



**Free speech protection by Students'
Unions of English universities:
The new requirements**

Important: please see the important notice at page 9.

www.bfsp.uk

PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at the date (expected to be later in 2023) when the main provisions of the Higher Education (Freedom of Speech) Act 2023 come into effect.

I. 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 our UK universities and other higher education providers (“**HEPs**”).

Recent amendments to the **Higher Education and Research Act 2017** (“**HERA**”) pursuant to the Higher Education (Freedom of Speech) Act 2023 (“**HE(FOS)A**”)¹ contain requirements on Students’ Unions (“**SUs**”) within HEPs in England that are eligible for financial support to protect free speech. These statutory duties broadly reflect those imposed on HEPs themselves. As confirmed and clarified in recent case law, some viewpoints are also protected under the **Equality Act 2010**.

This document is a brief statement of the relevant law for English SUs, with an explanation of what is required to be done in practice to comply with both the letter and the spirit of the law.

SUs will need to take active steps to ensure they comply. This is a major change.

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

II. Relevant law and requirements

Requirements in HERA and FS Statement/rules re free speech and academic freedom

Primary obligation to secure free speech: A relevant SU 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 members and staff of the SU, students of the relevant HEP and staff and members of the relevant HEP (and its constituent institutions such as colleges) (“**Participants**”) and visiting speakers.² 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 an SU as to what steps it needs to take. It results in various requirements in practice, which are discussed in detail in Part III. Free speech obligations override other considerations, subject only to the following:

- a. the relevant speech must be lawful: unless the relevant expression of views is so extreme as to be unlawful – for instance because defamatory or because amounting to

¹ New **Sections A5** and **A6** of HERA, introduced by Section 3 of HEFOSA.

² HERA **Sub-sections A5(1)-(2)**.

harassment under the Equality Act 2010 (“**Equality Act**”) (see below) – it is protected under HERA; and

- b. SUs are only required to take the steps that are reasonably practicable for them to take. If an SU is required to do (or not do) something under legal obligations – including legally mandated diversity requirements – then it is not practicable for it to take a step which is inconsistent with that duty.

Interpreting potentially contrary laws and requirements correctly is going to be vital for SUs, as over-interpretation creates major risks for them. See the Appendix for further discussion. The Office for Students (“**OfS**”) which will now have regulatory oversight of SUs, 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”.³

Meetings and code of practice: Relevant SUs must take all reasonably practicable steps to secure that neither the use of any premises occupied by the SU nor affiliation to the SU is denied to any individual or body in relation to their ideas, beliefs or views (or, for a society, its policies or objectives or the ideas *etc* of its members). The terms on which use is agreed must not themselves be based to any extent on such grounds. The SU must likewise secure that, save in exceptional circumstances, use of its premises by any individual or body is not on terms that require that individual or body to bear some or all of the costs of security relating to their use of the premises.⁴

Code of practice: In order to facilitate its compliance with its free speech obligations, a relevant SU must maintain a “code of practice” which sets out: the SU’s values relating to freedom of speech; the procedures to be followed by both its staff and students at the HEP who are members of the SU in connection with the organisation of meetings and other activities at the HEP’s premises and the conduct required of such persons in connection with those meetings and activities; and the criteria applied by the SU in deciding its support and funding for relevant events and activities and whether to allow the use of premises and on what terms. An SU must bring the code to the attention of its members who are students at the relevant HEP at least once a year. The SU must itself take all reasonably practicable steps to secure compliance with that code, including where appropriate the initiation of disciplinary measures.⁵

Complaints and statutory tort: HERA contains legal remedies against SUs for failures of free speech protection. These are important changes, and are discussed under “*Risk, accountability and liability*” below.

³ OfS Insight publication *Freedom to question, challenge and debate*, December 2022. Said in respect of HEPs, but equally applicable to SUs.

⁴ HERA **Sub-section A5(3) and (5)**.

⁵ HERA **Section A6**.

Relationships with their HEP: While the extent of their obligations in this regard is unclear, HEPs would be prudent to act on the basis that their own core obligations under HERA require them to take reasonably practicable steps to procure that SUs comply with their own obligations as regards students and staff of the HEP. To the extent that SUs occupy premises owned by or under the control of the HEP, it would, for example, be reasonably practicable for the HEP to make compliance with their obligations a condition of occupation or otherwise to exert some control over the SU's conduct in relation to freedom of speech. More widely, it must be reasonably practicable for HEPs to impose requirements to secure free speech through the agreements, memoranda of understanding and the like between them and their SUs and their effective power through the money they contribute to their SUs. The same considerations are likely to apply in relation to the independent obligations of constituent institutions at HEPs so far as their ability to exercise some reasonably practicable control over the activities of associated JCRs and similar student bodies.

Equality Act 2010 and the *Forstater* case

Under the **Equality Act 2010** (the “**Equality Act**”), SUs 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 as providers of services and employers and in many cases as members’ associations.

In 2021, the landmark *Forstater* case⁶ 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, SUs 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 (including, for example, in relation to aspects of Critical Race Theory⁷ and moves to “decolonise the curriculum”), must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such.

SUs therefore need to 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. Given

⁶ *Forstater v. CGD Europe et al.* (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

⁷ 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.

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

Resolving competing claims: dealing with conflicts of requirements and agendas

There are times when there can be a perceived overlap or conflict between requirements to protect free speech and other legal obligations, or SU programmes or priorities, which are asserted to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. However, the situation is simpler than is often appreciated. We set out detailed information in the Appendix on the necessary approach in order to resolve such perceived issues and conflicts appropriately.

Criminal matters

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 **Protection from Harassment Act 1997** (the "PHA") a person must not pursue a course of conduct which amounts to, harassment and which he knows or ought to know 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 an SU, from reputational damage, to regulatory/compliance failures, to unlawfulness and liability on its own part. Illegal activity by an officer or 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 SU. If an SU 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.

Risk, accountability and liability

Free speech failures create risk for SUs, including of financial cost, reputational damage and embarrassment, regulatory problems, wasted management time and internal strife. They also involve personal risk for individuals.

Complaints, claims and statutory tort: Complaints and claims have been successfully brought under the Equality Act for discrimination against people with protected viewpoints. HERA now supplements existing legal remedies with a right to make formal free speech complaints against SUs to the OfS and a right to bring civil proceedings against SUs for damages for loss caused by breach of their statutory duty to protect free speech.⁸ These are

⁸ HERA sections A7, and Section 69C and Schedule 6A.

important changes, and will greatly increase HEPs' accountability and their risks of legal liability.

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 an SU contravenes the Equality Act if he or she does something which is treated as having been done by the relevant SU and the doing of that thing amounts to a contravention of the Equality Act by the relevant SU. A personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act.⁹

Regulation

The OfS is now required to monitor compliance by SUs with their duties under HERA, and it is empowered to impose monetary penalties on SUs for non-compliance.¹⁰ Many SUs are charities, so are regulated by the Charity Commission and will need to comply with both charities law generally and the Charity Commission's relevant requirements.

III. Requirements and implications in practice

The primary obligations under HERA to secure free speech involve an SU taking the following steps, which are all "*reasonably practicable*".

- **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 significant 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.

⁹ Equality Act Sections 110 and 111.

¹⁰ HERA, Section 69B.

- **Having appropriate governance arrangements**, including an appropriately constituted and empowered committee of its governing body to oversee the implementation and enforcement of the free speech obligations; appointing an appropriately senior, empowered, experienced and non-conflicted¹¹ **free speech officer** to promote and defend free speech; and having an appropriate and effective reporting system in respect of free speech issues and complaints.
- **Ensuring that relevant staff and officers 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 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 SUs 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 SU to take such action as it can 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 SU’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).
 - SUs 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

¹¹ Given that controversies around aspects of diversity issues 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 role in an SU’s EDI function without insuperable conflicts of interest.

this pressure would itself be a breach by Participants of an SU's rules and requirements.

- **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. SUs and their representatives therefore need to maintain institutional neutrality in respect of matters of public debate, while of course complying with their wider relevant legal obligations.
- **Not enforcing controversial agendas:** Whenever SUs 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 the HERA, unless they are legally obliged to take the relevant actions.
- **Avoiding and reducing an oppressive atmosphere:** SUs should to take all reasonably practicable steps which might stop such an atmosphere developing or persisting in which Participants feel intimidated about expressing their opinions. This will involve being vigilant to prevent, identify and stop free speech transgressions; and firmly enforcing its code of conduct and rules.
- **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.

Information on free speech implications for various topics

[BFSP's website](#) provides detailed information on free speech compliance implications for various topics, including the following:

- A **statement for HEPs** of the new legal requirements and their implications.
- **The Equality Act after the *Forstater* case: protected viewpoints.**

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.*

Appendix: resolving competing claims; the scope of contrary laws

There are times when there can be a perceived overlap or conflict between requirements to protect free speech and other legal obligations or an SU's programmes or priorities which are asserted to justify actions such as preventing or not publicising events or bringing disciplinary proceedings. Allegations of harassment and other assertions of offence and insult often create apparent problems in the context of HEPs' freedom of speech obligations.

However, if speech is contrary to other laws (such as those preventing specified types of discrimination or harassment), it is not protected under HERA. If it is not, then all reasonably practicable steps must be taken to protect it. The situation is often simpler than is appreciated.

We set out below some of the processes that need to be gone through to ensure that mistakes are not made.

The necessary analytical process in the event of competing claims

In order to resolve appropriately what can appear to be difficult issues, it is necessary to approach apparent conflicts as follows.

1. The primary free speech obligation to take all reasonably practical steps to secure free speech within the law is overriding.
2. When an incident raises considerations of both protection of freedom of speech and other potential legal issues (e.g. in relation to assertions of unlawful harassment under the Equality Act by reason of (say) someone's opinions or a proposed meeting), SUs must review carefully whether any laws ("**contrary laws**") are contravened by the relevant statement, opinion, action or event ("**relevant view or event**"). If they are not contravened, reasonably practicable steps must be taken to protect the relevant view or event. In this review, SUs must be careful not to over-interpret the contrary laws, i.e. treat them as having wider application than they actually have in law. Subjective and incorrect interpretation of contrary laws is a real risk area for SUs, and their staff personally.
3. Issues may arise as to "reasonable practicability" and, in particular, whether other legal obligations on an SU render an action not reasonably practicable. Again, great care will be required to avoid over-interpreting any apparent or claimed contrary obligations.

Interpreting contrary laws and requirements

Identifying the limits to the scope which it is appropriate to give to duties which appear to be inconsistent with the free speech obligations, such as the anti-discrimination and harassment provisions in the Equality Act, and the PHA, requires care, but there is relevant case law and other information to refer to, which severely limits the extent to which they may be used to limit the speech and opinions of others.

SUs will have policies and rules reflecting their obligations under the Equality Act, although in many cases they extend beyond what is actually required of the SUs. In the context of their relationship with the obligations to protect free speech, it is only those policies and rules that reflect their legal obligations as they actually are that are relevant as possible limitations on SUs' obligations to secure free speech. To the extent that policies and rules go beyond this, treating them as overriding will put the relevant SU at risk as regards its obligations to secure free speech.

Harassment, offence and free speech

Harassment is very specifically defined under the Equality Act, and has been subject to extensive case law. 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 perception of the person claiming an action was harassment is relevant in the context of the *"effect"* of the conduct, as are the circumstances and, crucially, an objective test of whether it is reasonable for the conduct to have that effect. This last consideration operates to exclude assertions of harassment by the hypersensitive. In relation to taking all circumstances of the case into account, the Court of Appeal has stated that other statutory provisions (for instance the obligations in HERA) are relevant.¹² Further, the Employment Tribunal has stated that the relevant threshold will not be met by things said or done that are *"trivial or transitory, particularly if it should have been clear that any offence was unintended"*, and the courts have emphasised the importance of not encouraging *"a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"*.¹³ The Parliamentary Joint Committee on Human Rights has stated that: *"there is no right not to be offended or insulted. Just because a statement may offend another person does not necessarily make it unlawful"*.¹⁴

Not misrepresenting or overstating the effect of contrary laws

SUs need to be very careful to word any materials so they do not overstate the contrary laws and thus unlawfully restrict 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., it applies to actions of SUs and their staff and officers when performing functions for the SU, but not to those of students generally, or their staff and officers 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

¹² *Pemberton v. Inwood* [2018] EWCA Civ 564; [2018] I.C.R. 1291.

¹³ *Dhaliwal v. Richmond Pharmacology* [2009] ICR 724, [2009] IJLR 336 at para 22.

¹⁴ Fourth Report of Session 2017-19, part 2 para 18.

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.