Free speech protection at English universities:

The law and requirements in practice

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IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the requirements, guidance and knowledge develop. THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end. ***SEE ALSO the important notice at page 64.***

1. Introduction

Best Free Speech Practice ("**BFSP"**) is a non-partisan campaign to clarify and publicly share what the legal requirements actually are for protecting free speech and academic freedom at UK universities and other Higher Educational Providers ("**HEPs**"), and what their implications are in practice. These requirements are generally much more demanding than institutions appear to appreciate.

The legal obligations of English HEPs in relation to freedom of speech are extensive. Amendments made, with effect from August 2025, by the **Higher Education (Freedom of Speech) Act 2023** ("**HEFSA**") to the **Higher Education and Research Act 2017** ("**HERA**")[1] both strengthen existing duties and add new obligations. The requirements in practice under HERA are reflected in parts of the OfS Guidance (as defined below). As confirmed in recent case law, viewpoints on many areas of current controversy are protected as religious or philosophical beliefs ("**Protected Viewpoints**") under the **Equality Act 2010** (the "**Equality Act**"). Freedom of speech and academic freedom are also protected under the **European Convention on Human Rights** (the "**Convention**") as it has effect pursuant to the **Human Rights Act 1998** (the "**HRA"**), and the public interest governance principles with which HEPs are required to comply as ongoing conditions of their registration as HEPs. In this statement, the requirements under HERA, the Equality Act, the HRA and the registration conditions are together referred to as the "**Relevant FS Requirements**".

This document contains a brief statement of the Relevant FS Requirements and other applicable duties, together with an explanation of what is required to be done in practice to comply with them, and some additional recommended best practice.

Under the recent amendments to HERA, similar legal duties and remedies to those applicable to HEPs now apply to colleges, halls, and other constituent institutions of HEPs (**"Constituent Institutions**").

The new guidance ***Regulatory advice 24: Guidance related to freedom of speech*** of June 2025 ("**OfS Guidance**") issued by the Office for Students ("**OfS**") came into force on 1st August

[1] Pursuant to Sections 1 and 2 of HEFSA. Full details are available at: https://www.legislation.gov.uk/uksi/2025/528/regulation/2/made. The main provisions of HEFSA were due to come into effect on 1st August 2024, but this was suspended by the Secretary of State for Education in July of that year. An amended version of relevant sections of HEFSA (minus a statutory tort, provisions relating to students' unions and other provisions) was brought into effect on 1 August 2025.

2025. This reflects both the requirements under HERA and what appear to be the OfS's own expectations for HEP actions for compliance.

2. Relevant law and other requirements

A. Requirements in HERA and codes/rules relating to free speech

Primary obligation to secure free speech

The governing body[2] of an English HEP must 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[3] (within the law) for the staff, members and students ("**Participants**") of, and visiting speakers at, the HEP.[4] This is often referred to as the "**Secure Duty**".

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[2] All the obligations under HERA strictly speaking fall on the governing body (defined in HERA, Section 85). For convenience, however, we refer to them in this Statement as obligations of the HEP, which in practice they are.

[3] References in the main sections of HERA to "freedom of speech" are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention) by means of speech, writing or images (including in electronic form) (HERA Section A1(13)). See Section C below.

[4] HERA **Sub-sections A1(1)-(2)**. The duty extends to the recruitment of staff, members and students and to those who will in future be invited to visit and speak, rather than just those who have in fact already been invited. See the OfS Guidance, page 65.

"Members", "staff", "student" and "visiting speakers" are defined at pages 63-65 of the OfS Guidance. It defines "staff" and "student" as effectively existing rather than prospective staff members or students (although it includes students with a binding offer). "Visiting speaker" is stated as including a person who "was invited to speak at [an HEP], or who would have been invited had there not been a restriction on this *or* does not include a person who wanted or requested an invitation to speak but was not invited. It may include a person whose invitation has not been approved through an internal approvals process". (The italicised "or" above does not appear to make sense, and we assume should have been "but".) This is broadly consistent with the Court of Appeal case of *R. (on the application of Butt) v Secretary of State for the Home Department [2019] EWCA Civ 256 [2019] 1 W.L.R. 3873* at [171]–[172].

See, however, in relation to staff and students, the *Butt case*, which states (at paragraph [172]): "The point is reinforced by the broad categories of persons whose freedom of speech is protected by the legislation. If the duty only extended to those already invited to speak, then could the same limitation apply to members and students? Could freedom of speech and academic freedom be said to be preserved by granting freedom of speech to existing members and students, while restricting recruitment of members and students on the ground of their political opinions? We think not." While these are *obiter dicta*, so not binding precedent, they are very persuasive and a strong indication of how the Courts would decide an issue regarding what counts as "staff" and "students" in the future. HEPs will be well advised to act accordingly, especially as Part 6 of the Equality Act applies to the admission of new prospective students (Section 91) so acting otherwise in respect of HERA would be inconsistent. The academic freedom provisions discussed below in any event expressly extend the duty to the recruitment of academic staff.

This is a demanding requirement[5] and requires active, positive steps to be taken. It is stated in objective terms, giving little discretion to an HEP: if a step is reasonable (construed objectively rather than subjectively), it must be taken. The OfS states that "*If […] a step is reasonably practicable for [an HEP] to take, [an HEP] must take it*" and "*the starting point is that speech is permitted unless restricted by law*".[6] The Secure Duty results in various requirements in practice, which are discussed in detail in Part 3. Free speech obligations override other considerations, subject only to the following points.

- The relevant speech must be "within the law", i.e. not restricted by laws *"made by, or authorised by, the state, or made by the courts e.g. legislation or legal precedent/court decisions"*[7]. This includes criminal[8] and civil laws. Among the latter are the anti-harassment provisions of the Equality Act (see below) and laws relating to defamation, confidentiality and privacy. Extreme speech (such as Holocaust Denial) that is not protected by virtue of Article 17 of the Convention is also outside the scope of protected speech under HERA, while not strictly unlawful.[9] Unless the relevant expression of views is so extreme as to be unlawful or not protected, it is protected under HERA. The OfS has stated that it "*stands for the widest possible definition of free speech within the law*", and "*the starting point is that speech is permitted unless it is restricted by law*".[10]
- HEPs are only required to take the steps that are reasonably practicable for them to take. The OfS interprets this to include refraining from taking any step which would have the

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[5] And wide: it "seeks the securing of freedom of speech in all respects" (*R (ex p. Riniker) v UCL* [1995] ELR 213 at 216). However, HERA does not require [HEPs] to take steps to secure freedom of speech in respect of their activities outside England (OfS Guidance, paragraph 13).

[6] OfS Guidance, paragraphs 56 and 29. See also paragraph 134.

[7] See OfS Guidance, paragraph 27. There is some legal debate about what counts as "within the law" for this purpose. The OfS has provided welcome clarity as to its view as to the interpretation of these words, and HEPs need to follow this regulatory position in practice.

[8] Criminal laws restricting speech include the Protection from Harassment Act 1997, the Malicious Communications Act 1998, the Communications Act 2003, the Terrorism Acts 2000 (which includes in particular unlawful support for a proscribed organisation, which has become very relevant in respect of current controversies re Israel and Gaza) and 2006, and the Public Order Acts 1898 and 2023. See discussion of these at Part 2D below.

[9] This is reflected by paragraph 204 of the OfS Guidance, which says that the OfS will not protect Holocaust denial. Article 17 applies to a very limited range of speech. The OfS has subsequently confirmed (in a letter of 5 September 2025 to (*inter alia)* Universities UK) that there is no duty to secure such speech. See more on this at Section C below.

[10] Insight publication *Freedom to question, challenge and debate*, December 2022 (the "**OfS December 2022 Publication**"). https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf.)

effect of restricting freedom of speech, where doing this is reasonably practicable.[11] Various points are relevant.

- Contrary obligations/restrictions and compliant HEP policies: If an HEP is obliged by legal or regulatory obligations to do (or not do) something, such as to restrict the behaviour of its Participants[12], then it is not reasonably practicable for it to take a step (pursuant to the Secure Duty) which would be inconsistent with such obligation. Taking a step is not reasonably practicable if doing so is unlawful, and this includes unlawfully acting incompatibly with a Convention right/duty[13]. On the other hand, the Secure Duty will generally override duties to "have regard to" (i.e. duties of due consideration, rather than to achieve any particular outcome) such as under the Public Sector Equality Duty ("**PSED**") under the Equality Act (in relation to which see further below). The "Prevent" duty should be read similarly[14].

  Certain speech is unlawful. This includes speech which amounts to harassment contrary to the Equality Act (under which employee actions can give rise to liability on employers) and the Protection from Harassment Act 1997.

  An HEP needs to have carefully drafted anti-harassment policies to prevent such unlawful speech. An HEP may also be able to restrict certain types of otherwise lawful bullying speech, again provided that its anti-bullying policies are carefully drafted. Such policies are recognised by the OfS as being able to restrict free speech compliantly with the Secure Duty.[15] The OfS Guidance states that HEPs will "will wish to have

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[11] See: OfS Guidance, paragraphs 57 and 58. In the latter, the OfS says "For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all". This means that a 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 Convention.

[12] These effective obligations include needs to take certain actions in order to secure compliance, for instance steps to prevent harassment in order to qualify for the defence in Section 109(4) of the Equality Act as discussed below. Paragraph 64 of the OfS Guidance does not refer to these effective obligations, and is slightly over-restrictive in this respect.

[13] The OfS has stated this (in a letter of 5 September 2025 to (*inter alia*) Universities UK), and went on to say 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 that speech. The interaction of alleged contrary Convention rights/duties with the Secure Duty will be a complex and contested area with severe accompanying risks for HEPs of getting their compliance wrong. See some discussion of this in the Appendix to this statement.

[14] Under the Counter-Terrorism and Security Act 2015. This is a duty to have "due regard". See paragraphs 96 and 97 and Example 8 in the OfS Guidance.

[15] Paragraph 99 of the OfS Guidance. (It is worth noting that such policies will be an HEP's own requirements that reflect its actual and potential legal and/or regulatory obligations, including through being necessary to secure compliance with those obligations.) The OfS Guidance is slightly inconsistent in that it earlier refers (in paragraph 64) to HEPs being "required by law" to restrict free speech, which

robust anti-bullying and anti-harassment policies. The [Secure Duty] does not prevent them from doing so. Rather, institutions must ensure that these policies are carefully worded and implemented in a way that respects and upholds their free speech obligations. In doing so, particular regard and significant weight must be given to the importance of free speech."

In order to restrict free speech compliantly with the Secure Duty, such policies must be written with extreme care so that their requirements and effect are compliant with the Relevant FS Requirements, in particular by interfering with lawful free speech to the minimum extent necessary for the purpose for which they are in place. They must also be accessible and clear to those bound by them. It will in most cases be a "reasonably practicable step" to ensure that this is done, and thus required by the Secure Duty. Any restrictions in such policies on lawful speech must normally focus on the time, place, and the manner of speech, and not on the views expressed.[16] The restrictions will also be subject to the requirements in the condition of registration E6 relating to harassment. The OfS Guidance has some relevant detailed contents requirements.[17] The legitimate scope of such restricting requirements is discussed in

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appears to be more restrictive. Paragraph 99 provides necessary clarification as regards the scope of what can restrict free speech compliantly with the Secure Duty. The OfS reaffirmed this in a letter of November 2025 about harassment of Jewish staff and students: https://www.officeforstudents.org.uk/media/or4nf0jn/harassment-and-intimidation-jewish-students-staff.pdf. The OfS Guidance also acknowledges that "conditions of registration are also likely to be relevant" (in paragraph 105) and that "requirements of statutory guidance" are also relevant (in paragraph 65), which must include *inter alia* the OfS Guidance.

The position regarding the legal requirements to have anti-bullying policies is less clear than regarding anti-harassment ones (while such policies may be required under Article 8 of the Convention, whether this is the case and to what extent are disputed). However, given what is said in paragraph 99 of the OfS Guidance (and see more below), the OfS clearly views such requirements as legitimate (indeed, expected) – subject to appropriate/compliant drafting. HEPs can, in our view, proceed on the basis that correctly drafted anti-bullying policies can be compliant with the Secure Duty in the same way as anti-harassment policies can be. Note also the OfS' ***Consultation on proposed regulatory advice and other matters related to freedom of speech Analysis of responses and decisions*** of June 2025, in which it acknowledges that restrictions on lawful bullying and harassment are permissible (subject to proportionality, etc., as discussed elsewhere). In paragraph 67, which recognises the potential obligation under Article 8, it states: "In any case, it may not be reasonably practicable to permit bullying conduct. This is because it may undermine the essential functions of universities and colleges and/or conflict with other legal obligations and regulatory requirements on providers." In paragraph 97, it states: "We consider that it would not be likely to be reasonably practicable for institutions to secure harassing or bullying conduct […] we have decided to clarify this by including new paragraph 99 under 'Relevant factors: legal and regulatory obligations'".

[16] OfS Guidance, paragraphs 99, 109 and 110.

[17] The OfS Guidance (paragraph 169d) states that it would be good practice for 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) to include a statement that in cases of uncertainty, the

further detail in the Appendix to this Statement. (It will also be vital that such restricting policies are interpreted and applied compliantly in applicable circumstances, which will require great care in complex situations.)

Only the need to comply with and give effect to legal and regulatory obligations on them, or a restriction being imposed by a policy which falls within the limited range of compliant policies of HEPs discussed above, can justify HEPs in restricting free speech in this way. Policies which go beyond this will not comply with the Secure Duty, so will risk causing severe compliance, financial and reputational problems. Wider conflicting views and priorities of an individual HEP are likely to carry little relevant weight as regards the Secure Duty.

Essential functions: Whether a step to secure speech is reasonably practicable will also depend on whether the speech interferes with, the "essential functions" of an HEP. The OfS Guidance defines the essential functions of an HEP to be "teaching, learning, research and the administrative functions and resources that those three things require".[18] If the speech interferes with or prevents an essential function of the HEP, for instance, a protest outside a lecture hall which is so loud and continues for so long that it prevents students from hearing a lecturer, then it likely will not be reasonably practicable to allow the speech to go ahead without restrictions. Indeed, it would likely be a reasonably practicable step to require such a protest to take place elsewhere, so that the lecture could go ahead.[19] HEPs are required to reasonably practicable steps can be taken to secure the lawful exercise of speech via protests, while restricting speech that prevents other speech, for instance speech employing the 'heckler's veto' [20]. This is a complex area. See also the discussion of protests at Part 3, Section F below and BFSP's detailed statement ***Protest at English Universities: Free speech requirements and risks*** (the "**Protests Statement**").

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definitive and up-to-date statement of the institution's approach to freedom of speech is set out in its free speech code.

[18] OfS Guidance, paragraph 106. If speech constitutes the performance of those functions, for instance, a lecture, it must be very likely to be reasonably practicable to take action to allow the speech to take place. The fact that a teacher holds or expresses views which offend students, including views relating to protected characteristics which students have, need not have any negative effect on the essential function of teaching (OfS Guidance, paragraph 113, see also paragraph 114).

In paragraph 108, it states that HEPs "*have an interest in continuing ordinary functions relating to student life beyond these [essential] functions. These might include, for instance, celebrations following graduation ceremonies or student social events. However, any regulation of speech to protect these additional functions should be narrowly tailored to that function and should not restrict the expression of any particular viewpoint.*"

[19] For a detailed discussion, see OfS Guidance, paragraphs 106 to 114, and Examples 11 to 15. See also the discussion of protests at Part 3, Section F below.

[20] OfS Guidance, paragraph 111.

- Physical safety: Whether a step to secure speech is reasonably practicable will also depend on whether there is credible evidence that taking it or not taking it could affect the physical safety of individuals within an HEP's premises, or premises under its control. Physical safety is more likely to be relevant when there is a specific danger that the relevant speech directly creates. Unspecific, distant or indirect potential effects of the speech are unlikely to be relevant. Further, "threats to physical safety in external (possibly distant) locations, by persons outside [the HEP's] control, are not relevant to whether a step is reasonably practicable".[21]

- Irrelevant items: The viewpoint that speech expresses (and whether, for instance, it aligns with an HEP's aims or values) and the reputational impact of the speech on the provider are likely to be irrelevant in determining reasonable practicability.[22]

- Objective assessment of factors: relevance of cost: When deciding whether any particular step is reasonable practicable, an HEP must engage in an evidence-based assessment of options and costs, the risks and benefits, the relative rights and then perform a balancing exercise.[23] These factors must be assessed objectively and in the context of the specific statutory requirement to *"have particular regard to the importance of freedom of speech"*, which is clearly intended to be given particular weight in interpreting the obligations under HERA. The relevant costs (in the context of the HEP and its resources) would thus need to be very disproportionate to the likely free speech benefit for the step not to be reasonably practicable on grounds of cost. HEPs will be complying with an objective standard they may be held to: they do not have much discretion here. The OfS Guidance states: "*the effect of the 'secure' duty is that providers and constituent institutions may be required to incur significant costs in defence of the freedom of their own staff and students to conduct research*."[24] This applies beyond research to freedom of speech generally.

  HEPs need to take into account and deal with security concerns on their campuses. See the discussion at Part 3 below about when it is necessary for HEPs to pay for security costs of a meeting or event.

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21 OfS Guidance, paragraphs 61, and 120 – 122. Examples 16, 17, 18 and 19.

22 OfS Guidance, paragraph 123. This states that the irrelevant factors regarding a viewpoint include: whether it aligns with the the HEP's aims or values; whether it is controversial or offensive; and whether external or internal groups (for example alumni, donors, lobbyists, governments, staff or students) approve of the viewpoint that the speech expresses.

23 See *University of Birmingham v. Persons Unknown* [2024] EWHC 1529 (KB), at paragraph 49. It is unclear whether this case, which relates to predecessor legislation, would now be decided in exactly the same way given the detailed OfS Guidance, albeit that this is not legally binding.

24 OfS Guidance, paragraph 197.

- Regulating behaviour of Participants and its limits (ability to control): The Secure Duty is one "*to ensure, so far as is reasonably practicable, that those whom [an HEP] may control, that is to say its [Participants], do not prevent the exercise of freedom of speech within the law [….] in places under its control*".[25] This makes clear that:
    - there is a positive duty to control the behaviour of such people in order to protect free speech (this must include by having appropriate rules, and enforcing them); and
    - it is recognised that there are limitations on HEPs' ability to control the behaviour of people and that HEPs are less likely to be in a position to manage behaviour at off-campus events. The extent of HEPs' obligations in respect of colleges and other Constituent Institutions and students' unions is discussed in Part 3 below.[26]
- Equality Act cases relevant: Cases relating to the protection of Protected Viewpoints under the Equality Act (see below) are likely to be relevant in identifying the sorts of actions that the courts/tribunals will consider to be reasonably practicable. See the detailed discussion in the Appendix to this Statement.
- Interpreting and reflecting contrary requirements correctly: There are times when there can be a perceived overlap or conflict between requirements to protect free speech under HERA and other requirements or HEP priorities which are asserted to justify actions such as having particular policies, preventing or not publicising events or starting complaints or disciplinary proceedings. As explained above, the range of obligations which can restrict speech compliantly with the Secure Duty is very narrow, and wider concerns and agendas have no weight against the Secure Duty. Interpreting potentially contrary laws correctly will be vital for HEPs, as over- or mis-interpretation of obligations under supposedly contrary laws or other requirements creates major risks for them. We set out further information about these issues in the Appendix to this Statement.

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[25] *R. v University of Liverpool Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667 (per Watkins LJ at p132 D-H). Stated in respect of Section 43 of the Education No.2 Act (1986), which has been replaced and strengthened in HERA.

[26] Given that HEP have some ability to control the behaviour of their agents and contractors, it appears that similar requirements and considerations should apply in respect of them.

Actions which are implementing, or taken pursuant to, the requirements under HERA, for instance implementing and enforcing rules prohibiting Participants from taking hostile actions against each other in respect of their viewpoints, may themselves be claimed to infringe another person's rights to free speech and other protections under both HERA and the HRA. This will require (*inter alia*) that implementation or action itself to be "proportionate" in accordance with the requirements of the HRA. This "conflict of rights" is a potentially difficult area. It is discussed in the Appendix to this Statement and addressed in detail in BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance obligations***.

The necessary analytical process for resolving complex free speech issues and "competing claims", the OfS's 3 steps set out in the OfS Guidance for analysing and addressing free speech issues, the scope of "contrary" laws, the role of "proportionality", and the drafting of compliant anti-harassment and anti-bullying policies are discussed in the Appendix to this Statement.

Academic freedom

The Secure Duty extends to securing that academic staff are free (within the law) to question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without facing the risk of losing their jobs or privileges at the HEP or the likelihood of their securing promotion or different jobs at the HEP being reduced. Applicants (whether internal or external, i.e. including people who are not Participants at the relevant time) for academic positions must not be adversely affected because they have previously exercised their rights to academic freedom, i.e. questioned received wisdom *etc.* as described above.[27]

Duty to promote free speech

HEPs must now positively promote the importance of freedom of speech (within the law) and academic freedom in the provision of higher education.[28] This requires active, serious steps to be taken. Lip service, which has sometimes appeared to characterise HEPs' approach to their free speech obligations, will no longer be sufficient.

Meetings and security costs

HEPs must use all reasonably practicable steps to secure that the use of their premises is not denied to any individual or body on the grounds of their ideas, beliefs or views; and the terms on which those premises are provided must not be based on such grounds. HEPs must also now ensure that, save in exceptional circumstances, they must secure that use of their premises is not on terms that require the organiser to bear some or all of the costs of security[29]. This topic is discussed in Part 3 below.

Codes of practice

HEPs must maintain a *"code of practice"* ("**FS Code**") which sets out: the HEP's values relating to freedom of speech; the procedures to be followed by both staff and students of and any students' union at the HEP in connection with the organisation of meetings and other activities at the HEP's premises and the conduct required of such persons in connection with

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[27] **Sub-sections A1(5)-(9)**.

[28] **Section A3**.

[29] **Sub-sections A1(3) and (10)**. The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects, with activists threatening physical force and noisy disruption, being cancelled. See the discussion of the requirements in practice relating to meetings at Part 3 below, and also BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for detailed information about the requirements relating to meetings.

those meetings and activities; and the criteria applied by the HEP in deciding whether to allow the use of premises and on what terms. Each HEP must bring the FS Code to the attention of its students at least once a year and must itself take all reasonably practicable steps to secure compliance with their FS Code, including where appropriate the initiation of disciplinary measures.[30]

Complaints

HERA will require the OfS to create and run a complaints scheme, in respect of failures of free speech protection, although this has yet to be brought into effect. The complaints scheme will be an important change, and is discussed under "*Complaints, accountability and liability*" below.

OfS requirements and OfS Guidance, key tools of interpretation

The OfS, as regulator of English HEPs, has issued various requirements (including conditions of registration) and statements implementing and enlarging on the compliance regime for HEPs. In June 2025, it issued the OfS Guidance[31] about the requirements in practice consequent on the obligations under HERA and the OfS' expectations with respect to compliance with HERA. BFSP considers that the OfS Guidance generally correctly reflects the obligations under HERA, although there are some details which could be reflected more clearly.

The OfS's regulatory role and its conditions of registration are discussed below. The implications of the OfS Guidance are discussed extensively in Part 3 below.

B. Equality Act, PSED and the protection of Protected Viewpoints

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 (defined as "**Protected Viewpoints**" above). (People are also protected from victimisation, which has less regular relevance.) The Equality Act specifies various contexts in which unlawful actions can occur, including employment[32] and further and higher education. See BFSP's detailed Statement ***Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others*** (the "**BFSP Equality Act Statement**") for a detailed discussion of all this.

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[30] **Section A2**. Further requirements, and detailed consequential requirements under the OfS Guidance, are discussed in Part 3 below. The government has committed, in its policy paper *The Future of the Higher Education (Freedom of Speech) Act 2023*, to introducing legislation which will require HEPs to take all reasonably practicable steps to ensure that their Students' Unions comply with their HEP's FS Code on premises occupied by the Students' Union but not owned by their HEP.

[31] I.e. "*Regulatory advice 24: Guidance related to freedom of speech*".

[32] Which is defined in **Section 83(2)(a)** to include employment under a contract of employment, and a contract personally to do work.

Meaning of "Discrimination" and "harassment"

"Discrimination" occurs where a person (A) treats another person less favourably than A treats or would treat others because of a protected characteristic, including holding a Protected Viewpoint.[33] The Equality Act also applies to "indirect" discrimination.[34]

"Harassment" means (in summary) unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment. The question of whether there has been such an "effect" has an objective element.[35] This definition has very wide implications, with many consequent detailed requirements for protecting the free speech rights of those with Protected Viewpoints.

As the OfS Guidance makes clear, context is always relevant in determining whether speech is unlawful harassment. In particular, views expressed as part of academic teaching are unlikely to constitute harassment.[36]

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[33] See **Section 13**.

[34] Under **Section 19**, indirect discrimination may occur when there is a policy that applies in the same way for everybody (i.e., apparently neutrally) but puts a group of people who share a protected characteristic at a particular disadvantage (e.g. it has a worse effect on them) when compared with people who do not share that characteristic, and an individual is disadvantaged as part of this group. In such circumstances, unless the organisation concerned can prove that its practice, policy or rule is (objectively) a proportionate means of achieving a legitimate aim, it will likely be in breach of its obligations under the Equality Act. This can have real effects in practice: for instance, in respect of policies which equate "gender-critical" views with transphobia, training which insists that all white people should assume they are inherently racist and recruitment or promotion processes which require applicants to demonstrate support for particular viewpoints or agendas from which they dissent, where their dissenting viewpoints are "protected" under the Equality Act.

[35] See **Section 26**. In deciding whether conduct has this effect, the perception of the person claiming harassment, the other circumstances of the case and whether it is "reasonable" for it to have had such effect, must all be taken into account. This question thus has an objective element, and subjective perceptions of offence (while relevant) are not on their own sufficient for conduct to constitute harassment. See the BFSP Equality Act Statement for a detailed discussion of this. The OfS Guidance, paragraph 85, states that "the Equality Act does **not** require providers or constituent institutions to protect students or others from ideas that they might find offensive." The wider regulatory framework protecting free speech and academic freedom means that there is low likelihood that the objective element will be made out in the context of courses, materials, teaching and discussions in an academic context.

[36] OfS Guidance, paragraphs 83 to 85. In particular: "In connection with harassment, the Equality and Human Rights Commission (EHRC) 2019 statement on harassment in academic settings is relevant: '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". The guidance also notes that "the objective tests related to harassment under the Equality Act 2010 and the Protection from Harassment Act 1997 […] are of particular importance in a higher

Defining Protected Viewpoints

The landmark *Forstater* case[37] established that gender-critical views are Protected Viewpoints. Views which challenged aspects of critical race theory ("**CRT**") were subsequently ruled to be protected, as were anti-Zionist ones, and views critical of Islam.[38] The law in this area is still evolving. If they wish to avoid finding themselves in breach of the law, HEPs need to work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as Protected Viewpoints in appropriate circumstances and will, in time, be confirmed as such. Such obviously contested areas would include, for example, other aspects of CRT, the co-called *"decolonisation"* of the school and university curriculum, views in relation to religions and their effects, and views in relation Israel and Palestine.[39]

There can, however, be "inappropriate (sometimes expressed as "objectionable") manifestations" of Protected Viewpoints which do not qualify for protection.[40] This is a complex area (for instance, distinctions need to be drawn between the forums of the manifestation, e.g. personal social media or official channels of communication) but generally appears to result in a reasonable balance of outcomes between competing claims or considerations under the Equality Act.

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

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

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education context where a provider may face pressure from students or staff, or pressure from external groups, to curtail speech that is lawful but which is perceived as offensive towards a particular person or group of people."

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

[38] *Corby v ACAS*, September 2023 (Case No: 1805305/2022 and *Miller v University of Bristol*, February 2024 (Case No,1400780/2022). It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that Dr. Miller made "manifestations" which were antisemitic and thus not protected. *Lee v IFoA* (judgement not yet publicly available) re views on Islam.

[39] For further information and guidance, see the BFSP Equality Act Statement.

[40] See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643

Other than pursuant to their PSED (as discussed below), HEPs have very limited duties under the Equality Act in respect of the behaviour of:

- staff *acting in capacities which do not give rise to such responsibilities on the HEP's part*. So, for instance, opinions expressed by the HEP's staff via their private social media are not normally the HEP's problem under the Equality Act; and
- their students or visiting speakers (those who oppose a visiting speaker are often cite the risk of harassment as a reason for cancelling the meeting: there is little or no legal ground for this).

Public Sector Equality Duty

The PSED applies to public authorities (including most, if not all, HEPs).[41] It requires HEPs, in the exercise of their functions, "to have due regard to" the need to:

- eliminate unlawful discrimination and harassment (and other unlawful acts) under the Equality Act, including against people who hold or express a Protected Viewpoint;
- advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a Protected Viewpoint) and persons who do not share it; and
- foster good relations between persons who share a relevant protected characteristic (e.g. a Protected Viewpoint) and persons who do not share it.

The PSED is very specifically worded. It does not require or justify consideration of factors wider than the specific needs stated in the PSED when HEPs devise their programmes and agendas, EDI-related ones in particular. It is a duty to give "due regard to" (i.e. to consider or take account of) the need to achieve specified aims, and give those aims appropriate weight in context. It is not, however, a duty to take any particular actions to achieve those aims and is not in itself a mandate to override other considerations. It has been described as a "process duty not an outcome duty".[42] Positive duties to take action (such as those imposed under HERA and the need to avoid discriminating against or harassing people with protected viewpoints under the Equality Act) are, therefore, likely to override the PSED.[43] The discussion (both above and below) about the risk for HEPs in over-interpreting the meaning of "harassment" is of particular relevance in this context.

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41 See **Section 149**. This extends to other organisations, when exercising public functions.

42 *R (Bridges) v Chief Constable of South Wales Police* 2020 EWCA Civ 1058.

43 In addition, the Secure Duty requires HEPs to have "particular regard" to the importance of freedom of speech, a higher level of regard than "due regard" under the PSED. Thus, to the extent that the process duty under the PSED is applicable to decisions regarding whether/what action is required under the Secure Duty, this process aspect of the Secure Duty will have greater importance and force than the process duty imposed by the "due regard" requirement under the PSED.

The PSED does not give rise to a "duty on HEPs to promote equality, diversity, and inclusion", as has been asserted. This is not least because the PSED is a duty "to have due regard" not a duty to take any particular action (such as "to promote"). Further, "EDI" is a wide and amorphous set of concepts and a social phenomenon, which is not mentioned in the Equality Act, and significant parts of which bear no relation to the actual duties in that Act. HEPs are subject to the duties in the Equality Act, as written.

For more information, see BFSP's statement ***Public Sector Equality Duty – Scope and interactions with free speech requirements*** (the "**PSED Statement**").

Recent cases highlight the requirements and risks; Dandridge Review; summary of effect of Equality Act

Recent cases have held employers – including the Open University– liable for discrimination against and harassment of employees in connection with their viewpoints, including liability for bringing inappropriate disciplinary proceedings against employees for their viewpoints and for their employees attacking their colleagues by means of online petitions and pile-ons. They provide vivid examples of how this area of the law can apply in practice and confirm the onerous requirements which apply for an employer to bring itself within the Section 109(4) Defence, which is demanding and not easily satisfied.[44] See the BFSP Equality Act Statement for further information.

The review by Dame Nicola Dandridge ("**Dandridge Review**"),[45] published in September 2024, investigated the causes of the profound legal failures (resulting in expensive liability under the Equality Act) by the Open University ("**OU**") through its failing to protect Professor Jo Phoenix from attack for her viewpoints. The Dandridge Review contains worthwhile statements about what HEPs need to do to avoid legal and regulatory failures, although it has deep weaknesses as to its terms of reference and there are significant omissions and unhelpful obscurity and vagueness. We note in Part 3 below where actions in practice were referred to by the Dandridge Review.

HEPs thus need to work to protect their employees and students in respect of a wide range of Protected Viewpoints held, not held or expressed by them, including by:

- avoiding discriminating against or harassing such people through their own actions, policies and requirements, for instance through their rules operating so as to

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

[45] See https://www.open.ac.uk/blogs/news/wp-content/uploads/2024/10/Indpendent-Review-N-Dandridge-09.09.24.pdf. See BFSP's detailed review of the Dandridge Review at https://bfsp.uk/universities-and-free-speech.

inappropriately suppress the voicing of Protected Viewpoints or their disciplinary processes being used to do so;

- taking all reasonable steps (pursuant to the Section 109(4) Defence) to prevent attacks and other actions by their employees and other representatives which would constitute discrimination or harassment attributable to them under Section 109; and
- complying with their PSED in respect of them.

Given that many people hold Protected Viewpoints about a wide range of currently controversial issues, this creates a major risk area for HEPs. This is likely to require greatly increased institutional neutrality in relation to many contested issues, for the reasons discussed in Part 3 below.

It is important that HEPs do not misinterpret the requirements under the Equality Act and, in particular, do not over-interpret the meaning of 'harassment' for these purposes or succumb to pressure to treat the expression of a lawful but unpopular viewpoint as itself unlawful harassment. The OfS Guidance states unequivocally: "the Equality Act does **not** require providers or [Constituent Institutions] to protect students or others from ideas that they might find offensive".[46] Missteps in this respect can lead to severe compliance failures. See discussion in the Appendix of condition of registration E6, which will have some relevance in this context. See also the BFSP Equality Act Statement for a detailed discussion of all the above.

C. Human Rights Act and compelled thought

The free thought and speech rights of academics and students are protected under the Convention[47], as enacted in the UK by the HRA.[48] These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful.[49] Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.[50]

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46 OfS Guidance, paragraph 85.

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

48 As most, if not all, HEPs are "public authorities" for the purposes of the the HRA /Convention.

49 See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 9. See, also: *Lee v. Ashers Baking* [2018] UKSC 49 at [56], although this states the important proviso that compelled speech is not allowed "unless justification is shown for doing so".

50 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)). Any sanction imposed on an

The right to free expression does not apply to the limited range of expression which is so extreme as to fall within Article 17[51] (the best-known example being Holocaust denial). Articles 9 and 10 do not operate to require HEPs to take actions which would themselves interfere with another Convention right/duty (where two Convention rights are in tension, a balancing act must be undertaken, with reference to (*inter alia*) issues of "proportionality" as discussed below). The right to free expression is subject to the qualification that the "exercise of these freedoms, since it carries with it duties and responsibilities,[52] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law[53] and are necessary in a democratic society" for various specified purposes, including for the protection of the rights of others[54]; this qualification is, though, itself subject to a requirement that such restrictions be accessible, clear and precise, and to a "proportionality" test.[55] The

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academic in relation to the exercise of academic freedom is likely to be a breach of Article 10, since, however minimal, such sanction is liable to impact relevant rights of free expression and have a "chilling effect in that regard" (*See: Kula v. Turkey*, App. No. 20233/09 (2018)). Mere censure of an academic for expressing views (even without any form of sanction) was recently found to be a breach of Article 10 (See: *Torres v Spain*, App no. 74729/17 (2022)). It follows that any attempt to justify restrictions on, or impose sanctions in respect of, otherwise lawful statements made in an academic setting is very likely to be unsuccessful.

[51] Article 17 prevents individuals from abusing Convention rights to justify, promote or perform acts which: are contrary to the spirit of the Convention; are incompatible with democracy or other fundamental values; or, contribute to the destruction of rights or freedom of others under the Convention. It is a very high bar to meet. It covers matters such as: the incitement of violence; glorification of terrorism; promotion of totalitarian ideologies; and Holocaust Denial.

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

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

[54] These specified purposes are: the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

[55] See **Article 10(2)** (there is a similar provision in **Article 9(2)**). The proportionality test is derived from related case law.

proportionality of a restriction on otherwise lawful speech will need to be assessed on a case-by-case basis, with reference to relevant jurisprudence. The Convention, and case law under it, set a high bar in the context of restricting free speech, and academic freedom in particular. The need for a proportionality assessment does not give HEPs discretion: it is a matter of complying with an objective legal requirement.[56] See the detailed discussion of proportionality in the Appendix to this Statement. Contrary laws and other requirements (and HEP policies to implement them) can thus operate to restrict Convention free speech rights, to a limited extent.

The Convention can be relevant to what actions HEPs must, or can legitimately, take to implement and give effect to the Secure Duty. This can be particularly relevant in cases of conflicts of free speech rights, for instance where Participant A personally attacks Participant B for their viewpoints. Participant A's right (pursuant to the Secure Duty) to make such attacks can be restricted by rules made pursuant to the Secure Duty (and e.g. the need to prevent harassment by employees under the Equality Act), to the extent (*inter alia*) that this complies with the Convention, which will include a proportionality test. Given that the purpose of such restrictions is to protect free speech overall, and that cases under the Equality Act have operated to treat attacks on people for their protected viewpoints as unlawful (i.e., not meriting protection under the HRA), rules of this sort, which are accessible, clear and precise, are likely to satisfy this proportionality test <u>if appropriately drafted</u>, although the devil will of course be in the detail of this.

It follows from the above that speech is highly likely to fall outside the protection of the Convention where it contravenes the Equality Act or Article 8, as correctly interpreted and applied, or HEP anti-harassment/bullying policies/rules which are strictly limited in their scope (and in particular are written so as to be "proportionate" under Article 10(2)). Such requirements must, however, also be <u>enforced</u> proportionately[57].

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[56] The OfS Guidance states, in paragraph 130, that: "to assess the proportionality of a measure to interfere in lawful speech, providers and constituent institutions must consider: 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."

The OfS Guidance further states (at page 9): "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".

See the further discussion of "proportionality" in the Appendix to this Statement and in BFSP's forthcoming statement on proportionality.

[57] See the OfS Guidance, Example 24, for an example of how the Courts have applied this requirement in practice.

While the relevant Convention rights are primarily worded as negative obligations, i.e. not to interfere with freedom of thought or expression unless that is justified, HEPs are also under positive obligations to "create a favourable environment for participation in public debates for all concerned, allowing them to express their opinions and ideas without fear, even if these opinions and ideas are contrary to those defended by the official authorities or by a large part of public opinion, or even if those opinions and ideas are irritating or offensive to the public".[58] The nature and extent of these positive obligations are, however, unclear and vary from Article to Article. They must include presenting the importance of free speech positively, making it clear that Participants are expected not to take actions which materially interfere with other Participants' free speech rights, training them appropriately and ensuring that its own policies and requirements are not such as restrict Participants' free speech rights (this is discussed in detail elsewhere). A reasonable interpretation of this obligation would include imposing appropriate rules on Participants restricting attacks on and other hostile actions against other Participants for their viewpoints, and appropriate enforcement of those rules, and we consider that HEPs would be unwise not to act on this basis. All of these required actions will themselves need to comply with the requirements of Articles 9(2) and 10(2) of the Convention, including by being 'proportionate' as discussed above.

D. Criminal matters: the Protection from Harassment Act 1997

Taking various types of action against another person is criminalised: where taken in connection with that person's viewpoints, they can become relevant to free speech issues.

Most relevantly, under the **Protection from Harassment Act 1997** (the **"PHA"**), a person must not pursue a course of conduct which amounts to, and which he knows or ought to know[59] amounts to, harassment of another person. Harassment in this context includes alarming a person or causing a person distress. The PHA may give rise to both civil and criminal liability. Intent does not have to be proved, although criminal harassment will be subject to a higher standard of proof.[60] The course of conduct must comprise at least two occasions, and the fewer the occasions and the wider they are spread, the less likely it is reasonable to find that a course of conduct amounts to harassment.[61]

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

[59] There is an objective element to this.

[60] PHA sections 1, 2, 3 and 7. Relevantly, in particular, to mob behaviour on social media, the PHA also provides that a person must not pursue a course of conduct which (a) involves harassment of two or more persons, and which he knows or ought to know involves harassment of those persons, and (b) by which he intends to persuade any person (whether or not one of those mentioned above) either (i) not to do something that he is entitled or required to do, or (ii) to do something that he is not under any obligation to do.

[61] OfS Guidance, paragraph 47.

Other potentially relevant offences include putting a person in fear of violence, malicious communications and improper use of public electronic networks[62]. The Public Order Act 2023 criminalises some forms of protest, including "locking on" (defined as a person attaching themselves to another person, land, or an object), as a means to causing serious disruption. The Terrorism Acts 2000 and 2006 prohibit, amongst other things, speech that amounts to support for a proscribed organisation. See Part 3F below for a discussion of protests.

There are many ways in which illegal activity by staff or students "on its watch" can harm an HEP: from reputational damage, to regulatory/compliance failures, to unlawfulness and liability on its own part. Illegal activity by a member of staff will cause an HEP acute problems, which will be even worse if the perpetrator is apparently acting within the scope of authority conferred by the HEP. If an HEP discovers that illegal activity has or may have occurred, it will need to act promptly and carefully. This will likely involve taking and following timely legal advice.

E. Requirements as to governance and consequent on charitable status

Conditions of registration

HEPs are required by their conditions of registration to:

- have governing documents that uphold the public interest governance principles that apply to them [63] (**condition E1**); "Governing documents" are defined widely for these purposes[64]; and

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[62] Other offences include: putting a person in fear of violence (under **Section 4(1)** of the PHA and Section 4 of the Public Order Act 1986) and offences under **Sections 4A** (threatening and abusive behaviour intended to cause harassment) **and 5** (threatening and abusive behaviour within hearing or sight of a person likely to be caused harassment) of the **Public Order Act 1986** (offences under that Act can be committed through one-off events); malicious communications (under **Section 1 of the Malicious Communications Act 1988**) and improper use of public electronic networks (**Section 127** of the **Communications Act 2003**); and actions contrary to the **Terrorism Act 2000** and **the Public Order Act 2023**. These are discussed or mentioned in the OfS Guidance, paragraphs 33-54.

[63] 'Uphold the public interest governance principles' means as a minimum to reflect them, and where a public interest governance principle requires an active step to be taken, to provide a suitable framework to ensure that that step is identified, defined, taken, and can be shown to have been taken." Paragraph 426 of the OFS's Regulatory Framework. See https://www.officeforstudents.org.uk/publications/regulatory-framework-for-higher-education-in-england/part-v-guidance-on-the-general-ongoing-conditions-of-registration/condition-e1-public-interest-governance/.

[64] Defined (in its glossary to its *Securing student success: regulatory framework for higher education in England*.) as "Documents adopted, or that should have been adopted, by the provider that describe any of the provider's objectives or values, its powers, who has a role in decision making within the provider, how the provider takes decisions about how to exercise its functions or how it monitors their exercise. This test will be broadly rather than narrowly applied. Where a document in part deals with any such matters, and in part with other matters, the whole of the document is a 'governing document'." There is some debate about the meaning and extent of this. The OfS defines it (as evidenced in its 2025 report

- have in place adequate and effective management and governance arrangements to operate in accordance with its governing documents and to deliver those public interest governance principles in practice (**condition E2**). These include principles relating to securing freedom of speech and academic freedom[65].

The OfS has stated[66] that, in considering whether an HEP complies with these conditions of registration, it may consider questions such as:

- in respect of E1, whether those governing documents provide for reasonable steps that facilitate securing lawful speech or include content that provides for steps that may undermine free speech; and
- in respect of E2:
  - Does the HEP have robust decision-making arrangements, which require it to consider the impact of its decisions on free speech and academic freedom as part of the decision-making process?[67]
  - Does the HEP have checks and balances to ensure that its policies and processes do not adversely affect free speech or academic freedom?
  - Does the university ensure that staff are appropriately trained, in particular those who are making decisions that may affect free speech and academic freedom matters?

The above now appear to be reflected in the OfS Guidance.

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on the University of Sussex's failings in respect of Kathleen Stock) as including policies that relate to course materials and the curriculum and policies about behaviour and public utterances and disciplinary matters.

[65] The relevant governance principles are:

> "I. Academic freedom: Academic staff at an English [HEP] have freedom within the law:
> - to question and test received wisdom; and
> - to put forward new ideas and controversial or unpopular opinions,
>
> without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider […]
>
> VII. Freedom of speech: The governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the [HEP]."

[66] In the OfS December 2022 Publication. Note that this publication pre-dates the coming into effect of HEFSA and the duties to protect speech under the new condition of registration E6. It therefore omits the duties of universities and expectations of the OfS in these respects.

[67] See also OfS Guidance, paragraph 191. The OfS regards instituting and following clear arrangements regarding who may make decisions affecting compliance with free speech duties to be required by both condition E2, and HERA.

The OfS' Director of Free Speech and Academic Freedom has responsibility for overseeing and performing the OfS's functions in respect of free speech and academic freedom, including the new complaints procedure when it come into effect.[68] The OfS has the power to fine or ultimately deregister (remove the degree awarding powers of) universities which breach their conditions of registration and will do so, as evidenced by the OfS' fine of £585,000 in 2025 on the University of Sussex for free speech failures in the university's policies and governance arrangements.[69] The implications in practice of the Sussex case are discussed in detail in Part 3 below.

A further **condition of registration E6**[70], relating to harassment and sexual misconduct regarding students, requires HEPs to maintain, and operate in accordance with, a single comprehensive source of information which sets out policies and procedures on subject matter relating to incidents of (inter alia) harassment. This will extend to acting to prevent harassment against students for their viewpoints, and to stop it when it is happening.

Condition E6 also contains important provisions about the interaction of policies relating to harassment with the OfS's expectations regarding free speech protection and the other Relevant FS Requirements. In particular, condition E6:

- emphasises the need in, the context of creating and implementing their harassment policies, for HEPs to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment;
- requires HEPs to apply a rebuttable presumption to the effect that students being exposed to the content of higher education courses or statements on any subject matter connected to the content of a higher education course is unlikely to amount to harassment[71]; and
- effectively severely restricts harassment and sexual misconduct policies going beyond what is stated in the Equality Act[72].

This is discussed in detail in the Appendix.

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68 HERA, Schedule 1, paragraph 3A.

69 The OfS report on its investigation into the University of Sussex is available at: https://www.officeforstudents.org.uk/media/hcllzxwx/university_sussex_free_speech_case_report.pdf

70 Effective from 1st August 2025.

71 OfS Guidance, paragraph 101.

72 Condition E6 is discussed in some detail at paragraphs 98 to 105 of the OfS Guidance.

Charitable status

Most HEPs (and many constituent institutions such as colleges) are charities whose charitable purpose is advancing education. HEPs' trustees (who are not confined to members of an HEP's governing body[73]) have a core fiduciary 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 purposes are not the same as those set out, for instance, in an institution's 'mission statement'.[74]

All activities of the charity must further those specific, constitutional purposes. Charity law defines the purpose of "advancing education" broadly, but an intention to promote or an attempt to inculcate a particular view or political orientation – i.e. propaganda – is not educational for the purposes of charity law. It follows that careful consideration will need in order to secure compliance with these requirements and constraints. As discussed elsewhere, aspects of what is frequently promoted under the "EDI" banner derive from contested activist agendas, and so are a high risk in this regard. Note that, 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.

However, promoting and encouraging the development of political ideas is part of furthering an educational charity's purposes, and – as a matter of principle – discussion of especially controversial issues may be of greatest educational value. There is no requirement in charity law to ensure that certain viewpoints are incorporated or expressed, or that an equal number of speakers are heard on either side of a debate.

Trustees are further required: to take steps to ensure that freedom of speech and expression is facilitated in an open and accessible environment where views and opinions can be questioned and challenged;[75] to ensure that the charity only becomes involved in campaigning and political activity which furthers or supports its charitable purposes; and not to allow the

[73] 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.)

[74] It is sometimes 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.

[75] See the Equality and Human Rights Commission's *Freedom of Expression: a guide for higher education providers and students' unions in England and Wales*, section 3.3.

charity to be used as a vehicle for the expression of the political views of any individual trustee or member of staff[76].

The OfS is the principal regulator of all those HEPs which are "exempt" charities under the Charities Act 2011 (this includes almost all English universities), although the Charity Commission continues to have functions and responsibilities.[77]

F. Complaints, accountability and liability

Free speech failures create risk for HEPs, including of financial cost, reputational damage and embarrassment (the OfS will publish information about free speech failures), regulatory problems, wasted management time and internal strife. They also involve risks of personal liability for individuals.

Legal claims and regulatory accountability

Claims have been successfully brought under the Equality Act for discrimination against and harassment of people with Protected Viewpoints (as to which see the BFSP Equality Act Statement), and under the HRA for breaches of HEPs' duties as regards freedom of thought and expression.

Claims have also been brought, by way of judicial review (an unsatisfactory and little-used remedy), under Section 43 of the Education No.2 Act (1986), which HEFSA replaced and strengthened. (The coming into effect of a statutory tort, which was to be brought in by HEFSA and would have brought in some much-needed increased accountability, was suspended by the Labour Government in July 2024, and it is going to be repealed. This was deeply regrettable.)

Failures to protect free speech can also constitute or give rise to a breach of an HEP's registration conditions and result in enforcement by the OfS, including substantial fines and ultimately deregistration (removal of degree awarding powers). In a report published in March 2025, the OfS found that the University of Sussex's "Trans and Non-Binary Equality Policy Statement" restricted academic freedom and free speech and breached registration condition E1. For this breach, and a related breach of condition E2, the OfS fined the University of Sussex £585,000, which was the first such fine relating to academic freedom and free speech. The OfS has stated that fines for future breaches may be larger.

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[76] See *Campaigning and political activity guidance for charities* (updated to 7 November 2022), Charity Commission for England and Wales. https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities.

[77] See the Memorandum of Understanding between the OfS and the Charity Commission about their demarcation of operations and co-operation. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810662/OfS_and_Charity_Commission_Collaboration_agreement__final_signed_.pdf

Complaints schemes

HERA now supplements existing legal remedies with a right for members, members of staff, people who have applied for academic jobs and visiting speakers to make formal free speech complaints against HEPs to the OfS. This has not as yet been brought into effect, but will be an important change which will increase HEPs' accountability and risks when it is[78].

Students will continue to have to bring complaints to the Office for the Independent Adjudicator, which has a poor reputation for effectiveness or firm action.

HEPs are required by the Secure Duty to have appropriate and compliant free speech complaints schemes in place, for staff and students. The OfS Guidance contains detailed requirements in this regard. Documents providing for such schemes are likely to come within the wide definition of "governing documents" for the purposes of the conditions of registration. This is discussed in detail in Part 3 below.

Liability for individuals, and those who induce Equality Act breaches

There are various potential sources of liability for individuals involved with free speech protection failures. Officers of organisations who, through default or negligence, cause their organisations to breach the law and thereby suffer loss can be at risk of personal liability for that loss. An employee or agent of an HEP contravenes **Section 110** of the Equality Act if they do something which is treated as having been done by the relevant HEP and the doing of that thing amounts to a contravention of the Equality Act by the relevant HEP.

Under **Section 111** of the Equality Act, a personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act. This has become acutely relevant in the light of Sussex's non-compliant policy (leading to its regulatory penalty) appearing to have been taken from a template from Advance HE or its predecessor (and many other HEP policies appearing to based, in part at least, on this non-compliant template), and barrister Allison Bailey's 2025 claim against Stonewall for being behind her discriminatory treatment by her chambers.

G. Constituent institutions (colleges etc) and students' unions

Since the coming into effect of the main provisions of HEFSA on 1st August 2025, the same duties and remedies under HERA now also apply to Constituent Institutions (colleges, halls, and other constituent institutions) of HEPs, with minor adjustments. This is a major change.

The Equality Act regime also applies to Constituent Institutions and students' unions, but the PSED does not apply to students' unions. The HRA does not apply in respect of Constituent Institutions which are not themselves public authorities or to students' unions.

[78] HERA, Schedule 6A.

HEPs' own duties require them to take their own steps, to the extent reasonably practicable given the nature of their structures and relationships, to ensure compliance by their Constituent Institutions and students' unions, as regards the HEP's Participants, at the least.

The obligations of, and of HEPs in respect of, colleges and other Constituent Institutions and students' unions are discussed in more detail Part 3 below. BFSP intends to produce detailed statements about the requirements in respect of Constituent Institutions and students' unions.

3. Requirements and implications in practice

In Part 3, we indicate the legal sources of the requirements in practice using the following colour coding.

Highlighted in	***Sources***
Red	All Relevant FS Requirements: HERA; Equality Act (in respect of Protected Viewpoints); the HRA/Convention; regulatory
Orange	HERA and the HRA/Convention; regulatory
Yellow	HERA; Equality Act; perhaps the HRA/Convention; regulatory
Green	HERA; regulatory
Blue	Regulatory (e.g. conditions of registration, OfS Guidance) or good practice

Notes:

1. *The Equality Act only applies in respect of those viewpoints which are Protected Viewpoints.*
2. *It is unclear whether the positive obligations to act under the HRA/Convention, such as they are, apply in respect of the items highlighted in yellow, for the reasons discussed in Part 2C above.*

The obligations under HERA involve an HEP taking those steps set out below which are indicated as being required by HERA. These will all enhance free speech protection and are all reasonably practicable or likely to be so.[79] HEPs' conditions of registration will require many steps, particularly in relation to management, governance and core policies, most if not all of which are also required by HERA. We also indicate where steps, including ones required as aforesaid, are stated regulatory expectations pursuant to the OfS Guidance.

The need to avoid discrimination against and harassment of people with Protected Viewpoints under the Equality Act, and to qualify for the Section 109(4) Defence, and the need to comply with the HRA/Convention (including the positive obligations under it) also involve an HEP taking many of these steps.

[79] The majority of the detailed requirements are set out or evidenced in the OfS Guidance.

A. Key general obligations

- **Not to discriminate or harass in connection with viewpoints**: A key general obligation, which underlies many of the other obligations in practice below, is not to discriminate against or harass Participants or visiting speakers in connection with their lawful viewpoints, and to take all reasonably practicable steps to prevent their Participants from doing so.

  This is required in order to avoid compliance failures on the part of HEPs in respect of Protected Viewpoints under the Equality Act[80] and under the Secure Duty and the HRA/Convention. HEPs also need to take all reasonable steps to prevent their employees doing this in order to qualify for the Section 109(4) Defence. This will make a very substantial difference to securing free speech, and must in principle be reasonably practicable, so is in principle also required under the Secure Duty and (to a degree) the HRA/Convention, subject, of course, to the detailed circumstances of each case. This requirement also in principle extends (under the Secure Duty but not the Equality Act) to preventing harassment etc. by students (it is inherent, for instance, in the OfS's expectations regarding control of the behaviour of protesters), although what would be considered a "reasonably practicable step" in this regard would need to be viewed in the light of the nature of students – ever-changing, volatile, inexperienced: HEPs must not be burdened with unreasonable expectations.

  The OfS Guidance contains an obligation on HEPs not to treat a student unfavourably, or less favourably than it treats or would treat another student, on the grounds of that student's opinions or ideas in various specified contexts.[81] This follows anti-discrimination concepts in the Equality Act. This approach must also surely extend to harassment of Participants generally for the purposes of Secure Duty – and to visiting speakers.

- Take sufficient steps to satisfy its duty to **promote free speech**[82]. While the scope of this duty is somewhat unclear, it includes aspects of the steps described at Sections B and D below. It clearly requires HEPs to ensure that free speech is described in positive terms in all its documentation, and in its training in particular, and to commit appropriate staff and sufficient time to ensuring that this duty is carried out appropriately in practice. An HEP must not allow free speech to be presented in a negative light in its documents and official pronouncements.

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[80] Although this would be unlikely to extend to visiting speakers, noting that this is itself a contested point.

[81] Paragraph 206.

[82] In HERA Section A3.

B. Rules, policies, governance and training

- **Promote the importance of** free speech and work to achieve a positive official attitude and general atmosphere within the HEP towards it. This will make a very substantial difference to securing free speech. Active steps towards achieving this must be reasonably practicable, so HEPs will need to take sufficient steps of this nature in order to satisfy the Secure Duty, and these are likely to include the creation and enforcement of policies, practices and requirements relating to securing lawful free speech and appropriate induction/training. HEPs must not allow free speech to be presented in a negative light in their policies and other official documents. HERA clearly requires (e.g. pursuant to its "promote" duty) HEPs to ensure that free speech is described in positive terms in all its documentation, and in its training in particular. See Section D below about the need for effective systems for promotion of free speech, and this section and Section D below about the need for appropriate free speech training.

- **Have an appropriate FS Code**:
  - setting out the HEP's values relating to freedom of speech together with an explanation of how those values uphold freedom of speech[83] and procedural information regarding the holding of meetings and events (see further below);[84]
  - setting out the conduct required in connection with any such meeting or event;[85]
  - providing sufficient information to Participants about relevant free speech requirements as well as the HEP's own obligations in relation to free speech[86]; and
  - dealing with such other matters as the governing body consider appropriate[87].

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83 HERA Sub-section A2(2)(a), relating to FS Codes. Quoted in paragraph 170 of the OfS Guidance.

The OfS Guidance goes on to state (at paragraph 171) that HEPs should consider including: a statement about the overarching value of freedom of speech within the law for the HEP; a statement about how those free speech values uphold freedom of speech within the law at the HEP; a statement emphasising the very high level of protection for the lawful expression of viewpoints and for speech in an academic context; and a statement that freedom of speech within the law may include speech that is offensive.

84 HERA Sub-section A2(2)(b).

85 HERA Sub-section A2(2)(c) and OfS Guidance paragraphs 178 to 180.

86 The Dandridge Review, paragraphs 2.33 and 4.10, describe how a lack of clear guidance on the law and the OU's policies was a significant cause of the harassment suffered by Professor Phoenix.

87 HERA Sub-section A2(3).

It would be good practice (and is a stated expectation in the OfS Guidance) to have a clear and simple **statement** ("**FS Statement**") about the FS Code, which should summarise its contents and make clear how to access it.[88]

The OfS Guidance contains detailed information about FS Codes and HEPs' obligations and good practice regarding publication and ready availability. These include that the FS Code must be communicated to staff and students at least annually; and that it would be good practice for the FS Code to be easily accessible online, for the FS Statement to be communicated to staff and students at least annually, and for the FS Statement to be contained in any prospectus, staff and student handbooks, and also included prominently in any other document stating or explaining any other policy that may affect free speech or academic freedom.[89] It would also be good practice for such other documents to include a statement that, in cases of uncertainty, the definitive and up-to-date statement of the institution's approach to freedom of speech is set out in the FS Code.[90]

- **Ensure that its policies, practices and requirements are appropriate in the context of the Relevant FS Requirements**. This has two key aspects:
  - Ensuring that it does not have policies, practices or requirements which unjustifiably prevent or restrict lawful free speech.[91]

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[88] See paragraph 169 of the OfS Guidance. This will facilitate understanding of and access to free speech information and thus materially enhance free speech protection and is almost certainly reasonably practicable, so is highly likely to be required by the primary duty under HERA.

[89] See paragraphs 167-169 of the OfS Guidance. Per paragraph 169d, these documents include all policies relating to: admission, appointment, reappointment and promotion, disciplinary matters, employment contracts (that may include conditions on speech), equality or equity, diversity and inclusion, including the PSED, harassment and bullying, IT, including acceptable use policies and surveillance of social media use, the Prevent duty, principles of curricular design, research ethics, speaker events and staff and student codes of conduct. While this is not specifically required under HERA, it will materially enhance free speech protection and is almost certainly reasonably practicable, so it is highly likely to be required by the duty to take reasonably practicable steps.

[90] See paragraph 169 of the OfS Guidance.

[91] For example, the OfS found in a report of March 2025 that the University of Sussex's "Trans and Non-Binary Equality Policy Statement" restricted speech because it contained (inter alia): a requirement for 'any materials within relevant courses and modules [to] positively represent trans people and trans lives'; and a statement that 'transphobic propaganda ... will not be tolerated'.

The OfS also found that an "objective" test, in the same policy, for whether material was "abusive, bullying, or harassing" which was whether the material or communications "could reasonably be expected to cause distress" (which is wider in scope that the equivalent provision in the Equality Act) unjustifiably restricted lawful speech, and therefore breached condition E1.

The OfS expressed concern that, through the Trans and Non-Binary Equality Policy Statement, the University may have failed to comply with Section 43 of the Education Act, Section 19 of the Equality

In particular, HEPs must ensure that their policies, practices, and requirements do not:

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

One way much of the above may happen is through HEPs mis-stating or exaggerating or otherwise failing to reflect accurately legal obligations on them (for instance pursuant to the Equality Act) which may conflict with the Secure Duty. See the Appendix to this Statement for a detailed discussion of the sorts of problems that can arise.

All policies, practices and requirements need to be drafted so as to be compliant with the Relevant FS Requirements. This means that the HEP must have taken all reasonably practicable steps under the Secure Duty to ensure that they interfere with lawful free speech to the minimum extent necessary for the purpose for which they are in place. See the further discussion of this in Part 2A above. They will also need to be compliant with the Equality Act and with HRA/Convention, which will involve satisfying a demanding "proportionality" test.

The relevant risks, and factors (including proportionality) in constructing compliant policies, are discussed in detail in the Appendix to this Statement.

Act, Section 10 of the Human Rights Act, and the Public Sector Equality Duty. BFSP considers that this is over-cautiously stated: it is highly likely that at least some of these requirements were contravened.

See BFSP's report on the Sussex case at https://bfsp.uk/universities-and-free-speech.

- Creating policies and requirements to ensure compliance with the Relevant FS Requirements,[92] including securing compliance with its FS Code.[93] As the OfS Guidance puts it: the functioning of a university is also likely to require restriction of speech that prevents other speech.[94] In the context of Protected Viewpoints under the Equality Act, the Dandridge Review found that the Open University did not have adequate policies about what was expected in the way of behaviour, in particular as regards avoiding discrimination, harassment and other inappropriate actions against people in respect of their views:[95] this is a necessity to qualify for the Section 109(4) Defence and an issue for all HEPs. Such rules should expressly prohibit certain material actions by Participants against people in respect of their viewpoints, such as harassment, bullying and very severe personal attacks, online pile-ons[96], making inappropriate complaints and allegations, and the use of the "heckler's veto" to prevent others' speech (see the discussion of requirements relating to protests at Part 3F below). These restrictions will themselves need to be written in a way that is compliant with the free speech rights of those Participants who may wish to attack their colleagues for their viewpoints, which will be a delicate process[97] – see BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance obligations*** for a detailed discussion of this complex area.

  HEPs will need to have appropriate and effective structures, processes and plans for curtailing and remedying activity which is contrary to their free speech related

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92 This is a clear requirement in order to qualify for the Section 109(4) Defence, and failures to have such requirements (and to take action pursuant to them) underly the liability under the Equality Act in cases such as the *Phoenix/Open University* one. The Secure Duty is one "to ensure, so far as is reasonably practicable, that those whom [an HEP] may control, that is to say its [Participants], do not prevent the exercise of freedom of speech within the law [….]" - *R. v University of Liverpool Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667 (per Watkins LJ at p132 D-H). Stated in respect of Section 43 of the Education No.2 Act (1986), which HEFSA replaced and strengthened.

93 See in this regard HERA **Sub-Section A2(4)**, under which an HEP must: "take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure compliance with its code of practice".

94 See OfS Guidance, paragraph 111.

95 Dandridge Review, paragraphs 4.3 and 4.37.

96 Paragraph 143 of the OfS Guidance states that these may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns.

97 For example, to the extent that these rules, or enforcement of them, themselves restrict the rights of Participants to attack or express their views about other Participants or visiting speakers, they will need to be sufficiently restricted so as to comply with the Secure Duty, and be proportionate in order to comply with the HRA. See the discussion of proportionality under "*Human Rights Act*" at Part 2C above. For a detailed discussion of this complex area, see also BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance obligations***.

requirements and appropriate disciplinary processes in order to secure compliance with free speech requirements/rules.[98] See more at C below.

The following are some specific aspects of the above.

- Online work environments create particular problems. This was recognised in the Dandridge Review, in particular as a facilitator of bullying and harassment.[99] HEPs need to ensure that their requirements regarding behaviour extend to online behaviour and prohibit actions such as organising or joining in pile-ons, ostracisms and the like. See Section C below about HEPs' need to ensure that online work environments are controllable and monitorable.

- Personal views in the workplace: As noted in the Dandridge Review, there is a risk that the inappropriate expression of personal views in the workplace can lead "to censorship and unlawful discrimination or harassment, and bullying".[100] It recommends that clear guidelines should be developed on the expression of personal

[98] The OfS has stated that condition of registration E6 (on harassment etc) "requires institutions to take steps to address harassment. This includes taking appropriate disciplinary steps against students or staff...": OfS letter of November 2025 about harassment of Jewish staff and students: https://www.officeforstudents.org.uk/media/or4nf0jn/harassment-and-intimidation-jewish-students-staff.pdf. See also OfS Guidance, Examples 1, 6 (which says "[HEPs} should take appropriate steps to address any chilling effect"), 9 and 10.

[99] See for instance paragraphs 2.66, 2.67, 2.69-2.72, 4.51 and 5.4.5.

[100] Some organisations may have policies which require their employees not to manifest personal views in work contexts, where these are not directly or indirectly related to work. In contrast, a number of HEPs have instituted policies (and the OU did this) which aim to encourage or enable staff to bring their "whole" or "authentic" selves to work – which involves manifesting personal views in work contexts. In the context of recent developments, it appears to be inappropriate to have such a policy without suitable provisions to ensure that the policy does not result in the bullying and harassment of (creating a hostile environment for) individuals for their views, or the suppression of views. See the Dandridge Review, Recommendation 3, paragraph 5.3.1.

The Dandridge Review finds (in paragraphs 4.42 and 4.44) as follows: "If personal perspectives get out of kilter, it can translate into the expression of intrusive views, inappropriate behaviour, the disruption of working relations and respect for others, and undermine the independence and integrity of teaching, research and scholarship, as well as the institution's values. It can legitimise the expression and potentially the application of views that conflict with OU policy. At worst, the imposition of personal views can lead to censorship and unlawful discrimination or harassment, and bullying." "There is no simple solution to this balance between the personal and the professional. But there should be some broadly expressed common expectations as to where the balance should lie, and what amounts to the legitimate expression of authentic selves or the constructive contribution of alternative perspectives, what amounts to the unprofessional intrusion of personal views into the workplace or the inappropriate prioritisation of personal perspectives over institutional policy positions, and who determines the policy and how this is done."

views at work.[101] This appears to be required in order to maximise the chances of legal and regulatory compliance: achieving a fair and workable solution will be difficult in practice, in the light of the need to protect all people's free speech rights, both of those who want to express personal views and through restricting oppressive behaviour through over-sharing of personal views.

- Refusing to work with a colleague whose views one doesn't agree with: This is a form of ostracism, bullying, and is certainly oppressive behaviour which may amount to unlawful harassment. HEPs need to include in their behavioural codes a general requirement that staff are expected to work together, irrespective of the lawful views they hold .[102]

- **Have appropriate governance and management arrangements**, including the following.

  - Ensuring that it takes/has taken all actions required to comply with its conditions of registration as described above. 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 free speech and academic freedom, and to ensure that the governing body of the HEP takes all reasonably practicable steps to secure freedom of speech within the law. Failings in this regard were the cause of a large penalty for the University of Sussex in 2025.[103] The actions listed below are or may be required by condition of registration E2.

  - Taking requirements relating to free speech, and associated needs and risks, seriously at senior levels. This will, or will be highly likely to, involve (as best practice at the least): free speech promotion and protection being a sufficiently regular agenda item for its governing body; having an appropriately constituted and empowered committee of its governing body or other senior working group to ensure proper compliance with its free speech obligations; and having a senior and properly resourced free speech officer as discussed below.

  - Putting in place and following delegation arrangements setting out clearly and explicitly which committees or individuals are authorised to make decisions that are

[101] Recommendation 5.3.1.

[102] The Dandridge Review (in paragraph 4.26) stated that "As a general principle […] it cannot be acceptable for staff to determine who they are prepared to work with because of their perception of a colleague's lawfully held views, however offensive they may find them." There must be some practical limits to this: for instance, expecting detailed co-operation between academics on particular projects on which they disagree is impracticable.

[103] The OfS fined the University of Sussex £225,000 because governing bodies at the university repeatedly approved policies, including policies which restricted freedom of speech, without the delegated authority to do so, amounting to a breach of condition of registration E2.

likely to have a substantial (positive or negative) effect on compliance with free speech duties.[104] Ensuring that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact.[105]

- Ensuring they have robust decision-making arrangements, which require them to consider the impact of their decisions on free speech and academic freedom as part of the decision making-process;

- Ensuring they have checks and balances to ensure that their policies and processes do not adversely affect free speech or academic freedom;[106]

- 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. (This will particularly apply in respect of leaders in areas such as EDI and some academic disciplines in relation to which controversial agendas have sometimes been enforced, including by requiring agreement to contested opinions in induction, training, recruitment and/or promotion processes, and in respect of the curriculum.) There should be an appropriate chain of responsibility and supervision between those staff members and the governing body.[107]

- Ensuring that its 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.

[104] OfS Guidance, paragraph 191.

[105] This is stated in the OfS Guidance, paragraph 192. Even if not required pursuant to the Secure Duty, it still represents what the OfS regards as appropriate. This will require a list of committees responsible for various specified matters and will apply more widely that just in respect of obligations under the Secure Duty: for instance obligations to uphold Participants' entitlement to hold and express Protected Viewpoints under the Equality Act.

[106] See the OfS Insight publication *Freedom to question, challenge and debate*, December 2022. The OfS has explicitly stated that it will consider these third and fourth points when assessing compliance with regulatory conditions.

[107] It is unclear how much of the above is required in practice by the Secure Duty. They would all appear to be likely to make a material difference to securing free speech, and to be reasonably practicable. Some at least may be required under HEPs' conditions of registration. They are certainly best practice.

- Having appropriate and effective reporting and complaints systems in respect of free speech issues and complaints. This is discussed in detail at C below.[108]
- Recording all decisions that could directly or indirectly (and positively or negatively) affect free speech within the law. These records should demonstrate how the HEP has had particular regard for the importance of free speech within the law.[109]
- Having appropriate systems and structures in place to ensure that free speech and academic freedom are appropriately promoted and protected (see more below).

- 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 and regulatory obligations and follows and enforces its own policies/rules appropriately. Given the intense activism and competition between agendas that exist within HEPs, we ask: how they can comply with the Relevant FS Requirements without such an officer to advocate for free speech at a high level?[110] That officer should be appropriately senior (sufficiently so to participate in governing body meetings where relevant to their role), empowered and resourced, available (although this does not necessarily have to be a full-time position, particularly if they have other staff to help them fulfil their role), experienced and trained, and non-conflicted.[111]

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[108] This would appear to be required in practice by the Secure Duty. Some at least may be required under HEPs' conditions of registration and in connection with the Section 109(4) Defence.

[109] This is stated in the OfS Guidance, paragraph 190. Even of not required for compliance with the primary duties under HERA, it appears to represent what the OfS regards as appropriate. Best practice will therefore include this (at least in relation to decisions which materially affect free speech).

[110] The cases of *Phoenix/Open University* and of the University of Sussex illustrates this well. In the context of sometimes vicious disagreement at HEPs on questions concerning sex and gender, and in the absence of a dedicated free speech officer, liabilities are likely to arise; in Sussex's case, it maintained a policy document which restricted the speech of one side of the debate. For this, and related breaches, the OfS fined Sussex £585,000.

[111] This would surely make a very material contribution to securing free speech. As it is reasonably practicable, it is likely required pursuant to the primary obligations under HERA. In any event, having a free speech officer is an obvious requirement of good practice.

Given that controversies around aspects of EDI agendas appear to have given rise to many of the free speech problems in recent years, it is hard to see how a person could be appointed who also has or has had a role within an HEP's EDI function without such dual appointment giving rise to insuperable conflicts of interest/priorities, and the need for this separation was referred to in the Dandridge Review (paragraph 4.17) as follows: "the only possible way forward […] is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice."

See more at BFSP's statement ***Free Speech Governance, Officers and Reporting: Requirements for English Institutions***.

- **Ensure that adequate induction and training is available to Participants** about the value and benefits of, and protection of, free speech and academic freedom, and that they understand the nature of the requirements to protect free speech.[112] Induction in this regard will likely need to be mandatory, subject to any applicable limitations under the Relevant FS Requirements. (See the discussion in Section D below about training for relevant staff.)

C. Action required to protect free speech and stop suppression of viewpoints

- **Take prompt, active and effective action to ensure that it and its Participants comply** with applicable obligations, including under its FS Code and related policies/rules, and **enforcing compliance** with disciplinary action where appropriate.[113]

- **Deal with controversies effectively; protect Participants; resist pressure:** How HEPs deal with controversies – as in social media storms, demands for disciplining or that meetings not be held and the like – will be the sometimes very public face of how well (or not) they are securing free speech in practice. This has the following implications.

  - An HEP needs to take prompt, active and effective action to diffuse a controversy and ensure that it and its Participants comply with the Relevant FS Requirements in respect of it[114]. This can include reminding their staff and students of their policies and requirements, in particular regarding free speech and anti-bullying and harassment; where appropriate, warning them of the consequences where they contravene them;

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[112] This is required in practice by the Secure Duty as it would make a material difference to securing free speech and is a reasonably practicable step to take. The OfS Guidance (paragraphs 209-211) state that "providers and constituent institutions should offer adequate training on freedom of speech and academic freedom", that this training should be required or staff in a wide range of specified positions, and that "adequate training" means that staff will have at least an up-to-date understanding of: the FS Code and how it applies in practice; their own free speech rights under HERA, the HRA and the Equality Act; and the free speech rights of members, staff, students and visiting speakers under HERA, the HRA and the Equality Act. Note that any such training must not require staff and students to endorse any viewpoint or value judgement. See Section D below for detail on what the OfS considers to be adequate training of staff.

[113] This is required under HERA **Section A2(4)** in respect of the FS Code, and the Secure Duty more generally, to the extent that such steps are reasonably practicable. These are also key lessons of the *Fahmy* and *Phoenix/Open University* cases, described in the BFSP Equality Act Statement. See also Examples 1 and 6 in the OfS Guidance. See also footnote 114 below. The Dandridge Review (in various places, including Recommendation 6) identifies the need for prompt and effective intervention.

[114] Examples 1, 6, 9 and 10 in the OfS Guidance illustrate the OfS' expectation for HEPs to take action to intervene to protect Participants. See also the discussion herein of the implications of the Dandridge Review. The OfS has stated that condition of registration E6 (on harassment etc) "requires institutions to take steps to address harassment. This includes taking appropriate disciplinary steps against students or staff…."….": OfS letter of November 2025 about harassment of Jewish staff and students: https://www.officeforstudents.org.uk/media/or4nf0jn/harassment-and-intimidation-jewish-students-staff.pdf.

where appropriate, enforcing their policies/rules, including through disciplinary measures; and such other action as is likely to help remedy the situation.

- Where a Participant is under attack for expressing their lawful opinions (especially where such opinions are Protected Viewpoints), the Secure Duty and, often, the need to qualify for the Section 109(4) Defence[115], require an HEP to take all reasonable/reasonably practicable steps to stop (or stop recurrence of) various types of hostile actions, including harassment, personal attacks and online pile-ons, that are being taken against the Participant because of their lawful viewpoint. This is especially the case where those actions are in possible breach of the HEP's own relevant rules and requirements.[116]

  This is likely to involve some or all of: identifying the Participants who are, or may be, taking such actions, and informing them where they are or are likely to be in breach of its relevant policies/rules and requirements and requiring them to stop taking the relevant actions; taking such disciplinary action against the relevant Participants, where and to the extent appropriate, and such other action as is likely to help remedy the situation; and, if the relevant actions involve likely criminality, considering seriously (with advice) whether they should involve the police.

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[115] The *Fahmy* and *Phoenix/Open University* cases were in essence about attacks by employees made to harm and distress a colleague for her views (which dissented from the ideology held by the attackers) constituting harassment by the employer. An indication of the EHRC's likely attitude is that, in its Employment Code (paragraph 10.52), it states that "reasonable steps" might include dealing effectively with employee complaints.

[116] See HERA **Section A2(4)**, in respect of the FS Code, and the Secure Duty more generally.

The OfS Guidance states that "We would generally expect [HEPs] and constituent institutions, as promptly as is reasonably practicable and consistent with due process, and where appropriate publicly:

- to reject public campaigns to punish a student or member of staff for lawful expression of an idea or viewpoint that does not violate any lawful internal regulations
- to affirm students' and staff members' rights to make such statements regardless of any institutional position on the matter.

These campaigns may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running, focused media campaigns… Depending on the circumstances, rather than publicly distancing itself, it may be more helpful for a provider or its constituent institution to reiterate the importance of free speech for all staff and students, including the person affected. It may also be especially important for the response to be timely." (See paragraphs 143 and 144 and Examples 28 and 29.) This is very useful clarification as far as it goes, but insufficiently wide if HEPs are to be confident that they have done enough to comply with their obligations under the Secure Duty and to qualify for the Section 109(4) Defence (see more in the BFSP Equality Act Statement). HEPs need to be active in stopping attacks and, if appropriate, bringing disciplinary action. The OfS has clarified this to a degree with its statement about condition of registration E6 (on harassment inter alia) discussed at footnote 114 above.)

- HEPs must not succumb to pressure from Participants or others: (a) to take actions which suppress or restrict lawful free speech or which materially disadvantage another Participant or visiting speaker in connection with their holding or expressing certain opinions (including and especially Protected Viewpoints); or (b) not to take steps to enforce its rules and requirements regarding free speech protection. Succumbing to any such pressure would very likely give rise to a breach of the Secure Duty (and potentially the Equality Act and the HRA/Convention as well). Bringing such pressure to bear in the first place should itself be a breach by Participants of an HEP's rules and requirements if they have been properly formulated in order to comply appropriately with the Secure Duty.[117]

- HEPs need to have practices, policies and requirements in place to enable them to do the above, and appropriate disciplinary processes in order to secure compliance with free speech requirements/rules.[118] And, as discussed further in Section D below, have appropriate systems and staff to enable problems, especially online attacks and pile-ons, to be dealt with rapidly and effectively.

- Ensure that its **internal communications systems** (whether email, online meetings, chat or others means) are controllable and monitorable; and be ready to actively control and monitor them when necessary, making prompt and effective interventions (including requiring suspensions or deletions) where needed[119].

- Have appropriate and effective **reporting and complaints procedures and systems** in respect of free speech issues and complaints. This is clearly reasonably practicable and would be likely to contribute materially to securing free speech.[120] Ensure that its systems are structured and staffed to be able to deal with issues and complaints promptly and effectively, and in particular to review and address free speech problems in accordance

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[117] See footnote 117 above.

[118] See for instance the discussion in the Appendix to this Statement on condition of registration E6 as it concerns harassment. The OfS has stated that condition E6 (on harassment etc) "requires institutions to take steps to address harassment. This includes taking appropriate disciplinary steps against students or staff….": (See footnote 114 above). See also OfS Guidance, Examples 1, 6 (which says "[HEPs} should take appropriate steps to address any chilling effect"), 9 and 10. See also the *Fahmy* case, described in the BFSP Equality Act Statement. A failure to have the right rules was cited as one of the reasons why the defendant organisation could not escape liability for harassment committed by its employees.

[119] See more at Section B above. See the *Fahmy* and *Phoenix* cases, described in the BFSP Equality Act Statement, for what happens when this is not done. See also the discussion elsewhere of the Dandridge Review's identification of behaviour on internal staff networks as one of the key causes of the *Phoenix/Open University* failures.

[120] It is therefore likely to be required under the Secure Duty and to qualify for the Section 109(4) Defence. Appropriate reporting and complaints procedures and systems may also be required under condition of registration E2.

with the Relevant FS Requirements and consequential requirements in practice. Relevant staff will need to be thoroughly trained about what the law in fact requires and how to operate the system effectively (see more at Section D below). Such systems must also take account of the fact that many complaints will be against the HEP and its staff, so will need to be resolved by people who are sufficiently independent to avoid material conflicts of interest.[121]

As noted above, HERA provides for a free speech complaints scheme, run by the OfS. The complaints scheme will be available to staff and visiting speakers. This is yet to be brought into effect. Students will continue have to right to raise complaints through the Office of the Independent Adjudicator. Furthermore, the OfS will receive complaints, reports and (effective) whistleblowing relating to free speech failures and (if it considers appropriate) act on them with investigations and other actions (for instance, the investigation resulting in the recent huge fine on the University of Sussex for regulatory compliance failures). The OfS is likely to do this to an increasing extent in the future, given its greatly increased emphasis on free speech. (BFSP's associated campaign Alumni For Free Speech will be reporting serious failures to the OfS, especially where HEPs appear to have been cavalier about free speech protection, while being sensitive to the OfS's resource limits and avoiding (and encouraging complainants to avoid) causing disproportionate disruption to HEPs that appear to be serious about free speech protection.) In order to minimise the risk of a complaint being made to the OfS, HEPs will need to ensure that the complaint as first made to them is handled promptly, effectively and fairly.

- **Not allow its complaints and disciplinary functions to become instruments of free speech suppression**, contrary to the Relevant FS Requirements.[122] Every complaints process should include a fair, objective and rapid triage process during its initial stage, to the extent (at least) that complaints relate to a Participant's lawful speech or viewpoints. This process should ensure rejection of vexatious, frivolous or obviously unmeritorious complaints at an early stage.[123] An HEP should not permit the pursuit of obviously vexatious or trivial complaints or instigate formal investigations into a Participant following complaints which relate to their lawful expression of a viewpoint (including and especially a Protected Viewpoint).[124] HEPs should not encourage students or staff to report

[121] This would appear to be required in practice by the Secure Duty: it would surely make a material difference to securing free speech, and be reasonably practicable. It is also likely be required under HEPs' conditions of registration. A failure to have appropriate systems in place and operate them fairly and effectively may also give rise to failures under the Equality Act and the HRA/Convention.

[122] OfS Guidance, Example 40. The Dandridge Review, paragraphs 2.36-2.37, refers to excessive complaints being made against people at the OU, and complaints creating a chilling effect.

[123] OfS Guidance, paragraph 164. In addition to being required under Secure Duty and the Equality Act, this may also be required under condition of registration E2.

[124] See the OfS Guidance paragraphs 164 and 166, which are well illustrated by Example 40.

other Participants over opinions or speech that would (or might) involve the lawful expression of a particular viewpoint. For instance, maintaining systems where "microaggressions" can be anonymously reported may breach the Secure Duty.[125]

An HEP must treat all complaints arising from or relating to holding or stating lawful opinions and viewpoints with considerable caution. Its starting assumption (not least because of the foundational importance of free speech and academic freedom in the higher education context) should be that it is likely that such complaints are likely not be justified.

Complaints processes should be concluded as rapidly as is reasonably practicable and compatible with fairness.[126] Prolonging an investigation into a Participant's lawful speech, when it has become clear that there is no case to be answered, and in particular when this is done in order to appease individuals or groups complaining about the speech, is itself a form of punishment for lawful speech, and will constitute a breach of HERA.[127]

An HEP must not proceed with any complaints or disciplinary proceedings which risk constituting a failure to comply with the Secure Duty or unlawful discrimination or harassment under the Equality Act. It should, in any event, conduct complaints and disciplinary proceedings in such a way as to avoid unlawful discrimination and harassment[128] or a failure under the HRA/Convention.

- **Not allow inappropriate official endorsement (or effective enforcement) of controversial agendas or suppression of dissent; the curriculum; research:** In recent years, some HEPs have endorsed, promoted and/or enforced certain viewpoints and agendas in respect of areas which are the subject of debate or controversy.[129] This gives rise to various free speech issues and concerns.

  - Whenever such endorsement or promotion (directly or indirectly) requires or exerts pressure for the endorsement of or acquiescence to those viewpoints, or suppresses the expression of lawful dissenting viewpoints, there will be a clear breach of the

[125] This is referred to in the OfS Guidance, paragraph 163 and Example 39.

[126] See the OfS Guidance, paragraph 165. Example 28 of the OfS Guidance evidences that the OfS sees delay in this context as a free speech failure.

[127] OfS Guidance Example 40. Bristol University's failures in this regard in the case of Steven Greer were, we consider, unlawful at the time; they would have been clear compliance failures had they happened under the Relevant FS Requirements as they now are.

[128] See the *Meade* case, described in the BFSP Equality Act Statement.

[129] The University of Sussex did this, via its "Trans and Non-Binary Equality Policy Statement", which contained, inter alia, a requirement for "any materials within relevant courses and modules [to] positively represent trans people and trans lives" and a prohibition on "transphobic propaganda". These requirements breached condition of registration E1, and contributed, along with other failures, to the OfS fining the University of Sussex £585,000.

Secure Duty, unless an HEPs' actions are legally justifiable.[130] Such taking of sides also risks creating a hostile environment which constitutes harassment under the Equality Act and also risks a breach of free speech obligations under the HRA/Convention. An institution's disapproval of a particular lawful viewpoint has already been held to be sufficient to constitute harassment.[131] HEPs must therefore avoid imposing or enforcing controversial programmes and agendas, and in particular must not require Participants to commit (or give evidence of commitment) to values, beliefs or ideas being promoted by them, to the extent that to do so would (among other things) contravene their obligations under the Relevant FS Requirements, and this is reflected in the OfS Guidance[132]. This extends to things like EDI training.[133]

- Further, HEPs must therefore not impose ideologies, viewpoints or agendas (such as a "decolonisation" agenda) as part of the curriculum, to the extent that to do so would (among other things) contravene their obligations under the Relevant FS Requirements or their obligations as charities. In particular, an HEP "should ensure that decisions about the curriculum and the way it is delivered safeguard the autonomy of individual academics to teach and communicate lawful ideas that may be controversial or unpopular or that some (or many) find offensive, and do not restrict the exposure to students of such ideas because they are controversial or unpopular or because some (or many) find them offensive".[134] Further, "academic staff should not be constrained or pressured in their teaching to endorse or reject particular value judgements".[135]

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130 Examples 26, 29, 32, 34, 35, 38, 45, 51 and 53 in the OfS Guidance illustrate this well.

131 In the *Meade* case; see also the *Fahmy* case (both are described in the BFSP Equality Act Statement). See also the 2024 Opinion of Akua Reindorf KC into likely free speech failings at King's College, London, https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf: "A consequence of crafting internal policies with the aim of satisfying the ideological preferences of single-interest accreditation schemes is that it carries a risk of disturbing the balance of rights which the [Equality Act] seeks to achieve. […] It is likely to result in a conflict between the employer's policy aims and the rights of employees who hold protected philosophical beliefs which conflict with those of the accreditation schemes in question. For example, any requirement placed by [HEP] upon members of staff to demonstrate support of [a particular viewpoint] is plainly likely to place people with [opposing] beliefs at a disadvantage, particularly if it is accompanied by a penalty for failure to demonstrate such support." {

132 While OfS Guidance paragraph 147 (and others) and Examples 32 and 34 focus on academic staff in the employment context, similar protections under the Secure Duty also logically apply in respect of all Participants. The OfS also notes in paragraph 147 that requiring Participants to give evidence of particular viewpoints is distinct from requiring academic staff to teach "within the boundaries of disciplinary relevance and disciplinary competence".

133 OfS Guidance, paragraph 212 and Example 53.

134 OfS Guidance, paragraph 193.

135 OfS Guidance, paragraph 207 and Examples 51 and 15.

- **Research:** Participants should be free to undertake academic research within the law. This freedom should not be restricted or compromised in any way because of a perceived or actual tension between any conclusions that the research may reach or has reached or the viewpoint it supports, and the organisation's policies or values. Nor should it be restricted or compromised in any way because of any external pressure connected with those conclusions. If funding bodies exert pressure on researchers to reach or to avoid particular results, amending or terminating these funding arrangements is likely to be a reasonably practicable step for providers and constituent institutions to take.[136]

  HEPs should ensure that research ethics committees have particular regard to the importance of academic freedom and the risks to academic freedom in any decision, that the ethical review process is transparent, and that the review process is closely monitored for evidence of unlawful suppression of research.[137]

- **Sufficient institutional neutrality:**[138] The above requirements and risks highlight an underlying issue of more general importance: institutional neutrality. If an institution takes sides, in an area of passionate and polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a very obvious risk of disadvantaging (i.e. discriminating against) or creating a hostile environment for (i.e. harassing) people who hold that other viewpoint, and creating or tolerating environments in which attacking people for their viewpoints is acceptable. A number of recent public failures (with unlawful harassment and discrimination found by tribunals) have largely arisen as a result of an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate.[139]

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

137 OfS Guidance, paragraph 196 and Example 44.

138 "The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other…", per Choudhury P in *Forstater v CHG (Europe)* [2022] ICR 1, at paragraph 55. How have institutions so badly lost sight of this principle?

139 A failure of neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy*, *Meade* and *Phoenix/Open University* cases, described in the BFSP Equality Act Statement. Similarly, an absence of institutional neutrality must have contributed to the University of Sussex adopting a policy restricting the expression of gender critical views and a subsequent £585,000 fine issued by the OfS.

The OfS Guidance, Example 52, is an example of the underlying need for institutional neutrality. See also examples 12, 20, 34, 45, and 51.

HEPs and, whenever (expressly or by reasonable implication) representing the HEP as an institution (as, for instance, a spokesperson or a member of management opposed to when acting in their capacity as academics), their relevant employees and other representatives, therefore need to maintain sufficient institutional neutrality on matters of polarised public debate. By this we mean that they should take care to avoid actions, statements and language which by taking a side in relation to publicly contested issues risks suppressing free speech at the HEP and, in an extreme case risks breaching the HEPs legal and/or regulatory obligations and itself amounting to discrimination or harassment under the Equality Act. Achieving appropriate institutional neutrality on a piecemeal basis will be difficult. Such an approach will make compliance with the detailed legal requirements which will likely arise in relation to specific circumstances difficult. It will also involve risk and a lot of time from senior staff – and, perhaps inevitably, expensive legal advice. We therefore recommend that a general policy of maintaining institutional neutrality on controversial issues is the only realistic way forward for HEPs, and indeed it is being adopted by various institutions[140]. This was also recommended in the Dandridge Review.[141] This is also the effective expectation of the OfS: the OfS Guidance has several examples of the consequences of failures of neutrality.[142] Various HEPs have adopted institutional neutrality in recent years. One at last has adopted "institutional impartiality", which we consider is less likely to help an HEP protect free speech appropriately and thus minimise risks of compliance failures.

- **Avoid and reduce an oppressive atmosphere; cultures of conformity**: Research strongly evidences that an atmosphere exists at many HEPs or among their Participants in which many Participants feel intimidated about expressing their opinions.[143] This can arise as a

[140] In May 2024, following a scandal that cost its President her job, Harvard University announced that it had accepted a working group's report and recommendations that: "the [u]niversity and its leaders should not [...] issue official statements about public matters that do not directly affect the university's core function as an academic institution; the group reasoned that when the University 'speaks officially on matters outside its institutional area of expertise', such statements risk compromising the 'integrity and credibility' of [its]academic mission and may undermine open inquiry and academic freedom by making "it more difficult for some members of the community to express their views when they differ from the university's official position". In the UK, Imperial College and Queen Mary, London and others have adopted a formal policy of neutrality as part of their free speech codes. More are following them in doing so.

[141] In Appendix 3, paragraph 7. As explained in BFSP's statement ***The Dandridge Review re the Open University/Jo Phoenix***, this recommendation was more limited than is actually necessary in practice as a result of the limited focus of the Dandridge Review.

[142] Examples 26, 29, 32, 34, 35, 38, 45, 51 and 53.

[143] The Dandridge Review evidenced that there is a culture of consensus at the OU, that there are "right" ways of viewing things, which can lead to dissenting views being suppressed and individuals self-censoring, with fear mentioned by several witnesses: this does not appear to be unusual. See paragraphs 2.5-2.11 and 2.35, and also paragraphs 4.8-4.9.

result of the attitude of colleagues or online aggression, or the fear that job prospects may be hindered, or assessments of performance may be downgraded, in connection with their expressing certain opinions. In July 2025, Roger Mosey, master of Selwyn College, Cambridge for twelve years, gave a particularly lucid description of the problem, stating that academics at Cambridge had told him that in recent years they felt "afraid" and "frightened" of expressing their views, for fear of persecution or social ostracism.[144] Given that the existence of such an atmosphere gives rise to obvious risks of self-censorship and very harmful effects on free speech at HEPs, HEPs are required by the Secure Duty to take all reasonably practicable steps which might stop such an atmosphere developing in the first place or persisting if it already has. Qualifying for the Section 109(4) Defence under the Equality Act can also require this. It will involve HEPs being vigilant to prevent, identify and stop free speech transgressions; firmly enforcing its FS Code and related polices/rules; and taking the other steps such as promoting the importance and value of free speech set out elsewhere in this Part 3 and having appropriate induction and ongoing training. BFSP recognises that this is such a protean problem that it is not easy to address, and there may not be many further steps beyond those stated here which HEPs can realistically take, but they need to give this careful thought and take reasonably practicable action.[145]

- **Ensure that any staff or student courses, "tests" or "training"**, for instance induction for new arrivals, do not wrongly inhibit or suppress free speech, for instance by presenting one viewpoint as the only legitimate one, ensuring that negative consequences arise for people who disagree with viewpoints promoted at the training, and/or requiring "tests" to be answered in certain way to have "passed".[146] Making such training mandatory can

[144] Roger Mosey's article appeared in the Telegraph on the 26th July 2025. He quoted, in particular, Professor Mary Beard "I did take some nasty hits. Interestingly, a lot of those came from the political Left rather than the Right… all it took was saying something mildly off-message and suddenly I was being treated like a traitor… The idea that we all have to sign up to one monolithic cultural view is stifling." Mosey also notes overwhelming support for freedom of speech amongst university academics at Cambridge – in a vote on whether to "tolerate" or "respect" (as the university preferred) the views of those they disagreed with, 86.9% voted for tolerance. However, many academics were afraid of expressing their support publicly: their votes for tolerance were cast in secret ballot.

[145] For an example of kind of small step which might cumulatively lead to a less oppressive culture with respect to viewpoint expression, it is worth considering the OfS Guidance Example 50, which relates to trigger warnings. The guidance states that "A standing requirement to use content notes may encourage more intrusive investigation of the content of seminars, readings or speaker events. An expectation of content notes may also discourage academics from exposing students to new controversial material (so as not to risk wrongly including no, or the wrong type of, content note)." Although the example deals with speaker events, the point applies more broadly to, for instance, lectures and seminars. A step which would likely contribute to reducing oppressive cultures for viewpoint exchange would be to only use trigger warnings in specific circumstances, and where evidence suggests that they enable students or staff to access material.

[146] See OfS Guidance, paragraph 212 and Example 53.

also be a problem. EDI and other training regularly gives rise to unlawful action as result of enforcing agendas that go way beyond what is legally required under (principally) the Equality Act and so are effectively voluntary.[147] The OfS goes on to say that "by contrast, we do not intend to discourage institutions from offering or requiring training on sensitive subjects, including training that itself asserts positions with which some users may disagree"[148]. This is a delicate balance. Some training can be legally necessary, for instance in order to secure compliance with the Equality Act, but this is a specific and circumscribed category. See, in this context: BFSP's statement ***EDI and similar courses, training and tests: Free speech requirements and risks for English universities*** for detail about the relevant legal requirements and their effects in practice.

- **Avoid or restructure any association or relationship with any organisation which creates free speech compliance risks: risks with externally sourced materials.** HEPs often maintain relationships with external organisations, for example Stonewall and Advance HE, including by signing up to or participating in the accreditation or other schemes/programmes, charters, and commitments of such organisations. Where a relationship with an external organisation requires an HEP to take sides in relation to contested issues, or requires or encourages it to suppress the expression of views which dissent from the agenda being promoted by any such organisation, or results in it failing to maintain a sufficient level of institutional neutrality on contested issues, as discussed above, this creates profound compliance risks for that HEP. A policy template apparently sourced from the predecessor of Advance HE led directly to the University of Sussex's breach of condition of registration E1.[149] See BFSP's Statement ***Free speech risks of relationships with campaign organisations for English universities*** for greater detail

[147] For instance, training which informed staff (as the University of Sussex's "Trans and Non-Binary Equality Policy Statement" did) that communications "that could reasonably be expected to cause distress" (this wording is wider than equivalent wording under the Equality Act) amount to "abuse, harassment, or bullying" and "are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures" would violate a university's legal free speech obligations.

[148] OfS Guidance, paragraph 213.

[149] It may also have involved failures under the Equality Act. In a further example, the Dandridge Review, paragraph 2.27, notes evidence that the OU's membership of the Stonewall UK Diversity Champion's Programme undermined its institutional neutrality.

More generally, the policies or requirements of HEPs are sometimes written in ways which reflect the viewpoints or desired outcomes of campaign organisations, but which misrepresent relevant legal requirements or the nature of the HEP's and Participants' obligations and/or operate to suppress dissenting viewpoints, for instance through now-infamous "no debate" policies. Free speech issues with training and tests regarding diversity matters have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

about these risks. Specific examples of actions which are highly likely to involve unlawfulness or compliance failures include having policies, requirements and agendas which strongly promote contested agendas (which is likely to create a hostile environment for people with differing views and/or cause them to avoid expressing those views (chilling effect)) of such organisations and/or present negatively (or prohibit or effectively suppress) certain viewpoints on contested issues[150], discriminating against a person in connection with their lawful viewpoints, for instance by refusing them admission or "marking them down" in job application and promotion processes, or requiring candidates to commit (or give evidence of commitment) to certain values, beliefs or agendas[151]; and requiring "tests" in mandatory training to be answered in certain way to have "passed" (see the detailed discussion of these issues above and below).

Courses and materials (including templates for rules and policies) acquired from (or otherwise designed or approved by) external organisations, campaign groups or activists (such as Advance HE and Stonewall) will involve increased risks as regards compliance with an HEP's freedom of speech obligations, unless they have been carefully vetted by the HEP to ensure that they comply with its free speech obligations.[152] The University of Sussex's adoption of passages of a policy template provided by a predecessor of Advance HE led directly to its breach of registration condition E1. Accordingly, HEPs should either design such courses, materials, policies and requirements themselves having regard to their free speech obligations, or only rely on advice or use materials from third party providers if they have done enough work to secure that these materials are compliant with the Relevant FS Requirements, which is likely to entail:

- obtaining legally effective assurance that the advice/materials have taken account of the impact of legal and regulatory requirements for free speech protection and that appropriate specialist advice has been taken about compliance; and that they are

[150] A regular example being equating gender-critical views with transphobia, which was found to be unlawful harassment in the *Meade* and *Phoenix/Open University* cases discussed elsewhere.

[151] See BFSP's statement ***EDI considerations and inquiries in the recruitment process at English universities: Free speech compliance issues*** for detailed information on this issue.

[152] See the Reindorf Opinion for the legal risks of creating policies to satisfy the interests of campaign groups. Similar risks apply in respect of training courses. Relevantly, Ms Reindorf KC advised (at paragraph 70) that:

> "A consequence of crafting internal policies with the aim of satisfying the ideological preferences of single-interest accreditation schemes is that it carries a risk of disturbing the balance of rights which the [Equality Act] seeks to achieve. Of relevance in the current context, it is likely to result in a conflict between the employer's policy aims and the rights of employees who hold protected philosophical beliefs which conflict with those of the accreditation schemes in question. For example, any requirement placed by KCL upon members of staff to demonstrate support of the gender identity belief is plainly likely to place people with gender critical beliefs at a disadvantage, particularly if it is accompanied by a penalty for failure to demonstrate such support." https://sex-matters.org/wp-content/uploads/2024/04/KCL-advice-for-publication.pdf

confirmed as being compliant with such laws and requirements, with an indemnity against losses caused by that assurance not being correct; and/or

- themselves doing sufficient due diligence to secure compliance. The nature of that due diligence will depend on whether they have received the assurance referred to above. If they do not receive such assurance, they either need to themselves ensure compliance, or use a different source.

- **Not implement any accreditation/professional standards arrangement in a way that disproportionally interferes with freedom of expression.** Many HEPs operate courses that lead to professional qualifications because of their accreditation by PSRBs (Professional, Statutory and Regulatory Bodies), or other accrediting bodies. HEPs which provide accredited courses may be required, by the conditions of their accreditation, to enforce professional standards, for instance through 'fitness to practice' procedures. While professional standards may legitimately impose some restrictions upon lawful expression, any restrictions must be free speech compliant. See in particular the discussion of proportionality in relation to the HRA/Convention in Part 2, Section C above. In practice, the number of proportionate restrictions will be very small. HEPs must not implement or enforce any professional standards, or otherwise implement any accreditation arrangement, in a way which interferes with freedom of expression so as to contravene the Relevant FS Requirements. If concerned that an accreditation arrangement disproportionally interferes with freedom of expression, an HEP may wish to raise their concerns with the accrediting body.[153] In addition, HEPs with accredited courses must take various specified steps to ensure compliance.[154]

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[153] OfS Guidance, paragraphs 115 – 117 and Example 24 (and the case of *Ngole v Sheffield University* which it describes). See also the case of James Esses, who was expelled from a course provided by the Metanoia Institute, which holds an accreditation arrangement with Middlesex University, after he made it clear, publicly, that he held gender-critical beliefs. Esses brought an employment tribunal against Metanoia for discrimination and achieved a substantial settlement in his favour and a contrite apology from Metanoia. Pointing out to accreditation bodies that they may well be in breach of their legal obligations in relevant cases can help focus minds. It is worth also noting the case of *Meade v Westminster City Council and Social Work England* (2024), in which an employer and professional regulatory body were found to have harassed and discriminated against an employee by severely disciplining her after she expressed gender critical beliefs. For further details, see the BFSP Equality Act statement.

[154] OfS Guidance, paragraph 118. These are:

- make clear statements in or alongside fitness to practise policies protecting freedom of speech and academic freedom;

- highlight their FS Code in or alongside fitness to practise policies and procedures;

- provide and require suitable training on freedom of speech for any staff sitting on fitness to practise panels (or equivalent);

D. Management, staffing and training re free speech protection; the EDI function

- **Have appropriate systems and structures:** Free speech cannot be successfully promoted and protected unless there are clear and effective structures, policies and requirements for this, and a focused responsible officer to supervise and manage it (see the discussion of this in Section B above and elsewhere).

  That structure must be separate from the EDI function, which is a key consequence of the Dandridge Review[155], because of the insuperable conflicts between the desire (indeed it being a person's job) to promote and enforce EDI agendas and the need to protect dissent from aspects of those agendas.

  HEPs also need to have appropriate systems and staff in place to implement effectively their free speech protection structures and programmes (see below); and also their conflict management functions, so as to enable problems, especially online attacks and pile-ons, to be dealt with rapidly and effectively. Establishing, implementing, and appointing all of

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- monitor academic departments' implementation of fitness to practise schemes to ensure compliance with the 'secure' duty and with Convention rights; and

- ensure that students are aware of the relevant professional accreditation standards, and the implications of not meeting them, even where the HEP does not enforce them.

[155] The Dandridge Review refers throughout to the conflict between EDI agendas and their promotion and enforcement, and requirements relating to free speech. Staff within the EDI function will inherently have too great a conflict of interests to enable them to protect "protected viewpoints" under the Equality Act, and other free speech rights, as committedly and effectively as is necessary. The Dandridge Review states that:

- "The only possible way forward that allows for the appropriate manifestation of protected beliefs (even where those beliefs might conflict with another person's identity) and yet acknowledges each member of staff's fundamental right to determine and manifest their own identity, is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice" (paragraph 4.17); and

- the OU's approach to 'protected viewpoints' and other 'protected characteristics' under the Equality Act "should be distinct" (Appendix 3, paragraph 6).

The Dandridge Review focuses on this separation/distinction as a solution to conflicting rights under the Equality Act, which was the primary focus of the *Phoenix/OU* case. However, a separation between free speech protection and EDI functions is also a "reasonably practicable step" which would make a profound difference to free speech protection for the reasons given above, so should also be regarded as required pursuant to HERA. AFFS and BFSP have long been advocating this separation.

the structures, policies, systems, and staff described above will surely be required under the Secure Duty. Many are also reflected in the Dandridge Review.[156]

- **Staffing of free speech function**: these systems, structures and programmes need to be managed by appropriate staff, who are of appropriate seniority and experience, appropriately trained, have available time, and are even-handed and neutral in their handling of problems. They will need to act consistently and leave their own viewpoints "at the door", so not be conflicted by such strong personal views that they would struggle to maintain neutrality on particular issues. This will require a change in mindset; indeed, some people may not be suited to this role. (The people responsible for managing an HEP's requirements regarding behaviour, and managing disputes, should ideally be the same as, or at least regularly liaising with, those responsible for promoting and protecting free speech.)

- **Reduce the risk of the EDI function being a source of free speech problems**: the conflicts between agendas promoted under the EDI banner and the rights of dissidents from those agendas (the all-too-frequent example being the current controversy about the definitions of sex and gender and what constitutes transphobia) inevitably results in the EDI function being a source of free speech problems, and indeed this was at the heart of the failures at the OU which resulted in the Dandridge Review (which specifically identified these causal problems).[157] This requires:

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[156] The Dandridge Review compares (in paragraph 4.9) "the transparent arrangements for EDI and its visible committees and reporting lines, with the lack of visibility of arrangements for free speech and academic freedom". See Recommendation 8 ("Systems and structures should be put in place to support the promotion of free speech and academic freedom").

[157] EDI was cited in the Dandridge Review as a source of free speech problems at the OU as a result of the strength, general acceptance and rigidity of the EDI function and its agendas, and an imbalance between the resources allocated to EDI and free speech. This approach to EDI had the effect of undermining sustainable approaches to managing competing equality rights at the OU, as well as precluding legitimate debate and discussion about contentious matters. See paragraphs 4.8-4.9; see also paragraphs 2.14-16. The Review finds that "the only possible way forward is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice" (paragraph 4.17).

The Dandridge Review quotes one respondent, who ably describes the problem:

> "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. 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."

For evidence of this imbalance at HEPs generally, see AFFS' study of resources committed by top universities to EDI and to free speech, respectively, at https://affs.uk/edi-and-free-speech. The ratio was 214:1, and very few employed a dedicated free speech officer. See also its subsequent reports on HEPs

- an understanding within the EDI function: of the distinction between those relatively narrow aspects of most HEPs' EDI agendas and programmes which reflect legal obligations or the need to avoid infringements (for instance discrimination or harassment under the Equality Act), and wider programmes and agendas, which are effectively optional; of the requirements to protect free speech in the Equality Act and the other Relevant FS Requirements and of the limited nature and extent of the "process duty" in the PSED and its relative weakness compared to the "outcome duties" in the Relevant FS Requirements; and how those requirements interact with EDI programmes and agendas;
- an understanding within the EDI function that Relevant FS Requirements include the right to dissent from EDI policies, without suffering disapproval, sanctions or other adverse consequences;
- having the right structures, systems, policies, duties/requirements, personnel and training in place to ensure that EDI agendas are managed so as not to infringe the Relevant FS Requirements; and
- separation between the EDI and free speech protection functions as discussed above.

- **Training of all staff**: the Dandridge Review found that, at the OU, the handling of disagreements, disputes and complaints, the interpretation of requirements and other issues was poor, and cited a lack of training as a primary problem.[158] It is likely that this is a very widespread problem, not least because so many HEPs appear to be ill-prepared to ensure compliance with the requirements in practice discussed here.

  HEPs need to ensure that all staff have adequate induction (see Section B above) and training about protection of free speech and academic freedom, and that they understand the nature of the requirements to protect free speech.[159] The nature and extent of such training should take account of the nature the Participant's role within the HEP, and will likely be particularly important and extensive for staff who are involved in functions

imposing unlawful EDI requirements in the recruitment process – https://affs.uk/edi-requirements-university-recruitment; and demonstrating a correlation between levels of EDI spending and of free speech compliance failures – https://affs.uk/edi-spending-correlated-free-speech-failures.

158 Finding B contains some useful detail.

159 This would appear to be required in practice by the Secure Duty as it would make a material difference to securing free speech and is a reasonably practicable step to take. The OfS Guidance (paragraph 210) states the following: "'adequate training' means that staff will have an up-to-date understanding of: the FS Code and how it applies in practice, including its application in detail to the member of staff's role in the organisation, and the requirements of [HERA], the HRA and the Equality Act in relation to freedom of speech and how they apply in detail to the member of staff's role in the organisation". This should further extend to understanding their duties under the Code and Acts.

(See Section B above for a discussion of what "adequate induction" means.)

which could create free speech risks or have free speech implications, including anyone involved in appointments, promotions and disciplinary processes.[160]

All staff with responsibilities for free speech related functions discussed above need to be properly trained for their roles[161]. This includes staff in wider areas, and EDI in particular, which have potential implications for free speech: they need to understand the Relevant FS Requirements sufficiently to ensure that they do not cause compliance failures.

(Free speech induction for Participants is discussed in Section B above.)

E. Meetings and events

- **Meetings and events:** Taking all reasonably practicable steps to ensure that the use of any premises of the HEP is not denied to any person or body because of their viewpoints, policies or objectives and that the terms on which such premises are provided are not to any extent based on such grounds (i.e. including as to the requirements imposed in relation to hiring and using venues); and taking various specified steps to ensure that meetings are conducted appropriately. This applies both to internal meetings and ones with external speakers (including participants in debates or discussions).[162] A number of other requirements and factors arise in relation to meetings.

  - An HEP's FS Code must set out: the procedures to be followed by both staff and students of the HEP and of any associated students' union in connection with the organisation of meetings and other activities at the HEP's premises;[163] the criteria to be used by the HEP in making decisions about whether to allow the use of premises and on what terms; and the conduct required of such persons in connection with those meetings and activities; it may also deal with such other matters as the governing body

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[160] The OfS Guidance states that, so far as reasonably practicable, adequate training should be required for all staff involved in making decisions relating to admission, appointment, reappointment and promotion, disciplinary matters, employment contracts, processes and policies relating to equality or equity, diversity and inclusion, including the PSED, fitness to practise, harassment and bullying, IT policies and processes, including acceptable use policies and surveillance of social media use, the Prevent duty, principles of curricular design, research ethics, speaker events, and staff and student codes of conduct.

The Dandridge Review, Recommendation 5, paragraph 5.5.2 states that all staff should have mandatory training on (inter alia) its behaviour requirements, which will include ones for protecting freedom of speech. Recommendation 6 states that managers must be trained in enforcing expected standards of behaviour and to intervene effectively to prevent free speech problems.

[161] See footnote 160 above.

[162] From HERA **Sections A1(3) and A2**. See also the OfS Guidance paragraph 173.

[163] The government has committed, in its 2025 policy paper, *The Future of the Higher Education (Freedom of Speech) Act 2023*, to extend the meaning of "HEP premises", with respect to HEPs' FS Codes, to include premises not owned by HEPs but occupied by students' unions.

consider appropriate.[164] This would logically include a process for the timely consideration of risks to the event, the purpose of which would be to put in place steps that permit the event to go ahead. The FS Code should specify who would be responsible for planning and taking these steps.

- HEPs will need to be actively involved in monitoring and supervising security issues and assisting often inexperienced organisers to arrange appropriate security. Save in exceptional circumstances, HEPs must not require the organiser of an event to bear any of the costs of security relating to the event.[165] Their FS Codes must set out the criteria for making decisions about whether to allow the use of premises and on what terms, and for determining whether there are such exceptional circumstances[166]. These criteria should be clear, objective and neutral and should be framed in such a way that "exceptional" circumstances only arise very rarely. Both the criteria, and the definition of what counts as exceptional circumstances, should not (so far as is consistent with the law) depend on any of the relevant person's or body's viewpoints, policies or objectives or the ideas or opinions likely to get legal expression at the meeting.[167]

The cost-effective course, in the long run, is for HEPs to enforce their rules for free speech protection consistently, and to remind Participants regularly about the risks of non-compliance.

- The Secure Duty requires, within limitations, that HEPs manage the behaviour of their Participants more widely, for instance on Constituent Institutions' and students' unions' premises. See Section H below.

See BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for detailed information about the requirements relating to meetings.

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[164] See HERA **Section A2**. The OfS Guidance contains detailed requirements, including about the procedures for organising and required conduct at meetings, at paragraphs 170 to 180. Paragraph 173 states that: "The scope of the procedures section of the document should be broad. It should not be limited to policies relating to external speakers or events. The code of practice should apply (and be linked) to the procedures to be followed by staff and students of the provider …] when organising teaching or research-related activities, as well as other activities listed in paragraph 171d above. There should be links to the code of practice from the documents setting out the detailed procedures relating to those other activities."

[165] HERA **Section A1(10)**.

[166] HERA Section A2(2)(d).

[167] The OfS Guidance contains detailed requirements about security costs, including the above, at paragraphs 181 to 188: see also Examples 41, 42 and 43. An HEP "might have a stated policy that it will not pass on the first £X of security costs associated with the use of its premises, where X is stated as a numerical quantity that applies to all individuals or bodies regardless of their ideas, opinions, policies or objectives; and where security costs rarely exceed £X"; but it must apply this policy uniformly.

F. Protests and demonstrations

- **A complex problem**: Protests and demonstrations at HEPs raise peculiarly complex and difficult issues for them to negotiate. They face potentially conflicting needs and requirements. They need to:
  - ensure the physical safety of their Participants and prevent harassment and intimidation which is unlawful or contrary to their own FS Code and other requirements in this regard;
  - prevent excessive and unreasonable disruption of the activities of the HEP and its Participants, including preventing the disruption of events through the "heckler's veto"[168]; and
  - take the steps required of them to protect the free speech of the protesters and demonstrators, and also ensure that protests and demonstrations do not inappropriately interfere with others' free speech rights.
- This can involve difficult balancings of needs and requirements. The protests and demonstrations in 2024 about the conflict in the Middle East raised a particularly difficult nexus of concerns and conflicting requirements in this regard. Important points include:
  - An HEP must not restrict the speech of protesters who are Participants, in any way, including by regulating the time, place, and manner of the protest, except where doing so is compliant with the Secure Duty (as regards the speech of protesters who are Participants) and also, separately, compliant with the Convention. (This duty does not extend to individuals who may have joined a protest on the grounds of a university or college but have no other relation to that institution.)
  - HEPs should continue to ensure the physical safety of all students and staff on campus. Free speech rights do not, and cannot, include discrimination against or harassment of students or staff, or any other conduct prohibited by law. Legitimate limitations on free speech rights also include a narrow range of other requirements (such as an HEP's anti-harassment and -bullying rules), provided that these other requirements are for a legitimate aim and "proportionate", and enforced "proportionality "as contemplated in the HRA – see the discussion of conflicts of free speech rights below.) While this was not specifically stated by the OfS, this obviously extends to protests against individuals, which are at greater risk of constituting harassment. The OfS expects HEPs to remain vigilant to identify unlawful harassment,

[168] The OfS Guidance (paragraph 111) states that "this may include speech that is delivered at such a volume and for such a length of time that it prevents any other persons from being heard or from engaging in a lesson, debate or discussion. Similarly, it is unlikely to be a reasonably practicable step to allow incessant shouting in, or outside, a lecture that prevents anyone else from speaking or being heard in the lecture theatre, thereby preventing teaching and learning."

or other speech or expression outside the law, and to take specified steps if this is identified.[169]

- To the extent that protesters' speech prevents an HEP's essential functions of teaching, learning, research, and the administration necessary for these three things from taking place, it is likely that HEPs can compliantly restrict the protesters' protest rights (and thus arguably, speech). To be compliant, HEPs must restrict the protesters' speech no more than is necessary to ensure that the essential functions of the HEP can go ahead. Further, to the extent that protesters' speech prevents the ordinary activities of the HEP other than its essential functions, for instance graduation ceremonies, from continuing, an HEP may be able to compliantly restrict the protesters' speech. However, any restrictions on speech should be narrowly tailored to permitting that activity to go ahead.[170]
- Restrictions on speech should focus on the time, place and manner of that speech and not, in intent or effect, restrict legally expressible viewpoints (or be framed so broadly that they may be used to punish or suppress a legally expressible viewpoint). HEPs must restrict protesters' speech no more than is legally justifiable. This will require narrowly tailoring any restrictions on speech to ensure that they extend no further than is legally justifiable.[171]

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[169] The OfS issued guidance on protests concerning the events in the Middle East in 2024, in a letter dated 10th May 2024: https://www.officeforstudents.org.uk/publications/protests-on-campus-tackling-harassment-and-securing-freedom-of-speech/. The OfS states that HEPs should adhere to relevant policies and procedures in reporting unlawful harassment, and other potentially unlawful conduct to the police and other relevant authorities as a matter of urgency where appropriate; take timely and appropriate action, again in accordance with agreed policies and procedures, to support students or staff affected by unlawful conduct; and, in the context of unlawful harassment, have in place clear policies so that students and staff understand how they can raise issues, and how they can expect these issues to be handled.

[170] Paragraph 108 of the OfS Guidance states "Providers and constituent institutions have an interest in continuing ordinary functions relating to student life beyond learning, teaching, research and underlying administrative functions. These might include, for instance, celebrations following graduation ceremonies or student social events. However, any regulation of speech to protect these additional functions should be narrowly tailored to that function and should not restrict the expression of any particular viewpoint."

Example 13 describes how a university would be more likely to comply with the Secure Duty, when requiring protesters to vacate a lawn to be used for graduation ceremonies, if the requirement is targeted to the particular lawn, and does not extend long after the relevant ceremonies, and is not targeted at a particular viewpoint.

[171] For instance, a requirement that protestors should not intrude into teaching spaces is suitably neutral as to the viewpoint expressed. By contrast, a requirement that protests should not undermine the university's values may suppress lawful expression of a particular range of viewpoints.

Further, while the OfS does not expressly refer to this, there may well be other legal requirements as to when, how and where protests and demonstrations are (or are not) held and conducted. These need to be factored in.

- **Conflicts of free speech rights**: As the OfS notes in the OfS Guidance,[172] protest is itself a legitimate form of free speech, but protest must not shut down debate, and the content of an HEP's FS Code regulating conduct at/in relation to meetings must reflect that principle. Therefore, protests and demonstrations which are intended to or have the effect of preventing or seriously disrupting legitimate meetings and events will be contrary to an HEP's FS Code and associated requirements, if the HEP has the right policies in place. In order to comply with the Relevant FS Requirements, HEPs will need to intervene actively in order to secure free speech at the event. Provided that the HEP's requirements and relevant actions are compliant, including 'proportionate' as contemplated in the HRA, and enforced proportionately, it can be legitimate to stop protesters from shutting down or seriously disrupting debate or the expression of viewpoints, for the purposes of securing free speech at the relevant meeting or event. Such actions to prevent protesters from preventing others' speech should focus, wherever possible, on restricting the time, place, and manner of the protesters' speech, rather than their speech itself.[173] This will inevitably involve difficult and urgent decisions, and will not always be easy in practice. Good preparations, including actions which have been confirmed in advance as being "proportionate" in relevant circumstances, will be essential. The OfS states that it may be a reasonably practicable step (and therefore required under the Secure Duty) for HEPs to have a process for identifying controversial events ahead of time and putting in place mitigating steps to allow the events to go ahead.[174]

For more information, see BFSP's Protests Statement.

G. Admissions, appointments, promotions and termination: employment; requiring commitments to values

- **Admissions**: An HEP should not discriminate against a person in connection with their lawful viewpoints, for instance by refusing them admission (as students or academics), marking them down in the admissions assessment process or revoking or changing the terms of their admission to the HEP.[175]

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172 At paragraph 180d.

173 OfS Guidance, paragraphs 112 and 160. Examples 6 and 13.

174 OfS Guidance, paragraph 201, and Example 48.

175 Pursuant to:

- the Equality Act, in respect of people who have viewpoints which count as "protected" for its purposes; and the HRA; and

- External criteria and influence: An HEP should not admit students or visiting academics on the basis of funding arrangements or other criteria that have the effect of restricting their or others' free speech or academic freedom within the law. It will very likely be a reasonably practicable step for HEPs to undertake robust and detailed due diligence checks to ensure students and academics are not admitted on such arrangements. HEPs should be proactive about checking that those applying to be students or visiting academics do not pose risks to academic freedom.[176]

- **Employment, appointments and promotions**: An HEP must not discriminate against a person in respect of their lawful viewpoints in connection with their employment generally. An HEP should secure that, where a person applies to become a member of staff or for promotion, that applicant is not adversely affected in relation to the application, or the appointment or promotion process, because of lawful viewpoints held or previously expressed or because (in the case of applicants for academic positions) they have exercised their academic freedom within the law.[177]

- **Discipline and termination**: Staff and holders of other positions should not be prejudiced or subjected to disciplinary measures because they have lawfully expressed their viewpoints.[178] HEPs should not terminate employment for, or deny reappointment to, any member of staff because they hold or have expressed a particular lawful viewpoint, and must secure that no member of academic staff is at risk of losing their job or any privileges because they have exercised their free speech rights under HERA.[179]

- **No EDI commitments or statements:** An HEP should not:

  - the Secure Duty, in respect of people who count as Participants. OfS Guidance paragraph 136 relates HERA to students applying for another course and the revocation or change of offers of admission, but this applies more widely.

[176] See OfS Guidance paragraph 137 and Example 25.

[177] This is an important requirement pursuant to the Secure Duty (including as it relates to academic freedom), the Equality Act (in respect of people who have Protected Viewpoints for its purposes) and the HRA. This is reflected in OfS Guidance paragraphs 138 and 150: while this is stated there to apply in respect of applicants for academic positions only, the obligations apply more widely.

[178] The University of Sussex, in its "Trans and Non-Binary Equality Policy Statement", included prohibitions against "stereotypical assumptions about trans people" and "transphobic propaganda" – both undefined. These undefined prohibitions created the possibility that disciplinary proceedings could be initiated or carried through against Participants who expressed lawful views (in that case, gender-critical ones). Both prohibitions were found by the OfS to contravene condition of registration E1.

[179] Pursuant to the Secure Duty; the Equality Act in respect of people who have viewpoints which count as "protected" for its purposes; and the HRA. See OfS Guidance, paragraphs 145 and 146, and Example 31.

- require applicants for positions or promotions to commit (or give evidence of commitment) to values, beliefs or ideas; or
- require Participants to commit (or give evidence of commitment) to values, beliefs or ideas,

if that may disadvantage, or create an intimidating or hostile environment for, any candidate or Participant who holds, or has expressed, particular lawful viewpoints; or an academic for exercising their academic freedom within the law; or otherwise infringe the Relevant FS Requirements.[180]

More widely:

- seeking information on Participants' viewpoints/alignment with values, beliefs or ideas at all in connection with employment, appointments or promotions must be being done in preparation to discriminate based on their viewpoints (why else?), and more generally is likely to have an intimidating/chilling effect (and thus potentially constitute harassment). This should not happen; and
- taking actions which pressurise people who want a position or promotion, or indeed a career at an HEP, to suppress or hide their opinions or take actions or say things they do not believe in, in order to (as it appears to them) maximise their chance to secure a position, progress in their careers or obtain research funding, is likely to be contrary to the Relevant FS Requirements.[181]

See in this context: BFSP's statement ***EDI considerations and inquiries in the recruitment process at English universities: Free speech compliance issues*** for more information on this complex area.

- **Records**: An appointment, promotion, disciplinary or dismissal process should include a sufficiently detailed record of all decisions so far as they have a connection with a

[180] OfS Guidance paragraph 147 make clear that this requirement is distinct from a requirement to teach within the boundaries of disciplinary relevance and disciplinary competence, which is likely to engage the essential function of teaching. See also the footnote immediately blow.

[181] The above are important requirements pursuant to:

- the Equality Act, in respect of people who have Protected Viewpoints for its purposes; and the HRA; and
- the Secure Duty in respect of Participants and external applicants. They are stated in the OfS Guidance at paragraphs 139, 147 and 151 and evidenced in Examples 27,32 and 34. While this is stated in most of these places to apply in respect of applicants for (and holder of) academic positions only, the obligations under the Secure Duty apply more widely in respect of all employment, as evidenced by Example 34.

The penalties imposed on the University of Sussex (discussed elsewhere) are a good if indirect example of the perils of getting this wrong.

Participant's viewpoints or expression of them. Where relevant, this record should include evidence that the relevant process did not penalise a candidate or member of staff in connection with their viewpoints or for their exercise of free speech or academic freedom.[182]

- **Including appropriate free speech related requirements in all relevant employment or appointment contracts** and in the job specification for all appointments of senior staff and in their contracts with students.[183]

H. Relationships with colleges and other Constituent Institutions and students' unions

- **Application of Relevant FS Requirements to Constituent Institutions and students' unions**: Similar duties and remedies under HERA to those for HEPs apply, with minor adjustments, to colleges, halls, and other Constituent Institutions of HEPs. HERA, as the government intends to amend it, will not place direct obligations on HEPs' associated students' unions, to the extent that they are separate legal entities.

  The Equality Act regime applies to Constituent Institutions and students' unions, although the PSED does not apply to students' unions. The HRA does not apply in respect of Constituent Institutions which are not themselves public authorities, or to students' unions.

- **Obligations of HEPs relating to Constituent Institutions and students' unions: enforcing own requirements**: It must be that most of HEPs' duties under HERA[184], for

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[182] Per OfS Guidance paragraphs 140, 148 and 152. (These paragraphs are stated as focusing on protecting academic freedom, but this logically extends to all employees.) It may be that this extent of record keeping goes beyond what is required pursuant to HERA, but it is the OfS' regulatory expectation, and good governance must require sufficient record keeping to demonstrate that an HEP is preforming its duties while aiming to avoid excessive, onerous paper-pushing.

[183] These would most often be framed as general contractual provision requiring compliance with an HEP's policies in force from time to time, with free speech and anti-bullying/discrimination policies included within that general wording.

[184] With the major exception that the requirements in HERA about the FS Code as it applies to meetings (Sub-sections A2(2)(b) and (c)) only apply in respect of the organisation (etc) of meetings and events on the premises of the HEP, which would include where they are occupied or used by Constituent Institutions or students' unions. They do not apply to meetings on Constituent Institutions' or students' unions' own premises. The government has committed to removing this exception, see footnote 187 below.

The extent to which the Secure Dity extends in respect of meetings on Constituent Institution or students' union premises is somewhat unclear.

Meetings on Constituent Institution premises are discussed in more detail in BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks***.

instance as regards its FS Code and prohibiting Participants from bullying other Participants for their viewpoints, do not somehow cease to apply just because an action or event happens to take place within a college or on a students' union's premises, and they should continue to enforce those requirements against their Participants, irrespective of the location of the relevant actions.[185] Participants are subject to their HEP's FS Code and related requirements regarding behaviour and actions which relate to the HEP and other Participants, irrespective of where those actions are actually taken. This includes actions within colleges and other Constituent Institutions and on students' unions' premises (and indeed elsewhere, for instance organising a pile-on from their rented flat). That the OfS see it this way is evidenced by Example 49 of the OfS Guidance. This should be made clear in HEPs' FS Codes. This involves various detailed considerations.

- Relationships with Constituent Institutions: To the extent that a Constituent Institution has and correctly applies its own FS Code and requirements regarding behaviour pursuant to HERA, there is a strong argument for arrangements between the relevant HEP and that Constituent Institution to avoid duplication between their respective relevant activities for free speech protection. Steps which would otherwise be reasonably practicable for the HEP to take may well not be, if those steps would merely duplicate the actions of the relevant Constituent Institution, and indeed may actively cause confusion and other problems. This may apply, in particular, to supervision and enforcement of the HEP's FS Code as regards behaviour. But a residual ability should be retained for the HEP to intervene under its own requirements where a Constituent Institution fails to fulfil its obligations.

  Two obvious situations are:

  - an event/action which has no implications outside a Constituent Institution: it could be agreed that this is a matter for the Constituent Institution, with a residual

[185] See *R. v University of Liverpool Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667 (per Watkins LJ at p132 D-H). The Secure Duty is one "to ensure, so far as is reasonably practicable, that those whom [an HEP] may control, that is to say its [Participants], do not prevent the exercise of freedom of speech within the law [….] in places under its control". This was stated in respect of Section 43 of the Education No.2 Act (1986), which has been replaced and strengthened in HERA. This case is relatively old and pre-internet, so it would be incautious indeed for an HEP to turn a blind eye just because something is being done "off campus". E.g., if there was a social media campaign (organised from a college or a Participant's home) or protesting by Participants outside an academic's house, an HEP would be well advised to assume it can't rely on *Caesar-Gordon* to wash its hands of the issue, and needs to take reasonably practicable steps to stop the relevant misbehaviour. There is likely to be ample scope for certain types of activist activity to be distinguished from the type of activity in *Caesar-Gordon* and an HEP to be found still subject to the Secure Duty in respect of it.

For instance, a Participant bullying another by organising an online pile-on should not be regarded as not prohibited by an HEP's policies/rules just because they happened to be sitting inside a college or students' union (or indeed their rented flat) at the relevant time. This would be absurd and would in many cases render some HEPs' key duties nugatory (we have seen Cambridge argue this; it was not a good look and appeared to reflect a misunderstanding of their duties).

power of the relevant HEP to intervene under its own requirements (to the extent applicable) if the Constituent Institution has not taken appropriate action; and

- an event/action which has implications both within and outside the Constituent Institution: here it could be agreed that the HEP is the primary action-taker in respect of likely breaches of its requirements which has implications both within and outside the Constituent Institution (with a residual right/power in the part of the Constituent Institution to intervene if there are likely breaches of its own requirements and the HEP has not taken appropriate action) and the Constituent Institution is the primary action-taker in respect of other actions/events (if any), per the above.

  In particular, HEPs and their Constituent Institutions should be alert to cases where groups, organisations, or individuals partly or wholly external to a Constituent Institution attempt to restrict free speech within a Constituent Institution, for instance, by demanding that an employee of the Constituent Institution (who is also a Participant) is sacked for holding lawful views, or by seriously disrupting a meeting. In these cases, obligations for HEPs to take action to protect free speech, for instance, by disciplining, where appropriate, those attempting to restrict free speech, are highly likely to arise.

In both cases, a concern (under HERA in particular) will be: how much scope is there for such arrangements between HEPs and Constituent Institutions while remaining compliant with the Relevant FS Requirements? That will come down to what is "reasonably practicable". BFSP would be surprised if the OfS did not show understanding for the complexities of this situation if the institutions concerned had put sensible arrangements in place and had made committed and careful efforts to comply with their obligations.

There are special complexities regarding meetings and events on Constituent Institution premises. See BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for further discussion.

- While students' unions are not subject to direct obligations under HERA, their administrators may be HEP employees and their officers, members and participants HEP Participants, and so subject to their HEP's FS code and other requirements, if appropriately written. To the extent that those people take actions which relate to the HEP or other Participants or which conflict with the HEP's FS Code or requirements regarding behaviour more widely, they are subject to intervention and enforcement despite the fact they may be operating within the students' union's premises or in respect of the students' union and its members. That the OfS see it this way is evidenced by Example 49 of the OfS Guidance. HEPs need to use their powers or influence as regards their students' unions: this is discussed below.

- **Other obligations of HEPs relating to Constituent Institutions and students' unions:** The Secure Duty applies to a degree in respect of the behaviour of Constituent Institutions

and students' unions, to the extent relevant for securing freedom of speech for Participants involved with them[186] (although, as Constituent Institutions are subject to their own direct obligations under HERA, the requirements for their HEPs to take action in respect of their behaviour will inherently be different from those that apply in respect of their students' union). The question must be: what are those steps that are reasonably practicable, given the nature of the relationships involved, for an HEP to take to ensure that its Constituent Institutions and students' unions are taking appropriate actions to secure freedom of speech for Participants. Statements by the DfE in June 2025 support this view.[187]

- Reasonably practicable steps would include an HEP working to ensure that its Constituent Institutions and students' union are aware of the Relevant FS Requirements and adopt, comply with, and enforce policies, rules and practices of their own so as to reflect/give appropriate effect to the Relevant FS Requirements as regards Participants (but not in respect of people within the Constituent Institution or students' union who are not Participants), although their ability to do this can be subject to severe limitations in practice as discussed below. (To be clear, the existence of such duties would not thereby render an HEP in automatic violation of HERA as a result of the actions or failures of its relevant Constituent Institution or students' union.)

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[186] Secretary of State for Education, Bridget Phillipson, stated in January 2025: "I fully expect student unions to protect lawful free speech, whether they agree with the views expressed or not. I also expect HE providers to work closely with them to ensure that that happens and to act decisively to ensure their student unions comply with their free speech code of conduct." Hansard, Bridget Phillipson's Spoken Contributions, Higher Education Regulatory Approach. https://hansard.parliament.uk/Commons/2025-01-15/debates/1A36B4CA-1394-4601-B8FE-9C6BA134000B/details

[187] Section 1 of the DfE publication of June 2025 ***The future of the Higher Education (Freedom of Speech) Act 2023***, states that: "We intend to put beyond doubt through legislation:

- that [HEPs] are required to set out in their code of practice how their students' union should secure that affiliation is not denied to any student society on the grounds of its lawful policy or objectives, or the lawful ideas or opinions of its members
- that there is a duty on [HEPs] to take reasonably practicable steps to secure compliance by their students' union with that provision in the code of practice
- that complaints about whether an [HEPs] has fulfilled its duty to take reasonably practicable steps to secure compliance by staff, students and students' unions with its code of practice (including on affiliation) will be in scope of the OfS's free speech complaints scheme".

At page 13, the DfE states that HEPs "have levers to secure compliance [by their students' unions], including often through control of their funding and the premises available to them. We expect [HEPs] to work very closely with their students' unions to secure freedom of speech."

- To the extent that a students' union occupies or uses premises owned by or under the control of the HEP, it would be reasonably practicable for the HEP to make compliance a condition of occupation or use, or otherwise to exert an appropriate degree of control over the students' union's conduct in relation to freedom of speech. An HEP's FS Code must set out procedures to be followed by its associated students' union in connection with meetings on the HEP's premises, and the HEP must take those reasonably practicable steps to ensure that its students' union complies with the FS Code[188].

  The DfE has stated that it will be amending HERA to extend HEPs' obligations so as to apply in respect of students' unions' premises that are not HEP premises, and that in the meantime, HEPs can, and in its view should, voluntarily continue to take reasonably practicable steps to ensure that their students' unions fulfil their obligations under codes of practice in relation to events and meetings on non-HEP premises. This is a focused example of the more general principle stated above that the Secure Duty applies to a degree in respect of the behaviour of Constituent Institutions and students' unions.[189]

HEPs will also be liable under the Equality Act for the actions of their own employees within their Constituent Institutions or their students' unions, depending on the circumstances (e.g. college staff making decisions or providing information that are relied on by the HEP that adversely affect the outcome of an application for admission to or a position with the HEP).

There are likely, however, to be significant limitations on HEPs' ability to control the behaviour of their Constituent Institutions and students' unions; or their use and management of their own premises. Many Constituent Institutions and most if not all students' unions are separate legal entities and have extensive operational independence, so an HEP will likely not have much effective day to day control over their actions. All will depend on what actions would be "reasonably practicable" for the purposes of the Secure Duty, and whether they have been taken. This is fraught with uncertainty.

- Many colleges are separate legal entities and have long-standing operational independence, although this has significant limits so should not be used as an unjustifiable excuse for inaction by the HEP concerned, as has happened (see the discussion above). In any event, the availability of soft power (e.g. through conference of colleges and the like) might, at the least, require HEPs to endeavour to provide leadership about free speech and academic freedom and to promote best practice and the like.

- Likewise, students' unions have extensive operational independence, so an HEP will likely not have much effective day to day control over their actions. It must, however, be potentially reasonably practicable for HEPs to impose requirements to secure free

188 HERA Section A2(2) and (4).

189 In Section 1 of the DfE publication mentioned in footnote 187 above.

speech through the agreements, memoranda of understanding and the like between them and their students' unions and their effective power through the money they contribute to their students' unions.

The following factors need to be kept in mind:

- there are very significant variations in the legal and governance structures of Constituent Institutions, and in their relationships with their relevant HEPs, with greater or lesser control or day-to-day influence by the relevant HEP, so every case/relationship will require individual consideration;
- the matters discussed above involve judgements in respect of fine-grained points of law in an area with little or no jurisprudence: case law or guidance will at some point emerge which will confirm or modify the above; and
- given the legal uncertainty in this area, the safest course for HEPs to avoid liability for free speech failures in Constituent Institutions and students' unions is to work proactively, through a variety of realistically available means, to ensure that free speech is secured in Constituent Institutions and students' unions.

I. Information on free speech implications for various topics

BFSP's website provides detailed information on free speech compliance requirements in various contexts, including the following:

- **Protected viewpoints under the Equality Act: Risks and necessary actions for employers and others.**
- **The Dandridge Review re the Open University/Jo Phoenix: What all universities need to know – and do.**
- **Liability for discrimination and harassment by staff against people with protected beliefs under the Equality Act: The Phoenix case**.
- **Governance requirements re free speech at English universities: Severe consequences of failure: the Sussex Case.**
- **Open letter from free speech campaigns re adopting Institutional Neutrality.**
- **Know your free speech rights.**
- **Free speech codes: compliance checklist.**
- **Meetings at English HEPs: Free speech requirements and risks.**
- **Managing protests and demonstrations: free speech and other issues.**
- **EDI and similar courses, training and tests: Free speech requirements and risks for English universities**.

- **EDI considerations and inquiries in the recruitment and research approval process at English universities: Free speech compliance issues**.
- **Requirements re governance and appointing a free speech officer**.

Best Free Speech Practice

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

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Important: *This document:*

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

Appendix – Analysing and addressing free speech issues; "proportionality"; the appropriate scope of anti-harassment and anti-bullying policies; Condition E6

The OfS's 3 Steps for analysing and addressing free speech issues

A significant development in the final OfS Guidance is the addition of a new Section 2 with a "framework for assessment", which sets out a way in which free speech issues (typical examples being where a Participant's speech is under attack or activists are pushing for a meeting to be cancelled) can be analysed/assessed and which "may be helpful for assessing compliance with" the Secure Duty. This is very helpful in clarifying how the OfS sees the appropriate analytical process and adds regulatory certainty to a technical and complex area. The "3 Steps" which the framework envisages are generally consistent with how BFSP understands the law to operate in practice, although there are some details which could be explained more clearly: these are reflected in Parts 2 and 3 above. While the 3 Steps are not stated as being mandatory, HEPs would be ill-advised not to follow them in practice wherever possible.

Step 1: Is the speech 'within the law'? If yes, go to step 2. If no, the Secure Duty does not apply.

> If speech is contrary to other laws (such as criminal laws and civil laws preventing specified types of discrimination or harassment and defamation), it is not protected under the Secure Duty. HEPs therefore need to consider carefully whether any legal requirements ("**contrary laws**") are, in fact, contravened by the relevant viewpoint or its expression so as to render it unlawful. See the discussion of this subject at Part 2A above. In this review, HEPs must be careful not to over-interpret the contrary laws, i.e. treat them as having wider application than they actually have in law. Expressions of viewpoints will rarely be unlawful (even if controversial or very offensive to some). Subjective and incorrect interpretation of contrary laws is a real risk area for HEPs, and their staff personally. See further discussion of this below.

Step 2: Are there any 'reasonably practicable steps' to secure the speech? If yes, take those steps. Do not restrict the speech. If no, go to step 3.

> Questions will regularly arise as to whether there are steps that are, as a matter of fact, reasonably practicable to take in the relevant circumstances and, in particular, whether other legal or regulatory obligations on (or justifiable and compliant requirements of) an HEP render an action not reasonably practicable. See the discussion of this at in Part 2A above.
>
> The OfS Guidance is very helpful in stating how the OfS sees what the relevant factors are (and are not) in assessing this crucial step. The interaction of the duties to protect free speech with "competing" requirements and agendas is complex and contested, and has been a source of costly mistakes on the part of HEPs – the *Stock*/*Sussex* and *Phoenix*/*Open University* cases being prime examples. See the discussion of this subject at Part 2A above.

It will in most cases be a reasonably practicable step under the Secure Duty to ensure that an HEP's policies/rules interfere with lawful free speech ***to the minimum extent necessary for the purpose for which they are in place*** (e.g. that anti-harassment policies are sufficient to ensure compliance with the Equality Act and no more).

Again, great care will be required to avoid mis- or over-interpreting any apparent or claimed contrary obligations or requirements. The Secure Duty is overriding, subject to only to its inherent limitations.[190] The need to comply with the Equality Act in respect of people with Protected Viewpoints, including through actions necessary to qualify for the Section 109(4) Defence, is also an important and demanding consideration.

See the detailed discussion at "Constructing compliant anti-harassment/bullying policies: legitimate scope" below.

Step 3: Are any restrictions 'prescribed by law' and proportionate under the Convention?

The OfS has enhanced clarity by stating that an assessment of the proportionality of any relevant restriction on lawful speech needs to be made even where there are no reasonably practicable steps that can be taken to protect that speech for the purposes of the Secure Duty. See the discussion of this subject at Part 2C above. This step can, however, be otiose in practice to the extent that an HEP has, when writing its policies/rules, ensured that all provisions which could restrict free speech compliantly with the Secure Duty under Step 2 also do so compliantly with the other Relevant FS Requirements, including the HRA/Convention (see the detailed discussion at "Constructing compliant anti-harassment/bullying policies: legitimate scope" below).

Resolving completing claims: interpreting contrary (restricting) laws, requirements and policies

On occasion, there might be a perceived overlap or conflict between:

- an HEP's legal duties to protect free speech/ academic freedom under the Secure Duty and other Relevant FS Requirements; and
- other legal or regulatory obligations or requirements, or indeed an HEP's wider polices, programmes or priorities which are being relied on to justify restricting free speech/academic freedom, including actions such as preventing or not publicising events or giving credence to complaints against a Participant because of their viewpoints or expressions thereof.

In particular, allegations of harassment and bullying and other assertions of offence can create perceived difficulties in the context of the Relevant FS Requirements.

[190] E.g. it will override the PSED and the HEPs' non-legally justifiable policies and agendas as discussed in Part 2 and below. The obligation under the PSED is a duty to think (i.e. have due regard) and not to take action, and is overridden by positive duties to take action such as the Secure Duty.

This is a complex area and has been a source of costly mistakes, as discussed elsewhere. Perceived conflicts between free speech obligations and other legal obligations or wider agendas often, however, result from misunderstanding the appropriate analysis. The key question is always: to what extent do other legal or regulatory requirements (or legally justifiable restrictions such as anti-harassment policies) in fact have effect so as to restrict speech? Wider policies or agendas do not operate to restrict the free speech obligations.[191]

Identifying the effect of, and the limits to the scope which it is appropriate to give to, laws, duties and policies which can be inconsistent with the Secure Duty requires care, especially as regards the anti- discrimination and harassment provisions in the Equality Act (including pursuant to the PSED) and the PHA, and anti-bullying requirements. There are severe limitations to the extent to which such laws, duties and policies may be used to limit the speech and opinions of others. See the BFSP Equality Act Statement for a detailed discussion of this topic. See also "Constructing compliant anti-harassment/bullying policies: legitimate scope" below.

Circumstances can also arise involving apparently conflicting protected characteristics under the Equality Act. This can require careful analysis.[192]

Proportionality under the Convention and its limitations

Article 10(2) of the Convention permits restrictions on speech if certain conditions are met, as explained in Part 2C above. A key condition is "proportionality". In outline, a restriction is proportionate if it is a means to an end of sufficient importance to justify a restriction of the degree in question and it is rationally connected to that objective, if there are no less intrusive means to achieve the objective without unacceptably compromising the achievement of the

[191] With respect to non-legal policies and agendas, one misleading idea is that there is a "balance" to be achieved between free speech rights and non-legal policies/agendas (often originating from EDI). Attempts to "balance" free speech rights and non-legal policies/agendas lead to compliance failures. Some navigating between complex legal and regulatory rights and requirements can be necessary; but this does not justify restricting free speech beyond what is justified by those rights and requirements.

[192] The Dandridge Review, at paragraph 4.17, found that in, this connection, the OU (and universities generally) must have a separate approach specifically for the protected characteristic of belief: "…the only possible way forward that allows for the appropriate manifestation of protected beliefs (even where those beliefs might conflict with another person's identity) and yet acknowledges each member of staff's fundamental right to determine and manifest their own identity, is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice."

In relation to this, the OfS has stated that the "interaction between different protected characteristics may require careful consideration – for example, some religious beliefs and the protected characteristic of sexual orientation. Both characteristics are afforded protection from harassment and discrimination under the Equality Act, and it may be necessary for [HEPs] to balance the different protected characteristics in certain circumstances. The expression of beliefs in a way that amounts to unlawful harassment or discrimination does not constitute free speech within the law". (OfS December 2022 Publication, at page 4.)

objective, and if the importance of the objective outweighs the impact on the free speech rights concerned.[193] The following points mean that cases where HEP policies/rules restricting lawful speech at HEPs are compliant with the Convention will be rare. The main examples are carefully-written and limited anti-harassment and anti-bullying policies and requirements.

Limited application

Proportionality is not on its own a justification for limitations on free speech rights, it is a component test for a limited ability to restrict Convention rights such as to free speech. Proportionality is thus only relevant, in the context at hand, when Convention rights are engaged.

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 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.

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. 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.[194] Proportionality will have relevance to assessing the implications of the relevant Convention rights/duties. The interaction of alleged contrary Convention rights/duties with the Secure Duty will be a complex and contested area with severe accompanying risks for HEPs of getting their

[193] To assess the proportionality of a measure, HEPs must satisfy the following test set out in the OfS Guidance, paragraph 130:

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.

[194] See the discussion of this in Part 2A above.

compliance wrong.[195] The main implications in practice are likely to be in respect of the 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, such as freedom of expression, is generally high. Convention rights include the freedoms to offend, shock and disturb. The bar is higher still in the context of higher education.[196] The OfS Guidance states (at page 9) that "the

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

- There are many situations in which steps under the Secure Duty are necessary but there are unlikely to be relevant conflicting Convention duties/rights. 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 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. 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.
- 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.
- Individuals acting on their own account are not subject to the Convention. 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 under the Convention regarding managing/restricting the actions of such individuals in such cases (contrast the clearly stated requirements in respect of employees under Section 109 of the Equality Act).

[196] OfS Guidance, paragraph 131 says that "the "proportionality test is formulated such that there is a high bar to interfere with […] Article 10 on freedom of expression. In practice this means it is difficult to restrict lawful speech". Further:

- 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. (See the discussion at Part 2C above.)

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".

Objective legal requirement: HEPs have no 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 means applying the law around "proportionality" correctly – where it is relevant at all. HEPs do not have discretion, when conducting proportionality assessments, subjectively to decide, themselves, the relative importance free speech and other ends. They have to apply the law objectively and dispassionately.

Constructing compliant anti-harassment/bullying policies: legitimate scope and conflicts of free speech duties

As discussed at Parts 2A and 3B above, HEPs will have anti-harassment and anti-bullying policies and rules. Under the Secure Duty, an HEP must take all reasonably practicable steps to ensure that its policies interfere with lawful free speech to the minimum extent necessary for the purpose for which they are in place. There are many ways in which compliance failures can arise regarding these policies. HEPs therefore need to be very careful to write their rules, policies and other materials so as to be compliant with the Relevant FS Requirements.

Importance of wording policies so as to reflect, and not misrepresent or overstate, the scope or effect of contrary obligations

One cause of compliance failures is through policies mis-stating or exaggerating or otherwise failing to reflect accurately legal or regulatory obligations on HEPs which may conflict with their obligations to secure free speech. 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. The PSED is highly unlikely to justify interferences with free speech, for the reasons explained above.[197] Another example is that many HEP policies are inconsistent with what the Equality Act actually says (for instance in their definitions relating to "protected characteristics" such as sex and gender reassignment), which has led to inappropriate actions and regulatory failures and will do so again.[198]

- "The core mission of universities […] is the pursuit of knowledge. Free speech and academic freedom are fundamental to this purpose." (OfS Guidance, paragraph 8.) Few objectives, even of those prescribed by law, will be of sufficient importance to restrict lawful speech.

[197] At Section 2C above. For further details, see the PSED Statement.

[198] The Dandridge Review found or evidenced that:

In many cases, HEPs' policies extend beyond the limits of what would be compliant with the Relevant FS Requirements. It is only carefully drafted, compliant policies and rules, as discussed in Part 2A above, that will potentially restrict lawful speech compliantly with the Secure Duty: all other policies, requirements and programmes will be overridden by it. To the extent that policies and rules which go beyond this, HEPs will be at severe and obvious risk of compliance failures.

HEPs therefore need to be very careful to write their rules, policies or other materials so as to secure compliance. The recent huge fines by the OfS on the University of Sussex for having policies which inappropriately restricted free speech illustrate this.

Constructing compliant anti-harassment and anti-bullying policies

To state the obvious, it is only practicable for HEPs to have one set each of anti- bullying and harassment policies, so, when constructing these policies, HEPs must ensure that they are drafted so as to satisfy all applicable Relevant FS Requirements, i.e. including the Secure Duty, the Equality Act and the Convention and its conditions of registration. These policies/rules must be drafted very carefully in order to achieve this.[199] To ensure that any such policies/rules are compliant, an HEP should:

- the OU's policies and their implementation were insufficiently clear and robust to enable deeply contentious matters to be debated professionally and respectfully. (Paragraphs 4.3 and 4.10);
- there was uncertainty amongst staff as to what the law required in relation to equality legislation, free speech and academic freedom (paragraph 4.9); and a widely perceived lack of clarity and guidance about intersections between EDI, harassment and free speech (paragraphs 2.17, 2.18 and 2.38); and
- the OU's policies failed to reflect what the Equality Act actually says (paragraph 2.44; see further at paragraph 4.31).

It appears that these problems are widespread, and that all HEPs need to review their policies, practices and requirements to ensure compliance in this regard.

Recommendation 3 (at paragraph 5.3.2) addresses aspects of this, including that the OU should "review existing policies and templates that only refer to gender or sex and not both. Whether intended or not, where gender and not sex is referenced, the implication is that the legitimacy of sex is not recognised. This fits uncomfortably with the principle of institutional neutrality [which it recommends elsewhere] and can also be problematic in the context of the law, in that the Equality Act describes the protected characteristic in terms of sex not gender".

[199] See the OfS Guidance, paragraphs 155 to 161 and associated Examples. For example, paragraphs 156 and 157 (and 109) recommend that any such 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.

- both take all reasonably practicable steps pursuant to the Secure Duty to ensure that its policies interfere with lawful free speech to the minimum extent necessary for the purpose for which they are in place; and ensure that they are proportionate and otherwise compliant with the Convention and (where relevant) the Equality Act;
- take care when identifying the nature, limits, and scope of any legal obligations and regulations underlying these policies, 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 the risk of being non-compliant. Failures here may be caused by oversimplified understanding or presentation of the legal and regulatory duties on HEPs;[200]
- 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 range of legally expressible content; and[201]
- 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[202].

The EHRC has stated that: "The harassment provisions [of the Equality Act] 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."[203] This must logically apply in respect of anti-bullying requirements as well.

See also the OfS' condition of registration E6, discussed below. This must also logically extend in respect of anti-bullying requirements as well, although the OfS appears not to have had it in contemplation at the relevant time.

Anti-harassment policies/rules: relevance of "proportionality": As discussed above, the secure Duty requires that policies/rules must interfere with lawful free speech to the minimum extent

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In addition to the above conditions, in order to comply with the Convention, a rule must: be written such that both its requirements and effect are proportionate; restrict speech no more than is strictly necessary; and be clear and accessible to those bound by it.

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

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

202 See OfS Guidance, paragraph 169d.

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

necessary for the purpose for which they are in place: this means anti-harassment policies being such as to reflect the requirements in the Equality Act and the PHA and no wider. A proportionality assessment will be required as part of the assessment of the policies/rules under the Convention[204]. The relevant detailed provisions of the Equality Act and PHA, and case law under them, effectively reflect "proportionality" balancing needs under the Convention. This means that, as long as such policies/rules are no wider than is strictly necessary in order to ensure that they reflect the Equality Act/PHA, an additional proportionality assessment in respect of them is likely not to add much in practical terms in most circumstances. (Noting that proportionality can also be relevant to the application of such restrictions in particular cases.)

Anti-bullying policies/rules: relevance of "proportionality": As indicated at Section 2A above, the OfS expects that HEPs will have anti-bullying policies/rules, and certain such policies are likely effectively required under Article 8 of the Convention[205]. Unlike anti-harassment policies and the Equality Act, however, there are no clear and detailed legal moorings to which such policies can be fixed, so wording them is fraught with risk for HEPs. As well as complying with the need under the Secure Duty that such policies must interfere with lawful free speech to the minimum extent necessary for the purpose for which they are in place, a proportionality assessment will be necessary in assessing the compliance of all anti-bullying policies with the Convention at the drafting stage[206]. With Convention rights including the freedoms to offend, shock and disturb and a high bar for any objective to be sufficiently important as to justify restrictions on speech and academic freedom in an academic context, the range of lawful speech which such rules can restrict while remaining proportionate, and therefore lawful, will be both narrow and severely limited. Drafting compliant policies will be difficult, and HEPs need to exercise extreme caution[207]. (Noting that proportionality can also be relevant to the application of such restrictions in particular cases.)

Requirements on Participants to prevent bullying/harassment/other negative actions re viewpoints: conflicts of free speech duties

As discussed in Part 3 above, policies/rules prohibiting the harassment and bullying of individuals (and other negative actions against them) in respect of their viewpoints are likely to be required under the Secure Duty (as well as the need to qualify for the Section 109(4)

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[204] As reflected in step 3 of the OfS Guidance and the OfS's report relating to the 2025 Sussex fine. In this regard, the OfS puts emphasis on Convention proportionality as a protective mechanism for free speech.

[205] Bearing in mind the fact Article 8 can apply to bullying and harassment, and mindful of other employment duties such as maintaining trust and confidence, it is generally strongly advisable to have robust and compliant bullying and harassment policies to mitigate the risk of breaches of such duties.

[206] See Footnote 204 above.

[207] BFSP envisages non-compliant anti-bullying requirements being the new *Stock*/*Sussex* debacle.

Defence).[208] There can, however, be "conflict of free speech rights" issues as to whether rules restricting the ability of Participant A to protest or to attack other Participants or visiting speakers in respect of their viewpoints, themselves infringe Participant A's rights to free speech under the Secure Duty, the Convention and the Equality Act.

- Under the Secure Duty, appropriately written (and limited) policies and requirements prohibiting Participant A from making severe personal attacks on or taking other negative action against other Participants or a visiting speaker in respect of their viewpoints, which were written so as to satisfy obligations under the Relevant FS Requirements, would not be likely to be held to infringe the free speech rights of Participant A – so long as they were written so as to restrict Participant A's free speech no more than is necessary to prevent inappropriate restriction of those others' speech or a chilling effect on others' willingness to express their views.[209] Such policies and requirements would, though, need to strike a careful balance between the competing free speech rights, so as to secure free speech compliance in both directions.
- Under the Convention, Participant A's free speech rights are themselves subject to HEPs' entitlement to impose restrictions on their attacking or taking other negative action against other Participants in respect of their viewpoints, so long as those restrictions are themselves written so as to be compliant with the Convention, and proportionate under the Convention in particular[210]. Such requirements are, provided that they are written with great care so as to balance the rights of people to be protected from severe attack for their viewpoints against the free speech rights of the attackers, likely to qualify as proportionate in general terms. (The same compliance requirements applies in respect of enforcing relevant policies/rules.)

This is a difficult and complex area, which will require careful navigation. See BFSP's forthcoming statement ***Proportionality under the ECHR: Limits and risks of English HEPs' policies and practices restricting free speech***.

Condition of registration E6 – harassment policies re students and safeguards for free speech

A new general ongoing condition of registration E6[211], relating to harassment and sexual misconduct as regards **students,** requires HEPs to maintain, and operate in accordance with, a single, comprehensive source of information which sets out policies and procedures on

[208] The Open University's failure to protect Professor Jo Phoenix from harassment is one example of a failure to recognise that severe personal attacks on others for their viewpoints may constitute harassment, and thus require intervention by an HEP.

[209] See Example 6 of the OfS Guidance.

[210] See the discussion of proportionality above.

[211] In effect from 1st August 2025.

subject matter relating to incidents of harassment and sexual misconduct.[212] This will extend to acting to prevent harassment against students for their viewpoints, and to stop/address it when it is happening[213]. There are detailed rules on what content should be included as a minimum, as well as rules on the prominence of this source of information.

Accusations of harassment and bullying have often been made against staff and students who have expressed controversial views, and they have all too often been given inappropriate, uncritical credence by HEPs, with inappropriate disciplinary processes sometimes being begun. This is in part because HEPs' policies and rules all too often overstate, or misdescribe, key concepts such as harassment so as to go above and beyond what is strictly considered unlawful harassment pursuant to the Equality Act or the PHA.[214]This has resulted in frequent free speech failures.[215]

Condition E6 addresses these issues head-on, as regards harassment (there are strong arguments that the same concepts should be extended to anti-bullying requirements), and enhances the protections for free speech and academic freedom in this context.

An HEP will be required to comply with specified "freedom of speech principles" in respect of its relevant policies, rules and procedures, including when taking decisions about whether its policies, rules and procedures will include content on harassment which goes further than is required under the Equality Act, or could reasonably be considered capable of having a negative impact on, or the object or effect of restricting, free speech or academic freedom.

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[212] See the OfS Guidance, paragraph 103.

[213] The OfS's letter to HEPs of 11 November 2025 regarding harassment and intimidation of Jewish students and staff states that Condition E6 require HEPs to take steps to address harassment, and that this includes "taking appropriate disciplinary steps against students and staff who have been found to engage in (for instance) the stirring up or racial hatred against Jewish or Israeli students or staff". This must reflect a wider principle: HEPs are expected to intervene actively in harassment, and this can be required to include taking disciplinary steps.

[214] The OfS has stated that "Context is always relevant in determining whether speech is unlawful harassment. Universities and colleges have freedom to expose students to a range of thoughts and ideas, however controversial. Even if the content of the curriculum offends students with certain protected characteristics, this will not by itself make that speech unlawful." OfS Guidance, paragraph 83.

See also, in relation to this, the Dandridge Review, paragraph 2.36.

[215] In this connection, the OfS has stated: "Providers and constituent institutions will wish to have robust anti-bullying and anti-harassment policies. The legal duty to take reasonably practicable steps to secure freedom of speech does not prevent them from doing so. Rather, institutions must ensure that these policies are carefully worded and implemented in a way that respects and upholds their free speech obligations. In doing so, particular regard and significant weight must be given to the importance of free speech. Wherever possible, any restrictions should be framed in terms of the time, place and manner of speech, rather than the viewpoint expressed". (OfS Guidance, paragraph 99.)

These freedom of speech principles are demanding and reflect the strong protection for free speech on campus and academic freedom under the applicable law. They are as follows.

- "Irrespective of the scope and extent of any other legal requirements that may apply to [an HEP], the need for the [HEP] to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place."

  As well as its obvious prioritisation of free speech and academic freedom and tolerance as regards other agendas, this provision effectively restricts the misuse of laws which do not expressly render speech unlawful (such as the PSED and Prevent duty) so as to restrict free speech or academic freedom, and also effectively prevents this or other registration conditions being themselves used as a basis on which to restrict free speech. (The reference to "particular regard" echoes the wording of the Secure Duty and reflects the relative force of the duties/needs under the applicable law to take action to protect free speech (which is supercharged under the Convention in respect of academic free expression) as against the duties to think in the PSED and the Prevent duty.) This also reflects the special place of free speech and academic freedom on campus under the OfS's public interest governance conditions.

- "the need for [an HEP] to apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment:

  - the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures; or

  - statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course."

  This presumption broadly reflects the underlying law under the Equality Act and the PHA. The wider regulatory framework protecting free speech and academic freedom means that there is low likelihood that any objective test (as discussed above) with respect to harassment under those provisions will be made out in these contexts. A rebuttable presumption is a helpful framing for HEPs in avoiding inadvertent errors.

Most HEPs will need to review their existing harassment and bullying policies very carefully to ensure compliance.

Condition E6 largely reflects the underlying legal nexus, but HEPs need to understand that it does not do so in the following crucial ways:

- while the new condition is stated to apply only in respect of students, the free speech principles and their interaction with concepts regarding harassment are equally valid in respect of protections for academics and other staff; HEPs should avoid, to the extent practicable, having inconsistent rules in respect of staff and students; and

- the free speech principles are written so as to apply in an "educational context or environment", whereas the Relevant FS Requirements apply in respect of all discourse on campus, and HEPs would do well to reflect this wider reach in their policies and practices.

Equality Act cases relevant for identifying requirements in practice under HERA

As explained above, employers can qualify for the Section 109(4) Defence (against liability for harassment and discrimination by their employees) if they can show that they took "all reasonable steps" to prevent an employee from doing the alleged act or anything of that description. Note that, whereas the principal duties under the Equality Act are negative ones (i.e. not to discriminate, harass etc.), the Section 109(4) Defence requires positive action to be taken in order to qualify for it. This defence is hard to establish in practice. A high level of action is required, particularly for large employers.

A level of required action which is at least as demanding is likely to apply in relation to HEPs' obligations to prevent attacks and other actions under the Secure Duty[216]. It must, therefore, be likely that rulings by Employment Tribunals in respect of matters which have given rise to failures to qualify for the Section 109(4) Defence (e.g. by failing to prevent attacks on colleagues for their viewpoints) will be regarded as of persuasive authority when the courts come to consider how to interpret the positive duty under the Secure Duty. However, it might be the case that HERA demands a wider range of actions than those required to qualify for the Section 109(4) Defence.

In any event, in advance of guidance or emerging case law, it would be unwise for HEPs not to act on the basis that compliance with the Secure Duty will be approached as predicted above.

It would lead to insuperable complexities, and consequent legal problems, if HEPs had to operate two very different sets of restrictions to reflect different legal requirements.

[216] This because the wording in Section 109(4) of the Equality Act is strikingly similar to HERA Section A1(1), and two provisions are intended to ensure very similar outcomes. See detailed discussion of this in BFSP's statement ***Requirements for staff and student behaviour: English HEPs' free speech compliance obligations***.