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

Free speech compliance issues

PRELIMINARY – this Statement sets out the applicable legal obligations under the Higher Education and Research Act 2017 ("HERA") and other legal requirements for free speech protection at English HEPs, and their implications in practice. More detailed information is contained in BFSP's other statements referred to below. Amendments to HERA made by the Higher Education (Freedom of Speech) Act 2023 ("HEFSA") came into effect on 1st August 2025. This statement describes the obligations under HERA with effect from that date.

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end. ***SEE ALSO the important notice at page 20.***

Introduction

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

There are various legal and regulatory obligations on registered English Higher Education Providers ("**HEPs**") to protect people's expression of their viewpoints: to secure lawful free speech under the Higher Education and Research Act 2017, their duty under the Equality Act to protect people with viewpoints which count as "protected characteristics", their duties under the Human Rights Act, and their obligations under their conditions of registration, all as discussed in Part 1 below. (These are together referred to as the "**Relevant FS Requirements**".)

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

- apply considerations ("**EDI Considerations**") relating to compliance with and/or support for equality, diversity and inclusion ("**EDI**") expectations or wider values and beliefs, and

demonstrated active commitment to or support of EDI related programmes and causes, to the selection of people for academic and other jobs and the review, approval of and/or support for research plans, topics, applications and/or projects and the grant or allocation of research funding ("**Research Approval**"); and

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

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

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

- treating an applicant negatively in a job/Research Approval application/assessment process because that person lawfully dissents from or does not demonstrate support for aspects of the EDI agendas or programmes being promoted by the relevant HEP;
- seeking information about an applicant's support for such agendas or programmes, because this would be to provide information to put the HEP in a position to discriminate against applicants with the "wrong" views; and
- creating a situation where people who seek (or are likely to seek) jobs or Research Approval at an HEP think they need to visibly not dissent from, or even demonstrate adherence to and actively promote, an agenda aspects of which they do not necessarily agree with (often called a "chilling effect").

There are, however, potential protections for certain permitted activities, as discussed in Part 3 and the Appendix below. While this Statement may raise issues which HEPs have not appreciated, we hope that HEPs will find that it helps them avoid pitfalls.

BFSP's related campaign, Alumni for Free Speech (www.affs.uk), conducted a survey in early 2025 of various HEPs' compliance in this regard, and liaised with some of them to ensure that they are free speech compliant. AFFS has now published a report (the "**AFFS 2025 Report**") of its findings concerning the likely non-compliance of various HEPs' recruitment policies with respect to EDI[1].

EDI support duties: Finally, while this is not the focus of this statement, it is significant to mention that it is common that HEPs impose duties on their employees, including successful applicants for academic and other jobs, to "promote", "support", "contribute to", or "commit to" EDI. These raise serious risks of breaches of the Relevant FS Requirements. This is not discussed further here, but detailed information can be found in the AFFS 2025 Report.

Part 1: Relevant law and regulatory requirements

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

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

HERA – free speech protection obligations

Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017[2] ("**HERA**") require the governing body of an English HEP to take "*the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take*" to secure freedom of speech (within the law) for the staff, members and students ("**Participants**") of and visiting speakers to the HEP[3]. This is often referred to as the "**Secure Duty**". This is a demanding requirement

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1 https://affs.uk/wp-content/uploads/2025/05/AFFS-Report-re-EDI-on-jobs-FINAL-23.05.25-1.pdf

2 As introduced by the Higher Education (Freedom of Speech) Act 2023, with effect from 1st August 2025.

3 The duty extends to the recruitment of members, students (and logically employees, although this was not expressly stated) (OfS Guidance, paragraphs 136, 137, and 138). See also: *R. (on the application of Butt) v Secretary of State for the Home Department [2019] EWCA Civ 256 [2019] 1 W.L.R. 3873* at [171]–[172]. At paragraph [172]: "The point is reinforced by the broad categories of persons whose freedom of speech is protected by the legislation. If the duty only extended to those already invited to speak, then could the same limitation apply to members and students? Could freedom of speech and academic freedom be said to be preserved by granting freedom of speech to

and requires active, positive steps to be taken. The obligations are stated in objective terms, giving no material discretion to an HEP as to what steps it needs to take[4]. It results in various requirements in practice. Free speech obligations override other considerations, subject only to the following:

- The relevant speech must be lawful, i.e. not restricted by laws "*made by, or authorised by the state, or made by the courts e.g. legislation or legal precedent/court decisions*"[5]. This includes criminal and civil laws – for instance the Equality Act (see below) and laws relating to defamation, confidentiality and privacy. Unless the relevant expression of views is so extreme as to be unlawful, it is protected under HERA.
- HEPs are only required to take the steps that are reasonably practicable for them to take. (The Office for Students ("**OfS**") interprets this to include refraining from taking a step which would have an adverse impact on freedom of speech without compelling justification.[6]) Various points are relevant.
    - If an HEP is obliged to do (or not do) something under an effective legal or regulatory obligation – including the HEP's own requirements (for instance, anti-harassment rules which are themselves written so as to be compliant with the Relevant FS Requirements[7]) to the extent that they are needed to secure compliance with a legal obligation on it (we refer to being subject to such requirements as "legally justified", and discuss this concept further below) – then it is not reasonably practicable for it to take a step (pursuant to the Secure Duty) which is inconsistent with that obligation. The same could apply where certain "occupational requirements" are essential attributes to a position or positive action under Section 159 of the Equality Act is justifiable (as discussed in detail in Part 3 below), without the confirmation of which the position cannot practicably be filled. The duty to act under HERA will, though,

existing members and students, while restricting recruitment of members and students on the ground of their political opinions? We think not."

4 Per the OfS Guidance paragraph 134, "Where a step is reasonably practicable for an [HEP], it must be taken."

5 OfS Guidance, paragraph 27.

6 OfS Guidance, paragraphs 57-58.

7 This will mean by being no wider than is strictly necessary in order to ensure that they reflect the legal obligation which justifies them, thus interfering with free speech to the minimum extent necessary for that purpose; and being accessible and clear to those bound by them. It will in most cases be a "reasonably practicable step" to ensure that this is done, and thus a duty under the Secure Duty to do this. They restrictions will also need to comply with the HRA, which will include satisfying a "proportionality" test as discussed below, which will operate restrictively given the high levels of protection afforded to free speech and academic freedom under the HRA.

usually override duties to "think" such as under the Public Sector Equality Duty (of which more below).

- In order to validly derogate from the Secure Duty, policies, programmes and requirements of the HEP must (as well as being legally justifiable as discussed above) be written with extreme care so that their requirements and effect are compliant with the Relevant FS Requirements. This is a matter of compliance with a legal requirement, and the conflicting views and priorities of an individual HEP are likely to carry little relevant weight. This is supported by the OfS Guidance.[8]

- The OfS states that other factors that are relevant to an assessment of whether steps are "reasonably practicable" may include the impact taking or not taking the step would have on freedom of speech; whether taking or not taking the step would affect the "essential functions" of learning, teaching, research, and the necessary administration to sustain these three things; and whether there are any credible risk to Participant's physical safety.[9] Irrelevant factors are likely to include the viewpoint that the relevant speech expresses and the reputational impact of the speech on the HEP.[10] Some steps may be reasonably practicable for a large HEP but not for a small one[11]. This is discussed in more detail in the Principal Statement, but it will be very hard to argue that not doing something – i.e., refraining from applying EDI Considerations and seeking EDI Information – is financially impracticable.

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

The Secure Duty extends to ensuring that:

- Academic staff are free (within the law) to question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without facing the risk of losing their jobs or privileges at the HEP or the likelihood of their securing promotion or different jobs at the HEP being reduced; and
- applicants to become academic staff must not be adversely affected because they have previously exercised their rights to academic freedom as described above[12].

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8 OfS Guidance, paragraph 62, and paragraphs 125 – 131.

9 OfS Guidance, paragraph 61.

10 OfS Guidance, paragraph 123.

11 OfS Guidance, paragraph 133; and "Whether (and in what timescale) steps are reasonably practicable may vary according to the type of provider or constituent institution involved (for instance depending on size, specialisation".

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

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

Free speech code and requirements

HEPs must maintain a *"code of practice"* ("**FS Code**") which sets out (inter alia) the HEP's values relating to freedom of speech and the conduct required of such persons in connection with meetings and activities.[13] HEPs need to have related policies and requirements. They need be very careful to ensure that applying EDI Considerations or seeking EDI Information is not contrary to their own codes and requirements.

OfS Guidance

The OfS, as regulator of HEPs under HERA, has issued guidance (the "**OfS Guidance**") pursuant to HEFSA, which is published as *Regulatory Advice 24 - Guidance relating to freedom of speech*. This guidance reflects both the requirements under HERA and the OfS' own expectations of HEP actions for compliance. Parts of the OfS Guidance are directly relevant.

- HEPs should not require applicants to any academic position to commit (or give evidence of commitment) to a particular viewpoint.[14] HEPs should not require applicants for promotions[15] or Research Approval[16] to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate who holds, or has expressed, particular viewpoints, or an academic for having expressed or exercising, their academic freedom within the law.
- • HEPs should not require Participants (through, for instance, a contract of employment) to commit (or give evidence of commitment) to values, beliefs or ideas if that may disadvantage a Participant who holds, or has expressed, particular viewpoints, or an academic for exercising their academic freedom within the law.[17]
- Participants should be free to undertake academic research within the law. This freedom should not be restricted or compromised in any way because of a perceived or actual

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[13] **Section A2**.

[14] OfS Guidance, paragraph 139, Examples 27, 32, and 34. Example 32 explicitly describes how requiring candidates to provide evidence of commitment to EDI is likely to be unlawful.

[15] OfS Guidance, paragraphs 139 and 151 and Examples 32 and 34: while this is stated there to apply in respect of applicants for academic positions only, the obligations under HERA apply more widely.

[16] OfS Guidance, paragraphs 195 and 196, Example 45.

[17] OfS Guidance, paragraph 147: while this is stated there to apply in respect of holders of academic positions only, the obligations under HERA apply more widely. For a clear illustration of how this applies in practice, see Example 34. Employment contracts requiring Participants to commit to political or social ideals, e.g. "social justice" are likely to be unlawful.

tension between any conclusions that the research may reach or has reached or the viewpoint it supports, and the organisations' policies or values. Nor should it be restricted or compromised in any way because of any external pressure connected with those conclusions.[18]

- HEPs should ensure that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact. This includes committees responsible for admission, appointment, reappointment, promotion processes, employment contracts, fitness to practice, and processes and policies relating to equality or equity, diversity and inclusion, including the PSED.[19]

Equality Act 2010

Discrimination by an HEP against, and harassment[20] by it of, people with "*protected characteristics*" are unlawful in a range of circumstances specified in the Equality Act, including the provision of services to the public and exercise of public functions, employment and further and higher education[21]. (There are exceptions relating to "occupational requirements", of which more below.)

The landmark *Forstater* case[22] established that holding gender-critical views is a *"protected characteristic"*. Views which challenged aspects of critical race theory were subsequently ruled to be protected, as were anti-Zionist ones[23]. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. (These would include, for example, in relation to other aspects of critical race theory and moves to "decolonise the curriculum", and lawful views in relation to religions and their

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18 OfS Guidance, paragraph 195 and Examples 45 and 46.

19 OfS Guidance, paragraph 192.

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

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

22 *Forstater v. CGD Europe et al*., 2021 (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

23 *Corby v ACAS*, September 2023 [ET No: 1805305/2022] and *D. Miller v University of Bristol*, February 2024 [ET no: 1400780/2022]. It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that the Mr Miller made "manifestations" of this which were antisemitic and thus not protected.

effects, and in relation to Israel and the rights of Palestinians.) It must be highly likely that opposition to aspects of "EDI" (as a wide-ranging concept which includes contested values and views on a number of topics) is itself highly likely to be "protected" for the purposes of the Equality Act. There can be "inappropriate (sometimes expressed as "objectionable") manifestations" of protected beliefs which do not qualify for protection[24]. The existence of such limitations generally appears to work successfully to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

Section 109(1) of the Equality Act provides that anything done by an employee in the course of their employment, or an agent on behalf of their principal, must be treated as also being done by their employer or principal; it does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer has a defence (the "**Section 109(4) Defence**") if it can show that it took all reasonable steps to prevent an employee from doing the alleged act or anything of that description.

HEPs have very limited duties under the Equality Act in respect of the behaviour of Participants *acting in capacities which do not give rise to responsibilities on the HEP's part*, so, for instance, opinions expressed by the HEP's staff via their private social media are not normally the HEP's problem under the Equality Act and should not be their concern.

Recent cases have held employers – including the Open University – liable for discrimination against and harassment of employees in connection with their viewpoints. They provide vivid examples of how this area of the law has effect in practice, and the detailed requirements in practice on an employer for it to come within the Section 109(4) Defence. See the Appendix to the Principal Statement for further information.

Public Sector Equality Duty

HEPs are, in the exercise of their functions, obliged under their **Public Sector Equality Duty** ("**PSED**") in the Equality Act[25] to have due regard to the need to eliminate unlawful discrimination and harassment (and other unlawful acts) under the Equality Act, including against people who hold or express a protected viewpoint, to advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it.

The PSED is very specifically worded. It does not require (or justify) consideration of an HEP's wider EDI related programmes or agendas beyond the specific stated aims. It is a duty to *"have due regard"* is a duty to think and give appropriate weight in context. It does not require any particular steps to be taken and is not in itself a mandate to override other considerations. On the contrary, it assumes that other factors must be given appropriate weight and an

[24] See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643. [See also *Higgs v Farmor's School* [2023] ICR 1072.]

[25] **Section 149**.

appropriate balance struck. Positive duties to act (rather than merely to consider) are likely to be overriding, and this will in most (if not all) cases include one or both of the duty under HERA to take reasonably practicable steps to secure free speech and academic freedom, and duties under the Equality Act to avoid discriminating against or harassing people with protected viewpoints.

Safe harbours: Schedule 9 and Section 159

There are "safe harbours" from liability under the Equality Act in respect of actions relating to "occupational requirements" pursuant to **Schedule 9** and "positive action" pursuant to **Section 159**. These, and their effects (which are likely to be limited in practice in his context), are discussed in detail in Part 3.[26]

Equality Act: summary

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. Avoiding liability is likely to necessitate greatly increased institutional neutrality in relation to many contested issues, as discussed in Part 3 of the Principal Statement. It is important that HEPs do not misinterpret (or over-interpret) the requirements under the Equality Act, in order to avoid compliance failures. The fact that an applicant for a position may have viewpoints which some people find offensive or disagree with profoundly does not in itself constitute anything unlawful under the Equality Act. Getting this wrong is a real risk area for HEPs. Circumstances can arise involving apparently conflicting protected characteristics. The OfS has stated[27] that the *"interaction between different protected characteristics may require careful consideration – for example, some religious beliefs and the protected characteristic of sexual orientation. Both characteristics are afforded protection from harassment and discrimination under the Equality Act, and it may be necessary for [HEPs] to balance the different protected characteristics in certain circumstances"*.

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

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

- HEPs must not discriminate in the selection process (and ensure that those conducting the selection process do not so discriminate) against applicants because of their protected viewpoints, and must comply with their PSED in respect of those applicants.[28]

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[26] See, for instance, OfS Guidance, Example 33.

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

[28] OfS Guidance, paragraph 77, Example 27.

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

Human Rights Act and compelled thought

The free thought and speech rights of academics and students are protected under the **European Convention on Human Rights** ("**Convention**")[29], as enacted into UK law by the **Human Rights Act 1998** (the "**HRA**")[30]. These freedoms include the freedom to offend, shock and disturb. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.

Creating a situation in which people who seek (or are likely to seek) jobs/promotion/Research Approval at an HEP think that, in order not to impair their career prospects, they need to visibly not dissent from, or even demonstrate adherence to and be seen to actively promote, an agenda, or values, beliefs or ideas, regardless of their own actual views about such agendas, values etc., both pressurises people into publicly aligning with agendas, values, beliefs and ideas (often referred to as "compelled" thinking or speech), and reduces people's willingness (or perceived ability without having their career prospects impaired) to hold or express certain viewpoints and thus creates a "chilling effect" on people's freedom of thought and speech. These are contrary to the HRA.[26]

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[31] and are necessary in a democratic society" for various specified purposes, including for the protection of the rights

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

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

[31] "It is well established that "law" in this sense has an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law." See: *Higgs v. Farmor's School* [2023] EAT 89, paragraph 52. This includes pursuant to the HEP's own requirements (such as carefully-written anti-bullying rules), to the extent that they reflect its legal obligations or are necessary to secure a purpose specified in, and are proportionate in themselves and in their application in accordance with principles under, the HRA/Convention. In an academic context, and particularly where academic free expression is concerned, such restrictions will generally be hard to justify.

of others, although this qualification is subject to a "proportionality" test[32]. Contrary laws and legal obligations can thus operate to restrict free speech rights to a limited extent. Any interference by an HEP with the holding or expression of opinions and academic freedom of its academics and students will therefore require justification which itself satisfies the HRA.

Academic freedom protections extend *"to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence"*[33] 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"*.[34] 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"*.[35] Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10.[36] It follows that any attempt to justify restrictions on, or impose sanctions in respect of, otherwise lawful statements made in an academic setting is likely to be unsuccessful.

While the Convention rights are primarily worded as negative obligations, i.e. not to interfere with freedom of thought or expression unless that is justified, HEPs are also under positive obligations to "create a favourable environment for participation in public debates for all concerned, allowing them to express their opinions and ideas without fear, even if these opinions and ideas are contrary to those defended by the official authorities or by a large part of public opinion, or even if those opinions and ideas are irritating or offensive to the public". [37]

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

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

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

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

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

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

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

significant risk of being unlawful under the HRA as "compelled speech" and also because of its "chilling effect".

Reindorf Opinion

A very relevant example of the potential legal issues can be found in the detailed opinion by Akua Reindorf KC,[38] which was commissioned by the Sex Matters campaign in response to King's College London's requirement that applicants for promotion demonstrate their support of that university's "equality, diversity and inclusion ambitions"; it also named examples of campaign organisations for which applicants could show support. Ms Reindorf found that this requirement was likely to amount to indirect philosophical belief discrimination in violation of the Equality Act and would also violate Section 43 of the Education Act (the predecessor to HERA).[39]

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

The Dandridge Review[40] (the "**Review**") is a report, published in September 2024, of an independent investigation which was commissioned by the Open University ("OU") following its failure to manage disputes and prevent unlawful harassment of Professor Jo Phoenix over her views. Some key relevant findings of the Review were that there is a culture at the OU that there are "right" ways of viewing things, which can lead to dissenting views being suppressed and individuals self-censoring (fear was referred to by several witnesses) and an imbalance between EDI and free speech requirements and agendas. It cited numerous ways in which EDI requirements and agendas cause problems for free speech. All universities need to work to ensure that the promotion and implementation of EDI agendas does not unlawfully affect free speech. The Review also recommended an "underpinning principle" headed "[…] the OU should adopt a policy of institutional neutrality in relation to contentious issues (unless relevant to the OU's strategy)". While the detailed text explaining this proposal has a number of defects, this is still highly significant, and is consistent with AFFS having urged for some time that institutional neutrality is the only effective way to avoid legal and compliance failures such as discrimination and harassment as a result of taking sides in contested issues.

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

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

40 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.

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. Two 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 or relate to recruitment and the selection of candidates.[41] Whether more detailed materials (for instance, job advertisements, person specifications) count as "governing documents" for the purposes of condition E1 is less clear, and will to a degree depend on the circumstances of the HEP and the nature of the materials. What is clear is that HEPs need to ensure that their relevant policies are compliant with the law and their conditions of registration so as to uphold academic freedom and freedom of speech, and that their relevant detailed practices and materials comply with those policies.[42]

Condition E2

[41] 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) 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.

[42] This requires, amongst other things, that their free speech codes (save where rules for staff behaviour address this issue) are written so as to make clear that actions (including by staff) which inappropriately restrict free speech are prohibited.

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

- operate in accordance with its governing documents; and
- deliver, in practice, the public interest governance principles that are applicable to it."

If an HEP fails *in practice* to uphold academic freedom or free speech, with respect to recruitment and selection, then it is unlikely that it has "adequate… governance arrangements to… deliver in practice the public interest governance principles" and that HEP would therefore be at high risk of having violated condition E2.

Having adequate governance arrangements is likely to include ensuring that policies relating to hiring and promotions (and duties on staff) are reviewed and approved by the appropriate bodies, as determined by a university's governing documents. To comply with condition E2, any such bodies should be appropriately senior end empowered, have access to sufficient free speech expertise, and express responsibilities to take free speech protection into account.

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 restricted lawful speech, and condition E2 because groups involved in the university's governance had made related decisions in ways which failed to comply with the university's governing documents. 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.

Constituent institutions and students' unions

Since 1st August 2025, the same duties and remedies imposed on HEPs themselves under HERA also directly apply (subject to minor adjustments) to colleges, halls, and other "constituent institutions" of HEPs. This is a major change. The Equality Act 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' duties require them to take their own steps, to the extent reasonably practicable, given the nature of their structures and relationships, to ensure compliance by their constituent institutions and students' unions, as regards the HEP's Participants, at the least. This is discussed in detail in Part 3 of the Principal Statement.

Part 2: Implications in practice

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

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

- the Secure Duty, including the duties relating to academic freedom[43];
- the HEP's duty or need to comply with the Equality Act and its PSED in respect of applicants with viewpoints which count as "protected" under the Equality Act, depending on the relevant detailed circumstances and unless there are other overriding factors and/or
- the HRA,

and will indicate a significant risk of failure to comply with conditions of registration E1 and/or E2.

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

- the Secure Duty, including the duties relating to academic freedom[44];
- the HEP's duty or need to comply with the Equality Act and its PSED in respect of applicants with viewpoints which count as "protected" under the Equality Act, depending on the relevant detailed circumstances and unless there are other overriding factors[45]; and
- the HRA[46],

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43 This is expressly stated in OfS Guidance paragraphs 138 and 150, and Example 32: while this is stated there to apply in respect of applicants for academic positions only, the obligations apply more widely, in respect of all applicants. Example 32 describes extremely clearly how requiring applicants for academic positions to provide evidence of commitment to EDI is likely to be unlawful.

44 This is expressly stated in OfS Guidance paragraphs 139, 147 and 151 and Examples 32 and 34: while these focus on academic staff, similar protections should apply in respect of all employment.

45 The indirect discrimination provisions in Section 19 are particularly relevant in this context.

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

and to indicate a significant risk of failure to comply with conditions of registration E1 and/or E2.

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

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

Compelled thinking and chilling effect: more widely, these and other actions can create a situation where people who seek (or are likely to seek) jobs/promotion/Research Approval at an HEP think that, in order not to impair their career prospects, they need to visibly not dissent from, or even demonstrate adherence to and be seen to actively promote, an agenda, or values, beliefs or ideas, regardless of their own actual views about such agendas, values etc.. Such a situation both pressurises people into publicly aligning with agendas, values, beliefs and ideas (often referred to as "compelled" thinking or speech), and reduces people's willingness (or perceived ability without having their career prospects impaired) to hold or express certain viewpoints and thus creates a "chilling effect" on people's freedom of thought and speech. This is highly likely to be:

- contrary to the Secure Duty, including the duties protecting academic freedom;
- unlawful under the Equality Act to the extent that this counts as suppressing (as in discriminating against, or harassing (i.e. creating a hostile environment for) people with) viewpoints which count as protected characteristics; and likely, depending on the detailed circumstances, to be contrary to its PSED in respect of people with such viewpoints[47]; and
- contrary to the HRA as a result of this "compelled thinking" or "chilling effect",

and will indicate significant risk of failure to comply with conditions of registration E1 and/or E2.

Climate of fear: contributing to wider chilling effect. Research and numerous individual accounts evidence the existence, at many UK universities, of a climate of fear of expressing dissenting views on contentious topics. In July 2025, Roger Mosey, master of Selwyn College, Cambridge for twelve years, gave a particularly lucid description of the problem, stating that academics at Cambridge had told him that in recent years they felt "afraid" and "frightened" of expressing their views, for fear of persecution or social ostracism.[48] The knowledge that a

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

[48] Roger Mosey's article appeared in the Telegraph on the 26th July 2025. He quoted, in particular, Professor Mary Beard "I did take some nasty hits. Interestingly, a lot of those came from the political

university is actively discriminating against individuals for their views (and seeking information to put them in a position to do so) in their recruitment, promotion, and research approval processes can only worsen such a climate of fear and reluctance to express views. Given that such a climate is inimical to freedom of speech, universities are required under HERA to take those steps that are reasonably practicable to expunge any such culture where individuals may reasonably fear to express their views. An HEP having taken actions that contribute to such a climate may also be relevant to cases under the Equality Act and HRA. Securing compliance again involves removing the application of EDI Considerations and the seeking of EDI Information from the recruitment, promotion, and research approval processes. The only exceptions are the limited number of special situations discussed below in Part 3.

The AFFS 2025 Report contains extensive information on steps which could be appropriate for HEPs to take in order to ensure that their compliance is effective or where it appears they have or may have contravened the Relevant FS Requirements.

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

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

- "occupational requirements" related to the relevant position, or
- necessary to give effect to the right to take positive action pursuant to Section 159 of the Equality Act, as discussed below,

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

Occupational requirements for a position

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

Left rather than the Right… all it took was saying something mildly off-message and suddenly I was being treated like a traitor… The idea that we all have to sign up to one monolithic cultural view is stifling." Mosey also notes overwhelming support for freedom of speech amongst university academics at Cambridge – in a vote on whether to "tolerate" or "respect" (as the university preferred) the views of those they disagreed with, 86.9% voted for tolerance. However, many academics were afraid of expressing their support publicly: their votes for tolerance were cast in secret ballot.

Schedule 9 of the Equality Act contains "occupational requirement" provisions which operate as exceptions from the discrimination provisions relating to employment, so allow people with the relevant attributes to be preferred without counting as discrimination against other candidates. (So, for instance, it would be inappropriate in principle to appoint a militant atheist to position as a chaplain, just as it would be unreasonable for such a person to apply for that job, and Schedule 9 reflects this.) The application of these provisions must, however, be is "a proportionate means of achieving a legitimate aim"[49].

In order to be potentially justifiable in the context of contrary obligations to secure/protect free speech/viewpoints, related EDI Considerations and EDI Information would need to be focused on and limited to what is really necessary in order to ensure that an applicant has the attributes that constitute an occupational requirement within Schedule 9 to the Equality Act (applied in a way which is a proportionate means of achieving a legitimate aim).

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

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

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

(We call this the "**Section 159 Exception**".) This generally has limited application (particularly so in the context of the matters considered in this Statement), but could be relevant to any need to recruit a person with particular attributes. Note that it contains various objective tests, so gives limited discretion and needs to be applied carefully. What can be done is to encourage applications from relevant groups[50].

Interaction of the above with HERA and the HRA

Although they are an exception to certain aspects of mandatory Equality Act compliance, occupational requirements and the Section 159 Exception do not prevent the Secure Duty from

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

[50] See OfS Guidance, Example 33.

applying, subject to its limitations, and nor do they prescribe any mandatory obligations on an HEP.

Under the Secure Duty, these non-mandatory provisions are unlikely to make steps to secure free speech not reasonably practicable, unless the underlying reason for applying them in a particular situation is so compelling so to make contrary steps not reasonably practicable.

The Equality Act and the Secure Duty need to be looked at separately. In deciding whether the relevant proportionality assessments of the two exceptions are made out such that a defence may be established under the Equality Act, it may – depending on the facts – be necessary to separately consider the duties under HERA to the extent that they apply in any given situation on the basis it will be difficult to argue a requirement is proportionate to an aim if it fails to respect the statutory obligations under HERA. This is a nuanced interaction and one in respect of which guidance from the courts/tribunals would be particularly valuable. Their precise interaction, and the analysis to be undertaken, will depend on which duty is said to be breached.

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

Legally justifiable requirements and positions requiring essential attributes

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

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

What HEPs can legitimately do, and thus is a safe alternative, is to seek confirmation that an applicant understands the HEP's obligations under the Equality Act and that, irrespective of their personal views on relevant issues, the applicant will take care to avoid behaviour which would cause the HEP to be in contravention of the Equality Act (or indeed other legislation such as HERA). This should be accompanied with clear policies and training on Equality Act

compliance. This must, though, only be done where genuinely necessary in the circumstances and not be done in a way that will intimidate or create a hostile environment for the applicant.

Best Free Speech Practice

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***Important**: This document:*

- *is a short summary of a complex area of law and its implications, and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: HEPs and others should consult their legal and other advisers in respect of all matters relating to free speech in connection with their institution, including those referred to in this document;*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular HEPs, will have to be developed by HEPs themselves, in the context of their own particular circumstances;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE**: see its publication date above.*

Appendix: legally justifiable requirements and essential attributes

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

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

might be less likely to be contrary to the Relevant Law. In practice, however, the introduction of EDI Considerations and EDI Information on the basis of such necessity is still (at best) fraught with risk as discussed below.

Legally justifiable considerations and information

"**Legally justifiable**" EDI Considerations and EDI Information are those in that narrow range of considerations and criteria, and questions and information requests, which are effectively required by HEPs' legal and regulatory obligations and in respect of which the HEP concerned has complied with the Secure Duty and the HRA (which includes satisfying a "proportionality" test)[51]. This must logically include the need to take such steps as are necessary to ensure that they comply with those obligations, or come within exemptions from those obligations or liability under them. Those obligations are in this case primarily not unlawfully to discriminate against or harass people under the Equality Act, to take reasonable steps to protect workers from sexual harassment (if relevant in respect of free speech protection requirements) and/or to act so as to qualify for the Section 109(4) Defence[52] in respect of actions by its employees (we call this the "**Requirement to Secure EA Compliance**")[53].

EDI Considerations and EDI Information requests often relate to general adherence, compliance and/or commitment with/to EDI agendas, including by requiring evidence of

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[51] To the extent relevant in practice: the Equality Act has proportionality mechanisms built into it and reflected in its extensive interpretation under case law, so an additional proportionality test is in most cases effectively duplicative.

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

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

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

active support for internal programmes and/or external campaign groups. It is hard to conceive of circumstances in which such general considerations and information-seeking could count as legally justifiable.

Applying considerations and seeking information about an applicant's beliefs or views about particular matters which have an EDI angle (we call these "**Specific EDI Considerations and Information**") could also happen. An example might be seeking information about whether an applicant adheres (or does not adhere) to a particular religion in the context of a religious appointment: this belief/viewpoint (or not holding it) is a protected characteristic for the purposes of the Equality Act, so such considerations and inquiries fall within the focus of this statement.

In principle, applying and seeking Specific EDI Considerations and Information could count as legally justifiable pursuant to the need, in order to qualify for the Section 109(4) Defence, to take "all reasonable steps" to avoid a breach of the Equality Act in order. However, the following points apply.

- It is in principle not "reasonable" to contravene the Equality Act or other laws in respect of an applicant. Accordingly, if applying EDI Considerations and/or seeking EDI Information would contravene an applicant's legal protections (for instance in respect of their "protected viewpoints" under the Equality Act), doing so is very unlikely to count as necessary to qualify for the Section 109(4) Defence. The Section 109(4) Defence is therefore unlikely to justify applying and seeking Specific EDI Considerations and Information in such situations.
- Section 109(4) does not provide a defence when an employer has itself (i.e. not indirectly through its employees' actions) discriminated against an applicant because of their protected viewpoints. Section 109(4) only operates to protect employers when their employees have acted so as to put the employer in contravention of the Equality Act under Section 109(1).
- An asserted need to avoid a risk of future liability under the Equality Act (e.g. because there is a perception that people with certain protected beliefs are more likely to discriminate against or harass others, or cause the employer to do so) could not itself justify otherwise unlawful practices involving EDI Considerations and/or EDI Information.

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

HEPs would, in any event, need to identify carefully the focused and limited range of EDI Considerations or EDI Information (if any) which are required to be considered and/or sought

in consequence of being legally justifiable, and avoid those which extend wider than is necessary for that purpose. These would (if at all) have to be focused on whether there are material risks of an applicant causing the HEP to act unlawfully in their new position, and no wider. This will involve examining issues such as the following.

- Are the nature of the position being filled, the applicable needs, sensitivities and concerns, and the risks of liability if things go wrong, such as to make some EDI Considerations or EDI Information justifiable? Does the position involve sensitivities regarding the potential for failures by the HEP to comply with an applicable Requirement to Secure EA Compliance? In this regard, the position will need to involve performing functions for the HEP in respect of which there is a real risk that unlawful discrimination or harassment, or other failure under the Equality Act, on the part of the HEP, could arise as a result of the actions of the person holding the relevant position. These functions could include some administrative, teaching and support roles, but are much less likely to include (for instance) a pure research post with no other responsibilities. However, this exercise is highly risky as policies blocking or impeding those who hold or lack protected philosophical beliefs run a real risk of being discriminatory, especially if there is nothing more than an assumption or stereotype that a person with such views will be likely to harass or discriminate against someone else. In reality, if a genuine occupational requirement cannot be lawfully made out (see Part 3 above), then extreme caution should be applied.

- What considerations and information about the applicant's viewpoints (and past behaviour in particular) will legitimately address the reasons for the legal justification, and go no wider. In principle, it is possible that action required to qualify for the Section 109(4) Defence could justify an HEP making enquiries about whether an applicant for a sensitive position had evidenced a pattern of previous behaviour (which including unlawful action under the Equality Act) which indicated that there was a high risk that an applicant might commit unlawful discrimination or harassment in the relevant position with the HEP.[54] However, Section 109(4) is currently viewed by the courts/tribunals as focusing on having the right policies and training and dealing with complaints effectively. There is little reason to believe that the significantly wider interpretation required to encompass the sort of considerations referred to above would be adopted were this to come before a court/tribunal. If this is correct, such considerations/inquiries would not be justifiable as necessary to qualify for the Section 109(4) Defence.) Such a policy would in any event need to be applied consistently in respect of categories of potential applicants for particular posts, and not just in respect of particular applicants.

It thus appears to be very unlikely that there will be Specific EDI Considerations and Information which count as legally justifiable in the sort of circumstances under consideration

[54] The OfS Guidance (paragraph 77) states, however, that mere expression of views on (for instance) theological grounds, that some consider discriminatory, does not by itself imply that the person expressing such views will discriminate. It cites *R (Ngole) v The University of Sheffield* [2019] EWCA Civ 1127, 5(10) in support.

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

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

Essential attributes for a position

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

However, unless there is a genuine occupational requirement, what may seem like a commonsensical approach on first consideration, is potentially fraught with legal risk. In the example above, a qualified Christian counsellor may legitimately say it is discriminatory with respect to their protected beliefs to assume that they will inevitable discriminate, harass, or otherwise fail to be effective in their role and exclude them on that basis.[55]

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

Interaction with Relevant Law and regulatory requirements: such actions likely to unlawful

[55] See the OfS Guidance, paragraph 77. The fact that an employee or applicant expresses views which some consider discriminatory does not imply that the individual will discriminate. Unless there is evidence of the individual discriminating, then it will almost certainly be a reasonably practicable step (and therefore required under HERA) to continue their employment, or not discriminate against them for their beliefs in the application process.

Interaction with HERA, conditions of registration and the HRA

HEPs may in principle be able to apply the narrow range of EDI Considerations and seek EDI Information which are legally justifiable as discussed above without contravening their Secure Duty and condition of registration E2 (and the HRA), on the basis that they validly derogate from the Secure Duty (and/or don't unlawfully interfere with Convention rights). But whether this is the case will depend on the relevant circumstances of each situation. Assessing this will not be easy for HEPs.

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

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

Legally justifiable considerations and information

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

- While it is in principle possible that legally justifiable Specific EDI Considerations and Information could (depending of course on the detailed applicable circumstances) prevail over the a Requirement to Secure EA Compliance in respect of applicants with protected viewpoints, whether the courts would see it thus is extremely hard to predict, as conflicts of "protected characteristics" and obligations under the Equality Act are inherently difficult to resolve, and much will depend on the specific facts of any case, so a positive outcome cannot be guaranteed.
- It appears that the only realistic scenario in which a legal justification (if any) to apply EDI Considerations or seek EDI Information could override a contrary Requirement to Secure EA Compliance in respect of an applicant with a protected viewpoint is where that applicant has shown a pattern of conduct which has been unlawful under the Equality Act, and where there is a high risk that that conduct would be repeated (so as to give rise to unlawfulness) in the position for which they are applying. Applying considerations and seeking information would, however, need to be focused exclusively on what would be "inappropriate manifestations" of viewpoints, and not operate so as to discriminate against an applicant because of their legitimate expressions of their views. Even here, while it is arguable that doing so would be fair and reasonable, it cannot be guaranteed that the legal justification to do this would override the contrary Requirement to Secure EA Compliance in respect of that applicant.

- If, in a particular case, an HEP's apparent legal justification to apply/seek EDI Considerations or seek EDI Information is defeated by its conflicting Requirement to Secure EA Compliance in respect of an applicant with a protected viewpoint, that apparent justification will not be effective, and applying EDI Considerations and seeking EDI Information will have been an unlawful action, so a risk of compliance failure will inherently exist.
- Applying EDI Considerations and/or seeking EDI Information only pursuant to the PSED, which is a duty to think (but not to act) and is likely to be overridden by a Requirement to Secure EA Compliance in respect of an applicant who has protected viewpoints, will lead to compliance failure.

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

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

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

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

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

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