30.12.2025

AHE guidance on Embedding Freedom of Speech in EDI
Comments from AFFS

1. Introduction

As you are aware, Alumni For Free Speech ("**AFFS**") is a non-partisan organisation which seeks to ensure high standards of compliance with free speech obligations at Higher Education Providers ("**HEPs**") and other organisations. . Our aim is to help HEPs get their free speech compliance right and minimise their risks. Consistent with that aim, the purpose of our comments in this document is to help Advance HE ("**AHE**") help HEPs to achieve such compliance.

We recognise that it is sometimes not easy for HEPs to walk what can seem like a tightrope between competing legal and regulatory requirements, or to secure free speech in the face of criticism from often passionate activists who are neither familiar with those legal and regulatory requirements nor themselves subject to them. Any competing obligations can be correctly identified and compliance secured with good legal advice. Since few activists (of any persuasion) are likely it to be fully satisfied about anything, we appreciate that standing up to their (sometimes unlawful) demands when required to do so by legal and regulatory obligations requires some resolve. Our associated campaign, Best Free Speech Practice ("**BFSP**"), has produced detailed statements about legal and regulatory obligations with respect to free speech, to which we refer in this document, and which are available at: https://bfsp.uk/universities-and-free-speech.

This paper sets out AFFS's comments and concerns regarding the recent guidance ("**AHE Guidance**") *Embedding Freedom of Speech and Academic Freedom in Equality, Diversity and Inclusion* published by AHE. Although, as noted at page 5, while it primarily addresses the position in England following recent changes in the law relating to free speech, the AHE Guidance is also very relevant to Wales, in particular, and also to Scotland and Northern Ireland.

We start by acknowledging the significant improvements made by AHE in its approach to, and apparent understanding of, the requirements for free speech protection. This paper is therefore being written in the spirit of constructive criticism.

We also acknowledge that, as campaigners for free speech, we approach the interaction of Equality, Diversity and Inclusion ("**EDI**") and free speech requirements from the angle of securing good free speech protection. Nonetheless, like the Office for Students ("**OfS**") itself, we, of course, acknowledge that certain aspects of equalities and human rights law impact HEPs' existing and new free speech obligations. Our comments on the AHE Guidance are,

therefore, based on the applicable legal and regulatory requirements under both the Higher Education and Research Act 2017 ("**HERA**"), the **Equality Act 2010** ("**Equality Act**") and other relevant legislation such as the **Human Rights Act 1998** (**"HRA"**). Consistent with AFFS' nature as a non-partisan campaign to encourage compliance with free speech obligations, our comments are not reflections of any philosophical or ideological position, but of what universities are legally required to do (and not to do).

Subject to the qualifications identified below, we welcome and agree with the aspects of AHE Guidance, including the following.

- The acknowledgement that the way EDI agendas have been pursued has caused free speech problems. This is the primary issue addressed by the AHE Guidance, and acknowledging this has been a problem is an important step towards preventing future problems. We discuss this issue further below.
- The increased emphasis on the requirements to protect free speech, although, as we discuss in detail below, these remain understated, with obvious and important implications for free speech compliance by HEPs.
- The recognition that it is important for HEPs to maintain institutional neutrality i.e, "to avoid taking official stances on politically or socially contested issues not related to its core mission, charitable objects or academic functions".[1] The AHE Guidance refers to this principle as "institutional impartiality". We have some concerns about the apparent implications of the use of this different terminology, which we discuss below.
- The suggestion that HEPs "use clear and precise language and definitions"[2] when describing legal and regulatory requirements. This will significantly help to ensure that freedom of speech is not restricted.
- The partial recognition that it is unlawful for HEPs to discriminate against candidates for jobs on the basis of their values, beliefs, and ideas – although the AHE Guidance's treatment of this matter has significant flaws, as discussed below.
- References made throughout the AHE Guidance to tolerance. AFFS believes that tolerance is the virtue which is necessary for freedom of speech – it is, though, distinct from respect, which involves a positive esteem, and if required is incompatible with freedom of conscience and freedom of speech.

2. Relationship of AHE Guidance with OfS Guidance

As stated in section 2.1, the AHE Guidance has been issued following the coming into force of amendments to the HERA and the issuance of the OfS's own Regulatory Advice 24 Guidance related to freedom of speech ("**OfS Guidance**"). Both HERA and the OfS Guidance have been in effect since 1 August 2025. While we note that AHE advises English HEPs that the AHE Guidance should be read "in conjunction with" the OfS Guidance, we recommend that AHE

[1] AHE Guidance, page 13.

[2] AHE Guidance, page 19.

is clearer about the subsidiary role of the AHE Guidance as against that issued by the OfS itself as the statutory regulator of English HEPs. English HEPs need to follow the OfS Guidance and, insofar as the AHE Guidance is inconsistent with it (as to which see further below), following the AHE Guidance could lead to serious compliance failures and legal liability.[3]

3. EDI as a source of free speech problems: separation of free speech and EDI functions

We note that (albeit only on page 21) the AHE Guidance has correctly acknowledged that "many of the challenges that HEIs have faced in relation to free speech or academic freedom arise in the operationalism of policies and initiatives related to equality, diversity and inclusion".

Evidence of EDI being a source of free speech problems is provided in a recent report from AFFS, which finds that there is a statistically significant correlation between levels of universities' spending on EDI and levels of free speech non-compliance in their recruitment and promotion processes. While that correlation is (of course) not exact, it is pretty startling. Analysis of AFFS's data shows that EDI spending is a predictor of free speech non-compliance at a 95% confidence level.

However, this point, which is central to the issues the AHE Guidance addresses, ought to be given greater prominence, and recognised earlier and more explicitly. This could be done by reference, for example, to the independent review conducted by Dame Nicola Dandridge for the Open University (the "**Dandridge Review**"). This found that EDI had been a significant cause of free speech compliance failures in the Open University's treatment of Professor Jo Phoenix.[4] We believe it would be particularly helpful if the AHE Guidance were to quote the following passage, from a member of staff at the Open University, who Dame Nicola Dandridge quoted in her review, which explains why and how EDI can cause problems for free speech, while making clear that the two need not conflict:

> "Policies come from EDI readymade and sealed – with many assumptions baked in such as gender identity ideas or critical race theory. As they are university policy rather than academic debate, these can become incontestable in the university. There has been a lack of interrogation of the content and purpose of EDI in the university – and too much outsourcing of thinking.

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[3] Including, potentially, for AHE in event that, despite what is said at the end of page 5 of the AHE Guidance, it were found to owe a duty of care to HEPs which rely on the AHE Guidance in formulating EDI policies and/or in relation to compliance with their Secure Duty (as defined below) in circumstances where what it says is subsequently found to be wrong.

[4] For instance, in paragraphs 2.5–2.8, 2.14–2.15, and 4.8–4.9. The Review is available at: https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Indpendent-Review-N-Dandridge-09.09.24.pdf

The Open University was found liable for numerous counts of harassment and discrimination for its treatment of Jo Phoenix, and the case is reputed to have cost it upwards of £1,000,000.

> Questioning EDI is often framed as being somehow against the ideas of equality, diversity or inclusion – rather than there being an openness about the best ways to achieve these aims."[5]

As the above passage suggests, freedom of speech about the content and purpose of EDI, and the substantial involvement in the creation of EDI policies of the academics to whom these policies apply, are vital to ensuring that EDI does not restrict freedom of speech.

The Dandridge Review found that "systems and structures should be put in place to support the promotion of free speech and academic freedom"[6] and that the Open University must "separate out" its approach to issues of belief from its approach to other aspects of identity.[7] That means that, with respect to protected beliefs under the Equality Act, the systems and structures to protect free speech must be separate and distinct from the EDI function.

Given that EDI has been a source of problems for free speech, this need for separation also applies to free speech and the EDI function generally: implementing a complete separation between free speech protection and the EDI function is likely to be a "reasonably practicable step" which would make a significant difference to free speech protection, so should be regarded as required pursuant to the "**Secure Duty**" to take reasonably practicable steps to secure free speech imposed on English HEPs under sub-sections A1(1)-(2) of HERA, as discussed below. Implementing such a separation is also vital in order to ensure that an EDI function does not overreach and incur liability for its HEP by breaching free speech laws and regulations. The AHE Guidance needs to make this clear.

4. <u>The AHE Guidance misstates and exaggerates the importance of the PSED in asserting that it imposes a duty to promote EDI on HEPs</u>

We believe that the very first sentence of section 2.1.1 of the AHE Guidance is seriously inaccurate. This states that: "The duty on [HEPs] to promote equality, diversity and inclusion is grounded in an obligation to comply with the equality duties set out, in Northern Ireland, in section 75 of the Northern Ireland Act 1998 and in England, Scotland and Wales, with the Public Sector Equality Duty, as set out in section 149 of the EA 2010 (the "**PSED**")".[8] We address the various respects in which this statement is inaccurate immediately below.

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[5] We note that "come from EDI readymade" includes from external organisations, as discussed below, including, in many similar cases to the Sussex one, from AHE's predecessor organisation. We would hope that policies provided by AHE would not be thus.

"Too much outsourcing of thinking" is discussed in detail below. This includes, free speech campaigners like AFFS would say, to organisations such as AHE, unless they get their advice rock solid as regards free speech compliance.

[6] See Dandridge Review, Recommendation 8.

[7] See Dandridge Review, paragraph 4.17.

[8] The passage from the 2019 Equality and Human Rights Commission guidance also included within section 2.1.1 of the AHE Guidance is similarly inaccurate. While the AHE Guidance recognises that what the EHRC said here has been superseded by the OfS Guidance, it nonetheless seeks to emphasise its importance while, inadequately, counselling HEPs merely to be "mindful" of that fact.

4.1 *Specific requirements to secure compliance with Equality Act*

First, an important preliminary point: at section 2.1.4, the AHE Guidance states that: "As employers, [HEPs] are also under a legal obligation to take steps to prevent discrimination and harassment, which may reasonably include setting institutional policies and positions in response to evidenced risk". We agree that HEPs have positive obligations to secure compliance with the parts of the Equality Act, including a requirement (under section 109(4)) to take all reasonable steps to ensure that their staff comply with certain parts of the Equality Act. Of most relevance here are the restrictions on discrimination against and harassment of those with the "protected" characteristics.[9]

It is clear in this context that very carefully written anti-discrimination, -harassment and -bullying policies/rules can compliantly restrict free speech if they do so no further than is necessary to secure compliance with the Equality Act (or other legislation if and where applicable).[10] Thus, all steps taken to prevent staff committing harassment or discrimination need to be narrowly tailored and limited so as to restrict speech no further than is required to secure legal compliance. Any restrictions on lawful speech which go further than this will be voluntary on the part of HEPs, and – since they will be likely to be unlawful under the Secure Duty – become a serious compliance risk.

In other words, even positive legal requirements to secure compliance with obligations under the Equality Act cannot be used as a cover for imposing other restrictions on free speech which go beyond what is necessary for that compliance. This is a huge risk area for HEPs. Imposing policies relating to behaviour which extend more widely than their legal obligations actually require could easily lead to compliance failures similar to that which caused the University of Sussex to incur its huge recent fine.[11]

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[9] Although it is beyond the scope of this paper to address this sort of issue in more detail, we note in passing in this context that the AHE Guidance contains apparently misleading information about the protected characteristic of "gender reassignment" in the final example on page 19. Despite frequent statements to the contrary in HEPs' documents (often as influenced by external activists), being trans is not itself a "protected characteristic" and, while some trans people fall within the protected characteristic of "gender reassignment", not all do. This misapprehension (at best) has in some cases led to compliance failures, and we recommend that AHE needs to take great care not to inadvertently mislead people about this, so should adjust this wording to increase clarity. Promotion of preferred pronouns preferences of people self-identifying as another sex (but who do not fall within the protected characteristic) would not, therefore, be something which comes within the scope of the "due regard" requirements of the PSED. We of course accept that HEPs may want to encourage this for inclusivity anyway, so this point is to emphasise how complex and technical the law is, and how careful AHE, as a trusted adviser to HEPs, needs to be about it.

[10] See the OfS Guidance (especially at paragraph 99).

[11] The University of Sussex was fined £585,000 by the OfS for breaching registration conditions relating to freedom of speech. We note in this regard that the fine resulted, in part, from the University's use of a template produced and recommended by AHE's predecessor organisation.

In the present context, it is also important to note that even these direct obligations do not impose any obligation to "promote" "EDI". The same is all the more true of the limited duties imposed under the PSED.

4.2 *The nature of the PSED*

Contrary to what is said at the beginning of the AHE Guidance but as further explained below, the PSED does not create any duties to take any particular action beyond having *"due regard"* to the matters referred to in section 149 of the Equality Act in certain contexts. It is a process duty which does not impose any statutory obligations equivalent to those imposed on HEPs by the Equality Act in respect of discrimination and harassment of those with protected characteristics under that act, or the duty under HERA, having "particular regard" to the importance of freedom of speech, to take reasonably practicable steps to secure freedom of speech within the law.

We set out in BFSP's statement ***Public Sector Equality Duty: Scope and interaction with free speech requirements*** detailed information on key aspects of the PSED. The following are the most relevant to this case.

- The PSED applies in respect of the range of beliefs which are protected under the Equality Act ("**protected beliefs**"). It therefore operates in respect of the creation of policies and programmes which affect the free speech of people who hold such protected beliefs. This is not reflected in the AHE Guidance.
- The PSED is a duty to give due consideration to the need to achieve certain aims and give appropriate weight in context (this is recognised in the AHE Guidance). It is not, however, a duty to take any particular action to achieve those aims and does not provide any further basis for overriding other considerations. It has been described as a "process duty not an outcome duty".[12] This is not sufficiently recognised in the AHE Guidance.
- As the Equality and Human Rights Commission ("**EHRC**") and case law have stressed, the duty falls on decision makers and concerns the manner in which they make decisions. It is not a duty for an institution to have a particular programme or agenda.
- Positive duties to take action will, therefore, override the PSED in cases where the duties conflict. Such duties include those imposed under HERA, in particular the Secure Duty and the need to avoid discriminating against or harassing people with protected beliefs. The PSED thus cannot be relied upon to justify non-compliance with a positive duty to reach a particular outcome (such as the Secure Duty) or a negative duty to avoid certain action (e.g. discriminating against protected beliefs under the Equality Act). This point is also not made in the AHE Guidance.
- Decisions will need to be made in the context of all relevant factors, of which the PSED will be only one (and a relatively minor one when its interaction with the Secure Duty is properly considered). Another such factor will be contrary legal obligations to act, including the Secure Duty.

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[12] *R (Bridges) v. Chief Constable of South Wales Police* 2020 EWCA Civ 1058: "We accept (as is common ground) that the PSED is a duty of process and not outcome."

- As already noted above, the Secure Duty is to take all reasonably practicable steps to secure freedom of speech, having "particular regard" to the importance of freedom of speech. Thus, even the process aspect involved in compliance with the Secure Duty is plainly more onerous than the process duty imposed by the "due regard" requirement under the PSED. The AHE Guidance does recognise this in its section 2.1.2.

The PSED is carefully formulated and extends to a specific range of stated needs only. HEPs are not justified in taking actions such as instituting specific programmes or enacting specific policies, purportedly pursuant the PSED, where they are in fact neither aimed at, nor realistically likely to contribute to, achieving the specific and limited range of goals referred to in the PSED. HEPs need to be clear about what actions are not justifiable by reference to the PSED, as it will not be possible for them to defend those policies by invoking the PSED in any circumstances, let alone where there is a breach, for example, of the more powerful Secure Duty. It is highly likely, for example, that programmes and policies promoting or embedding aspects of a number of contested concepts such as:

- "social justice";
- "anti-racism" (including in its critical race theory form) as opposed to "non-racism";
- other ideas reflecting the extremer ends of critical theory; and
- the view that questioning aspects of trans ideology is "transphobic",

(all of which are examples of "EDI objectives beyond core legal compliance needs", as defined below) are all beyond what is contemplated by the PSED and are at risk of creating a chilling effect contrary to the Secure Duty and, in respect of people with protected beliefs, the Equality Act (so create a concern which is itself relevant to the PSED). Actions giving effect to some of these views and agendas have already been held to be unlawful under the Equality Act.

Most of the above points and limitations are, however, not made clear in the AHE Guidance, with the serious consequences and implications as discussed below.

Although, at the end of section 2.1.2, the AHE Guidance correctly states that "HEIs should hold a 'presumption in favour of lawful free speech' in policy, initiatives and decisions", it still fails to capture the overriding nature of the Secure Duty and associated risks for HEPs in not following this.

Furthermore, the quotation from the guidance produced by the Advisory, Conciliation and Arbitration Service ("**ACAS**") in section 2.1.4 of the AHE Guidance, is simply wrong, in that it states that "public sector organisations have an extra legal responsibility to stop discrimination under the [PSED]". As explained above, such organisations do not have such a duty. Rather, as already explained above, they have a duty to have "due regard" to this need, in context. This misleading quote should therefore be removed.

These erroneous statements relating to HEPs' supposed legal duty to promote EDI referred to above cause AHE to misrepresent (by overstating) HEPs' duties regarding EDI throughout the AHE Guidance.

It is also worth noting that the AHE Guidance is internally inconsistent in this regard. In the second example at page 19, it says that: "reference to the PSED should include requirements to have 'due regard to the need to…", rather than stating that HEPs "need to" eliminate

discrimination etc.. This is correct, but is inconsistent with AHE's key assertion that the PSED gives rise to a "duty to promote EDI", with the quotation from ACAS mentioned above, and also with AHE's own public webpage on the PSED, which also wrongly omits the fact that HEPs only need "to have due regard" to the aims under Section 149(1) of the Equality Act.

5. The AHE Guidance seriously understates the strength and scope of the Secure Duty and consequent risks, pays insufficient attention to risks re protected views under the Equality Act, and omits most free speech requirements imposed by HEPs' conditions of registration

5.1 *The content and scope of the Secure Duty*

The Secure Duty under sub-sections A1(1)-(2) of HERA requires the governing body of an English HEP to take "the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take" to secure freedom of speech (within the law) for the staff, members and students ("**Participants**") of, and visiting speakers at, the HEP.

This is a demanding requirement and requires active, positive steps to be taken. It is stated in objective terms, giving little discretion to an HEP to decide what steps it needs to take by reference to any subjective preferences it might itself have. This is confirmed by the OfS which has stated that "If […] a step is reasonably practicable for [an HEP] to take, [an HEP] must take it."[13]

The OfS has further clarified that the Secure Duty "includes a negative duty to refrain from taking certain steps which would have the effect of restricting freedom of speech within the law. For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all".[14] This is a crucial point which means that an HEP must not implement a policy restricting lawful speech where it is reasonably practicable not to implement it. This is so even if the policy could, in other contexts, satisfy the conditions of Article 10(2) of the European Convention on Human Rights (the "**Convention**").

The OfS has made it clear that there is only a very narrow range of circumstances when it is likely not to be a reasonably practicable step to allow lawful speech, including compliance with other legal and regulatory requirements (of which more below) and when allowing the speech would prevent the "essential functions of higher education" (learning, teaching, research).

Actions required in order to secure compliance with the Secure Duty include ensuring that HEPs do not promote or enforce agendas in ways which:

- discriminate against staff and students for their views, including in recruitment, through failing to deter and dismiss inappropriate complaints and through pursuing inappropriate complaints and disciplinary processes;

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[13] See OfS Guidance, paragraph 56.

[14] See OfS Guidance, paragraph 58. This may include, for instance, not having in place a policy that restricts the range of ideas that may be expressed. In many circumstances the negative duty is likely to have greater positive impact on freedom of speech than the positive duty (paragraph 59).

- harass, i.e. create a hostile atmosphere for, people with particular viewpoints and dissidents from contested EDI agendas in particular, and this can result from failures of institutional neutrality;

- compel assent to contested views (for instance, through duties on staff to promote or support EDI and through inappropriately structured training processes); and/or

- otherwise enforce silence or chill the expression of views on relevant subjects.

Anti-harassment and anti-bullying policies are recognised by the OfS as being able to restrict free speech compliantly with the Secure Duty, as discussed above. Other HEP policies, agendas and values which do not so qualify ("**EDI objectives beyond core legal compliance needs**"), and which are effectively voluntary, cannot restrict lawful free speech compliantly with the Secure Duty and, therefore, are illegitimate and unlawful to the extent that they have this effect.

In any event, the Secure Duty requires that policies should be drafted so as to restrict free speech to the minimum extent necessary in order to achieve their underlying legal purpose, i.e. should impose the least intrusive restriction that can be imposed on freedom of speech or academic freedom while achieving the justified purpose of the restrictions. This is crucial, and is mentioned in section 3.1 of the AHE Guidance. It should, though, be explained clearly in section 2 so users have the full picture when assessing what is required.

5.2 *Equality Act protections for viewpoints and their expression*

Under the Equality Act, HEPs must avoid unlawful discrimination against and harassment of people, including academics and students, who have the "protected characteristic" of holding (or not holding) particular religious or philosophical views ("**protected viewpoints**"). Beliefs confirmed as protected by the courts to date include gender critical beliefs, anti-Zionist beliefs, and beliefs opposing aspects of critical race theory. As discussed above, if they are to avoid liability under Section 109(4) of the Equality Act, HEPs must not only not discriminate against or harass their staff on the basis of their protected viewpoints, but must take all reasonable steps to prevent their staff harassing and discriminating against each other.

This is an area of serious legal risk for HEPs, with attendant heavy reputational and financial costs (often involving settlements, and overall costs which have been estimated to reach seven figures) for non-compliance. Avoiding liability will require HEPs to act decisively and proactively to pre-empt instances of harassment. Responding to events of harassment or discrimination as they arise is very unlikely to be sufficient to secure compliance.[15]

[15] Of particular relevance in this context are the cases of: Kathleen Stock/University of Sussex (settled out of court); *Phoenix v. The Open University* (2024) ET Case No: 3322700/2021 & 3323841/2021; *Meade v. Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022); *Mr J Esses v. The Metanoia Institute and Others*: 2206164/2021 and 2206708/2021; and *Corby v. ACAS*, September 2023 (Case No: 1805305/2022).

5.3 *Implications of the above for the AHE Guidance*

The AHE Guidance does not sufficiently address the strength and implications of the obligations in the Secure Duty or the limited extent to which HEPs' policies can legitimately restrict free speech while remaining in compliance with it. It also conspicuously fails to mention the requirements and risks under the Equality Act in section 2.1.

For example, at section 2.2.2 of the AHE Guidance, AHE states that:

> "HEIs should also be mindful of the chilling effect that strong positions on inclusion may create for staff or students who hold different views, as well as the risks of upholding free speech duties for all parties where there is a clash of views, especially where those views are likely to be protected religious or philosophical beliefs. HEIs should take reasonably practicable steps to promote and protect free speech and academic freedom within the law, welcoming and supporting discussion and disagreement when it arises."

This is fine as far as it goes, but it is a brief aside in a section on institutional impartiality. This subject needs to be given far more detailed emphasis in section 2.1, and reflected throughout the AHE Guidance.

A serious example/consequence of the failure sufficiently to explain the scope and strength of the Secure Duty in the AHE Guidance is the statement in section 2.2.1 that: "Robust policies or institutional actions on equality do not, in themselves, breach an HEI's legal or regulatory obligations in relation to freedom of speech and academic freedom or inhibit an institution's approach to impartiality." This is a gross oversimplification which gives rise to compliance risks. In particular:

- EDI policies at HEPs regularly do result in such breaches of free speech obligations. The recent fine imposed by the OfS on the University of Sussex is a prime example.
- AFFS itself regularly brings to the attention of HEPs freedom of speech failures arising from EDI policies imposed on students and staff (and, where appropriate, the OfS).
- The AHE Guidance needs to emphasise throughout that significant caution is needed to ensure that HEPs comply with the Secure Duty and ensure compliance with the Equality Act. As we say above, policies which constitute EDI objectives beyond core Equality Act compliance needs (i.e. anti-harassment and anti-bullying policies, which, if correctly drafted, can justifiably restrict free speech) are at the greatest risk of compliance failure.
- As AHE itself acknowledges in section 2.2.2, one of the ways in which "strong" EDI positions adopted by HEPs can be inimical to free speech is their chilling effect. Although the AHE Guidance does not recognise this, this chilling effect can lead to compliance failures. They are also very restricting in principle.
- It follows from this that policies and initiatives need to be planned, structured and carefully worded so as not to reduce people's willingness to express views on contested aspects of them, and in particular create a "hostile atmosphere" for people who hold dissenting views. We recommend that this be mentioned in section 2.1.

5.4 *Conditions of registration*

HEPs are required by their conditions of registration to have governing documents that uphold (Condition E1), and to have in place adequate and effective management and

governance arrangements to deliver in practice (Condition E2), academic freedom and freedom of speech.

These requirements have substantial implications in practice for what HEPs need to do to comply with their free speech obligations. The OfS has said that, in considering whether an HEP complies with its conditions of registration, it may consider such matters as: whether the HEP's governing documents facilitate or undermine the taking of reasonably practicable steps to secure lawful free speech, whether the HEP has decision-making arrangements which require it to consider the impact of its decisions on free speech and academic freedom, and whether the university ensures that staff are adequately trained on the law on freedom of speech.[16]

The AHE Guidance wholly omits reference to conditions of registration E1 and E2. They need to be explained in section 2.1.

HEPs must also comply with the recent condition of registration E6, which places obligations on HEPs concerning harassment and sexual misconduct relating to students. A significant focus of E6 is ensuring that relevant HEP actions are compatible with free speech protection. HEPs are required, in their actions to comply with condition E6, including drafting their anti-harassment policies and investigating and determining whether certain events amount to harassment, to apply a rebuttable presumption to the effect that students being exposed to the content of higher education courses, and statements and views which are connected to the content of higher education courses, are unlikely to amount to harassment. Although the AHE Guidance does refer to condition E6, it does not mention this important element of E6 for protecting free speech. This, along with other elements of condition E6 which are focused on securing free speech protection in this context, is part of the nexus of free speech protections that should be referred to in section 2.1.

The omission of conditions E1 and E2, and of a significant part of the free speech protections in condition E6, is a serious issue with the AHE Guidance. Not bringing their duties to protect free speech under conditions E1, E2 and E6 to HEPs' attention could lead to serious compliance failures. The requirements imposed by these conditions are demanding, and require HEPs to take substantive actions. The consequences of compliance failures for HEPs are severe. The University of Sussex was recently fined £585,000 by the OfS for breaching conditions of registration E1 and E2 in respect of freedom of speech failures. It appears, moreover, that at the time the fine was announced, a significant number of HEPs in addition to Sussex had policies similar to those in virtue of which Sussex had breached its conditions of registration. Risky compliance failures therefore appear to be widespread.

5.5 ***HRA and Convention***

Obligations under the HRA and the Convention to protect free speech are barely referred to in the AHE Guidance, and need to be included in Section 2.1 if HEPs are to be properly informed of extent of their obligations to protect free speech.

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[16] Insight publication Freedom to question, challenge and debate, December 2022 (the "**OfS December 2022 Publication**").

5.6 *Legal Framework Document*

There is reference to AHE's Legal Framework document at page 8. This document is brief, now out of date, and does not mention conditions of registration. Referring to it is insufficient to inform HEPs appropriately of the range and nature of their obligations.

6. <u>The AHE Guidance does not address the implications of charities law prohibiting "propaganda": inappropriate use of the concept of an HEP's "core mission"</u>

Charity law contains some restrictions and requirements which are very relevant to HEPs' EDI-related policies and practices, including training. Some of these are implementing legal requirements, such as those under the Equality Act to prevent discrimination and harassment which is attributable to an HEP. To the extent that these policies and practices are focused on and necessary for this purpose, they are likely to be compliant with charity law. Most EDI policies and practices go beyond this, though, and extend to agendas and activities (including training) which are not required to secure such legal compliance.

HEPs' trustees (which are not confined to members of an HEP's governing body)[17] have a core duty to act in ways which most effectively further the purposes of the charity. A charity's purposes are those which are set out in its charter, memorandum and/or articles, trust deed or other constitutional documents. These are its 'core mission'.[18]

All activities must further those specific, constitutional purposes. It should be noted that the promotion of political theories or propaganda – where it is sought to inculcate a particular point of view – is not to be treated as the advancement of education for charity law purposes. It follows that careful consideration will need to be given to the content of an HEP's EDI agendas and activities, including training, to secure compliance with these requirements and constraints. As discussed elsewhere, aspects of what is frequently promoted under the "EDI" banner derives from contested theory-born activist agendas, so are a high risk in this regard.

The PSED, as a duty to think but not a duty to achieve particular outcomes, will always have to operate within the constraints of an HEP's charity law obligations and thus what an HEP's purposes are: i.e., the PSED can never in itself justify taking actions that are not in furtherance of those purposes.

While the above is not directly relevant to requirements for free speech protection, it is worth noting that:

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[17] Members of an HEP's governing body are charity trustees, but the term should be understood more widely to include members of the executive and senior management, who hold significant decision-making powers in respect of how the institution operates, and other staff who take decisions in respect of education and research strategies, or undertake teaching and research. (See *The University-Charity: Challenging Perceptions in Higher Education,* by Mary Synge, pp 128-132.)

[18] It is often argued that EDI falls within a university's "core mission" or "essential functions" and is therefore justifiable for a range of purposes. For charity law purposes, however, a charity's "core mission" is its charitable purposes. "Mission statements" and the like can give rise to confusion and compliance problems as a result.

- the same types of agendas that are often promoted under the "EDI" banner, the promotion/enforcement of which is most likely to cause free speech compliance problems, are also the most likely to count as "propaganda" which is not justifiable for charity law purposes; and
- sooner or later, when an action promoting or inculcating an EDI agenda leads to litigation under free speech protections, the issue of the legality of that action under charity law will arise: HEPs should regard this as a live risk.

The OfS describes an HEP's "core mission" (e.g in the Introduction on page 4 of the OfS Guidance) as "the pursuit of knowledge".

The AHE Guidance makes no mention of these legal issues.

The AHE Guidance appears either to rely on an impermissibly wide concept of the "mission" or "core mission" of an HEP, or to assume that EDI policies and related actions can be justified by "aligning" or "linking" them to its "mission"/"core mission". For instance, in the example (regarding recruitment) on page 22 discussed below, AHE appears to proceed on the basis that explicitly "aligning" EDI agendas to an HEP's "mission" means that an HEP can legitimately include promoting EDI initiatives of the kind which have routinely given rise to free speech problems and produced a chilling effect on what students and visiting speakers feel they can say or advocate, and both what academic staff feel they can teach and what they feel they must say in order to secure academic posts or promotion.[19] This is, however, insufficient to secure compliance with charity law, which, as explained above, would require a careful assessment of whether a particular course of action is really promoting its core mission (as opposed to being presented as "aligned" or "linked"), or falls that wrong side of the line into the non-compliant promotion of political theories or propaganda as discussed above.

As well as the above risks, endeavouring to justify EDI initiatives by reference to an HEP's "mission"/"core mission" also results in the AHE Guidance (wrongly) advising that HEPs' institutional subjective aims and values relating to EDI (as frequently informed by the agendas of outside lobby groups and external advisers, as discussed below) are relevant to their compliance with the Secure Duty. This, though, is flatly contradicted by the OfS Guidance (see paragraph 62).[20] A need to secure legal compliance can justify taking or not taking particular

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[19] See similar assumptions made in: section 2.2.1 (on page 13) ("…ambitious policies and initiatives on inclusion may be appropriate in supporting institution's missions"); section 2.2.2 (on page 15) ("HEI's should be explicit about how their broader commitments, values and approaches in relation to inclusion or any references to other concepts such as social justice support their institutional mission"; section 3.1 (on page 18) ("Identifying legitimate aims in specific equality, diversity and inclusion policies and initiatives can be supported by explicitly linking to a HEI's mission"); and the example (on page 19) which suggests that a HEPs commitment to AHE's own Race Equality Charter and its requirement that HEPs be "anti-racist" would support its "institutional missions".

[20] The OfS Guidance's focus (in e.g. paragraph 61) on the "essential functions of higher education" (i.e. learning, teaching, research and administrative functions necessary for them) is consistent with charity law. Those functions are also relevant to compliance with the Secure Duty (as further explained in paragraphs 106 to 119 of the OfS Guidance).

steps, but promoting or enforcing EDI objectives beyond core legal compliance needs does not.

7. Institutional impartiality/neutrality

The section on institutional "impartiality" correctly recognises the importance of neutrality/impartiality in producing an environment which is supportive of free speech. This is a significant step forward. As well as urging AHE to adopt it, free speech campaigners have written to HEPs to urge institutional neutrality (the "**Joint IN letter**").

We do, however, question why AHE has chosen to adopt the word "impartiality" rather than "neutrality" as conventionally and widely used in this context. If the use of "impartiality" is intended to imply that an HEP needs not to join/take sides in debates on contested issues, but can otherwise still adopt, favour, or enforce certain views, through official statements, policies, practices, or other means, without their affecting its support for and protection of free speech or its legal risks, this is inappropriate both in principle and from the point of view of securing compliance.

It is noteworthy that, in the covering article to the AHE Guidance, it says that the "goal is not performative neutrality. Rather, it is to […] be transparent when the institution must take a stance; and ensure any stance protects and is distinguished from the personal academic freedom of senior leaders and staff". This suggests that AHE has drafted its Guidance in terms which will enable HEPs to take positions, ignoring the warnings that doing so can lead to compliance failures as a result of HEPs positions putting institutional weight behind contested viewpoints. If HEPs take such a course, they will risk:

- creating a chilling effect on dissent by their employees and students: AHE acknowledges this at section 2.2.2: "HEIs should also be mindful of the chilling effect that strong positions on inclusion may create for staff or students who hold different views;
- taking inappropriate steps to suppress free speech, or enabling or encouraging others to do so;
- making errors when faced with a free speech problem such as attacks, pile-ons and calls for discipline or sacking; and
- in particular, failing to take necessary action to secure free speech because there are assumed "right ways of thinking" (per the Dandridge Review) so the attacks are seen by relevant staff as justified and/or staff are enabled to follow their personal preferences rather than taking the steps necessary to enable the HEP to secure compliance.

Importantly, a lack of institutional neutrality contributed directly to the inappropriate policies and actions which caused the free speech failures which were the basis of:

- the failures by the University of Sussex as regards Kathleen Stock and, separately, the fine recently imposed on the University of Sussex by the OfS in connection with having non-compliant policies;
- the Open University's failures to protect Jo Phoenix (institutional neutrality was a recommendation in the subsequent Dandridge review); and

- the wrongful disciplinary processes and public statements in the *Meade* and other cases as explained in the BFSP's statement ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others*** (the "**BFSP Equality Act Statement**").[21]

There is an irony that SOAS, which has made a point of adopting impartiality rather than neutrality, has recently had to require changes to the basis on which people were allowed to participate in a conference on its premises. Potential participants were required to state their support for a very contested viewpoint in order to be allowed to participate, which would have been a clear breach of the Secure Duty had this happened. We wonder whether it would have made this error had it imposed neutrality on itself rather than the less-clear impartiality. For details, see: https://afcomm.org.uk/2025/12/05/soas-brismes-land-acknowledgement-climbdown/.

We note that, despite its apparent encouragement of HEPs to continue to take institutional positions on controversial and contested issues, AHE itself acknowledges the risks and issues referred to above when, on page 14, it says:

> "Securing and promoting free speech on contested and societally relevant topics may be hindered when an institution takes a partisan or biased stance on socially or politically contested topics. Impartiality enables a pluralistic environment where different views within the law can be expressed and heard, and individuals and groups within an institution to feel able to teach, research, debate or protest within the law."

This statement correctly reflects the position. We recommend that AHE revises this aspect of the AHE Guidance so as to be clearer about the severe risks of adopting positions beyond what is required to secure compliance with positive legal obligations under the Equality Act to avoid discrimination and harassment. Taking institutional positions in misplaced purported compliance with the PSED (as explained above) creates severe compliance risks.

We also strongly disagree with AHE's statement (at section 2.2 of the AHE Guidance) that "strict 'neutrality' is not a statutory or practical requirement". This is for the same reasons explained above and in the Joint IN Letter: as it is required in order to minimise risks of liability for discrimination against and harassment of people for their views as a result of having taken sides in contested societal debates, institutional neutrality plays a very important practical role in securing compliance with an HEP's statutory obligations under both the Equality Act and HERA.

In the same section, the AHE Guidance also refers to SOAS's concept of "plurality, not neutrality". We have recently written to SOAS about why the concept of "plurality, not neutrality" does not work on its own. "Plurality" is a valuable aim, but cannot be achieved without neutrality as an essential competent. See our letter to SOAS.

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[21] *Meade v. Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022). In the *Meade* case, a regulator wrongly subjected a social worker to fitness to practice proceedings for her gender-critical views, in a way found by an employment tribunal to be "indicative of a 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". The regulator's (and the social worker's employer's) subsequent liability well illustrates one way in which a lack of institutional neutrality will lead to compliance failures.

Section 2.2.1 of the AHE Guidance states that "Robust policies or institutional actions on equality do not, in themselves [….] inhibit an institution's approach to impartiality." As in the case of poorly drafted EDI policies, lack of institutional neutrality frequently underlies free speech failures. When institutions and their management lose sight of their need to remain neutral, this can easily lead to their not acting to protect free speech as now statutorily required by the Secure Duty. Ironically, "robust" EDI policies can also lead to compliance failures in relation to HEPs' obligation avoid liability under the Equality Act. This is thus not so much a question of such policies "inhibiting neutrality", as a lack of neutrality leading to a failure to recognise when policies are inappropriate and create compliance risks. Neutrality is an underlying need to secure compliance, as well as a good in its own right.

Section 2.2.3 of the AHE Guidance recognises the vital importance of senior leaders maintaining personal neutrality in their official capacity (and the risks of not doing so). No doubt, there is a valid distinction to be made between that and what they say privately, for instance in their capacity as academics (as AHE mentions). Leaders, do, however, need to be mindful of what they say privately, and online. For example: taking positions on contested issues will still be likely to have effects on their audience, which may not understand or appreciate this public/private distinction. This can be harmful to their institution and its reputation[22]. The AHE Guidance does not address this point. AFFS believes that the safest course is for senior leaders to be very wary of making any public statements about controversial and contested matters.

Inconsistently with this, section 2.2.3 also states that "Senior leaders will have discretion in acting as a 'champion' or appropriately raising the profile of a particular challenge or new initiative, but when speaking on behalf of the institution, they should broadly align with institutional policies and positions, and their 'championing' of that challenge or initiative should not act to the detriment or exclusion of other lawful views (or lawful manifestation of those views)". While it might be possible for senior leaders to become "champions" of a particular cause, the fact remains that the advocacy of contested and controversial positions and the use of incautious language in doing so, can itself lead to a chilling effect on free speech and other non-compliance: they will need to be very cautious for the reasons stated above, and the AHE Guidance is insufficiently clear about this.

8. Proportionality

The AHE Guidance also significantly misstates and exaggerates the role of "proportionality" (as referred to, albeit briefly, in the OfS Guidance).[23] We set out some detailed information and

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[22] For example, ahead of the talk to be given by Helen Joyce at Gonville and Caius College Cambridge, the Master and Senior Tutor of the college wrote to all students at the college "in our personal capacities" to describe Joyce's views as "offensive, hateful, and insulting to members of our community". Given that academics in their personal, or indeed academic capacities, do not email the entire college student body, the claim made by Professor Rogerson and Dr Andrew Spencer that they were emailing in a personal capacity, and as ordinary members of the college, not as Master and Senior Tutor is ludicrous. Any such email would likely now be in breach of an HEP's obligations under HERA.

[23] See: Section 2 of the OfS Guidance (pages 7 to 9) for the OfS's three-step framework for assessing compliance with the Secure Duty; and Step 3 (page 34 to 36) for a brief explanation of the role of "proportionality".

factors in Appendix 1. By reference to this, we would make the following points about this inaccurate approach to proportionality in the AHE Guidance.

- The OfS Guidance sets out a three step structure for analysis for assessing compliance with requirements to protect free speech. It states clearly that, in order for a policy/rule to restrict lawful speech compliantly, both of the following must be true:

  - the relevant policy/rule restricts free speech compliantly with the Secure Duty; and

  - the relevant policy/rule also satisfies the requirements of Article 10(2) of the Convention (as enshrined in UK law by the HRA) and is not, therefore, a breach of the fundamental right of freedom of expression in Article 10(1).

  It is a vital need for English HEPs to ensure that their policies/rules comply with both the Secure Duty and the Convention.

- Proportionality is not referred to in the Secure Duty itself, and the OfS Guidance makes is no mention of proportionality in Step 2 (re the Secure Duty). It is relevant to the separate need to justify restrictions under the Convention, and in Step 3 (relating to the Convention). Proportionality is a threshold component for a limited ability to restrict speech under the Convention. As a result, its relevance to HEPs' obligations to comply with the Secure Duty is limited to situations in which actions pursuant to the Secure Duty potentially interfere with others' Convention rights, as discussed in Appendix 1.

- Accordingly, there is no inherent requirement to undertake a proportionality assessment in assessments of whether a step to secure speech under the Secure Duty is "reasonably practicable". It follows that conflating the Secure Duty and need for proportionality as an element of compliance with Article 10, and routinely applying concepts of "proportionality" to determine whether policies/practices which restrict free speech are compliant with the Secure Duty, is highly likely to result in compliance failures and render policies and rules unlawful. This is because any such proportionality assessments would involve the application of a test which is, save as mentioned above, irrelevant to the Secure Duty and likely result in some steps being wrongly treated as not being reasonably practicable steps to take to secure freedom of speech at English HEPs.

- The bar for any objective addressed by an EDI policy or related action to be sufficiently important as to justify the limitation of any protected right under the Convention, including and most relevantly, the right to freedom of expression under Article 10, is generally high. Freedom of expression includes the freedom to offend, shock and disturb. The bar is higher still in the context of higher education.

- Proportionality, and in particular the relative importance of freedom of speech and academic freedom compared to other goals, are determined objectively by the courts in light of Article 10(2). HEPs do not have discretion subjectively to decide, themselves, the relative importance free speech and other ends. If HEPS seek to use proportionality as a justification for achieving policy ends they desire, they will be at high risk of a compliance failure.

In light of the above, the AHE Guidance needs to:

- make very clear that, in respect of any potential issue affecting free speech, English HEPs generally need to first make an assessment of Secure Duty compliance (which does not normally involve any Convention proportionality assessment, subject as discussed in Appendix 1), and then (and only where necessary) separately a Convention/proportionality assessment in accordance with Step 3 of the assessment process contained in the OfS Guidance;
- reflect the limitations on proportionality and HEPs' very limited discretion in applying that concept; and
- make clear that considerable care is needed when applying any proportionality assessment which is thought to be necessary.

We recognise that, when devising anti-harassment and anti-bullying policies/rules, proportionality will be of potential relevance. This is because, when constructing such policies (of which it is only practicable to have one set), HEPs must ensure that they are drafted so as to satisfy all applicable legal and regulatory requirements, i.e. the Secure Duty, requirements to act under the Equality Act, Article 10 of the Convention (including a "proportionality" element) and their conditions of registration with the OfS. See the discussion if this in Appendix 1.

As a result of the above, greater care needs to be taken throughout the AHE Guidance with using terms such as "proportionate" and "proportionality". This is because these words can have a general, non-legal, meaning as well as the technical legal meaning discussed above. In a number of places in the AHE Guidance, it is unclear in which sense these terms are being used, giving rise to the risk of confusion and possible problems for HEPs in understanding and following its advice. If intended to be used in the technical sense, that use is inappropriate in various places. Problems also arise from a conflating of the terms "proportionate" and "compliant". In such cases, we recommend that AHE considers replacing "proportionate" and "proportionality" with terms such as "compliant", depending on the context.

Specific examples of problematic use of "proportionate" and "proportionality" in the AHE Guidance are set out in Appendix 2.

9. Risks of relationships with external activist organisations

9.1 *The compliance risks involved*

The AHE Guidance refers at various points to the free speech obligations of HEPs concerning HEPs' engagement with external organisations such as Stonewall and Athena Swan, and charters and schemes created by these external organisations. It does this, for instance, at pages 15, 17, 20, and 24.

Relationships with such external organisations, including signing up to the commitments, charters or schemes of these organisations, give rise to high risks of promoting and enforcing the organisations' agendas in ways that cause severe legal and regulatory compliance failures, and indeed have already done so. The risks arise under HERA, the Equality Act, the HRA, and HEPs' conditions of registration, and are described in greater detail in BFSP's ***Statement***

of the new legal requirements for protecting free speech for English HEPs (the "**Principal Statement**").

There are three main ways in which maintaining relationships with external organisations cause compliance problems in practice. These are:

- Policies, practices, definitions, commitments, and agendas of external organisations, when adopted by HEPs, may be unlawful and regulatorily non-compliant. Examples of such non-compliant policies etc. are well known and include the University of Sussex's former "Trans and Non-Binary Equality Policy Statement", and Stonewall's former definition of transphobia, which extended to holding gender critical views, and which was adopted by multiple universities.
- In practice, it will be extremely difficult for HEPs to comply with their obligations regarding free speech if they simultaneously adopt strong positions on disputed political (in a broad sense) matters. They therefore have a strong compliance need not to take official views on disputed political matters (see the discussion on institutional impartiality above). Signing up to commitments, charters, principles, memoranda, and values of external organisations may be contrary to this compliance need. The AHE Guidance appears to recognise the importance of HEPs not taking official views on disputed political matters (though it fails to recognise that this is a strong compliance need).
- These risks take a new form when HEPs take actions to enforce, promote, or impose requirements in ways that are contrary to their free speech obligations, for instance through discriminating against people because they dissent, failing to protect their staff from harassment for their dissent, or creating a chilling effect or through imposing mandatory training.

9.2 *Recognition and reduction of compliance risks from aligning with external organisations*

The AHE Guidance states, at page 20, that:

> "[w]hen signing up to external commitments, charters or schemes, including those operated by Advance HE, HEIs should assure themselves that any required principles, policies or initiatives are fit for purpose in their particular institutional context and evidence base. Activity in relation to external charters and schemes must still meet relevant legal and regulatory requirements, including free speech and academic freedom."

The above passage contains an acknowledgement, albeit a weak one, that engaging with external organisations can cause serious compliance risks for universities. We welcome this acknowledgement, but the point needs to be made much more explicitly and strongly. Engagement with external organisations has, in recent years, caused HEPs (and other institutions) to commit serious compliance failures. The University of Sussex's non-compliant former "Trans and Non-Binary Equality Policy Statement", was created by copying the offending passages nearly verbatim from a template provided by an external organisation.

Of particular note is the statement in the AHE Guidance (page 17) that "it is likely to be appropriate for a Vice Chancellor to write and sign a letter of endorsement for an equality initiative, such as Athena Swan or the Race Equality Charter". The AHE Guidance mentions compliance risks arising from how such commitments and endorsements are

"operationalised", but does not discuss the nature of these risks in detail and in particular how personal endorsements by top leaders can create risks as discussed in respect of institutional impartiality above. This is a serious omission: many of these risks arise from failures to maintain institutional neutrality which committing to or endorsing the contents of these schemes may entail.

The Athena Swan Charter Principles, to which Athena Swan invites HEPs to "commit", includes "recognising that individuals can determine their own gender identity", which directly conflicts with certain lawful views, for instance, that gender (as distinct from sex) does not reflect reality. See, similarly, **Appendix 4**, which addresses AHE's Race Equality Charter and the AHE Guidance's discussion of it. If these schemes did not require HEPs to commit to official positions on highly contested political matters, and instead, for instance, merely required HEPs to commit to preventing racist and sexist discrimination and harassment, then they would not create compliance risks.

If HEPs are to avoid compliance failures, and these external organisations are to avoid serious reputational damage and potential liability under Section 111 of the Equality Act, such as Stonewall currently faces in the case brought by Allison Bailey, then the AHE Guidance must state the risks of engaging with external organisations, and actions necessary to avoid these risks, more explicitly.

9.3 *Adopting external definitions*

We welcome the statement, in the Example on page 20 of the AHE Guidance, that, when universities adopt definitions, for instance of antisemitism, islamophobia, and transphobia,

> "[t]hese definitions should only be adopted with suitable qualifications that they will not be applied in a way that restricts freedom of speech or academic freedom within the law, and that they do not supersede UK law in respect of definitions of harassment."

The International Holocaust Remembrance Alliance working definition of antisemitism, the All Party Parliamentary Group definition of islamophobia, and Stonewall's former definition of transphobia all either have significant potential to apply, or be applied, in a way which restricts lawful speech. Stonewall's definition of transphobia, for instance, included, legally protected, gender critical views. The Courts have ruled in multiple cases that an organisation's labelling of gender critical views as transphobia amounts to harassment. Therefore, simply adopting Stonewall's former definition may amount to harassment (and/or discrimination) under the Equality Act, and adopting any of the definitions puts an HEP at significantly increased risk of compliance failure. If an HEP takes action on the basis of one of these definitions against any of their Participants for their lawful views or their expression of them, they are at high risk of non-compliance under HERA.

9.4 *Preventing compliance failures resulting from unquestioning reliance on interested organisations*

The passage from page 20 of the AHE Guidance referred to above makes reference to steps which HEPs need to take in order to be compliant. To avoid compliance failures, HEPs need to assure themselves that, by participating in and giving effect to such commitments, charters, or schemes, and by adopting policy materials from external organisations, they are not putting themselves at risk of non-compliance. HEPs need to assure themselves of this by:

- Obtaining independent, professional legal advice on what actions or adjustments are necessary to avoid the legal and regulatory compliance risks discussed above.
- Obtaining assurances from the external organisations providing commitments, charters, schemes and templates for policies that the HEP's participation in giving effect to these schemes/policies will not breach its legal and regulatory obligations regarding free speech.

Because these external organisations are promoting schemes, templates etc which endorse their particular agenda, an obvious question arises: how can HEPs rely on them to have actually ensured that their schemes etc., and their implementation and enforcement, will not give rise to compliance failures? This is an issue in respect of AHE itself, of course. Why are HEPs accepting this risk dumping? The only way to resolve this is through formal, legally binding assurances that they have ensured that this is the case; or obtaining their own appropriate legal advice.

To avoid compliance failures on the part of HEPs, the AHE Guidance needs to state explicitly that HEPs need to take both steps.

10. EDI requirements in recruitment and promotion: unlawfulness and compliance failures

In an example on page 22, the AHE Guidance gives a description of questions which HEPs may and may not ask when recruiting candidates for academic posts in order to "ensure institutional values and approaches to inclusion are considered in the process", indicating that questions about "how [they] would contribute to an inclusive environment for everyone" and about "past contributions or commitments to meeting duties under the Equality Act 2010" can legitimately be asked.

The example starts by (wrongly) assuming that it is legitimate to consider candidates not only by reference to their academic credentials and suitability for the advertised posts, but also by reference to "institutional values and approaches to inclusion". This is based on inappropriately promoting the idea that adopting strong institutional positions promoting aspects of EDI is legitimatised by reference to an HEP's "mission" or "core mission", as discussed above.

The example correctly states that:

> "[HEPs] should ensure that language used in recruitment could not be reasonably interpreted as requiring endorsement of, agreement with, or experience in relation to specific viewpoints on equality, diversity and inclusion."

The problem with questions of this kind is not, though, merely one of language. It is clear that the only purpose for asking such a question would be to enable a HEP to discriminate between candidates who were committed to making such a contribution (perhaps because of a personal interest and belief in the importance of "inclusivity") and those who were not (perhaps because they disagree with aspects of the concept of "inclusivity" as applied in practice). It is, however, unlawful for HEPs to require evidence of commitments to viewpoints in a recruitment or promotion process, or to discriminate between candidates for positions on the basis of their commitment or lack thereof to certain values, beliefs, and ideas.

As the OfS Guidance clearly states:

> "Providers and constituent institutions should not require applicants to any academic position to commit (or give evidence of commitment) to a particular viewpoint."[24]
>
> "Providers and constituent institutions should not require applicants for academic promotion to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate for exercising their academic freedom within the law."[25]
>
> "Providers and constituent institutions should not require holders of any academic position to commit (or give evidence of commitment) to a particular viewpoint."[26]

The duty not to discriminate derives from the Secure Duty, and also the Equality Act (as regards people with protected beliefs) and the Convention (under the HRA). As the OfS states, when determining whether a particular action is prohibited by the Secure Duty, "whether [that action] aligns with the provider's or constituent institution's aims or values is likely to be irrelevant".[27]

Note that, as stated in the third quotation above from the OfS Guidance, HEPs must, in addition to applicants, also not require holders of academic posts to commit or give evidence of commitment to "EDI" or aspects of it.

The above legal and regulatory requirements are explained in detail in BFSP's statement ***EDI considerations and inquiries in the recruitment and research approval process at English universities Free speech compliance issues (***the "**EDI Information in Recruitment Statement**").

The AHE Guidance needs to state explicitly the above three restrictions from the OfS Guidance. The AHE Guidance does not mention the requirement on HEPs not to require their academic (and also non-academic) staff to commit or give evidence of commitment to EDI at all. Many HEPs do place such non-compliant requirements on their staff, as set out in detail in AFFS' report ***University Recruitment: EDI requirements causing free speech compliance failures*** (the "**AFFS Report**"). This is therefore a serious omission.

The second half of the example in the AHE Guidance (beginning "The department could…"), in some respects directly contradicts the OfS Guidance, and states that universities may take certain actions which it describes when selecting candidates which are, in fact, not legally or regulatorily compliant. The AHE Guidance is effectively advising HEPs to replace one sort of unlawful question with another.

The example on page 22 of the AHE Guidance goes on to state that an HEP "might ask about past contributions or commitments to meeting duties under the Equality Act 2010". As also

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[24] See OfS Guidance, paragraph 138. See also Example 27.

[25] See OfS Guidance, paragraph 151. See also Example 32.

[26] See OfS Guidance, paragraph 147.

[27] See OfS Guidance, paragraph 123.

already noted in section 4 above, however, there are no duties under the Equality Act 2010 to commit to or to promote EDI. Duties under the Equality Act extend to avoiding/preventing discrimination and harassment and fulfilling the process duty under the PSED when it has been applicable to them, and complying with other specified requirements. In the majority of cases, applicants who are applying to their first academic job (at least) will likely have had no opportunity to "contribute" or demonstrate a "commitment to" to meeting those duties under the Equality Act since they will not have been making decisions subject to the PSED, or otherwise responsible for ensuring an HEP's compliance with the Equality Act. Given that it would be unusual, and look decidedly peculiar, to ask questions in a process relating to a regular academic job relating to "past contributions or commitments to" securing compliance with this range of specified duties, such questions would be highly likely in practice to be veiled requests to state contributions and commitment to EDI, in which case they are highly likely to be unlawful.

The AHE Guidance needs to state the following clearly.

- **Discrimination in the selection process is unlawful**: treating an applicant negatively in a job application process because that person holds particular viewpoints, or lawfully dissents from or does not demonstrate support for aspects of the EDI agendas or programmes being promoted by the relevant HEP, will highly likely be contrary to the Secure Duty, as well as to the Equality Act and the Convention.
- **Seeking commitment/support information unlawful**: the only purpose of seeking information on candidates' commitment to or support for EDI and other values, beliefs, and ideas would be to provide information for an assessment process in order to put the HEP or its relevant staff in a position to discriminate – whether deliberately or unconsciously – against applicants with the "wrong" views. Requiring such information as part of a job application or promotion process must therefore be highly likely to be contrary to Secure Duty, as well as to the Equality Act, and the Convention.
- **Compelled thinking and chilling effect**: more widely, these and other actions can create a situation where people who seek (or are likely to seek) jobs or promotion at an HEP think that, in order not to impair their career prospects, they need to visibly not dissent from, or even demonstrate adherence to and be seen to actively promote, an agenda, or values, beliefs or ideas, regardless of their own actual views about such agendas, values etc.. Such a situation both pressurises people into publicly aligning with agendas, values, beliefs and ideas (often referred to as "compelled" thinking or speech), and reduces people's willingness (or perceived ability without having their career prospects impaired) to hold or express certain viewpoints and thus creates a "chilling effect" on people's freedom of thought and speech. This is highly likely to be contrary to Secure Duty, as well as to the Equality Act, and the Convention.

For further details, see the EDI Information in Recruitment Statement.

11. Governance and allocating resource to free speech protection

Securing that an HEP complies with its free speech obligations requires a strong free speech advocate and a governance focus and structure. Given the huge resources devoted to EDI and the relatively minute amount allocated to free speech protection (see AFFS's relevant study at

https://affs.uk/edi-free-speech-universities), it is unsurprising that EDI is a major source of free speech problems, as identified in the Dandridge Review, which recommended that "systems and structures should be put in place to support the promotion of free speech and academic freedom"[28].

Appropriate governance relating to free speech involves a number of actions, which we set out in **Appendix 3**. The most significant of these are the following.

- **Appointing a free speech officer** to be an internal advocate for free speech and academic freedom, with responsibility for ensuring that the HEP complies with its legal obligations and follows and enforces its own rules appropriately. Given the broad and demanding free speech requirements on universities, and recent widespread non-compliance, how can universities hope to comply, without a dedicated officer responsible for compliance? That officer should be appropriately senior, empowered and resourced, available, experienced and trained, and non-conflicted.
- **Have appropriate systems and structures, separated from EDI**. A university's systems and structures to protect free speech, including all those detailed here, must be separate from the EDI function. Given that EDI has been a source of free speech failures, separation is essential to prevent conflicts of interest in the relevant staff. The Dandridge Review identified the need for the Open University to "separate out" its approach to issues of belief from its approach to other aspects of identity, and this applies to free speech and EDI more broadly.
- Ensuring that an HEP has taken all **actions required to comply with its conditions of registration**. This will involve ensuring that its governing documents and governance structures and operations in respect of all matters that could affect free speech (positively or negatively), are consistent with its conditions of registration.
- Ensuring that staff and students have **adequate induction and training** about protection of free speech and academic freedom.

The AHE guidance does not mention the greater majority of this, and this is particularly glaring in Section 3.2. This is a significant failure, given that its aim is to clarify how to achieve a successful interaction between EDI and free speech.

If HEPs are to effectively and compliantly reconcile EDI agendas with their obligations regarding free speech, they will need to take these actions. The AHE Guidance mentions none of this, and this is particularly glaring in Section 3.2. This is a significant failure.

12. Giving examples of free speech compliance failures

The penalties on HEPs which seriously breach legal and regulatory requirements relating to free speech can be severe. If HEPs and their officers are to comply with their legal and regulatory obligations, they need to understand the consequences of committing or allowing serious compliance failures to occur, how they can arise, and thus how they can be avoided. For these purposes, recent cases of significant compliance failures are instructive.

[28] See Dandridge Review, Recommendation 8.

We therefore recommend that the AHE Guidance explains some relevant cases. The recent OfS fine on the University of Sussex and the cases of *Phoenix/Open University*, *Fahmy*[29] and *Meade* are instructive.

13. Section 3 of the AHE Guidance and implications for constructing policies

Section 3 of the AHE Guidance contains problems consequent on the errors discussed above. There is not space to identify them all, but we give two examples here.

The sentence at the very bottom of page 18 ("Requirements on staff, students, or stakeholders resulting from a policy or initiative should be both necessary (logically required and based in evidence) and proportionate in the delivery of these aims") is likely to lead to trouble. As soon as requirements are imposed on staff, students etc, this leads to compulsion and chilling effects in the context of free speech. In order to comply with the Secure Duty, all relevant requirements need to be sufficiently carefully drafted and narrowly focused on the legitimate underlying purpose so as to limit speech to the minimum extent necessary in order to achieve that purpose. The sorts of policies that can legitimately interfere with the Secure Duty are described above and are limited to securing compliance with obligations under the Equality Act relating to discrimination and harassment, and anti-bullying policies, if compliantly drafted. The PSED is highly unlikely to justify interferences with free speech, for the reasons explained above. 'Proportionality' is not a relevant general factor here, in the legal sense (it can be in cases where action under the Secure Duty potentially interferes with the Convention rights of others). All policies need to be drafted to avoid including requirements which are non-compliant with the Secure Duty.

At page 19, the first example provides a good example of the problems created by contested concepts being promoted and enforced under the EDI banner, as discussed above. Anti-racism (as opposed to non-racism/preventing racism) is a highly contested concept/agenda, which, as often promoted, includes expecting people to personally be active in and become enforcers of those agenda. The means of doing that have to be structured very carefully to ensure that it is free speech compliant. As soon as anti-racism is a requirement for staff, or is an official position in such a way that it creates a hostile environment for those who do not agree with it, and thus a chilling effect, it is highly likely to be unlawful. Imposing anti-racist policies will inherently give rise to free speech problem unless they are voluntary and not promoted in a way that effectively requires consent, encourages people to suppress each other's lawful views, or chills dissent. The example given correctly identifies this as a compliance risk area, but does not give sufficient information about how this can arise and how to avoid it.

The matters discussed above have many implications for constructing relevant HEP policies appropriately. It is worth setting out some key implications here.

- Because policies which reflect EDI objectives beyond the core legal compliance needs, i.e., other than limited anti-harassment and anti-bullying policies which are compliantly drafted and enforced as discussed above, can create high risks of free speech failures, great

[29] *Fahmy v. Arts Council England* (2023) ET case no 6000042/2022. In the *Fahmy* case, an institution was found guilty of harassment as a result of not having taken reasonable steps (so as to qualify for the defence under Section 109(4)) to prevent its employees from harassing a colleague for her gender critical viewpoints.

care will need to be taken to ensure that policies are either legally justified and appropriately drafted, in the case of anti-harassment and bullying policies, and otherwise constructed so as not to restrict free speech.

- HEPs will need to ensure that they do not officially promote or enforce contested views and agendas, including those derived from external organisations, which are likely to be a subject to dissent in ways that would cause free speech compliance problems. Obvious examples, as well as EDI objectives beyond core compliance needs as discussed above, are concepts relating to "decolonisation", especially as regards the curriculum.
- EDI requirements in recruitment are especially risky, as discussed above, and policies and practices need to be made compliant. Applying any relevant requirements involves a high risk of failures.
- EDI training is also risky as regards free speech, and needs to be carefully constructed to endure compliance. See BFSP's statement ***EDI and similar courses, training and tests Free speech requirements and risks for English universities*** for details. Information on requirements relating to EDI training is provided in the OfS Guidance at paragraph 212 and in Example 53. The AHE Guidance omits this important topic, despite it falling centrally within its subject matter. This is a weakness.

The above points should be made much more clearly than they currently are in the AHE Guidance.

Finally, it is vital that HEPs have appropriate policies/requirements for preventing attacks on colleagues for their views and managing disagreement. And to enforce them actively, with appropriate systems in place to do so. While section 3.3 of the AHE Guidance is a positive contribution, this need is insufficiently addressed in the AHE Guidance, other than obliquely in bullets under "Reflexive questions" on page 29.

14. Other comments

The following are some miscellaneous comments on the AHE Guidance.

- The reflexive questions page 15 of the AHE Guidance refer to "balancing" commitments to inclusion in relation to commitments to enable debate. This is risky language, as its implies that HEPs have discretion to create a "balance", whereas they are negotiating difficult legal waters in order to secure compliance with overriding legal requirements.
- The AHE Guidance refers on page 7 to an article written by Professor Naomi Waltham-Smith. Subsequent legislative and regulatory developments have rendered this article significantly out of date: it was written prior to the government's decision to repeal those sections of the Higher Education (Freedom of Speech) Act 2023 which provided for the creation of a statutory tort, and to make other changes relating to students' unions, the OfS' complaints scheme, and overseas funding; and prior to the issuing of the OfS Guidance. The article also refers to the Secure Duty as an "enhanced process duty", which could be seriously misleading. We therefore recommend that the AHE Guidance – a new publication, aiming to provide information to HEPs on their legal and regulatory obligations today – should not refer to this article.

- The AHE Guidance refers, and provides a link to, an article written by Professor David Ruebain *Freedom of Speech, Academic Freedom, EDI in higher education: Squaring the circle*. The article was published on Advance HE's website in November 2023. The article gives an account of the legal obligations on HEPs, related to freedom of speech, which is, we believe, materially incorrect and misleading in multiple places. The article is, moreover, significantly out of date; it was written prior to the publication of the OfS Guidance and makes no reference to it. If Advance HE is to avoid by reference misrepresenting the law and its implications, the reference and link to Professor Ruebain's article needs to be removed from the AHE Guidance, and the article be removed from Advance HE's website.
- We note that Example 23 contains two serious flaws. First, though, we should note that negative stereotyping can be offensive to many, and can indeed merit negative consequences where the legal nexus justifies this. We are not defenders of ugly behaviour, but we are of free speech, and we are conscious that concepts such as "stereotyping" have been weaponised by some.
    - The statement "Negative stereotyping in some circumstances may need to be balanced with human rights protections, e.g. under the Equality Act 2010" is misleading. This is a question of legal interactions and interpretation, and the use of the term "balancing" suggests that:
        - HEPs may compliantly restrict lawful speech in order that it is "balanced" with certain elements of the Equality Act.
        - HEPs have discretion in deciding how to "balance" free speech and those elements of the Equality Act.

      Both of these suggestions are incorrect, and this is caused in part by the understatement in the AHE Guidance of the effect and relative strength of the Secure Duty. An HEP may only restrict speech if it is either unlawful, for instance by amounting to harassment under the Equality Act, or if it contravenes rules of the HEP which are carefully and narrowly written so as to be compliant, the main example of which will be anti-bullying and anti-harassment rules, as discussed above. The Secure Duty will otherwise generally be overriding. Other possible limitations such as "essential functions" are not likely to be relevant to interactions such as this. The word "balance" implies discretion, and more accurate expressions, which would not lead HEPs into risk, would be ones such as "secure compliance" or "navigate legal interactions".
    - The example asserts that "stereotyping (or other academic expression) may not be protected, even in academic contexts, if it is [...] not based in evidence or does not meet minimal thresholds of academic quality or rigour". This assertion is incorrect. Even if such speech did not qualify for protection under the heading of academic freedom, it would still potentially be protected under the general provisions of the Secure Duty and the Convention, unless it were, in addition, such as made it unlawful or within

the limited range of lawful speech which can be compliantly restricted by HEPs, for instance pursuant to their anti-harassment and anti-bullying rules.

HEPs need to be clear that expressing views which others might accuse of being stereotyping is not a basis for negative consequences, unless those consequences are legally justified. They should keep in mind the relevant legal restrictions on speech, such as duties not to incite hatred or violence under (for instance) the Public Order Act 1986, and the limited range of lawful speech which universities may compliantly restrict under anti-harassment and anti-bullying rules.

- The AHE Guidance fails to address two further important matters, in addition to those noted earlier in this document, which are central to the subject on which it advises. Both these matters are addressed in the OfS Guidance and therefore illustrate the dangers for HEPs of relying solely on the AHE Guidance, which is not complete. These matters are:
  - The fact that an individual holds views that others consider discriminatory does not imply that that individual will discriminate. Such views may be lawful, in which case, they will receive the protection of the Secure Duty, and other legal and regulatory requirements on HEPs. This means that discriminating in applications against, disciplining, or firing an individual for their lawful views will be unlawful.[30]
  - Creating a reporting process for "microaggressions", depending on how this is done, may well be unlawful. Where those making the report are anonymous, those who are the subject of the report are identified, and the university may take action against those who are the subject of reports, the process is more likely to be unlawful.[31]

15. Conclusion: key messages from AFFS's comments

AFFS's comments are inevitably lengthy, and it is perhaps helpful if we conclude with some key messages that it is important the AHE ensures are made very clearly in the AHE Guidance.

- The legal and regulatory requirements on HEPs to protect free speech are complex, and demanding. Vague or half-hearted approaches to protecting freedom of speech are unlikely to ensure compliance. HEPs must be serious and careful in their approach, ensure that they fully understand the free speech requirements and take a wide variety of concrete, proactive steps with respect to freedom of speech and its interaction with EDI. The consequences of not doing so, and so falling into non-compliance, are severe, as evidenced by a series of costly cases under the Equality Act, including the *Phoenix*, *Stock*, *Miller*,[32] and *Esses* cases, and the regulatory fine on the University of Sussex.

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30 This point is stressed by the OfS Guidance at paragraphs 77 and 114.

31 OfS Guidance, Example 39.

32 *Miller v University of Bristol*, February 2024 (Case No,1400780/2022).

- HEPs need to appreciate the following, in particular.
    - EDI has been a source of free speech compliance problems. This is acknowledged by the AHE Guidance and discussed above. If HEPs are to be compliant, they will need to undertake major and systematic reviews of their EDI systems, policies, and structures, which where necessary must be updated, on the basis of specialist legal advice, to be compliant. Systems, policies, and structures furthering EDI matters must be separate from those ensuring freedom of speech, to prevent insuperable conflicts of interest, as partially recognised in the Dandridge Review, and as likely required by the Secure Duty.
    - The range of HEP policies (and their implementation and enforcement) which can compliantly restrict lawful speech is extremely narrow. The main example will be anti-bullying and anti-harassment policies which must be carefully drafted to be able to compliantly restrict lawful speech. HEPs should bear this in mind when constructing EDI policies.
    - All EDI agendas and activities beyond those core legal compliance needs are at risk of restricting free speech, and the more contentious the agenda or viewpoints that is being promoted/enforced under the banner of EDI, the higher the risk.
    - The PSED, as a process duty not an outcome duty, is always subject to duties to act such as the Secure Duty, and will not justify EDI objectives beyond core legal compliance needs restricting free speech in contravention of the legal and regulatory duties to secure free speech.
    - HEPs must ensure that their EDI activities – policies, promotion, enforcement – are in all respects compliant with the Secure Duty, Equality Act, Convention and conditions of registration, including by ensuring that they do not promote or enforce agendas in ways which:
        - discriminate against staff and students for their views, including in recruitment, through failing to deter and dismiss inappropriate complaints and through pursuing inappropriate complaints and disciplinary processes;
        - harass, i.e. create a hostile atmosphere for, people with particular viewpoints and dissidents from contested EDI agendas in particular, and this can result from failures of institutional neutrality;
        - compel assent to contested views (for instance, through duties on staff to promote or support EDI and through inappropriately structured training processes); and/or
        - otherwise enforce silence or chill the expression of views on relevant subjects.
    - HEPs have huge risks when they fail to protect their staff and students from attack for their viewpoints, as the *Stock*, *Fahmy*, *Phoenix*, and *Greer* cases demonstrate. They need

to have and enforce protections, such as anti-harassment and -bullying rules, in order to protect such people.

- "Proportionality" is a legal concept with strict limitations. It is not an inherent qualification in the Secure Duty. It provides little discretion to justify EDI objectives beyond core legal compliance needs restricting free speech. Misuse of concepts of "proportionality" and "balance" leads to compliance failures.
- Relationships with external activist organisations, and implementation of their agendas, create severe free speech compliance risks, and have to be handled with great caution.
- Institutional neutrality is a key need in order to secure compliance.

The AHE Guidance does not make the above points with adequate clarity.

- In order to give HEPs sufficient information to enable them to understand and give effect to their compliance obligations, the AHE Guidance needs to address the issues AFFS has raised above.

We hope that Advance HE finds these comments helpful. While they may in places make for uncomfortable reading, we hope that they may help to ensure that Advance HE's advice to HEPs is correct. This will require changes to its apparent understanding of the legal and regulatory matters at hand, and quite a lot of significant changes to its advice. Going through this process would ensure that it is giving HEPs good advice on this complex subject – we fully appreciate that this is not easy – and would reduce its own risk of reputational damage.

We are happy to liaise with Advance HE confidentially, if that would help.

Yours faithfully,

Alumni For Free Speech

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Appendix 1 – Proportionality, its limitations, and constructing compliant policies

The Convention

Freedom of speech protected by Article 10 includes the freedom to offend, shock, and disturb. Academic free expression and political expression (in a wide sense rather than a narrow party-political one) attract the highest degree of protection.[33]

Article 10(2) permits restrictions on the fundamental rights of expression enshrined in Article 10(1) only if the following conditions are met.

1. The restriction must be "prescribed by law".
2. The restriction must be "necessary in a democratic society" for various specified purposes, including for the protection of the rights of others.
3. The restriction must be "proportionate". This additional requirement has emerged through extensive case law although it is not explicitly stated in Article 10(2)).

A policy/rule introduced by an HEP which restricts lawful speech will not breach Article 10(1) rights only if it meets the above conditions.

OfS Guidance: a key point of analysis re Secure Duty

The OfS Guidance sets out a three step structure for analysis for assessing compliance with requirements to protect free speech. It states clearly that, in order for a policy/rule to restrict lawful speech compliantly, both of the following must be true:

- the relevant policy/rule restricts free speech compliantly with the Secure Duty (there is no reference to "proportionality" in the Secure Duty itself); and
- the relevant policy/rule also satisfies the requirements of Article 10(2) of the Convention and is not, therefore, a breach of the fundamental right of freedom of expression in Article 10(1).

The OfS Guidance states that these are separate processes and that proportionality is relevant to the second: there is no mention of proportionality in Step 2 in the OfS Guidance (re the Secure Duty)[34]. (Note that satisfying the requirement in Step 3 does not necessarily mean that the requirement in Step 2 is also satisfied.) As the OfS Guidance makes clear, HEPs need to have regard to, and to comply with, both of them.)

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

[34] Although the OfS has subsequently clarified that paragraph 64 of the OfS Guidance contemplates that, if no reasonably practicable steps can be taken to secure the speech in question without acting unlawfully under the HRA/Convention, then there will be no breach of the Secure Duty in not securing the speech; proportionality will be a relevant issue in this particular regard, as we discuss below.

Proportionality and its limitations

In outline, a restriction is proportionate for the purposes of Article 10(2) of the Convention if it is a means to an end of sufficient importance to justify a restriction of the degree in question, and either there are no less restrictive means to achieve the objective, or not taking any of the alternative means is of sufficient importance to justify the restriction in question.

More specifically, to assess the proportionality of a measure as an interference in lawful speech under the Convention, HEPs must consider the factors set out in paragraph 130 of the OfS Guidance, i.e.:

a. whether the objective of the measure is sufficiently important to justify the limitation of a protected right,

b. whether the measure is rationally connected to the objective,

c. whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

d. whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

Limited application re the Secure Duty

It is important for HEPs to keep in mind that there is no reference to "proportionality" in the Secure Duty itself.

Proportionality is a component test for a limited ability to restrict speech under the Convention. Proportionality is only relevant, in the context at hand, when Convention rights are engaged**.** Concepts of "proportionality" do not otherwise justify a limitation on free speech rights.

There is, therefore, ***no inherent requirement to undertake a proportionality assessment in routine assessments of whether a step to secure speech under the Secure Duty is "reasonably practicable"***. Proportionality is a Convention mechanism and only applies where Convention rights become relevant. Its relevance to HEPs' obligation to comply with the Secure Duty is limited accordingly.

It follows that, generally, applying concepts of proportionality to determine whether steps are reasonably practicable pursuant to the Secure Duty is likely to result in compliance failures and render policies and rules unlawful. This is because any such wider proportionality assessments would involve the application of a test which is irrelevant to the Secure Duty and likely to result in some steps being wrongly treated as not being reasonably practicable steps to take to secure freedom of speech at HEPs.

The exception to this is where there is a legal obligation (or likely one) pursuant to the HRA/Convention which is incompatible with the taking of particular steps to secure the speech pursuant to the Secure Duty.[35] If no reasonably practicable steps can be taken to secure

[35] The OfS Guidance (paragraph 64) states that taking a step is not reasonably practicable if doing so is unlawful, and the OfS has recently clarified (in a letter of 5 September) that this includes unlawfully

the speech in question without acting unlawfully under the HRA/Convention, then there will be no breach of the Secure Duty in not securing the speech. Proportionality will have relevance to assessing the implications of the relevant Convention rights/duties. However, this is a complex and contested area with severe accompanying risks for HEPs of getting their compliance wrong.[36] The main implications in practice are likely to be in respect of the

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acting incompatibly with a Convention right/duty and that, if no reasonably practicable steps can be taken to secure the speech in question without acting unlawfully under the HRA then there will be no breach of the Secure Duty in not securing the speech.

[36] The following are some considerations which will be relevant to whether (and the extent to which) any Convention rights/duties justify not taking steps under the Secure Duty in particular circumstances.

- As key context, the OfS Guidance states (at paragraph 58) that the Secure Duty "includes a negative duty to refrain from taking certain steps which would have the effect of restricting freedom of speech within the law. For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all". This reflects a crucial risk and limitation for HEPs in this regard.

- There are many situations in which steps under the Secure Duty are necessary but there are unlikely to be conflicting Convention duties/rights which will need to be applied in the relevant circumstances. Examples include:
    - an HEP requiring an applicant for a job to demonstrate how he/she supports "EDI" as part of the application process;
    - an HEP requiring staff to teach/exclude course materials for "decolonisation" reasons, allowing no scope for expressing disagreement about it; and
    - an HEP requiring a person to agree with a contested view (eg that people must support "equity") in order to "pass" EDI training.

- HEPs will need to be very sure that any asserted conflicts with Convention rights/duties are real. The extent to which Convention rights/duties would justify not taking steps under the Secure Duty will vary from Article to Article, is often legally unclear and contested and will always depend on the relevant facts, so asserting that a Convention duty/right justifies not taking steps under the Secure Duty will be highly risky. A relevant example of this is that the scope of Article 8 is unclear, in terms of both conduct captured and persons captured. Overreliance on and/or misinterpretation of the scope of that Article could lead to an HEP misapplying the Convention, or applying it when one is not needed. Any assertion as above should only be acted on following specialist legal advice.

- The extent of positive duties (to act) under the Convention, as opposed to negative duties to avoid breaches of Convention duties, varies and is often unclear and contested. HEPs would need to be very confident of the basis on which they are justifying their actions, with reference to established Convention case law.

- When a contrary Convention right/duty is asserted, it will need to be considered in the light of its interaction with both the Secure Duty and also Article 10 of the Convention. See the discussion below of the high bar for justifying interference with free speech under the Convention and of the fact that this is an objective legal requirement giving HEPs limited discretion units application.

appropriate scope of anti-harassment and anti-bullying policies/rules, to the extent that it is correct that they are giving effect to Convention rights, and rights to free speech/assembly in the context of "clashes of free speech rights", including in the currently-hot area of protests. These are discussed below.

High bar

The bar for any objective to be sufficiently important as to justify the limitation of any protected right under the Convention, including and most relevantly, the right to freedom of expression under Article 10, is generally high. Freedom of expression includes the freedom to offend, shock and disturb. The bar is higher still in the context of higher education. In relation to the application of Article 10 in this context:

- Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection under the Convention, as does academic free expression.[37]
- "The core mission of universities is the pursuit of knowledge (and the principles of free speech and academic freedom are fundamental to this purpose)."[38] Few objectives, even of those prescribed by law, will be of sufficient importance to restrict lawful speech.

The existence of this high bar in confirmed by the OfS Guidance. The flow diagram for Step 3[39] (on page 9) states: "the proportionality test in Article 10(2) means that, in practice, it is difficult to restrict or regulate speech in a higher education context. This is because there is a high bar for limitation of a protected [Convention] right in general terms, and the particular purpose of higher education is such that limitation of Article 10 rights would undermine that purpose." Paragraph 131 confirms that "the "proportionality test is formulated such that there

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- HEPs are not generally responsible under the Convention for the actions of individuals (staff or students) acting on their own account, so will accordingly have limited duties regarding managing/restricting the actions of such individuals.

- The OfS acknowledges that HEPs may have anti-harassment and anti-bullying policies/rules compliantly with the Secure Duty (see paragraph 99 of the OfS Guidance). Such policies/rules are discussed in detail below.

- The risks for HEPs described above are also risks for Advance HE: given that HEPs will be relying on its advice, that advice on this matter needs to be correct or it will face its own risks.

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

[38] OfS Guidance, paragraph 131.

[39] I.e. "Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights."

is a high bar to interfere with […] Article 10 on freedom of expression. In practice this means it is difficult to restrict lawful speech."

Objective legal requirement: HEPs have limited discretion

Proportionality, and in particular the relative importance of freedom of speech and academic freedom compared to other goals, are determined objectively by the courts in light of Article 10(2). Securing compliance with the overriding Secure Duty means applying the law around "proportionality" correctly – where it is relevant at all. When conducting any proportionality assessments which might be required, HEPs do not have discretion subjectively to decide, themselves, the relative importance free speech and other ends. They have to apply any proportionality considerations which potentially arise objectively and dispassionately; if they instead seek to use "proportionality" as a justification of achieving policy ends they desire, they will be at high risk of a compliance failure.

Constructing compliant anti-harassment and anti-bullying policies: conflicts of free speech rights

General Considerations

As noted above, the main HEP policies/rules which can compliantly restrict lawful speech are anti-harassment and anti-bullying policies/rules. When constructing such restrictions (to state the obvious, it is only practicable for an HEP to have one set of each such requirements), it must ensure that they are drafted so as to satisfy all applicable legal and regulatory requirements, i.e. both the Secure Duty and Article 10 of the Convention, and, indeed, under the Equality Act and its conditions of registration. From the point of view of proportionality, these policies/rules must be drafted very carefully in order achieve this.

Consistent with this, the OfS Guidance recommends that any such policies/rules should:

- apply objective tests (rather than depending solely on the subjective perceptions or assertions of individuals);
- avoid vague language;
- use legal definitions where available;
- include a clear statement, explicitly and adequately protecting freedom of speech and academic freedom in the document which sets out the rule; and
- ordinarily focus on the time, place and manner of speech, and not on the viewpoint expressed.[40]

In addition to the above conditions, and in order to comply with the Convention, a policy/rule must:

- be written such that both its requirements and effect are proportionate;
- restrict speech no more than is strictly necessary; and

[40] See OfS Guidance, paragraphs 156 and 157. See also paragraph 109.

- be clear and accessible to those bound by it.

More widely, to ensure that any such restrictions (on lawful speech) are compliant with legal obligations relating to freedom and/or speech and academic freedom, an HEP should do the following.

- Take care when identifying the nature, limits, and scope of any legal obligations and regulations underlying relevant restrictions, and take expert legal advice in case of any doubt. To the extent that these legal and regulatory duties are over or mis-interpreted, restrictions based on them run severe risks of being non-compliant. Failures here may be caused by oversimplified understanding or presentation of the legal and regulatory duties on HEPs.[41] An important example is HEP policies which are based on incorrect or exaggerated understandings or assertions of the strength and scope of the duties placed on HEPs by the PSED, as discussed above.
- Ensure that the terms of any code, contract, policy or rule at the HEP are not so broad that they suppress in non-compliant ways the lawful expression of a particular viewpoint or of a wide range of legally expressible content.[42]
- Include, as a matter of good practice, in any document stating or explaining any policy that may affect free speech or academic freedom (for instance a bullying and harassment policy, or research ethics policy), a statement that, in cases of uncertainty, the definitive and up-to-date statement of the HEP's approach to freedom of speech is set out in the HEP's free speech code.[43]

Under the Secure Duty, an HEP must take all reasonably practicable steps to ensure that its anti-harassment and -bullying policies interfere with lawful free speech to the minimum extent necessary for the purpose for which they are in place.[44]

The EHRC has stated that: "The harassment provisions [of the Equality Act 2010] cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act."[45] Logically, this must also apply in respect of anti-bullying requirements.

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41 For examples of oversimplification, see: the OfS Guidance, Example 37.

42 See OfS Guidance, paragraph 158. See also: Examples 34, 35, and 36.

43 See OfS Guidance, paragraph 169d.

44 For instance, the OfS Guidance states (at paragraph 58) that the Secure Duty "includes a negative duty to refrain from taking certain steps which would have the effect of restricting freedom of speech within the law. For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all". An HEP must not implement a policy restricting lawful speech where it is reasonably practicable not to implement it.

45 EHRC's *Guide Freedom of Expression for HEPs and SUs in England and Wales* (the "**EHRC Guide**"), page 18.

The OfS' condition of registration E6 is also of relevance. This must also logically extend in respect of anti-bullying requirements as well.

Anti-harassment policies/rules

The relevant detailed provisions of the Equality Act and Protection from Harassment Act 1997, and case law under them, to a large degree effectively reflect "proportionality" balancing needs under the Convention. This means that, as long as anti-harassment policies/rules are written with extreme care so that their requirements and effect are no wider than is strictly necessary in order to ensure that they reflect the actual requirements of the legislation, thus interfering with free speech to the minimum extent necessary for that purpose, an additional proportionality assessment in respect of them is likely to be otiose in most circumstances (not least because, if the speech is unlawful, then it is outside the Secure Duty in any event). Proportionality can, nonetheless, still be relevant to the application of those restrictions in particular cases.

Anti-bullying policies/rules

As discussed above, the OfS expects that HEPs will want to have such policies in order to carry out their essential functions or to satisfy legal and regulatory obligations[46]. Unlike anti-harassment policies required to secure compliance with the Equality Act, however, there are no clear and detailed legal moorings to which such policies can be fixed, so the drafting such policies will have to be very carefully drafted to minimise free speech compliance risks for HEPs.

The Secure Duty will require such policies/rules to restrict free speech no more than is necessary to secure the for the purpose for which they are in place. Unlike in the case of anti-harassment policies, a separate proportionality assessment will likely be necessary in assessing the compliance of anti-bullying policies with the Convention at the drafting stage. As detailed above, Convention rights include the freedoms to offend, shock and disturb and the bar for any objective to be sufficiently important as to justify restrictions on speech and academic freedom in an academic context is very high. Thus, even though some anti-bullying policies might operate as permissible restrictions on free speech under the Convention, the range of lawful speech which such policies/rules can restrict while remaining proportionate, and therefore lawful, will be both narrow and severely limited. The parallel obligation under the Secure Duty to restrict free speech no more than is necessary to secure the underlying legal justification of such policies would also need to be complied with. Drafting compliant policies will be difficult, and HEPs need to exercise extreme caution.[47] (Note that proportionality will also be relevant to the application of those restrictions in particular cases.)

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[46] As already noted above, paragraph 99 of the OfS Guidance states that HEPs "will wish to have robust anti-bullying […] policies. The [Secure Duty] does not prevent them from doing so".

[47] We believe that non-complaint anti-bullying policies have the potential to be the next *Stock*/*Sussex*-scale debacle.

Actions pursuant to the Secure Duty and conflicts of free speech duties

All actions to secure free speech pursuant to the Secure Duty and the Equality Act (and, indeed, the Convention), including the creation and enforcement of policies/rules to protect free speech, need to be carefully written//constructed/taken so as to comply with any obligations under the Secure Duty and the Convention in respect of the people who are (for instance) making severe personal attacks on people for their viewpoints, or protesting, i.e., so as to secure free speech compliance in both directions (i.e. in a "clash of free speech duties").

While this is a delicate area, to the extent that such actions work to protect freedom of speech overall, and are planned/constricted so as to operate to secure compliance with both the Secure Duty and the Convention in this context (the latter of which would involve getting proportionality right), they are likely to be able to satisfy both the Secure Duty and the Convention. (They would, of course, also need to be applied proportionately to the facts of any particular case.)

Identifying and reducing risks from getting proportionality wrong

Given the risks of compliance failures and resulting legal liability and reputational damage, HEPs cannot afford to get proportionality wrong. Rather than seeking to rely on supposed proportionality considerations to avoid or water down the actual requirements of the Secure Duty, HEPs need to work to prevent or avoid failures of the kind discussed below.

Examples of errors to be avoided

HEPs are at risk of committing various types of error when conducting proportionality assessments, all of which will lead to non-compliance and, therefore, potentially to legal and regulatory liability.

- **Applying proportionality where it is not relevant**. If HEPs conduct proportionately assessments, or otherwise make use of proportionality when determining their legal and regulatory free speech duties, in circumstances where this is not legally justified as discussed above, this creates serious risks of non-compliance.
- **Assessing proportionality according to non-legal standards: no discretion**. As explained above, proportionality, and in particular the relative importance of freedom of speech and academic freedom compared to other goals, are legally determined. HEPs do not have discretion in this regard and have to apply the legal requirements objectively and dispassionately. In particular, the relative importance of freedom of speech and academic freedom, and the objectives which relevant policies are intended to implement, need to be assessed in accordance with the law. Making judgements about this relative importance according to an HEP's or its officer's own views will lead to incorrect proportionality assessments and non-compliance.
- **Incorrectly assessing proportionality**. Assessing proportionality is a complicated and technical task, and errors may arise where staff fail to consider all the relevant factors (for instance, whether a less restrictive alternative is available) or misunderstand the legal duties engaged. HEPs and their officers must be able to conduct any proportionality assessments which are required correctly. What is needed are appropriate systems of governance, procedures, and access to specialist advice, as detailed below.

Preventing errors and non-compliance

- **Training and resources**. Training should be required for all staff on committees with responsibilities for decisions which could affect freedom of speech. The training should ensure staff understand the core elements of the law in relation to proportionality (for instance, that proportionality is only relevant in very specific circumstances, and is a legally defined concept). Staff should have access to specialist lawyers when they conduct any proportionality assessment.
- **Procedure**. Staff conducting proportionality assessments should be provided with documents setting out in detail the procedure they ought to follow when conducting proportionality assessments. They should follow this procedure. The following analytic process may be a useful basis from which HEPs can create their own procedures.
    - **Pre-assessment preparations**. First, before beginning any element of the proportionality assessment, staff of an HEP should identify the basis, purpose, nature and scope of the proposed Relevant HEP Restriction (see Part 1 above in this context). They should also establish that the Relevant HEP Restriction is for a legitimate purpose under the Convention.
    - **Making a proportionality assessment**. Staff should, first, establish the degree to which the restriction and its implementation will restrict lawful speech. Then they should consider in turn matters a–d of paragraph 130 of the OfS Guidance, listed above in Part 2, and come to a decision on the proportionality of the Relevant Restriction. At each stage of the assessment, reasons should be given and noted for any decision or finding. If the Relevant Restriction is found not to be proportionate, it should be adjusted so that it is.

Compliance with the Secure Duty as a separate process. As explained earlier, it does not automatically follow from a proportionality assessment that a policy/rule complies with the Secure Duty, as such assessments relate to the Convention, which is a separate set of requirements from the Secure Duty.

Appendix 2 – Examples of problematic use of "proportionality" in AHE Guidance

The following are specific examples of problematic use of "proportionate" and "proportionality" in the AHE Guidance, as discussed above.

- The use of "proportionate" in the middle of page 13 creates risk and needs to be considered. "Appropriate" may be better here.
- The use of "proportionate" in the second paragraph of page 15 might be appropriate assuming that it is reflecting obligations under the Equality Act. But since this is unclear, it might be worth assessing for potential compliance risk.
- Page 18 contains uses of "proportionate" which are confusing and, therefore, risky. A reasonable reader would be likely to take them to mean proportionate in the legal sense relevant to Article 10 of the Convention. Given the subject matter addressed on page 18, this could lead directly to compliance failures as a result of HEPs failing to follow the three step process required under the OfS Guidance.
- On page 19, second paragraph, "disproportionate" could helpfully be replaced with "non-compliant". In the final paragraph, "disproportionate" appears to be an inappropriate (and otiose) word in this context.
- Of particular concern is the statement at page 20: "A proportionality assessment must be used to consider likely interactions between inclusion related policies and initiatives, on the one hand, and freedom of speech and academic freedom within the law, on the other." This appears to imply that proportionality can be used to restrict the Secure Duty. While it might need to be taken into account when constructing anti-harassment and EDI policies for the reasons given above, its separate role from compliance with the clear requirements of the Secure Duty should also be mentioned here.
- The multiple uses of "proportionality" and "disproportionately" and "proportionate" on page 21 need careful consideration. "Compliance", "non-compliantly" and "compliantly" are probably better and more accurate words to use here. The same replies in respect of the bottom of pages 22 and 24.
- The use of "proportionate" in the context of the Equality Act in the middle of page 26 seems less problematic but, in order to avoid misunderstanding, it should be made clear that what is said is not intended to apply to compliance with the Secure Duty itself (as per Step 2 of the analysis required in the OfS Guidance).

Appendix 3 – Free speech related governance: free speech officer

In the light of the recent changes to relevant law and recent Sussex fine for governance failures, HEPs need to review their governance arrangements urgently. Compliance with the Secure Duty also require this. The Dandridge Review recommended the creation of systems and structures to protect free speech.

The AHE guidance makes little mention of these issues, a significant omission.

Various actions are explained in detail in the Principal Statement. They include the following.

- Ensuring that an HEP has taken all actions required to comply with its conditions of registration. This will involve ensuring that its governing documents and governance structures and operations in respect of all matters that could affect free speech (positively or negatively), are consistent with its conditions of registration. This involves having management and governance arrangements which are adequate to deliver in practice academic freedom, and to ensure that the governing body of the HEP takes reasonably practicable steps to secure freedom of speech within the law. Failings in this regard were the cause of the large penalty described above for the University of Sussex.
- Taking requirements relating to free speech, and associated needs and risks, seriously at senior levels.
- Ensuring that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact.[48]
- Ensuring they have checks and balances to ensure that their policies and processes do not adversely affect free speech or academic freedom;[49]
- Ensuring an effective accountability structure: all staff with responsibilities relating to areas that could affect compliance with free speech duties should have clear responsibilities for promoting and securing free speech within those areas and understand those responsibilities.
- Ensuring that risk officers and functions are aware of these issues and the risks they create, and that significant free speech risks are on its risk register and treated with an appropriate level of seriousness.
- Having appropriate and effective reporting and complaints systems in respect of free speech issues and complaints. This is discussed in detail below.
- Having appropriate systems and structures in place to ensure that free speech and academic freedom are appropriately promoted and protected, and their protections are appropriately enforced.

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[48] This is stated in the OfS guidance, paragraph 192.

[49] See the OfS December 2022 Publication. The OfS has explicitly stated that it will consider these third and fourth points when assessing compliance with regulatory conditions.

- Appointing a free speech officer (see below).
- Ensuring that staff and students have adequate induction and training about protection of free speech and academic freedom.[50]

Need for a free speech officer

A reasonably practicable step which will be likely to make a material difference to an HEP's ability to secure freedom of speech for its staff and students is the appointment of a dedicated free speech officer. Such a person is, therefore, almost certainly required under the Secure Duty and would be an effective step towards satisfying both the "secure duty under HERA.

More broadly, how could the systems and structures to protect free speech recommended by the Dandridge Review succeed in their aim to protect free speech without anyone to lead them – and how can an HEP minimise its risks of non-compliance, if it does not have a dedicated champion to advise senior leadership on compliance, serve as internal contact for freedom of speech concerns, and lead on the university's statutorily defined duty to promote free speech?

We ask: would the recent disasters at the Open University and the University of Sussex have occurred, if the universities had had appropriately resourced and empowered free speech officers?

To support this initiative at the local level, we also recommend appointing academic freedom leads within each Faculty or School.

To ensure impartiality, those appointed must be demonstrably independent of roles that could present a conflict of interest—particularly senior management or formal EDI leadership responsibilities. This is why the Dandridge Review found that it was necessary for the Open University "to separate out its approach to issues of belief from its approach to other aspects of identity".[51] Such a person should also possess a strong working knowledge of, and principled commitment to the legal and academic foundations of free speech and academic freedom.

This proposal is consistent with HERA, and indeed is almost certainly required to ensure compliance in practice with it. Establishing a free speech officer (or officers) would send a strong signal of institutional commitment to the 'promote duty' and help foster a culture that actively supports academic freedom and freedom of speech.

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50 See the OfS Guidance (paragraph 211).

51 See Dandridge Review, paragraph 4.17.

Appendix 4 – AHE's Race Equality Charter

The AHE Guidance states in an example on page 20:

> "an institution's executive team and Board have signed off on a voluntary commitment made under Advance HE's Race Equality Charter, to be an 'anti-racist' institution. Taking organisational steps towards addressing racism is likely to be appropriate when it supports both institutional missions and compliance with the Equality Act 2010 (including the PSED). The Board would need to be assured and leaders take steps to ensure that such a commitment is operationalised in a way that doesn't lead to disproportionate policies, initiatives, or expectations that would restrict lawful speech and/or academic freedoms."

In order to achieve a Race Equality Charter award, HEPs must (in addition to other requirements) commit to "five fundamental guiding principles", which include:

> "Racism is an everyday facet of UK society and racial inequalities may manifest themselves in everyday situations, processes, and behaviours. Racial disparities are a critical issue in outcomes for staff and students, recognising that racial inequalities are not necessarily overt, isolated incidents."

While opposition towards racism is near universal, the view that "[r]acism is an everyday facet of UK society" is highly contentious. By committing to the "five fundamental guiding principles", an HEP adopts a specific official view on a highly contentious political matter.

Opposition to aspects of critical race theory, including to the idea of "structural racism", has been found to be a protected belief under the Equality Act.[52] Opposition to the view that racism is an everyday facet of UK society is likely to qualify as a protected belief. By adopting an official view on this matter, an HEP increases its risk of liability under Section 109(4) of the Equality Act, for harassment and discrimination committed by its employees against individuals with such a protected belief. The *Fahmy* case is instructive here.[53] In it, an institution was found liable for the harassment committed by its employees against Ms Fahmy, as a result of it having omitted the protected characteristic of "belief" from its anti-harassment policy, and thus not having taken reasonable steps (so as to qualify for the defence under Section 109(4)) to prevent its employees from harassing a colleague for her gender critical viewpoints. Explicitly endorsing one side of a highly contested and at times vicious debate, as the Race Equality Charter requires, could similarly both encourage employees to harass individuals who dissent, and in that event contribute to an HEP failing to qualify for the Section 109(4) defence, resulting in legal liability.

An HEP should therefore exercise significant caution, and take independent professional legal advice, before signing up to, or implementing the terms of the Race Equality Charter. It should also obtain assurances from Advance HE (the author of and issuer of awards under the charter) that signing up and implementing the terms of the charter will not cause it to breach

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[52] *Corby v. ACAS, September 2023* [ET No: 1805305/2022]. For details see the BFSP Equality Act Statement.

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

its free speech legal and regulatory obligations. See, also, section 9 above in relation to relationships with external organisations more generally.

More generally, requiring employees to commit to or affirm principles such as the view that "[r]acism is an everyday facet of UK society", or that the UK or a university or sector is "systematically racist", whether this is done through training, the selection criteria in job interviews, university policies or other means, is highly likely to be non-compliant with HERA and other relevant requirements. AHE needs to warn HEPs very clearly of their risks in this regard.