Free speech protection at colleges and other constituent institutions of English universities:

The law and requirements in practice

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PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at 1 August 2024, when the main provisions of the Higher Education (Freedom of Speech) Act 2023 come into effect.

IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. Note that the OfS guidance to which it refers is in draft form and will be revised before it is finalised. THIS STATEMENT MAY BE OUT OF DATE: see its publication date at the end. *SEE ALSO the important notice at page 24.*

1. Introduction

Best Free Speech Practice ("**BFSP"**) is a non-partisan campaign to clarify and disseminate what the legal requirements and their implications in practice actually are for protecting free speech and academic freedom at UK universities and other registered higher education providers (**"HEPs"**).

The legal obligations of English CIs in relation to freedom of speech are extensive. Recent amendments made to the **Higher Education and Research Act 2017** ("**HERA**")[1] have introduced new free speech duties on the constituent institutions ("**CIs**") of HEPs in England, which are independent of the duties of their HEPs. CIs are colleges, schools, halls or other institutions of English registered HEPs.[2] As confirmed and clarified in recent case law, viewpoints on many areas of current controversy are protected under the **Equality Act 2010** ("**Equality Act**"). Freedom of speech and academic freedom are also protected under the **Human Rights Act 1998** ("**HRA**"). (HERA, the Equality Act and the HRA are together referred to as the "**Relevant Requirements**".)

This document is a brief statement of the relevant law for English CIs, with an explanation of what is required to be done in practice to comply with it, and any additional best practice.

Alumni for Free Speech (www.affs.uk) will be monitoring and liaising with HEPs to ensure that they are free speech compliant, and if necessary following this up with Freedom of Information Requests. It will be publicising any continuing failures by HEPs and CIs to comply with their free speech obligations under the law.

2. Relevant law and requirements

Requirements in HERA and codes/rules re free speech and academic freedom

***Primary obligation to secure free speech*:** The governing body of a CI must take "*the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take*" to secure freedom of speech (within the law) for the staff, members and students

[1] By the **Higher Education (Freedom of Speech) Act 2023**, with effect from 1 August 2024.

[2] HERA, **Section A4**.

("**Participants**") of and visiting speakers to the CI.[3] This is a demanding requirement and **requires active, positive steps to** be taken. The obligations are stated in objective terms, giving no material discretion to a CI as to what steps it needs to take[4]. It results in various requirements in practice, which are discussed in detail in Part 3. Free speech obligations override other considerations, subject only to the following.

- The relevant speech must be lawful, i.e. not restricted by laws "made by, or authorised by the state, or made by the courts[5]". This includes criminal and civil laws – for instance the Equality Act (see below) and laws relating to defamation, confidentiality and privacy. Unless the relevant expression of views is so extreme as to be unlawful, it is protected under HERA.

- CIs are only required to take the steps that are reasonably practicable for them to take (the Office for Students ("**OfS**") interprets this to include refraining from taking a step which would have an adverse impact on freedom of speech without compelling justification[6]). Various points are relevant.

  - If a CI is required to do (or not do) something under an effective obligation – including a CI's own requirements to the extent that they reflect a legal obligation on it – or other restrictions on behaviour under, for instance, anti-bullying rules which are themselves written so as to be compliant with the Relevant Requirements[7], then it is not practicable for it to take a step which is inconsistent with that obligation. The duty to act under HERA will, though, usually override duties to "think" such as under the Public Sector Equality Duty (of which more below).

  - The existence of policies, programmes and requirements of the CI which may conflict with the duty to secure free speech will not render relevant steps not reasonably practicable unless those policies etc are themselves legally mandated, and otherwise written so as to be compliant with the Relevant Requirements. This is a matter of compliance with a legal requirement, and the conflicting views and priorities of a CI are likely to carry little relevant weight. This is supported by the OFS Guidance[8].

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3 HERA **Sub-sections A1(1)-(2)**, as applied by **Section A4(1).**

4 Per the OfS' draft Regulatory advice 24: Guidance related to free speech (the "**OfS Guidance**"), paragraph 41, "Where a step is reasonably practicable for an organisation, it must be taken."

5 OfS Guidance, paragraph 13.

6 OfS Guidance, paragraph 35.

7 Such contrary laws or other requirements are, so far as they themselves restrict Participants'' free speech, subject to a "proportionality" test under the HRA, as discussed below.

8 See paragraph 75d.

- Cases relating to the protection of "protected viewpoints" under the Equality Act (see below) are likely to be relevant in identifying the sorts of actions that the courts will consider to be "reasonably practicable". See the detailed discussion at Appendix 2 to the Principal Statement.

- The OfS states that factors that are relevant to an assessment of whether steps are "reasonably practicable" include the extent to which taking the step, or not taking it, would secure or restrict freedom of speech; the practical costs (time, money, personnel) of taking the step, or not taking it; and financial constraints (contemplating that a step may be reasonably practicable for a large HEP but not for a small one)[9]. These factors must be assessed objectively and in the context of the requirement to "have particular regard to the importance of freedom of speech", which is clearly intended to give it particular weight in interpreting the obligations under HERA; it must be that the costs would (in the context of the HEP and its resources) need to be very disproportionate to the likely free speech benefit for the step not to be reasonably practicable. CIs will be complying with an objective standard they may be held to: they do not have much discretion here.

There are times when there can be a perceived overlap or conflict between requirements to protect free speech under HERA and other legal obligations, or with CI programmes or priorities, which are asserted to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. Interpreting potentially contrary laws and requirements correctly is going to be vital for CIs, as over-interpretation creates major risks for them. We set out detailed information in Appendix 1 to the Principal Statement about the necessary approach in order to resolve such perceived conflicts appropriately. The OfS has stated that it "*stands for the widest possible definition of free speech within the law*", and "*the starting point is that speech is permitted unless it is restricted by law*".[10]

Academic freedom: The primary duty above extends to securing that academic staff are free (within the law) to question and test received wisdom and put forward new ideas and controversial or unpopular opinions, without facing the risk of losing their jobs or privileges at the CI or the likelihood of their securing promotion or different jobs at the CI being reduced. Applicants for academic positions must not be adversely affected because they have

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[9] OfS Guidance, paragraph 36; and – "A step may be reasonably practicable for a large provider but not for a small relevant students' union" (OfS Guidance, paragraph 39).

[10] Insight publication *Freedom to question, challenge and debate*, December 2022 (the "**OfS December 2022 Publication**"). https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf.)

previously exercised their rights to academic freedom, i.e. questioned received wisdom *etc.* as described above[11].

Duty to promote free speech: CIs must now positively promote the importance of freedom of speech (within the law) and academic freedom in the provision of higher education.[12] This requires active steps to be taken.

***Meetings*:** CIs must use all reasonably practicable steps to secure that the use of their premises is not denied to any individual or body on the grounds of their ideas, beliefs or views; and the terms on which those premises are provided must not be based on such grounds. This has many implications in practice. CIs must also now ensure that, save in exceptional circumstances, they must secure that use of their premises is not on terms that require the organiser to bear some or all of the costs of security[13].

Codes of practice and free speech statements: CIs must maintain a *"code of practice"* which sets out: the CI's values relating to freedom of speech; the procedures to be followed by both staff and students of and any students' union at the CI in connection with the organisation of meetings and other activities at the CI's premises and the conduct required of such persons in connection with those meetings and activities; and the criteria applied by the CI in deciding whether to allow the use of premises and on what terms. A CI must bring the code to the attention of its students at least once a year and must itself take all reasonably practicable steps to secure compliance with their code, including where appropriate the initiation of disciplinary measures.[14]

***Complaints and the new statutory tort*:** HERA contains new legal remedies against CIs for failures of free speech protection. These are important changes, and are discussed under "*Complaints, risk, accountability and liability*" below.

OfS requirements and guidance: The OfS, as a regulator of CIs in respect of free speech matters under HERA, has issued various schemes and statements implementing and enlarging on the compliance regime under HERA, including about its complaints scheme. Its draft OfS Guidance explaining the requirements in practice consequent on the legal obligations in

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[11] **Sub-sections A1(5)-(9)**, as applied by Section A4(1).

[12] **Section A3**, as applied by Section A4(1).

[13] **Sub-sections A1(3) and (10**), as applied by Section A4(1). The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects, with activists threatening physical force and noisy disruption, being cancelled. See BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for detailed information about the requirements relating to meetings.

[14] **Section A2**, as applied by Section A4(1**)**. Detailed consequential requirements under the OfS Guidance are discussed in Part 3.

HERA is particularly significant, as it contains detailed information about how OfS expects CIs to implement the requirements. Further, the courts will be likely to make reference to it when deciding civil cases brought under HERA. The OfS Guidance is discussed extensively in Part 3.

Equality Act, PSED and the protection of "protected viewpoints"

Under the **Equality Act**, CIs must avoid unlawful discrimination against and harassment of people, including academics and students, who have the *"protected characteristic"* of holding (or not holding) particular religious or philosophical views. The Equality Act specifies various contexts in which unlawful actions can occur, including employment and further and higher education.

"Discrimination" occurs where a person (A) treats another person less favourably than A treats or would treat others, and includes an employer or other relevant person subjecting a relevant person to a detriment on account of their protected viewpoint[15]. In summary, "harassment" means unwanted conduct related to a relevant *"protected characteristic"* which has the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment; the question of whether there has been such an "effect" has an objective element[16]. This has very wide implications, with many consequent detailed requirements for protecting "protected viewpoints".

The landmark *Forstater* case[17] established that holding gender-critical views is a *"protected characteristic"*. Views which challenged aspects of critical race theory were subsequently ruled to be protected, as were anti-Zionist ones[18]The law in this area is still evolving and, in order

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[15] **Section 13**. Under **Section 19**, indirect discrimination may occur where a practice, policy or rule applies to many people in the same way (i.e., apparently neutrally) but it puts people with a protected characteristic (including a clamant) at a particular disadvantage (e.g. it has a worse effect on them) when compared with people who do not share that characteristic, and the HEP concerned cannot show it to be a proportionate means of achieving a legitimate aim. This can have real effects in practice, regarding, for instance, rules which equate "gender-critical" views with transphobia, training which insists that all white people should assume they are inherently racist and recruitment or promotion processes which require applicants to demonstrate support for particular viewpoints or agendas.

[16] **Section 26**. See detailed discussion of this in Appendix 2 to the Principal Statement.

[17] *Forstater v. CGD Europe et al.*, 2021 (Appeal No. UKEAT/0105/20/JOJ): https://assets.publishing.service.gov.uk/media/60c1cce1d3bf7f4bd9814e39/Maya_Forstater_v_CGD_Europe_and_others_UKEAT0105_20_JOJ.pdf

[18] *Corby v ACAS*, September 2023 and *D. Miller v University of Bristol*, February 2024 [ET no: 1400780/2022]. It is worth noting that the Tribunal was alert to the distinction between opposing Zionism and antisemitism: in that case it ruled that the Mr Miller made "manifestations" of this which were antisemitic and thus not protected.

to avoid finding themselves in breach of the law, CIs need to work on the basis that advocacy for free speech and human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas, must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. (These would include, for example, in relation to other aspects of critical race theory and moves to "decolonise the curriculum", and lawful views in relation to religions and their effects and the Palestinian cause.). See BFSP's detailed ***Statement about what sorts of beliefs are protected following the Forstater case***. There can be "inappropriate (sometimes expressed as "objectionable") manifestations" of protected beliefs which do not qualify for protection[19], and this generally appears to work successfully to create a fair balance of outcomes between competing claims or considerations under the Equality Act.

Section 109(1) provides that anything done by an employee in the course of their employment, or an agent on behalf of their principal, must be treated as also being done by their employer or principal; it does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer has a defence (the "**Section 109(4) Defence**") if it can show that it took all reasonable steps to prevent an employee from doing the alleged act or anything of that description. CIs have very limited duties under the Equality Act in respect of the behaviour of Participants *acting in capacities which do not give rise to such responsibilities on the CI's part* (other than limited duties under parts of the PSED as discussed below), so, for instance, opinions expressed by the CI's staff via their private social media are not generally the CI's problem under the Equality Act.

Recent cases have held employers – including the Open University – liable for discrimination against and harassment of employees in connection with their viewpoints, including liability for their employees attacking their colleagues by online petitions and pile-ons. They provide vivid examples of how this area of the law has effect in practice, and the detailed requirements in practice on an employer for it to come within the Section 109(4) Defence. See Appendix 2 to the Principal Statement for further information.

The **Public Sector Equality Duty** ("**PSED**") imposed on public authorities[20] requires CIs, in the exercise of their functions, to have due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express a protected viewpoint, to advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic (e.g. a protected

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19 See *Wasteney v East London NHS Foundation Trust* [2016] ICR 643.

20 Under **Section 149.**

viewpoint) and persons who do not share it. "Have due regard" is a duty to think and give appropriate weight in context, not to act; contrary duties to act are likely to be overriding.

CIs thus need to work to protect their employees and others in respect of a wide range of opinions held, not held or expressed by them, including by:

- avoiding discriminating against or harassing such people through their own actions, policies and requirements, for instance through their disciplinary processes being used to suppress legitimate free speech; and

- taking all reasonable steps to prevent attacks and other actions by their employees and other representatives which would constitute discrimination or harassment attributable to them under Section 109.

Given that many people hold protected viewpoints about a wide range of currently controversial issues, this creates a major risk area for CIs. This is likely to require greatly increased institutional neutrality in relation to many contested issues, as discussed in Part 3.

It is important that CIs do not misinterpret the requirements under the Equality Act, in particular over-interpret the meaning of 'harassment' for these purposes, or succumb to pressure to treat the expression of an unpopular viewpoint as unlawful harassment. Such missteps can lead to severe compliance failures. See detailed discussion of this in the Appendices to the Principal Statement.

Human Rights Act

The free thought and speech rights of academics and students are protected under the **European Convention on Human Rights**[21], as enacted in the UK by the **HRA**[22]. These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful[23]. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.

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[21] Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

[22] As most CIs are "public authorities" for the purposes of the Convention and the HRA.

[23] See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 9.

The right to free expression is subject to the qualification that the "exercise of these freedoms, since it carries with it duties and responsibilities[24], may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law[25] and are necessary in a democratic society" for various specified purposes, including for the protection of the rights of others, although this qualification is subject to a "proportionality" test[26]. Contrary restrictions can thus operate to restrict free speech rights to a limited extent. This can be particularly relevant in cases of conflicts of free speech rights, for instance where Participant A attacks Participant B for their viewpoints. Participant A's right to do so can be restricted by rules made pursuant to the primary obligation in HERA and the need to prevent harassment by employees under the Equality Act, to the extent that this is proportionate. Given that the purpose of such restrictions is to protect free speech overall, and that cases under the Equality Act have operated to treat attacks on people for their protected viewpoints as unlawful, appropriately drafted rules of this sort are likely to satisfy this proportionality test.

Criminal matters: the Protection from Harassment Act 1997 (the "PHA")

Taking various types of action against a person is criminalised, and this is relevant where they are taken in connection with that person's viewpoints.

Most relevantly, under the PHA, a person must not pursue a course of conduct which amounts to, and which he knows or ought to know[27] amounts to, harassment of another person. Harassment in this context includes alarming a person or causing a person distress. The PHA may give rise to both civil and criminal liability. Intent does not have to be proved. Other potentially relevant offences include putting a person in fear of violence and malicious communications and improper use of public electronic networks.

There are many ways in which illegal activity by staff or students "on its watch" can harm a CI, from reputational damage, to regulatory/compliance failures, to unlawfulness and liability

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[24] "Amongst them—in the context of religious opinions and beliefs— may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs" (*Giniewski v France* (2006) 45 EHRR 23 at paragraph 43).

[25] "It is well established that "law" in this sense has an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law."

[26] In **Article 10(2)** (there is a similar provision in Article 9(2)). Public authorities can only restrict this right if they can show that their action is lawful, necessary and proportionate (i.e. appropriate and no more than necessary to address the issue) in order to protect the wider interests of society.

[27] There is an objective element to this.

on its own part. Illegal activity by a member of staff will give it acute problems, which will be even worse if the perpetrator is apparently acting within the scope of authority conferred by the CI. If a CI discovers that illegal activity has or may have occurred, it will need to act promptly and carefully. This will likely involve taking and following timely legal advice.

Requirements as to governance

The OfS now has a role in the free speech-related regulation of CIs. It is required to promote the importance of freedom of speech within the law and academic freedom for staff of CIs and to identify and may identify and advise CIs about good practice relating to how to support freedom of speech and academic freedom[28]. The OfS also manages the new statutory complaints scheme (see below).

A CIs' regulatory status will depend on its legal status and structure. Many CIs are educational purpose charities. They will need to operate within their charters/constitutions/rules and relevant law and other requirements. In the past, the Charity Commission was the regulator of CIs, and will likely continue to have primary regulatory oversight of them, although we await information about how the interrelationship between the functions of the OfS as regards free speech protection and those of the Charity Commission will work in detail now that the OfS has regulatory functions in respect of their free speech obligations.

A new Director of Free Speech and Academic Freedom has responsibility for overseeing and performing the OfS's functions in respect of free speech and academic freedom, including the new complaints procedure.

Complaints, risk, accountability and liability

Free speech failures create risk for CIs, including of financial cost, reputational damage and embarrassment (the OfS will publish information about free speech failures), regulatory problems, wasted management time and internal strife. They also involve personal risk for individuals.

***Complaints, claims and statutory tort*:** Claims have been successfully brought under the Equality Act for discrimination against and harassment of people with protected viewpoints (see more at Appendix 2 to the Principal Statement). HERA now supplements existing legal remedies with a right to make formal free speech complaints against CIs to the OfS and a right to bring civil proceedings against CIs for damages for loss caused by breach of their statutory duty to protect free speech.[29] These are important changes, and will greatly increase CIs' accountability and their risks of legal liability.

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[28] **Sub-sections 69A(1) and (2)** of HERA.

[29] HERA sections **A7, and Section 69C and Schedule 6A**.

Personal liability: There are various potential sources of liability for individuals involved with free speech protection failures. Officers of organisations who, through default or negligence, cause their organisations to breach the law and thereby suffer loss can be at risk of personal liability for that loss. An employee or agent of a CI contravenes **Section 110** of the Equality Act if he or she does something which is treated as having been done by the relevant CI and the doing of that thing amounts to a contravention of the Equality Act by the relevant CI. Under **Section 111** of the Equality Act, a personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act.

HEPs' duties in respect of CIs

It is likely the case that the primary obligations in HERA require that an HEP itself takes such steps as are reasonably practicable for it to take to procure that its CIs are aware of the relevant legal requirements and adopt, comply with and enforce their own policies, rules and practices so as to give appropriate effect to the relevant legal requirements. There are likely, though, to be significant limitations on some HEPs' ability to do this in practice, not least as a result of their separate establishment and some colleges' long-standing operational independence, although this has significant limits so should not be used an unjustifiable excuse for inaction by the HEP concerned, as has happened. In any event, the availability of soft power (e.g. through conference of colleges and the like) might, at the least, require HEPs to provide thought leadership on free speech and academic freedom and to promote best practice and the like.

3. Requirements and implications in practice

The primary obligations under HERA to secure free speech and academic freedom, and the duty to promote free speech, involve a CI taking the following steps, which will all enhance free speech protection and are all "*reasonably practicable*" [30]. The need to avoid discrimination against and harassment of people with protected viewpoints under the Equality Act, and qualify for the Section 109(4) Defence, also involve a CI taking many of these steps (see the detailed discussion at Appendix 2 to the Principal Statement). Each CI will need conduct a thorough audit of its policies, practices and requirements, and identify the changes that are required to ensure its compliance with the revised legal and regulatory regime, and make those changes, before the changes to HERA come into effect.

[30] The majority of the detailed requirements are set out or evidenced in the OS Guidance.

Key general obligation(s)

- **Not to discriminate or harass in connection with viewpoints**: A key general obligation, which underlies many of the other obligations in practice below, is not to discriminate against or harass Participants or visiting speakers in connection with their viewpoints.

  This is required in order to avoid compliance failures (in respect of "protected viewpoints") under the Equality Act. CIs also need to take all reasonable steps to prevent their employees doing this in order to qualify for the Section 109(4) Defence. This will make a very substantial difference to securing free speech, and must in principle be reasonably practicable, so is in principle also required under the obligations in HERA, subject, of course, to the detailed circumstances of each case.

  The OfS Guidance contains an obligation on CIs not to treat a student unfavourably, or less favourably than it treats or would treat another student, on the grounds of that student's opinions or ideas in various specified contexts[31]. This follows anti-discrimination concepts in the Equality Act. Similar obligations apply in respect of employees under the Equality Act. This also extends to harassment of Participants generally. This will also be likely to extend to visiting speakers.

Rules, governance and training

- **Not having policies, practices or requirements which unjustifiably prevent or restrict lawful free speech**, or which mis-state or exaggerate legal obligations on them which may conflict with their obligations to secure free speech[32].

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[31] Paragraph 112.

[32] Specifically, the OfS Guidance says, at paragraph 64: "The terms of any code, contract or policy should not be so broad that they suppress the lawful expression of a particular viewpoint or of a wide range of legally expressible content"; at paragraph 65: "Policies and other statements should not discourage lawful speech by misrepresenting a provider's legal duties. This may include oversimplification – for instance, by omitting the importance of freedom of speech"; and, at paragraph 62: "If any code, contract or policy that regulates speech, or has the effect of regulating speech, identifies a category of restricted speech (such as 'harmful speech'), then:

a. such a category should be defined in a way which is not capable of restricting freedom of speech within the law, or academic freedom; and

b. that definition should explain that the interpretation of that category includes an objective element (so that it does not depend only on the perception of the alleged victim)."

See also Examples 10 to 13, which illustrate these requirements well.

- **Taking a positive approach** in relation to the creation, promotion and enforcement of policies, practices and requirements relating to securing lawful free speech. Working to ensure that its staff do likewise.

- Ha**ving an appropriate free speech code of practice** containing the CI's values relating to freedom of speech together with an explanation of how those values uphold freedom of speech[33], and specified procedural and other information regarding the holding of meetings and events (of which more later); and providing specified information to Participants about relevant free speech requirements as well as its own obligations in relation to free speech. It should also have a clear and simple **statement** about the code, which should summarise its contents and make clear how to access it.

  The OfS Guidance contains detailed information about publication, including that: the code must be easily accessible online; and the statement must be communicated to staff and students at least annually and contained in in any prospectus, staff and student handbooks, and included prominently in any other document stating or explaining any policy that may affect free speech or academic freedom, along with a statement that nothing in that other document should be read as undermining or conflicting with the free speech code of practice and that in case of any conflict the free speech code of practice will take precedence[34].[35]

  Information on the OfS' free speech complaints scheme must also be published in various specified ways[36].

Paragraphs 66 and 67 say: "Policies that regulate protests and demonstrations, posting or distributing written material (such as flyers), or recruitment activities, should not restrict these activities because they express or support a particular legally expressible viewpoint" and "Any other regulation of these activities should not be unnecessarily onerous". These are well illustrated by Examples 14 to 16.

[33] OfS Guidance, paragraph 76; it goes on to state (at paragraph 77) that CIs should consider including: a statement about the overarching value of freedom of speech within the law for the CI; a statement about how those values uphold freedom of speech within the law at the CI; a statement emphasising the very high level of protection for the lawful expression of a viewpoint and for speech in an academic context; and a statement that freedom of speech within the law may include speech that is offensive.

[34] This includes all policies relating to: admission, appointment, reappointment and promotion, disciplinary matters, employment contracts (that may include conditions on speech),equality or equity, diversity and inclusion, including the Public Sector Equality Duty, harassment and bullying, IT, including acceptable use policies and surveillance of social media use, the Prevent duty, principles of curricular design, research ethics, speaker events and staff and student codes of conduct.

[35] In paragraphs 74 and 75 of the OfS Guidance.

[36] In paragraphs 96 to 98 of the OfS Guidance.

- **Creating rules to ensure compliance** with the free speech obligations[37], including by prohibiting material actions by Participants against people in respect of their viewpoints, such as harassment and severe personal attacks, online pile-ons[38] and making inappropriate complaints and allegations. These restrictions will themselves need to be written in a way that is compliant with the free speech rights of Participants[39]. CIs will need to have appropriate disciplinary processes in order to secure compliance with those rules and appropriate and effective processes for remedying activity which is contrary to free speech related requirements.

- **Having appropriate governance arrangements**, including:

  - taking these issues seriously at senior levels, which will involve: free speech promotion and protection being a sufficiently regular agenda item for its governing body; having an appropriately constituted and empowered committee of its governing body or other senior working group to ensure proper compliance with its free speech obligations; and having an appropriate free speech officer as discussed below;

  - ensuring that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact[40];

  - ensuring it has an effective accountability structure: all staff with responsibilities relating to areas that could affect compliance with free speech duties should have clear responsibilities for promoting and securing free speech within those areas, and understand those responsibilities. This will particularly apply in respect of leaders in areas such as EDI and some academic disciplines, by or in respect of which controversial agendas may be enforced, such as requiring compliance with contested

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[37] This is a clear requirement in order to qualify for the Section 109(4) Defence, and will be likely to become a clear obligation under HERA as jurisprudence develops: see Appendix 2 for more on this. This requirement underlies paragraphs 75 to 86 of the OfS' Guidance.

[38] OfS Guidance, paragraph 50, states that these may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns.

[39] To the extent that these rules, or enforcement of them, themselves restrict the rights of Participants to express their views about other Participants or visiting speakers, they will need to be 'proportionate' in order to comply with the HRA and HERA. See the discussion of proportionality under "Human Rights Act" in Part 2.

[40] OfS Guidance paragraph 102: this includes a list of committees responsible for various specified matters. This will apply more widely that just in respect of obligations under HERA: for instance obligations to protect "protected viewpoints" under the Equality Act.

values in induction, training, recruitment or promotion processes, and in respect of the curriculum. There should be a chain of responsibility and supervision between those staff members and the governing body;

- ensuring that its risk officers and functions are aware of these issues and the risks they create, and that significant free speech risks are on its risk register and given an appropriate level of seriousness;

- having appropriate and effective reporting and complaints systems in respect of free speech issues and complaints; ensuring they are structured and staffed so as to deal with issues and complaints promptly and effectively; and appropriately addressing the fact that many complaints will be against the CI and its staff, so will need to be resolved by people who are sufficiently independent of the CI and its management to avoid material conflicts of interest; and

- recording all decisions that could directly or indirectly (and positively or negatively) affect free speech within the law. These records should demonstrate how the CI has had particular regard for the importance of free speech within the law[41].

- Appointing a **free speech officer** to be its internal advocate for free speech and academic freedom, with responsibility for ensuring that the CI complies with its legal obligations and follows and enforces its own rules appropriately. That officer should be appropriately senior (sufficiently so to participate in governing body meetings), empowered, available (although this does not necessarily have to be a full-time position, particularly if they have other staff to help them fulfil their role), experienced and trained, and non-conflicted[42].

- **Ensuring that Participants have adequate induction and training** (in the context of the nature of their involvement with the CI) about protection of free speech and academic freedom and understand the nature of the requirements to protect free speech[43]. This

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41 OfS Guidance paragraph 100. This is very onerous, and there is a good case to be made for restricting this to decisions which materially affect free speech.

42 Given that controversies around aspects of diversity agendas appear to have given rise to many of the free speech problems in recent years, it is hard to see how a free speech officer can also have material standing in respect of a CI's EDI function without insuperable conflicts of interest.

43 The OfS Guidance states that:

- "adequate induction" means that all staff and students will have at least an up-to-date understanding of: the free speech code of practice and how it applies in practice; *their own free speech rights under HERA, the HRA and the Equality Act*; the free speech rights of members, members of staff, students and visiting speakers under HERA, the HRA and the Equality Act; and the free speech complaints scheme and their own right to use it. (Paragraph 117.)

particularly applies in respect of staff who are involved in functions which could create free speech risks or have free speech implications, including anyone involved in appointments, promotions and disciplinary processes.

Action required to protect free speech and stop suppression of viewpoints

- **Taking active and effective action to ensure that it and its Participants comply** with applicable obligations, including its code of practice and related rules, and **enforcing compliance** with disciplinary action where appropriate[44].

- **Dealing with controversies effectively; protecting Participants; resisting pressure:** How CIs deal with controversies – as in social media storms, demands for disciplining or that meetings not be held and the like – will be the sometimes very public face of how well (or not) they are securing free speech in practice.

  - Where a Participant is under attack for expressing their lawful opinions, the primary HERA obligation, and, often, the need to qualify for the Section 109(4) Defence[45], requires a CI to take all reasonably practicable steps to stop (or stop recurrence of) various types of hostile actions, including harassment, personal attacks and online pile-ons, that are being taken against the Participant because of their lawful viewpoint, especially where those actions are in possible breach of the CI's own relevant rules and requirements.[46]

- "adequate training" means that staff will have an up-to-date understanding of: the free speech code of practice and how it applies in practice, including its application in detail to the member of staff's role in the organisation; the requirements of HERA, the (HRA) and the Equality Act in relation to freedom of speech and how they apply in detail to the member of staff's role in the organisation; and the OfS' free speech complaints scheme and its relevance to the member of staff's role in the organisation. This should further extend to understanding their duties. (Paragraph 116.)

[44] These are key lessons of the *Fahmy* and *Phoenix* cases, described in Appendix 2 to the Principal Statement. And see Example 2 in the OfS Guidance. See also Note 45 below.

[45] The *Fahmy* and *Phoenix/Open University* cases were in essence about attacks by employees made to harm and distress a colleague for her views which dissented from the ideology held by the attackers constituting harassment by the employer.

[46] The OfS Guidance says that CIs "should promptly reject public campaigns to discipline, expel or fire a student or member of staff for lawful expression of an idea or viewpoint. These may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running focused media campaigns. […] Depending on the circumstances, rather than publicly distancing itself, it may be more helpful for [a CI] to reiterate the importance of free speech for all staff and students, including the person affected. It may also be especially important for the response to be timely." (paragraphs 50 and 51. See also Examples 6 and 7). This is very useful clarification as far as it goes, but insufficiently wide if they are to have done enough to comply with their obligations under HERA and qualify for the Section 109(4) Defence (see more at Appendix 2 to the Principal Statement), CIs need to be active in stopping attacks and, if appropriate, bringing disciplinary action.

- This is likely to involve some or all of: identifying the Participants who are, or may be, taking those actions, and informing them where they are or are likely to be in breach of its relevant rules and requirements and requiring them to stop taking the relevant actions; taking disciplinary action against the relevant Participants, where and to the extent appropriate, and such other action as is likely to help remedy the situation; and, if the relevant actions involve likely criminality, considering seriously (with advice) whether they should involve the police.

- CIs must not succumb to pressure from Participants or others (a) to take actions which suppress or restrict lawful free speech or which materially disadvantage another Participant or visiting speaker in connection with their holding or expressing certain opinions, or (b) not to take steps to enforce its rules and requirements regarding free speech protection. Succumbing would very likely give rise to a breach of the primary obligations under HERA, and this pressure would itself be a breach by Participants of an CI's rules and requirements if they are appropriate to comply with HERA.[47]

CIs need to have practices, policies and requirements in place to enable them to do the above[48].

- **Not allowing its complaints and disciplinary functions to become instruments of free speech suppression**, contrary to the Relevant Requirements. Every complaints process should include a fair, objective and rapid triage process for complaints relating to speech, and this should reject vexatious, frivolous or obviously unmeritorious complaints relating to speech; a CI should also not pursue vexatious complaints or trivial investigations into other matters against an individual because of their lawful expression of a viewpoint.[49]A CI must treat all complaints relating to speech with caution. Complaints processes should be concluded as rapidly as is reasonably practicable, compatibly with the interests of justice[50]. A CI must not proceed with any complaints or disciplinary proceedings which are likely to constitute unlawful discrimination or harassment, and in any event, conduct complaints and disciplinary proceedings in such a way as to avoid unlawful

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47 See Note 46 above.

48 See the *Fahmy* case, described in Appendix 2 to the Principal Statement: a failure to have the right rules was cited as one of the reasons why it could not escape liability for harassment by its employees.

49 See OfS Guidance paragraphs 70 and 72, which are well illustrated by Example 18.

50 See OfS Guidance paragraph 71.

discrimination and harassment[51]. CIs should not encourage students or staff to report others over speech that could include the lawful expression of a particular viewpoint[52].

- **Not enforcing controversial agendas; the curriculum; research:** Whenever CIs promote certain viewpoints in respect of areas which are the subject of debate or controversy, to (directly or indirectly) require or exert pressure for the endorsement of or acquiescence to those viewpoints, or suppress the expression of lawful dissenting viewpoints, will be a clear breach of the primary requirements under HERA, unless they are legally obliged to take the relevant actions[53]. They also risk constituting harassment under the Equality Act; an institution disapproving of a viewpoint has been held to be sufficient to constitute harassment[54]. This extends to things like induction EDI training.

  CIs must therefore, where relevant, not impose ideologies or viewpoints (such as a "decolonisation" agenda) as part of the curriculum, to the extent that to do so would (among other things) contravene their obligations under the Relevant Requirements or their obligations as charities, or unlawfully discriminate against or harass people in respect of their views which count as "protected characteristics". In particular, a CI "should ensure that decisions about the curriculum and the way it is delivered safeguard the ability of academics to teach and communicate ideas that may be controversial or unpopular but lawful, and opportunities for students to be exposed to such ideas" and "academic staff should not be constrained or pressured in their teaching to endorse or reject particular value judgements"[55]. See BFSP's statement ***"Decolonizing the curriculum": potential free speech problems*** for more detailed information.

  Participants should be free to undertake academic research within the law. This freedom should not be restricted or compromised in any way because of a perceived or actual tension between any conclusions that the research may reach or has reached or the viewpoint it supports, and the organisation's policies or values. Nor should it be restricted

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51 See the *Meade* case, described in Appendix 2 to the Principal Statement.

52 OfS Guidance paragraph 69 and Example 17.

53 Examples 4, 7, 9, 10, 11, 14, 15, 22, 28 and 30 in the OfS Guidance illustrate this well.

54 In the Meade case (see Appendix 2 to the Principal Statement). See also the *Fahmy* case, described in Appendix 2. "A consequence of crafting internal policies with the aim of satisfying the ideological preferences of single-interest accreditation schemes is that it carries a risk of disturbing the balance of rights which the [Equality Act] seeks to achieve. […] It is likely to result in a conflict between the employer's policy aims and the rights of employees who hold protected philosophical beliefs which conflict with those of the accreditation schemes in question. For example, any requirement placed by [HEP] upon members of staff to demonstrate support of [a particular viewpoint] is plainly likely to place people with [opposing] beliefs at a disadvantage, particularly if it is accompanied by a penalty for failure to demonstrate such support." (From a 2024 opinion by Akua Reindorf KC in respect of likely free speech protection failings at KCL.)

55 OfS Guidance, paragraphs 103 and 112 and Examples 28 and 29.

or compromised in any way because of any external pressure connected with those conclusions[56]. [more on research and countries]

- **Sufficient institutional neutrality**[57]: The above requirements and risks lead inevitably to an underlying issue: if an institution takes sides, in an area of passionate and polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a very obvious risk of disadvantaging (i.e. discriminating against) or creating a hostile environment for (i.e. harassing) people who hold that other viewpoint, and creating or tolerating environments in which attacking people for their viewpoints is acceptable. A number of recent public failures (with unlawful harassment and discrimination found by tribunals) have largely arisen as a result of an underlying failure of objectivity and endorsing and enforcing (or not preventing the unlawful enforcement of) one side of a bitterly contested debate[58].

  CIs and their representatives therefore need to maintain sufficient institutional neutrality on matters of polarised public debate, i.e. at least take an approach which is very careful to avoid actions and language which risk counting as discrimination or harassment under the Equality Act or suppressing free speech contrary to HERA, while of course complying with their wider relevant legal obligations. This is also the effective expectation of the OfS: its Guidance has several examples of the consequences of failures of neutrality[59]. Achieving sufficient neutrality on a piecemeal basis will be difficult, as it will be hard to be sure of complying in the context of the great variety of factual circumstances and legal requirements that may apply. It will involve risk and a lot of time from senior staff – and inevitably expensive legal advice. We therefore recommend that a general policy of maintaining institutional neutrality on controversial issues is the safest way forward for CIs.

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[56] OfS Guidance, paragraph 105 and Examples 22 and 23.

[57] See Note 57 above. "The freedom to hold whatever belief one likes goes hand-in-hand with the State remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other…", per Choudhury P in *Forstater v CHG (Europe)* [2022] ICR 1, at paragraph 55. How have institutions so badly lost sight of this principle?

[58] A failure of neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy*, *Meade* and *Phoenix/Open University* cases, described in Appendix 2 to the Principal Statement. In May 2024, following a scandal that cost its President her job, Harvard University announced that it had accepted a working group's report and recommendations that the "[u]niversity and its leaders should not . . . issue official statements about public matters that do not directly affect the university's core function" as an academic institution; the group reasoned that when the University "speaks officially on matters outside its institutional area of expertise", such statements risk compromising the "integrity and credibility" of [its]academic mission and may undermine open inquiry and academic freedom by making "it more difficult for some members of the community to express their views when they differ from the university's official position".

[59] Examples 4, 5, 6, 7, 9, 10, 14, 22, 23, 28, 29 and 30.

- **Avoiding and reducing an oppressive atmosphere**: Research strongly evidences that an atmosphere exists at many CIs or among their Participants in which many Participants (including both academic staff and students) feel intimidated about expressing their opinions. This can arise as a result of the attitude of colleagues or online aggression, or the fear that job prospects may be hindered, or assessments of performance may be downgraded, in connection with their expressing certain opinions. Given that the existence of such an atmosphere gives rise to obvious risks of self-censorship and very harmful effects on free speech at CIs, CIs are required by the primary HERA obligation to take all reasonably practicable steps which might stop such an atmosphere developing in the first place or persisting if it already has; qualifying for the Section 109(4) Defence can also require this. This will involve being vigilant to prevent, identify and stop free speech transgressions; firmly enforcing its code of conduct and rules; and taking the other steps set out elsewhere in this Part 3. BFSP recognises that this is an such a protean problem that it is not going to be easy to address, and there may not be many further steps which CIs can realistically take.

- **Ensuring that any staff or student courses, "tests" or "training**", for instance for new arrivals, do not wrongly inhibit or suppress free speech. See BFSP's statement ***Introductory EDI courses: potential free speech problems*** for detail about the relevant legal requirements and their effects in practice[60].

- **Avoiding or restructuring any association or relationship with any organisation** where that relationship requires it to take sides in relation to contested issues, or requires or encourages it to suppress the expression of views which dissent from the agenda being promoted by any such organisation.[61]

<u>Meetings</u>

- **Meetings:** Taking all reasonably practicable steps to ensure that the use of its premises is not denied to any person or body because of their viewpoints, policies or objectives, including as to the requirements imposed in relation to hiring and using venues, and taking various specified steps to ensure that meetings are conducted appropriately. This

60 See OfS Guidance paragraph 118.

61 The policies or requirements of CIs are sometimes written in ways which reflect the viewpoints or desired outcomes of campaign organisations but which misrepresent relevant legal requirements or the nature of the CI's and Participants' obligations and/or operate to suppress dissenting viewpoints. Free speech issues with training and tests regarding diversity matters have sometimes arisen because they have been designed by or acquired from campaign organisations or other external providers which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications. These must not be allowed to happen.

applies both to internal meetings and ones with external speakers (including participants in debates or discussions). [62]

CIs' free speech codes should contain specified procedural and other information regarding the holding of and conduct at meetings and events, including a process for the timely consideration of risks to the event, the purpose of which would be to put in place steps that permit the event to go ahead. The document should specify who would be responsible for planning and taking these steps.[63]

- Save in exceptional circumstances, CIs must not require the organiser of an event to bear any of the costs of security relating to the event.[64] Their free speech codes must set out the criteria for determining whether there are such exceptional circumstances. These criteria should be clear, objective and neutral and should be framed in such a way that "exceptional" circumstances only arise very rarely. Both the criteria, and the definition of what counts as exceptional circumstances, should not (so far as is consistent with the law) depend on any of the relevant person's or body's viewpoints, policies or objectives or the ideas or opinions likely to get legal expression at the meeting. A CI "might have a stated policy that it will not pass on the first £X of security costs associated with the use of its premises, where X is stated as a numerical quantity that applies to all individuals or bodies regardless of their ideas, opinions, policies or objectives; and where security costs rarely exceed £X"; but it must apply this policy uniformly.[65]

See BFSP's statement ***Meetings at English HEPs: Free speech requirements and risks*** for detailed information about the requirements relating to meetings.

<u>Admissions, appointments, promotions and termination</u>

- **Admissions**: A CI should not discriminate against a person in connection with their lawful viewpoints, for instance by refusing them admission, marking them down in the

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62 From HERA **Section A1(3) and A2** as applied by Section A4(1), and OfS Guidance paragraph 79.

63 HERA **Section A2**, as applied by Section A4(1). The OfS Guidance contains detailed requirements, including about the procedures for organising and required conduct at meetings, at paragraphs 76 to 86. Paragraph 79 states that "The scope of the procedures section of the document should be broad. It should not be limited to policies relating to external speakers or events. The code of practice should apply (and be linked) to the procedures to be followed by staff and students of the provider …] when organising any activities that relate to academic life, whether those activities take place on or off campus. This includes activities listed in" paragraph 75d of the OfS Guidance".

64 HERA **Section A1(10)**, as applied by Section A4(1).

65 The OfS Guidance contains detailed requirements about security costs at paragraphs 87 to 94: see also Examples 19, 20 and 21.

admissions assessment process or revoking or changing the terms of their admission to the CI. It should not admit students or visiting academics on the basis of funding arrangements or other criteria that have the effect of restricting their or others free speech or academic freedom within the law. They should be proactive about checking that those applying to be visiting academics do not pose risks to academic freedom.[66]

- **Employment, appointments and promotions**: A CI should not discriminate against a person in respect of their lawful viewpoints in connection with their employment generally. A CI should secure that, where a person applies to become a member of staff or for promotion, the applicant is not adversely affected in relation to the application, or the appointment or promotion process, because of viewpoints held or previously expressed or because (in the case of applicants for academic positions) they have exercised their academic freedom within the law.[67]

- **Termination**: CIs should not terminate employment for, or deny reappointment to, any member of staff because they hold or have expressed a particular viewpoint, and must secure that no member of academic staff is at risk of losing their job or any privileges because they have exercised their free speech rights under HERA.[68] More widely, the primary obligation under HERA, as well as (in many cases) the Equality Act, require that staff are not prejudiced or subjected to disciplinary measures because they have lawfully expressed certain viewpoints.

- **No EDI commitments or statements:** CIs should not require employees, or applicants for positions or promotions, to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate who holds, or has expressed, particular viewpoints, or for having exercised, or exercising, their academic freedom within the law[69]. More widely, seeking information on people's viewpoints/alignment with values at

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[66] See OfS Guidance paragraphs 43 and 44 and Example 3.

[67] This is an important requirement pursuant to the primary duty under HERA as well as (in many cases) the Equality Act. While OfS Guidance paragraphs 45 and 57 are stated to apply in respect of applicants for academic positions only, the obligations apply more widely, in respect of all applicants for employment. To the extent that a person has expressed something unlawfully in the past, that needs to have been of a nature which is sufficiently relevant to the position being filled and its functions and responsibilities so as to create a material risk of future unlawfulness or other materially adverse outcomes for the CI or its Participants in order to justify adverse treatment of the relevant person.

[68] See OfS Guidance, paragraphs 52 and 53. and Example 8. Paragraph 53 focuses exclusively on academic freedom, although in principle similar protections should apply in respect of all staff. See also Note 55 above about previous unlawful statements.

[69] This is a requirement under the primary duty under HERA as well as (in many cases) the Equality Act. While OfS Guidance paragraphs 46, 54 and 58 and Examples 5 and 9 focus on academic staff, similar protections should apply in respect of all staff.

all in connection with employment, appointments or promotions risks being seen as being done in preparation to discriminate based on their viewpoints, and more generally is likely to have an intimidating/chilling effect. This should not happen.

- **Records**: An appointment, promotion, disciplinary or dismissal process should include a sufficiently detailed record of all decisions. This record should include evidence that the relevant process did not penalise a candidate or member of staff in connection with their viewpoints or for their exercise of free speech or academic freedom.[70]

- **Including appropriate free speech related requirements in all relevant employment or appointment contracts** and in the job specification for all appointments of senior staff and in their contracts with students.

Information on free speech implications for various topics

BFSP's website provides detailed information on free speech compliance requirements in various contexts, including the following:

- S**tatements** about the new legal requirements and their implications **for HEPs** and for **students' unions**.
- **The Equality Act after the *Forstater* case: protected viewpoints**.
- **Liability of employers for harassment by their staff of people with protected beliefs under the Equality Act: after the *Fahmy* case.** And **Liability of employers for allowing their disciplinary processes to be used to suppress free speech: the *Meade* case**.
- **Know your free speech rights.**
- **Introductory EDI courses: potential free speech problems**.
- **"Decolonizing the curriculum": potential free speech problems.**
- **Requirements re governance and appointing a free speech officer**.

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[70] OfS Guidance, paragraphs 47, 55 and 59 focus on protecting academic freedom, but this logically extends to all members of staff.

It is unclear to BFSP whether the primary obligation under HERA requires this extent of record keeping, but good governance must require sufficient record keeping to demonstrate that a CI is preforming its duties (which would extend to admissions as well), while achieving a balance as so as to avoid excessive, onerous paper-pushing.

Best Free Speech Practice

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Details of the Committee (authors) and Editorial and Advisory Board of BFSP are on the BFSP website.

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Important: *This document:*

- *is a short summary of a complex area of law and its implications, and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: CIs and others should consult their legal and other advisers in respect of all matters relating to free speech in connection with their institution, including those referred to in this document;*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular CIs, will have to be developed by CIs themselves, in the context of their own particular circumstances;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE****: see its publication date above.*