



Dealing with free speech crises effectively: Action needed to ensure compliance

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IMPORTANT – THIS STATEMENT IS OUT OF DATE: it was written before draft OfS guidance was produced, so needs to be significantly revised.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 9.

How universities and other Higher Educational Providers (“HEPs”) deal with free speech controversies (as in attacks on people, social media pile-ons, demands for disciplinings or for meetings not to be held or publicised and the like) will be a sometimes very public face of how well they are securing free speech in practice.

This statement provides information about the legal and regulatory requirements, and consequent action in practice, in relation to the preparation and action by English HEPs that need to be made and taken in order to deal effectively with these sorts of problems.

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 for the protection of free speech at UK HEPs.

Introduction – relevant law

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

English HEPs must comply with the following principal relevant obligations:

- their legal obligations under Section A1 of the **Higher Education and Research Act 2017**¹ (“**HERA**”), that 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, members and students (“**Participants**”) of and visiting speakers (“**Visiting Speakers**”) to the HEP or to its premises², and to secure academic freedom and protect meetings;
- the **Equality Act 2010** (“**Equality Act**”) (see further below), so far as it relates to viewpoints which count as “protected characteristics” for the purposes of that Act, and the **Human Rights Act 1997** (together with the above, the “**Relevant Law**”); and
- their own statements, codes, rules and requirements relating to the protection of free speech (“**HEP’s FS Requirements**”) (together with the above, “**Relevant Requirements**”).

Equality Act

As is now well known, various viewpoints on currently contested issues had been ruled to be protected philosophical beliefs under the Equality Act. These include “gender-critical” viewpoints and ones which contest aspects of “critical race theory”. 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 Employment 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 following is action which HEPs will need to take in preparation for and during a controversy or crisis involving free speech issues in order to comply with the Relevant Requirements.

Preparation

An HEP must take all reasonably practicable steps to minimise the risk of, and enable itself to deal promptly and effectively with, any free speech problems that arise, and to put itself in

¹ With effect from 1 August 2024.

² This is a demanding requirement and requires active, positive steps to be taken. The obligations are stated in objective terms, giving no material discretion to an HEP as to what steps it needs to take. It is limited only by reference to the speech being “*within the law*” and by what is “*reasonably practicable*”. Free speech obligations otherwise override other considerations.

the best position to reduce the likelihood of mistakes and resist appropriately the sorts of pressure that can cause such mistakes. This will involve the following.

- Have plans, procedures, processes, decision-making structures and appropriate personnel in place for when such issues do arise. This would include maintaining a list of people who may need to be contacted urgently and ensuring that all people who may have roles in this process are appropriate to and suitably empowered for their roles, and are prepared and have had appropriate training.
- Impose detailed requirements for behaviour by Participants with a view to securing and protecting free speech, but which do not themselves inhibit compliant free speech. This means having in place appropriate prohibitions on actions and activities whose aim or effect is to intimidate or adversely affect Participants in connection with their viewpoints and expressions of them. HEPs must have associated disciplinary procedures and sanctions sufficient to put both the letter and spirit of their obligations into effect. A BFSP statement titled *Requirements for staff and student behaviour: English HEPs' free speech compliance obligations* will be published within April 2024 at <https://bfsp.uk/universities-and-free-speech>.
- Provide and prepare for the enforcement of those prohibitions including, whenever appropriate, by disciplinary measures. Be ready to take prompt action to prevent continuation of any problems.
- Work to ensure that its Participants understand the HEP's FS Requirements through appropriate training.

See BFSP's statement titled *Meetings at English HEPs: Free speech requirements and risks* at <https://bfsp.uk/universities-and-free-speech>, for information on specific obligations regarding meetings and events.

Action when an HEP hears of a free speech problem

When problems arise, for instance where a Participant (the "**Target of Attack**") is under attack for their viewpoints ("**Relevant Attack**"), or threatened intimidation puts the holding of a meeting at risk, the Relevant Requirements will require an HEP to take such steps as are reasonably practicable to stop the hostile actions that constitute the Relevant Attack to the extent that those actions are, or are likely to be, contrary to the HEP's FS Requirements ("**Prohibited Actions**").

Special considerations and requirements apply in respect of meetings: these are explained in detail at BFSP's statement titled *Meetings at English HEPs: Free speech requirements and risks*, at <https://bfsp.uk/universities-and-free-speech>.

Dealing with problems successfully will involve HEPs doing some or all of the following.

Immediate action: preparation and assessment

- Move as quickly as possible, but not react precipitately: assess the issues and their implications dispassionately and carefully.
- Set protection wheels moving: Notify staff who need to know that a problem has arisen and to be ready to take prompt action if needed, and set wheels moving to do so.
- Rapidly but carefully obtain as much clear information about what has happened as possible, including the following.
 - Names and contact information for all relevant parties, including the Target of Attack and all Participants who are or may be taking Prohibited Actions.
 - What has happened? Create a clear written record of the relevant facts, for reference by relevant officers and as a basis for future action. Keep a record of all actions taken or not taken and decisions made and significant matters considered by the HEP or its relevant representatives.
 - Was the Relevant Attack or other event a one-off or part of something larger or continuing?
 - Is an online pile-on happening or likely?
 - Is there a risk or likelihood of the issue/problem escalating, and soon?
 - Whether the complaint appears to be hypersensitive (or malicious or vexatious).
- Assess legal position: Carefully and correctly assess, taking appropriate advice where necessary, what the position is under the Relevant Law, the HEP's FS Requirements and other requirements and rules, in respect of the relevant matter: i.e., have there been any Prohibited Actions?

Rapid prevention and enforcement action

- Issue rapid statements, including warnings: Subject to the below, an HEP must, as early as practicable:
 - Continuing events: unless the relevant events are clearly in the past, with no material risk of repetition:
 - contact all Participants who are or may be involved in the Relevant Attack;

- if the HEP is not confident that it can contact all Participants who have participated in the Relevant Attack or may participate in any continuations of it, issue a public statement to all Participants, or to such group of Participants as may be relevant, to inform/remind them of the Relevant Law and its HEP's FS Requirements and their obligations under them, and, in particular, of any disciplinary matters which may have arisen or be at risk of arising, and require them to stop taking any actions which are contrary to the Relevant Requirements.

If the Relevant Attack includes widespread or concerted action, such as an online pile-on, or there are indications that action might shortly happen, the HEP should send an immediate email or other message to all relevant categories of Participants, warning of the HEP's FS Requirements and that an online pile-on or other widespread or concerted action would be likely to breach those requirements and must not happen. If it does and they participate, this will be regarded as a serious disciplinary matter.

- Past events: In respect of relevant events which are clearly in the past, with no material risk of repetition, an HEP must state, either:
 - privately to the Participants involved if this was a one-on-one or very limited matter and keeping this private is the desire of the Target of Attack; or
 - publicly in other circumstances,

that (if this appears to be the case) breaches of the HEP's FS Requirements appear to have occurred in respect of the relevant matter and could well result in disciplinary proceedings, especially if relevant breaches continue.

- In all cases, state, using the relevant means of communication specified above, that that the HEP is not entitled to, and does not seek to:
 - prevent or restrict the statements or comments of Participants in exercise of their freedom to speak within the law or the holding of meetings or events at which certain viewpoints may be expressed or explored; and/or
 - restrain, apologise in respect of or impose any form of disciplinary sanction or other negative consequence in respect of any such statements or comments.

To the extent that the statements or viewpoints of the Target of Attack are themselves unlawful, for instance because they breach or cause a breach under any Relevant Law, or are contrary to HEP's FS Requirements which are in place pursuant to legal obligations on the HEP, an HEP is not required under HERA or the Equality Act to protect them or stop attacks against them. However, protections such as an HEP's general anti-bullying rules would still be likely to apply, and it must be appropriate to enforce them: an HEP turning a blind eye to bullying against someone who (say) may

have had 30 years of unblemished discourse within an HEP then made a terribly-judged social media post will look very bad and could lead to disaster such as criminal activity or a mental health collapse on its watch and/or liability for the HEP. It appears in these circumstances to be reasonably practicable to enforce those anti-bullying protections if they are themselves compliant with HERA.

- Investigate the matter carefully and, where any Participants have committed or participated in or encouraged any breaches of the Relevant Requirements, commence disciplinary proceedings against those Participants as appropriate in the context.

General requirements

- HEPs must not succumb to pressure from Participants or others:
 - 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
 - not to take steps to enforce its HEP's FS Requirements in such ways as would be appropriate.

Doing (or not doing) so would very likely give rise to a breach by the HEP of the Relevant Requirements³. This pressure would itself be a breach by the relevant Participants of the HEP's FS Requirements (if they have been appropriately drafted). The HEP should tell Participants who attempt to exert such pressure that they have (or may have) done Prohibited Actions and may be subject to disciplinary action.

- Complaints against Target of Attack: To the extent that there are:
 - complaints or allegations against the Target of Attack, for instance that they should not be allowed to hold or express the opinions which are the subject of the controversy or have breached or may breach an HEP's FS Requirement by holding or expressing those opinions, or
 - demands that the HEP investigate or discipline that person,

the HEP will be in a delicate position. The following applies.

³ Department for Education publication *Higher education: free speech and academic freedom*, 2021, Annex B, states that good practice requires that, "where staff or students express controversial, but lawful, views or opinions, the HEP is clear in public statements and in response to any internal petitions or pressure for action against the individuals concerned that they support their right to free speech, even if they disagree with the views expressed".

- It will do well as a preliminary step to require that any complaint/allegation/demand (together, “**Relevant Complaint**”) must be in writing in accordance with its complaints processes before it will act on it, and must be made by identifiable complainants and give details of the relevant facts and how they justify the Relevant Complaint, with reference to relevant laws or rules or requirements of the HEP.
- While it will be the HEP’s duty to deal appropriately with and give fair consideration to a formal complaint when received, it will need to be alert to the possibility that the Relevant Complaint is inappropriate, and indeed contrary to the HEP’s FS Requirements, given that it relates to a person whose viewpoints the complainants object to.
- If the facts in a Relevant Complaint are themselves strongly disputed, or if there is reason to suspect that the Relevant Complaint may involve material untrue statements, an HEP must make it clear to the makers of the Relevant Complaint that if, as is being maintained by the Target of Attack or there is other reason to suspect, the Relevant Complaint turns out to be based on untruths or unsupported asserts, the makers would be very likely to be in breach of the HEP’s FS Requirements and possibly criminal and other laws, with potentially serious consequences, while also making clear that it will take the Relevant Complaint seriously and that this is not meant to put off those making complaints which are based on accurately stated facts and relevant rules.
- The HEP will need to be dispassionate and even-handed throughout the process, and investigate promptly and carefully the relevant facts and the accuracy of the assertions in the Relevant Complaint; and form a correct decision on the implications as soon as possible.
- If it becomes apparent that the Relevant Complaint is not founded in fact or otherwise not justified, the HEP needs to:
 - o dismiss the Relevant Complaint promptly, and make that conclusion public immediately thereafter;
 - o investigate how this happened, and, for instance, whether this was done deliberately or as a result of an honest mistake, keeping in mind that various laws and HEP’s FS Requirements may have been contravened; and
 - o seriously consider whether disciplinary action against the complainants is appropriate.
- If it turns out that the Relevant Complaint is well-founded, then the HEP must take such action as is appropriate in the circumstances (for instance, if the Target of Attack

has themselves acted contrary to the HEP's FS Requirements), it should take appropriate action, including considering disciplinary action.

- Special considerations apply in respect of disproportionate, vexatious or malicious Relevant Complaints, and an HEP will need to adopt the following approach.
 - If a Relevant Complaint turns out to be vexatious or malicious, it is almost certainly a breach of the HEP's FS Requirements. A Relevant Complaint about a statement or viewpoint which appears to be based on untruths should be presumed to be vexatious or malicious unless the complainant can establish it was made in genuine error (having made reasonable efforts to establish the facts) or that there were special circumstances which indicate that it was reasonably made in the circumstances. I.e, there is a duty on complainants to be truthful and not reckless as to the truth.
 - A Relevant Complaint will always have negative consequences for the Target of Attack, ranging from mere annoyance and wasted time to distress and the threat of career ruin. Any Relevant Complaint therefore needs to be expressed in moderate terms, with any consequences called for proportionate to the matters the subject of the Relevant Complaint. Whether a Relevant Complaint is to be regarded as disproportionate is to be viewed through the eyes of a reasonable person. Subjective and hypersensitive reactions to lawful statements or viewpoints cannot justify a making a Relevant Complaint.
 - Serious disciplinary action needs to be taken in respect of a Relevant Complaint which turns out to be vexatious or malicious, or to have called for consequences which were materially disproportionate to the matter complained of.
- Take disciplinary action against Participants who have breached the HEP's FS Requirements, where and to the extent appropriate.
- Take such other action as it likely to help remedy the situation.
- If the Relevant Attack involves criminality (for instance, see the discussion of the criminal harassment in the Principal Statement) or likely criminality, an HEP needs to consider seriously (with advice) whether it needs to involve the police.

Publicity about free speech breaches and what the HEP did about them

In order to provide Participants with the best available information about what is and is not allowed, and real-life examples of how problems can arise and what to do to avoid breaches of the HEP's FS Requirements, HEPs should publicise information about actions or events which have breached or resulted in breaches of the Relevant Requirements, including details of the actions or events, the ways they contravened the HEP's FS Requirements and the action taken by the HEP, including any disciplinary action. The HEP should anonymise the relevant details if required or it otherwise considers appropriate.

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.*