

Free Speech Codes – checklist

Name of HEP:

Date:

Notes:

- Based on draft OfS guidance – to be revised.

Obligation	Complies?	Comments on compliance	Other information about requirements
<p>Main obligations in HERA/OfS Guidance and publicity</p>			
<p>HEPs must maintain a “code of practice” (HERA Section A2)</p>			
<p>The HEP’s values relating to freedom of speech must be set out, together with an explanation of how those values uphold freedom of speech.</p> <p>HEPs should consider including:</p> <ul style="list-style-type: none"> - a statement about the overarching value of freedom of speech within the law for the HEP; - a statement about how those values uphold freedom of speech within the law at the HEP; - 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. 			<p>All required pursuant to HERA Section A2(2)(a) and draft OfS Guidance, paragraph 76.</p>

<p>An HEP must bring the provisions of Section A1 (the primary free speech protection obligations) and code to the attention of its students at least once a year.</p> <p>Section A1 should be explained in the code.</p>			<p>HERA Section A2(5).</p>
<p>An HEP should have a clear and simple statement about the code, which should summarise its contents and make clear how to access it.</p> <p><u>Publication</u>: the code/ statement must be:</p> <ul style="list-style-type: none"> - published in a prominent position - easily accessible online; - communicated to staff and students at least annually; - 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. 			<p>OfS Guidance paragraph 75.</p> <p>All in paragraphs 74 and 75 of the OfS Guidance. [to check all Guidance is included in the checklist]</p> <p>This last requirement includes in all policies relating to <u>staff and student codes of conduct</u> and <u>speaker events</u>, and to:</p> <ul style="list-style-type: none"> - 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.

<p>The HEP must itself take all reasonably practicable steps to secure compliance with their code, including where appropriate the initiation of disciplinary measures.</p> <p>This clearly requires HEPs to:</p> <p>have appropriate rules in place requiring compliance with the code, but also rules prohibiting discrimination, harassment, bullying and other attacks (such as complaints and false accusations) against staff and students for their viewpoints.</p> <p>Enforce those rules actively and appropriately.</p>			Section A2(4).
<p><u>Complaints:</u></p> <p>Information on the HEP’s complaints scheme, with a link to it.</p> <p>A link to the OfS’s free speech complaints scheme together with the following text:</p> <p>‘The Office for Students (OfS) operates a free speech complaints scheme. Under that scheme, the OfS can review complaints about free speech from members, students, staff, applicants for academic posts and (actual or invited) visiting speakers. Information about the complaints that the OfS can review is available on its website. [LINK]’</p>			OfS Guidance paragraph 81.

Impact of important wider legal obligations	Complies?	Comments on compliance	Other information about requirements
The primary duty to secure free speech in HERA, and the need to avoid discrimination against and harassment of	[no reply]		These are not expressly required under HERA to be set out in the code, but either are

staff and students in connection with their protected viewpoints under the Equality Act, and the need to qualify for the defence in Section 109(4) of the Equality Act against liability for their employees' discrimination and harassment, involve the following requirements.			required to avoid liability and risk, or are mentioned for completeness as they could valuably be included or are relevant to it.
Codes should (in addition to describing the obligations in Section A1 of HERA as above) refer to the need to avoid discrimination and harassment under the Equality Act re staff and students with "protected viewpoints", and to take "all reasonable steps" pursuant to the Section 109(4) defence to prevent discrimination and harassment by their employees.			
A statement of institutional neutrality on contentious issues.			This is a clear need in order for an HEP itself not to disadvantage people with dissenting viewpoints, and also to ensure that it and its employees do not discriminate and harass against people in its operations, for instance by failings to reject complaints early on because of an assumption they must be reasonable, which led to humiliating liability for an employer and regulator in the <i>Meade</i> case [reference]. UK institutions such as Imperial are leading the ways with neutrality statements in their codes.
Clear rules requiring compliance by staff and students with the code and not to discriminate, harass, attack etc re participants' viewpoints.			Required pursuant to HERA and to qualify for the Equality Act S.109(4) defence.
Training of staff and students about their free speech requirements. While this would not be "in" the code, it would normally refer to it extensively.			Required pursuant to HERA and to qualify for the Equality Act S.109(4) defence.
HEPs must not misdescribe, misinterpret or misapply definitions and obligations (including "contrary obligations", eg to avoid discrimination and harassment)			Required pursuant to HERA and to qualify for the Equality Act S.109(4) defence and

<p>under the Equality Act, as this leads to mistakes and unlawfulness. Examples of errors include:</p> <ul style="list-style-type: none"> - Failure to update policies to cater for developments in what count as “protected viewpoints” - Exaggeration/misstatement of definitions or obligations in the Equality Act, in particular giving “harassment” a wider meaning than its restricted, objective statutory one, eg so as to give weight at any claim of “offence”. - Working on the basis that an HEP’s requirement under the Equality Act to protect people from harassment and discrimination applies more widely than just in respect of their employees and (to a degree) students*. I.e., HEPs don’t have to protect: <ul style="list-style-type: none"> (a) third parties (who don’t otherwise have express protections as regards the HEP) from the behaviour of their employees or students, or (b) their employees or students from the behaviour of parties other than the HEP itself and its employees, save re sexual harassment. <p>So, an HEP couldn’t invoke the Act to cancel a <u>student-organised</u> event because it might result in its employees or students** claiming to experience harassment or discrimination as a result of the subject-matter or views expressed at the meeting (subject to its wider anti-bullying rules, although this would have to be exercised compliantly with HERA and “proportionately” under the Human Rights Act).***</p>			<p>otherwise avoid liability under the Equality Act.</p> <p>These issues are in our experience endemic in UK institutions, and lead to unlawfulness/liability, eg the now famous Fahmy, Meade and Phoenix cases. For instance, in the <i>Fahmy</i> case, the employer had not updated its policies to cater for what count as “protected viewpoints”, and was held liable under Section 109 of the Equality Act when its employees harassed a colleague over her viewpoints.</p> <p>AFFS will be conducting a review of HEP policies in this regard, and where these are not promptly corrected on notification, or are grossly and negligently defective, will be reporting them to the OfS.</p> <p>* HEPs in any event have no duties under the Equality Act as regards the behaviour of their students, save possibly under their weak duties (to consider) under the PSED.</p> <p>** And possibly under its weak duties (to consider) under the PSED.</p> <p>*** But note that relevant parties, including third external speakers, may well have protections under HERA and the Human Rights Act</p>
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Meetings	Complies?	Comments on compliance	Other information about requirements
The Code must set out the following (all from Section A2)	[no reply]		
<p>The procedures to be followed by both staff and students of and any students' union at the HEP in connection with the organisation of meetings and other activities at the HEP's premises.</p> <p>These must include:</p> <ul style="list-style-type: none"> - The content of the procedures section should clearly and expressly require decision-makers, in making any decision or adopting any policy that could directly or indirectly (and positively or negatively) affect freedom of speech, to act compatibly with the statutory free speech duties." - 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. <p>This section of the code should also include a link to the OfS's free speech complaints scheme together with the text set out above.</p>			<p>HERA Section A2(2)(b). The OfS Guidance contains detailed requirements, at paragraphs 78 to 83.</p> <p>These detailed procedures are often found in a separate document. A section in the main code describing these requirements and linking to the separate document is sufficient. These requirements need to be publicly available and easily found.</p> <p>Any more from Guidance?</p> <p>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 <u>any activities</u> 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 – see above].</p>
The procedures for organising room bookings and speaker events should adhere to the following principles, which are widely recognised:			OfS Guidance paragraph 82.

<ul style="list-style-type: none"> - They should make clear that the starting point for any event is that it should go ahead and that cancellation is exceptional and undesirable. - The procedures should be clearly set out. - The process should not take longer than necessary. - There should be a single, identified point of contact for questions about the process. - There should be an identified person responsible for deciding whether and how an event may proceed. - There should not be onerous requirements for information. <p>This section of the code should set out a process for the timely consideration of risks to the event. The purpose of the process would be to put in place steps that permit the event to go ahead.</p>			<p>OFS Guidance paragraph 83.</p>
<p>The criteria to be used by the provider in making decisions about whether to allow the use of premises and on what terms.</p>			<p>HERA Section A2(2)(d).</p>
<p>The conduct required of staff and students in connection with those meetings and activities (the scope of this section should replicate that in the procedures section of the code).</p> <p>The content of this section should be consistent with the following principles:</p>			<p>HERA Section A2(2)(c), as supplemented by OFS Guidance paragraphs 85 and 86.</p>

<ul style="list-style-type: none"> - Everyone has the right to free speech within the law. - Providers, constituent institutions and relevant students' unions should seek to expose their members and students to the widest possible range of views. - If a speaker breaks the law, it is the speaker who is culpable. - Protest is itself a legitimate expression of freedom of speech. However, protest must not shut down debate. 			
<p>These requirements apply both to internal meetings and ones with external speakers.</p>			<p>See above re paragraph 79 of the OfS Guidance.</p> <p>External speakers includes external participants in debates or discussions.</p>

Costs of meetings	Complies?	Comments on compliance	Other information about requirements
<p>Save in exceptional circumstances, HEPs must not require the organiser of an event to bear any of the costs of security relating to the event.</p>			<p>HERA Section A1(10). The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects being cancelled, with activists threatening physical force and noisy disruption.</p> <p>This is a requirement for action in practice, rather than for code content.</p>
<p>The code must set out the criteria for determining whether there are such exceptional circumstances.</p>			<p>HERA Section A2(2)(d).</p>

These criteria should be clear, objective and neutral and should be framed in such a way that “exceptional” circumstances only arise very rarely.			OfS Guidance paragraphs 89 and 90.
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.			OfS Guidance paragraph 89.
An HEP “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.			The OfS Guidance contains detailed requirements about security costs at paragraphs 87 to 94: see also Examples 19, 20 and 21.
The HEP should supply the organiser of the event with a clear written summary of its calculation of the expected security cost and an explanation for this calculation.			
The HEP must, where reasonably practicable have in place a process for appealing this calculation to an independent review, and for the provider, constituent institution or relevant students’ union to supply this summary in enough time for the event organiser to appeal the calculation.			

Protection of meetings	Complies?	Comments on compliance	Other information about requiremtns
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<p>HEPs 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.</p> <p>HEPs must have compliant rules to secure this. And enforce those rules.</p>			Sub-section A1(3).
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