

Alumni for **FREE SPEECH**

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BY EMAIL to S.Roseneil@sussex.ac.uk

10 February 2023

Dear Professor Roseneil,

Free Speech compliance issues at the University of Sussex

I was much encouraged by your correspondence with my colleague William Mackesy last November. I was also interested both to read your article in Times Higher Education¹ and to watch your evidence to the Education Select Committee of the House of Commons.² Obviously, AFFS welcomes these public statements of support for freedom of speech and academic freedom.

I am, though, now writing in relation to free speech-related developments at Sussex which have recently been brought to our attention and about which we have serious concerns.³ The first is the appointment, last month, of Professor David Ruebain as the executive responsible for free speech and academic freedom at Sussex⁴, notwithstanding his existing role as Pro-Vice Chancellor for Culture, Equality and Inclusion (i.e. as Head of the University's EDI Unit).⁵

¹ <https://www.sussex.ac.uk/broadcast/read/58541>

² <https://www.parliamentlive.tv/Event/Index/d17426b1-8c34-42db-b965-58f0b09de11b>

³ It is symptomatic of the problems we raise below that even though the issues addressed in this letter were first brought to our attention by someone within the University, that person lacked sufficient confidence in the University's internal procedures to raise their concerns directly for fear of discriminatory consequences. We see this sort of very troubling self-censorship a lot. We find it especially unsurprising in this case given the University's failure effectively to protect Professor Kathleen Stock from the unlawful harassment, discrimination and victimisation by students and staff at the University which led to her departure.

⁴ <https://student.sussex.ac.uk/news/article/59837-sussex-creates-new-executive-level-freedom-of-speech-responsibility>

⁵ <https://www.sussex.ac.uk/equalities/people>

The second relates to the detailed contents of the University's Free of Speech Code of Practice, which appears to have been issued at about the same time.

Given its contents, we are of course copying this letter to Professor Ruebain. As issues relating to legal compliance are raised below, we have also copied in both Geraldine Ismail (Interim Head of Legal Service) and Nicola Enston (a Senior Legal Officer who, according to your website, has responsibility for the University's compliance with Freedom of Speech obligations). We have also copied in Professor Kelly Coate in her capacity as Pro-Vice Chancellor (Education and Students).

The relevant legal framework

Given what you said in the article and evidence referred to above, we assume that your appointment of Professor Ruebain reflects your view that "*Academic freedom, freedom of speech and expression, and diversity should be fundamentally entwined*". It is not entirely clear to AFFS what you mean by this. However, to the extent that this statement reflects the view that the University's legal obligations relating to freedom of speech and academic freedom are somehow generally limited by reference to its legal obligations relating to EDI (as principally stated in the **Equality Act 2010**), this is a misconception we regularly encounter. It is, though, wrong as a matter of law.

In short:

1. The University's existing obligation under **Section 43** of the **Education (No.2) Act 1986** (and its forthcoming obligation under the **Higher Education (Freedom of Speech) Bill** once enacted) requires the University to "*take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers*". Subject only to the requirement that speech is "*within the law*", this is an obligation which requires the University to take all steps which are (objectively) reasonably practicable to secure freedom of speech for staff, students and visiting speakers. This duty is unaffected by the **Equality Act 2010**, save to the extent that speech is, in fact, unlawful by reason of its provisions. Even where in potential conflict with other factors or desired outcomes, free speech obligations must be complied with whenever reasonably practicable. The Office for Students ("**OfS**") has recently stated that it "*stands for the widest possible definition of free speech within the law*" and made clear that "*the starting point is that speech is permitted unless it is restricted by law*".⁶
2. Subject only to the above, AFFS does not believe that there is any potential conflict between equalities laws and those relating to freedom of speech. So long as within the law, freedom of speech is an unfettered right which itself is protected both by the **Equality Act 2010** and under the **Human Rights Act 1998**. In this regard, we think the summary of the University's existing relevant legal obligations relating to academic

⁶ See: OfS Insight publication *Freedom to question, challenge and debate*, December 2022, pages 6 and 1 respectively: <https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf>.

freedom and freedom of speech on its website⁷, is deficient in that it does not refer to its additional obligations under the 2010 Act itself, particularly in light of the landmark *Forstater* case.⁸ This is especially surprising given that it is clear from your evidence to the Education Select Committee that the University is well aware of the wide implications of that case for free speech issues. In *Forstater*, Mr Justice Choudhury (sitting as President of the Employment Appeal Tribunal) confirmed that the right to hold (or not to hold) and to express “*any religious of philosophical belief*” (as defined by **Section 10** of the **Equality Act 2010**⁹), includes so-called gender critical views. AFFS believes that it is obvious that the analysis of the law in *Forstater* will apply equally to viewpoints relating to many other matters of current public debate and controversy.

Like the websites of many other institutions, the University’s EDI pages are replete with statements of the University’s formal endorsement of aspects of trans ideology. Although trans lobbyists, including Stonewall, maintain that there is “*no debate*” about the trans ideology they espouse¹⁰, it is, as you are doubtless aware, the subject of ongoing public and political debate. AFFS itself takes no position in relation to the trans debate and has no wish to become embroiled in the so-called Culture Wars, either about this or about other contested matters which are the subject of public debate. On the contrary, AFFS advocates the legal rights of all to speak freely about any issue they choose (including at universities). However, we are concerned that universities’ formal association with external lobbyists (such as, but not limited to, Stonewall) involves their taking sides on issues of public controversy (such as, but not limited to, trans rights) in a way which is plainly incompatible with their existing and future legal obligations relating to freedom of speech and academic freedom.

In light of the above, I now return to the specific issues AFFS wishes to raise with you.

⁷ <https://www.sussex.ac.uk/about/academic-freedom-and-freedom-of-speech#:~:text=The%20University%20of%20Sussex%20values,scrutinised%20and%20explored%20with%20civility.>

⁸ See: *Forstater v. CGD Europe et al* (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf.

See also: *Bailey v. Stonewall et al* (2022) (Case No: 2202172/2020): https://assets.publishing.service.gov.uk/media/62e1307c8fa8f5649a40110a/Ms_A_Bailey_vs_Stonewall_Equality_Limited_Reserved.pdf

⁹ [https://www.legislation.gov.uk/ukpga/2010/15/section/10#:~:text=10Religion%20or%20belief&text=\(1\)Religion%20means%20any%20religion,to%20a%20lack%20of%20belief.](https://www.legislation.gov.uk/ukpga/2010/15/section/10#:~:text=10Religion%20or%20belief&text=(1)Religion%20means%20any%20religion,to%20a%20lack%20of%20belief.)

¹⁰ <https://www.stonewall.org.uk/node/100426>

Professor Ruebain's recent appointment as the executive responsible for freedom of speech

Given its legal obligations relating to free speech and academic freedom, AFFS believes that it is simply not tenable for Professor Ruebain to be simultaneously both the Head of Sussex's EDI Unit and responsible for its compliance with its free speech obligations. We should, of course, make clear that AFFS has nothing against Professor Reubain personally, and no negative inference about his personal attributes is intended by anything said in this letter. We also acknowledge his own relevant legal qualifications, expertise and long involvement in equalities issues, all as noted in his website profile.

Nonetheless, in his capacity as Head of the EDI Unit, we assume that Professor Ruebain approved and endorses the University's continued formal association with Stonewall as stated on its website.¹¹ Presumably, as well, Professor Ruebain approved and endorses what appears in the EDI section of Sussex's website in relation to its Trans and Non-Binary Staff Network, including what is said in relation to so-called "transphobia" and "requests to Debate" in that group's "Trans and Non-Binary (TNB) staff network statement for friends and allies".¹² The University's own official "Trans and Non-Binary Equality Policy Statement"¹³, which also appears in the EDI section of its website, states the University's own formal acceptance of the central, though contested, tenets of trans ideology about what is referred to as "gender identity/expression".¹⁴ This Policy Statement was approved by the University's Executive

¹¹ <https://www.sussex.ac.uk/equalities/lgbt/stonewall>

¹² <https://www.sussex.ac.uk/webteam/gateway/file.php?name=tnb-staff-network-ally-statement--july-2022.pdf&site=369>.

This page also contains a link to "What is Transphobia" page of the website of a trans lobby group called Transactual: <https://www.transactual.org.uk/transphobia>. This page (like others authored by the same group also linked to the University's website) contains statements of the law which are inaccurate. For example, in a passage attacking, in very intemperate and irrational terms, anyone who takes a different view to it (who are variously referred to as "fascists", "haters" and "transphobic hate groups"), Transactual states in unqualified terms that: "the Equality Act (2010) protects trans people's rights access to single sex spaces in line with their self-determined gender". We commonly see inaccurate statements about the application of the **Equality Act 2010** to trans rights on university websites. Such statements are generally the result of universities adopting legally inaccurate statements of trans lobbyists. For example, they often state or imply that the "protected characteristic" of "gender reassignment" in **Section 7** of the 2010 Act applies to "gender identity" as that term is used in trans ideology. This is not the case (see further below). That the University should be associating itself with inaccurate statements of the effect of scope and effect of the 2010 Act is bad enough. That it should still be providing space on its website for the sort of extreme language that was a prominent and disturbing feature of the, plainly illegal, campaign against Professor Kathleen Stock orchestrated by trans activist students and staff at Sussex is much worse.

¹³ <https://www.sussex.ac.uk/webteam/gateway/file.php?name=trans-and-non-binary-equality-policy-statement.pdf&site=369>

¹⁴ The University's official policy starts by stating that: "The University of Sussex recognises that there can be differences between physical sex and gender identity/expression. We will at no time discriminate against people on the grounds of their gender identity or gender expression. Where this policy refers to 'trans people', it has in mind a broad range of people whose gender identity is not expressed in ways that are typically

Group (including, presumably, Professor Ruebain) and was last revised as recently as January 2023.

The Policy Statement also includes a final paragraph asserting that it is consistent with the University's free speech obligations. We assume that this is the product of its revision, at about the same time as Professor Ruebain was put in charge of freedom of speech. However, this self-serving statement does not, in law, make the rest of the statement compliant with the University's actual legal obligations relating to free speech and academic freedom. The fact that the University, and we assume Professor Ruebain, believes that it does, is itself troubling. In relation to the expanded statutory duties which are about to become law, their sponsor, the Department for Education ("DfE"), has stated that universities: "*should strive to do the very best they can, as they do with other areas which are considered to be moral imperatives [...]. Government wants them not to simply do the minimum that is required by law*"¹⁵; and that HEPs must "*take positive steps to promote the values of free speech and enquiry as essential elements of a healthy and thriving academic environment*".¹⁶ Giving lip service to free speech obligations is not enough. Neither is self-certification of compliance with such obligations.

In any event, AFFS believes that by making (or hosting) public statements endorsing aspects of trans ideology, the University is plainly taking sides on an issue of public controversy in a way that is completely inconsistent with the requirement of institutional neutrality which, until recently at least, was accepted as an uncontroversial aspect of the public role of universities.¹⁷ More importantly, Professor Ruebain, as Head of EDI, is himself responsible for permitting the University's continued formal association with external lobbyists who steadfastly and unashamedly seek to shut down all debate in relation to lawfully contested

associated with their assigned sex at birth. This includes those who have non-binary, non-gender or genderfluid identities." It is especially surprising that, on the website of the University at which the Kathleen Stock affair occurred, there is no recognition that "*gender identity/expression*" is a highly controversial and contested concept about which many (probably the majority of) people take a different view.

Within the university sector itself, there is wide debate about failure of university managers to uphold basic principles of institutional neutrality in the context of the public debate about aspects of trans ideology: <https://blogs.ed.ac.uk/edinburghafaf/2022/06/21/sex-gender-and-academic-freedom-a-guide-for-university-managers/>. The few Vice-Chancellors who have adopted an appropriately neutral stance have themselves been attacked by groups of activists (sometimes in vituperative terms).

See: <https://www.reading.ac.uk/news/2022/University-News/VC-comment-strengthen-freedom-and-support>;

<https://www.thesaint.scot/post/university-email-addressing-transfest-leads-to-backlash>;and

<http://stirlingbus.com/map/map-sasp-statement-against-transphobia-and-the-principals-email/>.

¹⁵ DfE, *Higher education: free speech and academic freedom*, 2021, paragraph 67.

¹⁶ *Ibid*, paragraph 88.

¹⁷ See, in this regard:

https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf. See also, and more recently:

<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>

aspects of trans ideology. Whatever Stonewall might wish was the case, the University is legally obliged to uphold the rights of all to speak freely in relation to such issues. Inconsistently with these legal obligations, the University (including Professor Ruebain as Head of its EDI Unit) continues to permit extreme and intemperate statements asserting that trans ideology is uncontestedly true (and that anyone who suggests otherwise is a hate-filled, fascist transphobe) to appear in the EDI section of its website.¹⁸ Furthermore, the University's own formal statement of its agreement with gender identity ideology on its website, is not qualified by reference to the *Forstater* decision which is nowhere so much as mentioned.

In short, in light of the University's public advocacy of trans ideology including in formal documents approved by senior managers, Professor Ruebain has an obvious conflict of interest, which AFFS believes makes it untenable for him simultaneously to hold the two formal roles to which he has now been appointed. Given the University's existing (and future) legal obligations in relation to freedom of speech and academic freedom, AFFS also believes that it is essential (and, at least under the enhanced obligations under the new legislation, arguably required as a matter of law or regulation) that the manager with executive responsibility for freedom of speech and academic freedom is completely independent of the University's EDI Unit. How could anyone with views contrary to those publicly endorsed by the EDI Unit, be reasonably expected to have any confidence in Professor Ruebain's neutrality about such views if they wished to raise free speech concerns in relation to them? As in other areas of such potential conflict, the test for answering this obvious question is an objective one.

The University's new Freedom of Speech Code of Practice

First of all, we should say that AFFS welcomes the fact that the University has issued an updated Freedom of Speech Code of Practice ("**the Code**")¹⁹ in advance of its legal obligation to do so under the forthcoming legislation. We also acknowledge the Code's recognition of the University's specific obligations under the 1986 Act (as soon to be updated and enhanced) and its commitment to review the Code on an annual basis.

That having been said, AFFS believes that the Code is incomplete in that it does not refer to or recognise the University's separate and additional free speech obligations under both the **Equality Act 2010** and the **Human Rights Act 1998**. It also contains not core statement of institutional neutrality and is, perhaps, overly focussed on meeting, events and external

¹⁸ See: footnote 12 above. Although such attacks are consistent with the "no debate" policy of trans ideologues, universities (including Sussex) are centres for, and in the business of, debate. Consistent with this, they should be institutionally neutral. They should certainly not be providing space on their websites for extreme lobbyists who use intemperate and abusive language and whose intention is to curtail the free speech rights of other students, staff and external speakers. Why does the University continue to do so?

¹⁹ <https://www.sussex.ac.uk/webteam/gateway/file.php?name=freedom-of-speech-code-of-practice-university-of-sussex.pdf&site=76>

speakers.²⁰ AFFS also regards the reference in paragraph 11 to so-called “Unconscious Bias Training” as somewhat ironic in a free speech code.²¹

Furthermore, and in relation to the concerns raised with us, we believe that the Code overemphasises and misstates the University’s right to restrict, where “*proportionate*”, the free speech rights of staff, students and external visitors, especially in paragraphs 5 and 7.²²

Paragraph 5 generally provides:

“All staff, students and visitors have the right to hold opinions and to receive and impart information and ideas so long as they do not break the law (“the right to freedom of speech”). The right may be restricted to protect the rights of other people if the restriction is proportionately justified. In accordance with section 43 of the Education (No.2) Act 1986, the University will take such steps as are reasonably practicable to ensure the right. In particular, the University will ensure, so far as is reasonably practicable, that no individual or body of persons is denied the use of any of its premises for reasons relating to their beliefs, views, policies or objectives. The University will only restrict the right (for example, by refusing to permit an event to take place on campus) if it is legal and proportionate to do so (for example, if risks of the kind identified at paragraph 7 below outweigh the strong interest in promoting free speech). In addition, academic staff at the University have the right to (a) question and test received wisdom and (b) put forward new ideas including controversial or unpopular opinions, without fear of being sanctioned for doing as long as they do not break the law (“the right to academic freedom”)...”

More specifically, and in relation to events and meetings, paragraph 7 states:

- “7. Only in limited circumstances will the University refuse permission for an event to be held. These may include:
- 7.1 Where there are serious safety concerns for the speaker and/or others in this assembly, and the risks cannot be appropriately mitigated.
 - 7.2 When the speaker is from a political party during an election *purdah* (the time between the announcement of a General Election and the results of the election being announced).
 - 7.3 Where there is evidence that a speaker is likely to:
 - 7.3.1 incite hatred or violence; harass the assembly by using hate speech; cause a breach of the peace or is likely to transgress the bounds of lawful free speech or assembly;

²⁰ Inconsistently with the guidance recently given by the OfS in respect even of the less regulated speech codes required under existing law. See: OfS’s December 2022 briefing “Freedom to question challenge and debate”, p.4: <https://www.officeforstudents.org.uk/publications/freedom-to-question-challenge-and-debate/>

²¹ We will not burden what is already a long letter with further observations about this separate subject. Suffice it to say, AFFS believes that any mandatory requirement to participate in such training (whose contents, purposes and efficacy are all highly contested) is itself unlawful under free speech laws (even in relation to the Prevent Duty referred to in paragraph 11).

²² Paragraph 4 also has a general reference to restricting the use of University premises where “*it is legal and proportionate to do so*” (emphasis added), albeit that this then cross-references paragraph 7.

- 7.3.2 discriminate against or harass any person or group on the grounds of sex; gender reassignment; race, nationality or ethnicity; disability; religious or other similar belief; sexual orientation; marriage or civil partnership; pregnancy or maternity or age;
- 7.3.3 defame any person or organisation;
- 7.3.4 spread hatred and intolerance;
- 7.3.5 encourage or promote any acts of terrorism or promote individuals, groups or organisations that support terrorism.”

We have several concerns about these paragraphs.

First, there is no legal basis for introducing a general concept of proportionality.²³ As already noted, the University’s existing (and future) obligation to take all reasonably practicable steps to uphold freedom of speech is limited only by whether speech is “*within the law*” and whether the steps are objectively reasonably practicable. Otherwise, what the Code defines as “the right to freedom of speech” and “the right to academic freedom” are unfettered. There is no reference to any additional restriction relating to so-called proportionality in the existing or future statutory language. What is the legal basis or source for the University’s introduction of this additional restriction in the Code? If (as we believe) there is none, reference to it should be removed.

Secondly, we note the prominent reference in **sub-paragraph 7.1**, to refusing permission to use University facilities due to supposed “*security concerns*”. Security issues might, in extreme and unforeseeable circumstances, justify refusing permission for, or the late cancellation of, a lawful meeting. However, AFS is increasingly concerned by the over reliance by universities on supposed security concerns as an excuse to refuse permission for events involving external speakers unpopular with universities or, more often, with small groups of staff or students. We are also concerned that universities, again relying on supposed security concerns, are increasingly acquiescing in unlawful interference by such activists aimed at disrupting events organised by others with the express intention of suppressing their freedom to speak.²⁴

While we welcome the acknowledgment in this sub-paragraph of the University’s duty to mitigate any security risk, what is said seriously understates the extent of this duty. AFS

²³ We note the reference in paragraph 10 to a proportionality criterion said to be based on the guidance issued in relation to the University’s Prevent Duty under **Section 26(1)** of the **Counter Terrorism and Security Act 2015**. This, though, in no way justifies its wholesale incorporation into the Code. Proportionality has no significance in relation to the University’s existing and future overarching duty to take all reasonably practicable steps to secure freedom of speech or in relation to its duties to protect free speech under both the **Human Rights Act 1998** and the **Equality Act 2010**.

²⁴ The failure by the University of Edinburgh to ensure the screening of a film to which trans activists objected is only the most recent example of this: See: <https://www.telegraph.co.uk/news/2022/12/16/university-staff-accused-colluding-trans-activists-stop-womens/>; <https://www.scotsman.com/news/opinion/columnists/transgender-debate-after-screening-of-adult-human-female-is-cancelled-amid-protests-edinburgh-university-has-a-historic-choice-to-make-susan-dalgety-3956744>

believes that the Equality and Human Rights Commission (“EHRC”) has stated the true position accurately: “the s.43 duty does not require HEPs to protect free speech at the expense of the safety of staff, students or speakers. For example, it would be reasonable to cancel an event if the participants would not be safe from physical harm, for instance, if there was a threat of violent protests. However, the provider would need to show that no ‘reasonably practicable’ steps, such as increased security (within reasonable cost) could have been taken.”²⁵ A failure to make appropriate security arrangements to ensure a controversial event can go ahead notwithstanding the, entirely foreseeable, last minute disruption which is a commonplace tactic of anti-free speech activists would likely be a breach of the University’s existing obligations. It will almost certainly be a breach of its enhanced obligations under the new legislation.

As you will no doubt be aware, the University’s policies in relation to meetings and events will, in any event, need to be revisited in light of the enhanced obligations which are likely to be included in the new legislation.²⁶

In light of the above, we believe that the reference to security concerns in this part of the Code should make clear that, in light of the University’s overarching and fundamental obligation to take all reasonably practicable steps to secure freedom of speech, security concerns will rarely mean that permission for events may be lawfully refused.

Thirdly, we have several concerns about **sub-paragraph 7.3** of the Code. Most arise from considerations already addressed above. AFFS welcomes the reference to the need for “evidence” and to the need for such evidence to establish the existence of a likelihood of unlawful speech. That said, we have particular concerns about the language used in relation to the various sub-categories of supposed potentially unlawful speech (other than the reference to incitement of violence in sub-paragraph 7.3.1 and the other recognisable examples of unlawful speech referred to in sub-paragraphs 7.3.3 and 7.3.5).

Sub-paragraph 7.3.1 refers to the risks that a speaker will “incite hatred” or “harass the assembly by using hate speech”. Given that, as further discussed below, these expressions have no legal meaning or implications, limiting free speech by reference gives rise to the obvious risk of the University acting unlawfully.

It is, for example, unclear what the University would regard as inciting “hatred”. Given, however, the University’s official endorsement of the gender identity tenets of trans ideology and its apparent endorsement of the view that so-called gender critical views which disagree with, or criticise aspects of, gender identity are themselves a form of hatred (see above), we are concerned that the University might regard this part of the Code as permitting it to refuse to permit a meeting or event at which speakers espoused such perfectly lawful views. We

²⁵ EHRC’s Guide for HEPs and SUs in England and Wales (“EHRC Guide”), Section 3.4 (page 22). See: <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>. Note that the EHRC Guide was issued prior to the stricter obligations required under the upcoming legislation coming into effect, and will no doubt be revised in time.

²⁶ See: **Section A2(2)** of the current Bill.

suggest that this nebulous and subjective concept is either removed from the Code or that its intended legal meaning is made much clearer.

Similarly, the phrase “*harass the assembly by using hate speech*” does not itself describe or identify any unlawful speech. As already noted above, any restriction of speech which is “*within the law*” is very likely to be an illegal breach of the University’s free speech obligations. When the new legislation is enacted, it is also likely to be a statutory tort.

We assume, that the reference in sub-paragraph 7.3.1 to the risk to people attending a meeting or event of being harassed, is intended to refer to harassment which might make anything which might be said at the meeting and event unlawful, i.e. most obviously to harassment as defined by and outlawed under **Section 26** of the **Equality Act 2010**.²⁷ As harassment in this context only applies in limited and defined settings²⁸, we believe that this should be made clear in the Code together with a clear explanation of the legal limitations of harassment in this context. As the EHRC²⁹, the DfE³⁰, most recently, the OfS³¹ have repeatedly made clear, universities’ obligations to prevent unlawful harassment in the **Equality Act 2010** should not be overinterpreted so as unlawfully to restrict free speech or academic freedom.

Similarly, “*hate speech*” as used in the Code, is a highly problematic phrase. Even though the phrase again has no relevant legal meaning or significance in the context of free speech (including at universities)³², we often see it identified as a basis for the restriction of free speech rights. Especially given the University’s EDI Unit’s formal endorsement of gender identity ideology and very wide concepts of so-called “*transphobia*” and its apparent tolerance of the

²⁷ While AFFS is, of course, also the provisions of **Protection from Harassment Act 1997**, we do not believe that they would be relevant in the context of events or meetings at universities save in the most extreme circumstances which would, very likely, also in any way give rise to harassment under the 2010 Act.

²⁸ With the obvious implications that has for the Universities related Public Sector Equality Duty (“**PSED**”) under **Section 149** of the 2010 Act.

²⁹ EHRC’s February 2019 publication “*Freedom of Expression Guide for Higher Education Providers and Student Unions in England and Wales*”, Section 1, Key points, Section 2.1 and Section 3.2.
<https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>.

³⁰ DfE’s February 2021 publication “*Higher Education: Free Speech and Academic Freedom*”, Annex A, p.34:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961537/Higher_education_free_speech_and_academic_freedom_web_version_.pdf

³¹ OfS’s December 2022 briefing “Freedom to question challenge and debate” , pp.5-6:
<https://www.officeforstudents.org.uk/publications/freedom-to-question-challenge-and-debate/>

³² See in this regard: the free speech compliance report prepared for Essex University by Akua Reindorf (an equalities law specialist who is a EHRC Commissioner and has recently also been appointed KC), paragraphs 189 to 193. Essex has made a redacted version available at:
https://www.whatdotheyknow.com/request/770790/response/1885639/attach/4/events%20review%20report%20university%20of%20essex%20september%202021%201.PDF.pdf?cookie_passthrough=

description of those with gender critical views as “fascists”, “haters” and “transphobic hate groups” (see footnote 12 above), we are very concerned about the use of this phrase in the Code. It should be removed. Any restrictions in the Code should be tied clearly and only to speech which is, in fact, unlawful under legislation which is properly identified and whose actual scope and effect is accurately stated.

Sub-paragraph 7.3.2 refers to discrimination and harassment as defined in **Sections 13 to 19** and **26** respectively of the **Equality Act 2010**. AFFS of course accepts that speech which amounted to either of those things would not be lawful and would not be within the scope of the University’s overriding free speech obligations. We would, however, make the following three points:

- (1) We reiterate what is already said above about the need not to overinterpret or exaggerate the requirements of the 2010 Act as a pretext for illegal restriction of lawful speech. Consistent with the public statements of the EHRC, DfE and OfS on this subject, the exercise of free speech or academic freedom on contested political or social issues will almost never amount to either discrimination or harassment within the meaning of the 2010 Act (even when what is said is controversial, highly contested or offends, shocks, disturbs people who hold different views). The commonplace resort of activists to concepts which associate lawful speech with physical violence or feelings of so-called “unsafety” or the requirement for so-called “safe spaces”, should be paid no regard in this context.
- (2) In light, especially of its formal endorsement of the “gender identity” aspect of trans ideology in its “*Trans and Non-Binary Equality Policy Statement*”³³, the University should make clear that this aspect of trans ideology is not itself included within the “*protected characteristic*” of “*gender assignment*” as defined in **Section 7** of the 2010 Act³⁴ and does not, therefore, attract the protections which flow from such status (including in terms of discrimination and harassment as described and outlawed under the 2010 Act).³⁵ We raise this because we have frequently seen universities (often due to their reliance on inaccurate assertions about the law by external lobbyists) seeking to treat “gender

³³ <https://www.sussex.ac.uk/webteam/gateway/file.php?name=trans-and-non-binary-equality-policy-statement.pdf&site=369>

³⁴ “7 **Gender reassignment**

- (1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex”.

³⁵ See further in this regard, Ms Reindorf’s Report for Essex University (referred to in footnote 32 above). Ms Reindorf also addresses the sort of typical mischaracterisation of scope of “*gender reassignment*” as stated in Section 7 of the Equality Act 2010 referred to in footnote 12 above: see, paragraphs 177, 217 to 227 and Recommendations 18 and 19. Ms Reindorf attributed this misstatement to Essex’s acceptance of Stonewall’s description of the law as it would wish it to be as opposed to how it was, in fact, enacted by Parliament.

identity” as if it were a “*protected characteristic*” and to seek to restrict any debate (including at meetings and events) about it on that basis.

- (3) By contrast, and notwithstanding the University’s own formal endorsement of the existence of “gender identity”, the right not to believe in “gender identity” or to criticise it, is itself a “*protected characteristic*” within **Section 10** of the 2010 Act (as was confirmed in the caselaw referred in footnote 8 above). It follows that if, whether due to pressure from trans activist students or staff or otherwise, the University refused permission for a gender critical event, this would likely itself be in breach of its obligation not to discriminate against people with protected characteristics. Logically, the same must apply to many other contested and controversial areas of public debate about which people hold religious or philosophical beliefs similarly protected under the 2010 Act.

We believe that all of the above should be made clear in notes to the Code relating to what is said in sub-paragraph 7.3.2.

Finally, we are also concerned about the reference to speakers likely to “*spread hatred and intolerance*” in **sub-paragraph 7.3.4** of the Code. This is for the same reasons as in relation to so-called “*hate speech*” in sub-paragraph 7.3.2. Like that used in sub-paragraph 7.3.2, the expression used in sub-paragraph 7.3.4 has no recognised legal meaning or significance. It adds nothing to the accurate description of potentially unlawful speech in other sub-paragraphs. Any restriction of speech which is not in fact clearly unlawful, risks putting the University in breach of its existing and future obligations relating to free speech and academic freedom. This sub-paragraph should, therefore, be removed in its entirety.

Recommendations

For the reasons addressed in detail above, AFFS strongly recommends that:

1. The University appoints someone other than Professor Ruebain, with similar seniority but who is completely independent of its EDI Unit, to be responsible for its compliance with both the letter and the spirit of its existing and future free speech obligations. On any objective view of the contents of the EDI pages on the University’s website for which Professor Ruebain is responsible, we are confident that any present or future free speech regulator will not approve of the University’s combining executive responsibility for EDI and free speech. In the case of Sussex, this is not least because of the Professor Kathleen Stock debacle.
2. The University retains an external lawyer with appropriate expertise in both equalities and free speech law to review its Code and to ensure that it accurately states and reflects the law and does not risk unlawfully restricting lawful speech.

Because we commonly find that universities’ misstatement of the law and failures to comply with their free speech obligations are linked to their formal obligations with external lobbyists such as Stonewall, AFFS also urges you urgently to consider whether the University’s

continued association with external lobbyists of this kind is compatible with its existing and future free speech obligations.³⁶

In relation to external lobbyists, we expect that you are already aware that an increasing number of public authorities have cut their ties with Stonewall. These include: the EHRC, the BBC, Channel 4, ACAS, Ofsted, Ofcom, the Cabinet Office and many government departments. Universities are also increasingly cutting some or all of their formal associations with Stonewall (e.g. participation in Stonewall's Workplace Equality Index and/or participation in Stonewall's Diversity Champions scheme). To date, these include: Edinburgh, Glasgow, UCL, St Andrews and, most recently, LSE. All of these public authorities (including the universities which have so far taken action) have, we assume, correctly concluded that continued formal involvement with Stonewall is incompatible with their legal obligations, including in relation to freedom of speech. In light of the what happened to Professor Stock, and at a time when other institutions are disengaging with increasingly controversial organisations like Stonewall, it seems very strange that the University is continuing formally to endorse the agenda of external lobbyists in a way which is deeply problematic as regards free speech. AFFS believes that any delay by the University in joining others in cutting ties with external lobbyists can only further damage its public reputation.

This letter also serves respectfully to remind you that, if the University continues to use and follow the practices and policies about which we have explained our detailed concerns, it will risk acting unlawfully in the ways we have also explained above. We mention this not least because, if senior managers cause or allow the University run this risk, they will themselves run the risk of being in breach of **Section 111** of the **Equality Act 2010** by directly or indirectly instructing, causing or inducing the University contravene the 2010 Act.

In light of what is said above and depending on your response, AFFS must reserve its right to bring its concerns to the attention of current or future free speech regulators and to write to all Trustees and other relevant officers raising the concerns addressed in this letter directly with them. In the meantime, we intend to raise the issues referred to in this letter with Sussex alumni (including those who are already AFFS members) and to post this letter in the news section of AFFS' website.

Finally, as part of a sister project to AFFS, a group of senior lawyers and academics are collaborating to produce a comprehensive statement of Best Free Speech Practice ("**BFSP**"). As we feel sure that the University will want to comply with best practice, we will ensure that a copy of BFSP's statement is provided to you as soon as it is finalised. In the meantime, I attach copies of BFSP's briefing notes on issues which are relevant to the concerns raised above *viz.*

- Philosophical beliefs protected under the Equality Act: The Forstater case
- The application of the PSED as regards discrimination, harassment and victimisation
- Free speech risks of relationships with campaign organisations

³⁶ Consistent, again, with the contents of Ms Reindorf's Report for Essex (see, Recommendation 28).

We look forward to your detailed response to this letter and in working cooperatively with you in the future in relation to other issues relating to free speech and academic freedom at the University.

Yours sincerely

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