

## The Dandridge Review re the Open University/Jo Phoenix

### What all universities need to know – and do

#### Summary

The Dandridge Review (the “**Review**”) is a report, published in September 2024, of an independent investigation by Dame Nicola Dandridge 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.

The potential usefulness of the Review was restricted by Dame Nicola’s terms of reference. These appeared to assume a need to “balance” legal rights to free speech with wider (non-legally mandated) equality and other agendas. This is the wrong focus as, in what many see as at times a legal and regulatory minefield, the focus has to remain on complying with legal obligations and negotiating a path through those obligations where they potentially conflict. It is vital to remember that the legal obligation to protect free speech overrides conflicting agendas and programmes, unless they are required pursuant to applicable law, which few are. The frequently perceived conflicts are often the result of over-interpreting (and, sometimes misinterpreting) of relevant legislation. The terms of reference imposed on Dame Nicola were, therefore, highly inappropriate and inevitably caused some real weaknesses in the Review and its findings. They meant that, while the Review contains worthwhile statements about what universities and other higher education providers need to do to avoid legal and regulatory failures, there are some significant omissions and unhelpful obscurity and vagueness.

*Despite the limitations of its terms of reference, and its focus on the disputes over trans rights and gender critical feminism which were the subject of the Phoenix case, the Review’s findings, with respect to what universities must do to protect free speech and avoid legal and compliance failures, are, generally, applicable to all universities.*

#### **Key implications of the Review; requirements for action**

- **Culture of conformity/consensus; fear.** 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. This is inappropriate.

- **EDI as a source of freedom of speech problems.** EDI was cited in Dame Nicola's conclusions as a source of free speech problems at the OU as a result of the strength, general acceptance, and rigidity of the EDI function and its agendas, and an imbalance between the resources allocated to EDI and free speech. It makes some unsatisfactory recommendations about this while simultaneously appearing to seek to "balance" the OU's actual free speech obligations with its "mission" and "strategy" to promote EDI: in most cases, this is inappropriate, as legal obligations to protect free speech override conflicting agendas and strategies as discussed elsewhere. All universities need to work to ensure that the promotion and implementation of EDI agendas does not unlawfully affect free speech.
- **Standards of behaviour.** The OU did not have adequate policies about what was expected in the way of behaviour, in particular as regards avoiding discrimination, harassment and other inappropriate actions against people in respect of their views. These need to be developed, and to extend to clear guidelines about online working and online behaviour and its enablement of bullying and harassment; and when it is not appropriate to express personal views at work, and that staff should be willing to work with colleagues whose views they disagree with. These need to be the subject of effective training.

To state this very clearly, universities need to have effective and compliant prohibitions on bullying, harassment and taking actions (such as making complaints) to the detriment of people because of their viewpoints – and enforce them.

- **The vital need for clear, consistent, lawful and effective policies.** Staff at the OU were unclear about where the boundary between legal speech and harassment lies. The OU's policies and their implementation were insufficiently clear and robust to enable deeply contentious matters to be debated professionally and respectfully; and failed to reflect the law as it is, for instance what the Equality Act actually says about sex and gender. The Review made clear that this needs to be addressed, although in somewhat unsatisfactory terms.
- **Adopt institutional neutrality.** The Review recommends some "underpinning principles", one of which is headed "[...] the OU should adopt a policy of institutional neutrality in relation to contentious issues (unless relevant to the OU's strategy)". The text explaining this proposed principle then states: "...the OU should adopt a policy of institutional neutrality in relation to the trans inclusivity versus gender critical debate" and give consideration to "extending such institutional neutrality to other contested areas (unless those areas have direct relevance to the OU's mission and strategy)". While this recognition of the importance of institutional neutrality is welcome, the approach taken by the Review is defective in important ways, for a number of significant reasons. This is discussed further below.
- **Effective management of disputes.** The Review identifies failures relating to management of disputes as a significant cause of the OU's legal failings. Universities need to develop appropriate and robust systems and requirements and ensure proper training so they anticipate potential conflicts and act proactively to enforce behavioural standards.

- **Free speech promotion and protection structures; separation from EDI.** The Review recommends that “systems and structures should be put in place to support the promotion of free speech and academic freedom”. We ask: how could free speech be properly protected without a dedicated structure for that purpose? Importantly, the approach to protecting expression of belief must be distinct and separate from protection of “other aspects of identity”. The Review focuses on this separation/distinction as a solution to conflicting rights under the Equality Act. But a complete separation between free speech protection and any EDI policies which are legally required is also a “reasonably practicable step” which would make a significant difference to free speech protection for the reasons given above, so should also be regarded as required pursuant to the law requiring free speech protection.

### **Important matters omitted, understated or insufficiently clear**

- **“Balancing”.** The idea that there is a “balance” to be achieved between free speech rights and non-legal agendas (often originating from EDI) is misleading and leads to compliance failures, as discussed above. Some navigating between complex legal rights can be necessary; but this does not justify restricting free speech beyond what is required by the law. This was not made sufficiently clear.
- **Ensure that its policies and requirements generally** – and in respect of EDI agendas in particular – are structured so as not to inappropriately restrict free speech. This could usefully have been stated more clearly in the Review.
- **Have adequate training and induction:** Ensure that all staff understand the law and the requirements regarding free speech, to the extent relevant to them, including what constitutes discrimination and harassment and what are protected viewpoints; and that tolerant, personally respectful discourse, including when made through internal communications systems, is expected within the work environment. The Review was focused on staff managing of disputes, but wider free speech training for all staff *and students* is essential.
- **Effective intervention and enforcement.** While the Review rightly refers to “effective early management” and “early intervention”, the vital importance of intervening proactively is not given sufficient focus: where appropriate, universities must enforce their rules forcefully, including through disciplinary measures where appropriate. This is a serious omission.
- **Systems for reporting and managing disputes and free speech complaints.** Have appropriate and effective systems in place for reporting and management of disputes and other free speech problems, and for complaints procedures and systems in respect of free speech issues.
- **Free speech officer.** The Review does not address the vital need for a free speech officer, responsible for both protection and promotion of freedom of speech, to lead the free speech protection structure recommended by the Review: how could such a structure work effectively without such a leader? Having such an officer is a “reasonably practicable

step” which would make a material contribution to free speech protection, so is required under the relevant law.

- **Institutional neutrality.** 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. BFSP considers that sufficient neutrality is therefore, in practice, an effective legal requirement. The Review’s identifying the need for institutional neutrality is very welcome, but how it states this is defective, for a number of reasons, including that it is addressed only as an underpinning principle rather than as a core recommendation and that the qualifications with reference to the OU’s mission and strategy area cause for real concern. This is all discussed in detail in Part 4 below.
- **Reducing complaints culture; managing complaints connected with viewpoints effectively.** The Review rightly refers to excessive complaints being made, and complaints creating a chilling effect. But it fails to recommend that universities need to: make it clear that complaining about someone’s views is generally unacceptable; handle complaints effectively, and not allow their complaints functions to become instruments of free speech suppression; ensure that their complaints process includes early triage; and not encourage people to report each other over their opinions.
- **Review relationships with campaign organisations.** The Review does connect the OU’s relationship with Stonewall with its failure to remain neutral between “trans inclusive” and “gender critical” views. It did not state the obvious consequence, that the OU needs to review its relationship with Stonewall, so as to ensure it can maintain institutional neutrality and reduce legal risks, and, if necessary, restructure or discontinue that relationship. This applies to university relationships with campaign groups more generally.

## 1. Introduction

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

This Statement examines the report by Dame Nicola Dandridge, published in September 2024<sup>1</sup>, of an independent investigation into the profound legal and compliance failures by the Open University failing to protect Professor Jo Phoenix from attack for her viewpoints. Dame Nicola is a former Chief Executive of the Office for Students (**OfS**), Universities UK and the Equality Challenge Unit.

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<sup>1</sup> See:

<https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Independent-Review-N-Dandridge-09.09.24.pdf>.

This Statement identifies important lessons from the Review, and some flaws and omissions. These lessons reflect both legal requirements and what the OfS is likely to expect following the Review. Much of the Review and its lessons are applicable to English and Welsh universities generally (and, to a slightly lesser degree, Scottish ones), so the Review and this Statement need careful study, and their recommendations implemented, by all universities and other providers so as to ensure they avoid similar unlawfulness, compliance failures and embarrassment.

The Open University (OU)/Phoenix case is a textbook illustration of a contemporary free speech failure, demonstrating the problems that can arise as a result of the empowerment of ugly discourse by the online world, and universities' internal communications systems in particular, and failures by universities to proactively regulate on-campus behaviour. In this case, personal attacks on Professor Jo Phoenix, a senior member of academic staff, for her gender-critical viewpoints and activities, including an aggressive open letter and an online pile-on, were held to be unlawful harassment and/or discrimination for which the OU was found to be legally liable (this is said to have cost it over £1 million). There were more than 25 counts of discrimination and harassment, and more than 395 individual events of harassment (mainly as a result of employees signing an open letter attacking Professor Phoenix) for which the OU was responsible. See BFSP's Statement [\*Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others\*](#) for detailed information about the case and the legal and regulatory requirements and their implications in practice.

The failures at the OU connected with Professor Phoenix's case led to both legal liability and media embarrassment as a result of the OU's failures to comply with its obligations under the Equality Act 2010 (**Equality Act**) to protect her from harassment for her viewpoints. It also refers to the requirements in Section 43 (**Section 43**) of the Education (No. 2) Act 1986 (**Education Act**) and the Human Rights Act 1999 (**Human Rights Act**).

Since, based on its own work, BFSP has no reason to suppose that the atmosphere, attitudes and lack of effective protections and procedures are much different at other HEPs from at the OU, the Review provides an insight (both depressing and illuminating) into how bad things are at our universities as regards free speech protection, and the attacks on colleagues because of their views which are such a regular occurrence.

For all its failings, the Review is a worthwhile study and report which at least addresses many of the causes of the problems that arose. It also contains much of interest to those who care about free speech. It is, however, regularly obfuscated by management speak and provides insufficient clarity and precision as to its findings and recommendations. As we explain in Part 4 below, it also omits or understates some important actions needed to ensure that free speech is better secured and compliance achieved. It is, therefore, in some ways a missed opportunity and a disappointment. Because of the issues which led to the Phoenix judgment, the Review inevitably focuses on the problems caused by disputes between, as the Review refers to them, "trans inclusive" and "gender critical" staff. The same sorts of issues arise in relation to other contested issues and HEPs need to get their free speech compliance right in respect of all aspects of modern controversy.

The potential usefulness of the Review was restricted by Dame Nicola's terms of reference. These appeared to assume a need to "balance" legal rights to free speech with wider (non-legally mandated) equality and other agendas, and required her only "to investigate how the OU can balance academic freedom, free speech and equality and employment rights to ensure that all staff can feel confident in expressing their views within the boundaries of the law and in a way that is consistent with the OU's values and behaviours".<sup>2</sup> Leaving aside whether such terms of reference were an appropriate response to the contents of the Phoenix judgment, they had the inevitable effect of tying Dame Nicola's hands to a significant extent and are a cause for concern about whether the Review is correctly focused. The relevant legal framework must be the primary focus and guide, and wider "balancing" of agendas will very likely lead to the kinds of compliance failures which were found to have occurred in the Phoenix case (see the further discussion of this in Part 2 below). Furthermore, the concluding words of the terms of reference are somewhat unclear. They could be read as implying that agendas/values that are not backed by legal requirements can be balanced against legal rights and obligations. The Review does, however, go on to make it reasonably clear that, within the confines of the terms of reference, it is focusing on how to devise policies and requirements, deal with controversies and disputes, and take other actions in ways that are legally compliant.<sup>3</sup>

Managing and moderating discourse in the modern workplace, particularly in the context of the online world and especially at universities, can sometimes be uncomfortable and seem complex. Universities have, though, failed to keep up with the changing environment, and the dire effects of social media on the quality of our discourse in particular. They often demonstrate analogue mindsets in a digital world when it comes to managing free speech issues, as well as managerial unwillingness to take the uncomfortable steps necessary to control aggressive and unlawful behaviour.

It must surely be the case that these problems will be very significantly reduced if it is widely understood at universities that bullying and harassing people for their viewpoints is unacceptable and will result in rule breaking and disciplinary measures, with universities visibly, firmly and consistently enforcing their requirements, if necessary, with disciplinary proceedings.

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<sup>2</sup> See paragraph 1.1, as also referred to in paragraphs 1.13 and 4.1.

<sup>3</sup> The clearest single expression of this is at paragraph 3.4: "it is sometimes challenging for employers to establish the appropriate legal balance between one employee's right to express or otherwise manifest their beliefs and the protection of the rights and freedoms of others, as evidenced by the Tribunal judgment which prompted this review".

## 2. Relevant law and issues regarding “balancing” of rights and requirements

The legal obligations of English and Welsh universities in relation to freedom of speech are extensive<sup>4</sup>. Section 43 contains key obligations on universities and other higher education providers in England to take all reasonably practicable steps to secure speech (within the law). Freedom of speech and academic freedom are also protected under the Human Rights Act and the public interest governance principles with which English universities are required to comply as an ongoing condition of their registration. As confirmed in recent case law, viewpoints on many areas of current controversy are protected as religious or philosophical beliefs under the Equality Act. See: BFSP’s Statement [\*Free speech protection at English universities: The law and requirements in practice\*](#) for detailed information about the legal and regulatory requirements and their implications in practice.

A key point to remember is that a university’s free speech duties<sup>5</sup> are written as effectively overriding so long as the relevant speech is “lawful” (for instance not being “inappropriate manifestations” of otherwise protected viewpoints under the Equality Act) and the relevant steps are “reasonably practicable” for it to take. They prevail over other programmes or agendas, unless those programmes are themselves legally mandated, for instance because necessary to ensure that the university complies with its legal duties under the Equality Act.

The idea that there is a “balance” to be achieved between free speech rights and other wider agendas is misleading and leads to compliance failures. Although HEPs’ clear legal obligations in relation to freedom of speech and academic freedom under the above laws are, in some cases, affected by their duties under the Equality Act, this does not justify restricting free speech beyond what is required by that Act or other applicable law. This legal consideration is, of course, different from the often-difficult process of managing disputes, where detoxification and achieving “balance” in the sense of tolerant and less aggressive discourse are desirable aspects of any debate. Outside of actual legal obligations, any wider agendas and programmes favoured by university managers or other stakeholders will be overridden by the legal obligation to protect free speech. As explained in BFSP’s main guidance document, the supposed conflicts often perceived by HEPs are the result of over-interpreting (and, sometimes misinterpreting) of relevant legislation. The focus, therefore, must remain on complying with legal obligations as they actually are (and finding the correct path where they appear to conflict), rather than seeking to “balance” supposed conflicts between free speech obligations and wider agendas and desires. As discussed above, the terms of reference for the Review inappropriately presupposed the existence of a need to “balance” legal rights to free speech with wider (non-legally mandated) equality and other agendas, which created some real weaknesses in the Review and its findings.

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<sup>4</sup> These are discussed in detail, although not entirely adequately, in Section 3 of the Review.

<sup>5</sup> Under Section 43 and under the equivalent provisions of the HEFSA, if and when brought into effect.

### **3. Key implications of the Review; requirements for action**

The following are some key points in the Review relating to free speech. Our strong impression is that these problems prevail at many universities, and they all need to study the Review carefully, review their own policies, practices and requirements for effectiveness and compliance and update them accordingly, in order to ensure that viewpoints can be expressed without negative consequences.

#### **Culture of conformity/consensus; fear**

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.<sup>6</sup> Fear was mentioned by several witnesses<sup>7</sup>, and appears to reflect the mechanisms by which conformity is enforced (at many universities: this is not just an OU problem). The Review did not make specific recommendations about this, but the other actions discussed below would largely address the problem.

#### **EDI as a source of free speech problems; imbalance between EDI and free speech requirements and agendas**

EDI was cited in Dame Nicola’s conclusions as a source of free speech problems at the OU as a result of the strength, general acceptance, and rigidity of the EDI function and its agendas, and an imbalance between the resources allocated to EDI and free speech. The “desire to protect and promote principles of EDI had on occasions translated into excessive caution as to as to what could and could not be said, even when the views in question were legitimate and lawful, albeit contentious. This was associated with a potentially rigid approach that assumed that only one interpretation of principles of EDI was acceptable, making it difficult to have an open and honest discussion about how complex issues should be interpreted and applied. This approach to EDI had the effect of [...] precluding legitimate debate and discussion about contentious matters.”<sup>8</sup>

For evidence of this imbalance at universities generally, see AFFS' study of resources committed by top universities to EDI and to free speech, respectively, at <https://affs.uk/edi-and-free-speech>. The ratio is 214:1 reflecting in part the fact that very few employ a dedicated free speech officer.

This approach to EDI had the effect of undermining sustainable approaches to managing competing equality rights at the OU, as well as precluding legitimate debate and discussion about contentious matters. It was compounded by uncertainty amongst staff as to what the law required about these matters, and the OU’s policies in these areas being inadequate (see

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<sup>6</sup> See paragraphs 2.5-2.11.

<sup>7</sup> See paragraphs 2.7, 2.10 and 2.35. This was also referred to by the Tribunal.

<sup>8</sup> See paragraphs 4.8-4.9. See also paragraphs 2.14-16.



more below). The Review states that “the only possible way forward is [...] for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice”.<sup>9</sup> This, and the wider requirements it points towards, are discussed in detail below.

Recommendation 4 includes that the OU should “encourage debate and continue with its work to review terminology and the role of the staff networks and EDI leads” and “embrace the vibrancy and dynamism of these debates by [...] proactively seeking out a diversity of perspectives”. It states that “supporting the rights of one group should not come at the expense of another” . This is a vague and weak recommendation and only addresses the problem partially, although other recommendations go some way to helping address the issue. See more at Part 4 below.

### **Problems with the OU’s policies and requirements: vital need for clear, consistent and effective policies – and which reflect the law as it is**

The OU’s policies and their implementation were insufficiently clear and robust to enable deeply contentious matters to be debated professionally and respectfully. They did not enable staff to express their views confidently, disagreements were not well managed, and a framework for appropriate standards of behaviour had not been clearly communicated and upheld.<sup>10</sup>

The Review found that there was uncertainty amongst staff as to what the law required in relation to equality legislation, free speech and academic freedom, and staff found the OU’s policies in these areas sometimes insufficiently granular and consistent to offer useful guidance<sup>11</sup>. A significant body of evidence was cited about widely perceived lack of clarity and guidance about the distinctions between lawful free speech and unlawful harassment, and the intersections between EDI, harassment and free speech, which underlay this finding.<sup>12</sup>

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<sup>9</sup> Paragraph 4.17.

<sup>10</sup> See paragraph 4.10.

<sup>11</sup> See paragraph 4.9.

<sup>12</sup> “Many expressed uncertainty, even bewilderment, as to what was lawful and acceptable free speech and what amounted to unlawful harassment. They pointed to the fact that regulation and principles of free speech seemed to be pointing in one direction, with EDI legislation and policies pointing in the other. Several people observed that uncertainty about what was acceptable and unacceptable, let alone lawful or unlawful, meant that in relation to contentious matters they had decided to say nothing.” “The difficulty of defining the boundaries between EDI and free speech were described as leading to imposed or self-imposed constraints.” “Generally, people felt that relevant OU policies, specifically those relating to EDI and free speech, were [...] often not sufficiently detailed to provide assistance, particularly in terms of the intersections between EDI, harassment and free speech, nor in providing guidance to staff as to how to behave when rights were seen to conflict. Policies could be interpreted in different ways to justify behaviour which others would regard as unacceptable.” (Paragraphs 2.17, 2.18 and 2.38.)

The OU's policies also failed to reflect (in the specifically relevant context of "sex" and "gender") what the Equality Act actually says.<sup>13</sup> This is a crucial and widespread problem: many university policies misrepresent what the Equality Act says, especially in respect of sex, gender and trans aspects, leading to inappropriate actions and regulatory failures. They need to be strictly consistent, both with the underlying law and between different policies, for instance those relating to EDI and to free speech (there is no point working to achieve a free speech policy which is legally compliant, then having EDI policies which continue to lead to free speech suppression and unlawfulness).<sup>14</sup>

Recommendation 3 ("Agree ways forward in areas where there is uncertainty or disagreement on policy or process") addresses aspects of this, including that the OU should:

- create a system for resolving questions that arise in the workplace in relation to the interpretation of the issues identified in the Review; and
- "review existing policies and templates that only refer to gender or sex and not both. Whether intended or not, where gender and not sex is referenced, the implication is that the legitimacy of sex is not recognised. This fits uncomfortably with the principle of institutional neutrality<sup>15</sup> and can also be problematic in the context of the law, in that the Equality Act describes the protected characteristic in terms of sex not gender (except in the context of gender recognition certificates and the gender pay gap)."<sup>16</sup>

Recommendation 4 ("OU's approach to EDI should embrace the full diversity of the OU's staff and their identities, encourage debate, and continue with its work to review terminology and the role of the staff networks and EDI leads") also addresses aspects of this problem.

The devil will, however, be in the detail. This is a complex area, with different and occasionally conflicting legal right and obligations to be complied with.

Policies and requirements regarding standards of behaviour in its many aspects are discussed below.

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<sup>13</sup> See paragraphs 2.43 and 2.44 for illustrations in the context of the confusion between "sex" and "gender". See also the recommendation at paragraph 5.3.2.

<sup>14</sup> Paragraph 4.31 says: "These factors point towards the need for clear and consistent policy that can underpin and inform the guidance and training for both managers and People Services. Consistency is essential to avoid, for instance, policies that make sense from an EDI perspective not aligning with policies relating to free speech and academic freedom."

<sup>15</sup> See Appendix 3, principle 7, and the discussion below.

<sup>16</sup> See paragraph 5.3.2.

While the Review correctly addresses the need for better policies and requirements, and their implementation, and discusses interventions, it fails to address the crucial issue of effective enforcement.<sup>17</sup> This is discussed in Part 4 below.

These problems prevail at many universities: they all need to review their policies and requirements for compliance and appropriateness in this complex modern context.

### **Standards of behaviour**

The evidence cited by the Review does not explicitly focus on the standards of behaviour expected of OU staff (and indeed students). But the findings derived could not be clearer: the OU did not have adequate policies about what was expected in the way of behaviour, in particular as regards avoiding discrimination, harassment and other inappropriate actions against people in respect of their views.<sup>18</sup>

This is addressed in Recommendation 5: “Agreed standards of behaviour should be developed [...] and implemented by way of mandatory training” and “The Behaviours and Standards at Work policy and the Bullying and Harassment Policy and Code should be reviewed and extended to include guidance and case studies that illustrate standards of acceptable and unacceptable behaviours, in line with the OU’s values. [...] They should include detailed case studies of when free speech or adherence to principles of equality translate into bullying and harassment, and the point at which staff expressing their personal views turn into unacceptable behaviour.”

While this is correct, it is over-cautiously and obscurely stated. We note, in this regard, how Professor Phoenix, who is critical of the Review, approached this: “I could have answered [the Review’s] task easily: don’t engage in unlawful harassment! Play the ideas. Use evidence. Use arguments. Do not use negative stereotyping. Tell the truth. But most of all, do not shut down debate because you do not agree with someone else’s starting premise”.<sup>19</sup> Or, in our words, universities need to have effective and compliant prohibitions on bullying, harassment and taking actions (such as making complaints) to the detriment of people because of their viewpoints – and enforce them.

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<sup>17</sup> Even though enforcement is recognised as an issue: “There was also a sense that policies were not always enforced.” (Paragraph 4.9.)

<sup>18</sup> See section 4C of the Review. In particular, paragraph 4.37 states “[...] reference was made to some OU policies being too generic to be useful. The OU’s Bullying and Harassment Policy and Code do include examples of what amounts to bullying and harassment, but they are quite generic and there are no detailed, worked-up examples of what the definitions might look like in practice. [...] Although the policies in themselves are fine, from the way the staff who gave evidence to the review referred to them there was a sense in which they were not regarded as useful, living documents that informed their behaviour.” See also the discussion below about expressions of personal views and staff networks.

<sup>19</sup> See: <https://jophoenix.substack.com/p/the-dandridge-review-the-open-university>.

This is supported by Recommendation 6: “Training to be provided to managers to support them in enforcing expected standards of behaviour and in managing disagreement”.

Actions found to constitute unlawful harassment included signing an open letter which attacked Professor Phoenix, calling on others to sign the letter, hostile tweets and retweets, and actions which amounted to an invitation to join a “pile-on”. Given the breadth of actions which can constitute harassment, clear and detailed case studies, included in OU guidance, of when speech and actions constitute discrimination, harassment or bullying, are essential.

See also the discussion of personal views in the workplace and online behaviour below.

While the Review correctly addresses the need for better policies and requirements about behaviour, and their implementation, and discusses interventions, it fails to address the crucial issue of effective enforcement. This is discussed in Part 4 below.

The above problems prevail at many universities: they all need to review their policies and requirements for compliance and appropriateness in this complex modern context.

### **Personal views in the workplace: appropriateness and need for guidance**

There is considerable uncertainty at the OU about the extent to which expressing personal views is appropriate in the workplace. The Review cited views to the effect that this can be oppressive for those who do not agree with strongly expressed views and about a lack of guidance.<sup>20</sup>

This is a very difficult area, as expressing personal views can both be unprofessional (for instance in the context of management decisions) and oppressive of other people who have different viewpoints, as discussed above; but it can also itself be protected by free speech rights.

The Review identifies this as a problem.<sup>21</sup>

Recommendation 5.3.1 states that “Clear guidelines should be developed on the expression of personal views, with case studies including examples of what is meant by staff bringing their

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<sup>20</sup> See paragraphs 2.45 to 2.54.

<sup>21</sup> Paragraphs 4.42 and 4.44 state as follows: “If personal perspectives get out of kilter, it can translate into the expression of intrusive views, inappropriate behaviour, the disruption of working relations and respect for others, and undermine the independence and integrity of teaching, research and scholarship, as well as the institution’s values. It can legitimise the expression and potentially the application of views that conflict with OU policy. At worst, the imposition of personal views can lead to censorship and unlawful discrimination or harassment, and bullying.” and “There is no simple solution to this balance between the personal and the professional. But there should be some broadly expressed common expectations as to where the balance should lie, and what amounts to the legitimate expression of authentic selves or the constructive contribution of alternative perspectives, what amounts to the unprofessional intrusion of personal views into the workplace or the inappropriate prioritisation of personal perspectives over institutional policy positions, and who determines the policy and how this is done.”

authentic selves to work, and the balance between authenticity and the strengthening of minority perspectives, and inappropriate behaviour that may conflict with the OU's values and policies."

Achieving a fair and workable solution in this important area will be difficult in practice, in the light of the need to protect everyone's free speech rights. But the expression of personal views at work views can be restricted to the extent that it is "proportionate" to do so. BFSP's statement [Requirements for staff and student behaviour: English HEPs' free speech compliance obligations](#) contains detailed information about relevant issues, requirements and considerations.

Bringing this particular aspect of the problem under the spotlight is one of the Review's genuine contributions to enhancing free speech protection.

### **Online work environment and online behaviour**

As with other recent free speech failures by employers (such as in the *Fahmy* case<sup>22</sup>), the OU/Phoenix case has at its heart the problems that can arise as a result of the empowerment of ugly discourse by the online world and failures to have appropriate policies about and proactively regulate staff and student behaviour (especially their online interactions) by universities and other employers.

The recent case of Alexander Rogers, a student at Oxford, is a particularly tragic example, although this was itself not the direct consequence of a free speech issue relating to the behaviour of university staff. A campaign of ostracism was organised online against Mr Rogers by other students after unproven allegations, which was a significant factor in his suicide shortly afterwards. Organising and joining in a campaign of ostracism is clear bullying. Universities/colleges have rules against this, and ought to enforce them. There is a deep integrity issue here and universities are regularly failing to come up to standard.

Online environment and staff networks: Although fundamental to its identity, the OU's online existence was seen as making it harder to secure good relationships between staff, particularly when they disagreed.<sup>23</sup> While some of these issues are specific to the OU, that staff networks and other means of communication play a role in contemporary free speech problems is clear.

The above is reflected to a degree in [Recommendation 4](#): "The ongoing work to review the role and remit of staff networks should be continued and include review of the provisions of

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<sup>22</sup> *Fahmy v Arts Council England* (2023) ET case no 6000042/2022. [See also BFSP's statement about this case here.](#)

<sup>23</sup> Some witnesses spoke of the effect of remote working and the depersonalisation of online communication as potentially magnifying disagreement, narrowing discussions, and leading to the expression of more polarised views than would be the case with in-person meetings. Passing comments that normally would be made orally in the corridor or in the margins of meetings were instead written down in emails or chats, thereby becoming formalised, retained and potentially misinterpreted. See paragraphs 2.66, 2.67 and 2.71.

the Staff Network Framework that relates to their purpose and scope. The Framework should also make clear how the networks should operate so as to be in line with OU policies”.<sup>24</sup> The Review does not go into detail about solutions, presumably because the management of remote working fell outside the remit of the Review.<sup>25</sup>

Online behaviour: The Review describes online behaviour, and how to manage it, as a significant problem.<sup>26</sup>

Recommendation 5 therefore states that “agreed standards of behaviour should be developed [...] and implemented by way of mandatory training”. The relevant policies “should be reviewed and extended to include guidance and case studies that illustrate standards of acceptable and unacceptable behaviours, in line with the OU’s values. [...] They should include detailed case studies of when free speech or adherence to principles of equality translate into bullying and harassment, and the point at which staff expressing their personal views turn into unacceptable behaviour.”<sup>27</sup>

Dealing effectively with these problems requires a number of actions. The Review addresses many of these, but not all, as explained in Part 4 below: in particular, it does not give sufficient emphasis to effective enforcement.

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<sup>24</sup> See paragraph 5.4.5.

<sup>25</sup> See paragraph 4.51.

<sup>26</sup> Some who provided evidence to Dame Nicola “observed that bullying and harassment can take place more easily online” and the online environment can “disguise incidents of bullying and harassment”. In its response, the UCU stated that “A particular challenge with bullying and harassment at the institution is that poor behaviour can remain hidden due to communication via Skype or Microsoft Teams and emails rather than in person meetings. The current policies [...] do not address this.” Some people said that “on-line existence could magnify and distort engagement, particularly in relation to contentious equality related issues [...] providing a platform for people ‘to rant on EDI issues’ in a way that was undermining for others.” See paragraphs 2.69, 4.51, 2.70, and 2.72.

<sup>27</sup> See paragraph 5.5.1.

## **Reducing a complaints culture, and managing complaints connected with people's viewpoints effectively**

The Review refers to excessive complaints being made against people,<sup>28</sup> and complaints creating a chilling effect.<sup>29</sup>

The Review does not, however, follow through with specific recommendations about how to deal with these, even though various steps are, AFFS consider, required by the relevant law. These are discussed in Part 4 below.

### **Need for institutional neutrality**

A failure of neutrality on a contentious issue was at the heart of the compliance fiasco that was the Phoenix case. The relevant legal requirements for free speech protection lead inevitably to a need to adopt sufficient institutional neutrality so as to ensure compliance with universities' legal obligations. Recommendation 1 proposes various "underpinning principles" that can inform the implementation of the Review's recommendations.<sup>30</sup> One of these principles, headed "[...] the OU should adopt a policy of institutional neutrality in relation to contentious issues (unless relevant to the OU's strategy)", states that "[...] to help secure academic freedom, the OU (and its departments and schools) should remain neutral between trans inclusive and gender critical views" and that "Consideration should be given to extending a policy of institutional neutrality to other contested areas (unless those areas have direct relevance to the OU's mission and strategy)".<sup>31</sup> This need for neutrality is not as clearly or firmly stated as BFSP considers is required in order to avoid legal failures of the sort seen in the Phoenix case, and is defective in important ways, for a number of significant reasons. This is discussed in detail in Part 4 below.

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<sup>28</sup> See paragraph 2.36: "I was also told that uncertainty about the law and about the OU's policy position had led to a large number of complaints and grievances having been lodged against other members of staff, citing bullying and harassment. These complaints and grievances were described as distressing both for those who lodged them and for those on the receiving end, not least because both sides thought they were acting appropriately."

<sup>29</sup> See paragraph 2.37: "Several said that the distressing effect was magnified because OU policy required staff not to talk about the issues with anyone else while complaints and grievances were being investigated, leading to long periods of enforced silence that made working relations difficult. Complaints and grievances were also said to have a chilling effect: whether or not subsequently upheld, the impact on staff was 'I will not do that again'".

<sup>30</sup> Recommendation 1 (paragraphs 5.1.1 and 5.1.2) is that the OU's Council and the Vice-Chancellor's executive team should "discuss and agree a set of underpinning principles regarding free speech, equality and employment rights, as proposed in Appendix 3, that can inform the implementation of this report's recommendations".

<sup>31</sup> See Appendix 3, paragraph 7.

These problems prevail at many universities, and they all need to work to ensure that the promotion and implementation of EDI agendas does not unlawfully affect free speech. See the discussion below of what this means in practice, including separation of free speech promotion and protection structures from EDI functions.

### **Effective management of problems and disputes: prompt intervention and enforcement: preparation**

Problems with managing disputes and attacks effectively are identified as a key element in the failures at the OU. Finding B<sup>32</sup> contains some good detail, including some relating to:

- The expression of views which others find deeply offensive, with effective early management the key.<sup>33</sup>
- Staff not being willing to work with colleagues whose views they disagree with.<sup>34</sup>
- Disagreement turning into unlawful or inappropriate behaviour.<sup>35</sup>

The Review correctly identifies aspects of the problems with free speech at our universities and its causes and makes some good proposals, including that the OU needs to improve its policies/requirements, encourage good disagreement and debate, and set standards of behaviour and training and early intervention (see Recommendations 3 to 7, discussed elsewhere). However, it fails to address some important needs, especially the crucial issues of effective intervention and enforcement. To address these issues effectively, universities need to take the actions listed in Part 4 below. Many of these actions are recommended by the Review. Some, however, are not. In particular, the following requirements for universities are not, or are not adequately, addressed:

- intervene promptly and effectively, and enforce their requirements appropriately, if necessary by bringing disciplinary proceedings;

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<sup>32</sup> At paragraphs 4.21 to 4.36.

<sup>33</sup> “The freedom to manifest belief [...] and to express views relating to that belief are foundational and essential rights in any democracy whether or not the belief is popular or mainstream or might cause offence. However [...] these rights are qualified...” (Paragraph 4.24) These are then addressed to a degree in some of the recommendations.

<sup>34</sup> “As a general principle - and although there may be exceptions - it cannot be acceptable for staff to determine who they are prepared to work with because of their perception of a colleague’s lawfully held views, however offensive they may find them.” (Paragraph 4.26)

<sup>35</sup> “Disagreements should be effectively managed at an early stage to prevent them from escalating and turning into unacceptable behaviour which then becomes far harder to deal with. The evidence I heard suggested that this early intervention did not always happen at the OU.” (Paragraph 4.27.)



- have appropriate systems, and staff who are of appropriate seniority and experience, are appropriately trained, not conflicted and have available time, in place to enable problems, especially online attacks and pile-ons, to be dealt with rapidly and effectively;
- ensure that their internal communications systems are controllable and monitorable; and be ready to actively control and monitor them when necessary; and
- have appropriate and effective reporting and complaints procedures and systems in respect of free speech issues and complaints.

### **Line manager and HR responsibilities; training**

It is fair to say that the Review found that the handling of disagreements, disputes, complaints, the interpretation of requirements and other issues was poor. It cited a lack of training as a primary problem. Finding B addresses this in some detail.<sup>36</sup>

While the development of appropriate and robust requirements and proper training are essential, other changes are also vital. Managers need to:

- be prepared to be proactive (there is some reference to this, but its vital importance is not given sufficient focus), and willing to intervene promptly in heated and even toxic situations, which will not always be comfortable (some may even not be suited to this role); and
- be consistent, even-handed and neutral in their handling of problems. They will need to leave their own viewpoints “at the door” (see elsewhere). This will require a change in mindset; indeed, again, some people may not be suited to this role.

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<sup>36</sup> “Line managers should feel confident in managing disagreements, intervening at an early stage to prevent issues from becoming entrenched or leading to the risk or likelihood of inappropriate behaviour. This is a challenging task, and many people I spoke to [...] felt that they were ill-equipped and unsupported in doing this. The strong temptation, particularly given their large workloads, was to ignore the issues and then only once the disagreements had escalated to pass them over to the People Services team to try and resolve. This was particularly the case in relation to complex matters relating to the intersection between EDI and free speech [...]” (Paragraph 4.28)

“Managing disagreement should be regarded as an integral part of a manager’s job, and passing everything over to People Services is not a sustainable solution. Effective training for line managers should be provided to support them in dealing effectively with disagreements and enabling them to intervene early and effectively. This training should include how to manage disagreement including in relation to matters of EDI.” (Paragraph 4.29.)

“People Services did not always have the capacity for capabilities to provide effective advice in relation to complex matters which involved difficult strategic issues (such as in relation to sex and gender) where the OU’s policy position was not clear.” (Paragraph 4.30.)

See also: paragraphs 2.55 to 2.65.

The Review does not focus on the need for EDI personnel to be properly trained about free speech protection and about the interaction of legal obligations to protect people's speech with EDI related legal requirements and other programmes and agendas which are not legally mandated, so are effectively voluntary. Given that the Review cites EDI as a source of free speech problems, this should have been expressly mentioned.

### **Good free speech promotion and protection structures, separated from EDI**

Universities need to promote, effectively, the right of people to express their lawful views, freely, without personal attacks or other negative consequences, and to work to protect those rights.

Free speech cannot be successfully promoted and protected unless there is a structure for it, and a focused responsible officer to supervise and manage it. Some who spoke to Dame Nicola noted that, although there was a visible staffing structure supporting EDI at the OU, there was no one responsible for supporting free speech and academic freedom, or if they did exist they were less visible. It was suggested that this imbalance impacted on OU communications, both internal and external.<sup>37</sup> The Review's findings also highlighted the stark difference between "the transparent arrangements for EDI and its visible committees and reporting lines, with the lack of visibility of arrangements for free speech and academic freedom".<sup>38</sup>

There therefore need to be clear and effective structures, policies and requirements for promoting and protecting free speech. This is reflected, albeit imperfectly, in Recommendation 8 ("Systems and structures should be put in place to support the promotion of free speech and academic freedom"), which states that the "ongoing work to set up systems for promoting free speech and academic freedom through the development of the new Code of Practice should continue to be taken forward, notwithstanding the pause of the Higher Education (Freedom of Speech) Act 2023, and be clearly communicated to all staff and embedded in OU policies and systems".<sup>39</sup>

That structure has to be separate from the EDI function. The Review refers throughout to the conflict between EDI agendas and their promotion and enforcement, and requirements relating to free speech. Staff within the EDI function will inherently have too great a conflict of interests to enable them to protect "protected viewpoints" under the Equality Act, and other free speech rights, as committedly and effectively as is necessary. The Review states that:

- "The only possible way forward that allows for the appropriate manifestation of protected beliefs (even where those beliefs might conflict with another person's identity) and yet acknowledges each member of staff's fundamental right to determine and manifest their

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<sup>37</sup> See paragraph 2.16.

<sup>38</sup> See paragraph 4.11.

<sup>39</sup> See paragraph 5.8.1.

own identity, is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice”<sup>40</sup>; and

- the OU’s approach to ‘protected viewpoints’ and other ‘protected characteristics’ under the Equality Act “should be distinct”.<sup>41</sup>

The Review focuses on this separation/distinction as a solution to conflicting rights under the Equality Act, which was the primary focus of the case. However, a separation between free speech protection and EDI functions is also a “reasonably practicable step” which would make a profound difference to free speech protection for the reasons given above, so should also be regarded as required pursuant to Section 43. AFS and BFSP have long been advocating this separation. Many universities appear, though, to be very resistant to this, despite mounting evidence that EDI programmes, agendas and management are often a significant part of the problem. As mentioned above, the supposed conflicts between the free speech and EDI agendas can appear (or be made to appear) insuperable if managed by the same people. Our experience has been that, where responsibility for free speech protection lies with people whose primary focus is on EDI agendas, compliance failures repeatedly occur but go unrecognised by HEPs. A reasonable suspicion arises that some HEPs (or managers within them) are deliberately seeking to locate free speech protection management within their EDI functions in order to find ways of mitigating or avoiding their free speech obligations (from an EDI point of view). Separation is the only realistic answer to these compliance problems and would likely significantly contribute to moving free speech protection forward.

Free speech officer: The issues acknowledged by Dame Nicola in her Review combine to highlight the vital need for a dedicated free speech officer to lead that separated function and for that officer not to be part of the EDI function. This was not addressed head-on by the Review, and is an omission. It is discussed in detail in Part 4 below.

#### **4. Key requirements and what the Review missed, understated or made insufficiently clear**

**Key requirements for avoiding and dealing effectively with problems and disputes: what is not addressed: effective intervention and enforcement**

To bring various strands together, we consider that the relevant law requires that universities do the following, as explained in BFSP’s Statement *Free speech protection at English universities: The law and requirements in practice*. Most regulatory requirements and their implications in practice are addressed by the Review – but not all.

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<sup>40</sup> See paragraph 4.17.

<sup>41</sup> See Appendix 3, paragraph 6.

- Have appropriate requirements in place regarding behaviour, including prohibiting online attacks and bullying. See BFSP’s Statement [\*Requirements for staff and student behaviour: English HEPs’ free speech compliance obligations\*](#) for information on what is required and what relevant rules could look like. This requirement is addressed in the Review, albeit imperfectly.
- Ensure that its policies and requirements generally – and in respect of EDI agendas in particular – are structured so as not to inappropriately restrict free speech. This could be stated more clearly in the Review.
- Have adequate training and induction about the issues and the required standards of behaviour. This requirement is addressed in the Review, but not in as much detail as is desirable as it focuses on training staff to manage disputes effectively. Universities need to ensure that all their staff:
  - have sufficient understanding of the law and the requirements regarding free speech to the extent relevant to them and their responsibilities; and
  - understand what constitutes discrimination and harassment, what are protected viewpoints, and that discrimination against and harassment of people with such viewpoints is unacceptable; and that tolerant, personally respectful discourse, including when made through internal communications systems, is expected within the work environment, while making it clear that this requirement does not prevent staff from disagreeing, sometimes strongly, with each other’s ideas.
- Intervene promptly and effectively, and enforce their requirements appropriately, if necessary by bringing disciplinary proceedings. This requirement is not adequately addressed in the Review.

The Review rightly refers to "effective early management", "early intervention", the need to intervene proactively (although its vital importance is not given sufficient focus) and effectively to calm an angry dispute and restore tolerance through engagement, dialogue and explanation, and (too briefly) to enforcement. However, universities also need to:

- create consistent policies about disciplinary proceedings, and apply them consistently across all their operations;
- remind their staff and students of their policies and requirements;
- where appropriate, warn them of the consequences where they contravene these policies and requirements; and
- where appropriate, enforce their rules, including through disciplinary measures. The Review noted that several members of staff pointed to the Employment Tribunal’s “findings as evidence that the OU’s Bullying and Harassment Policy was neither understood nor enforced” and that the evidence gave "a sense that policies were not always enforced"<sup>42</sup>. [Recommendation 6](#) does refer to enforcing standards of behaviour

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<sup>42</sup> See: paragraphs 2.39 and 4.9.

but does not include the crucial need to be forceful where appropriate and use and publicise disciplinary measures.

It is fairly clear that, had the OU been ready to intervene effectively, early, and forcefully if necessary, and to warn of and if necessary apply disciplinary measures, the outcome would have been very different.

We ask: has the OU brought any disciplinary proceedings against the most extreme offenders in the Phoenix case? If not, why not? Has it noted on the records of those whose harassment caused the OU to breach its obligations that this has been the case?

Not identifying the need for enforcement, including through disciplinary measures where appropriate, is one of the Review's major missed opportunities. BFSP believes that this is one of its biggest single failings.

- Have appropriate separated systems and staff in place to enable problems, especially online attacks and pile-ons, to be dealt with rapidly and effectively. The staff need to be of appropriate seniority and experience, appropriately trained, not conflicted (by, for instance, strongly-held views which would make it difficult to deal with disputes objectively and even-handedly) and have available time. The Review refers to this requirement, but perhaps not in sufficient detail. A key requirement is for a focused officer with responsibilities for the promotion and protection of free speech. See further below.
- 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. This requirement is not addressed in the Review.
- Have appropriate and effective systems in place for reporting and management of disputes and other potential free speech problems, and for complaints procedures and systems in respect of free speech issues; and implementing procedures effectively and taking prompt and appropriate action where issues arise. This requirement is not addressed sufficiently in the Review.
- See below about institutional neutrality in relation to contentious issues.

Universities need to have appropriate systems in place for future review and improvement of their policies, practices and requirements in the context of protecting free speech and academic freedom.

## **Students**

The Phoenix case was primarily about staff behaviour and the OU's failure to manage it. Student behaviour was therefore outside the Review's remit. Nonetheless, the OU (and universities more generally) needs to remember that many requirements similar to those highlighted in the Review and in this Statement (for instance, promoting free speech appropriately, having appropriate rules regarding behaviour and adequate training) also

apply in respect of students. They need to ensure that such requirements are properly addressed and implemented.

### **Responsible officer for free speech promotion and protection**

The discussion in Part 3 under “Good free speech promotion and protection structure, separated from EDI” highlights the need for:

- a structure for free speech promotion and protection, which has to be separate from the EDI function (identifying this is one of the Review’s big contributions towards moving free speech protection forward); and
- vitally, but not mentioned by the Review, a dedicated free speech officer responsible for that separated function (this was not addressed head-on by the Review and is an omission). AFFS and BFSP have long been advocating this. An example from the Review of why such a person is so important is [Recommendation 2](#), for a working group to oversee the implementation of the recommendations: this lists recommended members, including a senior person from the EDI team, but fails to require a person to advocate for free speech. How can the OU have a hope of getting the free speech protection aspects of the solutions right without a person on the group whose focus is on advocating for and working to protect free speech, given that the interests of the EDI team and People Services militate (as described in the Review itself) towards minimum interference with their agendas – or avoiding unpleasant and difficult controversies and having a quiet life?

The free speech officer should 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.

The officer should not have a material role in the EDI function, for the reasons discussed above.

### **Sufficient institutional neutrality**

[Recommendation 1](#) proposes various “underpinning principles” that can inform the implementation of the Review’s recommendations.<sup>43</sup> One of these is headed “[...] the OU should adopt a policy of institutional neutrality in relation to contentious issues (unless relevant to the OU’s strategy)”. The text explaining this proposed underpinning principle then

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<sup>43</sup> Recommendation 1 (paragraphs 5.1.1 and 5.1.2) is that the OU’s Council and the Vice-Chancellor’s executive team should “discuss and agree a set of underpinning principles regarding free speech, equality and employment rights, as proposed in Appendix 3, that can inform the implementation of this report’s recommendations”.

states: “[...] to help secure academic freedom, the OU (and its departments and schools) should remain neutral between trans inclusive and gender critical views” and that “Consideration should be given to extending a policy of institutional neutrality to other contested areas (unless those areas have direct relevance to the OU’s mission and strategy)”.<sup>44</sup>

This is not as clearly or firmly stated as BFSP considers the law requires (see the discussion below) and is defective for the following reasons in particular.

- A failure of neutrality on a contentious issue was at the heart of the compliance fiasco that was the Phoenix case, so, while it is important for achieving good free speech protection that the need for institutional neutrality is expressed in the Review, the fact that it is set out only in proposed underpinning principles, rather than as its own clear recommendation for a long-term position, is inadequate.
- The qualifications with reference to the OU’s mission and strategy are a cause for real concern. To the extent that this is limited to policies relating to, for example, anti-bullying and harassment, this is unexceptional insofar as such policies accurately reflect what is legally required (see Part 2 above). To the extent that wider agendas and concerns are reflected in those policies and strategies, those policies and strategies need themselves to be adjusted so they are free speech compliant. If they were permitted to override the principle of neutrality, that would lead straight back to the problems that caused the Phoenix disaster and were the subject of the Review, and to likely unlawfulness (as discussed in Part 2 and below). Given that Appendix 4 makes clear that the OU’s mission and strategy involves fundamental commitments to an EDI agenda, elements of which will themselves be highly contested,<sup>45</sup> the likelihood of a repeat of everything that went wrong in the Phoenix case is obvious.
- Institutional neutrality needs to extend to all potentially contentious matters, as the heading to the section in the Review indicates. The fact that this is not clearly stated in the detailed text as being required to extend beyond the trans/gender critical debate (the words “consideration should be given to” are relevant here) implies that this is optional and that there is scope for abandonment of wider institutional neutrality. Institutional neutrality is not optional, if compliance failures are not to follow.
- The Review’s recommendation that that this principle also be discussed with “staff groups, and the trade unions” and that, following the discussions she recommends,

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<sup>44</sup> See Appendix 3, paragraph 7.

<sup>45</sup> As Appendix 4 notes, “OU Strategy 2022-27” states that: “Guided by our values to be inclusive, innovative and responsive, we ask of ourselves and other than we take personal responsibility for our behaviour and hold each other to account for our words and actions to achieve the equity diversity and inclusion that will make us an even better university” (emphasis added).

“adjusted as appropriate, and published”<sup>46</sup>, could be taken to imply that this is optional, which it is not. This is, again, inappropriate.

Legal needs for institutional neutrality: The relevant legal requirements for free speech protection lead inevitably to a need to adopt sufficient institutional neutrality so as to ensure compliance with universities’ obligations. 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. Beyond the Phoenix case, number of other 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.

Universities and their representatives therefore need to maintain sufficient institutional neutrality on matters of polarised public debate: i.e., at an institutional level, to 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 the Human Rights Act and their duty under the Education Act to take all reasonably practicable steps to secure freedom of speech. This is also the expectation of the OfS, whose recent draft guidance has several examples of the consequences of failures of neutrality.<sup>47</sup> Achieving sufficient neutrality on a piecemeal basis would be difficult, as it would be hard to be sure of complying in the context of the great variety of factual circumstances and legal requirements that may apply. It would involve risk and a lot of time from senior staff – and inevitably expensive legal advice. It therefore appears that a general policy of maintaining institutional neutrality on controversial issues is the only realistic way forward.<sup>48</sup> This principle needs to extend to staff when acting in senior management roles, or in other roles which carry an effective implication that the relevant person represents the university.

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<sup>46</sup> See Recommendation 1 (paragraphs 5.1.1 and 5.1.2).

<sup>47</sup> See Examples 4, 5, 6, 7, 9, 10, 14, 22, 23, 28, 29 and 30.

<sup>48</sup> 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 and Queen Mary, London, have adopted a formal policy of neutrality as part of their free speech codes. We expect more to follow.



### **Reducing a complaints culture and managing complaints connected with people's viewpoints effectively: not allowing complaints and disciplinary functions to become instruments of free speech suppression**

The Review rightly refers to excessive complaints being made against people, and complaints creating a chilling effect (see Part 3 above). This is a widespread problem which AFFS has encountered regularly.

The Employment Appeal Tribunal has stated that the threshold for (the violating dignity aspect of) harassment is not met by speech that is "trivial or transitory, particularly if it should have been clear that any offence was unintended" and that it is "important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."<sup>49</sup> Further, that beliefs which "may well be profoundly offensive and even distressing to many" may be "beliefs that are and must be tolerated in a pluralist society".<sup>50</sup>

The Review does not, however, follow through with specific recommendations about how to deal with these complaints, even though various steps are, AFFS considers, required by the relevant law.

Having appropriate requirements: universities need to make it clear that:

- complaining about someone's views is unacceptable unless those views, or their expression, are unlawful or in breach of the HEP's rules (which are themselves written so as not to inappropriately suppress speech); and
- complaining or making allegations about a person, apparently about matters other than expressions of their viewpoints, is also unacceptable if primarily motivated by dislike of their viewpoints.

Handling complaints effectively: not allowing their complaints and disciplinary functions to become instruments of free speech suppression: 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 person's lawful speech or viewpoints. This process should ensure rejection of vexatious, frivolous or obviously unmeritorious complaints at an early stage. In the *Meade* case, the Tribunal criticised an apparent greater willingness to accept complaints from a favoured side of the sex/gender debate.<sup>51</sup>

Universities should not encourage students or staff to report other people over opinions or speech that would (or is likely to) involve the lawful expression of a particular viewpoint. A university must treat all complaints arising from or relating to holding or stating lawful

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<sup>49</sup> *Dhaliwal v. Richmond Pharmacology* [2009] ICR 724, [2009] ILRL 336 at paragraph 22.

<sup>50</sup> *Forstater v. CGD Europe et al.* (2021: Appeal No. UKEAT/0105/20/JOJ)

<sup>51</sup> *Meade v. Westminster City Council and Social Work England* (2024) ET Case No: 2201792/2022 & 2211483/2022).

opinions and viewpoints with considerable caution. Complaints processes should be concluded as rapidly as is reasonably practicable, compatibly with the interests of justice. A university should conduct complaints and disciplinary proceedings in such a way as to avoid unlawful discrimination and harassment or a failure under other legislation. This is explained in greater detail in BFSP's Statement [\*Requirements for staff and student behaviour: English HEPs' free speech compliance obligations\*](#).

### **Review relationships with campaign organisations**

When discussing the institutional position of the OU, the Review notes that respondents with gender-critical perspectives generally believed that "OU policy was overall more supportive of trans inclusive perspectives than gender critical" and that this was "exemplified in the university's membership of the Stonewall UK Diversity Champions Programme".<sup>52</sup> Stonewall is an LGBTQ+ charity which argues that gender critical views are "transphobic", and which has campaigned for there to be "no debate" over its position in the "gender critical" vs "trans inclusion" debate – an objective which would involve preventing the expression of gender critical views.

The proposed Underpinning Principles in Appendix 3 of the Review<sup>53</sup> state that the OU "should remain neutral between trans inclusive and gender critical views".<sup>54</sup> In the light of that underlying principle (which BFSP agrees clearly reflects required compliance) and the need to adopt institutional neutrality as discussed above, it is difficult to see how the OU can continue to be so closely connected to Stonewall and aligned to its objectives through the Diversity Champions programme. To achieve institutional neutrality and reduce the risk of the sorts of failures that occurred in the Phoenix case, the OU should, as a minimum first step, review its relationship with Stonewall. To the extent necessary to achieve institutional neutrality, the relationship must be restructured, or if this not possible, discontinued (as it has already been at a number of other universities). University relationships with other organisations which campaign on matters of significant political or societal contention should similarly be reviewed. Beyond noting the views of gender critical respondents, the Review does not further address the risks of the OU's relationship with Stonewall. This is a significant omission.

As a matter of wider principle, where such a relationship requires a university 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,<sup>55</sup> or result in it

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<sup>52</sup> Section 2: Evidence from the meetings and written submissions, 2.27.

<sup>53</sup> As to which, see Recommendation 1 (paragraph 5.1.1).

<sup>54</sup> See Appendix 3, proposed Underpinning Principle 7.

<sup>55</sup> The policies or requirements of universities 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 university's and its participants' obligations and/or operate to

failing to maintain a sufficient level of institutional neutrality on contested issues as discussed above, the relationship has to be restructured to avoid unlawfulness and compliance failures. See BFSP's Statement [\*Free speech risks of relationships with campaign organisations for English universities\*](#) for greater detail about these risks<sup>56</sup>.

## Best Free Speech Practice

January 2025

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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.

<sup>56</sup> Specific examples of actions which are highly likely to involve unlawfulness or compliance failures include discriminating against a person in connection with their lawful viewpoints, for instance by refusing them admission or “marking them down” in job application and promotion processes, or requiring candidates to commit (or give evidence of commitment) to certain values, beliefs or agendas; and having mandatory training about contested issues and agendas, and requiring “tests” in such training to be answered in certain way to have “passed”.