



## Meetings at English HEPs

### Free speech requirements and risks

**IMPORTANT – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. IT MAY BE OUT OF DATE: see its publication date and the important notice at page 15.**

This statement provides information about the legal and regulatory requirements for securing free speech in the context of the use of premises for meetings at English universities and other registered Higher Educational Providers (“HEPs”).

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 English HEPs.

#### Relevant law

BFSP has provided detailed information about the relevant legal and regulatory requirements and their implications in its Statement **Free speech protection at English universities: the law and requirements in practice** (the “Principal Statement”), which can be found at <https://bfsp.uk/universities-and-free-speech>.

#### *Section 43 and related guidance*

Under **Section 43** (“Section 43”) of the Education (No.2) Act 1986 (the “**Education Act**”) English and Welsh HEPs<sup>1</sup> have an overarching statutory duty to take all steps as are reasonably practicable to secure freedom of speech within the law members, students and employees (“**Participants**”) and for visiting speakers<sup>2</sup>.

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<sup>1</sup> Under Section 43(1). All the obligations under Section 43 strictly speaking fall on “*Every individual and body of persons concerned with the government and management of any establishment*” (See: Sub-section 43(1)). For convenience, however, we refer to them in this Statement as obligations of the HEP.

<sup>2</sup> The duty extends to those who will in future be invited to visit and speak, rather than just those who have in fact already been invited. *R. (on the application of Butt) v Secretary of State for the Home Department* [2019] EWCA Civ 256 [2019] 1 W.L.R. 3873 at [171]–[172].

This primary duty is demanding and involves the taking of positive steps rather than merely paying lip service. It is stated in objective terms, giving limited discretion to an HEP as to what steps it needs to take so long as: the relevant speech is lawful and the relevant step is one which is, as a matter of fact, a reasonably practicable one for the HEP to take.

Of particular relevance to meetings or events on premises of the HEP and its associated students' unions ("SUs")<sup>3</sup>:

- Sub-section 43(2) makes clear that the primary duty):
  - “...includes (in particular) the duty to ensure, so far as reasonably practicable, that the use of any premises of the [HEP and its associated SU] is not denied to any individual or body of persons on any ground connected with-
  - (a) The beliefs or views of that individual or any member of that body; or
  - (b) The policy or objectives of that body.”
- Sub-section 43(3) goes on to require that an HEP must have a free speech code (“FS Code”):
  - “with a view to facilitating the discharge of the [primary free speech] duty [...] issue and keep up to date a code of practice setting out-
  - (a) the procedures to be followed by members, students and employees of [the HEP] in connection with the organisation-
  - (i) of meetings which are to be held on premises of the [HEP or SU] and which fall within any class of meeting specified in the code; and
  - (ii) of other activities which are to take place on those premises and which fall within any class of activity so specified; and
  - (b) the conduct required of such persons in connection with any such meeting or activity;and dealing with such other matters as the governing body consider appropriate.”
- Sub-section 43(4) requires that the FS Code required under Sub-section (3) has teeth by additionally requiring that HEPs:
  - “...shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the code of practice for that establishment, issued under subsection (3) above, are complied with.”

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<sup>3</sup> In connection with obligations relating to the use of premises, it is important to note that premises occupied by associated SUs at HEPs will be deemed to be premises of the HEP itself for the purposes of Section 43 even though they may be completely separate: see Sub-section 43(8).

The amendments to the Higher Education and Research Act 2017 (“HERA”) introduced by the Higher Education (Freedom of Speech) Act 2023 (“HEFSA”) included enhancements of the free speech duties under Section 43 (including in relation to the use of premises for meetings and the FS Codes required under Sub-section 43(3) were due to come into force on 1 August 2024. Following the General Election, however, the new government revoked the commencement provisions pending a review of HEFSA (including its potential repeal)<sup>4</sup>. By then, though, pursuant to provisions of HEFSA already in force, the Office for Students (“OfS”) had already issued draft guidance (“Draft OfS Guidance”)<sup>5</sup> including in relation to the use of HEP premises for meetings and events.<sup>6</sup> We consider that the Draft OfS Guidance generally correctly reflects the relevant legal requirements under HEFSA.

Many of the core duties in HEFSA are substantially identical or very similar to the core duties in Section 43, so it appears that the Draft OfS Guidance continues (to that extent) to be an accurate reflection of the requirements in practice under Section 43 as well as being likely still to reflect the OfS’s expectations for HEP compliance. Compliance with the relevant provisions of the Draft OfS Guidance is therefore both prudent and best practice. Those relevant sections of the Draft OfS Guidance are reflected in this Statement. Some HEPs (e.g. Cambridge University) have already said that they intend to go ahead with revisions to their own FS Codes made in response to HEFSA despite its suspension.

The OfS has, in respect of the existing requirement for FS Codes, stated<sup>7</sup> that: *“in our view, it would not be sufficient for [an HEP’s] free speech code only to deal with the organisation of meetings [...]. In our view, a free speech code should go a lot further than that. We consider that such a code should provide a broader framework for ensuring free speech at the [HEP]. This means that we would expect [an HEP’s] free speech code to include broader statements about free speech and academic freedom, and to extend to activities such as teaching and curriculum content”*. This is relevant to the obligation in Section 43(1) that FS Codes deal with “such other matters [HEPs] consider appropriate”).

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<sup>4</sup> The legality of the suspension is the subject of Judicial Review proceedings instigated by the Free Speech Union. Even if those proceedings are unsuccessful, however, what is said here about the probable relevance of Draft OfS Guidance will be unaffected.

<sup>5</sup> I.e. “Regulatory advice 24: Guidance related to freedom of speech”.

<sup>6</sup> See: Draft OfS Guidance, paragraphs 106 to 110 under “Speaker events”.

<sup>7</sup> See: OfS’ 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>. The OfS December 2022 Publication reflected the OfS’ robust approach to even existing free speech obligations in light both of Section 43 itself and HEP’s related statutory duties under the **Equality Act 2010** and the **Human Rights Act 1998** (as to which, see further below) and referred to HEFSA only in passing at the end.

We also refer to a valuable study and report on university codes of practice issued by the Higher Education Policy Institute at Oxford University in 2018. This report made recommendations on how to optimise FS Codes which we include in the **Appendix** to this Statement. We believe that these should also be adopted by HEPs as a matter of best practice.

Finally, we draw attention to a guide issued by the Equality and Human Rights Commission (“**EHRC**”)<sup>8</sup> which contains various statements about the extent of HEPs’ obligations<sup>9</sup> about the use of premises for meetings as well as other useful guidance on making decisions in relation to meetings and risk mitigations.<sup>10</sup>

### *Equality Act*

As is now very clearly established in case law, various viewpoints on currently contested issues are protected philosophical beliefs (“**Protected Viewpoints**”) under the **Equality Act 2010** (“**Equality Act**”). These include so-called “gender-critical” viewpoints and Protected Viewpoints which contest aspects of so-called “critical race theory”. Employers and education providers must avoid discrimination against and harassment of people with Protected Viewpoints in certain contexts relevant to the use of HEPs’ premises for meetings.

Employers are liable for discrimination and harassment committed by their employees in the course of their employment, unless they can establish the defence provided under Sub-section 109(4) by proving that they took all reasonable steps to prevent this happening (“**the Section 109 Defence**”). In general, HEPs are not, though, responsible under the Equality Act for the behaviour of their students. See the Principal Statement for more detail about this subject.

Of particular relevance to meetings are the recent *Fahmy, Meade* and *Phoenix/Open University* cases. More details about these cases can be found in **Appendix 2** to the Principal Statement. They concerned the protection of Protected Viewpoints under the Equality Act and employers’ liability for the unlawful actions of their employees, including severe or co-ordinated personal attacks at meetings, and online pile-ons. Given that misuse of an employer’s disciplinary process has been held to be discrimination and harassment, it seems highly likely that a misuse of meeting approval processes by employees so as to disadvantage people because they hold particular viewpoints would also amount to harassment, depending on the detailed circumstances.

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<sup>8</sup> I.e. EHRC’s Guide Freedom of Expression for HEPs and SUs in England and Wales (“**EHRC Guide**”): <https://www.equalityhumanrights.com/sites/default/files/freedom-of-expression-guide-for-higher-education-providers-and-students-unions-england-and-wales.pdf>. The EHRC Guide was issued prior to the developments under the Equality Act over recent years, so should be regarded as out of date and likely to be revised in the future.

<sup>9</sup> See: Sections 2 to 4.

<sup>10</sup> See: Sections 6 and 7.

The Equality Act (which is frequently resorted to in the context of employment disputes) is, generally, more likely to be relevant to management and staff meetings/gatherings rather than to exclusively student meetings or external speaker meetings, as regards the organisation and conduct of and behaviour at meetings.

### *Human Rights Act*

Given that most (if not all) HEPs are “*public authorities*”, the fact that the freedom of thought and expression of Participants and visiting speakers are specifically protected under the **European Convention on Human Rights** (the “**Convention**”)<sup>11</sup>, as enacted in the UK by the Human Rights Act 1998 (“**HRA**”), is an obviously relevant consideration in relation to the use of HEPs’ premises for meetings. Again, further detail about the relevance of the HRA in the university context is to be found in the Principal Statement.

While the Convention rights are primarily worded as negative obligations, i.e. not to interfere with freedom of thought or expression unless that is justified, HEPs are also under positive obligations to “create a favourable environment for participation in public debates for all concerned, allowing them to express their opinions and ideas without fear, even if these opinions and ideas are contrary to those defended by the official authorities or by a large part of public opinion, or even if those opinions and ideas are irritating or offensive to the public”.<sup>12</sup> The nature and extent of these positive obligations are, however, unclear. They must include making it clear that Participants are expected not to take actions which materially interfere with other Participants’ free speech rights, training them appropriately and ensuring that its own policies and requirements are not such as restrict Participants’ free speech rights (this is discussed in detail elsewhere). A reasonable interpretation of this obligation would include imposing appropriate and proportionate rules on Participants restricting disruption of meetings and attacks on and other hostile actions against other Participants for their viewpoints, and appropriate enforcement of those rules, and we consider that HEPs would be unwise not to act on this basis.

### **Legal requirements and best practice for ensuring that meetings happen and are not disrupted**

The legal obligations and guidance referred to above give rise to extensive requirements in practice. Some of these are considered below.

#### *Preliminary points: requirements apply in respect of “internal” as well as “external” meetings; and to meetings at SU premises*

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<sup>11</sup> Under **Article 9** (Freedom of thought, conscience and religion) and **Article 10** (Freedom of expression).

<sup>12</sup> *Dink V Turkey*, judgement of 14 September 2010 in French only, at 137.

The requirements of Section 43 (and possibly the other statutes referred to above) appear to apply equally to “internal” or routine meetings (lectures, seminar, tutorials and the like, and also staff meetings) as well as external or formal ones (for instance publicly accessible lectures or debates involving external speakers), and this appears to be the OfS’ expectation<sup>13</sup>.

More “formal” events are more likely to give rise to free speech compliance risks than routine lectures or seminars. However, HEPs’ FS Codes should make clear that their core requirements apply to all meetings.

For obvious reasons, the great majority of internal or regular meetings are unlikely to involve any free speech problems, and it is clearly not practicable for a lengthy notification and review process to be gone through in respect of every such meeting. Nonetheless, HEPs do have duties to protect free speech rights in respect of such meetings, and FS Codes must provide for risks to be identified and dealt with.

As regards employee interactions, internal meetings (including staff meetings) could give rise to free speech compliance risks: in particular risks arising from unlawful harassment or discrimination as illustrated by the facts of the *Fahmy* and *Phoenix* cases (as to which see further in Appendix 2 of the Main Statement).

As discussed above, premises occupied by the associated SUs of an HEP will be deemed to be premises of the HEP itself for the purposes of its duties in respect of meetings, even though the premises may be completely separate<sup>14</sup>. This will cause HEPs acute problems in practice. This is discussed in detail below.

### ***Policies, rules, enforcement***

Section 43(3)(b) specifically requires that FS Codes set out the conduct required of Participants in connection with relevant meetings and other activities and Section 43(4) requires HEPs to secure compliance with their FS Code, including where appropriate the initiation of disciplinary measures. The creation of appropriate rules and enforcement of procedures and conduct requirements contained in or referred to in FS Codes should also maximise the prospect of HEPs being able to rely on the Section 109 Defence where things do go wrong. It appears that the law, regulatory requirements and/or best practice require HEPs to do the following.

- Create appropriate and effective policies, procedures and rules:
  - about meetings, events and the use of premises, which need to be clear and user-friendly, avoid unnecessary bureaucracy and not become barriers to holding meetings but, rather, facilitate successful and peaceful ones; and

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<sup>13</sup> See Draft OfS Guidance paragraph 79.

<sup>14</sup> See Sub-section 43(8).

- prohibiting actions intended to prevent or inhibit the holding of lawful meetings. An example of such a rule would be the following.

“No [Participant] may, without reasonable excuse, take any action intended to:

- o prevent or hinder a meeting, event or other activity (including those involving visiting speakers) (a “**Meeting**”) from happening at the premises of HEP (or [ its SU]), or elsewhere in circumstances where the Meeting will be attended, in part at least, by Participants; or
- o render the Meeting or activity impossible or impracticable to hold or more difficult or expensive to organise or publicise than that Meeting would otherwise be,

because of the intended subject-matter of the Meeting or the statements made or beliefs or opinions held or expressed of any person or body organising or intended to participate in that Meeting.”<sup>15</sup>

The Draft OfS Guidance<sup>16</sup> states that content of these requirements should be consistent with the following principles:

- Everyone has the right to free speech within the law;
  - 
  - HEPs should seek to expose their members and students to the widest possible range of views;
  - If a speaker breaks the law, it is the speaker who is culpable; and
  - Protest is itself a legitimate expression of freedom of speech. However, protest must not shut down debate.
- Enforce such rules appropriately and consistently. HEPs must to secure compliance with their FS Code, including where appropriate the initiation of disciplinary measures. They need to be ready to act quickly and effectively if a problem develops.

### *Review and approval of meetings*

FS Codes must set out the procedures to be followed by Participants in connection with the organisation of meetings and events. The Draft OfS Guidance<sup>17</sup> states that:

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<sup>15</sup> Prohibited actions would likely include: knowingly making misrepresentations or exaggerated claims of the likely negative consequences of holding the Meeting, for instance making claims of likely violent protest which are not supported by real and credible evidence; acting on such misrepresentations or exaggerated claims in the knowledge that they are misrepresentations or exaggerated; and threatening violent protest or other adverse consequences in connection with the holding or the Meeting.

<sup>16</sup> Draft OfS Guidance paragraphs 84 and 86.

<sup>17</sup> Draft OfS Guidance, paragraphs 79, 82, 83 and 108 and Example 25.

- the scope of the procedures section should be broad;
- an HEP should have in place a process for the timely consideration of controversial events. The purpose of the process would be to put in place any necessary mitigating steps that permit the event to go ahead; a person should be identified as responsible for this process; and
- the procedures for organising room bookings and speaker events should adhere to the following principles, which are widely recognised:
  - they should make clear that the starting point for any event is that it should go ahead and that cancellation is exceptional and undesirable;
  - the procedures should be clearly set out;
  - the process should not take longer than necessary;
  - there should be a single, identified point of contact for questions about the process;
  - there should be an identified person responsible for deciding whether and how an event may proceed; and
  - there should not be onerous requirements for information.

More widely, the Draft OfS Guidance states that the content of the procedures section should clearly and expressly require decision-makers, in making any decision or adopting any policy that could directly or indirectly (and positively or negatively) affect freedom of speech, to act compatibly with the statutory free speech duties<sup>18</sup>.

HEPs need to ensure that all Participants who are involved in any approval process understand the requirements and their responsibilities.

### Internal meetings

Although it would not be appropriate (and would likely be impractical in any event) for “internal” meetings to be the subject of automatic formal review and approval processes of the sort which will apply to one-off lectures or debates, FS Codes should specifically address internal meetings and should have tailored processes for consideration of risks and dealing with potentially difficult meetings and events. BFSP recommends that FS Codes should require that people organising internal meetings give thought to whether the meeting could involve discussion of contested subjects and may give rise to disruption and/or free speech problems for that or other reasons, and should inform the relevant staff responsible for the review and approval of meetings. A review process would then be necessary: for instance, it

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<sup>18</sup> Draft OfS Guidance paragraph 80.



might be necessary to consider whether security arrangements need to be made in case a problem develops.

HEPs will need to be ready to deal with potentially contentious internal meetings and issues arising and have the right policies, procedures and rules in place, and ensure their students and staff understand what they are prohibited from doing during internal meetings. Relevant staff and managers should be ready and able to intervene effectively if something goes wrong.

### *Review and approval of particular meetings and events, planning for problems*

As is stated by the EHRC<sup>19</sup>, and as is implicit in both Section 43 and the Draft OfS Guidance, HEPs' starting point should be that the meeting, event or activity should be allowed to proceed, without any unreasonable restrictions or mitigations.<sup>20</sup>

HEPs are expected not to interfere with free speech or academic freedom any more than is necessary to ensure that the event goes ahead safely and within the law<sup>21</sup>. If an HEP decides to impose restrictions or mitigations on a meeting or event, it must:

- ensure that they are not more onerous than the minimum level which is necessary to ensure that the relevant safety or other concern is addressed; and
- strive to be even-handed and impartial in relation to controversial issues in relation to which Participants hold starkly differing but lawful views. Where an HEP decides to impose restrictions or mitigations at a meeting or event where a speaker is taking a particular position on an issue, but not to impose similar requirements at an event where a speaker is taking a different position on the same issue, it should document and be able to justify its reasons for doing so.

The need to be impartial in relation to the use of HEP or SU premises for meetings and events is an aspect of the wider requirement of institutional neutrality which underpins the foundational commitment to free speech and academic freedom which HEPs have repeatedly, and rightly, restated, and is essential for avoiding compliance failures; 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, and creating or tolerating environments in which attacking people for their viewpoints is acceptable.

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<sup>19</sup> See: EHRC Guide, Section 6.

<sup>20</sup> An example of an unreasonable restriction might be a requirement that the contents of a speech be provided in advance (see, in this regard, paragraph 41 of the *Report of the Joint Committee on Human Rights Inquiry into Freedom of Speech in Universities* of 27 March 2018). Even more unreasonable would be any requirement that a speech be revised so as not to address certain issues or to exclude certain passages. An example of an unreasonable mitigation might be the requirement for (or for the organisers to pay for) excessive security arrangements (see more below).

<sup>21</sup> See Draft OfS Guidance, paragraph 110 and Example 27.

It might well be appropriate (and not unreasonably restrictive) for the broad content of a speaking event which is open to Participants generally to be clearly advertised in advance so as to enable people who may be offended by views expressed to decide whether to attend or not. Any such requirement should simply require a neutral explanation of the broad content and/or subject of the advertised meeting or event and not be such as to prevent or hinder the holding of the meeting or event or the free expression of views, or create hurdles or inconvenience for the organisers, or require that the meeting or event be presented in any particular way (including negatively).

### *Dealing with challenges and problems; mitigations*

Peaceful protest is itself a protected form of expression. It should not, however, be allowed to shut down debate or unreasonably infringe the rights of others both to attend and to hear what is said, or to intimidate or harass people with excessive abuse, threats and the like, thus deterring people from attending or expressing their views<sup>22</sup>. HEPs need to be ready to monitor and police protests and ensure that this requirement is given effect. Physical barriers to entry and unreasonable creation of noise and disturbance intended to shut down meeting or event or drown out lawful speech should be prohibited and prevented.

On some well publicised recent occasions,<sup>23</sup> HEPs have permitted (or, at the least, not prevented) protesters seeking to intimidate or prevent Participants or members of the public from attending meetings or events at HEP (or SU) premises and/or activities (e.g. banging of drums or banging on doors or windows of premises) intended to drown out speakers and prevent them from being heard. On other occasions, protestors have been allowed to gain access to and to attempt to disrupt lawful meetings and have not been swiftly removed and/or disciplined. FS Codes and related procedures should make clear that this sort of unlawful and disruptive behaviour is not permitted, will be tolerated and that Participants who engage in it will be liable to face disciplinary measures of the sort envisaged under Sub-section 43(4).

As HEPs must take all reasonably practicable steps to enforce their FS Codes, they should deal with any issues raised or challenges made in respect of the holding of or content or speakers at meetings or events promptly and effectively. Any issues raised as objections to the holding of a meeting should be dismissed if they do not raise reasonable concerns about a potential breach of the law or of the HEP's policies or rules. Where objections are not summarily dismissed, they should be investigated promptly, carefully and objectively, so as to confirm the truth or otherwise of claims or allegations made in respect of the upcoming meeting or event.

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<sup>22</sup> See Draft OfS Guidance, paragraph 109.

<sup>23</sup> For example: the multiple attempts to show a controversial documentary at Edinburgh University which were repeatedly and unlawfully disrupted by protestors including staff and students; the disruption of a meetings involving Helen Joyce at Gonville & Caius College in Cambridge and Dr Kathleen Stock at the Oxford Union.

If challenges are made or problems created in respect of a planned meeting and the relevant HEP suspects that this is deliberately done in order to prevent or hinder the meeting, the HEP should point out to relevant Participants that they may be in breach of the HEP's FS Code, related requirements and the meetings procedures and will be subject to disciplinary processes if this turns out to be the case.

HEPs should have contingency plans and decision-making structures in place (e.g. in relation to access to sources of additional security), so issues can be responded to promptly and effectively and risks of cancellation of meetings or events reduced. This would likely include having forms of documents ready for rapid use, such as warning letters to people who are threatening to disrupt a meeting.<sup>24</sup>

However attractive a compromise option it might appear in the face of controversy, the postponement of a meeting can be very onerous for its organisers. Such postponements can often mean cancellation in effect (e.g. where the speaker is busy or the meeting was due at the end of a term). This option should, therefore, only be considered as a last resort and only when it can be shown to be the only reasonable course to take.

So long as an HEP takes reasonably practicable steps to make alternative premises available, it might consistent with its obligations that it regulates such use so as to avoid groups with competing views on controversial issues coming into conflict e.g. where a group with views contrary to those of another seeks to book premises close to premises used or occupied by that other group.<sup>25</sup>

HEPs should only impose chairs of meetings where strictly necessary in order to ensure orderly conduct and not so as to effectively restrict the rights of participants at the meeting or event to speak their minds.

Particular risks of non-compliance with statutory obligations relating to free speech arise where meetings or events are (expressly or effectively) prevented from being held at a very late stage, in particular as a result of alleged safety concerns or the like in circumstances where there is no time to address any concerns raised with the consequence that the meeting or event has to be cancelled. This is a well-known and regular tactic of opponents of particular types of speaker or viewpoints. Accordingly, any HEP which does not:

- take a wary and sceptical approach to late claims or allegations;

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<sup>24</sup> There is case law to the effect that a decision to cancel a conference on the ground that it was not possible to put measures in place to ensure good order consistently with safeguarding staff and students was compatible with a university's duty under the predecessor to the primary obligations under Section 43 (*R (Ben Dor) v. University of Southampton* [2015] EWHC 2206 [Admin] [2015] ELR 590). However, the lawfulness of each such decision will turn on its own facts and by reference to what was (or was not) a reasonably practicable step in all the circumstances.

<sup>25</sup> See: Draft OfS Guidance, paragraph 107 and Example 24.

- warn people making the relevant allegations or threatening to prevent or disrupt meetings or events that they are already in breach of its HEP's FS Code or policies, rules or procedures and may be subject to disciplinary processes, and will be in further breach of such requirements if they continue with such actions or do actually prevent or disrupt the meeting or event, and that this will be regarded as an exacerbating factor in any disciplinary processes; and
- take all reasonably practicable steps to ensure that the meeting or event does happen despite these issues,

risks being in breach of its free speech obligations under Section 43 and, potentially, of breaching its obligations under the Equality Act and the HRA.

*Questions of cost (e.g. for security)*

The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects being cancelled, with activists threatening physical force and noisy disruption.

HEPs will need to be actively involved in monitoring and supervising security issues and assisting often inexperienced organisers to arrange appropriate security.

It must in many cases be "reasonably practicable" for the purposes of Section 43(1) for HEPs to pay for security costs of a meeting or event, and case law recognises that this may be required. And this will be essential for the meeting to continue and thus for free speech to be actively protected. There must, however, be limits to what would be considered to "reasonably practicable". The uncertainty over the point at which it would in a particular case cease to be reasonably practicable that an HEP pays the security or other costs of a meeting militates towards caution and prudence: paying security costs in cases of doubt is the only safe way forward.

HEPs should make clear in their FS Codes what their criteria are for determining whether the HEP will pay the security costs of a meeting or event.

The Draft OfS Guidance (paragraphs 97 to 94) requires that HEPs pay security costs, save in exceptional circumstances, and sets out detailed consequential requirements. While the provision of HEFSA that this reflects have not come into effect, and parts of this section of the Draft OfS Guidance go further that what is required under Section 43, HEPs should consider (with legal advice) which of them are "reasonably practicable" for the purposes of Section 43, and put those into effect. Parts of this section of the Draft OfS Guidance may well also reflect, to some extent, the continuing expectations of the OfS. Clarification would be helpful. The following represents what appears to be required pursuant to section 43 and the Draft OfS Guidance, to the extent applicable, and in any event represents best practice.

- HEPs should be as transparent and consistent as possible about how questions of cost will be addressed, and the applicable criteria and requirements. The criteria should be clear, objective and neutral and not (so far as is consistent with the law) depend on any of the

organiser's viewpoints, policies or objectives or the ideas or opinions likely to get legal expression at the meeting or event<sup>26</sup>.

- The key test remains reasonable practicability. The fact that a course of action is expensive would not necessarily justify it being treated as not reasonably practicable for the HEP to pay for it. The cost would likely need to be both significant and very disproportionate to the benefits likely to be obtained in order for an HEP to be able to justify not taking an action on grounds of cost alone.
- Where an HEP decides that security is required, it must actively seek to minimise both the degree of security required and its cost. It should document any decision as to security measures and security costs, and who should bear any costs, setting out the reasons for those decisions. If it decides that the relevant circumstances reasonably justify imposing costs on people or groups planning to hold a meeting or event, it should endeavour to minimise the security required and costs imposed on the people or groups planning to hold the relevant meeting or event given that as such costs can quickly render an event impracticable.
- When making a decision on security costs, an important factor will be whether the speech is from a particular perspective or on a particular topic that is generally disadvantaged and/or particularly susceptible to being stifled.

#### Recording decisions

HEPs should make and retain a written record of decisions taken<sup>27</sup> to:

- refuse permission for a meeting or event to be organised;
- cancel or postpone a meeting or event which has already been organised;
- impose restrictions or mitigations on a meeting or event, such as the appointment of an independent chair;
- take any action which may render a meeting or event harder to organise or hold; and
- take or require any security measures or impose security costs, as mentioned above.

In documenting its decision, an HEP should indicate the factors taken into account and their reasons for making the decision.

#### *No platforming policies*

In relation to so-called “no platforming” policies:

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<sup>26</sup> Draft OfS Guidance, paragraph 89.

<sup>27</sup> From Department for Education, *Higher education: free speech and academic freedom*, 2021. While this document is generally out of date, these appear to remain appropriate.

- HEPs (and SUs) can reasonably adopt a list of proscribed bodies and other organisations holding overtly racist or terrorist or other unlawful views representatives of which ought not to be invited by Participants to meetings or events intended to be held on HEP (or SU) premises.
- Insofar as maintained by HEPs (or SUs), such lists need to comply with HEPs' obligations under Section 43, the Equality Act and the HRA (keeping in mind that maintaining institutional neutrality is to a degree inherent in those obligations). This means that, in order not to breach HEPs' free speech obligations, such lists need to be very limited and the justifications for including any particular organisation or speaker on it compelling (e.g. that the relevant organisation is proscribed under law).

### *Safe spaces*

So-called "safe spaces" for Participants should also be discouraged in the context of the obligations to secure free speech. If an HEP (or SU) wishes to create a "safe space", it should take care that this does not operate so as to create inappropriate restrictions on Participants' or visiting speakers' freedom of speech. To the extent that they are designed to "protect" Participants from viewpoints which count as Protected Viewpoints for the purpose of the Equality Act, they risk involving a HEP or SU in unlawful discrimination under that Act against the people who hold Protected Viewpoints. Furthermore, to the extent that the creation of such "safe spaces" involves official disapproval of the Protected Viewpoint concerned, there is an added risk that HEPs' or SUs' actions could count as harassment under the Equality Act.<sup>28</sup> It will be extremely difficult to justify "safe spaces" which purport to apply across campuses or cover important shared facilities within student buildings. Rather, they need to be limited in space and/or time and/or scope.

### *Obligations regarding colleges and similar institutions and students' unions*

The Principal Statement contains detailed discussion of the application (if any) of the relevant law to colleges and similar institutions and to SUs.

It must be that many of HEPs' duties under Section 43, for instance as regards having rules prohibiting Participants from bullying other Participants for their viewpoints, do not somehow cease to apply just because an action happens to take place on a college's or SU's premises. Further, it appears to be the case that HEPs' duties under Section 43(1) include their taking such steps as are reasonably practicable for them to take to ensure that their colleges and SUs are aware of the relevant law and adopt, comply with and enforce policies, rules and practices of their own so as to reflect/give appropriate effect to the relevant law as regards Participants (but not in respect of people within the constituent institution or SU who are not Participants), although this can be subject to severe limitations in practice because of those organisations' operational independence as discussed below.

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<sup>28</sup> See: *Meade v Westminster City Council and Social Work England* (2024) ET Case No: 2201792/2022 & 2211483/2022). See also: BFSP's detailed statement about this case at <https://bfsp.uk/universities-and-free-speech>.

The obligations of an HEP under Section 43(2), (3) and (4) in respect of meetings and FS Codes (including to take all reasonably practicable steps to secure compliance with their FS Code) extend to use of the HEP's premises by an associated SU, and also use by the SU of its own premises<sup>29</sup>. To the extent that such an SU occupies or uses premises owned by or under the control of the HEP, it would, for example, be reasonably practicable for the HEP to make compliance a condition of occupation use, or otherwise to exert some control over the SUs' conduct in relation to freedom of speech.

There are likely, however, to be significant limitations on HEPs' ability to control the use and management by colleges and SUs of their own premises. Many colleges and (we assume) **all** SUs are separate legal entities and have extensive operational independence, so an HEP will likely not have much effective day to day control over their actions although this should not be used as an unjustifiable excuse for inaction by the HEP concerned, as has happened. All will depend on what actions would be "reasonably practicable" for an HEP to take for the purposes of Section 43, and whether they have been taken. This is fraught with uncertainty.

- In relation to colleges, the availability of soft power (e.g. through conference of colleges and the like) might, at the least, require HEPs to provide thought leadership on the appropriate practices and procedures in respect of meetings.
- In relation to SUs, it must be potentially 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 matters discussed above involve judgements in respect of fine-grained points of law in an area with little or no jurisprudence: case law or guidance will at some point emerge which will confirm or modify the above.

## Best Free Speech Practice

September 2024

*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 its implications, 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*

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<sup>29</sup> See Sub-sections 43(2), (3), (4) and (8).

*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.*



## APPENDIX: HEPI RECOMMENDATIONS ON CODE CONTENTS

The Higher Education Policy Institute (“HEPI”) produced a valuable study and report in 2018 on HEP Codes of Practice, with recommendations on how to optimise these codes. [See their full study here](#).

We set out their most relevant recommendations below, with BFSPs suggestions added. We recommend that HEPI’s recommendations should be adopted as a matter of good practice whether or not they are (or might be) strictly required under Section 43 or HEPs other free speech obligations.

*“To optimise the format of codes of practice on freedom of speech, we recommend universities:*

- include a cover page to the code detailing the document’s history, including key information on the date of its approval, the next date of review and contact information for the responsible officer;
- consider formulating the codes in other formats (such as braille or audio) to ensure the widest possible readership;
- enhance the usability of the codes by employing hyperlinks throughout all online versions of the policies, as well as writing out web addresses in full in an appendix to the code (or in footnotes or endnotes) to ensure this information is not lost when the codes are printed out;
- make use of additional appendices to the codes to host vital supplementary documentation including application forms and additional guidance, so that this information is all housed in one place;
- visualise application and assessment processes in the form of process flowcharts wherever possible, to allow event organisers to easily understand what is required of them and to ensure the policies are as simple as they can be during the design process;
- take care to define what the code covers both in terms of meeting size and meeting format; and
- outline the precise remits of the code if intended, for example, to be applicable to students’ unions, in other countries, in constituent parts of a university with otherwise autonomous governance structures (such as Oxbridge colleges) or in faith-based institutions, where contradictions may occur with religious doctrine (such as Canon Law in Catholic institutions).

*To optimise the processes surrounding the codes of practice on freedom of speech, we recommend universities:*

- regularly review and update their code, particularly in line with developments in relevant legislation;
- ensure the latest versions of the code are swiftly approved by relevant university boards and committees, and published accordingly on university websites;
- keep a visual record of where the code has been disseminated to allow university committees and boards to decide whether this is appropriate and sufficient at the next review meeting;
- avoid requesting information from speakers or event organisers that could be deemed unreasonable or offputting (such as routinely requesting copies of speeches before they are made);
- include in the code reasonable timescales for both the initial application to host an event or external speaker and the appeals process;
- offer in the code assistance to event organisers – such as PA systems or added security provisions – to give an event the best chance of going ahead before considering it for cancellation;
- consider including a disclaimer in the code to cover more lengthy and complex decision processes over appeals (although every effort should be made to stick to the original timescales outlined as above); and
- consider employing the expertise of an assessment panel, as opposed to just one accountable officer, to help in the case of deciding whether more complex or controversial events or speakers should go ahead. In addition, higher education institutions – particularly in England – may consider producing additional governance documents, such as statements of commitment to the codes of practice. This will not only help institutions to become clear about what their codes of practice are for, and what purpose they serve, but also help them to prepare for life under the Office for Students and its new *Regulatory Framework*, which may well require providers of higher education to justify their policies and processes in more detail in the future.”