

**UNIVERSITY OF ESSEX**

**Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020**

**REPORT**

**AKUA REINDORF**

**21 December 2020**

**(amended 17 May 2021 following comments from the expert external reference group and University governance)**

Redactions made by Eversheds Sutherland for the purposes of publication.

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## EXECUTIVE SUMMARY

### The Criminology seminar

- On 5 December 2019 the University's Centre for Criminology cancelled a seminar at which [Professor Jo Phoenix](#) of the Open University had been due to speak on the subject of "Trans rights, imprisonment and the criminal justice system". On the day of the seminar, complaints were made that [Prof 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. At a later meeting of the Department of Sociology, however, it was decided by vote to rescind the invitation and to not invite [Prof Phoenix](#) to a future seminar. An apology was made for the hurt caused to the trans community.
- In isolation, the decision to cancel the seminar was unavoidable in the circumstances. However, it could have been averted by proper understanding and timely use of the University's [external speaker notification procedure](#). In the context of the systemic and decision-making failures which led to it, the cancellation amounted to a breach of [Prof Phoenix](#)'s right to [freedom of expression](#) and the associated legal duties to which the University was subject.
- The later decision to exclude and blacklist [Prof Phoenix](#) was also unlawful. There was no reasonable basis for thinking that [Prof 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.
- [Prof Phoenix](#) should be offered an open apology and an opportunity to give a seminar at the Centre for Criminology. Further [recommendations](#) are made below.

### The Holocaust Memorial Week event

- On 30 January 2020 a roundtable discussion took place on the subject of “The State of Antisemitism Today” as part of the Holocaust Memorial Week event organised by [REDACTED]. [Professor Rosa Freedman](#) of Reading University was on the panel.
- [REDACTED]  
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[REDACTED] Complaints had been made to the effect that she had published “\*\*\*\* viewpoints” which were “hate speech”, [REDACTED]  
[REDACTED]
- [Prof Freedman](#) was given an assurance in December 2019 that she would be formally invited to appear at the HMW event. Concerns about her views on sex and gender were then raised and discussed internally. A decision was made not to send her a formal invitation. She wrote to her MP and the Universities Minister complaining of having been “blacklisted”, and gave an interview to the Sunday Times. In response, a member of the University posted a tweet which compared her views on gender identity to Holocaust denial. The invitation to appear at the HMW event was then extended to her on the purported basis that it was felt possible to adjust the timings.
- The decision made on or before 9 January not to invite [Prof Freedman](#) to the HMW event, which was extant until 27 January, was made because of her views on gender identity. The organisers were afraid that if she attended, controversy or disruption would overshadow the event. 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 academic expertise [REDACTED].
- [Prof Freedman](#) should be offered an open apology. Further [recommendations](#) are made below.

## CONDUCT OF THE REVIEW

1. The Terms of Reference for the review are at [Appendix 1](#).
2. I received several thousand pages of documentary evidence, consisting largely of emails, letters, meeting notes and policy documents. I interviewed 33 witnesses by Zoom in September and October 2020. The witnesses are listed in [Appendix 2](#), other than the two who requested that their interviews remain anonymous. Some of the witnesses gave parts of their evidence off the record.
3. I approached most of the witnesses myself, having identified them from the paperwork as people who would be likely to have relevant evidence to give. Of those I approached, two did not wish to contribute to the review and a third was not able to find a suitable time. I was approached by other witnesses through the mechanisms put in place by the University. I asked each witness to encourage anybody to contact me who might wish to give evidence to the review. Two witnesses contacted me as a result of this. The interviews generally lasted one to two hours each. Agreed notes were produced.
4. I received twelve written submissions, of which five were anonymous.
5. I was empowered by my [Terms of Reference](#) to take anonymous evidence. I was satisfied that it was appropriate to do so given the sensitivities of the matters under discussion. I received credible evidence that people on both sides of the issue (and neither) were afraid of voicing an opinion openly because of the toxicity of the debate. In the event taking anonymous evidence enabled me to form a fair and balanced view of the issues from a wide range of sources.
6. I am grateful to all of the witnesses. Without exception, they participated in the review in a constructive, candid and thoughtful manner. I would like to extend particular thanks to [REDACTED] for their invaluable [REDACTED] assistance [REDACTED].

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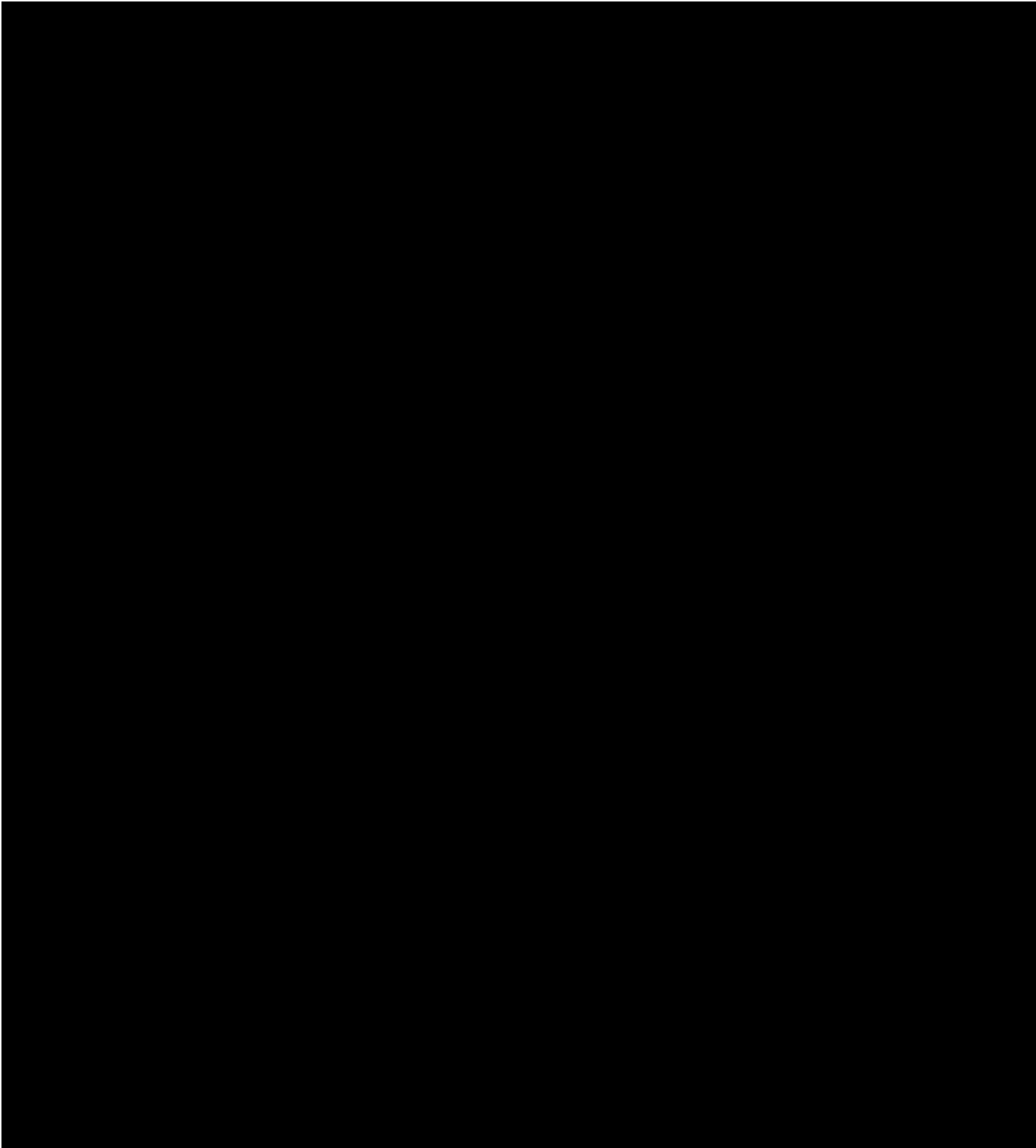
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**NOTES**

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## LEGAL AND REGULATORY FRAMEWORK

### Freedom of expression

140. The right to freedom of expression is contained in Article 10.1 of the European Convention on Human Rights (“the Convention”), which is enshrined in domestic law in the Human Rights Act 1998:

*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority [...]*

141. The University is a public authority, so it is obliged to uphold this right<sup>21</sup>.
142. The Article 10.1 right to freedom of expression is fundamental, but it is not absolute. Speech which seeks to abuse the rights and freedoms in the Convention is excluded from the scope of Article 10.1 altogether by Article 17. This Article prohibits the gravest form of hate speech, such as Holocaust denial<sup>22</sup>. The Article is only applicable on an exceptional basis and in extreme cases where it is immediately clear that there is an intention to achieve ends which are clearly contrary to the values of the Convention, such as stirring up hatred or violence. It does not cover, for instance, vulgar homophobic slurs<sup>23</sup>.
143. Further, Article 10.2 provides that speech which might otherwise be protected by Article 10.1 may be subject to interference by way of formalities, conditions, restrictions or penalties in certain circumstances. Restrictions may only be imposed on speech under Article 10.2 when a constraint is both (a) prescribed by law and (b) necessary in a democratic society in order to pursue one of a limited number of aims<sup>24</sup>.
144. There are several UK laws which may be relied on to show that a restriction of speech is “prescribed by law”. These include prohibitions on harassment and discrimination, limitations placed on types of expression which might be described as “[hate speech](#)”, the criminal prohibition on acting in a disorderly

manner for the purpose of preventing a public meeting<sup>25</sup>, certain public order offences<sup>26</sup> and the [Prevent Duty](#).

145. Importantly, there is a difference between unlawful harassment or "[hate speech](#)" and speech which may be merely offensive, shocking or disturbing, or even speech which may be dangerous or irresponsible<sup>27</sup>. Although speech which is intended to inform attracts more protection than speech which is intended to offend<sup>28</sup>, offensive speech may still be protected by Article 10.1<sup>29</sup>. This is because if the right to free speech did not protect "the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative" it would be "not worth having"<sup>30</sup>. It can be difficult to draw the line between harassment or unlawful "[hate speech](#)" on the one hand and merely offensive, shocking or disturbing speech on the other.
146. It is rarely possible to justify interference with speech about political matters or issues of public interest<sup>31</sup>, including peaceful protest on such matters. Political speech is regarded as essential in a democracy in order that "the arguments for and against different [political] solutions and the facts underlying those arguments" can be ventilated<sup>32</sup>.
147. In a recent High Court case, it was found that allegedly transphobic tweets constituted "expressions of opinion on a topic of current controversy ... which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons", even though the tweets were "for the most part, either opaque, profane, or unsophisticated"<sup>33</sup>. The court found that it was not proportionate for the police to have interfered by warning the tweeter of the possibility of criminal prosecution, in part because the tweets were part of a "legitimate political debate" which was "complex [and] multi-faceted"<sup>34</sup>. Relevant factors included the fact that the complainant had chosen to read the tweets and the tweets were not directed at her<sup>35</sup>.

148. The requirement that any restriction be “necessary in a democratic society” means that it must reflect “a pressing social need”<sup>36</sup>. The permissible aims of a restriction include: the interests of public safety; the prevention of disorder or crime; the protection of health or morals; and the protection of the rights of others. Relevant factors include: whether the speech was made against a tense political or social background (in which case an interference might be more readily justifiable); whether the speech, in context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance; and the manner in which the speech was made, and its capacity to lead to harmful consequences<sup>37</sup>.
149. Any restriction on free speech must be proportionate, in that it must not go further than is reasonably necessary to achieve the aim of the restriction<sup>38</sup>. Relevant factors are: the importance of the aim; whether the restriction is rationally connected to the aim; whether a less intrusive measure could have been used; and whether a fair balance has been struck between the rights of the individual and the interests of the community<sup>39</sup>.
150. Thus, in a university context, the High Court has found that where there was a substantial risk of disorder at a conference about the legality of the State of Israel, it was proportionate to postpone the conference until there was time to plan properly to mitigate the risk. Cancelling the conference altogether would have been a disproportionate interference with free speech<sup>40</sup>.

### **Freedom of thought, conscience and religion**

151. Article 9.1 of the Convention provides that everybody has the right to freedom of thought, conscience and religion. The freedom to *hold* a particular belief is absolute, but the right to *manifest* religion or belief is a qualified right which is subject to similar restrictions to those which apply to freedom of expression (§§142–150 above)<sup>41</sup>.
152. Article 9 does not protect opinions but it does protect non-religious beliefs<sup>42</sup> such as pacifism<sup>43</sup>, veganism<sup>44</sup> and belief in man-made climate change<sup>45</sup>. Such

a belief must be genuine, coherent, consistent with basic standards of human dignity or integrity, and relate to matters more than merely trivial<sup>46</sup>. It must be “worthy of respect in a democratic society ... and not in conflict with the fundamental rights of others”<sup>47</sup>.

153. Applying this test in a different context, an Employment Tribunal found in 2019 that the belief that “even if a trans woman has a gender recognition certificate, she cannot honestly describe herself as a woman” was not “worthy of respect in a democratic society”, was incompatible with the human rights of others and could amount to harassment contrary to the Equality Act 2010. Thus the “absolutist view that sex is immutable” was held not to be a protected belief. The Tribunal observed that it could legitimately be argued that some spaces should only be available to women identified female at birth “without insisting on calling trans women men”<sup>48</sup>. This decision is not binding on other courts and is currently under appeal<sup>49</sup>. In the appeal the Equality and Human Rights Commission has appeared as an intervener supporting the Appellant’s submission that gender critical views amount to a “belief” for the purposes of the legislation. The case should therefore be treated with some caution.

### **Freedom of assembly and association**

154. By Article 11.1 of the Convention:

*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

155. As with the right to freedom of expression, this is a qualified right (see §§142–150 above)<sup>50</sup>. It is also a fundamental right which is “an essential foundation of democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”<sup>51</sup>. It is “of such importance that it cannot be restricted in any way ... so long as the person concerned does not himself commit any reprehensible act on such an occasion”<sup>52</sup>.

156. Article 11.1 imposes a positive obligation on public authorities to take reasonable and appropriate measures to facilitate peaceful assembly. However it does not require an absolute guarantee<sup>53</sup>.

### **Duties under section 43 of the Education Act (No. 2) 1986**

157. Higher education providers are subject to an enhanced duty to protect and promote freedom of expression. Thus the University is under a statutory duty to take reasonably practicable steps to ensure that freedom of speech within the law is secured for members, students, employees and visiting speakers (“the s.43 duty”)<sup>54</sup>. It must, in particular, ensure so far as is reasonably practicable that the use of its premises is not denied to any individual on any ground connected with the individual’s beliefs or views<sup>55</sup>.
158. In order to facilitate the discharge of the s.43 duty, the University must issue and keep up to date a code of practice setting out its procedures in relation to meetings and other activities on its premises and the conduct required of attendees at those meetings and events<sup>56</sup>. The provisions of the code of practice must be enforced, so far as it is reasonably practicable to do so, including by the use of disciplinary procedures where appropriate<sup>57</sup>.

### **Academic freedom**

159. Article 13 of the Charter of Fundamental Rights of the European Union<sup>58</sup> provides that “The arts and scientific research shall be free of constraint. Academic freedom shall be respected”.
160. This right is closely associated with the right to freedom of expression. It protects freedom of speech as well as “freedom ... of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction”<sup>59</sup>.
161. The University is a signatory to the Magna Charta Universitatum (“MCU”), a “declaration and affirmation of the fundamental principles upon which the

mission of universities should be based". This contains a statement of commitment to academic freedom as "the fundamental principle of university life".

162. The principles of academic freedom are also expressed in Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe, which states that "history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation".
163. The Office for Students ("OfS") (the universities' regulator in England) must have regard to the need to protect<sup>60</sup>, and in some circumstances must actively protect<sup>61</sup>, the "institutional autonomy" of universities. Institutional autonomy includes the freedom within the law of academic staff to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the University<sup>62</sup>. The need to ensure this freedom must also be given regard by the University Commissioners in exercising their functions<sup>63</sup>.
164. The Equality and Human Right Commission's 2019 guidance on "Freedom of expression: a guide for higher education providers and students' unions in England and Wales"<sup>64</sup> ("the EHRC Guidance") covers both freedom of expression and academic freedom. It provides a wealth of helpful material relating to the application of the legal principles to the sorts of situation which are likely to arise within a university setting, including a flowchart for decision making about how to protect freedom of speech in planning events<sup>65</sup>. Similarly, the legal and practical guidance provided by Universities UK in its 2013 paper "External speakers in higher education institutions" is of considerable assistance (although care should be taken to also consult more up to date sources)<sup>66</sup>.

## **Duties under the Charities Act 2011**

165. As a charity, the University must act only in ways which further its objects<sup>67</sup>. The objects must be for the public benefit<sup>68</sup>.
166. The University's objects are: "to advance education, scholarship, knowledge and understanding by teaching and research, for the benefit of individuals and society at large"<sup>69</sup>.
167. Members of the University's Council, as trustees, bear responsibility for ensuring that this duty is complied with. They must also manage the charity's resources responsibly, protect its assets and avoid taking undue risks.
168. The University's trustees must not promote particular political positions or engage in political campaigning or political activity, unless they are doing so in order to advance the University's charitable objects. They must ensure that the University complies with its legal obligations to protect freedom of speech and to protect students, employees and workers from harassment, discrimination and other unlawful acts.
169. The trustees should be "alert to, rather than averse to" the risks of inviting speakers to the University, and take a "measured and proportionate risk-based approach" to the organisation of events involving external speakers<sup>70</sup>.

## **Regulatory duties**

170. The University is regulated by the OfS<sup>71</sup>. Conditions of the University's registration with the OfS include:
  - 170.1. that its governing documents uphold the OfS' "public interest governance principles", which include a commitment to academic freedom and freedom of speech<sup>72</sup>; and
  - 170.2. that it delivers the public interest governance principles in practice<sup>73</sup>.

171. In its guidance on freedom of speech<sup>74</sup>, the OfS states “We stand for the widest possible definition of freedom of speech: anything within the law”.

172. In March 2020, the OfS Chief Executive Nicola Dandridge made the following statement after Professor Selina Todd claimed to have been “no-platformed” at the International Women’s Festival at Oxford University because of her connections with WPUK:

*We support the widest possible definition of freedom of speech. There is a legal requirement on universities to take steps that are reasonably practicable to secure freedom of speech within the law and protect academic freedom. It is after all a crucial aspect of higher education that students and academics are able to engage with a wide range of theory and opinion, including those which some might find uncomfortable or offensive. This must include the right of academics like Professor Todd to be able to advance views at campus events with which others may disagree. All universities need to demonstrate that they are taking reasonably practicable steps to secure freedom of speech, and that they deal responsibly with any complaints or concerns.*

173. The University must also comply with legislation on equality and diversity, and may be sanctioned by OfS if it fails to do so<sup>75</sup>.

174. In February 2021 the government announced proposals<sup>76</sup> for a new Free Speech and Academic Freedom Champion, to be appointed as a member of the OfS Board, who would have power to investigate alleged breaches of registration conditions related to freedom of speech and academic freedom. The proposal also includes:

174.1. a new registration condition and a redrafted [s.43 duty](#) requiring universities to actively promote freedom of speech on campus;

174.2. an extension of the [s.43 duty](#) to cover student unions;

174.3. the setting of minimum standards for the codes of practice required by s.43;



- 174.4. the introduction of a statutory tort which would give private individuals a right of redress for loss as a result of a breach of s.43; and
- 174.5. contractual protections for academic staff in relation to freedom of speech and academic freedom.

### **Harassment under the Equality Act 2010**

- 175. The Equality Act 2010 prohibits harassment related to a protected characteristic, such as gender reassignment, sex or religion and belief.
- 176. The University may be liable for harassment of this sort perpetrated by its members against its employees, workers and students, as well as (in some circumstances<sup>77</sup>) its visitors. However, as the law currently stands it is not liable for harassment perpetrated by a third party on its premises, unless the third party is acting as the University's agent<sup>78</sup>.
- 177. The protected characteristic of gender reassignment applies to people who are proposing to undergo, are undergoing or have undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex<sup>79</sup>. There is no need for the person to be under medical supervision or to have a gender recognition certificate issued pursuant to the Gender Recognition Act 2004. An Employment Tribunal has recently held that the definition covers nonbinary and gender fluid people as well as trans people<sup>80</sup>.
- 178. The protected characteristic of sex covers only men and women<sup>81</sup>. Under the Act a man is a male of any age and a woman is a female of any age<sup>82</sup>. Holders of Gender Recognition Certificates are to be recognised in the sex stated on the certificate<sup>83</sup> (although this is subject to some exceptions: see §187 below).
- 179. The protected characteristic of religion or belief includes any religious or philosophical belief as well as a lack of belief<sup>84</sup>. It bears the meaning described in §§151–152 above.

180. Harassment consists of engaging in unwanted conduct related to the protected characteristic which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment<sup>85</sup>.
181. If the conduct has the effect (rather than the purpose) of violating dignity etc, it must be reasonable in the circumstances for the conduct to have had that effect, taking into account the perception of the individual. This is an objective test<sup>86</sup>. Conduct may amount to unlawful harassment if the complainant reasonably perceived it to have violated his or her dignity etc, even if another person might reasonably not have regarded it in that way.
182. The EHRC Guidance says: "The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010"<sup>87</sup>.
183. Note that there is another species of harassment in law, which is contained in the Protection from Harassment Act 1997. Broadly, this consists of a course of conduct which is targeted at an individual. The classic example of harassment which is caught by this Act is stalking. There is a civil wrong of harassment as well as a criminal offence.

### **Direct and indirect discrimination under the Equality Act 2010**

184. In addition to the provisions relating to harassment, the Equality Act 2010 prohibits direct discrimination and indirect discrimination because of a protected characteristic, including gender reassignment, sex or religion and belief (see §§177–179 above).
185. Direct discrimination consists of treating a person less favourably because of a protected characteristic than you would have treated or would treat others in the same circumstances<sup>88</sup>.

186. Indirect discrimination occurs where a person is subject to a provision, criterion or practice (“PCP”) which is applied to people generally but which puts or would put people with the protected characteristic at a particular disadvantage by comparison to others<sup>89</sup>. If the PCP is a proportionate means of achieving a legitimate aim there is no discrimination.
187. There are exceptions to the law on discrimination in relation to the protected characteristic of gender reassignment. Amongst other things, these include provisions permitting the exclusion of trans people from communal accommodation<sup>90</sup> and sex-segregated services<sup>91</sup> in their “acquired gender”, regardless of whether they hold a Gender Recognition Certificate. These are known as the “sex-based exceptions”. They may only be applied where it can be shown that doing so is a proportionate means of achieving a legitimate aim. The housing of trans prisoners is capable of falling under these exceptions<sup>92</sup>.
188. A report of the House of Commons Women and Equalities Committee of 14 January 2016 recommended the repeal of the sex-based exceptions in respect of trans people who hold a Gender Recognition Certificate<sup>93</sup>. In its submission to this Committee, Stonewall called for the repeal of the sex based exceptions<sup>94</sup>.

### **“Hate speech”**

189. “Hate speech” is not a legal concept and is not prohibited *per se* by UK law.
190. If a person convicted of a crime was motivated by hostility to the victim on grounds of transgender identity (or other specified status), his or her sentence may be increased under the powers in the Criminal Justice Act 2003. These provisions give courts power to increase the sentence of any offence that is aggravated by such hostility<sup>95</sup>, and are known as the “hate crime laws”. However these laws do not contain a standalone offence of inciting hatred on grounds of transgender identity, and indeed no such law currently exists (although there are laws relating to incitement to hatred on grounds of race, religion and sexual orientation<sup>96</sup>). Thus, the University would not be able to restrict a person’s freedom of expression on the sole basis that it suspected that

the speaker intended to incite hatred on grounds of transgender identity, since this would not be “prescribed by law”.

191. Relevant criminal offences which might be aggravated by hostility on grounds of transgender status (and thus attract an increased sentence under the “hate crime laws”) include:
  - 191.1. Intentionally encouraging or assisting another person in committing an offence<sup>97</sup>, for example assault, the sending of malicious communications<sup>98</sup> or criminal harassment<sup>99</sup>. This requires the perpetrator to believe that an offence will be committed by another person, rather than to merely suspect or shut their eyes to the circumstances<sup>100</sup>, so it is a high bar.
  - 191.2. Several offences under the Public Order Act 1986 which prohibit, variously, the use of threatening, abusive or insulting words or behaviour in particular circumstances. Again, however, there is a high bar for these offences. Speech or behaviour is not threatening, abusive or insulting just because it gives rise to annoyance, anger, disgust or distress<sup>101</sup>, or just because it is vigorous, distasteful or unmannerly<sup>102</sup> or offensive or rude<sup>103</sup>.
192. If the University suspected that an external speaker might commit one of these offences it could potentially justify placing restrictions on the event in question, although the other requirements of Article 10.2 of the Convention would also have to be met in order for speech to be lawfully restricted on this basis (see §§145–150 above).
193. The police are empowered by law to record a “non-crime hate incident” which is “perceived to be motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender”<sup>104</sup>, even where this entails an interference with the freedom of speech of the person against whom the incident is recorded<sup>105</sup>. By definition these records do not relate to breaches of criminal law. It would therefore be surprising if the University were to be

entitled to restrict a person's freedom of speech on the basis that they are likely to commit a non-crime hate incident.

### **The Public Sector Equality Duty**

194. The Equality Act 2010 imposes a general equality duty on public authorities ("PSED")<sup>106</sup>. This means that the University must, when it is exercising its functions, have due regard to the following three aims:
  - 194.1. The need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
  - 194.2. The need to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it.
  - 194.3. The need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it<sup>107</sup>.
195. It is a duty to have due regard rather than to meet the needs directly<sup>108</sup>, but the three aims must be consciously considered in a way which is meaningful, rigorous and substantial, and not a tick box exercise<sup>109</sup>. Equality should be at the centre of policy making, side by side with all other pressing circumstances of whatever magnitude<sup>110</sup>. The University should also pay reasonable regard to any countervailing factors<sup>111</sup>.
196. The EHRC Guidance suggests that the PSED requires universities which are hosting debates on divisive topics to "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 [university] environment".
197. It is good practice to undertake an Equality Impact Assessment, keep records and gather relevant information when making policy or decisions.

198. The University must publish equality objectives and an annual report to demonstrate its compliance with the PSED.

### **The Prevent Duty**

199. Universities are subject to a statutory requirement under the Prevent Duty<sup>112</sup> to have due regard to the need to prevent people from being drawn into terrorism. In doing so they must have particular regard to the duty to ensure freedom of speech and the importance of academic freedom<sup>113</sup>. In 2019 the Court of Appeal directed the government to redraft passages in its Higher Education Prevent Duty Guidance which cautioned against hosting external speakers with extremist views. These passages were held to be “unbalanced”<sup>114</sup>.

## NOTES

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- 21 Human Rights Act 1998 s.6(1)
- 22 *Garaudy v France* [2003] ECHR 65831/01 ECtHR. See also *Ivanov v Russia* [2007] ECHR 35222/04 ECtHR; *Norwood v United Kingdom* (2005) 40 EHRR SE11; *Glimmerveen and Hagenbeek v The Netherlands* (1982) 4 EHRR 260 at §16
- 23 *Lilliendahl v Iceland* (Application 29297/18) (12 May 2020) ECtHR. See also *Perinçek v Switzerland* [GC], no. 27510/08, §§ 113-115, 15 October 2015
- 24 ECHR Art. 10.2
- 25 Public Meeting Act 1908 s.1
- 26 Public Order Act 1986
- 27 *R v Central Independent Television plc* [1994] Fam 192 at 202-203 per Hoffmann LJ
- 28 *Jersild v Denmark* (Application 15890/89) (23 September 1994) ECtHR
- 29 *Handyside*
- 30 *Redmond-Bate v DPP* (1999) 7 BHRC 375 at §20 per Sedley LJ
- 31 See *Vajnai v Hungary* (33629/06) 8 July 2008) at §47
- 32 *R v Shayler* [2003] 1 AC 247 at §21 per Lord Bingham
- 33 *R (on the application of Miller) v College of Policing* [2020] HRLR 10 at §251 (at the time of writing this matter is under appeal)
- 34 *Miller* at §265
- 35 *Miller* at §287
- 36 See eg *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] AC 945 SC at §34 per Lord Sumption.
- 37 *Perinçek v Switzerland* (Application 27510/08) (15 October 2015) ECtHR at §§ 113-115
- 38 *Handyside v United Kingdom* (1979-80) 1 EHRR 737 ECtHR
- 39 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 per Lord Sumption
- 40 *R (on the application of Ben-Dor) v University of Southampton* [2016] EWHC 953 (Admin)
- 41 ECHR Art. 9.2
- 42 *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 per Lord Nicholls of Birkenhead
- 43 *Arrowsmith v United Kingdom* (1978) 19 DR 5, EComHR
- 44 *H v United Kingdom* (1993) 16 EHRR CD 44, ECtHR, *W v United Kingdom* (Application 18187/91) (10 February 1993) ECtHR
- 45 *Nicholson*
- 46 *Nicholson v Grainger plc* [2010] ICR 360 per Burton J
- 47 *Nicholson* per Burton J.
- 48 *Forstater v CGD Europe and others* (Case 2200909/2019) (18 December 2019, unreported) ET
- 49 The appeal was heard on 27 and 28 April 2021. At the time of writing judgment is awaited.
- 50 ECHR Art. 11.2
- 51 *Steel v UK* (1998) 5 BHRC 339 at 358 §101
- 52 *Ezelin v France* (1991) 14 EHRR 362 at 389 §53
- 53 *Plattform 'Ärzte für das Leben'* at §34
- 54 Education Act (No. 2) 1986 s.43(1)
- 55 Education Act (No. 2) 1986 s.43(2). There is also a duty not to deny access to a body of persons, on a similar basis.
- 56 Education Act (No. 2) 1986 s.43(3)
- 57 Education Act (No. 2) 1986 s.43(4)

- 58 To which the UK will no longer be a signatory from 31 December 2020.
- 59 *Commission v Hungary (Higher education)* (C-66/18) (6 October 2020) at §225. See also *Hasan Yazici v Turkey* [2014] ECtHR 403 at §55; *Sorguç v Turkey* (17089/03) at §35; *Sorguç v Turkey* [2009] ECtHR 979.
- 60 Higher Education and Research Act 2017 s.2(1)(a)
- 61 Higher Education and Research Act 2017 s.36
- 62 Higher Education and Research Act 2017 s.2(8)(c)
- 63 Education Reform Act 1988 s.202(2)
- 64 See also “External speakers in higher education institutions”, Universities UK, 22 November 2013, although this is now somewhat out of date.
- 65 Freedom of expression: a guide for higher education providers and students’ unions in England and Wales p.32. See also the Universities UK report on Freedom of Speech on Campus: <https://www.universitiesuk.ac.uk/our-work-in-parliament/Documents/freedom-of-speech-on-campus.pdf#search=freedom%20of%20speech>
- 66 <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/external-speakers-in-higher-education-institutions.aspx>
- 67 Charities Act 2011 s.1(1)(a)
- 68 Charities Act 2011 s.4(1)
- 69 Charter of the University of Essex §3
- 70 Charity Commission guidance “Protecting charities from abuse for extremist purposes” at §10.3
- 71 Established by the Higher Education and Research Act 2017
- 72 Office for Students Regulatory Framework, Annex B
- 73 Office for Students Regulatory Framework, Annex A, Conditions E1 and E2
- 74 <https://www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/freedom-of-speech/>
- 75 Office for Students Regulatory Framework, Condition E2 (Management and Governance)
- 76 <https://www.gov.uk/government/publications/higher-education-free-speech-and-academic-freedom>
- 77 When acting as a service provider to members of the public or as an association: Equality Act 2010 ss.28 and 101-102
- 78 *UNITE the Union v Nailard* [2018] IRLR 730 CA
- 79 Equality Act 2010 s.7
- 80 *Taylor v Jaguar Land Rover Ltd* (Case 1304471/2018 (30 November 2020, unreported) ET
- 81 Equality Act 2010 s.11
- 82 Equality Act 2010 s.212
- 83 Gender Recognition Act 2004 s.9
- 84 Equality Act 2010 s.10
- 85 Equality Act 2010 s.26(1)
- 86 See *Driskel v Peninsula Business Services Ltd* [2000] IRLR 151 EAT.
- 87 Freedom of expression: a guide for higher education providers and students’ unions in England and Wales p.18
- 88 Equality Act 2010 s.13
- 89 Equality Act 2010 s.19
- 90 Equality Act 2010 Sch.23 §3
- 91 Equality Act 2010 Sch.3 §28
- 92 See [“The care and management of individuals who are transgender”](#), Ministry of Justice, 27 January 2020



- <sup>93</sup> House of Commons Women and Equalities Committee, "[Transgender Equality](#)", First Report of Session 2015–16, HC 390 14 January 2016 at §132
- <sup>94</sup> <https://www.stonewall.org.uk/women-and-equalities-select-committee-inquiry-transgender-equality>
- <sup>95</sup> Criminal Justice Act 2003 s.146
- <sup>96</sup> Public Order Act 1986 Part 3A. NB the Law Commission is currently consulting on proposed changes to the hate crime laws: <https://www.lawcom.gov.uk/project/hate-crime/>
- <sup>97</sup> Serious Crime Act 2007 ss.44–46
- <sup>98</sup> Malicious Communications Act 1988; Communications Act 2003 s.127. See further *Scottow v CPS* (CO/3202/2020) (16 December 2020) QBD which makes clear that Art 10 considerations must be factored in when considering offences under the Communications Act 2003.
- <sup>99</sup> Protection from Harassment Act 1997 s.2; see §183 above
- <sup>100</sup> *Treacy v DPP* (1971) 55 Cr.App.R. 113; *R v Moys* (1984) 79 Cr.App.R.72
- <sup>101</sup> *Parkin v Norman, Valentine v Lilley* [1983] QB 92
- <sup>102</sup> *Brutus v Cozens* [1973] AC 854 HL
- <sup>103</sup> *R v Ambrose* (1973) 57 Cr App Rep 538 CA
- <sup>104</sup> Hate Crime Operational Guidance 2014 [1.2]
- <sup>105</sup> *Miller*
- <sup>106</sup> Equality Act 2010 s.149
- <sup>107</sup> See further the EHRC's [Technical Guidance on the PSED](#).
- <sup>108</sup> *R (Rahman) v Birmingham City Council* [2011] EqLR 705; *R (Williams) v Surrey County Council* [2012] EqLR 656
- <sup>109</sup> *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158
- <sup>110</sup> *Stuart and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 per McCombe LJ at §60
- <sup>111</sup> *Williams*
- <sup>112</sup> Counter-Terrorism and Security Act 2015 s.26(1)
- <sup>113</sup> Counter-Terrorism and Security Act 2015 s.31(2)
- <sup>114</sup> *R (Butt) v the Secretary of State for the Home Office* [2019] EWCA Civ 256

## POLICY FRAMEWORK

### Policy on Academic Freedom and Freedom of Speech

200. The University's policy on "Academic Freedom and Freedom of Speech"<sup>115</sup> seeks to comply with its [s.43 duty](#) as well as its other legal and regulatory obligations to protect freedom of speech and academic freedom.
201. The policy commits the University to "promoting an environment in which intense inquiry and informed argument generates lasting ideas, and where members of its community have a responsibility both to challenge and to listen fully"<sup>116</sup>.
202. The substantive part of the policy provides that:
- so far as is reasonably practicable, access to the premises of the University shall not be denied to any registered student or employee of the University or to any individual or body of persons invited to the premises of the University by a registered student or employee of the University, on any grounds relating to:*
- the beliefs or views of that registered student, employee or person so invited: or*
- the policies or objectives of that body*
- except insofar as the expression of such belief, views, policies or objectives shall be unlawful and where it is reasonably anticipated that the unlawful expression of such beliefs, views, policies or objectives might occur on the relevant occasion<sup>117</sup>.*
203. The policy goes on to state that the University might apply restrictions where necessary to discharge its legal and regulatory obligations, to safeguard health and safety, or for the purpose of maintaining and promoting the efficient conduct and administration of the University's functions<sup>118</sup>.

204. Finally, the policy states that members of the University are expected not to obstruct or interfere with the rights of others “to express views with which they might disagree profoundly”<sup>119</sup>.
205. I was told by numerous witnesses that the University has adopted a “no no-platforming” policy, which appears to enjoy wide support.

### **External Speaker Code of Practice and notification procedure**

206. I have had regard to the University’s External Speaker Code of Practice dated November 2018 (“the 2018 CoP”). I have also seen an amended version dated 1 August 2020<sup>120</sup> (“the 2020 CoP”).
207. Both versions of the Code of Practice state that the University has an “expectation that [external speakers will] promote academic freedom, freedom of speech and equality and diversity, and remain within the law”.
208. The 2018 CoP contains a mandatory procedure, which requires organisers of events involving external speakers to fill in an electronic form at least 15 working days before the event (other than in reasonable circumstances).
209. The organiser must tick a box on the form to confirm that they have read the Code of Practice, the Policy on Academic Freedom and Freedom of Speech and the Equality and Diversity Framework (note that the 2020 CoP does not ask organisers to share the Equality and Diversity policy with the speakers).
210. The form itself has space for basic information, such as the name of the speaker, the subject of the talk and the “purpose of event”. It does not contain any space for the organiser to set out any observations, points of potential concern or possible risks, and nor does it direct them to do so by any other means. There is a box to tick to confirm that all the correct information has been provided to the University so that it can undertake a review.
211. Once completed by a member of staff, the form is sent automatically to [REDACTED] [REDACTED] who conduct the review (forms completed by

students are sent automatically to the Students' Union in the first instance). According to the Code of Practice this "is the process by which the University will consider possible risks posed by an external speaker and mitigating actions that may be required in order to reduce the level of risk".

212. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[Redacted]

[Redacted]

[Redacted]

## Equality, diversity and inclusion policy and practice

217. I have seen the Equality and Diversity Framework and Sub-Strategy 2015-18 (“the 2015 Framework”), the Equality, Diversity and Inclusion Policy 2019–2025<sup>121</sup> (the “2019 Policy”) and the Equality, Diversity and Inclusion Annual Report for 2018-19<sup>122</sup>.

218. The 2015 Framework contains a different list of protected characteristics than that which appears in the University’s Charter (██████████). It says:

*We expect staff, students and visitors to be treated, and to each other, with dignity and respect regardless of age, disability, gender identity, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation, socio-economic background, political beliefs and affiliations, family circumstances or other irrelevant distinction*<sup>123</sup>.

219. The 2019 Policy gives third list of protected characteristics. These are broadly in alignment with the protected characteristics in the Equality Act 2010, except that “gender identity” does not appear in the Act: the relevant protected characteristic is “gender reassignment” (see §177 above). In the 2015 Framework it is explained that “the University’s policies go beyond the requirements of legislation and protect a broader group of people than those covered by the term ‘gender reassignment’”<sup>124</sup>.

220. The 2019 Policy states “We expect all members of our campus communities, employees, workers, contractors, students and visitors to be treated, and to treat others, with dignity and respect”. It later expresses a “dual commitment” to inclusion and freedom of speech. Similarly, the University’s Equality, Diversity and Inclusion Annual Report for 2018-19, published pursuant to its obligations under the PSED (see §198 above), notes that “balancing inclusion and academic freedom is an ongoing challenge”.

221. Both the 2015 Framework and the 2019 Policy documents contain details of the informal and formal complaints procedures and numerous sources of support,

which now include the University's Report and Support system<sup>125</sup>, through which anonymous reports may be made.

### **Supporting Trans and Non Binary Staff**

222. The University's Supporting Trans and Non Binary Staff policy<sup>126</sup> was created in May 2019. [REDACTED]

223. Once drafted, the policy went through the University's usual consultation and approvals processes. It is also submitted as part of the University's annual application to stay within the Stonewall Top 100 Employers list. The University's Equality, Diversity and Inclusion Annual Report for 2018-19 states that one of the University's equality objectives is to consistently be ranked in the Stonewall Top 100 employers list. It notes that the University's "trans-inclusion score" under the Stonewall Diversity Champions programme "indicates that there is plenty of room for improvement in this area".

224. In the Introduction to the policy it is said that:

*We recognise that laws, policies and processes alone do not create inclusive environments and this is why we take a holistic approach, which places as much emphasis on how people behave as it does on policy and process.*

*This document sets out our approach to supporting trans and nonbinary staff in the context of our broader commitment to celebrating the diversity of our students and staff, nurturing communities of belonging in which all are accepted without exception, and promoting inclusion, well-being, resilience and empowerment to enable everyone to reach their full potential<sup>127</sup>.*

225. The policy sets out the relevant law as follows:

*Under the Equality Act 2010, it is unlawful to discriminate against or treat someone unfairly because of their gender identity or trans status. Examples of discrimination include outing someone as trans without their permission, refusing to use someone's*

*preferred name and correct gender pronouns and denying someone access to appropriate single-sex facilities*<sup>128</sup>.

226. This does not accurately state the law, since “gender identity or trans status” are not protected characteristics under the Equality Act 2010; rather, the protected characteristic is gender reassignment (see §177 above). Moreover, it cannot be said that the examples given would invariably amount to unlawful discrimination (or, in some cases more accurately, harassment). In particular, “denying someone access to appropriate single-sex facilities” is a contested issue and the Equality Act 2010 contains specific “sex-based exceptions” relating to this (see §187 above). Later in the policy it is said that the University “will not tolerate staff being questioned inappropriately about the facility they choose or being denied access to that facility”<sup>129</sup>. This is a problematic provision. Insofar as its effect is that single sex facilities may be used by whoever chooses to use them in accordance with their gender identity rather than their sex, it is a potential breach of health and safety legislation, which requires employers to provide toilets and changing rooms either on a single-sex basis or in individual lockable rooms<sup>130</sup>.
227. The policy sets out a substantial amount of practical information and guidance for trans and nonbinary staff members and their managers, relating to issues such as coming out, planning transition, time off for medical appointments and sources of additional and ongoing support.

### **Harassment and Bullying Zero Tolerance**

228. I have seen two versions of the University’s Harassment and Bullying Zero Tolerance policy, dated April 2018 and July 2020<sup>131</sup>. They are materially identical.
229. This policy contains dedicated procedures for harassment complaints. Its definition of harassment is broadly similar to that contained in the Equality Act 2010. It explains that the University goes beyond the legislation and “covers all



trans staff, students and visitors i.e. all those whose gender identity, expression and/or history differ from their birth sex”<sup>132</sup>.

230. The policy gives examples of conduct which might amount to harassment, which include “denying a trans person or people access to the appropriate single sex facilities such as toilets or changing rooms”<sup>133</sup> (see §§225–226 above).

231. In the section entitled “Hate incidents or crimes”, the policy gives a definition which I assume to be derived from the law on “hate crimes” (see §190 above).

The policy says:

*Hate crimes or prejudice-based incidents are defined as any incident, which may constitute a criminal offence, which is perceived by the victim or any other person as being motivated by prejudice or hostility based on a person’s ... gender identity or perceived gender identity”*

232. The examples of such “hate crimes” given in the policy include “abuse, such as offensive leaflets and posters, unfounded and malicious complaints and bullying”<sup>134</sup>. These examples are misleading. As set out at §190 above, there is no standalone crime of inciting hatred on grounds of transgender identity. Nor is there a crime of bullying or making offensive comments on grounds of transgender identity. The “hate crime” laws enable a judge to increase a sentence imposed for a crime because the crime was aggravated by hostility on grounds of the victim’s transgender identity. Thus, for example, publishing an offensive leaflet cannot amount to a “hate crime”, unless it is already a breach of the criminal law for some other reason and the person who published or circulated it was motivated by hostility towards a particular victim on the grounds of their transgender identity.

233. The policy refers to the University’s Hate Incident Reporting Centre, which helps with reporting hate incidents or crimes to the police.

234. In the section on “Academic freedom, freedom of expression and inclusion”, the policy states that “neither academic freedom nor freedom of expression can

be used as an excuse for subjecting an individual or group to bullying or harassment or for committing a hate incident or crime”<sup>135</sup>.

## NOTES

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- 115 I have had regard to the version dated 1 October 2016, which has [now been updated](#).
- 116 Academic Freedom and Freedom of Speech policy §3
- 117 Academic Freedom and Freedom of Speech policy §5
- 118 Academic Freedom and Freedom of Speech policy §6
- 119 Academic Freedom and Freedom of Speech policy §7
- 120 <https://www.essex.ac.uk/student/event/external-speaker>
- 121 <https://www.essex.ac.uk/information/equality-and-diversity/equality-and-diversity-policy-and-strategy>
- 122 <https://www.essex.ac.uk/-/media/documents/directories/equality-and-diversity/annual-report-to-council-2018-19.pdf?la=en>
- 123 Equality and Diversity Framework and Sub-Strategy 2015-18 §1.1
- 124 Equality and Diversity Framework and Sub-Strategy 2015-18 Appendix B.1
- 125 <https://reportandsupport.essex.ac.uk/>
- 126 <https://tinyurl.com/ycslsuyx>
- 127 Supporting Trans and Non Binary Staff p.4
- 128 Supporting Trans and Non Binary Staff p.3
- 129 Supporting Trans and Non Binary Staff p.6
- 130 Regulations 20, 21 and 24 of the Workplace (Health, Safety and Welfare) Regulations 1992
- 131 <https://www.essex.ac.uk/information/equality-and-diversity/zero-tolerance-of-harassment-and-bullying>
- 132 Harassment and Bullying Zero Tolerance policy July 2020 p.7
- 133 Harassment and Bullying Zero Tolerance policy July 2020 p.7
- 134 Harassment and Bullying Zero Tolerance policy July 2020 p.9
- 135 Harassment and Bullying Zero Tolerance policy July 2020 p.13

## OBSERVATIONS AND ASSESSMENT

### The Criminology seminar

235. It is my view that, taken in isolation, the decision to cancel the Criminology seminar on 5 December 2019 was unavoidable since:

235.1. There was a credible and serious threat that attempts would be made to cause disruption and barricade the room (██████████). The event was taking place against a background of considerable tension in relation to trans rights and gender critical feminism, particularly in the higher education context. Events in other universities had been subject to disruption, including alleged violence<sup>136</sup>. These widely known background facts supported an inference that there was a high risk that disruption would occur.

235.2. A wholly unacceptable flyer was circulating which contained a violent and profane threat targeted directly at [Prof Phoenix](#) (██████████). I unequivocally reject the evidence given to me that this flyer amounted to no more than teenage stupidity, and I find it surprising that once its existence was brought to the University's attention no timely investigation was undertaken into who had produced and circulated it. The University has a statutory duty to use disciplinary procedures where appropriate to enforce the provisions of its [freedom of speech policy](#) (§159 above). Whilst ██████████ did not know about the flyer in any detail when ██████ made the decision to cancel the seminar, it forms an important part of the factual matrix and it exemplifies the volatility of the situation. Its existence was known to at least one other member of senior leadership, who had fed into the reports given to ██████████ about the threat level.

- 235.3. Crucially, there was very limited time to make the decision. By the time information was given to the organisers about the threats to barricade the room there were only four hours until the event was due to take place. [Prof Phoenix](#) was asking for assurances about her safety before setting off (██████████).
- 235.4. It was proposed that the seminar would be rescheduled, rather than permanently cancelled (██████████).
236. However, it is accepted by the organisers of the seminar that they had not anticipated the tensions which were likely to be generated by the seminar and they did not follow the [external speaker notification procedure](#). This was caused by a combination of:
- 236.1. The organisers not heeding [Prof Phoenix](#)'s warnings that the topic was likely to be controversial (██████████).
- 236.2. Naivety about the fraught nature of public discourse on the subject of gender identity, and the organisers not realising that [Prof Phoenix](#) was a person who was regarded by some as having a particular position on the issue.
- 236.3. A systems failure, in that no automatic [external speaker notification](#) was sent to the organisers because they had block-booked the room (██████████).
- 236.4. Ignorance and deliberate disregard of the internal [policy](#), as it was incorrectly regarded in the department as only being relevant to events which might engage the [Prevent Duty](#) (██████████).
237. I consider that these failures led directly to the cancellation of the seminar on the morning of 5 December. They resulted in a loss of control over the presentation and framing of the event followed by a last-minute panic. There was insufficient time to conduct any proper risk assessment or put mitigating

measures into effect.. In that context the cancellation amounted to a breach of [Prof Phoenix's freedom of expression](#), a breach of the University's [Freedom of Speech and Academic Freedom policy](#) and a breach of the University's [s.43 duty](#).

238. Applying the Article 10.2 test (§§143–150 above), it was not necessary to cancel the seminar in the interests of public safety, for the prevention of disorder or for the protection of health. Nor was it proportionate to do so. This is because if the [procedure](#) had been followed in a timely manner it would have been possible to take a number of steps which almost certainly would have resulted in the seminar going ahead safely and effectively, such as:

238.1. Implementing a more sophisticated communications strategy. This might have avoided the ill-advised use of the hashtag *#transrights* to promote the seminar (██████████). In the context of a highly polarised conflict between trans rights advocates and gender critical feminists, it was inevitably antagonising to badge a person regarded as being on one side of the argument with the insignia of the other. It is notable that no objections were raised until after the hashtag was used on Twitter.

238.2. Having discussions at an early stage about whether the event would be better set up as a debate. Some witnesses thought this would have been unduly polemical and artificially divisive. Others were concerned about whether it would be appropriate to impose a “balance” requirement on a seminar which was intended to present academic research. An alternative idea expressed to me was that the LGBT Forum and Allies could have organised a counter event. The point is that dialogue could have taken place about how best to secure [freedom of expression](#) on both sides as well as the objectors' [freedom of assembly](#).

238.3. Giving consideration to whether the seminar was likely to be distressing for trans and nonbinary members of the University, and to approach Student Wellbeing and Inclusion Services and Human

Resources to request that they provide support for the people affected by these issues.

- 238.4. Involving the Estates team so that security measures could be put into place, if necessary. These could have included setting up and overseeing a space for peaceful protest which would not amount to a barricade of the room.
239. Furthermore, the seminar should have been rearranged after the cancellation. Instead, the standing invitation to [Prof Phoenix](#) was rescinded and she was told that she would not be invited in future (██████████). This decision was not, in my opinion, lawful.
240. It was suggested to me that the right to [freedom of expression](#) does not extend to a right to be invited. That may be the case but it is not relevant here. Firstly, an extant invitation was rescinded. This was a restriction on [Prof Phoenix](#)'s freedom of expression. Secondly, she was explicitly blacklisted in circumstances where she was a senior scholar who might reasonably expect to be invited to share her expertise in a specialist academic environment. On the face of it, blacklisting her was clearly capable of amounting to a restriction on her [freedom of expression and a breach of the University's duties to protect it](#).
241. I am entirely satisfied that as at 11 December 2019 – or indeed at any other time – there was no risk whatever that [Prof Phoenix](#)'s seminar might amount to “[hate speech](#)” of the sort which would fall within Article 17 of the Convention (§142 above). Nor was there any reasonable basis for thinking that [Prof Phoenix](#) might engage in [harassment contrary to the Equality Act 2010](#) or any other unlawful speech.
242. I do not doubt that trans and nonbinary members of the University felt profound offence at the prospect of [Prof Phoenix](#) being given a platform to speak on campus. It is clear that people felt that it would have violated their dignity and/or created an intimidating, hostile, degrading, humiliating or

offensive environment for them. In the law of [harassment](#), conduct is only unlawful if an impact of this sort has been caused deliberately or if it is objectively reasonable for this impact to have been subjectively experienced.

243. I reject the implication made to me by several witnesses that [Prof Phoenix](#) intended deliberately to violate the dignity of trans and nonbinary people or to subject them to an intimidating (etc) environment. I also do not think that it was objectively reasonable for people to believe that her presence or her seminar would have that effect on them, notwithstanding that their fears of this were indisputably genuinely experienced. In reaching this conclusion I take into account the following factors:

243.1. There was no suggestion that anybody thought that the seminar would be conducted in an uncivil manner or that [Prof Phoenix](#) would behave in an uncivil way at any future event. Indeed, the references that were made to “dog whistles” and “gaslighting” indicate that it was believed that [Prof Phoenix](#) would speak in a way which was superficially courteous but in bad faith. This belief was honestly held, whether or not it was well-founded. However, without more it does not objectively show that she would be likely to cause trans or nonbinary people to experience a violation of their dignity (etc).

243.2. Those who voted to rescind the invitation had almost no knowledge of the content of the seminar. It is notable in connection with this that [Prof Phoenix](#) had been asked to provide a copy of her talk to inform the discussion at the meeting (██████████). Many of the witnesses I spoke to agreed that this sort of vetting was unacceptable. The Joint Committee on Human Rights has said that requests of this sort are not a “reasonable condition” to impose upon external speakers. At most the speaker should be asked to give an assurance that the speech is lawful<sup>137</sup>.



- 243.3. The attendees at the 11 December meeting proceeded on the assumption that the seminar would amount to an argument in favour of housing trans women in men's prisons. Even if this were the case, it could not on any basis have amounted to [harassment](#) or "[hate speech](#)". Trans women may currently be housed in men's prisons where doing so is a proportionate means of achieving a legitimate aim (§187 above). Logically, arguing that the law should remain as it is cannot be an attack on trans rights, unless one takes the view that the law itself fails to enshrine rights which exist independently of it. If that is the case, then academic research and discussion would appear to be a good starting point for driving a change to the law. Indeed, it is difficult to see how the enhancement of trans rights in law is to be achieved without such inquiry and discussion.
- 243.4. Nor did I see convincing evidence that those who voted to blacklist [Prof Phoenix](#) had any real knowledge of her views on sex and gender, or that what they did know about this amounted to evidence that she was likely to engage in unlawful [harassment](#) or "[hate speech](#)". Their understanding of what her views were was derived from a cursory examination of a few pieces of evidence in the public domain: her speech to WPUK, her alleged affiliation with that organisation, and the fact that she signed open letters in the Guardian and the Sunday Times (██████████).
- 243.5. It cannot be unlawful to present an argument that in some respects there is a conflict of rights between natal women and trans women, as [Prof Phoenix](#) did in her speech to WPUK (██████████). The Equality Act 2010 recognises a potential conflict of rights by providing the "sex-based exceptions" (§187 above). Given that the principle of a conflict of rights is enshrined in the law, the articulation of views about where the boundaries of that principle should lie would have to be very extreme to amount to [harassment](#) or "[hate speech](#)".

- 243.6. The allegation that [Prof Phoenix](#) was affiliated with WPUK was based only the fact that she gave one speech to them. [REDACTED]  
[REDACTED] I am aware that many people consider WPUK to be a “hate group”. For example, very senior Labour politicians have signed a pledge card to this effect written by the Labour Campaign for Trans Rights, which indicates that those who share WPUK’s position on trans rights and gender identity should be expelled from the Party<sup>138</sup>.
- 243.7. On the other hand, gender critical feminists associated with WPUK have been described by the High Court as “respected academics who hold gender-critical views and do so for profound socio-philosophical reasons” (§147 above), and by the Joint Committee for Human Rights as “leading feminists and LGBT activists with a lengthy pedigree in campaigning for LGBT rights” engaging in “critical debate about issues around feminism and trans politics” which form part of “open debates that democracy needs”<sup>139</sup>.
- 243.8. In any case, membership of or affiliation to a political organisation, whether extremist or not, is not in itself an act of [harassment](#) against an individual or group of people since it cannot be described as “unwanted conduct”, although it may be evidence that other conduct was improperly motivated. Nor does it amount to “[hate speech](#)”.
- 243.9. Similarly, the letters signed by [Prof Phoenix](#) in the Guardian and the Sunday Times do not indicate the possibility that she might engage in unlawful [harassment](#) of trans and nonbinary people or “[hate speech](#)”. The letters express concerns about the proposed introduction of self-ID, and allege that the influence of Stonewall and other advocacy organisations has resulted in the suppression of academic research and discussion of gender identity issues in academia. Some of the language used in these letters may be regarded as objectionable by trans rights

advocates. However it does not, in my view, reach the objective threshold for [harassment](#).

- 243.10. Furthermore the mere discussion of what “trans rights” entail cannot be regarded as a violation of those rights in a context where the proper extent of those rights is clearly not settled either in law or in public opinion, where it is the subject of an extant government consultation and where there is a potential conflict of rights (as discussed in §243.5 above).
- 243.11. It is worth noting that the examples of [harassment](#) in the University’s [Supporting Trans and Non Binary Staff policy](#) might lend credence to the idea that these newspaper letters could amount to or lead to unlawful [harassment](#). This policy is founded on an erroneous understanding of the law (see §§225–226 above). The policy is reviewed annually by Stonewall, and its incorrect summary of the law does not appear to have been picked up by them. In my view the policy states the law as Stonewall would prefer it to be, rather than the law as it is. To that extent the policy is misleading.
- 243.12. In any event, as the law stands the University does not have a legal duty to protect students and staff members from [harassment](#) by a third party such as an external speaker (§176 above).
244. Thus, whether taken individually or as a whole, I do not consider that the pieces of evidence upon which the decision to rescind the invitation to [Prof Phoenix](#) and to blacklist her could reasonably be said to have shown that she was likely to commit unlawful behaviour. The decision was not prescribed by the law of [harassment](#) or any “[hate speech](#)” laws.
245. Furthermore, the subject matter of the seminar was a matter of current political controversy and public interest, and as such should have attracted an enhanced protection (§146–147 above). Therefore even if there was a chance of [Prof](#)

[Phoenix](#) committing an act of [harassment](#), it would be difficult to justify preventing her from speaking rather than pursuing a less drastic course, taking into account the need to act proportionately (§§149–150 above).

246. The University has an obligation under the [Public Sector Equality Duty](#) (“PSED”) to pay due regard to the need to foster good relations between persons with a particular protected characteristic (such as gender reassignment or sex) and others who do not share it.

247. It could be argued that the decision to exclude [Prof Phoenix](#) was in compliance with that duty, and was therefore prescribed by law. I do not share this view, and indeed I consider that the decision was more likely to be in contravention of the [PSED](#). Excluding and silencing individuals does not foster good relations; that can only be achieved by resolving disputes through peaceful dialogue in an environment which supports and protects those who are distressed by the discussion of challenging issues. [REDACTED]

248. Nor, in my view, do the decisions to cancel the seminar and to rescind the invitation and blacklist [Prof Phoenix](#) comply with the [PSED](#) obligation to have due regard to the need to eliminate [discrimination](#) and [harassment](#) (§194.1 above). For the reasons set out above, there was no reasonable basis for thinking that [harassment](#) would be perpetrated against trans or nonbinary people. That reasoning also applies to direct [discrimination](#).

249. As for indirect [discrimination](#), the decision taken in relation to [Prof Phoenix](#) may contribute to indirect sex [discrimination](#) against women at the University, on the basis that more women than men tend to hold (and publicly express) gender critical views<sup>140</sup>. If that can be shown, it can be argued that women are more likely than men to be put at a disadvantage by a practice of excluding gender critical voices. Whilst the University does not owe a duty to [Prof](#)

[Phoenix](#) personally in [discrimination law](#), pursuing policies of excluding gender critical external speakers might very well be of evidential value in an indirect discrimination complaint by a gender critical female staff member.

250. This is bolstered by the evidence I was given about the “culture of fear” which obtains amongst staff who hold these views or whose views on gender deviate from the majority opinion in support of the trans rights advocates [REDACTED] [REDACTED]). This may also indicate that the [academic freedom](#) of these individuals is being inhibited.
251. The [culture](#) which has developed in the University in relation to these issues does not help the University to show that it has paid due regard to the need to eliminate [discrimination](#) or [harassment](#) or to foster good relations between those with the protected characteristic of gender reassignment and others, or between people with the protected characteristic of female sex and others. Certainly, it does not constitute evidence that excluding [Prof Phoenix](#) from the Department of Sociology was a decision which was prescribed by the law contained in the [PSED](#).
252. In summary, I conclude that the decisions to cancel the seminar and to rescind [Prof Phoenix](#)’s invitation and blacklist her were in contravention of the University’s [statutory duty](#) to take reasonably practicable steps to ensure that [freedom of speech](#) within the law is secured for visiting speakers. They were also inconsistent with the University’s [freedom of speech policy](#) and with its [obligations to its regulator](#), and with the University’s [charitable objects](#) of advancing education, scholarship, knowledge and understanding. They may also have amounted to a breach of the University’s obligations under the [PSED](#).
253. I make [recommendations](#) arising from these findings below.

#### **The Holocaust Memorial Week event**

254. Clearly, if an invitation to [Prof Freedman](#) to appear at HMW 2020 to talk about antisemitism was rescinded because of her views on gender identity, this would

potentially contravene the University's [s.43 duty](#) and its [freedom of speech policy](#).

255. I have concluded in light of all the evidence that that was, in fact, what took place in the first instance. Although there were several reasons for it, [Prof Freedman](#)'s views on gender identity were the deciding factor. It was done not out of malice, but out of fear. It was a serious matter, exacerbated by the fact that [Prof Freedman](#) had been invited to speak on an entirely separate topic which was her academic specialism [REDACTED]

256. My reasoning is as follows:

256.1. I received contradictory evidence from the organisers of the event about the timeline as well as the rationale for the decisions which were made. I preferred [Prof Freedman](#)'s account, since it was coherent and consistent with the documentary evidence.

256.2. I reject the claim that was made to me that [Prof Freedman](#)'s views on gender identity were not in the minds of the organisers of HMW 2020 when they decided not to send her a formal invitation on or around 9 January 2020. In light of the background this was not credible.

256.3. In particular, [Prof Freedman](#)'s views on sex and gender had been a constant feature of her interactions with the University [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] there is documentary evidence that her views were flagged and as a result her public profile and social media were vetted.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

256.4. Furthermore, in December 2019 the cancellation of the [Criminology seminar](#) involving [Prof Phoenix](#) had just taken place, and there was very considerable controversy within the University surrounding that decision.

256.5. In any event, it is quite clear from the documentary and witness evidence that [Prof Freedman](#)'s views were very much in the minds of the HMW 2020 organisers in early January. [REDACTED]. On 7 January 2020 it was regarded as so potentially problematic – particularly in light of the controversy surrounding the cancelled [Criminology seminar](#) – that the matter was escalated to senior leadership and to the HMW 2020 organising committee ([REDACTED]). A meeting took place to discuss this ([REDACTED]). [REDACTED]. [REDACTED]. [REDACTED].

256.6. [REDACTED] was then invited to attend the event. There was contradictory evidence about whether this person was invited instead of [Prof Freedman](#) ([REDACTED]) or alternatively as a Chair for the event.

256.7. The decision to reinstate [Prof Freedman](#)'s invitation on 27 January was taken after a number of incidents on 26 and 27 January which threatened to jeopardise the event: [Prof Freedman](#) publicising her complaint of blacklisting and sending it to her MP and the Universities Minister ([REDACTED]), the tweet comparing her to a Holocaust denier ([REDACTED]), and [REDACTED] letter expressing concern about the matters raised by [Prof Freedman](#) and the fact that the panel would be all male ([REDACTED]). It is my view that all of these incidents led to the reinstatement of the invitation to [Prof Freedman](#).

257. My view is that the decision not to issue [Prof Freedman](#) with a formal invitation was not motivated by a desire on the part of the organisers of HMW 2020 to restrict her free speech, or by any objection on their part to her views on gender identity. It was motivated by a wish to avoid the consequences of inviting a controversial figure to appear at the event, including the possibility of disruption. They did not want controversy to overshadow the event, and they did not want to upset colleagues. This was a “ground connected with [[Prof Freedman](#)’s] beliefs or views”, within [s.43 of the Education Act \(No. 2\) 1986](#) and the University’s [Policy on Academic Freedom and Freedom of Speech](#).
258. It was plainly not necessary to restrict [Prof Freedman](#)’s freedom of speech for these reasons. There was no reasonable basis for anybody to think that she would say anything unlawful about gender identity, not least because the topic of the debate would not entail any discussion of gender identity issues. Even if it had, there was no evidence that she might engage in unlawful [harassment](#) or “[hate speech](#)” or other unlawful activity. There was no question of the University’s duties under the [Public Sector Equality Duty](#) being brought into play; the mere presence on campus of a person with whom others disagree about gender identity does not indicate a failure on the part of the University to pay due regard to the needs to eliminate discrimination and foster good relations. Moreover no risk of disruption had been threatened or meaningfully investigated.
259. Nor was it proportionate to restrict [Prof Freedman](#)’s freedom of speech, since alternative steps could have been taken to mitigate any risk of disorder. In the event this was not necessary, since those who might have objected to [Prof Freedman](#)’s presence on campus decided to stay away, at least in part in order to signal their respect for the solemnity and significance of the event.
260. I have therefore reached the view that from 9 to 27 January 2020 [Prof Freedman](#) was correct to think that the University was failing to take reasonably practicable steps to ensure that her freedom of speech within the law was



secured. This was a contravention of the University's [freedom of speech policy](#), its [s.43 duty](#), its [regulatory obligations](#) and its [duties under charity law](#).

261. The decision also engages [Prof Freedman](#)'s right to [freedom of assembly](#) and her right to [freedom of thought, conscience and religion](#). In respect of the latter, the law is not settled as to whether gender critical (or similar) views are protected. It is important to note that the recent Employment Tribunal case in which this has been considered concluded only that the "absolutist view that sex is immutable" did not satisfy the legal test on the basis that it was "not worthy of respect in a democratic society", whereas views about the access of trans people to single-sex spaces did not fall into this category (§152 above). The case is therefore of limited application, and is any event not a binding authority and is subject to a current appeal.
262. The decision not to invite [Prof Freedman](#) was rectified within a short time, so ultimately her freedoms were not restricted. This reversal would not have happened if she had not taken the steps that she did to complain and publicise her displeasure.
263. I make [recommendations](#) arising from these findings below.

## NOTES

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<sup>136</sup> For example at the [Open University's Centre for Crime and Justice Studies](#) in March 2019 and at [Edinburgh University](#) in June 2019

<sup>137</sup> [Report of the Joint Committee on Human Right Inquiry into Freedom of Speech in Universities](#), 27 March 2018, §41

<sup>138</sup> <https://tinyurl.com/uhozh3y>

<sup>139</sup> [Report of the Joint Committee on Human Right Inquiry into Freedom of Speech in Universities](#), 27 March 2018, §52-54

<sup>140</sup> This argument is likely to be run in a forthcoming Employment Tribunal case: *Allison Bailey v (1) Garden Court Chambers (2) Stonewall*.

## RECOMMENDATIONS

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### Professor Phoenix

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**Recommendation 1** | The University should issue an open apology to Prof Phoenix for (1) failing to plan adequately for her seminar on 5 December 2019, such that the event had to be cancelled at the last minute because of a risk of disruption; (2) failing to undertake a timely investigation (and thereafter disciplinary action if appropriate) in respect of the flyer circulated on 5 December 2019 containing violent and profane imagery which was targeted at her; (3) inappropriately asking her on 10 December 2019 to provide a copy of her seminar for the purposes of vetting its content; (4) infringing her freedom of speech without justification by deciding on 11 December 2019 to (a) rescind the invitation to present a seminar and (b) not invite her to attend a future seminar in the Department of Sociology; and (5) thereby causing her distress.

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**Recommendation 2** | The Department of Sociology should declare void the decision taken on 11 December 2020 to not invite Prof Phoenix to a future seminar.

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**Recommendation 3** | Prof Phoenix should be invited to present a seminar in the Centre for Criminology.

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### Professor Freedman

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**Recommendation 4** | The University should issue an open apology to Prof Freedman for (1) threatening to infringe her freedom of speech without justification between 9 and 27 January 2020 by rescinding the invitation to her to take part in the Holocaust Memorial Week roundtable debate on 30 January 2020; (2) causing her distress [REDACTED].

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## Policy

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**Recommendation 5** | A facility should be implemented to send an automatic notification where a room has been block-booked to prompt both the organiser and the professional services staff team which manages room bookings that the external speaker notification form needs to be completed.

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**Recommendation 6** | The External Speaker Code of Practice should be amended to clarify that speakers must not be asked to provide copies of their papers or seminars in advance for the purposes of vetting, other than in cases which appear to fall within the scope of the Prevent duty.

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**Recommendation 7** | The external speaker notification form should be amended to add a section within which the organiser must properly set out any concerns they may have about potentially controversial or distressing topics or speakers.

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**Recommendation 8** | The External Speaker Code of Practice should be amended to state that compliance with its provisions will be monitored and that persistent failure or refusal to comply with it may result in cancellation of events and/or disciplinary action. An effective mechanism for monitoring by Compliance should be put in place.

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**Recommendation 9** | The external speaker review process should adopt a decision making structure to be used in cases of potential concern. It should be based on the questions set out in [Appendix 6](#). The EHRC and UUK guidance should also be considered as sources of good practice (§164 above).

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**Recommendation 10** | The University should give consideration to engaging specialist professional legal advice to assist in complex or difficult external speaker reviews.

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**Recommendation 11** | The external speaker review should in every case consider whether the event is likely to cause distress, and if so (1) seek to consult with any relevant staff or student groups as to what support measures might be put into place; and (2) work with Student Wellbeing and Inclusion Services, the Students' Union and/or Human Resources to ensure that appropriate and adequate support is provided.

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**Recommendation 12** | When a potentially controversial or distressing topic or speaker is approved through the external speaker review, the reviewers should seek to consult with staff and student groups who might wish to organise protests or counter-speech (where such groups are reasonably identifiable) and seek to ensure that assistance is provided to organise these appropriately, safely and peacefully. This consultation should form the basis for guidance on appropriate protesting which should be published in good time in advance of the event in a clear and accessible manner and via staff and student groups.

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**Recommendation 13** | All marketing materials for external speaker events (including on social media) should be supervised by the event organiser(s) and not delegated to junior staff or interns.

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**Recommendation 14** | The External Speaker Code of Practice should be amended to add a requirement for Compliance to be notified of any proposal to rescind an approved invitation to an external speaker, and for reasons to be provided. Compliance should review any such proposal and satisfy themselves that it is not based on improper reasons. In difficult cases Compliance may refer this task to the Registrar.

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**Recommendation 15** | The University should communicate to all members of staff that the external speaker notification procedure is mandatory and is not limited to cases which fall within the scope of the Prevent Duty. Staff should be warned that persistent refusal or failure to comply with it could result in disciplinary action.

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**Recommendation 16** | The University should ask all members of staff to confirm in writing that they are aware of the external speaker notification procedure, and to state whether they require any clarification or training in relation to the procedure. If they require clarification or training this should be provided to them promptly.

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**Recommendation 17** | The University should inform all staff that (1) decisions on whether to approve external speakers will be made on a case by case basis within the existing procedure, and must not be made outside the procedure (and in particular must not be made on a departmental basis and/or by way of any kind of vote); and (2) under no circumstances should an external speaker or potential external speaker be blacklisted or no-platformed.

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**Recommendation 18** | The University's equality, diversity and inclusion policy documents, Charter and Strategic Plan should be standardised so that they all accurately describe the protected characteristics in the Equality Act 2010, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Any additional characteristics in respect of which the University wishes to extend protection should be clearly identified as such.

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**Recommendation 19** | The Supporting Trans and Non Binary Staff policy and Harassment and Bullying Zero Tolerance policy should be amended to accurately state the law, in particular with a view to ensuring that they are an authoritative source of information for the purposes of the external speaker review process.

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**Recommendation 20** | The Supporting Trans and Non Binary Staff policy should be reviewed by a specialist lawyer and if necessary amended to ensure that it offers adequate protection and is lawful.

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## Culture

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**Recommendation 21** | The University should circulate a statement to staff and students (1) condemning the flyer circulated on 5 December 2019 containing violent and profane imagery; and (2) stating that any similar conduct will be dealt with by way of disciplinary action.

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**Recommendation 22** | The University should set up a Working Group to devise and implement a strategy for repairing relationships between trans and nonbinary University members and those with gender critical views, in particular women. In doing so it should bear in mind its duty to pay due regard to the need to foster good relations between people with particular protected characteristics and others. The Working Group should consult as widely as possible with individual members of the University, staff and student groups, the Inclusion Champions, Human Resources, Student Wellbeing and Inclusion Services and the Students' Union. It should enable University members to contribute to the development of this strategy in a strictly confidential environment or anonymously.

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**Recommendation 23** | The University should implement at the earliest opportunity the measures identified in the meeting of 20 December 2019 between the Registrar and members of the LGBT Forum (██████████).

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**Recommendation 24** | The University should reiterate to staff and students its commitment to providing a supportive and inclusive environment within which people can expect to learn, grow and develop through challenge; that this means that they will be confronted with people who have different views which may be experienced as objectionable or offensive; but that a line will be drawn at conduct which is unlawful or contrary to the University's policies. The University may wish to consider the wording of the University of Oxford's freedom of

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speech policy ([Appendix 7](#)) in considering how best to communicate this message.

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**Recommendation 25** | The University should review the Inclusion Champion roles to ensure that they cover appropriate constituencies and that the postholders are able to work effectively together.

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**Recommendation 26** | The University should review the mental health and welfare support provided to trans and nonbinary staff and students, and make such changes to it as are necessary to ensure that it is appropriate and adequate to meet existing need.

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**Recommendation 27** | The University should review the “Report and Support” system, and make such changes to it as are necessary to ensure that it is appropriate and adequate to meet existing need.

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**Recommendation 28** | The University should give careful and thorough consideration to the relative benefits and disbenefits of its relationship with Stonewall, bearing in mind the issues raised in this report. In particular, it should consider that this relationship appears to have given University members the impression that gender critical academics can legitimately be excluded from the institution [REDACTED]; the potential effect of this on the University’s obligations to uphold freedom of expression; the effect on University members’ understanding of the values of the institution; and the effect on those members of the University who hold gender critical views (see §§249–251 above). If the University considers it appropriate to continue its relationship with Stonewall, it should devise a strategy for countering the drawbacks and potential illegalities described above.

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## APPENDICES



[REDACTED]

Following the raising of concerns about the selection of speakers for the Holocaust Memorial Week event on the State of Antisemitism Today, the following actions were taken:

- [REDACTED]
- [REDACTED]
- [REDACTED]

**Reviewer**

A suitably experienced individual, appointed from outside the University of Essex to undertake the review and prepare a report with recommendations.

The reviewer will have demonstrable experience in relation to University governance and practice, and Equality, Diversity and Inclusion.

The appointment of the reviewer will be made following a presentation by the reviewer to a panel of three members of the University, who will provide assurance that the reviewer is committed to undertaking the review in an inclusive manner and ensure that the experience required of the reviewer can be assessed fully. [REDACTED]

[REDACTED]

## **Timetable**

### *Approval of Terms of Reference*

- 17 December 2019: Consideration of initial draft by USG
- 14 January 2020: Approval by Senate by circulation
- 31 January 2020: Approval by Council by circulation
- 16 June 2020: Approval by USG of updated timings for the review

### *Selection of Reviewer:*

- 20 July 2020: Reviewer selected and commences review process.

### *Reporting of Findings:*

- 6 October 2020: Report to USG
- 4 November 2020: Report to be considered by Senate, to make recommendations to Council
- 30 November 2020: Report to be considered by Council, for approval of recommendations

Should the reviewer identify any urgent issues during the course of the review, they may draw these to the attention of the Registrar & Secretary who will take action appropriate to the specific issue identified.

## **Approach**

The Review will:

- Assemble and review the evidence, including contemporary documentary evidence;
- Assess how University policies and procedures have been applied on this occasion;

- Assess the evidence available against good practice to identify any gaps or issues arising;
- Identify any recommendations in relation to University policies, procedures and practices that arise from these incidents and the evidence collected through the review;
- Provide any other observations that the reviewer would want to draw to the attention of the University's Senate and Council.

### **Review Process**

In undertaking the review, in pursuit of the approach set out above, the reviewer will:

- Collect contemporary documentary evidence relevant to the events that are subject to the review;
- Make direct approaches to individuals involved in the events, seeking their account of the circumstances relating to the organisation of the events and:
  - the decision that the event on 5th December should be cancelled; and
  - the selection of speakers for the event on 30th January;
- Invite written submissions from members of the University, which may be made by individuals or groups and can be made on a named basis, anonymously or by individuals on behalf of others;
- Provide opportunities for individuals and/or groups to meet with the reviewer to provide input in person or through a representative of their choosing;
- Undertake research into the general application of the University's policies relating to external speakers;
- Draw attention to sources of best practice guidance that might be relevant to the matters subject to review;

- Identify the legal and policy issues (including University policies) relevant to the review and highlight their implications for the University's policy and practice;
- Give specific consideration to wellbeing issues that are relevant to the matters subject to review and to any recommendations made by the reviewer;
- Complete any other tasks that the reviewer considers to be necessary for the conduct of the review.

During the course of the review, the reviewer will be asked to confirm that written or face-to-face input to the review is being provided in a manner that suggests that the review is, itself, being conducted in an inclusive way and that diverse voices are contributing to it.

The University will appoint an expert external reference group of at least three members to comment on the draft report from the review and make comments to assist the reviewer in producing a final version for submission to the University. The expert panel will also be asked to comment upon the way that the review has been conducted by the reviewer, providing assurance that the review has been conducted in an inclusive and open manner. The membership of the expert reference group will be agreed with the panel involved in the selection of the reviewer.

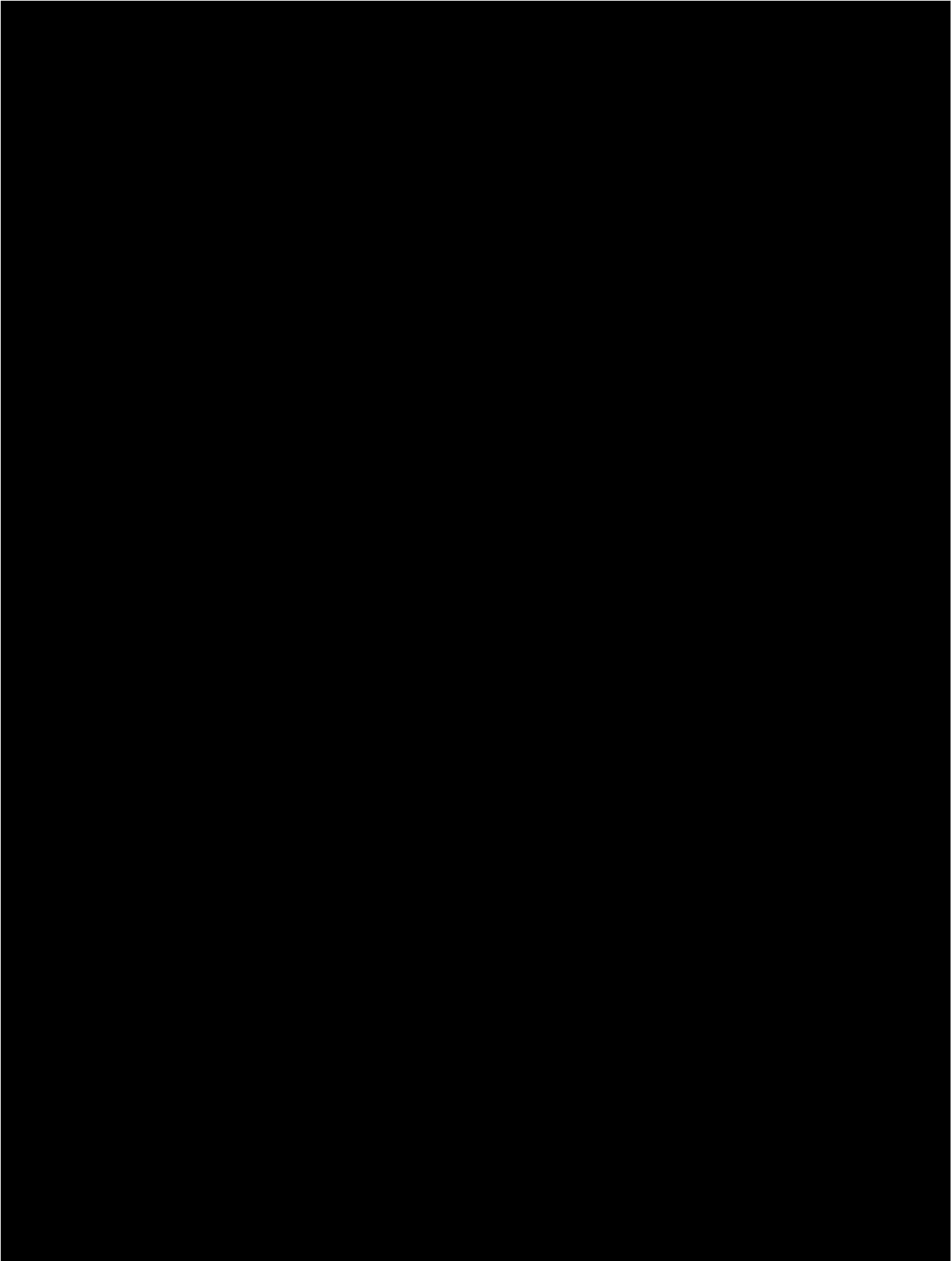
### **Review Outputs**

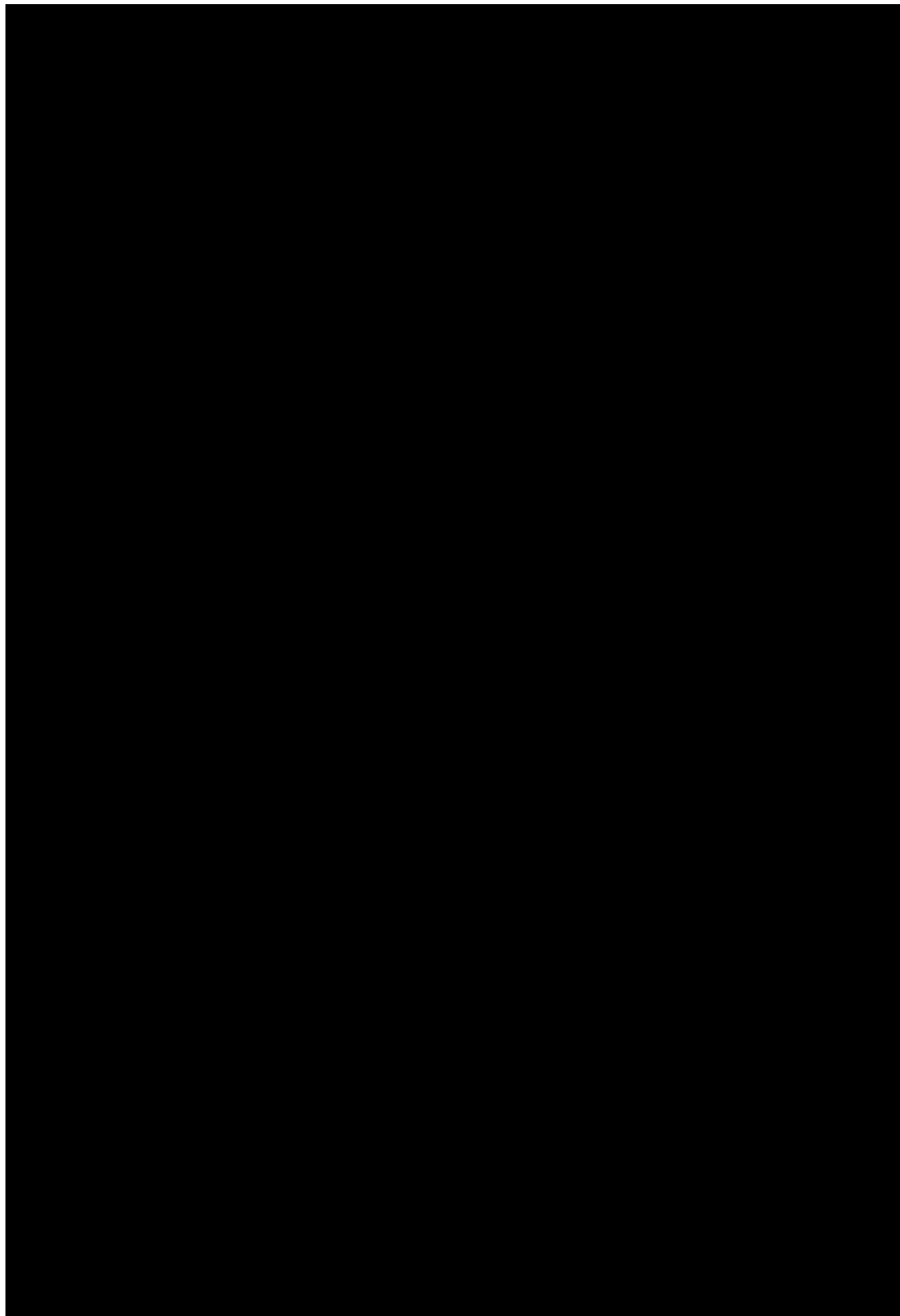
The reviewer will:

- Produce a report for consideration by the University's Senate on 4 November 2020 and Council on 30 November 2020, addressing the aims of the review and having followed the review process;
- Make recommendations in the report in relation to University policy and practice;
- Make any other observations that they would wish to make, including suggestions for the effective communication and operationalisation of the recommendations in the report.

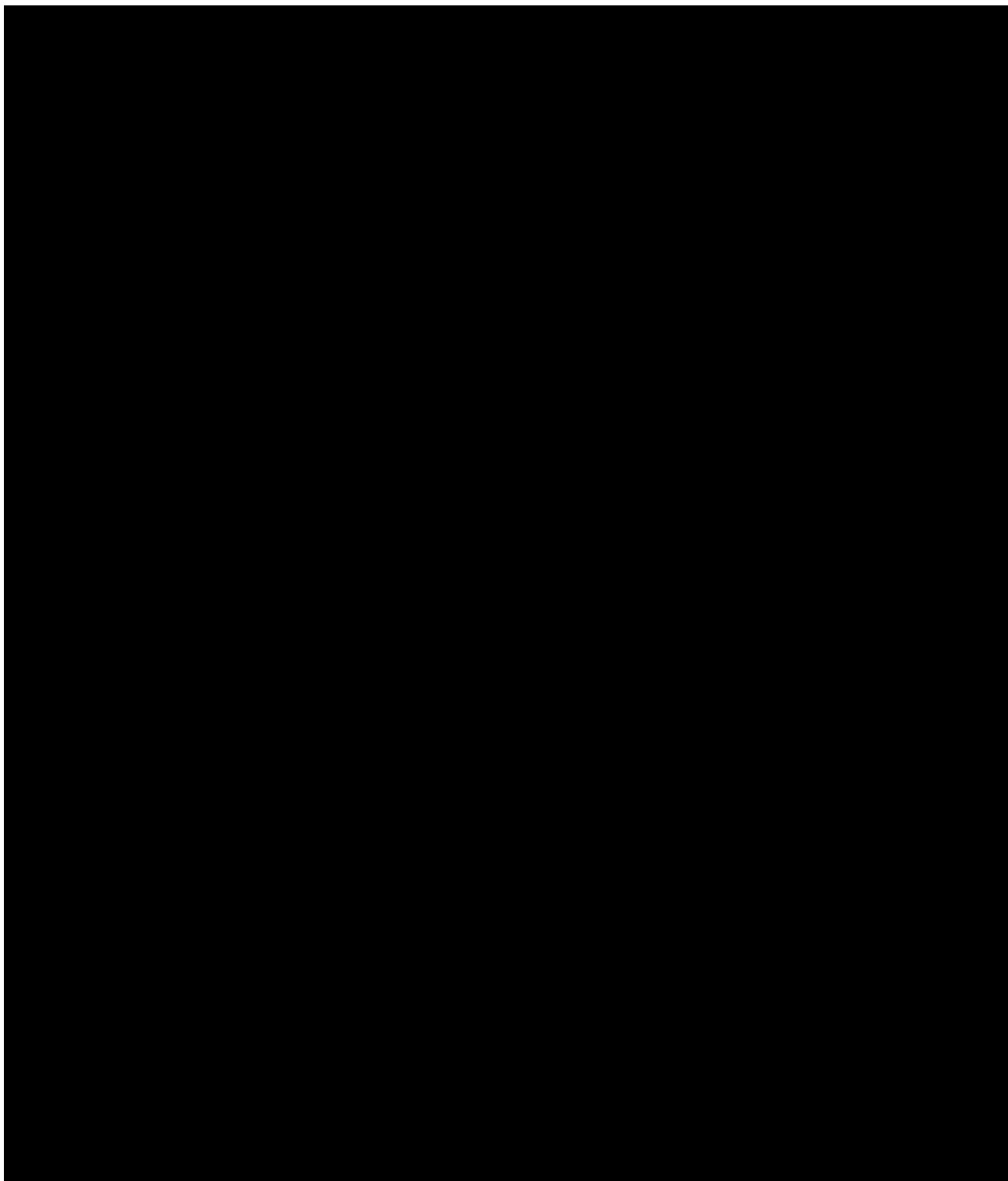
4 June 2020

## Appendix 2 | Witnesses









## Appendix 3 | Vice Chancellor's blog 9 December 2019

### **Upholding academic freedom and promoting inclusivity**

Last week a seminar involving an external speaker invited to talk about trans rights and justice was cancelled at short notice by the organising department, as a result of their concerns about safety. Our policy on academic freedom and freedom of speech is very clear, and states: "Just as the University will not restrict debate or deliberation simply because the views being expressed might be considered unwise or even offensive, so it also expects members of the University community to show commitment to this same principle by not obstructing or interfering with the rights of others to express views with which they might disagree profoundly."

We also have an equally clear commitment to being an inclusive community and our policies are set out in our Equality and Diversity Codes of Practice with our Equality and Diversity Policy Statement affirming: "The University of Essex celebrates diversity, challenges inequality and is committed to sustaining an inclusive and diverse community that is open to all who have the potential to benefit from membership of it and which ensures equality of opportunity for all its members."

We have well-established procedures in place to reflect these values and govern events with speakers from outside the University, so it is very important that we understand what happened in this case and what lessons we should draw.

Accordingly, I have commissioned a review of the circumstances that resulted in the event being cancelled. We will appoint a suitably experienced person to lead this review.

They will be asked to:

- Assemble and review the facts;

- Assess how University policies and procedures have been applied on this occasion;
- Identify any recommendations in relation to University policy and practice that arise from this incident;
- Provide any other observations that the reviewer would want to draw to the attention of the University's Senate and Council.

The report will be considered by our Senate meeting on Wednesday 29 April and Council on Monday 18 May, with any urgent issues being highlighted earlier should that be necessary.

I hope the review will give us complete confidence in our processes for upholding academic freedom and promoting freedom of speech within the law, in a context of being an inclusive community.

If you do have comments or observations that you would like to share please email: [review@essex.ac.uk](mailto:review@essex.ac.uk)

Once the review is underway we will also ensure that there are other opportunities to engage our community on these issues that matter to us all.

- I welcome your comments and feedback – please e-mail me at: [vc@essex.ac.uk](mailto:vc@essex.ac.uk)

## Appendix 4 | Open letter to the Vice Chancellor 18 December 2019

Dear Vice Chancellor,

Following recent coverage of the University of Essex's cancellation of a seminar, which was due to be presented on Thursday 5th December 2019, by Professor Jo Phoenix (The Open University), we would like to address the issue and detail our stance on this matter.

As members of the LGBTQ community and allies at the University of Essex, we appreciate that academic freedom of speech plays a key part in the production of intelligent and useful debate, particularly in a research environment where creativity, discussion and challenging various perspectives breeds impactful output. However, an area of which we feel should not be up for discussion or debate is the existence of Trans/nonbinary communities and identities.

Being Trans/nonbinary is not a topic for debate: it is a reality.

We were disappointed to hear, on the morning of the 5th December, that Professor Jo Phoenix had been invited to present a seminar, which was going to "explore that there are some conceptual and political problems with the Trans rights perspective when applied to the administration of criminal justice in the UK"

(<https://www.essex.ac.uk/events/2019/12/05/trans-rights-and-justice>).

Trans/nonbinary people having equal rights is not a 'perspective': it is a human right.

The right for trans people to access so-called 'single-sex spaces' (such as bathrooms, prisons, changing rooms, etc) has been sensationalised and often negatively portrays Trans people. The narrative specifically against Trans women being able to access 'women's spaces' has been largely negative: framing Trans women as posing a 'threat' to cisgender women, as being predators, attackers or criminals. The talk proposed by Professor Jo Phoenix showed evidence of a similar narrative: an 'argument' that there

are 'conceptual and political problems with the trans rights perspective when applied to the administration of criminal justice in the UK'

(<https://www.essex.ac.uk/events/2019/12/05/trans-rights-and-justice>).

We emphasise, Trans/nonbinary people having equal rights is not a 'perspective': it is a human right.

What the media often fails to cover is that Trans/nonbinary people are subjected to widespread abuse, invalidation and discrimination simply for existing. What the media fails to reinforce is that Trans women are women, Trans men are men, and all gender identities are valid. What the media fails to report is what the GRA reform means and what existing rights exist within the Equality Act 2010.

As per the LGBT in Britain: Trans Report 2018 from Stonewall, 48 percent of Trans people do not feel comfortable using public toilets. Two in five Trans people and three in ten non-binary people have experienced a hate crime or incident because of their gender identity in the last 12 months. Younger Trans adults are at greatest risk: 53 percent of Trans people aged 18 to 24 have experienced a hate crime or incident based on their gender identity in the last 12 months. For a community who are constantly having their occupancy and existence in everyday spaces questioned to see that an academic with the profile of Professor Jo Phoenix – someone with an academic status of power and influence – has been given a platform at a University to present a seminar on the implications of allowing trans women into women's prisons is not productive or helpful. It is harmful and validates public questioning of the Trans experience.

We emphasise, being Trans/nonbinary is not a topic for debate: it is a reality.

On the news of this seminar, several members of our LGBTQ Forum & Allies individually contacted the Head of Department for Sociology and the Director for the Centre of Criminology, along with contacting the Chief of Staff, the Compliance Manager (Safeguarding) and relevant Inclusion Champions, to ask questions and express our concerns. We feared that the organisers might not be aware that Jo Phoenix is in fact a vocal member of the transphobic lobby that has emerged in

academia. She was one of the signatories of a letter to the Guardian in October 2018 which expressed the concerns of a group of academic who claim to be “concerned about the suppression of proper academic analysis and discussion of the social phenomenon of transgenderism” and about the Gender Recognition Act reforms. Jo Phoenix is also affiliated with Woman’s Place, a vocal lobby group that has publicly voiced its disagreement with the reform of the Gender Recognition Act.

Jo Phoenix was also a signatory to a letter in the Sunday Times which claimed that, in part, "As academics we are writing to register our disquiet over the inappropriately close relationship between the LGBT charity Stonewall and UK universities, via the Stonewall Diversity Champions programme. The membership requirements of this programme are in tension with academic freedom. For instance, university members must instigate specialist trans policies, in addition to general equality policies, which outlaw “transphobic” teaching and research material but offer no clear definition of what would count as such." Jo Phoenix is thus not just tacitly but openly hostile to the proclaimed inclusivity policies of our institution which have been carefully and collectively arrived at. Huge amounts of institutional energy and collective goodwill was put towards recognition that this community supports the Diversity Champions initiative. It is therefore contradictory that someone who is openly hostile to our stated community position on this issue was invited to speak.

We appreciate that “academic staff shall have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges” (as outlined in the University’s Royal Charter). However, the University of Essex policy on Academic Freedom and Freedom of Speech also states that the university may itself apply restrictions in circumstances where they are necessary to safeguard the safety, health and welfare of its registered students, employees and other persons lawfully upon the premises or engaged in activities associated with the University: including giving effect to the safeguards set out in the Equalities Act 2010.

Discrimination against those who fall under the protected characteristic ‘Gender Reassignment’ (which the University of Essex recognises is an outdated term) can be direct, indirect, harassment and victimisation. The debate around the ‘legitimacy’ of

Trans/nonbinary people is direct discriminative speech. Hailing academic freedom of speech as a justification for introducing such a party into the University environment is directly creating an offensive and unsafe environment for those who are Trans/nonbinary.

The University states a zero-tolerance approach to hate crime: this is inclusive of hate speech. We believe that the talk, as well as the speaker presenting this seminar, was conducive to hate speech and bigotry: not academic freedom. As a zero-tolerance approach, this 'debate' is not welcome here at our campus. The safety and wellbeing of a marginalised community, our Trans/nonbinary community, is paramount above that of the need to express bigoted views.

We would urge those who disapprove of the cancellation of this talk to consider their own privileges and seek to position themselves as allies for the Trans community. The statistics published by Stonewall (Trans Report in Britain: 2018) recently conveyed the harrowing reality for Trans/nonbinary people seeking an education within the academic sector:

- More than a third of Trans University students (36 per cent) have experienced negative comments or conduct from staff in the last year.
- One in seven Trans university students (14 per cent) have considered dropping out or have dropped out of a higher education course because of experiencing harassment or discrimination from students and staff in the last year.
- Half of trans and non-binary people (51 per cent and 50 per cent respectively) have hidden or disguised the fact they are LGBT at work because they were afraid of discrimination.

If we were discussing academic freedom of speech, we would hope that this would extend to ensuring equality of freedom of speech: allowing Trans/nonbinary people equal opportunity and rights to education, to research, to impactful study. What they do not deserve is to have their existence questioned by those who not only are already in a place where they have gained academic accolade and privilege, but also have such

people influencing and addressing the majority with their discriminatory stance and viewpoint under the guise of 'academia'.

We welcome a review of the external speaker notification form and the process in which talks are vetted at the University. We also welcome a review of how marginalised communities are discussed within academia, to ensure not only adherence to the Equality Act 2010, but also a respectful environment that allows marginalised communities to access academia freely, without fear of being used as a topic for debate and scrutiny. If the university continue to handle this incident poorly, it has the potential to further alienate the LGBTQ community at Essex, including the many students who are affected by these issues.

We have attached our comments and concerns from the Forum, collated on the 9th December 2019. We request a response from the Vice Chancellor on these matters, with the hope that in consultation with the Forum, a preventative strategy can be created and put in place, to ensure that a situation such as the events of the 5th December 2019 do not occur again.

We would like to thank all those who raised their concerns and expressed their support for our cause. We also encourage students, staff and visitors to the University to continue to utilise the Report and Support service available online, and to challenge discrimination against the LGBTQ community when safe and able to do so.

Yours Sincerely,

The LGBTQ Forum & Allies



## Appendix 5 | Email from the Registrar 27 January 2020

I am writing to follow up on our conversation about the Holocaust Memorial Week event on The State of Antisemitism Today, scheduled for later this week. As I understand the situation, in the light of the public comment about the event, [REDACTED]

[REDACTED]. This has opened up an opportunity to extend the panel by inviting additional speakers. As a consequence, you indicated that the organising committee was minded to extend an invitation to two additional speakers, [REDACTED] and Professor Rosa Freedman. You were seeking my views on this, given the specific role that the Registrar and Secretary plays in relation to external speaker invitations, as set out in our Code of Practice.

[REDACTED] For Professor Freedman, our normal arrangements require a period of notice to be provided for consideration of proposed external speakers at University events. However, I had already received a request, on 8<sup>th</sup> January, exploring the possibility of Professor Freedman being invited to this event and seeking my view from the perspective of the University's Policy on Academic Freedom and Freedom of Speech and External Speaker Code of Practice. I had replied, at that time, saying that I saw no compelling reason why Professor Freedman should not be invited, although I understand that no invitation was then issued. As I had already expressed my view in line with the timescales set out in the Code of Practice, I consider it to be in line with the Code to proceed with the request you have now made.

As a consequence, I have given further consideration to the issue, in particular in relation to the element of the policy that states:

so far as is reasonably practicable, access to the premises of the University shall not be denied to any registered student or employee of the University or to any individual

or body of persons invited to the premises of the University by a registered student or employee of the University on any grounds relating to:

the beliefs or views of that registered student, employee or person so invited: or

the policies or objectives of that body;

except insofar as the expression of such belief, views, policies or objectives shall be unlawful and where it is reasonably anticipated that the unlawful expression of such beliefs, views, policies or objectives might occur on the relevant occasion.

I have no reasonable anticipation that Professor Freedman, or any of the other speakers at the event, are likely to express beliefs, views, policies or objectives that might be unlawful. However, I would ask that you ensure that all speakers at the event receive a copy of the University's Policy on Academic Freedom and Freedom of Speech in advance, and are asked to make themselves familiar with the policy.

I have also considered the event within the test of reasonable practicability described in the policy. I can see no reasons why it should not be reasonably practicable for the event to take place with Professor Freedman as a speaker. Given the public interest in the event, it would be appropriate, however, to have a presence from the University's patrol officers for the event, to ensure that it progresses smoothly.

On the basis outlined above, I am content to confirm that you may proceed with the invitation to Professor Freedman.

## Appendix 6 | Decision making structure for external speaker reviews

1. Is it immediately obvious that the speaker intends to engage in very serious hate speech which seeks to abuse the human rights of others, such as directly inciting violence? If so, the request for authorisation should be refused.
2. Is it likely that the speaker will engage in speech which may be unlawful, in that for example it may amount to harassment or discrimination against people with protected characteristics? Be careful to distinguish between speech which may be merely offensive, shocking or disturbing and speech which may be unlawful.
3. If so, taking into account the relevant factors (§148 above), is it necessary to impose a limitation or condition to protect:
  - the interests of public safety;
  - the prevention of disorder or crime;
  - the protection of health or morals; or
  - the protection of the rights of others?
4. If so, what limitations or conditions is it proportionate to impose? Take into account that:
  - limitations or conditions must go no further than is reasonably necessary to achieve their aim(s);
  - a fair balance should be struck between the competing interests;
  - speech which is about a matter of political or public interest should be given enhanced protection; and
  - speech which is intended to offend rather than to inform may be subjected to tighter restrictions.
5. Are there any issues relating to freedom of thought, conscience or religion?
6. Are there any issues relating to freedom of assembly and association? The rights of any protesters should be protected.

## **Appendix 7 | University of Oxford Freedom of Speech policy**

### **Free speech is the lifeblood of a university**

It enables the pursuit of knowledge. It helps us approach truth. It allows students, teachers and researchers to become better acquainted with the variety of beliefs, theories and opinions in the world. Recognising the vital importance of free expression for the life of the mind, a university may make rules concerning the conduct of debate but should never prevent speech that is lawful.

Inevitably, this will mean that members of the University are confronted with views that some find unsettling, extreme or offensive. The University must therefore foster freedom of expression within a framework of robust civility. Not all theories deserve equal respect. A university values expertise and intellectual achievement as well as openness. But, within the bounds set by law, all voices or views which any member of our community considers relevant should be given the chance of a hearing. Wherever possible, they should also be exposed to evidence, questioning and argument. As an integral part of this commitment to freedom of expression, we will take steps to ensure that all such exchanges happen peacefully. With appropriate regulation of the time, place and manner of events, neither speakers nor listeners should have any reasonable grounds to feel intimidated or censored.

It is this understanding of the central importance and specific roles of free speech in a university that underlies the detailed procedures of the University of Oxford.