

Alumni for FREE SPEECH

To:

The Chief Executive, Office for Students (OfS)

The Chair, Equality and Human Rights Commission (EHRC)

Cc CEO, Charity Commission

24 April, 2023

Dear Ms Lapworth and Baroness Falkner

Free speech protection and governance failures at Cambridge University re the Helen Joyce affair

We are a non-partisan organisation which is representing alumni of UK universities to encourage high standards of compliance with institutions' obligations to protect the freedom of speech of their students, staff and visiting speakers. More information about AFFS can be found at www.affs.uk.

We are writing about the free speech and governance aspects of the Helen Joyce affair at Cambridge University.

What happened and legal and governance implications

Original failures

The relevant events and the legal and governance issues which have arisen are set out in our letters of 17 November 2022 and 22 December 2022 to the Council of Cambridge University (together the **AFFS Council Letters**) which are provided with this letter.

We would add the following supplemental points about governance and free speech protection requirements and failures.

Need for institutional neutrality: If an institution takes sides, in an area of passionate and severely polarised debate, with one contested position (here trans activists), it necessarily formally sets itself against the other position (here gender-critical feminists). This state of affairs gives rise to a very obvious risk of disadvantaging (discriminating against) or creating a hostile environment for (harassing) people who hold that other viewpoint. The primary duty to take all reasonably practicable steps to secure free speech therefore requires universities to maintain institutional neutrality in respect of matters of public debate while of course complying with their wider relevant legal obligations. The University's relevant officer, Professor Desai, failed to act with the impartiality that her position required in this regard.

Work to avoid repressive atmosphere: Research strongly evidences that an atmosphere exists at many universities or among their staff and students (or some of them) in which many academic staff and students feel intimidated about expressing their 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 universities, universities must take such reasonably practicable steps as may help address this issue. In the case at hand, Cambridge should have refrained from making clear that it considered that one viewpoint was “potentially harmful” and merited “raising concerns with [the relevant college] regarding the events they are putting on” and a talk about it not worthy of being publicised.

Failure to resist activist pressure: To expand on a point made in the AFFS Council Letters, it seems clear that there is a widespread failure by universities to appreciate that their duty under **Section 43(1) of the Education (No.2) Act 1986** to take such steps as are reasonably practicable to secure freedom of speech for its members, students, employees and visiting speakers is a demanding requirement, which requires active steps to be taken. This appears to underlie many of the free speech problems that are arising. Section 43(1) requires a university to take such action as it can to bring a halt to various types of hostile actions that are being taken against a person because of their lawful viewpoint, especially where they are in possible breach of its own relevant rules and requirements. This is likely to involve some or all of:

- identifying the people who are, or may be, taking those actions, and informing them directly 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 people, where and to the extent appropriate; and
- taking such other action as is likely to help remedy the situation.

It is clear from Professor Desai’s email that the Sociology Department came under pressure from activists as a result of circulating information on the relevant event, and sent the email to address issues raised, or take steps requested, by those activists. These activists, by demanding an apology and/or that the Department not circulate information on future censored events, acted contrary to Cambridge’s free speech statement and were pressurising the University to act unlawfully. If the Department had understood and complied with its (and the activists’) free speech obligations, it would have explained these obligations to the activists and told them that they were in breach of the free speech statement and that they risked disciplinary action. The University failed to comply with its duties in this regard, and needs to appreciate this and remedy it for the future.

(We would comment that we are assuming that these failures do not result from Professor Desai’s actions alone: she is probably the unfortunate person whose actions got public attention. If Cambridge’s systems were working properly and its management both genuinely committed to and actually “on the case” about free speech protection, she would have been

properly educated about the requirements to protect free speech and the implications of factors such as the Equality Act. We strongly suspect systemic failure.)

It is frustrating that the original failures on Cambridge's part were not of the highest gravity in themselves and, had Cambridge promptly acknowledged the failures, set them right to the extent possible and committed to getting these aspects of securing free speech right in the future, that would as far as we are concerned have been the end of it, with Cambridge coming out of the affair with some credit. By not addressing the issues, it has turned what should have been a minor problem into a significant one involving material governance failures (see further below).

What the University and its management should have done when these issues were raised – further governance failures

The AFFS Council Letters (as supplemented by the points above) set out what we consider the initial free speech protection and governance failures to have been.

We have received no material response or engagement on this (indeed, the University explicitly told us that it would not be engaging with us), and we are not aware of any public information about any action having been taken to remedy these failures. It thus appears that both the Council and the University are defaulting on their governance obligations, despite having received a credible complaint of unlawfulness from an external whistle-blower (AFFS), which a responsible university would treat as meriting careful investigation, with input from suitably expert and independent lawyers. We submitted a Freedom of Information Request on 6 February 2023, as to whether such advice has been sought, and received a response (dated 3 March 2023) which indicated that it had not (it referred to advice which was received prior to the date of the AFFS Council Letters).

It may be that the University has actually taken appropriate steps, but it has seen fit not to share that fact publicly. We question why this would be the case, as good governance (in particular, principles of transparency and accountability) would require that, if it becomes aware that mistakes have been made, it owns up to them and makes clear that it intends to remedy them, so as to reassure the public, and its staff and students in particular, that it is serious about free speech protection.

Our strong impression is that the protection of the institution, in the sense of avoiding adverse publicity, appears to be more important than good governance or best free speech practice, and that the University is used to being effectively unaccountable, so its policy for dealing with the awkward issues raised is not to engage or respond publicly with/to the issues raised: what, if anything, it is doing internally to change its practices going forward is anyone's guess. This is wholly inappropriate for a public education institution and a charity.

Registration Conditions and governance

The OfS will appreciate that the matters we report in this letter indicate a failure to comply with Registration Condition E2 (management and governance), in that it does not have in

place adequate and effective management and governance arrangements to deliver, in practice, the public interest governance principle of securing free speech.

Cambridge's apparent failure to comply with its statutory duties under the Education Act and the Equality Act are indicative of non-compliance with this registration condition, as contemplated in paragraph 451 of the OfS publication *Securing student success: Regulatory framework for higher education in England*. We would add that the fact that Cambridge appears not to have done anything about its failures, and certainly has not been telling the public about them, indicate that Cambridge has not been acting openly, accountability and with integrity as contemplated in paragraph 451.

Cambridge's governing body appears to have failed to ensure that Cambridge complies with Condition E3 (Accountability), and taken no steps to mitigate the risk of future further breaches of this registration condition.

Paragraph 442g of the abovementioned OfS publication states that the OfS will, in judging whether a university's arrangements are effective, take into account whether it takes appropriate action to mitigate increased risk of a breach of his conditions of registration. Given the issues which appear to have arisen, one would expect Cambridge to have taken various actions to prevent such issues happening again. This does not appear to have happened.

Finally, we ask whether Cambridge notified the OfS of a reportable event, being its unlawful actions, as contemplated in paragraph 451.

Recommendations for regulatory action

The evidence is that the University and its officers have committed or allowed free speech and management and governance failures, and appear to have done nothing about them. We submit that Cambridge's current management and governance, and rules and processes, are not fit for purpose in this regard, and need significant improvement.

The OfS

We believe that it is appropriate that the OfS should require that the University do the following, at the least:

- (unless the OfS itself carries such an investigation) in order to establish the facts and free speech and governance implications of this case, engage an independent lawyer of appropriate seniority and expertise, appointed by and answerable to those members of the Council who do not have conflicts of interest in this matter, in order to investigate and report to the University and the OfS on the relevant facts and the implications for free speech protection and governance; that report should be made public;
- if there have been failures, work urgently to set them right, and revise its rules, policies and procedures to ensure that similar mistakes are not made again;

- ensure that the independent members of its Council have appropriate levels and types of skills and experience to bring to its deliberations, including in respect of regulatory and financial matters; and have sufficient seniority to enable them to challenge management and have their voices appropriately heard;
- a step that is reasonably practicable for Cambridge to take for securing free speech in accordance with Section 43, and is therefore a requirement which it has failed to comply with, is to have a senior, appropriately empowered and non-conflicted free speech officer to promote and work to secure free speech. It should also have a focused committee of its governing body with responsibilities to do this. It should also have a process for dealing with free speech problems that arise effectively, with relevant officers taking any issues that have arisen appropriately seriously. This would include taking legal advice on any technical aspects, where appropriate; and
- implement the requirements in practice imposed by the applicable legal obligations, including those outlined in the Appendix.

EHRC

While the EHRC is the regulatory body responsible for supervision of compliance with the Equality Act 2010, prior to the landmark *Forstater* case it did not have a regular role in regulating free speech issues at universities. It now does, however, as events which involve free speech issues and which are now known to be potentially unlawful under the Equality Act or relevant to its Public Sector Equality Duty are now regularly occurring at English universities – as they have in this case.

We urge the EHRC to investigate these free speech and governance failures, to the extent that they involve actions which contravene or are otherwise inappropriate in the context of the Equality Act, and to require the University to set right its past errors, including by making apologies to people prejudiced by them where applicable, and to take concrete steps to improve its governance as regards the Equality Act going forward. We recommend that these steps would include those outlined under “The OfS” above.

Regulatory overlap

It is unclear to us what (if any) the relationship/demarcation between the responsibilities of the EHRC and the OfS currently is as regards complex free speech cases where both of their areas of responsibility are involved. So, if the EHRC is not currently taking an active role in case such as this, we ask it to treat this letter as for information only.

We are also copying this letter to the Charity Commission, but for information only, as, while the University is a charity, our understanding is that it does not in most cases take the regulatory lead as regards universities.

Yours sincerely

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For

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Appendix: required steps to improve free speech enforcement and governance

The University's duty under **Section 43(1)** of the **Education (No 2) Act 1986**, as shortly to be re-enacted and extended by the **Higher Education (Freedom of Speech) Act 2023**, is a wide and onerous obligation and requires various steps to be taken in practice, including:

1. not having policies, practices or requirements which prevent or restrict free speech;
2. taking a positive approach in relation to the creation, promotion and enforcement of policies, practices and requirements relating to securing free speech;
3. creating rules to ensure compliance with the free speech obligations, including prohibiting certain extreme actions and securing compliance with those rules by having a disciplinary process; and taking enforcement action when appropriate;
4. having adequate governance arrangements, including a committee of its governing body to oversee the implementation and enforcement of the free speech obligations; and appointing a senior, appropriately empowered and non-conflicted free speech officer to promote and defend free speech and academic freedom;
5. ensuring that relevant staff are properly trained and understand the nature of the requirements to protect free speech; and making compliance with free speech related requirements express duties of relevant staff and in particular those in its HR, diversity, equality and related complaints functions;
6. where a person is under attack for his/her viewpoints, taking such steps as are reasonably practicable to stop the hostile actions that are being taken, to the extent that those actions are, or are likely to be, contrary to the HEP's free speech statement and other rules and requirements which it has, or should have, in place;
7. dealing with crises and controversies appropriately and not succumbing to pressure to take inappropriate action;
8. taking all reasonably practicable steps to avoid or reduce an atmosphere which prevents or intimidates staff, members and students from expressing lawful views;
9. adopting a position of institutional neutrality, avoiding taking sides on lawfully contested issues, and avoiding any association or relationship with any organisation which requires or encourages it to suppress the expression of views which dissent from the agenda being promulgated by that organisation; and
10. taking all reasonably practicable steps to ensure that the use of premises is not denied to anybody because of their viewpoint; and taking various specified steps to ensure that meetings are conducted appropriately (including in relation to the costs and requirements imposed in relation to hiring and using venues).