



## **Governance requirements re: free speech at English universities**

### **Severe consequences of failure: the Sussex Case**

#### **Background**

Kathleen Stock was a professor of philosophy at the University of Sussex (the “**University**” or “**Sussex**”). Stock holds ‘gender critical’ views: she believes that biological sex is real, important, immutable, and not to be conflated with gender identity. She has a public profile in the higher education sector and beyond.

In 2021, students and staff protested against Stock because of her gender critical views, amongst other things calling for her sacking by the University. In the course of the protests, Stock received numerous death threats and was advised by the police that she might need security to go into the University. Eventually, due to this pressure, Stock resigned her position.

The University appears to have failed catastrophically to comply with its legal duties to avoid discriminating against and harassing Stock, and to defend Stock from attack, including the need under Section 109(4) of the Equality Act 2010 (the “**Equality Act**”) to take all reasonable steps to prevent harassment of her by its employees. It is reputed to have paid her a very large sum in settlement.<sup>1</sup>

The Office for Students (“**OfS**”) is the regulator for higher education. The OfS does not currently have a role to intervene in support of individuals who have suffered attack or detriment because of their viewpoints. When the new complaints scheme provided for by the Higher Education (Freedom of Speech) Act 2023 (“**HEFSA**”) is brought into effect, the OfS will be able to investigate and act on complaints made by individual staff members relating to academic freedom and freedom of speech in universities. Students will continue to have access to a separate scheme, under current Government plans.

The OfS can, however, investigate whether universities are complying with their ‘conditions of registration’ – conditions which universities must meet in order to retain their degree awarding powers – and punish universities which fail to meet these conditions.

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<sup>1</sup> Other universities have recently paid settlements, reputed to be very large, in a number of related cases, including those brought against the Open University by Joanna Phoenix and Almut Gadow, and the Metanoia Institute by James Esses.

In October 2021, the OfS opened an investigation into whether the University of Sussex was complying with its conditions of registration. In March 2025, following the conclusion of the investigation, the OfS published its report.<sup>2</sup>

## **Breaches of conditions of registration**

### Governing documents

The OfS found that the University breached condition of registration E1. Condition E1 requires a university's governing documents to uphold certain "public interest governing principles", which include:

- academic freedom: the right of academic staff to question and test received wisdom; and to put forward new ideas and controversial or unpopular opinions, within the law, without placing themselves in jeopardy of losing their jobs or privileges they may have at a university.
- freedom of speech: the governing body of the university takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the university.

The University breached condition E1 because of four elements in the university's "Trans and Non-Binary Equality Policy Statement" ("**TNEP Statement**"). These elements were:

- A requirement for 'any materials within relevant courses and modules [to] positively represent trans people and trans lives'.
- A statement that 'the curriculum shall not rely on or reinforce stereotypical assumptions about trans people'.
- A statement that 'transphobic propaganda ... will not be tolerated' (we refer to this statement later as the "**Transphobic Propaganda Statement**").
- A statement that 'transphobic abuse, harassment or bullying (name-calling/derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures.'

The OfS found that all four statements restricted lawful speech and academic freedom. The report's reasoning for the claim that the statements restricted lawful speech and academic freedom is quite brief, although this may be because it is so obvious. The statements restricted lawful speech and academic freedom in part because the University lacked adequate

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<sup>2</sup> The report is available at:

[https://www.officeforstudents.org.uk/media/hcllxwx/university\\_sussex\\_free\\_speech\\_case\\_report.pdf](https://www.officeforstudents.org.uk/media/hcllxwx/university_sussex_free_speech_case_report.pdf)

safeguards to prevent the statements from restricting lawful speech and academic freedom, and in part because the statements simply restricted lawful speech.

This case highlights that “governing documents” are defined widely for these purposes<sup>3</sup>, and include the TNEP Statement, to the extent at least that it related to course materials and the curriculum, and policies about behaviour and public utterances and disciplinary matters. Universities are going to need to clarify what elements of their policies, requirements and other documents constitute their “governing documents” for this purpose.

### Governance arrangements

The OfS also found that the University breached condition of registration E2. Condition E2 states that a university ‘must have in place adequate and effective management and governance arrangements to [...] operate in accordance with its governing documents.’ The OfS found that the University breached condition E2 because certain groups involved in the University’s governance repeatedly approved formal university policy documents, despite not having the delegated authority to do so.<sup>4</sup> Governing documents approved in this way included the TNEP Statement.

The OfS stated that decisions at universities “should be taken at the appropriate level by appropriate individuals or groups. When decisions are made by individuals or groups not identified by a university [in accordance with its statutes and other governing documents] as appropriate to make those decisions, there is a risk that this may lead to decision making of a degraded quality. For example, decisions may be made without sufficient scrutiny, expertise or knowledge of the matters at hand.”

### **Some important points arising**

The report makes abundantly clear that, in order to comply with their conditions of registration, universities must ensure that their governing documents do not restrict lawful speech. This is a demanding requirement. Given the current levels of compliance by universities, securing compliance will require very substantial work. Universities will need to thoroughly review their governing documents and policies, and make the revisions necessary to achieve compliance.

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<sup>3</sup> Defined (in the glossary to the conditions of registration) as “Documents adopted, or that should have been adopted, by the provider that describe any of the provider’s objectives or values, its powers, who has a role in decision making within the provider, how the provider takes decisions about how to exercise its functions or how it monitors their exercise. This test will be broadly rather than narrowly applied. Where a document in part deals with any such matters, and in part with other matters, the whole of the document is a ‘governing document’.” There is some apparent uncertainty about the meaning and extent of this. The OfS defines it (as evidenced in the report) as including policies that relate to course materials and the curriculum, and policies about behaviour, public utterances, and disciplinary matters.

<sup>4</sup> The groups which approved policy documents without the authority to do so were the Prevent Steering Group and the University Executive Group. (

The OfS' report is instructive on what university policies must include and not include in order not to restrict speech; and also how the OfS expects them to engage with it in relation to breaches of regulatory conditions.

The following points are particularly relevant.

### Statute VII

Statute VII is part of the University's governing documents. It requires that staff disciplinary or dismissal procedures at the university are guided by principles of academic freedom and freedom of speech.

The OfS considered that Statute VII did not adequately protect free speech, repeatedly noted the following, and appears to regard them to be limitations on Statute VII.

- Conflict. Nothing in any of the University's governing documents explained how to resolve a conflict between Statute VII and the TNEP Statement.
- Students. Statute VII does not protect the freedom of speech or academic freedom of students.
- Investigations. Statute VII contained no provisions which could prevent members of staff from being investigated for lawful speech which violated the TNEP Statement. The OfS noted that such investigations are to the detriment of academics and can cause anxiety, stress, and uncertainty.

The OfS noted, however, that Statute VII, if properly applied, would prevent a member of staff from suffering an adverse outcome in a disciplinary or dismissal procedure for lawful speech, including for speech which violated the TNEP Statement. This led the OfS to reduce the fine payable by the university for breaching condition E1.

Statute VII does not contain requirements regarding bullying individuals for their viewpoints, nor does the FS Code. This was this another governance failing which the OfS did not pick up on. It is an important omission from an otherwise admirable report.

Statute VII is narrowly focused and insufficient on its own to ensure compliance with the registration conditions and relevant law. The necessary nexus of protections to ensure compliance is much wider and includes a university's free speech code and rules requiring compliance with that code. The actions which are necessary for compliance are explained under "What universities are going to need to do" below.

### "Safeguard Statement"

During the course of the investigation, the University added a general statement (called the "Safeguard Statement" by the OfS) to the TNEP Statement, purportedly to safeguard academic freedom and freedom of speech.

- Re academic freedom: the OfS took the view that the Safeguard Statement, because it stated explicitly that ‘nothing in this Policy Statement should be taken to justify sanctioning academic staff for questioning or testing received wisdom or putting forward new ideas including controversial or unpopular opinions within the law...’, adequately safeguarded academic freedom. This was because it made clear that, where the TNEP Statement and academic freedom came into conflict, the conflict ought to be resolved in favour of academic freedom.
- Re freedom of speech: the OfS took the view that the Safeguard Statement, where it stated ‘nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech’, in conjunction with the statements restricting speech in TNEP Statement, did not adequately safeguard freedom of speech. This is because this wording operated so as to imply that the restrictions in the TNEP Statement were proportionate, and therefore not overridden by the Safeguard Statement. (See the note on proportionality under the Human Rights Act below. This is an important point for universities: they need to ensure that their policies are themselves proportionate, and not to rely on opaque statements such as Sussex did, which render the policies incomprehensible to the ordinary user, without sufficient guidance on what the policy is actually requiring.)

*No restrictions on free speech beyond what is consistent with the law*

During the course of the OfS investigation, the University replaced the Transphobic Propaganda Statement with a statement restricting ‘transphobic abuse, harassment or bullying’, and it created an objective test for whether material was abusive, bullying, or harassing, which was whether the material ‘could reasonably be expected to cause distress or fear among trans people’.

- Objective test. The OfS noted that the replacement of the Transphobic Propaganda Statement and the introduction of an objective test narrowed the scope of the restrictions on lawful speech made by (the replacement for) the Transphobic Propaganda Statement. The OfS regarded the objective test as a mitigating factor, and consequently reduced the fine payable by the University.
- No restrictions beyond what is consistent with the law. The OfS noted that, while an improvement, the objective test, as written, was ‘not limited to existing prohibitions in law’ (in other words, it had the effect of imposing prohibitions which were wider in scope than those which would be necessary in order to comply with applicable law).<sup>5</sup> Therefore,

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<sup>5</sup> The relevant law which Sussex’s objective test exceeds in the scope of its prohibitions is Section 26 of the Equality Act, which defines harassment. Under Section 26, behaviour amounts to harassment if (inter alia) it is unwanted, related to a protected characteristic, and it is reasonable for the behaviour to have the effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for a person. Behaviour which could reasonably be expected to cause a person distress is not (without more) harassment (as defined) and is not contrary to the Equality Act.

despite the test's introduction, (the replacement for) the Transphobic Propaganda Statement still restricted lawful speech, and therefore violated condition E1.

### Proportionality under the Human Rights Act

The free thought and speech rights of academics and students are protected under the European Convention on Human Rights (the "**Convention**")<sup>6</sup>, as enacted in the UK by the Human Rights Act 1998 (the "**HRA**"). Universities are entitled to restrict the right to free speech in Article 10 of the Convention if so doing is (inter alia) a "proportionate" (i.e. appropriate and no more than necessary) means for various purposes specified in the HRA.

To the extent that a university imposes a restriction on lawful free speech which is proportionate and otherwise compatible with the Convention (and applies it in a way which is compatible), this appears not to contravene the duty to take reasonably practicable steps to secure lawful free speech under Section 43(1) of the Education (No.2) Act 1986 ("**Section 43**") and the Higher Education and Research Act 2017 (once the relevant provisions of HEFSA are in effect), and presumably also the registration conditions as their relevant wording is so similar.<sup>7</sup> This is how the OfS appears to see it, judging by its report into Sussex. This applies in respect of policies and requirements that are required for compliance with applicable laws such as the Equality Act, provided that such laws are themselves compliant with the HRA and applied compliantly (in particular, proportionately) through the relevant policies and requirements.

It is, however, likely to be a challenge to show that restrictions which go beyond what is legally required, so effectively voluntary, are proportionate. This is because of the very high importance accorded to free speech in the academic context under the HRA and the fact that it is firmly established under the Convention that protected speech includes the freedom to offend, shock and disturb. This means that the category of justifiable, "proportionate", restrictions is likely to be very small in practice.

It appears that, as an example, anti-bullying rules (although not in themselves by law) could, if written so as to be compliant, in principle lawfully restrict free speech. It is, in this context, important to note that the statements restricting free speech in Sussex's TNEP Statement were not written so as to be compliant. The OfS found "no credible evidence" that:

- the university assessed whether the statements in the TNEP Statement were proportionate restrictions on speech (this is a stark reminder that universities are expected to conduct a "proportionality assessment" when developing policies and requirements that could negatively impact free speech), or

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<sup>6</sup> Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

<sup>7</sup> See BFSP's statement *Free speech protection at English universities: the law and requirements in practice* (the "**Principal BFSP Statement**"), which can be found at <https://bfsp.uk/universities-and-free-speech>.

- the potential interferences with free speech in the statements were themselves proportionate.

Universities need to be very careful to ensure that any restrictions on free speech that they create which go beyond what is required to secure compliance with (for instance) the Equality Act will be viewed as “proportionate” and otherwise compliant with the HRA. This is a matter of legal interpretation and compliance, so gives very little discretion to a university. We anticipate many further costly embarrassments because of failures to do so.

### Self-reporting

The OfS held, in the cases of the breaches of both condition E1 and E2, that the failure of the University to self-report the breach was an aggravating factor. The OfS expects universities to self-report compliance failures to it, and failure to do so may lead to higher penalties.

### **Penalties**

With respect to the University’s breach of condition E1, the OfS took the view that ‘the fundamental importance of freedom of speech and academic freedom means that this is a serious breach with significant consequences’. The OfS likewise viewed the breach of condition E2 to be ‘serious’.

The OfS has fined the University for the above breaches. The OfS calculated that the appropriate penalty, given the seriousness of the breaches, was £3,717,742.

However, the OfS reduced the fine to a total of £585,000 to reflect, amongst other factors, that this is an evolving area of law and practice and that this is the first time the OfS has found a university in breach of the relevant registration conditions. Nonetheless, the fine is the largest ever imposed by the OfS. Universities which make similar breaches of conditions E1 and E2 in future could be subject to substantially larger fines.

There has been debate about whether these penalties were excessive. BFSP will only comment that you don’t have to be a free speech fundamentalist to view Sussex’s failings as egregious, and its lack of contrition a moral if not legal aggravating factor.

### **Condition of registration E6**

While reviewing their governing documents, universities will need to take account of a further condition of registration, E6, relating to harassment and sexual misconduct regarding students, which will be coming into effect on 1<sup>st</sup> August 2025. This contains important provisions about the interaction of policies relating to harassment with the law protecting free speech, and effectively severely restricts such policies going beyond what is stated in the Equality Act and otherwise limiting lawful speech. This is discussed in detail in the Appendix to the Principal BFSP Statement.

## Compliance with the law

The OfS investigated the University for breaching its regulatory obligations relating to academic freedom and freedom of speech. Many of these regulatory obligations overlap with parallel legal duties. The OfS is not currently empowered to investigate whether universities have broken the law. However, when the new complaints scheme under HEFSA comes into effect, as the government intends, then the OfS will be so empowered.

The OfS noted its concern that the University, in relation to its TNEP Statement, may have failed to comply with multiple legal duties. These are:

- Section 43 (which is shortly to be replaced and strengthened pursuant to HEFSA).
- Article 10 of the Convention (the right to freedom of expression).
- Section 19 of the Equality Act (indirect discrimination).
- The Public Sector Equality Duty (PSED).

BFSP's view is that this is over-cautiously stated. It is pretty well beyond doubt that parts at least of the TNEP Statement have contravened the law: for instance, officially equating gender-critical views with transphobia (as appears was the intention behind the Transphobia Propaganda Statement) has been held to constitute harassment for the purposes of the Equality Act.<sup>8</sup>

## What universities are going to need to do

It is very telling that research by our friends at the Committee For Academic Freedom has indicated that, at the time of that research, at least 25 English universities had policies or requirements derived, in at least one respect, from the externally sourced template that caused the breach of condition of registration E1 in the Sussex case. Seven of them had three of the four statements that caused the first fine in the Sussex case.<sup>9</sup> Given the Sussex ruling, it must

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<sup>8</sup> Equating gender critical view with transphobia has been held to constitute harassment in multiple recent court cases, which include: the *Phoenix* case (*Phoenix v The Open University* (2024) ET Case No: 3322700/2021 & 3323841/2021), the *Meade* case (*Meade v Westminster City Council and Social Work England* 2024: Case No: 2201792/2022 & 2211483/2022), and the *Fahmy* case (*Fahmy v Arts Council England* (2023) ET case no 6000042/2022). In the further case of Eleanor Frances, two civil service departments agreed to pay a six figure settlement and to change their definitions of transphobia, after they were taken to court for defining transphobia to include gender critical beliefs. See BFSP's statement *Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others* for full information on these cases. Available at <https://bfsp.uk/universities-and-free-speech>.

<sup>9</sup> See <https://afcomm.org.uk/2025/03/28/will-british-universities-learn-from-the-mistakes-of-sussex/>. The source of the template appears to have been, directly or indirectly, Advance HE, or its predecessor organisation: it appears to have a big problem, which we assume goes way beyond this narrow issue.



be highly likely that these universities have also been in contravention of their conditions of registration in this regard. They are just the ones identified by CAF when looking at one narrow aspect of their policies and requirements. This is very indicative of the depth of the problem. If universities are not deeply concerned, they are asleep.

Universities are going to need to review their governing documents and governance processes urgently and revise them to secure both regulatory and legal compliance. This will include the following. (We have included steps required for legal compliance, as well as regulatory compliance in respect of the conditions of registration, to try to give a clear overall picture of the requirements. Part of the difficulty for universities is the multiple sources of their obligations.)

- Universities will need to review and revise their policies, practices, procedures and rules (in particular, those below), in order to **ensure that they do not effectively enforce controversial views or agendas**, or otherwise operate so as to discriminate against or harass people for their viewpoints or otherwise suppress free speech, or otherwise fail to comply with legal and regulatory requirements. In particular, universities must ensure that any restrictions on lawful free speech imposed by their policies, practices, procedures and rules are proportionate in the context of the high level of protection afforded to free speech under the HRA. This requires universities to identify any such restrictive materials and conduct proportionality assessments to ensure these restrictions are compliant, as a matter of law, with the HRA and other applicable legal and regulatory requirements.
  - Their **policies**, especially those relating to aspects of EDI generally, harassment, behaviour, training, recruitment and promotion, and curriculum design. The OfS expects that any policy or document which may affect free speech include a statement explaining that where the policy and the university's free speech code of practice come into conflict, the free speech code of practice shall take precedence.<sup>10</sup> See further details in the Principal BFSP Statement.
  - Their **complaints and disciplinary policies and processes** (the process must not be allowed itself to be a form of punishment). In particular, HEPs should ensure that there is a rebuttable presumption that complaints about people's speech and views are not appropriate.<sup>11</sup> In addition, HEPs should institute a fair, objective, and rapid triage

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The seven universities were Hertfordshire, Leeds, Liverpool Hope, Nottingham Trent, Royal Veterinary College, University of Portsmouth and York St John. The remaining 18 are too numerous to mention here, but included Bath and Imperial College London.

<sup>10</sup> In the report, the OfS repeatedly notes where Sussex had or lacked materials explaining how to resolve conflicts between free speech policies and documents and other policies and documents. See also the OfS' draft Regulatory Guidance related to freedom of speech, paragraph 75d.

<sup>11</sup> Condition of registration E6, which will come into force on 1<sup>st</sup> August 2025, explicitly requires universities to apply a rebuttable presumption against claims that certain speech amounts to harassment. More generally, the OfS appeared to view the lack of any mechanism to prevent people being investigated for expressing lawful views which violated Sussex's policies as a limitation of the university's Statute VII.

process to ensure rejection of vexatious, frivolous or obviously unmeritorious complaints at an early stage. See further details in the Principal BFSP Statement.

- All policies, practices and requirements in connection with **hiring, promotions and research** approvals. See further information in BFSP's Statement *EDI considerations and inquiries in the recruitment and research approval process at English universities*.
  - All policies and practices relating to **training**, in particular in respect of aspects of EDI. See further information in BFSP's Statement *EDI and similar courses, training and tests*. This includes ensuring they have appropriate policies about training on free speech protection. Staff should understand the law and requirements regarding free speech, including harassment and discrimination and the protected characteristic of belief.
  - Universities will also need a **nexus of free speech protections**, under their statutes, free speech codes and rules requiring compliance with their codes and more widely, to ensure compliance with the law and the registration conditions. The following steps to prevent inappropriate attacks on people for their viewpoints are either expressly required or clearly likely to be "reasonably practicable steps"/"reasonable steps" for the purposes of Section 43, condition of registration E1, and the "safe harbour" from liability for employee actions under Section 109(4) of the Equality Act, and therefore required by law and regulatory requirements. Sussex failed to take some (at least) of these steps, which have in substantial part underlain its reputedly huge settlement with Dr. Stock. Universities will therefore need to review and revise the following to ensure compliance:
    - their free **speech code of practice** (see BFSP's publication *Free Speech Codes: Compliance Checklist*), *in particular to ensure that there are requirements that make it clear that staff and students are expected to comply with the code*;
    - their policies for promoting and protecting free speech;
    - their policies and requirements regarding behaviour, including prohibiting online attacks and bullying, to ensure that they do not wrongly restrict lawful speech and clearly apply in respect of actions against people because of their viewpoints. University anti-bullying policies must make clear that expressing viewpoints on matters will rarely count as bullying, and that complaints about viewpoint expression under anti-bullying rules should not be lightly made, and can themselves be a form of bullying and contrary to the FS code. 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;
    - their related policies for disciplinary measures against individuals who contravene those requirements. Universities will need to apply those policies consistently across all their operations;
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- their schemes for making free speech complaints (see the Principal BFSP Statement); and
- their policies and processes regarding training, to ensure that they include appropriate training regarding free speech protection. Appropriate training involves ensuring that staff understand the law on freedom of speech, and how it applies to their particular role.<sup>12</sup>

They will also need to:

- remind their staff and students of their policies and requirements, and where appropriate, warn them of the consequences where they contravene these policies and requirements;
  - intervene promptly, proactively, and effectively, to calm angry disputes and restore tolerance through engagement, dialogue and explanation; and
  - enforce their requirements appropriately, including, if necessary, by bringing disciplinary proceedings.
- Universities must also review and revise their **governance arrangements** to ensure that they are compliant with their conditions of registration and legal duties. This is highly likely to require ensuring that:
    - their governance structures and operations in respect of all matters that could affect free speech (positively or negatively), are consistent with their conditions of registration. Failings in this regard at Sussex, where subsidiary bodies approved policies when they lacked the delegated authority to do so, caused the University's breach of condition E2 and resultant large penalty. The OfS found that this breach of registration conditions was "serious because it constitutes a repeated failure of the university to follow its own governance processes". Universities must ensure that actions and decisions are being taken by the right people and bodies in accordance with their constitutions and other governing documents.
    - they have robust decision-making arrangements, which require them to consider the impact of their decisions on free speech and academic freedom as part of the decision making process;
    - they have checks and balances to ensure that their policies and processes do not adversely affect free speech or academic freedom;<sup>13</sup>

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<sup>12</sup> OfS' draft Regulatory Guidance relating to freedom of speech, paragraph 115. <https://www.officeforstudents.org.uk/media/fsvjdljh/regulatory-advice-24-guidance-related-to-freedom-of-speech.pdf>

<sup>13</sup> See the OfS Insight publication *Freedom to question, challenge and debate*, December 2022. The OfS has explicitly stated that it will consider these second and third points when assessing compliance with regulatory conditions.

- they have an appropriately constituted and empowered committee of their governing body or other senior working group to ensure proper compliance with its free speech obligations.
  - their risk officers and functions are aware of these matters and the risks they create, and that significant free speech risks are on its risk register and treated with an appropriate level of seriousness.
- Universities should also consider seriously appointing a **free speech officer** to be an internal advocate for free speech and academic freedom, with responsibility for ensuring that their university complies with its legal obligations and follows and enforces its own rules appropriately. Given the intense activism and competition between agendas that exist within universities, we ask: how they can comply with the relevant legal and governance requirements without such an officer to advocate for free speech at a high level? 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.<sup>14</sup>
  - **Self-reporting:** If it transpires that universities are in breach of their registration conditions, they need to seriously consider self-reporting to the OfS. The report makes clear that this is the expectation of the OfS: it considered the failure of Sussex to self-report to be an aggravating factor in the breaches of both conditions E1 and E2, and accordingly substantially increased Sussex’s penalty. By contrast, self-reporting is likely to result in reducing or even avoiding adverse consequences. This will involve difficult decisions for those universities which find themselves to be in contravention of their obligations when they review their governance, policies etc. in the light of the Sussex case. The safest course, although one which may not come comfortably, would be to report failings, and to emphasise the inadvertency of the errors and the seriousness with which they are working to set relevant failures right.
  - **Externally sourced materials:** Sussex appears to have used a template from Advance HE to create the TNEP Statement (OfS report, page 8) which led directly to a huge penalty. All

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<sup>14</sup> This would surely make a very material contribution to securing free speech. As it is reasonably practicable, it is likely required pursuant to the primary obligations under Section 43/Higher Education and Research Act. In any event, having a free speech officer is an obvious requirement of good practice. Given that controversies around aspects of diversity agendas appear to have given rise to many of the free speech problems in recent years, it is hard to see how a person could be appointed who also has or has had a role within a university’s EDI function without such dual appointment giving rise to insuperable conflicts of interest/priorities, and the need for this separation was referred to by Dame Nicola Dandridge in her Review for the Open University (the “**Dandridge Review**”) relating to the case of Jo Phoenix (Recommendation 1, underpinning principle 6). <https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Independent-Review-N-Dandridge-09.09.24.pdf> .

universities which have created policies similar to those in the TNEP<sup>15</sup> are highly likely to be in breach of their registration conditions and at risk of penalties if they do not bring themselves rapidly into compliance.

Policies, courses, training and materials (including templates for policies and other requirements) acquired from (or otherwise designed or approved by) external organisations (such as Advance HE), campaign groups (such as Stonewall), or activists will involve severe risks as regards compliance with an HEP's freedom of speech obligations, unless the HEP has carefully verified that these are compliant with laws and regulatory requirements relating to free speech.<sup>16</sup> Accordingly, HEPs should either design such policies, courses, training and materials themselves having regard to their free speech obligations, or only rely on advice or use materials from third party providers if they have:

- obtained a warranty that the advice/materials have taken account of the impact of legal and regulatory requirements for free speech protection and that appropriate specialist advice has been taken about compliance; and that they are confirmed as being compliant with such laws and requirements, with an indemnity against losses caused by that warranty not being correct; and/or
  - themselves done sufficient due diligence to ensure compliance. The nature of that due diligence will depend on whether they have received the assurances referred to above. If they do not receive such assurances, they either need to themselves ensure compliance, or use a different source.
- **External relationships:** Universities need to review and restructure relationships with third party organisations which require them to take sides in relation to contested issues, or require or encourage them to suppress the expression of views which dissent from the agenda being promoted by any such organisation, or result in them failing to maintain a sufficient level of institutional neutrality on contested issues. This creates profound

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<sup>15</sup> We are aware, as a result of research by the Committee for Academic Freedom, of at least 29 universities which have policies which contain elements similar to the TNEP Statement.

<sup>16</sup> 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>

compliance risks.<sup>17</sup> BFSP has long been advising that such relationships can result in universities' policies or requirements being written in ways which reflect the viewpoints or desired outcomes of campaign organisations but which misrepresent relevant legal requirements or the nature of a university's and its employees' obligations and/or simply do not comply with requirements for protecting free speech, for instance by operating to suppress dissenting viewpoints. An acute example of this was the use of the externally-sourced template in the Sussex case.

Universities need to review and restructure these relationships to ensure that compliance failures cannot occur, or if this is not possible, terminate them.

- Adopt **sufficient institutional neutrality**.

If a university:

- takes sides, in an area of passionate and polarised debate, with one contested position, it necessarily formally sets itself against other positions. 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 those other viewpoints, and creating or tolerating environments in which attacking people for their viewpoints is acceptable.
- endorses or promotes certain viewpoints and agendas in respect of areas which are the subject of debate or controversy, it is at high risk of exerting pressure for the endorsement of or acquiescence to those viewpoints and thus of suppressing the expression of lawful dissenting viewpoints.

The above are highly likely to:

- give rise to breaches of the primary requirements under Section 43 and the conditions of registration, unless a university's actions are legally justifiable; and
- risk creating a hostile environment which constitutes harassment under the Equality Act, and also a breach of free speech rights under the HRA.

A number of recent public failures (with unlawful harassment and discrimination found by tribunals) have largely arisen as a result of an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate and evidencing disapproval of expression of a particular lawful viewpoint.<sup>18</sup> The same is the case with the failures which led to the fines on Sussex.

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<sup>17</sup> The Dandridge Review, paragraph 2.27, notes evidence that the OU's membership of the Stonewall UK Diversity Champion's Programme undermined its institutional neutrality.

<sup>18</sup> A failure of neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy*, *Meade* and *Phoenix/Open University* cases, described in the BFSP Equality Act Statement. The same applies in respect of the fines on Sussex, as explained above.

The requirements and risks described above lead to an unavoidable need for universities to maintain sufficient neutrality on political, social, philosophical and other issues which are or may be contested so as to avoid or at least minimise risks of legal and regulatory failures as described above. By this we mean that they must not take official “university” positions on publicly contested matters, or take action, through for instance public statements or the contents of their policies, which amounts effectively to “taking sides” or the endorsement of a contested viewpoint and thus risks suppressing free speech at the university and, in an extreme case, risks breaching the university’s legal and/or regulatory obligations.

This will need to apply to significant employees and other representatives, whenever representing their university as an institution (for instance, when acting as a university spokesperson or a member of management), as opposed to when acting in their capacity as academics or clearly in their private capacities.

Achieving appropriate institutional neutrality on a piecemeal basis will be difficult, and will involve risk and a lot of time from senior staff – and, perhaps inevitably, expensive legal advice. A general policy of maintaining institutional neutrality on controversial issues is, therefore, the only realistic way forward, and indeed it is already being adopted by various institutions<sup>19</sup>. This was also recommended in the Dandridge Review.<sup>20</sup> It is also the effective expectation of the OfS: its draft Regulatory Guidance related to freedom of speech once HEFSA is enacted has several examples of the consequences of failures of neutrality.<sup>21</sup>

## Best Free Speech Practice

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<sup>19</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.

<sup>20</sup> In Appendix 3, paragraph 7. As explained in the BFSP’s Statement *The Dandridge Review re the Open University/Jo Phoenix*, this recommendation was more limited than is necessary in practice as a result of the limited focus of the Dandridge Review.

<sup>21</sup> Examples 4, 5, 6, 7, 9, 10, 14, 22, 23, 28, 29 and 30.

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

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- *is a short summary of a complex area of law and regulation and their implications and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: universities 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; and*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular universities, will have to be developed by universities themselves, in the context of their own particular circumstances.*