



Introductory courses, training and tests for students

Free speech requirements and risks for English institutions

PRELIMINARY – EFFECTIVE DATE : this Statement sets out the position as at the date when the main provisions of the Higher Education (Freedom of Speech) Act 2023, which amends HERA so as to have the effects described below, come into effect. This Statement is also an accurate statement in all material respects of the effects in practice of existing legal obligations under the Education (No. 2) Act 1986.

Introduction

Many English universities and other Higher Educational Providers (“HEPs”) have compulsory courses, training or tests for students regarding matters such as behaviour and language, diversity and attitudes to racial and sexual matters. These are sometimes part of the formal matriculation process.

Aspects of these courses have become controversial, particularly where certain viewpoints are required to be agreed with in order to have successfully completed training or “passed” tests. This may be a consequence of HEPs acquiring courses or modules from activist organisations whose purpose is to advocate for a particular viewpoint.

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 at UK HEPs.

Alumni for Free Speech (“AFFS”) will be monitoring and liaising with HEPs to ensure that their relevant courses, training and tests for the beginning of the next academic year are free speech compliant, and if necessary following this up with Freedom of Information Requests and publication of the results. In the meantime, it asks anyone who has first-hand experience of such a course, training or test to contact it at info@affs.uk.

The relevant law

HERA – free speech obligations

Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017¹ (“HERA”) require the governing body of an English HEP to take “*the steps that, having particular regard to the*

¹ As introduced by the Higher Education (Freedom of Speech) Act 2023, with effect from a date to be fixed, but which is currently expected to be in late 2023.

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 ("**Participants**") of and visiting speakers to the HEP. This requirement is very onerous, and requires active, positive steps to be taken². It gives no material discretion to the HEPs. The only limitations to these obligations under HERA are that:

- (a) the relevant speech must be lawful: unless the relevant expression of views is so extreme as to be unlawful – for instance as unlawful harassment under the Equality Act 2010 ("**Equality Act**") (see below) – they are protected under HERA; and
- (b) HEPs are only required to take the steps that are reasonably practicable for them to take. If an HEP is obliged to do (or not do) something under other laws or legally mandated requirements, then it is not practicable for it to take a step which is inconsistent with that duty. Grey areas could arise where steps that are reasonably practicable in themselves might, nevertheless, be thought not to be appropriate in all of the relevant circumstances, e.g. as a result of competing considerations relating to promotion of an equality agenda. This is, however, a matter of compliance with an objective legal requirement, and the subjective views of an HEP are likely to have little relevance: i.e., if something is reasonably practicable and would operate to enhance free speech protection, it is required to be done. The duty to act under HERA will usually override duties to "think" such as under the PSED (of which more below).

Sub-sections A1(5)-(7) of HERA provide that academic staff must be 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 HEP or the likelihood of their securing promotion or different jobs at the HEP being reduced.

There is a large range of actions which are required in practice by HERA, the most relevant of which are the following:

- (a) having adequate governance arrangements, including appointing an appropriately empowered and non-conflicted free speech officer to promote and defend free speech and academic freedom;
- (b) maintaining institutional neutrality in respect of matters of public debate or controversy while of course complying with their wider relevant legal obligations. If an institution takes sides, in an area of passionate and severely polarised debate, with one contested position, it necessarily formally sets itself against the other position. This gives rise to a

² The OfS recently put it thus: "*this is likely to entail a wide range of steps needing to be taken in practice. In our view, it is unlikely to be sufficient for a university only to make public statements in favour of free speech*". *Insight publication Freedom to question, challenge and debate, December 2022*: <https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf> (the "**December 2022 OfS statement**")

very obvious risk of disadvantaging (discriminating against) or creating a hostile environment for (harassing) people who hold that other viewpoint;

- (c) taking all reasonably practicable steps to avoid an atmosphere developing at the HEP which prevents or intimidates staff, members and students from expressing lawful views; and
- (d) ensuring that relevant staff are properly trained and understand the nature of the requirements to protect free speech, so they can devise courses, material and tests so as to be free speech compliant.

The same legal duties and remedies under HERA now also apply to colleges, halls, and other “constituent institutions” of HEPs, with minor adjustments. Similar duties and remedies now also apply to students’ unions. This is a major change.

Equality Act and Human Rights Act

Under the **Equality Act 2010** (the “**Equality Act**”), HEPs must prevent unlawful discrimination against and harassment of students with the “*protected characteristic*” of holding (or not holding) particular religious or philosophical views, including various viewpoints on matters of current public controversy.

The *Forstater* case in 2021 established that holding gender critical views is a “*protected characteristic*”. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, HEPs should work on the basis that advocacy for free speech and other human rights, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including, for example, in relation to aspects of Critical Race Theory³ and “decolonising the curriculum”), must logically also be treated as protected beliefs and will, in time, be confirmed as such. HEPs should therefore act on the basis that they must work to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them. Their Public Sector Equality Duty (“**PSED**”) imposed under **Section 149** of the Equality Act will include having due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express those beliefs, to advance equality of opportunity for those people and foster good relations between people who have a protected characteristic (i.e. these views) and those who do not.

³ This has already been litigated and subject to a substantial payment, albeit not yet a formal judgement. In May 2023, the Department For Work and Pensions paid Anna Thomas £100,000 just before a case came to the Employment Tribunal which involved her claiming discrimination for being dismissed following making whistleblowing complaints voicing concerns that (inter alia) the DWP’s adoption of aspects of Critical Race Theory, in particular the distribution of materials asking white employees to “assume” they were racist, was a breach of the Civil Service Code requiring them to be politically impartial and could lead to discrimination against white people.

Furthermore, free speech rights and academic freedom at universities are protected under the **European Convention on Human Rights** (as enacted in the UK by the **Human Rights Act 1998** (the “HRA”).

What the law requires in practice in this context

HEPs must not hold courses or training or impose test questions or processes to the extent that such courses, training or tests contravene their obligations (a) to secure free speech, (b) not to discriminate against or harass people in respect of views which count as “protected characteristics”, (c) to fulfil their PSED, and (d) to give effect to students’ free speech rights under the HRA.

Some HEPs appear to have been acting contrary to their legal obligations by doing (or not doing) some or all of the following.

Directly or indirectly requiring or pressurising students to endorse or acquiesce in specific viewpoints (compelled speech): requirement to mention free speech rights

To the extent that these courses or tests:

- (a) require specific viewpoints to be expressed or supported or acquiesced to in order to have “correctly” answered certain questions, to have “passed” the training or test, or to avoid having to retake the test (or answer specific questions again) until they give the “right” answer or enough “right” answers; and thereby
- (b) effectively disallow or suppress opinions which are contrary to the ones being promoted in the relevant course, training or test,

they are clearly contrary to the primary obligation under HERA to secure free speech and are, therefore, unlawful.

Further, effectively disallowing or suppressing particular viewpoints, or presenting them materially negatively or imposing negative consequences in respect of them, is likely to be unlawful discrimination, and could also amount, or lead, to harassment, by the HEP under the Equality Act, to the extent that holding (or not holding) those viewpoints count as religious or philosophical belief which are “protected characteristics” under the Equality Act; it is also a likely failure to comply with its PSED. It might well also involve a contravention of free speech rights protected under the HRA.

To the extent that these courses, training programmes and tests have the effect of sending a message to students that there are views which it is effectively compulsory to hold and express, and unacceptable to dissent from, at that HEP, and therefore disallow and suppress and impose negative consequences on holding and expressing certain views, they are also likely unlawful as described above.

Materials acquired from (or otherwise designed or approved by) campaign groups or activists will involve increased risks as regards compliance with HEPs’ freedom of speech obligations, unless they have been carefully vetted by the HEP to ensure that they comply with its free

speech obligations. Accordingly, if HEPs wish to provide courses, training or tests in areas of potential public controversy, they should either design them themselves having regard to their free speech obligations or ensure that materials provided by third parties are properly vetted to ensure that they comply with HEPs' free speech obligations.

HEPs should also, in the context of courses and tests that seek to promote specific viewpoints on areas of public controversy: (a) make clear to students their rights to hold (or not hold) and to express their beliefs and viewpoints (or lack of them) about those issues; and (b) inform students that the HEP has legal obligations to protect students' free speech, and that those obligations are backed up by rules and complaint and disciplinary processes to which the students may resort if concerned about the courses, training and tests they are being required to undertake.

Stating inappropriate requirements for student behaviour

HEPs must ensure that their own requirements for students, particularly about on-campus behaviour and attitudes, are not such as prevent or restrict lawful free speech. In designing course/training/test materials, they must make sure that these compliance requirements are correctly reflected. This will ensure that they do not unlawfully mislead students about the range of opinions, and forms of expressions, which are available to them.

Misrepresenting or overstating the effect of contrary laws and requirements

To the extent that any statement, opinion, action or event contravenes an existing law (e.g. preventing unlawful harassment or unlawful discrimination), it is not required to be protected under HEPs' free speech obligations under HERA. However, all lawful speech is protected and an HEP must act to uphold it as required. It follows that HEPs must be careful not to over-interpret contrary laws, e.g. treat or present them as having wider application than they in fact have in law. To the extent that HEPs' rules and requirements are not legally mandated, ie they reflect programmes and agendas of the HEP rather than its legal obligations, the HEP will be acting unlawfully if it follows those rules and requirements so as to suppress free speech. HEPs need to be very careful to word any EDI courses, training and tests so they do not overstate the contrary laws and thus unlawfully restrict students' free speech.

A key example of a misleading statement, which we see regularly, is that the Equality Act outlaws discrimination and harassment. It actually only outlaws them when done by specified parties in specified categories of situation, such as employment and education. I.e. in the higher education context, it applies to actions of HEPs and their staff when performing functions for the HEP, but not to those of their students, or staff in other circumstances. This misapprehension – and resultant misrepresentation – is often used as a justification for a variety of restrictions on student behaviour. While HEPs can make such rules as they see fit, they must not assert that such rules reflect a requirement of the Equality Act. This is misleading, and quickly leads to free speech protection failures.

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 does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: HEPs 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. It does not seek to prescribe detailed policies and practices. These will have to be developed by HEPs themselves, in the context of their own particular circumstances.*