



Free speech and compliance risks of relationships with campaign organisations for English universities

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 the existing legal obligations under the Education (No. 2) Act 1986.

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 Educational Providers (“**HEPs**”). It has no interest in taking sides in matters of public controversy.

Many English HEPs have relationships with external campaign or activist organisations (“**Campaign Organisations**”) such as Stonewall. Such relationships are controversial because they involve the HEPs promoting or effectively enforcing the agenda of the Campaign Organisation against the wishes of, or in ways which are contrary to the viewpoints of, sections of the HEPs’ staff and students and visiting speakers (“**Participants**”).

BFSP has prepared this statement to highlight the fact that these relationships will, depending on how they are implemented, risk HEPs acting unlawfully or non-compliantly under laws and other requirements relating to free speech.

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.

The relevant law and requirements: implications in practice

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 the date when the main provisions of HE(FoS)A come into effect.

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 is a demanding requirement, limited only by reference to the speech being "*within the law*" and by what is "**reasonably practicable**". It gives no discretion to HEPs as to the steps they take: if a step is reasonably practicable, it must be taken. Free speech obligations otherwise override other considerations.

This obligation results in various requirements in practice.

Institutional neutrality: 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 very obvious risk of disadvantaging (discriminating against) or creating a hostile environment for (harassing) people who hold that other viewpoint. HEPs 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 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 the Education Act, unless they are legally obliged to take the relevant actions.

Work to avoid repressive atmosphere: Research strongly evidences that an atmosphere exists at many HEPs or among their Participants (or some of them) in which many Participants (including both academic staff and students) feel intimidated about expressing their opinions. These sorts of problems can be peculiarly difficult to manage or address. Given, however, 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 must take such reasonably practicable steps as may help address this issue.

Under the **Equality Act 2010** (the "**Equality Act**"), must avoid unlawful discrimination against and harassment of Participants with the "*protected characteristic*" of holding (or not holding) particular religious or philosophical views, including various viewpoints on matters of current public controversy. The Equality Act specifies various contexts in which unlawful actions can occur, including employment and education.

In 2021, the landmark *Forstater* case² established that holding gender critical views (ie, disagreeing with aspects of Trans ideology) is a "*protected characteristic*". The law in this area

² *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 These principles have been applied in subsequent cases. For further discussion of this, see BFSP's statement *Philosophical beliefs protected under the Equality Act: After the Forstater case* at <https://bfsp.uk/universities-higher-education>.

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 opinions (whether religiously or philosophically based) in respect of other currently contested areas must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. We therefore refer to such beliefs below as “**protected viewpoints**”.

The **Public Sector Equality Duty** (“**PSED**”) imposed under **Section 149** of the Equality Act 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 those protected viewpoints, to advance equality of opportunity between persons who share a relevant protected viewpoint and persons who do not share it, and to foster good relations between persons who share a relevant protected viewpoint and persons who do not share it.

HEPs should therefore act on the basis that they must work to protect the freedom of speech of people in respect of people who hold a protected viewpoint (“**protected people**”). Given that many people disagree with or have significant or doubts about aspects of the agendas promoted by Campaign Organisations, or aspects of them, there will be many people with this “protected characteristic”: this creates a major risk area for HEPs which take action to promote and enforce the agenda of relevant Campaign Organisations.

This has the following implications:

- (1) presenting ideological viewpoints or activists’ agendas as fact or generally accepted and/or uncontested and therefore inappropriate to be questioned or disagreed with; and/or
- (2) presenting disagreement with those viewpoints or agendas in a negative light or imposing negative consequences for such disagreement; and/or
- (3) requiring those viewpoints or agendas to be accepted or supported or presented favourably in order to achieve positive personal outcomes or avoid negative ones,

are at risk of constituting unlawful discrimination by the HEP against, and/or likely to could also amount, or lead, to harassment of, those who count as protected people”. Such conduct would also risk being a failure to comply with the HEPs’ PSEDs. Given that the evidence indicates that there will be many protected people who do not agree with aspects of various currently contested ideologies and agendas, this creates a major risk area for HEPs.

Furthermore, the free speech rights of Participants are protected under the **European Convention on Human Rights** (as enacted in the UK by the **Human Rights Act 1998**³ (the

³ 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).

“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. Compelled thought and no doubt speech are unlawful⁴. Any interference by an HEP with the expression of opinions of its Participants will require exceptional justification. Imposing the viewpoints or agendas of Campaign Organisations on staff or students in the ways described above might well lead to breaches of their rights of free thought and expression protected under the HRA.

HEPs will often have a statement or code and/or rules on freedom of speech (“**FS Statement**”).⁵ Each HEP will need ensure that its functions and actions comply with its own FS Statement. Each will, for example, need to avoid preventing or closing down disagreement and discussion about the viewpoints or agendas being promoted by Campaign Organisations.

In summary, the essence of these complex requirements is that HEPs must not impose ideologies, viewpoints or agendas to the extent that to do so would contravene their obligations: (a) to secure free speech and comply with their own FS Statement, (b) not to discriminate against or harass people in respect of views which count as “protected characteristics” and to comply with their PSED in respect of those people, and (c) to give effect to Participants’ free speech rights under the HRA.

Constituent institutions and students’ unions: Very similar free speech protection obligations under HERA now apply to the “constituent institutions” (e.g. colleges) and students’ unions of HEPs, with the same effects in practice as the above. This is a major change. The Equality Act regime also applies to constituent institutions and SUs, but the PSED does not apply to students’ unions.

Implications for HEPs: potential unlawfulness and compliance problems

Close involvement with Campaign Organisations can as a result create significant legal and compliance problems for HEPs. In particular:

1. The policies, rules or requirements of an HEP are sometimes written in ways that reflect the viewpoints or desired outcomes of Campaign Organisations but which do not

⁴ See, for example: *Buscarini and Others v. San Marino* App. No. 24645/94 (1999), which held that a requirement to swear an oath on the Gospels contravened Article 9.

⁵ FS Statements will become mandatory for English HEPs if and when the Higher Education (Freedom of Speech) Bill presently going through Parliament becomes law. See, Section A2 of the current draft: <https://bills.parliament.uk/publications/49055/documents/2622>.

correctly reflect (and often have a wider extent than) the law as it is or to the HEP's obligations under that law (this different extent can be called "**agenda enforcement**"). The agenda enforcement aspects of these policies *etc* risk putting that HEP in contravention of relevant laws and other requirements relating to the protection of free speech by (amongst other things) misrepresenting the nature of HEP's and Participants' obligations and/or operating to inappropriately suppress dissenting viewpoints by promoting (and effectively enforcing) Campaign Organisations' agendas. HEPs will need to take great care to ensure that this is not the case. This should involve detailed advice from appropriately qualified independent lawyers.

2. Many HEPs hold compulsory courses, tests and training ("**courses**") for students, particularly new arrivals, regarding matters such as behaviour and attitudes to sexual matters. While introductions to appropriate behaviour in certain contexts might be appropriate in principle, aspects of these courses have become controversial where they have strayed into matters of public controversy and contested views. In a number of well-publicised cases, certain viewpoints have been required to be agreed with in order to have 'passed' or 'completed'. HEPs may not hold courses or impose test questions or processes to the extent that to do so would contravene relevant laws and other requirements relating to the protection of free speech, and some of these courses appear to have done this. These issues have sometimes arisen because the courses have been designed by or acquired from Campaign Organisations which have (deliberately or otherwise) misstated or exaggerated the relevant legal requirements and their implications⁶. HEPs will need to check carefully that any information in materials acquired from external sources about relevant legal requirements and their implications are accurate and not exaggerated and that courses and materials will not, as a result of agenda enforcement and/or misdescription, cause them to contravene relevant laws and other requirements relating to the protection of free speech. The fact that they have been designed or created by a third party will not be a defence against allegations that they have failed to comply with these requirements. HEPs' PSED will also require this, to the extent that people with "protected viewpoints" are at risk of being adversely affected by this.
3. It is contrary to the duty under HERA to secure free speech, and can give rise to contraventions under the Equality Act, for HEPs have associations or relationships with Campaign Organisations which require or encourage (e.g. as a condition of membership, participation in schemes, or in order to obtain elevated status within a scheme or outside endorsement) an HEP to hold or endorse certain views or opinions on contested subjects, or even to suppress or punish dissenting viewpoints, for instance

⁶ This was found to be the case in respect of (and a contributing factor to) significant problems with free speech suppression at the University of Essex. See paragraph 243.11 of the independent report commissioned by the University of Essex from barrister Akua Reindorf (now KC) and published in May 2021 ("**the Reindorf Report**").

pursuant to Stonewall’s “no debate” requirement. (As an example of the problems that arise, it has been convincingly asserted that such relationships lead to relevant staff being trained to accept that certain viewpoints are “unassailable truth”.⁷) This is because giving effect to the requirements or encouragement inherent in these associations or relationships creates a high risk of causing HEPs to take steps to discourage or even to prevent or suppress or punish the holding or expression of dissenting or opposing views from the agenda or ideology being promoted by the relevant Campaign Organisation. This is highly likely to be a breach of HERA and, depending on the viewpoints being discouraged or suppressed, the Equality Act.

4. All relationships with campaign organisations which give rise to the above issues need to either:
 - (a) be restructured to avoid potential breaches of the relevant laws and other requirements, for instance by removing or adjusting all aspects of the relationships which give rise to the relevant free speech risks; or
 - (b) if, and to the extent to which, that is not possible, be discontinued.

Best Free Speech Practice

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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.*

See: Shereen Benjamin’s and Neil Thin’s “*Sex, Gender and Academic Freedom: a guide for university managers*”, 2022: <https://blogs.ed.ac.uk/edinburghafaf/2022/06/21/sex-gender-and-academic-freedom-a-guide-for-university-managers/>