By email to:

Professor Chris Day CBE – Chair, Russell Group
Dr Tim Bradshaw – Chief Executive, Russell Group
Jamie Roberts – Policy Manager, Russell Group
Cc Board members

2 February 2024

Dear Russell Group Officers,

New free speech protection obligations coming into effect on 1 August 2024: urgent action needed by English universities

We are writing to introduce Best Free Speech Practice ("**BFSP**") and its sister organisation, Alumni for Free Speech ("**AFFS"**), two non-partisan campaigns whose aim is to help and encourage UK Higher Education Providers (**"HEPs"**) to better understand and comply with their legal duties to protect free speech.

AFFS' alumni have a deep and abiding attachment to their universities, which means that we, in turn, are motivated to approach our work in a spirit of co-operation and support where it is reciprocated.

New legal obligations coming into effect on 1 August: the law and its effects in practice

As you are aware, the Higher Education (Freedom of Speech) Act 2023 ("**HE(FOS)A**") has become law, and English universities and other HEPs – along with their colleges and other 'constituent institutions' and students' unions – must now plan to adjust their policies, practices, and requirements to ensure compliance with the impending extended regulatory regime.

We are convinced that the law – as is and as will shortly be – requires a wide range of actions in practice. We know from our ongoing engagement with these issues that there is widespread misunderstanding of just how onerous HEPs' existing free speech obligations to take all reasonably practicable steps to secure freedom of speech within the law really are. As a result, there have been far too many compliance failures on campus – for instance the famous *Kathleen Stock/Sussex* scandal, and the recent wide-reported *Phoenix/Open University* disaster.

As you will be aware, the consequences of such failures are about to get more serious. Amendments made to the Higher Education and Research Act 2017 ("**HERA**") by the HE(FOS)A will, from 1 August 2024, strengthen existing duties and add new obligations in relation to freedom of speech. This will create new and unprecedent risks for HEPs, including

of financial cost, reputational damage and embarrassment, regulatory problems, wasted management time and internal strife.

We strenuously recommend that Universities UK needs to give much more detailed guidance about what the law will actually require in practice, in order to greatly reduced the likelihood of free speech failures going forward. We:

- set out in the Appendix what we consider these requirements mean in practice; and
- also attach a detailed BFSP **Statement about the new requirements** to protect free speech, and their implications in practice. Appendix 1 is largely derived from that statement.

Implications of the **Equality Act 2010** ("**EA**"): It is worth specifically emphasising, as we do not see any Russell Group information on this, that recent case law under the EA has dramatically strengthened the protections under the EA for various viewpoints as "protected characteristics". These follow the now-famous *Forsater* case, of which you will be aware. We attach a detailed BFSP Statement about this and subsequent cases, their implications in practice.

- *Ms D Fahmy v Arts Council England*: an institution was found guilty of harassment as a result of not having taken reasonably practicable steps to prevent its employees from harassing their colleague for her viewpoints. Further, the convener of a meeting was criticised for expressing personal views in solidarity with one side of a toxic debate: while the Tribunal concluded that his actions did not cross the threshold for itself creating an intimidating etc environment, it stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment in that case.

- *Ms R Meade v Westminster City Council and Social Work England*: an employer and a regulatory body were found guilty of harassment as a result of inappropriate disciplinary action against an employee for expressing dissenting views on a matter of controversy. In particular, they had both subjected her to harassment related to her beliefs as follows.

  - The regulator subjected her to a prolonged investigation into her beliefs, and "fitness to practise" proceedings, and sanctioned her for misconduct. The Tribunal stated that[the regulator's "failure to check if [the complainant] could be malicious, and not checking his previous social media history, is indicative of a lack of rigour in the investigation, and an apparent willingness to accept a complaint from one side of the gender self-identification/gender critical debate without appropriate objective balance of the potential validity of different views in what is a highly polarised debate."

  - The employer subjected her to a disciplinary process; suspended her on charges of gross misconduct; issued an investigation report which was hostile in tone and content; and issued a final written warning. Importantly, the Tribunal ruled that the employer's implied continuing disapproval of her conduct, both during return-to-work meetings and when withdrawing the final warning, and its continued restraint on her freedom of expression, themselves constituted harassment; and that a staff member conducting

the disciplinary process "labelling [Ms Meade's] Facebook posts as being transphobic was …sufficient…to constitute harassment."

- *Ms J Phoenix v The Open University*: attacks on a senior member of staff for her viewpoints, including an aggressive open letter and an online pile-on, were held to be unlawful harassment and/or discrimination attributable to the Open University. There were more than 25 counts of discrimination and harassment, and more than 395 individual events of harassment as a result of individuals signing the open letter being found to be harassment. Again, equating gender-critical views with transphobia was repeatedly found to be harassment.

- It is also worth mentioning in passing that Lloyds Banking Group recently had to pay damages and costs under the EA which are likely to exceed £800,000 for mistreating an employee over something he said (the recent *Mr Carl Borg-Neal v Lloyds Banking Group* case).

We attach BFSP statements explaining the findings in the *Fahmy* and *Meade* cases. The key lessons to be taken from these cases are as follows.

- An employer has to take all reasonably practicable staps **to prevent its staff from attacking people** for their viewpoints, including by writing or signing aggressive open letters, joining social media pile-ons, making unjustified complaints and the like.

- an employer's **complaints and disciplinary functions** must not be allowed to become instruments of free speech suppression.

- an employer must not allow **inappropriate enforcement of contested viewpoints as this will itself be discrimination and harassment,** as evidenced by, inter alia, the Tribunal's ruling that labelling Ms Meade's gender-critical posts as being transphobic itself constituted harassment.

- an employer must maintain sufficient **institutional neutrality** on contested issues so as to ensure it satisfies its duties under the EA: all the failings in these cases arose from a failure of objectivity and strongly endorsing and enforcing one side of a bitterly contested debate.

These primary requirements have many necessary secondary implications, such as that employers must:

- update their rules to make sure they give proper effect to their duties to protect free speech, including defining harassment carefully by reference to the definition in and case under the EA, and not giving inappropriate emphasis to concepts such as "hurt" or "harm";

- ensure that their employees are sufficiently trained about free speech and their duties not to harass and discriminate against their colleagues for their viewpoints;

- properly enforce their rules: bring disciplinary proceedings against employees who harass their colleagues; and
- restructure or terminate relationships with external activists where they have caused or may cause the HEP to go down the part to unlawfulness, for instance by imposing a conflation of gender-critical views with transphobia.

The detailed BFSP statements on these cases set out these and other requirements in greater detail.

This area is a major problem for HEPs, and there is a total absence of guidance from the Russell Group about it. We have considerable sympathy, as it is a fast-moving and contentious area, but we suggest that the Russell Group is at risk of perpetuating HEP complacency about the problems with free speech protection and risks of their failing to comply with their obligations.

These cases are of huge relevance to HEPs' obligations under HERA, which is partly why we mention them here: we consider it highly likely that the courts will adopt the logic of these cases in interpreting the new HERA obligations to secure free speech, as the relevant requirements are similarly worded (see section 109(4) of the EA). We attach a letter we have recently written to the OfS about this.

Further, the above actions which would have been required to be taken to avoid the failures in these EA cases are the same as most, if not all, of what we listed in the Appendix as being steps which HEPs need to take to satisfy the requirement in Section A1 of HERA. These requirements are real, and HEPs (as guided by the Russell Group (and Universities UK, to who we have written in similar terms) are, we believe, sleepwalking into compliance disaster.

The same legal duties and legal remedies under HERA now also apply to colleges, halls, and other "constituent institutions" of HEPs, with minor adjustments. Similar legal duties and legal remedies now also apply to students' unions. This is a major change, which, again, the Russell Group should be bringing to the attention of its members.

We will be advising academics and students to view their rights in the above light, and will be preparing templates for people who are prejudiced by free speech failures to make complaints to HEPs and (if they do not get a satisfactory conclusion) the OfS about relevant failures, so they can marshal their facts and statements of their legal protections clearly and fully. These will be in respect of failures such as:

- where an HEP allows its complaints and disciplinary procedure to be used to attack someone for their lawful viewpoints, citing both HERA and the *Meade* case;
- where an HEP has failed to intervene to stop attacks on a person for their viewpoints, citing HERA, the *Fahmy* case and the very recent *Pheonix/Open University* case; and
- where an HEP's policies, rules etc discriminate against or harass (e.g. create a hostile environment for) a person for their viewpoints (for instance the many HEPs which

describe questioning the extremer aspects of trans ideology as transphobia), citing failure of institutional neutrality, allowing a hostile atmosphere to persist, HERA and the *Meade* case (in which implying continuing official disapproval of the claimant's viewpoint was ruled to be unlawful harassment).

So, what we are saying above is not merely theoretical.

Recommended next steps

For your universities to avoid free speech disasters when the new regime takes effect, we therefore urge the Russell Group to give a lot of detail, including the above, in its guidance to its members about their legal obligations under HERA, and that this needs to mention the matters we have set out in the Appendix.

(Our statements of the law and its implications have been prepared by senior lawyers, with input from other lawyers and academics. They are, we believe, the best currently available information on this important aspect. You will, however, perfectly reasonably want to confirm that what we say above is legally correct. We recommend that, at this critical juncture, it is worth your asking your lawyers to review this letter and the documents we have provided to you, to confirm whether they agree with what we are saying (or not!). We are confident of the outcome.)

Giving an appropriate level of detail about what is required in practice is essential to focusing HEPs' minds on just how onerous their legal obligations actually are, and will help reset their understanding of what is required of them. It is frankly only fair. The Russell Group is otherwise itself at risk of complaints for not having properly warned them of these implications.

If it would be helpful to meet you and/or your lawyers to discuss this, we would be happy to do so. We are also happy to provide advice and clarification on a confidential basis. We would also be happy to join seminars or Q&A discussions with relevant professionals or indeed HEP VCs or registrars.

It would be useful if you could confirm receipt.

Yours faithfully

William Mackesy and Andrew Neish KC

Best Free Speech Practice

[www.bfsp.uk / info@bfsp.uk](www.bfsp.uk)

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Appendix - Requirements and implications in practice

The primary obligations under HERA to secure free speech and academic freedom involve an HEP taking the following steps, which are all "*reasonably practicable*". HEPs' current and future conditions of registration will also require them to the extent that the above is correct [1]. The need to avoid discrimination against and harassment of people with protected viewpoints under the EA, and qualify for the defence under Section 109(4) of the EA, also involve an HEP taking most, if not all, of these steps. Each HEP 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.

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

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

- **Creating rules to ensure compliance** with the free speech obligations, including prohibiting material actions against people in respect of their viewpoints; having appropriate disciplinary processes in order to secure compliance with those rules; and having 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 and, which will involve free speech protection being a sufficiently regular agenda item for its governing body and 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;

  - appointing an appropriately senior (sufficiently so to participate in governing body meetings), empowered, available (although this does not necessarily have to be a full-time position), experienced and non-conflicted[2] **free speech officer** to be its internal advocate for free speech and academic freedom, with responsibility for ensuring that it complies with its legal obligations and follows and enforces its own rules appropriately;

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[1] Not least under the requirement, due in effect on 1 September 2025, for a condition that the governing body of the HEP complies with its primary obligations under HERA described above.

[2] Given that controversies around aspects of diversity agendas appear to give 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 functions in an HEP's EDI department without insuperable conflicts of interest.

- 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; and

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

- **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.

- **Taking active and effective action to ensure that it and its staff and students ("Participants") comply** with applicable obligations, including its code of practice and related rules, and enforcing compliance with disciplinary action where appropriate.

- **Dealing with controversies effectively; protecting Participants; resisting pressure:** How HEPs 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 requires an HEP to take such action as it can to stop various types of hostile actions that are being taken against the Participant because of their lawful viewpoint, especially where they are in possible breach of the HEP's own relevant rules and requirements.

  - This is likely to involve some or all of: identifying the Participants 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 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 (see further below).

  - HEPs must not succumb to pressure from Participants or others (a) to take actions which suppress or restrict 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 HEP's rules and requirements.

HEPs need to have practices, policies and requirements in place to enable them to do the above.

- **Not allowing its complaints and disciplinary functions to become instruments of free speech suppression**, contrary to HERA, the EA or the HRA. An HEP must assess any complaints or allegations for whether they are made in respect of people's protected viewpoints. If they are, it must exclude them or at least treat them with great caution. It 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 discrimination and harassment.[3]

- **Institutional neutrality:** 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[4]. HEPs and their representatives therefore need to maintain institutional neutrality on matters of polarised public debate (the safe option), or at least take an approach which is very careful to avoid actions or language which risk counting as harassment under the EA or suppress free speech contrary to HERA (the onerous and risky option), while of course complying with their wider relevant legal obligations.[5]

- **Not enforcing controversial agendas; the curriculum:** Whenever HEPs 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, and risks constituting harassment under the EA[6]. HEPs must therefore 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 to secure free speech and academic freedom or their obligations as charities, or unlawfully discriminate against or harass people in respect of their views which count as "protected characteristics".

- **Avoiding and reducing an oppressive atmosphere**: Research strongly evidences that an atmosphere exists at many HEPs 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

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3 See the *Meade* case.

5 A failure of sufficient neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy*, *Meade* and *Phoenix/Open University* cases.

6 See the *Fahmy* case.

existence of such an atmosphere gives rise to obvious risks of self-censorship and very harmful effects on free speech at HEPs, HEPs 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; the Section 109(4) Defence also requires this. This will involve being vigilant to prevent, identify and stop free speech transgressions; and firmly enforcing its code of conduct and rules.

- **Ensuring that any staff or student courses, "tests" or "training**", for instance for new arrivals, do not wrongly inhibit or suppress free speech.

- **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.

- **Having an appropriate free speech statement and a code** containing specified procedural and other information regarding the holding of meetings and events; and providing specified information to Participants about relevant free speech requirements as well as its own obligations in relation to free speech.

- **Taking all reasonably practicable steps to ensure that the use of its premises is not denied** to anybody because of their viewpoint, 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. Save in exceptional circumstances, not requiring the organiser of an event to bear any of the costs of security relating to the event.

- **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.