Free speech protection by Students' Unions of English universities:

The new requirements

Important: please see the important notice at page 13.

www.bfsp.uk

PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at 1 August 2024, 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 registered higher education providers ("**HEPs**").

Recent amendments to the **Higher Education and Research Act 2017** ("**HERA**") (effective on 1 August 2024) pursuant to the Higher Education (Freedom of Speech) Act 2023 ("**HE(FOS)A**")[1] contain requirements on students' unions ("**SUs"**) of Higher Education Providers ("**HEPs**") in England that are eligible for financial support[2] that are eligible for financial support to protect free speech. These statutory duties broadly reflect those imposed on registered 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

***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.[3] This is a demanding requirement and

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1 New **Sections A5** and **A6** of HERA, introduced by Section 3 of HE(FOS)A.

2 A list of these HEPs can be found on the Office for Students' website (not yet available as at January 2024).

3 HERA **Sub-sections A5(1)-(2)**.

requires active, positive steps to be taken[4]. 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, whether under criminal or civil laws – for instance because amounting to unlawful harassment under the Equality Act 2010 (see below) or because it is defamatory – it is protected under HERA; and

b. SUs are only required to take the steps that are reasonably practicable for them to take. (the Office for Students ("**OfS**") interprets this to include deciding not to take a step which would have an adverse impact of freedom of speech[5]). Various points are relevant.

- If an SU is required to do (or not do) something under a legal obligation – including an SU's requirements to the extent that they reflect a legal obligation on it – then it is not practicable for it to take a step which is inconsistent with that obligation.

- The existence of policies, programmes and requirements of the SU which may conflict with the duty to secure free speech will not render relevant steps not reasonably practicable unless those policies etc are themselves legally mandated. (Indeed, those conflicting policies etc would normally need to be qualified so as to ensure future compliance with this primary obligation.) This is a matter of compliance with an objective legal requirement, and the conflicting subjective views and priorities of an SU are likely to have little relevance.

- The OfS states that factors which may be relevant to an assessment of whether steps are "reasonably practicable" include the extent to which a step would prevent restrictions on free speech; the financial and other costs which would be incurred in taking the step; and the extent to which it would directly disrupt other lawful

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[4] 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 (the "**OfS December 2022 Publication**"). https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf.) Said in respect of HEPs, but equally applicable to SUs.

[5] OfS Consultation on its approach to regulating students' unions, December 2023 ("**SU Consultation Paper**"), para 201H.

activities[6], it being noted that these factors must be assessed objectively and in the context of the requirement to "have particular regard to the importance of freedom of speech", which is clearly intended to give it particular weight in relevant calculations; it must be that the costs would need to be excessively disproportionate to the likely free speech benefit for the step to be unreasonable in these circumstances. SUs will be complying with an objective standard they may be held to: they do not have much discretion here.

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 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*".[7]

***Meetings*:** 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.[8]

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.[9]

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[6] SU Consultation Paper, para 201I. It being noted that it would appear that other activities which would cause an HEP a legal compliance failure (so should have been prevented in order for that failure not to have occurred) should not be regarded as "lawful" in this context.

[7] OfS December 2022 Publication. Said in respect of HEPs, but equally applicable to SUs.

[8] HERA **Sub-section A5(3) and (5)**. The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects, with activists threatening physical force and noisy disruption, being cancelled.

[9] HERA **Section A6**.

***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.

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.

"Discrimination" includes an employer or other relevant person subjecting a relevant person to a detriment on account of their protected viewpoint. 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, and has an objective element[10]. This has very wide implications, including that complaints and disciplinary processes should not be allowed to

[10] **Section 26**. Under **Section 26(4)**, in deciding whether conduct has this effect, each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

become instruments of free speech suppression, with many consequent detailed requirements[11].

The landmark *Forstater* case[12] of 2021 established that holding gender-critical views is a *"protected characteristic"*. In the subsequent *Corby*[13] case, views which challenged aspects of Critical Race Theory were ruled to be protected. 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 Theory and moves to "decolonise the curriculum", and lawful views in relation to Israel/Palestine), must logically also be treated as protected beliefs in appropriate circumstances and will, in time, be confirmed as such. See BFSP's detailed *Statement about what sorts of beliefs are protected following the Forstater case*.

Section 109(1) provides that anything done by an employee in the course of their employment, or an agent on behalf of their principal, must be treated as also being done by their employer or principal; it does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer has a defence (the "**Section 109(4) Defence**") if it can show that it took all reasonable steps to prevent an employee from doing the alleged act or anything of that description.[14] SUs otherwise have no duty under the Equality Act in respect of the behaviour of Participants acting in capacities which do not give rise to such responsibilities on the SU's part, so opinions expressed and actions taken by the SU's staff are otherwise irrelevant for the purposes of the Equality Act. have no duty under the Equality Act in respect of the behaviour of Participants *acting in capacities which do not give rise to such*

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11 *Ms R Meade v Westminster City Council and Social Work England* (2024: Case No: 2201792/2022 & 2211483/2022). See details in the Appendix.

12 *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

13 *Corby v ACAS*, September 2023; note that this was a first instance judgement, so is not a binding precedent. Mr Corby was ordered to remove posts on an internal communications system which were critical of aspects of Critical Race Theory ("**CRT**"). He successfully claimed that this was discriminatory under the Equality Act. Whether views critical of CRT were protected had already been litigated and subject to a substantial payment, albeit not 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 relating to the DWP's adoption of aspects of CRT.

14 The recent *Fahmy* case (*Fahmy v Arts Council England* (2023) ET case no 6000042/2022) gives a vivid example of how this area of the law has effect in practice. See a detailed BFSP statement about this case and its implications here.

responsibilities on the Su's part, so, for instance, opinions expressed by the SU's staff via their private social media are not the SU's problem under the Equality Act.

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[15], including from attacks by their colleagues, and to avoid discriminating against or harassing such people through their own policies and requirements. Given 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 often simpler than appears to be appreciated. We set out detailed information in the Appendix on the necessary approach in order to resolve such perceived conflicts appropriately.

Criminal matters: the Protection from Harassment Act 1997 (the "PHA")

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 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.

[15] And in particular to act to prevent harassment by their employees of such people so as to qualify for the Section 109(4) Defence.

Risk, accountability and liability

Free speech failures create risk for SUs, including of financial cost, reputational damage and embarrassment (the OfS will publish information about free speech failures), 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 and harassment of 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.[16] 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 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.[17]

Regulation

The OfS is now required to monitor compliance by SUs with their duties under HERA, and it is empowered to intervene and to impose monetary penalties on SUs for non-compliance.[18] 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*". The need to avoid discrimination against and harassment of people with protected viewpoints under the Equality Act, and qualify for the

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

17 Equality Act **Sections 110 and 111**.

18 HERA, **Section 69B**.

Section 109(4) Defence, also involve an SU taking most, if not all, of these steps. Each SU 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 management committee or other managing body and having an appropriately constituted and empowered committee of its managing body or other senior working group to ensure proper compliance with its free speech obligations;

  - appointing an appropriately senior (sufficiently so to participate in managing body meetings), empowered, available (although this does not necessarily have to be a full-time position), experienced and non-conflicted[19] **free speech officer** to be its internal advocate for free speech, with responsibility for ensuring that it complies with its legal obligations and follows and enforces its own rules appropriately;

  - ensuring that its risk officers and functions are aware of these issues and the risks that 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 that 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 SU and its staff, so will need to be resolved by people who are sufficiently independent of the SU and its management.

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

  SUs 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 or the Equality Act. An SU 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. [20]

- **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. A number of recent public failures at HEPs have been indicated by the Employment Tribunal to have largely arisen as a result of failures of objectivity[21]. SUs 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 Equality Act or suppress free speech contrary to HERA (the onerous and risky option), 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, and risks constituting harassment under the Equality Act[22].

- **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; the obligations under HERA and the Section 109(4) Defence require 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.

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[20] See the *Meade* case (cited at Note 11 above; see also the Appendix).

[21] A failure of neutrality on contested issues was at the heart of the embarrassments that were the *Fahmy* and *Meade* cases, cited at Notes 11 and 14 above, and described in more detail in the Appendix.

[22] In the *Fahmy* case (cited at Note 14 above), the convener of a meeting was criticised by the Employment Tribunal for expressing personal views in solidarity with one side of a passionate debate. While it concluded that his actions did not themselves cross the threshold for creating an intimidating etc environment constituting harassment under the Equality Act, the Tribunal stated that his taking sides provided "the basis, or opened the door, for the subsequent petition and the comments" which constituted the harassment in the *Fahmy* case.

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- **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.
- **Requirements re governance and appointing a free speech officer**.
- **The Equality Act after the *Forstater* case: protected viewpoints**.
- **Liability of employers for harassment by their staff of people with protected beliefs under the Equality Act: after the *Fahmy* case.**
- **Know your free speech rights.**
- **Introductory EDI courses: 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; defining harassment

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 under HERA to take all reasonably practical steps to secure free speech within the law is overriding, subject to its inherent qualifications. The need to take actions so as to qualify for the Section 109(4) Defence will also carry very significant weight.

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, requirements and policies

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 likely 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

People's actions and statements are often (indeed indiscriminately) claimed to be "harassment". But harassment is very specifically defined under the Equality Act, and has been subject to extensive case law, so identifying the correct interpretation of "harassment", and applying it appropriately to particular circumstances, requires care.

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. In relation to this:

- It must be remembered that *"discrimination"* and *"harassment"* (as defined in the Equality Act) are not themselves unlawful: this only arises in the various circumstances (such as employment and the provision of services) specified later in the Equality Act.
- 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.[23]
- 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".[24]

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[23] *Pemberton v. lnwood* [2018] EWCA Civ 564; [2018] l.C.R. 1291.

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

- SUs have no duty in respect of the behaviour of students or their staff acting in their own capacities (as opposed to when they also have some role with the SU, such as employee, in the context of which the relevant event occurred).

Fahmy case

The *Fahmy* judgment[25] illustrates the kinds of statements likely to be viewed by a tribunal as constituting harassment in the workplace of those with protected viewpoints.

The following were stated as (together) constituting harassment: describing gender-critical views as "bigotry", a "cancer that needs to be removed", "should not be tolerated" and "discriminatory, transphobic", and likening them to racism and sexism; and calling the LBG Alliance (which promotes gender-critical viewpoints and which Ms Fahmy was defending) a "cultural parasite and a glorified hate group that has [….] supporters that also happen to be neo-nazis, homophobes and Islamophobes". It is not clear how many of these statements it would have taken in order for the threshold to have been crossed.

It is also worth noting that comments at an online meeting were quite strongly expressed, but these were held not to constitute harassment. They included the convenor of the meeting stating that the LBG Alliance was, in his personal opinion, "a divisive organisation that has a history of anti trans-exclusionary [sic] activity", and another saying that it was "extremely disappointing to see people trying to defend [the LBG Alliance] here of all places." This is a reminder that comments and statements, even strongly expressed ones, which a recipient may find offensive, do not necessarily constitute harassment. The bar is not low.

Meade case

In the *Meade*[26] case, a social worker's employer and regulator were found, following a complaint, to have 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; sanctioned her for misconduct then failed to set aside the relevant staff's decision when presented with the evidence in support of her application for a review; failed to train its relevant staff to respect protected beliefs; and failed, when requested to do so, to remove the flawed case report from its website.

- Her employer subjected her to a disciplinary process; suspended her on charges of gross misconduct; refused to lift the suspension despite her requests for this; issued an investigation report which was hostile in tone and content; issued a final written warning. Importantly, the Tribunal ruled that, when withdrawing the final warning, its implied

[25] See Note 14 above.

[26] See Note 11 above. See a detailed BFSP statement about the *Meade* case and its implications here.

continuing disapproval of her conduct and continued restraint on her freedom of expression itself constituted harassment.

The Tribunal stated that the regulator's "failure to check if [the complainant who initiated that process] 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 key lesson to be drawn from the Meade case is that an employer's and regulator's complaints and disciplinary functions should not be allowed to become instruments of free speech suppression, contrary to the Equality Act. The following detailed implications arise.

- Complaints and allegations should be assessed to confirm whether they are genuine, or whether they are false, malicious or vexatious. If they are the latter, they must be excluded.

- An employer or regulator 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.

- An employer or regulator 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.

- It must maintain sufficient **institutional neutrality** on contested issues so as to ensure it satisfies its duties under the Equality Act, and ensure that its employees do likewise (to avoid an attributable failure pursuant to Section 109(1)).

<u>*Further indications*</u>

In this context, 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"*.[27]

The Equalities and Human Rights Commission has stated in its publication *Freedom of Expression: a Guide for [HEPs] and [SUs] in England and Wales* (the "**EHRC Guide**"):

"Everyone has the right to express […] opinions, including those that may 'offend shock or disturb others'."

(Re the Human Rights Act 1998) *"The courts generally say that the right to free expression should not be restricted just because other people may find it offensive or insulting." "Speech that is intended*

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

to inform rather than offend attracts greater protection, even if it could be seen as discriminatory. An intolerant point of view, which offends some people, is likely to be protected if it is expressed in a political speech or a public debate where different points of views are being exchanged and are open to challenge. However, speech may lose the protection of Article 10 if it is used to abuse the rights of others, for example by inciting hatred."

"Whether or not behaviour is harassment is not just based on the view of the person making the complaint. The courts consider whether it is reasonable for the behaviour to have that effect, as well as the circumstances. They have to balance competing rights, including the right to freedom of expression of the person responsible.

The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.

Views expressed in teaching, debate or discussion on matters of public interest, including political or academic communication, are therefore unlikely to be seen as harassment, even if they are deeply offensive to some of the people who are listening, as Article 10 will protect them."

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 contexts in specified categories of situation, such as employment and education. It applies to actions of HEPs, and their employee in the course of their employment and agents when performing functions for the HEP, but not to those of their students, or staff in other circumstances. These misapprehensions – and resultant misrepresentations –often result in inappropriate restrictions on Participants' behaviour.

While SUs can make such rules as they see fit (while complying with their legal obligations), they must not assert that such rules reflect a requirement of the Equality Act where they do not do so. This is misleading, and quickly leads to free speech protection failures.