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"), which came into effect on 1st August 2025.

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 IT MAY BE OUT OF DATE: see its publication date and also the important notice at page 22.

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 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.

Relatedly, AFFS has recently published a report (the "**Recruitment Report**") showing how widespread requirements to endorse disputed ideas and values in the recruitment processes at UK Russell Group universities, , through requirements to support EDI, risk unlawfulness.[1]

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 ***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.

The requirements under HERA, the Equality Act 2010 (the "**Equality Act**"), the Human Rights Act 1998 (the "**HRA**"), and the conditions of registration 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 is often referred to as the "**Secure Duty**".

This a demanding requirement and requires active, positive steps to be taken: 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 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.)

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[1] ***University Recruitment: EDI requirements causing free speech compliance failures***. Available at: https://bfsp.uk/wp-content/uploads/2025/05/AFFS-Report-re-EDI-on-jobs-FINAL-23.05.25-1-1.pdf

[2] As introduced by the Higher Education (Freedom of Speech) Act 2023 ("**HEFSA**") with effect from 1st August 2025.

[3] Consistent with this, paragraph 134 of the OfS Guidance (referred to further below) states: "Where a step is reasonably practicable for an [HEP], it must be taken."

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 or otherwise legally justified.[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 in this context. 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 guidance ("**OfS Guidance**") about the legal requirements in HERA.[5] The OfS Guidance includes specific provisions relevant to EDI training.

Most relevantly, the OfS Guidance specifically states:

> *"212. Providers and constituent institutions should not require training or induction that imposes a requirement on the person completing the training actively to endorse any viewpoint or value judgement. The preceding sentence and the associated example 53 relate to compelled speech within training: training that cannot be completed unless the user actively assents to a particular viewpoint or value-judgement that they may reject."*

We consider that this is a correct reflection of the requirements in HERA.[6]

Regulatory "conditions of registration" are also imposed pursuant to HERA: these are discussed below.

Equality Act

[4] This includes policies etc. created by an 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) and otherwise compliant in accordance with the principles under the HRA discussed below. This is a narrow category in practice.

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

[6] This is well illustrated in the OfS Guidance by Example 53. See also paragraph 147: "Providers and constituent institutions should not require holders of any academic position to commit (or give evidence of commitment) to a particular viewpoint." It is important to note that this requirement applies more widely, so as to include both students and staff other than holders of academic positions.

As is now clearly established in case law, various viewpoints about currently contested issues are protected philosophical beliefs ("**Protected Viewpoints**") under the Equality Act.[7]

Employers and education providers must avoid discrimination against and harassment[8] of people with Protected Viewpoints in certain contexts, including employment and further and higher education.

Protected Viewpoints include (but are by no means limited to) so-called "gender-critical" beliefs, anti-Zionist beliefs, and viewpoints which contest aspects of so-called "critical race theory".[9] The law in this area is still evolving. If they wish to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as Protected Viewpoints in appropriate circumstances and will, in time, be confirmed as such. 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. Where the relevant facts fit the necessary criteria[10], there is a strong likelihood that some other views which are opposed to views and agendas promoted under the EDI banner, or indeed opposition to EDI as this banner under which a wide range of contested views are promoted and enforced, would themselves be ruled to be protected under the Equality Act were this ever to be litigated.

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

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7 "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."

8 Which includes creating a hostile environment.

9 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.

10 Given the nature of the *Grainger* test (see footnote 9), one must keep in mind that each case is fact sensitive and personal to the particular claimant: for an example, see https://thecritic.co.uk/being-anti-woke-as-a-protected-philosophical-belief/.

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* [11]. 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**")[12], as enacted in the UK by the

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

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

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.

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. In practical terms, and while there is no direct legal precedent to confirm this, we believe that some HEP rules which, while one cannot point to a particular rule justifying them, are securing a legitimate aim, are proportionate (including being no more restrictive than is necessary to achieve the aim) and are enforced proportionately, and otherwise compliant with the HRA, will operate so as to justifiably limit obligations to protect free speech. However, the range of restrictions which are justified under the HRA in this way will in practice be extremely narrow. The principal example (the only one we are aware of that could be relevant to this context) is appropriate anti-bullying rules. These, though, would need to be very carefully drafted so as to be compliant.

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"[13] 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".[14] 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".[15] Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10.[16] It follows

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

[14] Ibid, concurring judgements paragraph 3.

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

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

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*".[17] The nature and extent of these positive obligations are, however, 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[18] 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. [19]

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

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

[19] The case Mr S Isherwood v West Midlands Trains Limited illustrates the legal risks of forcing employees not to dissent from views presented in training. Mr Isherwood was fired by West Midlands Trains after strongly criticising a training session on "white privilege". A subsequent Employment Tribunal found that West Midlands Trains had unlawfully discriminated against Mr Isherwood.

Relevantly, Ms Reindorf KC advised about the consequence of crafting internal policies with the aims or agendas of external groups in mind.[20]

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

The Dandridge Review[21] 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.[22] The Review cited numerous ways in which EDI requirements and agendas cause problems for free speech. Some key relevant findings of the Review included the following.

- 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 speech requirements and agendas. Clearly, this has major implications for EDI training: HEPs should not be implementing training in a way which creates or permits such a culture.
- The Review showed that the OU's policies were not sufficiently clear about the boundary between lawful free speech and harassment, and were not adequately communicated to staff. If a university's policies on harassment are unclear, or actively restrict lawful speech beyond the limited range of legal justification, then training on harassment which makes use of or references those policies is likely to restrict speech, and to be unlawful.[23]
- 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

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[20] In paragraph 70, she stated: "*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

[21] 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.

[22] Those failings were identified in a damning judgment of the relevant employment tribunal 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.

[23] See, for example, paragraphs 2.17, 2.33, and 2.35 - 2.36, and Recommendation 5 of the Review.

failures such as discrimination and harassment as a result of taking sides in contested issues. This means that EDI training must avoid taking sides in such a way.

Regulatory requirements: conditions of registration: the Sussex case

English HEPs must comply with various "conditions of registration", which are imposed pursuant to HERA. Compliance is overseen by the OfS, which has the power to fine or deregister (remove the degree awarding powers of) non-compliant HEPs. Three conditions of registration are particularly relevant to free speech and academic freedom.

Condition E1: Condition of registration E1 requires that an HEP's governing documents uphold the "public interest governance principles" of:

- Academic freedom: Academic staff at an English HEP have freedom within the law to question and test received wisdom; and to put forward new ideas and controversial or unpopular opinions; and
- Freedom of speech: The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider.

"Governing documents" are widely defined for these purposes and will include any of an HEP's policy documents which describe its "objectives or values". This is highly likely to include policies which inform, relate to, or are referred to in staff and student training.[24] HEPs need to ensure that their policies regarding training are compliant so as to uphold academic freedom and freedom of speech, and need to ensure that their relevant detailed practices and materials comply with those policies. An HEP's policies on harassment will constitute governing documents, as this concept is interpreted by the OfS.

Condition E2: Condition E2 requires that an HEP has "in place adequate and effective management and governance arrangements to:

- operate in accordance with its governing documents;

[24] Governing documents are 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 its report into the University of Sussex's governance failures in connection with the Kathleen Stock scandal, discussed below) as including policies that relate to course materials and the curriculum, and policies about behaviour, public utterances, and disciplinary matters. Sussex's "Trans and Non-Binary Equality Policy Statement" was recently found by the OfS to be a governing document. An HEP's free speech code will be a governing document. Whether more detailed training materials count as "governing documents" for the purposes of condition E1 is unclear (it would surprise us if they did); this will to a degree depend on the circumstances of the HEP and the nature of the materials.

- deliver, in practice, the public interest governance principles that are applicable to it."

Condition E6: Condition E6 is a new condition of registration and will come into force on 1st August 2025. E6 relates to harassment and sexual misconduct as regards students, but includes important free speech provisions. In particular, E6 requires an HEP's policies on harassment to be consistent with:

- severe limits on the ability of HEPs to extend definitions of harassment beyond the law in ways which restrict lawful free speech; an
- the need for HEPs to apply a rebuttal presumption to the effect that statements or views expressed in the course of teaching or research, and course content, are highly unlikely to constitute harassment.

Implications as regards EDI training

HEPs need to ensure that their policies and other governing documents which affect EDI training are in a form which complies with condition E1. Whether or not an HEP does this, if it *in practice* fails to uphold academic freedom or free speech, and in particular if its EDI training on harassment operates so as to significantly restrict lawful speech, or repudiates the need for a rebuttal assumption, then it must be at high risk of not having "adequate… governance arrangements to… operate in accordance with its governing documents" and "deliver, in practice, the public interest governance principles that are applicable to it" thus violating condition E2.

In a major recent development, the University of Sussex was found by the OfS to have breached condition E1 because its "Trans and Non-Binary Equality Policy Statement" contained statements which inappropriately restricted lawful speech, and condition E2 because its governance procedures were inadequate to ensure that the university operated in accordance with its governing documents (in its case because decision-making bodies (even though relatively senior) approved the policies without appropriate delegated authority to do so). The OfS fined the University £585,000, noting that higher fines were possible for future breaches at other universities. This case highlights the stringency of the conditions of registration with respect to freedom of speech, and the seriousness of the OfS in enforcing these conditions. We refer to examples from the Sussex case when discussing the requirements in practice on HEPs below.

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 their free speech obligations[25]. FS Codes (save where rules for staff behaviour address this issue) must be written so as to make clear that actions (including by staff) which inappropriately restrict free speech are prohibited.

[25] HERA Section A2, effect in practice.

The key consequential general 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.

- **Having policies which comply**: HEPs must ensure that their policies are compliant with legal and regulatory obligations to protect free speech. Further, the OfS regards it to be good practice for any document stating or explaining any policy which may affect free speech to include a statement that, in cases of uncertainty, the definitive and up-to-date statement of the institution's approach to freedom of speech is set out in the [the institution's free speech] code.[26]
- **Having requirements for free speech protection**: HEPs must have in place appropriate policies and requirements to protect freedom of speech within the law. This would include rules prohibiting Participants from bullying, harassing, or discriminating against other Participants for their viewpoints. Universities must act proactively to enforce these requirements, where appropriate, through disciplinary measures.
- **Having appropriate governance arrangements**: ensuring that the HEP has dedicated free speech protection governance structures. These should include a free speech officer, free speech being a sufficiently regular agenda item for governing bodies, policies which could affect free speech being reviewed to ensure compliance by decision making groups with access to adequate free speech expertise, according to clearly defined university procedures, and having effective reporting and accountability structures for free speech failures. The terms of reference of all committees which could affect compliance with free speech duties, including committees responsible for EDI matters, should expressly include consideration of this impact.[27]
- **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. This is 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.

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[26] In its report on its investigation to the University of Sussex, 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 Guidance related to freedom of speech, paragraph 169d.

[27] OfS Guidance, paragraph 192.

- **Maintaining sufficient institutional neutrality:** In order to implement the above requirements effectively and 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.
- **Not require commitment to beliefs, ideas or values:** HEPs must not require Participants to commit or give evidence of commitment to any values, beliefs, or ideas, including EDI. This is distinct from a requirement for academics to teach within the boundaries of disciplinary relevance and disciplinary competence, and from testing the academic knowledge of students or those applying to be students, which, if done properly, are likely to engage the essential function of teaching. [28] [29]
- **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 the Secure Duty 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. The HRA places positive obligations on HEPs to create an atmosphere where individuals can "express their ideas and opinions without fear… even if these opinions and ideas are contrary to those defended by the official [university] authorities".[30]
- **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. This is discussed in detail in Part 2 below.
- **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.[31] 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.

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[28] See the OfS Guidance, paragraph 147. Note that the requirement extends to freedom of speech, and to all Participants.

[29] AFFS's recent Recruitment Report shows how requirements to endorse disputed ideas and values, through widespread requirements to support EDI, in the application processes to academic positions at UK Russell Group universities, risk unlawfulness.

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

[31] The OfS Guidance contains detailed requirements in this regard, which are discussed in the Principal Statement.

Constituent institutions and students' unions

Now that the relevant sections of HEFSA have been brought into effect, the same duties and remedies imposed on HEPs themselves under HERA apply directly (subject to minor adjustments) to colleges, halls, and other "*constituent institutions*" of HEPs. This is a major change. The Equality Act 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, including with respect to EDI training, 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

An HEP 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 its 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.[32] It should be borne in mind, however, that HEPs

[32] Such training might be necessary in order for an 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

have limited obligations under the Equality Act in respect of the behaviour of students (as 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. Such training needs to be carefully constructed as discussed in Part 1 above.

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[33]. 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, 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.

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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.

[33] See both the OfS Guidance and the guidance on the new condition of registration E6 re harassment (in effect from 1st 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 Equality Act and Protection from Harassment Act but includes various important protections for freedom of speech.

- 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 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.[34] [35]

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 the experience of free speech campaigners, EDI Training is all too often not 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.

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

[35] See paragraph 213 of the OfS Guidance: "we do not intend to discourage institutions from offering or requiring training on sensitive subjects, including training that itself asserts positions with which some users may disagree." See also Example 54.

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 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);***
- ***suppress people's willingness to express views which may be unpopular or contrary to the agendas, viewpoints or purposes being promoted or implemented through the training (chilling effect); or***
- ***penalise dissent, harass or create a hostile environment.***

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 or 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.

EDI Training which does this will be contrary to some or all of the Relevant FS Requirements (and, very likely, to an HEP' own FS Code or rules).[36]

The same obviously applies in respect of penalising, including encouraging or allowing negative consequences for, dissent from the agendas or 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 legally justified:

[36] OfS Guidance, paragraph 212, and Example 53. Similarly, requirements to endorse disputed ideas and values, through requirements to support EDI in the application processes to academic positions are likely unlawful, as shown by AFFS's Recruitment Report.

- 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 equated gender-critical views with transphobia.[37]

Compulsory training, or presenting non-attendance negatively

While the OfS Guidance (paragraph 213) states: "we do not intend to discourage institutions from offering or requiring training on sensitive subjects, including training that itself asserts positions with which some users may disagree", 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, depending on the manner in which it is delivered, run a significant risk of being contrary to some or all of the Relevant FS Requirements (and HEPs' own FS Codes or rules), unless that training is legally justified as discussed above. 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,

such compulsory training must be likely to be contrary to some or all of the Relevant FS Requirements, and/or HEPs' own FS Codes or rules. HEPs that want to impose compulsory training – other than on matters which are legally justified (such as on harassment and

[37] 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). See also the OfS' regulatory report on the University of Sussex which dealt with Sussex's "Trans and Non-Binary Equality Policy Statement". Training which instructed Participants on the four statements in the policy found to breach condition of registration E1, or similar statements, would likely be non-compliant.

bullying in ways that comply with Relevant FS Requirements) as discussed above – will need to design that training carefully.

Make right to dissent clear

It is likely that the Secure Duty under HERA requires that HEPs should, in the context of even non-compulsory 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 complaints and disciplinary processes to which the Participants may resort if concerned about aspects of the training they are being required to undertake. This will in any event be best practice.

The above may also help HEPs demonstrate that they have done enough to qualify for the Section 109(4) Defence in respect of alleged discrimination against or harassment of Participants in respect of their Protected Viewpoints under the Equality Act.

The OfS Guidance[38] states that: it would be good practice for a statement about an HEP's FS Code to be included prominently in any document stating or explaining any policy that may affect free speech, along with a statement that in cases of uncertainty, the definitive and up-to-date statement of the institution's approach to freedom of speech is set out in the [institutions FS] code. 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 OfS Guidance does not make express reference to EDI Training content or materials in this context, we nonetheless regard the above as an indication of the likely expectations of the OfS in this context as well; we also consider that it reflects the Relevant FS Requirements.

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

In 2018, the University of Sussex created its "Trans and Non-Binary Equality Policy Statement" by copying nearly verbatim a number of passages from a template provided by a predecessor of the organisation Advance HE. The OfS found that these passages restricted academic freedom and freedom of speech, and therefore caused the university to breach its conditions of registration. The OfS found that this was a "serious and significant breach" and fined the university £585,000 in total.[39] The OfS has stated that future breaches at other universities could result in even larger fines.

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[38] See paragraph 169d.

[39] These fines were in respect of failing to comply with both conditions of registration E1 and E2. See the OfS' report on its investigation into the University of Sussex:

BFSP has consistently warned that acquiring courses and materials from (or otherwise designed or approved by) external organisations or campaign groups or activists dramatically increases the risk of HEPs failing to comply with their free speech legal and regulatory obligations.[40] The case of the University of Sussex is an exact illustration of this risk.[41]

To avoid compliance failures, HEPs need either to design such policies, courses, training and materials themselves having regard to their free speech obligations, or only to rely on advice or to 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 themselves to ensure compliance, or to use a different source.

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. For example, the University of Sussex told Participants in its "Trans and Non-Binary Equality Policy Statement" that "communications that could reasonably be expected to cause distress" "are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures". This passage of the Statement restricted lawful speech without legal justification and caused the university

https://www.officeforstudents.org.uk/media/hcllzxwx/university_sussex_free_speech_case_report.pdf. See also BFSP's statement on the OfS report at https://bfsp.uk/universities-and-free-speech.

[40] 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. 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.

[41] See also the discussion of the Reindorf Opinion in Part 1 for the legal risks of creating policies to satisfy the interests of campaign groups. Similar risks apply in respect of training courses.

to breach its conditions of registration.[42] A similar passage in a training course would be likely to cause a university to breach its legal free speech obligations.

Not misrepresenting or overstating the scope or effect of contrary laws

Care is required in 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).

HEPs need to be very careful to word any training and other materials so that they do not misstate the scope or effect of such duties and 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, 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. These misapprehensions – and resultant misstatements – often result in inappropriate (and potentially unlawful) restrictions on Participants' rights for free speech and expression.[43]

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. For example, the University of Sussex did this in relation to transgender matters in its "Trans and Non-Binary Equality Policy Statement". This resulted in the university breaching its conditions of registration and contributed to the subsequent fine of £585,000. In another example, AFFS has documented in its Recruitment Report how requirements to endorse disputed ideas and values, through widespread requirements to support EDI in the application processes to academic positions at UK Russell Group (and other) universities, risk unlawfulness. Whenever promotion of controversial viewpoints requires or exerts (directly or indirectly) 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 Secure Duty,

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[42] For details of why this Statement breached the university's legal and regulatory obligations, see BFSP's statement on the case of the University of Sussex, available at: https://bfsp.uk/universities-and-free-speech

[43] For instance, if HEPs incorporate into their rules Stonewall's previous definition of transphobia, which equated gender-critical views with transphobia, this is unlawful.

subject to the limitations on that duty discussed above.[44] 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.[45]

Save to the extent that doing so is legally justified as discussed above, 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; this is reflected in the OfS Guidance as discussed above.

Key underlying compliance need: sufficient institutional neutrality

The above requirements and risks highlight another underlying issue of 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 endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate.[46]

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

[44] Examples 26, 29, 32, 34, 35, 45, 51, 52, and 53 in the OfS Guidance illustrate this well. The University of Sussex's requirement for "any materials within relevant courses and modules [to] positively represent trans people and trans lives" was found to breach the university's conditions of registration and contributed to the OfS imposing the fine referred to elsewhere.

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

[46] 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. It also underlay the University of Sussex's failures which led to the fine by the OfS discussed elsewhere.

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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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 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*
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