Protected viewpoints under the Equality Act:

Risks and necessary actions for employers and others

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 THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end.

1. Introduction

Best Free Speech Practice ("**BFSP**") is a non-partisan campaign to clarify and publicly share what the legal requirements and their implications in practice actually are for protecting free speech and academic freedom at UK organisations, companies, and institutions. These requirements are generally much more demanding than organisations appear to appreciate. The legal obligations of many organisations in relation to freedom of speech are extensive.

As confirmed in recent case law, under the Equality Act 2010 (the "**Equality Act**"), viewpoints on many areas of current controversy are protected as religious or philosophical beliefs. Harassment and discrimination against people because of their protected viewpoints are unlawful in a wide range of contexts, including employment. Employers and others will be liable unless they meet demanding requirements to prevent unlawful harassment and discrimination.

This document explains the relevant duties and risks of employers and organisations under the Equality Act, with illustrations of how they result in liability and embarrassment in practice, and explains what is required to be done in practice to secure compliance.

Alumni for Free Speech ("**AFFS**") will be monitoring and liaising with organisations, companies, and institutions to ensure that they are compliant with the Equality Act. In the meantime, it asks anyone who has first-hand experience of an organisation which may not be compliant to contact it at info@affs.uk.

2. Protected Viewpoints: requirements and risks under the Equality Act

Under the Equality Act, certain organisations must avoid unlawful discrimination against and harassment of people, including their employees, who have the "protected characteristic" of

holding (or not holding) particular religious or philosophical views ("**Protected Viewpoints**"). Victimisation is also prohibited.

Contexts in which it is unlawful to discriminate against and harass people for Protected Viewpoints include: the provision of services and exercise of public functions, employment, further and higher education, and membership associations[1].

Protected Viewpoints

The "protected characteristics" are identified in Section 4 of the Act. "Religion or belief" is one such characteristic and is defined in Section 10.[2] Not all religious or philosophical beliefs qualify as protected characteristics. To qualify, a belief must meet the judge-developed *Grainger*[3] criteria (see the discussion in the Appendix). The range of beliefs which can be expected to qualify is, however, extremely broad.

The landmark *Forstater* case[4] established that gender-critical views are Protected Viewpoints. Views which challenged aspects of critical race theory ("**CRT**") were subsequently ruled to be protected, as were anti-Zionist ones, and views critical of Islam.[5] The law in this area is still evolving. If they wish to avoid finding themselves in breach of the law, organisations need to work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as Protected Viewpoints in appropriate circumstances and will, in time, be confirmed as such. Such obviously contested areas would include, for example, other aspects of CRT, the co-called "decolonisation" of the school and university curriculum, views in relation to religions and their effects, and views in relation Israel and Palestine. Where the relevant facts fit the necessary criteria[6], there is a strong likelihood that some other views which are opposed to views and agendas promoted under the EDI banner, or indeed opposition to EDI as a banner under which a wide range of contested views are promoted and

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1 See: Sections 28 and 29, Sections 39 to 41, Sections 90 to 94 and Sections 101 and 102.

2 The definition is set out in Appendix 1 below.

3 Grainger v. Nicholson (2010) ICR 360.

4 *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

5 *Corby v ACAS*, September 2023 [ET No: 1805305/2022] and *Miller v University of Bristol*, February 2024 (Case No,1400780/2022) re views on aspects of CRT and anti-Zionism. 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. *Lee v IFoA* (judgement not yet publicly available) re views on Islam.

6 Given the nature of the *Grainger* test (discussed in the Appendix), each case is fact sensitive and personal to the particular claimant.

enforced, would themselves be ruled to be protected under the Equality Act were this ever to be litigated. See further information in the Appendix.

There can, however, be "inappropriate (sometimes expressed as "objectionable") manifestations" of Protected Viewpoints which do not qualify for protection.[7] This is a complex area (for instance, distinctions need to be drawn between the forums of the manifestation, e.g. personal social media or official channels of communication), but generally appears to result in a reasonable balance of outcomes between competing claims or considerations under the Equality Act.

Discrimination and harassment: recent cases involving liability for actions against employees for their viewpoints

"Discrimination" occurs where a person (A) treats another person less favourably than A treats or would treat others because of a protected characteristic, including holding a Protected Viewpoint.[8] The Equality Act also applies to "indirect" discrimination.[9] This can have real effects in practice: for instance, rules which equate "gender-critical" views with transphobia, training which insists that all white people should assume they are inherently racist and recruitment or promotion processes which require applicants to demonstrate support for particular viewpoints or agendas are all likely to infringe the Equality Act.

"Harassment" means (in summary) unwanted conduct related to a relevant "protected characteristic" which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment. The question of whether there has been such an "effect" has an objective element, and subjective perceptions of offence (while relevant) are not on their own sufficient for conduct to constitute harassment.[10]

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[7] See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643 and *Higgs v Farmor's School* [2023] EAT 89.

[8] See Section 13.

[9] Under Section 19, indirect discrimination may occur where a practice, policy or rule applies to a number of people in the same way (i.e., apparently neutrally) but, nonetheless, puts people with a protected characteristic (including a claimant) at a particular disadvantage (e.g. it has a worse effect on them) when compared with people who do not share that characteristic. In such circumstances, unless the organisation concerned can prove that its practice, policy or rule is a proportionate means of achieving a legitimate aim, it will likely be in breach of its obligations under the Equality Act.

[10] See Section 26. In deciding whether conduct has this effect, the perception of the person claiming harassment, the other circumstances of the case (these would include an organisation's duties to secure free speech and academic freedom, where relevant) and whether it is "reasonable" for it to have had such effect, must all be taken into account. This question thus has an objective element, and subjective perceptions of offence (while relevant) are not on their own sufficient for conduct to constitute harassment. This operates to exclude subjective assertions of harassment by the hypersensitive. See the detailed discussion of this in Appendix 2 below.

Employment Tribunals have stated that (in respect of the "violating dignity" limb) the relevant threshold will not be met by things said or done that are "trivial or transitory, particularly if it should have been clear that any offence was unintended"[11]. They have also emphasised the importance of not encouraging "a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"[12]; and that beliefs that are "profoundly offensive and even distressing to many others" may well be "beliefs that are and must be tolerated in a pluralist society".[13]

This definition has very wide implications, with many consequent detailed requirements for protecting the free speech rights of those with Protected Viewpoints.

Recent cases have held employers – including the Open University and Arts Council England ("**ACE"**) – and a regulatory body liable for discrimination against and harassment of employees in connection with their viewpoints, including liability for bringing inappropriate disciplinary proceedings against employees for their viewpoints and for their employees attacking their colleagues by online petitions and pile-ons. They provide vivid examples of how this area of the law can apply in practice and confirm the onerous requirements which apply for an employer to bring itself within the Section 109(4) Defence, which is demanding and not easily satisfied.[14] See more detail in Part 3 below.

Liability for conduct of employees: limited duties in respect of employees more generally

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.

Other than pursuant to their PSED (as discussed below), organisations have very limited duties under the Equality Act in respect of the behaviour of staff acting in capacities which do not give rise to such responsibilities on the organisation's part. So, for instance, opinions expressed by the organisation's staff via their private social media are not normally the organisation's problem under the Equality Act.

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11 Dhaliwal v. Richmond Pharmacology [2009] ICR 724, [2009] ILRL 336 at paragraph 22.

12 *Ibid*.

13 Forstater v. CGD Europe et al., 2021 (Appeal No. UKEAT/0105/20/JOJ), at paragraph 116.

14 As will be seen from the cases considered in Section 3 below. In Allay (UK) Limited v Gehlen [2021] UKEAT 0031_20_0402 (Unreported, 4 February 2021), the EAT clarified that the Section 109(4) Defence is designed to encourage employers to take significant and effective action to prevent unlawful action.

Public Sector Equality Duty

The Public Sector Equality Duty ("**PSED**") applies to public authorities (and other organisations, when exercising public functions).[15] It requires public authorities, in the exercise of their functions, "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.

A duty to "have due regard to" is only a duty to think about something and to give it appropriate weight in context. The PSED is not a duty to act and has been described as a "process duty not an outcome duty". Positive duties to take action (such as the need to avoid discriminating against or harassing people with protected viewpoints under the Equality Act) are, therefore, likely to override the PSED. Furthermore, the PSED is very specifically worded and does not require (or justify) consideration of an organisation's wider EDI related programmes or agendas beyond the specific stated aims. The risk for organisations in over-interpreting the meaning of "harassment" is of particular relevance in this context. See more in BFSP's detailed statement ***Public Sector Equality Duty – scope and interaction with free speech requirements***.

3. Significant cases: ways in which liability can arise: what constitutes harassment (and discrimination) in the workplace

Recent case law relating to the Equality Act has dramatically strengthened the protections under the Equality Act that legislation for various viewpoints which it is now clear count as "protected characteristics". There has been a line of crucial cases which consider in detail what constitutes discrimination and harassment in the context of protected expressions of belief.

The *Fahmy* case

In the *Fahmy* case,[16] an institution was found guilty of harassment as a result of not having taken reasonable steps (so as to qualify for the Section 109(4) Defence) to prevent its employees from harassing a colleague for her gender-critical viewpoints by way of a very hostile online petition. Further, the convener of an earlier meeting was criticised for stating personal views in solidarity with one side of a controversial and highly charged debate. While the Tribunal concluded that the convener's actions did not cross the threshold for themselves creating an intimidating (etc.) environment, it stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which were found to amount to harassment in that case.

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15 See Section 149.

16 *Fahmy v Arts Council England* (2023) ET case no 6000042/2022.

In *Fahmy*, the following were (together) found to constitute unlawful harassment: describing gender-critical views as "bigotry", a "cancer that needs to be removed", views which "should not be tolerated", and "discriminatory, transphobic". Likening such views to racism and sexism, and calling the LBG Alliance (which promotes gender-critical viewpoints and which Ms Fahmy was defending) a "cultural parasite and a glorified hate group that has [….] supporters that also happen to be neo-nazis, homophobes and Islamophobes", was conduct which contributed to the finding of unlawful harassment in that case.

It is worth noting, however, that comments at the earlier online meeting, which were hostile and quite strongly expressed, were held not to constitute harassment. They included the convenor of the meeting stating that the LBG Alliance was, in his personal opinion, "a divisive organisation that has a history of anti anti trans-exclusionary [sic] activity", and another saying that it was "extremely disappointing to see people trying to defend [the LBG Alliance] here of all places.") This finding reflected the importance of encouraging and protecting robust debate, that meetings are inherently spontaneous so often involve spontaneous expressions of viewpoints which might well not be made in a different environment, and that meetings on a contentious topics are inherently likely to involve strongly expressed views. (The outcome may well have been different had the meeting involved co-ordinated, extreme attacks, barracking and the like.) This finding is a reminder that comments and statements, even strongly expressed ones, which a recipient may find offensive, do not necessarily constitute harassment. The bar for what will constitute unlawful harassment of speakers on either side of contentious debate is deliberately not a low one.

In connection with the Section 109(4) Defence, the Tribunal noted that the employer had taken disciplinary action but ruled that having an anti-harassment policy which omitted protected beliefs from a list of protected characteristics, and not having provided staff training about protected beliefs, meant that it had not made out the Section 109(4) Defence.

The *Meade* case

In the *Meade* case,[17] an employer and a regulatory body were found guilty of discrimination and harassment as a result of inappropriate disciplinary action against an employee for expressing dissenting views on a matter of controversy. In particular, both had subjected the employee to harassment related to her gender critical beliefs as a result of the following conduct:

- The regulator subjected the employee to a prolonged investigation into her gender-critical beliefs and to "fitness to practise" proceedings before sanctioning her for professional misconduct. The Tribunal stated that the regulator's "failure to check if [the complainant] could be malicious, and not checking his previous social media history, is indicative of a

[17] *Meade v Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022).

lack of rigour in the investigation, and an apparent willingness to accept a complaint from one side of the gender self-identification/gender critical debate without appropriate objective balance of the potential validity of different views in what is a highly polarised debate."

- The employer subjected the employee to a disciplinary process; suspended her on charges of gross misconduct; issued an investigation report which was hostile in tone and content; and issued a final written warning. Importantly, the Tribunal ruled that the employer's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing the final warning, and its continued restraint on her freedom of expression themselves constituted harassment; and that a staff member conducting the disciplinary process "labelling [Ms Meade's] Facebook posts as being transphobic was …sufficient…to constitute harassment."

It should be noted that, in the *Meade* case, it was actions by the employer and regulator themselves which were the primary events of harassment, rather than failing to prevent employees attacking their colleague.

The *Phoenix/Open University* case and the Dandridge review

In the *Phoenix/Open University* case,[18] personal attacks on a senior member of academic staff for her gender-critical viewpoints, including an aggressive open letter and an online pile-on, were held to be unlawful harassment and/or discrimination for which the Open University ("**OU**") was found to be legally liable. There were more than 25 counts of discrimination and harassment and more than 395 individual events of harassment as a result of individuals signing the open letter being found to be harassment.

It is useful to list some of the things that were held to constitute harassment: as in the *Meade* case, equating gender-critical views with transphobia, calling the OU's Gender Critical Research Network a "hate group"; a senior colleague telling Professor Phoenix that having her in the department was like having a racist uncle at the Christmas dinner table; an open letter signed by 368 people (almost all of whom were found to have harassed Professor Phoenix by so doing); a number of tweets, and retweets of hostile statements and information.

It should also be noted that a key feature of many of the events which were found to amount to harassment was that they were regarded as an invitation to people to join the pile-on.

Furthermore, leaving a hostile statement on the OU's website, despite requests to remove it, itself constituted a separate act of harassment by the OU from the issuing of the statement itself.

[18] *Phoenix v The Open University* (2024) ET Case No: 3322700/2021 & 3323841/2021.

It is also worth mentioning that various actions were held not be harassment. These included: admonishing Professor Phoenix for swearing a lot during a meeting; not praising Professor Phoenix's success in obtaining a large grant to support her research;[19] a statement which was found to have a purpose of reassuring the trans and non-binary community. These findings, again, help illustrate where the bar is likely to be set in future cases.

In the circumstances, it is perhaps unsurprising that the OU did not even attempt to claim it could rely on the Section 109(4) Defence.

The Dandridge Review[20] is a report, published in September 2024, of an independent review which was commissioned by the OU following the *Phoenix* case. (See BFSP's detailed analysis of the Review at https://bfsp.uk/universities-and-free-speech.) The Dandridge Review (and BFSP's analysis) make sobering reading.

Some key relevant findings and recommendations of the Dandridge Review were that:

- There was a culture of conformity/consensus at the OU, and fear amongst dissidents from orthodoxies (see Part 4 below).
- EDI was a source of freedom of speech problems (see Part 4 below).
- Requirements re standards of behaviour were poor and needed a lot of improvement. These should extend to clear guidelines about online working and online behaviour, when it is not appropriate to express personal views at work, and that staff should be willing to work with colleagues whose views they disagree with.
- There is a vital need for clear, consistent, lawful and effective policies more generally.
- The OU should adopt institutional neutrality.[21]
- Much more early, active and effective management of disputes was needed.
- The need for dedicated, effective free speech promotion and protection structures, with separation from EDI.

The Review had some important omissions and failings, which BFSP explains in its statement.

The *Doyle* Case

In the *Doyle* case, a publishing company (Hachette) settled a claim for belief discrimination by Ursula Doyle, the editorial director of *Fleet*, a Hachette imprint. Doyle holds gender-critical

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[19] This was, though, found to amount to discrimination.

[20] See: https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Indpendent-Review-N-Dandridge-09.09.24.pdf

[21] The Dandridge Review addressed only the OU, but the same reasons and the need for institutional neutrality apply to other universities. Any university which does not wish to risk free speech compliance failures needs to adopt institutional neutrality.

views, and published Kathleen Stock's *Material Girls* in 2021. She has described how, following this publication, she was abused online by individuals working in the publishing industry, who repeatedly tagged her employer in their posts.[22] Hachette subsequently moved the books of two authors who objected to Doyle publishing work by gender-critical authors, from her imprint.

4. Problems with culture and atmosphere: the role of EDI

Problems with culture and atmosphere are backgrounds which shape how free speech problems arise at organisations. The Dandridge Review focused on these as problems underlying the OU/Phoenix compliance disaster.

Cultures of conformity and consensus; fear

The Dandridge Review cited evidence that there was 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.[23] Fear was mentioned by several witnesses[24], and appears to reflect the mechanisms by which conformity is enforced. From BFSP's experience and the evidence of the *Fahmy* and *Meade* cases, this is the case at many institutions and organisations.

A culture of conformity leads in a very short journey to a hostile environment (as evidenced by the fear mentioned by Dandridge witnesses), a core ingredient of harassment. While liability under the Equality Act does not arise without "unwanted conduct" creating such an environment, having institutional positions or policies which institutionalise or enforce that environment is sufficient[25] (this is key evidence in the case for institutional neutrality on contentious issues, discussed elsewhere). Once employer liability for employee actions under Section 109 of the Equality Act, and the need under Section 109(4) for employers (in order to avoid liability) to take all reasonable steps to prevent actions by employees which create harassment, are brought into the picture, the need for firm action to prevent this culture is overwhelmingly obvious.

Key actions that would help address this problem would be: proper promotion of free speech and the need for tolerance of viewpoint diversity, with appropriate training about it and a suitable person to lead that work; institutional neutrality on contentious issues; prohibitions on harassment and other adverse actions against people because of their views, which are

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22 https://thecritic.co.uk/how-i-was-hounded-out-of-publishing/

23 See paragraphs 2.5-2.11 of the Dandridge Review.

24 See paragraphs 2.7, 2.10 and 2.35 of the Dandridge Review. This was also referred to by the Tribunal in the *Phoenix/OU* case.

25 See *Meade v. Westminster City Council and Social Work England* (2024) ET Case No: 2201792/2022 & 2211483/2022) and the *Phoenix* case as examples.

actively enforced, including through disciplinary proceedings; active and effective intervention using those rules when problems arise; and stopping a complaints culture.

EDI as a source of free speech problems; imbalance between EDI and free speech requirements and agendas and available resources

The findings of the Dandridge Review cited EDI as a source of free speech problems at the OU as a result of the strength, general acceptance, and rigidity of the EDI function and its agendas, and an imbalance between the resources allocated to EDI and free speech.[26] It can contribute to cultures of conformity and indeed to fear to dissent. Dame Nicola is a former EDI professional, so this is particularly telling.

For evidence of this imbalance at universities generally, see the study by AFFS of resources committed by top universities to EDI and to free speech, respectively, at https://affs.uk/edi-and-free-speech. The ratio is 214:1, reflecting in part the fact that very few employ a dedicated free speech officer.

Further evidence of the free speech compliance problems caused by blind adherence to EDI agendas is the University of Sussex being fined £585,000 by the Office for Students for having breached its conditions of registration because (inter alia) one of its policies contained statements which restricted lawful speech.[27]The university had used a template provided to it by a campaign group without questioning its lawfulness.

The Dandridge Review recommends various things, including that "supporting the rights of one group should not come at the expense of another".[28]

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[26] See paragraphs 4.8-4.9 of the Dandridge Review. See also paragraphs 2.14-16. The "desire to protect and promote principles of EDI had on occasions translated into excessive caution as to as to what could and could not be said, even when the views in question were legitimate and lawful, albeit contentious. This was associated with a potentially rigid approach that assumed that only one interpretation of principles of EDI was acceptable, making it difficult to have an open and honest discussion about how complex issues should be interpreted and applied. This approach to EDI had the effect of […] precluding legitimate debate and discussion about contentious matters."

Paragraph 4.17 states: "This approach to EDI had the effect of undermining sustainable approaches to managing competing equality rights at the OU, as well as precluding legitimate debate and discussion about contentious matters. It was compounded by uncertainty amongst staff as to what the law required about these matters, and the OU's policies in these areas being inadequate (see more below). The Review states that "the only possible way forward is […] for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice.".

[27] For further analysis, please see BFSP's statement "***Governance requirements re: free speech at English universities; Severe consequences of failure: the Sussex case***."

[28] Recommendation 4 includes that the OU should "encourage debate" and "embrace the vibrancy and dynamism of these debates by […] proactively seeking out a diversity of perspectives". It states that "supporting the rights of one group should not come at the expense of another".

A recent study by AFFS found significant positive correlation between universities' EDI spending and breaches of their free speech obligations: the more spent on EDI, the greater the likelihood of compliance failures.

This indicates a widespread problem: EDI, while pursuing laudable goals at its heart, has become a source of problems, especially relating to free speech, at many universities and other organisations. This problem would be greatly reduced by taking the actions described in Part 5 below.

5. Requirements in practice: need to prevent discrimination and harassment over viewpoints, including by employees

It appears that many organisations are still very behind on their understanding of this aspect of the Equality Act and need to bring their practices up to date urgently, to ensure they comply with their duties as recently clarified. This means a profound change of mindset as regards e.g. campaigns and complaints against staff in connection with their expression of lawful opinions and viewpoints.

The key direct implications of the issues/failures addressed in these cases are that, in order to avoid breaches on their own part and/or to qualify for the Section 109(4) Defence as regards unlawful conduct by employees, organisations must do the following. It is worth noting that what is required to qualify for the Section 109(4) Defence will vary depending on organisations' circumstances, size and resources.

- Take all reasonable steps **to prevent staff from attacking, or otherwise acting to create a hostile atmosphere** for, other staff (or students, in the case of universities) in respect of their viewpoints in ways that would be likely to constitute harassment, including by writing or signing aggressive open letters, joining social media pile-ons, making unjustified complaints and the like[29]. This means:

[29] Some specific aspects of this:

- Online work environments create particular problems. Organisations need to ensure that their requirements regarding behaviour extend to online behaviour and prohibit actions such as organising or joining in pile-ons, ostracisms and the like.

- Personal views in the workplace: the Dandridge Reviews notes that there is a risk that the inappropriate expression of personal views in the workplace can lead "to censorship and unlawful discrimination or harassment, and bullying". It recommends that clear guidelines should be developed to address this (Recommendation 5.3.1). This appears to be required in order to maximise the chances of legal and regulatory compliance: achieving a fair and workable solution will be difficult in practice, in the light of the need to protect all people's free speech rights, both of those who want to express personal views and through restricting oppressive behaviour through over-sharing of personal views.

- Refusing to work with a colleague whose views one doesn't agree with: this is a form of ostracism, bullying, and is certainly oppressive behaviour which may amount to unlawful harassment. This

- **having appropriate policies and requirements** prohibiting harassment, bullying and other hostile actions against other employees (etc), such as making clear that malicious or unjustified complaints will themselves be disciplinary matters (e.g. preventing the unjust complaint that led to the failures in the *Meade* case). In the *Fahmy* case, the fact that ACE knew that its Dignity at Work policy wrongly omitted protected viewpoints from the list of characteristics protected from harassment, but had not updated the policy, was mentioned by the Tribunal in connection with it failing to qualify for the Section 109(4) Defence.

- **Intervening promptly and effectively** when problems arise, and **enforcing policies and requirements** appropriately, bringing disciplinary proceedings against employees who harass their colleagues. If rules are known to be toothless, they will be ignored. The Dandridge Review goes into some detail about this, albeit with insufficient focus on the active enforcement of its rules, where necessary[30].

- Ensure that their **employees and other staff are sufficiently trained** about protecting viewpoints, their duties not to harass or discriminate against their colleagues for their lawful views and the boundary between robust but legitimate debate and bullying or harassment; and ensure that this training is done sufficiently regularly[31]. This would include ensuring that they understand: what constitutes harassment and discrimination and what are protected viewpoints; and that tolerant, personally respectful discourse, including when made through internal communications systems, is expected within the work environment, while making it clear that this requirement does not prevent staff from disagreeing, sometimes strongly, with each other's ideas. Managers will need to be prepared to be proactive, and willing to intervene promptly in heated controversies, which will not always be comfortable; and be consistent, even-handed and neutral in their handling of problems. Some may not be suited to this role.

- Not allow **inappropriate official endorsement (or effective enforcement) of contested viewpoints**, as this is at high risk of itself being discrimination and harassment, and in particular **not allow its complaints and disciplinary functions to become instruments of free speech suppression**. The *Meade* case arose from wrongful disciplinary actions by

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needs to be addressed. The Dandridge Review (in paragraph 4.26) stated that "As a general principle […] it cannot be acceptable for staff to determine who they are prepared to work with because of their perception of a colleague's lawfully held views, however offensive they may find them."

30 See its Recommendations 3 to 7.

31 Per *Allay (UK) Limited v Gehlen* [2021] UKEAT 0031_20_0402 (Unreported, 4 February 2021), it is necessary to consider the nature and likely effectiveness of any training that is delivered, as well as whether that has been understood and taken on board by employees; and to conduct training sufficiently regularly.

institutions against an employee for her viewpoints and included a ruling that labelling her gender-critical views as being transphobic was enough to itself constitute harassment.

- Maintain sufficient **institutional neutrality** on contested issues so as to ensure they satisfy their duties under the Equality Act. All the failings in the cases we have cited arose from an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate[32]. The actions of the convener in the in the *Fahmy* case, expressing personal views in solidarity with one side of the debate, are a good example of a failure of institutional neutrality. While it appears to BFSP that he was sincere in attempting to prevent inappropriate behaviour (and he was not himself held to have harassed Ms Fahmy), the Tribunal criticised his actions and stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment.

- **Update their policies, practices, and requirements** to make sure they are consistent with their duties under the Equality Act. Organisations must avoid the unjustifiable prevention of and/or restrictions on (and the creation of a hostile atmosphere in respect of) the expression of protected viewpoints, through actions that can constitute harassment or discrimination, such as labelling gender-critical views as "transphobic" (as happened in the *Meade* case)[33]. This will mean, for instance, that organisations must take care not to mis-define "harassment" (which should be defined as set out in the legislation) by giving inappropriate emphasis to subjective assertions of "hurt" or "harm" (neither of which is recognised in the Act). Such over- (or mis-) interpretation of actual requirements of the Equality Act in a way that results in effective suppression of unpopular viewpoints gives rise to serious risks of breach of free speech duties by organisations. Similar serious risks arise from mis-stating or exaggerating the legal obligations actually imposed on organisations by the Equality Act in a way which may conflict with their obligations to secure those viewpoints.

The above primary requirements have now become clear. There are many **necessary secondary or associated implications**.[34] They include that organisations need to do the

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[32] A failure of neutrality on a contentious issue was at the heart of the compliance fiasco that was the *Phoenix/Open University* case. The Dandridge Review recommended that the OU adopt institutional neutrality, although in somewhat imperfect terms. See its Recommendation 1 and Appendix 3, paragraph 7.

[33] Note also the case of Eleanor Frances. Frances, a former civil servant, brought a case for discrimination against two Government departments which maltreated her because of her gender critical beliefs. This partly arose because the departments' policies defined transphobia as the "denial/refusal to accept" a person's gender identity. The departments have agreed a settlement involving a six-figure sum, and, importantly, will no longer define transphobia to include gender critical beliefs.

[34] See the detailed list, in respect of higher education providers, in BFSP's Statement ***Free speech protection at English universities: The law and requirements in practice***.

following, subject to the need, where there is a clash of rights to free speech, to balance all such rights and act proportionately in accordance with relevant legal obligations.

- Have **appropriate systems** in place for reporting and management of problems, and for review and improvement of their policies, practices and requirements.
- **Have good free speech promotion and protection structures, separated from EDI**. Organisations need to promote, effectively, the right of people to express their lawful views, freely, without personal attacks or other negative consequences. Free speech cannot be successfully promoted and protected unless there is a structure for it. That structure has to be separate from the EDI function, because of the inherent conflicts of interest in that area.[35] Organisations need to have appropriately senior, experienced, empowered, and non-conflicted **personnel with responsibly** to carry the above into effect, and more generally to ensure compliance with free speech requirements. A key reason behind many failures appears to be that there was no such person, so little brake on agendas or actions which resulted in unlawfulness, and no-one with appropriate knowledge, focus and authority to intervene and act when a crisis evolved.
- Ensure that their **internal communications systems** (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed (see the *Fahmy* and *Phoenix* cases for what happens when this is not done).
- Ensure that their **complaints processes** are not used by activists as instruments to persecute individuals with protected views. Even if a complaint is ultimately ruled out, the "process is the punishment".
    - Complaints and allegations should be assessed promptly and effectively to confirm whether they are genuine, or whether they are false, malicious, or vexatious. If they are the latter, they must be excluded.
    - If complaints and allegations are made which are malicious, vexatious, or which seek adverse consequences for a person which are disproportionate to the matters complained of, this itself is likely to be harassment and should be considered carefully in this light, and the employer or regulator must not entertain complaints or allegations to the extent they seek such disproportionate consequences.
    - Complaints and allegations must be assessed for whether they are made in respect of people's protected viewpoints. If they are, they must be excluded or at least treated with great caution. If complained-of viewpoints are lawful, there will usually need to be a presumption that any complaints or allegations about them are inappropriate, unless good reason can be shown for proceeding with the process, for instance because the way the protected views are expressed is likely to constitute an "inappropriate

[35] This is a focus of the Dandridge Review: see its Recommendation 8 and Appendix 3, paragraph 6.

manifestation" of that viewpoint; in this case, the employer/regulator should proceed with caution.

- Not allow considerations to be applied or information to be sought in connection with **people's support or otherwise for EDI programmes** or agendas in recruitment and promotion processes, or in connection with employment or participation in the organisation's activities (for example, as a client or supplier), to the extent that this would result in discrimination against somebody because of their viewpoints which dissent from the programmes or agendas of the organisation or its functions, or in harassment of them by creating a hostile atmosphere in connection with such dissenting viewpoints. See BFSP's statement ***EDI considerations and inquiries in the recruitment and research approval process at English universities: free speech compliance issues*** for a detailed discussion of this difficult topic. While the statement discusses universities in particular, its sections on the Equality Act apply to all organisations subject to the Act.

- **Restructure or terminate relationships** with external activists where they have caused or may cause the employer to go down the path to unlawfulness, for instance by requiring "no debate" policies or conflating gender-critical views with transphobia in its policies or official pronouncements.

  Organisations' internal policies or requirements are sometimes written in ways which reflect the viewpoints or desired outcomes of campaign organisations but which are inconsistent with or misrepresent relevant legal requirements or the nature of the organisations' and their employees' obligations and/or operate to suppress dissenting viewpoints. (The University of Sussex's fine because (inter alia) one of its policies contained statements which restricted lawful speech, referred to above, is a prime example. The university created the policy by adopting, largely verbatim, a template provided to it by a campaign group.) Free speech issues with training and tests regarding diversity matters have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

  Organisations getting too close to such campaign groups creates risk, as does enforcing their agendas (as, for instance, a condition of qualifying for approvals from them) leads to a profound loss of neutrality and discrimination and harassment of people who dissent from the viewpoints being enforced. Unless such relationships can be restructured, they need to be terminated.

Best Free Speech Practice

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

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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 1: the *Grainger* tests and likely categories of protected viewpoints

"Religion or belief" is a protected characteristic, and is defined in Section 10 of the Equality Act.[36]

There have been numerous judicial decisions about what beliefs are capable of falling within the protected characteristic of "Religion or belief", and how to identify those beliefs. The principles which have evolved are usefully summarised in *Grainger v Nicholson*[37], in which five criteria were identified as characteristic of beliefs qualifying for protection:

(i) the belief must be genuinely held;

(ii) it must be a belief, and not simply an opinion based upon the present state of information;

(iii) it must concern a weighty and substantial aspect of human life and endeavour;

(iv) it must attain a level of cogency, seriousness, cohesion and importance; and

(v) it must be worthy of respect in a democratic society and not conflict with the fundamental rights of others.

In the *Forstater* case in 2021[38], the Employment Appeal Tribunal decided that holding gender-critical views (i.e., disagreeing with aspects of trans ideology) is a "philosophical belief" and, therefore, within the protected characteristic of "Religion or belief".

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[36] Section 10 provides:

> **"10 Religion or belief**
>
> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> […]"

[37] *Grainger v. Nicholson* (2010) ICR 360.

[38] *Forstater v. CGD Europe et al.* (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

The principles established in the *Forstater* case were reinforced by the *Bailey* case[39] in July 2022, were taken as a given in the significant *Fahmy*[40] case of mid 2023, and in December 2023, James Esses won a substantial settlement from the United Kingdom Council for Psychotherapy (UKCP) following their mistreatment of him for expressing concerns about relevant issues[41]. In an earlier case, belief in Scottish independence was held to be a philosophical belief.[42]

In September 2023, the Employment Tribunal ruled that Sean Corby was expressing a legitimate philosophical belief when he challenged aspects of CRT in his ACAS workplace[43]. This gives some interesting indications of the way a tribunal can be expected to treat a similar case in the future, particularly in instances where an employee expresses a 'colour-blind' critique of the CRT approach to racism.

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[39] In which an Employment Tribunal found that a barristers' Chambers which stated that they were investigating the claimant and considering appropriate action following complaints about her expression of gender-critical views on social media had acted unlawfully in doing so and that views which were critical of the Stonewall campaign's Trans ideology were protected viewpoints. See: *Bailey v. Stonewall Equality Ltd and others*, Case No: 2202172/2020 https://assets.publishing.service.gov.uk/media/62e1307c8fa8f5649a40110a/Ms_A_Bailey__vs_Stonewall_Equality_Limited_Reserved.pdf.

[40] *Fahmy v Arts Council England* (2023) ET case no 6000042/2022.

[41] UKCP issued a formal statement: "UKCP recognises that gender-critical beliefs (that sex is both binary and immutable) are protected under the Equality Act 2010. UKCP also recognises the validity of the professional belief that children suffering from gender dysphoria should be treated with explorative therapy, rather than being affirmed towards irreversible and potentially damaging medical intervention. Psychotherapists and counsellors accredited by UKCP are fully entitled to hold such beliefs and any discrimination against them on this basis, including by UKCP-accredited training organisations, is unlawful.' As Mr. Esses said, "this is an extremely important statement, which I hope will ensure that what happened to me will never happen to another trainee therapist".

[42] *McEleny v Ministry of Defence*, ET, 2019. An Employment Tribunal judgment which has not been published, but the case has been widely reported. It is subject to significant limitations: the Judge said that membership of and support for the SNP did not in themselves meet the *Grainger* tests: it was the claimant's belief in the importance of Scottish sovereignty that did so.

[43] *Corby v ACAS*, September 2023 (ET No: 1805305/2022); note that this was a first instance judgement, so is not a binding precedent. Mr Corby was ordered to remove posts on an internal communications system which were critical of aspects of CRT. He successfully claimed that this was discriminatory under the Equality Act. Whether views critical of CRT were protected had already been litigated and subject to a substantial payment, albeit not a formal judgement. In May 2023, the Department For Work and Pensions had paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns relating to the DWP's adoption of aspects of CRT.

Anti-Zionist views were held to be protected in February 2024 in the *Miller v University of Bristol*[44] case.

Views critical of Islam were held to be protected in November 2025 in the *Lee v IFoA* case.[45]

Types of viewpoints which are likely to be protected

Consistent with the above principles, and the judgements in the *Forstater*, *Corby*, *Fahmy*, *Miller*, *Lee* and other cases:

- while each case will depend on its particular facts, it appears highly likely that the following viewpoints are capable of satisfying the criteria in *Grainger v Nicholson* constituting protected beliefs for the purposes of the Equality Act 2010, including the Public Sector Equality Duty under it, and will, in time, be confirmed as such; and

- in order not to find themselves acting unlawfully, universities (and their constituent institutions and students' unions), businesses and other bodies to which the Equality Act applies would be ill-advised not to act on the basis that this is the case.

Gender-critical beliefs, as discussed above.

Belief in the importance of and advocacy for free speech and other human rights.

Holding views about, and questioning of or disagreement with ideologies, assertions, viewpoints, campaigns, proposals, and programmes relating to, certain matters associated with race or racial history and their implications, and in particular:

- aspects of CRT[46] (for instance in respect of concepts such as so-called "white privilege" or "white guilt") or of the Black Lives Matter movement; and the promotion of a requirement to be "anti-racist" rather than "non-racist" or "colourblind";

- the "decolonising" of curriculums; and

- history and the behaviour and moral character of peoples and countries, in particular in connection with the British or other empires, colonies, slavery and such matters.

Holding views about, and questioning of or disagreement with, religious and philosophical beliefs and dogma and their effects in practice.

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44 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.

45 Judgement as yet unpublished.

46 See footnote 43 above re the case of Anna Thomas, and the *Corby* case.

Holding views about, and the questioning of or disagreement with relevant viewpoints relating to, significant aspects of politics, society, and social and international relations which are matters of public controversy or debate, where such views satisfy the *Grainger* tests. These must include viewpoints on the Palestinian cause and Israeli/Palestinian relations (noting that anti-Zionism has already been ruled protected).

Views which are critical of aspects of "EDI" agendas, values and ideologies more widely are highly likely to fall within the *Grainger* tests, where the relevant facts fit the necessary criteria[47].

- It is important to keep in mind that, while much that is promoted under the "EDI" flag may be uncontroversial, and in a narrow range of cases legally required, various highly controversial beliefs and agendas are also promoted (and indeed effectively enforced) under it, such as are associated with extreme 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). These wider agendas are not legally required to be promoted or enforced so are, effectively, optional on the part of employers and other organisations.

- EDI was cited in the conclusions to the Dandridge Review (which was commissioned following the *Phoenix/Open University* case) as a source of free speech problems at the Open University as a result of the strength, general acceptance, and rigidity of the EDI function and its agendas, and an imbalance between the resources allocated to EDI and free speech[48].

- Many people have concerns of this nature regarding EDI, and there must be a strong likelihood that opposition to EDI as a banner under which a wide range of contested views are promoted and enforced, would itself be ruled to be protected Viewpoints were the matter litigated.

- 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: there may well be reasoned and principled objections to aspects of them (or indeed to "EDI" itself as discussed above)

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47 Given the nature of the *Grainger* test, one must keep in mind that each case is fact sensitive and personal to the particular claimant.

48 See: https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Indpendent-Review-N-Dandridge-09.09.24.pdf; and BFSP's statement about the Review at https://bfsp.uk/universities-and-free-speech

The "desire to protect and promote principles of EDI had on occasions translated into excessive caution as to as to what could and could not be said, even when the views in question were legitimate and lawful, albeit contentious. This was associated with a potentially rigid approach that assumed that only one interpretation of principles of EDI was acceptable, making it difficult to have an open and honest discussion about how complex issues should be interpreted and applied. This approach to EDI had the effect of […] precluding legitimate debate and discussion about contentious matters." (See paragraphs 4.8-4.9. See also paragraphs 2.14-16.)

which will turn out to meet the test for protection under the Equality Act. Indeed, clumsy promotion of EDI, in a way that creates a hostile environment for people who have dissenting viewpoints, is already creating a compliance risk.

There is case law to the effect that left-wing democratic socialism counts as protected for these purposes, so, logically, other political beliefs, at least non-extreme ones, must be capable of satisfying the *Grainger* tests. But membership of and support for a political party has been held not of itself to meet the *Grainger* tests[49].

If belief in Scottish independence can satisfy the *Grainger* tests, so surely can carefully thought-through belief in the demerits of Scottish independence, and also viewpoints both for and against Brexit.[50]

[49] See for instance the *McEleny* case discussed at footnote 42 above.

[50] It has been widely reported, following the case of *Mrs C Fairbanks v Change Grow Live*: 2409700/2023, that pro-Brexit views are not protected under the Equality Act. These reports are highly misleading. Mrs Fairbanks' views failed to qualify as protected beliefs not because of their stance on Brexit, but because Mrs Fairbanks (representing herself) failed to articulate any philosophical beliefs, merely stating her view that "the UK should be outside of the EU". The employment tribunal judge suggested that certain philosophical beliefs, for instance, in "English Nationalism" or that "a country should, as a sovereign state, have control over its own legislation" could underlie or encompass pro-Brexit views, and have qualified for protection. Pro-Brexit views, where they are philosophical in character, and not merely "opinion or viewpoint based on the present state of information" therefore may well qualify for protection. The same is true for anti-Brexit views.

Appendix 2: Defining harassment

Harassment, offence and free speech

Within organisations, people's actions and statements are often claimed to amount to harassment. "Harassment" in the legally relevant use of the term is, however, very specifically defined under the Equality Act and has been subject to extensive case law. It follows that approaching allegations of supposed harassment cautiously, and applying the concept appropriately to particular circumstances, are vital.

Harassment is defined in **Section 26** of the Equality Act as follows:

"(1) A person (A) harasses another (B) if:
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
[…]
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

In summary, harassment means unwanted conduct related to a relevant "protected characteristic" which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for that person.[51] In relation to this:

- It must be remembered that "discrimination" and "harassment" (as defined in the Equality Act) are only unlawful in respect of actions which come within the various specifically defined circumstances (such as employment and the provision of education) set out in the Equality Act.
- The perception of the person claiming that an action was harassment is relevant in the context of the alleged "effect" of the conduct, as are all of the other particular circumstances. Crucially, an objective test is applied when considering whether it is reasonable for the conduct to have that effect.[52] This last consideration operates to exclude subjective assertions of harassment by the hypersensitive. In relation to taking all

[51] **Section 26**.

[52] **Section 26(4).**

circumstances of the case into account, the Court of Appeal has stated that other statutory provisions (for instance the obligations in Section 43) are relevant.[53]

- Further, Employment Tribunals have stated that the relevant threshold will not be met by things said or done that are "trivial or transitory, particularly if it should have been clear that any offence was unintended". They have also emphasised the importance of not encouraging "a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"[54]; and that "beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society".[55]
- An organisation has no relevant duties under the Equality Act, excepting the process duty of the PSED, in respect of its staff when they are not acting in capacities which give rise to duties or liabilities on the organisation's part. The fact that it can be very hard to identify in which capacities actions have been taken in the complicated circumstances of modern interactions adds a further layer of difficulty. This has been fertile ground for costly litigation.

In this context, the Parliamentary Joint Committee on Human Rights has stated that: "there is no right not to be offended or insulted. Just because a statement may offend another person does not necessarily make it unlawful".[56] And the EHRC Guidance states the following:

> (Re the HRA) "The courts generally say that the right to free expression should not be restricted just because other people may find it offensive or insulting.…Speech that is intended to inform rather than offend attracts greater protection, even if it could be seen as discriminatory. An intolerant point of view, which offends some people, is likely to be protected if it is expressed in a political speech or a public debate where different points of views are being exchanged and are open to challenge. However, speech may lose the protection of Article 10 if it is used to abuse the rights of others, for example by inciting hatred."[57]
>
> (Re the Equality Act) "…The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course

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53 *Pemberton v. lnwood* [2018] EWCA Civ 564; [2018] lCR 1291 at [88].

54 *Dhaliwal v. Richmond Pharmacology* [2009] ICR 724, [2009] ILRL 336 at paragraph 22.

55 *Forstater* (see footnote 23 above) at paragraph 116.

56 Fourth Report of Session 2017-19, part 2 para 18.

57 EHRC, Freedom of Expression: a guide for higher education providers and students' unions in England and Wales. Page 12.

material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010."[58]

Views expressed in teaching, debate or discussion on matters of public interest, including political or academic communication, are therefore unlikely to be seen as harassment, even if they are deeply offensive to some of the people who are listening, as Article 10 will protect them."[59]

[58] EHRC, Freedom of Expression: a guide for higher education providers and students' unions in England and Wales. Page 18.

[59] EHRC, Freedom of Expression: a guide for higher education providers and students' unions in England and Wales. Pages 18-19.