

Office for  
Students

The logo for the Office for Students, featuring a dark blue square with a yellow square in the top right corner containing the letters 'OfS' in white.

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# Insight event

## Freedom of speech in higher education

David Smy, Office for Students (OfS)  
Director of Monitoring and Intervention

Online via Zoom

15 December 2022

**#OfSInsight**

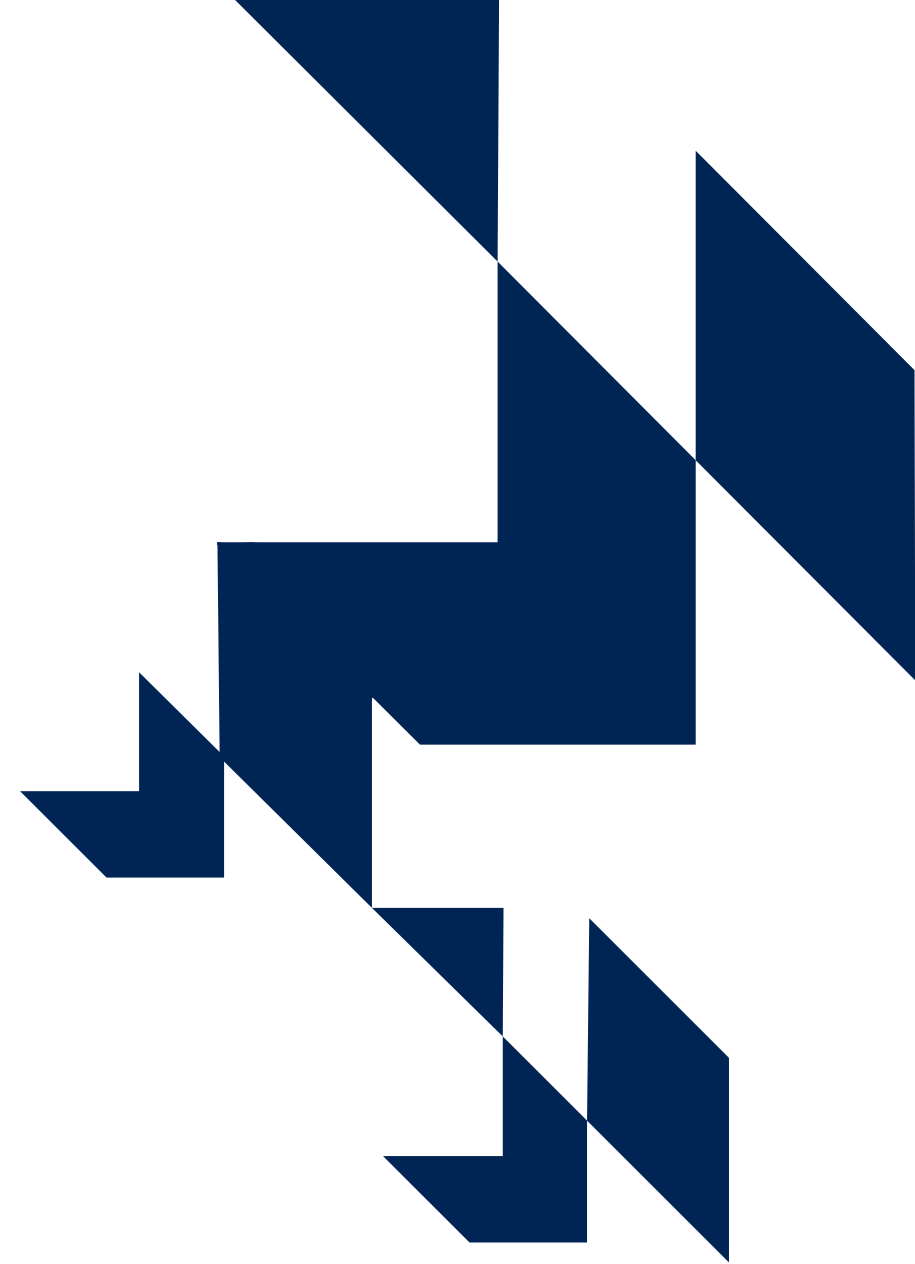
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# Today's programme:

- Welcome and introduction with Lord James Wharton
- Introductory remarks by Claire Coutinho MP
- Keynote address by Susan Lapworth
- Audience question and answer with Susan Lapworth
- Keynote address by Dr John Tomasi
- Keynote address by Akua Reindorf
- Panel discussion on 'How can universities and colleges meet their obligations for both freedom of speech and equality?' with
  - Akua Reindorf
  - Patrick O'Donnell
  - Ruth Anderson
  - Professor Steve West
- Closing remarks by Susan Lapworth

# **James Wharton, Lord Wharton of Yarm**

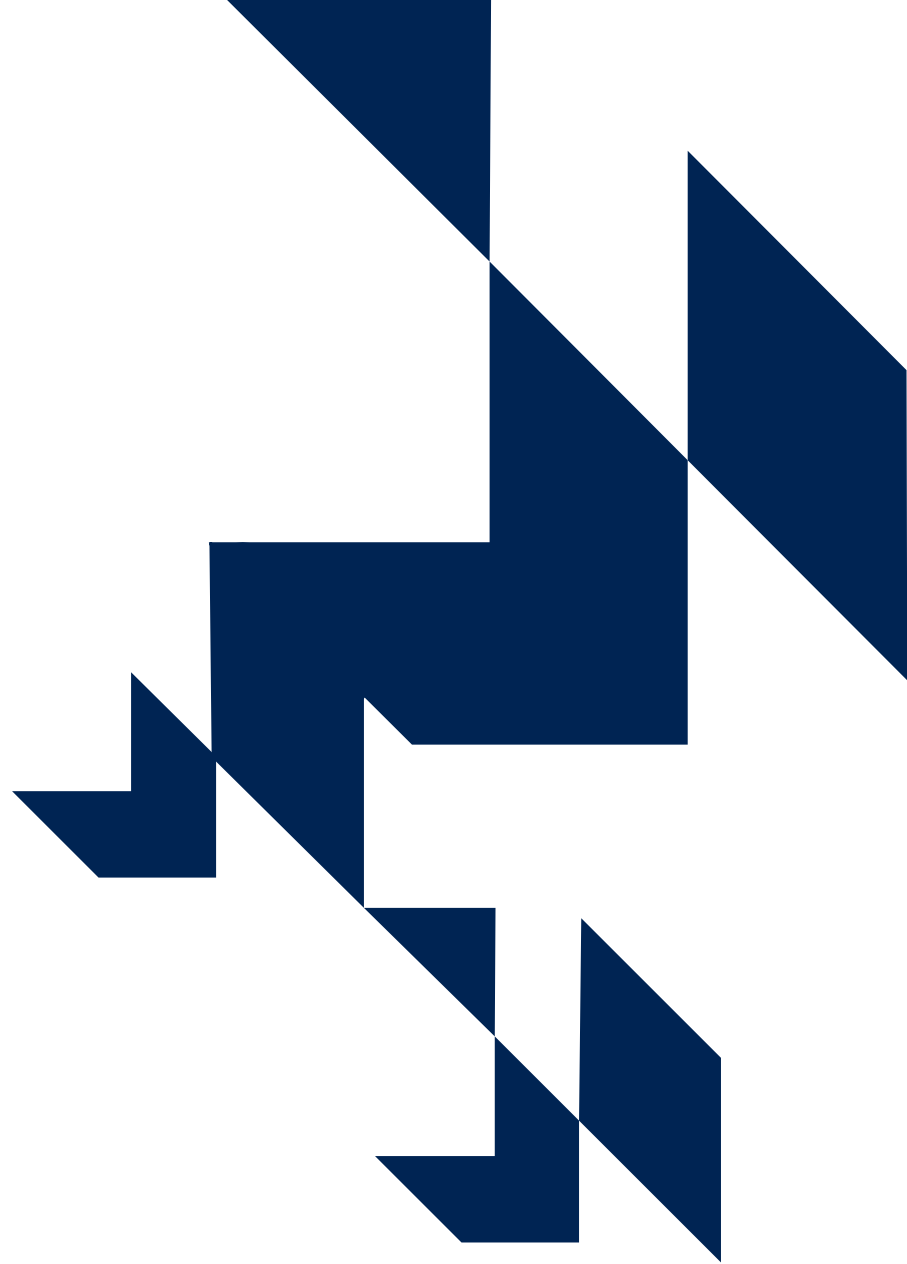
Chair, Office for Students (OfS)



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# Claire Coutinho MP

Minister for Children, Families and Wellbeing



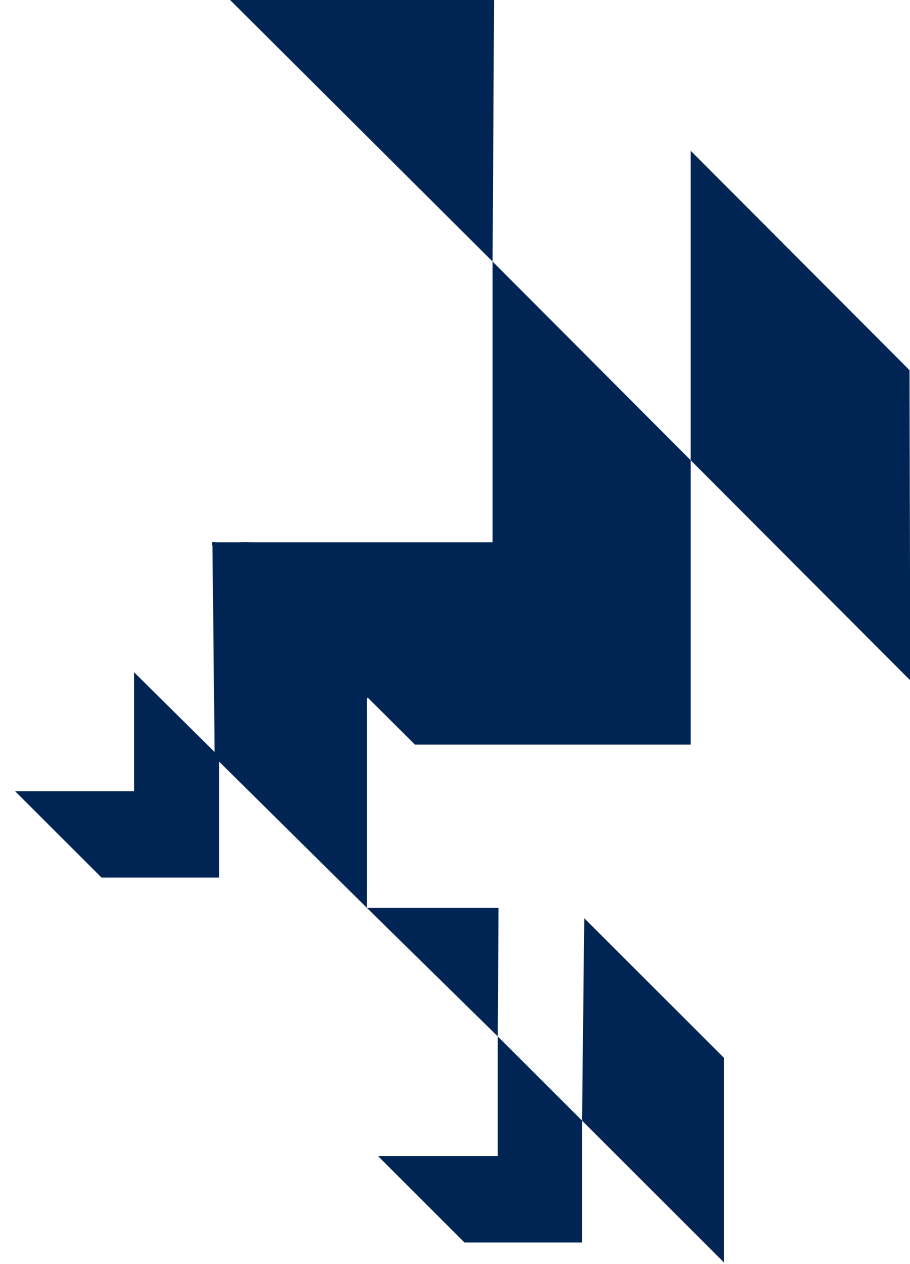
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# Susan Lapworth

Chief Executive, Office for Students (OfS)

*Freedom to question, challenge and debate*



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# Dr John Tomasi

President, Heterodox Academy

*Disciplined Speech: An American Perspective*



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great minds don't always think alike

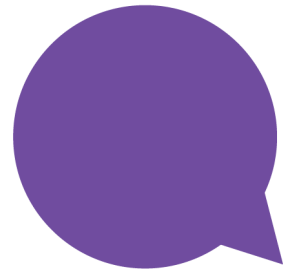
[tomasi@heterodoxacademy.org](mailto:tomasi@heterodoxacademy.org)

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great minds don't always think alike



John Tomasi, President  
[tomasi@heterodoxacademy.org](mailto:tomasi@heterodoxacademy.org)

# Our Mission

Improve the quality of teaching and research in universities by increasing open inquiry, viewpoint diversity, and constructive disagreement

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5. History

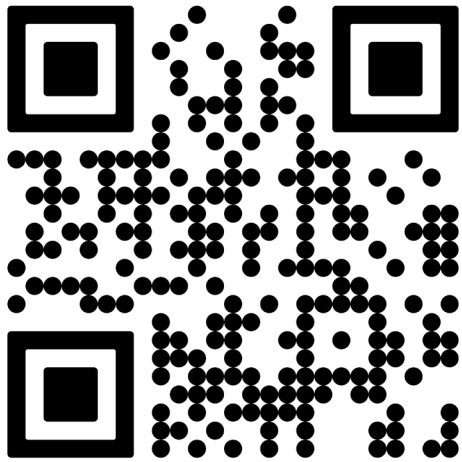
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## Countries



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- 1 Make your case with evidence.
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- 3 Be intellectually humble.
- 4 Be constructive.
- 5 Be yourself.

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The hxx way

# Dr John Tomasi

President, Heterodox Academy

*Disciplined Speech: An American Perspective*



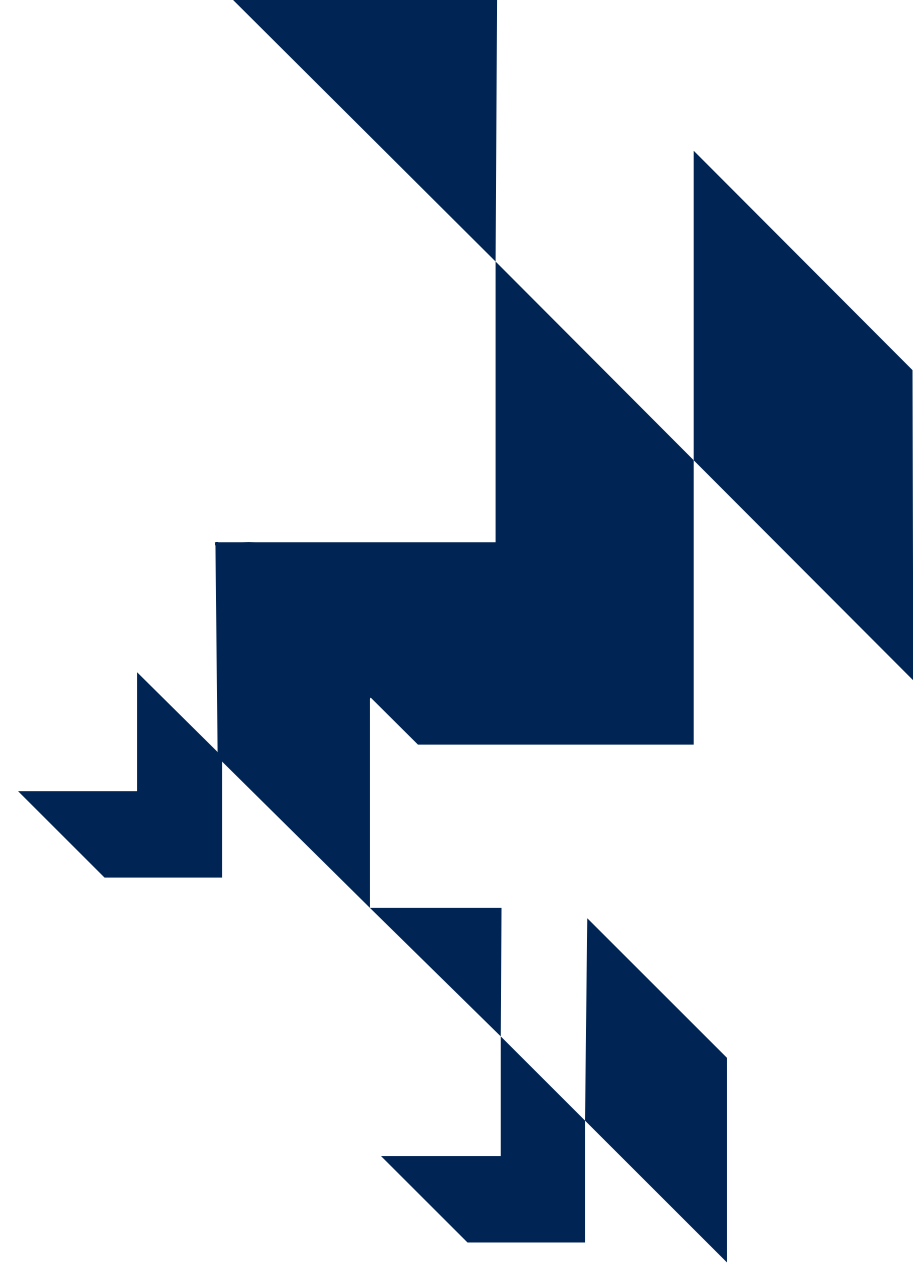
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# Akua Reindorf

Equalities and Human Rights  
Commission (EHRC) Commissioner  
and Barrister, Cloisters Chambers

*Harassment, hate and offence -v- freedom of  
speech in the academy: where does the law  
draw the line?*

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# HARASSMENT, HATE & OFFENCE

- v -

## FREEDOM OF EXPRESSION IN THE ACADEMY

### WHERE DOES THE LAW DRAW THE LINE?

AKUA REINDORF

Barrister, Cloisters Chambers | Commissioner, Equality and Human Rights Commission

15 DECEMBER 2022



# WHAT IS FREEDOM OF EXPRESSION?

- **Art 10.1 European Convention on Human Rights (ECHR)**

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



- Public authorities include:
  - universities in the exercise of their public functions
  - courts and tribunals when they apply the law

- Overlaps with **Art 9 ECHR Freedom of Thought, Conscience and Religion**
  - Art 9.1: absolute right to hold any belief
  - Art 9.2: qualified right to manifest belief in worship, teaching, practice and observance

# WHEN CAN FREEDOM OF EXPRESSION BE RESTRICTED?

- **Art 10.2 ECHR:**
  - Free speech may be subject to formalities, conditions, restrictions or penalties
    - **if** prescribed by law
    - **and** necessary in a democratic society
      - **in** the interests of public safety, **for** the prevention of disorder or crime, **for** the protection of health or morals, **for** the protection of the reputation or rights of others, or **for** preventing the disclosure of information received in confidence (amongst other things)
- Freedom to manifest belief is subject to similar restrictions: Art 9.2

## WHEN CAN FREEDOM OF EXPRESSION BE RESTRICTED?

- **“Prescribed by law”:**
  - doesn’t have the same meaning as “free speech within the law”
  - means the speech can only be restricted if there is a lawful basis for restricting it
  - even then, it can only be restricted in a way that is:
    - within the categories in Art 10.2 ECHR; and
    - is proportionate
  - proportionate = necessary and appropriate

# WHEN CAN FREEDOM OF EXPRESSION BE RESTRICTED?

- **Different levels of protection:**
  - higher protection for speech intended to inform than speech intended to annoy
  - very high protection for e.g. political expression, journalism and academic expression

## WHEN CAN FREEDOM OF EXPRESSION BE RESTRICTED?

- **The right to speak only inoffensively would not be a right worth having:**
  - speech which shocks, offends or disturbs can only be restricted if there's a lawful basis and in a proportionate way
  - the right to free speech protects "the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative" (*Redmond-Bate v DPP*)

## WHEN CAN FREEDOM OF EXPRESSION BE RESTRICTED?

- **Speech which is profoundly hateful is not protected at all:**
- Art 17 ECHR:
  - no right to “engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”
- E.g. Holocaust denial, totalitarianism

## WHEN CAN FREEDOM OF EXPRESSION BE RESTRICTED?

- **Opinions which are not spoken are (almost) absolutely protected:**
  - Art 9.1 gives an absolute protection for the holding of any belief (except those that fall foul of Art 17)
  - Interference with a person's speech merely because they are known to hold beliefs considered offensive cannot be justified (unless the belief falls within Art 17)



# WHAT IS ACADEMIC FREEDOM?

- **Magna Charta Universitatum Recommendation 1762 (2006)**

“the fundamental principle of university life”

“violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation”

- No single definition
- Focus is on prohibiting adverse consequences for challenging received wisdom or established doctrine
- Aim is the production of knowledge and truth
- Encompasses:
  - **expression** e.g. discussing, questioning, testing
    - falls within Art 10 freedom of speech: utmost protection
  - **action** e.g. research, teaching, disseminating, publishing
    - wider scope than freedom of expression

- **Parliamentary Assembly of the Council of Europe (2006)**

academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction

- **UNESCO Recommendation concerning the Status of Higher Education Teaching Personnel (1997)**

the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative bodies

- **Higher Education and Research Act 2017 s.2(8)(c)**  
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 the University

- **Higher Education (Freedom of Speech) Bill clauses A1(6),(7)**  
freedom **within the law** to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions without risk of the loss of jobs or privileges in the institution or the reduction of the likelihood of promotion or different jobs in the institution

- **“Within the law”**
  - appears in domestic legislation defining academic freedom
  - if the speech amounts to harassment or discrimination (or is otherwise unlawful), it is not protected by those statutes

- So:
  - internationally, academic freedom is amongst the strongest forms of Art 10 free speech
  - but UK academic freedom legislation is weaker than Art 10, because it only protects speech which is “within the law”
- this raises very complex questions about the scope of universities’ duties



- Can speech be “within the law” if:
  - ordinarily, it would amount to harassment; but
  - either it would not amount to a breach of Art 10 because it does not reach the threshold for restrictions under Art 10.2; or
  - under Art 10.2 it would not be proportionate to restrict the speech altogether, but instead to impose a lesser interference?

# THE SCOPE OF ACADEMIC FREEDOM

- **Who?**
  - academics only
- **Where and when?**
  - can extend outside the institution and beyond activities forming part of the individual's academic role (*Erdoğan v Turkey, Kula v Turkey*)
  - including Twitter! (see *Magyar Helsinki Bizottság v Hungary*)

- **What?**
  - can include speech falling outside the individual's area of academic expertise as long as it has an academic element (*Erdoğan v Turkey*, *Aksu v Turkey*)
  - includes freedom to criticise the institution and system because the protection of a university's reputation is merely institutional (*Kharmalov v Russia*)

- **How?**
  - harsh and offensive speech may be protected (*Erdoğan v Turkey*)
  - but freedom of academic speech must be exercised professionally and is subject to established principles of intellectual rigour, scientific inquiry and research ethics (UNESCO (1997))

### - **Restrictions**

- even minimal sanctions can be a breach of Art 10 because they can have a “chilling effect” (*Kula v Turkey*)
- ideas expressed do not have to be meritorious (*Hertel v Switzerland*)
- the need for restrictions must be established convincingly (*Aksu v Turkey*)

# EQUALITY ACT HARASSMENT IN THE HE CONTEXT

- **Harassment under s.26 of the Equality Act 2010:**
  - unwanted conduct
  - related to a protected characteristic
  - which has the
    - purpose; or
    - effect
  - of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them

- **Speech is not harassment just because it offends:**
  - Unwanted conduct related to a protected characteristic is only harassment if it is:
    - either deliberately offensive (etc); or
    - can reasonably be said to have had an offensive (etc) effect, taking into account
      - the perception of the person; and
      - the other circumstances of the case
  - Mixed subjective and objective test

- Relatively unusual for speech to amount to harassment if:
  - not targeted at the purported victim(s); or
  - the person affected has sought it out (e.g. by voluntarily attending a talk, following the offender on social media or searching for the impugned speech on the internet)
- Almost inconceivable that the mere presence of a person on university premises whose views are regarded as offensive would amount to harassment



- Strongly arguable that in an academic context the “reasonableness” threshold is higher than elsewhere
- Because “relevant circumstances” must include:
  - the nature and purpose of higher education, where academic freedom is “the fundamental principle”; and
  - the “utmost protection” given to academic speech under Art 10; and
  - the domestic legislation which protects academic freedom and requires universities to promote it

# SUMMARY

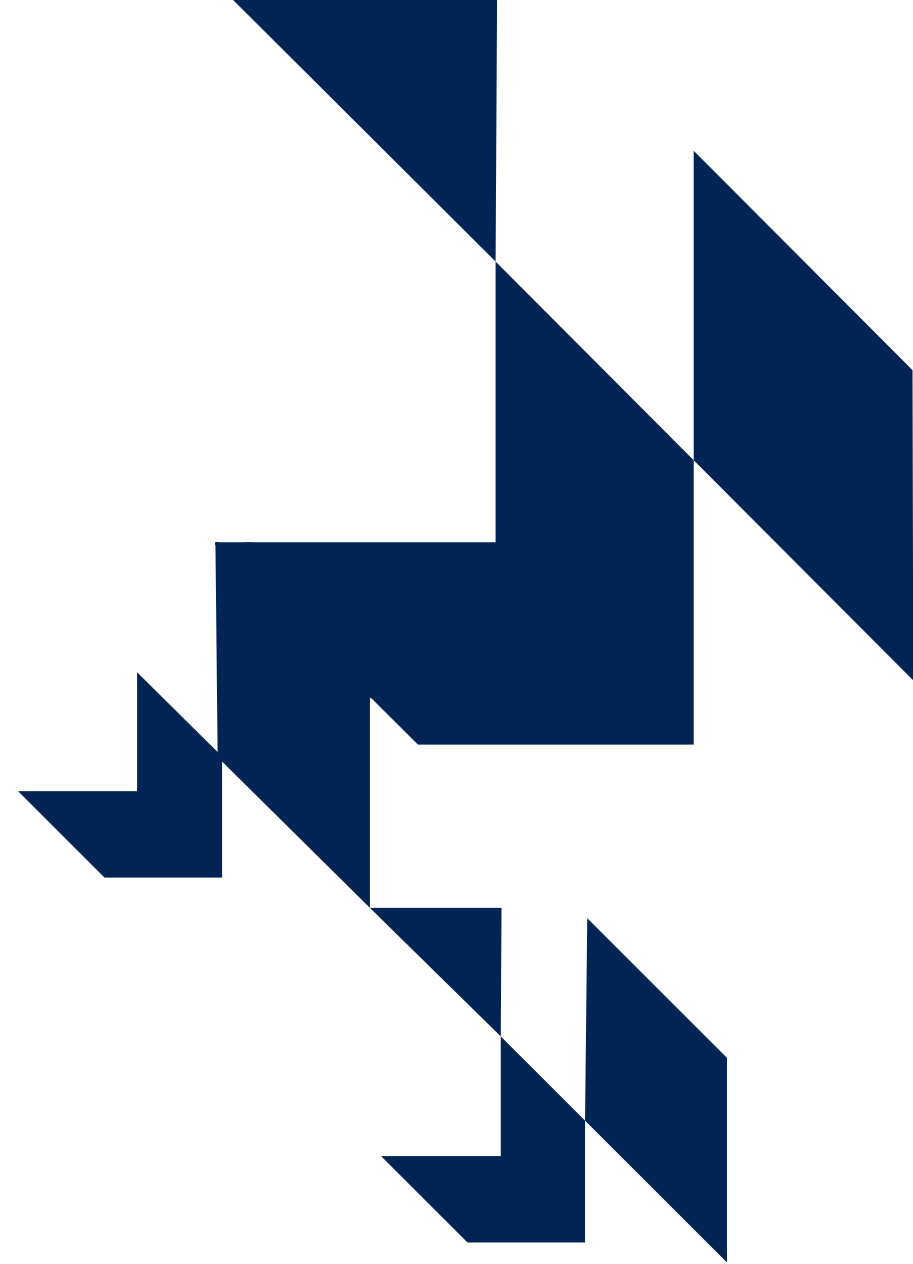
- To amount to harassment, academic speech which is related to protected characteristics must be either intended to offend or reasonably experienced as offensive, taking into account the specific context of the nature and purpose of higher education and the strong protection given to freedom of academic speech by Art 10 and to academic freedom by domestic legislation
- Universities must very carefully interrogate any claims that academics' speech or publications, in any context, should be restricted because they amount to harassment
- Universities must very carefully justify any restrictions made on that basis

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# Panel discussion

How can universities and colleges meet their obligations for both freedom of speech and equality?

## Facilitator:

- Hilary Jones, Competition and Registration Manager, OfS

## Panelists:

- Akua Reindorf, EHRC Commissioner and Barrister, Cloisters Chambers
- Patrick O'Donnell, former President, University of York Students' Union
- Ruth Anderson, Chief Executive, Index on Censorship
- Professor Steve West, President Universities UK, and Vice-Chancellor, University of the West of England

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# Thank you for listening

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Recording: [Insight event: Freedom of speech in higher education - Office for Students](#)

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