



## Free speech complaints:

### Requirements and risks for English HEPs

**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.

**IMPORTANT – THIS STATEMENT IS OUT OF DATE:** it was written before draft OfS guidance was produced, so needs to be significantly revised. THIS STATEMENT WILL BE REVISED after 1 August, and from time to time as the law, guidance and knowledge develop. SEE ALSO the important notice at page 6.

This statement provides information about the legal requirements in relation to the processes of English universities and other Higher Educational Providers (“HEPs”) for dealing with complaints relating to free speech issues, and discusses how to deal with urgent problems. It makes related recommendations.

Best Free Speech Practice (“BFSP”) is a non-partisan campaign to clarify and publicly share what the legal requirements and their implications in practice actually are at UK HEPs.

### Relevant law and structural consequences

BFSP has summarised the relevant legal and regulatory requirements and their implications in its Statement **Free speech protection at English universities: the requirements post HE(FOS)A** (the “Principal Statement”), which can be found at <https://bfsp.uk/universities-and-free-speech>. Terms defined in the Principal Statement have the same meaning in this Statement.

Under Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017<sup>1</sup> (“HERA”), registered HEPs 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,

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<sup>1</sup> With effect from 1 August 2024.

members and students (“**Participants**”) of and visiting speakers (“**Visiting Speakers**”) to the HEP or to its premises.

As is now well known, various viewpoints on currently contested issues had been ruled to be protected philosophical beliefs under the Equality Act 2010 (“**Equality Act**”). Employers and education providers need to avoid discrimination against and harassment of people with such viewpoints in certain specified contexts. Employers are liable for discrimination and harassment committed by their employees in the course of their employment, unless they can show that they took all reasonable steps to prevent this happening. Of particular relevance to the subject at hand are various Tribunal judgements in respect of the protection of protected viewpoints under the Equality Act, under which employers have been held liable for actions of their employees, including personal attacks and online pile-ons. Detailed statements on these cases can be found at <https://bfsp.uk/universities-and-free-speech>.

The law is clear, under both HERA and the Equality Act, that HEPs are responsible for taking all “reasonably practicable”/“reasonable” steps to prevent (in both cases) staff and (under HERA) students from acting in ways that attack or prejudice people for their lawful free speech, in the case of the Equality Act in ways that are attributable to the HEP so as to have caused it to have (for instance) created a hostile atmosphere that suppresses free speech.

Where there have been free speech failures, a complaint under HERA and an action under the Equality Act may both be brought against the HEP itself.

Where a free speech issue is current, if an HEP has the right rules, procedures and practices already in place, and then does its demonstrable best to stop the relevant actions when it becomes aware of them, it has the best possible chance of avoiding liability for the relevant events.

There are therefore two preliminary questions the answers to which interact to create four potential ways in which notifications of problems and/or complaints about free speech problems need to be dealt with. These questions are:

- Is the problem current, or in the past? Current problems often need to be stopped urgently, to prevent their continuation or exacerbation, ie they require preparation for and deployment of systems, structures and people to deal with a current problem. Addressing complaints about past problems involves going through a formal process, the careful assessment of issues and reaching an appropriate decision, all under the shadow of possible regulatory complaints and/or litigation.
- Does the problem arise under HERA or under the Equality Act? (In many cases it will arise under both; but a complaint or action might only be brought under one of them.) Under both strands of law, cases can end in litigation, so need to be approached with that in

mind. This will potentially lead to different processes for dealing with a complaint/problem.

## **Dealing with urgent free speech issues: HERA and the Equality Act**

Free speech problems frequently arise which need to be dealt with urgently if the HEP is to satisfy its legal obligations and avoid/minimise compliance failures. The most likely such situations are where a meeting is under threat because of unpopular viewpoints, or a person (staff or student or visiting speaker) is currently under attack for their viewpoints, including by a social media pile-on, complaints being made to the HEP about their views and demands for disciplinary action by the HEP.

Relevant requirements under HERA and under the Equality Act are likely to overlap substantially and will in many cases result in similar requirements in practice in order to comply with them and thus avoid or minimise liability for the HEP, so in many cases can (need to) be considered together.

These requirements will oblige an HEP to:

- have prepared appropriately: to have taken all reasonably practical steps to put itself in a position to deal with free speech problems as they arise, including having appropriate policies, practices and rules in place;
- have appropriate personnel in place with the necessary powers; and
- address problems appropriately as they arise. This will involve taking prompt and effective action, including enforcement of rules against bullying etc, and bringing disciplinary action where appropriate.

*These obligations result in detailed requirements in practice, which are set out in BFSP's Statement "Dealing with free speech crises effectively: Action to ensure compliance", which can be found at <https://bfsp.uk/universities-and-free-speech>.*

## **Dealing with complaints relating to past events: implications of HERA**

HEPs' complaints schemes ("HEP Schemes") need to do the following, it being noted that some complaints will be followed by an on-complaint to the OfS, which will review relevant events and also, logically, the quality of the HEP's review process and of its conclusion, and that a poorly structured or executed complaints process could itself result in embarrassment and other adverse consequences for the HEP.

- HEP Schemes need to be constructed so as to review and address free speech problems in accordance with the law and consequential requirements in practice. HEPs need to ensure

that any statements about the free speech protection requirements, including requirements for Participants, and any limitations or restrictions on what is considered to be legitimate free speech, correctly reflect the law and do not insert agendas or approaches which do not have the backing of legal requirements. To do so would inevitably lead to free speech embarrassments.

Relevant staff will need to be thoroughly trained about what the law actually requires.

- HEP Schemes need to comply with any relevant OfS expectations and requirements (no formal requirements have as yet been published) and be designed so as to fit with structure and detail of the OfS' own complaints scheme ("**OfS Scheme**"), which assumes that a complaint and review process will have been gone through with the HEP first.
  - For instance, the current draft of the OfS Scheme effectively requires HEPS to have completed their own processes (or, realistically, at least progressed them sufficiently that complainants are willing to wait for the outcome before complaining to the OfS) within 30 days, after which the OfS will entertain complaints to it after that date without waiting for the HEP to complete its processes. It is quite possible that this date will be extended, but whatever date is fixed will then effectively fix the parameters within which HEP's have to operate.
  - The OfS Scheme (and the underlying law) provide for the OfS to make recommendations, which can include taking (or refraining from taking) specified actions, including the payment of money. The OfS expects its recommendations to be complied with in full. If HEPs are to avoid onward complaints to the OfS occurring regularly, with all the accompanying adverse consequences, they will need to themselves be able to take (and actually take) actions of the sorts likely to be ordered by the OfS. This is initially going to involve some difficulty, until a body of published OfS decisions builds up to give guidance as to the sorts of recommendations made (and in particular the amounts of payments ordered).The HEP Scheme will need to provide sufficient powers and flexibility to enable decisions from its scheme to be adequate to satisfy justified complainants so they do not feel the need to complain onwards to the OfS.
- While free speech complaints will technically/legally be against HEPs themselves, in most cases they will be about the actions of individuals, and it will be how the HEP deal with those actions and any breaches of requirements they involve, that will give, or fail to give, a complainant satisfaction. If HEPs are to minimise the number of on-complaints to the OfS (or legal actions under the new statutory tort), they will need to work to give complainants fair satisfaction (which they perceive to be fair) to the extent that their complaints are justified. This may include, for instance, taking disciplinary action against Participants who have broken the HEP's rules.

- Because the obligations in HERA and the Equality Act fall on the HEP/its governing body, the HEP itself will be the subject of a free speech complaint or legal claim, with particular employees, students or others named as people who have caused the alleged failure. It would be wholly inappropriate for people who have a conflict of interests to be involved in reviewing or adjudicating the relevant complaint and related issues (“**Relevant Case**”), whether because of being:
  - a senior manager of the HEP who has functions which make it unlikely that they will be able to assess and adjudicate the Relevant Case impartially;
  - a person who was involved in the events or actions which formed or caused the issues complained of, or may have been involved indirectly as part of the background to or cause of the Relevant Case, for instance as someone who formulated or promoted, or was an enthusiastic supporter of, an HEP’s rule or policy which is the subject of the Relevant Case; or
  - a person who holds such strong views on relevant issues that their impartiality is at risk of being compromised,

(a person with such a conflict in respect of a Relevant Case being a “**Conflicted Person**”).

HEPs will need to have a structure which requires free speech complaints against them to be assessed and ruled on by people who are not Conflicted People.

The details of individual HEP Schemes will depend on the circumstances of those HEPs, and will need to be developed with specialist legal advice.

## **Dealing with complaints relating to past events: the Equality Act**

Formal free speech-related complaints processes do not really fit with Equality Act problems and structures, and any OfS guidance is most unlikely to be directly relevant to them. HEPs will need to have appropriate processes in place to deal with Equality Act problems and complaints regarding protected viewpoints. The details of those processes will depend on the circumstances of individual HEPs, and will need to be developed with specialist legal advice. They will, however, need to be sufficiently harmonised with HEPs’ formal HERA-related free speech schemes/processes as to be effective in both contexts.

In most cases, aggrieved parties will be likely to bring a formal free speech complaint before thinking of starting proceedings under the Equality Act, so HEPs will have no choice but to go through the complaints process even though they are aware that an Equality Act claim could be a possibility. But, if the outcome of that process gives sufficient satisfaction to the aggrieved party, this will make an Equality Act claim, with all its attendant risk, cost and unpleasantness, much less likely. Given that Equality Act cases against HEPs happen and, we

understand, there are many others in the pipeline, if the complaints process reduces the number of future Equality Act cases, that will be of value to the HEPs concerned.

## 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;*
- *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;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE:*** *see its publication date above.*