



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

Free speech compliance issues

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 THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end.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 18.

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 Welsh universities and other providers of higher and further education (“**HEPs**”)¹ to protect people's expression of their viewpoints: to secure lawful free speech under Section 43 of the Education (No.2) Act 1986 (“**Section 43**”), their duty under the Equality Act to protect people with viewpoints which count as "protected characteristics", their duties under the Human Rights Act, 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 Welsh 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

¹ Section 43(5) of the Education (No.2) Act 1986.

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.

In relation to the requirements under Section 43 and recommended best practice, we make reference to parts of the guidance *Regulatory advice 24: Guidance related to freedom of speech* of June 2025 (“OfS Guidance”) issued by the Office for Students (“OfS”) pursuant to **the Higher Education (Freedom of Speech) Act 2023 (“HEFSA”)** in respect of English HEPs. This is on the basis that such guidance in various critical ways reflects the requirements under Section 43. See the detailed discussion of this below.

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 EDI².

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

This Part sets out the main relevant legal requirements on HEPs. Further details of many 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>. (Note: BFSP will be publishing an equivalent statement for Welsh HEPs in due course.)

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.

Section 43 – free speech protection obligations

Section 43 of the Education (No.2) Act 1986³ requires every individual and body of persons concerned in the government of any HEP⁴ to take "such steps as are reasonably practicable" to ensure that freedom of speech (within the law) is secured for the members, students and employees ("**Participants**") of, and visiting speakers to, the HEP.⁵ This is a demanding

² <https://affs.uk/wp-content/uploads/2025/05/AFFS-Report-re-EDI-on-jobs-FINAL-23.05.25-1.pdf>

³ See Sub-section 43(1).

⁴ All the obligations under Section 43 strictly speaking fall on these people personally and in particular. For convenience, however, we refer to them in this Statement as obligations of the HEP.

⁵ The duty extends to the recruitment of members, students (and logically employees, although this was not expressly stated) and to those who will in future be invited to visit and speak, rather than just those who have in fact already been invited. *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

requirement (stated in objective terms) and requires active, positive steps to be taken.⁶ We refer to it as the (“**Section 43 Secure Duty**”). The Section 43 Secure Duty results in various requirements in practice, which are discussed in detail in Part 3. 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.”⁷ This includes criminal and civil laws. Among the latter are 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 Section 43.
- HEPs are only required to take the steps that are reasonably practicable for them to take. This “includes a negative duty to refrain from taking certain steps which would have the effect of restricting freedom of speech within the law. For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all”.⁸

Various points are relevant here.

- If an HEP is obliged by law or legally justifiable necessity (which includes by the HEP’s own requirements to the extent that they reflect its legal obligations or are necessary to secure a legally justifiable end and restrict free speech to the minimum extent necessary to secure that end) to do (or not do) something, such as to restrict the behaviour of its Participants (e.g. under, for instance, anti-harassment/bullying rules which are themselves written so as to be compliant with the Relevant Requirements)⁹, then it is not reasonably practicable for it to take a step (pursuant to Section 43) which would be inconsistent with such obligation. On the other hand, the duty to act under Section 43 will generally override duties to “have regard to” (i.e. merely to think about) such as under the Public Sector Equality Duty (“**PSED**”) under the Equality Act (in relation to which see further below).

In order to restrict speech compliantly with the Section 43 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 they interfere with lawful

granting freedom of speech to existing members and students, while restricting recruitment of members and students on the ground of their political opinions? We think not.”

⁶ This is also how the OfS sees it in respect of English HEPs. See the OfS Guidance, paragraph 56, “If [...] a step is reasonably practicable for [an HEP] to take, [an HEP] must take it.”

⁷ See the OfS Guidance, paragraph 27.

⁸ See OfS Guidance, paragraph 58. This correctly reflects how we believe the law operates.

⁹ Such contrary laws or other requirements are, so far as they themselves restrict Participants’ free speech, also subject to a separate “proportionality” test under the HRA, as discussed below.

free speech to the minimum extent necessary for the purpose for which they are in place.

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.¹⁰

- The OfS states other factors that are relevant to an assessment of whether steps are “reasonably practicable”.¹¹ Similar considerations are likely to apply under Section 43.
- 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.

Free speech code and requirements

HEPs must issue and keep up to date a “code of practice”. 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 as key tool of interpretation

The OfS, as regulator of English HEPs, has issued the OfS Guidance referred to above¹² about the requirements in practice consequent on changed legal obligations introduced into the Higher Education and Research Act 2017 (“**HERA**”), with effect from 1st August 2025. Revised provisions included Section A1(1), which created an obligation for the governing body of an English HEP to take “the steps that [...] are reasonably practicable for it to take” to secure freedom of speech (within the law) (the “**Relevant HERA Obligation**”); this is worded substantively identically to Section 43(1), which requires “such steps as are reasonably practicable to ensure that freedom of speech (within the law) is secured”.¹³

The OfS Guidance was prepared by OfS staff, including its lawyers, to set out extensive information on what was required to be done by HEPs in practice pursuant to the Relevant

¹⁰ This is supported by the OfS Guidance, paragraph 62.

¹¹ OfS Guidance, paragraph 61. These 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. Irrelevant factors are likely to include the viewpoint that the relevant speech expresses and the reputational impact of the speech on the HEP (OfS Guidance, paragraph 123).

¹² I.e. “*Regulatory Advice 24: Guidance related to freedom of speech*”.

¹³ Noting that there is introductory wording in Section A1 to the effect that it must be read “having particular regard to the importance of freedom of speech”, which gives greater relative weight to the requirements of Section A1 when balanced against other requirements and considerations. This is not in Section 43(1), so should be discounted in the interpretation discussed below.

HERA Obligation (as well as pursuant to other provisions inserted into HERA). BFSP considers that the OfS Guidance generally correctly reflects (subject to the factors discussed below) HEPs' duties under HERA, including the Relevant HERA Obligation. It follows that, to the extent that the Relevant HERA Obligation is substantively identical to parts of Section 43 as stated above, the OfS Guidance operates as an accurate statement of the implications in practice of those parts of Section 43. HEPs would be ill-advised not to act on this basis.

We have excluded those parts of the OfS Guidance and those aspects of the Relevant HERA Obligation which go beyond what is required by Section 43. Subject to these exclusions, those parts of the OfS Guidance which are relevant for interpreting Section 43 are discussed herein.

Parts of the OfS Guidance are directly relevant to the application of EDI Considerations and the seeking of EDI information.

- HEPs should not require applicants to any position to commit (or give evidence of commitment) to a particular viewpoint.¹⁴ HEPs should not require applicants for promotions¹⁵ or Research Approval¹⁶ 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.
- 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.¹⁷
- 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.¹⁸

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. Although Examples 27 and 32 focus on academic positions, the requirements extend to all positions at the HEP.

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 and) Section 43 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 and) Section 43 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.

¹⁸ OfS Guidance, paragraph 192. Even if not required pursuant to the primary obligations under HERA, it still represents what the OfS regards as appropriate.

We consider that these statements are correctly reflect the requirements in practice under Section 43 as well as under HERA.

Equality Act 2010

Discrimination by an HEP against, and harassment¹⁹ 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, employment²⁰ and further and higher education. (There are exceptions relating to “occupational requirements”, of which more below.)

The landmark *Forstater* case²¹ 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.²² 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 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.²³ 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.

¹⁹ The definitions of discrimination (including “indirect” discrimination) and harassment are discussed in BFSP’s statement [Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others.](#)

²⁰ In the context of employment, discrimination includes subjecting a person to a detriment because of a protected characteristic (**Section 39(2)**).

²¹ *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

²² *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.

²³ See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643. [See also *Higgs v Farmor’s School* [2023] ICR 1072.]

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 Act²⁴ 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 factors wider than the specific needs stated in the PSED when HEPs devise their EDI related programmes and agendas. It is a duty to "have due regard", that is, a duty to think and give appropriate weight in context. It has been described in the courts as "a duty of process not outcome". 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 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 Section 43 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. See BFSP's detailed statement [**Public Sector Equality Duty – Scope and interaction with free speech requirements**](#).

Safe harbours: Schedule 9 and Section 159

²⁴ Section 149.

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.

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 stated²⁵ 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.²⁶
- 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

²⁵ *Insight publication Freedom to question, challenge and debate, December 2022, at page 4.*

²⁶ OfS Guidance, paragraph 77, Example 27.

The free thought and speech rights of academics and students are protected under the **European Convention on Human Rights (“Convention”)**²⁷, as enacted into UK law by the **Human Rights Act 1998** (the “HRA”)²⁸. 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.

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 law²⁹ and are necessary in a democratic society” for various specified purposes, including for the protection of the rights of others, although this qualification is subject to a “proportionality” test.³⁰ 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”³¹ and to “extramural” speech “which embraces not

²⁷ Under Article 9 (Freedom of thought, conscience and religion) and Article 10 (Freedom of expression).

²⁸ As most, if not all HEPs are “public bodies” for the purposes of the Convention and the HRA.

²⁹ “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.

³⁰ 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.

³¹ See: *Erdoğan v. Turkey*, App. nos. 346/04 and 39779/04 (2014), paragraph 40.

only academics' mutual exchange (in various forms) of opinions on matters of academic interest, but also their addresses to the general public".³² 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"³³. Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10.³⁴ 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".³⁵

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 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,³⁶ 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

³² *Ibid*, concurring judgements paragraph 3.

³³ See: *Kula v. Turkey*, App. No. 20233/09 (2018).

³⁴ See: *Torres v Spain*, App no. 74729/17 (2022).

³⁵ *Dink V Turkey*, judgement of 14 September 2010 in French only, at 137.

³⁶ <https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf>

found that this requirement was likely to amount to indirect philosophical belief discrimination in violation of the Equality Act and also likely violated Section 43.³⁷

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

The Dandridge Review³⁸ (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 ADFS 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.

Regulatory requirements

From September 2027, Welsh HEPs will be subject to a new regulatory regime overseen by the new regulator, Medr. Medr has a duty, under Section 17 of the Tertiary Education and Research Act (Wales) 2022, (the “**TER Act**”), to have regard to the importance, in the exercise of its functions, of protecting the academic freedom of individual academics and HEPs. This duty will likely require Medr to impose regulatory requirements relating to protecting academic freedom on HEPs.

Colleges, schools and students’ unions

Section 43 does not apply directly to colleges, schools and halls of Welsh HEPs or to their associated students’ unions, to the extent that they are separate legal entities. The Equality Act applies to constituent institutions and also, with the exception of the PSED, to students’

³⁷ 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].”

³⁸ See: <https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Independent-Review-N-Dandridge-09.09.24.pdf>. See BFSP’s detailed analysis of the Review at <https://bfsp.uk/universities-and-free-speech>.

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 likely 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 Section 43 Secure Duty;³⁹
- 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.

Seeking EDI Information likely 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 Section 43 Secure Duty;⁴⁰

³⁹ This is expressly stated in OfS Guidance paragraphs 138 and 150, and Example 32 in respect of HERA. As Section 43 and HERA are identical in the relevant respects, HEPs would be ill-advised to act on the basis that the same is not true for Section 43. Further, while these requirements are stated in the OfS Guidance 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.

⁴⁰ This is expressly stated in OfS Guidance paragraphs 139, 147 and 151 and Examples 32 and 34 in respect of HERA. As Section 43 and HERA are identical in the relevant respects, HEPs would be ill-

- 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 factors⁴¹; and
- the HRA.⁴²

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 Section 43 Secure Duty;
- 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 viewpoints⁴³; and
- contrary to the HRA as a result of this “compelled thinking” or “chilling effect”.

advised to act on the basis that the same is not true for Section 43. Further, while these requirements in the OfS Guidance focus on academic staff, if universities are to be compliant, similar protections should apply in respect of all employment.

⁴¹ The indirect discrimination provisions in Section 19 are particularly relevant in this context.

⁴² While the HRA does not apply to hypothetical interferences (see 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”.

⁴³ See recent cases under the Equality Act discussed at Appendix 2 to the Principal Statement, the *Meade* case in particular.

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.⁴⁴ The knowledge that a 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 the Section 43 Secure Duty 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.

⁴⁴ 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 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.

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.

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".⁴⁵

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,

⁴⁵ Equality Act **Schedule 9**, various paragraphs.

so gives limited discretion and needs to be applied carefully. What can be done is to encourage applications from relevant groups.⁴⁶

Interaction of the above with Section 43 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 Section 43 Secure Duty from applying, subject to its limitations, and nor do they prescribe any mandatory obligations on an HEP.

Under the Section 43 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 Section 43 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 Section 43 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 Section 43. 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

⁴⁶ See OfS Guidance, Example 33. The same would appear to apply in respect of Section 43.

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 Section 43 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 Section 43). 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 Section 43 Secure Duty and with the HRA (which includes satisfying a “proportionality” test)⁴⁷. 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) Defence⁴⁸ in respect of actions by its employees (we call this the **“Requirement to Secure EA Compliance”**).

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

⁴⁷ 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.

⁴⁸ 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.

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) Defence⁴⁹. The Section 109(4) Defence is therefore unlikely to justify applying and seeking Specific EDI Considerations and Information in such situations.
- 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 natures of the positions being filled, the applicable needs, and the risks of liability if things go wrong, such as to make some EDI Considerations or EDI Information

⁴⁹ Remember that, in any event, 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).

justifiable? Does the position involve concerns regarding the potential for failures by the HEP to comply with an applicable Requirement to Secure EA Compliance?

- 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.

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 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 Section 43 and the HRA to protect such a person), which will conflict with, and would be likely to prevail over, a requirement which caused 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 this view 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 inevitably discriminate, harass, or otherwise fail to be effective in their role and exclude them on that basis.⁵⁰

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

⁵⁰ 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 Section 43) to continue their employment, or not discriminate against them for their beliefs in the application process.

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

Interaction with Section 43 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 Section 43 Secure Duty and the HRA, on the basis that they validly restrict free speech compliantly with the Section 43 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 the 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.