UNIVERSITY OF SUSSEX

By email only:

litigationteam@officeforstudents.org.uk

[redacted]

27 March 2025

Dear Sir/Madam,

Letter sent under the pre-action protocol for judicial review

Notice of intended appeal under Schedule 3 paragraph 3 of the Higher Education and Research Act 2017

Response required by 4pm 3 April 2025

A. Introduction

1. This is a letter sent under the pre-action protocol for judicial review. It also constitutes notice of an intended appeal under Schedule 3 (3) of the Higher Education and Research Act 2017 (**"HERA 2017"**).

2. The University of Sussex (the **"University"**) intends to apply for judicial review of the "Notice of final decision on substantive matters" issued by the Office for Students' (the **"OfS"**) dated 20 March 2025 (the **"FD"**).[1] The University will also appeal against the decision to impose a monetary penalty (and its amount) recorded in the FD.

3. The FD is unlawful. As explained further below, it is:

   3.1. *Ultra vires*:

      (i) The OfS is not empowered to set a public interest governance condition that covers documents that are not a provider's "governing documents" within the meaning of section 14(1) of HERA 2017. The University's Trans and Non-Binary Equality Policy Statement (**"TNBEPS"**) is not a governing document within the meaning of section 14(1) HERA 2017.

      (ii) The OfS does not have jurisdiction to assess whether the University has complied with its own internal scheme of delegation. That jurisdiction is reserved to the King, as the Visitor of the University,

[1] The FD is dated 20 March 2025 but was only validly issued on 27 March 2025. The FD issued on 20 March 2025 failed to comply with the requirements of paragraph 2(7) of Schedule 3 to HERA 2017. The limitation period for appeal is 28 days after 27 March 2025.

and nothing in HERA 2017 expressly or by necessary implication intrudes on the King's jurisdiction.

(iii) The OfS has no statutory or other power to expend funds (which it raises by levying fees on providers) to investigate and opine on "other regulatory concerns" beyond the regulatory conditions (and its analysis of these other matters is in any event wrong in law).

3.2. Wrong in law:

(i) the OfS is empowered by HERA 2017 to assess whether the provider's governing documents, properly interpreted, are "consistent" (section 14 (1) HERA 2017) with, inter alia, the

Academic Freedom and Freedom of Speech principles. This requires the OfS to direct itself correctly both as to the meaning of "consistent" and the underlying legal norm against which it is assessing consistency (Academic Freedom and Freedom of Speech). The OfS failed in both respects. It was wrong to direct itself that a document is inconsistent with a principle because somebody may misread it and fail to give it its reasonable meaning. As explained by the Supreme Court, *"a drafter of a policy statement is not required to imagine whether anyone might misread the policy and then to draft it to eliminate that risk": R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 at §34.

(ii) The OfS misdirected itself as to the meaning of the Disciplinary Statement. The Disciplinary Statement does not capture speech which is not already unlawful. It captures speech which would be contrary to section 5 of the Public Order Act 1986. Even if the Disciplinary Statement were thought to cover some lawful speech, it was proportionate (and therefore lawful) for the University to have a policy that prohibited abusive, harassing or bullying conduct that could reasonably be expected to cause distress or fear (while at the same time expressly stating in the policy that this prohibition would not be used to disproportionately limit free speech).

(iii) The OfS misdirected itself as to what freedom of speech "*within the law*" means. The University is entitled to limit speech that is otherwise lawful under criminal and civil law, so long as the limitation is in accordance with law (e.g. a lawfully made contract or policy) and proportionate. Universities, like other employers, are permitted to prevent academics from bullying students. Universities are also permitted to prevent students from bullying other students. On the OfS' approach, Universities would be powerless to prevent (for example) an (i) academic shouting at students and (ii) some forms of plagiarism, so long as that conduct was not discriminatory or

otherwise criminal or unlawful. That is wrong in law.

3.3. Irrational: the OfS concluded that the Stereotyping Statement in the 2023 TNBEPS did not breach the Academic Freedom principle (§§80-81, FD) but did breach the Freedom of Speech principle and would have a chilling effect on staff and students. The Stereotyping Statement concerns the process by which the curriculum is set and could only ever apply to academics. Having satisfied itself that the TNBEPS safeguards the freedom of academics to set the curriculum, the OfS failed to provide any rational explanation for concluding that the freedom of speech of academics in setting the curriculum would be unreasonably impaired.

4. There is no pre-action protocol for appeals to the First-tier Tribunal. Nevertheless, this letter also explains why the monetary penalty is *ultra vires*, so as to give you the opportunity to withdraw the penalty and avoid the appeal.

5. Given the speed with which this letter has necessarily been drafted, it is expressly without prejudice to any additional or different grounds that the University may advance in the claim for judicial review or appeal.

6. We require a substantive response, and the disclosure set out below, by no later than 4pm on 3 April 2025. The time limit to file an appeal is a short one (28 days) and it would be proportionate to file the linked claim for judicial review at the same time. We will need time to consider your response before issuing proceedings.

7. We note that the OfS provided the University with four clear working days' notice of its intention to publish a summary of the FD. Although the FD and the accompanying documents ran to many hundreds of pages and followed an investigation that had lasted 1,246 days, the OfS stated that it considered four clear working days' notice to "*afford the provider a fair opportunity and sufficient time to seek to obtain an injunction against publication*". In those circumstances, we trust that the OfS will have no issue responding to this letter within four working days.

8. The University intends to publish this letter.

B. Parties

B1. The Claimant

9. The Claimant is the University. It is an English higher education provider within the meaning of section 83 of HERA 2017. It has legal personality as an exempt charity.

B2. The Defendant

10. The Defendant is the OfS. It is a body corporate established by section 1 of HERA 2017 and is empowered by Parliament to regulate the higher education sector in accordance with that Act and the Regulatory Framework made under that Act.

B3. Interested Parties

11. We do not consider there to be any Interested Parties at this stage. Please confirm in your response whether you agree.

C. The OfS's decisions

12. On 22 October 2021, the OfS opened an investigation into free speech matters at the University. 1,246 days later it produced a final decision on breach. Throughout various stages of the investigation, the OfS has intimated different levels of potential penalties and breaches, most of which have now been withdrawn.

13. The OfS did not once meet any member of the University to inform its investigation. The OfS refused all the University's requests to meet. The OfS refused all requests to discuss the substance of its investigation, initial findings, provisional decision or final decision. The OfS refused the University's requests for an indication as to whether revisions to the TNBEPS addressed the OfS's concerns.

C1. Initial Findings (2022)

[redacted]

15. We intend to rely on the information at paragraph 14 above in the proposed legal proceedings and can see no proper basis for it being withheld from the Court. However, given that (a) you have previously contended that this information is confidential (but provided no reasoned basis for that contention) and (b) the University intends to publish this letter, it will redact paragraph 14 from the published version to afford you an opportunity to explain whether and, if so, why you consider that this information cannot be provided to the High Court and First Tier Tribunal.

C2. Provisional Decision (2024)

16. In March 2024, the OfS reached its Provisional Decision on substantive matters (the **"PD"**). The PD was 259 pages long and was repetitive and poorly written. The University provided representations in response (the **"PD response"**). The majority

of the findings and proposed penalties in the PD (including a £325,000 penalty and conditions of registration relating to the FOSCOP and ESP) have now been abandoned, with no explanation or apology from the OfS. The PD also proposed (inter alia) monetary penalties of (i) £450,000 in relation to the TNBEPS and (ii) £225,000 in relation to delegation arrangements. It provisionally found the University to be in ongoing breach. No explanation for the increase in proposed penalties between the Initial Findings and the PD was provided.

C3. Final Decision

17. At 10.08am on 20 March 2025, without prior notice, the OfS telephoned the University requesting a meeting with the Vice Chancellor by 1.30pm that day. The Vice Chancellor rearranged her diary and a call was held between the OfS's Arif Ahmed and the Vice Chancellor at 1.30pm. He notified her that the FD would be issued later that day. The FD was sent by email at 3.57pm. In the FD, the OfS made the following findings.

18. First, the OfS directed itself as to the law in the following way:

    16.1. It found that the obligation under the Freedom of Speech principle includes *"deciding not to take a step would have an adverse impact on freedom of speech without compelling lawful justification"* (FD, §25) and that, in considering the consistency of the TNBEPS with the Freedom of Speech principle, the OfS should consider the extent to which (i) *"the contents of the policy expressly provide for steps to be taken that are likely to directly or indirectly undermine freedom of speech within the law, including by having content which by its very existence would be likely to undermine freedom of speech"* and (ii) *"*[the] *policy fails to provide for reasonably practicable steps that would facilitate securing freedom of speech within the law e.g. because of inadequate content or a lack of content."* (FD, §27).

    16.2. In so doing, the OfS has not construed the TNBEPS objectively but considered various subjective readings that people might give to it, including readings which the OfS accepts are wrong: FD §§50, 67(a)-(b), 78, 83(b), §92, 93.

    16.3. In considering the consistency of the TNBEPS with the Academic Freedom principle, the OfS should consider the extent to which (i) *"the contents of this policy contain anything that could potentially be relied on by the higher education provider to take disciplinary action against an academic member of staff, or treat them less favourably than other academic staff, because of their lawful academic ideas and opinions;"* and (ii) *"this policy fails to expressly provide for effective safeguards (such as in decision making) to prevent academic staff from being disciplined or treated less favourably than other academic staff because of their lawful academic ideas and opinions."* (FD, §28).

17. Second, the OfS found that the TNBEPS is a governing document (FD, §§29-31).

18. Third, the OfS asserted that it *"did not and does not solely rely on the purported contractual effect of the TNBEPS to explain why it creates a chilling effect. Rather, the contractual nature of the policy reinforces the chilling effect that it creates. [Ftn, by chilling effect, the OfS means the potential for staff and students to self-censor and not speak about/express certain views]."* (FD, §33). The OfS found that the TNBEPS has contractual effect for both staff and students (FD, §34).

19. Fourth, the OfS examined the effect of Statute VII of the University's Statutes and concluded that (i) Statute VII did not protect students (FD, §36); (ii) Statute VII protects academic staff from an adverse outcome, but not the possibility of disciplinary proceedings being brought (FD, §53-55).

20. Fifth, the OfS concluded that the Positive Representation Statement (removed in 2022) breached the Academic Freedom and Freedom of Speech principles.

21. Sixth, the OfS concluded that the Stereotyping Statement breached:

    21.1. The Freedom of Speech and Academic Freedom principle in all versions of the TNBPS from 2018 to 2022. The OfS in particular concluded that an academic designing their curriculum with the intention of reinforcing stereotypes about transgender people would be acting lawfully (FD, §69).

    21.2. The Freedom of Speech principle in the 2023 version, notwithstanding the words *"Nothing in this Policy Statement should be taken to justify sanctioning academic staff for questioning or testing received wisdom or putting forward new ideas including controversial or unpopular opinions within the law, nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech. Any person concerned that their right of academic freedom or freedom of speech have been unjustifiably restricted may lodge a complaint"* and notwithstanding the OfS' conclusion that the TNBPS as a whole adequately safeguarded academic freedom.

22. Seventh, the OfS concluded that the Disciplinary and Transphobic Propaganda Statements breached:

    22.1. The Freedom of Speech and Academic Freedom principle in all versions of the TNBPS from 2018 to 2022.

    22.2. The Freedom of Speech principle (but not the Academic Freedom) principle in the 2023 version. In particular, the OfS found that the definition of "*transphobic abuse, harassment or bullying*" as *"unwanted behaviours and communications that could reasonably be expected to cause distress or fear among trans people"* captured lawful speech (FD, §90) because, unlike the definition of criminal harassment in the Protection from Harassment Act 1997, no course of conduct is required. It found as such notwithstanding the

provision in the TNBPS that *"Nothing in this Policy Statement should be taken to justify sanctioning academic staff for questioning or testing received wisdom or putting forward new ideas including controversial or unpopular opinions within the law, nor should this Policy Statement be taken to justify disproportionate restrictions on freedom of speech. Any person concerned that their right of academic freedom or freedom of speech have been unjustifiably restricted may lodged a complaint"*.

23. Eighth, the OfS found that the combination of those matters resulted in a single historic breach of E1 from 1 August 2019 to 20 March 2024. It declined to determine whether the current version of the TNBPS, published on 20 March 2024, satisfies the Freedom of Speech principle, reserving its position on that point.

24. Ninth, the OfS found that the University did not follow its internal delegation arrangements and that this led to a breach of E2(i). Again, the OfS reserved its position as to whether or not the breach is ongoing (FD, §23). As to its jurisdiction to make such findings, the OfS argued that *"HERA confers on the OfS the power to impose (and therefore enforce) conditions E1 and E2(i) and in doing so Parliament implicitly intrudes into the visitor's jurisdiction."* We return to this below.

25. Tenth, the OfS concluded that the intervention factors favour intervention and a monetary penalty. Its calculation of the monetary penalty was set out in FD Annex G.

26. Eleventh, the OfS set out a series of "wider regulatory concerns" in FD Annex H. It justified these findings on the ground that *"non-compliance with these duties could be indicative of whether the provider is compliant with condition E1 by reference to academic freedom and freedom of speech PIGP given the overlap/relevance of the subject matter of these wider legal obligations and those PIGPs."*

D. Grounds for judicial review

D1. The TNBEPS is not a governing document within the meaning of section 14(1) HERA

27. The definition of *"governing document"* as set out in the Regulatory Framework is very wide.[2]

28. However, "*governing document*" is a statutory concept. Section 14(1) of HERA 2017 provides that the public interest governance conditions mean *"a condition requiring the provider's governing documents to be consistent with the principles in the list published in this section, so far as applicable to the provider."*

[2] In the Regulatory Framework "governing documents" are defined to mean *"the documents adopted, or that should have been adopted by the provider, that describe any of the provider's objectives or values, its powers, who has a role in decision-making within the provider, how the provider takes decisions about how to exercise its functions, or how it monitors their exercise. This test will be broadly rather than narrowly applied."*

29. Parliament has not empowered the OfS to expand the definition of "*governing document*" through its Regulatory Framework. The consequences of this are as follows:

    29.1. The words "*governing document*" in section 14(1) of HERA 2017 must be construed according to ordinary principles of statutory interpretation.

    29.2. To the extent that the Regulatory Framework captures documents within its wide definition of "*governing documents*" that are not governing documents within the scope of section 14(1) HERA 2017, then (a) the Regulatory Framework and (b) any decision based on it will be *ultra vires.*

30. The natural and ordinary meaning of the "*governing documents*" of a charity (such as the University) are the documents which constitute the charity as a legal person and set out its purposes and governance structures. For the University, this is its Charter, and Statutes made under the Charter. It does not include the TNBEPS.

31. Parliament has defined what it considers to be "*governing documents*" for universities in Wales and Scotland as follows:

    31.1. In Wales, a *"governing document"* means "*in the case of an institution established by Royal charter- (i) the institution's charter, and (ii)any instrument relating to the conduct of the institution the making or amendment of which requires the approval of the Privy Council*" (section 47 of the Higher Education (Wales) Act 2015).

    31.2. In Scotland, a *"governing document"* means *"in the case of an institution established by royal charter, means its charters together with the statutes (if any) made under them"* (Higher Education Governance (Scotland) Act 2016).

32. There is no indication that Parliament intended the words "*governing document*" to carry a fundamentally different meaning in respect of universities established by Royal charter in England.

33. The Regulatory Framework and FD are therefore *ultra vires* and the TNBEPS is not a "*governing document*".

<u>D2. The OfS has misdirected itself as to the scope of its task under HERA and the Regulatory Framework</u>

34. Section 15(1) of HERA 2017 empowers the OfS to *"impose a monetary penalty on a registered higher education provider if it appears to the OfS that there is or has been a breach of one of its ongoing registration conditions"*. The registration condition relating to public interest governance is provided for at section 13(1) *"the initial and ongoing registration conditions may, in particular, include…(b) a public interest governance condition"* defined in section 14(1) as *"a condition requiring the*

provider's governing documents to be consistent with the principles in the list published in this section, so far as applicable to the provider."

35. The two relevant public interest governance principles (**"PIGPs"**) are Academic Freedom and Freedom of Speech, defined as:

"Academic freedom: academic staff at an English higher education provider 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 the provider.

Freedom of speech: the governing body take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider."

36. The obligation on the OfS in assessing whether there is or has been a breach of the ongoing condition is accordingly to assess whether the governing documents are "consistent" with the properly construed PIGPs. In coming to a decision under section 15, the OfS must properly direct itself as to the content of the governing documents and the content of the PIGPs. It has done neither.

37. It is wrong to conclude that a document is inconsistent with a principle on the ground that somebody may misread the document and fail to give it its reasonable meaning. As explained by the Supreme Court, *"a drafter of a policy statement is not required to imagine whether anyone might misread the policy and then to draft it to eliminate that risk": R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 at §34. In the FD, the OfS erred in asking what readers may or may not do rather than identifying the objective meaning of the policy (FD, §§50, 67(a)-(b), 78, 83(b), §92, 93). It also failed to construe the 2023 TNBEPS in its relevant context, which includes:

37.1. That the Disciplinary Procedure must always be applied consistently with the overarching safeguarding principles in the University Statutes. That includes the decision on whether to start disciplinary proceedings at all: see §274 of the University's PD response.

37.2. The Freedom of Speech Code of Practice, which specified (2023 version) that *"the right* [to academic freedom] *applies to all activities which relate to academic life, whether those activities take place on or off campus, including designing the curriculum and teaching….Every member of the University is expected to uphold the right to freedom of speech and academic freedom…the University recognises that, on occasion, the views of some who exercise the right to freedom of expression may cause offence, shock or disturb others who do not hold those views. This, in itself, is not a matter for*

constraint and is not breaking the law. Allowing opposing views to be heard will continue to be encouraged by the University…"

37.3. That the intended audience of the TNBEPS was academics and students who can reasonably be assumed to be literate and are required to be familiar with the University Statutes and Regulations. Policies are to *"be read objectively, having regard to the intended audience"* (*A* at §34).

D3. The OfS erred in finding that the Disciplinary Statement captured speech that was not already prohibited in law

38. The OfS misdirected itself in law in deciding that the Disciplinary Statement contained in the 2018, 2022 and 2023 versions of the TNBEPS constituted a breach of E1, even if it was right to conclude that Universities may only limit speech by reference to what is already unlawful under civil and criminal law.

39. In the 2018 and 2022 versions of the TNBEPS, the Disciplinary Statement read as follows:

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

40. The 2023 version of the TNBEPS retained that wording and added to it a footnote, which confirmed that the application of the Disciplinary Statement was subject to a harm threshold being met, namely that the communications in question "*could reasonably be expected to cause distress or fear among trans people*".

41. The 2023 version of the TNBEPS was further qualified by an express proviso in the following terms:

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

42. The OfS found that each iteration of the Disciplinary Statement was *"capable of capturing lawful speech because it is not limited to existing prohibitions in law"* (FD, §89). Even if that were the right approach, the OfS misdirected itself.

    42.1. Objectively construed (as policies must be, see *A* above), the terms *"transphobic abuse, harassment or bullying"* captures speech that would constitute an offence contrary to section 5 of the Public Order Act 1986, which prohibits the use of threatening or abusive words or behaviour within the hearing or sight of a person likely to be caused harassment, alarm or distress nearby.

    42.2. That position is *a fortiori* in respect of the 2023 iteration of the Disciplinary Statement which (i) expressly limited its application to transphobic abuse, harassment or bullying that could reasonably be expected to cause distress or fear among trans people and (ii) is subject to the interpretive provision that the TNBEPS should not be relied on to justify sanctioning academic staff for exercising their academic freedom and should not be taken to justify disproportionate restrictions on freedom of speech.

D4. The OfS has misdirected itself as to the meaning of freedom of speech within the law

43. The OfS' position is that Universities are not permitted to prohibit their students or academics from expressing any speech unless that speech is not independently prohibited by civil or criminal law: the OfS relies on the proposition that each iteration of the Disciplinary Statement was *"capable of capturing lawful speech because it is not limited to existing prohibitions in law"* (FD, §89). That is wrong and the OfS has accordingly misdirected itself as to what freedom of speech "within the law" means.

44. Universities, like other employers and educational institutions, are permitted to prevent academics from (for example) bullying students, and prevent students (for example) from abusing academics. Universities are also permitted to maintain academic standards. On the OfS' approach, a University would not be permitted to discipline (or even have the *potential* to discipline) a student or academic for inappropriate conduct that is not otherwise prohibited by civil and criminal law. For example:

    44.1. The University would have to tolerate forms of plagiarism. As the OfS will be aware, not all plagiarism is a copyright breach (for example self-plagiarism or plagiarism by consent) or fraud (where there is, for example, no intention to make gain or cause a loss within the meaning of section 5 of the Fraud Act 2006). The OfS' approach would prohibit the University from disciplining students for plagiarism that does not amount to a civil wrong or an offence.

    44.2. The University would have to tolerate academics designing curriculums which lack academic rigour, for example a curriculum which seeks to

reinforce stereotypes (as distinct from a curriculum that discusses stereotypes).

44.3. The University would have to tolerate an academic starting every lecture by swearing at and demeaning students, so long as such action did not relate to protected characteristics.

44.4. The University would have to tolerate an academic conducting every lecture through the medium of song or mime (noting that freedom of speech protects the manner of speech as well as the content).

45. Contrary to the OfS's approach, Universities are permitted to prohibit such matters because they are permitted to interfere with freedom of speech or academic freedom where the interference is in accordance with law and proportionate (see Article 10 of ECHR, which permits the Universities exercising public functions to interfere with Article 10 when the interference is proportionate: *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127).

46. The OfS is also wrong as a matter of law to find that the mere possibility of disciplinary proceedings (particularly in circumstances where it accepts that such disciplinary proceedings could not be upheld in relation to lawful speech) is an interference with freedom of speech. This is inconsistent with Strasbourg authority: *MD and others v Spain* (Application No. 36584/17) at §§80-91.

D5. The decision relating to the 2023 Stereotyping Statement was irrational

47. The OfS concluded that the Stereotyping Statement in the 2023 TNBEPS complied with the academic freedom PIGP, given that the policy explained that it should not be read as justifying constraints on academic freedom or disproportionate restrictions on freedom of speech. However, the OfS concluded that the same part of the policy breached the freedom of speech PIGP. In doing, the OfS misinterpreted the 2023 TNBEPS, failed to provide adequate reasons and/or reached irrational conclusions as to the meaning the 2023 TNBEPS.

48. The Stereotyping Statement concerns the process by which the curriculum is set and could only ever apply to academics. Having satisfied itself that the TNBEPS safeguards the freedom of academics to set the curriculum, the OfS failed to provide any rational explanation for concluding that the freedom of speech of academics in setting the curriculum would be unreasonably impaired.

D6. The OfS had no jurisdiction to find that the University failed to comply with its delegation arrangements and the findings are therefore *ultra vires*

49. Questions about the University's compliance with its own internal system of delegation fall within the exclusive jurisdiction of the Visitor. In particular:

49.1. The Charter of the University establishes that the Visitor of the University is the King (para 3).

49.2. The Visitor has exclusive jurisdiction: *"In my judgment…for over 300 years the law has been clearly established that the visitor of an eleemonsynary charity has an exclusive jurisdiction to determine what are the laws of the charity and the proper application of those laws to those within his jurisdiction.*
…This inability of the court to intervene is founded on the fact that the applicable law is not the common law of England but a peculiar or domestic law of which the visitor is the sole judge. This special status of a visitor springs from the common law requirement recognising the right of the founder to lay down such a special law subject to adjudication only by a special judge, the visitor": *R v Hull University Visitor ex P Page* [1993] AC 682, 700C *per* Lord Browne Wilkinson.

49.3. Parliament can remove or intrude upon the Visitor's jurisdiction (which is an exercise of the King's prerogative power) by statute, expressly[3] or by necessary implication. The test for necessary implication is strict: *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at para 45, *per* Lord Hoffmann.[4]

49.4. In the FD, the OfS relies on *Thomas v University of Bradford* [1987] AC 795 and asserts that *"there are clear authorities that Parliament can invade the visitor's exclusive jurisdiction either expressly or implicitly"* (Annex D, §18(a)). This case does not help the OfS. In *Thomas*, the House of Lords explained that the Visitorial jurisdiction was exclusive in respect of the matter they were considering, but that academics' statutory employment rights (at that time, the Employment Protection (Consolidation) Act 1978) necessarily implied that - to the extent set out in that Act - that Parliament had *"given rights that enter and supersede the jurisdiction of the visitor"* (pg. 824).

49.5. Unlike the Employment Protection (Consolidation) Act 1978, the necessary implication test is not satisfied in respect of HERA 2017. HERA 2017 does not expressly or by necessary implication require the OfS to adjudicate on a University's compliance with its internal delegation arrangements. HERA 2017 does not require the OfS to promulgate such a condition and does not

[3] As Parliament has done, for example, in section 46(1) of the Higher Education Act 2004 in relation to "(a) any dispute relating to a member of staff which concerns his appointment or employment or the termination of his appointment or employment, (b) any other dispute between a member of staff and the qualifying institution in respect of which proceedings could be brought before any court or tribunal, or (c) any dispute as to the application of the statutes or other internal laws of the institution in relation to a matter falling within paragraph (a) or (b)".

[4] *"A necessary implication is not the same as a reasonable implication…a necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."*

by necessary implication require it to do so. The OfS can exercise the condition-making powers conferred by Parliament perfectly well without intruding into the Visitor's jurisdiction.

49.6. If the OfS disagrees with this analysis, please identify which section(s) of HERA 2017 the OfS contends expressly or by necessary implication oust the University Visitor's jurisdiction.

D7. The monetary penalty is ultra vires

50. The University will appeal on the grounds that the penalty is unreasonable and disproportionate. It is also unlawful in at least two respects.

51. First, the OfS was required to consider the duration of the breach for the purposes of deciding whether there should be a monetary penalty: see Higher Education (Monetary Penalties and Refusal to Renew an Access and Participation Plan) (England) Regulations 2019 (the **"Penalty Regulations"**) reg. 4, and Regulatory Advice §9, pg. 7 (which also requires the OfS to consider the steps taken by the provider to mitigate or remedy matters that gave rise to a finding of breach by the OfS). In the FD, the OfS expressly declined to determine whether (i) the version of the TNBEPS in force since March 2024 complies with the PIGPs (FD, §102 Annex C, pg. 30; and (ii) whether the alleged breach of condition E2(i) is ongoing (FD §23 Annex D pg.35).[5] The OfS therefore failed to determine the duration of the breach and whether the University has remedied the breach, contrary to the Penalty Regulations and its own Regulatory Advice, and/or it failed to take a relevant factor into account.

[redacted]

53. We have redacted paragraph 52 of the published version of this letter for the reasons at paragraph 15 above.

D8. Annex H is *ultra vires*

54. The OfS did not have jurisdiction to make the findings in FD Annex H. Nothing in HERA 2017 empowers the OfS to expend money investigating or making such findings. The explanation provided at Annex H §2 that *"the OfS is concerned that the provider may not have complied with these legal obligations because non- compliance with these duties could be indicative of whether the provider is compliant*

[5] It is not understood how the OfS could possibly reserve its position on this matter given all three documents were approved by Council.

with E1 by reference to academic freedom and freedom of speech PIGPs given the overlap/relevance of subject matter of these wider legal obligations and those PIGPs" does not explain why the OfS considers itself to have jurisdiction and is in any event wrong. E1 concerns the consistency of governing documents with the PIGPs. Whether those documents are consistent with the PIGPs cannot be determined by whether the University may have breached other legal obligations over which the OfS has no supervisory jurisdiction.

55. The OfS' findings in Annex H are in any event littered with legal errors. For example:

55.1. The OfS found that there was reason to believe that the University breached Article 10 ECHR because it had *"seen no credible evidence"* that the University conducted a proportionality assessment in relation to the TNBEPS (Annex H §10). However, whether a proportionality assessment has been conducted is irrelevant to the existence of a Convention breach: *Belfast City Council v Miss Behavin' Limited* [2007] 1 WLR 1420 at §§14-15 (*per* Lord Hoffmann).

55.2. The OfS found that the University may have indirectly discriminated against gender critical staff or students by statements in the TNBEPS that related to the content of the University curriculum. However, the content of the University's curriculum falls outside of the Equality Act 2010: section 94(2).

E. Disclosure

E1. The OfS' obligations

56. Judicial review proceedings are now contemplated, and the duty of candour and co-operation applies to the OfS. These duties require the OfS to take a different approach to the uncooperative approach taken during its four-year investigation. In particular, we remind the OfS:

56.1. The primary obligation of a defendant in judicial review is to uphold the rule of law, not save face or serve its own private interests: *"the underlying principle is that public authorities are not engaged in ordinary litigation trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law"* (*R (Terra Services Ltd) v National Crime Agency* [2019] EWHC 1933 (Admin).

56.2. The duty of candour extends to documents and information which will assist the Claimant's case and/or give rise to additional and otherwise unknown grounds of challenge: *TSol Guidance* [2010] JR 177. An approach which *"at almost every stage, involved revealing as little as possible, and only then in response to specific requests from another party"* breaches the duty of candour – it is *"about as far from the requirement of 'laying one's cards face*

up on the table' as could be imagined" (*R (XY) v Secretary of State for the Home Department* [2024] 1 WLR 2272, §132).

57. It is crucial that the OfS discloses relevant documents at this stage. This is because the University has credible reason to suspect that there may be further procedural grounds of challenge in how the FD has been made, including (i) breach of the *Tameside* duty of inquiry, (ii) taking irrelevant considerations into account, and (iii) (as intimated in the PD response) bad faith.

58. Given the acute public interest in a Court resolving this matter expeditiously (in respect of which, see below) it is crucial that the University has the full facts at an early stage and before it pleads its case. Should any non-disclosure by the OfS lead to the University incurring additional costs, the University will seek to recover those costs on the indemnity basis.

E2. Documents requested

59. In light of the above principles, please disclose by 4pm on 3 April:

59.1. The identity of the decision-makers in relation to the PD and FD.

59.2. Records of all internal and external meetings, discussions, emails, messages or other conversations (such request to be construed expansively) concerning the decisions set out in section C above (the Initial Findings, the PD and the FD), including (i) the decision to abandon the majority of the findings in the PD, (i) the decision to refuse to accept arguments made and evidence submitted in the PD response, and (iii) the decisions in the FD. This is relevant to whether the OfS has taken into account irrelevant factors, failed to relevant factors into account and/or has been motivated by improper considerations.

59.3. [redacted] The previous sentence has been redacted in the published version of this letter for the reasons at paragraph 15 above.

59.4. We note the following: (i) OfS staff met Professor Stock at least twice during its investigation but refused nine times to meet with any person from the University; and (ii) in response to the University's submissions on the PD, the OfS obtained a second statement from Professor Stock, did not provide the University with a copy of the second statement or any opportunity to comment on it in advance of the FD, and uncritically relied on the second statement to reject the University's submissions on the harm caused by the breach of condition E1 (despite the existence of contrary statements from those who the OfS refused to meet or speak to). Those circumstances give rise to

concerns of procedural fairness, an appearance of bias and/or bad faith. Please disclose (i) all records showing the circumstances in which the evidence of Professor Stock was collected (including notes of her interviews), (ii) any record of the analysis of the evidence of Professor Stock, and (iii) a list of all occasions on which OfS staff communicated with Professor Stock after 1 October 2021 (in person, by phone or in writing).

59.5. All other relevant documents and information.

60. We remind you that any redaction in such documents must be in accordance with *R (/AB) v Secretary of State for the Home Department and anor* [2024] 1 WLR 1916.

F. Other matters

F1. Procedure

61. The University has a right of appeal to the First-Tier Tribunal (**"FtT"**) against the decision to impose a monetary penalty and its amount (Schedule 3, para 3 HERA 2017).

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

63. The only remedy in relation to the findings of breach (and other parts of the FD that cannot be remedied by the FtT) is judicial review. To save time and duplication, the University intends to file a composite set of pleadings in both the High Court and FtT and ask for the FtT proceedings to be stayed pending the judgment in the judicial review. That is a proportionate approach because, if the FD is quashed, it will be unnecessary to hear the appeal against the monetary penalty.

F2. Expedition

64. There is a pressing public interest in a Court reviewing the FD as soon as possible. First, the OfS accepts that the reputational harm of the FD to the University is very great: Final Decision on Publication, §6. Second, the OfS has warned other universities that they must act on the FD to avoid even larger monetary penalties. If unlawful, the FD therefore threatens the institutional autonomy of English universities.

65. The University will accordingly apply to expedite the proceedings. Please confirm that you accept that expedition is appropriate or, if not, why not. Please also confirm whether you accept that any of the proposed grounds set out above are arguable,

so as to avoid the need for a contest at the permission stage. We would respectfully invite the OfS to take a realistic approach.

F3. ADR

66. The University has made numerous attempts to resolve the dispute through ADR but the OfS has refused to engage. Throughout the investigation, the University repeatedly asked to meet with the OfS (i) to discuss potential settlement, (ii) to ensure that the investigation was reasonably informed and (iii) to enable the University quickly to remedy the OfS' concerns. As set out above, at every juncture the OfS refused to engage with the University. Please state whether, contrary to its approach hitherto, the OfS will now agree to engage in some form of ADR. If so, please set out your proposals.

F4. Service

67. The details of the Claimant's legal advisors dealing with this claim are: Mills & Reeve LLP, One Centenary Way, Birmingham B3 3AY and the relevant reference number is BHTR/4038196-0047. Please ensure that any court documents are served on Mills & Reeve using this reference. Mills & Reeve **do not** accept service by email. Please confirm that you accept service by email.

F5. Response time

68. As explained at section A above, we require your response by 4pm on 3 April 2025.

69. Absent reply, or the retraction of the FD, we will prepare to issue the proposed claim without further notice. The University will seek to recover its costs of the proceedings.

Yours faithfully,

[redacted]