EDI considerations and inquiries in the recruitment and research approval process at English universities

Free speech compliance issues

PRELIMINARY NOTE: this draft Statement sets out the position on the assumption that the main provisions that the Higher Education (Freedom of Speech) Act 2023 ("HEFSA"), which amends HERA so as to have the effects described below, are in effect. This Statement is also an accurate statement in most material respects of the effects in practice of the currently applicable legal obligations under the Education (No. 2) Act 1986 (it being noted that provisions regarding the protection of academic freedom should be in an HEP's constitution but are not in the Education Act). Note also that we make reference to parts of the draft guidance *Regulatory advice 24: Guidance related to freedom of speech* of March 2024 issued by the Office for Students pursuant to the HEFSA even though the coming into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 the Education Act and what appears to be the OfS's own expectations of HEP actions for compliance.

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. Note that the OfS guidance to which it refers is in draft form and will be revised before it is finalised. THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end. ***SEE ALSO the important notice at page 15.***

Introduction

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

There are various legal obligations on registered English Higher Education Providers ("**HEPs**") to protect people's expression of their viewpoints: to secure lawful free speech under the Higher Education and Research Act 2017, their duty under the Equality Act to

protect people with viewpoints which count as "protected characteristics", and their duties under the Human Rights Act, all as discussed in Part 1 below. (These are together referred to as the "**Relevant Law**".)

It has in recent years been common practice for English HEPs to:

- apply considerations ("**EDI Considerations**") relating to compliance with and/or support for equality, diversity and inclusion ("**EDI**") expectations or wider values and beliefs, and demonstrated active commitment to or support of EDI related programmes and causes, to the selection of people for academic and other jobs and the review, approval of and/or support for research plans, topics, applications and/or projects and the grant or allocation of research funding ("**Research Approval**"); and

- require applicants to provide information ("**EDI Information**") as part of the application process, to demonstrate that compliance, support and commitment. The EDI Information provided forms part of the assessment, appointment and/or Research Approval process, which will inherently include (whether overtly or not) adherence, compliance and/or commitment to EDI expectations, programmes, and/or causes as a criterion for assessing the relative merits of the applicants, with people who have 'weaker' EDI Information marked down.

It is important to keep in mind that, while much that is promoted under the "EDI" flag may be uncontroversial, and in a narrow range of cases legally required, various widely contested beliefs and agendas, about which many people have dissenting viewpoints, are also promoted (and indeed effectively enforced) under it, such as are associated with extreme trans and "critical race theory" ideologies (opposition to both of which has been held to be a "protected viewpoint" for the purposes of the Equality Act). As discussed below, the Dandridge Review cited numerous ways in which EDI requirements and agendas cause problems for free speech at the Open University. Many people have similar concerns regarding EDI. To the extent that requiring support for "EDI" therefore requires support for such ideologies, and indeed for any agendas or programmes which are not required to be promoted by law, this creates severe compliance risks as explained below.

This Statement examines the serious and complex issues and risks created by applying EDI Considerations and seeking or requiring EDI Information as a result of the protections for free speech in the Relevant Law; and what HEPs need to do to ensure that they comply with their legal obligations. In summary, doing the following things will give rise to breaches of some or all of these obligations:

- treating an applicant negatively in a job/Research Approval application/assessment process because that person lawfully dissents from or does not demonstrate support for aspects of the EDI agendas or programmes being promoted by the relevant HEP;

- seeking information about an applicant's support for such agendas or programmes, because this would be to provide information to put the HEP in a position to discriminate against applicants with the "wrong" views; and

- creating a situation where people who seek (or are likely to seek) jobs or Research Approval at an HEP think they need to visibly not dissent from, or even demonstrate adherence to and actively promote, an agenda aspects of which they do not necessarily agree with.

However, there are potential protections for certain permitted activities, as discussed in Part 3 below.

While the Statement may raise issues which HEPs have not appreciated, we hope that HEPs will find that it helps them avoid pitfalls.

Alumni for Free Speech (www.affs.uk) will be monitoring and liaising with HEPs to ensure that they are free speech compliant, and if necessary submitting Freedom of Information Requests to obtain relevant information. It will be publicising any continuing failures by HEPs to comply with their free speech obligations under the law. We share a link to an article by the Committee For Academic Freedom about AFFS' project focusing on these issues at our universities: https://afcomm.org.uk/2025/01/21/new-campaign-to-remove-edi-statements-from-academic-job-applications/

Part 1: Relevant law and regulatory requirements

This Part sets out the main relevant legal requirements, which are supplemented by regulatory requirements and HEPs' conditions of registration relating to securing free speech. Further details of the relevant legal and regulatory requirements and their implications can be found in BFSP's Statement ***Free speech protection at English universities: The law and requirements in practice*** (the "**Principal Statement**"), which can be found at https://bfsp.uk/universities-and-free-speech.

A major risk area for HEPs is that they will not know the identity or potential views of applicants for a position or Research Approval at the time they fix any EDI Considerations and EDI Information requirements for that position, so they will not be able to know whether or not there are people whose viewts are protected per the below.

HERA – free speech protection obligations

Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017[1] ("**HERA**") require the governing body of an English HEP to take "*the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take*" to secure freedom of speech (within the law) for the staff, members and students ("**Participants**") of and visiting speakers to the HEP[2].. This is a demanding requirement and requires active, positive steps to be taken.

[1] As introduced by the Higher Education (Freedom of Speech) Act 2023, with effect from [date to be fixed].

[2] 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*

The obligations are stated in objective terms, giving no material discretion to an HEP as to what steps it needs to take[3]. It results in various requirements in practice. Free speech obligations override other considerations, subject only to the following.

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

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

    - If an HEP is required to do (or not do) something under an effective obligation – including the HEP's own requirements to the extent that they reflect a legal obligation on it – or other restrictions on behaviour under, for instance, anti-bullying rules which are themselves written so as to be compliant with the Relevant Requirements[6], then it is not reasonably practicable for it to take a step which is inconsistent with that obligation. The same could apply where certain "occupational requirements" are essential attributes to a position or positive action under Section 159 of the Equality Act is justifiable (as discussed in detail in Part 3 below), without the confirmation of which the position cannot practicably be filled. The duty to act under HERA will, though, usually override duties to "think" such as under the Public Sector Equality Duty (of which more below).

    - The existence of policies, programmes and requirements of the HEP which may conflict with the duty to secure free speech will not render relevant steps not reasonably practicable unless those policies etc are themselves legally mandated, and

---

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."

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

4 OfS Guidance, paragraph 13.

5 OfS Guidance, paragraph 35.

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

otherwise written so as to be compliant with the Relevant Requirements. This is a matter of compliance with a legal requirement, and the conflicting views and priorities of an HEP are (unless they are so mandated) likely to carry little relevant weight. This is supported by the OFS Guidance[7].

- 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 (contemplating that a step may be reasonably practicable for a large HEP but not for a small one)[8]. This is discussed in more detail in the Principal Statement, but it will be hard to argue that not doing something – i.e., refraining from applying EDI Considerations and seeking EDI Information – is financially impracticable.

Interpreting potentially contrary laws and requirements correctly is going to be vital for HEPs, as over-interpretation creates major risks for them. We set out detailed information in Appendix 1 to the Principal Statement about the necessary approach in order to resolve such perceived conflicts appropriately.

The above duty extends to securing that:

- Academic staff are free (within the law) to question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without facing the risk of losing their jobs or privileges at the HEP or the likelihood of their securing promotion or different jobs at the HEP being reduced; and
- applicants to become academic staff must not be adversely affected because they have previously exercised their rights to academic freedom as described above[9].

Free speech code and requirements

HEPs must maintain a *"code of practice"* ("**FS Code**") which sets out (inter alia) the HEP's values relating to freedom of speech and the conduct required of such persons in connection with meetings and activities.[10] HEPs need to have related policies and requirements. They need be very careful to ensure that applying EDI Considerations or seeking EDI Information is not contrary to their own codes and requirements.

OfS Guidance

---

7 See paragraph 75d.

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

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

10 **Section A2**.

The OfS, as regulator of HEPs under HERA, has issued draft OfS Guidance which contains detailed information about how OfS expects HEPs to implement the requirements in HERA. Parts of the OfS Guidance are directly relevant.

- An HEP should secure that, where a person applies to become a member of staff or for promotion, or for Research Approval, that applicant is not adversely affected in relation to the application, or the appointment, promotion or approval process, because of lawful viewpoints held or previously expressed or because (in the case of applicants for academic positions) they have exercised their academic freedom within the law. [11]

- HEPs should not require applicants for positions, promotions or Research Approval to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate who holds, or has expressed, particular viewpoints, or an academic for having expressed or exercising, their academic freedom within the law;[12] or require Participants to commit (or give evidence of commitment) to values, beliefs or ideas if that may disadvantage a Participant who holds, or has expressed, particular viewpoints, or an academic for exercising their academic freedom within the law.[13]

- 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 organisations' policies or values. Nor should it be restricted or compromised in any way because of any external pressure connected with those conclusions.[14]

Equality Act 2010 and Public Sector Equality Duty

Discrimination by an HEP against, and harassment[15] by it of, people with "*protected characteristics*" are unlawful in a range of circumstances specified in the Equality Act, including the provision of services to the public and exercise of public functions, employment

[11] OfS Guidance, paragraphs 45 and 57: while this is stated there to apply in respect of applicants for academic positions only, the obligations apply more widely.

[12] OfS Guidance, paragraphs 46 and 58 and Examples 5 and 9: while this is stated there to apply in respect of applicants for academic positions only, the obligations under HERA apply more widely.

[13] OfS Guidance, paragraph 54: while this is stated there to apply in respect of holders of academic positions only, the obligations under HERA apply more widely.

[14] OfS Guidance, paragraph 105 and Examples 22 and 23.

[15] The definitions of discrimination (including "indirect" discrimination) and harassment are discussed in the Principal Statement.

and further and higher education[16]. (There are exceptions relating to "occupational requirements", of which more below.)

The landmark *Forstater* case[17] established that holding gender-critical views is a *"protected characteristic"*. Views which challenged aspects of critical race theory were subsequently ruled to be protected, as were anti-Zionist ones[18]. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. (These would include, for example, in relation to other aspects of critical race theory and moves to "decolonise the curriculum", and lawful views in relation to religions and their effects and the Palestinian cause.) There can be "inappropriate (sometimes expressed as "objectionable") manifestations" of protected beliefs which do not qualify for protection[19], and this generally appears to work successfully to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

Section 109(1) provides that anything done by an employee in the course of their employment, or an agent on behalf of their principal, must be treated as also being done by their employer or principal; it does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer has a defence (the "**Section 109(4) Defence**") if it can show that it took all reasonable steps to prevent an employee from doing the alleged act or anything of that description. HEPs have very limited duties under the Equality Act in respect of the behaviour of Participants *acting in capacities which do not give rise to responsibilities on the HEP's part*, 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 and should not be their concern. Recent cases have held employers – including the Open University – liable for discrimination against and harassment of employees in connection with their viewpoints. They provide vivid examples of how this area of the law has effect in practice, and the detailed requirements in practice on an employer for it to come within the Section 109(4) Defence. See Appendix 2 to the Principal Statement for further information.

---

16 In the context of employment, discrimination includes subjecting a person to a detriment because of a protected characteristic (**Section 39(2)**).

17 *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

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

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

HEPs are, in the exercise of their functions, obliged under their **Public Sector Equality Duty** ("**PSED**") in the Equality Act[20] 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. "Have due regard" is a duty to think and give appropriate weight in context, not to act; contrary duties (such as under HERA) to act are likely to be overriding. It has been described as a "process duty not an outcome duty".[21]

Given that many people hold protected viewpoints about a wide range of currently controversial issues, the Equality Act creates a major risk area for HEPs. This is likely to require greatly increased institutional neutrality in relation to many contested issues, as discussed in Part 3 of the Principal Statement. It is important that HEPs do not misinterpret the requirements under the Equality Act, in order to avoid compliance failures. The fact that an applicant for a position may have viewpoints which some people find offensive or disagree with profoundly does not in itself constitute anything unlawful under the Equality Act. Getting this wrong is a real risk area for HEPs. See detailed discussion of this area in the Appendices to the Principal Statement. Circumstances can arise involving apparently conflicting protected characteristics. The OfS has stated[22] 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"*.

For detailed information about the above, see BFSP's statement ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others***.

---

20 **Section 149**.

21 Various considerations arise:

- "Have due regard" does not require any particular steps to be taken, and is not in itself a mandate to override other considerations. On the contrary, it assumes that other factors must be given appropriate weight and an appropriate balance struck. Contrary duties to act (rather than consider) are likely to be overriding, and this will, in most if not all cases, include the duty under HERA to take all reasonably practicable steps to secure free speech, and duties under the Equality Act to avoid discriminating against or harassing people with protected viewpoints.

- 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. Note the discussion above about the risk for HEPs in over-interpreting the meaning of "harassment" for these purposes.

22 *Insight publication Freedom to question, challenge and debate, December 2022*, at page 4.

Safe harbours: Schedule 9 and Section 159

There are 'safe harbours' from liability under the Equality Act in respect of actions relating to "occupational requirements" pursuant to **Schedule 9** and "positive action" pursuant to **Section 159**. These, and their effects, are discussed in detail in Part 3.

In summary, the above requirements mean that, subject as discussed in Part 3 and to any other contrary legal requirements:

- HEPs must not to discriminate in the selection process (and ensure that those conducting the selection process do not so discriminate) against applicants because of their protected viewpoints, and must comply with their PSED in respect of those applicants.
- HEPs will need to ensure that any seeking of EDI Information and any investigations made about applicants' opinions do not themselves operate unlawfully, for instance by producing information which could itself be discriminatory under the Equality Act or contrary to their PSED by inappropriately affecting the selection process by, for instance, creating or feeding biases in the selectors for or against certain applicants in connection with their protected viewpoints; or by harassing people with certain viewpoints by creating or contributing to an intimidating or hostile environment for such people and thus creating a "chilling effect".

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** ("**Convention**") [23], as enacted into UK law by the **Human Rights Act 1998** (the "**HRA**")[24]. These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful[25]. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.

The right to free expression is subject to the qualification that the "exercise of these freedoms, since it carries with it duties and responsibilities[26], may be subject to such formalities,

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

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

[25] 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 91.

[26] "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 paragraph 43).

conditions, restrictions or penalties as are prescribed by law[27] and are necessary in a democratic society" for various specified purposes, including for the protection of the rights of others, although this qualification is subject to a "proportionality" test[28]. Contrary laws and legal obligations can thus operate to restrict free speech rights to a limited extent.

Any interference by an HEP with the holding or expression of opinions and academic freedom of its academics and students will therefore require justification which itself satisfies the HRA.

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"*[29] 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"*.[30] 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"*.[31] Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10.[32] It follows that any attempt to justify restrictions on, or impose sanctions in respect of, otherwise lawful statements made in an academic setting is likely to be unsuccessful.

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".[33]

---

[27] "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."

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

[29] See: *Erdoğan v. Turkey*, App. nos. 346/04 and 39779/04 (2014), paragraph 40.

[30] *Ibid*, concurring judgements paragraph 3.

[31] See: Kula v. Turkey, App. No. 20233/09 (2018).

[32] See: *Torres v Spain*, App no. 74729/17 (2022).

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

Treating an applicant negatively in a job or Research Approval application/assessment process because of their previously expressed lawful viewpoints, or their not adhering to agendas and programmes being promoted, is therefore highly likely to be contrary to the HRA, unless that is justified under contrary laws which themselves are justified under Articles 9(2) and 10(2). While this may require litigation to resolve, it appears to BFSP that seeking EDI Information (in the context of recruitment and promotion) about a person's compliance with an HEP's agendas may run a significant risk of being unlawful under the HRA, not least because of the "chilling effect" mentioned above.

Reindorf Opinion

A very relevant example of the potential legal issues can be found in the detailed opinion by Akua Reindorf KC,[34] which was commissioned by the Sex Matters campaign in response to King's College London's requirement that applicants for promotion demonstrate their support of that university's "equality, diversity and inclusion ambitions"; it also named examples of campaign organisations for which applicants could show support. Ms Reindorf found that this requirement was likely to amount to indirect philosophical belief discrimination in violation of the Equality Act and would also violate Section 43 of the Education Act (the predecessor to HERA).[35]

Dandridge review: EDI as a source of free speech problems; institutional neutrality

The Dandridge Review[36] (the "**Review**") is report, published in September 2024, of an independent investigation which was commissioned by the Open University ("OU") following its failure to manage disputes and prevent unlawful harassment of Professor Jo Phoenix over her views. Some key relevant findings of the Review were that there is a culture at the OU that there are "right" ways of viewing things, which can lead to dissenting views being suppressed and individuals self-censoring (fear was referred to by several witnesses) and an imbalance between EDI and free speech requirements and agendas. It cited numerous ways in which EDI requirements and agendas cause problems for free speech. All universities need to work to ensure that the promotion and implementation of EDI agendas does not unlawfully affect free speech. The Review also recommended an "underpinning principle"

---

[34] https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf

[35] In this regard, the Reindorf Opinion (in sub-paragraphs 3.1 and 3.2) concludes that it is "likely to be unlawful for KCL to place a requirement upon applicants for promotion that they demonstrate their support of the university's "equality, diversity and inclusion ambitions". [..] this requirement, when analysed in its context, amounts to indirect philosophical belief discrimination contrary to ss.10 and 19 of the [Equality Act] against potential applicants who hold gender critical beliefs. […] the requirement may amount to a breach of [Section 43]."

[36] See: *https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Indpendent-Review-N-Dandridge-09.09.24.pdf*. See BFSP's detailed analysis of the Review at https://bfsp.uk/universities-and-free-speech.

headed "[…] the OU should adopt a policy of institutional neutrality in relation to contentious issues (unless relevant to the OU's strategy)". While the detailed text explaining this proposal has a number of defects, this is still highly significant, and is consistent with AFFS having urged for some time that institutional neutrality is the only effective way to avoid legal and compliance failures such as discrimination and harassment as a result of taking sides in contested issues.

Conditions of registration

The Principal Statement contains information about relevant requirements in HEPs' conditions of registration.

Constituent institutions and students' unions

The Principal Statement contains information about relevant requirements in respect of colleges, halls, and other "constituent institutions" of HEPs, and students' unions of certain HEPs. Many of the requirements and implications explained in this statement also apply in respect them, but not all: the HRA, for instance, does not apply in respect of students' unions.

Part 2: Implications in practice

Applying EDI Considerations and seeking EDI Information creates severe risks of unlawfulness for an HEP as follows, but subject to the special situations discussed at Part 3.

Discrimination in the selection process prohibited: treating an applicant negatively in a job/Research Approval application/assessment process because that person holds particular viewpoints, or lawfully dissents from or does not demonstrate support for aspects of the EDI agendas or programmes being promoted by the relevant HEP, will be:

- likely to be unlawful under the primary free speech protection obligations and academic freedom protection obligations under HERA[37];
- unlawful discrimination (and possibly harassment, depending on the circumstances and the nature of the consequences) under the Equality Act, if the relevant applicant's dissent or non-compliance is as a result of a viewpoint which count as "protected" under the Equality Act; and a potential breach, depending on the relevant detailed context, of its PSED in respect of such person; and/or
- contrary to the HRA. [WM note - ECHR cases support applicability to external candidates, in document[??]]

Seeking EDI Information prohibited, and is likely preparation to discriminate: the only purpose of seeking EDI Information would be to provide information for an assessment

[37] This is expressly stated in OfS Guidance paragraphs 45 and 57: while this is stated there to apply in respect of applicants for academic positions only, the obligations apply more widely, in respect of all Participants.

process in order to put the HEP or its relevant staff in a position to discriminate – whether deliberately or unconsciously – against applicants with the "wrong" views. Further, the practical effect of requiring the EDI Information as part of the Application Requirements will, in many cases, be either to compel applicants to profess their agreement with the Relevant Agendas and Values (as to which, see further below) or face being treated less favourably than other candidates. Requiring EDI Information as part of a job application or promotion process must therefore be highly likely to be contrary to:

- the HEP's primary obligations under HERA, including those relating to academic freedom[38];
- the HEP's Requirement to Secure EA Compliance and its PSED in respect of applicants with viewpoints which count as "protected" under the Equality Act, depending on the relevant detailed context and unless there are other overriding factors[39]; and
- the HRA[40].

It does not appear to be relevant that it may not be known at the relevant time whether there is or is not a such a person among the likely applicants. A relevant factor is that the knowledge that EDI Information is being sought would be likely to put off people with viewpoints inconsistent with those apparently expected to be supported from applying for the relevant position.

The above also applies in respect of conducting investigations, e.g. online searches, about a potential applicant's viewpoints and past expressions of them (although this can be validly done in limited circumstances as described in Part 3 below).

Compelled thinking and chilling effect: further, creating a situation where people who seek (or are likely to seek) jobs/promotion/Research Approval at an HEP think that, in order not to impair their career prospects, they need to visibly not dissent from, or even demonstrate adherence to and actively promote, an agenda, or values, beliefs or ideas, aspects of which they do not necessarily agree with, both pressurises people into publicly aligning with agendas, values, beliefs and ideas, and reduces people's willingness (or perceived ability without having their career prospects blighted) to hold or express certain viewpoints and thus creates a "chilling effect" on people's freedom of thought and speech. This is:

- contrary to the primary HERA requirements, including those protecting academic freedom;

[38] This is expressly stated in OfS Guidance paragraphs 46, 54 and 58 and Examples 5 and 9: while these focus on academic staff, similar protections should apply in respect of all employment.

[39] The indirect discrimination provisions in Section 19 are particularly relevant in this context.

[40] While the HRA does not apply to hypothetical interferences (se e.g. *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357), this appears to be sufficiently specific not to be excluded as "hypothetical".

- unlawful under the Equality Act to the extent that this counts as suppressing (as in discriminating against, or harassing (i.e. creating a hostile environment for) people with) viewpoints which count as protected characteristics; and likely, depending on the detailed context, to be contrary to its PSED in respect of people with such viewpoints[41]; and

- potentially contrary to the HRA as a result of it reducing applicants' willingness (or perceived ability without having their career prospects blighted) to hold or express certain viewpoints; i.e., its "chilling effect" on people's freedom of thought and speech.

Part 3: Special situations: occupational requirements, positive action and others

EDI Considerations applied or EDI Information sought which can be justified (objectively, not in the subjective view of relevant staff) as necessary to identify whether an applicant has attributes which are:

- "occupational requirements" related to the relevant position, or

- necessary to give effect to the right to take positive action pursuant to Section 159 of the Equality Act, as discussed below,

are less likely to be struck down under the Relevant Law but still require careful assessment of likely compliance in each case.

Occupational requirements for a position

The nature of the functions and responsibilities inherent in some positions is such that there are essential qualifications or personal attributes which an applicant would need to have (or not have) in order to be suitable for that post, and an employer would need to confirm that an applicant has those attributes if it is to recruit a suitable person. These can include beliefs and viewpoints.

Schedule 9 of the Equality Act contains "occupational requirement" provisions which operate as exceptions from the discrimination provisions relating to employment, so allow people with the relevant attributes to be preferred without counting as discrimination against other candidates. (So, for instance, it would be inappropriate in principle to appoint a militant atheist to position as a chaplain, just as it would be unreasonable for such a person to apply for that job, and Schedule 9 reflects this.) The application of these provisions must, however, be is "a proportionate means of achieving a legitimate aim"[42].

In order to be potentially justifiable in the context of contrary obligations to secure/protect free speech/viewpoints, related EDI Considerations and EDI Information would need to be focused on and limited to what is really necessary in order to ensure that an applicant has the

[41] See recent cases under the Equality Act discussed at Appendix 2 to the Principal Statement, the *Meade* case in particular.

[42] Equality Act **Schedule 9**, various paragraphs.

attributes that constitute an occupational requirement within Schedule 9 to the Equality Act (applied in a way which is a proportionate means of achieving a legitimate aim).

Section 159 of the Equality Act: positive action in recruitment and promotion

Under **Section 159**, if an employer (or prospective employer) reasonably thinks that persons who share a protected characteristic suffer a disadvantage connected to that characteristic, or participation in an activity by such persons is disproportionately low, then the provisions in the Equality Act relating to employment do not prohibit that employer (or prospective employer) from treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not, provided that:

- this is with the aim of enabling or encouraging people who share the protected characteristic to overcome or minimise that disadvantage or participate in that activity; and
- A is as qualified as B to be recruited or promoted, the employer (or prospective employer) does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and taking the action in question is a proportionate means of achieving that aim.

(We call this the "**Section 159 Exception**".) This generally has limited application (particularly so in the context of the matters considered in this Statement), but could be relevant to any need to recruit a person with particular attributes. Note that it contains various objective tests, so gives limited discretion and needs to be applied carefully.

Interaction of the above with HERA and the HRA

Although they are an exception to certain aspects of mandatory Equality Act compliance, occupational requirements and the Section 159 Exception do not prevent the duties under HERA from applying and nor do they prescribe any mandatory obligations on a HEP.

In deciding whether the relevant proportionality assessments of the two exceptions are made out, it may – depending on the facts – be necessary to consider the duties under HERA to the extent that they apply in any given situation on the basis it will be difficult to argue a requirement is proportionate to an aim if it fails to respect the statutory obligations under HERA. This is a nuanced interaction and one in respect of which guidance from the courts/tribunals would be particularly valuable.

Compliant application of the "occupational requirements" provisions and the Section 159 Exception should not contravene the HRA, in particular as they contain their own "proportionality" tests.

Legally mandated requirements and positions requiring essential attributes

There can in principle be "legally mandated" EDI Considerations and EDI Information, i.e. those in that narrow range of considerations and criteria, and questions and information requests, which are effectively required by HEPs' legal obligations. It is, however, highly unlikely that there will be any legally mandated requirements in the contexts addressed in this Statement, for the reasons explained in the Appendix. Even if there were, they are highly

likely to be overridden by the requirements under the Relevant Law to protect applicants' free speech, for the reasons explained in the Appendix.

The nature of the functions and responsibilities inherent in some positions is such that there are essential qualifications or personal attributes (not being "occupational requirements" reflected in Schedule 9) which an applicant would need to have (or not have) in order to be suitable for that post, and an employer would need to confirm that an applicant has those attributes if it is to recruit a suitable person. This could feasibly include holding or lacking certain beliefs and viewpoints. However, HEPs need to be cautious in two respects: requiring applicants to hold or lack certain viewpoints may contravene the Equality Act if they are protected philosophical beliefs; and, it runs a real risk of contravening HERA and the HRA, for the reasons explained in the Appendix.

What HEPs can legitimately do, and thus is a safe alternative, is to seek confirmation that an applicant understands the HEP's obligations under the Equality Act and that, irrespective of their personal views on relevant issues, the applicant will take care to avoid behaviour which would cause the HEP to be in contravention of the Equality Act (or indeed other legislation such as HERA). This should be accompanied with clear policies and training on Equality Act compliance This must not, though, be done in a way to intimidate or create a hostile environment for the applicant.

Best Free Speech Practice

January 2025

www.bfsp.uk / info@bfsp.uk

BFSP is part of DAFSC Ltd, Company no 14189200. Registered office: 27 Old Gloucester St, London W1N 3AX.

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: legally mandated requirements and essential attributes

EDI Considerations applied or EDI Information sought which can be justified (objectively, not in the subjective view of relevant staff) as necessary to:

- comply with an HEP's legal obligations as correctly interpreted; or
- identify whether an applicant has attributes which are essential to enable proper performance of the duties associated with that position, as discussed below,

might be less likely to be contrary to the Relevant Law, although in practice this is (at best) fraught with risk as discussed below.

Legally mandated considerations and information

"**Legally mandated**" EDI Considerations and EDI Information are those in that narrow range of considerations and criteria, and questions and information requests, which are effectively required by HEPs' legal obligations, which must logically include the need to take such steps as are necessary to ensure that they comply with those obligations, or come within exemptions from those obligations or liability under them; those obligations are in this case primarily not to unlawfully discriminate against or harass people under the Equality Act, to take reasonable steps to protect workers from sexual harassment (if relevant in respect of free speech protection requirements) and/or to act so as to qualify for the Section 109(4) Defence[43] in respect of actions by its employees (we call this the "**Requirement to Secure EA Compliance**")[44].

EDI Considerations and EDI Information requests often relate to general adherence, compliance and/or commitment, including by requiring evidence of active support for internal programmes and/or external campaign groups. It is hard to conceive of circumstances in which such general considerations and information-seeking could count as legally mandated.

Applying considerations and seeking information about an applicant's beliefs or views about particular matters which have an EDI angle (we call these "**Specific EDI Considerations and Information**") could also happen, for instance as to whether an applicant adheres (or does not adhere) to a particular religion in the context of a religious appointment: this belief/viewpoint

[43] Note that the Section 109(4) Defence requires "all reasonable steps" to be taken; it is not reasonable to contravene the Equality Act or other laws in respect of an applicant, so this is not legally mandated pursuant to the Section 109(4) Defence. The same applies in respect of other clashes of obligations.

[44] And also under charitable law obligations to comply with the Equality Act and other laws.

HEPs' PSEDs are (as discussed above) a duty to think in context and not to act in a particular way, and are likely in most cases to be overridden by contrary duties to act such as under HERA and a Requirement to Secure EA Compliance, so will seldom be safe to rely on as a justification for action in these sorts of cases because of the risk that applicants have overriding protections. The PSED is thus so relatively weak that any actions taken solely pursuant to the PSED should not be treated as "legal mandated", as to act otherwise would almost always lead to unlawful actions in these contexts.

(or not holding it) is a protected characteristic for the purposes of the Equality Act, so such considerations and inquiries fall within the focus of this statement.

While there can in principle be circumstances in which applying and seeking Specific EDI Considerations and Information could count as legally mandated, in particular pursuant to the need to act so as to qualify for the Section 109(4) Defence, the Section 109(4) Defence:

- requires "all reasonable steps" to be taken; it is in principle not reasonable to contravene the Equality Act or other laws in respect of an applicant, so, if applying/seeking considerations/information would contravene an applicant's legal protections (for instance in respect of their "protected viewpoints" under the Equality Act), doing so is very unlikely to count as necessary to qualify for the Section 109(4) Defence; and
- is not a defence to a claim that an employer had itself (i.e. not indirectly through its employees' actions) discriminated against an applicant because of their protected viewpoints, so is not relevant in this context; and nor would an asserted need to avoid a risk of future direct liability under the Equality Act be, e.g. because there is a perception that people with certain protected beliefs are more likely to discriminate against or harass others.

(In any event, HEPs will need to be very careful to apply and interpret the Equality Act correctly, and must not over-interpret the application of concepts such as harassment (see the discussion of this subject in the Appendices to the Principal Statement) so as, for instance, to create "risks" to "address" that are not supported by legal reality. A vital distinction would also need to be made between EDI Considerations and EDI Information which are legally mandated or necessary per the above purposes, and those which reflect wider programmes, agendas or ideologies.)

HEPs would in any event need to identify carefully the focused and limited range of EDI Considerations or EDI Information (if any) which are required to be considered and/or sought in consequence of being legally mandated, and avoid those which extend wider than is necessary for that purpose. These would (if at all) have to be focused on whether there are material risks of an applicant causing the HEP to act unlawfully in their new position, and no wider. This will involve examining issues such as:

- are the nature of the position being filled, the applicable needs, sensitivities and concerns, and the risks of liability if things go wrong such as make some EDI Considerations or EDI Information mandated? Does the position involve sensitivities regarding the potential for failures by the HEP to comply with an applicable Requirement to Secure EA Compliance? In this regard, the position will need to involve performing functions for the HEP in respect of which there is a real risk that unlawful discrimination or harassment, or other failure under the Equality Act, on the part of the HEP, could arise as a result of the actions of the person holding the relevant position. These functions could include some administrative, teaching and support roles, but are much less likely to include (for instance) a pure research post with no other responsibilities. However, this exercise is highly risky as policies blocking or impeding those who hold or lack protected philosophical beliefs run a real risk of being discriminatory, especially if there is nothing more than an assumption or stereotype that a person with such views will inevitably harass or discriminate against someone else. In reality, if a genuine occupational

requirement cannot be lawfully made out (see Part 3 above), then extreme caution should be applied.

- what considerations and information about the applicant's viewpoints (and past behaviour in particular) will legitimately address the reasons for the legal mandate, and go no wider. While it could, in principle, be possible that action required to qualify for the Section 109(4) Defence could include an HEP to making enquiries as regards whether an applicant for a sensitive position had evidenced a pattern of previous behaviour (which had included unlawful action under the Equality Act) which indicated that there was a high risk that an applicant might commit unlawful discrimination or harassment in the relevant position with the HEP, Section 109(4) is currently viewed by the courts/tribunals as focusing on having the right policies and training and dealing with complaints effectively, and there is little reason to believe that this significantly wider interpretation would be given effect were this to come before a court/tribunal; if this is correct, such considerations/inquiries would not be necessary to qualify for the Section 109(4) Defence. Such a policy would in any event need to be applied consistently in respect of categories of potential applicants for particular posts, and not just in respect of particular applicants.

It thus appears to be very unlikely that there will be Specific EDI Considerations and Information which count as legally mandated in the sort of circumstances under consideration here. Further, as discussed below, contrary obligations will often exist in respect of an applicant, for instance a Requirement to Secure EA Compliance where the applicant has a protected viewpoint under the Equality Act (and obligations under HERA and the HRA to protect such a person), which will conflict with, and would be likely to prevail over, a requirement which causes the relevant EDI Considerations and EDI Information requests to count as legally mandated (see further below).

What HEPs can legitimately do, and thus is a safe alternative, is to seek confirmation that an applicant understands the HEP's obligations under the Equality Act and that, irrespective of their personal views on relevant issues, the applicant will take care to avoid behaviour which would cause the HEP to be in contravention of the Equality Act.

Essential attributes for a position

The nature of the functions and responsibilities inherent in some positions is such that there are essential qualifications or personal attributes which an applicant would need to have (or not have) in order to be suitable for that post, and an employer would need to confirm that an applicant has those attributes if it is to recruit a suitable person. These can include beliefs and viewpoints. Some of these do <u>not</u> count as "occupational requirements" as reflected in Schedule 9 of the Equality Act. For instance, a supportive attitude would be essential for a position as an LGBT support counsellor, and it would seem inappropriate in principle to many to appoint a person with religiously based views that homosexuality is sinful and wrong because there is a perception that they will feel obliged to express at work or otherwise not be able to discharge their post because of their views).

However, unless there is a genuine occupational requirement, what may seem like a commonsensical approach on first consideration, is potentially fraught with legal risk. In the

example above, a qualified Christian counsellor may legitimately say it is discriminatory with respect to their protected beliefs to assume that they will inevitable discriminate, harass, or otherwise fail to be effective in their role.

In cases where the Equality Act is not protecting the applicant's views, it is nonetheless important that, in order to be potentially justifiable in the context of contrary obligations to secure/protect free speech/viewpoints, related EDI Considerations and EDI Information are focused on and limited to what is really necessary in order to ensure that an applicant has required essential attributes.

Interaction with Relevant Law: such actions likely to unlawful

Interaction with HERA and the HRA

HEPs may in principle be able to apply EDI Considerations and seek EDI Information in the above cases without contravening their obligations under HERA (and the HRA), on the basis that they do not conflict with the duty to take reasonably practicable steps to secure lawful free speech (and/or don't unlawfully interfere with Convention rights). But whether this is the case will depend on the relevant circumstances of each situation. Assessing this will not be easy for HEPs.

Equality Act: interaction with the Requirement to Secure EA Compliance and PSED

If the viewpoints of actual or potential applicants count (or are very likely to be found to count) as protected under the Equality Act, a Requirement to Secure EA Compliance (and potentially the PSED) will apply (or should be treated as to applying) in respect of those applicants. This will create difficult conflicts between the HEP's EDI Considerations and EDI Information (whether legally mandated or in principle reasonable as regards essential attributes), and that Requirement to Secure EA Compliance (and potentially its PSED) in respect of those applicants (or potential applicants).

Legally mandated considerations and information

The following considerations apply in respect of the narrow range of Specific EDI Considerations and Information (if any, and this is unlikely) which are legally mandated in respect of particular circumstances, and appropriately focused and limited, as described above.

- While it is in principle possible that legally mandated Specific EDI Considerations and Information could (depending of course on the detailed applicable circumstances) prevail over the a Requirement to Secure EA Compliance in respect of applicants with protected viewpoints, whether the courts would see it thus is extremely hard to predict, as conflicts of "protected characteristics" and obligations under the Equality Act are inherently difficult to resolve, and much will depend on the specific facts of any case, so a positive outcome cannot be guaranteed.

  It appears that the only possible scenario in which a legal mandate (if any) to apply EDI Considerations or seek EDI Information could override a contrary Requirement to Secure EA Compliance in respect of an applicant with a protected viewpoint is where that applicant has shown a pattern of conduct which has been unlawful under the Equality

Act, and where there is a high risk that that conduct would be repeated (so as to give rise to unlawfulness) in the position for which they are applying. Applying considerations and seeking information would, however, need to be focused exclusively on what would be "inappropriate manifestations" of viewpoints, and not operate so as to discriminate against an applicant because of their legitimate expressions of their views. Even here, while it is arguable that doing so would be fair and reasonable, it cannot be guaranteed that the legal mandate to do this would override the contrary Requirement to Secure EA Compliance in respect of that applicant.

- If, in a particular case, an HEP's apparent legal mandate to apply/seek EDI Considerations or seek EDI Information is defeated by its conflicting Requirement to Secure EA Compliance in respect of an applicant with a protected viewpoint, that apparent mandate will not be effective, and applying EDI Considerations and seeking EDI Information will have been an unlawful action, so a risk of compliance failure will inherently exist.

- Applying EDI Considerations and/or seeking EDI Information only pursuant to the PSED, which is a duty to think (but not to act) and is likely to be overridden by a Requirement to Secure EA Compliance in respect of an applicant who has protected viewpoints, will lead to compliance failure.

It is therefore going to be very difficult, in most if not all circumstances, for HEPs to apply EDI Considerations or seek EDI Information pursuant to an apparent legal mandate with any confidence that this will not give rise to breaches of their legal obligations.

Need to ensure that an applicant has essential attributes for a particular position

Despite it appearing to BFSP to be reasonable to apply highly focused considerations and questions to ensure that an applicant has essential attributes for a particular position, there is no apparent legal reason, other than potentially the occupational requirements exception (which is discussed in Opart 3 above) or Section 159 Exception, for a contrary Requirement to Secure EA Compliance not to prevail, so the risk of compliance failure appears to be overwhelming.

But, if it makes no sense to fill a position or give Research Approval without ensuring that the appointee has essential attributes for that position, how can they in the real world not proceed with doing this? This will create difficult practical dilemmas for HEPs.

The safe way to proceed: obtaining assurances re Equality Act compliance

What HEPs can legitimately do, and thus is a safe alternative where applying EDI Considerations or seeking EDI Information appears to be unworkable or too risky, is to seek confirmation that an applicant understands the HEP's obligations under the Equality Act and that, irrespective of their personal views on relevant issues, the applicant will take care to avoid behaviour which would cause the HEP to be in contravention of the Equality Act. This should be accompanied with clear policies and training on Equality Act compliance. This must not, though, be done in a way to intimidate or create a hostile environment for the applicant.