IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

CASE NO: AC-2025-LON-001462

BETWEEN:

THE KING

(on the application of THE UNIVERSITY OF SUSSEX)

Claimant

-and-

THE OFFICE FOR STUDENTS

Defendant

RE-AMENDED STATEMENT OF FACTS AND GROUNDS

References:

- References to the Core Permission Bundle are in format **[CB/Tab/Page]**.
- References to the Supplementary Permission Bundle are in format **[SB/Tab/Page]**.
- References to paragraphs of Witness Statements are in format **Surname, Statement Number, §Paragraph.**

Essential reading:

- Statement of Facts and Grounds, including Annexed Chronology **[CB/2-3/21-95]**.
- Final Decision on Substantive Matters **[CB/6/103-195]**.
- First Witness Statement of Vice-Chancellor Professor Sasha Roseneil **[CB/24/318-349]**.
- First Witness Statement of Chief Financial Officer Jacinda Humphry **[CB/26/354-369]**.
- The OfS' pre-action protocol response **[CB/23/287-317]**.

Other applications

- This claim is accompanied by three applications (set out in section 9 of the Claim Form): (i) an application for expedition; (ii) an application to file a Statement of Facts and Grounds not exceeding 65 pages; and (iii) an application for further directions. Submissions in support of those applications are set out in separate submissions **[CB/4/96-100]**.

Amendments

- The amendments advance submissions in support of the existing grounds of claim in light of Regulatory Advice 24, which the Defendant published on 19 June 2025 (after the claim was issued on 9 May 2025). Although these submissions could have been advanced in a skeleton argument, the Claimant considers it preferable to amend the pleadings so that the Defendant has the opportunity to address the submissions in its detailed grounds of defence.

- In the original version of this document, the Claimant used red and green text to highlight different amendments made in its policy documents. The amendments are therefore shown in purple font.

Re-Amendments

- These amendments: (i) advance an additional submission regarding the appearance of bias in light of the disclosure made by the OfS on 23 October 2025; (ii) plead an alternative route by which the Court may find that the definition of *"governing documents"* applied in the FD is unlawful, albeit that the substance of the point remains the same. Although these submissions could have been advanced in a skeleton argument, the Claimant considers it preferable to amend the pleadings so that the OfS has more advanced notice.

A. INTRODUCTION AND SUMMARY

1. The University of Sussex (**"the University"**) applies for judicial review of (a) the decision of the Office for Students (**"the OfS"**) to find, via a 'Final Decision on Substantive Matters' (**"FD"**) issued on 27 March 2025, that the University had breached two of the ongoing conditions of registration on English higher education providers: condition E1 and condition E2(i), and (b) of the OfS' Regulatory Framework (the **"RF"**) as applied to the University in the FD. In light of its findings on breach, the OfS has imposed a penalty of £585,000 on the University. The OfS' findings of breach primarily relate to the University's Trans and Non-Binary Equality Policy Statement (the **"TNBEPS"'**), which is a two-page policy statement intended to promote the fair and equal treatment of trans and non-binary staff and students. The FD followed an investigation lasting three and a half years, throughout which the OfS refused to hold any substantive meetings with any member of the University.

2. The University submits that the FD is *ultra vires*, wrong in law, irrational, and procedurally unfair.

   2.1. As to vires:

      2.1.1. Ground 1: s.14 of the Higher Education and Research Act 2017 (**"HERA 2017"**) permits the OfS to devise and publish a public interest governance condition in relation to a provider's "*governing documents*". Governing documents are therefore a statutory concept. The OfS has chosen to devise such a condition and publish it in the RF. In its RF, the OfS has defined "*governing document*" as any document that (*inter alia*) describes any of the provider's values and has stated that this definition should be applied broadly. The OfS applied that approach in the FD. The University submits that the RF is unlawful in that it defines "*governing documents*" in terms that are broader than the concept of "*governing documents*" in s.14 HERA 2017, and the FD is unlawful because it applied that erroneous definition. The governing documents of a university established by Royal Charter (such as the University) are its Charter and Statutes. A policy statement relating to the treatment of a specific group of staff and students is not a governing document of the University (see §§121-127 below).

2.1.2. Ground 2: the University is an exempt charity established by Royal Charter. The University's Visitor is the King. The King has the exclusive jurisdiction – subject to any abrogation of that jurisdiction by Parliament – to determine whether the University has breached any of its internal laws. Parliament has not authorised the OfS to intrude upon the Visitor's jurisdiction in HERA 2017 or any other statute. The OfS accordingly has no power to find, as it has in the FD, that the University breached its internal scheme of delegation. The OfS' decision is accordingly also *ultra vires* on that basis (see §§128-133 below).

2.2. As to errors of law:

2.2.1. Ground 3: the OfS erred in its interpretation of condition E1, in all four of its elements: First, on the meaning of *"reasonably practicable"* and *"freedom of speech within the law"* the OfS contends that universities are not permitted to take any action that would impose any restriction on any speech whatsoever unless the speech amounts to a civil wrong or a criminal offence. This is wrong. The obligation in the RF to "*take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider*" cannot be taken to prevent universities from imposing restrictions on freedom of speech that are necessary and proportionate for the purposes of legitimate aims such as maintaining order and academic standards within the University. The OfS' position would mean that a university policy that is wholly compliant with Article 10 of the ECHR ("**Article 10**") (which permits proportionate interferences with free speech) could nevertheless breach the OfS' regulatory framework on freedom of speech. The OfS' position on the meaning of "*freedom of speech within the law*" for the purposes of condition E1 is also inconsistent with its approach to the meaning of *"freedom of speech within the law"* under the Higher Education (Freedom of Speech) Act 2023 (the **"2023 Act"**) – in the latter case, the OfS accepts that "*freedom of speech within the law*" means the same thing as Article 10 (see §§147-153 below). Second, the OfS has also erred in its interpretation of the other elements of condition E1. The OfS is only empowered to assess whether the *"governing documents"* (plural) are *"consistent"* with the Public Interest Governance Principles (the **"PIGPs"**). The OfS (i) failed to apply the proper definition of *"governing documents"* (ii) failed to assess the *"governing documents"* (as it defined them) as a whole; (iii) failed to assess whether they were *"consistent with"* the PIGPs; and (~~iii~~iv) failed to apply the Academic Freedom PIGP in accordance with ss.14(7) and 85 of HERA 2017 (see §§134-153 below).

2.2.2. Ground 4: the OfS misinterpreted the TNBEPS. Interpreted objectively and in context, the TNBEPS could not have led to any member of academic staff being subject to disciplinary proceedings for conduct that is protected by the principles of freedom of speech and academic freedom. Further, the OfS erred in law or acted irrationally in finding that the 2022 and 2023 versions

of the TNBEPS limited freedom of speech within the law and/or caused harm.

2.3. As to irrationality/failure to consider relevant matters (Ground 5): the *"primary purpose"* of the OfS' enforcement powers (as set out in its published policy, see §163 below) is to ensure that providers comply with the conditions of registration. In the FD, the OfS failed to decide whether the University currently complies with the conditions of registration by reason of the changes made to the TNBEPS in 2024 and thereby failed to have regard to a consideration that was relevant to its discretion on whether to make findings of regulatory breach (see §§163-165 below). The OfS also breached s.2(2)(c) of HERA 2017 in failing to have rational regard to the anti-competitive effects of its approach (see §§168-173 below). The OfS also acted irrationally in its findings concerning the alleged harm caused by the TNBEPS.

2.4. As to procedural fairness (Ground 6): the OfS' investigation was procedurally unfair and/or gave rise to an appearance of bias. The University asked to meet with the OfS nine times to discuss matters of substance during its three-and a half-year investigation. All those requests were refused or ignored. The OfS did not interview a single person at the University to collect any evidence. The OfS instead took two witness statements from a sole witness, Dr Kathleen (formerly Professor)[1] Stock, in circumstances unknown to the University, failed to disclose the majority of evidence to the University before making its FD, and substantially relied on that evidence to justify its decision. From at least April 2023 onwards the OfS viewed the dominant purpose of collecting and assessing evidence in the investigation as defending its position and treated the fact-finding process as adversarial rather than investigative. Further, the OfS unfairly singled out the University for investigation and punishment, without dialogue or discussion, when other universities operating similar or identical policies to the TNBEPS have been offered a process of open dialogue and discussion to remedy the flaws in their policies (see §§181-185 below).[2]

3. The University applies for expedition on the ground of the strong public interest in the prompt resolution of the points in issue and the prejudice the FD is causing to the University for the reasons set out in separate submissions.

4. The structure of this pleading is as follows:

4.1. **Section B:** the University.

4.2. **Section C:** legal framework on the regulation of higher education provider.

4.3. **Section D:** legal framework on freedom of expression.

[1] Dr Stock is understood to have renounced the title 'Professor' and accordingly the University does not refer to her by that title. No disrespect is intended by this.

[2] In breach of its duty of candour, the OfS has failed to give any relevant pre-action disclosure relevant to this ground. The University reserves the right to apply to amend and/or withdraw this ground when the OfS has complied with its duty of candour.

4.4. **Section E:** the OfS' investigation and decisions.

4.5. **Section F:** grounds for judicial review.

4.6. **Section G:** ancillary matters.

4.7. **Section H:** relief.

B. THE UNIVERSITY

5. The University is a leading higher education and research institution located near Brighton and Hove. In the 2021 Research Excellence Framework, 89% of its research was categorised as "world-leading" or "internationally excellent". It has approximately 19,200 students, of which 26% are postgraduates and 30% are international students.

B1. The governing documents of the University

6. The University was established by Royal Charter in 1961 (the **"Charter"**) **[CB/13/224-226]**.

7. Its Charter and Statutes are its governing documents (as to which, see §§121-127 below).

8. The Charter **[CB/13/224-226]** establishes the University, its governance, and sets out its foundational principles. As to which:

8.1. The object of the University is to advance learning and knowledge by teaching and research to the benefit of the wider community (§3).

8.2. The King is established as the Visitor of the University (§4).

8.3. Within the law, the University is granted unlimited powers (i.e. all the powers of a natural person) (§10). These powers include to do all things in order to further the objects of the University.

8.4. The Charter is subject to the interpretive principle set out at §15, namely *"Our Royal Will and Pleasure is that this Charter shall ever be construed benevolently, and in every case most favourably to the University and the promotion of the objects and principles of this Our Charter."*

8.5. The foundational principles of the University are set out in the Charter (§14), including the principle of non-discrimination.

8.6. The Charter establishes the Council as the governing body of the University (§7). The Council is empowered to make (i) Statutes, subject to the approval of the Privy Council (§12); and (ii) Regulations (§13).

8.7. No changes may be made to the Charter or Statutes without the approval of the Privy Council.

9. The University's Statutes are at **[CB/14/227-232]**. Statute VII applies to all staff employed by the University. Relevantly:

9.1. Council is obliged under Statute VII.3 to ensure that in respect of staff there are certain procedures set out in Regulations, which include Grievance and Disciplinary procedures.

9.2. In determining such procedures to be adopted, the Council is obliged to apply the guiding principles set out in Statute VII.6. These include the principles of freedom of speech and academic freedom:

9.2.1. The first principle, namely "*uphold the right of any member of staff to express political, religious, social and professional views, both privately and in public, provided that this is within the law and is done explicitly in his or her own name and not in that of the University*"; and

9.2.2. The second principle, namely *"to ensure that academic staff have freedom, within the law, to carry out teaching and research, including the publication of the outcomes of research, in a way which questions and tests established ideas and received wisdom, and presents controversial or unpopular points of view, without placing themselves in jeopardy of losing their jobs or privileges"*.

9.3. Paragraph 7 of Statute VII provides *"Any Regulation made under this Statute VII shall be construed in every case to give effect to the guiding principles in Statute VII.6"*.

B2. Regulations of the University

B2.1. Regulations relating to staff

10. As required by the Statutes, the Council made Regulations providing for (inter alia) staff Grievances (Regulation 30) and Discipline (Regulation 31).

11. Regulation 31 **[CB/15/233-253]** provides, so far as is relevant:

11.1. That misconduct which *may* lead to disciplinary action includes "*failure to comply with University policies, procedures, rules and regulations, for example the Equality and Diversity policy*". (Appendix 3, §4.6) **[CB/15/233-253]**.

11.2. Managers have discretion to resolve potential problems through informal discussion. The regulation recognises that constructive guidance can often resolve difficulties and obviate the need for formal disciplinary action (§3.2(viii)). In those circumstances, no formal investigation will take place. **[CB/15/234]**.

11.3. That before any disciplinary proceedings are brought, there will be an investigation into the potential disciplinary matter to establish the facts of the case (§17.1). **[CB/15/239]**. The person complained about will usually be required to attend an

investigatory interview, which is not a disciplinary hearing. In cases where the facts are clear and not in dispute, the investigation will be very short and will not necessarily involve such an interview (§§17.3, 17.6). **[CB/15/240]**

11.4. Following the investigation, the hearing manager will assess the case and decide on next steps. There will only be a disciplinary hearing or disciplinary panel convened if there is a case to answer. If there is no case to answer, a letter confirming that there is no case to answer, and that all reference to the investigation will be removed from the record will be sent to the individual who has been the subject of the investigation (§17.9).**[CB/15/240-241]**

12. No disciplinary procedure has ever been commenced against any member of staff at the University following a complaint relating to lawful expression of protected beliefs, including gender critical beliefs. **[SB/25/464/§34]**

13. The University has standard Conditions of Service of Faculty Members. These terms and conditions include:

13.1. At §1, that *"The terms of appointment of a member are subject to the provisions of the Charter and Statutes of the University. They are also subject to such Regulations as may from time to time be made by the Senate and/or the Council, provided that any such matters as may for the time being fall within the scope of the Procedure Agreement shall have been negotiated according to the full processes of that Agreement."* **[SB/39.5/1081]**

13.2. Obligations relating to the professional conduct of those in various faculties of the University. For example, §15 of the Terms and Conditions say *"It is the responsibility of members of the teaching faculty to advance and diffuse knowledge through teaching, advanced study and original research or other professional activities and to undertake such academic and administrative tasks as relate to those purposes."***[SB/39.5/1083]**.

<u>B2.2. Regulations relating to students</u>

14. Regulation 2 relates to student discipline **[SB/39.4/1065-1079]**. It relevantly provides that an investigation will be undertaken and a decision made on the balance of probabilities. Following the investigation, during which the student has a right to make representations and provide evidence, the potential outcomes are (i) no further action, (ii) insufficient evidence to prove the case on the balance of probabilities, (iii) impose a penalty, if a Level 1 or Level 2 case, or (iv) proceed to a student disciplinary panel hearing, if a Level 3 case (pg. 12). Breaches of University policies do not fall within Level 3. Any sanctions will be proportionate, reasonable, fair and based on the evidence available (§3.1).

15. Regulation 2, §1.4, provides *"the contract between all students and the University includes a commitment from the University to make available the University Charter, Statutes, Regulations, policies and support information. Students in turn need to be familiar with the above and abide by them."* **[SB/39.4/1064]**.

B3. Other relevant policy context

16. The University also relies on the following facts and matters as relevant to the construction of the TNBEPS.

16.1. First, the University has at all material times operated the Freedom of Speech Code of Practice (**"the FOSCOP"**) **[CB/16-18/254-262]**. This provides, for example, *"The University recognises that, on occasion, the views of some who exercise the right to freedom of expression may cause offence, shock or disturb others who do not hold those views. This, in itself, is not a matter for constraint and is not breaking the law. Allowing opposing views to be heard will continue to be encouraged by the university …"* and *"Every member of the University is expected to uphold the right to freedom of speech and the right to academic freedom and nothing in this Code of Practice should be taken to limit the right to academic freedom or justify a disproportionate interference with the right to freedom of speech"*. The FOSCOP is incorporated into student and academic contracts.[3]

16.2. Second, the University expects those holding Academic Titles (which includes the vast majority of its teaching staff) to be aware of the contents of the Code of Practice on Academic Titles **[SB/39.8/1135-1139]**. The Code of Practice applies to *"lecturers, senior lecturers, as well as titles that are bestowed on academics by the relevant Committee, such as 'Reader' or 'Professor'"*. The Code of Practice provides at §§15 and 16 that *"This Code of Practice recognises that academics have freedom to (a) carry out teaching and research; and (b) publish the outcomes of research, in ways that question and test established ideas and may present unpopular points of view, without placing themselves in jeopardy of losing their jobs and privileges. Nothing in this Code is intended to undermine that academic freedom."* The University specifically draws the Code of Practice on Academic Titles to the attention of Lecturers, Senior and Professorial Appointments, and Research Fellows in their letters of appointment. §13 of the Code of Practice provides that *"Academic title holders must not bring the University into disrepute."*

16.3. Third, since 2022 students have been given inductions on the University's equality and free speech obligations, which specifically includes reference to s.43 of the Education (No 2) Act 1986 (the **"1986 Act"**), academic freedom as defined in s.202 of the Education Reform Act 1988 (the **"1988 Act"**) and the University Statutes. It concludes that *"the university must proactively advance EDI and prevent bullying and harassment, in a range of ways, whilst simultaneously upholding lawful freedom of speech and academic freedom."* **[SB/67.27/2591-2593]**. Also since 2022, all University committee papers have an integrated cover sheet (which *must* be used) which *requires* the author to assess any potential academic freedom or freedom of speech implications. The author has to answer, for example, *"How will this report support the active promotion of [these] public interest principles?*" **[SB/29/521-522] [SB/38.12/1050-1053]**.

[3] See Regulation 2 §1.4 and paragraph 14-15 above.

16.4. Fourth, the University has – particularly since the events surrounding the protests concerning Dr Stock, media reports of which gave rise to the OfS' investigation – repeatedly defended and emphasised the importance of freedom of speech within the law to its student body and academic staff. As set out to the OfS in June 2023 **[SB/67.27/2581-2583]** and again in the Witness Statement of David Ruebain in response to the Provisional Decision **[SB/30/538-543]**[4] *"the University has undertaken a comprehensive freedom of speech and academic freedom programme to ensure that freedom of speech and academic freedom are understood as a cornerstone of university life."*

17. Freedom of speech is therefore well protected at the University. Evidence of the student experience of freedom of speech is collected by the OfS through the National Student Survey. In 2023, students were asked *"During your studies, how free did you feel to express your ideas, opinions and beliefs?"* in relation to which (i) the average positivity measure across all undergraduates in England was 85.9% and the University's score was 84.7%; (ii) the average positivity measure across all undergraduates in England studying Philosophy was 86.9% and the University's score was 86.2%. Student experience of free speech at the University is accordingly in line with the national average. **[SB/28/494]**[5]

B4. The TNBEPS

18. The TNBEPS is one of many lower-order policy statements at the University.

19. The OfS' findings relate to three versions of the TNBEPS. The relevant passages of the three versions of the TNBEPS are set out below.

B4.1. 2018 version

20. The 2018 version of the TNBEPS **[CB/12/223-223]** was in force during Dr Stock's time at the University. The incumbent Vice-Chancellor was not in post when it was approved. It was modelled on a template provided by Advance HE, which is a charity (led by experts in the field of higher education) whose purpose is to promote higher education for the public benefit **[SB/30/534]**. The University applies the abbreviations used by the OfS in describing parts of the TNBEPS. The 2018 version materially provided:

> *"The curriculum shall not rely on or reinforce stereotypical assumptions about trans people …"* (the **"Stereotyping Statement"**)
>
> *" … and any materials within relevant courses and modules will positively represent trans people and trans lives."* (the **"Positive Representation Statement"**)
>
> *"Transphobic abuse, harassment or bullying (name-calling/derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary*

[4] See further the Witness Statement of Vice-Chancellor Sasha Roseneil in support of the claim for judicial review **[CB/24/380-411**.

[5] The NSS survey (run by the OfS) produced similar data in 2024. The University scored 85.6% against a sector average of 86.5%.

offences for staff and students and will be dealt with under the appropriate University procedures." (the **"Disciplinary Statement"**)

"Transphobic propaganda, in the form of written materials, graffiti, music or speeches, will not be tolerated. We undertake to remove any such propaganda whenever it appears on the premises." (the **"Transphobic Propaganda Statement"**).

B4.2. 2022 version

21. Almost immediately following her appointment, the incumbent Vice-Chancellor amended the TNBEPS as follows **[CB/11/214-221]**:

"The curriculum shall not rely on or seek to reinforce stereotypical assumptions about trans people … (the **"Amended Stereotyping Statement"**).

~~*, and any materials within relevant courses and modules will positively represent trans people and trans lives*~~.

Transphobic abuse, harassment or bullying (name-calling/derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures.

Transphobic propaganda, in the form of written materials, graffiti, music or speeches, will not be tolerated. We undertake to remove any such propaganda whenever it appears on the premises."

B4.3. 2023 version

22. In December 2022, the OfS gave the University some initial indications of its concerns about the contents of the TNBEPS. In response, the University amended the TNBEPS as follows (2022 amendments in green, new 2023 amendments in red, with footnotes in square brackets) **[CB/10/212-213]**:

"The curriculum shall not rely on or seek to reinforce stereotypical assumptions about trans people~~*, and any materials within relevant courses and modules will positively represent trans people and trans lives*~~*.*

Transphobic abuse, harassment or bullying [We use the term 'transphobic abuse, harassment or bullying' to mean unwanted behaviours and communications that could reasonably be expected to cause distress or fear among trans people.] (name-calling/derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures.

~~*Transphobic propaganda, in the form of written materials, graffiti, music or speeches, will not be tolerated. We undertake to remove any such propaganda whenever it appears on the premises*~~

Any abusive, bullying or harassing material (e.g. written materials, graffiti or recordings) will be removed from University premises. …

This Policy Statement is intended to promote the fair and equal treatment of trans people. That is compatible with the University's obligation to ensure, so far as reasonably practicable, that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers (as required by section 43 of the Education (No 2) Act 1986), and the requirement to have regard to the need to ensure that academic staff have freedom within the law to (a) question and test received wisdom and (b) put forward new areas including controversial and unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges at the University (as required by section 202 of the Education Reform Act 1988). For the avoidance of doubt, nothing in this Policy Statement should be taken to justify sanctioning academic staff for questioning or testing received wisdom or putting forward new ideas including controversial or unpopular opinions within the law, nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech. Any person concerned that their rights of academic freedom or freedom of speech have been unjustifiably restricted may lodge a complaint." **("the Safeguarding Statement")**

B4.4. 2024 version

23. In late March 2024, the University received the PD. As soon as practicable, the University's Council made changes to the TNBEPS as follows (2022 and 2023 amendments in green, new 2024 amendments in red, with footnotes in square brackets) **[CB/9/208-211]**:

> *"The curriculum shall not rely on or seek to reinforce stereotypical assumptions about trans people~~, and any materials within relevant courses and modules will positively represent trans people and trans lives~~. unless such reliance or seeking to reinforce is in accordance with paragraph 3 of this policy statement.*
>
> *Transphobic abuse, harassment or bullying [We use the term 'transphobic abuse, harassment or bullying' to mean unwanted behaviours and communications that could reasonably be expected to cause distress or fear among trans people. This definition is objective and replicates the definition in the Protection from Harassment Act 1997, as set out in the Code for Crown Prosecutors.] (name-calling/derogatory jokes, unacceptable or unwanted behaviour, intrusive questions) are serious disciplinary offences for staff and students and will be dealt with under the appropriate University procedures. [Including the University Statutes and Regulations]*
>
> ~~*Transphobic propaganda, in the form of written materials, graffiti, music or speeches, will not be tolerated. We undertake to remove any such propaganda whenever it appears on the premises*~~
>
> *After consideration of its form and contents, material (e.g. ~~Any abusive, bullying or harassing material (e.g.~~ written materials, graffiti or recordings) that is found objectively to be abusive, bullying or harassing will be removed from University premises. ...*
>
> *3. This Policy Statement is intended to promote the fair and equal treatment of trans people. That is compatible with the University's obligation to ensure, so far as reasonably practicable, that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers (as required by section 43 of the Education (No 2) Act 1986), and the requirement to have regard to the need to ensure that academic staff have freedom within the law to*

> *(a) question and test received wisdom and (b) put forward new areas including controversial and unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges at the University (as required by section 202 of the Education Reform Act 1988). For the avoidance of doubt, nothing in this Policy Statement should be taken to justify sanctioning academic staff for questioning or testing received wisdom or putting forward new ideas including controversial or unpopular opinions within the law, nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech. Any person concerned that their rights of academic freedom or freedom of speech have been unjustifiably restricted may lodge a complaint."*

24. The OfS has found that the 2018, 2022 and 2023 versions breached condition E1. It has reserved its position on the 2024 version, to which the University returns below.

B5. The University's Visitor

25. The University is a Charity established by Royal Charter. Royal Charters are issued by the monarch on the advice of the Privy Council and are a form of law, made in the monarch's exercise of the Royal Prerogative.

26. The Charter establishes the King as Visitor of the University (*"We, Our Heirs and Successor, shall be the Visitor of the University through the Lord President of Our Council"*). The King's powers are exercised by the Privy Council, which retains Visitorial jurisdiction over sixteen universities.[6]

27. A modern summary of the Visitorial jurisdiction is provided in *R v Lord President of the Privy Council ex p Page* [1993] AC 682 by Lord Griffiths and Lord Browne-Wilkinson as follows:

> *"the common law has ever since the decision in Philips v Bury (1694) Holt 715 recognised that the visitor acting as a judge has exclusive jurisdiction and that his decision is final in all matters within his jurisdiction... for three centuries the common law courts have recognised the value of the visitor acting as the judge of the internal laws of the foundation and have refused to trespass upon his territory*
>
> *... that for over 300 years the law has been clearly established that the visitor of an eleemosynary charity has an exclusive jurisdiction to determine what are the internal laws of the charity and the proper application of those laws to those within his jurisdiction ...*
>
> *... the inability of the court to intervene is founded on the fact that the applicable law is not the common law of England but a peculiar or domestic law of which the visitor is the sole judge. This special status of a visitor springs from the common law recognising the right of a founder to lay down such a special law subject to adjudication only by a special judge, the visitor."*

28. The Visitor's jurisdiction:

[6] See *"Privy Council Office, Guidance on Petitioning the Visitor"* updated 7 February 2025.

28.1. Is exclusive: *Philips v Bury* (1694) Holt 715 pp. 723-726, *Thomas v University of Bradford* [1987] AC 795, *R v Lord President of the Privy Council ex p Page* [1993] AC 682 at 700.

28.2. Includes, inter alia: (i) the interpretation and enforcement of the internal laws of the University, (ii) the interpretation and enforcement of internal powers and discretions that derive from internal laws, and (iii) alleged abuses concerning the internal regulation of the University: *Ex p Kirkby Ravensworth Hospital* (1808) 15 Ves 305 at 311, *per* Sir Samuel Romilly,[7] *A-G Stephens* (1737) 1 Atk 358 at 360, *per* Lord Hardwicke LC, *A-G v Dulwich College* (1841) 4 Beav 255.

28.3. Recognises that the internal laws of the University are not statutes or contracts. They are unfamiliar creatures for interpretation by the Courts. For example, the Charter contains a presumption that it be construed benevolently in every case most favourably to the University.

28.4. Is established over the University through the exercise of the Royal Prerogative (the Charter is an Order in Council) and may only be modified by statute, either expressly or by necessary implication: *Thomas v University of Bradford* [1987] AC 795 at 824[8] and see further *Bennion on Statutory Interpretation* s.25.12. The University returns to this below.

29. Parliament has chosen to abrogate the jurisdiction of the Visitor in certain contexts. For example, through the Higher Education Act 2004, Parliament abrogated the Visitor's jurisdiction insofar as it related to (i) student complaints (ss.20(1)-(3)) and (ii) staff complaints relating to employment matters or any other matter that could be brought in a court or tribunal (for example, a contract claim) (ss.46(1)).[9] **[SB/8/29]**.

30. The OfS has taken two inconsistent positions on the Visitor's jurisdiction:

30.1. In the FD, the OfS takes the position that (i) Parliament may abrogate the Visitor's jurisdiction expressly or by necessary implication; (ii) the OfS is empowered by Parliament (through s.5 HERA 2017) to devise and enforce condition E2(i); and (iii) by dint of the alleged implied abrogation in s.5 HERA 2017, the OfS has <u>concurrent</u> jurisdiction with the King to decide on the interpretation of the laws of the University

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[7] *"A visitor … is a Judge, not for the single purpose of interpreting laws, but also for the application of laws, that are perfectly clear: requiring no interpretation; and, father, for the interpretations of questions os fact, involving no interpretation of laws",* approved by Lord Griffiths in *Thomas v University of Bradford* [1987] AC 795 at 815.

[8] *"Parliament can of course invade the jurisdiction of the visitor if is chooses to do so. If in the course of such proceedings [proceedings under the Employment Protection (Consolidation) Act 1978] any question arises concerning the interpretation or application of the internal laws of the university, it will have to be resolved for the purpose of the case by the tribunal hearing the application. <u>Such power must be implicit in the remedies provided by the Act, and to this extent, Parliament has given rights that enter and supersede the jurisdiction of the visitor.</u>"*

[9] Section 20(1) of the Higher Education Act 2004 provides: *"The Visitor of a qualifying institution has no jurisdiction in respect of any complaint which falls within subsection (2) or (3)."* In other contexts, the abrogation of the Visitor's jurisdiction has also been express, see for example, s.24(1) of the Crime and Courts Act 2013 *"Section 44 of the Senior Courts Act 1981 (extraordinary functions of High Court judges) ceases to have the effect of conferring jurisdiction of the High Court sitting as Visitors to the Inns of Court"*, and in Northern Ireland, see the Public Services Ombudsman Act (Northern Ireland) 2016 s.18(2)-(5).

[CB/6/187/4]. In the FD, the OfS accordingly does not consider that s.5 of HERA 2017 ousts the King's jurisdiction, rather than it creates a jurisdiction for the OfS alongside the King's jurisdiction. The basis for this is unexplained and the OfS does not state which of these concurrent jurisdictions is said to be superior.

30.2. In its pre-action response, the OfS takes a different position. It now contends that s.5(1) of HERA 2017 (which provides that *"the OfS must devise and publish the initial registration conditions and the general ongoing registration conditions"*) expressly ousts the jurisdiction of the Visitor (see **[CB/23/307-308/80-87]**). How this argument is maintained in the absence of any express reference to the Visitor in that provision is unexplained.

C. THE REGULATION OF HIGHER EDUCATION PROVIDERS: THE LEGAL FRAMEWORK

C1. The historical position

31. Prior to the creation of the OfS, higher education institutions (**"HEIs"**) had to be designated as eligible in order to receive funding from the Higher Education Funding Council for England (the **"HEFCE"**). As summarised by the First tier Tribunal (the **"FtT"**) in *St Patrick's International College v HMRC* [2023] UKFTT 00408 (TC), *"In order to receive HEFCE funding … HEIs had to submit to the Privy Council oversight of their governing documents to protect the public interest in various matters. Those matters included the composition of governing bodies and academic freedom provisions. Any changes to the governing documents required Privy Council approval …"*.

32. Section 129 of the Education Reform Act 1988 (the **"1988 Act"**) relevantly provided that

> *"(1) The Secretary of State may by order designate as an institution eligible to receive support from funds administered by a higher education funding council – … (a) any institution which appears to him to fall within subsection (2) below.*
>
> *…*
>
> *(2) An institution falls within this subsection if its full-time equivalent enrolment number for courses of higher education exceeds 55 per cent of its total full-time equivalent enrolment number."* **[SB/4/18-23]**

33. The 1988 Act placed various governance obligations on designated HEIs (s.129B for those conducted by companies, and s.129A for those not conducted by companies). Section 129A provides:

> *"(1) This section has effect in relation to any designated institution other than an institution conducted by a company.*
>
> *(2) For each institution there shall be –*
>
> > *(a) an instrument providing for the constitution of a governing body of the institution (to be known as the instrument of government); and*

(b) an instrument in accordance with which the institution is to be conducted (to be known as the articles of government)

each of which meets the requirements of subsection (3) below.

(3) Those requirements are that the instrument –

(a) was in force when the designation took effect; or

(b) is made in pursuance of a power under a regulatory instrument, or is made under subsection (5) below,

and is approved for the purposes of this section by the Privy Council.

…

(7) Either of the instruments referred to in subsection (2) above may be modified by order of the Privy Council and no instrument approved by the Privy Council for the purposes of this section may be modified by any person without the Privy Council's consent.

…

(10) In this section and section 129B 'designated institution' means an institution in relation to which a designation made, or having effect as if made, under section 129 of this Act has effect but does not include any institution established by Royal Charter." **[SB/4/18-23]**

34. For universities established by Royal Charter, it was the Charter itself (made by an Order of the Privy Council) which established the requirement that changes to the Charter and Statutes may only be made with approval of the Privy Council. These were well understood to amount to the provider's "governing documents". The "governing documents" of exempt charities established by Royal Charter, such as the University, are its Charter and Statutes. Indeed, in relation to charity law, this is accepted by the OfS. The OfS considers that the *"governing documents"* of an exempt Charity such as the University as those set out in ss.197-198 of the Charities Act 2011, i.e. its instrument and articles of association (see Regulatory Advice 5, pg. 12). **[SB/19/157]**. The OfS therefore accepts that the ordinary and natural meaning of *"governing documents"* is as the University contends (see §§121-127 below).

35. Guidance issued by the then Secretary of State for Business and Innovation (*"Guidance for Higher Education Providers: Designation as an institution eligible to receive HEFCE funding"*, September 2015) **[SB/13/38-59]** provided, in respect of all HEIs (not merely Chartered HEIs), states that:

*"**Privy Council approval of Governing Documents***

All amendments, however minor, to the governing documents of an HE provider that has been designated for HEFCE funding must be submitted to the Privy Council for approval and must be approved by the Council before they can take effect." **[SB/13/52]** (see further **[SB/13/51]**).

36. In November 2015, the then government published a Green Paper on the regulatory architecture of Higher Education (*"Fulfilling our Potential: Teaching Excellence, Social Mobility, and Student Choice"*) **[SB/14/60-73]** (the **"2015 Paper"**). Part C of the proposals concerned "*Simplifying the higher education architecture*" (pgs. 57-68) **[SB/14/60-73]**. It relevantly provided that:

36.1. The government's intention, in creating the OfS, was to streamline into one body the disparate functions that were being performed by nine government and sector owned bodies (pg. 58). The intention was that the OfS would be a single, transparent, and light-touch regulator (pg. 60). **[SB/14/65]**

36.2. The Government intended to simplify the system for approval to the reform of constitutional arrangements for HEIs (pg. 66). The role of the Privy Council was addressed at pg. 67 as follows:

> *"At present, all HEFCE funded providers must seek Privy Council approval to all changes to their governing documents no matter how minor. Requiring Privy Council approval is recognition that there is some public interest in the governing documents of institutions.*
>
> *This can, however, be burdensome and time-consuming to institutions …*
>
> *… The Government therefore wants to simplify and speed up the process for amending the governing documents of HEFCE-funded providers so that they can more quickly reflect the needs of the organisation and the environment within which they are operating and competing …*
>
> *Providers can, where they wish to do so, already reduce the burden by bringing forward proposals to the Privy Council in the shape of suitable amendments to their governing documents, removing those provisions where there is no significant public interest. The documents would retain those provisions where there is public interest and changes to these would need to be approved by the Privy Council."* **[SB/14/72-73]**

36.3. The paper noted that the current principles of public interest were set out in a letter and Annex from the Minister of State for Higher Education to all Vice-Chancellors, dated 6 February 2006 **[SB/14/72]**. The letter provides at paragraph 4 that *"Higher education institutions do, of course, own their own governance arrangements. They therefore are responsible for the content of their Charter and Statutes, or Instrument and Articles of Government, and for proposing changes to them. However, the current legal position is that all changes to these documents have to be agreed by the Privy Council."* The public interest principles applicable at the time were annexed to the letter.[10] **[SB/75/2951-2953]**

36.4. The 2015 paper went on to note that *"In the longer term, the Government is seeking views on removing the requirement for changes to the governing documents of HEFCE funded providers to be approved by the Privy Council. Responsibility for*

[10] The Claimants have been unable to locate the Annex to this letter in time to issue the Claim. If the Claimants manage to locate it, they will disclose it if is relevant.

protecting the public interest in their governing documents would transfer to the OfS, with the principles of public interest incorporated into the terms and conditions of grant funding. Providers would not be required to seek approval to individual changes to their governing documents and would be free to make changes as and when best suited them to meet their business needs. The governing documents would, however, be periodically reviewed for compliance with the public interest principles, as part of ongoing monitoring to determine whether the conditions for continuing grant funding were being met." (pg. 68). **[SB/14/73]**.

37. In June 2016, the Secretary of State published *"A case for the Creation of the Office for Students"* (the **"2016 Paper"**) **[SB/15/74-99]**.

38. The Higher Education and Research Bill (the **"Bill"**) was introduced to Parliament in May 2016. In June 2016, the Department for Business, Innovation and Skills published a Detailed Impact Assessment **[SB/16/100-123]** concerning the Bill. One section concerned simplifying the Privy Council approval process (pg. 17-190). It relevantly provided that *"all publicly funded HEPs are currently subject to a lengthy process of Privy Council approval when seeking to amend their governing documents, which is unnecessarily burdensome and restrictive"* (§19) **[SB/16/108]**. At §27, it was explained that "*responsibility for the public interest in the governing documents of publicly funded HEPs will transfer from the Privy Council to the OfS. The OfS will consult on, publish and maintain a list of 'public interest principles' against which it will in future monitor the governing documents of publicly funded HEPs."* **[SB/16/109-110]**.

39. The intention to transfer these functions to the OfS and the scope of the proposed condition was also raised in Parliament. As explained by the Minister for Universities, Science, Research and Innovation at Committee stage (in speaking to an amendment which sought to give the OfS remit to assess a university's *"practices"* against the PIGPs):

> *"Let me first explain how we envisage the public interest governance condition working. Clause 14 explains what the condition allowed for by clause 13 is. It will be a condition requiring certain providers' governing documents to be consistent with a set of principles relating to governance. The principles will be those that the OFS thinks will help ensure that the relevant higher education provider has suitable governance arrangements in place. That is not new. Legislation currently requires the governing documents of certain providers – broadly, those that have been in receipt of HEFCE funding – to be subject to Privy Council oversight. That is the backdrop ...*
>
> *… The introduction of the word 'practices' through the amendment would risk changing the scope of the public interest governance condition to give it a much wider and more subjective application and imposing significant and ambiguous regulatory burden on the OFS. That would stray outside our stated policy objective and beyond the OFS' regulatory remit."* **[SB/18/142]**.

40. The Bill received Royal Assent in April 2017 and the OfS was created (on which, see below). The OfS only has oversight of English higher education providers. In England, Parliament has

not specifically defined *"governing documents"* in HERA 2017.[11] Its meaning is therefore for the Court, in accordance with the ordinary principles of statutory interpretation.

C2. The OfS

C2.1. The system of registration

41. The OfS is a body corporate established under Part 1 of HERA 2017 **[CB/29/384-446]**. The OfS' principal function is to establish and maintain a register of English higher education providers (**"the register"**) (s.3(1) HERA 2017).

42. Under s.5, the OfS is required to determine and publish *"initial registration conditions"* (s.5(1)(a) HERA 2017) and *"general ongoing registration conditions"* (s.5(1)(b) HERA 2017).

43. The OfS must register a particular institution if the provider meets the initial conditions of registration (s.3(3) HERA 2017) and must not register a provider if it does not meet those conditions (s.3(4)).

44. Following registration, s.3(7) provides that *"an institution's ongoing registration is subject to satisfying (a) the general ongoing registration conditions applicable to it at the time of its registration and as they may be later revised (see section 5), and (b) the specific ongoing registration conditions (if any) imposed on it at the time of its registration and as they may be later varied (see section 6)."*

C2.2. The Regulatory Framework

45. Under s.75 of HERA 2017, the OfS must prepare and publish a regulatory framework to which it must have regard when exercising its functions (s.75(2)) **[CB/29/439]**. The regulatory framework was last revised on 24 November 2022. The RF is supplemented by Regulatory Advices (**"RAs"**) published by the OfS. The RF is required to satisfy certain requirements and serve certain purposes.

46. First, it must contain a *"statement of how [the OfS] intends to perform its functions"* (s.75(3)(a)). That statement must *"set out how the OfS intends to perform its functions in relation to a registered higher education provider in proportion to the OfS assessment of the regulatory risk posed by the provider"* (s.75(4)). Regulatory risk is defined as *"the risk of a breach of the provider's ongoing registration conditions"* (s.75(5)). The RF makes clear that

[11] The Welsh and Scottish Parliaments have articulated the well-known ordinary meaning of *"governing documents"* in devolved legislation. In Wales a *"governing document"* means *"in the case of an institution established by Royal Charter – (i) the institution's charter, and (ii) any instrument relating to the conduct of the institution the making or amendment or which requires the approval of the Privy Council"* (see s.47 of the Higher Education (Wales) Act 2015). In its pre-action response, the OfS erroneously asserts that (ii) does not mean the University's statutes. That is wrong for the reasons set out at §§39-40 above: statutes had to be approved by the Privy Council. In Scotland, a *"governing document"* means *"in the case of an institution established by royal charter, means its charters together with the statutes (if any) made under them"* (s.19 Higher Education Governance (Scotland) Act 2016).

the OfS' enforcement jurisdiction is limited to addressing the risk of breach of ongoing registration conditions.

47. Second, it must contain *"guidance for registered higher education providers on the general ongoing registration conditions"* (s.75(3)(b)) including *"guidance for the purposes of helping determine whether or not behaviour complies with the general ongoing registration conditions"* (s.75(6)). Such guidance may specify *"(a) descriptions of behaviour which the OfS considers compliant with, or not compliant with, a general ongoing registration condition"* and *"(b) factors which the OfS will take into account in determining whether or not behaviour is compliant with general ongoing registration conditions"* (s.75(7)). Parliament therefore requires that any guidance should give providers a reasonable degree of foreseeability as to how the OfS interprets the conditions and whether their actions will or will not comply with those conditions.

C2.3. The ongoing conditions of registration

48. Section 5 of HERA 2017 **[CB/29/390]** provides:

> *"(1) The OfS must determine and publish –*
>
> *(a) the initial registration conditions, and*
>
> *(b) the general ongoing registration conditions.*
>
> *(2) Different conditions may be determined –*
>
> *(a) for different descriptions of provider;*
>
> *(b) for registration in different parts of the register.*
>
> *(3) The OfS may revise the conditions.*
>
> *(4) If the OfS revises the conditions, it must publish them as revised.*
>
> *(5) Before determining or revising the conditions, the OfS must, if it appears to it appropriate to do so, consult bodies representing the interests of higher education providers which appear to the OfS to be concerned.*
>
> *(6) The OfS may, at the time of an institution's registration or later, decide that a particular general ongoing registration condition is not applicable to it.*
>
> *(7) When the decision is made after the institution's registration, the OfS must notify the governing body of the institution of its decision."*

49. The OfS must include certain mandatory provisions within the ongoing registration conditions (s.8(1)). The OfS may, in particular, include certain other kinds of general ongoing registration conditions (s.13). **[CB/29/401]**

C2.3.1 The public interest governance condition (condition E1)

50. One of the conditions provided for by s.13 is a "*public interest governance condition*" (s.13(1)(b)). Section 14(1) provides that "*for the purposes of section 13(1)(b) 'a public interest governance condition' in relation to a provider means a condition requiring the provider's governing documents to be consistent with the principles in the list published under this section, so far as applicable to the provider."* **[CB/29/401-403]**

51. Section 14(2) requires the OfS to determine and publish a list of the PIGPs with which providers' governing documents must be consistent.

52. Section 14 also relevantly provides that:

    52.1. The PIGPs must be those that the OfS considers will help to ensure that English higher education providers perform their functions in the public interest (s.14(3)).

    52.2. The list must include the academic freedom PIGP (s.14(7)).

    52.3. The list may include different principles for different descriptions of English higher education providers (s.14(4)).

53. Parliament has thereby imposed three limits on the public interest governance condition:

    53.1. First, the condition may only apply to documents of the provider which are *"governing documents"*.

    53.2. Second, the nature of the obligation is that the governing documents must be *"consistent"* with the principles.

    53.3. Third, the OfS must specify the PIGPs in accordance with s.14 HERA 2017, including the Academic Freedom PIGP.

54. In the RF, the public interest governance condition is condition E1. As to this:

    54.1. The RF interprets "*governing document*" in an expansive way that, in the University's submission, goes well beyond the concept of "*governing document*" in the enabling statute. At §§424-425 of the RF **[CB/30/512]**

> *"Governing documents means the documents adopted, or that should have been adopted by the provider, that describe any of the provider's objectives or values, its powers, who has a role in decision making within the provider, how the provider takes decisions about how to exercise its functions, or how it monitors their exercise. This test will be broadly rather than narrowly applied. Where a document in part deals with any such matters, and in part with other matters, the whole of the document is a 'governing document'.*
>
> *Depending on the legal form of the provider its 'governing documents' may include a Royal Charter, Statutes and Ordinances, articles of association, or Instruments of Government and/or a trust deed or deeds. They are also likely to include documents such as schemes of delegation, terms of reference of committees to which significant functions have been delegated, the provider's policies on matters such as management of conflicts of interest, support for*

freedom of speech or academic freedom, and/or member/shareholder agreements where these may influence the operation of the provider."

54.2. As to the nature of the obligation, the RF provides *"Uphold the public interest governance principles means as a minimum to reflect them, and where a public interest governance principle requires an active step to be taken, to provide a suitable framework to ensure that that step is identified, defined, taken, and can be shown to be taken"* (§426) **[CB/30/512]**. The guidance given to providers on behaviours that may indicate non-compliance with this condition are *"the provider makes changes to its governing documents that affect the public interest governance principles without submitting an updated version to the OfS as soon as reasonably practicable following the change."* **[CB/30/513]**

54.3. The PIGPs are set out in Annex B to the RF **[CB/31/533]**. Two are relevant to these proceedings, as follows.

55. The first relevant principle is the Academic Freedom PIGP **[CB/31/533]**. The Academic Freedom PIGP (required by Parliament under s.14(7)) has the specific meaning given to it by Parliament under s.85(6)-(7), namely:

> *"(6) In this Part, 'academic freedom' in relation to academic staff at an institution, means their freedom within the law –*
>
> *(a) to question and test received wisdom, and*
>
> *(b) to put forward new ideas and controversial or unpopular opinions,*
>
> *without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).*
>
> *(7) Those ways are –*
>
> *(a) loss of their jobs or privileges at the institution;*
>
> *(b) the likelihood of their securing promotion or different jobs at the institution being reduced."*

56. Thus, Parliament has specified how the OfS must define academic freedom. The only relevant adverse effects on academics are set out in s.85(6)-(7) **[CB/29/446]**.

57. The second relevant principle in the RF is that *"the governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider"* (the **"Freedom of Speech PIGP"**) **[CB/31/533]**. Read in the context of ss.13 and 14 HERA 2017, the nature of the obligation under condition E1 is that the provider's governing documents, as a whole, must provide a suitable framework to ensure that *"reasonably practicable"* steps are taken to secure *"freedom of speech within the law"*.

58. The Freedom of Speech PIGP resembles the wording of s.43(1) of the 1986 Act, which provides, inter alia (see §78 below), that *"Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are*

reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers." **[SB/2/13]**

59. In its pre-action response, the OfS stated that the meaning of the words *"freedom of speech within the law"* in condition E1 is intended to replicate s.43(1), and that the interpretation of the latter should inform the former. The University agrees, while noting that condition E1 can only relate to the consistency of governing documents with the *"freedom of speech within the law"* principle.

60. The proper interpretation of the RF is a matter for the Court, construing the RF objectively, in context. There is a material dispute between the parties as to each of the component parts of condition E1: *"governing documents" "consistent with" "reasonably practicable"* and *"freedom of speech within the law"*. As to the meaning of *"freedom of speech within the law"*:

    60.1. The University submits that "*freedom of speech within the law"* has an equivalent meaning to Article 10, i.e. all speech which may not be lawfully limited. This means that the University may limit speech in accordance with law, where the limitation pursues a legitimate aim and is proportionate.

    60.2. The OfS contends that condition E1 goes much further than Article 10, and that Universities are prohibited from limiting any speech which does not amount to a criminal offence or civil wrong, unless it is not "*reasonably practicable*" to allow that speech (see pre-action response at **[CB/23/302-303]**). For example, on this approach, the University would be in breach of condition E1 by banning most types of plagiarism, or by banning academics from using foul language in lectures, unless it was not *"reasonably practicable"* not to ban it. This goes much further than Article 10 because it will always be *"reasonably practicable"* to not do something: *"Many of the provisions are negative, and generally speaking they must be practicable, because it is always possible to do nothing" per* Day J, *Wales v Thomas* (1885) 16 QBD 340.

61. Section 85 of HERA 2017 has, since 11 May 2023, provided that *'references to 'freedom of speech' have the same meaning as in Part A1 (see section A1(13)'*. Section A1(13) provides:

> *"In this Part – references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form);*
>
> *'the Convention' has the meaning given by section 21(1) of the Human Rights Act 1998"* **[SB/70/2836]**

62. Parliament has thereby expressly linked the concept of "*freedom of speech within the law*" to Article 10, and expressly to how Article 10(1) *"has effect for the purposes of the Human Rights Act 1998"* i.e. subject to Article 10(2). The University returns to this below.

C2.3.2 The effective management and governance arrangements condition (condition E2)

63. The second relevant ongoing condition of registration is condition E2. The legal basis for this condition set out in the RF is s.5 of HERA 2017. It is accordingly not a condition required or specified by Parliament.

64. The RF provides that condition E2 applies to all registered providers irrespective of their legal form. Condition E2 provides that *"the provider must have in place adequate and effective management and governance arrangements to: (i) operate in accordance with its governing documents; (ii) deliver, in practice, the public interest governance principles that are applicable to it; (iii) provide and fully deliver the higher education courses advertised; (iv) continue to comply with all conditions of its registration."* **[CB/30/514]**

65. In this case, the OfS decided that the University was in breach of condition E2(i). Guidance as to the meaning of condition E2(i) is provided at §§435-451 of the RF **[CB/30/514]**.

C1.4. Enforcement powers of the OfS

66. The OfS has powers to investigate potential breaches of ongoing conditions of registration and to take enforcement action. When exercising enforcement powers, finding breaches, and imposing sanctions, Parliament (through HERA 2017) and the OfS (through its own published policy) have created a set of mandatory relevant considerations for the OfS.

67. As to the decision to find breaches, the RF provides that the OfS will consider a range of factors before deciding whether to intervene and, if so, which form that intervention should take (RF, §167) **[CB/30/494-495]**. This obligation applies not only to the decision to impose specific forms of sanction, but the decision to find a breach at all (see FD, Annex E *"The OfS has considered the factors set out at paragraph 167 of the OfS' regulatory framework when reaching its final decisions to find breaches of ongoing conditions of registration E1 and E2(i) and to impose monetary penalties."***[CB/6/138]**). For present purposes the three key mandatory relevant considerations are:

    67.1. First, whether the enforcement action is necessary to ensure that the provider complies with its conditions of registration. Securing compliance is described by the OfS as the *"primary purpose"* of its enforcement powers. See, for example:

        67.1.1. *"The OfS will consider … the nature of the increased risk or breach and whether a particular intervention would be effective in mitigating the risk or remedying the breach"* (RF, §167) **[CB/30/494-495(d)]**.

        67.1.2. *"The primary purpose of using our enforcement powers is to ensure that a provider takes necessary actions to comply with its conditions of registration … where a breach is not remedied in a reasonable timescale, the OfS would expect to escalate its interventions in a way that is proportionate to the provider's circumstances and the risks to students...in practice this would mean that a provider that breaches one or more conditions would be likely to be provided with an opportunity to improve its performance"* (Regulatory Advice 15 §§73-75) **[SB/20/180-181]**.

67.1.3. *"We will also follow best regulatory practice by ensuring that our actions are prioritised, proportionate, targeted and transparent. This approach to intervention means that there may be circumstances in which we identify a breach of a condition and decide not to take action, for example, because it has a limited impact on students or because the provider has already taken action to rectify the problem."* (Regulatory Advice 15 §53 **[SB/20/176]**).

67.2. Second, the need to protect the institutional autonomy of English higher education providers (s.2(1)(a) HERA 2017) which means *"(a) the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way"* and *"(b) the freedom of English higher education providers – (i) to determine the content of particular courses and the manner in which they are taught, supervised and assessed, (ii) to determine the criteria for the selection, appointment and dismissal of academic staff and apply those criteria in particular cases, and (iii) determine the criteria for the admission of students and apply those criteria in particular cases"* and *"(c) the freedom within the law of academic staff at English higher education providers (i) to question and test received wisdom, and (ii) to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at the provider."* (s.2 (8) HERA 2017) **[CB/29/386]**.

67.3. Third, the need to *"encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers"* (s.2(1)(c)) of HERA 2017. **[CB/29/385]**.

68. The RF and RA15 also sets out important context in which the reasonableness of the findings of breach must be judged. They recognise and accept that a regulatory system based on principles, rather than rules, requires the OfS to act proportionately and communicate well with the providers it regulates (*"principles are flexible and adaptable and can apply across a diverse range of contexts. However, this means that they are harder than detailed and prescriptive rules to set out in a definitive way. Those being regulated may be unsure about how to comply with the principles and may seek guidance from the regulator. In turn, the regulator may respond with too much guidance which then risks creating uncertainty … the OfS's principles-based approach means that how we engage with registered providers if of particular importance."* RA15 §§12-13) **[SB/20/168]**.

69. As well as making findings of breach, the OfS has specific punitive intervention powers ranging from imposing specific conditions of registration, monetary penalties, suspension, revocation of the degree awarding power and deregistration. Under s.15(1) HERA 2017, *"the OfS may impose a monetary penalty on a registered provider if it appears to the OfS that there is or has been a breach of one of its ongoing registration conditions"*. There are further matters that the OfS must consider in the Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019/1026. Further details will be set out in the University's appeal against the monetary penalty.

D. FREEDOM OF SPEECH AND ACADEMIC FREEDOM

70. The right to freedom of speech has two sources in domestic law:

    70.1. Article 10, as incorporated into domestic law through the HRA 1998.

    70.2. The common law, which in this context is no different in content to Article 10.[12]

71. The right extends to all forms of expression save those falling under Article 17 of the Convention.[13] It is applicable *"not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."* (*Handyside v United Kingdom* (1979-80) 1 EHRR 737 at §49).

72. Article 10 is a qualified right and may be interfered with (interference will generally be through a *"formality, condition, restriction or penalty"*, i.e. more than a *potential* chilling effect (as found by the OfS), *per Wille v Leichtenstein* (app no. 28396/95) 28 October 1999 at §43).

73. To comply with Article 10, any interference must satisfy the following conditions:

    73.1. The interference must be prescribed by law ('law' having an autonomous meaning – the relevant norm must be sufficiently foreseeable and accessible[14]).

    73.2. The interference must be in pursuit of a legitimate aim (*"in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"*).

    73.3. The interference must be proportionate. The proportionality of restrictions on speech to protect the rights of others will often require a balance to be struck between Article 8 rights and Article 10 rights. This is an inherently fact-specific exercise.[15]

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[12] See, for example, *R (Butt) v Secretary of State for the Home Department* at [2019] 1 WLR 3873 §179, *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 at 131-132 *per* Lord Hoffmann.

[13] The protection provided by freedom of speech is therefore wider than (and different to) that provided by discrimination law. Freedom of speech protects speech which doesn't fall within 'protected beliefs' and also protects the manner, timing, and form of expression. Article 17 of the Convention relates to the most serious forms of hate speech falling outside the protection of Article 10. Speech which *"explicitly calls for violence or other criminal acts … attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population"* fall within Article 10's protection, but can nonetheless be proportionately restricted: *Lilliendahl v Iceland* [2020] ECHR 931.

[14] Any interferences with freedom of speech by the University are *"prescribed by law"* by dint of the University's power to do anything a natural person may do (see Charter, §10), and the foreseeable and accessible provisions of contracts and policies the University operates.

[15] See *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at §17, *per* Lord Steyn, *"neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."*

74. Freedom of speech is defined in s.85 of HERA 2017 as having the same meaning as under HRA 1998, i.e. Article 10.

75. The OfS maintains that *"freedom of speech within the law"* in condition E1 means something other than Article 10 (or the analogous common law) but has not pointed to a domestic source or definition of that right. The University return to this below.

76. As well as being subject to the HRA 1998 when exercising public functions, and subject to the ongoing conditions of registration set out above, Universities are subject to direct obligations under primary legislation concerning academic freedom and freedom of speech.

77. As to academic freedom, s.202 of the 1988 Act requires the University Commissioners (in exercising functions under s.203-207 of the 1988 Act[16]) to *"have regard to the need ... to ensure that academic staff 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 and privileges they may have at their institutions"*. As set out above, the definition of Academic Freedom in HERA 2017 (for the purposes of condition E1) is more specifically defined, though its meaning is the same.

78. As to freedom of speech, s.43 of the Education Act (No 2) 1986 provides **[SB/2/13-15]**

> *(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.*
>
> *(2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with*
>
> *(a) the beliefs or views of that individual or of any member of that body; or*
>
> *(b) the policy or objectives of that body.*
>
> *(3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out –*
>
> *(a) The procedures to be followed by members, students and employees of the establishment in connection with the organisation –*
>
> *(i) Of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and*

[16] Securing certain matters within the statutes of the University and amending the statues of the University (with the approval of the Privy Council).

(ii) Of other activities which are to take place on those premises and which fall within any class of activity so specified; and

(b) The conduct required of such persons in connection with any such meeting or activity;

and dealing with such other matters as the governing body consider appropriate.

(4) Every individual and body of persons concerned in the government of any such establishment shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the code of practice for that establishment, issued under subsection (3) above, are complied with.

79. Pursuant to that obligation, the University publishes and maintains its FOSCOP and the External Speakers Procedure (the **"ESP"**). Various versions of the FOSCOP have emphasised the importance of freedom of speech within the law. For example, the 2021 version of the FOSCOP provided:

> *"The University values diversity and is committed to the principles of academic freedom and freedom of speech and expression. In support of these values, an atmosphere of tolerance, where personal and academic growth take place is fundamental to enable open discussion and debate a wide variety of ideas, some of which may be controversial … The University recognises that, on occasion, the views of some who exercise the right to freedom of expression may cause offence, shock or disturb others who do not hold opposing views. This, in itself, is not a matter for constraint and is not breaking the law. Allowing opposing views to be heard will continue to be encouraged by the university, with appropriate and timely risk assessments undertaken as required."* **[CB/18/261-262]**

80. The 2023 version of the FOSCOP provided, inter alia:

> *"All staff, students and visitors have the right to hold opinions and to receive and impart information and ideas so long as they do not break the law ("the right to freedom of speech"). The right may be restricted to protect the rights of other people if the restriction is proportionately justified. In accordance with section 43 of the Education (No.2) Act 1986, the University will take such steps as are reasonably practicable to ensure the right. In particular, the University will ensure, so far as is reasonably practicable, that no individual or body of persons is denied the use of any of its premises for reasons relating to their beliefs, views, policies or objectives. The University will only restrict the right (for example, by refusing to permit an event to take place on campus) if it is legal and proportionate to do so (for example, if risks of the kind identified at paragraph 7 below outweigh the strong interest in promoting free speech). In addition, academic staff at the University have the right to (a) question and test received wisdom and (b) put forward new ideas including controversial or unpopular opinions, without fear of being sanctioned for doing as long as they do not break the law ("the right to academic freedom"). The right applies to all activities that relate to academic life, whether those activities take place on or off the campus, including designing the curriculum and teaching. It is enshrined in Article VII of the University Statutes, pursuant to section 202 of the Education Reform Act 1988. Every member of the University is expected to uphold the right to freedom of speech and the right to academic freedom and nothing in this*

Code of Practice should be taken to limit the right to academic freedom or justify a disproportionate interference with the right to freedom of speech." **[CB/17/258-260]**.

81. In its PD, the OfS found that the 2023 FOSCOP breached condition E1 because it did not protect freedom of speech. In the FD, the OfS quietly abandoned that provisional finding. The FD contains no analysis of the protective effect of the FOSCOP, despite, on the OfS' case, the FOSCOP being a *"governing document"*.

82. Parliament has enacted further legislation concerning freedom of speech in universities through the 2023 Act. Some of the 2023 Act is in force (including para 11 of the Schedule, which defines *"freedom of speech"*) and some remains to be brought into force.

83. When the 2023 Act is brought fully into force, s.13(3) HERA 2017 will be amended so as to impose a further free-standing freedom of speech obligation under s.A1 of HERA 2017, as follows:

> *"(1) The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (2).*
>
> *(2) That objective is securing freedom of speech within the law for –*
>
> > *(a) the staff of the provider,*
> >
> > *(b) members of the provider*
> >
> > *(c) students of the provider, and*
> >
> > *(d) visiting speakers. ...*
>
> *(13) In this Part – references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form)."*

84. Thus, HERA 2017 allows the OfS to require that a provider's governing documents must be consistent with the right to freedom of speech within the law, whereas the amendments (when brought into force) will require that a provider must take reasonably practicable steps to secure freedom of speech within the law.

85. Paragraph 1 of the Explanatory Notes to the 2023 Act provides: *"This Act includes a range of measures aimed at strengthening previous legislation on freedom of speech and academic freedom in higher education, including strengthening the duties regarding freedom of speech previously imposed by section 43 of the Education (No 2) Act 1986 ..."* (emphasis added). **[SB/17/124]**

86. In its consultation on proposed regulatory advice relating to the 2023 Act, the OfS recognised that *"freedom of speech within the law"* has the same meaning as in Article 10. Further, the

OfS accepts that, under the 2023 Act, *"there must be some (extremely limited) scope to place proportionate restrictions or constraints on free speech and academic freedom where there are compelling reasons to do so. Article 10(2) of the European Convention on Human Rights provides a sensible legal framework to enable this and places a ceiling on any such restriction, although in practice there may be less scope to interfere with free speech*" (emphasis added [**SB/73/2909**]).

87. By contrast, in the FD and its pre-action protocol reply **[CB/23/287-317]**, the OfS does not accept that *"freedom of speech within the law"* for the purposes of condition E1 has the same meaning as Article 10.

88. Thus, the OfS' approach is that:

88.1. The concept of *"freedom of speech within the law"* under s.43 of the 1986 Act and condition E1 is stricter than Article 10. This means that universities must take reasonably practicable steps to secure all speech that does not amount to a civil wrong or criminal offence, even if that speech could lawfully be limited under Article 10.

88.2. The OfS accepts that the meaning of *"freedom of speech within the law"* in the 2023 Act is the same as Article 10 and therefore does permit Universities to proportionately limit freedom of speech.

88.3. Thus, on the OfS' approach, the 2023 Act therefore reduces the strictness of the obligations relating to free speech (contrary to Parliament's clear statutory intention).

89. The University returns to this again below.

89A. On 19 June 2025 the OfS published Regulatory Advice 24 (**"RA24"**). RA24 gives guidance on how the OfS considers that duties in the 2023 Act may be discharged. It discloses further confusion in the OfS' approach to freedom of speech within the law. In particular:

89A.1. The OfS accepts that *"freedom of speech within the law"* has the same meaning for the purposes of the 2023 Act as it has in Article 10(1) of the Convention (para 16, pg. 5). It recognises that *"Article 10 provides a sensible legal framework and places a ceiling on any restriction or regulation of freedom of speech that a provider or constituent institution may impose"* (para 19, pg. 6).

89A.2. The OfS accepts that the relevant adverse effects for the purposes of Academic Freedom are the risks of *"loss of their jobs or privileges at the provider"* and *"the likelihood of their securing promotion or different jobs at the provider being reduced"* (pg. 6) (*contra* the OfS' position in the FD that "*anxiety, stress and uncertainty*" is capable of being a relevant adverse effect **[CB/6/124]**).

89A.3. The OfS states that complying with the 2023 Act requires providers to undergo a three stage process: (i) determining whether speech is *"within the law"* (ii) determining whether steps to secure the speech are *"reasonably practicable"* and then (iii) determining whether any limitations on the speech are compliant with Article 10 of the Convention.

89A.4. As to the **first** step, the OfS defines *"within the law"* as speech that is not *"prohibited by law"* – giving examples of (i) the common law on confidentiality; (ii) speech prohibited by the Equality Act 2010; (iii) the Public Order Act 1986; (iv) the Harassment (Protection from Harassment) Act 1997; (v) the Terrorism Act 2000 (pgs. 10-14).

89A.4. As to the **second** step, if the speech is not prohibited by law, the provider is directed to consider whether there are any *"reasonably practicable"* steps that it could take to *"secure"* the speech (pg. 15). The OfS' interpretation of the meaning of the words *"reasonably practicable"* imports a proportionality requirement. In particular:

89A.4.1. The OfS interprets *"reasonably practicable"* steps to include not taking steps to prohibit lawful speech (*"if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all"*).

89A.4.2. The corollary of this is that it may sometimes be reasonably practicable to take a measure which restricts lawful speech.

89A.4.3. The guidance states that, when deciding if steps are reasonably practicable, relevant factors will probably include (i) legal and regulatory requirements and (ii) impact on the essential functions (learning, teaching, research) of a university (pg. 26). For example, the OfS indicates that it would be permissible to discipline a lecturer for using a maths lecture to express his political views at length, even though the speech is lawful (or, as the OfS puts it, it would be "*unlikely to be a reasonably practicable step to permit the speech*" (pg. 28)).

89A.4.4. The OfS also (i) accepts that it may be permissible to restrict the *"time, place and manner"* of lawful speech so as to facilitate other lawful speech;[17] and (ii) encourages universities to go beyond the law in framing anti-bullying and harassment policies (*"providers and constituent institutions will wish to have robust anti-bullying and anti-harassment policies. The legal duty to take reasonably practicable steps to secure freedom of speech does not prevent them from doing so"*). The OfS encourages providers to use safeguarding statements in equality and anti-bullying policies (such as the Safeguarding Statement in the TNBEPS). These should include *"clear, adequate and effective 'safeguard' statements protecting academic freedom and freedom of speech within the law (for instance, to the effect that where a policy conflicts with academic freedom, the latter prevails)"* (pg. 23).

[17] See, for example, pg. 22 *"providers and constituent institutions should take appropriate steps to address any chilling effect. For instance, frequent, vociferous and intrusive anti-Israel protests across campus, including outside lecture blocks and accommodation, may have a chilling effect on pro-Israeli speech or Jewish religious expression. Students may self-censor support for Israel, and Jewish students might be chilled from expressing their religious beliefs on campus. Regulation of the time, place and manner of such protests may be a reasonably practicable step to take to secure the speech of students."*

89A.5. As to the **third** step, the OfS states that (i) if there are no reasonably practicable steps (positive or negative) that may be taken to secure the lawful speech, then (ii) the provider may impose 'restrictions' (positive or negative) on lawful speech that are compliant with Article 10(2) of the Convention. The OfS accepts that *"law"* in Article 10(2) has an autonomous meaning, but contends this is different from the meaning of *"law"* in the 2023 Act.

89B. Section 3 of RA24 gives examples of what the OfS regards is *"likely to be reasonably practicable"* in certain circumstances (§132).

89C. Significantly, the OfS accepts (contrary to the finding in the FD) that *"in order to avoid unnecessarily intrusive investigations, it is likely to be reasonably practicable to include a preliminary assessment/triage to assess whether to commence an investigation. The starting point of any such process should be that lawful speech will not be punished because of a viewpoint that it expresses...complaints processes should be concluded as rapidly as is reasonably practicable and compatible with fairness…in practice, it may not always be possible to determine that a complaint is vexatious at the outset of any investigation"* (§§164-166).

89D. Also on 19 June 2025, the OfS published its analysis of responses and decisions on the consultation for RA24. Notably, at paragraph 67, the OfS accepts:

> *"In relation to the comment about potentially lawful conduct including belittling and insult [sic], we recognise that universities and colleges that are public authorities are subject to the duty under section 6 of the Human Rights Act not to act incompatibly with a Convention right. It is arguable that they have an obligation under Article 8 of the Convention to prohibit some workplace bullying. In any case, it may not be reasonably practicable to permit bullying conduct. This is because it may undermine the essential functions of universities and colleges and/or conflict with other legal obligations and regulatory requirements on providers. We accept that there may be more scope to include more detail in the guidance on the circumstances in which providers and constituent institutions might regulate speech, including speech that is within the law."*

89E. The University returns to this below.

E. THE OFS' INVESTIGATION AND DECISION

E1. The investigation

90. The OfS opened its investigation into the University in October 2021, following media reports concerning protests about the continued employment of Dr Stock at the University. A chronology of the OfS' investigation is provided at Annex A to this pleading, which the University relies on as relevant facts for the purposes of, inter alia, its procedural unfairness argument. It is not repeated here, but the Court is invited to read it in full. Three points bear emphasis.

91. First, the OfS has, at all times, refused to speak to any member of the University about any relevant substantive matter. This approach was unfair and/or contrary to:

91.1. The standards of procedural fairness set out in the OfS' published policy - Regulatory Advice 15: Monitoring and Intervention (**"RA15"**).[18]

91.2. The approach taken by the OfS to speaking to Dr Stock. The OfS appears to have met with Dr Stock at least twice and drafted witness statements on her behalf. The OfS failed to disclose the second witness statement to the University or invite representations on it before taking the FD, which was fundamentally dependent on that evidence. The OfS has so far refused to disclose any of its correspondence with Dr Stock, explain the circumstances in which it took witness statements on her behalf, or explain the basis of its decision to meet her but not the University.

91.3. The approach that the OfS has taken to other universities with policies materially the same as the TNBEPS. During the course of responding to the OfS' PD the University identified at least eight universities in England which had materially the same policy as the TNBEPS and that other universities had had high profile media reports concerning protests about sex, gender and trans issues, and about issues of academic freedom and freedom of speech. The OfS took no regulatory action against those universities. The OfS took no regulatory action against those universities. Since publishing the FD, Dr Arif Ahmed, the Director of Free Speech at the OfS, has written to a considerable number of universities (understood to be 19) saying *"I encourage you to review relevant policies in light of the OfS' findings set out in our case report … and consider the steps you may need to take to ensure the university is meeting its regulatory obligations in these areas. I am keen to meet you to discuss the steps you are taking and would be pleased to support your work in an appropriate way."* **[CB/21/266]**. That form of engagement – which is entirely appropriate – is very different to the approach taken to the University. That is both unfair and anti-competitive. The University will suffer financial and reputational detriment which those universities will not (a matter to which the OfS has failed to have regard, in breach of s.2(1)(c) HERA 2017).

92. Second, despite taking three and a half years to come to a decision about a two-page policy statement, the OfS has failed to come to a decision as to whether the University is now compliant with the conditions of registration. In June 2024, the University submitted representations in response to the PD **[SB/23-32/249-567]**, accompanied by eight witness statements and exhibits. As explained in those submissions, the University had made changes to the TNBEPS in an effort to address the concerns expressed by the OfS in the PD. The University stated:

> *"It is unnecessary to impose any monetary penalty or specific conditions of registration to achieve compliance or mitigate ongoing risk. Had the OfS co-operated with the University, these changes would have been made much earlier. As the University explained to the OfS many times during its investigation, the*

[18] RA15 provides, inter alia, at §§13-17 that *"The OfS's principles-based approach means that how we engage with registered providers is of particular importance. Any system of principles-based regulation must be founded on open dialogue between the regulator and the regulated about the purposes of application of the principles … Where we identify behaviour in a provider which we consider may suggest a risk of breaching our conditions of registration, we will usually discuss this with the provider concerned first...we will seek an open and trusting relationship with the providers we regulate; a relationship that is based on mutual respect."* **[SB/20/168]**

University wished to work collaboratively with the OfS and ensure that the OfS was satisfied with the changes to its documents. The OfS ignored those requests. Had the OfS' responded to the University's requests, the policies would long since have been amended to allay the OfS' concerns. A lengthy and expensive investigation was therefore entirely unnecessary … The University requests confirmation that its amendments meet the OfS' concerns within 10 days of the submission of these representations." **[CB/23/254]**.

93. The OfS has ignored that request. It has expressly reserved its position on whether the current version of the TNBEPS complies with condition E1 **[CB/6/132]**.

94. Third, the only evidence on which the OfS has relied to make adverse findings about the University are the witness statements of Dr Stock **[SB/33-34/568-599]** which it appears it may have drafted itself. Dr Stock left the University before the 2022 and 2023 versions of the TNBEPS were in force.[19] The OfS therefore had no evidence at all relating to the impact of the 2022 and 2023 versions of the TNBEPS.

95. In coming to the finding that the TNBEPS caused significant harm at the University, the OfS did not, for example:

    95.1. Interview any student (current or past) whose speech was alleged to have been restricted.

    95.2. Interview any academic at the University whose freedom was alleged to have been restricted, other than Dr Stock.

    95.3. Interview or ask further questions in respect of the University's witnesses – including those who worked with and managed Dr Stock – whose evidence contradicted Dr Stock's first witness statement. The OfS implicitly rejected their evidence without giving any reasons for doing so.[20]

    95.4. Assess whether Dr Stock's assertion that her speech had been chilled was reasonable. Rather, the OfS treated Dr Stock's assertion that she did not *feel* reassured that she could express lawful views (despite having been so reassured, in fact) as dispositive of the question of chilling effect: **[CB/6/144]**.

96. Faced with the (correct) submission in the University's response to the PD that the OfS had no evidence of a chilling effect, the OfS did two things. First, it took another statement on behalf

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[19] Dr Stock resigned in October 2021. Since the publication of the FD, her publicly stated position has been that *"Sussex, on the other hand, changed its policy* [the TNBEPS] *to something more sensible a while ago, shortly after I left."* (See https://unherd.com/2025/03/fortunes-are-changing-in-the-culture-war/ [accessed 7 May 2025])

[20] For example, the OfS concluded that Dr Stock's speech at the University was chilled by the TNBEPS and that she was not reassured she could teach whatever she wanted. The evidence of Dr Stock's line manager was *"I did reassure Professor Stock in informal meetings, several times, that she had freedom to teach whatever she wanted to and would not be subject to disciplinary measures"* **[SB/476/481]**. That is consistent with the emails sent by Dr Stock's line manager to the relevant department, which included *"I have been asked by some colleagues to reassure you that you are free (and of course safe) to teach your courses and to express your opinions (as long as they are within the law) be that via the media, your own blogs or by displaying such flags in the School. None of these symbols should be objects of contention or disrepute. This will never change."* The OfS rejected that evidence, without explanation or further inquiry.

of Dr Stock to serve its own ends and failed to disclose that to the University prior to making the FD. Second, the OfS has defined *"chilling effect"* such that it does not claim that the TNBEPS *actually* chilled speech, but only that it *potentially* could have done (see FD fn 24, *"by chilling effect, the OfS means the potential for staff and students to self-censor and not speak about/express certain lawful views"*) **[CB/6/138]**. That is not what a chilling *effect* is. Such a definition would, in any event, create an *extraordinarily* wide definition of 'interference' for the purposes of freedom of speech. It would mean that anything that has the *potential* to chill freedom of expression automatically breaches E1 – because on the OfS' interpretation no actual *chilling effect* has to be shown, nor can any *potential* chill (other than those amounting to criminal offences or civil wrongs) be proportionately justified.

97. The OfS appears to dispute that the only evidence underlying the FD is Dr Stock's **[CB/6/144]** but it has failed to identify what other evidence of harm it said to have relied on. Certainly, no such evidence has been disclosed to the University.

E2. The Provisional Decision

98. In March 2024, the OfS issued the PD **[SB/51/1624-1882]**. In the PD, the OfS provisionally:

    98.1. Found that current and past versions of the FOSCOP and ESP breached ongoing condition E1.

    98.2. Found that current and past versions of the TNBEPS breached condition E1.

    98.3. Found a breach of condition E2(i).

    98.4. Found wider regulatory concerns relating to Article 10, indirect discrimination contrary to the EqA 2010, a breach of the Education (No 2) Act 1986, the Public Sector Equality Duty, and public law principles.

    98.5. Calculated the appropriate penalty as £1,000,000.

    98.6. Imposed specific conditions of registration EA, E1A, and E2A. The specific conditions of registration would have required the University to comply with the 2023 Act before it came into force.

99. Following the University's submissions on the PD, most of the findings in the PD were abandoned. In the FD, there are (i) no breaches, historic or current, relating to the substance of the FOSCOP, (ii) no ongoing breaches relating to the TNBEPS, (iii) the historic breaches are narrower, (iv) the monetary penalty is reduced, (v) there are no specific conditions of registration and (vi) the wider regulatory concerns are more limited. The OfS has not provided any explanation for abandoning most of its provisional findings, in breach of its duty of transparency (see RF §166 and s.2 HERA 2017).

E3. The Final Decision

E3.1. Summary

100. The decisions underlying the findings of breach were made by the OfS on 14 February 2025. They were communicated to the University for the first time on 20 March 2025. **[SB/67.46/2798-2800]**.

101. The OfS issued the FD on 20 March 2025. It then reissued the FD on 27 March 2025 because the 20 March 2025 version was invalid, in that it failed to comply with Schedule 3(3) HERA 2017. **[SB/6/103-195]**.

102. In summary:

102.1. E1: The OfS found a single composite historic breach of condition E1 in relation to the TNBEPS. Specifically, the OfS found that the different versions of the TNBEPS breached the Academic Freedom principle from 1 August 2019 to 23 January 2023, and the Freedom of Speech Principle from 1 August 2019 to "*at least*" 20 March 2024. **[CB/6/112-132]**.

102.2. E2(i): The OfS found a single composite historic breach of condition E2(i) on the basis that the University had failed to have adequate and effective governance arrangements in place to ensure that it operated in accordance with its governing documents (in which the OfS included the University's Scheme of Delegation and 'Organisation of the University' documents). **[CB/6/133-137]**.

102.3. Intervention: The OfS decided that the intervention factors favoured the findings of a breach **[CB/6/138-158]**.

102.4. Penalty: The OfS imposed monetary penalties of £585,000, comprising £360,000 for the alleged breach of E1 and £225,000 for the alleged breach of E2(i). **[CB/6/159-181]**.

102.5. Regulatory concerns: The OfS found that the University *may* not have complied, or acted compatibly with, (i) s.43 of the 1986 Act, (ii) s.19 of the EqA 2010 (iii) the Public Sector Equality Duty, and (iv) Article 10, in relation to the content of the TNBEPS and/or the approval of amendments to the TNBEPS. **[CB/6/182-186]**.

103. In light of the OfS' pre-action protocol response, four points bear emphasis:

103.1. First, the OfS interpreted *"freedom of speech within the law"* to mean all speech that is not prohibited by civil or criminal law. **[CB/6/130]**.

103.2. Second, the OfS interpreted a *"reasonably practicable step"* to include making clear in any policy document that there can be no restrictions on any lawful speech (meaning no restrictions on any speech that is not prohibited by civil or criminal law). **[CB/6/131].** There is no analysis anywhere in the FD – nor was there in the PD – which considered whether the potentially lawful speech covered by the TNBEPS (in respect of which see §§154-5 below) was reasonably practicable (on the OfS' interpretation of that term) *not* to prohibit (for example, by reason of needing to protect the Article 8 rights of students). Rather, the OfS simply saw it as dispositive

that if the speech was *"within the law"* it was reasonably practicable not to prohibit it.

103.3. Third, in considering whether the TNBEPS is consistent with the PIGPs, the OfS sought to predict how students and staff may understand or respond to the TNBEPS. **[CB/6/140-141]**. In so doing, the OfS has only considered the TNBEPS and the Statutes and Regulations, and not other Codes of Practice (such as the FOSCOP) or lower-order policy statements, induction materials, or other University documents on freedom of speech (even though, on the OfS' interpretation, they are all 'governing documents').

103.4. Fourth, the OfS has justified the findings of breach in large part because they could, in the OfS' view, *"incentivise compliance"* by the University **[CB/6/188] [CB/6/192] [CB/6/139]**. As noted above, the OfS declined to determine whether the University is now compliant with condition E1 and therefore whether there is any need to "*incentivise compliance*".

104. The University takes each element in turn, save for §102.4, which falls within the jurisdiction of the FtT.

E.3.2 The decision-maker

105. The OfS has disclosed very little about the process of investigation and decision-making. So far as the University can ascertain (see further in Annex A):

105.1. On 6 July 2023, the OfS' Chief Executive Susan Lapworth purported to exercise delegated authority under Part 3 (I) 1 of the OfS' Scheme of Delegation to establish the University of Sussex Compliance and Enforcement Committee (the **"USCEC"**).[21] **[SB/54/1946]**.

105.2. On 1 March 2024, the investigation team (whose membership has not been disclosed to the University) recommended to the USCEC that Provisional Decisions be taken, substantially in the form that was issued to the University in the PD. The USCEC was given less than a week to consider the draft decision of the investigation team, which ran to 174 pages. The USCEC agreed with the recommendations. **[SB/57/2022-2026]**

105.3. Following the decision of the USCE, the investigation team decided that the PD needed to be amended. Holly Clacey, a legal advisor at the OfS, sought authorisation to issue the PD from the Deputy Director of Enabling Regulation, who purported to have authority to impose provisional decisions on the University under an (undisclosed) email from the Chief Executive dated 21 July 2021. This decision superseded the decision of the USCEC. **[SB/58/2027-2032]**

[21] The USCEC comprised Martin Coleman (Panel Chair of the Competition and Markets Authority, Deputy Chair of the Office for Students), Elizabeth Fagan (former CEO and non-executive chair of Boots UK), and Nisha Arora (Director, Consumer and Retail Policy at the Financial Conduct Authority

105.4. In May and June 2024, the University provided a substantial response to the PD. **[SB/23-41.14/249-1572]**.[22]

105.5. Between June and December 2024, the investigation team contacted Dr Stock and took a further witness statement on her behalf, to meet the criticisms advanced by the University in its representations. The circumstances of that contact, or of Dr Stock's first witness statement, have not been disclosed to the University. The second witness statement was not disclosed to the University before the FD was issued. The second witness statement was finalised on 16 December 2024. **[SB/34/592-599]**.

105.6. On Christmas Eve 2024, the USCEC was given a three-page recommendation paper in which the investigation team requested that it make final decisions as to breach. **[SB/59-60/2033-2052]**. The USCEC was also asked to consider the options for monetary penalty. One option presented by the investigation team was to retain a penalty of £1m, despite the majority of the findings in the PD having been abandoned. The USCEC was provided with six bundles of evidence – running to more than 3,000 pages. Of note:

105.6.1. The USCEC was provided with a table of "*changes to key provisions of the TNBEPS*" which did not include changes made in 2024. **[SB/59/2036]**

105.6.2. The USCEC was provided with a table of decision-making for the purposes of its consideration of condition E2(i), which did not include the University Council's approval of documents in 2024. **[SB/59/2038]**

105.6.3. The USCEC was provided with a document entitled *"Response to the University's representations"* (which asserted that the decision-makers had regard to the full suite of the University's representations, before those representations had been provided to the decision-makers). That document summarises two points made by the University in its representations. It does not, for example, summarise the conflicting evidence about the extent to which Dr Stock was reassured. Rather, it seeks to justify the approach the investigation team had taken. **[SB/60/2041-2052]**

105.7. The USCEC met twelve working days later, on 15 January 2025. The Committee members were accompanied by twelve members of OfS staff, most of whom were presumably the investigation team. The USCEC accepted the recommendations as to breach and noted that *"the USCEC requested that any notice of final decision in respect outline clearly the chilling effect"*. The decisions concerning wider regulatory concerns and monetary penalties were deferred. **[SB/62/2063-2065]**

105.8. On 10 February 2025, the USCEC was provided with a further decision paper and was requested to "*confirm*" its decisions in relation to breach, and to take further decisions relating to monetary penalties and wider regulatory concerns. The USCEC was provided with nine bundles of evidence, again running to more than 3,000 pages.

[22] Excluding pages 568-599, which were produced by the OfS.

The USCEC was again provided with incomplete chronologies as to the changes to the policies, and an incomplete (and one-sided) summary of the evidence. The USCEC had three working days to consider these documents. **[CB/7/196-203]**

105.9. On 14 February 2025, the USCEC met again and made final decisions (which superseded decisions on 15 January 2025) as to breach, monetary penalties, and wider regulatory concerns. **[CB/8/204-207]**

106. The USCE lacked authority to impose monetary penalties on the University, because that is a power reserved expressly to the Board or Provider Risk Committee: **[SB/53/1926-1927]**. It is open to the Board or the Provider Risk Committee to make different arrangements, but no such arrangements were made in this case. Although Ms Lapworth was empowered to establish the USCE Committee, she was not empowered to delegate to it the power to impose monetary penalties. The decision to impose a penalty was therefore taken without lawful authority and is *ultra vires.* The University will pursue this argument in its appeal to the First-tier Tribunal.

E3.3. Findings on condition E1

107. The OfS directed itself in law, as regards condition E1, as follows:

107.1. The OfS found that the TNBEPS was a *"governing document"* because (i) it expressly related to the University's *"objectives and values"* and directly affected freedom of speech, academic freedom and wider equality issues; (ii) it *"governed"* its approach to equality law relevant to the protected characteristic of gender re-assignment; and (iii) it governs the behaviour of staff and students because it sets out *"behaviour that is considered to be unacceptable from both staff and students and makes refence to disciplinary consequences"* (FD, pg. 16). **[CB/6/118]**

107.2. *"The OfS has interpreted the duty to take reasonably practicable steps in order to ensure freedom of speech within the law to include deciding not to take a step which would have an adverse impact on freedom of speech without compelling lawful justification"* (FD, pg. 15). **[CB/6/117]**.

107.3. As applied to the TNBEPS in respect of the Freedom of Speech PIGP, the OfS directed itself that it should consider whether and the extent to which (i) *"the contents of the policy expressly provide for steps to be taken that are likely to directly or indirectly undermine freedom of speech within the law, including by having context which by its very existence would likely undermine freedom of speech"* and (ii) *"this policy fails to provide for reasonably practicable steps that would facilitate securing freedom of speech within the law e.g. because of inadequate content or a lack of content."* (FD, pgs. 15-16). **[CB/6/117-118]**.

107.4. As applied to the TNBEPS in respect of the Academic Freedom PIGP, the OfS directed itself that it should consider whether and the extent to which *"the contents of this policy contain anything that could potentially be relied on by the higher education provider to take disciplinary action against an academic member of staff, or treat them less favourably than other academic staff, because of their lawful academic ideas and opinions"* and *"this policy fails to expressly provide for effective*

safeguards (such as in decision making) to prevent academic staff from being disciplined or treated less favourably than other academic staff because of their lawful academic ideas and opinions" (FD, pg. 16). **[CB/6/117-118]**

108. Applying those directions, the OfS found in relation to the University Statutes **[CB/6/119-123]**:

108.1. The TNBEPS had contractual effect for both staff and students (by dint of Regulation 31 for Staff and Regulation 2 for students).

108.2. Chilling effect meant *"the potential for staff and students to self-censor and not speak about/express certain views"* (emphasis in original).

108.3. Statute VII of the University Statutes did not safeguard against (i) the restrictive effect of the contents (or lack of contents) of the TNBEPS on freedom of speech or academic freedom or (ii) a staff member or student being found in breach of the TNBEPS through exercising their rights to academic freedom and/or freedom of speech (FD, pgs. 19-20).

108.4. A breach of the TNBEPS could lead to disciplinary proceedings being brought against a staff member (FD, pg. 20). The OfS found that *"[a] staff member could potentially be subject to the adverse consequences flowing from any potential disciplinary proceedings which could potentially include stress, anxiety, and/or reputational damage."* (FD, pg. 20).

108.5. Statute VII.6 and VII.7 do safeguard against disciplinary proceedings progressing to an adverse outcome because *"the Disciplinary Procedure must be construed to give effect to the guiding principles. However, even in that circumstance, the staff would technically still be in breach of the TNBEPS. The safeguarding effect of Statute VII is therefore limited only to protecting against disciplinary proceedings progressing to an adverse outcome, and does not extent to protecting a member of staff from being subjected to disciplinary proceedings."* The OfS also concluded that because the University would (i) have to determine whether or not the relevant restriction in the TNBEPS has the potential to restrict lawful speech and/or academic freedom, (ii) establish and assess the facts, (iii) determine whether or not bringing disciplinary proceedings would conflict with the guiding principles, and (iv) identify the meaning of Statute VII.7, then:

> *"Were such an exercise to be carried out, given the complexity of these matters, it would take time for that exercise to be completed. Indeed, a full investigation or detailed inquiry may be needed to determine some of these matters. In that time, the affected staff member could potentially suffer the detrimental effects of being subject to disciplinary proceedings themselves, including anxiety, stress and uncertainty."* **[CB/6/123]**.

109. As to the 2018 version of the TNEBPS (see §20 above), the OfS concluded that:

109.1. The Positive Representation Statement breached the Freedom of Speech PIGP because it has the potential to capture lawful speech, and that *"as a result, staff and*

students may have self-censored and avoided speaking about negative or neutral views of trans people and trans lives as a result". The same findings were made in respect of the Academic Freedom PIGP. **[CB/6/124-125]**. The University does not seek to defend the Positive Representation Statement, which was deleted in 2022, almost immediately after the incumbent Vice-Chancellor took office and before the OfS articulated any concerns about the TNBEPS.

109.2. The Stereotyping Statement was capable of capturing lawful speech. The OfS concluded that *"this means that academics may have excluded content from the curriculum that contained lawful speech which was, could be, or may be perceived to be, stereotypical assumptions about trans people"*. **[CB/6/125-127]**

109.3. The Transphobic Propaganda Statement was capable of capturing lawful speech and breached both PIGPs for that reason. **[CB/6/128-130]**

109.4. The Disciplinary Statement was capable of capturing lawful speech and breached both PIGPs for that reason. **[CB/6/128-130]**

109.5. The OfS found that it would have been a reasonably practical step for the University to make clear that the TNBEPS was only intended to capture unlawful speech and to ensure adequate and effective safeguards for freedom of speech in either the TNBEPS or one of the University's other governing documents.

109.6. The OfS found that there were no other effective safeguards in other governing documents but only considered the Statutes in this respect.

110. In relation to the 2022 version of the TNBEPS (see §21 above), the OfS concluded:

110.1. The prohibition on <u>intentional</u> reinforcement of stereotypical assumptions about trans people (the Amended Stereotyping Statement, see §§21 above) was *"capable of capturing lawful speech*" and therefore breached the Academic Freedom and Freedom of Speech PIGP. **[CB/6/125-126]**

110.2. The OfS found breaches in relation to the Transphobic Propaganda and Disciplinary Statements, for the same reasons as set out above. **[CB/6/128-130]**

110.3. The OfS found that it would have been a reasonably practical step for the University to make clear that the TNBEPS was only intended to capture unlawful speech and to ensure adequate and effective safeguards for freedom of speech in either the TNBEPS or one of the University's other governing documents (see, for example, [**CB/6/126]**).

110.4. The OfS found that there were no other effective safeguards in other governing documents but only considered the Statutes in this respect. **[CB/6/128-130]**

111. In relation to the 2023 version of the TNBEPS (see §22 above), the OfS concluded:

111.1. That the Safeguarding Statement was inadequate to safeguard freedom of speech or remedy the problems with the Amended Stereotyping Statement that it identified in

the 2022 version of the TNBEPS, because *"Whilst this must have some safeguarding effect because it confirms that the provider will not permit disproportionate restrictions on lawful speech, it is inadequate because it is undermined by the continued inclusion of the Stereotyping Statement in the 2023 version of the TNBEPS. Together these imply that the provider considers the Stereotyping Statement (which for reasons explained above captures lawful speech) itself to be a proportionate restriction on freedom of speech."* The OfS accordingly concluded that *"staff and students may have self-censored and avoided discussing anything that was, could be, or may be perceived to be, stereotypical assumptions about trans people'*. **[CB/6/128]**.

111.2. That the amended Disciplinary Statement (see §22 above) and amended statement on harassing materials were insufficient because (i) it was still capable of capturing lawful speech (i.e. speech that is not prohibited by criminal or civil law); and (ii) the Safeguarding Statement was an insufficient safeguard for the reasons set out above.

111.3. In contrast, the OfS concluded that the same interpretive wording *"nothing in this Policy Statement"* did adequately safeguard Academic Freedom. **[CB/6/128]**

111.4. Accordingly, the OfS considered the words *"For the avoidance of doubt, nothing in this Policy Statement should be taken to justify* [a breach of academic freedom]*"* to be sufficient for the purposes of the Academic Freedom PIGP, but the words *"For the avoidance of doubt … nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech"* to be insufficient for the purposes of the Freedom of Speech PIGP.

111.5. The OfS found that it would have been a reasonably practical step for the University to make clear that the TNBEPS was only intended to capture unlawful speech and to ensure adequate and effective safeguards for freedom of speech in either the TNBEPS or one of the University's other governing documents (see, for example, **[CB/6/131]**).

111.6. The OfS found that there were no other effective safeguards in other governing documents but only considered the Statutes. **[CB/6/131]**

112. In light of those findings, the OfS found that there had been *"one single historic holistic breach of condition E1 in relation to this governing document in order to ensure that the provider is not being penalised for the same issues multiple times."* (FD, pg. 30). The OfS *"reserve[d] its position on whether the aforementioned breach of condition E1 continued past 20 March 2024, including (but not limited to) in the version of the TNBEPS that was adopted by the provider in May 2024."* **[CB/6/132]**

E3.2. Findings on condition E2(i)

113. The OfS directed itself in law, as regards condition E2(i), to consider *"whether there is evidence of repeated failures by the provider to follow management and governance arrangements (which have affected the way in which decisions have been made in practice)* (FD pg. 31). **[CB/6/133]**.

114. The OfS found that the FOSCOP (2021) version, ESP (2023 version) and TNBEPS (2022 and 2023 version) were approved by bodies which lacked authority under the University's delegation arrangements to approve such policies. The OfS rejected the argument made by the University that (i) the ESP and TNBEPS were not reserved matters and (ii) the Vice-Chancellor considered and approved these documents on the advice of the UEG, and when doing so was exercising delegated power under Regulation 7(3) of the University Regulations. This was rejected because the OfS interpreted Regulation 7(3) to be an *"operational delegation only that goes to the day-to-day management of the university (and does not extend to deciding on the substantive content of policies dealing with matters of equality, freedom of speech and academic freedom"*. **[CB/6/133-137]**.

115. The OfS rejected the University's arguments on the Visitorial Jurisdiction, because the OfS had implicit power under s.5 HERA 2017 to impose and enforce conditions that encroach onto the Visitor's jurisdiction. **[CB/6/136-137]**. Later in the FD, the OfS found that its jurisdiction is concurrent with the Visitor **[CB/6/187]** and that the Visitor's jurisdiction had therefore not been ousted.

E3.3. Intervention

116. The OfS referred to the intervention factors as factors relevant to its decision on whether it should exercise its discretion to find a breach of the conditions (the intervention factors being those set out at §167 of the RF) **[CB/6/138-158]**. This was distinct from its decision on whether to impose a monetary penalty, which is reviewable by the FtT.

117. The OfS concluded:

    117.1. The impact of the breaches was significant and severe, because the TNBEPS created a chilling effect. The OfS defined a chilling effect as the *"potential"* for staff and students to self-censor, not an allegation that any staff or student (save for Dr Stock in relation to the 2018 TNBEPS only) did self-censor. In its analysis of Dr Stock's evidence, the OfS treated it as dispositive that Dr Stock *felt* chilled, and did not assess whether she in fact reasonably self-censored (as a result of the TNBEPS or otherwise) or whether she was reasonably reassured by the University. **[CB/6/140-147]**.

    117.2. The OfS found that the findings of breach would *"incentivise the provider ... to ensure they are complying with their regulatory obligations relating to freedom of speech and academic freedom"*. **[CB/6/138]**

    117.3. The OfS considered it significant that the University *"did not notify"* the OfS of the breaches, despite there being no suggestion that the University knew or should have known that it was in breach. **[CB/6/153]** The OfS concluded that *"finding breaches of condition E1 and imposing monetary penalties is in the student interest because it could incentivise this provider to ensure future compliance with that condition"*. (FD, pg. 49 **[CB/6/151]**). It made the same finding in relation to E2(i) (FD, pg. 50). It stated that *"findings on breaches ... will act as strong incentive for the provider to address breaches of conditions E1 and E2(i) and ensure compliance in the future in*

addition to incentivising compliance from other providers if details of the enforcement / regulatory action are publicised." (see FD, pg. 51) **[CB/6/152]**.

117.4. In its consideration of intervention factor (g), *"steps taken by the provider to mitigate the increased risk or remedy the breach"* the OfS did not consider whether the amendments made by the University in response to the PD had remedied the breach. Indeed, without having regard to the content of the updated documents (or the fact that all updated documents had been approved by Council), at FD pg. 54 the OfS concluded that it was a factor in favour of intervention that *"some of the issues with the TNBEPS which gave rise to the breach of condition E1 continued to exist as at 20 March 2024, and therefore it is possible that the breach continued beyond that date and could occur again"*. The same finding was made in relation to condition E2(i). **[CB/6/154-155]**.

118. In Annex I, the OfS set out its purported consideration of the mandatory factors under s.2 of HERA 2017. As to these: (i) the OfS considered that the King retains concurrent jurisdiction, alongside the OfS (FD, pg. 85). **[CB/6/187-188]**; (ii) it repeated the findings on incentivising compliance. **[CB/6/188]**. It found that the need to encourage competition between English higher education providers was not relevant (FD, pg. 87) **[CB/6/189]**; (iii) It repeatedly justified the significant use of OfS resources because, in part, *"findings of breach and imposition of monetary penalties should increase the likelihood of compliance by the provider (and among the sector more widely if regulatory action is publicised). This has the potential to reduce the need for further regulatory action in this area in the future"*. **[CB/6/190]**

E3.4. Regulatory concerns

119. In Annex H, the OfS found that it had *"identified a number of wider regulatory concerns"*. The OfS considered itself to have the power to do this because *"the OfS is concerned that the provider may not have complied with these legal obligations because non-compliance with these duties could be indicative of whether the provider is compliant with condition E1 by reference to academic freedom and freedom of speech PIGPs given the overlap/relevance of the subject matter of these wider legal obligations and those PIGPs."* (FD, pg. 80). **[CB/6/182-183]**.

120. The University notes:

120.1. At FD pg. 80, the OfS accepted that the requirements of the s.43 duty and the requirements of the freedom of speech PIGP are *"very similar"*. It interpreted *"freedom of speech within the law"* to mean all speech not prohibited by criminal or civil law, rather than all speech which cannot be lawfully limited. **[CB/6/182-183]**.

120.2. The OfS did not assess whether the TNBEPS is compliant with Article 10, only that the OfS considers its contents *"could"* be disproportionate. **[CB/6/183]**

F. GROUNDS FOR JUDICIAL REVIEW

F1. Ground 1: The approach to "*governing documents*" in the RF and the FD is unlawful

121. The University submits that the definition of "*governing documents*" in the RF is unlawful because it goes beyond what is permitted by s.14 HERA 2017. The University submits that the approach to "*governing documents*" in the FD is unlawful because the OfS directed itself to apply the broad meaning set out in the RF (FD, Annex C, §29) **[CB/6/118]**. Either the OfS misdirected itself in the FD as to the proper meaning of *"governing documents"* in condition E1, or, if the OfS' interpretation of E1 is correct, then condition E1 is *ultra vires.* Either way, the approach to *"governing documents"* in the FD was unlawful. The University makes the following particular points.

Vires

122. First, the OfS is only empowered (through s.14 HERA 2017) to assess the consistency of the University's *"governing documents"* – objectively defined in accordance with the ordinary principles of statutory interpretation – with the PIGPs. This appears to be accepted by the OfS.

123. Those ordinary principles of statutory interpretation are:

123.1. The Court must search for the meaning of the legislation expressed in the words used by Parliament, having regard to the purpose and context of the legislation: *R (O) v Secretary of State for the Home Department* [2022] UKSC 3 [2023] AC 255 at §§31 and 59, *per* Lord Hodge and Lady Arden.[23]

123.2. The starting point is the natural and ordinary meaning of the words used (*"giving the words their natural and ordinary meaning … helps the growth and multiplication of refined and subtle distinctions in the law's use of common English words" R v Barnet LBC ex p Nilish Shah* [1983] 2 AC 303, 345H-346A).

123.3. Parliament is presumed to have legislated in knowledge of existing law: *UKI (Kingsway) v Westminster City Council* [2018] UKSC 16 [2019] 1 WLR 104 at §45 (*"this was the state of the general law … Parliament must be taken to have legislated against that background"*).

123.4. Context is both internal and external: *R (CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852 [2019] 1 WLR 1862 at §20, *per* Leggatt LJ (as he then was).[24] A part of the relevant context is the mischief at which the relevant part of the Act is aimed, which can be discerned from (among other things) the (i) state of affairs

[23] See further Lord Reed in *UBS AG v HMRC* [2016] UKSC 13 [2016] 1 WLR 1005 at §61 *"the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in the way which best gives effect to that purpose"*.

[24] *"Relevant context [is] internal and external to the statute. The internal context requires the interpreter to consider how the provision in question relates to the other provisions of the same statute and to construe the statute as a whole. The external context includes other relevant legislation and common law rules, as well as any policy documents such as Law Commission reports, reports of Parliamentary committees, or Green and White Papers, which form part of the background to the enactment of the statute. When the strict conditions specified by the House of Lords in Pepper v Hart [1993] AC 593 are satisfied, reference may also be made to Parliamentary debates as reported in Hansard."* It is permissible to refer to Hansard to identify the mischief of the legislation or for legislative background, as distinct from the rule in *Pepper v Hart* (see, for example, *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [2025] AC 1016 at §55, *per* Lord Mance, and *McDonnell v Congregation of Christian Brothers Trustees* [2003] UKHL 63 [2004] 1 AC 1101 at §29, *per* Lord Steyn.

existing, and known by Parliament to be existing, at the time and (ii) explanatory notes and preceding reports to the relevant Act (*R (Forge Care Home Ltd) v Cariff and Vale University Health Board* [2017] UKSC 56 [2017] PTSR 1140 at §25, and *Littlewoods Ltd v HMRC* [2017] UKSC 70 [2018] AC 869 at §35).

124. Second, prior to the enactment of the HERA 2017, *"governing documents"* were understood, as a matter of common law, to refer to the documents instituting a charity and providing for its governance.[25] Those documents could only be amended with the Privy Council's oversight – either by dint of the 1988 Act or (in the case of chartered universities) the Royal Charters themselves (see §§31-40 above). The Privy Council had oversight as to whether those governing documents complied with public interest principles (see §§31-40 above).

125. Third, Parliament's purpose in transferring this oversight function to the OfS was to *simplify* it, not to *expand* it (see §§31-40 above). Nothing in the wording of the Act or in its context indicates that Parliament intended to expand the definition of *"governing documents"* when enacting HERA 2017.

126. Fourth, the RF, within its definition of "*governing document*", states *"the documents ... that describe any of the provider's objectives or values ... this test will be broadly rather than narrowly applied ..."* goes beyond the meaning of *"governing documents"* in s.14 HERA 2017. The RF is accordingly *ultra vires*. The FD, relying on that *ultra vires* part of the RF, is also *ultra vires.* The TNBEPS is not a *"governing document"*.

127. In its pre-action response, the OfS makes five submissions **[CB/23/287-317]**. As to these:

    127.1. First, the OfS states that the question of whether a particular document is a governing document is a "*mixed question of fact and law*". If the OfS simply means that the factual circumstances must be measured against the legal meaning of "*governing document*", then the University agrees. The meaning of *"governing documents"* in HERA 2017 is a question of statutory construction, which is an objective question for the Court. Which of a particular university's documents are governing documents may vary depending on the legal form of the provider (as the OfS' itself recognises in the RF). In the case of a university established by Royal Charter, the governing documents are the Charter and Statutes.

    127.2. Second, the OfS contends that there is no warrant in the text of HERA 2017 for confining the terms in the way suggested by the University. That is wrong for the reasons set out above. The ordinary meaning of governing documents, particularly in light of the legislative context, is clear.

    127.3. Third, the OfS contends that the University's reading cuts across the statutory purpose of HERA 2017, because it would *"exclude policy statements which directly bear on the public interest governance principles, which would undermine the efficacy of*

[25] See, for example, Tolley's Charities Manual at 34.8 *"The governing document is a legal document setting out the charity's purposes and how it is to be administered. It may take the form of a trust deed, constitution, memorandum, and articles of association, will, conveyance, Royal Charter, Scheme of the Charter Commission or other formal document."*

condition E1 because it would not bite on documents likely to be most relevant". This misunderstands the statutory framework. Parliament did not require the OfS to make a public interest governance condition and did not prescribe the form of the public interest governance principles. Rather, Parliament permitted the OfS to formulate a public interest governance condition and public interest governance principles, subject to the limitation (among others) that the condition could only apply to "*governing documents*". Even if a narrower reading of "*governing documents*" were thought to cut across the "*public interest governance principles*", that would be a consequence of how the OfS has chosen to formulate the condition and the principles. It is nothing to do with Parliament's intention and therefore cannot shed light on the proper interpretation of HERA 2017.

127.4. Fourth, the OfS contends that the legislative position in Scotland and Wales (see footnote 11 above) is irrelevant because the legislation was enacted by the devolved Parliaments. To the contrary, the position in Scotland and Wales (just like the pre-HERA 2017 position in England) supports the University's argument that "*governing documents*" are well understood to mean the documents which establish the structure and rules for governing a university.

127.5. Fifth, the OfS relies on the fact that the University did not dispute in its PD response that the FOSCOP is a governing document and so it must *"implicitly accept"* that *"governing document"* means something different in England. What the University had previously accepted was that the FOSCOP was a governing document as defined by the RF. The submission the University now advances is that the definition of "*governing document*" in the RF is *ultra vires*.

Misdirection

127A. Alternatively, if condition E1 is *intra vires,* the OfS misdirected itself in the FD as to the proper meaning of condition E1 for the reasons set out above. In particular:

128A.1 The OfS is obliged to prepare and publish from time to time a regulatory framework (s.71(1)) to which it must have regard when exercising its functions (s.75(2)). The ongoing conditions of registration need not be published in the RF itself, though the OfS has chosen to take this course. The RF is not a source of the OfS' powers, it is guidance to which the OfS must have regard and from which it may depart if it has good reason.

128A.2 In the RF, Condition E1 is *"the provider's governing documents must uphold the public interest governance principles that are applicable to the provider"*. The guidance at §424 of the RF, on which the OfS relies (namely that *"governing documents"* means a document which *"describe any of the provider's objectives and values"*) is guidance on condition E1, not condition E1 itself.

128A.3 In relying on that guidance as to the true meaning of *"governing document"* in Condition E1, the OfS misdirected itself in law.

F2. Ground 2: The Regulatory Framework and the finding of breach of condition E2(i) is *ultra vires* because s.5 of HERA 2017 does not abrogate the Visitorial jurisdiction[26]

128. The University submits that:

128.1. First, the Visitor of the University was granted exclusive jurisdiction over its laws through the Charter (which appoints the Visitor to the University). The grant of a Royal Charter *"is an act of the royal prerogative"* (*R (on the application of BMA) v Royal College of General Practitioners* [2024] EWHC 2211 (Admin) at §83).

128.2. Second, Parliament may abrogate that jurisdiction either expressly or by necessary implication. The necessary implication test is a strict one: *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at §45, *per* Lord Hoffmann).

128.3. Third, nothing in s.5 HERA 2017 either expressly or by necessary implication requires the OfS to judge whether the University has complied with its own internal laws.

128.4. Fourth, condition E2(i) and the FD (insofar as they intrude on the exclusive jurisdiction of the Visitor) are *ultra vires.*

129. The OfS appears to accept that the Visitor of the University has exclusive jurisdiction unless something in HERA 2017 ousts that jurisdiction. The points of dispute are (i) the test for ousting the visitorial jurisdiction, and (ii) applying that test, whether HERA 2017 ousts the visitorial jurisdiction.

130. As to the test, the University submits that the Visitor of the University is appointed in the exercise of the prerogative and therefore derives his visitorial powers from the prerogative. Abrogating that power must meet the test for abrogating a prerogative power – a *"strict"* one. In its pre-action response, the OfS contends that *"the exclusive jurisdiction of visitors is a matter of common law and therefore can be overridden by an ordinary Act of Parliament"* [**CB/23/307**]. The University submits that the jurisdiction of the University's Visitor is conferred by the Royal Prerogative rather than the common law. But either way Parliament will not be taken to have intended to make changes to the Royal Prerogative[27] or to the common law[28] unless it does so expressly or by necessary implication. As Lord Browne Wilkinson held in relation to the common law, in *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539 at 537: *"statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions. Parliament is presumed not*

[26] If the University is correct that *"governing documents"* means, for a University established by Royal Charter, its Charter and Statutes, then the OfS' findings under E2(i) are flawed for that reason alone. Condition E2(i) requires the University to have adequate and effective management governance arrangements to operate in accordance with its governing documents. The OfS has found that the University failed to follow its Scheme of Delegation and Organisation of the University documents. If they are not governing documents, then the findings under E2(i) fall away, irrespective of the position relating to the Visitorial Jurisdiction.

[27] *Bennion on Statutory Interpretation,* 25.12; *R (XH) v Secretary of State for the Home Department* [2018] QB 355 at [89].

[28] *Bennion on Statutory Interpretation,* 26.1, approved in *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16 at [31].

to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication". [29]

131. HERA 2017 does not oust the Visitor's jurisdiction:

131.1. There are no express words in HERA 2017 which oust the Visitor's jurisdiction.

131.2. The particular registration condition provided for by s.13(1) HERA 2017 might be taken necessarily to imply that the OfS may intrude on the Visitor's Jurisdiction if and insofar as necessary to give effect to such conditions. For example, the OfS' specific power to assess whether a provider's governing documents are consistent with the Academic Freedom PIGP (pursuant to s.13(1)(b) and s.14(7)) might be taken necessarily to imply that the University Visitor's jurisdiction is ousted to that extent.

131.3. However, the legal basis for condition E2(i) is solely s.5 HERA 2017 **[CB/30/514]**. This provides that *"(1) The OfS must determine and publish – (a) the initial registration conditions, and (b) the general ongoing registration conditions"*. Section 5 contains nothing to indicate that the OfS will necessarily have to devise and publish any condition that ousts the Royal Prerogative in relation to the jurisdiction of the University Visitor.

132. In its pre-action response **[CB/23/287-317]**:

132.1. The OfS contends that by s.5 of HERA 2017 (read with ss.2 and 7 Parliament has expressly abrogated the Visitor's jurisdiction (§83). That argument is misconceived because there is nothing in HERA 2017 that says anything about the visitorial jurisdiction, or which expressly abrogates the Royal Prerogative.

132.2. The OfS relies on the fact that "*Parliament imposed no restriction on the creation of conditions which impinge upon visitorial jurisdiction*" (§84). That may be so but given that the OfS must show that the Royal Prerogative has been ousted expressly or by necessary implication, the absence of reference to the visitorial jurisdiction is a point which counts against rather than in favour of it being ousted.

132.3. The OfS contends it has never been suggested that condition E2(i) is *ultra vires* and that such a challenge would be out of time (§85(a)). That is incorrect (see §§194 below). The grounds for judicial review arose when condition E2(i) was applied to the University in the FD.

132.4. The OfS contends that it is "*unlikely*" and "*absurd and anomalous*" that Parliament would have intended that the OfS could not regulate adherence to management and governance arrangements in governing documents in respect of providers who are subject to a visitorial jurisdiction (§84(b)). There is nothing absurd about Parliament leaving intact the jurisdiction of university visitors, when they have for centuries been

[29] See further Lord Hutton in *R (Rottman) v Comr of Police of the Metropolis* [2002] UKHL 20 [2002] 2 AC 692 para 75 *"It is a well-established principle that a rule of common law is not extinguished by a statute unless the state makes this clear by express provision or by clear implication"* cited with approval in the Supreme Court in *Fylde Coast Farms Ltd v Fylde Borough Council* [2021] UKSC 18 at §47, per Lord Brigg and Lord Sales.

entrusted to apply and enforce the internal rules of the foundation. And while governance arrangements are different between universities established by Royal Charter and those established by statute, the difference has long existed.[30]

132.5. The OfS argues that the inconsistent treatment of providers with visitorial jurisdiction and without visitorial jurisdiction would be anti-competitive and therefore contrary to one of the statutory purposes of HERA 2017 which is to promote a competitive higher education market (s.(2)(1)(c)) (§84(c)). However, there is no indication that Parliament was concerned that the role of university visitors was anti-competitive. Further, Parliament specifically envisaged that there may be different conditions of registration for different descriptions of providers (s.5(2)(a)).

133. None of the OfS' arguments engage with the *linguistic* nature of the necessary implication test: *"A necessary implication is not the same as a reasonable implication … a necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation"*: *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at §45, *per* Lord Hoffmann. The OfS has not come close to showing that the broad power to impose conditions under s.5 of HERA 2017 must be taken to have abrogated the jurisdiction of university visitors to apply and enforce the internal rules of the foundation.

F3. Ground 3(a)-(d)[31]: The OfS erred in law in its interpretation of condition E1

134. The OfS is empowered to impose a monetary penalty on the University where *"it appears to the OfS that there is or has been a breach of one of its ongoing registration conditions"* (s.15(1)). In order to make a finding of breach or impose a monetary penalty, the OfS must correctly direct itself as to the meaning of the ongoing conditions of registration.

135. There are four elements of condition E1. The OfS is empowered to determine whether the

135.1. *"Governing documents"* (plural, and objectively construed as set out above),

135.2. are *"consistent"* with

135.3. the Academic Freedom PIGP, defined in HERA 2017 (s.14(7) and s.85(1), (6)-(7))[32], and

135.4. the Freedom of Speech PIGP (*"the governing body takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider"*) as set out in the RF. Given that the Freedom of Speech PIGP requires an active step to be taken, the relevant question for the OfS is whether the provider's

[30] *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, §29, *per* Lord Woolf MR
[31] All four elements of ground 3 are separate and freestanding errors of law.
[32] To the extent that the OfS contends that its definition of academic freedom in the RF is contrary to or goes further than HERA 2017 definition, the RF would be *ultra vires*.

governing documents *"provide a suitable framework to ensure that that step* [*'reasonably practicable [steps] to ensure that freedom of speech within the law is secured within the provider*] *is identified, defined, taken, and can be shown to have been taken"* (RF, §426). Although the Freedom of Speech PIGP is not statutory, it falls to be objectively construed by the Court (*Tesco Stores Ltd v Dundee City Council* [2021] UKSC 13 [2012] PTSR 983 at §18, *per* Lord Reed).

136. The OfS has misdirected itself in relation to each element and/or failed to take relevant matters into account.

137. First, as to *"governing documents"*[33]:

137.1. Condition E1 requires the OfS to consider the provider's governing documents, i.e. the governing documents taken as a whole.

137.2. As the RF notes, in relation to the Free Speech PIGP, the OfS must consider whether the governing documents *"provide a suitable framework"*.

137.3. If (contrary to ground 1) the University's governing documents are broader than its Charter and Statutes, then the OfS erred by only considering the TNBEPS, Charter and Statutes. For example, the OfS did not consider the protective effect of any of the following (all of which were before the OfS when it made its decision):

137.3.1. The Freedom of Speech Code of Practice – which is incorporated into student and academic contracts, and provides *"every member of the University is expected to uphold the right to freedom of speech and the right to academic freedom"*. **[CB/16-18/254-262]**. The FOSCOP is the primary document through which universities discharge their duties under s.43 of the 1986 Act – on which the OfS contends that condition E1 is based – yet the OfS failed to consider the substance or the protective effect of the FOSCOP *at all* in the FD.

137.3.2. Student induction materials (see §16.3 above). **[SB/67.27/2591-2593]**.

137.3.3. The Code of Practice on Academic Titles (see §16.2 above). **[SB/39.8/1135-1139]**

137.3.4. The Academic Achievement and Development Guidance **[SB/37.3/765-776]**.

137.3.5. The University's Academic Freedom and Freedom of Speech Commitment Report **[SB/38.9/945-951]**.

137.4. The OfS accordingly (i) misdirected itself as to what condition E1 required, (ii) misdirected itself as to the relevance of documents other than the TNBEPS, Charter

[33] Assuming (contrary to ground 1 above) that HERA 2017 entitles the OfS to consider *"the documents … that describe any of the provider's objectives or values"*

and Statutes, and/or (iii) failed to have regard to a material consideration (*viz*. whether the relevant governing documents, taken together, provided a suitable framework).

138. Second, as to *"consistent",* s.14(1) empowers the OfS to assess whether, and the extent to which, a provider's governing documents are *"consistent with"* the PIGPs. The requirement to assess "consistency" is a statutory requirement. The relevant statutory context is as follows:

138.1. First, the ordinary natural meaning of *"consistent with"* is agreeing or according in substance or form (see Oxford English Dictionary, meaning 6 of *"consistent"*)

138.2. Second, Parliament is presumed to legislate in the knowledge of the common law. At common law, the test for assessing the consistency of a policy document against an underlying legal norm is well understood. It is the test expressed in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. As explained by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 *"the test set out in Gillick is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations"* (§41).

138.3. Third, Parliament is presumed to legislate to create an internally consistent and rational system of law, without overlapping rules or arbitrary distinctions.[34] To read the words *"consistent with"* (in respect of assessing a document against a principle) as allowing the OfS to impugn governing documents on the ground that people may misread the policy would create inconsistency, in that a university's policy could be (i) compliant with Article 10 (on the basis that it does not offend the *Gillick* principle) but (ii) non-compliant with condition E1, despite the substantive obligation (freedom of speech) being the same. It would also be inconsistent with Parliament's recognition of the *"need to protect the institutional autonomy of English higher education providers"* (s.2(1)(a)) which includes *"the freedom within the law to conduct their day-to-day management in an effective and competent way"*. Parliament thereby intended that universities should be free to act (including by proportionately limiting speech) so long as they do not act unlawfully.[35]

138.4. Fourth, *"it is a basic principle of legal policy that law should serve the public interest. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account"* (*Bennion on Statutory Interpretation* §26.2). As the Supreme Court has recognised, there is a

[34] *"It is a principle of legal policy that law should be coherent and self-consistent. This principle forms part of the context against which legislation is enacted and, when interpreting legislation, a court should take it into account" Bennion on Statutory Interpretation,* §26.8.

[35] This is *a fortiori* the case with Academic Freedom, which Parliament has recognised includes the freedom of institutions *"to determine the content of particular courses and the manner in which they are taught, assessed and supervised"* (see s.36(1)(a) HERA 2017).

strong public interest in ensuring that bodies exercising public functions are able to operate flexible and workable policies. As explained in *A* at §§39-40:

> *"There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court … There are further reasons which indicate that this is the appropriate standard. If the test were more demanding, there would be a practical disincentive for public authorities to issue policy statements for fear that they might be drawn into litigation on the basis that they were not sufficiently detailed or comprehensive. This would be contrary to the public interest, since policies often serve useful functions in promoting good administration. Or public authorities might find themselves having to invest large sums on legal advice to produce textbook standard statements of the law which are not in fact required to achieve the practical objectives the authority might have in view. Also, if the test were of the nature for which [counsel] contends, the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree. In effect they would have a revising role thrust upon them requiring them to produce elaborate statements of the law to deal with hypothetical cases which might arise within the scope of a policy. Such a role for the courts cannot be justified.*

139. The OfS' interpretation of its function (to assess whether government documents are *"consistent"* with the PIGPs) stands to undermine that public interest and impair the ability of universities to implement practical and effective policies. As explained by Mary Curnock Cook (the Former Chief Executive of UCAS) in her evidence (which the OfS has not disputed) given in response to the Provisional Decision:

> *"My estimation is that there will be very few universities in this country whose policies would withstand this level of technical scrutiny… the impact on the sector would be profound. University administrators would be forced to review and redraft their policies, including detailed definitions and providing such a level of detail (to avoid sanction) that policies become inflexible and unusable in the wide range of situations in which they might need to be deployed. Many universities may simply choose not to have policies which would otherwise be tools of good administration, for fear that they will lead to punitive fines and reputational damage because someone may misinterpret them. Universities use policies to provide guidelines of expectations, approaches and procedures that reflect a university's values and interpretation of its obligations. …The value of a policy is in being able to give general guidance that can be applied flexibly and in a common-sense way on the facts of an individual situation. There is a danger that they will become so long and convoluted that nobody understands them or reads them, and their purpose of thereby undermined."* **[SB/26/473-474]**.

140. The OfS failed to consider whether the governing documents were *"consistent with"* the principles. It did not apply the *Gillick* test. Instead, it assessed whether the TNBEPS may be misread or subjectively understood differently (see, for example, FD pg. 19 (§50), pg. 23-24 (§67)), contrary to s.14(1) HERA 2017.

141. Third, as to the Academic Freedom PIGP:

142. The OfS was required to ask itself whether the University's governing documents were consistent with the Academic Freedom PIGP (as set out in the RF and HERA 2017). The Academic Freedom principle protects academics from a specific form of harm – being in "*jeopardy of losing their jobs and privileges they may have at the provider"*.

143. The OfS recognised that none of the versions of the TNBEPS could (in light of Statute VII) have led to the dismissal (or other disciplinary sanction) of an academic (where their conduct falls within the protection of the academic freedom and freedom of speech principles) ([**CB/6/122]**) Accordingly, an academic in breach of the TNBEPS in those circumstances would not be *"in jeopardy of losing their jobs and privileges"*.

144. However, the OfS found that there was a possibility that the TNBEPS might lead to academics being subject to disciplinary proceedings and that, even though the proceedings would be resolved in the academic's favour (by virtue of Statute VII), the process might cause stress and anxiety. The OfS concluded that this was enough to establish a breach of the Academic Freedom PIGP **[CB/6/122-123]**.

145. The OfS thereby failed to ask itself the right question. It asked whether the TNBEPS contained *"anything that could potentially be relied on by the higher education provider ... to treat [the academic] less favourably than other academic staff, because of their lawful academic ideas and opinions"* (a question which relates to the wide concept of 'detriment' found in anti-discrimination law, where such ideas and opinions amount to 'protected beliefs') rather than whether it put academics *"in jeopardy of losing their jobs and privileges"* at the University (which is the question related to academic freedom which it had the power to ask).

146. Fourth, as to the Freedom of Speech PIGP, the relevant question for the OfS was whether the governing documents, taken as a whole, "*provide a suitable framework to ensure that that step* [*'reasonably practicable [steps] to ensure that freedom of speech within the law is secured within the provider*] *is identified, defined, taken, and can be shown to have been taken"*. Nowhere in the FD did the OfS ask or answer that question, in breach of published policy (the RF).

147. Fifth, the OfS also misconstrued the meaning of *"freedom of speech within the law"*. In the FD, the OfS interpreted this to mean that the University may not prohibit any speech unless that speech is otherwise a criminal offence or a civil wrong. The OfS confirmed that this is its approach in the FD in its pre-action response. That approach is wrong in law:

147.1. First, the right to *"freedom of speech"* at common law and under Article 10 (which are analogous) is capable of proportionate restrictions beyond than those that exist in criminal and civil law. That much appears to be accepted by the OfS. **[CB/23/303]**

147.2. Second, it is unclear from where the absolute right to *"freedom of speech"* asserted by the OfS is said to spring. A right to freedom of speech must have a source. The only sources of such rights in domestic law are capable of proportionate restrictions.

147.3. Third, the OfS' interpretation would have absurd consequences. It would mean, for example, that the University would be prohibited under the conditions of registration from restricting the following types of lawful speech through its policy documents or contracts:

147.3.1. Certain forms of plagiarism. Not all plagiarism is a copyright breach (for example self-plagiarism or plagiarism by consent) or fraud (where there is, for example, no intention to make a gain or cause a loss within the meaning of s.5 of the Fraud Act 2006).

147.3.2. Academics designing curriculums of poor quality or which is unrelated to the subject matter they are employed to teach (potentially in breach (i) of the University's contractual obligations to its students and (ii) of the ongoing 'B' conditions of registration).

147.3.3. The use of abusive or demeaning language (beyond that which relates to protected characteristics and is therefore prohibited by the EqA 2010). For example, it would not be a criminal offence or civil wrong for a lecturer to give feedback on an essay or presentation *"Nice essay, but your forehead is enormous"*, *"Excellent presentation, but you smell disgusting"* or start every lecture with *"Good morning you stupid uglies who will never amount to anything"*. On the OfS' approach, the University would be prohibited from intervening in these circumstances.

147.3.4. The use of abusive and discriminatory language where such use falls outside the protection of the EqA 2010. For example, there will be some visitors to the University with whom the University (either through its staff or students) does not have a relationship that is covered by the EqA 2010 (for example, independent contractors, and visiting speakers). This would also include the harassment of one student by another, which falls outside the EqA 2010.

147.3.5. The University would be prohibited from requiring students and staff to treat each other with courtesy and respect, which is essential for any organisation. Preventing universities from building inclusive environments is contrary to the OfS' own expectations regarding Access and Participation (which, for example, requires universities to consider how they can improve the mental health of their students – in respect of which the OfS specifically recognises the heightened risk of poor health faced by LGBT+ students, which includes trans students).[36]

147.3.6. Lecturers teaching in a language other than the published language of instruction (e.g. giving all engineering lectures in Latin) or through an

[36] See Regulatory Notice 1, §10, and OfS' Equality of Opportunity Risk Register. The OfS recognises that *"students reporting a sexual orientation of lesbian, gay, bisexual or 'other' and students reporting their gender identity as not the same as the sex registered at birth"* to be at risk group of inequality of opportunity in higher education in relation to four identified risks.

inappropriate medium (e.g. teaching all computer science classes through the medium of mime).

147.3.7. The University would also be prohibited from imposing any 'rules of engagement' in relation to debates, mock trials or other public speaking. This would create a paradox in that, for example, the University would have to allow Debating Team A shout down Debating Team B, so as to afford absolute protection to Debating Team A's free speech rights, even though the shouting down would impair Debating Team B's free speech rights.

147.4. The OfS' response to this in pre-action correspondence is to say that not banning these forms of lawful speech may not necessarily be a *"reasonably practicable"* step. But this is wrong: (i) reasonable practicability relates to whether the University is <u>able</u> to permit the speech, not a judgment-call on whether it is necessary or proportionate to do so; and (ii) it is <u>always</u> practicable <u>not</u> to do something. In any event, whatever the OfS says in pre-action correspondence, its clear position in the FD was that it is a reasonably practicable step to ensure that policy documents do not capture lawful speech. The OfS' approach would therefore prohibit universities from taking any action that would impair lawful speech to any extent, no matter how undesirable the consequences (see further §151A below).

148. <u>Fifth,</u> on the OfS' approach, *"freedom of speech within the law"* in the 1986 Act (on which condition E1 is based) would mean something different from *"freedom of speech within the law"* in the 2023 Act, even though the wording is identical. That is contrary to the OfS' published position. On the University's approach, there is no inconsistency: both Acts protect the right to freedom of speech as conferred by Article 10.[37]

149. <u>Sixth</u>, the OfS' approach would create inconsistency and confusion. On the OfS' interpretation, the University's policies could be perfectly compliant with Article 10 and the common law right to freedom of speech (by not inducing disproportionate interferences, *per R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931)) but could nevertheless breach condition E1.

150. The inconsistency would also abound between different conditions of registration. For example, under the new ongoing condition of registration E6 (which comes into force on 1 August 2025), the OfS specifically envisages that it is (in principle) <u>compatible</u> with the concepts of freedom of speech within the law and academic freedom for a university to impose <u>reasonable</u> restrictions on speech that is not contrary to civil or criminal law (§§58):

> *"The OfS recognises that the Equality Act 2010 does not currently give rise to legal obligations for a higher education provider to address conduct by a student that amounts*

[37] The OfS' position on what speech is lawful or unlawful, and the extent to which such speech can be encouraged or limited, is also inconsistent between the FD and other published positions of the OfS. For example, the OfS has endorsed the adoption by universities of the International Holocaust Remembrance Alliance definition of antisemitism, which includes *"claiming that the existence of the State of Israel is a racist endeavour"*. In *Miller v University of Bristol* the belief that *"an ideology that asserts that a state for Jewish people ought to be established and maintained in the territory that formerly comprised the British Mandate of Palestine is inherently racist"* was held to be a protected belief for the purposes of the Equality Act 2010.

to harassment. One of the aims of this condition is to create obligations for higher education providers in respect of dealing with harassment that goes further than the existing law, but only in so far as that does not involve doing things that could reasonably be considered to have the object or effect of restricting freedom of speech within the law or academic freedom." **[SB/22/226-248]**

151. Condition E6 has not changed the meaning of condition E1. If the approach in the FD were correct (such that all restrictions on freedom of speech which go further than criminal or civil law breach condition E1[38]), then there would be a contradiction between conditions E1 and E6.

151A. Seventh, since this claim was issued, the OfS has tried to resolve this contradiction by claiming that its inflexible (and incorrect) definition of *"freedom of speech within the law"* is attenuated by its more flexible (and convoluted) definition of *"reasonably practicable"* (see §§89A-89B on RA24 above). As to which:

151A.1. The University's primary argument, as set out above, is that the OfS has misunderstood the meaning of *"freedom of speech within the law"* and *"reasonable practicable"*. The University submits that *"freedom of speech within the law"* has the same meaning as Article 10 and *"reasonably practicable"* relates to whether it is feasible to take a step, with regard to factors such as resources and enforceability. The OfS' approach is internally inconsistent and unworkable. For example, the OfS accepts that speech will not be *"within the law"* (the first stage in its three-stage analysis) if it would breach the common law duty not to misuse private information, which mirrors the protection of Article 8. However, the OfS says the Article 8 rights of students to be protected from bullying are not relevant to the first stage but are relevant at the second stage of the analysis (the *"reasonably practicable"* stage). There is no explanation for this inconsistency in the approach to the protection of Article 8 rights. Such a convoluted and confusing approach cannot have been intended by Parliament.

151A.2. In any event, in the FD, the OfS did not take the approach that it now says should be taken to give effect to *"reasonable practicability"*. In the FD, the OfS took the view that any restriction on speech that went beyond existing civil or criminal law was not reasonably practicable. The OfS now accepts that such an approach is wrong in law.

152. This is highly material to the TNBEPS. On its proper interpretation, the Disciplinary Statement is unlikely to capture speech that is not already prohibited by the criminal law and, to the extent it does so, it requires the restrictions to be proportionate. As to this:

152.1. The Disciplinary Statement makes it a disciplinary offence to perpetrate transphobic abuse, harassment and bullying. In the 2023 version of the TNBEPS, the Disciplinary Statement was made subject to (i) an explicit harm threshold being met (namely, that

[38] Noting that the OfS' clear position in the FD is that making clear that policies are only intended to capture or limit speech which is otherwise unlawful is a *"reasonably practicable step"*.

the abuse, harassment or bullying in question "*could reasonably be expected to cause distress or fear among trans people*") and (ii) the Safeguarding Statement.

152.2. In most cases where a person perpetrates transphobic abuse, harassment or bullying that could reasonably be expected to cause distress or fear among trans people, that speech would constitute an offence contrary to s.5 of the Public Order Act 1986. That provision makes it an offence to use threatening or abusive words or behaviour (or display any writing, sign or other visible representation) within the hearing or sight of a person likely to cause harassment, alarm or distress thereby.

152.3. The OfS is right to point out, at §63 of its pre-action response, that an accused would have a defence under s.5 if they had "*no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress*" or if their conduct was reasonable in all the circumstances. However, the OfS is wrong to say that these defences are not available under the Disciplinary Statement. The Safeguarding Statement (and the University Statutes) would plainly operate to protect somebody who (i) was unaware of any person within hearing or sight who was likely to be caused harassment, alarm or distress, or (ii) whose conduct was reasonable in all the circumstances (indeed, the reasonableness defence under s.5 must be read so as to give effect to the requirement of proportionality under Article 10, *per R v Hicks* [2023] EWHC 1089 (Admin)).

152.4. The OfS is also correct that no offence is committed under s.5 "*where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling*". However, insofar as the Disciplinary Statement is concerned with bullying and harassment (which, on an objective reading, require a course of conduct), such behaviour would be an offence contrary to s.2 of the Protection from Harassment Act 1997. The s.2 offence can be committed inside or outside of a dwelling.

152.5. Insofar as the Disciplinary Statement is concerned with isolated incidents of abuse that occur within a dwelling, these may be captured by other criminal offences, such as: (i) common assault (intentionally or recklessly causing someone to fear immediate violence) contrary s.39 of the Criminal Justice Act 1988; (ii) battery (the unlawful infliction of physical contact) also contrary s.39 of the Criminal Justice Act 1988; (iii) using a public communications network to send an indecent, obscene, menacing, or grossly offensive message, contrary to s.127 of the Communications Act 2003; or (iv) sending a letter, electronic communication or article that conveys and indecent or grossly offensive message, contrary to s.1 of the Malicious Communications Act 1988.

153. Where an isolated incident of transphobic abuse occurs within a private dwelling and does not constitute one of the criminal offences specified above, it is unlikely to be caught by the Disciplinary Statement. This is because, in most such cases, the person would be protected by the Safeguarding Statement. However, the University accepts that it may be possible to conceive of circumstances in which an isolated incident of transphobic abuse within a dwelling

would be captured by the Disciplinary Statement, where that abuse would not constitute a criminal offence. The University makes two points about this.

153.1. First, the category of conduct that is prohibited under the Disciplinary Statement and not prohibited under the criminal law is therefore extremely narrow. Any restriction of lawful free speech (which would not in any event occur, because of the University Statutes) is therefore liable to be very limited and capable of proportionate justification. The OfS has not turned its mind to this or considered whether it was reasonably practicable (as it now interprets that term) for the University not to prohibit transphobic abuse that occurs in private dwellings, having regard, in particular, to its admission that universities may be required to go beyond existing prohibitions in criminal law to protect the Article 8 rights of students. The FD was flawed by the complete absence of analysis on this point.

153.2. Second, it is unclear whether or why the OfS considers that it is rational to exercise its discretionary enforcement powers to seek to protect (in absolute terms) this narrow potential category of lawful speech – that is, abuse in domestic settings.

F4. Ground 4: The OfS erred in law in its interpretation of the TNBEPS and the University Statutes and/or acted irrationally in its findings in respect of them

F4.1. Legal framework

154. The TNBEPS is a lower-level policy statement. Its construction is an objective question for the Court, construed according to the ordinary principles of policy interpretation: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 [2012] PTSR 983.[39] In order to come to a lawful decision on whether the TNBEPS was *"consistent"* with the PIGPs, the OfS had to correctly interpret the TNBEPS: *"the [decision-maker] must proceed on a proper understanding of the Guidance … the [decision-maker] misinterpreted … the guidance, as, as a result, erred in concluding that its decision … was consistent with the guidance"* (*R (Britwell Parish Council) v Slough Borough Council* [2019] EWHC 988 (Admin). A misinterpretation of the TNBEPS is an error of law.

155. Under the ordinary principles of policy construction, the policy must be interpreted objectively, having regard to the language used and the audience to which the policy is addressed: *R (Cotter) v NICE* [2020] EWHC 435 (Admin) at §47. A drafter of a policy is *"not required to imagine whether anyone might misread the policy and then draft it to eliminate that risk"*.[40] If a policy contains a discretion, it should be assumed that discretion will be exercised lawfully unless the contrary context appears. A policy must be interpreted with regard to its purpose, including the need for policies to be sufficiently flexible and workable: *A* at §47.[41]

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[39] See further *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074 at §56.
[40] *R (A) v Secretary of State for the Home Department* at §34
[41] "*it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldly and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much will depend on the particular context in which it is used"*

F5.2. The OfS's approach

156. The OfS correctly noted that the TNBEPS applies to staff through the incorporation of the Disciplinary Policy into academic contracts. Statute VII.7 requires that the Disciplinary Procedure (among others) be construed in *every case* to give effect to the guiding principles under Statute VII.6, which include academic freedom and freedom of speech. The OfS correctly noted that Statute VII.7 protects the principles of freedom of speech and academic freedom, such that no breach of the TNBEPS could lead to an adverse outcome for an academic for exercising those rights, i.e. loss of their job or privileges.

157. However, the OfS concluded that the safeguarding effect of Statute VII.6 and 7 was insufficient for three reasons:

157.1. First, because academics could still face disciplinary proceedings (even if they would not be upheld – *"the effect of Statute VII is **not** to rule out the possibility of disciplinary proceedings being brought in the first place"* [**CB/6/122**]).

157.2. Second, the time taken to assess whether disciplinary proceedings should be brought would mean that *"the affected staff member could potentially suffer the detrimental effects of being subject to disciplinary proceedings themselves, including anxiety, stress and uncertainty*" **[CB/6/123]**.

157.3. Third, *"staff and students cannot reasonably be expected to understand"* that the University operates a vertical hierarchy of norms (i.e. Charter, Statutes, then Regulations) *"where such 'hierarchy' is not clearly set out on the face of the provider's governing documents or elsewhere"*, with the result that they could self-censor despite the protective principles set out in the Charter and Statutes **[CB/6/121]**.

F5.3. Submissions

158. As set out under ground 3 above, the initiation of disciplinary proceedings would not infringe the Academic Freedom PIGP (which is concerned with the loss of jobs and privileges). Further or alternatively, the OfS misinterpreted the policy framework relating to the circumstances in which disciplinary proceedings could be instituted for an alleged breach of the TNBEPS:

159. As explained in the University's PD Representations, the Disciplinary Procedure has an informal resolution stage, an investigative stage and a disciplinary proceedings stage. Following an investigation (if one is needed following informal resolution), there are several possible outcomes, including (i) no case to answer, (ii) the arrangement of a disciplinary hearing (if the alleged misconduct could not result in dismissal), or (iii) the convening of a disciplinary panel on the recommendation of the Vice-Chancellor (if the alleged misconduct could potentially lead to dismissal) **[CB/15/240-241]**. In every case, the decision-making process is required to give effect to the principles of freedom of speech and academic freedom pursuant to the University's Statutes. Accordingly, the proper interpretation of the University's policy framework is that a complaint would be investigated and dismissed with no case to answer where necessary to give effect to the principles of freedom of speech and academic freedom.

160. There is no reason to suppose that staff or students would fail to understand the policy framework, objectively construed. As explained in the (unchallenged) evidence of Ms Potts submitted as part of the PD representations, *"The University operates under a vertical hierarchy of norms which starts with the Charter, then the Statutes, Regulations, policies, operational and supporting documents, in that order of priority. This is a form of governance structure which is very familiar to me and has been replicated across the Universities I have worked in. It is the common governance structure in the vast majority of pre-1992 chartered institutions."* **[SB/29/498]** Any reasonable staff member or student considering to 'self-censor' would be familiar with the Disciplinary Procedures and Statutes, which prohibit any disciplinary proceedings being brought because of the expression of lawful ideas and opinions. In any event, the OfS erred in assessing the risk that the policy framework (as properly interpreted) would be misunderstood.

161. Further or alternatively, even if a mere investigation were thought inconsistent with the PIGPs, the 2023 version of the TNBEPS provided that *"For the avoidance of doubt, nothing in this Policy Statement should be taken to justify* [a breach of academic freedom] *…nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech"*. The OfS considered that this qualification was sufficient for the purposes of the Academic Freedom PIGP, but insufficient for the purposes of the Freedom of Speech PIGP. It considered the qualification to be insufficient for the Freedom of Speech PIGP because it interpreted the policy as providing that the restrictions in the TNBEPS (on transphobic abuse etc) were necessarily regarded as proportionate restrictions. That was a misinterpretation of the policy. On a plain reading of the TNBEPS, the qualification (that nothing in it should be taken to justify disproportionate restrictions on freedom of speech) meant that nothing in the TNBEPS should be taken to justify disproportionate restrictions on lawful speech.

F5. Ground 5: In deciding to make a finding of breach of condition E1, the OfS failed to have regard to mandatory relevant considerations and/or acted irrationally

162. The University submits that the OfS failed to take into account mandatory relevant considerations and acted irrationally in five ways, each of which is an error of law.

162.1. The OfS was obliged to consider whether a finding of breach was necessary to achieve compliance with the conditions of registration. This was a mandatory relevant consideration that it failed to address.

162.2. The OfS was obliged to consider the effects of its approach on competition between providers. It failed to do so.

162.3. The OfS irrationally concluded that the Amended Stereotyping Statement simultaneously complied with the academic freedom PIGP and breached the freedom of speech PIGP, given it only applied to freedom of academics to set the curriculum.

162.4. The OfS irrationally concluded that a merely possibility of being subject to an investigation (as opposed to a disciplinary hearing or an adverse disciplinary outcome) rendered the TNBEPS, read with the Statutes, inconsistent with the PIGPs.

162.5. The OfS irrationally concluded that the *"likely impact"* of the TNBEPS on students was *"significant and severe"* and that the TNBEPS *"would have reduced the lawful opinion and debate that academics could teach and to which students were exposed."*

F5.1. Error one: failure to consider steps taken to remedy the alleged breach

163. First, whether a finding of breach was necessary to achieve compliance with the conditions of registration was a mandatory relevant consideration. The OfS had to address that factor before it could make a rational decision. This is clear from:

163.1. HERA 2017, which requires the OfS to have regard to the principles of best regulatory practice, including the principles that regulatory activity should be proportionate and *"targeted only at cases in which action is needed"* (s.2(1)(g)(ii)).

163.2. The RF (*"The OfS will consider … whether a particular intervention would be effective in mitigating the risk or remedying the breach"*) (RF, §167). **[CB/30/494-495]**

163.3. Regulatory Advice 15 (*"The primary purpose of using our enforcement power is to ensure that a provider takes necessary actions to comply with its conditions of registration"*) (RA15, §§73-75). **[SB/20/180]**

163.4. The FD, in which the OfS recognised that it was relevant whether the findings of breach would *"incentivise compliance"* by the University (and, in large part, justified the findings of breach because it thought that the findings would incentivise compliance) e.g. FD pg. 49 (§32), 51 (§41-42), and 54 (§59-61). Indeed, the OfS went so far as to judge (and hold it against the University) that *"some of the issues with the TNBEPS which gave rise to the breach of condition E1 continued to exist as at 20 March 2024, and therefore it is possible that the breach continued beyond that date and could occur again"* (FD, pg. 54 (§61). **[CB/6/156]**

164. Second, in order rationally to consider what impact the findings of breach would have on compliance, the OfS needed to consider whether the University was compliant with the conditions of registration by the time of the FD. Without this, the OfS could not make a sufficiently informed decision on the effect of adverse findings on the University's compliance.

165. Third, the OfS did not do this. It expressly reserved its position on compliance at the time of the FD, despite the University's amendments to the TNBEPS to address the concerns expressed in the PD and the University's requests that the OfS should decide whether the amendments remedied the concerns expressed in the PD.

166. Fourth, that failure was material. Even if (contrary to the grounds set out above) the OfS's criticisms of the 2023 TNBEPS were well-founded, those concerns were adequately addressed by the 2024 changes to the TNBEPS (see §23 above), alone and together with:

166.1. The amendments to the FOSCOP in response to the PD, in May 2024 **[CB/16/254-57**];

166.2. The amendments to the Student Code of Conduct to oblige students, as a matter of contract, to uphold the principles of academic freedom and freedom of speech **[SB/76/2954]**[42]; and

166.3. The amendments to the Staff Disciplinary Regulation to include that *"This Procedure applies to all University staff and should be applied in accordance with … the Higher Education (Freedom of Speech) Act 2023."* **[SB/77/2957-2979]**

167. The primary purpose of the OfS' powers is to secure regulatory compliance. The OfS erred in shutting its eyes to current compliance. This vitiated the decision to make a finding of breach.

F5.2. Error two: failure to consider/irrational treatment of anti-competitive nature of approach

168. The OfS was obliged to have regard to the need to encourage competition between English higher education providers: s.2(2)(c) of HERA 2017.

169. In her covering letter to the University's representations submitted in response to the PD, the Vice-Chancellor wrote *"The reality is that similar statements to the Sussex TNBEPS were adopted across the sector …There is no evidence that any or more harm relating to the TNBEPS has occurred at Sussex than has occurred at any other University under the OfS' jurisdiction that has adopted a similar statement. Yet, those other universities will not be harmed, whereas Sussex will. That is fundamentally inconsistent, unfair, and stands to mislead students, which cannot be the intention, or action, of the regulator."* The University provided the OfS with policies from other Universities which are substantially similar to the TNBEPS **[SB/38.3/820-935]**. The University also provided evidence from Mary Curnock Cook CBE, a leading expert in higher education. Her (unchallenged) evidence was:

> *"the University stands to be significantly harmed in the recruitment market for doing something many of its competitors do, whereas those competitors will not face the same adverse consequences. In my view, the scale of the impact on the University's ability to recruit students is potentially very significant."* **[SB/26/466-475]**.

170. The anti-competitive effects of the OfS' approach are plain and were squarely put to the OfS by the University in its PD Representations.

171. In the FD (pg. 87 §§12-13) the OfS addressed this as follows: *"The OfS has had regard to the University's representation that the OfS has not attempted to address the principle set out in HERA section 2(1)(c). However, although it has had regard to this principle, the OfS considers that the matters relating to academic freedom and freedom of speech that are engaged in this investigation are of less relevance to the need to encourage competition between providers than they are to the other principles set out in the section of HERA detailing the OfS' general duties."* **[CB/6/189]**

172. The OfS thereby indicated that it had regard to the need to encourage competition but considered that this was not relevant to its decision. For the reasons set out above, that was a misdirection: it is an error of law to characterise a factor as irrelevant when it is in fact relevant.

[42] The obligation to uphold freedom of speech and academic freedom was in any event already incorporated into Student Contracts through the FOSCOP.

Alternatively, if the OfS considered that the need to encourage competition was relevant to its decision, it failed to give adequate reasons to explain (a) its conclusions about the impact of its decision on competition between providers or (b) why it considered that impact to be justified. In the absence of such reasons, its treatment of this factor was irrational.

173. Further or alternatively, the OfS failed to consider (or failed rationally to consider) the need to encourage competition when it decided to take a more lenient approach to other universities with similar policies. The OfS' difference in treatment between universities acting in the same manner has been compounded by the OfS' actions since the publication of the FD (summarised at §§91.3 above).

F5.3. Error three: irrational conclusion concerning the freedom of speech of academics

174. The OfS correctly accepted that the Amended Stereotyping Statement read with the Safeguarding Statement protected Academic Freedom because of the words *"nothing in this policy statement should be taken to justify sanctioning academic staff"*. However, at the same time it found that the policy breached the Freedom of Speech PIGP because the words *"Nor should this policy statement be taken to justify disproportionate restrictions on freedom of speech"* were inadequate. That was irrational:

174.1. First, there was no distinction between the effect of the words *"nothing in this policy statement should be taken"* and *"nor should this policy statement be taken"*. The meaning is equivalent. Properly interpreted, the TNBEPS means that to the extent there is a conflict between the Amended Stereotyping Statement and Freedom of Speech, the latter prevails.

174.2. Second, in any event, the Stereotyping Statement related to the design of the curriculum. This part of the policy therefore concerns academics, because the curriculum is designed by academics. Once it was accepted that the statement was consistent with the academic freedom PIGP, it followed that it was also consistent with the freedom of speech of academics, and it was irrational to conclude that the Stereotyping Statement breached the freedom of speech PIGP. And if a statement concerning the design of the curriculum was consistent with the academic freedom and freedom of speech PIPGs in relation to academics, there was no rational basis for concluding that it would impair the freedom of speech rights of anyone else.

F5.4. Error four: irrational conclusion concerning the significance of an investigation

175. As set out under ground 5 above, the TNBEPS, read with the Statutes, did not provide for members of academic staff to be subjected to adverse disciplinary outcomes (which is accepted by the OfS) or to be subjected to disciplinary proceedings if that would breach the academic freedom or freedom of speech PIGPs. However, the OfS went on to conclude that the TNBEPS read with the Statutes was inconsistent with the PIGPs because it did not eliminate the possibility of an academic being subject to an *investigation*.

176. It was irrational for the OfS to conclude that the *mere possibility of being subject to an investigation* breaches the PIPGs, and/or that the allegedly problematic content in the TNBEPS was causative of the need for investigations. Even a policy that only prohibited criminal speech would have to be applied to different factual situations. A decision-maker would have to work

out if, on the facts, the speech in question was criminal.[43] That might be a difficult and sensitive question – and will always be fact-sensitive. Accordingly, even an absolutist approach to freedom of speech would require an investigation to be conducted.

F5.5. Error five: irrational conclusion concerning significant and severe impact of alleged breach

177. To be rational, a judgement must be supported by evidence which justifies the conclusion.[44]

178. In its analysis of the intervention factors, the OfS concluded (FD pg. 38-39) **[CB/6/140-141]** that the impact of the alleged breach of condition E1 was *"significant and severe"* because (inter alia):

    178.1. The TNBEPS captured speech which did not amount to a criminal offence or civil wrong, which the OfS treated as dispositive on the question of harm.

    178.2. The TNBEPS created the potential for staff and students to self-censor.

    178.3. An example of that potential was Dr Stock's evidence.

179. Those judgments lacked proper evidential foundation:

    179.1. It was irrational to treat the fact that the TNBEPS captured speech which did not amount to a criminal offence or civil wrong as dispositive of the question of harm. There would only be evidence of harm having occurred if there was evidence that the wording of the TNBEPS had actually limited such speech in practice. A potential but not actual impact on expression by staff and students is a risk of future harm, not evidence of actual harm.

    179.2. The only evidence of actual harm came from Dr Stock **[SB/33-34/568-591]**.[45] As to which:

        179.2.1. Dr Stock left the University in late 2021. She did not give evidence of any harm arising from the 2022 and 2023 versions of the TNBEPS.

        179.2.2. Dr Stock's evidence only went to the Positive Representation Clause (see first statement §§23-24, second statement §5). She gave no evidence of harm arising from any other part of the TNBEPS.

        179.2.3. Dr Stock's evidence is that her *"skipping over topics in my own teaching"* (noting that in her first Witness Statement Dr Stock accepts that she did *not*

[43] This much appears to be accepted by the OfS' Director of Free Speech, Arif Ahmed, who was reported in the Guardian as saying *"I'd be reluctant to say any particular phrase is always going to be acceptable or always not, because with many of these things it's going to be depend [sic] on a variety of factors"*.

[44] See, for example, *Grafton Group (UK) Plc v Secretary of State for Transport* [2016] UEWCA Civ 561 [2017] 1 WLR 373 at §30; *Nzolameso v Westminster City Council* [2015] UKSC 22 [2015] PTSR 549 at §31, *R (Laws) v Police Medical Appeal Board* [2010] EWCA Civ 1099 [2011] ICR 242 at §20.

[45] The OfS confirmed in correspondence that it only relied on paragraphs 23, 24, 26, 37 and 41 of Dr Stock's First Statement for the purposes of the PD. For the purposes of the FD, the OfS confirmed in the FD is relied on those paragraphs only of Dr Stock's first statement and her second statement in its entirety **[CB/6/108]**.

stop expressing gender-critical ideas in her teaching) occurred *partly* because of the Positive Representation Clause, and partly because of other matters over which the OfS does not claim to have jurisdiction – namely the allegedly *"oppressive climate"* at the University (see, for example, Second Statement, §8, §18).

179.2.4. Dr Stock's evidence, read fairly, is that any chilling effect on her (because of the Positive Representation Clause in the 2018 TNBEPS) was minimal. Gender-critical texts *were* included in her reading lists and she *did* draw students' attention to her gender-critical writing. She *did* express some gender-critical ideas in teaching. She published and spoke publicly about her gender-critical beliefs, and engaged in debate and discussion about sex, gender and trans issues within the University and outside. The height of her evidence is that she cannot *recall* teaching some gender-critical texts in lectures.

179.2.5. Dr Stock's evidence is contradicted by evidence provided by the University that Dr Stock was reassured in informal meetings that she was free to express her views and teach as she wished, and that she would not be subject to disciplinary proceedings **[SB/27/480-482]**. Dr Stock did not contradict that evidence – her evidence was that she could not remember such meetings. The OfS failed to determine whether such reassurances were given.

180. In those circumstances and having failed to interview any staff or students (or consider the NSS evidence), the OfS could not rationally conclude that the TNBEPS had a significant and severe effect on students.

F6. Ground 6: The investigation process was procedurally unfair and/or gave rise to an appearance of bias

F6.1. Procedural unfairness

181. The twin pillars of natural justice are procedural fairness and an absence of bias (whether actual or apparent). What fairness requires is driven by context. The context of the OfS's investigation and decision is as follows.

181.1. First, the OfS recognises that its system of principles-based regulation means that a relationship of open, constructive dialogue is an essential aspect of fairness to providers (see §68 above). Principle rather than rule-based regulation means, in the absence of such dialogue, providers may be taken by surprise. The RF states that the fact of submitting governing documents to the OfS is likely to indicate compliance with condition E1, and therefore envisages that the OfS will engage with providers constructively if there are concerns about the contents of their governing documents.

181.2. Second, a finding of breach has the potential to significantly damage the reputational and financial standing of the University, decrease student numbers, embolden the harassment and abuse of transgender people, and threaten the standing of

qualifications obtained at the University [**SB/52/1884-1885**]. There is no right of appeal in relation to decisions on breach.

182. The context therefore calls for high standards of procedural fairness. The OfS failed to meet those standards. The OfS failed to give the University a fair and effective opportunity to make representations while the decision was at a provisional stage – both on the new evidence and the new basis for the FD. The University asked for a further opportunity to comment on any new evidence or substantial changes.[46] The OfS responded to this request by letter on 28 June 2024, where it represented that it would *"grant such periods of time for representations as we consider reasonable with regard to any relevant factors"*. **[CB/20/327]**. In fact the University was given no time to do so at all and was not given any reasons why not. In particular:

182.1. The key evidence relied on by the OfS to reject the University's submissions on chilling effect (the second witness statement of Dr Stock) was produced by the OfS itself[47] and not disclosed to the University. In pre-action correspondence the OfS has claimed that the reason for non-disclosure is that the second witness statement contained *"no new evidence"* **[SB/67.53/2822]**. This is demonstrably incorrect on the face of the FD: the second witness statement was the only evidence used to rebut the University's evidence on chilling effect **[CB/6/144-147]**. It was responsive to the University's evidence, not repetitive of Dr Stock's first witness statement.

182.2. The basis of the decisions in the FD is substantially different from the PD, yet no opportunity to make representations on those matters was given to the University. By way of example, in the PD, there was no analysis of the meaning of the Statutes and their significance to the interpretation of the TNBEPS– the OfS merely took the view that the Statues were insufficient because they were not reproduced in the TNBEPS **[SB/51/1707]**. By contrast, in the FD, the Statutes were found to have been insufficient for a different reason – namely that they do not rule out the possibility of investigations (and associated stress and anxiety with such investigations) in relation to speech which may (once considered in its context) be lawful. A further example is the OFS' definition of chilling effect – which in the FD is defined as the *"potential"* for self-censorship (see §§96 above), whereas in the PD the OfS judged that staff and students were *"likely to have self-censored"* **[SB/51/1681]**.

183. Denying the University those opportunities was procedurally unfair and/or breached the University's legitimate expectation that it would be afforded a reasonable opportunity to respond to new points.[48]

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[46] PD Representations, §308, 567 **[SB/23/249-436]**

[47] The OfS has not disclosed who wrote Dr Stock's witness statement. On 27 July 2024, Dr Stock tweeted *"Been waiting 3 years for result of @officeforstudents investigation. Gave deposition last year. Have been interviewed by head of OFS. I am hearing that Sussex were about to receive a massive fine. It would be marvellous to find out whether pausing of Higher Education Act is related"*.

[48] *"if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict them …"* (*Kanda v Malaya)* [1962] AC 322 at 337.

F6.2. Apparent bias and/or predetermination

184. An appearance of bias will arise where *"the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [OfS] was biased"* (*R (United Cabbies Group (London) Ltd) v Westminster Magistrates Court* [2019] EWHC 409 (Admin) at §36(v)). This impression may arise where the Court considers that *"a fair-minded and informed observer would think that the evidence gives rise to a real possibility or risk that the decision-maker had pre-determined the matter, in the sense of closing his mind to the merits of the issue to be decided"* (*R (Electronic Collar Manufacturers Association) v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) [2020] ACD 4 at §140. The relevant facts in this case include:

184.1. The OfS refused to consider whether the University had now addressed its concerns, despite the *"primary purpose"* of the powers it was considering exercising being to secure compliance. The OfS deliberately closed its eyes to an obviously relevant factor.

184.2. The OfS refused substantively to discuss the investigation with the University despite the University's nine requests to do so.

184.3. The OfS unilaterally cancelled the only substantive meeting planned with the University because the University would not unquestionably submit to the OfS' judgment.

184.4. The OfS investigation team – which drafted the decisions that were seemingly rubber stamped by the USCEC – appears to have met with and taken witness statements from Dr Stock, the second of which was not disclosed to the University. Dr Stock's statements were taken to justify the findings that the OfS was already minded to make. In particular, the OfS contends that the communications between its investigation team and its legal team with Dr Stock are subject to litigation privilege (see correspondence of 23 October 2025). This means that either (i) those communications and evidence were drafted with the dominant purpose of defending the OfS' position in these judicial review proceedings, or (ii) the OfS treated the investigation as an adversarial process in which the OfS sought to defend its position rather than conducting an open-minded administrative decision-making process. In either case, this indicates that the OfS had impermissibly closed its mind on the issues to be decided.

184.4A The OfS did not take statements from anyone else, consider contradictory evidence, or give reasons for rejecting the evidence submitted by the University.

184.5. Dr Stock's second statement was finalised on 16 December 2024, five working days before the investigation team sent a finalised draft final decision to the UESC. The University infers that the investigation team had already come to draft final judgments in advance of drafting the evidence to justify those judgments and failed to approach this matter with an open mind. The University will seek disclosure of the dates on which drafts of the decision were written, and whether the authors of the

draft decisions and the interviewer and authors of Dr Stock's witness statements are the same or within the same OfS team.

184.6. The summary of the University's evidence given to the decision-makers was incomplete and argumentative, and sought to justify the investigation team's actions. The chronologies of relevant changes to the TNBEPS and decision-making did not include relevant information that post-dated the PD.

184.7. The University was singled out for investigation, punishment, and monetary penalty, despite many other Universities operating substantially similar policies. By contrast, those other Universities have been approached with a tone of open dialogue. The University understands that the OfS has been notified repeatedly about 'Bible Colleges', which receive public funds and are subject to regulation by the OfS, and which are plainly in breach of the freedom of speech and academic freedom principles. In particular, these colleges exist for the purpose of promoting and advancing the Christian faith and their governing documents require students to sign statements affirming their Christian beliefs. The University understands that the OfS has taken no action against them.

184.8. ~~The University understands that a key staff member of the OfS,~~ Dr Arif Ahmed led the investigation team from October 2024, in particular when the second witness statement was collected from Dr Stock (and not disclosed to the University) and when the investigation team decided what evidence to present to decision makers. ~~, may have a pre-existing relationship with Dr Stock.~~ Correspondence disclosed by the OfS on 23 October 2025 shows that, by the time he was appointed to the investigation team, (i) Dr Ahmed had expressed firm views (including to Dr Stock herself) that Dr Stock had been mistreated at the University (and the OfS later concluded that its FD *"vindicated"* Dr Stock[49]) (ii) had strongly expressed the view that the University's diversity and equality policies and training (i.e. matters of central relevance to the issues in the investigation) were inappropriate; and (iii) Dr Ahmed and Dr Stock were clearly aligned and working together on issues concerning gender critical feminism and freedom of speech, were on warm and friendly terms, offering each other mutual support, invitations, and congratulations. The OfS has said in correspondence that Dr Ahmed has not met Dr Stock since being employed at the OfS. ~~It has provided no response to the wider allegation, nor commented on the nature of their relationship (if any) prior to Dr Ahmed's employment.~~

185. The conduct of the OfS would lead a fair-minded and informed observer to conclude that there was a real possibility of bias, including through pre-determination.

G. PROCEDURE AND ANCILLARY MATTERS

[49] In its Final Decision to publish the FD, the OfS considered it relevant that publication of the FD would be *"likely to make Professor Stock feel vindicated (and may also vindicate her in public perception…this may also positively impact her future employment opportunities."*

186. The University applies for expedition and directions as set out in the attached application and submissions. Other ancillary matters are addressed below.

G1. Forum

187. The University has a right to appeal to the FtT against the decision to impose a monetary penalty and its amount (Schedule 3, para 3 HERA 2017).

188. The right to appeal to the FtT is only an adequate alternative remedy to judicial review in respect of the decision to impose a monetary penalty (as distinct from the decision to make a finding of breach) and the decision as to the amount of the penalty (Schedule 3, para 3(1) HERA 2017). The remedial powers of the FtT are limited to (i) withdrawing the requirement to pay the penalty (ii) confirming that requirement (iii) varying that requirement or (iv) remitting the matter to the OfS (Schedule 3, para 3). The FtT has no power to quash the findings of breach.

189. The OfS confirmed in its pre-action response that it accepts for the purposes of these proceedings that the Administrative Court is the appropriate forum in respect of the University's challenge to the findings of breach **[CB/23/313-314]**.

190. On 22 April 2025, the University filed an appeal to the FtT and applied immediately to stay proceedings pending the determination of the claim for judicial review, on the ground that the appeal will become unnecessary if the Administrative Court quashes the decision. If the FD is quashed, the appeal will be withdrawn.

G2. Candour

191. At the pre-action stage, the University asked the OfS to disclose (amongst other things) information about the circumstances in which the evidence of Dr Stock was collected, and a list of all occasions on which OfS staff communicated with Dr Stock after 1 October 2021. This information is relevant to the University's grounds of challenge. The OfS failed to provide any such information at the pre-action stage, contrary to good practice: *TSol Guidance* [2010] JR 177; *National Bank of Anguilla v Chief Minister of Anguilla* [2025] UKPC 14, §91.

192. To the extent that the OfS fails to disclose all such documents with its Summary Grounds of Defence, the University may make a Part 18 request and apply to amend this pleading if so advised. The University would seek to recover the costs of doing so from the OfS.

G3. Timing

193. The FD was issued on 20 March 2025 and reissued on 27 March 2025 to address defects in the original notice. The OfS contends that time runs from 14 February 2025, despite there being no basis upon which the University could have challenged a decision that had not been finalised or issued to it. But - either way – the claim is brought in time.

194. In its pre-action protocol response, the OfS contended that a challenge to the Regulatory Framework, as applied to the University in the FD, is out of time. This is incorrect. The University does not challenge the RF in the abstract, but as it was applied to the University in

the FD. The grounds for judicial review first arose when the University was affected by the application of the definition of "*governing documents*" in the RF (applying *R (Badmus) v Secretary of State for the Home Department* [2020] 1 WLR 4609).

H. RELIEF

195. The Claimant seeks:

195.1. An order that the FD is quashed.

195.2. A declaration that the OfS' investigation and/or decision was unlawful for the reasons set out above.

195.3. Such further or alternative relief as is necessary to give effect to the judgment of the Court.

195.4. Costs.

CHRIS BUTTLER KC
KATY SHERIDAN
JACK BOSWELL

MATRIX
9 MAY 2025
AMENDED 15 AUGUST 2025
RE-AMENDED 30 OCTOBER 2025