



**Free speech protection at English
universities:
The requirements post HE(FOS)A**

Important: please see the important notice at page 11.

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. This Statement is also an accurate statement in all material respects of the effects in practice of the existing legal obligations under the Education (No. 2) Act 1986, save that all references to the new requirements in HERA to protect academic freedom should be discounted for this purpose.

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

The legal obligations of English HEPs in relation to freedom of speech are extensive and generally clear. Recent amendments made to the **Higher Education and Research Act 2017** (“HERA”) by the **Higher Education (Freedom of Speech) Act 2023** both strengthen existing duties and add new obligations. As confirmed and clarified in recent case law, freedom of speech and academic freedom are also protected under the **Human Rights Act 1998**, as are some viewpoints under the **Equality Act 2010**.

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

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. HEPs’ own duties might require them to take their own steps to ensure compliance by their constituent institutions and students’ unions.

Alumni for Free Speech (www.affs.uk) will be monitoring and liaising with HEPs to ensure that they 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 codes/rules re free speech and academic freedom

Primary obligation to secure free speech: The governing body of an English HEP 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 the staff, members and students (“**Participants**”) of and visiting speakers to the HEP.¹ This is a demanding

¹ HERA Sub-sections A1(1)-(2).

requirement and requires active, positive steps to be taken². The obligations are stated in objective terms, giving no material discretion to an HEP 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 harassment under the Equality Act 2010 (“**Equality Act**”) (see below) – it is 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 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. The duty to act under HERA will usually override duties to “think” such as under the PSED (of which more below).

Interpreting potentially contrary laws and requirements correctly is going to be vital for HEPs, as over-interpretation creates major risks for them. See the Appendix for further discussion. The Office for Students (“**OfS**”) 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

Academic freedom: 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. Applicants for academic positions must not be adversely affected because they have previously exercised their rights to academic freedom, i.e. questioned received wisdom *etc.* as described above⁴.

Duty to promote free speech: HEPs must now positively promote the importance of freedom of speech (within the law) and academic freedom in the provision of higher education.⁵ This requires active steps to be taken.

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>.)

³ OfS Insight publication *Freedom to question, challenge and debate*, December 2022.

⁴ HERA **Sub-sections A1(5)-(9)**.

⁵ HERA **Section A3**.

Meetings: HEPs must also 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. HEPs must also now ensure that, save in exceptional circumstances, they must secure that use of their premises is not on terms that require the organiser to bear some or all of the costs of security⁶.

Codes of practice and free speech statements: HEPs must maintain a “code of practice” which sets out: the HEP’s values relating to freedom of speech; 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 and the conduct required of such persons in connection with those meetings and activities; and the criteria applied by the HEP in deciding whether to allow the use of premises and on what terms. An HEP must bring the code to the attention of its students at least once a year and must itself take all reasonably practicable steps to secure compliance with their code, including where appropriate the initiation of disciplinary measures.⁷

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

Equality Act 2010, PSED and the *Forstater* case

Under the **Equality Act 2010** (the “**Equality Act**”), HEPs 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 employment and education.

In 2021, the landmark *Forstater* case⁸ 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 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

⁶ HERA **Sub-sections A1(3) and (10)**. The imposition of unaffordable security costs has previously resulted in meetings on subjects unpopular with activists threatening physical force and noisy disruption being cancelled.

⁷ HERA **Section A2**.

⁸ *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

Theory⁹ 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.

The **Public Sector Equality Duty** (“**PSED**”) imposed on public authorities¹⁰ requires HEPs, in the exercise of their functions, to have due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express a protected viewpoint, to advance equality of opportunity between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic (e.g. a protected viewpoint) and persons who do not share it.

HEPs therefore need to act on the basis that they must work to protect the freedom of speech and academic freedom of people in respect of a wide range of opinions held, not held or expressed by them. Given that many people hold protected viewpoints about a wide range of currently controversial issues, this creates a major risk area for HEPs. This is likely to require greatly increased institutional neutrality in relation to many issues.

Human Rights Act

The free speech rights of academics and students are protected under the **European Convention on Human Rights** (as enacted in the UK by the **Human Rights Act 1998**¹¹ (the “**HRA**”). These freedoms include the freedom to offend, shock and disturb. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic freedom. Any interference by an HEP with the expression of opinions and academic freedom of its academics and students will require exceptional justification.

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 HEP programmes or priorities, which are

⁹ 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.

¹⁰ Under Section 149 of the Equality Act.

¹¹ The HRA directly enacts the European Convention on Human Rights (“**ECHR**”) into UK law, including and relevantly for present purposes, **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

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 about 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, 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 HEP, from reputational damage, to regulatory/compliance failures, to unlawfulness and liability on its own part. Illegal activity by a 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 HEP. If an HEP 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.

Requirements as to governance

HEPs are required by their conditions of registration (E1 and E2) to have governing documents that uphold, and to have in place adequate and effective management and governance arrangements to deliver in practice, the public interest governance principles that apply to it. These include principles relating to securing freedom of speech and academic freedom.

The OfS has publicly stated¹² that, in considering whether an HEP complies with condition of registration E1, it may consider questions such as whether those governing documents provide for reasonable steps that facilitate securing lawful speech or include content that provides for steps that may undermine free speech. In the same publication, the OfS stated that, in considering whether an HEP complies with condition of registration E2, it may consider questions such as:

- a. Does the HEP have robust decision-making arrangements, which require it to consider the impact of its decisions on free speech and academic freedom as part of the decision-making process?

¹² OfS Insight publication *Freedom to question, challenge and debate*, December 2022.

- b. Does the HEP have checks and balances to ensure that its policies and processes do not adversely affect free speech or academic freedom?

Pursuant to **Section 8A** of HERA, the OfS must now ensure that HEPs' conditions of registration include a requirement that:

- a. their governing documents are consistent with compliance with their duties under Sections A1 to A3 of HERA to take reasonably practicable steps to secure and promote freedom of speech, including via a Code; and
- b. HEPs must have in place adequate and effective management and governance arrangements to secure compliance with those duties.¹³

A new Director of Free Speech and Academic Freedom has responsibility for overseeing and performing the OfS's functions in respect of free speech and academic freedom, including the new complaints procedure.

Risk, accountability and liability

Free speech failures create risk for HEPs, 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 HEPs to the OfS and a right to bring civil proceedings against HEPs for damages for loss caused by breach of their statutory duty to protect free speech.¹⁴ These are 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 HEP contravenes **Section 110** of the Equality Act if he or she does something which is treated as having been done by the relevant HEP and the doing of that thing amounts to a contravention of the Equality Act by the relevant HEP. Under **Section 111** of the Equality Act, a personal claim may be brought against anyone who has instructed, caused or induced a contravention of relevant parts of the Equality Act.

¹³ See also the OfS's *Securing student success: regulatory framework for higher education in England*.

¹⁴ HERA sections **A7, and Section 69C and Schedule 6A**.

III. 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*”.

- **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.
- **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-conflicted¹⁵ **free speech officer** to promote and defend free speech and academic freedom; and having an appropriate and effective reporting system in respect of free speech issues and complaints.
- **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 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.

¹⁵ Given that controversies around aspects of diversity issues 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.

- 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 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.
- **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. HEPs 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; 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. 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 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. 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.

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 students’ unions** of the new legal requirements and their implications.
- **Requirements re governance and appointing a free speech officer.**
- **The Equality Act after the *Forstater* case: protected viewpoints.**

- **Introductory EDI courses: potential free speech problems.**
- **“Decolonizing the curriculum”: potential free speech problems.**

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 HEP'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), HEPs 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, HEPs 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 HEPs, and their staff personally.
3. Issues may arise as to "reasonable practicability" and, in particular, whether other legal obligations on an HEP render an action not reasonably practicable. Again, great care will be required to avoid over-interpreting any apparent or claimed contrary obligations. For instance, the obligation under the PSED to have due regard to the need to eliminate unlawful discrimination and harassment (and achieve other ends) does not in effect extend more widely than what counts as "unlawful" discrimination or harassment and is a duty to think not to act, so is overridden by contrary duties to act such as under HERA.

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 (including pursuant to the PSED), 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.

HEPs will have policies and rules reflecting their obligations under the Equality Act and the PSED, although in many cases they extend beyond what is actually required of the HEPs. 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 HEPs' obligations to secure free speech. To the extent that policies and rules go beyond this, treating them as overriding will put the relevant HEP 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.¹⁶ 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"*.¹⁷ 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"*.¹⁸

Not misrepresenting or overstating the effect of contrary laws

HEPs 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 HEPs and their staff when performing

¹⁶ *Pemberton v. Inwood* [2018] EWCA Civ 564; [2018] I.C.R. 1291 at [88].

¹⁷ *Dhaliwal v. Richmond Pharmacology* [2009] ICR 724, [2009] ILRL 336 at para 22.

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

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.