

Freedom of Speech and Academic Freedom in Higher Education in England

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ABSTRACT

This article considers the context, development, and significance of the *Higher Education (Freedom of Speech) Act 2023*. The Act was relatively unusual in aiming to increase the normative strength of freedom of speech. The central justification given for the Act was the need to respond to an increasing number of interferences with free speech and academic freedom occurring at universities. The growth of a ‘cancel culture’ was having a ‘chilling effect’ on students, staff and visiting speakers. The article examines a range of high-profile cases and incidents that have attracted political and media attention. Many of these have concerned contemporary debates related to trans issues and identity politics. The issues discussed on the article are of wider international interest. Similar controversies have been experienced in universities other States. The article makes comparative reference to developments in the field in the US, Canada, Australia and New Zealand. The article examines the perceived issues and evidential bases for the Act, reviews the legal duties and analyses the key legal concepts. It considers these in terms of compatibility with the European Convention on Human Rights (1950). It concludes by addressing three thematic issues: (i) a Model Code; (ii) challenging university ideologies; and (iii) securing cultural change.

1. INTRODUCTION

This article considers the context, development and significance of the *Higher Education (Freedom of Speech) Act 2023*.¹ The central justification given for the Act was the need to respond to an increasing number of interferences with free speech and academic freedom occurring at universities and other Higher Education Providers (HEP’s) in England.² Their combined effect was negatively impacting on the culture in universities. In colloquial terms, the growth of a ‘cancel culture’³ was having a ‘chilling effect’ on students, staff and

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* All URLs cited in this article were last accessed on 18 September 2023.

¹ UK Public General Acts, 2023, c. 16,

<https://www.legislation.gov.uk/ukpga/2023/16/contents/enacted>. It received Royal Assent on 11 May 2023. See Joe Lewis, *Higher Education (Freedom of Speech) Bill: Progress of the Bill*, House of Commons Library, 12 May 2023. The substance of the Act is expected to come into force at the start of the 2024/25 academic year.

² For convenience I have referred interchangeably to Universities and to HEP’s.

³ Hansard, House of Lords, Vol. 829, Col. 1869 (10 May 2023) (Earl Howe). For broader critiques see Alan Dershowitz, CANCEL CULTURE: THE LATEST ATTACK ON FREE

visiting speakers.⁴ More broadly, there were concerns that academic freedom was declining and the decline was accelerating.⁵ The prevailing ‘culture’ needed to be changed and such cultural change occurred more readily when backed up by appropriate legislation.⁶ The Act was relatively unusual in aiming to increase the normative strength of freedom of speech, rather than impose restrictions on it.⁷ Among its key provisions the Act (i) strengthened the existing duties regarding freedom of speech (ii) created a new duty to promote lawful freedom of speech and academic freedom (iii) created duties regarding freedom of speech for constituent institutions (iv) created new duties regarding freedom of speech for students’ unions (v) created stronger and clearer means of enforcement of the legal duties and (vi) significantly increased the regulatory powers of the Office for Students (OfS).

Following this introduction, Part 2 sets out the legal and regulatory context. Part 3 examines the perceived issues and evidential bases. Part 4 reviews the legal duties imposed by the Act. Part 5 critically analyses the key legal concepts. Part 6 concludes by addressing three thematic issues: (i) a Model Code; (ii) challenging university ideologies; and (iii) securing cultural change.

2. THE LEGAL AND REGULATORY CONTEXT

A. The University Context in England

Historically, UK Universities, as HEP’s, have a public importance as seats of learning and critical thought, and the source of scientific, economic and artistic developments.⁸ This largely explains why Universities are considered as natural sites for the concepts of institutional autonomy, freedom of speech and academic freedom to operate.⁹ However, an emphasis on free speech can be viewed as at odds with work to reduce inequalities and

SPEECH AND DUE PROCESS (2020); Douglas. Murray, THE WAR ON THE WEST (2022).

⁴ *Higher education: free speech and academic freedom*, Department of Education, CP 394, prs. 39-59, (2021). In 2020-23, 2,000+ cases dealt with by the Free Speech Union, an NGO, involved universities, <https://freespeechunion.org/weekly-news-round-up-112/> (11 May 2023).

⁵ Hansard, House of Commons (HC) Debs, Vol. 699, Col. 46 (12 July 2021) (Williamson, Secretary of State for Education).

⁶ Hansard, HC Debs, Vol. 716, Cols. 115-116 (13 June 2022) (Donelan, Minister for Further and Higher Education).

⁷ Cf. the restrictions in the Police, Crime, Sentencing and Courts Act 2022 and the Public Order Act 2023.

⁸ Alfredo Moscardini, Rebecca Strachan and Tanya Vlasova, *The Role of Universities in Modern Society*, 47 STUDIES IN HIGHER EDUCATION 812 (2022).

⁹ Jennifer Lackey, (ed), ACADEMIC FREEDOM (2018); Donald Alexander Downs and ChrisW. Surprenant eds., THE VALUE AND LIMITS OF ACADEMIC SPEECH (2018); David Palfreyman, *Is Academic Freedom Under Threat in UK and US Higher Education?*, 19 EDUCATION AND THE LAW 19 (2007); Katarzyna Kaczmarek and Yeşim Yaprak Yıldız eds., *Academic Freedom and Internationalisation*, Special Issue, INT J HUMAN RIGHTS 1691-1865 (2022); S. Manley, *Chilling and Warming Effects on the Production of Legal Scholarship*, 86 Modern LR 1077 (2023).

tackle discrimination in higher education, particularly its impact on groups who may feel silenced or threatened by the expression of certain views and perspectives.¹⁰ There are some aspects of universities that are analogous to schools and which also serve to make them different from the wider societal context outside.¹¹ Lastly, there is a need to highlight the ubiquitous importance and significance of the operation of the internet and social media in academic contexts.¹² Their exponential ability to generate a critical mass of publicity and complaints have played a dramatic role in some of the most controversial cases.¹³

B. Regulation of Freedom of Speech and Academic Freedom in English Universities

The *Higher Education and Research Act (2017)* (HERA) created a new independent regulatory body overseeing the English higher education sector, the Office for Students (OfS).¹⁴ HEP's in England must register with the OfS to access public funding, award degrees, and recruit international students. In performing its functions, OfS must *have regard to* the need to protect the 'institutional autonomy' of HEPs.¹⁵ This is stated to include the, 'freedom within the law of academic staff (i) to question and test received wisdom, and (ii) 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 providers'.¹⁶ Section 14 HERA required the OfS to determine and publish a list of public interest governance principles, which must include the principle on academic freedom.¹⁷

C. Domestic English law on Higher Education in English Universities

¹⁰ On free speech and inclusion as congruous see 'Higher education sector statement on promoting academic freedom and free speech', <https://www.universitiesuk.ac.uk/latest/news/higher-education-sector-statement>.

¹¹ Bryan .R. Warnick, *Student Speech Rights and the Special Characteristics of the School Environment*, (2009) 38 Educational Researcher 200; Susan N. Herman, *Advanced Introduction to US Civil Liberties*, 57-63 (2023); *Higgs v. Farmor's School* [2023] EAT 89.

¹² Cf. Rhoda E. Howard-Hassman and Neil McLaughlin, *Ideacide: How On-Line Petitions and Open Letter Undermine Academic Freedom and Free Expression*, 44 HUM. RTS. Q. 451 (2022).

¹³ Cf. James Marriot, *Mob Rule and Cancel Culture Have Had Their Day*, THE TIMES, 11 May 2023.

¹⁴ The OfS is a non-departmental public body of the Department for Education.

¹⁵ S 2(1) HERA 2017 (*emphasis added*). See also s. 2(4) HERA 2017.

¹⁶ S. 2(8) HERA 2017.

¹⁷ S. 14(7) HERA, which repeats the terms of s. 2(8) HERA 2017. See Dennis Farrington and David Palfreyman, 3rd edn, THE LAW OF HIGHER EDUCATION (2021), prs .13.01-13.27; OfS, *Public Interest governance Principles*, <https://www.officeforstudents.org.uk/advice-and-guidance/regulation/registration-with-the-ofs-a-guide/public-interest-governance-principles/>.

A Department of Education (DoE) White Paper on *Higher education: free speech and academic freedom* highlighted legal complexity and the lack of redress.¹⁸ In addition to the HERA 2017, there are a range of applicable laws. Under s. 43 (Education Act (No 2) (1986) the governing bodies of HEP's are required to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students, employees and visiting speakers. The duty extends to ensuring that the use of the HEP's premises is not denied to any individual or body because of their beliefs, views, policy or objectives. Significantly, the s. 43 duty does not apply to students' unions (SUs). However, SUs have to follow their university's s.43 code of practice. Most universities are charities but have the status of 'exempt charities' on the basis that they have a different 'principal regulator', namely the OfS.¹⁹ Students' unions are also established as charities.²⁰ Employee duties and employer responsibilities may support certain restrictions that impinge upon an employee's human rights.²¹ Under s. 6 Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a 'Convention right'. (the rights and fundamental freedoms set out in (a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the European Convention on Human Rights (1950) (ECHR).²² The DoE and the OfS are public authorities. With respect to the functions considered in this article, universities are regarded as public authorities.²³ However, students' unions are not public authorities and are, therefore, not directly subject to the s. 6 duty.²⁴ Under s. 12 HRA, if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression, it must, inter alia, 'have particular regard to the importance of the Convention right to freedom of expression'.²⁵ Under s. 149 Equality Act 2010,²⁶ the Public Sector Equality Duty (PSED), applies to specified 'public authorities', which include the

¹⁸ n. 4; Farrington and Palfreyman, *ibid.*, prs. 1.01-1.46; Ian G. Cram and Helen Fenwick, *Protecting Free Speech and Academic Freedom in Universities*, 81 MOD LR. 825 (2018).

¹⁹ *English higher education 2022 – OfS annual review*, <https://www.officeforstudents.org.uk/publications/annual-review-2022/>; Mary Synge, *Regulation of Universities as Charities: One Step Forward, Two Steps Back*, 41 LEGAL STUDIES 214 (2021).

²⁰ The National Union of Students (NUS) is not a charity.

²¹ *Richard Page v. The Lord Chancellor and the LCJ of England and Wales* [2021] EWCA Civ 254.

²² S. 6(2) HRA sets out exceptions.

²³ OfS, *Insight, - Freedom to question, challenge and debate*, (2022).

²⁴ Hansard, House of Lords (HL) Debs, Vol. 826, Col. 186 (7 December 2022) (Baroness Barran).

²⁵ *In re S (A Child)* [2004] UKHL 47.

²⁶ UK Public General Acts 2010, c.15.

governing body of an institution in England within the higher education sector.²⁷ Universities in England, Wales and Scotland are subject to s. 26(1) of the Counterterrorism and Security Act 2015, which imposes a duty on higher education bodies when exercising their functions, to ‘have due regard to the need to prevent people from being drawn into terrorism.’²⁸ However, under s. 31, it also requires those bodies, when doing this, to have ‘particular regard’ to the duty to secure free speech. The *Prevent* duty is underpinned by specific statutory guidance for higher education institutions.²⁹ The *Prevent* Duty has been controversial.³⁰ Student unions are not subject to the duty in the 2015 Act. Universities and SU’s have common law duties of care towards students, members, employees and visiting speakers. This includes taking steps to protect their health, physical safety and, arguably, aspects of their mental health and welfare.³¹

D. ECHR Jurisprudence on Freedom of Speech and Academic Freedom

Under s. 2 HRA 1998 the UK courts must take ‘account’ of specified ECHR jurisprudence. Freedom of expression under Article 10 ECHR clearly applies in university contexts. Any interference with an individual’s freedom of expression has to be in pursuit of a legitimate aim and necessary in a democratic society. The national authorities are afforded a margin of appreciation,³² but the ECtHR rarely approves restrictions on the speech if it concerns a matter of public debate or public interest.³³ So academic comments on matters of public interest receive a high level of protection. Although the boundaries of permissible academic speech are narrower than the boundaries of permissible political speech,³⁴ in terms of general principle, academic speech is treated as justifying quite a high

²⁷ Equality Act 2010, Schedule 19; EHRC, ‘*PSED*’, <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty>.

²⁸ UK Public General Acts 2015, c.6.

²⁹ *Butt v Secretary of State for the Home Department* [2017] EWHC 1930 (Admin).

³⁰ Steven Greer and L.C. Bell, *Counter-terrorist law in British universities: a review of the “Prevent” debate*, PUBLIC LAW 84 (2018); William Shawcross, *Independent Review of Prevent*, 8 February 2023, HC 1072, especially prs. 6.13-6.31.

³¹ *Farrington and Palfreyman*, n. 17, prs. 21.01-31.32; *Sanchez v University of Bristol*, Claim No: 008LR988, County Court, Bristol (S had been subjected to abuse by another student who was a trans rights activist).

³² Cf. With respect to the right to education in Article 2 of Protocol 1 ECHR, *Ponomaryovi v. Bulgaria*, A. 5335/05, pr. 56 (21 June 2011).

³³ *Thorgeir Thorgeirson v. Iceland*, A 13778/88 (25 June 1992).

³⁴ Anthony Julius, *Willed Ignorance: Reflections on academic free speech, occasioned by the David Miller case*, 75 *Current Legal Problems* 1, at 41 (2022).

level of protection.³⁵ Article 10 also protects the form in which ideas are conveyed.³⁶ Any restrictions on the freedom of academics to carry out research and to publish their findings must be subjected to careful scrutiny. This freedom extends 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. The principle of open discussion of issues of professional interest is construed as an element of a broader concept of academic autonomy which encompasses the academics' freedom to express their opinion about the institution or system in which they work.³⁷ However, a distinction is made between criticism on the one hand and insult and gratuitous attacks on the other.³⁸

E. International Standards in Relation to Free Speech and Academic Freedom

The central importance of academic freedom to universities has been recognised in the majority of the national constitutions and legislations of EU members.³⁹ In 1997, the UNESCO General Conference adopted the *Recommendation concerning the Status of Higher - Education Teaching Personnel*.⁴⁰ In 2006, the then 47 members of the Council of Europe approved *Recommendation 1762 on Academic Freedom and University Autonomy*.⁴¹ Influential national guidance includes the University of Manchester's *Statement on Academic Freedom* (2007),⁴² and the *Chicago Principles* (2015).⁴³

3. FREEDOM OF EXPRESSION IN HIGHER EDUCATION IN ENGLAND – 'CRISIS, WHAT CRISIS?'

³⁵ *Sorguç v. Turkey*, A. 17089/03, pr. 35 (23 June 2009); *Sapan v. Turkey*, A. 44102/04, pr. 34 (8 June 2010).

³⁶ *Kula v. Turkey*, A. 20233/06 (19 June 2018) pr. 38 (K's right to freely express his views as an academic during a television programme organised outside his city of residence).

³⁷ *Kharmalov v. Russia*, A. 27447/07, prs. 40-46 (8 October 2015),

³⁸ *Mustafa Erdoğan and Others v. Turkey*, A. 346/04 and 39779/04, (27 May 2014). See also the joint concurring opinion of Judges Sajo, Vucinic and Kuris on the scope of academic freedom.

³⁹ Monika Stachowiak-Kudła, *Academic Freedom as a Source of Rights' Violations: A European Perspective*, 82 HIGHER EDUCATION 1031 (2021).

⁴⁰ Records of the General Conference, 29th Session, 1997, Vol. 1 Resolutions, p. 26. Referenced in Hansard, HC, Public Bill Committee (Bill 12), 2021–2022, Cols. 67, 189 and 202; Hansard, HL Debs, Vol. 826, Col. 188-9, (7 December 2022) (Baroness Fox).

⁴¹ <https://pace.coe.int/en/files/17469>.

⁴² <http://hummedia.manchester.ac.uk/institutes/mci/final-revised-code-of-practice-on-freedom-of-speech-2016.pdf>.

⁴³

<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>, referenced in n. 40, Cols. 5, 94, 120, 168. See also *Report of the Committee on Freedom of Expression at Yale*, (1974). Private universities in the US have no federal constitutional obligation to protect the free-speech rights of students.

In terms of modern understandings of good governance, it is important to analyse the evidence basis for the HE (FoS) Act 2023.

A. Individual Cases/ Incidents

Individual cases have commonly concerned protests by student's unions against particular politicians,⁴⁴ or foreign State representatives.⁴⁵ Student groups supporting pro-Israeli policies have complained that their activities have been restricted by the NUS or other students groups.⁴⁶ There have also been complaints by student groups supporting Christian anti-abortion policies.⁴⁷ Six contemporary cases or incidents illustrate different aspects of the debates.

(i) Kathleen Stock

Stock, Professor of Philosophy, Sussex University, was a gender critical feminist.⁴⁸ She taught and published on transgender rights and gender identity.⁴⁹ She had opposed amendments to the UK Gender Recognition Act (2004) on transgender self-identification. She sought to exclude trans women from the category 'woman' and advocated for single sex spaces that would exclude trans women. She denied opposing trans rights. Her views met with protests, death threats and calls for dismissal from students, and criticisms from other academics. She was described as a trans exclusionary radical feminist (TERF), a derogatory term of abuse. Posters displayed at the University stated that Stock 'makes trans students feel unsafe' and that 'It's not a debate, it's not feminism, it's not philosophy'. Police advised Stock to take precautions for her safety, including installing CCTV at her home and using bodyguards on campus.⁵⁰ Stock had complained to the University, alleging it had failed to protect her and to safeguard her academic freedom.

⁴⁴ Catherine Lough, 'Education Secretary heckled by LGBT protesters', *The Independent*, 31 May 2022 (it was claimed that he played 'a significant role in institutional transphobia').

⁴⁵ Lianne Kolirin, *Ex-student claims university gives 'free rein' to extremism*, THE JEWISH CHRONICLE, 22 February 2017; E. Heinze, *Israel, no-platforming – and why there's no such thing as "narrow exceptions" to campus free speech*, THE CONVERSATION, 30 April 2017.

⁴⁶ Joint Committee, n. 90, prs. 11, 43-45 and 56; Hansard, HC Debs, Vol. 716, Col. 74 (13 June 2022) (Donelan); Nicola Woolcock, *NUS Hostility to Jewish Students Revealed*, THE TIMES, 13 January 2023. In 2022, the Charity Commission opened a compliance case into the charitable arm of the NUS following allegations of antisemitism.

⁴⁷ Hansard, HC Debs, Vol. 716, Col. 70 (13 June 2022) (Sir Edward Leigh).

⁴⁸ Judith Suissa and Alice Sullivan, *The Gender Wars, Academic Freedom and Education*, 55 JOURNAL OF PHILOSOPHY OF EDUCATION 55 (2021).

⁴⁹ Kathleen Stock, *Material Girls: Why Reality Matters for Feminism* (2021); Aleardo Zanghellini, *Philosophical Problems With the Gender-Critical Feminist Argument Against Trans Inclusion*, 10(2) SAGE Open, 1–14 (2020); Sophia Siddiqui, 'Feminism, Biological Fundamentalism and the Attack on Trans Rights', Institute of Race Relations, <https://irr.org.uk/article/feminism-biological-fundamentalism-attack-on-trans-rights/>; Helen Joyce, TRANS – WHEN IDEOLOGY MEETS REALITY (2021).

⁵⁰ Sian Griffiths, 'Kathleen Stock, the Sussex University professor in trans row, urged to get bodyguards', *The Sunday Times*, 10 October 2021.

The Vice-Chancellor issued a statement supporting Stock and defending freedom of speech. However, the Sussex branch of the University and College Union did not criticise attacks and considered that the Vice-Chancellor's statement had not upheld the dignity and respect of trans students and staff.⁵¹ In 2020, Stock was appointed Officer of the Order of the British Empire (OBE) in recognition of services to higher education. The decision was criticised by a group of over 600 academic philosophers from fifteen states in an *Open Letter Concerning Transphobia in Philosophy*.⁵² It did not say that Stock should not be permitted to say the things she did. In their view, objecting to someone being lauded or honoured for their speech simply did not conflict with the principles of academic freedom. However, it argued that Stock's 'harmful rhetoric' contributed to the marginalisation of transgender people. Also, that, 'Academic freedom comes with responsibility; we should not use that freedom to harm people, particularly the more vulnerable members of our community. Conflating concern about the harms of Stock's work with threats to academic freedom obfuscates important issues.'⁵³ The letter concluded with, 'We stand against prominent members of our profession using their academic status to further gender oppression'.⁵⁴ Over 200 academic philosophers from the UK signed an open letter in support of Stock's academic freedom.⁵⁵ Another open letter in support was signed by legal academics.⁵⁶ The University issued a statement on 'Academic freedom and lawful freedom of speech',⁵⁷ claiming that it had vigorously and unequivocally defended Stock. Interestingly, it accepted that rights of people to hold gender-critical views was a protected philosophical belief.⁵⁸ However, a week later, Stock resigned from the University.

The situation of Stock became something of a *cause célèbre*.⁵⁹ It was widely discussed in the media and during the parliamentary debates on the HE (FoS) Bill. The head of the Equality and Human Rights Commission, Baroness Falkner, called the attacks on her disgraceful and stated that tougher regulation was needed.⁶⁰ The suggestion was

⁵¹ Nicola Woolcock, *Union backs transgender students in professor row*, THE TIMES, 13 October 2021. The University and College Union (UCU) represents over 120,000 academics, lecturers, trainers, instructors, researchers, managers, administrators, computer staff, librarians, technicians, professional staff and postgraduates in universities, colleges, prisons, adult education, and training organisations across the UK.

⁵² <https://sites.google.com/view/trans-phil-letter/>.

⁵³ Ibid. Obviously, the critical underlying philosophical and legal issues are what is considered a 'harm'.

⁵⁴ Ibid.

⁵⁵ Harry Lambert, *Kathleen Stock and Sussex University: the war over academic freedom*, *New Statesman*, 20 October 2021.

⁵⁶ *Open Letter to Sussex University from legal academics*, <https://openlettertosussexfromuklegalscholars.uk/>.

⁵⁷ <https://www.sussex.ac.uk/broadcast/read/56535>.

⁵⁸ Cf *Forstater* case, text to nn. 176-7.

⁵⁹ Deborah Shaw, *A tale of two feminisms: gender critical feminism, trans inclusive feminism and the case of Kathleen Stock*, 31 *Women's History Review* (2022). For similar allegations see *Letter To Minister For Education Concerning Intimidation Campaign Against Cardiff Academics*, 22 February 2022, <https://freespeechunion.org>.

⁶⁰ *Vital need to guard academic freedom*, Letter to the Editor, THE TIMES, 9 October 2021. In April 2023, the EHRC advised the Minister for Women and Equalities that clarifying the term 'sex' to mean 'biological sex' in the Equality Act 2010 merited further

that the University should have taken a stronger range of actions at a much earlier stage to stop her being abused.⁶¹ In May 2023, Stark was invited to a debate at the Oxford Union Society (OUS), which exists independently from the University and is distinct from the Oxford University Student Union.⁶² The Junior Common Rooms (organisations for undergraduate students) of a number of Oxford colleges passed motions condemning the decision to invite Stark and the refusal to disinvite her.⁶³ The students' union voted to sever fiscal ties with OUS, banning it from its freshers' fair, at which it recruits heavily.⁶⁴ The Union's decision was criticised in a letter to *The Telegraph* by 44 Oxford Academics, which supported Stock's academic freedom and her planned appearance.⁶⁵ More than 100 Oxford-based staff members signed a response letter supporting trans rights and calling for her to be disinvited.⁶⁶

(ii) Incidents at Essex University

Two incidents at Essex University attracted significant political and media attention and were the subject of an independent review by Akua Reindorf, a specialist employment law barrister.⁶⁷ The first incident concerned the cancellation of the Centre for Criminology seminar by Professor Phoenix of the Open University on 'Trans Rights, Imprisonment and the Criminal Justice System'. On the day of the seminar, complaints were made that Phoenix was a 'transphobe' who was likely to engage in 'hate speech'. There were reports that people felt unsafe and threatened by the prospect of her appearing on campus. There was a credible threat that students planned to barricade the room, and a flyer was circulating which bore a violent image and the words 'SHUT THE **** UP, ****'. The seminar was cancelled due to security concerns, on the basis that it would be rearranged. However, the Department of Sociology decided by vote to rescind the invitation and to not invite Phoenix to a future seminar. An apology was made for the hurt caused to the trans community. The reviewer considered that the cancellation amounted to a breach of Phoenix's right to freedom of expression and the associated legal duties to which the University was subject. The decision to exclude and blacklist Phoenix was also unlawful.

consideration. Somewhat ironically, Falkner was then herself the object of criticism from staff within the EHRC, allegedly related to the EHRC's approach to trans rights.

⁶¹ Julius, n. 34 supported Stock on the basis that she was engaged in genuine academic speech.

⁶² <https://oxford-union.org/>.

⁶³ Jawad Iqbal, *Trauma Help for Debate Students Makes Oxford a Joke*, THE TIMES, 10 May 2023.

⁶⁴ Nicola Woolcock, *Students sever ties with Oxford Union over "toxic environment"*, THE TIMES, 10 May 2023. The ban was almost immediately withdrawn after advice from their trustees.

⁶⁵ Louisa Clarence-Smith, *Free speech in peril as trans row engulfs Oxford University*, *The Telegraph*, 16 May 2023, referring to 'Letter: Universities Must Tolerate Debate'.

⁶⁶

https://docs.google.com/document/d/1myWcqaU0E4Yokw6NavfNwgxuXwJ_Fad5zsiwZt8f14Y/edit.

⁶⁷ <https://www.essex.ac.uk/-/media/documents/review/events-review-report-university-of-essex-september-2021.pdf>.

There was no reasonable basis for thinking that Phoenix would engage in harassment or any other kind of unlawful speech. The decision was unnecessary and disproportionate. Moreover, the violent flyer was wholly unacceptable and should have been the subject of a timely disciplinary investigation.

The second incident concerned a 2020 panel discussion on the subject of ‘The State of Antisemitism Today’, as part of the Holocaust Memorial Week event organised by the University’s Human Rights Centre. Professor Freedman of Reading University was on the panel. Freedman was given an assurance that she would be formally invited to appear at the event. Complaints were made to the effect that she had published viewpoints on sex and gender identity that were ‘hate speech’. After internal discussions, a decision was made not to send her a formal invitation. A member of the University posted a tweet which compared her views on gender identity to Holocaust denial. The invitation to appear at the event was subsequently extended to her. The reviewer found that if the invitation had not been reinstated, she would have been subjected to an interference with her right to freedom of expression. This would have been particularly egregious given that the topic on which she was due to speak was entirely unconnected to the question of gender identity and was a matter of her academic expertise.

The University issued a public statement and a series of public apologies. The Vice-Chancellor issued an open apology to staff and student members of the University regarding procedural failings that occurred and for the distress that this caused.⁶⁸ Both Phoenix and Freedman did not accept the public or private apologies to them. They believed a second apology to staff and students fundamentally undermined the apologies given to them and the outcome of the review.⁶⁹

(iii) Steven Greer

Steven Greer was Professor of Human Rights Law, Bristol University.⁷⁰ He was subjected to criticism and an extended social media campaign by the University of Bristol Islamic Society (BRISOC). The allegations centred around the content of an optional human rights module entitled ‘Islam, China and the Far East’ module, which he had taught for 15 years. BRISOC considered that Greer’s teaching was Islamophobic. More than 4000 students supported a petition calling for Greer to apologise. The University conducted an almost eight-month inquiry and review. A review by a Queen’s Counsel found no evidence of Islamophobic speech, that the material did not amount to discrimination or harassment and was intended as the basis for academic debate by the students who elected to study it. In addition, the issues discussed in relation to Islam were within the scope of the curriculum and therefore exempt from constituting harassment or discrimination under s. 94(2)

⁶⁸ *Review of two events involving external speakers*, <https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers>.

⁶⁹ *Joint Statement about the University of Essex*, <https://jophoenix.substack.com/p/joint-statement-about-the-university>.

⁷⁰ He had published on the *Prevent Strategy*, n. 30.

Equality Act 2010.⁷¹ The University did not uphold BRISOC's complaint.⁷² It also acknowledged that the process had had a regrettable impact on Greer in particular, who had been the target of abuse after BRISOC released details of the complaint on social media. However, it recognised BRISOC's concerns and the importance of airing differing views constructively. Greer complained that the University had done nothing to stop the abuse by BRISOC.⁷³ The suggestion that it was necessary to restructure the degree unit in order to be 'respectful of the sensitivities of students on the course', was totally at variance with the result of the official inquiry and review. The modification of the syllabus in question also called the University's commitment to academic freedom into question. The failure of the university to discipline the students had put his life at risk.⁷⁴ The University responded that the changes made were of emphasis and allowed a level of flexibility in the development of new teaching material to match students' current interests, the specialisms of the course's new conveners and their wish to deliver the material in a context that was both broad-reaching and respectful of sensitivities of students on the course.⁷⁵ As Greer was retiring, the University was not faced with the decision of whether the course could continue to be taught as it had previously been. In January 2022, Greer was appointed to a research position at the Oxford Institute for British Islam.⁷⁶

(iv) Nigel Biggar

'Ethics and Empire' was a six-year interdisciplinary project co-led by Biggar, Professor of Moral and Pastoral Theology, Oxford University.⁷⁷ It sought to measure apologies and critiques of empire against historical data from antiquity to modernity across the globe. The project attracted criticism from students, colleagues and other academics.⁷⁸ Sixty academics wrote an open letter denouncing Biggar's work and his support for Bruce Gilley, who had written a paper entitled 'The case for colonialism'.⁷⁹ The letter described the Empire project as 'too polemical and simplistic to be taken seriously'.⁸⁰ The project

⁷¹ 'Nothing in this Chapter applies to anything done in connection with the content of the curriculum.'

⁷² *University statement regarding complaint against Professor Steven Greer*, 8 October 2021, <http://www.bristol.ac.uk/news/2021/october/complaint-outcome.html>.

⁷³ 'Professor Steven Greer speaks out on his exoneration by the University of Bristol', 14 October 2021, <https://epigram.org.uk/2021/10/14/professor-steven-greer-speaks-out-on-his-exoneration-by-the-university-of-bristol/>; Steven Greer, FALSELY ACCUSED OF ISLAMOPHOBIA (2023).

⁷⁴ Fariha Karim, *University put my life at risk, says Professor cleared of racism*, THE TIMES, 16 February 2023.

⁷⁵ N. 72.

⁷⁶ <https://oibi.org.uk/>.

⁷⁷ 'Ethics and Empire', <https://www.mcdonaldcentre.org.uk/ethics-and-empire>.

⁷⁸ Damian Whitworth, *Bloody new battle of British Empire as 60 dons write open letter to Nigel Biggar*, THE TIMES, 23 December 2017.

⁷⁹ Serious threats of violence against the editor led the *Third World Quarterly* to withdraw the article. It was subsequently republished in (2018) 31 *Academic Questions* 167. See Howard-Hassman and McLaughlin, n. 12, 454-8.

⁸⁰ 'Ethics and empire: an open letter from Oxford scholars', 19 December 2017, <https://theconversation.com/ethics-and-empire-an-open-letter-from-oxford-scholars-89333>.

proceeded. However, in another twist, Biggar’s contract to publish the book was effectively cancelled by the Publishers, Bloomsbury.⁸¹ The book, *Colonialism: A Moral Reckoning*, was published by Collins in 2023.

(v) David Miller

Miller was Professor of Political Sociology at the University of Bristol. He was alleged to have made a series of anti-Semitic comments.⁸² In October 2021, the university said the decision to terminate his employment with immediate effect was prompted by its duty of care to students and the wider university community. Although an unnamed Queen’s Counsel had found that the comments Miller was alleged to have made ‘did not constitute unlawful speech’, a disciplinary hearing concluded that he ‘did not meet the standards of behaviour we expect from our staff’.⁸³

(vi) The Cambridge Debate on Free Speech 2020

In 2020, Cambridge University’s Council proposed a series of updates to its free speech rules. One rule would have required academics to be ‘respectful of the diverse identities of others’. A group of academics, headed by philosopher Arif Ahmed, managed to force a ballot on a series of amendments including that the phrase ‘respectful of’ be replaced with ‘tolerant’.⁸⁴ They argued that the vague nature of the original wording meant that they could be used to undermine academics’ freedom of speech rather than protect it.⁸⁵ The substance of the issue was that ‘respectful of’ signified a higher requirement than tolerance. Ahmed used the Cambridge issue to exemplify concerns at how academics were self-censoring. It took him a month to get 24 people to support a motion, but when the vote was held by secret ballot, it was passed by 1,378 votes to 208.

(vii) Evaluation of the Individual Cases/ Incidents

Many of these individual cases and incidents were referred to in the parliamentary debates on the HE (FoS) Bill. Perceptions and sympathies in relation to them may differ. However,

⁸¹ Andrew Ellson, *Nigel Biggar hits out at Bloomsbury over ‘cancelled’ book on Empire*, THE TIMES, 28 January 2023.

⁸² Julius n. 34, does not support Miller on the basis that academic conspiracy speech is the enemy of academic speech.

⁸³ ‘Bristol University Statement on Prof David Miller’, <https://www.bristol.ac.uk/news/2021/october/prof-miller-statement.html>. Cf *Ross v Canada*, UN Human Rights Committee (disciplinary action against a schoolteacher for his off-duty antisemitic remarks), UN Doc. CCPR/C/70/D/736/1997 (2000).

⁸⁴ *Cambridge University Statement on Freedom of Speech*, (9 Dec 2020), <https://www.governanceandcompliance.admin.cam.ac.uk/governance-and-strategy/university-statement-freedom-speech>.

⁸⁵ Camilla Turner, ‘Cambridge dons win free speech row as they defeat new “authoritarian” rules’, *The Telegraph*, 9 December 2020.

it is submitted that they do evidence significant systemic problems. For exercising their freedom of speech and academic freedom the academics concerned have been subjected to unacceptable abuse and attacks (both in person and online), had invitations cancelled, were subjected to internal investigations, or felt compelled to resign. There is little or no public evidence of students being disciplined in relation to the death threats against *Stock*, for posting violent flyers against *Pheonix*, or for releasing details of the complaint against *Greer* on social media. The Universities concerned appear to have acted tardily or not at all. The objections to the particular kind of speech were the same in the *Stock*, *Pheonix* and *Freedman* cases.⁸⁶ *Pheonix*'s views have also been an internal issue at the Open University, from which she resigned in December 2021. The *Pheonix* and *Freedman* cases are similar in that they both involved external speakers. The incident with *Freedman* is particularly notable because the rescinding of the invitation was not related to the issues being discussed at the HMW.

The *Greer* case exemplifies the power on online campaigns against academics, the lengthy periods required for investigation of complaints, the significant impact on the individual concerned (who was signed off work because of the impact on his health), and the desire of Universities to be respectful of the sensitivities of students. In some cases, the universities concerned have responded by considering it appropriate to apologise to everyone involved. That may appear as good public relations, but it makes their institutional position on freedom of speech and academic freedom appear ambiguous or equivocal. It is difficult to argue that they were complying with the existing protection of freedom of speech under s. 43 of the 1986 Act.

The *Biggar* case is the narrowest in the sense that it is focused on differing views on the academic credibility of his work. The principled response in free speech term is to strongly critique the work. The effective cancellation of publication by the publisher based on perceived reader sensitivities is a worrisome development. Once the HE (FoS) Act is in force, the same decision taken by a university press based in England might be challengeable under it because they are part of the university.⁸⁷ The *Miller* case needs careful appreciation because the official justification for his dismissal was based on standards of behaviour rather than unlawful speech.

In some of the cases and incidents considered, the behaviour of other academic colleagues may not have constituted disciplinary offences but raises serious questions about their commitment to freedom of speech. Academic freedom should include the protection of academics from other academics.⁸⁸

⁸⁶ See also ““*Who put the GI in SOGI*” An investigation into the concerns arising from Dr Lawford-Smith’s research seminar on 25 April, 2022’, <https://www.reading.ac.uk/news/-/media/news/files/holly-lawfordsmith-seminar--reportfinal.pdf>.

⁸⁷ See Hansard, HL Debs, Vol. 826, Col. 244 (7 December 2022) (Baroness Barran)..

⁸⁸ In the US context, Howard-Hassman and McLaughlin noted the ‘increasing divide between the engaged politics of many academics, especially in the social sciences and humanities, and the center of political consensus in their respective societies’, n. 12, at 464-5.

B. Systemic Evidence

The six individual/ institutional cases discussed above could be understood as isolated cases where matters have unfortunately gone wrong or as the tip of icebergs, thus evidencing systemic issues.

(i) Joint Committee on Human Rights

In 2017-18, the Joint Committee of the House of Commons and House of Lords on Human Rights conducted an inquiry into free speech at universities. It heard evidence from 34 witnesses and received 109 written submissions.⁸⁹ Its 2018 Report on *Freedom of Speech in Universities*,⁹⁰ presented a balanced review of the evidence. It reported that breaches of freedom of speech took a number of forms, including ‘no platforming’⁹¹ and ‘safe spaces’⁹² but that such breaches were ‘not pervasive’. It found that, while restriction of freedom of expression was not a widespread issue, there were concerns around increased bureaucracy, and potential self-censorship from students on campus as a result of the *Prevent* duty guidance. It considered that the Charity Commission’s approach to regulating free speech in students’ unions was problematic and unduly restrictive.⁹³ The Committee found that there were a number of factors that may interfere with freedom of speech at universities. One was regulatory complexity. Some University codes on freedom of speech and procedures for inviting external speakers put barriers in the way of events, rather than facilitating them. The Committee also published an *Analysis of UK university free speech policies* prepared it by The Higher Education Policy Institute.⁹⁴

The Government’s response welcomed the Report but observed that the inquiry did not consider the ‘culture in our universities’.⁹⁵ A summit of leaders in the higher education sector, called for by the Universities Minister, agreed that the sector should support the Equality and Human Rights Commission to develop new guidance on freedom of expression. The *Guidance on Freedom of Expression for HE Providers in England and*

⁸⁹ <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2017/inquiry/publications/>

⁹⁰ Fourth Report of Session 2017–19, HC 589, HL Paper 111, <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf>. See also Josh Freeman, *No Platform: Speaker Events at University Debating Unions*, HEPI, No. 153 (2022).

⁹¹ *Ibid*, prs. 40-42. NUS’s No Platform Policy covers six organizations proscribed under *Prevent* or other duties.

⁹² *Ibid*, prs. 55-60.

⁹³ N. 90, prs. 79-86. See updated *Operational Guidance 48: Students’ unions* (2019).

⁹⁴ <https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/2015-20-parliament/HEPIreport090218.pdf>.

⁹⁵ *Freedom of Speech in Universities: Responses: Apx A: the Government’s Response*, <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1279/127904.htm>.

Wales (2019),⁹⁶ was to be used by all institutions and students' unions when formulating their policies on freedom of speech.⁹⁷

(ii) Policy Exchange

Policy Exchange⁹⁸ published two papers entitled *Academic freedom in the UK* (2019),⁹⁹ and *Academic Freedom in the UK - Protecting viewpoint diversity* (2020).¹⁰⁰ Its polling showed that a number of current and retired academics chose to self-censor. 32% of those who identified as 'fairly right' or 'right' had refrained from airing views in teaching and research, with around 15% of those identifying as 'centre' or 'left' also self-censoring.¹⁰¹

(iii) Department of Education

In February 2021, the DoE's White Paper¹⁰² drew heavily on the two reports published by Policy Exchange. It set out the Government's view that freedom of speech in HE was under threat and was not adequately protected by the current legal framework. It pointed to instances of 'cancel culture' and speakers being 'no platformed'. It viewed the individual cases as the 'tip of the iceberg'.¹⁰³ The rise of intolerance and 'cancel culture' upon campuses was one that directly affected individuals and their livelihoods.¹⁰⁴

(iv) University and College Union

In 2017 a Report was prepared for the UCU on *Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context*.¹⁰⁵ The Report submitted that the UK was amongst the worst nations in Europe with respect to the *de jure* protection for academic freedom. With respect to *de facto* protection, bullying, psychological pressure and self-censorship were all commonplace within higher education institutions.¹⁰⁶ 35.5% of UK

⁹⁶ <https://equalityhumanrights.com/en/publication-download/freedom-expression-guide-higher-education-providers-and-students-unions-england>.

⁹⁷ 'Free speech to be protected at university', 2 February 2019, <https://www.gov.uk/government/news/free-speech-to-be-protected-at-university>.

⁹⁸ A right-wing think tank with close links to the Conservative Party, <https://policyexchange.org.uk/>.

⁹⁹ T. Simpson and E. Kaufman, *Academic freedom in the UK*, Policy Exchange, November 2019, <https://policyexchange.org.uk/wp-content/uploads/2019/11/Academic-freedom-in-the-UK.pdf>.

¹⁰⁰ R. Akekoya, E. Kaufman and T. Simpson, Policy Exchange, August 2020, <https://policyexchange.org.uk/publication/academic-freedom-in-the-uk-2/>. See Jonathan Portes, 'The rightwing defence of "academic freedom" masks a McCarthyite agenda', *The Guardian*, 4 August 2020.

¹⁰¹ Akekoya et al., *ibid*, 8.

¹⁰² N. 4.

¹⁰³ *Ibid*, 5.

¹⁰⁴ *Ibid*. See also pr. 63 on the 'cultural shift in the way that debate and disagreement is approached'

¹⁰⁵ The authors were T. Karran and L. Mallinson.

¹⁰⁶ *Ibid*, 80.

academics self-censoring, compared to 19.1% for the EU.¹⁰⁷ In 2019, UCU submitted to the UNESCO/ILO committee of experts on the application of the recommendations concerning teaching personnel, an allegation against the UK Government in respect of ‘non-compliance’ with the 1997 UNESCO recommendation.¹⁰⁸ However, somewhat inconsistently, the UCU argued that the HE (FoS) Bill had been introduced on the pretext that there was a crisis of free speech and academic freedom on campus caused by intolerant students and staff, and the resultant rise of so-called ‘cancel culture’. It considered that there was no real evidence for this. The significant threats to both academic freedom and free speech came from the government and university managers.¹⁰⁹

(v) King’s College, London

A 2019 report by King’s College London, *Freedom of expression in UK Universities*,¹¹⁰ showed that 97% of students thought it was important for freedom of speech and academic freedom to be protected in universities. However, it also found signs of a ‘chilling effect’. Some students reported reluctance to express their views for fear of disagreeing with their peers. 25% of students claimed that they were scared to state their views openly. One in four students (26%) thought that violence could be a justifiable response to hate speech or racially charged comments.

(vi) Legatum Institute

In 2022, the Legatum Institute¹¹¹ published a paper on *Academic Freedom Under Threat*.¹¹² Its survey found, *inter alia*, that large numbers of academics, regardless of their ideological orientation, felt the need to ‘self-censor’ their political beliefs while on campus. In the UK 35% of academics felt the need to self-censor compared to 29% in Australia, 44% in Canada and 50% in the United States.

(vii) CIVITAS (Institute for the Study of Civil Society)

¹⁰⁷ Ibid, 55-6.

¹⁰⁸ https://www.ucu.org.uk/media/10122/UCU-submission-to-UNESCOILO-concerning-teaching-personnel/pdf/UK_CEART_Submission_UCU_Jan2019.pdf; *Final Report, Fourteenth Session Joint ILO–UNESCO Committee of Experts on the Application of the Recommendations concerning Teaching Personnel*, (2021) prs. 115-54.

¹⁰⁹ *UCU Briefing on the HE (FoS) Bill House of Lords Second Reading*, https://www.ucu.org.uk/media/12919/UCU-briefing-on-the-Higher-Education-Freedom-of-Speech-Bill-Jun-22/pdf/UCU_Lords_briefing_on_the_HE_FoS_Bill_Jun_22.pdf.

¹¹⁰ The authors were Jonathon Grant, Kirstie Hewlett, Tamar Nir and Bobby Duffy, <https://www.kcl.ac.uk/policy-institute/assets/freedom-of-expression-in-uk-universities.pdf>.

¹¹¹ The Institute is a think tank based in London, UK, <https://li.com/>.

¹¹² Authored by Matthew J. Goodwin, <https://kar.kent.ac.uk/93251/1/Legatum-Institute-Is-Academic-Freedom-Under-Threat.pdf>.

In 2020, a CIVITAS¹¹³ report, *Academic Freedom in Our Universities: The Best and the Worst*,¹¹⁴ analysed over three years of campus censorship. Across all UK Universities, 93 of all 137 (68%) university institutions experienced a controversy relating to censorship of free speech. Of the ‘Russell Group’, a self-selected association of twenty-four public research-intensive universities, 42% were recorded overall as receiving the most restrictive censorship score; over half (54%) came in with a moderately restrictive censorship score, while just one registered as most friendly. Over half (53%) of all 137 universities experienced alleged ‘transphobic’ episodes that led to demands for censoring speech. Just under a quarter (23%) of all universities experienced (i) episodes that led to demands for censoring speech due to the intervention of external pressure groups and (ii) episodes of free speech restrictions due to the intervention of their own university societies. Over half (55%) of all universities experienced a ‘cancel culture’ of open letters or petitions which pushed for the restriction of views of staff, students or visiting speakers. 50 of the 137 universities (37%) experienced incidents that led to demands for censorship of speech or written material due to social media activism. 98 of the 137 universities (72%) had taken steps to introduce a documented policy on free speech/expression that had itself imposed a restrictive set of conditions on free speech. 68 universities (50%) had harassment policies placing over 100 levels of practical restrictions on free speech. 81% of universities adopted an ‘Equal Opportunities policy’ that limited individual expression. 93% of universities listed a series of unacceptable speech acts in their student and staff Codes of Conduct. Overall, 83 of the 137 universities (64%) had Codes of Conduct placing over 30 levels of practical restrictions on free speech. Over 50 institutions had an External Speaker policy which had themselves become a cause for curbing free speech.

(viii) Office for Students

The OfS’s data showed that only a tiny percentage of events and speaker requests were rejected. Figures from 2017-2018 showed that out of nearly 60,000 reported events only 53 were rejected, fewer than 0.1%, and these cases concerned only 17 HEPs out of more than 250. However, over 2,153 events were approved with mitigations and conditions including putting in place experienced chairs to manage and moderate events, ticketing events, or having senior staff present to monitor an event and intervene where necessary. The OfS expressed strong support for the Act. It was concerned at issues beyond the statistics. It thought that there were serious and significant issues which it wanted universities to take seriously.¹¹⁵ It noted the frequent press reports of incidents that caused concern, alongside

¹¹³ A British think tank working on issues related to democracy and social policy, <https://civitas.org.uk/>.

¹¹⁴ <https://www.civitas.org.uk/content/files/Academic-Freedom-in-Our-Universities.pdf>.

¹¹⁵ N. 40, Col 113 (Nicola Dandridge, Chief Executive, OfS). Equivalent statistics for 2021-22 (published in 2023) were 31, 545 events, 260 events did not go ahead, 475 went

the 60 or so notifications it had received on free speech issues since 2018.¹¹⁶ Even before the passing of the Act, it had indicated how it would approach key issues.¹¹⁷

(ix) The Parliamentary Hearings and Debates

During the Bills' Committee stage in the House of Commons there was evidence from a range of academics, some of whom had been involved in specific controversies discussed above (Stock, Ahmed, and Biggar), representatives of HEPs, OfS, and research institutes, some of which had published reports on the issues (Policy Exchange, Legatum Institute).¹¹⁸ Conservative MPs and the government argued the Act was necessary. According to the then Minister for Higher and Further Education, 'More than two thirds of the world's population live in countries where academic freedom is severely limited.'¹¹⁹ It was claimed that the UK was one of the few nations in which free, fair and lawful speech at university was truly valued. It was asserted that it was, 'no coincidence that the most academically free countries in the world are also the most socially progressive, the most democratic, the most peaceful and, of course, the most prosperous.'¹²⁰ The government considered the evidence of problems in higher education to be 'overwhelming'.¹²¹ It referred to an *Academic Freedom Index* under which the UK had become the only country in the top tier of academically free countries to be significantly downgraded.¹²² Indeed the decline appeared to be accelerating (we were now ranked 63rd in the world). Reported breaches of freedom of speech took a number of forms, including 'no platforming' and 'safe spaces'. Such breaches collectively created a 'chilling effect' that had reduced students' confidence to exercise freedom of speech. The government was particularly concerned that there were existing legal duties, particularly s. 43 of the 1986 Act, but without proper means of enforcement, and that students' unions were not directly regulated with regards securing freedom of speech.¹²³ By contrast, the Shadow Minister for Education described the Bill as a Bill primarily searching for a problem.¹²⁴ Although the government liked to present themselves as defenders of freedom of speech, their actions

ahead with some form of mitigation. Again the OfS's view was that the data may not provide the full picture, OfS, *New data on rejected speakers at English universities* (May 2023).

¹¹⁶ OfS, *Annual Report 2022*.

¹¹⁷ *Insight*, n. 23.

¹¹⁸ n. 40.

¹¹⁹ Hansard, HC, Vol 716, Col. 69 (13 June 2022) (Donelan).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, Col 70.

¹²² Varieties of Democracy Institute, <https://www.v-dem.net/our-work/research-programs/academic-freedom/>. See Terrence Karran, Klaus D. Beiter and Lucy Mallinson, *Academic Freedom in Contemporary Britain: A Cause for Concern?*, 76 HIGHER EDUCATION QUARTERLY 563 (2021).

¹²³ Hansard, HC Debs, Vol. 716, Col. 116, (13 June 2022) (Donelan).

¹²⁴ *Ibid.* (Western).

told us differently.¹²⁵ The opposition pointed to the lack of evidence, citing OfS's statistical evidence, and had deep reservations about the unintended consequences of the Act.¹²⁶

(x) Evaluations of the Systemic Evidence

The nine sources of evidence considered above have their own political or institutional agendas. However, the cumulative systemic evidence is concerning in its consistency and the chilling effects experienced across the political and ideological spectrum. It was notable that Lord Collins, a Labour member of the House of Lords with long experience as a trade union official, acknowledged that the debates and evidence on the Bill had changed his mind on the need for the Act.¹²⁷ Universities UK (UUK), a body that speaks collectively for 140 UK universities, adopted a nuanced position. It did not really argue against the substance of most of the Act. Rather it was concerned at how it could deal with potentially conflicting legal duties and new proposals put forward in the *Bill of Rights Bill*¹²⁸ and the *Online Safety Bill*.¹²⁹ It sought help in identifying where further guidance and support could help members in bringing together three strands of work that were often perceived to sit in tension with one another: the need to promote free speech and academic freedom, the importance of good campus relations and equality, diversity and inclusion (EDI) work, and maintaining a zero-tolerance towards harassment.

4. THE HIGHER EDUCATION (FREEDOM OF SPEECH) ACT 2023

The HE (FoS) Act implemented the 2019 Conservative government's Manifesto commitment to '*strengthen freedom of speech and academic freedom in universities*'.¹³⁰ and the legislative proposals in the 2021 White Paper.¹³¹ Its main provisions only apply to England,¹³² thus any practical effect will occur in England only.¹³³ It largely operates by inserting changes into the HERA 2017. Sections 1 to 4 relate to the legal duties of registered HEP's and their constituent institutions (for example, the colleges of the Universities of Cambridge, Oxford and Durham),¹³⁴ to protect freedom of speech and

¹²⁵ The implicit reference was to the Police, Crime, Sentencing and Courts Act 2022.

¹²⁶ Hansard, HC Debs, Vol. 716, Col. 117, (13 June 2022) (Western).

¹²⁷ Hansard, HL Debs, Vol. 826, Col. 222, (7 December 2022).

¹²⁸ G. Bossutil, 'What impact might the Bill of Rights have on freedom of expression cases?' Part I and II, (22 August 2022), <https://constitutionallawmatters.org>.

¹²⁹ The adult safety duties ('legal but harmful' provisions) were removed from the Bill and replaced with new transparency, accountability and freedom of expression duties, <https://bills.parliament.uk/bills/3137>.

¹³⁰ *Get Brexit Done, Unleash Britain's Potential*, 17 (2019).

¹³¹ n. 4.

¹³² S. 12 HE (FoS) Act 2023.

¹³³ HE (FoS), *Explanatory Notes (2023)*, pp. 5-6, 13, (12 May 2021).

¹³⁴ S. A4 HERA 2017, inserted by s. 2 HE (FoS) Act 2023.

academic freedom and students' unions duty to protect freedom of speech. Section 4 provides for civil claims for breach of the duties under s. A1 and s. A5 of the Act.

A. Duties to protect freedom of speech

(i) *Duty to take steps to secure freedom of speech*

Under the s. A1(1), *Duty to take steps to secure freedom of speech*, the governing body of a registered HEP must take the steps that, having *particular regard* to the importance of freedom of speech, are *reasonably practicable* for it to take in order to achieve the objective in s. A1(2), namely '*securing freedom of speech within the law*' for staff, members and students of the provider, and visiting speakers (*emphases added*). The term 'members' was intended to include those who were not technically staff but were closely involved in university life, in particular members of the governing councils of universities and retired academics who were emeritus professors.¹³⁵ 'Members' does not include a person who is a member of the provider solely because of having been a student of the provider.¹³⁶

The governing body of a registered HEP must, with a view to facilitating the discharge of the duties in s.A1(1) (freedom of speech) and (10) (use of premises), maintain a code of practice setting out a number of specified matters. These are (a) the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech, (b) the procedures to be followed by staff and students of the provider and any students' union for students at the provider in connection with the organisation of meetings which are to be held on the provider's premises and which fall within any class of meeting specified in the code, and (ii) other activities which are to take place on those premises and which fall within any class of activity so specified, (c) the conduct required of such persons in connection with any such meeting or activity, and (d) the criteria to be used by the provider in making decisions about whether to allow the use of premises and on what terms. This must include its criteria for determining whether there are exceptional circumstances that require the individual or body to bear some or all of the costs of security relating to their use of the premises. The governing body must take the steps that are reasonably practicable for it to take (including where appropriate the initiation of disciplinary measures) in order to secure compliance with its code of practice.

¹³⁵ Hansard, Vol. 826, Col. 198, (7 December 2022) (Earl Howe).

¹³⁶ S. A1(13) HERA 2017, inserted by s. 1 HE (FoS) Act 2023; s. A4(4) HERA 2017, as inserted by s. 2 HE (FoS) Act 2023. The University of Cambridge treat its students as members for life.

(ii) *Academic Freedom*

The objective in s. A1(2), so far as relating to academic staff, includes securing their academic freedom.¹³⁷ In this Part, ‘academic freedom’, in relation to academic staff at a registered HEP, means their freedom within the law - (a) to question and test received wisdom, and (b) to put forward new ideas and controversial or unpopular opinions,¹³⁸ without placing themselves at risk of being adversely affected in any of these ways: (a) loss of their jobs or privileges at the provider; (b) the likelihood of their securing promotion or different jobs at the provider being reduced.¹³⁹ This last subsection goes beyond the previous language in the HERA. The Minister explained that the term ‘staff’ was intended to broaden the previous reference to employees. Not all those who worked for a HEP had an employment contract or employee status. ‘Staff’ was intended to include those on short-term, casual contracts and PhD students undertaking teaching.¹⁴⁰ It would not include students. Section A1(9) then extends this duty to job applicants.¹⁴¹ That extension goes beyond the previous law. The caveat in the original Bill that academic freedom protections covered only an academic’s ‘field of expertise’ was removed. In many disciplines it would be hard to define exactly where the boundaries of a particular field lie and many issues are cross-disciplinary by nature.

(iii) *Use of Premises*

Under s. A1(3) the objective in s. A1(2) includes securing that - (a) the use of any premises of the provider is not denied to any individual or body on grounds specified in s. A1(4), and (b) the terms on which such premises are provided are not to any extent based on such grounds. The grounds specified in s. A1(4) are - (a) in relation to an individual, their ideas or opinions; (b) in relation to a body, its policy or objectives or the ideas or opinions of any of its members.¹⁴²

(iv) *Security Costs/ NDA’s*

Further provisions deal with security costs for events, which can only be passed on in exceptional circumstances.¹⁴³

(v) *Duty to promote the importance of freedom of speech and academic freedom*

Section 1 HE (FoS) 2023 inserts a new s. A3 into HERA 2017 concerned with a *Duty to promote the importance of freedom of speech and academic freedom*. This is a new duty.

¹³⁷ S. A1(5) HERA, inserted by s. 1 HE (FoS) Act 2023. See Eric Barendt, *ACADEMIC FREEDOM AND THE LAW: A COMPARATIVE STUDY* (2010); Robert C. Post, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012); Richard Watermeyer, Rille Raaper and Mark Olssen eds., *HANDBOOK ON ACADEMIC FREEDOM* (2022).

¹³⁸ S. A1(6) HERA, inserted by s. 1 HE (FoS) Act 2023.

¹³⁹ S. A1(7) HERA, inserted by s. 1 HE (FoS) Act 2023.

¹⁴⁰ Hansard, HC Debs, Vol. 716, Col. 72 (13 June 2022) (Donelan).

¹⁴¹ S. A1(9) HERA, inserted by s. 1 HE (FoS) Act 2023.

¹⁴² S. A1(4) HERA, inserted by s. 1 HE (FoS) Act 2023.

¹⁴³ s. A1(4) HERA, inserted by s. 1 HE (Fos) Act 2023. See also S. A1(11) HERA, inserted by s. 1 HE (FoS) Act 2023 on NDA’s.

(vi) Students' unions

Section 3 HE (FoS) Act 2023 operates by way of inserting a new Part A5 into the HERA (2017), entitled *Duties of students' unions*. It is concerned with the *Duty to take steps to secure freedom of speech*. A students' union must take the steps that, having particular regard to the importance of freedom of speech, are *reasonably practicable* for it to take in order to achieve the objective¹⁴⁴ of securing freedom of speech *within the law* for (a) members of the students' union, (b) students of the provider, (c) staff of the students' union, (d) staff and members of the provider and of its constituent institutions, and (e) visiting speakers.¹⁴⁵ There are parallel provision on the use and terms of premises¹⁴⁶ and on security costs.¹⁴⁷ Under s. 6A, a students' union to which s. A5 applies must, with a view to facilitating the discharge of its duties under that section, maintain a code of practice setting out specified matters.¹⁴⁸

B. Civil Claims for Breach of Duty – A New Tort.

Section 4 HE (FoS) 2023 inserts a new s. A7 into HERA 2017 concerned with *Civil claims for breach of duty*. That provision creates a new statutory tort for breach of specified freedom of speech duties. Under s. A7(1) a person may bring civil proceedings against a registered HEP or one of its constituent institutions, in respect of a breach by the governing body of the provider of any of its duties under s. A1 that causes the person to sustain loss; or a students' union, in respect of a breach by it of any of its duties under s. A5 that causes the person to sustain loss.¹⁴⁹ Before doing so they must normally¹⁵⁰ have exhausted either the existing scheme operated by the Office of the Independent Adjudicator for Higher Education or a new OfS Complaints Scheme provided for in the 2023 Act.¹⁵¹ The provision on civil claims proved to be controversial. It was deleted by the HL, reinstated by the HC and then accepted by the HL.¹⁵² The responsible Minister stated that the clause was 'critical to stimulating the cultural transformation that we need', and ensuring there was a 'legal backstop' in place for the Bill's duties.¹⁵³

5. CRITICAL ANALYSIS OF THE KEY CONCEPTS AND LANGUAGE IN THE ACT

¹⁴⁴ S. A5(1) HERA 2017, inserted by s. 3 HE (FoS) Act 2023.

¹⁴⁵ S. A5(2) HERA 2017, inserted by s. 3 HE (FoS) Act 2023.

¹⁴⁶ S. A5(3)-(4) HERA 2017, inserted by s. 3 HE (FoS) Act 2023.

¹⁴⁷ S. A5(5) HERA 2015, inserted by s. 3 HE (FoS) Act 2023.

¹⁴⁸ S. A6(1) HERA 2017, inserted by s. 3 HE (FoS) Act 2023.

¹⁴⁹ There is no cause of action against an individual student or a student society, only a students' union.

¹⁵⁰ The exception is where they are seeking an injunction only.

¹⁵¹ s. 8 HE (FoS) Act 2023 inserting a new s. 69C HERA 2017 and a new *Schedule 6A*.

¹⁵² For the final debates Hansard, HC, Vol. 732, Cols. 45-52 (2 May 2023); Hansard, House of Lords, Vol 829, cols. 1870-79 (10 May 2023).

¹⁵³ Hansard, HC Debs, Col. 854 (7 February 2023).

A. Freedom of Speech

Under s. A1(13),

In this Part, references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form).¹⁵⁴

This provision was inserted as a government amendment in the HL. ‘Opinions’ replaced the expression ‘beliefs or views’ in the original Bill. It was explained that it was ‘not intended to change its meaning’¹⁵⁵ but was ‘consequential on the... new definition of “freedom of speech”’.¹⁵⁶ Under ECHR jurisprudence a strong distinction is drawn between statements of facts and of opinion or value judgments, with restrictions on the latter two being more difficult to justify.¹⁵⁷ There is no reference to other aspects of Article 10(1) such as excludes the right to express oneself through other actions, to hold opinions and to receive information and ideas without interference by public authorities, or at all to Article 10(2).¹⁵⁸ However, reference to Article 10(2) is presumably implicit in the reference to how Article 10(1) ‘has effect’ for the purposes of HRA 1998. The Act appears to define freedom of speech by reference to Article 10(1) ECHR. However, the appearance may be deceptive as the reference is to Article 10(1) as it has ‘effect for the purposes’ of the HRA. That effect must be determined by s. 2 HRA. If so, the courts must take account of what the ECHR jurisprudence considers to be encompassed by freedom of speech, but they would not be bound to follow it.

B. Speech and Expressive Conduct

The ‘freedom to impart ideas, opinions or information’ gives this provision a wide scope. S. A1(13) also makes it clear that freedom of speech is not limited to the spoken word.¹⁵⁹ It ‘includes speech, writing or images (including in electronic form)’. This would cover many of the forms the ECHR jurisprudence accepts as forms of expression such as distributing leaflets, posters, paintings, workshops. Electronic forms would cover social media, email and other digital communications. However, s. A1(13) it might not cover some expressive activities that the ECtHR has treated as expression such as a principled decision not to wear clothes.¹⁶⁰ In the House of Lords debate, it was stated that the Bill, ‘did not cover conduct which is not speech, such as the act of affiliating with or joining an

¹⁵⁴ HE (FoS) Bill, December 2022, s. 1 inserting A1 (13). The same wording appears in Clause 4 *Bill of Rights Bill* (2022).

¹⁵⁵ Hansard, HL Debs, Vol. 826, Col. Ibid, Col. 186 (Baroness Barran).

¹⁵⁶ Ibid, Col. 188.

¹⁵⁷ See Part 2D above; David Harris et al., *LAW OF THE ECHR*, 5th edn, 683-9 (2023).

¹⁵⁸ These aspects may be relevant to any disciplinary proceedings.

¹⁵⁹ The EHRC’s *Guidance* was that HEPs should consider ‘freedom of speech’ to cover wider forms of expression, n. 96, at 13.

¹⁶⁰ *Gough v. UK*, A. 49327/11 (28 October 2014).

organisation.¹⁶¹ Similarly, it did not cover tying oneself to a railing or blocking a street.¹⁶² In 2022, the Court of Appeal held that the ECHR did not provide protection to those who caused criminal damage during protest that was violent or not peaceful. Articles 9, 10 and 11 ECHR were not engaged in those circumstances and no question of proportionality arose. Prosecution and conviction for causing significant damage to property, even if inflicted in a way which was ‘peaceful’, could not be disproportionate.¹⁶³

C. *Interpreting s. AI(13) – Hate Speech*

Although a number of crimes are commonly described as ‘hate crimes’,¹⁶⁴ ‘hate speech’ is not a legal categorisation in English law.¹⁶⁵ Rather it is a descriptor of various kinds of expression that are considered extreme on the basis that they incite violence, hatred or discrimination against other people and groups. Offending someone is not, in and of itself, a criminal offence. To constitute an offence under hate crime legislation, the speech or behaviour in question must be threatening, abusive or insulting and be intended to, or likely to, stir up hatred. By contrast, the ECtHR does use the categorisation of ‘hate speech’,¹⁶⁶ though it has also noted that there is no universal definition.¹⁶⁷ It has developed a rather nuanced jurisprudence using two approaches. The first is the exclusion from the protection provided for by Article 17 ECHR (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention. This approach is only applicable on an exceptional basis and in extreme cases. It has been applied to (i) expression which is inspired by totalitarian doctrine or which expresses ideas that represent a threat to the democratic order and are liable to lead to the restoration of a totalitarian regime; (ii) the spreading of ideas which are racially discriminatory; (iii) negationism and revisionism such as denial of the Nazi Holocaust or of the committal of denying the committing of genocide in the gas chambers of the concentration camps under National Socialism; (iv) a general and vehement attack against a religious or ethnic group, and (v) incitement to violence and support for terrorist groups.¹⁶⁸

The second approach is setting restrictions on protection, as provided by Article 10(2) ECHR. This approach is adopted where the hate speech is considered to be not apt to

¹⁶¹ HL, Debs, Vol. 826, Col. 195 (7 December 202) (Lord Howe).

¹⁶² Ibid, Col. 205 (Baroness Barran).

¹⁶³ *Attorney General’s Reference On A Point Of Law No. 1 of 2022*, [2022] EWCA Crim 1259, pr. 120 (criminal damage to a statue of Colston, a Bristol-born merchant, whose trading activities included the transportation of African slaves).

¹⁶⁴ *CPS Guidance on Hate Crimes*, <https://www.cps.gov.uk/crime-info/hate-crime>; *Hate Crime Laws – Final Report*, Law Commission (2021).

¹⁶⁵ Cf. Jessica Johnson, *When Hate Circulates on Campus to Uphold Free Speech*, 80 *STUD. L. POL. & SOCIETY* 113 (2019).

¹⁶⁶ *Factsheet – Hate Speech*, ECtHR, June 2022, https://echr.coe.int/Documents/FS_Hate_speech_ENG.pdf.

¹⁶⁷ *Sanchez v. France*, A. 45581/15, pr. 160 (15 May 2023); Jacob Mchangama and Natalie Alkiviadou, *Hate Speech and the European Court of Human Rights*, 21 *HUM. RTS. LR.* 1008 (2021).

¹⁶⁸ *Factsheet*, n. 166, 2-5; Harris et al, n. 157, 608-12; *Lenis v. Greece*, A. 47833/20 pr. 52 (31 August 2023) (homophobic abuse denying LGBTI people their human nature, coupled with incitement to violence).

destroy the fundamental values of the Convention. The factual context is often similar to those in which the first approach is applied, for example, incitement to racial or religious discrimination or hatred, condoning war crimes, glorification of or incitement to violence, incitement to religious intolerance or ethnic hatred, condoning terrorism, publicly mocking, defaming, denigrating or threatening a person or group of persons for certain characteristics, including their sexual orientation or gender identity.¹⁶⁹ To illustrate the nuanced approach, expression denying the Nazi holocaust and genocide is viewed as not being protected by Article 10, while denial of other alleged genocide in Armenia in 1915-16,¹⁷⁰ or in (Myanmar) Burma since 1917 would be viewed as protected speech. The issue then is whether limitations on that speech can be justified under Article 10(2). Denial of the Nazi holocaust and genocide *per se* is not a criminal offence in the UK.¹⁷¹ However, in a particular context it may contravene a broader criminal offence such as being an act intended or likely to stir up hatred on the grounds of race,¹⁷² or if sent by a public electronic communications network (e.g. if a video of a presentation is posted) as being a ‘grossly offensive’ message.¹⁷³

D. Interpreting s. A1(13) – Trans Speech

Many of the individual cases and incidents have concerned speech which argues for limits on trans rights and differentiating them from women’s rights.¹⁷⁴ Opponents of such speech have sometimes sought to describe it as ‘hate speech’, as in the cases of *Stock*, *Pheonix* and *Freedman*. However, it would not seem to fall within the ECtHR’s understanding of hate speech. Although supporters of trans rights would regard it as upsetting and offensive, it does not reach the threshold of or denying their human nature, coupled with incitement to violence, or denigrating or threatening a person or group of persons for their gender identity.¹⁷⁵ In *Forstater v. CDG and Others*,¹⁷⁶ an Employment Appeal Tribunal held that F’s gender-critical beliefs, which were widely shared, and which did not seek to destroy

¹⁶⁹ Ibid, citing *Lilliendahl v. Iceland*, A. 29297/18, (11 June 2020) (L’s use of derogatory language and clear expressions of disgust for homosexuals amounted to hate speech).

¹⁷⁰ *Perinçek v. Switzerland*, A. 27510/08, (15 Oct 2015).

¹⁷¹ Cf. Rob Merrick, ‘No 10 slaps down universities min for saying ‘Free Speech Bill’ will allow holocaust deniers to speak’, *The Independent*, 13 May 2021; Dominic McGoldrick and Therese O’Donnell, *Hate-speech laws: consistency with national and international human rights law*, 18 LEGAL STUDIES 453 (1998).

¹⁷² ss. 18-23 Public Order Act 1986.

¹⁷³ s. 127(1) of the Communications Act 2003; *Chabloz v Crown Prosecution Service* [2019] EWHC 3094 (Admin); Dominic McGoldrick, *The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective*, 13 HUM. RTS. LR. 125 (2013).

¹⁷⁴ For similar issues in Australia see Chip Le Grand, *Class warfare: Lecturer targeted by trans activists over rally role*, *The Sydney Morning Herald*, 14 May 2023. For human rights perspectives see Susan Dicklitch-Nelson and Indira Rahman, *Transgender rights are human rights: A cross-national comparison of transgender rights in 204 countries*, 21 JOURNAL OF HUMAN RIGHTS 525 (2022); Sandra Duffy, *Contested Subjects of Human Rights: Trans- and Gender-variant Subjects of International Human Rights Law*, 84 MOD. LR. 1041 (2021).

¹⁷⁵ Cf. *Lenis v. Greece*, n. 168; *Lilliendahl v. Iceland*, n. 169;.

¹⁷⁶ UKEAT/0105/20/JOJ (10 June 2021).

the rights of trans persons, clearly did not fall into the category of the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 ECHR by virtue of Article 17 ECHR. F's belief, whilst offensive to some, and notwithstanding its potential to result in the harassment of trans persons in some circumstances, fell within the protection under Article 9(1) ECHR (freedom of belief) and therefore within s.10 Equality Act.¹⁷⁷

The mere expression of 'gender critical' beliefs, in and of themselves, is undoubtedly within the law. *R (Miller) v. College of Policing*,¹⁷⁸ concerned recording of gender critical comments as non-hate crimes.¹⁷⁹ Although the Court of Appeal did not accept that the perception-based recording of non-crime incidents by the police was *per se* unlawful, it considered that some additional safeguards should be put in place so that the incursion into freedom of expression was no more than was strictly necessary.¹⁸⁰ However, the court was very clear that the speech in *Miller* was not criminalised. Nor was there any suggestion that it was unlawful in any other way.

Similar issues in relation to trans rights have arisen in Australia. When publication of Lawford-Smith's book, *Gender-Critical Feminism*, was announced in 2022, a group of academics across different universities wrote to OUP arguing that gender-critical feminism was not a scholarly field but 'a coordinated polemical intervention' which denied transgender rights under the guise of scholarly inquiry.¹⁸¹ A second letter from OUP employees and authors asked management to reconsider the decision to publish. In response, OUP management described *Gender-Critical Feminism* as a 'serious and academic representation of this school of feminist thought'. In 2023, news that Lawford-Smith's book, *Sex Matters: Essays in Gender-Critical Philosophy*, would be published led another author to withdraw her forthcoming book.¹⁸² She claimed OUP was contributing to a genocidal agenda and helping to launder transphobia. If OUP had declined to publish, it might be challengeable under the HE (FoS) Act, because they are part of the university.

E. Interpreting s. A1(13) – Identity Politics

Many of the individual cases and incidents considered above have related to issues of identity politics (*Stock, Phoenix, Freedman, Greer, Cambridge*). In none of them was the speech considered or held to be unlawful. Cram and Fenwick observed that in the UK context, 'issues relating to identity politics are being used (sometimes successfully) to close down a category of speaker against whom the most that could be said is that their words might hurt the feelings of somebody on campus. To their supporters the efforts to

¹⁷⁷ *Forstater v. CGC and Others*, Case Number: 2200909/2019 (merits).

¹⁷⁸ [2021] EWCA Civ 1926.

¹⁷⁹ Stock provided expert evidence in the case in support of M's claim.

¹⁸⁰ Revised Guidance (2022). In March 2023, the Home Secretary published *The Non-Crime Hate Incidents Draft Code of Practice on the Recording and Retention of Personal Data*.

¹⁸¹

<https://docs.google.com/forms/d/e/1FAIpQLSc342TjGvVsw80WpnZtJqJO7JUAjCY5LVxcZQzVVjFVEFbvUQ/viewform>. See also n. 86.

¹⁸² Tim Witherow and Aanvee Bhutani, *Academic Pulls Book From OUP in Transphobia Row*, THE TIMES, 12 May 2023.

curtail such offensive speech are part of a broader campaign to challenge the dominance of white, male heterosexual worldviews.’¹⁸³ In the US context, Howard-Hassman and McLaughlin, have similarly suggested that the, ‘Scholars immersed in some of these new currents in academic politics often dismiss academic freedom and freedom of speech as outmoded remnants of a white, male, cis-gendered colonial liberalism’.¹⁸⁴ Also that some scholars believe that, ‘freedom of speech ought to be limited to persons whose identities conform to the identities of those about whom they speak. Otherwise, it is legitimate to censor their ideas’.¹⁸⁵

F. Interpreting A1(13) – Controversial Academic Views on Political Issues

The *Biggar* case could be viewed as related to issues of identity politics in a wider sense, but it is best regarded as an example of controversial academic views on political issues. Applying ECHR jurisprudence, it would be classified as academic speech expressing B’s opinion or value judgments on an issue of public importance and which should, therefore, be afforded a high level of protection.¹⁸⁶ Its controversial nature would not take it outside of the academic context. The mode and language of the speech would not have been considered derogatory or insulting. It did not constitute a gratuitous personal attack on an individual or a community.¹⁸⁷ It does not matter that its opponents considered Biggar’s opinions to be a minority one and devoid of merit.¹⁸⁸ Biggar’s speech was undoubtedly lawful. A stark contrast is with *Zemmour v. France*.¹⁸⁹ For the ECtHR, Z’s aggressive, sweeping language asserting that France was being ‘colonised’ by ‘Muslims’ had been deployed with discriminatory intent and not for the sole purpose of sharing with the public an opinion about the rise of religious fundamentalism in France’s peri-urban neighbourhoods. The statements had not belonged to a category of speech enjoying enhanced protection under Article 10 ECHR and the French authorities had therefore had a wide margin of appreciation to impose restrictions. Z’s conviction for ‘inciting racial discrimination and religious hatred’ did not violate Article 10.

G. Within the Law

Assuming that the particular ‘speech’ is covered by Article 10 ECHR, the duty under s. A1(1) relates to the objective of securing freedom of speech ‘within the law’. An individual does not have to demonstrate that they have right to say something. Rather they are at liberty to say anything unless it is prohibited by law.¹⁹⁰ Criminal law prohibits speech in a variety of contexts. The *EHRC Guidance* listed seven acts of Parliament that

¹⁸³ n. 18, at 852.

¹⁸⁴ n. 12, at 471-2.

¹⁸⁵ *Ibid*, at 472.

¹⁸⁶ Cf. *Sorguc v. Turkey*, A. 17089/03 (23 June 2009).

¹⁸⁷ *Mustafa Erdogan v. Turkey*, A. 346/04 and 39779/04, pr. 45 (27 May 2014). For Julius, n. 34, it would qualify as possessing academic substance, even if one profoundly disagreed with it. It is not actively inimical to academic values.

¹⁸⁸ *Hertel v. Switzerland*, A. 25181/94, pr. 50 (25 August 1998).

¹⁸⁹ A. 63539/19, (20 December 2022).

¹⁹⁰ *Insight*, n. 23, 1.

contained criminal offences that placed limitations on freedom of expression.¹⁹¹ Therefore, in principle, the death threats against *Stock* could have been prosecuted. Civil law may also serve to prohibit speech in a variety of contexts, such as defamation, libel, confidential information, and copyright. The existence of Article 10 as a Convention right under the HRA may have changed the system in the sense that an individual can argue that they now have a ‘right’ to freedom of expression under Article 10, which is normatively stronger than the residual common law liberty. In the HL, the government minister explained that the Bill did not change an individual’s right to freedom of speech.¹⁹²

In some of the controversies that have arisen the argument has been made that particular speech is discriminatory, or constitutes harassment, or is inconsistent with Public Sector Equality Duties (PSED’s). We consider these in turn.

H. Discrimination

The Equality Act 2010 prohibits unlawful discrimination in relation to certain ‘protected Characteristics’. Speech that amounts to unlawful discrimination (direct or indirect) is unlawful.¹⁹³ The content of the curriculum has never been caught by discrimination law. The delivery of the curriculum is included,¹⁹⁴ but it would have to be an extreme case. A report found that the contents of *Miller’s* allegedly anti-Semitic speech do not ‘constitute unlawful speech’.¹⁹⁵ A large number of registered HEP’s have adopted the IHRA’s non-legally binding working definition of antisemitism as ‘a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.’¹⁹⁶ However, that definition is not law.¹⁹⁷ It also makes clear that criticism of Israel similar to that levelled against any other country cannot be regarded as anti-Semitic. A contemporary controversy is whether it is anti-Semitic to use the term ‘apartheid’ in connection with the policies and practices of the State of Israel.¹⁹⁸ Also, it is not always clear what the ‘adoption’ of the definition, with

¹⁹¹ n. 96, 17.

¹⁹² Hansard, HL Debs, Vol. 826, Col. 186 (7 December 2022) (Baroness Barron).

¹⁹³ *Guidance*, n. 96.

¹⁹⁴ ss. 91, 94 Equality Act 2010.

¹⁹⁵ n. 83.

¹⁹⁶ OfS, *Providers that have adopted the IHRA working definition of antisemitism*, (5 July 2022).

¹⁹⁷ <https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism>. For a critique of its quasi-legal status see Rebecca Ruth Gould, *Legal Form and Legal Legitimacy: The IHRA Definition of Antisemitism as a Case Study in Censored Speech*, 18 *LAW, CULTURE AND THE HUMANITIES* 153 (2022). In 2022, a report by the UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance called upon UN member States to suspend the adoption and promotion of the working definition and the examples attached to it, UN Doc. A/77/512 (2022), prs. 71-8.

¹⁹⁸ One of the examples accompanying the definition is ‘Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist

or without its examples, means in terms of its integration into universities disciplinary procedures. To comply with Article 10 ECHR's requirement that restriction be 'provided by law' a disciplinary procedure relating to alleged anti-semitic speech based on the IHRA definition would have demonstrate that the unlawfulness of the prohibited content was both accessible and foreseeable.

I. Harassment

Under the Protection From Harassment Act 1997, 'harassment' (which requires the pursuance a course of conduct) is both a crime and a tort.¹⁹⁹ Harassment is also prohibited under s. 26 Equality Act 2010, but it has a different definition. In this context, harassment means unwanted conduct that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person because of, or connected to, one or more of the person's relevant protected characteristics. However, the harassment provisions cannot be used to undermine academic freedom. There is a 'high bar' to making out a successful claim of harassment contrary to s.26, where the effect of the impugned conduct is in question.²⁰⁰ In deciding whether conduct has the effect referred to, it is necessary to take into account the perception of the person who is at the receiving end of the conduct, all the circumstances of the case, and whether it is reasonable for the conduct to have that effect.²⁰¹ The circumstances will include the nature and purpose of higher education, the principle of academic freedom, and the high level of protection of academic speech under article 10 ECHR. Therefore, in an academic context, the reasonableness requirement will be much more difficult to satisfy. Views expressed in teaching, debate or discussion on matters of public interest, including political or academic communication, are therefore unlikely to be seen as harassment, even if they are deeply offensive to some of the people who are listening, as Article 10 will protect them.²⁰² 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.²⁰³ The teaching and materials at issue in the *Greer* case was found not to be discriminatory or to constitute harassment.²⁰⁴ In a wider HEP context, if the subject matter of a talk is clear from material

endeavor'. See Human Rights Watch, *A Threshold Crossed – Israeli Authorities and the Crimes of Apartheid and Persecution* (2021).

¹⁹⁹ *Hayes v. Willoughby* [2013] UKSC 17; *Pal v. UK*, A. 44261/19 (30 Nov 2021) (Journalist's arrest and prosecution for the harassment of another journalist); *FO v. Croatia*, A. 29555/13 (22 April 2021), (allegations of harassment at school. *Quaere* whether similar obligations would apply with respect to HEP's).

²⁰⁰ James Murray, *Examining the interaction between harassment under the Equality Act 2010 and the law protecting academic freedom and free expression on campus*, EUR. HUM. RTS. LR. 368 (2022).

²⁰¹ *Insight*, n. 23, at 1.

²⁰² *EHRC Guidance*, n. 96, 19; Hansard, HC Debs, Vol. 699, Col. 57 (12 July 2021) (Kate Green).

²⁰³ *Ibid*, at 18; EHRC, *What equality law means for you as an education provider: Further and higher education* 39 (2014).

²⁰⁴ Part 3A(iii).

promoting an event, then people who voluntarily attend are unlikely to succeed in a claim for harassment arising from views expressed.²⁰⁵

Universities and colleges should ensure that any consideration of harassment within their policies and processes reflects the correct legal definition.²⁰⁶ Policies and processes that define ‘harassment’ too broadly, and so conflate lawful speech with harassment, may act to curtail free speech. The University of Essex amended the wording of its policies on bullying and harassment - reliance on incidents ‘perceived by the victim or any other person, to be motivated by hostility or prejudice based on protected characteristics’ was revised to refer to where ‘an incident is found to be motivated by hostility or prejudice’.²⁰⁷

J. Public Sector Equality Duty

HEPs that are ‘public authorities’ specified for this purpose must comply with

Under the Public Sector Equality Duty (PSED) in s.149 Equality Act 2010, persons specified as ‘public authorities’ under that Act include the governing body of an institution in England within the higher education sector. Such public authorities must, in the exercise of their functions have *due regard* to the need to (a) eliminate discrimination, harassment, victimisation; (b) advance equality of opportunity; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it. It is easy to understand how the expression of controversial views might not foster good relations. However, the PSED is a duty to ‘have due regard’ to the need to achieve the aims set out above. It is not a duty to achieve those aims.²⁰⁸ The EHRC *Guidance* states that when a HEP takes steps to ensure a debate on a divisive topic can go ahead – to protect free speech – it must consider the potential impact on students who may feel vilified or marginalised by the views expressed. They should think about how to ensure those students feel included and welcome within the HEP environment. However, it is submitted that if the speech is within the law, the PSED to have regard to the various needs cannot justify its restriction. So an argument that lawful speech advocating restrictions on trans rights, as in the *Stock, Pheonix* and *Freedman* case, could be restricted because it was considered to be contrary to eliminating discrimination, did not advance equality of opportunity and did not foster good relations between persons who share a relevant protected characteristic and persons who do not share it, would not be sustainable.

K. Fitness to practise issues

Students in a number of professional disciplines can be subjected to Fitness to Practise assessments by HEP’s. These operate alongside disciplinary procedures. If the issue is one of conduct, for example, committing a criminal offences then there would be no issue

²⁰⁵ In February 2023, the OfS issued a *consultation on a new approach to regulating harassment and sexual misconduct in English higher education* (OfS 2023-06). It included a proposal on ‘requirements relating to free speech’, 29-32.

²⁰⁶ n. 85, Col. 30 (Professor Biggar).

²⁰⁷ John Morgan, *Free Speech Union legal pressure forces Essex harassment changes*, THE TIMES HIGHER EDUCATION SUPPLEMENT, 7 June 2022.

²⁰⁸ *McMahon v Watford Borough Council* [2020] EWCA Civ 497 at [68].

under the Act.²⁰⁹ However, if the issue relates to freedom of speech, and the speech is within the law, then the HEP's duties under the Act will be relevant as in *R (Ngole) v The University of Sheffield*.²¹⁰ The court's reasoning in *Ngole* suggests that where the FtP issue raised relates to the individual's speech, the relevant university panel will need to consider whether there is evidence of harassment or discrimination or likely future discrimination. Any sanction will also need to be proportionate. A similar analysis would need to be applied to the Catholic midwifery student who was suspended from entering her programme's hospital placement phase after the University of Nottingham learned of her leadership of a pro-life student group.²¹¹

L. Must take the steps that, having particular regard to the importance of freedom of speech

(i) Particular Regard

'Particular regard' indicates a higher weighting than 'due regard'.²¹² In *Butt v. Secretary of State for the Home Department*,²¹³ the same contrasting terms were taken to mean that the s. 26 *Prevent* duty to have 'due regard' did not override the s.31 duty to pay 'particular regard'. The expression 'particular regard' again appears in the new s. A1(1) HERA. The Minister explained that the new requirement was, 'intended to shift the dial in the balancing act that providers had to undertake in order to give more weight in favour of freedom of speech than currently'.²¹⁴ It did not mean freedom of speech must always outweigh other considerations but it indicated that it was a very important factor. The requirement may, 'in a particular case, prompt a provider to prioritise freedom of speech over another right, but this would always be subject to the provider's assessment of what was reasonably practicable, and would need to be lawful'.²¹⁵

(ii) steps that, are reasonably practicable for it to take

If the speech is regarded as 'speech' in this context, and is 'within the law', then the duty on the governing body to so 'take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective of 'securing freedom of speech within the law' The standard of what is 'reasonably practicable' is the same as that in s. 43 of the 1986 Act but now has to be determined by reference to the particular importance of freedom of speech. In the

²⁰⁹ *Thilakawardhana v. OIA and the University of Leicester* [2018] EWCA Civ 13, [2018] E.L.R. 223.

²¹⁰ [2019] EWCA Civ 1127, [2019] E.L.R. 443.

²¹¹ A decision denying the society affiliation to the Students' Union was reversed after a threat of legal action.

²¹² Mark Bennett, 'Protecting Free Speech whilst Preventing Terrorism: The Higher Education (Freedom of Speech) Bill and the 'Prevent Duty'', U.K.Const.L.Blog (28th June 2022).

²¹³ [2017] EWHC 1930 (Admin), pr. 62.

²¹⁴ n. 85, Col. 150 (Donelan).

²¹⁵ n. 85, Col. 150 (Donelan).

Commons, the Minister explained that ‘reasonably practicable’ was a commonly understood term used across the statute book.²¹⁶ It meant that the relevant body could take into account all the other legal duties on a case-by-case basis. If another legal duty required or gave rise to certain action, it might not be reasonably practicable to override that.²¹⁷ The DoE’s view was that the duties on HEP’s, their constituent institutions and students’ unions were framed in a way that permitted them to reach decisions that were consistent with the ECHR, where relevant.²¹⁸ By only requiring steps that were ‘reasonably practicable’ to secure freedom of speech, having particular regard to the importance of freedom of speech, it left it to the individual HEP, their constituent institution or a students’ union to balance the competing rights and considerations that may be engaged in any given case. With specific reference to the duties on students’ unions, the DoE noted that the State has a wide margin of appreciation in how it regulates conduct between private actors so as to strike a balance between their competing Convention rights.²¹⁹

The EHRC’s *Guidance* on meeting the s.43 duty on HEPs to take reasonably practicable steps to ensure that lawful speech is protected noted that promoting balanced debate and challenge at events can often reduce any legal risks as well as furthering the purpose of the PSED and *Prevent* duties. It suggested that steps might include challenging high-risk speakers with opposing views, having an independent chairperson to facilitate an event and make sure a range of viewpoints can be heard, filming an event to deter the use of unlawful speech, putting additional security in place (the costs of which cannot now be passed on the event holders except in exceptional circumstances); ticketing an event to avoid non-student violent protest, requesting to see any promotional materials before the event, having a policy setting out principles of respectful discourse that speakers have to follow, and supporting and encouraging the SU and student body to host debates.²²⁰ Other steps might include ensuring that counter-events can be held as a form of peaceful protest; taking steps to ensure that a speaker is not stopped from speaking freely; ensuring that a protest outside a venue should be set back sufficiently from the windows that it cannot prevent the effective holding of the event;²²¹ providing additional security to ensure that protestors could be removed if they refused to leave or stop their protest after having a reasonable opportunity to express their views; exploring whether an event where a range of views would be expressed was a viable alternative, obtaining an assurance from a speaker that their speech will be lawful;²²² taking disciplinary measures against academic staff or students. The Codes of Practice under the Act are required to set out ‘the conduct required’ of staff and students in connection with any meeting or activity on the premises.

²¹⁶ A text search in September 2023 for ‘reasonably practicable’ in all UK Public General legislation returned more than 200 results. See *McCue v. Glasgow City Council (Scotland)* [2023] UKSC 1.

²¹⁷ Hansard, HC Debs, Vol. 716, Col. 103 (13 June 2022) (Donelan).

²¹⁸ *ECHR memorandum from the Department of Education (Carry Over)*, DoE, (11 May 2022) pr. 20.

²¹⁹ *Ibid*, pr. 21.

²²⁰ n. 96, 33.

²²¹ Cf. *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* (2022) UKSC 32.

²²² The Joint Committee considered that if a speaker gave such an assurance it would not be reasonable for them to be required to submit a copy or outline of their speech in advance, n. 90, pr. 41.

With respect to the s. 43 duty, the courts have shown, ‘some disinclination to interfere with universities’ decisions on the meaning of ‘reasonably practicable’ where speech is curbed as a result’.²²³ Given that the 2023 Act was intended to strengthen the normative weight of freedom of speech and academic freedom, the burden on HEP’s to demonstrate that they have taken reasonably practicable steps should be much more difficult to satisfy. A standard resort to safety or security concerns is unlikely to pass muster.

6. CONCLUDING COMMENTS - THEMATIC ISSUES

A. A Model Code?

An obvious question is whether there should be a uniform or model code along the lines of the *Chicago Principles*?²²⁴ In the United States, more than 70 institutions have adopted the *Chicago Principles* or developed similar policies of their own.²²⁵ In Australia in 2018, the *Independent Review of Freedom of Speech in Australian Higher Education Providers*,²²⁶ concluded that protection for academic freedom and freedom of speech could be strengthened by the adoption of a Model Code embedded in HEP’s institutional regulations or policies on a voluntary basis. The government accepted the Report’s recommendation. All Australian universities have undertaken to implement the Code in a way that is consistent with their individual legislative frameworks.²²⁷

The UK government’s view on Codes is that the context of each institution is different. Therefore, it strongly supported their autonomy to develop codes of practice appropriate for their individual circumstances, including to determine what conditions may be reasonable to impose to allow free speech to go ahead.²²⁸ Given that OfS will monitor the content of the Codes as part of its regulation of the duties of HEP’s, there might be a strategic interest in HEPs agreeing on a model code. Given the premise that all lawful speech is protected, and the same criminal and civil laws apply, then is difficult to see why the Codes should be significantly different as between HEP’s and between students’

²²³ Cram and Fenwick, n. 18, at 855.

²²⁴ As suggested by CIVITAS, n. 114, 17.

²²⁵ n. 43.

²²⁶ <https://www.education.gov.au/>; Paul M. Taylor, Thinking Allowed in The Academy: International Human Rights Law and the Regulation of Free Speech and Academic Freedom Under The “Model Code”, 39 UNIV. QUEENSLAND. LJ. 117 (2020).

²²⁷ A 2020 Review assessed the degree of alignment, *Report of the Independent Review of the Adoption of the Model Code on Freedom of Speech and Academic Freedom*, <https://www.education.gov.au/>. See also Carolyn Evans, Adrienne Stone and Jade Roberts, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (2021).

²²⁸ *Government Response*, n. 95, at 15.

unions. The OfS is considering a thematic review around codes of practice as a first phase of its work to promote free speech.²²⁹

B. Challenging Academic and University Ideologies

The prevailing or changing culture in universities is determined by what may be termed academic and university ‘ideologies’. Critical assessments of such culture may turn of one’s view of the continuing applicability of the liberal justifications for free speech in a University context.²³⁰ The Act may open up for further scrutiny such ideologies. It has been argued that, ‘the fashion of recent years for requiring universities, colleges and faculties to set down, in a sentence or two, their “values” has been a powerful tool for ensuring conformity and suppressing dissent’.²³¹ A CIVITAS Report in 2023 entitled *The Radical Progressive University Guide*,²³² set out to quantify the extent of ‘radical progressive’ policies, including their curbs on free speech. It found that 87 out of 140 (62%) universities had references to trigger warnings, or content warnings, or ‘content notes’.²³³ Only a small number of complaints to OfS have concerned content warnings and students may welcome them. The EHRC’s *Guidance* was that they may help to facilitate free speech by enabling balanced debate to take place without causing harassment.²³⁴ However, the question has been raised as whether, in response to the growth of such content warnings, compulsory training on ‘white privilege’²³⁵ or ‘diversity’,²³⁶ and institutional commitment to the ‘decolonisation of the curriculum’,²³⁷ the Act gives academics the confidence to challenge such ideological developments without fear that it will prejudice them?²³⁸ Freedom of speech undoubtedly extends to a prohibition on forced speech,²³⁹ such as a requirement, rather than an invitation, to wear a Progress lanyard, as either an LGBTQIA+ person or as an ally.

²²⁹ *Freedom of Speech in Universities: Responses, OfS Response, Apx. 3*, https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1279/127906.htm#_idTextAnchor018.

²³⁰ Julius, n. 34.

²³¹ John Marenbon, *Truth Under Attack in the Universities*, in *Freedom to Think*, (POLITEIA, 2022), 13 at 28.

²³² Authored by R. Norrie, <https://www.civitas.org.uk/publications/the-radical-progressive-university-guide/>.

²³³ *Censorship on campus: Universities scrap “challenging” books to protect students*, THE TIMES, 10 August 2022.

²³⁴ n. 96, 43.

²³⁵ CIVITAS, n. 231, 1, 4-7.

²³⁶ Nicola Woolcock, *Universities Accused of Abusing Power with Bias and Guilt Courses*, THE TIMES, 2 October 2021.

²³⁷ Richard Norrie, *Free speech and decolonisation in British universities*, CIVITAS, (2022).

²³⁸ Melanie. Phillips, *It Will Take More Than a Tsar to Heal Universities*, THE TIMES, 17 January 2023.

²³⁹ *Lee v. Ashers Baking Company Ltd (NI)*, [2018] UK SC 49; *Commodore of the Royal Bahamas Defence Force v. Laramore* [2017] UKPC 13

C. Culture and Codes

Throughout the process leading to the Act, the government argued that the overall aim was to change the wider ‘culture’ in HEPs.²⁴⁰ The extension of legal duties to areas where they did not apply before - to recruitment of academic staff, to constituent institutions and to students’ unions – should assist in this respect. The strengthened cultural requirements relating to free speech will be most visible in the revised Codes of Practice that HEPs will adopt and the new Codes of Practice that Student Unions will be required to adopt. In England, over 70% of universities have already adopted their own free speech code.²⁴¹ The Joint Committee observed that, ‘some [Codes] are unclear, difficult to navigate, or impose bureaucratic hurdles which could deter students from holding events and inviting external speakers’.²⁴² Promoting free speech and supporting inclusivity are not mutually exclusive.²⁴³ The best-case scenario is that the implementation of the Act reinforces the existing culture where freedom of speech is well protected and changes it where it was not. In the latter case, it needs to change the behaviour of academics, students, and HEP and students’ unions administrators.²⁴⁴ The OfS and the new Director of Free Speech appointed under the Act,²⁴⁵ Arif Ahmed, could have a positive effect on culture by setting expectations, engaging in discussions with stakeholders, and championing freedom of speech and academic freedom.

²⁴⁰ Hansard, HC Debs, Vol. 716, Cols. 115-116 (13 June 2022) (Donelan); n. 95.

²⁴¹ n. 94.

²⁴² n. 90, pr. 87.

²⁴³ S. West, ‘Universities stepping up to promote free speech and academic freedom’, HEPI, (2022).

²⁴⁴ Cf. José A. Cabranes, *For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University*. 35 YALE LAW. POL. R. 345 (2017).

²⁴⁵ Schedule 1, s. 3A HERA 2017, as inserted by s. 10 HE (FoS) Act 2023; n. 85, Col. 112 (Dandridge).