



EDI considerations and inquiries in the recruitment and research approval process at Scottish 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 **THIS STATEMENT MAY BE OUT OF DATE:** see its publication date at the end.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 15.*

Introduction

Best Free Speech Practice (“BFSP”) is a non-partisan campaign to clarify and disseminate information about what the legal requirements and their implications in practice actually are in relation to the protection of free speech and academic freedom at UK universities and other providers.

Along with all other “post-16 education bodies”, Scottish “higher education institutions”, including Scottish Universities, are subject to the following principal legal obligations¹ to protect people's expression of their viewpoints: their duty under the **Further and Higher Education (Scotland) Act 2005** (“the 2005 Act”) to uphold academic freedom (and to ensure that appointments held or sought and entitlements and privileges enjoyed by academics are

¹ As noted in the EHRC Scotland’s 2019 guidance document “Freedom of expression: a guide for higher education providers and students’ unions in Scotland”, Scottish Universities which are registered charities are also subject to potentially relevant duties to promote and uphold free speech as an important aspect of meeting their charitable purpose of furthering students’ education for the public benefit.

not adversely affected by its exercise); their duty under the **Equality Act 2010** to protect people with viewpoints which count as "protected characteristics" from harassment and discrimination; and their duties under the **Human Rights Act 1998** to protect freedom of thought, belief and freedom expression. These obligations are together referred to as the "**Relevant Law**" and further discussed below.

It has in recent years been common practice at Scottish Universities 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 required to be 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 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 caused problems for free speech at the Open University. Similar misuse (or misunderstanding) of EDI requirements gives rise to significant free speech compliance failures at other universities, including those in Scotland. To the extent that requiring support for "EDI" requires support for controversial and contested 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 legal compliance failures which have arisen, and risks which are created, under the protections for free speech in the Relevant Law by applying EDI Considerations and seeking or requiring EDI Information. It also identifies what Scottish Universities need to do to ensure that they comply with the Relevant Law.

In summary, doing one, any or all of the following things is highly likely to give rise to breaches of some or all of the obligations imposed on Scottish Universities by the Relevant Law:

- 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 Scottish Universities;
- seeking information about an applicant's support for such agendas or programmes, because this would be to provide information to put the university 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 Scottish Universities think they need visibly not to dissent from, or even to demonstrate adherence to and actively promote, ideological agenda containing aspects with which they do not necessarily agree.

There are, however, potential protections for certain permitted activities. These are discussed in Part 3 below.

This Statement may well raise matters which Scottish Universities have not appreciated. We hope, however, that they will find that it helps them avoid pitfalls.

BFSP's related campaign, Alumni for Free Speech ("**AFFS**") (www.affs.uk), will be monitoring and liaising with Scottish Universities to ensure that they are free speech compliant. It will also be publicising any continuing failures by Scottish Universities to comply with their free speech obligations. AFFS conducted a survey in early 2025 of various English Universities as regards the sorts of compliance issues addressed in this Statement. AFFS has now published a report (the "**AFFS 2025 Report**") of its findings concerning the likely non-compliance of a significant number of such universities' recruitment policies and practices². On the evidence available to AFFS at this stage, there is little reason to believe that compliance failures are any less widespread at Scottish Universities. We also share a link to an article by the Committee For Academic Freedom about AFFS' project focusing on these compliance failures at our universities: <https://afcomm.org.uk/2025/01/21/new-campaign-to-remove-edi-statements-from-academic-job-applications/>

EDI support duties: Finally, while this is not the focus of this statement, it is important to mention that the AFFS Report found that it is common that English universities impose duties on their employees, including successful applicants for academic and other jobs, to "promote", "support", "contribute to", or "commit to" EDI. These duties, whether they are imposed by English or Scottish universities, raise serious risks of breaches of the relevant laws. This is not discussed further here, but detailed information can be found in the AFFS 2025 Report.

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

Part 1: Relevant law and regulatory requirements

This Part sets out the Relevant Law to which Scottish Universities are subject.

A major risk area for Scottish Universities 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 will be applicants whose views are protected per the below.

Further and Higher Education (Scotland) Act 2005 (the “2005 Act”) – free speech protection obligations

Free speech-related legal requirements specific to the higher education sector are to some extent different in Scotland from those affecting English providers. Under Section 26(1) of the 2005 Act, Scottish Universities, as post-16 education providers, must “aim to:

- (a) uphold (so far as the body considers reasonable) the academic freedom of all relevant persons; and*
- (b) ensure (so far as the body considers reasonable) that [appointments held or sought], are not adversely affected by the exercise of academic freedom by any relevant persons”.*

While the above gives HEPs an element of discretion, implementation of this provision must be done so as to comply with administrative law and is challengeable by judicial review.

Sub-section 26(3) makes clear that “relevant persons” for these purposes are anyone who is engaged in either teaching or the provision of learning, or researching at Scottish Universities. Sub-section 26(4) makes clear that “academic freedom” is a broad concept which includes the freedom within the law of academics working for Scottish Universities to:

- “(a) hold and express opinions,*
- (b) question and test established ideas or received wisdom,*
- (c) develop and advance new ideas or innovative proposals,*
- (d) present controversial or unpopular points of view”.*

In light of the statutory definition of “academic freedom”, the specific duty under Sub-section 26(1)(b) is expressly relevant to any attempt by Scottish Universities to apply EDI Considerations in the selection processes of people for academic and other jobs and/or Research Approval. Any requirement included within any such processes for applicants to share and endorse particular ideological agendas will be at risk of constituting a breach of the statutory duties imposed on Scottish Universities by Section 26(1) of the 2005 Act.

Equality Act 2010

Discrimination by Scottish Universities against, and harassment³ by Scottish Universities 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.⁴ As further discussed below, there are some highly specific, legally defined exceptions.

The landmark *Forstater* case⁵ 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.⁶ The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, Scottish Universities 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, views in relation to other aspects of critical race theory and moves to “decolonise the curriculum”, and in relation to religions and their effects and in relation to Israel and the rights of Palestinians.) There can be “inappropriate (sometimes referred to as “objectionable”) manifestations” of protected beliefs which do not qualify for protection.⁷ The existence of such limitations generally appears to work successfully to create

³ 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* (the “Equality Act Statement”), which can be found at <https://bfsp.uk/universities-and-free-speech>.

⁴ In the context of employment, discrimination includes subjecting a person to a detriment because of a protected characteristic (**Section 39(2)**).

⁵ *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

⁶ See: *Corby v. ACAS*, September 2023 and *Miller v. University of Bristol*, February 2024 [ET no: 1400780/2022]. It is worth noting that although the Tribunal in the latter case was alert to the distinction between opposing Zionism and antisemitism, it ruled that some of the Dr Miller’s “manifestations” of this distinction were antisemitic and thus not protected.

⁷ See: *Wasteney v. East London NHS Foundation Trust* [2016] ICR 643.

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.

On the other hand, Scottish Universities have very limited duties under the Equality Act in respect of the behaviour of staff, students and visiting speakers acting in capacities which do not give rise to responsibilities on the university's part. Accordingly, opinions expressed, for instance, by university staff via their private social media are not normally the university'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 Part 5 of the Equality Act Statement for further information. A very relevant example of the potential legal issues can be found in the detailed opinion by Akua Reindorf KC,⁸ 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.⁹

Given that many people hold protected viewpoints about a wide range of currently controversial issues, the Equality Act creates a major risk area for Scottish Universities. This is likely to require greatly increased institutional neutrality in relation to many contested issues. In order to avoid compliance failures, it is important that Scottish Universities do not misinterpret (or over-interpret) the requirements under the Equality Act. The fact that an

⁸ <https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf>

⁹ 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."

applicant for a position may have viewpoints which some people find offensive or disagree with profoundly does not make them unlawful under the Equality Act (which will only be engaged when speech amounts to discrimination or harassment as narrowly and carefully defined in that legislation). Getting this wrong is a real risk area for Scottish Universities.

Public Sector Equality Duty

Scottish Universities are, in the exercise of their functions, obliged by their Public Sector Equality Duty (“PSED”) under the Equality Act¹⁰ to “have due regard to” the need to eliminate unlawful discrimination and harassment (and other unlawful acts), 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. Furthermore, the PSED obligation to “have due regard” is a duty to think and give appropriate weight in context and has been described as a process duty not an outcome duty. The PSED 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. Contrary 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 26 of the 2005 Act to uphold 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, are discussed in detail in Part 3.

Equality Act: summary

In summary, the above requirements mean that, subject to Section 159 and Schedule 9 (as discussed in Part 3) and to any other contrary legal requirements:

- Scottish Universities must not to 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.

¹⁰ Section 149

- Scottish Universities 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 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".

For detailed information about the above, see BFSP's Equality Act Statement.

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** (the "**Convention**"),¹¹ as enacted into UK law by the **Human Rights Act 1998** (the "**HRA**"). These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful.¹² Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.

The right to free expression is subject to the qualification that the "exercise of these freedoms, since it carries with it duties and responsibilities,¹³ may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law¹⁴ and are necessary in a democratic society" for various specified purposes, including for the protection of the rights

¹¹ Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

¹² See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 91.

¹³ "Amongst them — in the context of religious opinions and beliefs — may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs" (*Giniewski v France* (2006) 45 EHRR 23 at paragraph 43).

¹⁴ "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."

of others, although this qualification is subject to a “proportionality” test.¹⁵ Contrary laws and legal obligations can thus operate to restrict free speech rights to a limited extent.

Any interference by a Scottish University 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”¹⁶ 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”.¹⁷ 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”.¹⁸ Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10.¹⁹ 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, Scottish Universities 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”.²⁰

¹⁵ 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.

¹⁶ See: *Erdoğan v. Turkey*, App. nos. 346/04 and 39779/04 (2014), paragraph 40.

¹⁷ *Ibid*, concurring judgements paragraph 3.

¹⁸ See: *Kula v. Turkey*, App. No. 20233/09 (2018).

¹⁹ See: *Torres v Spain*, App no. 74729/17 (2022).

²⁰ See: *Dink v. Turkey*, judgement of 14 September 2010 in French only, at 137.

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, 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 ideological agendas at Scottish Universities might run a significant risk of being unlawful under the HRA, not least because of the "chilling effect" mentioned above.

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

The Dandridge Review²¹ 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. Insofar as it addressed legal obligations arising under the Equality Act and the HRA, the findings of the Dandridge Review are of relevance to Scottish HEPs. Some key relevant findings of the Dandridge 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 Dandridge 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.

Halls, schools and students' unions

The Equality Act applies to halls, schools and the like and also, with the exception of the PSED, to students' unions. By contrast, the HRA does not apply to such institutions which are not themselves *public authorities*, or to students' unions.

²¹ See: <https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Independent-Review-N-Dandridge-09.09.24.pdf> and BFSP's detailed analysis of the Review at <https://bfsp.uk/universities-and-free-speech>

Part 2: Implications in practice

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

Discrimination in the selection process 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 be:

- at risk of being unlawful under the obligations to protect academic freedom under Section 26 of the 2005 Act;
- highly likely to be unlawful discrimination (and possibly harassment, depending on the circumstances and the nature of the consequences) under the Equality Act, if the relevant applicant's dissent or non-compliance is as a result of a viewpoint which count as “protected” under the Equality Act; and a potential breach, depending on the relevant detailed context, of its PSED in respect of such person; and/or
- highly likely to be contrary to the HRA.

Seeking EDI Information likely prohibited and is likely preparation to discriminate: the only purpose of seeking EDI Information would be to provide information for an assessment process in order to put the university 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:

- at risk of being contrary to Scottish Universities’ obligations under Section 26 of the 2005 Act;
- highly likely to be contrary to Scottish Universities’ requirements to Secure EA Compliance and its PSED in respect of applicants with viewpoints which count as “protected” under the Equality Act, depending on the relevant detailed context and unless there are other overriding factors;²² and

²² The indirect discrimination provisions in Section 19 are particularly relevant in this context.

- highly likely to be contrary to the HRA.²³

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: further, creating a situation where people who seek (or are likely to seek) jobs/promotion/Research Approval at Scottish Universities think that, in order not to impair their career prospects, they need to visibly not dissent from, or even demonstrate adherence to and actively promote, an agenda, or values, beliefs or ideas, aspects of which they do not necessarily agree with, both pressurises people into publicly aligning with agendas, values, beliefs and ideas, and reduces people's willingness (or perceived ability without having their career prospects blighted) to hold or express certain viewpoints and thus creates a "chilling effect" on people's freedom of thought and speech. This is:

- at risk of being contrary to the requirements of Section 26 of the 2005 Act;
- highly likely to be 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 context, to be contrary to its PSED in respect of people with such viewpoints;²⁴ and
- highly likely to be contrary to the HRA as a result of it reducing applicants' willingness (or perceived ability without having their career prospects blighted) to hold or express certain viewpoints i.e., its "chilling effect" on people's freedom of thought and speech.

²³ 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".

²⁴ See: the recent cases under the Equality Act discussed at Appendix 2 to the Principal Statement, the *Meade* case in particular.

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.

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 “a proportionate means of achieving a legitimate aim”.²⁵

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

²⁵ Equality Act, **Schedule 9**, various paragraphs.

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**”.

The Section 159 Exception 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. It is also to be noted that it contains various objective tests, so gives limited discretion and needs to be applied carefully.

Interaction of the above with the 2005 Act and the HRA

Although they are an exception to certain aspects of mandatory Equality Act compliance, occupational requirements and the Section 159 Exception neither prevent the duties under the 2005 Act from applying nor impose any mandatory obligations on Scottish Universities.

In deciding whether the relevant proportionality assessments of the two exceptions are made out, it may – depending on the facts – be necessary to consider the duties under the 2005 Act 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 the 2005 Act. This is a nuanced interaction and one in respect of which guidance from the courts/tribunals would be particularly valuable.

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 Scottish Universities’ 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 Law 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, Scottish Universities 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 the 2005 Act and the HRA, for the reasons explained in the Appendix.

What Scottish Universities can legitimately do by way of a safe alternative is to seek confirmation that an applicant understands the universities’ 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 a Scottish University to be in contravention of the Equality Act (or, indeed, the 2005 and the HRA). This should be accompanied with clear policies and training on Equality Act compliance. This must not, though, be done in a way to 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:

- comply with a Scottish University'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 Scottish Universities' legal obligations and which, in addition, satisfy a "proportionality" test for the purposes of the HRA (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) Defence²⁶ in respect of actions by its employees (we call this the **"Requirement to Secure EA Compliance"**).²⁷ Further, EDI Considerations and EDI Information which, while one cannot point to a specific law under which it is justifiable, address legitimate concerns and are "proportionate" for the purposes of the HRA, could potentially be justifiably applied or sought to the extent they are focused exclusively on such concerns.

EDI Considerations and EDI Information requests often relate to general adherence, compliance and/or commitment, 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.

²⁶ 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 this is not legally mandated pursuant to the Section 109(4) Defence. The same applies in respect of other clashes of obligations.

²⁷ And also, under charitable law obligations to comply with the Equality Act and other laws.

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/seeking Specific EDI Considerations and Information could be legally required 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:

- 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.²⁸ 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) could not itself justify otherwise unlawful practices involving EDI Considerations and/or EDI Information.

In any event, Scottish Universities 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 in order 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.)

Scottish Universities 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 have to be focused on whether there are

²⁸ 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).

material risks of an applicant causing the university to act unlawfully in their new position, and no wider. This will involve examining issues such as:

- 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 a Scottish University to comply with an applicable Requirement to Secure EA Compliance? In this regard, the position will need to involve performing functions on behalf of a Scottish University 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 university, 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 inevitably 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 mandate? In principle, it is possible that action required to qualify for the Section 109(4) Defence could justify Scottish Universities making enquiries about whether an applicant for a sensitive position had evidenced a pattern of previous behaviour (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 university. 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 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 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 the 2005 Act 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 Scottish Universities can legitimately do by way of a safe alternative is to seek confirmation that an applicant understands the university'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 university 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 inevitably discriminate, harass, or otherwise fail to be effective in their role.

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: such actions likely to unlawful

Interaction with the 2005 Act and the HRA

Scottish Universities may in principle be able to apply EDI Considerations and seek EDI Information in the above cases without contravening their obligations under the 2005 Act (and/or the HRA), on the basis that they do not conflict with the duty to uphold academic freedom (and/or do not unlawfully interfere with Convention rights). Whether this is the case will, however, depend on the relevant circumstances of each situation. Assessing this will not be easy for Scottish Universities.

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 Scottish Universities' EDI Considerations and EDI Information (whether legally mandated or in principle reasonable as regards essential 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 possible scenario in which a legal mandate (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, a Scottish University's apparent legal justification to apply 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 Scottish Universities 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 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 (which is discussed in Part 3 above) or Section 159 Exception, 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 Scottish Universities.

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

What Scottish Universities can legitimately do, by way of 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 university'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 university to be in contravention of the Equality Act. This should be accompanied with clear policies and training on Equality Act compliance. This must not, though, be done in a way to intimidate or create a hostile environment for the applicant.