other people, although it appears that the same considerations should apply to the behaviour of agents and other contractors of HEPs, and that HEPs are not usually in a position to manage behaviour at off-campus events.

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[10] See paragraph 75d. This should probably be regarded as a statement of regulatory expectation rather than as a statement of a requirement in practice under Section 43.

[11] See *University of Birmingham v. Persons Unknown* [2024] EWHC 1529 (KB), at paragraph 49.

[11] See *University of Birmingham v. Persons Unknown* [2024] EWHC 1529 (KB), at paragraph 49.

[12] See paragraph 36 of the Draft OfS Guidance. In paragraph 39, the OfS expressly recognises that a step which may be reasonably practicable for a large HEP might not be for a smaller HEP.

[13] *R. v University of Liverpool Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667 (per Watkins LJ at p132 D-H).

- HEPs need to take into account and deal with security concerns on its campus. See the discussion at Part 3 below about when it is necessary for HEPs to pay for security costs of a meeting or event.

There are times when there can be a perceived overlap or conflict between requirements to protect free speech under Section 43 and other legal obligations which are asserted to justify actions such as preventing or not publicising events or starting complaints or disciplinary proceedings. Interpreting potentially contrary laws and requirements correctly will be vital for HEPs, as over- or mis-interpretation of obligations under supposedly contrary laws creates major risks for them. We set out detailed information about the necessary approach in order to resolve such perceived conflicts appropriately in **Appendix 1** to this Statement. The OfS has itself stated that it "*stands for the widest possible definition of free speech within the law*", and "*the starting point is that speech is permitted unless it is restricted by law*".[14]

Meetings and costs of meetings

Section 43 includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the HEP or an associated students' union[15] is not denied to any individual or body of persons on any ground connected with the beliefs or views of that individual or of any member of that body, or the policy or objectives of that body.[16] It is a logical requirement in practice of the duties Sections 43(1) and (2) that the terms on which those premises are provided should not be based on such grounds if this is adverse to the successful holding of the meeting. This has many implications in practice, which are discussed in Part 3 below.

Issues regarding payment of the cost of security are discussed at Part 3 below.

Codes of practice

HEPs must issue and keep up to date a *"code of practice"* ("**FS Code**") which sets out:

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

[15] The phrase *"premises of [the HEP]"* is extended by **Section 43(8)** to include premises occupied by an associated students' union which are not premises of their associated HEP.

[16] See **Section 43(2)**.

- the procedures to be followed by Participants in connection with the organisation of meetings and other activities[17] at the premises of the HEP or an associated students' union[18]; and
- the conduct required of such persons in connection with those meetings and activities,

and deals with such other matters as the governing body consider appropriate. HEPs must themselves take all reasonably practicable steps to secure compliance with their FS Code, including where appropriate by the initiation of disciplinary measures.[19]

OfS requirements and draft guidance as key tools of interpretation

The OfS, as regulator of English HEPs, has issued various requirements and statements implementing and enlarging on the compliance regime for HEPs. In March 2024, it issued the Draft OfS Guidance referred to above[20] about the requirements in practice consequent on the legal obligations under the HEFSA.

But for the suspension of its commencement in July 2024, HEFSA would have introduced into the Higher Education and Research Act 2017 ("**HERA**") on 1 August 2024 (*inter alia*) the following new Sections (together, the "**Relevant HERA Obligations**"):

- A1(1), which would have created an obligation that the governing body of an English HEP must take "*the steps that […] are reasonably practicable for it to take*" to secure freedom of speech (within the law); this is worded substantively identically to Section 43(1), which requires "*such steps as are reasonably practicable to ensure that freedom of speech (within the law) is secured*"[21];

- A1(3), which focused on securing that the use of any premises of the HEP is not denied to any individual or body on grounds of its/their belief; this is worded substantively identically to Section 43(2); and

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17 Which fall within any class of meeting or activity specified in the FS Code.

18 The phrase *"premises of [the HEP]"* is extended by **Section 43(8)** to include premises occupied by an associated students' union which are not premises of their associated HEP.

19 **Sub-sections 43(3) and (4)**. Detailed, consequential requirements under the Draft OfS Guidance are discussed in Part 3 below.

20 I.e. "*Regulatory advice 24: Guidance related to freedom of speech*".

21 Noting that there is introductory wording in Section A1 to the effect that it must be read "having particular regard to the importance of freedom of speech", which gives greater relative weight to the requirements of Section A1 when balanced against other requirements and considerations. This is not in Section 43(1), so should be discounted in the interpretation discussed below.

- A2, which would have required HEPs maintain a code of practice relating to free speech and is in many respects worded substantively identically to key parts of Section 43(3).

The Draft OfS Guidance was prepared by OfS staff, including its lawyers, to set out extensive information on what was required to be done by HEPs in practice pursuant to the Relevant HERA Obligations (as well as pursuant to other provisions inserted into HERA by the HEFSA). BFSP considers that the Draft OfS Guidance generally correctly reflects (subject to the factors discussed below) the Relevant HERA Obligations. It follows that:

- to the extent that the Relevant HERA Obligations are substantively identical to parts of Section 43 as stated above, the Draft OfS Guidance operates as an accurate statement of the implications in practice of those parts of Section 43. This is particularly pertinent with respect to the core duty under HERA Section A1(1), which substantively overlaps in its scope and effect with the existing duty under Section 43(1);

- the Draft OfS Guidance is generally a strong indication of the OfS's expectations with respect to compliance with Section 43, other law and the current public interest governance conditions; and

- the Draft OfS Guidance will, in legal proceedings, likely be treated as evidence of the implications in practice of the parts of Section 43 referred to above and also as to wider best practice.

As things currently stand, however, it will be essential for this purpose to:

- exclude those parts of the Draft OfS Guidance that reflect aspects of the Relevant HERA Obligations that went beyond the existing law and thus are not relevant for interpreting what is required by Section 43; and

- exclude or treat with caution (as appropriate) any parts of the Draft OfS Guidance which were likely (or might) not to have been an accurate statement of the implications of the requirements under the Relevant HERA Obligations (as strictly interpreted), for instance as guidance only representing good practice as envisioned by the OfS (although such guidance might still be relevant in practice as indications of continuing regulatory expectations of the OfS).

Subject to these exclusions, those parts of the Draft OfS Guidance which are relevant for interpreting Section 43 are discussed extensively in Part 3 below. This Statement 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.

We anticipate that, after the fate of the HEFSA is finally decided, the OfS will issue revised guidance in respect of the implications pursuant to the HEFSA or Section 43, as the case may be. This Statement will need to be revised to reflect this final guidance.

B. Equality Act, PSED and the protection of Protected Viewpoints

Under the Equality Act, HEPs must avoid unlawful discrimination against and harassment of people, including academics and students, who have the *"protected characteristic"* of holding (or not holding) particular religious or philosophical views (defined as "**Protected Viewpoints**" above). The Equality Act specifies various contexts in which unlawful actions can occur, including employment[22] and further and higher education.

Meaning of "Discrimination" and "harassment"

"Discrimination" occurs where a person (A) treats another person less favourably than A treats or would treat others because of a protected characteristic, including holding a Protected Viewpoint.[23]

"Harassment" means (in summary) unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment. The question of whether there has been such an "effect" has an objective element.[24] This definition has very wide implications, with many consequent detailed requirements for protecting the free speech rights of those with Protected Viewpoints.

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[22] Which is defined in **Section 83(2)(a)** to include employment under a contract of employment, and a contract personally to do work.

[23] See **Section 13**. Under **Section 19**, indirect discrimination may occur where a practice, policy or rule applies to a number of people in the same way (i.e., apparently neutrally) but, nonetheless, puts people with a protected characteristic (including a claimant) at a particular disadvantage (e.g. it has a worse effect on them) when compared with people who do not share that characteristic. In such circumstances, unless the HEP concerned can prove that its practice, policy or rule is a proportionate means of achieving a legitimate aim, it will likely be in breach of its obligations under the Equality Act. This can have real effects in practice: for instance, rules which equate "gender-critical" views with transphobia, training which insists that all white people should assume they are inherently racist and recruitment or promotion processes which require applicants to demonstrate support for particular viewpoints or agendas are all likely to breach HEPs legal duties under the Equality Act.

[24] See **Section 26** and the detailed discussion of this in **Appendix** 2 below.

Defining Protected Viewpoints

The landmark *Forstater* case[25] established that gender-critical views are Protected Viewpoints. Views which challenged aspects of critical race theory ("**CRT**") were subsequently ruled to be protected, as were anti-Zionist ones.[26] The law in this area is still evolving. If they wish to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as Protected Viewpoints in appropriate circumstances and will, in time, be confirmed as such.[27] Such obviously contested areas would include, for example, other aspects of CRT, the co-called *"decolonisation"* of the school and university curriculum, views in relation to religions and their effects, and views in relation Israel and Palestine.

There can, however, be "inappropriate (sometimes expressed as "objectionable") manifestations" of Protected Viewpoints which do not qualify for protection.[28] This is a complex area (for instance, distinctions need to be drawn between the forums of the manifestation, e.g. personal social media or official channels of communication), but generally appears to result in a reasonable balance of outcomes between competing claims or considerations under the Equality Act.

Liability for conduct of employees: limited duties in respect of Participants more generally

Section 109(1) of the Equality Act 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.

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25 *Forstater v. CGD Europe et al*., 2021 (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

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

27 For further information and guidance, see: BFSP's detailed ***Statement about what sorts of beliefs are protected following the Forstater case***.

28 See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643 and *Higgs v Farmor's School* [2023] EAT 89.

Recent cases have held employers – including the Open University – liable for discrimination against and harassment of employees in connection with their viewpoints, including liability for bringing inappropriate disciplinary proceedings against employees for their viewpoints, and for their employees attacking their colleagues by online petitions and pile-ons. They provide vivid examples of how this area of the law can apply in practice and confirm the onerous requirements which apply for an employer to bring itself within the Section 109(4) Defence, which is demanding and not easily satisfied.[29] See Appendix 2 below for further information.

Other than pursuant to their PSED (as discussed below), HEPs have very limited duties under the Equality Act in respect of the behaviour of staff *acting in capacities which do not give rise to such responsibilities on the HEP's part*, and very limited duties in respect of the behaviour of their students. So, for instance, opinions expressed by the HEP's staff via their private social media are not normally the HEP's problem under the Equality Act.

Public Sector Equality Duty

The PSED applies to public authorities (including most HEPs).[30] It requires HEPs, in the exercise of their functions, *"to have due regard to"* the need to eliminate unlawful discrimination and harassment (and other unlawful acts) under the Equality Act, including against people who hold or express a protected viewpoint, to advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it. A duty to have due regard to is only a duty to think about something and to give it appropriate weight in context.

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. The discussion (both above and below) about the risk for HEPs in over-interpreting the meaning of "harassment" is of particular relevance in this context.

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[29] As will be seen from the cases considered in Appendix 2 below. In *Allay (UK) Limited v Gehlen* [2021] UKEAT 0031_20_0402 (Unreported, 4 February 2021), the EAT clarified that the Section 109(4) Defence is designed to encourage employers to take significant and effective action to prevent unlawful action.

[30] See **Section 149**.

Summary of effect of Equality Act

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

- avoiding discriminating against or harassing such people through their own actions, policies and requirements, for instance through their rules operating so as to inappropriately suppress the voicing of Protected Viewpoints or their disciplinary processes being used to do so;

- taking all reasonable steps (pursuant to the Section 109(4) Defence) to prevent attacks and other actions by their employees and other representatives which would constitute discrimination or harassment attributable to them under Section 109; and

- complying with their PSED in respect of them.

Given that many people hold Protected Viewpoints about a wide range of currently controversial issues, this creates a major risk area for HEPs. This is likely to require greatly increased institutional neutrality in relation to many contested issues, for the reasons discussed in Part 3 and Appendix 2 below.

It is important that HEPs do not misinterpret the requirements under the Equality Act and, in particular, do not over-interpret the meaning of 'harassment' for these purposes or succumb to pressure to treat the expression of a lawful but unpopular viewpoint as itself unlawful harassment. Such missteps can lead to severe compliance failures. See detailed discussion of this in the Appendices (and in particular of the new condition of registration E6 in Appendix 2 below).

C. Human Rights Act and compelled thought

The free thought and speech rights of academics and students are protected under the **European Convention on Human Rights** (the "**Convention**")[31], as enacted in the UK by the **HRA**.[32] These freedoms include the freedom to offend, shock and disturb. Compelled thought

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

[32] As most, if not all HEPs are "public authorities" for the purposes of the Convention and the HRA.

and speech are unlawful.[33] Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.[34]

The right to free expression is subject to the qualification that the *"exercise of these freedoms, since it carries with it duties and responsibilities,*[35] *may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law*[36] *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.[37] Contrary laws and legal obligations can thus operate to restrict free speech rights, to a limited extent. This qualification can operate to limit what actions HEPs must, or can legitimately, take to implement and give effect to Section 43, and is taken into account in cases under the Equality Act. This can be particularly relevant in cases of conflicts of free speech rights, for instance where Participant A attacks Participant B for their viewpoints. Participant A's right (pursuant to Section 43) to do so can be restricted by rules made pursuant to the primary obligation in Section 43 and the need to prevent harassment by employees under the Equality Act, to the extent that this is proportionate. Given that the purpose of such restrictions is to protect free speech overall, and that cases

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[33] See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 9. See, also: *Lee v. Ashers Baking* [2018] UKSC 49 at [56], although this states the important proviso that compelled speech is not allowed "unless justification is shown for doing so"

[34] Academic freedom protections extend *"to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence"* and to *"extramural"* speech *"which embraces not only academics' mutual exchange (in various forms) of opinions on matters of academic interest, but also their addresses to the general public"* (*See: Erdoğan v. Turkey,* App. nos. 346/04 and 39779/04 (2014)).Any sanction imposed on an academic in relation to the exercise of academic freedom is likely to be a breach of Article 10, since, however minimal, such sanction is liable to impact relevant rights of free expression and have a *"chilling effect in that regard"* (*See: Kula v. Turkey,* App. No. 20233/09 (2018)*)*. Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10 (See: *Torres v Spain*, App no. 74729/17 (2022)). It follows that any attempt to justify restrictions on, or impose sanctions in respect of, otherwise lawful statements made in an academic setting is very likely to be unsuccessful.

[35] *"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"* (*Giniewski v France* (2006) 45 EHRR 23 at [43]).

[36] *"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."* From *Higgs* case.

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

under the Equality Act have operated to treat attacks on people for their protected viewpoints as unlawful (i.e., not meriting protection under the HRA), appropriately drafted rules of this sort, which are accessible, clear and precise, are likely to satisfy this proportionality test.

It follows from what is said above that:

- speech which is outside the protection of Section 43 because it contravenes the Equality Act will be highly likely to be proportionately restricted under the Convention (rights under which are considered when considering whether a violation has occurred);
- policies can be *"prescribed by law"* provided they are accessible, clear and precise; and
- if such policies satisfy the *"prescribed by law"* limb of Articles 9(2) or 10(2) of the Convention, the proportionality of the restriction on otherwise lawful speech will then be assessed on a case-by-case basis.

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".[38] The nature and extent of these positive obligations are, however, unclear. They must include presenting the importance of free speech positively, 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). A reasonable interpretation of this obligation would include imposing appropriate rules on Participants restricting attacks on and other hostile actions against other Participants for their viewpoints, and appropriate enforcement of those rules, and we consider that HEPs would be unwise not to act on this basis. All of these required actions will themselves need to comply with the requirements of Articles 9(2) and 10(2) of the Convention, including by being 'proportionate' as discussed above.

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

Taking various types of action against another person is criminalised. Where such actions are taken in connection with that person's viewpoints, the PHA can become relevant to free speech issues.

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

Most relevantly, under the PHA, a person must not pursue a course of conduct which amounts to, and which he knows or ought to know[39] amounts to, harassment of another person. Harassment in this context includes alarming a person or causing a person distress. The PHA may give rise to both civil and criminal liability. Intent does not have to be proved, although criminal harassment will be subject to a higher standard of proof.[40] Other potentially relevant offences include putting a person in fear of violence and malicious communications and improper use of public electronic networks[41].

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

E. Requirements as to governance

HEPs are required by their conditions of registration to have governing documents that uphold (condition E1), and to have in place adequate and effective management and governance arrangements to deliver in practice (condition E2), the public interest governance principles that apply to them. These include principles relating to securing freedom of speech and academic freedom[42].

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[39] There is an objective element to this.

[40] PHA sections 1, 2, 3 and 7. Relevantly, in particular, to mob behaviour on social media, the PHA also provides that a person must not pursue a course of conduct which (a) involves harassment of two or more persons, and which he knows or ought to know involves harassment of those persons, and (b) by which he intends to persuade any person (whether or not one of those mentioned above) either (i) not to do something that he is entitled or required to do, or (ii) to do something that he is not under any obligation to do.

[41] There are other relevant offences: for example, putting a person in fear of violence (under Section 4(1) of the PHA) and offences under **Sections 4A** (threatening and abusive behaviour intended to cause harassment) **and 5** (threatening and abusive behaviour within hearing or sight of a person likely to be caused harassment) of the **Public Order Act 1986** (these can be one-off events); and malicious communications (under **Section 1 of the Malicious Communications Act 1988**) and improper use of public electronic networks (**Section 12**7 of the **Communications Act 2003**).

[42] The relevant governance principles are:

> "I. Academic freedom: Academic staff at an English [HEP] have freedom within the law:
>
> - to question and test received wisdom; and
> - to put forward new ideas and controversial or unpopular opinions,

The OfS has stated[43] that, in considering whether an HEP:

- complies with condition of registration E1, it may consider questions such as whether those governing documents provide for reasonable steps that facilitate securing lawful speech or include content that provides for steps that may undermine free speech.

- complies with condition of registration E2, it may consider questions such as:

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

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

(The above now appear to be reflected in the Draft OfS Guidance, so far as applicable in the context of Section 43.)

A new condition of registration E6, relating to harassment and sexual misconduct, 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. This is discussed in detail at Appendix 2 below.

A new Director of Free Speech and Academic Freedom has responsibility for overseeing and performing the OfS's functions in respect of free speech.[44]

F. Complaints, accountability and liability

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

Complaints and claims

Claims have been successfully brought under the Equality Act for discrimination against and harassment of people with Protected Viewpoints (as to which see **Appendix 2** below), and under the HRA for breaches of HEPs' duties as regards freedom of thought and expression.

> without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider […]
>
> VII. Freedom of speech: The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the [HEP]."

43 OfS December 2022 Publication.

44 HERA, Schedule 1, paragraph 3A.

The options for direct legal redress for failures under Section 43 are limited, but failure to comply can be a breach of an HEP's registration conditions and result in enforcement by the OfS. Section 43 also modulates key employment law rights including the reasonableness of a dismissal, and the objective tests under the Equality Act.

Personal liability

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

G. Colleges and students' unions

The obligations of, and of HEPs in respect of, colleges and other "constituent institutions" and students' unions are discussed in Part 3 below.

3. Requirements and implications in practice

In Part 3, we indicate the legal sources of the requirements in practice using the following colour coding.

Highlighted in	***Sources***
Red	All Relevant Requirements: Section 43 of the Education Act; Equality Act (in respect of Protected Viewpoints); HRA; regulatory
Orange	Section 43 and HRA; regulatory
Yellow	Section 43 and Equality Act (and perhaps the HRA); regulatory
Green	Section 43; regulatory
Blue	Regulatory (e.g. conditions of registration, Draft OfS Guidance) or good practice

Notes:

1. *The Equality Act only applies in respect of those viewpoints which are Protected Viewpoints.*

2. *For the reasons given above, the Draft OfS Guidance, should be taken as highly relevant in interpreting the obligations under Section 43, and this is reflected in this Part 3.*

3. *It is unclear whether the positive obligations to act under the HRA apply in respect of the items highlighted in yellow, for the reasons discussed in Part 2 above.*

The obligations under Section 43 involve an HEP taking those steps set out below which are indicted as being required by Section 43. These will all enhance free speech protection and are all reasonably practicable or likely to be so.[45] HEPs' conditions of registration will also require those steps which are required by Section 43, and possibly by the Equality Act and HRA, and potentially those other steps that are indicated as being regulatorily required pursuant to the Draft OfS Guidance. The need to avoid discrimination against and harassment of people with Protected Viewpoints under the Equality Act, or to qualify for the Section 109(4) Defence, and the need to comply with the HRA (including the positive obligations under it) also involve an HEP taking many of these steps (see the detailed discussion in **Appendix 2** below).

A. Key general obligation

- **Not to discriminate or harass in connection with viewpoints**: A key general obligation, which underlies many of the other obligations in practice below, is not to discriminate against or harass Participants or visiting speakers in connection with their lawful viewpoints (especially Protected Viewpoints under the Equality Act), and to take all reasonably practicable steps to prevent their Participants from going so. This is required in order to avoid compliance failures (in respect of Protected Viewpoints) under the Equality Act[46] and (to a degree) under the HRA. HEPs also need to take all reasonable steps to prevent their employees doing this in order to qualify for the Section 109(4) Defence. This will make a very substantial difference to securing free speech, and must in principle be reasonably practicable, so is in principle also required under the obligations in Section 43, subject, of course, to the detailed circumstances of each case. [47]

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

[46] Although this would be unlikely to extend to visiting speakers, noting that this is itself a contested point.

[47] The Draft OfS Guidance (Paragraph 112) contains an obligation on HEPs not to treat a student unfavourably, or less favourably than they treat or would treat another student, on the grounds of that student's opinions or ideas in various specified contexts. This must also extend to harassment of Participants and visiting speakers generally for the purposes of Section 43.

B. Rules, governance and training

- **Not having policies, practices or requirements which unjustifiably prevent or restrict lawful free speech**, or which mis-state or exaggerate legal obligations on them which may conflict with their obligations to secure free speech.[48]

- **Promoting of the importance of**, and achieving a positive official attitude and general atmosphere within the HEP towards, free speech: this will make a very substantial difference to securing free speech and sufficiently active steps towards achieving this must in most cases be reasonably practicable, so HEPs will need to take such steps in order to satisfy the duties under Section 43, and likewise in respect of the creation and enforcement of policies, practices and requirements relating to securing lawful free speech. Working to ensure that its staff do likewise. Section 43 (as evidenced by sections of the Draft OfS Statement quoted herein) clearly requires HEPs to ensure that free speech is described in positive terms in all its documentation, and in its training in particular. HEPs must not allow free speech to be presented in a negative light and need to commit time to ensuring that this is carried out appropriately in practice.

- Ha**ving an appropriate FS Code** containing: the HEP's values relating to freedom of speech together with an explanation of how those values uphold freedom of speech[49] and

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[48] Specifically, paragraph 64 of the Draft OfS Guidance states: *"The terms of any code, contract or policy should not be so broad that they suppress the lawful expression of a particular viewpoint or of a wide range of legally expressible content"*. At paragraph 65, the Draft OfS Guidance goes on to say: **"***Policies and other statements should not discourage lawful speech by misrepresenting a provider's legal duties. This may include oversimplification – for instance, by omitting the importance of freedom of speech"*. These paragraphs are consistent with the overarching guidance in paragraph 62: *"If any code, contract or policy that regulates speech, or has the effect of regulating speech, identifies a category of restricted speech (such as 'harmful speech'), then: (a) such a category should be defined in a way which is not capable of restricting freedom of speech within the law, or academic freedom; and (b) that definition should explain that the interpretation of that category includes an objective element (so that it does not depend only on the perception of the alleged victim)."*

See also the new condition re registration E,6 as discussed in Appendix 2 below.

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

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

[49] This is an express requirement in the HEFSA relating to FS Codes which goes beyond those already contained in Sub-section 43(3). Enhanced requirements in practice are quoted in paragraph 76 of the Draft OfS Guidance. Despite the current suspension of the relevant provisions of HEFSA, we consider that these actions are a key aspect of the requirement in practice to take a positive approach to free speech discussed above, and also required both under Section 43(1) and the positive obligations under the HRA, and also probably still reflect the OfS' expectations in this regard.

procedural information regarding the holding of meetings and events (see further below); providing specified information to Participants about relevant free speech requirements as well as its own obligations in relation to free speech[50]; and dealing with such other matters as the governing body consider appropriate. It should also have a clear and simple **statement** ("**FS Statement**") about the FS Code, which should summarise its contents and make clear how to access it.[51]

The Draft OfS Guidance contains detailed information about FS Codes and HEPs' obligations about publication and ready availability. This includes that the FS Code must be easily accessible online; that the FS Statement must be communicated to staff and students at least annually; and that FS Statement must be contained in any prospectus, staff and student handbooks, and must also be included prominently in any other document stating or explaining any other policy that may affect free speech or academic freedom.[52] Such other documents must also include a statement that nothing in that other

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The Draft OfS Guidance goes on to state (at paragraph 77) that HEPs should consider including: a statement about the overarching value of freedom of speech within the law for the HEP; a statement about how those free speech values uphold freedom of speech within the law at the HEP; a statement emphasising the very high level of protection for the lawful expression of viewpoints and for speech in an academic context; and a statement that freedom of speech within the law may include speech that is offensive. These all appear to be natural consequences of Sub-section 43(3) and may also be required pursuant to the positive duty under the HRA.

50 This express requirement in the HEFSA (quoted in paragraph 76 of the Draft OfS Guidance) goes beyond what is required under Sub-section 43(3). However, since the draft OfS Guidance presumably l represents what the OfS regards as desirable, HEPs that wish to adopt best practice would include this information in their Free Speech Codes and policies.

51 See paragraph 75 of the Draft OfS Guidance. This is not specifically required by Sub-section 43(3). However, the primary duty under Section 43(1) requires HEPs to all steps reasonably practicable to freedom of speech within the law and what is said in paragraph 75 will facilitate understanding of and access to free speech information and thus materially enhance free speech protection and is almost certainly reasonably practicable, so is highly likely to be required by Section 43(1) and also likely to still represent what the OfS thinks appropriate. .

52 See paragraph 75 of the Draft OfS Guidance. This is not specifically required under Sub-section 43(3). However, it will materially enhance free speech protection and is almost certainly reasonably practicable, so is highly likely to be required by Section 43(1) and also likely to still represents what the OfS thinks appropriate. Further, Sub-section 43(3) requires HEPs include in FS Codes *"such other matters as [HEPs] consider appropriate"*. The aforesaid leads us to conclude that best practice includes all of these additional steps.

Paragraph 75(d) of the Draft OfS Guidance states that this includes all policies relating to: admission, appointment, reappointment and promotion, disciplinary matters, employment contracts (that may include conditions on speech), equality or equity, diversity and inclusion, including the PSED, harassment and bullying, IT, including acceptable use policies and surveillance of social media use, the Prevent duty, principles of curricular design, research ethics, speaker events and staff and student codes of conduct.

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.[53]

- **Creating rules to ensure compliance** with the free speech obligations,[54] including securing compliance with its FS Code.[55] Such rules should expressly prohibit material actions by Participants against people in respect of their viewpoints, such as harassment and severe personal attacks, online pile-ons[56] and making inappropriate complaints and allegations. These restrictions will themselves need to be written in a way that is compliant with the free speech rights of Participants[57] – see BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance*** obligations for a detailed discussion of this complex area. HEPs will need to have appropriate disciplinary processes in order to secure compliance with free speech rules and appropriate and effective processes for curtailing and remedying activity which is contrary to free speech related requirements.

- **Having appropriate governance arrangements**, including the following.

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

  - Taking these issues seriously at senior levels. This will, or will be highly likely to, involve (as best practice at the least): free speech promotion and protection being a sufficiently regular agenda item for its governing body; having an appropriately constituted and empowered committee of its governing body or other senior working group to ensure proper compliance with its free speech obligations; and having a senior and properly resourced free speech officer as discussed below.

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[53] See paragraphs 74 and 75 of the Draft OfS Guidance. This is probably not required pursuant to Section 43, but probably still represents what the OfS would desire.

[54] This is a clear requirement in order to qualify for the Section 109(4) Defence and will be likely to become also be recognised as required under Section 43 as jurisprudence develops: see Appendix 2 for more on this. This requirement underlies paragraphs 75 to 86 of the Draft OfS Guidance.

[55] See in this regard Section 43(4), under which an HEP must: "take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the [FS Code] […] are complied with."

[56] Paragraph 50 of the Draft OfS Guidance 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.

[57] For example, to the extent that these rules, or enforcement of them, themselves restrict the rights of Participants to attack or express their views about other Participants or visiting speakers, they will need to be 'proportionate' in order to comply with the HRA and HERA. See the discussion of proportionality under "Human Rights Act" in Part 2 above. For a detailed discussion of this complex area, see also BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance obligations***.

- Ensuring that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact.[58]

- Ensuring an effective accountability structure: all staff with responsibilities relating to areas that could affect compliance with free speech duties should have clear responsibilities for promoting and securing free speech within those areas and understand those responsibilities. (This will particularly apply in respect of leaders in areas such as EDI and some academic disciplines in relation to which controversial agendas have sometimes been enforced, including by requiring agreement to contested opinions in induction, training, recruitment or promotion processes, and in respect of the curriculum.) There should be an appropriate chain of responsibility and supervision between those staff members and the governing body.[59]

- Ensuring that its risk officers and functions are aware of these issues and the risks they create, and that significant free speech risks are on its risk register and treated with an appropriate level of seriousness.

- Having appropriate and effective reporting and complaints systems in respect of free speech issues and complaints. This is discussed in detail below.[60]

- Recording all decisions that could directly or indirectly (and positively or negatively) affect free speech within the law. These records should demonstrate how the HEP has had particular regard for the importance of free speech within the law.[61]

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[58] This is stated in the Draft OfS Guidance, paragraph 102. Even if not required pursuant to the general obligation to take all reasonably practicably steps under Sub-section 43(1), it probably still represents what the OfS regards as desirable. HEPs that wish to adopt best practice should, therefore include this. This will require a list of committees responsible for various specified matters and will apply more widely that just in respect of obligations under Section 43: for instance obligations to uphold Participants' entitlement to hold and express Protected Viewpoints under the Equality Act.

[59] It is unclear how much of the above is required in practice by Section 43. It would all appear to be likely to make a material difference to securing free speech, and to be reasonably practicable. Some at least may be required under HEPs' conditions of registration.

[60] This would appear to be required in practice by Section 43: it would surely make a material difference to securing free speech, and to be reasonably practicable. Some at least may be required under HEPs' conditions of registration.

[61] This is stated in the Draft OfS Guidance, paragraph 100. Even of not required for compliance with the general duty under Sub-section 43(1), it likely represents what the OfS regards as appropriate. As before, therefore, best practice will include this (at least in relation to decisions which materially affect free speech).

- Appointing a **free speech officer** to be an internal advocate for free speech and academic freedom, with responsibility for ensuring that the HEP complies with its legal obligations and follows and enforces its own rules appropriately. That officer should be appropriately senior (sufficiently so to participate in governing body meetings), empowered and resourced, available (although this does not necessarily have to be a full-time position, particularly if they have other staff to help them fulfil their role), experienced and trained, and non-conflicted.[62]

- **Ensuring that Participants have adequate induction and training** about protection of free speech and academic freedom, and that they understand the nature of the requirements to protect free speech.[63] The nature and extent of such training should take account of the nature the Participant's role within the HEP, and 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, including anyone involved in appointments, promotions and disciplinary processes.

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[62] This would surely make a very material contribution to securing free speech. As it is reasonably practicable, it is likely required pursuant to the core obligation in Section 43(1). In any event, having a free speech officer is an obvious requirement of good practice. Given that controversies around aspects of diversity agendas appear to have given rise to many of the free speech problems in recent years, it is hard to see how a person could be appointed who also has or has had a role within an HEP's EDI function without such dual appointment giving rise to insuperable conflicts of interest/priorities.

[63] The Draft OfS Guidance states the following. This would appear to be required in practice by Section 43 as it would materially assist in securing free speech and is a reasonably practicable step to take. Even if that were not that case, as it represents what the OfS regard as appropriate, HEPs that wish to adopt best practice will implement such induction and training in any event.

- "adequate induction" means that all staff and students will have at least an up-to-date understanding of: the FS Code and how it applies in practice; their own free speech rights under [Section 43], the HRA and the Equality Act; the free speech rights of members, [employees], students and visiting speakers under [Section 43], the HRA and the Equality Act; and[n/a]. (Paragraph 117.)

- "adequate training" means that staff will have an up-to-date understanding of: the FS Code and how it applies in practice, including its application in detail to the member of staff's role in the organisation; the requirements of [Section 43], the HRA and the Equality Act in relation to freedom of speech and how they apply in detail to the member of staff's role in the organisation; and the OfS' free speech complaints scheme and its relevance to the member of staff's role in the organisation. This should further extend to understanding their duties. (Paragraph 116.)

C. Action required to protect free speech and stop suppression of viewpoints

- **Taking active and effective action to ensure that it and its Participants comply** with applicable obligations, including its FS Code and related rules, and **enforcing compliance** with disciplinary action where appropriate.[64]

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

    - Where a Participant is under attack for expressing their lawful opinions (especially where such opinions are Protected Viewpoints), Section 43 and, often, the need to qualify for the Section 109(4) Defence[65], require an HEP to take all reasonably practicable steps to stop (or stop recurrence of) various types of hostile actions, including harassment, personal attacks and online pile-ons, that are being taken against the Participant because of their lawful viewpoint. This is especially the case where those actions are in possible breach of the HEP's own relevant rules and requirements.[66]

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

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64 This is required under Section 43(4), and the principal obligation under Section 43(1) more generally, to the extent that such steps are reasonably practicable. These are also key lessons of the *Fahmy* and *Phoenix/Open University* cases, described in Appendix 2. See also Example 2 in the Draft OfS Guidance. See also Note 66 below.

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

66 See: Section 43(4). The Draft OfS Guidance says that HEPs *"should promptly reject public campaigns to discipline, expel or fire a student or member of staff for lawful expression of an idea or viewpoint. These may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns. […] Depending on the circumstances, rather than publicly distancing itself, it may be more helpful for [an HEP] to reiterate the importance of free speech for all staff and students, including the person affected. It may also be especially important for the response to be timely."* (See paragraphs 50 and 51 and Examples 6 and 7.) This is very useful clarification as far as it goes, but insufficiently wide if HEPs are to be confident that they have done enough to comply with their obligations under Section 43 and qualify for the Section 109(4) Defence (see more at Appendix 2). HEPs need to be active in stopping attacks and, if appropriate, bringing disciplinary action.

- HEPs must not succumb to pressure from Participants or others: (a) to take actions which suppress or restrict lawful free speech or which materially disadvantage another Participant or visiting speaker in connection with their holding or expressing certain opinions (including and especially Protected Viewpoints); or (b) not to take steps to enforce its rules and requirements regarding free speech protection. Succumbing to any such pressure would very likely give rise to a breach of the primary obligations under Section 43 (and potentially under the Equality Act and the HRA as well). Bringing such pressure to bear in the first place would itself very likely be a breach by Participants of an HEP's rules and requirements if they have been properly formulated in order to comply appropriately with Section 43.[67]

- HEPs need to have practices, policies and requirements in place to enable them to do the above.[68]

- Ensuring that their **internal communications systems** (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed[69].

- Having appropriate and effective **reporting and complaints procedures and systems** in respect of free speech issues and complaints. This is clearly reasonably practicable and be likely to contribute materially to securing free speech. Ensuring that its systems are structured and staffed to be able to deal with issues and complaints promptly and effectively, and in particular to review and address free speech problems in accordance with the Relevant Requirements and consequential requirements in practice. Relevant staff will need to be thoroughly trained about what the law in fact requires and how to operate the system effectively. Such systems must also take account of the fact that many complaints will be against the HEP and its staff, so will need to be resolved by people who are sufficiently independent to avoid material conflicts of interest.[70]

  As noted above, the coming into force of the formal OfS complaints scheme provided for in the HEFSA was revoked in July 2024. However, students will continue have to right to raise complaints through the Office of the Independent Adjudicator. Furthermore, the OfS has in the past received complaints, reports and (effective) whistleblowing relating to free

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67 See footnote 66 above.

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

69 See the *Fahmy* and *Phoenix* cases, described in Appendix 2 below, for what happens when this is not done.

70 This would appear to be required in practice by Section 43: it would surely make a material difference to securing free speech, and to be reasonably practicable. It is also likely be required under HEPs' conditions of registration. A failure to have appropriate systems in place and operate them fairly and effectively may also give rise to failures under the Equality Act and the HRA.

speech failures and acted on them with investigations and other actions. We see no reason why the OfS will not be prepared to do this to an increasing extent in the future, given its greatly increased emphasis on free speech in recent years. (BFSP's associated campaign Alumni For Free Speech will be reporting serious failures to the OFS, especially where HEPs appear to have been cavalier about free speech protection, while being sensitive to the OfS's resource limits and avoiding (and encouraging complainants to avoid) causing disproportionate disruption to HEPs that appear to be serious about free speech protection.) In order to minimise the risk of a complaint being made to the OfS, HEPs will need to ensure that the complaint as first made to them ii handled promptly, effectively and fairly.

- **Not allowing its complaints and disciplinary functions to become instruments of free speech suppression**, contrary to the Relevant Requirements. Every complaints process should include a fair, objective and rapid triage process during its initial stage, to the extent (at least) that complaints relate to a Participant's lawful speech or viewpoints. This process should ensure rejection of vexatious, frivolous or obviously unmeritorious complaints at an early stage. An HEP should not permit the pursuit of obviously vexatious or trivial complaints or instigate formal investigations into a Participant following s complaints which relate to their lawful expression of a viewpoint (including and especially a Protected Viewpoint).[71] HEPs should not encourage students or staff to report other Participants over opinions or speech that would (or might) involve the lawful expression of a particular viewpoint.[72]

  An HEP must treat all complaints arising from or relating to holding or stating lawful opinions and viewpoints with considerable caution. Its starting assumption (not least because of the foundational importance of free speech and academic freedom in the higher education context) should be that it is likely that such complaints are likely not be justified. Complaints processes should be concluded as rapidly as is reasonably practicable, compatibly with the interests of justice.[73] An HEP must not proceed with any complaints or disciplinary proceedings which risk constituting a failure to comply with its primary duties under Section 43 or unlawful discrimination or harassment. It should, in any event, conduct complaints and disciplinary proceedings in such a way as to avoid unlawful discrimination and harassment[74] or a failure under the HRA.

- **Not allowing inappropriate official endorsement (or effective enforcement) of controversial agendas; the curriculum; research:** In recent years, some HEPs have

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

72 See: Draft OfS Guidance, paragraph 69 and Example 17.

73 See: Draft OfS Guidance, paragraph 71.

74 See: the *Meade* case, described in Appendix 2 below.

endorsed or 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 endorsement or 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.[75] 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.[76] 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 [77]. This extends to things like EDI training.

- Further, HEPs must therefore not impose ideologies, viewpoints or agendas (such as a *"decolonisation"* agenda) as part of the curriculum, to the extent that to do so would (among other things) contravene their obligations under the Relevant Requirements. In particular, an HEP "should ensure that decisions about the curriculum and the way it is delivered safeguard the ability of academics to teach and communicate ideas that may be controversial or unpopular but lawful, and opportunities for students to be exposed to such ideas" and "academic staff should not be constrained or pressured in their teaching to endorse or reject particular value judgements".[78]

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

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

[76] In the *Meade* case (see **Appendix 2** below). See also the *Fahmy* case (also described in **Appendix 2**). See also the 2024 Opinion of Akua Reindorf KC into likely free speech failings at King's College, London: "*A consequence of crafting internal policies with the aim of satisfying the ideological preferences of single-interest accreditation schemes is that it carries a risk of disturbing the balance of rights which the [Equality Act] seeks to achieve. […] It is likely to result in a conflict between the employer's policy aims and the rights of employees who hold protected philosophical beliefs which conflict with those of the accreditation schemes in question. For example, any requirement placed by [HEP] upon members of staff to demonstrate support of [a particular viewpoint] is plainly likely to place people with [opposing] beliefs at a disadvantage, particularly if it is accompanied by a penalty for failure to demonstrate such support.*"

[77] While Draft OfS Guidance paragraph 54 (and others) and Examples 5 and 9 focus on academic staff in the employment context, similar protections logically apply in respect of all Participants.

[78] Draft OfS Guidance, paragraphs 103 and 112 and Examples 28 and 29.

be restricted or compromised in any way because of any external pressure connected with those conclusions.[79]

- **Sufficient institutional neutrality:**[80] The above requirements and risks lead inevitably to an underlying issue: if an institution takes sides, in an area of passionate and polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a very obvious risk of disadvantaging (i.e. discriminating against) or creating a hostile environment for (i.e. harassing) people who hold that other viewpoint, and creating or tolerating environments in which attacking people for their viewpoints is acceptable. A number of recent public failures (with unlawful harassment and discrimination found by 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.[81]

  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. This is also the expectation of the OfS: its draft guidance has several examples of the consequences of failures of neutrality.[82] 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[83].

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79 Draft OfS Guidance, paragraph 105 and Examples 22 and 23.

80 See footnote 57 above. "The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other…", per Choudhury P in *Forstater v CHG (Europe)* [2022] ICR 1, at paragraph 55. How have institutions so badly lost sight of this principle?

81 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 below.

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

83 In May 2024, following a scandal that cost its President her job, Harvard University announced that it had accepted a working group's report and recommendations that: *"the [u]niversity and its leaders should not . . . issue official statements about public matters that do not directly affect the university's core function as an academic institution; the group reasoned that when the University 'speaks officially on matters outside its institutional area of expertise', such statements risk compromising the 'integrity and credibility' of [its]academic mission and may undermine open inquiry and academic freedom by making "it more difficult for some members of the community to express their views when they differ from the university's official position"*. In the UK, Imperial College London has adopted a formal policy of neutrality as part of its free speech code. We expect more to follow.

- **Avoiding and reducing an oppressive atmosphere**: Research strongly evidences that an atmosphere exists at many HEPs or among their Participants in which many Participants feel intimidated about expressing their opinions. This can arise as a result of the attitude of colleagues or online aggression, or the fear that job prospects may be hindered, or assessments of performance may be downgraded, in connection with their expressing certain opinions. Given that the existence of such an atmosphere gives rise to obvious risks of self-censorship and very harmful effects on free speech at HEPs, HEPs are required by 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. It will involve HEPs being vigilant to prevent, identify and stop free speech transgressions; firmly enforcing its code of conduct and rules; and taking the other steps set out elsewhere in this Part 3. BFSP recognises that this is such a protean problem that it is not easy to address, and there may not be many further steps beyond those stated here which HEPs can realistically take, but they need to give this careful thought and take reasonably practicable action.

- **Ensuring that any staff or student courses, "tests" or "training**", for instance for new arrivals, do not wrongly inhibit or suppress free speech.[84] This is regularly gives rise to unlawful action as result of enforcing agendas that go way beyond what is legally required under (principally) the Equality Act, so are effectively voluntary. See, in this context: BFSP's statement ***EDI and similar courses, training and tests: Free speech requirements and risks for English universities*** for detail about the relevant legal requirements and their effects in practice.

- **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.[85]

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[84] See Draft OfS Guidance, paragraph 118.

[85] 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 training and tests regarding diversity matters have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

D. Meetings

- **Meetings and events:** Taking all reasonably practicable steps to ensure that the use of any premises of the HEP (or occupied by any associated student's union[86]) is not denied to any individual or body of persons on any ground connected with the beliefs or views of that individual or of any member of that body, or the policy or objectives of that body.[87] It is a logical requirement in practice under Section 43(1)[88]: that the terms on which such premises are provided must not be based on such grounds to the extent that this is adverse to the successful holding of the meeting, and this includes as to any requirements imposed in relation to hiring and using venues; and that an HEP should take all reasonably practicable steps to ensure that meetings are conducted appropriately. This applies both to internal meetings (including lectures, seminars and staff meetings) and ones with external speakers (including participants in debates or discussions).[89] A number of other requirements and factors arise in relation to meetings.

  - An HEP's FS Code must set out the procedures to be followed by both staff and students of the HEP in connection with the organisation of meetings and other activities at the HEP's (or associated students' union's) premises, and the conduct required of such persons in connection with those meetings and activities and dealing with such other matters as the governing body consider appropriate. [90] This would logically include a process for the timely consideration of risks to the event, the purpose of which would be to put in place steps that permit the event to go ahead, and that the document should specify who would be responsible for planning and taking these steps.

  - HEPs will need to be actively involved in monitoring and supervising security issues and assisting often inexperienced organisers to arrange appropriate security. While it must in many cases be "reasonably practicable" for the purposes of Section 43(1) for HEPs to pay for security costs of a meeting or event, and case law recognises that this may be required, there must be limits to what would be considered to "reasonably

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86 See Section 43(8).

87 See Section 43(2).

88 And under the Equality Act and the HRA.

89 See Draft OfS Guidance, paragraph 79.

90 See Section 43**(3)**. The Draft OfS Guidance contains detailed requirements, including about the procedures for organising and required conduct at meetings, at paragraphs 76 to 86 (some of which, paragraph 81 in particular, is not relevant in the context of Section 43). Paragraph 79 states that: *"The scope of the procedures section of the document should be broad. It should not be limited to policies relating to external speakers or events. The code of practice should apply (and be linked) to the procedures to be followed by staff and students of the provider …] when organising any activities that relate to academic life, whether those activities take place on or off campus"*.

practicable"[91]. The uncertainty over the point at which it would in a particular case cease to be reasonably practicable that an HEP pays the security costs of a meeting militates towards caution and prudence: paying security costs in cases of doubt is the only safe way forward, as well as what those who are serious about free speech would do. [92] The cost-effective course, in the long run, is for HEPs to enforce their rules for free speech protection consistently, and to remind Participants regularly about the risks of non-compliance.

- It must be highly likely to be a "reasonably practicable" step, which will be very helpful to event organisers and thus help the planning and holding of potentially controversial events, that HEPs make clear in their FS Codes what their criteria are for determining whether the HEP will pay the security costs of a meeting or event.

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

E. Admissions, appointments, promotions and termination

- **Admissions**: An HEP should not discriminate against a person in connection with their lawful viewpoints, for instance by refusing them admission (as students or academics), marking them down in the admissions assessment process or revoking or changing the terms of their admission to the HEP.[93] An HEP should not admit students or visiting academics on the basis of funding arrangements or other criteria that have the effect of restricting their or others' free speech or academic freedom within the law. They should be proactive about checking that those applying to be visiting academics do not pose risks to academic freedom.[94]

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[91] And courts have ruled that HEPs are entitled to look to event organisers to cover security costs where they can afford to do so: see *R. (Ben-Dor) v University of Southampton* [2016] EWHC 953 (Admin); [2016] E.L.R.279, at [62] – [63].

[92] The Draft OfS Guidance (paragraphs 97 to 94) requires that HEPs pay security costs, save in exceptional circumstances, and sets out detailed consequent requirements. While the provision of HEFSA that this reflects have not come into effect, and parts of this section of the Draft OfS Guidance go further that what is required under Section 43, HEPs should consider (with legal advice) which of them are "reasonably practicable" for the purposes of Section 43, and put those into effect. Parts of this section of the Draft OfS Guidance may well also reflect, to some extent, the continuing expectations of the OfS. Clarification would be helpful.

[93] Pursuant to Section 43;the Equality Act, in respect of people who have viewpoints which count as "protected" for its purposes; and the HRA

[94] See Draft OfS Guidance, paragraphs 42 to 44 and Example 3. This appears to us to be not simply an expression of what the OfS regards as appropriate practice but also required by HEPs' basic obligation under Section 43 to take such steps as are reasonably practicable to secure freedom of speech.

[94] See Draft OfS Guidance, paragraphs 42 to 44 and Example 3. This appears to us to be not simply an expression of what the OfS regards as appropriate practice but also required by HEPs' basic obligation under Section 43 to take such steps as are reasonably practicable to secure freedom of speech.

- **Employment, appointments and promotions**: An HEP must not discriminate against a person in respect of their lawful viewpoints in connection with their employment generally. An HEP should secure that, where a person applies to become a member of staff or for promotion, that applicant is not adversely affected in relation to the application, or the appointment or promotion process, because of lawful viewpoints held or previously expressed.[95]

- **Discipline and termination**: Staff and holders of other positions should not be prejudiced or subjected to disciplinary measures because they have lawfully expressed their viewpoints. HEPs should not terminate employment for, or deny reappointment to, any member of staff because they hold or have expressed a particular lawful viewpoint.[96]

- **No EDI commitments or statements:** An HEP should not:

  - require applicants for positions or promotions to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage, or create an intimidating or hostile for, any candidate who holds, or has expressed, particular lawful viewpoints; or

  - require Participants to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage, or create an intimidating or hostile for, a Participant who holds, or has expressed, particular viewpoints.

  More widely:

  - seeking information on Participants' viewpoints/alignment with values, beliefs or ideas at all in connection with employment, appointments or promotions risks being regarded as being done in preparation to discriminate based on their viewpoints, and more generally is likely to have an intimidating/chilling effect (and thus potentially constitute harassment). This should not happen; and

  - taking actions which pressurise people who want a position or indeed a career at an HEP to suppress or hide their opinions or take actions or say things they do not believe

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[95] This is an important requirement pursuant to the primary duty under Section 43, the Equality Act, in respect of people who have Protected Viewpoints for its purposes, and the HRA. This is reflected in Draft OfS Guidance paragraphs 45 and 57 (although it is now too wide-reaching to the extent it relates to external applicants): while this is stated there to apply in respect of applicants for academic positions only, the obligations apply more widely.

[96] Pursuant to the primary obligation under Section 43; the Equality Act, in respect of people who have Protected Viewpoints for its purposes; and the HRA. See Draft OfS Guidance, paragraphs 52 and 53 and Example 8.

in, in order to (as it appears to them) maximise their chance to secure a position, progress in their careers or obtain research funding, are likely to be unlawful.[97]

See in this context: BFSP's statement ***EDI considerations and inquiries in the recruitment process at English universities: Free speech compliance issues*** for more information on this complex area.

- **Records**: An appointment, promotion, disciplinary or dismissal process should include a sufficiently detailed record of all decisions so far as they have a connection with a Participant's viewpoints of expressions of them.[98]

- **Including appropriate free speech related requirements in all relevant employment or appointment contracts** and in the job specification for all appointments of senior staff and in their contracts with students.[99]

G. Relationships with colleges and other "constituent institutions" and students' unions

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[97] These are important requirements pursuant to:

- the Equality Act, in respect of people who have Protected Viewpoints for its purposes; and the HRA; and

- the primary duty under Section 43 in respect of Participants and external applicants. This is stated in Draft OfS Guidance at paragraphs 46, 54 and 58 and Examples 5 and 9. Although this is stated there to apply in respect of applicants for (and holder of) academic positions only, the obligations apply more widely in respect of all employment.

[98] Keeping insufficient records would be likely to count against an HEP in a decision as to whether it had fulfilled its duties under Section 43 in a particular case, but it is unclear to BFSP what level of record-keeping is generally required. This is stated as a requirement in the Draft OfS Guidance, paragraphs 47, 55 and 59, which also state that this record should include evidence that the relevant process did not penalise a candidate or employee in connection with their viewpoints or for their exercise of lawful free speech. (These paragraphs were stated as focusing on protecting academic freedom, but this logically extends to all employees.) It may be that this extent of record keeping goes beyond what is required pursuant to Section 43, but:

- good governance must require sufficient record keeping to demonstrate that an HEP is preforming its duties (which would extend to admissions as well); and

- it probably still represents what the OfS would desire,

so HEPs that wish to be adopting best practice would apply this while aiming to achieve a balance as so as to avoid excessive, onerous paper-pushing.

[99] These would most often be framed as general contractual provision requiring compliance with an HEP's policies in force from time to time, with free speech and anti-bullying/discrimination policies included within that general wording.

- **Application of Relevant Requirements**: 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 generally apply in respect of constituent institutions which are not themselves public authorities, or students' unions.

- **HEP obligations**: It must be that many of HEPs' duties under Section 43, for instance as regards prohibiting Participants from bullying other Participants for their viewpoints, do not somehow cease to apply just because an action happens to take place within a college or on a students' union's premises.[100] Further, it appears to be the case that HEPs' duties under Section 43(1) include their taking such steps as are reasonably practicable for them to take to ensure that their constituent institutions and students' unions are aware of the Relevant Requirements and adopt, comply with and enforce policies, rules and practices of their own so as to reflect/give appropriate effect to the Relevant Requirements as regards Participants (but not in respect of people within the constituent institution or students' union who are not Participants), although this can be subject to severe limitations in practice as discussed below.[101] (For the avoidance of doubt, the existence of such duties would not thereby render an HEP in automatic violation of Section 43 as a result of the actions or failures of its relevant constituent institution or students' union.)

  HEPs will also be liable under the Equality Act for the actions of their own employees within their constituent institutions or their students' unions.

  The obligations of an HEP under Section 43(2), (3) and (4) in respect of meetings and FS Codes (including to take all reasonably practicable steps to secure compliance with their FS Code) extend to use of the HEP's premises by an associated students' union, and also use by the students' unions of its own premises[102]. To the extent that such a students' union occupies or uses premises owned by or under the control of the HEP, it would, for example, be reasonably practicable for the HEP to make compliance a condition of occupation or use, or otherwise to exert some control over the students' union's conduct in relation to freedom of speech.

  There are likely, however, to be significant limitations on HEPs' ability to control the use and management by constituent institutions and students' unions of their own premises. Many constituent institutions and all students' unions are separate legal entities and have

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100 For instance, a Participant bullying another by organising an online pile-on should not be regarded as not prohibited by an HEP's policies/rules just because they happened to be sitting inside a college at the relevant time. This would be absurd, and would in many cases render some HEPs' key duties nugatory (we have seen Cambridge argue this, and it was not a good look, and appeared to reflect a misunderstanding of their duties).

101 The DfE has stated that it expects this. See: DoE 2021 Publication, Annex B.

102 See Sub-sections 43(2), (3), (4) and (8).

extensive operational independence, so an HEP will likely not have much effective day to day control over their actions. All will depend on what actions would be "reasonably practicable" for the purposes of Section 43, and whether they have been taken. This is fraught with uncertainty.

- Many colleges have long-standing operational independence, although this has significant limits so should not be used as an unjustifiable excuse for inaction by the HEP concerned, as has happened (for instance, the HEP's requirements in respect of Participant behaviour do not (and certainly should not) cease to apply in respect of actions because they happen to have been taken within a college, as discussed above). In any event, the availability of soft power (e.g. through conference of colleges and the like) might, at the least, require HEPs to provide thought leadership on free speech and academic freedom and to promote best practice and the like.

- Likewise, students' unions have extensive operational independence, so an HEP will likely not have much effective day to day control over their actions. [It must, however, be potentially reasonably practicable for HEPs to impose requirements to secure free speech through the agreements, memoranda of understanding and the like between them and their students' unions and their effective power through the money they contribute to their students' unions.

- The following factors need to be kept in mind:

  - there are very significant variations in the governance structures of constituent institutions, and in their relationships with their relevant HEPs, with greater or lesser control or day-to-day influence by the relevant HEP, so every case/relationship will require individual consideration; and

  - the matters discussed above involve judgements in respect of fine-grained points of law in an area with little or no jurisprudence: case law or guidance will at some point emerge which will confirm or modify the above.

H. Information on free speech implications for various topics

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

- **The Equality Act after the *Forstater* case: protected viewpoints**.
- **Liability of employers for harassment by their staff of people with protected beliefs under the Equality Act: after the *Fahmy* case.** And **Liability of employers for allowing their disciplinary processes to be used to suppress free speech: the *Meade* case**. And **Liability for discrimination and harassment by staff against people with protected beliefs under the Equality Act: The Phoenix case**.
- **Free speech codes: compliance checklist**
- **Know your free speech rights.**

- **Meetings at English HEPs: Free speech requirements and risks.**
- **EDI and similar courses, training and tests: Free speech requirements and risks for English universities**.
- **EDI considerations and inquiries in the recruitment and research approval process at English universities: Free speech compliance issues**.
- **"Decolonizing the curriculum": potential free speech problems.**
- **Requirements re governance and appointing a free speech officer**.
- **Requirements for staff and student behaviour: English HEPs' free speech compliance obligations.**

Best Free Speech Practice

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

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Important: *This document:*

- *is a short summary of a complex area of law and its implications, and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: HEPs and others should consult their legal and other advisers in respect of all matters relating to free speech in connection with their institution, including those referred to in this document;*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular HEPs, will have to be developed by HEPs themselves, in the context of their own particular circumstances;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE****: see its publication date above.*

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

On occasion, there might be a perceived overlap or conflict between an HEP's legal duties to protect free speech under Section 43 and other legal obligations, or between those duties and an HEP's programmes or priorities which are being relied on to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. In particular, allegations of harassment and other assertions of offence and insult can create apparent problems in the context of HEPs' freedom of speech obligations.

If, however, speech is contrary to other laws (such as those preventing specified types of discrimination or harassment and defamation), it is not protected under Section 43, as discussed in Part 1. If it is not, then all reasonably practicable steps must be taken to protect it, of which more below.

The necessary analytical process in the event of competing claims

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

- The primary free speech obligation under Section 43 to take all reasonably practical steps to secure free speech within the law is overriding,[103] subject to only to its inherent limitations. The need to take actions in order to qualify for the Section 109(4) Defence is also an important and demanding consideration.

- An incident sometimes raises considerations about whether the speech in question is "lawful" and therefore falls within the obligations in Section 43 (e.g. where it is asserted that the expression of a person's viewpoint amounts to unlawful harassment under the Equality Act). (We discuss the meaning of "lawful" in the context of Section 43 in Part 1 above). In such a case, HEPs must review carefully whether any laws ("**contrary laws**") are, in fact, contravened by the relevant statement, opinion, action or event ("**relevant view or event**") so as to render the relevant view or event unlawful (see the discussion of this in Part 1). If the relevant view or event is not, in fact, unlawful, reasonably practicable steps must be taken to protect the relevant view or event. In this review, HEPs must be careful not to over-interpret the contrary laws, i.e. treat them as having wider application than they actually have in law. Expressions of viewpoints will rarely be unlawful (even if controversial and even where others strongly disagree with them). Subjective and incorrect interpretation of contrary laws is a real risk area for HEPs, and their staff personally.

[103] E.g. it will override the PSED and the HEPs' non-legally mandated policies and agendas as discussed below.

- Issues might arise as to whether there are steps that are, as a matter of fact, reasonably practicable to take in the relevant circumstances[104] and, in particular, whether other legal obligations on an HEP render an action not reasonably practicable (see the discussion of this in Part 1 above). Again, great care will be required to avoid over-interpreting any apparent or claimed contrary obligations. For instance, the obligation under the PSED to have due regard to the need to eliminate unlawful discrimination and harassment (and achieve other specified aims[105]) does not extend more widely than what counts as "unlawful" discrimination or harassment. It is also a duty to think (i.e. have due regard) and not to take action. It is, therefore, overridden by positive duties to take action such as those to protect free speech under Section 43.

Interpreting contrary laws, requirements and policies; the HRA and conflicts of rights

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

HEPs will very likely already have policies and rules which purport to reflect their obligations under the Equality Act and the PSED. In many cases, however, they extend beyond what is actually required of the HEPs under such legislation. In the context of their relationship with the obligations to protect free speech, it is only those policies and rules that reflect their actual legal obligations that will be potentially relevant to HEPs' obligations to secure free speech. To the extent that policies and rules go beyond this and treat other obligations as justifying non-compliance with free speech duties, HEPs will be at severe and obvious risk of acting in breach of those duties. See the detailed discussion of this, and the new condition of registration E6 in particular, at Appendix 2 below.

There can also be issues as to whether rules restricting the ability of Participant A to attack other Participants or visiting speakers in respect of their viewpoints themselves infringe Participant A's rights to free speech under the HRA and Section 43. Under the HRA, Participant A's free speech rights are, however, themselves subject to HEPs' entitlement to impose restrictions on their attacking other Participants in respect of their viewpoints, so long as those restrictions are themselves written so as to be compliant, and "proportionate" in particular[106]. The same applies in respect of enforcing those rules. Similar considerations

[104] See the discussion of *"reasonable practicability"* in Part 2 above, including where the interpretation and/or application of Section 43 themselves potentially infringe others' rights, so need to be proportionate in accordance with the requirements of the HRA.

[105] I.e. to advance equal opportunities and to foster good relations between people with and without protected characteristics.

[106] See the discussion of proportionality in relation to the HRA in Part 2 above.

would apply under Section 43: appropriately written rules (which are themselves "proportionate" for the purposes of the HRA) prohibiting Participant A from attacking other Participants or a visiting speaker in respect of their viewpoints, which were made so as to satisfy obligations under Section 43, would not be likely to be held to infringe the free speech rights of Participant A.

Circumstances can also arise involving apparently conflicting protected characteristics. In relation to this, the OfS has stated that the *"interaction between different protected characteristics may require careful consideration – for example, some religious beliefs and the protected characteristic of sexual orientation. Both characteristics are afforded protection from harassment and discrimination under the Equality Act, and it may be necessary for [HEPs] to balance the different protected characteristics in certain circumstances. The expression of beliefs in a way that amounts to unlawful harassment or discrimination does not constitute free speech within the law"*. [107]

Not misrepresenting or overstating the scope or effect of contrary laws

HEPs need to be very careful to word any rules, policies or other materials so that they do not overstate the scope or effect of contrary laws and thus have the effect of unlawfully restricting free speech.[108]

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 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 not to actions of students, or staff in other circumstances. Another common misrepresentation is about what falls within the "protected characteristic" of gender reassignment. These misapprehensions – and resultant misrepresentations – often result in inappropriate (and potentially unlawful) restrictions on Participants' rights for free speech and expression.

While, subject to complying with their legal and regulatory obligations (see the discussion the new condition of registration E6 at Appendix 2 below), HEPs can make such rules as they see fit, they must not assert that such rules reflect a requirement of the Equality Act where they do not, in fact, do so. This is misleading, and quickly leads to free speech protection failures.

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107 *OfS December 2022 Publication*, at page 4.

108 See the Draft OfS Guidance, paragraphs 62 to 67 and associated examples.

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

Harassment, offence and free speech

At HEPs, people's actions and statements are often claimed to amount to harassment. "Harassment" in the legally relevant use of the term is, however, very specifically defined under the **Equality Act** and has been subject to extensive case law. It follows that approaching allegations of supposed harassment cautiously, and applying the concept appropriately to particular circumstances, are vital.

In summary, harassment means unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for that person.[109] In relation to this:

- It must be remembered that "discrimination" and "harassment" (as defined in the Equality Act) are only unlawful in respect of actions which come within the various specifically defined circumstances (such as employment and the provision of education) set out in the Equality Act.
- The perception of the person claiming that an action was harassment is relevant in the context of the alleged "effect" of the conduct, as are all of the other particular circumstances. Crucially, an objective test is applied when considering whether it is reasonable for the conduct to have that effect.[110] This last consideration operates to exclude subjective assertions of harassment by the hypersensitive. In relation to taking all circumstances of the case into account, the Court of Appeal has stated that other statutory provisions (for instance the obligations in Section 43) are relevant.[111]
- Further, Employment Tribunals have stated that the relevant threshold will not be met by things said or done that are *"trivial or transitory, particularly if it should have been clear that any offence was unintended"*. They have also emphasised the importance of not encouraging "*a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*"[112]; and that "*beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society*".[113]

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109 **Section 26**.

110 **Section 26(4).**

111 *Pemberton v. lnwood* [2018] EWCA Civ 564; [2018] lCR 1291 at [88].

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

113 *Forstater* (see footnote 26 above) at paragraph 116.

- Save in connection with the second and third elements of the PSED, an HEP has no relevant duties in respect of the behaviour of students (unless a student also has some role with the HEP which is relevant in the applicable context), or of its staff when not acting in capacities which give rise to duties or liabilities on the HEP's part. The fact that it can be very hard to identify in which capacities actions have been taken in the complicated circumstances of modern interactions adds a further layer of difficulty. This has been fertile ground for costly litigation.

In this context, the Parliamentary Joint Committee on Human Rights has stated that: *"there is no right not to be offended or insulted. Just because a statement may offend another person does not necessarily make it unlawful"*.[114] And the EHRC Guidance states the following:

> (Re the HRA) *"The courts generally say that the right to free expression should not be restricted just because other people may find it offensive or insulting.…Speech that is intended to inform rather than offend attracts greater protection, even if it could be seen as discriminatory. An intolerant point of view, which offends some people, is likely to be protected if it is expressed in a political speech or a public debate where different points of views are being exchanged and are open to challenge. However, speech may lose the protection of Article 10 if it is used to abuse the rights of others, for example by inciting hatred.*
>
> *(Re the Equality Act) …The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.*
>
> *Views expressed in teaching, debate or discussion on matters of public interest, including political or academic communication, are therefore unlikely to be seen as harassment, even if they are deeply offensive to some of the people who are listening, as Article 10 will protect them."*

Condition of registration E6 – safeguards for free speech regarding harassment policies

The OfS published a new general ongoing condition of registration E6, relating to harassment and sexual misconduct as regards **students**, in July 2024. This condition will come into effect on 1 August 2025. It requires providers to provide and operate in accordance with a single, comprehensive source of information which sets out policies and procedures on subject matter relating to incidents of harassment and sexual misconduct. There are detailed rules on what content should be included as a minimum, as well as rules on the prominence of this source of information.

Accusations of harassment and bullying against people who have expressed controversial views have often been made against staff and students, and they have all too often been given inappropriate, uncritical credence by HEPs, with inappropriate disciplinary processes sometimes being begun. This is in part because HEPs' policies and rules all too often overstate, or misdescribe, key concepts such as harassment so as to go above and beyond what is strictly

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[114] Fourth Report of Session 2017-19, part 2 para 18.

considered unlawful harassment pursuant to the Equality Act or the PHA. This has resulted in frequent free speech failures.

The new registration condition addresses these issues head on and enhances the protections for free speech and academic freedom. An HEP will be required to comply with specified "freedom of speech principles" in respect of such policies and procedures, including when taking decisions about whether its policies and procedures will include content on harassment which goes further than is required under the Equality Act, or could reasonably be considered capable of having a negative impact on, or the object or effect of restricting, free speech or academic freedom.

These freedom of speech principles are demanding and reflect the strong protection for free speech on campus and academic freedom under the applicable law. They as followings.

- "*Irrespective of the scope and extent of any other legal requirements that may apply to [an HEP], the need for the [HEP] to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place.*"

  As well as its obvious prioritisation of free speech and academic freedom and tolerance as regards other agendas, this provision effectively requires that laws which do not expressly render speech unlawful (such as the PSED and Prevent duty) should not be referred to in ways which restrict free speech or academic freedom, and also avoids this or other registration conditions being themselves used as a basis on which to restrict free speech. (The reference to "particular regard" reflects the relative force of the duties/needs under the applicable law to take action to protect free speech (which is supercharged under the HRA in respect of academic free expression) as against the duties to think in the PSED and the Prevent duty.) This also reflects the special place of free speech and academic freedom on campus under the public interest governance conditions.

- *"the need for [an HEP] to apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment:*

  - *the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures; or*

  - *statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course."*

  This rebuttable presumption broadly reflects the underlying law under the Equality Act and the PHA. The wider regulatory framework protecting free speech and academic freedom means that there is low likelihood that any objective test (as discussed above) with respect to harassment under those provisions is made out. A rebuttable presumption is a helpful framing for HEPs in avoiding inadvertent errors.

Most HEPs will need to review their existing harassment and bullying policies very carefully to ensure compliance. Where an HEP's policies do go beyond what is actually required by or legitimately implemented pursuant to relevant law – and they very frequently do, for example in the form anti-harassment policies which aren't connected to protected characteristics

under the Equality Act – an HEP must be extremely careful in applying them if doing so could reasonably said to have a negative effect on free speech or academic freedom.

The new registration condition E6 largely reflects the underlying legal nexus, but HEPs need to understand that it does not do so in the following crucial ways:

- while the new condition is stated to apply only in respect of students, the free speech principles and their interaction with concepts regarding harassment apply equally under the applicable law in respect of protections for academics and other staff; HEPs should avoid, to the extent practicable, having inconsistent rules in respect of staff and students;
- the free speech principles are written so as to apply in an "educational context or environment", whereas the Relevant Requirements apply in respect of all discourse on campus, and HEPs would do well to reflect this wider reach in their policies and practices; and
- the new condition reflects legal obligations which already exist as regards free speech protection and its interaction with concepts regarding harassment, so HEPs would do well to be reflecting it in practice as soon as possible rather than waiting until August 2025.

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

Recent case law relating to the Equality Act has dramatically strengthened the protections under that legislation for various viewpoints which it is now clear count as "protected characteristics". The following are three crucial cases which consider in detail what constitutes discrimination and harassment in the context of protected expressions of belief.

- The *Fahmy* case:[115] an institution was found guilty of harassment as a result of not having taken reasonable steps (so as to qualify for the Section 109(4) Defence)[116] to prevent its employees from harassing a colleague for her viewpoints by way of a very hostile online petition. Further, the convener of an earlier meeting was criticised for stating personal views in solidarity with one side of a controversial and highly charged debate. While the Tribunal concluded that the convener's actions did not cross the threshold for themselves creating an intimidating (etc.) environment, it stated that his taking sides provided *"the basis, or opened the door, for the subsequent petition and the comments"* which were found to amount to harassment in that case.

  In *Fahmy*, the following were (together) found to constitute unlawful harassment: describing gender-critical views as "*bigotry*", a "*cancer that needs to be removed*" views which "*should not be tolerated*" and "discriminatory, transphobic". Likening such views to racism and sexism, and calling the LBG Alliance (which promotes gender-critical

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

[116] As already noted above, Section 109(4) of the Equality Act provides a statutory defence for an employer where *"discrimination"* or *"harassment"* is found to have occurred in a workplace if they took *"all reasonable steps"* to prevent it occurring. The threshold set by Section 109 is a high one.

viewpoints and which Ms Fahmy was defending) a *"cultural parasite and a glorified hate group that has [….] supporters that also happen to be neo-nazis, homophobes and Islamophobes"*, was conduct which contributed to the finding of unlawful harassment in that case.

It is worth noting, however, that comments at the earlier online meeting, which were hostile and quite strongly expressed, were held not to constitute harassment. This finding reflected the importance of encouraging and protecting robust debate, that meetings are inherently spontaneous so often involve spontaneous expressions of viewpoints which might well not be made in a different environment, and that meetings on a contentious topics are inherently likely to involve strongly expressed views. (The outcome may well have been different had the meeting involved co-ordinated, extreme attacks, barracking and the like.) This finding is, a reminder that comments and statements, even strongly expressed ones, which a recipient may find offensive, do not necessarily constitute harassment. The bar for what will constitute unlawful harassment of speakers on either side of contentious debate is deliberately not a low one.

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

- The *Meade* case:[117] an employer and a regulatory body were found guilty of discrimination and harassment as a result of inappropriate disciplinary action against an employee for expressing dissenting views on a matter of controversy. In particular, both had subjected the employee to harassment related to her beliefs as a result of the following conduct:

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

  - The employer subjected the employee to a disciplinary process; suspended her on charges of gross misconduct; issued an investigation report which was hostile in tone and content; and issued a final written warning. Importantly, the Tribunal ruled that the employer's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing the final warning, and its continued restraint on her freedom of expression, themselves constituted harassment; and that a staff

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

member conducting the disciplinary process *"labelling [Ms Meade's] Facebook posts as being transphobic was …sufficient…to constitute harassment."*

It should be noted that in the *Meade* case, it was actions by the employer and regulator themselves which were the primary events of harassment, rather than failing to prevent employees attacking their colleague.

- The *Phoenix/Open University* case:[118] personal attacks on a senior member of academic staff for her gender-critical viewpoints, including an aggressive open letter and an online pile-on, were held to be unlawful harassment and/or discrimination for which the Open University was found to be legally liable. There were more than 25 counts of discrimination and harassment, and more than 395 individual events of harassment as a result of individuals signing the open letter being found to be harassment.

  It is useful to list some of the things that were held to constitute harassment: as in the *Meade* case, equating gender-critical views with transphobia, calling the Open University's Gender Critical Research Network a "*hate group*"; a senior colleague telling Professor Phoenix that having her in the department was like having a racist uncle at the Christmas dinner table; an open letter signed by 368 people (almost all of whom were found to have harassed Professor Phoenix by so doing); a number of tweets, and retweets of hostile statements and information.

  It should also be noted that a key feature of many of the events which were found to amount to harassment was that they were regarded as an invitation to people to join the pile-on.

  Furthermore, leaving a hostile statement on the Open University's website, despite requests to remove it, itself constituted a separate act of harassment by the Open University from the issuing of the statement itself.

  It is also worth mentioning that various actions were held not be harassment. These included: admonishing Professor Phoenix for swearing a lot during a meeting; not praising Professor Phoenix's success in obtaining a large grant to support her research;[119] a statement which was found to have a purpose of reassuring the trans and non-binary community.[120] These finding, again, help illustrate where the bar is likely to be set in future cases.

  In the circumstances, it is perhaps unsurprising that The Open University did not even attempt to claim it could reply on the Section 109(4) Defence.

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

119 This was, though, found to amount to discrimination.

120 This was, though, found to amount to *"unwanted conduct"* related to Professor Phoenix's gender-critical beliefs.

[Add Esses settlement, or put in big EA statement?] [For later, or big EA statement: Corby case? Miller case: illustrates subtleties and efforts to achieve a fair solution. Anti-Zionist protected, but made inappropriate manifestation, but unfairly dismissed because sacked him rather than eg training. Farmoors?]

There are detailed BFSP statements explaining the decisions in the *Fahmy*, *Meade* and *Phoenix/Open University* cases.

Requirements in practice to prevent discrimination and harassment following these cases

It appears that many HEPs are still very behind on their understanding of this aspect of the Equality Act, and need to bring their practices up to date urgently, to ensure they comply with their duties as recently clarified. This means a profound change of mindset as regards e.g. campaigns and complaints against staff and students in connection with their expression of lawful opinions and viewpoints.

The key direct implications of the issues/failures addressed in these cases are that, in order to avoid breaches on their own part and/or to qualify for the **Section 109(4)** Defence as regards unlawful conduct by employees, HEPs must do the following, subject to the need, where there is a clash of rights to free speech, to balance all such rights and act proportionately as discussed elsewhere herein.

- Take all reasonable steps **to prevent staff from attacking other staff or students** for their viewpoints in ways that would be likely to constitute harassment, including by writing or signing aggressive open letters, joining social media pile-ons, making unjustified complaints and the like. This means:

  - **having appropriate policies and requirements** prohibiting attacks on other employees (etc), such as making clear that malicious or unjustified complaints will themselves be disciplinary matters (i.e., preventing the unjust complaint that led to the failures in the *Meade* case); and

  - **enforcing them** appropriately, bringing disciplinary proceedings against employees who harass their colleagues. If rules are known to be toothless, they will be ignored.

- Ensure that their employees are **sufficiently trained** about protecting viewpoints, their duties not to harass or discriminate against their colleagues for their lawful views and the boundary between robust but legitimate debate and bullying or harassment; and ensure that this training is done sufficiently regularly[121].

[121] Per *Allay (UK) Limited v Gehlen* [2021] UKEAT 0031_20_0402 (Unreported, 4 February 2021), it is necessary to consider the nature and likely effectiveness of any training that is delivered, as well as whether that has been understood and taken on board by employees; and to conduct training sufficiently regularly.

- Not allow **inappropriate official endorsement (or effective enforcement) of contested viewpoints**, as this is at high risk of itself be discrimination and harassment, and in particular **not allow its complaints and disciplinary functions to become instruments of free speech suppression.** The *Meade* case arose from wrongful disciplinary actions by institutions against an employee for her viewpoints and included a ruling that labelling her gender-critical views as being transphobic was enough to itself constitute harassment. The *Fahmy* and *Phoenix/Open University* cases arose from attacks by employees made to harm and distress a colleague for lawful views which merely dissented from the ideology held by the attackers. Such attacks were found to constitute harassment for which the employer itself was legally liable.

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

It is clear that other actions will sooner or later result in liability and scandal unless the following further actions are taken.

- Not allow considerations to be applied or information to be sought in connection with **people's support or otherwise for EDI programmes or agendas** in recruitment, promotion and research approval processes, or in connection with employment or participation in the HEP's activities (for instance as a student), to the extent that this would result in discrimination against somebody because of their viewpoints which dissent from the programmes or agendas of the HEP or its functions. See BFSP's statement ***EDI considerations and inquiries in the recruitment and research approval process at English universities: free speech compliance issues*** for a detailed discussion of this difficult topic.

- **Update their policies, practices and requirements** to make sure they are consistent with their duties under the Equality Act and the HRA. HEPs must avoid the unjustifiable prevention of and/or restrictions on (and the creation of a hostile atmosphere in respect of) the expression of protected viewpoints. Through actions that can constitute harassment or discrimination, such as labelling gender-critical views as "transphobic" (as happened in the *Meade* case). This will mean, for instance, that HEPs must take care not to mis-define "harassment" (which should be defined as set out in the legislation) by giving inappropriate emphasis to subjective assertions of "hurt" or "harm" (neither of which is recognised in the Act). Such over- (or mis-) interpretation of actual requirements of the Equality Act in a way that results in effective suppression of unpopular viewpoints gives rise to serious risks of breach of free speech duties by HEPs. Similar serious risks arise from mis-stating or exaggerating the legal obligations actually imposed on HEPs by the Equality Act in a way which may conflict with their obligations to secure those viewpoints.

The above primary requirements have now become clear. There are many necessary secondary or associated implications listed in Part 3 of this Statement. They include that HEPs need to do the following, subject to the need, where there is a clash of rights to free speech, to balance all such rights and act proportionately as discussed elsewhere herein.

- Have **appropriate systems** in place for reporting and management of problems, and for review and improvement of their policies, practices and requirements.

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

- Ensure that their **internal communications systems** (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed (see the *Fahmy* and *Phoenix* cases for what happens when this is not done).

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

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

  The recent Cass review into the profound NHS failures regarding the inappropriate treatment of children with gender issues – e.g. giving puberty blockers to young children when there was no good science as to the risks of such treatment – made clear that a lot of the problems arose as a result of systematic suppression of dissent and questioning scientists by or pursuant to policies of campaign groups such as Stonewall.

  HEPs getting too close to such organisations creates risk, as does enforcing their agendas (as, for instance, a condition of qualifying for approvals from them) leads to a profound loss of neutrality and discrimination and harassment of people who dissent from the viewpoints being enforced. Unless such relationships can be restructured, they need to be terminated.

Equality Act cases relevant for identifying requirements in practice under Section 43

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

A similarly high threshold is likely to apply in relation to HEPs' obligations to prevent attacks and other actions under Section 43 in cases alleging unlawful failures to secure free speech. Although such cases are yet to come before the courts, this conclusion appears to us to follow for the reasons given below.

First, the wording in Section 109(4) of the Equality Act is strikingly similar to Section 43(1). This requires a HEP to take such steps as are reasonably practicable (i.e., all reasonably practicable steps) to secure freedom of speech. It is also worth noting in this context that the duty under Section 43(1) is a positive one, so likely to be held to be 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 primary duties under the Equality Act. In Venn Diagram terms, the positive duty under Section 43(1) would seem to be a larger circle within which the circle of actions required for the Section 109(4) Defence sits. What is, though, so far unclear is how much larger the range of actions required under Section 43(1) is as compared to those required to qualify for the Section 109(4) Defence. This will become clearer as case law, regulatory precedent and guidance evolve.

Secondly, the two provisions are intended to ensure very similar outcomes. It must, therefore, be likely that rulings by Employment Tribunals 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) will be regarded as of persuasive authority when the courts come to consider how to interpret the positive duty under Section 43(1). However, it might be the case that Section 43 demands a wider range of actions than those required to qualify for the Section 109(4) Defence. In any event, in advance of guidance or emerging case law, it would be unwise for HEPs not to act on the basis that compliance with Section 43(1) will be approached as predicted above.

In the meantime, it is hoped that the above will help HEPs to a degree. It is intended to give them information about the sorts of actions that will need to be taken to comply with Section 43(1). It would lead to insuperable complexities, and consequent legal problems, if HEPs had to operate two very different sets of restrictions to reflect different legal requirements.