



## Protests at English universities

### 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 IT MAY BE OUT OF DATE: see its publication date and also the important notice at page 15.**

#### Introduction

Best Free Speech Practice (“BFSP”) is a non-partisan campaign to clarify and publicly share the actual legal requirements for protecting free speech and academic freedom at UK universities and other Higher Educational Providers (“HEPs”) and their implications in practice. These requirements are generally much more demanding than HEPs appear to appreciate.

This statement provides information about the legal and regulatory requirements for securing free speech, as they apply in respect of protests.

Protests at HEPs are common. Even at times where there are no immediate factors which focus the political energies of staff, students, and members of an HEP (“Participants”), such as the current events in Gaza, the high proportion of politically interested individuals in universities means that protests will frequently occur.

Protests and demonstrations at HEPs raise peculiarly complex and difficult issues for them to negotiate. They face potentially conflicting needs and requirements. They need to:

- ensure the physical safety of their Participants and prevent harassment and intimidation which is unlawful or contrary to their own free speech codes and other requirements in this regard;
- prevent excessive and unreasonable disruption of the activities of the HEP and its Participants, including preventing the disruption of events through the “heckler’s veto”; and

- take the steps required of them to protect the free speech of the protesters and demonstrators, and also ensure that protests and demonstrations do not inappropriately interfere with others' free speech rights.

This can involve a difficult balancing exercise involving needs and requirements.

The law on freedom of speech relating to protests at HEPs has complex aspects. This, combined with the frequency of protests at HEPs, means that protests are an area of serious risk for non-compliance with free speech related duties. If HEPs are to comply, they will need to ensure that they understand their duties, and take proactive, concrete actions.

## Part 1: 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>.

### *HERA and related guidance*

The Higher Education and Research Act 2017 ("HERA") provides that the governing body of an English HEP 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 the staff, members and students ("Participants") of and visiting speakers<sup>1</sup> to the HEP.<sup>2</sup> This is often referred to as the "**Secure Duty**". The Secure Duty is a demanding requirement and requires active, positive steps to be taken. The obligations are stated in objective terms, giving little material discretion to an HEP as to what steps it needs to take. It results in various requirements in practice, which are discussed in detail below. Free speech obligations override other considerations, subject only to the following:

- the relevant speech must be lawful; and
- the relevant step must be one which is, as a matter of fact, a reasonably practicable for the HEP to take.

Factors determining whether taking or not taking a step is reasonably practicable include the impact of the step on freedom of speech, the effect that taking the step would have on an HEP's "essential functions" of teaching, learning, research, and the administration necessary for these three things, and whether taking the step could affect anyone's physical safety.

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<sup>1</sup> In sub-sections A1(1) and (2). 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. See: *R. (on the application of Butt) v. Secretary of State for the Home Department* [2019] EWCA Civ 256, [2019]1W.L.R. 3873 at [171]–[172].

<sup>2</sup> While the obligations under Sub-sections A1(1) and (2) fall on the governing bodies of HEPs, they are effectively obligations of the relevant HEP, and we refer to them as such herein.

HERA also requires an HEP to have a “code of practice” on freedom of speech (“**FS Code**”), and to enforce it by taking those steps that are reasonably practicable to ensure compliance with the FS Code. The FS Code must include protections for the freedom of speech of Participants in meetings, and requirements for the behaviour of Participants with respect to those meetings, where those meetings take place on the Providers’ premises, the premises of its Students’ Union, or premises otherwise under its control. See BFSP’s [Free speech codes: compliance checklist](#).

Similar obligations also apply in respect of colleges and other “constituent institutions” of HEPs.

The Office for Students (“**OfS**”) has published guidance (“**OfS Guidance**”) pursuant to HERA, including in relation to protests at HEPs. The guidance is published as *Regulatory Advice 24 – Guidance relating to freedom of speech*. The guidance reflects both the requirements under HERA and what the OfS regards as best practice.<sup>3</sup>

### *Equality Act*

As is now 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 “gender-critical” and “anti-Zionist” viewpoints, views which contest aspects of “critical race theory” and views which are critical of aspects of Islam. Employers and education providers need to avoid discrimination against and harassment of people with such viewpoints in certain specified contexts. This includes avoiding discrimination or harassment of HEP staff who express protected viewpoints at protests. However, HEPs may legitimately have certain policies/rules regulating the manner in which viewpoints are expressed, provided that these policies/rules are carefully drafted to be legally compliant.

Under Section 109 of the Equality Act, an employer, for instance an HEP, is liable for all harassment and discrimination committed by its staff in the course of their employment. An employer can only avoid liability in such a case if it can show that it took all reasonable steps to prevent their employees from doing the alleged acts or anything of that description (the “**Section 109(4) Defence**”). This bar to avoid liability is high, and the range of actions which HEPs must take proactively to meet it is broad.

The Equality Act (which is frequently relied on in the context of employment disputes) is unlikely to be relevant to protests which only involve students or protests involving external speakers.

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<sup>3</sup> For sections of the OfS Guidance relevant to protests, see, in particular, paragraphs 107-108, 111-112, 122, 160-161, and 180. See Examples 11, 12, 13, 16, and 19. The OfS has previously published guidance on protests concerning the current events in Israel/Palestine: <https://www.officeforstudents.org.uk/publications/protests-on-campus-tackling-harassment-and-securing-freedom-of-speech/>. This is incorporated within, and superseded by, the OfS Guidance.

## *Human Rights Act*

The free thought and speech rights, and rights of assembly, of academics and students, are protected under the European Convention on Human Rights (the “**Convention**”), as enacted in the UK by the Human Rights Act 1998 (“**HRA**”).<sup>4</sup> These freedoms include the freedom to offend, shock and disturb. Compelled thought and speech are unlawful. Political expression (in a wide sense rather than a narrow party-political one) attracts the highest degree of protection, as does academic free expression.

Article 10 of the Convention permits an HEP to restrict lawful speech *if, and only if*, certain conditions are met. These conditions include that the restriction is:

- “Prescribed by law”. To be prescribed by law a restriction must be authorised by a rule which has a basis in UK law, and the rule must meet certain conditions of clarity, accessibility, and precision to enable those affected by it to foresee how and when it might be enforced; and
- Proportionate. In outline, a restriction is proportionate if it is a means to an end of sufficient importance to justify a restriction of the degree in question, and either there are no less restrictive means, or not taking these less restrictive means is of sufficient importance to justify the greater degree of restriction.

In determining whether a restriction is proportionate, the high relative importance of freedom of speech (and even more so academic freedom) is set by law. The views and values of an HEP are irrelevant to the importance of freedom of speech. Similarly, proportionality is a matter of fact and legal interpretation: it does not depend on the views or values of an HEP.

For further details on the conditions for compliantly restricting speech under the Convention, and in particular proportionality, see BFSP’s Principal Statement, and its soon to be published (the “**Proportionality Statement**”) *Proportionality under the ECHR: risks for HEPs restricting free speech*.

## *Legal consequences*

The above requirements have the following consequences:

- Peaceful protest is itself a protected form of expression. Such protest should not, however, be allowed to shut down debate<sup>5</sup> 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.
- The Secure Duty requires HEPs to take all reasonably practicable steps to secure the lawful speech of protesters. Subject to the discussion below, securing protesters’ free speech

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<sup>4</sup> As most, if not all, HEPs are “public authorities” for the purposes of the Convention and the HRA.

<sup>5</sup> See: OfS Guidance, paragraphs 180d, and 202.

means allowing the speech to go ahead with no restrictions, and ensuring the speech is not prevented. HEPs are not required to secure protester's speech, to the extent that it is not reasonably practicable to do so.

- In certain limited, and legally determined cases, and to an extent that is legally determined, an HEP may be permitted or required to restrict protesters' speech. This may be because, for instance, the speech is unlawful, constitutes harassment contrary to the HEP's policies/rules (which are themselves compliant) or interferes with the essential functions of the HEP, or because the speech amounts to a use of the "heckler's veto".<sup>6</sup> This is discussed in greater detail in Part 2. To be lawful, any restriction imposed by an HEP on protesters' speech must be compliant with both HERA and the Convention.
- Good preparations, including actions which have been confirmed in advance as being compliant, will be essential.

## Part 2: Requirements and implications in practice

In Part 2, we set out the requirements and implications in practice for HEPs with respect to freedom of speech and protests.

*Key consideration: the location of a protest and limited ability of HEPs to protect/control/restrict it*

In any given case of protest, the extent to which the various requirements on an HEP discussed herein will apply will depend on the location of the protest and its target.

The rest of the discussion below assumes that both a protest and its object are on the premises of an HEP or at a location controlled by it, including through relationships or arrangements with, for instance, colleges or students' unions ("Relevant Location").

The Secure Duty is one "to ensure, so far as is reasonably practicable, that those whom [an HEP] may control, that is to say its [Participants], do not prevent the exercise of freedom of speech within the law [...] in places under its control".<sup>7</sup> This makes clear that there is a positive duty to control the behaviour of such people in order to secure free speech (this must include by having appropriate rules, and enforcing them); and that it is recognised that there are limitations on HEPs' ability to control the behaviour of people and that HEPs are less likely to be in a position to manage behaviour which is not at a Relevant Location. This limitation does not cater for factors such as the reasonably practicable ability of HEPs to have an element of control – or influence, at least – in respect of locations which are not under its direct control, for instance through agreements with colleges (which are now themselves subject to HERA) as to the allocation of responsibilities for securing free speech and with students' unions, which

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<sup>6</sup> OfS Guidance, paragraphs 107 and 111. Example 11.

<sup>7</sup> *R. v. University of Liverpool Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667 (per Watkins LJ at p132 D-H). Stated in respect of Section 43 of the Education No.2 Act (1986), which has been replaced and strengthened in HERA. This case, which predates the internet, seems ripe for qualifying.

will usually depend on financial support from their HEP and whose officers as Participants will be subject to its FS Code and requirements for behaviour. The latter are not necessarily limited by geographical considerations.

- If a protest itself is not at a Relevant Location, then the applicable obligations (if any) of an HEP will depend on the relevant circumstances.
  - If the protest could adversely affect the free speech of Participants (for instance those at a meeting at a Relevant Location which is next door to the location of the protest), then the HEP may well be required to exercise any ability which it has to control/restrict the actions of the Protesters so as to give effect to such of the requirements on it discussed below as are relevant in the circumstances. While its ability to do this may be very limited in some cases, it will be able to take steps in respect, for instance, of those protesters who are themselves Participants through its FS Code and other relevant requirements: for instance, by reminding Participants about the requirements on them not to restrict speech, warning them that its policies/rules will be enforced, where appropriate through disciplinary processes, and actually taking those enforcement steps where relevant. The Secure Duty may, for instance, require informing and liaising with the police when a risky protest becomes known to an HEP.
  - One very specific example is that an HEP may be required under the Secure Duty, Equality Act and/or the Convention to take action in respect of protests at a Participant's home off-site or otherwise part of a targeted campaign against a Participant because of their viewpoints.
  - Conversely, If the protest is unlikely to adversely affect the free speech of Participants, the HEP is unlikely to have any obligation as regards controlling it.
  - The same limited duties apply when the free speech of protesters who are Participants is threatened, although, where those threatening the speech of protesters are not Participants, the ability of the HEP to take action, and hence any requirements on it to do so, is likely to be very limited beyond informing and liaising with the police.
- If the target of a protest is not at a Relevant Location, but is at a location in close proximity to or associated with an HEP and/or one at which a substantial number of Participants are likely to be present – students' union and organisations such as the Oxford Union are good examples – the relevant HEP would be well advised to act on the basis that it may incur compliance failures, and at the least incur reputational damage, if it does not take such steps (if any) as are reasonably practicable in the circumstances to secure free speech at an event on such premises, for instance pursuant to its FS Code and associated requirements for the behaviour of Participants. (See also above re protests outside a Participant's home.) HEPs are particularly likely to be subject to duties where the protests are themselves at a Relevant Location. By way of contrast, it is hard to envisage an HEP having duties in respect of an event in another city, even though many of its Participants might be present.

### *Requirements to secure protesters' speech; scope of compliant limitations on their speech*

- No restrictions, except where they are compliant. An HEP must not restrict the lawful speech of protesters who are Participants, *in any way*, including by regulating the time, place, and manner of the protest, except where doing so is compliant with the Secure Duty (as regards the speech of protesters who are Participants) and also, separately, compliant with the Convention. Some specific examples of compliant restrictions are set out below.
- Proportionate. Any restrictions imposed by an HEP must be such as to comply with the Secure Duty (as regards the speech of protesters who are Participants) and also as to be proportionate for the purposes of the Convention. This means, for instance, that, wherever possible, HEPs must regulate the time, place, and manner of protests, rather than banning protests outright.
- Neutral policies/rules: impartial application. We discuss HEPs' policies/rules which could restrict protests, and the need for them to be viewpoint-neutral, below. To comply with the Secure Duty, an HEP must apply its policies/rules regarding protests impartially, irrespective of the viewpoints expressed by protesters. Where an HEP imposes restrictions on one protest, but not another, it should be capable of justifying, legally, its decision to do so.
- Physical safety of protesters. On occasion, there may be a risk that protesters will be exposed to threats to their physical safety, for instance, from opposing protesters. Where an HEP learns of credible evidence that the physical safety of protesters may be threatened, the OfS Guidance envisages that it must, as a minimum, take reasonably practicable steps to secure their physical safety. This may include paying the costs of the security necessary to ensure the protesting Participants' safety. Whether an HEP takes steps to secure the physical safety of protesting Participants must not depend on the viewpoints of those Participants.<sup>8</sup>
- Reputational costs. The alleged or actual impact of a protest on the reputation of an HEP will not make restricting the protest compliant.<sup>9</sup>
- Offensive and hurtful speech. The fact that protesters' speech is offensive or hurtful will not make restrictions on that speech compliant, provided that the speech is not contrary

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<sup>8</sup> Pursuant to the Secure Duty (HERA, Section A1(10)), HEPs must, apart from in exceptional circumstances, pay the security costs of meetings on their premises. See the OfS Guidance, Paragraphs 181–187, Examples 41, 42, and 43. Similar requirements are likely to exist under the primary provisions of the Secure Duty in respect of protecting protests.

<sup>9</sup> The OfS Guidance, paragraph 123, states that the reputational impact of speech (e.g. a protest) is likely to be “irrelevant” as to whether it is a reasonably practicable step, and hence required by the Secure Duty, not to restrict that speech. In practice, in the specific context of protests, reputational considerations will be irrelevant: they cannot justify restricting a protest.

to an HEP's bullying and harassment policies (which must themselves be carefully written so as to be compliant, see the Principal Statement).<sup>10</sup>

HEPs are not required to secure protesters' speech, to the extent that:

- the speech is unlawful;
- (as regards the Secure Duty) the protesters are not Participants of the HEP; and/or
- the speech can otherwise be compliantly restricted in accordance with both the Secure Duty and the Convention, as detailed below.

#### *Protest which disrupts the functions/activities of an HEP*

- Essential functions. To the extent that protesters' speech prevents an HEP's essential functions of teaching, learning, research, and the administration necessary for these three things from taking place, it is likely that HEPs can compliantly restrict the protesters' protest rights (and thus arguably, speech). To be compliant, HEPs must restrict the protesters' speech no more than is necessary to ensure that the essential functions of the HEP can go ahead. This will almost always involve regulating the time, manner, or place of protests.
  - For example, protests outside a lecture hall which continued at such volume, and for such a length of time that a lecturer could not be heard would interfere with or prevent the essential function of teaching. In this case, an HEP could compliantly require the protests to take place elsewhere, such that they would not prevent the essential function of teaching from taking place.<sup>11</sup>
- Ordinary activities. To the extent that protesters' speech prevents the ordinary activities of the HEP, other than its essential functions, from continuing, an HEP may be able compliantly to restrict the protesters' speech. However, any restrictions on speech should be narrowly tailored with the aim of permitting that activity to go ahead. Further, the lesser, and varying importance of the ordinary activities of the university, compared to its essential functions, may mean that restrictions on protesters' speech are not always be justified. Whether restrictions are justified will depend on the particular facts of each case, and case law may be required to clarify HEPs' obligations here. See also the discussion on the proportionality of restrictions below.
  - For example, it is likely that an HEP could compliantly require protesters who had occupied a lawn shortly to be used for graduations to vacate it. However, a ban on protests on the lawn and all nearby lawns, extending beyond the period of

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<sup>10</sup> OfS Guidance, paragraph 30.

<sup>11</sup> OfS Guidance, paragraph 107 and Example 11.

graduations, would be less likely to be compliant because it is not narrowly tailored to permitting the activity in question to go ahead.<sup>12</sup>

### *Where restrictions required on protesters' speech*

HEPs are, on occasion, required to restrict protesters' speech. To be compliant, HEPs must not restrict speech more than is reasonably required.

- Secure others' free speech. If a protest prevents others' speech, an HEP will be required to restrict the protest to secure that speech which the protest prevents, to the extent necessary to comply with both the Secure Duty and the Convention. Getting the balance right between the rights of the protesters and those whose speech they prevent in these cases will involve weighing the right of the protesters to protest unrestricted, against the right to free speech of those whose speech they prevent. Generally, an HEP may and should restrict protesters' speech to the extent necessary to secure the speech of those whose speech they prevent. The exact nature of the restrictions will depend on the relevant circumstances, but getting the balance right will be likely to involve allowing some minor disruption (e.g. background noise) as long as free speech can still be exercised.<sup>13</sup>
  - For example, suppose that protest outside a speaker event would continue at such volume, and for such a length of time, that speakers at the event could not be heard, and thus that the event could not take place, or could only take place with difficulty (a use of the so-called "heckler's veto"). In this case, an HEP would be required to restrict the protest, and other matters aside, to do so by regulating its time, place, or manner. This might involve requiring the protest to take place at a sufficient distance from the speaker event to ensure that speakers could easily be heard.
- Prevent harassment and bullying. To the extent that protesters' speech or actions contravene an HEP's bullying and harassment rules (where these rules are themselves carefully written to be compliant with applicable free speech requirements: see the Principal Statement and the Proportionality Statement), an HEP is required to restrict the protest. Depending on the circumstances, an HEP may be required to regulate the time, place, and manner of the protest, or to take other measures.<sup>14 15</sup>

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<sup>12</sup> OfS Guidance, paragraph 108 and Example 13.

<sup>13</sup> OfS Guidance, paragraph 111.

<sup>14</sup> OfS Guidance, paragraph 112.

<sup>15</sup> In relation to harassment, the OfS has also stated, in a letter to HEPs *Protests on campus: tackling harassment and securing freedom of speech*, May 2024, that:

"Our expectation is that institutions should remain vigilant to identify unlawful harassment, or other speech or expression outside the law, and should: a. Adhere to relevant policies and procedures in reporting unlawful harassment, and other potentially unlawful conduct to the police and other relevant authorities as a matter of urgency where appropriate. b. Take timely and

- For example, if a vociferous anti-Zionist protest is due to take place in front of a synagogue, it may be that Jewish worshippers will be at risk of harassment. If this is the case, then the HEP would likely be required to require the protest to take place elsewhere.
- Preventing threats to physical safety. Where there is credible evidence<sup>16</sup> that a protest would threaten anyone's physical safety within the HEP's premises or premises it controls,<sup>17</sup> then the OfS expects that an HEP is required to restrict the protest. Depending on the circumstances, an HEP may be required to regulate the time, place, and manner of the protest, or to take other measures.
  - For example, suppose that an academic has been invited to speak at an HEP on animal experimentation. Animal rights activists have previously assaulted the academic by throwing objects and forcibly attempting to prevent him/her from speaking, leading to several arrests. The HEP learns that individuals planning to protest against the speaker event have called for similar tactics. In this case, it is likely that the HEP would be required to restrict the protest, for instance, by requiring it to take place in a specified area, at some distance from the event, in the presence of HEP supplied security.<sup>18</sup>

### *Policies, rules, structures, systems*

- Policies/rules re restrictions: neutral requirements. An HEP must have clear policies/rules specifying when and how it will restrict protests. These policies/rules will need to be written so as to be compliant with the Secure Duty and the HRA/Convention, and the latter is likely to involve concepts of "proportionality". It must adhere to these policies/rules and apply them consistently.<sup>19</sup> These rules should state that, where an HEP

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appropriate action, again in accordance with agreed policies and procedures, to support students or staff affected by unlawful conduct. c. In the context of unlawful harassment, have in place clear policies so that students and staff understand how they can raise issues, and how they can expect these issues to be handled."

<sup>16</sup> Where there is no evidence that a protest is an immediate threat to physical safety, but merely supposition, an HEP is not permitted to restrict the protest. OfS Guidance, paragraph 121, Example 18.

<sup>17</sup> Threats to physical safety in external, possibly distant locations, by person's outside of an HEP's control will not justify restrictions on protesters' speech. OfS Guidance, paragraphs 121-122, Examples 18 and 19.

<sup>18</sup> See also, OfS Guidance, Example 16.

<sup>19</sup> Any restrictions on protesters' speech must be compliant with both the Secure Duty and the Convention. The OfS Guidance recommends, as part of the "three step framework" it sets out, that HEPs should first assess compliance with the Secure Duty, and then the Convention.

In order to be compliant with the Convention, when an HEP takes action to restrict the speech at a protest, that action must be "prescribed by law". This means there must be a rule authorising the restriction, which applies to those whom the restriction affects, which has a basis in UK law, and which

restricts protesters' speech, it will do so to the extent that any restrictions are legally justified by their specific purpose, and no more. The rules should state that generally, and wherever possible, the HEP will impose restrictions short of banning a protest outright, for instance, through regulating the time, place, or manner of the protest.

Any policies/rules which restrict protests should be neutral with respect to the lawful viewpoints expressed by protesters who are Participants. These policies must not be written in such a way as to punish or suppress the expression of a lawful viewpoint.

"For example, a requirement that protesters should not intrude into classrooms, or attempt to shut down debate and discussion, is suitably neutral as to the viewpoint expressed. By contrast, a requirement that protests should not express views that undermine the university's values, may unlawfully suppress the expression of a particular range of viewpoints."<sup>20</sup>

- Requirements relating to protesters: In order to comply with the Secure Duty and the OfS's apparent expectations,<sup>21</sup> an HEP must create policies/rules prohibiting protesters from intentionally preventing the speech of others. Such policies/rules should be in, or referred to in, its FS Code. We consider that such a policy/rule could, for example, take the following form:

"No [Participant – i.e. member of staff, student etc.] may, without reasonable excuse,<sup>22</sup>

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meets conditions of clarity, accessibility, and precision. Whether or not an HEP's otherwise existing rules relating to free speech, behaviour, or the continuance of its essential functions will meet these conditions – and hence whether the restriction is compliant – is a difficult question and will depend on the particular facts of the case. In particular, it may be unlikely that restrictions imposed in order to allow the essential functions of the university to continue meet the conditions for being "prescribed by law". Note also that, where restrictions on protesters' speech are required, for instance to secure free speech overall, and where an HEP's otherwise existing rules are not sufficient to ensure that the required restrictions are "prescribed by law", then an HEP will necessarily be non-compliant. The safest way for HEPs to proceed is therefore to construct specific rules stating how and when they will restrict protesters' speech. These rules, since they will restrict protesters' speech, must themselves qualify as "prescribed by law".

<sup>20</sup> OfS Guidance, paragraph 109 and Example 12.

<sup>21</sup> OfS Guidance, paragraphs 178-180. "HERA requires that the free speech code of practice sets out the conduct required in connection with relevant meetings and other activities... The content of this section should be consistent with the following principles... protest must not shut down debate".

<sup>22</sup> For the purposes of this prohibition, actual or claimed ignorance of the HEP's requirements with respect to freedom of speech should not be treated as a reasonable excuse.

take any action<sup>23</sup> intended<sup>24</sup> to:

- prevent or materially hinder a meeting, event or other activity from happening, or otherwise prevent lawful speech at the premises of [HEP] (or any of its constituent institutions), or elsewhere in circumstances where the relevant events will be attended, in part at least, by [Participants]; or
- render a 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 content of the lawful speech prevented, or the intended subject-matter of the meeting or the statements made or beliefs or opinions held or expressed by any persons organising or intending to participate in that meeting. "<sup>25</sup>

- Decision structures. An HEP will often have to make legally consequential decisions about protests at short notice, and with imperfect information. To ensure that HEPs make the correct decisions, and with sufficient speed as to be compliant, HEPs must have dedicated procedures, staff, and policies to make decisions about protests. These could include an identified person or body with explicit responsibility for making the decision,<sup>26</sup> "scenario maps" detailing different circumstances and the appropriate response in each case, which has been confirmed as proportionate in advance, and the details of each response, including the necessary steps and arrangements required. Since such measures will be crucial to protecting the free speech of protesters and their targets, and are eminently reasonably practicable, they are a requirement under HERA.<sup>27</sup>

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<sup>23</sup> Including actions not ordinarily regarded as "protest", e.g. buying out the tickets to an event with the sole aim of preventing others from attending.

<sup>24</sup> An action or course of action which has the prohibited effect will be deemed to be intended as provided above, and because of the content of the lawful speech, or the subject-matter of the meeting, if no other convincing explanation for it is provided.

<sup>25</sup> Prohibited actions will include: knowingly making misrepresentations or exaggerated claims of the likely negative consequences of speech or holding a 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 speech or meeting.

<sup>26</sup> This would naturally be a responsibility of a university's free speech officer. See Section 2 of the Principal Statement.

<sup>27</sup> See the OfS Guidance, paragraph 201, on the requirement for a timely process for considering and taking steps to allow controversial events to go ahead. Under such a process, HEPs must consider possible restrictions on protests. However, HEPs must also have a similar or joint process, to be used only where necessary, for considering protests in their own right.

- FS Code. An HEP's FS Code must, where it deals with meetings on HEPs' premises and premises occupied by its Students Union,<sup>28</sup> be consistent with the principle that "peaceful protest is itself a legitimate expression of freedom of speech. However, protest must not shut down debate". This means that protests and demonstrations which are intended to or have the effect of preventing or seriously disrupting legitimate meetings and events will be contrary to an HEP's FS Code, provided it is written correctly.<sup>29</sup>
- 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. HERA Section A1(10) requires HEPs to secure that, save in exceptional circumstances, use of their 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 relating to their use of the premises. HEPs will need to be actively involved in monitoring and supervising security issues and assisting often inexperienced organisers to arrange appropriate security. This complex subject is discussed in detail in BFSP's detailed statement [Meetings at English HEPs: free speech requirements and risks](#).

### ***Active intervention***

In order to comply with the relevant legal requirements, an HEP will need to intervene actively in order to secure free speech at meetings and events, and must enforce its policies/rules prohibiting protesters from restricting speech consistently and compliantly and in ways that are compliant with the Secure Duty and the HRA/Convention, and the latter is likely to involve the concept of "proportionality". This will inevitably involve difficult and urgent decisions and will not always be easy in practice. Prior to protests, an HEP may issue letters stating the requirements on protesters and warning them not to breach them. When a protester or protesters have intentionally restricted speech, disciplinary sanctions are likely to be appropriate, and may be legally required.<sup>30</sup>

## **Part 3: Specific case studies**

In Part 3, we discuss two case studies where an HEP and a college would likely have been permitted or required under the Secure Duty (had it then applied) and the Convention to

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<sup>28</sup> The government has stated that it will amend the Higher Education (Freedom of Speech) Act 2023 to the effect that HEPs will be required to take all reasonably practicable steps to ensure that their Students' Unions comply with their free speech codes within the premises which they occupy, irrespective of whether these premises are owned by the HEP. See the government's policy paper [The Future of the Higher Education \(Freedom of Speech\) Act 2023](#), Section 1.

<sup>29</sup> OfS Guidance, paragraph 180d. See also footnote [28]. [Dealing with A2(2)(c) of HERA]

<sup>30</sup> Section A2(2)(c) of HERA specifically requires that HEPs' FS Codes set out the conduct required of Participants in connection with relevant meetings and other activities. Section A2(4) requires HEPs to secure compliance with their FS Code, including where appropriate the initiation of disciplinary measures. These rules concerning meetings must include some rules on protests, however, the Secure Duty requires HEPs to have similar or joint rules which focus specifically on protests in their own right, and to enforce these rules.

restrict protesters' speech. In both cases, the HEP/college did not restrict the protesters' speech. While the duties under HERA were not in force at the times these events took place, partially identical duties on universities (but not colleges) under Section 43 of the Education (No.2) Act 1986 were in force. It is likely that, in the case of Durham University (see below), by not restricting the protesters' speech, it acted unlawfully. Were similar events to take place today, it is highly likely that the actions described in both cases below would be unlawful.

#### *Durham University – Palestine debate*

**Events.** In June 2024, the University of Durham's Durham Union Society organised a debate (in a university-owned building) to take place on the motion "This house believes Palestinian leadership is the biggest barrier to peace". The university knew that protesters might attempt to block the entrances to the venue for the debate with intention of preventing the debate from taking place. It was also clear that any protest was likely to be emotionally charged and aggressive. Before the debate was due to begin, protesters blocked the entrances to the venue, screamed abuse at those inside, and banged on the walls. As a result, the debate did not take place. The university did not attempt to prevent protesters from blocking the entrances to the venue, or otherwise act to ensure that the protest did not prevent the debate from going ahead. The university could, for instance, have instructed the security team which it provided for the event to prevent protesters from blocking the entrances. It could also have required the protesters (who were Participants) not to beat on the walls of its building, or to exercise the heckler's veto against those inside.

**Legal Requirements.** By not restricting the protest, Durham University failed to secure the speech of those Participants who would have participated in or attended the debate. The university could have restricted the time, place, or manner of the protest such that the debate could go ahead. For instance, it could have required any protest to take place a certain distance away from the venue, and ensured that university security prevented protesters from blocking the venue's doors. Such restrictions would, as necessary means to securing both the free speech of the protesters, and those attending the debate, be reasonably practicable steps to secure speech, and therefore required under the Secure Duty. These restrictions would also be likely to be proportionate and compliant under the Convention.

#### *St John's College, Cambridge – Birthgap screening*

**Events.** In May 2023, Charlie Astor-Bentley, a student at St John's College, Cambridge, organised a screening at the college of the film "Birthgap – A childless world". Students complained to the college about the screening, and the college became aware that the screening would likely attract a protest. The college required Astor-Bentley to take action to prevent the protesters from causing noise, which might have disturbed students revising for their summer exams. When Astor-Bentley made it clear she was unable to prevent protesters causing disturbance, the college postponed the screening. This postponement amounted to a de facto cancellation of the event, since Astor-Bentley was shortly due to graduate and leave the college.

**Legal Requirements.** By in effect cancelling the screening, the college restricted the free speech of Astor-Bentley and those students and staff who wished to attend it. The college could, instead of cancelling the screening, have regulated the time, place, or manner of any protest against it. It could have, for instance, required the protesters not to protest in areas where they would disturb revising students, or allowed the protesters to protest in these areas quietly, for instance, by holding up placards or distributing leaflets. If the college did not have adequate authority over the protesting students, for instance, because the students were members of a different constituent college of the university, then it could have referred the matter to appropriate university authorities. Such restrictions would be permissible under HERA, because revision for examinations is a crucial part of the university's essential function of learning, and would almost certainly be proportionate and compliant under the Convention.

These events took place before the college became subject to the Secure Duty. Had it then applied, given that the college could have compliantly, and with comparatively little difficulty, prevented protesters from disrupting revising students, it would very likely be a reasonably practicable step under the Secure Duty not to cancel the event.

HERA (and the Convention, were it to apply in respect of the college) would therefore require the college not to cancel or postpone the screening, and permit them to regulate proportionately the time, place, and manner of any protest.

## **Best Free Speech Practice**

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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 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 specific policies, practices and requirements for particular HEPs, will have to be developed by HEPs themselves, in the context of their own particular circumstances;*
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