
Independent Review for The Open University

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Introduction

- 1.1 On 7 May 2024, I was commissioned by the Chair of Council of the Open University ('the OU') to undertake a review to *'investigate how the OU can balance academic freedom, free speech and equality and employment rights to ensure that all staff can feel confident in expressing their views within the boundaries of the law and in a way that is consistent with the OU's values and behaviours.'* This followed the judgment of the Employment Tribunal of 22 January 2024 in the case of Professor Joanna Phoenix v The Open University ('the Tribunal judgment') which found that the OU had unlawfully harassed and discriminated against Professor Phoenix on several counts.
- 1.2 The terms of reference for the review, set out in full at Appendix 1, describe its aims as being *'to learn from the tribunal's ruling and make appropriate recommendations'*. It is not *'to revisit or challenge'* the Tribunal judgment nor *'to apportion blame or criticise individuals'*.
- 1.3 Although the circumstances that led to the Tribunal's judgment concerned sex and gender, the terms of reference require a broader remit. In particular:
- The review will:*
- *Identify the main issues emerging from the tribunal's judgment that are relevant to the review's purpose. These will include:*
 - *The OU's approach to academic freedom and free speech, and how these rights intersect with equality principles enshrined in the Equality Act 2010, Section 75 of the Northern Ireland Act 1998, and employment rights generally. In particular, the review will consider how difficult and contested matters can be debated in a way that respects the rights of others and is consistent with and supports the OU's values.*
 - *The OU's approach to managing disagreement between members of staff who hold profoundly different and conflicting views.*
 - *The standards of behaviour expected of members of OU staff and whether those standards are clear, well communicated, and are upheld by effective processes and practices.*
 - *Make a series of recommendations on the changes required to the OU's ways of working such as policies, practices, procedures, induction, training, leadership and decision making in order to address the issues raised in the tribunal and otherwise found in the course of this review.*
- 1.4 The terms of reference require me to identify the main issues emerging from the Tribunal judgment. The main issues are in my view captured in the bullet points in paragraph 1.3 above and it is not proportionate or necessary to extend the scope of the review beyond them.

Review methodology

- 1.5 All OU staff were invited to contribute evidence to the review, either in individual meetings or by way of written submissions. In addition and in line with the review's terms of reference, the OU arranged for me to meet with four groups of staff in advance of the individual meetings. The four groups comprised representatives from the trade unions (UCU and Unison), some of the witnesses who had given evidence to the Tribunal, a representative from the Trans Staff Network, and members of the Gender Critical Research Network ('GCRN').
- 1.6 I met with 53 members of staff, online and in person, during May, June, and July 2024, and received written submissions from 48 people, of which 34 were named and 14 were anonymous. Those who responded to the invitation were self-selecting. They were primarily academics and included both junior and senior staff. I did not ask them to self-identify in terms of their protected characteristics. Nonetheless given the relevance of issues of sex and gender to the review, it is relevant that nine people proactively identified as trans or non-binary. The majority did not refer to their own identities.

- 1.7 Generally people who submitted evidence did not suggest that their UK nationality was relevant, though when giving evidence to the review some did explicitly refer to their Scottish, Welsh or Northern Irish backgrounds or locations. Although there are significant differences between the four nations in terms of legislation and political and policy context, I have not distinguished between them in this report on the basis that the recommendations are relevant to all four nations (though they will of course have to be implemented in a way that is consistent with domestic legislation).
- 1.8 The terms of reference require me to look backwards in considering the events that led to the Tribunal judgment, as well as forwards to how the OU should proceed in future. It was on this basis that the views of staff were sought.
- 1.9 The framing for my discussions with staff and their written submissions centred on four questions which I devised and which were published in advance of the meetings and the submission of written evidence. The four questions were: (i) what was your experience of the issues identified in the terms of reference; (ii) what do you consider the OU did well that you would want to preserve; (iii) what you think the OU should have done differently; and (iv) how you would like to see these issues being taken forward in the future. The questions were designed to focus on the terms of reference in a way that drew on people's individual experiences and views while ensuring a degree of consistency between the responses.
- 1.10 This report has taken full account of the need for confidentiality. The evidence supplied to me has not been retained on any OU platform or server, and all recordings of meetings have been deleted. I have sought to ensure that no individual who submitted evidence to the review can be identified.
- 1.11 During the course of the review I requested sight of relevant OU policies. The staff who submitted evidence also forwarded documents to me. The main documents that I have relied on are the OU's Strategy 2022-27, the Equality Scheme 2022-26, the Equality Plan 2022-27, the Statement of Principles on Academic Freedom, the Code of Practice for Freedom of Speech and Academic Freedom, the Social Media Policy, the Transgender Staff Policy, the Bullying and Harassment Policy and Code, the Behaviours and Standards at Work Policy, the draft Value in Action initiative, the Framework for Supporting Self-Managing Staff Networks, the 2024 staff survey results, and the main documents referred to in the Tribunal judgment.

Scope

- 1.12 A few people who gave evidence to the review referred to issues relating to the curriculum, for instance expressing concerns about partiality of curriculum content across a range of matters. Others referred to questions of access to facilities, and several raised points relating to students. The terms of reference for this review are solely focused on staff not students and matters of curriculum and facilities fall outside the review's scope. I have not therefore addressed these areas in this report.
- 1.13 In line with the terms of reference, I have framed the review and its recommendations in the context of issues of academic freedom, free speech, equality and employment rights. Some of those who gave evidence to the review spoke about these issues in the context of Israel and Palestine, Brexit, politics, decolonisation, vaccinations, religion, or their own personal circumstances. However, the focus was mainly on sex and gender. Because sex and gender raise distinct challenges, I have addressed them separately and explicitly in this report.

Sex and gender

- 1.14 In recent years, the concepts of sex and gender have become ever more highly charged and contested. Increasing numbers of people are identifying by reference to gender rather than biological or legal sex, regardless of whether they have a gender recognition certificate. In turn, others are asserting the relevance of biological sex to issues of identity and service provision in a way that would not have been seen as necessary in the past when sex and gender were widely assumed to denote the same thing. Gender critical and trans inclusive views are strongly held by people often irrespective of their own sex or gender. These are matters of intense debate across the entire higher education sector and beyond, with differences of views often amplified by social media.
- 1.15 The OU is not unique in needing to address these matters. However, the context in which they have arisen is of course specific and so requires a bespoke analysis and set of recommendations.

- 1.16 The Equality Act 2010 (and its Northern Irish equivalents¹) does not clearly distinguish between sex and gender, and employment tribunal decisions that have dealt with the rights of trans men and women and those with gender critical and trans inclusive views have been inconsistent as the courts have sought to catch up with and reflect changing social views and expectations.
- 1.17 Terminology is challenging and contested. The protected characteristics of ‘sex’ and ‘gender reassignment’ are not fully defined under the Equality Act 2010. Under section 11, a reference to the protected characteristic of sex is ‘a reference to a man or to a woman’. Section 212(1) defines a man as ‘a male of any age’ and a woman as ‘a female of any age’. The Equality Act 2010 does not define what is meant by ‘male’ or ‘female’. Recent analysis of the Equality Act 2010 in non-statutory guidance produced by the Equality and Human Rights Commission states that:
- ‘Under the Equality Act 2010, ‘sex’ is understood as binary, being a man or a woman. For the purposes of the Act, a person’s legal sex is their biological sex as recorded on their birth certificate. A trans person can change their legal sex by obtaining a Gender Recognition Certificate. A trans person who does not have a Gender Recognition Certificate retains the sex recorded on their birth certificate for the purposes of the Act.’²*
- 1.18 Meanwhile, section 7 of the Equality Act 2010 provides that a person has the protected characteristic of ‘gender reassignment’ if ‘the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex’. The Equality and Human Rights Commission guidance states that:
- ‘There is no requirement for a trans person to have any kind of medical supervision or intervention in order to be protected from gender reassignment discrimination. A person does not need a Gender Recognition Certificate to be protected under the characteristic of gender reassignment.’³*
- 1.19 When describing or transcribing people’s evidence I use the terminology that they used. Otherwise, I use the terminology of the Equality and Human Rights Commission outlined above (while acknowledging that the Equality and Human Rights Commission guidance is non-statutory and is contested). I use the word ‘biological sex’ to refer to a person’s sex recorded on their birth certificate and I use the word ‘legal sex’ to refer to those whose legal sex is female or male as recorded on their birth certificate or on a gender recognition certificate. I use the words ‘trans woman’ or ‘trans man’ to refer to people whose gender is different to their biological sex recorded on their birth certificate regardless of whether or not they have a gender recognition certificate which changes their legal sex. By ‘non-binary’ I refer to people whose gender does not fall within either binary category of woman or man, so including for instance those who identify as gender-fluid.
- 1.20 When referring to belief, for the purpose of this report I use the terminology that staff or the staff groups used (though even here there was not always consensus). I therefore use the words ‘gender critical’ to refer to the views of those who believe that biological sex is significant and material to identity. I use the words ‘trans inclusive’ to reflect the views of those who believe that gender not biological sex is material to identity (though some also used the expression ‘gender affirmative’).
- 1.21 I acknowledge that these definitions are inadequate to describe the complexity of the identities and issues that underpin the terminology. The meaning of the terms ‘woman’ and ‘man’ are contested and distinguishing between legally defined women and men and trans women and men can be perceived as divisive. Further, the guidance from the Equality and Human Rights Commission gives examples where services can be provided on the basis of biological sex whether or not a person has a gender recognition certificate⁴. The terms ‘gender critical’ and ‘trans inclusive’ are also contested. In particular, I acknowledge that the expression ‘trans inclusive’ could be construed as implying that gender critical views are ‘trans exclusive’. But my use of the expression in this report does not carry that implication, and the expression of gender critical views cannot be equated with trans exclusion (still less transphobia).

¹ The Equality Act 2010 does not apply to Northern Ireland. However the equivalent legislation, as referenced in Section 3 below, is similar, with similar definitions and requirements

² [Separate and single-sex service providers: a guide on the Equality Act sex and gender reassignment provisions | EHRC \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/en/legislation/separate-and-single-sex-service-providers-a-guide-on-the-equality-act-sex-and-gender-reassignment-provisions)

³ Ibid

⁴ Ibid

- 1.22 There was little consensus about this vocabulary among the staff I spoke to, even among people who were broadly expressing the same views. There are also wide variations in views and identities within each of these categories, and significant intersections with other protected characteristics. The terms used should therefore be treated as working definitions for the purpose of this report.
- 1.23 In recommendation 5.4.3, I propose that the EDI team extend their important ongoing work on developing an equality, diversity and inclusion (EDI) glossary to produce a set of vocabulary that can be used in this area. In particular they should determine appropriate terminology to describe ‘gender critical’, and ‘trans inclusive’ or ‘gender affirmative’ views.

Structure of this report

- 1.24 This report is structured as follows:

Sections and appendices	Page number
Section 1: Introduction	1
Section 2: Evidence from OU staff, taken from meetings, written submissions and other documents	5
Section 3: Analysis of the law	16
Section 4: Findings in relation to the evidence	19
Section 5: Recommendations	27
Appendix 1: Terms of Reference	31
Appendix 2: Overview of basic legal protections in the Equality Act 2010	33
Appendix 3: Proposed underpinning principles	35
Appendix 4: Extracts from OU policy documents	36

Acknowledgements

- 1.25 I am enormously grateful to everyone who has contributed to this review and gave their time, expertise and insights. Everyone I spoke to was thoughtful and constructive. There was an extraordinary degree of loyalty towards the OU and its mission, and a tangible desire to move forwards from the divisions described in the Tribunal judgment. Many observed that those divisions were out of keeping with what was seen to be a generally collaborative, supportive, and kind working environment.
- 1.26 I owe particular thanks to Jyoti Mehta and Edina Keresztes, who transcribed all the meetings with witnesses and supported me with the review’s administrative arrangements, to the Council Advisory Group, and to Farrer & Co who have provided me with legal expertise and advice. However, the conclusions that I have reached and the recommendations I make are entirely my own.

Section 2: Evidence from the meetings and written submissions

- 2.1 In this section I have sought to present a balanced and objective overview of what people wrote or said to me, using their words so far as possible. My analysis and commentary are set out in Section 3.
- 2.2 Overall, people who submitted evidence to the review were positive about the OU. They spoke of it being a good place to work, and the word ‘kind’ was invoked several times. The reflections below need to be read in this broader, positive, context.
- 2.3 Views were varied and sophisticated, and the intersections between free speech, equality, bullying and harassment are complex. They do not lend themselves to easy linear categorisations nor do they easily match the structure of the terms of reference. To capture and represent the responses, I have grouped them under seven headings:
- (i) OU’s mission, vision and culture
 - (ii) The boundaries between free speech, EDI, bullying, and harassment
 - (iii) OU policies
 - (iv) The role of personal views in the workplace
 - (v) Managers and People Services
 - (vi) The impact of an online working environment
 - (vii) Promoting a culture of respectful disagreement and debate.
- (i) OU’s mission, vision and culture**
- 2.4 The terms of reference require me to consider how the OU can balance free speech and equality so that all staff feel confident in expressing their views lawfully and in a way that is consistent with the organisation’s values and behaviours.
- 2.5 Several people pointed out that contested and difficult debates had taken place within the OU in the past involving the robust expression of differing views. They warned against reading too much into the circumstances of the Tribunal judgment which in their view were specific to the challenges of sex and gender. Others spoke of a prevailing ‘*culture of consensus*’ at the OU comprising an assumption of agreement on social and political priorities, particularly in relation to EDI.
- 2.6 For some, this culture of consensus was presented as a good thing, representing a shared understanding of the OU’s mission and values of being open to all, socially inclusive and committed to principles of equality and diversity. The shared values were identified as a source of pride and motivation, allowing staff to feel valued and respected. For them, the consensus reflected the unifying power of the values from which there should be no rowing back.
- 2.7 Others however spoke of downsides in terms of an assumption of uniformity of views and approaches. This was described as potentially constraining the expression of different perspectives and opinions. At its worst, it translated into a culture of intolerance of alternative views: in fact, the opposite of the OU’s values.
- ‘There is a culture of seeing to be doing the right thing/saying the right thing which prevents real debate.’*
- ‘...essentially shutting down any form of healthy discussion around topics (aside from absolute agreement) for fear of causing offence or professional sanctions. To be made to feel that you can only absolutely agree with a speaker is not a healthy or supportive environment.’*
- ‘The OU from the beginning has a sort of social mission and a strong set of values so in some ways it isn’t neutral as an institution, or institutional neutrality doesn’t work terribly well.’*
- 2.8 An assumption of consensus was also associated with inappropriate and unnecessary avoidance of disagreement.
- ‘Contentious has rapidly become a code word for ‘this can’t be discussed/debate on this issue is too difficult.’*
- 2.9 The assumption of a consensus was referenced in different contexts. For some it manifested itself in relation to politics, religion, approaches to history, or Brexit, and they spoke of being reluctant to express

their own personal views in these areas given that their views departed from what was perceived to be the norm within the university. They contrasted this with the relative ease with which those whose views aligned with the norm were able to speak openly and easily. It was observed that university policies that encouraged people to bring their authentic selves to work may work well for those whose authentic selves were regarded as acceptable. The difficulty for them was that they did not feel that their views aligned with the prevailing norm and the expression of their authentic selves felt less welcome.

'I have always felt there is a liberal-left intolerance towards what are seen as 'conservative' (with a small 'c') views ... Obviously no [associate lecturer] should be sharing their political views with their students anyway (it would be unprofessional), but we should be able to share our views with our colleagues. I have never felt able to.'

- 2.10 One person expressed the difficulty of confronting orthodoxy in vivid terms.

'Sometimes I'll have to, you know ... as if you're going in a sort of fight, you have to breathe. Breathe. Right. I'm going to say it and then you say it. And sometimes I even hear a little quiver in my voice and again, bloody hell and that displays anxiety and fear. It's a demonstration of how bad things have got.'

- 2.11 The other downside of a culture of consensus was that it left the OU profoundly ill-prepared for the explosion of disagreement that emerged in the events that led to the Tribunal judgment.

(ii) The boundaries between free speech, EDI, and bullying and harassment

- 2.12 No one who submitted evidence to the review disagreed with the objective of securing free speech within the boundaries of the law and consistent with the OU's values, but there were substantial differences of view as to where those boundaries should lie: what represented free speech and what amounted to a breach of principles of EDI, and at what point free speech, or adherence to principles of EDI turned into bullying and harassment. These different views related both to the law and to the OU's policy positions.

- 2.13 Several people emphasised the need to make sure that free speech and EDI were aligned and mutually supportive, and not pitted against each other. They pointed out that without the protection that adherence to EDI principles afforded they would not have the confidence to speak out and their rights to free speech would be eroded.

- 2.14 Others spoke of an imbalance, saying that in their view the OU tended to err on the side of an over-rigid interpretation of equality rights associated with an assumption that there was only one 'right' way to demonstrate inclusion. This was not presented as a criticism of the EDI team who were described as playing an important and often challenging role, but was more to do with EDI policies themselves and the way they were implemented.

'In faculty meetings ... if people talk about EDI there is a ... hush, and it becomes something that people don't want to question or discuss.'

'Policies come from EDI readymade and sealed – with many assumptions baked in such as gender identity ideas or critical race theory. As they are university policy rather than academic debate, these can become incontestable in the university. There has been a lack of interrogation of the content and purpose of EDI in the university – and too much outsourcing of thinking. Questioning EDI is often framed as being somehow against the ideas of equality, diversity or inclusion – rather than there being an openness about the best ways to achieve these aims.'

- 2.15 At its extreme, this caution was described in terms of suppression of free speech. One person gave an example of an incident when they had posted on their personal social media account a list of books on gender and sex that they thought were useful and informative, balanced to include both gender critical and trans inclusive perspectives. Shortly after posting the tweet they were contacted by a number of OU staff, some of whom suggested that they should take the post down because it could cause difficulties. In different circumstances another person cited an example of where they had been constrained from expressing a controversial opinion, with senior managers intervening to suggest it would be 'better' if the argument were not pursued.

- 2.16 In this context, it was noted that although there was a visible staffing structure supporting EDI (and no one was suggesting that this was not necessary or appropriate), there was no one responsible for supporting free speech and academic freedom, or if they did exist they were less visible. It was suggested

that this imbalance impacted on OU communications, both internal and external, leading towards a more cautious approach to what should and should not be said.

'There is no attempt to balance perspectives or offer alternative viewpoints and a total absence of the promotion of freedom of speech.'

- 2.17 As well as concerns about the appropriate policy balance between free speech and EDI, many expressed uncertainty, even bewilderment, as to what was lawful and acceptable free speech and what amounted to unlawful harassment. They pointed to the fact that regulation and principles of free speech seemed to be pointing in one direction, with EDI legislation and policies pointing in the other. Several people observed that uncertainty about what was acceptable and unacceptable, let alone lawful or unlawful, meant that in relation to contentious matters they had decided to say nothing.

'We all need stronger guidance on what academic freedom means – for all concerned – and what is considered inappropriate closing down of academic opinions in situations when they are likely to constrain the personal experiences, values and opinions of others... Is it even appropriate to sign an open letter?'

'We need to have more blunt or critical conversations ... about getting the boundaries right ... around what's appropriate at work and what's not appropriate and how we protect academic freedom and how we protect people's safe spaces in a workplace.'

- 2.18 The difficulty of defining the boundaries between EDI and free speech were described as leading to imposed or self-imposed constraints. But in the context of gender and sex, the consequences were more serious: they were described not just in terms of constraints, but in terms of vulnerabilities, anxiety, bullying and harassment.

- 2.19 One person suggested that this escalation of consequences was connected with the inherent contradictions between the different perspectives in relation to sex and gender that in their view made it extremely difficult to find compromise.

'There's an existential element to this debate that makes people feel like they are being told that they, as they know themselves to be, don't exist. So women are being told they don't exist as they know themselves to be - women who are biologically born as women. And people who are trans-identifying are being told that the category of person that you think you are doesn't exist because there are only two kinds of sexes.'

- 2.20 For some people their trans inclusive or gender critical beliefs existed independently of their own gender or sex identity. But for others, issues of identity and belief were one and the same thing: the expression of trans inclusive views was the manifestation of their trans identity, or their gender critical views were the manifestation of their sense of their biological sex.

'It's a belief for them, but for trans people it's who they are.'

'I do care passionately about my right to believe we remain the biological sex we were born as.'

- 2.21 The academic staff working in gender critical academic areas, and those working in trans inclusive academic areas, each saw their work as an entirely appropriate expression of free speech and academic freedom.

'I obviously understand that [my gender critical work] is in some senses controversial, but in other respects I'm just doing what [an academic] ought to do – going through different accounts of fairness looking at policy, in fact trying to have an impact.'

'We are fully gender inclusive, trans positive [and] this is to do with ... the kind of research that we are all very interested in doing.'

- 2.22 For a small number of people the existence of this academic work was threatening. One person who identified as trans explained that for them the expression of gender critical views was intrinsically harmful, undermining their sense of identity and their 'right to exist'. Another directly equated the expression of gender critical views with transphobia. Another person, who identified as trans, spoke of the OU as their academic home, and that for them it was starting to feel as if it were no longer open to them to access in a way that flew in the face of everything they knew about the OU.

- 2.23 I also heard a sense of vulnerability from women who found transgender theories threatening to their sense of identity.
- 'The ... demands of the transgender lobby have come into direct conflict with my rights as a woman. ... I am afraid to speak ... Inclusion can actually cause exclusion.'*
- 2.24 Mainly, however, the concerns were not targeted at the existence of gender critical or trans inclusive views and research, which generally people acknowledged should be allowed to be held and pursued. It was the ways the views were expressed, the language used, and the activities associated with those views that were the concern. Many spoke of the need for more moderate and respectful language and expression.
- 'Language needs not to be used in an inflammatory way. What is provocative depends on context. We have a duty to respect each other.'*
- 'There needs to be a real push on academic freedom to discuss matters in a professional way. For both sides to be open to the arguments of others, and disrespectful behaviour challenged or questioned.'*
- 2.25 For most of the trans and non-binary staff who submitted evidence to the review, the particular concern identified in the events leading to the Tribunal judgment was the establishment of the GCRN – both its creation and how it was set up. Concerns were expressed that its existence might create an environment of institutional prejudice in which trans staff were marginalised. It was also felt that the vocabulary and tone of the launch were not scholarly or respectful of trans rights, particularly the podcast which accompanied the launch which they felt was deliberately provocative.
- 'As a member of the trans community ... I am now scared to post anything even vaguely relating to trans issues.'*
- 'I don't dare talk about it, because I don't know who I can trust to not turn out to be 'Gender Critical'. I simply don't feel safe.'*
- 2.26 On the other hand, staff associated with the GCRN described how they felt they had been criticised and ostracised by trans inclusive colleagues. They said they had been likened to antisemites and homophobes as a consequence of their gender critical views.
- 'I still do not feel safe to express my gender critical views.'*
- 2.27 The institutional position of the OU was raised by many. In general, those with gender critical views felt that OU policy was overall more supportive of trans inclusive perspectives than gender critical, exemplified in the university's membership of the Stonewall UK Diversity Champions Programme. They said that this made it more difficult to express their gender critical views and that this was inconsistent with rights to free speech and academic freedom.
- 'Across the institution, gender affirmative views are 'right' and gender critical are 'wrong' leading to self-censorship.'*
- 'If statements, claims and theoretical positions and conceptual definitions are denounced as 'transphobic' by definition ... these arguments are never heard and never engaged with on anything other than the most superficial level.'*
- 2.28 Several people giving evidence to the review expressed concerns about a perceived pressure on staff to confirm pronouns.
- 'Pronouns, gender-neutral terms etc show that what one person sees as inclusivity is what another... sees as erasure.'*
- 2.29 Others cited the difficulty of setting up the GCRN. In their view, even though they appreciated the fact that the OU had allowed it to be created, they felt that the university had not properly stood by it or supported or protected them from the onslaught of criticism that followed its launch. In their view the university's support was grudging and given only because the law required it, as manifested in the tone of the OU's communications.
- 'It sounded as though the University was saying that it supports academic freedom in this case only because it's our legal duty, not because we passionately believe in it.'*

- 2.30 Reference was also made to the decision to require ongoing risk assessments of the GCRN, which some considered positioned it as a risk to be managed, rather than making a positive contribution to important debates about live social issues.
- 2.31 From the trans perspective, some felt that the university had not done enough and that in not challenging the methodologies adopted by the GCRN the OU had effectively *'picked a side.'* One person expressed appreciation for the OU's support in the past but was concerned about the future.
- 'I have appreciated how the OU has reiterated support for our trans community (and LGBT+ community). Throughout history there have been examples of people who do not fit conveniently into 'women' and 'men' categories ... We have to decide if we want these people to be safe in our society, and if we want these people to feel they have a valued place among us. I desperately hope the OU continues to stand up for ALL.'*
- 2.32 Some conflated the existence of the GCRN with the OU's policy position on trans rights. For them, the use of the OU logo on the GCRN's webpage was perceived as meaning that gender critical academics *'were now holding sway over the leadership'*. One person felt that although the research should be allowed to be carried out, it should not be funded, promoted or publicised by the OU.
- 2.33 The uncertainty expressed in general about the balance between free speech and EDI was magnified in the context of sex and gender. Different views were expressed about what the law required, with people often invoking various, conflicting, interpretations of the law to justify or explain their own perspectives. The circumstances leading to the Tribunal judgment were frequently referred to in this connection: staff required to give evidence to the Tribunal on behalf of the OU told me that they had thought they were both acting lawfully and *'doing the right thing'* in upholding what they understood to be the OU's values in terms of support for its trans staff and students and a trans inclusive approach. For instance, the June 2021 open letter, described at length in the Tribunal judgment, explicitly invoked the OU's Gender Identity Policy and its Statement of Principles on Academic Freedom to justify its position.
- 2.34 The signing of the open letter was described as having been *'completely motivated by loyalty to the university'*, and an assumption of its legality. Another described it in these terms.
- 'It was assumed that an open letter signed by so many colleagues would not be seen as 'attacking' colleagues as individuals or indeed as academics ... We always need to learn from this as no-one should be at work feeling bullying and harassed.'*
- 2.35 Uncertainty about where to draw the line between free speech and equality was noted not just to have an impact on staff and relations between staff, but also in enabling staff to feel confident about how to resolve issues such as complaints from students, due to lack of confidence in the issue and fear of repercussion.
- 2.36 I was also told that uncertainty about the law and about the OU's policy position had led to a large number of complaints and grievances having been lodged against other members of staff, citing bullying and harassment. These complaints and grievances were described as distressing both for those who lodged them and for those on the receiving end, not least because both sides thought they were acting appropriately.
- 2.37 Several said that the distressing effect was magnified because OU policy required staff not to talk about the issues with anyone else while complaints and grievances were being investigated, leading to long periods of enforced silence that made working relations difficult. Complaints and grievances were also said to have a chilling effect: whether or not subsequently upheld, the impact on staff was *'I will not do that again'*.
- (iii) OU policies**
- 2.38 Generally, people felt that relevant OU policies, specifically those relating to EDI and free speech, were good in principle but were often not sufficiently detailed to provide assistance, particularly in terms of the intersections between EDI, harassment and free speech, nor in providing guidance to staff as to how to behave when rights were seen to conflict. Policies could be interpreted in different ways to justify behaviour which others would regard as unacceptable.

'What I would like to see are crystal-clear policies at the OU. At the moment, the OU's policies are good, but they are vague and could be used in various ways. If they are crystal clear it will end a lot of the paranoia.'

'I really liked the interim social media guidance, but it just wasn't specific enough.'

2.39 People also observed that the policies were often not enforced: they existed as documents, but neither staff nor line managers tended to reference them or enforce them. For example, several pointed to the Tribunal's findings as evidence that the OU's Bullying and Harassment Policy was neither understood nor enforced.

2.40 A similar point was made in relation to the OU's policies on free speech.

'The OU has a Statement of Principles on Academic Freedom so there should have been some kind of mechanism to ensure that it was upheld.'

'My concern is that the 'academic freedom' policy means nothing in practice as there is no way to invoke it... We need something like an OU ombudsman for academic freedom.'

2.41 It was noted that the OU was already taking action in these areas, with one person describing how a more clearly identifiable route for complaints and decision-making around free speech and academic freedom was being developed. Another referred to the work that already existed for managing different often contested views, for instance as part of the OU's Code of Practice for Managing Events. Although it was acknowledged that systems and processes were much improved, it was said that there was still work to do in ensuring common standards and approaches across the university.

2.42 Comments were also made about there being too many policies which made it confusing to track them down and identify what was relevant and what was not.

'Our policies need to be more robust and less complicated ... to enable improved behaviour.'

2.43 A question was raised about the application of EDI policies and practices to research activity. Although it was acknowledged that EDI policies were relevant and necessary to the employment of research staff, some observed that EDI had been inappropriately invoked in the context of the substance and methodology of research activity. For instance, one academic said that they had initially had difficulty in securing the data that they needed for their medically based research because their research had required data collection based on biological sex whereas the OU's approach to data collection centred on gender not sex. The OU's approach to EDI had been invoked as a reason not to allow them to use the data category that their research required (though the issue was subsequently resolved).

2.44 A similar point was made in relation to OU policy documents that referred only to gender and not sex, the issue being that in the context of the Equality Act 2010 reference to sex as a protected characteristic was necessary, and that in general reference to both categories would be appropriate.

(iv) The role of personal views in the workplace

2.45 A question raised by many people related to the extent to which it was necessary or appropriate for staff to express or manifest their personal views in a professional workplace context. At issue was whether the expression of personal views was a legitimate manifestation of free speech, or the inappropriate and unprofessional expression of personal opinions at work.

2.46 Several people spoke of not being able to express their views on issues such as politics, religion, vaccinations, decolonising the curriculum, and EDI priorities.

'We are encouraged to bring our authentic selves to work, but this seems, in an unspoken yet ever-present way not to apply to people of faith... I feel secular/atheist staff are favoured by the current systems, which leads to a situation where some can speak freely, but roughly half of staff cannot.'

2.47 However others observed that the expression of personal views might not be appropriate or necessary in a workplace context.

'Too much emphasis is placed on people's personal views on a matter, and far too little on the fact that we are all here to do a job; we may not always agree with what we are asked to do ... but that doesn't mean we shouldn't then put aside our emotional responses and personal views and work together towards our collective goal.'

- 2.48 Someone who described themselves as having gender critical views explicitly said that even though they felt strongly about certain issues, they were not relevant in a professional context.
- 'I would actively avoid discussing my views ... with colleagues – I am here to do a job.'*
- 2.49 Several people referred to the need for clearer guidance about the status of personal views and the extent to which they should they be brought into the workplace and if so when and how.
- 'I don't know the boundaries between personal, private and employment.'*
- 'Training should be provided so everyone is clear that you can get along with people even if you disagree with them on certain points: that's part of civil society.'*
- 2.50 In a similar vein, some people were uncertain about the role and remit of the staff networks. Some spoke of the networks as playing an essential role in supporting vulnerable or minority groups of staff within the workplace. The Trans Staff Network was particularly invoked as an example of a network that had played an essential role in supporting trans staff during a difficult few years, as well as providing advice to OU management about the experience and perspectives of trans staff. But others suggested that there should be greater clarity about the networks' role: apart from providing support to staff and to each other, was it also their role to develop or promote policy views that reflected the personal views of the network members? It was said that there was a lack of transparency about how members' personal perspectives translated into OU policy, which could then not be challenged (though I was also told that work was ongoing in this area).
- 2.51 Questions were also raised about the role of EDI leads (variously also referred to as representatives and champions). Although their contributions and commitment were widely acknowledged, again there were questions about their role and the extent to which they were there to support staff, or champion OU EDI policies and practices, or draw on their own personal experience to develop policy. The process for becoming an EDI lead was described as opaque, and the criteria for appointment not clear.
- 2.52 More widely, a repeated theme expressed by staff with differing perspectives including both gender critical and trans inclusive, concerned the implications of personal perspectives impacting on academic activity.
- 'It's the inability of separating personal opinions and experiences from academic debate.'*
- 'I believe that there is a need to restate the distinction between academic enquiry and activism.'*
- 'The primary purpose [of research] should not be activism. It should be research, and then activism may or may not be one of the things that comes out of it, but in small doses, but not its central purpose.'*
- 'I wasn't sure that [the Faculty] in an academic institution should actually be expressing a unified view about an issue on which there is so much heated academic debate: in effect 'taking sides', rather than remaining open to a range of options.'*
- 'The problem that I have with belief in an academic context is that it's sometimes less flexible in relation to change, and if you are presented with new evidence as a researcher you need to be able to change your position. Belief can really be a roadblock to good scientific research and the production of knowledge ... You must be able to question [the production of knowledge] and if belief stands in the way of that questioning, then does it have a place in the room?'*
- 2.53 One member of academic staff, themselves from a Black, Asian and Minority Ethnic background, took the point of principle to an extreme by saying that if someone were to argue in an academic context that their ethnicity was inferior:
- 'I will feel a bit perturbed, and I will feel uncomfortable and think why would people want to do that in the first place. But I don't feel I want to undermine other people's academic freedom to debate it as a topic... And there's a lot of things I have heard, very unsavoury in my opinion, in the academic world. But we are academics, you know, let's talk about it and think about it and debate it.'*
- 2.54 Although outside the scope of this review, this question was raised by an associate lecturer in the context of their freedom to shape the curriculum in a way that reflected their own personal and academic perspectives, particularly in relation to issues relating to the gender and sex debate. They were not sure of the extent to which they as an associate lecturer had freedom to interpret the teaching material in their own way.

(v) Managers and People Services

- 2.55 The sense of managers not feeling confident, willing, or equipped to line manage disagreement, and the appropriate balance between free speech and EDI, was expressed by many. The same point was made in relation to other roles – one person pointing out that Heads of Unit could feel exposed in being expected to make difficult organisational design decisions with little support or advice.
- 2.56 The concern was generally expressed in terms of how to manage disagreement between staff, but it was identified as particularly challenging in the context of drawing the line between free speech and equality, and in identifying bullying and harassment and intervening as appropriate.
- 'I am a line manager ... I do not know how to best handle the situation [differing views on sex and gender] should this arise and don't recall seeing any guidance on this. In particular what should we do if one staff member does not want to use the pronouns of another staff member? Or what would we say if someone expresses their belief regarding sex/gender that potentially someone else doesn't agree with? I would like to see some guidelines on how to handle this type of situation.'*
- 2.57 There was a sense from some that because managers did not know how to address these questions, they in effect withdrew and left it to staff to sort out amongst themselves. Someone observed that this was sometimes (unhelpfully) justified by invoking the importance of free speech and 'civility' and then leaving it to staff to sort out the disagreements themselves.
- 'The uni tends to assume that because everyone is nice, they will just sort [disagreement] out... People hoped that everyone would get on, because that's what people do.'*
- 2.58 This same point was made in relation to the events of the Tribunal judgment.
- 'I understand how tough it is, but I do think we could have been braver and bolder much earlier and said to the folk who were bullying Jo Phoenix, you cannot do that, that is completely unacceptable in a university. And we didn't do it because the nature of my uni is to be really nice... It's a really supportive culture which has got loads of positives but in this instance it's got us into an incredible hole.'*
- 2.59 This was also associated with a hesitancy about intervening early and making difficult judgments.
- 'There was something of a culture of waiting until something blew up in order to resolve it rather than being proactive, which didn't sit well with me ... I really want something to be resolved before it gets to crisis point.'*
- 'We overly prescribe which means essentially we disempower, which means that leaders are nervous to make bold decisions. We have got to empower our leaders, train them better.'*
- 2.60 Many noted that line managers received little training in how to line manage, let alone in how to manage disagreement between colleagues. Although I was told about the existence of on-line line-management training modules, in their written submission UCU were doubtful about how visible or effective this training was.
- 'There is no line management induction and training, while the numbers of policies and procedures line managers are meant to apply with confidence (but without any knowledge of employment law) is enormous and subject to frequent changes and 'updates''*
- 2.61 Some considered that as a consequence of this lack of confidence, issues that should be resolved by line managers were passed over to People Services to deal with, which further disempowered managers and added to the workload of the HR team.
- 'There is a culture at the OU which is still very much of the view that 'I'm not equipped to have that conversation. I need an expert to do that for me. HR, could you do that for me?'... I think that [is the case] even with relatively minor [matters].'*
- 'We have actually got to start giving weight to the core competencies to deal with being a manager.'*
- 2.62 The impact of not seeking to resolve emerging disagreements was seen as leading to positions becoming entrenched, differences of views becoming far harder to resolve, and then potentially becoming formalised into complaints, grievances and appeals, which made resolution even harder.
- 2.63 People were sympathetic to the pressures on the People Services team caused by large caseloads. Nonetheless there was a sense that they had been shown to be ill-equipped to deal with the complexity

of managing and advising in relation to the disagreements on the intersection between free speech, equality, and bullying and harassment, particularly in the context of sex and gender.

'The [HR] advisors were really excellent in many ways, but this issue is deep and probably was out of their depth on how to resolve it... This issue has this weird set of blurry boundaries between beliefs, academic freedom and research... and with an HR hat on you can't really say 'OK, where's the operational issue?' That's what they wanted to boil things down to.'

2.64 It was also suggested that the sheer number of grievances and appeals meant that People Services were so over-worked that they did not have the capacity to respond strategically or proactively.

2.65 UCU indicated that mediation was offered, but if not taken up no other responses were offered to tackle the underlying issues.

'When complaints from staff are upheld, there is no university process to ensure that recommendations from the process are implemented, especially if these involve cross-unit changes.'

(vi) The impact of an online work environment

2.66 The impact of working in an online environment, with many staff rarely or even never attending campus, is a distinctive feature of the OU and was identified by several people as being relevant to the review's terms of reference. Although fundamental to its identity, the OU's online existence was seen as making it harder to secure good relationships between staff, particularly when they disagreed.

2.67 Some spoke of the effect of remote working and the depersonalisation of online communication as potentially magnifying disagreement, narrowing discussions, and leading the expression of more polarised views than would be the case with in-person meetings. Passing comments that normally would be made orally in the corridor or in the margins of meetings were instead written down in emails or chats, thereby becoming formalised, retained and potentially misinterpreted.

'Online meetings make [real debate] difficult as – even if not recorded text chat remains, people's names are prominent – so there's no way of commenting without this being very 'public' ... It would be good to have f2f in person discussions.'

2.68 The point was made that where issues arose in an in-person office environment relatively small points could be checked with line management and resolved quickly. In the online environment at the OU, the risk was that staff did not feel these small points merited an email and so they did not get raised until the issue became more serious.

2.69 Others observed that bullying and harassment can take place more easily online, because there is no one else around to witness inappropriate behaviour.

'This remote [working means that] these behaviours can very easily become invisible... it makes the act of hiding much easier.'

2.70 This is a point raised by UCU in their written submission.

'A particular challenge with bullying and harassment at the institution is that poor behaviour can remain hidden due to communication via Skype or Microsoft Teams and emails rather than in person meetings. The current policies of the Open University do not address this.'

2.71 A more fundamental issue was also made by several people: how a remote environment can dehumanise relations with colleagues.

'Working in a remote environment, we lose the human aspects. That's the human bit, the humanity that's missing... So how do we introduce 'human'?''

2.72 Concerns particularly focused on the roles of online forums, with many people referencing the Associate Lecturer Common Room (ALCR). Although overall the ALCR was seen as a useful mechanism for encouraging engagement and communication with and between a dispersed group of staff, views differed as to the extent to which its contents should be controlled. Some people explained how its on-line existence could magnify and distort engagement, particularly in relation to contentious equality related issues. They described it as providing a platform for people *'to rant on EDI issues'* in a way that was undermining for others. Many said they did not use it for these reasons. Although I did not see any of these ALCR exchanges, the contents were described in trenchant terms.

'I see threads where ALs are discussing transgender issues, and every single time these threads are filled with the most vitriolic and misinformed moral panic, and anti-trans bigotry.'

'Where a person such as an EDI representative posts about staff development or awareness events on this forum ... their posts were relentlessly challenged by self-proclaimed proponent of academic freedom and academic rigour, with a few others piling on... it was exhausting to read and must have been exhausting for the ... colleague involved to continually have to justify their role and their work. I haven't seen them post for a while; I suspect as a result.'

2.73 The suggestion was that the ALCR needed to be more tightly moderated in a way that would not be necessary in an in-person setting, even though that could more obviously appear to be constraining free speech.

2.74 By contrast others thought its moderation was over-controlling.

'I was told that I had made a post in the AL Forum... that had been 'seen' and that 'I should be more careful' and be 'aware that senior managers are watching' ... I found this message pretty chilling.'

2.75 One person said that the main problem was one of uncertainty as to what was acceptable and what was not.

'Various comments and discussions on the AL Common Room on a range of topics have resulted in intervention by leadership when they were respectful, rational and would require deliberate or uncharitable interpretation to consider them harassment or harmful. That is not to say that there are also occasions when this is not the case – the point is that there seems to be a fundamental inability to distinguish between the two.'

2.76 In their written submission, UCU reflect that a single moderator for the ALCR is not enough, particularly given the role that it plays for a large, isolated home-working population.

(vii) Promoting a culture of respectful disagreement and debate

2.77 Many people wanted to see the OU take a lead on hosting and managing contentious discussions.

2.78 This appetite for informed and thoughtful debate was particularly strongly expressed in the context of sex and gender identity, where the absence of informed discussion – internally or externally - was seen as not helping to tackle divisions and differences of views. Someone who described themselves as trans drew on their experience of having witnessed similar debates.

'I have seen a debate concerning sex and gender on a student forum ... and other students seemed to find the debate helpful to them, through seeing the arguments set out by both sides ... [this] would have led to a constructive and healthy exchange of ideas.'

2.79 The same person expanded on this point aligning it with the OU's mission.

'Encouraging this would be very much in the spirit in which the OU was set up... Staff should have the freedom to put counter arguments to gender critical beliefs, as long as it is done in a respectful way... I feel it would be very beneficial if both sides in the debate were encouraged to concentrate on expressing their views in ways that are pedagogically valid i.e. ways that are of educational benefit to students and other staff, and discouraged from political campaigning, defined as trying to influence or indoctrinate people. It is recognized though that it is not always easy to distinguish between the two activities, particularly when controversial topics are being discussed.'

2.80 Others drew on their academic backgrounds and experience to suggest ways in which these issues could be tackled. They referred to the substantial academic and professional expertise that exists within the OU that could be drawn on to assist in enabling debates to be conducted in a civil and respectful way.

'What I've been trying to do through my ... work is ... almost go to the other end of the spectrum and knock people out of their comfort zone. They are trapped inside these ego shells that are quite brittle and quite bitter. So, the idea is that we would then listen to each other.'

'In helping people work through difficult things they are often stuck in a position and can't see other people's positions. The way out of that is by providing them with a safe space to enable them to be able to 'uncontract'... As an institution we need to be able to create that space, to enable people to uncontract and listen to each other. When you are in that closed down space, I'm not going to be able to hear you

because I'm in threat-mode space. So I don't know the answer to how to bring the two sides together ... but we are not going to get there while everybody is threatened.'

2.81 One academic proposed the creation of a 'Centre for Depolarisation' within the OU.

'It could be] valuable in the wider world in addressing situations characterised by being highly contested, and where long-standing social norms are being challenged. This centre would operate according to a framework of rules governing how it would work but not what people should think, say, or adopt as a moral framework.'

2.82 Other submissions referred to initial steps already being taken in some faculties to facilitate difficult (internal) debates on sex and gender. These were welcomed and viewed positively, although the challenges were acknowledged.

'There has been a series of regular meetings for research leads to explore how we can work with these to lead clarity of academic freedom guidance for colleagues to protect ALL colleagues. This has allowed us space to be open about our own stances which has felt safe and purposeful. We have posed some practical principles ... drawing on support by independent facilitators ... These principles are focused on the need for views to be ... evidence-based rather than just opinion as a way of separating personal from academic.'

2.83 In advocating for an open culture where debate was encouraged, several people made the point that this need not come at the expense of the OU's commitment to EDI. They wanted to see a more confident, proactive approach to debate being crafted in line with the OU's values.

'There is some kind of narrative that needs to be constructed around our identity as a collective university - that we work together collectively, that we work collaboratively, that we care about each other, that we care about the institution, and we don't want anybody feeling left out. That's our whole value system. That's where I would like us to go, but really meaningfully and not just let's skate along the surface.'

'[The OU] could be a real beacon in terms of openness and academic freedom and controversy. The sort of place where controversy gets thrashed out because we are open.'

'If any organisation in the world could find a way forward to have people with very different views on something coexist, I would have thought the OU would be the place... I do think we have the capacity for being able to hold two very different positions at once, and that's one of the strengths of the OU. It's part of its DNA.'

Section 3: the legal framework

- 3.1 The terms of reference require me to ‘*investigate how the OU can balance academic freedom, free speech and equality and employment rights to ensure that all staff can feel confident in expressing their views within the boundaries of the law and in a way that is consistent with the OU’s values and behaviours*’ (my emphasis). In interpreting what those boundaries are I adopt the approach taken in the Tribunal judgment, as required by my terms of reference. My remit is not to analyse this legal framework; it is to consider in practical terms how the OU can move forward constructively and positively within the context of the framework.
- 3.2 Extensive guidance and analysis exist that cover the law relating to the intersection between academic freedom, free speech, and equality and employment rights (in particular, discrimination and harassment) and little would be served by replicating that analysis in this report. For instance, Advance HE has recently published a series of guidance notes to support higher education institutions in this area:
- (a) [Protected beliefs in higher education](#)
 - (b) [Freedom of speech in higher education: legal framework⁵](#)
 - (c) [Freedom of speech and academic freedom: activities and events checklist](#)
- 3.3 Broadly, the legal issues⁶ can be split into two categories:
- An individual’s beliefs and their right to express those beliefs are protected under the Human Rights Act 1998 (which gives effect to the European Convention on Human Rights) and equality legislation. In a higher education context, there is additional legal protection related to academic freedom and freedom of speech on campus. Universities are under a legal duty to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for their members, students, employees and visiting speakers (under the Education (No 2) Act 1986). Separately, universities must 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 or privileges they may have at their institutions (under the Education Reform Act 1988). In addition, in England the Office for Students’ Regulatory Framework requires higher education providers to uphold the public interest governance principles (Condition E1) which include a requirement for academic staff to have the freedom within the law to question and test received wisdom and put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges they may have; and a requirement to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured.
 - Individuals are also protected under equality legislation from unlawful discrimination, harassment and victimisation related to protected characteristics, including protected beliefs. In England, Wales and Scotland, the primary piece of legislation relating to equality matters is the Equality Act 2010 which protects staff from unlawful discrimination, harassment and victimisation on the basis of certain “protected characteristics”: age, disability, gender reassignment, marriage and civil

⁵ This document was published in May 2024, before the government on 26 July 2024 [confirmed](#) its intention to pause the implementation of the Higher Education (Freedom of Speech) Act 2023. At the time of this report, it is not known whether or when the 2023 Act will come into force; however the existing legal duties on universities in respect of free speech and academic freedom remain in force – see paragraph 3.3 below.

⁶ As noted in paragraph 1.16 above, the Equality Act 2010 does not apply in Northern Ireland. Instead, the equivalent legislation is contained in the Equal Pay Act (NI) 1970, the Sex Discrimination (NI) Order 1976 as amended, the Race Relations (NI) Order 1997, the Disability Discrimination Act 1995, the Fair Employment and Treatment (NI) Order 1998, Section 75 of the Northern Ireland Act 1998, the Employment Equality (Sexual Orientation) Regulations (NI) 2003, the Equality Act (Sexual Orientation) Regulations (NI) 2006 and the Employment Equality (Age) Regulations (NI) 2006. Although not identical, the principles in the legislation are broadly similar. The Higher Education (Freedom of Speech) Act 2023 also does not extend to Northern Ireland. Principles of freedom of speech tend to be upheld through a combination of human rights legislation, and institutional regulations and policies. The Industrial and Fair Employment Tribunal in Northern Ireland tends to follow English equivalents where they are a persuasive authority unless there is a legitimate Northern Irish reason for departing from them.

partnership, pregnancy and maternity, race, religion or belief⁷, sex, and sexual orientation. The law on who is and is not covered by these protected characteristics is evolving, and in part remains uncertain and unclear. I have set out in Appendix 2 a table which summarises the current position in respect of the protected characteristics which have been raised with me most frequently during this review, in particular those relating to sex and gender. The OU, as a public authority, is also subject to the Public Sector Equality Duty. This requires the OU to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity, and foster good relations between people who share and people who do not share a relevant protected characteristic.

- 3.4 It is sometimes challenging for employers to establish the appropriate legal balance between one employee's right to express or otherwise manifest their beliefs and the protection of the rights and freedoms of others, as evidenced by the Tribunal judgment which prompted this review but also in many other recent employment cases.
- 3.5 Although this report does not rehearse all the relevant legal principles, in the light of the evidence submitted to this review I consider it important and helpful to record the following non-exhaustive legal principles arising from the current legal framework and recent case law:
- (a) Whether a particular belief qualifies for protection under the Equality Act 2010 is a question for determination on the facts⁸.
 - (b) The table at Appendix 2 contains examples of beliefs which have and have not been found by the courts to qualify for protection. Although a question for determination on the facts, gender critical beliefs have been treated by the courts as protected under the Equality Act 2010⁹ and in my view it is likely that in principle trans inclusive beliefs could also be protected.
 - (c) Under the Equality Act 2010, there is no "hierarchy" between the different protected characteristics and no one belief trumps any other¹⁰. Therefore, there is no hierarchy between the protection afforded to people on the basis of their protected characteristics such as sex or gender reassignment, and the protection afforded to people on the basis of their protected beliefs including, if protected, gender critical or trans inclusive beliefs.
 - (d) Likewise, where different even opposing beliefs qualify for protection, there is no hierarchy between those protected beliefs – the law does not seek to evaluate their relative merit.
 - (d) Except in the case of age, protection from direct discrimination on the grounds of holding a protected characteristic cannot be justified (although there are various exceptions in the Equality Act 2010 which permit more favourable treatment of certain groups, for example providing reasonable adjustments for disabled persons or affording women favourable treatment in connection with pregnancy, childbirth or maternity).
 - (e) In the case of protected beliefs, protection applies not just to the holding of beliefs (or the lack of belief) but also to their manifestation. Less favourable treatment because of the fact that someone holds and/or manifests a protected belief would amount to direct discrimination on the grounds of belief. However, the right to manifest is not absolute and may be limited if prescribed by law and to the extent necessary (inter alia) to protect the rights and freedoms of others.
 - (f) Limiting rights requires a proportionality assessment bearing in mind the rights protected under the Human Rights Act 1998 - namely the Article 9(2) right to freedom to manifest religion or belief and the Article 10(2) right to freedom of expression. The proportionality assessment will involve considering a range of factors such as the content and tone of the manifestation, the context, who the individual thought their likely audience would be, and the extent and nature of the intrusion on the rights of others. Case law suggests that in an employment context the employer

⁷ Under s.10(2) of the Equality Act 2010, 'belief' means '*any religious or philosophical belief and a reference to belief includes a reference to a lack of belief*' and that is how I use the term in this report.

⁸ The criteria for establishing whether a philosophical belief is protected are set out in the case of *Grainger plc v Nicholson* UKEAT/0219/09

⁹ *Forstater v CGD Europe and Others*: UKEAT/0105/20/JOJ

¹⁰ *2 R (on the application of Marouf) (Appellant) v Secretary of State for the Home Department (Respondent)* [2021] EWCA Civ 348 at 26

should ask: (i) is the objective sufficiently important to justify the limitation, (ii) whether the limitation is rationally connected to that objective, (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question, and (iv) whether, balancing the severity of the limitation on the rights of the individual concerned against the importance of the objective, the former outweighs the latter¹¹.

- 3.6 Additional duties related to the protection of free speech and academic freedom within higher education will also be engaged in the higher education context as part of this balancing exercise (as summarised in paragraph 3.3 above). This area of law is somewhat in flux, given the Government's decision in July 2024 to pause implementation of the Higher Education (Freedom of Speech) Act 2023.
- 3.7 In my view, in the light of the potential for the manifestation of beliefs to be restricted (as described in (f) above), it is important to understand and distinguish between the protection afforded to individuals on the basis of protected beliefs, and the protection afforded on the basis of other protected characteristics such as sex and gender reassignment.
- 3.8 These legal principles and observations inform and underpin my findings and recommendations set out in Sections 4 and 5 below.

¹¹ Summarising *Higgs v Farmor's School and Archbishop's Council of the Church of England* [2023] EAT 89

Section 4: Findings from the evidence

- 4.1 The terms of reference for this review require me to consider how the OU should balance academic freedom, free speech, equality and employment rights to ensure that all staff can feel confident in expressing their views within the law and in a way that is consistent with the OU's values. In particular it requires consideration of how equality principles intersect with free speech, how difficult matters can be debated, how disagreements can be managed, and how expected standards of behaviours can be communicated well and upheld.
- 4.2 Were it not for the disagreements that emerged in relation to gender critical and trans inclusive beliefs, my findings and recommendations would have been very different. I probably would have recommended a review of the OU's approach in certain areas and more rigorous implementation of policies, but my recommendations would have been limited and there would have been no obvious reason to suggest that relevant policies and practices were not broadly fit for purpose.
- 4.3 However, the profound differences of views that emerged in relation to sex and gender, as described in the Tribunal judgment, suggest that the OU's policies and their implementation were in practice insufficiently robust to enable these deeply contentious matters to be debated professionally and respectfully. They did not enable staff to express their views confidently, disagreements were not well managed, and a framework for appropriate standards of behaviour had not been clearly communicated and upheld. As determined by the Tribunal, the way the OU approached the intersection between free speech, equality and employment rights was, in relation to its findings of facts, unlawful.
- 4.4 These failures were clearly significant and have been distressing and traumatic for the people involved. But they did not affect every member of staff and I am mindful of the need not to overstate the scale of the challenge that the OU is facing. Overall, I heard from just over 100 members of staff, out of a total staff cohort of over 10,000 people. The OU's 2024 staff survey results were broadly positive, which given the pressures facing the higher education sector and the OU is impressive. Neither the staff survey nor the evidence I heard suggests – overall - a cowed and constrained workforce.
- 4.5 I am also mindful of the fact that I took what people told me during the course of the review at face-value: I did not fact-check what I was told, nor did I seek to corroborate any of the assertions.
- 4.6 I have therefore sought to ensure that my recommendations deal robustly with the issues that need to be addressed, without exaggerating the scale of what needs to change.
- 4.7 Despite these caveats, some clear findings emerge. I have set these out below, structured so far as possible under the headings of the terms of reference.
- A. The intersection between academic freedom, free speech, equality and employment rights, and how difficult and contested matters can be debated in a way that respects the rights of others and is consistent with and supports the OU's values**
- 4.8 Evidence to the review revealed widespread support for the OU's commitment to EDI, and the need for principles of EDI to be respected and promoted. That commitment was seen as part of the university's DNA and its identity as a progressive, inclusive university. But I also heard from staff who suggested that this legitimate desire to protect and promote principles of EDI had on occasions translated into excessive caution as to as to what could and could not be said, even when the views in question were legitimate and lawful, albeit contentious. This was associated with a potentially rigid approach that assumed that only one interpretation of principles of EDI was acceptable, making it difficult to have an open and honest discussion about how complex issues should be interpreted and applied.
- 4.9 This approach to EDI had the effect of undermining sustainable approaches to managing competing equality rights, as well as precluding legitimate debate and discussion about contentious matters. It was compounded by uncertainty amongst staff as to what the law required in relation to equality legislation, free speech and academic freedom, and was not assisted by staff finding OU's policies in these areas sometimes insufficiently granular and consistent to offer useful guidance. There was also a sense that policies were not always enforced.
- 4.10 The need for more certainty and guidance about the law and the OU's policies in relation to the expression of conflicting views, particularly the intersection between EDI, free speech, and bullying and harassment, was a consistent theme that ran through most of my meetings and the written submissions. The sense was that if there were more certainty about where the boundaries lay, then not only would

staff be clearer about what the law and OU policies required, but they would also feel more confident in contributing to open debates, including in relation to contentious matters. This is a compelling argument, and I make recommendations in these areas (recommendations 2, 3, 4 and 5).

- 4.11 Questions about the appropriate balance between EDI and free speech were also raised in relation to OU systems and structures. Some people contrasted the transparent arrangements for EDI and its visible committees and reporting lines, with the lack of visibility of arrangements for free speech and academic freedom. I was told that work was ongoing in this area, partly as a result of the requirements of the Higher Education (Freedom of Speech) Act 2023. Although the implementation of the Act has been paused, I understand the OU's work is continuing. It is important and useful work in the context of the terms of reference of this review and I support its continuation, regardless of uncertainties regarding the law (recommendation 8).
- 4.12 The terms of reference for this review were framed in general terms in relation to EDI and free speech. However, most of the evidence submitted focused on sex and gender and the expression of gender critical and trans inclusive views.
- 4.13 This focus on sex and gender was perhaps an inevitable consequence of the review being set up in the aftermath of the Tribunal judgment. It also reflects the uncertainties about the law in this area with conflicting tribunal judgments as to whether gender critical views could amount to a protected characteristic¹². I heard several, sometimes contradictory, analyses of the law by different members of staff, particularly in relation to the implications of the *Forstater*¹³ decision, but also as to whether there existed a hierarchy of protected characteristics. This uncertainty about the law was evidenced in the circumstances of the Tribunal case where the witnesses who gave evidence to the Tribunal said that they thought were doing the right thing – both in terms of the law and in complying with OU policy - but were then found by the Tribunal to have acted unlawfully.
- 4.14 The issues (and potential confusion) noted above are also partly a consequence of the inherent contradictions between trans inclusive and gender critical views, and the potential tensions between the rights of men and women, trans men and trans women, and non-binary people. These inherent contradictions are not present to the same degree, or at least not in the same way, with any of the other protected characteristics.
- 4.15 The complexities and differences of views in relation to sex and gender identity are too specific to be effectively addressed within a broader equality framing. The risk in adopting a purely generic EDI approach is that contradictions and disagreements that are specific to policy approaches to sex and gender remain unresolved. The OU's Transgender Staff Policy focuses on process and administration not policy, and the EDI Plan and Strategy are generic and do not explicitly address issues of sex and gender. In order to move forward from the Tribunal judgment, the OU needs to tackle policy issues in relation to sex and gender identity explicitly and do so in a way that acknowledges the legitimate plurality of identities and views in relation to sex and gender within its staff cohort (recommendations 1, 3 and 4).
- 4.16 Some of those who gave evidence to the review spoke of how their trans inclusive beliefs were for them inseparable from their trans identity. For others their gender critical views were inseparable from their identity as a man or woman. In effect, this means that for them the expression of gender critical or trans inclusive views had the potential to undermine (in different ways) their sense of identity as men or women, or as trans and non-binary people.
- 4.17 However, that entirely legitimate and understandable inseparability in terms of an individual's perspective need not and cannot translate into inseparability as a matter of policy by the OU as their employer. In my judgment, the only possible way forward that allows for the appropriate manifestation of protected beliefs (even where those beliefs might conflict with another person's identity) and yet acknowledges each member of staff's fundamental right to determine and manifest their own identity, is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice. This can then provide a robust framework for the OU's employment of men, women, trans and non-binary people (as well as others who define their identity in

¹² This question now appears to have been resolved by the EAT's judgment in *Forstater v CGD Europe and Others*: UKEAT/0105/20/JOJ

¹³ *ibid*

different ways) and of people with trans inclusive and gender critical beliefs, all of whom must be able to work alongside each other harmoniously (recommendations 1, 3 and 4).

- 4.18 This approach is in line with the legal principles set out in Section 3 above, which provides that there is no hierarchy between the different protected characteristics, including beliefs and other protected characteristics. It also facilitates debate and discussion about gender critical and trans inclusive issues without undermining people's sense of identity, and acknowledges that men and women may well have trans inclusive views and that trans men and women may have gender critical views.
- 4.19 What this separation means in practice is that the OU must unequivocally and absolutely support the rights of those with protected characteristics of sex and gender reassignment, including men, women, trans men, trans women and non-binary members of staff, and ensure that their identities are acknowledged and respected. Separately, it must also enable and support the manifestation of protected beliefs, including gender critical and trans inclusive views. But as set out in Section 3 above the right to manifest those beliefs is not absolute and where their manifestation impacts on the rights of others there needs to be a proportionality assessment and some restriction may be justified. That assessment will involve consideration of a range of factors such as the content and tone of the manifestation, the context, the likely audience, the extent and nature of the intrusion on the rights of others, and the academic context. This assessment should be anticipated and so far as possible proactively managed in advance of disagreements emerging (recommendations 3 and 5).
- 4.20 The approach may also assist in other areas where the manifestation of belief may intrude on the rights of others, for instance where the manifestation of beliefs in relation to Israel and Palestine might be seen to impact on the rights of others.

B. The OU's approach to managing disagreement between members of staff who hold profoundly different and conflicting views.

- 4.21 Differing and conflicting views are to be expected in a higher education context where the expression of radical and provocative ideas can be a necessary part of the process of creating and disseminating new knowledge. Staff will inevitably hold profoundly different opinions. This is to be welcomed as a symptom of a vibrant and dynamic intellectual environment and is not something to be avoided.
- 4.22 In parallel, the concepts and policy positions that are represented by EDI are also by their very nature dynamic and evolving, just as social norms and expectations evolve. They should always be subject to testing, debate, and disagreement.
- 4.23 During the course of the review, I heard many different and opposing perspectives, often strongly held. These related to Israel and Palestine, Brexit, politics, decolonisation, religion, vaccinations, and most of all sex and gender. In general, in the OU as elsewhere, the expression of different views and opinions is not problematic. However, I also heard accounts of where the impact of these differing views had become a problem in terms of (i) the expression of views which others find deeply offensive; (ii) staff not being willing to work with colleagues whose views they disagree with; and (iii) disagreement turning into unlawful or inappropriate behaviour. I explore these three areas below.
- (i) The expression of views which others find deeply offensive*
- 4.24 The freedom to manifest belief (religious or otherwise) and to express views relating to that belief are foundational and essential rights in any democracy whether or not the belief is popular or mainstream or might cause offence. However, as discussed above, these rights are qualified – the manifestation can be restricted to the extent necessary for the protection of the rights and freedoms of others and whether a particular limitation is justified will always be context specific.
- 4.25 Where the manifestation of belief amounts to unlawful discrimination, harassment, or victimisation then it clearly cannot be tolerated, limitation will be justified, and issues of line management and disciplinary action come into play. Recommendation 3 addresses the need for greater clarity on the OU's approach to the manifestation of belief and when the restriction of that manifestation will be justified. Recommendation 5 addresses the development of expected standards of behaviour that will also provide guidance in this area, and the underpinning principles proposed in recommendation 1 may also be useful. In addition, recommendation 3.1 addresses the specific question of when the expression of personal views represents the legitimate non-objectionable manifestation of belief, as opposed to representing intrusive behaviour which infringes the rights of others.

(ii) Staff not being willing to work with colleagues whose views they disagree with

4.26 Where staff are not willing to work with colleagues whose views they disagree with, resolving the issue will largely depend on the circumstances. Nonetheless as a general principle - and although there may be exceptions - it cannot be acceptable for staff to determine who they are prepared to work with because of their perception of a colleague's lawfully held views, however offensive they may find them. This includes staff who hold and express gender critical or trans inclusive views. This situation, and the nuances of context, should be addressed as part of the expected standards of behaviour at work (recommendation 5).

(iii) Disagreement turning into unlawful or inappropriate behaviour

4.27 The management of behaviour that has become unlawful or unacceptable is an HR matter which falls outside the scope of the review. But two aspects are relevant. The first is the point made by several people in giving evidence to the review which is that disagreements should be effectively managed at an early stage to prevent them from escalating and turning into unacceptable behaviour which then becomes far harder to deal with. The evidence I heard suggested that this early intervention did not always happen at the OU. The second point is that where new policies or interventions are likely to provoke conflict or disagreement (as was the case with the establishment of the GCRN) then they need to be anticipated and proactively managed as a way of avoiding unacceptable behaviour. I deal with each of these two points in turn.

4.28 Line managers should feel confident in managing disagreements, intervening at an early stage to prevent issues from becoming entrenched or leading to the risk or likelihood of inappropriate behaviour. This is a challenging task, and many people I spoke to (including line managers themselves) felt that they were ill-equipped and unsupported in doing this. The strong temptation, particularly given their large workloads, was to ignore the issues and then only once the disagreements had escalated to pass them over to the People Services team to try and resolve. This was particular the case in relation to complex matters relating to the intersection between EDI and free speech, and sex and gender.

4.29 Managing disagreement should be regarded as an integral part of a manager's job, and passing everything over to People Services is not a sustainable solution. Effective training for line managers should be provided to support them in dealing effectively with disagreements and enabling them to intervene early and effectively. This training should include how to manage disagreement including in relation to matters of EDI, though clearly when complex issues arise then People Services do need to be involved. Recommendations 3, 5 and 6 address this.

4.30 It was also observed during the review that People Services did not always have the capacity for capabilities to provide effective advice in relation to complex matters which involved difficult strategic issues (such as in relation to sex and gender) where the OU's policy position was not clear. For instance, in the context of the Tribunal judgment, what had been understood to be OU policy was subsequently found by the Tribunal judgment to be unlawful and in breach of the OU's own policies, including in relation to bullying and harassment. This made it extremely difficult for the staff in People Services, let alone line managers, to deal with matters effectively.

4.31 These factors point towards the need for clear and consistent policy that can underpin and inform the guidance and training for both managers and People Services. Consistency is essential to avoid, for instance, policies that make sense from an EDI perspective not aligning with policies relating to free speech and academic freedom. A review of all of the relevant OU policies should therefore be conducted to ensure that they cohere and provide clear guidance to staff and managers, and that effective training is available to managers and People Services to ensure that there is a shared and consistent understanding of the law, of OU policies, and how they are to be applied (recommendations 3 and 4). The impact of these policies, including the impact of the implementation of these recommendations, should be reviewed on a regular basis (recommendation 10).

4.32 The other element of managing disagreements relates to anticipating situations where differences of views are likely to emerge and become problematic, so that steps can be taken in advance to mitigate their impact. Where the differences of views involve the expression of protected beliefs that may impact on the rights of others with protected characteristics, proportionality assessments may be required. For

example, in the context of the expression of gender critical beliefs this could involve an assessment as to when the expression of these beliefs might turn into unlawful discrimination or harassment of a trans man or women; or when the expression of trans inclusive beliefs might turn into discrimination or harassment of someone whose legal or biological sex is male or female; or when the expression of gender critical or trans inclusive beliefs might turn into discrimination or harassment of those with opposing views.

- 4.33 The principles outlined in recommendation 1, the guidance in recommendations 3, 5 and 6, and the expertise and experience of the group in recommendation 2 will assist with this exercise. In more complex cases Equality Impact Assessments (EIAs) may be required. It should also be acknowledged that there are no absolute wrong or right answers here. But providing all relevant factors are taken into account and appropriate steps taken, then managers and People Services should be confident in pressing forwards on the basis of its informed judgment. There is far more risk inherent in avoiding difficult issues than in acknowledging their complexity and then making informed judgments.
- 4.34 There is experience within the OU in making these sorts of difficult judgment calls that can be drawn on. For example, the work of those responsible for risk assessing events have experience in balancing the competing demands of free speech, academic freedom and equality.
- 4.35 The OU's EIA policy is relevant in this context. The OU's EDI Scheme (paragraph 3.3) states that EIAs will be carried out when developing or revising '*any strategy, policy, project, procedure or practice that may have an impact on people*'. This blanket approach to requiring an EIA to be carried out before any action is no doubt in practice finessed. However, the risk in stating they should be carried out prior to *any* action means that they may be conducted as purely tick-box exercises or not be carried out at all precisely in circumstances when they are most needed.
- 4.36 Had the EIA policy been followed when the GCRN was established, then an EIA would have been conducted with account being taken of the Public Sector Equality Duty to foster good relations between those who share a protected characteristic and those who do not. This would have then (probably) led to a significantly better outcome in that discussions may have taken place about the best way of launching the GCRN to ensure its success, involving discussions about the appropriate material to use when launching it, identification of the likely impact on other groups of staff and therefore ways of mitigating negative reactions, and proper advance communication with the trade unions and other staff groups. Recommendation 4.4 addresses the need for more work on the role and use of EIAs.

C. Standards of behaviour expected of OU staff, whether those standards are clear, well-communicated, and upheld by effective process and practices

- 4.37 During the review, reference was made to some OU policies being too generic to be useful. The OU's Bullying and Harassment Policy and Code do include examples of what amounts to bullying and harassment, but they are quite generic and there are no detailed, worked-up examples of what the definitions might look like in practice. Likewise, the university's Behaviours and Standards at Work Policy is primarily concerned with arrangements for the appropriate use of university materials, the use of its name, and its social media policy etc. It concerns process rather than expected behavioural standards and does not include illustrative examples of expected behaviours. Although the policies in themselves are fine, from the way the staff who gave evidence to the review referred to them there was a sense in which they were not regarded as useful, living documents that informed their behaviour. This is generally not a problem where what is acceptable and unacceptable are broadly understood, but in relation to more contentious issues – such as the intersection between free speech and EDI – the risk is that staff will interpret the policy in different ways.
- 4.38 One of the witnesses to the review made reference to the ongoing OU work programme 'Values in Action'. Led by the People Services team, this work involves a consultative process with staff to agree what the OU's values mean in practice and how they can be translated into staff behaviours. This is potentially useful work with direct relevance to this review and should be expanded to include examples of acceptable and unacceptable behaviours to illustrate the OU's policy approach to the intersection of free speech and EDI (recommendations 5, 6 and 7).

The expression of personal views at work

- 4.39 An issue raised by several people during the review was the extent to which personal views should be expressed at work, and the point at which their expression became inappropriate. This point was made not just in the context of sex and gender, but also in relation to staff wishing to express their personal religious views, or their views on matters such as decolonising the curriculum or their support for Palestine and Israel. Some of the examples related to opinions on matters directly relevant to the OU's work, but others related to entirely personal perspectives such as the expression of political or religious views. There were two perspectives on this. For some who wished to express these views, they identified a culture of consensus that constrained them from speaking out. But for others, the expression of these personal views was seen as unwelcome and if they were not directly relevant to the OU's work could be regarded as having no role in the workplace.
- 4.40 Where views did have relevance to OU work, for instance decolonising the curriculum, it was not always clear when the OU's institutional policies should prevail over individual members of staff's personal views, and who was responsible for determining and signing off the policies.
- 4.41 The blurring of the personal and the professional is to some extent an inevitable feature of working life. At best, in a university context, it means that academics are personally committed to their areas of teaching or research, and able to draw on their own personal experiences to inform and enrich their work. It can mean that staff feel that they belong in the workplace and can work in an authentic way. It can be motivating for them and others. It can allow for the expression of minority perspectives that might otherwise be suppressed. It can result in universities leading positive social change, linked to their important role in supporting civil society.
- 4.42 However, if personal perspectives get out of kilter, it can translate into the expression of intrusive views, inappropriate behaviour, the disruption of working relations and respect for others, and undermine the independence and integrity of teaching, research and scholarship, as well as the institution's values. It can legitimise the expression and potentially the application of views that conflict with OU policy. At worst, the imposition of personal views can lead to censorship and unlawful discrimination or harassment, and bullying.
- 4.43 The OU's EDI policies support the manifestation of individual personal perspectives as being an important part of building an inclusive culture. The EDI Plan 2022-27 refers to encouraging an environment '*where people feel comfortable being their authentic selves at work*'. This expression is clearly intended to support the positive values outlined above. But it is not qualified in any way, and therefore risks giving rise to the personal and professional getting out of balance.
- 4.44 There is no simple solution to this balance between the personal and the professional. But there should be some broadly expressed common expectations as to where the balance should lie, and what amounts to the legitimate expression of authentic selves or the constructive contribution of alternative perspectives, what amounts to the unprofessional intrusion of personal views into the workplace or the inappropriate prioritisation of personal perspectives over institutional policy positions, and who determines the policy and how this is done (recommendations 3 and 5).

Staff networks

- 4.45 The role of staff networks raises similar questions. Evidence given to the review confirmed the important role that staff networks play, not only in supporting their members, but in providing valuable and informed advice to the OU. Many people pointed to the essential role that the Trans Staff Network has played in this respect.
- 4.46 However, there was a degree of uncertainty about their role and remit: was it their role to provide support for staff with protected characteristics, or draw on their experience to inform policy development, or act as champions for particular policies. All of these are legitimate potential roles, but they are different and each needs separate consideration, and most of all transparency. For instance, if staff networks have a role in developing OU policy, then that needs to work within the systems for overall institutional policy development with transparency about process and sign-off. If they are to provide support to their members, then that can happen in a more autonomous way. If their role is to be champions then it needs to be understood that although members have rights to freedom of expression, their positions are subject

to overall institutional policy, for instance as set out in the section on the use of the university's name in the Behaviours and Standards at Work Policy, and the social media policy.

- 4.47 The Staff Network Framework explicitly states that the university should not determine the purpose or nature of groups, and that their activities can serve any purpose. The only provisos in the Framework are a set of expectations which relate to structures and support, rather than purpose. The open-ended nature of the networks does not matter when the policy priorities of the networks and the OU are aligned, but it would matter if, for instance, a network decided to adopt policy or activist positions that did not align with current OU policies on EDI or free speech. These are areas that need to be discussed with the networks with a view to clarifying the framing of the terms of reference in the Framework document (recommendation 4).
- 4.48 Similar questions were raised regarding the role and purpose of EDI leads. Their roles and remit should be clearly set out and be discussed and agreed with them so that they can contribute in the most meaningful way and be supported by consistent OU policies in doing so. The process for appointing EDI leads should also be made clearer (recommendation 4).

D. Ways of working: policies and practices

People Services

- 4.49 A feature that stands out from the events which led to the Tribunal judgment was the way that individual incidents were treated by People Services in isolation with no one standing back to look at the overall impact of those individual incidents. I was told that the People Services team were so overwhelmed by the volume of individual grievances, appeals, and claims and counterclaims, that they simply did not have the time or capacity to stand back and take a strategic overview.
- 4.50 In evidence given to the review, I was informed that work is already ongoing to look at the role and structure of People Services - work that extends well beyond the terms of reference of this review. My findings reinforce the need for this examination of the role of People Services, to ensure that its operation is structured and resourced so that the strategic perspective does not get lost in the detail and that there is always the capacity for overview. More broadly, the People Services team need to be empowered to focus more on prevention than reaction: to proactively shape policies, practices and behaviours throughout the organisation in a way that then minimises the volume of reactive requests for advice and assistance which appears to so dominate their time and resources. Prioritising training for managers (recommendation 6) would be an obvious example of achieving this outcome.

Online working and the role of the staff forums

- 4.51 The management of remote working falls outside the remit of this review, except to the extent that in their submissions many people observed how online exchanges can magnify and distort communications and obstruct informal resolution of disagreements, as well as disguising incidents of bullying and harassment.
- 4.52 The functioning of the ALCR was a source of controversy. The principles and recommendations in this report, for instance in relation to standards of behaviours, should apply equally to behaviour in the ALCR and all other online OU forums, as with any other area of university activity. Disagreement and diversity of views are encouraged, provided they are expressed respectfully and appropriately, and recommendations 3 and 5 are relevant.

EDI and research

- 4.53 In the evidence to the review, I heard suggestions that EDI principles, developed in an employment/people services context, were also being applied to the substance and methodology of research. This falls outside the scope of this review and I make no recommendations other than to note that principles developed in a workplace context should not be automatically extended to apply to the substance of research (though of course they will apply to the employment of the people doing the research).

E: Promoting a culture of debate

- 4.54 The OU's mission is to be open to people, places, methods and ideas. Its strategy for 2022-

27 speaks of being an exemplar in how to discuss important and controversial matters, and the university's Code on Freedom of Speech refers to free speech and academic freedom being fundamental to its purpose in the advancement and dissemination of learning and knowledge, the development of critical thinking, and the ability to challenge established ideas. The EDI Plan refers to '*creating an environment where all staff and students respect the rights of others to hold different beliefs and opinions. Expression of differing, and perhaps contested views is always carried out in a respectful and professional manner.*'

- 4.55 Most of the review's recommendations that are set out below relate to ensuring that staff can express themselves openly and confidently, in line with the law and OU's values, with disagreement managed effectively and clear standards of behaviour communicated and enforced. They represent necessary building blocks to enable the OU to move forward from the Tribunal judgment. However, the OU's mission and strategies are more ambitious than this and envisage the university's culture as being one that actively promotes openness and debate - an exemplar in how controversial issues can be debated.
- 4.56 Several people in giving evidence to the review spoke of the potential for debate about contentious matters being an opportunity for the OU. It was precisely because of its deep-rooted commitment to EDI that the OU could and should feel confident in enabling and leading debate in these areas, including in relation to sex and gender. I heard from several academics with obvious and impressive expertise and strong research records in these areas (both trans inclusive and gender critical) whose expertise could be usefully drawn on to inform those debates.
- 4.57 There is useful learning to be had from across the sector where other universities are taking steps to proactively encourage open and sometimes difficult debates – for example Universities UK's '[How Can Universities Prepare for the Higher Education \(Freedom of Speech\) Act 2023](#)' and related case studies '[Case Studies publication](#)'. Although the implementation of the Act has been paused, the issues identified in the report and case studies are still useful and relevant to the matters identified in this report.
- 4.58 The OU's experience of the Tribunal judgment, combined with its distinctive and powerful mission and values, can be drawn on to inform a confident strategy of promoting a culture of debate in the future (recommendation 9).

Section 5: Recommendations

5. Drawing on these findings, my recommendations are set out below.

Recommendation 1: The OU Council and Vice-Chancellor's executive team should discuss and agree a set of underpinning principles regarding free speech, equality and employment rights, as proposed in Appendix 3, that can inform the implementation of this report's recommendations

5.1.1 Most of the recommendations in this review are deliberately practical and fall to be implemented by the executive. However, to ensure cogency and coherence in their implementation across the organisation, they should be underpinned by some common principles to be agreed by the Council. These principles should be discussed with the Vice-Chancellor's executive team, staff groups, and the trade unions. These principles will inform the implementation of all the recommendations, particularly the work of the working group (recommendations 2 and 3), the work of the EDI team (recommendation 4), the development of behaviours (recommendation 5) and the provision of training (recommendations 6 and 7). They will also help ensure consistency between the OU's mission and values, and what happens in practice throughout the organisation now and into the future.

5.1.2 I have set out some proposed underpinning principles in Appendix 3, to be discussed, adjusted as appropriate, and published.

Recommendation 2: A working group should be set up to oversee the implementation of the recommendations, reporting through the Vice-Chancellor's executive team to Council

5.2.1 A 'task and finish' working group should be set up, to be chaired by the University Secretary. This group should include a senior representative from People Services and from the EDI team, a representative from the trade unions, as well as an academic representative from Senate. There may also be benefit in bringing in an independent perspective from outside the OU.

5.2.2 The working group should report into Council on a regular basis, through the Vice-Chancellor's executive team, so that Council can be reassured that the outcomes from the review are being implemented effectively.

5.2.3 Given the existing pressures on staff teams, and the additional (albeit time-limited) work that these recommendations involve, Council may want to discuss with the Vice-Chancellor's executive whether additional resource should be provided.

5.2.4 The working group should set out a process and timeline, to be signed off by the Vice-Chancellor's executive team and Council, determining how the recommendations will be implemented, by whom, and to what timescale (with an end-date). This timeline should be developed within 2 months of these recommendations being agreed and be signed off by the OU Council in their November 2024 meeting. The timeline should be shared with all staff. The working group should stand down after the end-date, having embedded any ongoing work in existing processes and structures.

Recommendation 3: the working group should agree ways forward in areas where there is uncertainty or disagreement on policy or process

5.3.1 The working group should address areas of policy uncertainty that need to be resolved before the university can move forward. They should produce short written guidance notes that can be embedded, or inform, relevant policies. They should do this by drawing on the legal principles set out in Section 3, and the underpinning principles in Appendix 3¹⁴. The areas of policy uncertainty would include:

- How controversial ideas can be debated and discussed where they are likely to impact on the rights of others. Assessing proportionality will be central to this exercise and will be highly fact and context specific. Shaped by the OU's values, case studies should be developed that take account of context, reflecting the fact that different standards and approaches might be appropriate in academic contexts, in public debates and discussions, and in teaching students. This work and the case studies should be embedded into the work on behaviours (recommendation 5), particularly staff training (recommendation 5.2) and in the manager's training (recommendation 6).

¹⁴ The legal analysis in this report that underpins these recommendations reflects my understanding of the law. The OU may wish to take its own legal advice to ensure that the legal analysis remains up to date

- As part of this work, explicit consideration should be given to gender critical and trans inclusive ideas and research, and how they can be properly manifested, debated and discussed in a way that is lawful and does not undermine the rights of others.
- Clear guidelines should be developed on the expression of personal views, with case studies including examples of what is meant by staff bringing their authentic selves to work, and the balance between authenticity and the strengthening of minority perspectives, and inappropriate behaviour that may conflict with the OU's values and policies. This work should be embedded into the work on behaviours (recommendation 5).
- The role and use of EIAs should be reviewed to ensure that are used consistently and effectively in relation to new policies, internal developments, events, and debates involving the intersection between equality and free speech to ensure that (i) they are always undertaken when necessary and (ii) they are designed to enable and facilitate the expression of differing views, including controversial views, in a way that protects the rights of other groups. Training in the use of EIAs should be a part of the mandatory EDI training for all staff.

5.3.2 The working group should review existing OU policies and templates that only refer to gender or sex and not both. Whether intended or not, where gender and not sex is referenced, the implication is that the legitimacy of sex is not recognised. This fits uncomfortably with the principle of institutional neutrality (recommendation 1, principle 7) and can also be problematic in the context of the law in that the Equality Act 2010 describes the protected characteristic in terms of sex not gender (except in the context of gender recognition certificates and the gender pay gap). Data collections – such as by the Higher Education Statistics Agency – require data to be collected on the basis of legal sex, as well as making provision for gender identity.

5.3.3 The working group should create a system for resolving questions that arise in the workplace in relation to the interpretation of the issues identified in this report. This is primarily likely to involve determination by Heads of Schools and through them to the Heads of Faculties or Units or Nation Directors, and (for as long as it exists) to the working group itself if necessary. This system is separate to the OU's existing grievance processes. Where matters raised amount to grievances, they should be dealt with in line with standard grievance processes. These arrangements should be published so all staff are aware of them.

Recommendation 4: The OU's approach to EDI should embrace the full diversity of the OU's staff and their identities, encourage debate, and continue with its work to review terminology and the role of the staff networks and EDI leads

5.4.1 Social norms and expectations in relation to EDI are evolving all the time, and are subject to intense societal and political debates, both within the UK and abroad. The OU should embrace the vibrancy and dynamism of these debates by encouraging and facilitating discussions amongst OU staff about its own approach, and by proactively seeking out a diversity of perspectives. This should include (voluntary) discussions about gender critical and trans inclusive perspectives. This will ensure that the OU's EDI policies and approaches have legitimacy and are enriched and informed by staff views.

5.4.2 The OU's EDI approach should acknowledge, support and embrace those who identify as men, women, trans and non-binary, and those with gender critical and trans inclusive views and perspectives, while acknowledging intersections with other characteristics. Supporting the rights of one group should not come at the expense of another.

5.4.3 The OU's current work on terminology used in relation to EDI issues should extend to the vocabulary that I have used in this report, particularly the use and meaning of the words men and women, trans men and trans women, non-binary people, and gender critical and trans inclusive or trans affirmative views. This terminology should have a practical focus so that it can inform and encourage debate and discussion. Reflecting the fact that in this area social norms and expectations are shifting and evolving all the time, any glossary will need to be reviewed regularly in the future.

5.4.4 The ongoing work to review the use of EIAs, should be continued and developed in line with the work referred to in recommendations 3 and 5.

- 5.4.5 The ongoing work to review the role and remit of staff networks should be continued and include review of the provisions of the Staff Network Framework that relates to their purpose and scope. The Framework should also make clear how the networks should operate so as to be in line with OU policies. If staff networks are to contribute to OU policy development, then the processes for doing this should be transparent with clear arrangements for how this is done, and who determines and signs off on the policy.
- 5.4.6 The role of EDI leads should be reviewed and clarified.

Recommendation 5: Agreed standards of behaviour should be developed and aligned with the OU's Values in Action initiative and implemented by way of mandatory training.

- 5.5.1 The Behaviours and Standards at Work policy and the Bullying and Harassment Policy and Code should be reviewed and extended to include guidance and case studies that illustrate standards of acceptable and unacceptable behaviours, in line with the OU's values. They should draw on the legal principles in Section 3 and the underpinning principles in Appendix 3 and be discussed and tested with staff and the trade unions. They should include detailed case studies of when free speech or adherence to principles of equality translate into bullying and harassment, and the point at which staff expressing their personal views turn into unacceptable behaviour. The proposed Values in Action project should align with this work in terms of translating the OU's values into specific case study examples.
- 5.5.2 This revised work on behaviours and the Values in Action, once completed, should form part of the mandatory element of staff training.
- 5.5.3 The trade unions have an important role to play in shaping and supporting the development of these behaviours and case studies, as well as the roll out of the training amongst staff, and championing the importance and value of the training to their members.
- 5.5.4 EDI leads should also be involved in the process, given that they may find themselves at the sharp end of having to interpret the guidance in the light of their EDI responsibilities to represent staff with a diversity of protected characteristics.

Recommendation 6: Training to be provided to managers to support them in enforcing expected standards of behaviour and in managing disagreement

- 5.6.1 Recommendations 3, 4 and 5 above will assist managers in overseeing behaviours given that the recommendations will lead to clearer OU policy and guidance on acceptable and unacceptable behaviours and therefore what managers should be entitled to expect from the staff they manage. This will assist in enabling them to intervene at an early stage to resolve disagreements.
- 5.6.2 The relevance and content of existing leadership development programmes and line management training should be checked to ensure that all the recommendations of this report are covered effectively, particularly in relation to how to support and enforce standards of behaviours, how to manage disagreement, and how objectives and appraisals should be linked to expected standards of behaviour. If they are not, new learning material should be developed. The training should make clear when line managers are expected to manage issues themselves, when they should refer upwards to their own managers, when they should involve People Services, and when they should involve the people in their faculty or school tasked with resolving particularly difficult issues (recommendation 5.3.3).
- 5.6.3 In designing the training, People Services should draw on relevant internal OU academic expertise, as well as the extensive published guidance available, for instance on training managers in dealing with bullying and harassment, on building capability and conflict-management skills, including (where necessary) discussions about the case studies and 'cognitive rehearsal' involving staff in role-playing exercises and learning how to manage conflict in a safe environment.
- 5.6.4 People Services should be responsible for ensuring that the training and development recommendations in this report are implemented.
- 5.6.5 There should be a consistency of approach across faculties and units, and where appropriate the four nations. The leaders of faculties, units and nations should be responsible for ensuring that their staff undertake the relevant training. Learning sets may be useful to discuss the dissemination of the report's recommendations, particularly where issues are contentious or not clear-cut.

Recommendation 7: Involvement of other staff groups

- 5.7.1 These recommendations impact not just on the behaviours and approaches of individual members of staff, but also on the approaches and practices of staff groups, both academic and professional. The heads of these groups should facilitate discussions within their teams as to how the recommendations impact on their collective work, and whether additional training is required at group level.
- 5.7.2 The role of staff working in internal and external communications is pivotal in setting the institution's tone in relation to free speech and equality and disseminating the OU's policy positions, both internally and externally. They should also be involved in discussions about how the OU can best disseminate and embed the principles and recommendations of this report.

Recommendation 8: Systems and structures should be put in place to support the promotion of free speech and academic freedom

- 5.8.1 The ongoing work to set up systems for promoting free speech and academic freedom through the development of the new Code of Practice should continue to be taken forward, notwithstanding the pause of the Higher Education (Freedom of Speech) Act 2023, and be clearly communicated to all staff and embedded in OU policies and systems.

Recommendation 9: The OU should explore initiatives or projects which would enable it to draw on its experience to take a lead in promoting a culture of encouraging debate and constructive disagreement, in line with its values, both internally and externally.

- 5.9.1 The OU, with its strong and proud commitment to equality, diversity and inclusion, is ideally placed to take a lead in enabling contested discussions and debates to take place including in relation to sex and gender, in a managed, inclusive but open way, welcoming a plurality of views and different perspectives.
- 5.9.2 The creation of an environment where debate and disagreement are encouraged needs to be led by the Vice-Chancellor's executive team and endorsed by Council. It could manifest itself in small internal steps – such as encouraging people chairing meetings or leading discussion groups to actively call for and encourage the expression of different views and opinions, as a way of instilling a culture of discussion and debate. It could involve staff being actively involved in discussing the practical implications of the underpinning principles proposed in Appendix 3. Or it could involve more ambitious internally or externally facing projects, conferences, and events, drawing on internal expertise where possible. For example, the OU could support and promote public debates about complex and contested social challenges including trans inclusive and gender critical theory, shaped in the light of the OU's values. Discussion between the Vice-Chancellor's executive team and the working group should determine how this broader culture of debate can be taken forward.

Recommendation 10: The impact of these recommendations should be evaluated

- 5.10.1 The impact of these recommendations should be evaluated by the working group to assess whether they are achieving the objectives set out in the review's terms of reference, or whether anything needs to be adapted or changed. It would be sensible to evaluate progress at the end of the 12 months from the date of this report, and then at the point when the working group stands down its work (which would then influence how ongoing work is embedded elsewhere and taken forwards).
- 5.10.2 The evaluation should involve engagement with staff and the trade unions to understand their perspectives on the implementation of the report's recommendations.
- 5.10.3 As part of this evaluation exercise, additional questions should be included in the annual Staff Survey asking staff whether they understand the expectations on them in relation to free speech, equality, and bullying and harassment in terms of the law and the OU's values and behaviours; and then a supplementary question as to whether they feel confident in expressing their views, within the boundaries of the law and in a way that is consistent with the OU's values and behaviours.

Appendix 1: Terms of reference

Purpose and scope

Following the publication of the tribunal's reserved judgment in Professor Joanna Phoenix's case against the OU on 22nd January 2024, Council has commissioned an independent review to consider the consequences of the tribunal's findings and make recommendations to assist the OU in addressing the issues raised by the tribunal's judgment.

The review will take the tribunal's findings as its starting point, and its purpose will not be to revisit or challenge those findings. The purpose is not to apportion blame or criticise individuals, but to learn from the tribunal's ruling and make appropriate recommendations which set out appropriate action.

The review will investigate how the OU can balance academic freedom, free speech and equality and employment rights to ensure that all staff can feel confident in expressing their views within the boundaries of the law and in a way that is consistent with the OU's values and behaviours.

While the tribunal judgment will act as a reference point for the review and has been the catalyst for commissioning this work, the review will be more widely focussed than the area of sex and gender identity.

Aims of the review

The review will:

- Identify the main issues emerging from the tribunal's judgment that are relevant to the review's purpose. These will include:
 - The OU's approach to academic freedom and free speech, and how these rights intersect with equality principles enshrined in the Equality Act 2010, Section 75 of the Northern Ireland Act 1998, and employment rights generally. In particular, the review will consider how difficult and contested matters can be debated in a way that respects the rights of others and is consistent with and supports the OU's values.
 - The OU's approach to managing disagreement between members of staff who hold profoundly different and conflicting views.
 - The standards of behaviour expected of members of OU staff and whether those standards are clear, well communicated, and are upheld by effective processes and practices.
- Make a series of recommendations on the changes required to the OU's ways of working such as policies, practices, procedures, induction, training, leadership and decision making in order to address the issues raised in the tribunal and otherwise found in the course of this review.
- For clarity, the review will not replace existing OU processes such as those in relation to complaints or grievances which will continue to be handled using existing university policies and procedures.

Proposed framework for the review

Timeline – it is anticipated that the review will commence in April and run until the Autumn.

Review Lead – Professor Dame Nicola Dandridge.

Review Legal Advisor – Kathleen Heycock, External Legal Advisor, Farrer & Co. LLP. The role of the legal advisor will be to advise the review lead and also to provide advice and support on procedural issues related to the

review to the Council Advisory Group.

Council – Council are the commissioners of the review and will ensure that the terms of reference of the review, as set by Council, are followed.

Council Advisory Group - The Chair of Council has appointed two lay members: Professor Dame Julia Goodfellow and Nikki Humphrey, a staff member of Council, Sas Amoah, and a student member of Council, Margaret Greenaway. Together they will form an Advisory Group whose role it will be, amongst other things, to act on the review's Terms of Reference, and support and advise the review lead. This group will also report back to Council and will review any draft reports and papers that are shared with Council.

Process

The views of OU staff will be central to the review's approach, its findings, and its recommendations. One exception to the internal focus of the review will be to offer ex members of OU staff named in the tribunal ruling the opportunity to contribute. The review's lead will listen to colleagues' views as they relate to these terms of reference, and will seek views on potential ways forward, inviting both positive and negative experiences to be shared.

- Arrangements will be made for some views to be shared in person or via MS Teams, whilst others will submit in writing or by sending in a recording. There will also be an opportunity for views to be submitted to the review's lead anonymously.
- In addition, the review lead will speak to the Gender Critical Research Network (GCRN), the Trans Network and the tribunal witnesses at the outset of the review and half-way through the review's work to discuss both the proposed process and emerging findings with them.
- An initial call for engagement will be made through an all-staff email from the Chair of Council and the review lead. Specific criteria for submissions will be defined and submissions will need to accord with these criteria. Those wanting to submit views will be asked to send a note to a specific review email address sharing how they prefer to make their submission. It will be made clear in the all-staff communication that only a certain number of staff will be afforded a face to face or MS Teams meeting with the review lead.
- All submissions will be treated as confidential and be available only to the review's lead and legal advisor to ensure that individuals feel able to be as candid and open as possible about their experiences and their views.
- The review lead and legal advisor will have full access to all appropriate documents, correspondence, oral and written evidence, or other materials the review reasonably judges necessary.
- The findings of the review and any relevant recommendations will be submitted to the OU's Council. Senate will receive the review's recommendations ahead of any decisions on their adoption. An agreed summary of the process and the recommendations will be available to all staff.

Appendix 2: Who is protected under the Equality Act 2010 (EqA)

Protected Characteristic (s.4 EqA)	Established to be included	Established not to be included	Not yet considered by courts
<p>Gender reassignment (“A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.” s.7 EqA)</p>	<ul style="list-style-type: none"> • Trans man (given that an individual “proposing to undergo” a process is protected, an individual need not have undertaken any actual steps to be protected, and an individual starting out on the process is protected as well as an individual who has completed the process) • Trans woman (see above) • Non-binary • Gender fluid 		<ul style="list-style-type: none"> • A-gender (though likely to be protected applying the same logic as the case which considered a non-binary, gender fluid person to be protected) • Intersex (unlikely to be covered unless embarking on a process of reassignment)
<p>Religion or belief (“Religion means any religion and a reference to religion includes a reference to a lack of religion” and “Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief” s.10 EqA)</p>	<ul style="list-style-type: none"> • Someone holding gender critical beliefs 	<ul style="list-style-type: none"> • Objectionable manifestations of beliefs (regardless of what those beliefs are) 	<ul style="list-style-type: none"> • Someone holding trans inclusive beliefs (though likely to be capable of protection, subject to determination on the facts)
<p>Sex (“a reference to a person who has a particular protected characteristic is a reference to a man or to a woman” s.11 EqA, and ““man” means a male of any age” and ““woman” means a</p>	<ul style="list-style-type: none"> • Someone who is identified female at birth, as recorded on their birth certificate • Someone who is identified male at birth, as recorded 	<ul style="list-style-type: none"> • Someone who does not have a Gender Recognition Certificate in their acquired sex (in which case their sex for EqA purposes is 	

<p>female of any age” s.212 EqA)</p>	<p>on their birth certificate</p> <ul style="list-style-type: none"> Someone who has a Gender Recognition Certificate in their acquired sex (in which case their sex for EqA purposes is their acquired sex) 	<p>their sex identified at birth, as recorded on their birth certificate)</p> <ul style="list-style-type: none"> Intersex (assuming they do not have a Gender Recognition Certificate) 	
<p>Sexual orientation (“Sexual orientation means a person's sexual orientation towards (a) persons of the same sex, (b) persons of the opposite sex, or (c) persons of either sex” s.12 EqA)</p>	<ul style="list-style-type: none"> Homosexual Heterosexual <ol style="list-style-type: none"> Bi-sexual 		<ul style="list-style-type: none"> Asexual (unlikely to be included based on the exclusion of the words “lack of” in s.12 EqA) Pansexual (not specifically protected but may be able to claim protection akin to bisexuality depending on facts)

Appendix 3: Underpinning principles

1. Free speech and EDI should not be set in opposition to each other.

When free speech and EDI are in balance, they act to support each other and reinforce the OU's values. When out of balance, they undermine each other and the OU's values. Free speech without equality is partial and polarising, potentially leading to the loudest voices prevailing and the suppression of minority perspectives. Equality without free speech is brittle and unsustainable and can lead to a narrowing of understanding and censorship.

2. Open debate – including the expression of differing views including contentious views - should be welcomed and encouraged, providing it is within the law

Open debate should be welcomed and encouraged as essential to a vibrant intellectual environment. This should include the expression of different views and contested perspectives that other staff may profoundly disagree with (subject to principle 3 below).

3. The expression of contentious views needs to be proactively managed.

Proactive and confident management of anticipated issues that are likely to give rise to strong disagreement needs to be embedded in OU practices and policies, so that disagreement can be managed effectively and productively. This is not with a view to constraining the expression of contentious views, but to help support their expression in a time, place and manner that respects the rights of others, is lawful, and aligns with the OU's values.

4. Alongside a general policy approach to EDI, there should be a specific focus on sex and gender, without obscuring the OU's essential work in other equality areas

Issues of sex and gender cannot be dealt with solely by way of general approaches to equality principles and practices. They require specific and explicit consideration, though the specific approach should be consistent with general EDI policy positions. This specific focus should not however be allowed to compromise essential EDI work in other equality areas, for instance in relation to race or disability.

5. The legal principles set out in Section 3 should inform OU's policy on sex and gender

The OU's approach to sex and gender should be premised (in principle and subject to the facts) on the legal principles set out in Section 3.

6. The OU's approach to the protected characteristic of belief should be distinct

Of the nine protected characteristics under the Equality Act 2010, the protected characteristic of belief – and in particular manifestation of belief – is subject to limitations. This ability to limit the manifestation of belief means that the OU's approach to this particular protected characteristic should be distinct. This distinct approach by the OU does not negate the fact that many people feel their identity and beliefs are inseparable.

7. As a general principle, the OU should adopt a policy of institutional neutrality in relation to contentious issues (unless relevant to the OU's strategy)

As a matter of institutional policy and to help secure academic freedom, the OU (and its departments and schools) should remain neutral between trans inclusive and gender critical views, allowing research and the expression of ideas and perspectives in both areas to be undertaken and supported equally and in line with OU policies. Consideration should be given to extending a policy of institutional neutrality to other contested areas (unless those areas have direct relevance to the OU's mission and strategy).

Appendix 4: Extracts from OU policies relevant to the review

1. The OU's mission and values

The OU's mission is to be *'Open to people, places, methods and ideas.'* Its values are to be inclusive, innovative and responsive.

2. OU Strategy 2022-27

The strategy prioritises inclusion. Equity is one of the five goals, defined as *'greater diversity at all levels, and inclusion in every aspect of how we work and what we achieve.'*

The first of the seven enablers is identified as *'living our values, being inclusive, innovative and responsive in all we do'*.

In terms of research, the strategy states that *'We are committed to providing a research environment that is supportive, inclusive and equitable, facilitates good research practice based on principles of research integrity ...'*

On equality and diversity the strategy states that *'We are committed to creating a culture of respect and belonging so that everyone is meaningfully included in the University's ways of working and way of life, addressing under-representation or exclusion of voices that should be heard. Guided by our values to be inclusive, innovative and responsive, we ask of ourselves and others that we take personal responsibility for our behaviour and hold each other to account for our words and actions to achieve the equity diversity and inclusion that will make us an even better university...'*

Enablers include *'our university is a place of open inquiry and discussion. We aspire to be an exemplar of how to discuss important and controversial matters bringing the standards of inquiry we have as an academic institution not just into our own conversations but taking them out into wider society. These obligations are not just about following rules but about the care and regard we have for one another. We value and respect each other for who we are and what we contribute, welcoming differences.'*

3. The OU Equality Scheme 2022-26

The Equality Scheme is a public document in which the OU's legal commitments under the Public Sector Equality Duty and other legislation is set out.

The Scheme states that *'We want everyone coming into contact with us off and online and regardless of reason to be treated with dignity and respect and to experience our stated commitment to our EDI values and regard bullying, harassment or discrimination as unacceptable behaviour. We want alignment between what we say and what we do.'*

Staff are explicitly required to *'treat all members of our University community with dignity and respect for their rights and beliefs'* and to *'respond positively and inclusively to individual differences'*.

A specific requirement for staff involved in research or with line management or Head of Unit responsibilities is to ensure that an 'equality analysis' is carried out for new research and new activity.

EDI structures are referenced in the scheme: *'There should be a named EDI representative in each of the areas who is responsible for driving the EDI agenda in their unit...'*, and Equality Impact Assessments are described as being used *'to meet our legal duty to give due regard to equality when developing or revising any ... project ... that may have an impact on people.'*

4. The Institutional EDI Plan, 2022-27

The EDI Plan is an internal document demonstrating how the EDI strategy will be implemented. It covers similar ground to the EDI Scheme, describing EDI principles as a lens through which all behaviours, policies and practices are viewed.

The Plan states that *'we commit to creating an environment where all staff and students respect the rights of others to hold different beliefs and opinions. Expression of differing, and perhaps contested views is always carried out in a respectful and professional manner.'* Its vision is described in the

following terms: *'We will seek to nurture a sense of belonging for those we employ and encourage an environment where people feel comfortable being their authentic selves at work.'*

The Plan refers to a *'zero tolerance'* approach to inappropriate behaviours/discrimination by ensuring that bullying and discrimination are addressed swiftly and effectively.

All staff are required to complete an online Diversity Compliance training module as part of their induction. This incorporates information about gender reassignment including relevant equality law and experiences of trans staff in higher education.

The Plan emphasises the role of Staff Networks in bringing people together to build a more inclusive organisational culture, and states that *'we will establish a staff network framework designed to provide clarity of purpose, roles and responsibilities and support for each network.'*

5. The Framework for Supporting Self-Managing Staff Network Group

The staff network Framework sets out what the objectives of staff networks are and how they will be run. The emphasis is on self-determination, noting that the purposes of networks include enabling people to *'share collective understanding, positive and negative experiences and evolve strategies in response to their experience at work'*.

The Framework states that *'the University will not determine the purpose or nature of groups or impose a specific structure on groups ... Activities can serve any purpose that the group members consider appropriate and may include ... responding to consultations from People Services or other University functions; collecting views and feedback on issues affecting group members...'*

If staff wish to establish a network, it is suggested that they should *'establish draft terms of reference ...'*

6. Transgender Staff Policy

The Transgender Staff Policy sets out in a practical way the arrangements that will be put in place to support staff transitioning from one gender to another, identifying the range of issues that they will need to deal with. It identifies the rights and responsibilities of trans staff, all staff, and line managers, and emphasises the support that is available to trans staff before, during and after transition. It references the Transgender Staff Guidance which provides information about recruitment, disclosure, support, and university records.

7. The OU's Code of Practice for Freedom of Speech and Academic Freedom

The Code, approved by the OU's Council on 9 July 2024, was introduced to comply with the Higher Education (Freedom of Speech) Act 2023 (now paused).

The Code describes freedom of speech and academic freedom as fundamental to the purpose of the university in the advancement and dissemination of learning and knowledge, the development of critical thinking, and the ability to challenge established ideas. It references the need for tolerance and respect for different viewpoints expressed within the law, and specifically notes the need for staff to respect the right of colleagues to express views we disagree with, and if necessary challenge those views openly through rigorous debate, and to *'make every reasonable effort to minimize the risk of any harm, either physical or psychological'*.

The Code also states that staff should *'be careful to distinguish between our personal views and those of The Open University or any other person, group of people or organization with which we may be associated'*; that *'some academic opinions and arguments may cause offence, but that is not of itself, a sufficient reason not to express those opinions and arguments... Staff ... will, nevertheless, be sensitive to the views of others and will not present or challenge views in a way that is hostile or degrading;*' and that staff should *'respect the right of others to challenge views ... provided that challenge is based on accurate evidence, facts or reasonable argument, and that it is thoughtful and made in appropriate fora.'*

The Code describes how its provisions can be enforced by way of complaint to the University Secretary, with the proposed guidance expanding on the complaints process and the investigation process.

8. The OU's Statement of Principles on Academic Freedom

This states that:

'By being places of debate universities are one of our most important pillars of civil society ... they must also be places where differing and difficult views can be brought forward, listened to and challenged.'

We have responsibilities to each other and to the wider society to: ... respect the rights of individuals to hold different beliefs and views and to express them through appropriate contribution to discussion and academic debate...

'This means that:

- *We will be academically rigorous, justify our views with evidence and academic argument and be willing to recognize the gaps and weaknesses in our own arguments*
- *In promoting our ideas we will make every reasonable effort to minimise the risks of any harm, either physical or psychological, arising for any person, institution or community*
- *We will be aware that some academic opinions and arguments may cause offence to some people but that this is not, of itself, a sufficient reason not to express those opinions and arguments. We will nevertheless be sensitive to the views of others and we will not present or challenge views in a way that is hostile or degrading.*
- *We respect the rights of others to challenge our views, provided that it is based on accurate evidence facts, or reasonable argument and that it is thoughtful and made in appropriate fora*
- *We will always be careful to distinguish between our personal views and those of The Open University or any other person group of people or organization with which we may be associated'*

9. Bullying and Harassment Policy and Code of Practice

The OU's bullying and harassment policy defines bullying as *'intimidating, hostile or humiliating treatment by one or more individuals'* and includes *'public humiliation, derogatory or belittling remarks concerning job performance or personal attributes...'*

Under the policy managers are required to act if they observe bullying and harassment occurring. They should not wait until complaints are brought to their attention if they are aware of behaviour that might cause offence.

The Bullying and Harassment Code of Practice includes examples of unacceptable behaviour, including *'public humiliation, derogatory or belittling remarks concerning job performance or personal attributes, shouting and/or sarcasm, personal insults and name-calling.'*

10. Bullying and Behaviours and Standards at Work Policy

This policy describes processes for dealing with such matters as behaviours during social activities, the use of work property, the use of the university's name and similar arrangements. It references other policies, with some examples of expected standards, but in a generic way: *'The University is committed to providing a workplace in which all employees are given the dignity and respect to which they are entitled. Expectations around behaviour are set out in the Bullying and Harassment Policy/Code and apply to all staff.'*