EDI and similar courses, training and tests

Free speech requirements and risks for English universities

PRELIMINARY – this Statement sets out the applicable legal obligations under the Higher Education and Research Act 2017 ("HERA") and other legal requirements for free speech protection at English HEPs, and their implications in practice. More detailed information is contained in BFSP's other statements referred to below. This Statement is also an accurate statement in all material respects of the effects in practice of the obligations in the Education (No 2) Act 1986.

Recent amendments to HERA were made by the Higher Education (Freedom of Speech) Act 2023 ("HEFSA"). The main provisions of HEFSA were due to come into effect on 1st August 2024, but this was suspended by the Secretary of State for Education, Bridget Philipson following the election of the Labour Government. The Government has now committed to bring an amended version of HEFSA into effect.[1] This Statement describes the obligations under HERA, when HEFSA is amended and comes into effect in the manner that the government intends. These major changes will come into effect on [a date which is yet to be specified].

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. IT MAY BE OUT OF DATE: see its publication date and also the important notice at page 17.

Introduction

Best Free Speech Practice ("**BFSP"**) is a non-partisan campaign to clarify and publicly share the actual legal requirements for protecting free speech and academic freedom at UK universities and other Higher Educational Providers ("**HEPs**") and their implications in practice. These requirements are generally much more demanding than HEPs appear to appreciate.

Most (if not all) English HEPs have courses, training and (sometimes) tests, which are often compulsory, for staff and students regarding matters such as behaviour and language, diversity and attitudes to racial and sexual matters. Such training is very often associated with

[1] In a statement to Parliament on 15th January 2025. The amendments intended by the Government involve the repeal of certain sections of HEFSA.

equality, diversity and inclusion ("**EDI"**) agendas. This is usually part of formal induction and matriculation processes for staff and students. It is also part of general (sometimes compulsory) staff training, both for academics and for administrators. We refer to these courses, training and tests as "**EDI Training**", although their scope may be wider than just EDI topics.

Aspects of EDI Training have become controversial, particularly where certain viewpoints are required to be agreed with in order to have successfully completed training or to "pass" tests. This seems to be a consequence of HEPs acquiring courses or modules from activist organisations whose purpose is to promote a particular viewpoint about contested issues while supressing other lawful views.

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

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

Part 1: Relevant law and regulation

BFSP has provided detailed information about the relevant legal and regulatory requirements for the protection of free speech and their implications in its Statements ***Free speech protection at English universities: the law and requirements in practice*** (the "**Principal Statement**") and ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others*** (the "**BFSP EA Statement**"), which can be found at https://bfsp.uk/universities-and-free-speech. Consistent with the Principal Statement, the requirements under HERA, the Equality Act, the Human Rights Act, and the registration conditions of HEPs are together referred to in this statement as the "**Relevant FS Requirements**".

HERA and related guidance

Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017 1 ("**HERA**")[2] require the governing bodies of English HEPs 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**") at, and visiting speakers to, HEPs.

This a demanding requirement and requires active, positive steps to be taken: rather paying lip service to the importance of free speech is not enough. It is stated in objective terms, giving little material discretion to HEPs as to what steps they need to take. [3] Free speech obligations

[2] As introduced by the Higher Education (Freedom of Speech) Act 2023 with effect from [date when known].

[3] Consistent with this, paragraph 41 of the Draft OfS Guidance (referred to further below) states: "Where a step is reasonably practicable for an organisation, it must be taken."

override other considerations, subject only to two limitations: that the relevant speech must lawful; and that the relevant step must be one which is, objectively viewed, a reasonably practicable one for the HEP to take. (See the Principal Statement for detailed discussion of these concepts.)

The fact that an HEP may have policies, programmes and requirements which may be thought to conflict with the free speech obligations in HERA will not mean that steps required to secure free speech are not reasonably practicable unless those policies *etc* are themselves required by law.[4] This is a matter of compliance with an objective legal requirement, and the conflicting subjective views and priorities of HEPs (or their EDI departments) are likely to have little relevance. Furthermore, the duty to act under HERA will usually override duties to "think" such as the duty to "have regard to" certain matters under the PSED (see below). Interpreting potentially contrary laws and requirements correctly is going to be vital at English HEPs, as over-interpretation creates major risks for them. Detailed information about the necessary approach in order to resolve such perceived conflicts appropriately is set out in the Appendix to the Principal Statement.

Sub-sections A1(5)-(7) of HERA provide that academic staff must be 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.

The Office for Students ("**OfS**") has issued draft guidance ("**Draft OfS Guidance**") about the legal requirements in HERA which have been introduced by HEFSA.[5] The Draft OfS Guidance includes specific provisions relevant to EDI training. We consider that the Draft OfS Guidance correctly reflects the relevant legal requirements under HERA. The Guidance also likely reflects the OfS' expectations for HEPs.

Most relevantly, the Draft OfS Guidance specifically states:

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

We consider that this is a correct reflection of the requirements in HERA, although it is important to note that those requirements apply more widely, so include both students and staff other than holders of academic positions.

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[4] "Required by law" has an extended meaning for these purposes. It includes, for example, steps required by a HEP itself to the extent that they reflect its legal obligations or are necessary to secure a legitimate end (and are "*proportionate*" in their application) in accordance with the principles arising under the HRA discussed below.

[5] I.e. the OfS' "*Regulatory advice 24: Guidance related to freedom of speech*".

Equality Act

As is now clearly established in case law, various viewpoints about currently contested issues are protected philosophical beliefs ("**Protected Viewpoints**") under the **Equality Act 2010** ("**Equality Act**").[6]

Employers and education providers must avoid discrimination against and harassment[7] of people with Protected Viewpoints in certain contexts, including employment and further and higher education.

Protected Viewpoints include (but are by means limited to) so-called "gender-critical" beliefs, anti-Zionist beliefs, and viewpoints which contest aspects of so-called "critical race theory". The law in this area is still evolving[8].If they wish to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as Protected Viewpoints in appropriate circumstances and will, in time, be confirmed as such. Such obviously contested areas would include, for example, other aspects of critical race theory, the co-called *"decolonisation"* of the school and university curriculum, views in relation to religions and their effects, and views in relation Israel and Palestine. Employers are liable for discrimination and harassment committed by their employees in the course of their employment, unless they can establish the defence provided under Sub-section 109(4) by proving that they took all reasonable steps to prevent this happening ("**the Section 109 Defence**"). This has given rise to some now well-known embarrassments and liabilities on the part of employers for failing to take sufficient steps to prevent harassment of their employees by their colleagues because of their Protected Viewpoints. See the BFSP EA Statement for detailed discussion of this.

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 such responsibilities on the HEP's part* [9].

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[6] "Religion or belief" is identified as a "protected characteristic" under Sections 4 and 10 of the Equality Act. Sub-section 10(2) states that: "Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

[7] Which includes creating a hostile environment.

[8] Per the decision of the Employment Appeal Tribunal in *Grainger plc v. Nicholson* [2010] IRLR 4, the essential criteria for protection are that a belief must be genuinely held and relating to a weighty and substantial aspect of human life and behaviour, and must be "worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others". The threshold for satisfying the "worthy of respect" test is not a high one. Case law makes clear that only extreme views (e.g. belief in totalitarianism) would not satisfy it. Veganism, a belief in Scottish independence, gender critical beliefs, opposition to critical race theory with support for the attitude of Martin Luther King towards race, and anti-Zionist beliefs, have all been held to be philosophical beliefs protected under the Equality Act 2010, on the principles set out in the *Grainger* case. See further discussion in the BFSP EA Statement.

[9] Other than limited duties under parts of the PSED as discussed below.

Opinions expressed by the HEP's staff via their private social media are not, therefore, normally the HEP's problem or concern under the Equality Act. In general, HEPs are also not responsible under the Equality Act for the behaviour of their students. See the Principal Statement for more detail about this aspect.

Subject to those limitations, however, HEPs should act on the basis that they have a legal obligation to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them. 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.

HEPs are subject to the Public Sector Equality Duty ("**PSED**") imposed under **Section 149** of the Equality Act. The PSED requires HEPs "to have due regard to" the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The words "have due regard to" mean that the PSED is a duty to consider and not a duty to act. It has been described as a "process duty not an outcome duty". Positive duties to take action (including both those now included in HERA and the need to avoid discriminating against or harassing people with protected viewpoints under the Equality Act) are, therefore, likely to override the PSED. Furthermore, the PSED is very specifically worded, and does not require (or justify) consideration of an HEP's wider EDI related programmes or agendas beyond the specific stated aims. All of the above is discussed in detail in the BFSP EA Statement.

Human Rights Act

Given that most (if not all) HEPs are *"public authorities"*, the fact that the freedom of thought and expression of Participants and visiting speakers are specifically protected under the **European Convention on Human Rights** (the "**Convention**")[10], as enacted in the UK by the Human Rights Act 1998 ("**HRA**"), is an obviously relevant consideration in ascertaining whether any EDI Training at HEPs is lawful. Again, further detail about the relevance of the HRA in the HEP context is to be found in the Principal Statement.

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

The free speech rights protected under the HRA include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic freedom. Any interference by an HEP with the expression of opinions and academic freedom of its academics and students will require exceptional justification.

Unlike the right to freedom of thought, the right to free expression is subject to the qualification that the *"exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society"* for various specified purposes, including for the protection of the rights of others. This qualification is, though, itself subject to a requirement that such restrictions be accessible, clear and precise, and to a *"proportionality"* test. Contrary laws and legal obligations can thus operate to restrict free speech rights, to a limited extent.

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"[11] 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".[12] 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".[13] Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10.[14] 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 enshrined in the HRA 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".[15] The nature and extent of these positive obligations are, however,

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

12 Ibid, concurring judgements paragraph 3.

13 See: *Kula v. Turkey*, App. no. 20233/09 (2018).

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

15 See: *Dink v. Turkey*, judgement of 14 September 2010 in French only, at 137.

unclear. They must include making it clear that Participants are expected not to take actions which materially interfere with other Participants' free speech rights, training them appropriately and ensuring that its own policies and requirements are not such as restrict Participants' free speech rights (this is discussed in detail elsewhere).

Reindorf Opinion

An analogous example of the potential legal issues which arise in relation to EDI Training can be found in a detailed opinion by the specialist barrister Akua Reindorf KC[16] 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". Ms Reindorf found that the requirement to demonstrate support was likely to be unlawful discrimination against individuals with protected philosophical beliefs. This was because the university's approach to equality, diversity, and inclusion in part "actively contradicts the law" and is "partisan and ideological in nature". The same must be true of any EDI Training which requires students or staff to demonstrate their agreement with contested views endorsed by HEPs (or their EDI departments).

In particular, EDI Training which requires staff or students, in order to have "completed" their training, or as a condition of starting their job or course of study, to provide "correct" answers to tests or not to dissent from certain views, especially where the training goes beyond what is legally justified (as discussed below), are also likely constitute unlawful discrimination under the Equality Act.

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

The Dandridge Review[17] is a report, published in September 2024, following an independent investigation commissioned by the Open University ("**OU**") into its failure to manage disputes and prevent unlawful harassment of Professor Jo Phoenix over her views.[18] 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 (as referred to by several witnesses) and an imbalance between EDI and free

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

17 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.

18 Those failings were identified in a damning judgment of the employment tribunal which determined Professor Phoenix's proceedings against the OU for unfair and wrongful dismissal and harassment and discrimination under the Equality Act: https://www.judiciary.uk/wp-content/uploads/2024/01/Joanna-Phoenix-v-The-Open-University-Employment-Tribunal-Reserved-Judgment.pdf.

speech requirements and agendas. It cited numerous ways in which EDI requirements and agendas cause problems for free speech. The Review also recommended an "underpinning principle" 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.

The key consequential requirements of the Relevant FS Requirements

There is a large range of actions which are required as a consequence of the Relevant FS Requirements. These are discussed in detail in the Principal Statement. The most relevant are the following.

- **Not enforcing controversial agendas:** In recent years, some HEPs have promoted certain viewpoints about areas which are the subject of debate or controversy. This gives rise to various free speech issues and concerns and, in order to avoid unlawful actions, HEPs and their representatives need to avoid enforcing controversial agendas including via EDI Training and as discussed in detail in Part 2 below.

- **Not allowing its administrative, EDI and other functions to become instruments of free speech suppression:** For instance, by pursuing inappropriate (often unlawful) disciplinary processes relating to expressions of viewpoints, or taking the actions described below.

- **Maintaining sufficient institutional neutrality:** In order to avoid unlawful actions, HEPs and their representatives need to maintain sufficient institutional neutrality on matters of polarised public debate, as discussed in detail in Part 2 below.

- **Avoiding and reducing an oppressive atmosphere**: Given that the existence of an atmosphere in which Participants feel intimidated about expressing their opinions gives rise to obvious risks of self-censorship and very harmful effects on free speech at HEPs, HEPs are required by their primary HERA obligations to take all reasonably practicable steps which might stop such an atmosphere developing in the first place or persisting if it already has. Qualifying for the Section 109(4) Defence under the Equality Act can also require this. BFSP recognises that this is not easy to address, but HEPs need to give this careful thought and take available action.

- **Avoiding or restructuring any association or relationship with any organisation** where that relationship requires it to take sides in relation to contested issues or requires or

encourages it to suppress the expression of views which dissent from the agenda being promoted by any such organisation.[19]

- **Ensuring that Participants have adequate induction and training** about protection of free speech, and that they understand the nature of the requirements to protect free speech.[20] This will likely be particularly important and extensive for staff who are involved in functions which could create free speech risks or have free speech implications.

Regulatory requirements: conditions of registration

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

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

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

Free speech codes and related rules

HEPs must maintain a free speech code of practice ("**FS Code**") and must have rules to ensure compliance with its free speech obligations[21]. FS Codes should expressly prohibit material actions by Participants against people in respect of their viewpoints.

Constituent institutions and students' unions

When HEFSA is brought into effect, the same duties and remedies imposed on HEPs themselves under HERA will also directly apply (subject to minor adjustments) to colleges, halls, and other "*constituent institutions*" of HEPs. This is a major change. The Equality Act

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[19] The policies or requirements of HEPs are sometimes written in ways which reflect the viewpoints or desired outcomes of campaign organisations, but which misrepresent relevant legal requirements or the nature of the HEP's and Participants' obligations and/or operate to suppress dissenting viewpoints, for instance through "no debate" policies. Free speech issues with EDI Training have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

[20] The Draft OfS Guidance contains detailed requirements in this regard, which are discussed in he Principal Statement.

[21] HERA Section A2, effect in practice.

already applies to constituent institutions and also, with the exception of the PSED, to students' unions. By contrast, the HRA does not apply to constituent institutions which are not themselves *public authorities*, or to students' unions.

HEPs' own duties require them to take their own steps, to the extent reasonably practicable given the nature of their structures and relationships, to ensure compliance by their constituent institutions and students' unions, as regards the HEP's Participants, at the least. This is discussed in detail in Part 3 of the Principal Statement.

Part 2: What the law requires in practice

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

There is a key distinction between:

- EDI Training which is necessary or justifiable pursuant to other legal obligations or non-mandatory, but otherwise justifiable, restrictions on speech as discussed below; and

- other EDI Training, which is effectively voluntary.

This is particularly important where such training reflects programmes, agendas or ideologies which are wider than what is required under (for instance) the specifically worded requirements of the Equality Act. If HEPs, despite considerations of institutional neutrality, offer (or permit) such training, it is crucial that the distinction between what is legally justifiable and what is not is kept firmly in view. This is explored below.

Legally justifiable EDI training: limited application

EDI Training pursuant to other legal obligations and proportionate for other limited purposes

EDI Training can be required to be undertaken by relevant staff in order for an HEP to comply with its legal obligations. For example, HEPs might require relevant staff to undergo training so as to ensure compliance their obligations under the Equality Act to avoid or prevent unlawful discrimination or harassment.[22] It should be borne in mind, however, that HEPs have limited obligations under the Equality Act in respect of the behaviour of students (as

[22] Such training might be necessary in order for a HEP to demonstrate, as required by the Section 109(4) Defence referred to above, that it has taken all reasonable steps to prevent actions on the part of its employees for which it is liable under the Equality Act. Training might also be necessary in relation to compliance with the PSED albeit that, as already noted, as this "take due regard" duty is likely to be overridden by the positive obligations under HERA.

opposed to employees). It will, therefore, be difficult to justify mandatory student-focused EDI Training under that Act.

Further, training which, while one cannot point to a specific law to which it relates, addresses legitimate concerns and is "*proportionate*" for the purposes of the HRA, could be justifiably required of relevant staff and students to the extent it is focused exclusively on such concerns. Examples of this might include general training relating to the avoidance of bullying and harassment and the need for mutual tolerance.

Where EDI training is imposed on staff in order to ensure compliance with HEPs' other legal obligations, it is unlikely (so long as carefully designed) to be regarded as inconsistent with HEPs' obligations to protect free speech. It can also be legitimate to have (carefully constructed, "*proportionate*") anti-bullying and anti-harassment rules which go beyond the strict terms of the Equality Act or the Protection from Harassment Act 1997, and these can operate to restrict otherwise lawful speech, provided this is done proportionately and in line with OfS guidance[23]. Note that what is "*proportionate*" is not for HEPs to decide, it is a legal concept: they will need to construct and focus any relevant rules with extreme care.

To the extent that the nature and extent of EDI Training goes beyond what is strictly necessary to deliver legally justifiable ends as discussed above, it is voluntary on the part of the HEP, and needs to be considered under the second category below.

Identifying the scope of legally justifiable EDI Training

In order to count as legally justifiable (and made compulsory on that basis), the nature and extent of EDI Training will need to be such as are required to achieve the justifiable objectives, and no more.

The following are some relevant requirements and factors.

- HEPs will need to properly understand the actual legal requirements of the Equality Act or other relevant law, so that it is interpreted and applied correctly. In particular, HEPs must not over-interpret the scope and application of the concepts of discrimination, harassment and "proportionality" as very specifically defined in the legislation and interpreted by the courts (see the discussion of this subject in the Principal Statement) so as, for instance, to create "risks" or "requirements" which do not in fact arise under the relevant law. The new condition of registration E6, referred to above, will be significant in this regard.
- It will be important to keep the Relevant FS Requirements in mind and ensure that the interaction of the EDI Training and the Relevant FS Requirements is properly understood

[23] Both the Draft OfS Guidance and the guidance on the new condition of registration E6 re harassment (in effect from 1 August 2025) - see https://www.officeforstudents.org.uk/for-providers/student-protection-and-support/harassment-and-sexual-misconduct/condition-e6-harassment-and-sexual-misconduct/. That guidance envisages harassment rules extending beyond the EA and Protection from Harassment Act, but includes various important protections for freedom of speech.

and managed successfully. HEPs will need to act to minimise any negatives for free speech while delivering any EDI training required to achieve the necessary compliance objectives.

- The PSED might be relevant to decisions as to what is included in EDI Training. As already noted, however, the PSED is a duty to consider and does not create any positive obligation to take action and is, therefore, usually overridden by positive duties to act (such as the free speech obligations under HERA). In reaching decisions relating to EDI Training, HEPs will be required to take account of the overriding duties to protect Participants' free speech and thought. Treating the PSED as somehow justifying compulsory EDI Training would likely give rise to an immediate risk of contravening the Relevant FS Requirements.

Even where EDI Training is justified as discussed above, the Relevant FS Requirements still apply, so the EDI Training must only limit free speech to an extent that does not contravene the Relevant FS Requirements. If this is achieved, HEPs:

- may be justified in having certain kinds of EDI Training, with certain kinds of contents;
- may be able, indeed required, to make such EDI Training compulsory for relevant Participants; and
- may legitimately test Participants' understanding of the information imparted and require confirmation of an intention to comply with the HEP's requirements as to behaviour.[24]

HEPs must not, however:

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

While, in our experience, EDI Training is seldom structured and focused so as to be defensible as legally required or justified, with appropriate focus and discipline there seems to be no reason why EDI Training cannot be designed so as to comply with all of an HEPs relevant legal obligations and legally justifiable objectives, including the Relevant FS Requirements. What often appears to be lacking is the will to ensure such compliance, rather than the means.

EDI training which is not legally justifiable: compliance limitations

Most EDI Training goes beyond what is legally justifiable. All too often, EDI Training (including some which is compulsory) is obviously non-complaint with the Relevant FS

[24] As is, in any event, commonly required under the terms of employment contracts between HEPs and their employees and/or student conduct rules.

Requirements, as explained below. As a result, some HEPs appear to have been acting (and still to be acting) contrary to their legal obligations by doing (or not doing) some or all of the following.

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

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

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

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

If so, such EDI Training will be contrary to some or all of the Relevant FS Requirements (and, very likely, to an HEP' own FS Code or rules).

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

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

To the extent that EDI Training which is not justified by reference to an HEP's other legal obligations:

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

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

A good example of such non-compliance would be EDI Training which equates gender-critical views with transphobia[25]

Compulsory training, or presenting non-attendance negatively

Forcing Participants to attend EDI Training relating to contested subjects and/or containing content about which Participants are entitled lawfully to hold differing views will almost inevitably be contrary to some or all of the Relevant FS Requirements (and HEPs' own FS Codes or rules). For instance, to the extent that the fact that EDI Training is compulsory (or non-attendance is presented negatively):

- has the effect of sending a message to Participants that there are views which it is effectively compulsory to hold and express, and unacceptable to dissent from; or

- is likely to create or contribute to an intimidating or hostile environment (whether at the training or more generally) for those Participants who disagree with those viewpoints or aspects of them, and

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

Make right to dissent clear

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

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

The Draft OfS Guidance[26] states that: a statement about an HEP's FS Code should be included prominently in any document stating or explaining any policy that may affect free speech, that the statement should make clear that nothing in that other document should be read as undermining or conflicting with the FS Code and that, in case of any conflict, the FS Code will take precedence. This guidance applies explicitly to all policies relating to equality (or equity), diversity and inclusion, harassment and bullying and staff and student codes of conduct. While the Draft OfS Guidance does not make express reference to EDI Training content or

[25] Cases under the Equality Act have shown that this sort of negative stereotyping can be unlawful harassment (see for instance the *Meade and Phoenix cases discussed in the BFSP EA Statement*).

[26] See paragraph 75d.

materials, we nonetheless regard it as a strong indication of the likely expectations of the OfS in this context as well; we also consider that it reflects what the law requires.

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

Courses and materials acquired from (or otherwise designed or approved by) external campaign groups or activists (such as Stonewall) will involve increased risks as regards compliance with an HEP's freedom of speech obligations, unless they have been carefully vetted by the HEP to ensure that they comply with its free speech obligations.[27] Accordingly, if HEPs wish to provide EDI Training in areas of potential public controversy, they should either design them themselves having regard to their free speech obligations or ensure that materials provided by third parties are properly vetted to ensure that they are compliant.

Stating inappropriate requirements for Participant behaviour

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

Not misrepresenting or overstating the scope or effect of contrary laws

Identifying the limits to the scope which it is appropriate to give to duties and laws which overlap with or otherwise potentially affect the Relevant FS Requirements (for example, the anti- discrimination and harassment provisions in the Equality Act), requires care.

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

A common example of a misleading statement, which we see regularly, is that the Equality Act generally outlaws discrimination and harassment. In fact, however, that legislation only outlaws discrimination and harassment perpetrated by specified parties in specified contexts,

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[27] See the Reindorf Opinion for the legal risks of creating policies to satisfy the interests of campaign groups. Similar risks apply in respect of training courses. Relevantly, Ms Reindorf KC advised (at paragraph 70) that:

> "*A consequence of crafting internal policies with the aim of satisfying the ideological preferences of single-interest accreditation schemes is that it carries a risk of disturbing the balance of rights which the EqA seeks to achieve. Of relevance in the current context, it is likely to result in a conflict between the employer's policy aims and the rights of employees who hold protected philosophical beliefs which conflict with those of the accreditation schemes in question. For example, any requirement placed by KCL upon members of staff to demonstrate support of the gender identity belief is plainly likely to place people with gender critical beliefs at a disadvantage, particularly if it is accompanied by a penalty for failure to demonstrate such support.*" https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf

such as employment and education, with respect to specified protected characteristics including certain protected viewpoints. It applies to actions of HEPs, and their employees in the course of their employment and their agents when performing functions for the HEP, but generally not to actions of students, or staff in other circumstances. Another common misstatement of the law is about what falls within the "protected characteristic" of gender reassignment.[28] These misapprehensions – and resultant misstatements – often result in inappropriate (and potentially unlawful) restrictions on Participants' rights for free speech and expression.

Key underlying compliance need: not enforcing controversial agendas

In recent years, some HEPs have promoted certain viewpoints in respect of areas which are the subject of debate or controversy. This gives rise to various free speech issues and concerns. Whenever such promotion (directly or indirectly) requires or exerts pressure for the endorsement of or acquiescence to those viewpoints, or suppresses the expression of lawful dissenting viewpoints, there will be a clear breach of the primary requirements under HERA, subject to the limitations on those requirements discussed above.[29] Such taking of sides also risks creating a hostile environment which constitutes harassment under the Equality Act and also risks a breach of free speech rights under the HRA. An institution's disapproval of a particular lawful viewpoint has already been held to be sufficient to constitute harassment.[30] HEPs must therefore avoid imposing or enforcing controversial programmes and agendas, and in particular must not require Participants to commit (or give evidence of commitment) to values, beliefs or ideas being promoted by them, to the extent that to do so would (among other things) contravene their obligations under the Relevant FS Requirements, and this is reflected in the Draft OfS Guidance as discussed above.

Key underlying compliance need: sufficient institutional neutrality

The above requirements and risks highlight an underlying issue of more general importance: 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, and creating or tolerating environments in which attacking people for their viewpoints is acceptable. A number of recent public failures (with unlawful harassment and discrimination found by tribunals) have largely arisen as a result of an underlying failure of objectivity and

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[28] Which then leads to other errors and unlawfulness. If HEPs incorporate Stonewall's definition of transphobia into their rules, which results in holding gender-critical views being a disciplinary offence, this is unlawful.

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

[30] In the *Meade* case and also the *Fahmy* case (both described the BFSP EA Statement**)**).

endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate.[31]

HEPs and, whenever representing the HEP as an institution, their relevant employees and other representatives, therefore need to maintain sufficient institutional neutrality on matters of polarised public debate. By this we mean that they should take care to avoid actions, statements and language which by taking a side in relation to publicly contested issues risks suppressing free speech at the HEP (and, in an extreme case risks breaching the HEPs legal obligations under HERA and the HRA and itself amounting to discrimination or harassment under the Equality Act). Achieving appropriate institutional neutrality on a piecemeal basis will be difficult. Such an approach will make compliance with the detailed legal requirements which will likely arise in relation to specific circumstances difficult. It will also involve risk and a lot of time from senior staff – and, perhaps inevitably, expensive legal advice. We therefore recommend that a general policy of institutional neutrality on controversial issues is the safest way forward for HEPs, and indeed it is being adopted by various institutions.

Best Free Speech Practice

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***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.*

[31] A failure of neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy*, *Meade* and *Phoenix* cases, described in the BFSP EA Statement.