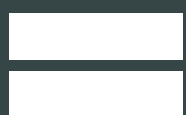




# Freedom of expression:

a guide for higher  
education providers  
and students' unions in  
England and Wales



Equality and  
Human Rights  
Commission



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# About this guide

## What is this guide about?

This guide is about what the law says on freedom of expression in England and Wales, specifically in universities and other higher education environments. It provides practical advice on how to protect free speech and makes it clear to students what they should expect from their institutions. It includes:

- All current available guidance that helps to protect free speech on campus.
- Information about the relevant laws and legal issues to consider.
- Definitions for some terms associated with freedom of expression, such as ‘hate speech’, ‘trigger warnings’ and ‘no-platforming’.
- Case studies to help higher education providers and students’ unions to promote and protect free speech.

## Who is it for?

This guide will be most useful for:

- governing bodies of universities and other higher education providers
- students’ union trustees

It may also be of interest to others including academic staff, students’ union elected officers, individual students and speakers.

## Why have we produced it?

The right to express views and ideas freely, without fear of interference or persecution, is an essential part of democracy. Respectful debate and conversation helps us challenge discrimination, get rid of intolerance and harmful attitudes, and build strong, positive communities.

Freedom of expression is a key part of the higher education experience. Sharing ideas is crucial for learning, and allows students to think critically, challenge and engage with different perspectives. In England and Wales, most universities and other publicly funded higher education providers have legal duties to protect free speech.

**In 2017, the Joint Committee on Human Rights held an inquiry into the state of free speech in UK universities.** They found that while restriction of freedom of expression was not a widespread issue, there were concerns around increased bureaucracy, and potential self-censorship from students on campus as a result of the Prevent duty guidance. They also flagged intolerant attitudes and violent protest as potential obstacles to free speech, as well as a potential conflict in interpretation and grey areas in some existing laws and guidance.

In May 2018, in light of these concerns, the Universities Minister called a summit for leaders in the higher education sector. They agreed that the sector should support the Equality and Human Rights Commission to develop new guidance on freedom of expression.

We have worked with organisations from the higher education sector and beyond, to bring together the legal duties, risks, issues and regulation around free speech in England and Wales. These organisations include: the Department for Education, the Home Office, the Charity Commission, the Office for Students, the Higher Education Funding Council for Wales, the Commission for Countering Extremism, the National Union of Students (NUS), Universities UK, independentHE, and GuildHE.

While all of these partner organisations approach these issues from different perspectives, they do share the core ideas set out below. We would like to thank everyone who has given their time and expertise to develop this guide.

**PLEASE NOTE:** This guide does not replace the existing regulatory or statutory guidance relating to charity law or the Prevent duty, and readers should refer to those documents, listed in **Further reading**, for an official and comprehensive guide to their legal duties.

## Core ideas and key points

This guidance covers a number of issues but approaches them all from the same five core ideas:

1. Everyone has the right to free speech within the law.
2. Higher education providers should always work to widen debate and challenge, never to narrow it.
3. Any decision about speakers and events should seek to promote and protect the right to freedom of expression.
4. Peaceful protest is a protected form of expression; however, protest should not be allowed to shut down debate or infringe the rights of others.
5. Freedom of expression should not be abused for the purpose of unchallenged hatred or bigotry. Providers of higher education should always aim to encourage balanced and respectful debate

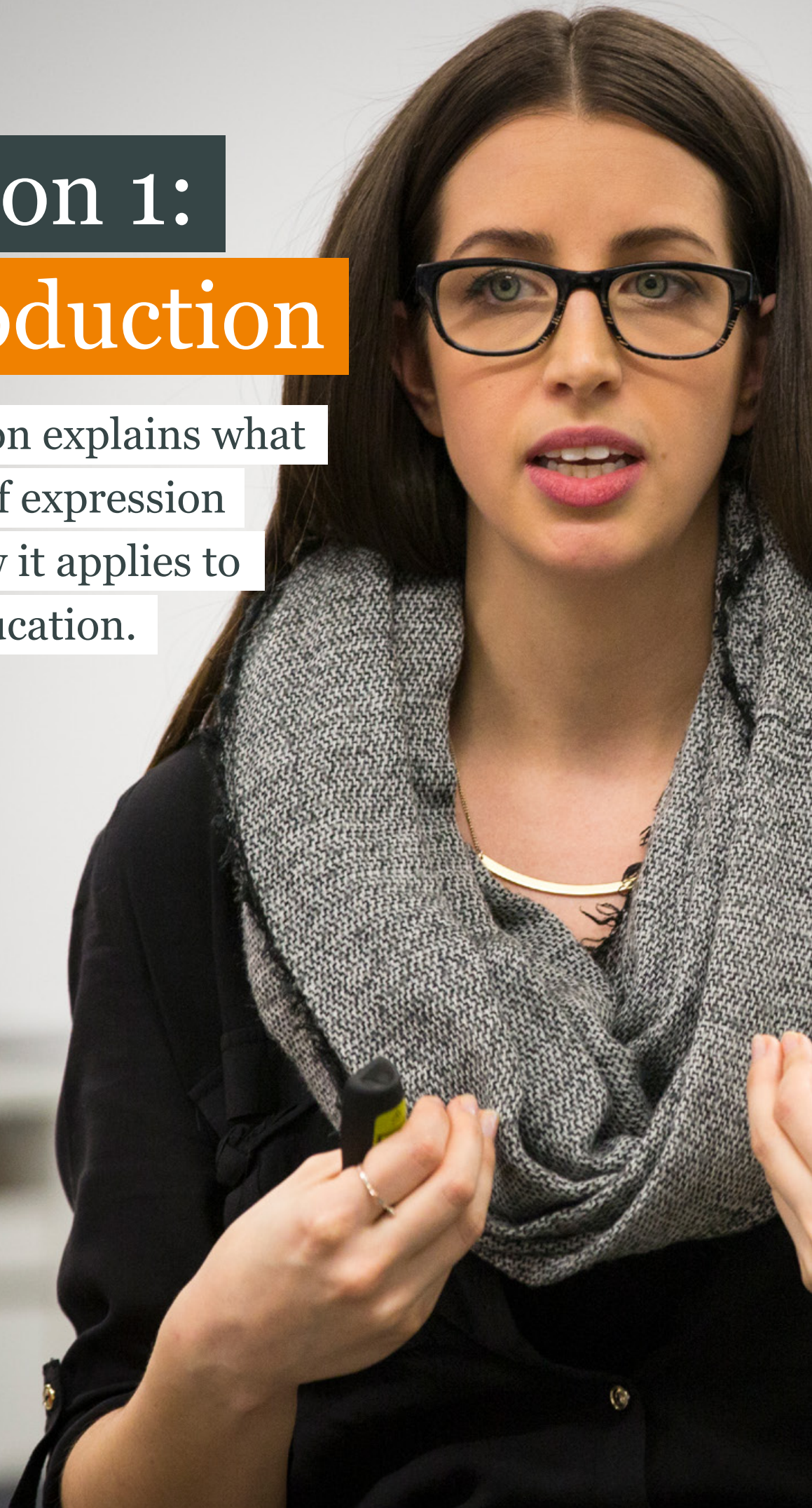
## Key points

- Everyone has the right to express and receive views and opinions, including those that may 'offend, shock or disturb others'.
- Protecting freedom of expression is a legal requirement for most higher education providers. Students' unions also have a role to play, although their legal duties are different (see **section 2**).
- Higher education providers need to have a code that sets out their policies and procedures relating to external speakers, and make sure their procedures don't create unnecessary barriers to free speech. They also need to make sure all students are aware of the code (see **section 2.2**).
- There are some circumstances where UK law limits the right to freedom of expression, for example, to protect national security or to prevent crime (see **section 3**).
- Most higher education providers and students' unions are registered charities and have a charitable purpose to further students' education for the public benefit. Free speech is an important part of meeting this purpose (see **section 3.3**).
- The starting point should be that any event can go ahead, but higher education providers have to consider all their legal duties carefully (see **section 6**).

# Section 1:

# Introduction

This section explains what freedom of expression is and how it applies to higher education.



## 1.1 What is freedom of expression?

Everyone has the right to freedom of expression. This means everyone has the right to express lawful views and opinions freely, in speech or in writing, without interference from the state or other bodies carrying out public functions, including most higher education providers.<sup>1</sup> This is true even when these views or opinions may ‘offend, shock or disturb’<sup>2</sup> others.

The European Court of Human Rights has described the right to freedom of expression as one of the ‘essential foundations of a democratic society’<sup>3</sup> because it gives everyone the right to exchange information, debate ideas and express opinions, including political views. Respectful debate and conversation helps us to challenge discrimination, get rid of intolerance and harmful attitudes, and build strong, positive communities.

Freedom of expression also supports artistic, scientific and commercial development. When we talk about freedom of expression, we mean both the spoken and written word, as well as actions, gestures and the display of images intended to show meaning. In this guide, ‘freedom of expression’ also includes ‘freedom of speech’.

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<sup>1</sup> See for example, *R (Ben-Dor) v University of Southampton* [2016] EWHC 953 with respect to public universities. The legal position on whether other HEPs are public authorities for the purpose of the Human Right Act 1998 is untested.

<sup>2</sup> *Delfi As v Estonia* [2014].

<sup>3</sup> *Handyside v the United Kingdom* [1976].



## 1.2 How does it apply to higher education?

‘Higher education’ describes a wide range of organisations. It covers ‘traditional’ universities, smaller and more specialist or vocational providers, as well as students’ unions, societies and other groups that operate in a campus environment. The way each organisation is set up will determine which laws apply to it. This means that the way the law requires them to manage and protect freedom of speech varies.

This guidance sets out the legal duties for the vast majority of universities and other higher education providers collectively, higher education providers or HEPs and students’ unions (SUs). HEPs and SUs that have different legal obligations can still use the general principles outlined in this guidance to promote and protect freedom of expression.

**HEPs should refer to Annex C to check which laws apply to them.**

Freedom of expression is a key part of the higher education experience.<sup>4</sup> Sharing ideas freely is crucial for learning, and allows students to think critically, challenge and engage with different perspectives. Therefore, HEPs should encourage discussion and exchange of views on difficult and controversial issues.

Most universities and other publicly funded HEPs in England and Wales have a legal duty to protect freedom of expression for their members, students and employees and for visiting speakers. SUs also have an important role to play in protecting freedom of expression, but their legal duties are different.

However, freedom of expression can be limited by law if necessary, for example, to prevent crime, for national security or public safety, or to prevent unlawful discrimination and harassment.

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<sup>4</sup> In this guidance, ‘higher education’ refers to any of the courses mentioned in Schedule 6 to the Education Reform Act 1988, which includes first degrees.

# Section 2: Freedom of expression in UK law

This section explains:

- how HEPs have to protect freedom of expression by law
- how the different legislation on freedom of expression works together, and
- how this applies to SUs.



## 2.1 What are the legal duties on HEPs to protect freedom of expression?

There are two main pieces of legislation requiring HEPs to protect freedom of expression: the Education (No 2) Act 1986 and the Human Rights Act 1998.<sup>5</sup> If a HEP doesn't meet their legal duties under these acts, they may be taken to court.

### The Human Rights Act 1998

The Human Rights Act 1998 says that all public bodies have to comply with the rights set out in the European Convention on Human Rights (ECHR).<sup>6</sup> This includes Article 10, which protects the right to freedom of expression. Article 10 protects your right to hold opinions and express them freely without interference from public bodies. In connection with freedom of expression, most publicly funded HEPs are likely to be public bodies for the purpose of the Human Rights Act 1998.<sup>7</sup>

#### Article 10 of the European Convention on Human Rights

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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<sup>5</sup> Freedom of speech in Britain is also a fundamental right under the common law: *Derbyshire County Council v Times Newspapers* [1993] AC 534.

<sup>6</sup> Section 6, Human Rights Act 1998.

<sup>7</sup> See footnote 1.

## When can Article 10 rights be restricted?

There are some reasons why restriction on freedom of expression may be allowed – they are mentioned in Article 10 (2) above. Public authorities can only restrict this right if they can show that their action is lawful,<sup>8</sup> necessary and proportionate (in other words, that it is appropriate and no more than necessary to address the issue) in order to protect the wider interests of society – for example, for national security or to prevent crime. If the aim could be achieved in a less restrictive way – for example, through open debate and challenge of the views being expressed – then the restriction on free speech would breach Article 10.

The courts generally say that the right to free expression should not be restricted just because other people may find it offensive or insulting. The police, Crown Prosecution Service and courts have to protect Article 10 rights when deciding whether an act or speech breaks the law. This decision usually depends on a number of factors, including the context of the speech and its purpose, as well as the actual spoken or written words.

Speech that is intended to inform rather than offend attracts greater protection, even if it could be seen as discriminatory.<sup>9</sup> An intolerant point of view, which offends some people, is likely to be protected if it is expressed in a political speech or a public debate where different points of views are being exchanged and are open to challenge. However, speech may lose the protection of Article 10 if it is used to abuse the rights of others, for example by inciting hatred.<sup>10</sup> To learn more about the difference between intolerant or offensive views that are protected under Article 10, and those that are not, see our guide on **'Freedom of Expression'**.

The ECHR also includes other rights that may be relevant to situations involving freedom of expression, including:

- Article 9: right to hold and manifest a religion or belief
- Article 11: right to freedom of assembly and association, and
- Article 14: right to non-discrimination in the enjoyment of Convention rights

Sometimes the rights of a speaker may conflict with the rights of other people affected by their views, for example, a protester's right to freedom of expression. Someone's freedom of expression may need to be limited if it would lead to a breach of another person's rights under the ECHR. To learn more, see **our guidance on ECHR rights and how they are protected.**

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<sup>8</sup> In this context, 'lawful' means that the restriction is prescribed by law.

<sup>9</sup> *Jersild v Denmark* [1994].

<sup>10</sup> Article 17 ECHR.

## Education (No. 2) Act 1986

Section 43 of the Education (No 2) Act 1986 (the s.43 duty)<sup>11</sup> places a legal duty on universities and other HEPs to take ‘**reasonably practicable**’ steps to ensure freedom of speech within the law for their members, students, employees and visiting speakers.<sup>12</sup>

This includes making sure, as far as possible, that no individual or group is stopped from using the HEP’s premises for any reason connected with an individual’s beliefs or views, or the policy or objectives of the group.<sup>13</sup> This duty includes any premises used by an SU, even if they are not owned by the HEP or located on its campus.<sup>14</sup>

The s.43 duty applies to speech that is ‘within the law’. This means it does not cover speech that would be a criminal offence, or break civil law, including charity law. We explain this further in **section 3**.

The s.43 duty refers to freedom of speech, but this does not necessarily mean that only the spoken word is covered. Although untested in the courts, the definition of speech is likely to include written material, both printed and electronic (such as social media, email and other digital communications, slogans, posters and leaflets).<sup>15</sup> HEPs should consider ‘freedom of speech’ to cover wider forms of expression.

## What does this mean for visiting speakers?

The s.43 duty does not mean that any group or speaker has a right to be invited to speak to students on HEP premises or at SUs. What it does mean is that a speaker who has been invited to speak at a meeting or other event should not be stopped from doing so unless:

- they are likely to express unlawful speech, or
- their attendance would lead the host organisation to breach other legal obligations

and no reasonably practicable steps can be taken to reduce these risks.

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<sup>11</sup> See: <https://www.legislation.gov.uk/ukpga/1986/61/section/43>.

<sup>12</sup> Education (No.2) Act 1986, s.43(1). See **Annex C** for details of all HEPs the s.43 duty applies to.

<sup>13</sup> As above, s.43(2).

<sup>14</sup> As above, s.43(8).

<sup>15</sup> The common law right to ‘freedom of speech’ is not restricted to the spoken word and it is likely that this legal term, used in legislation, would be interpreted in this way, as well as compatibly with Article 10 ECHR.

## 2.2 Code of practice

The s.43 duty also requires governing bodies of HEPs to have a code of practice (code) about securing freedom of speech and keep it up to date.

The code has to include:

- the procedures that members, students and employees have to follow in relation to meetings and other activities held on the premises, and
- the behaviours required of any people in connection with those activities.

HEPs have to take steps to ensure their members, students and employees follow the code. This includes taking disciplinary measures, if appropriate, if they do not comply with the code.<sup>16</sup> SUs should comply with their institution's code.

HEPs also have to communicate with their students (at least once a year) about the parts of the s.43 duty and code that are relevant to the activities or behaviour of the SU.<sup>17</sup>

A free speech public interest governance principle is also built into the regulatory framework of the Office for Students (OfS); failure of an institution to abide by its own s.43 code of practice may indicate non-compliance with a condition of registration.<sup>18</sup>

Guidance on what may constitute 'reasonably practical steps' and how to ensure an s.43 code complies with the requirements of Article 10 are set out in **section 6**.<sup>19</sup>

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<sup>16</sup> Education (No.2) Act 1986, s.43(4).

<sup>17</sup> Education Act 1994, s.22(4)(c).

<sup>18</sup> More information on how the OfS will regulate in relation to freedom of expression is included in **Annex A**.

<sup>19</sup> The Higher Education Policy Institute has produced a guide on **how to put together an effective code of practice that promotes free speech**.

## Academic freedom

Freedom of expression is relevant to, but should not be confused with, the important principle of academic freedom. Academic freedom relates to the intellectual independence of academics in respect of their work, including the freedom to undertake research activities, express their views, organise conferences and determine course content without interference.

As part of their duties under Article 10 and the s.43 duty, HEPs must protect the freedom of expression of academics and staff. Student complaints and protests should not result in HEPs imposing limits on course content or speaker events organised by lecturers. HEPs should also take steps, such as providing support to their staff, where necessary to make sure that the pressure of student complaints does not lead to self-censorship of academic work. They must also ensure that internal policies (for example, policies to comply with the Prevent duty) do not unduly inhibit academic freedom.

## 2.3 Do SUs have to comply with the s.43 duty and Article 10 ECHR?

Unlike HEPs, SUs are not likely to be 'public authorities' so they are not directly required to comply with Article 10. They are not directly required to comply with the s.43 duty either, but it does affect SUs in two important ways:

- It applies to SU premises. This is because HEPs have to take steps to ensure the lawful free speech of students, visiting speakers and staff on campus and that they are not denied use of SU premises because of their views.
- SUs have to follow their HEP's s.43 code of practice. This relationship is not always easy – SUs are usually independent bodies but the s.43 duty may sometimes mean that a HEP is indirectly accountable for their SU's actions in relation to freedom of expression. See **section 5** for guidance on how HEPs and SUs can work together.

Where an SU or other student group is not an independent body, it will be bound by their HEP's policies and s.43 code of practice.

## Section 3:

Where does  
the law allow  
for limitations  
on freedom of  
expression?

This section explains  
when speech is considered  
unlawful and when  
restrictions on freedom of  
expression may be required  
or allowed.



## 3.1 Criminal offences

Speech can be limited if it would break criminal law. Some of the criminal offences that may occur in relation to speech include:

- speech causing fear or provocation of violence<sup>20</sup>
- acts intended or likely to stir up hatred on grounds of race, religion or sexual orientation<sup>21</sup>
- speech amounting to a terrorism related offence,<sup>22</sup> and
- causing a person harassment, alarm, or distress.<sup>23</sup>

**Annex B** is a longer list of offences relating to freedom of expression.

### Case study

#### Unlawful harassment on campus

In 2018, a university student pleaded guilty to the crime of racially aggravated harassment. He had been filmed making racist chants in a hall of residence that caused distress to a resident. He admitted to using threatening or abusive words that caused the victim distress. The student was convicted and had to pay £500 in compensation.

## 3.2 Civil law breaches

There are some situations where civil law provides protection against offensive or harassing behaviour. These include discrimination or harassment under the Equality Act 2010. It may be that certain views are lawful to express, but are unlawful in certain contexts such as in the workplace.

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<sup>20</sup> Public Order Act, s.4.

<sup>21</sup> Public Order Act 1986, s.18 and 29B.

<sup>22</sup> Under the Terrorism Act 2006 or Terrorism Act 2000.

<sup>23</sup> Public Order Act 1986, intentionally (s.4A) or unintentionally (s.5).

## Equality Act 2010

When HEPs, SUs and their clubs or societies are acting as service providers to members of the public, or as associations under the Equality Act 2010,<sup>24</sup> they may be liable for discrimination against, or harassment of, their service users, members and guests.<sup>25</sup> This may apply when they are hosting speakers or events that are open to the public.

## Harassment

Harassment under the Equality Act 2010 is unwanted behaviour related to certain protected characteristics,<sup>26</sup> which has the purpose or effect of:

- violating a person's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Whether or not behaviour is harassment is not just based on the view of the person making the complaint. The courts consider whether it is reasonable for the behaviour to have that effect, as well as the circumstances. They have to balance competing rights, including the right to freedom of expression of the person responsible.<sup>27</sup>

The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.<sup>28</sup>

Also, if the subject matter of a talk is clear from material promoting an event, then people who attend are unlikely to succeed in a claim for harassment arising from views expressed by the speaker.

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<sup>24</sup> Equality Act 2010, s.29 and ss.101-102.

<sup>25</sup> HEPs may also be liable for harassment in their role as employers and education providers under parts 5 and 6 of the Equality Act 2010.

<sup>26</sup> **Annex C** sets out when the harassment provisions of the Equality Act 2010 may apply.

<sup>27</sup> Paragraph 116 of the Explanatory Notes to the Equality Act 2010 states, 'Courts and tribunals will continue to be required to balance competing rights on the facts of a particular case; this would include consideration of the value of freedom of expression (as set out in Article 10 of the European Convention on Human Rights) and of academic freedom'.

<sup>28</sup> See: <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/2/2/14>.

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

## Discrimination

HEPs, SUs and their clubs and societies must ensure they do not discriminate in the way they organise events. For an example, **see our guidance on gender segregation at events and meetings.**

In some situations, a discriminatory act may breach a person's freedom of expression as well as the Equality Act 2010.

**Direct discrimination** is when an individual is treated less favourably because of a protected characteristic.<sup>29</sup> For example, refusing to let female attendees ask male speakers questions would restrict their right to freedom of expression as well as directly discriminating against them on the basis of their sex.

**Indirect discrimination** Indirect discrimination can arise where a policy applies to everyone, but disadvantages a particular group or individual due to a protected characteristic. If this happens, the policy will not be unlawful if the person or organisation applying the policy can show that there is a good reason for it – that is, that it is 'a proportionate means of achieving a legitimate aim'.

## 'Hate speech'

The term 'hate speech' is widely used, but does not have any legal meaning. Generally, it describes forms of expression that incite violence, hatred or discrimination against other people and groups. Whether or not hate speech falls outside the protection of Article 10 and is unlawful depends on the context of what is said and when.

The criminal law balances the right to freedom of expression with the protection of individuals and communities from threats, abuse and harassment both on and offline. Where this line is crossed, the perpetrator may be prosecuted.

A list of the criminal offences used to prosecute offending behaviour, often described as 'hate crimes' is included in **Annex B.**<sup>30</sup>

<sup>29</sup> See: <https://www.equalityhumanrights.com/en/equality-act/protected-characteristics>.

<sup>30</sup> The CPS has produced the following guidance on the prosecution of 'hate crime': **racist and religious hate crime; disability hate crime; homophobic, biphobic and transphobic hate crime.**

## 3.3 Charity law

A significant number of registered HEPs and SUs are charities. For all institutions that are charities, whether they are regulated by the Charity Commission or not, their trustees are responsible for ensuring that their institution complies with charity law and any other laws that apply to them.

Trustees must make sure their charity acts in ways that further its charitable purposes, and no other purposes. For most charitable HEPs and SUs, their charitable purpose will be to further students' education for the public benefit. They can meet this by promoting, sustaining and increasing the knowledge of students and their understanding of specific areas of study, skills and expertise.

Charitable status does not stop SUs and HEPs from organising (or supporting students to organise) debates and discussions, or other activities that encourage students to gain knowledge, learn how to debate and form views on different issues. Encouraging debate on political matters and other matters of public or academic interest can be an important part of advancing education.

To meet charity law requirements, charities advancing education must be neutral in their starting point and must not promote a particular point of view, unless in doing so they will be advancing education for the public benefit. Trustees must take steps to ensure that freedom of speech and expression is facilitated in an open and accessible environment where views and opinions can be questioned and challenged.

Separately, charities can carry out political activities – such as campaigning for a change in the law – if this furthers their charitable purpose.<sup>31</sup> This could include organising debates on political issues and putting forward political resolutions for their students to vote on. However, trustees of an SU must not take steps to implement or campaign in support of such a resolution if doing so does not support their charity's purposes. SUs can campaign on political issues, such as tuition fees, if doing so supports their charitable purpose of advancing the education of students.

Furthermore, charity law does not require SUs to provide access for all external groups to their events or facilities (such as freshers' fairs) in the name of freedom of expression.

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<sup>31</sup> See for example the High Court case *Baldry v Feintuck* [1972] 1 WLR 552. The Charity Commission has published a guide for charities '**CC9: Campaigning and Political activities guidance for charities**' which trustees should follow in relation to speakers or events.

Finally, SUs can fund and support clubs or societies which have a range of political or party political views, as long as this furthers their charitable purposes, for example, by facilitating debate and discussion on political issues. SUs do not have to ensure that clubs and societies with opposing views have equal prominence, but SU funding and support in kind (i.e. access to spaces) must be made in way that is balanced and not unlawfully discriminatory.

Charity law also requires trustees of SUs to:

- manage the risk of criminal conduct, including terrorism or other criminal offences such as inciting racial or religious hatred
- comply with civil law obligations, for example, under the Equality Act 2010
- satisfy the ‘public benefit requirement’, which means ensuring that the charity’s activities are focused on benefit to the public, and
- manage their charity’s resources responsibly, for example, by avoiding exposing the charity’s assets, beneficiaries or reputation to undue risk.

Trustees must be able to show how they have decided to mitigate any risks associated with a speaker or event, when they invite speakers to attend.

Given the important role of SUs in advancing education through debate, it is important for trustees to consider any reputational harm to their charity that may arise if they prevent activities, such as planned speaker events, from going ahead, as well as the risks if they allow them to proceed.

To comply with their HEPs s.43 code of practice, the SU may also have to take steps to ensure speaker events can take place.

## Key issues for trustees to consider in relation to speaker events

Trustees should be clear on how hosting the speaker or event will further the purposes of the organisation.

They should also make sure that hosting a speaker or event is not likely to result in a breach of:

- criminal law
- charity law restrictions on political activities and campaigning, or
- other laws or rules that apply to the charity as this could expose its assets, beneficiaries or reputation to undue risk (for example, the risk of being sued for defamation or a breach of equality law).

## Student societies

Students' union trustees must comply with their charity law obligations when making decisions about funding and support for student societies. This means that, among other things, they must ensure that the funds given to student societies are only used for the charitable purposes of the SU and in compliance with the law.

## 3.4 Duty of care

HEPs and SUs have to take steps to ensure the safety of students, members, employees and visiting speakers, for example, under their common law duty of care. The s.43 duty does not require HEPs to protect free speech at the expense of the safety of staff, students or speakers.

For example, it would be reasonable to cancel an event if the participants would not be safe from physical harm, for instance, if there was a threat of violent protests. However, the provider would need to show that no 'reasonably practicable' steps, such as increased security (within reasonable cost) could have been taken.



# Section 4: Legal duties that may interact with freedom of expression

This section explains the other legal duties HEPs need to consider in relation to freedom of expression, including Prevent duty and the public sector equality duty.

## 4.1 What other legal duties do HEPs and SUs need to consider in relation to freedom of expression?

HEPs and SUs need to consider other legal duties that interact with freedom of expression, including Prevent duty and the public sector equality duty. These do not usually require restrictions to be put on lawful speech and other forms of expression.

### Prevent duty

Most HEPs<sup>32</sup> are subject to a statutory duty to have due regard to the need to prevent people from being drawn into terrorism.<sup>33</sup> This is known as the Prevent duty. HEPs should refer to the statutory **Prevent Duty Guidance for Higher Education** for guidance on how it applies to them.

HEPs must have regard to this statutory guidance when carrying out the Prevent duty,<sup>34</sup> and they should be able to demonstrate how they have considered it in their decision-making. The statutory guidance sets out the considerations that HEPs should take into account but it does not require a particular decision to be made in any given case.

In carrying out the Prevent duty, the Counter Terrorism and Security Act 2015 requires HEPs to have 'particular regard' to their s.43 duty,<sup>35</sup> and to the importance of academic freedom.<sup>36</sup> Compliance with the Prevent duty does not prevent HEPs from upholding their duty to protect freedom of speech.

When considering speakers who express extremist ideas, providers should be mindful that the Prevent duty and guidance are only relevant if there is a risk of people being drawn into terrorism. The guidance says that providers should consider carefully whether the views being expressed risk drawing people into terrorism and gives guidance on the type of actions that might be taken to mitigate this risk. Section 6 of this document gives some further examples of measures providers may wish to consider in order to mitigate risk. Providers can also contact their Prevent coordinators for more advice.

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<sup>32</sup> All providers of HE which are either publicly funded (including all those registered with the Office for Students) or have over 250 students.

<sup>33</sup> See **Annex A**.

<sup>34</sup> Counter-Terrorism and Security Act 2015, s.29(2).

<sup>35</sup> As above, Part 5, s.31(2)(a).

<sup>36</sup> As above, Part 5, s.31(2)(b).



As SUs are independent bodies, the Prevent duty does not apply directly to them. However, under charity law, all charities have to manage the risk of illegal behaviour, including terrorism or other criminal offences such as inciting racial or religious hatred. This means SUs should consider similar actions to HEPs to ensure that they are promoting freedom of speech safely in a way that manages these risks.

Aside from external speaker events, the Prevent duty guidance also includes a wider range of considerations (set out in the statutory guidance). Institutions must have regard to the duty across all of their activities; this includes training relevant HEP staff to be able to recognise vulnerability to being drawn into terrorism, and to know when to make referrals to the Channel programme.

However, HEPs should ensure that the way they comply with the duty does not lead to students or staff feeling uncomfortable expressing their political or religious views on campus. We have produced guidance on how universities in **England** and in **Wales** can comply with the PSED in relation to the Prevent duty, by assessing and mitigating the potential impact of Prevent action plans on equality and good relations.

## Case study

### Prevent duty and freedom of expression

A risk assessment of an invited speaker has shown that they have a history of associating with violent extremists and making statements that could risk drawing people into terrorism. They have publicly distanced themselves from these comments but continue to associate with extremist groups.

In this situation, the provider needed to consider the interaction between free speech and the Prevent duty. The HEP took advice from their Prevent coordinator on how significant the risk was and how it could be reduced. Proposed measures for consideration included making sure materials given out at the event (such as leaflets) were seen in advance, or making sure the event had a strong chairperson.

If the speaker agreed to give advance sight of materials and speak alongside an individual with an alternative viewpoint, the event should be able to go ahead as planned. However, if they did not agree to this, or if no chairperson or alternative viewpoint was available, the HEP may have decided the risk was too great and cancelled or postponed the event.

In this situation, neither decision would necessarily be unlawful. It is down to the institution to justify its decision, and make clear the steps it has taken to balance its legal responsibilities, taking into account the particular regard that must be had to the duty to take 'reasonably practicable' steps to ensure freedom of speech.

## Public sector equality duty (PSED)

Most HEPs must comply with the PSED under s.149 of the Equality Act 2010.<sup>37</sup> This is a duty to consider the need to:

- eliminate discrimination, harassment, victimisation and other behaviour that is prohibited by the Equality Act 2010
- advance equal opportunities between people who share a relevant protected characteristic and people who do not, and
- encourage good relations between people who share a relevant protected characteristic and people who do not, including the need to tackle prejudice and promote understanding.

The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

This means HEPs have a legal responsibility to think about how they can promote equality and minimise tension and prejudice between different groups on campus. This is something that HEPs must consider when they are promoting freedom of expression.

For example, when a HEP takes steps to ensure a debate on a divisive topic can go ahead – to protect free speech – it must consider the potential impact on students who may feel vilified or marginalised by the views expressed. They should think about how to ensure those students feel included and welcome within the HEP environment. HEPs who are subject to the s.43 duty should therefore use the PSED to encourage good relations, but without restricting lawful free speech.

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<sup>37</sup> The PSED applies to higher educational establishments specified in Schedule 19, Equality Act 2010.

## ‘Freedom from harm’

**NUS guidance** talks about the need to balance freedom of speech with ‘freedom from harm’. Freedom from harm may refer to a number of the legal duties mentioned in this guide, including an SU’s duty of care and responsibilities to protect students from unlawful harassment, discrimination and hate crime

SUs are entitled – and required, to the extent that the speech may break the law – to consider ‘harm’ that someone’s views may cause to some of their members, when deciding whether to invite a speaker to an event they are organising.

However, if a speaker has already been invited by an SU society or group and the speech will be lawful, the SU will need to consider their obligations under their HEP’s s.43 code of practice. If an SU cancels a speaker in these circumstances, their HEP has a duty to take reasonably practicable steps to ensure the speaker event can proceed.

## Section 5:

# How HEPs and SUs can work together on freedom of speech

SUs and HEPs serve the same student body and often have similar legal responsibilities.

This section explains how they can work together to support freedom of expression.



## How HEPs and SUs can work together on freedom of speech

Governing bodies of HEPs have certain responsibilities for SUs. These include a requirement to tell all students about their s.43 code, and ensure freedom of speech (as required by the s.43 duty) on SU premises. They must also have a system for handling student complaints about their SU.

The s.43 code should explain the procedures staff, students and SUs have to follow when organising events. HEPs and SUs should try to align their policies and procedures in relation to external speakers, taking account of the s.43 duty. However, HEPs should ensure that their s.43 code and Prevent duty policies do not create unnecessary barriers to freedom of speech.

Individual HEPs and their SUs should decide how to manage their relationship within the law, and most HEPs and SUs already work together on issues of freedom of speech and expression to ensure they meet their legal duties.

HEPs and SUs will generally want to agree risk management procedures, or at least understand each other's approach. Expectations should be clear where the responsibilities of the HEP and the SU may overlap, and it might be helpful to have formal structures to escalate issues.

The Committee of University Chairs and NUS have published [guidance on relationship agreements for HEPs and SUs](#). See also the Higher Education Policy Institute's [guidance on creating an effective code of practice](#) and Universities UK's [guidance on external speakers](#).



Section 6:  
Guidance for  
HEPs making  
decisions on  
how to protect  
freedom of  
speech

## Guidance for HEPs making decisions on how to protect freedom of speech

Every HEP must have a clear s.43 code of practice that is kept up to date. The code should include clear steps to take in relation to the organisation of meetings or speaker events and questions around freedom of speech that arise.

The starting point to approach any event should be that it is able to go ahead. However, there will be some situations where HEPs need to use their judgement to balance their other legal duties.

They should only consider cancelling an event if there are no reasonable options for running it.

The questions in this chart may help HEPs to make a decision, as well as following the steps in their s.43 code of practice. Often, there is no one right answer to these questions and each situation will be different. Although it will fit a number of situations, the chart does not cover everything; HEPs should consider each legal duty and make a judgment accordingly.

It may not be for one individual to answer all of these questions. For example, if the event is hosted by the SU they may follow their own processes and carry out due diligence checks and risk assessments (the NUS has its own **guidance** for SUs on how to do this). However, the HEP should make sure that there is documentation showing that all of these steps have been followed and is ultimately responsible for ensuring compliance with the s.43 duty.

1. Does the event meet my duties under charity law?

Does it further my charitable purposes? (Usually, these will include furthering education and promoting academic enquiry).

2. Is the speech likely to be unlawful (e.g. a criminal offence or harassment?)

Has the individual/group spoken unlawfully in the past, or indicated a likelihood of doing so? Does the topic or purpose of the event imply it will be unlawful, carefully considering the requirements of Article 10?

**If yes** - you determine it is likely the speech will be unlawful and the risk cannot be reduced - there is no obligation to let the event proceed.

If you **do not have enough evidence that unlawful speech will take place**, but still consider it a risk, you will want to consider steps to reduce the risk. The event should proceed.

3. Have I considered my other legal duties, including the PSED and Prevent duty?

For example, is the speech likely to risk drawing people into terrorism? Is it likely to affect good relations between groups?

**If yes**, you will need to consider how you can reduce these risks or impacts while allowing the event to go ahead, and record your decision.

**If no**, you should record how you reached the decision and why you considered there would be no risks or negative impacts.

4. Are there any other potential barriers to speech going ahead, such as security concerns about planned protests?

If so, can I take **reasonably practicable steps** to remove these barriers?

**If yes**, you can put in place reasonably practicable steps to reduce risks and address barriers – then you must take those steps and the event should go ahead..

**If no**, the steps are not reasonably practicable –then the obligation to secure free speech and let the event proceed falls away.



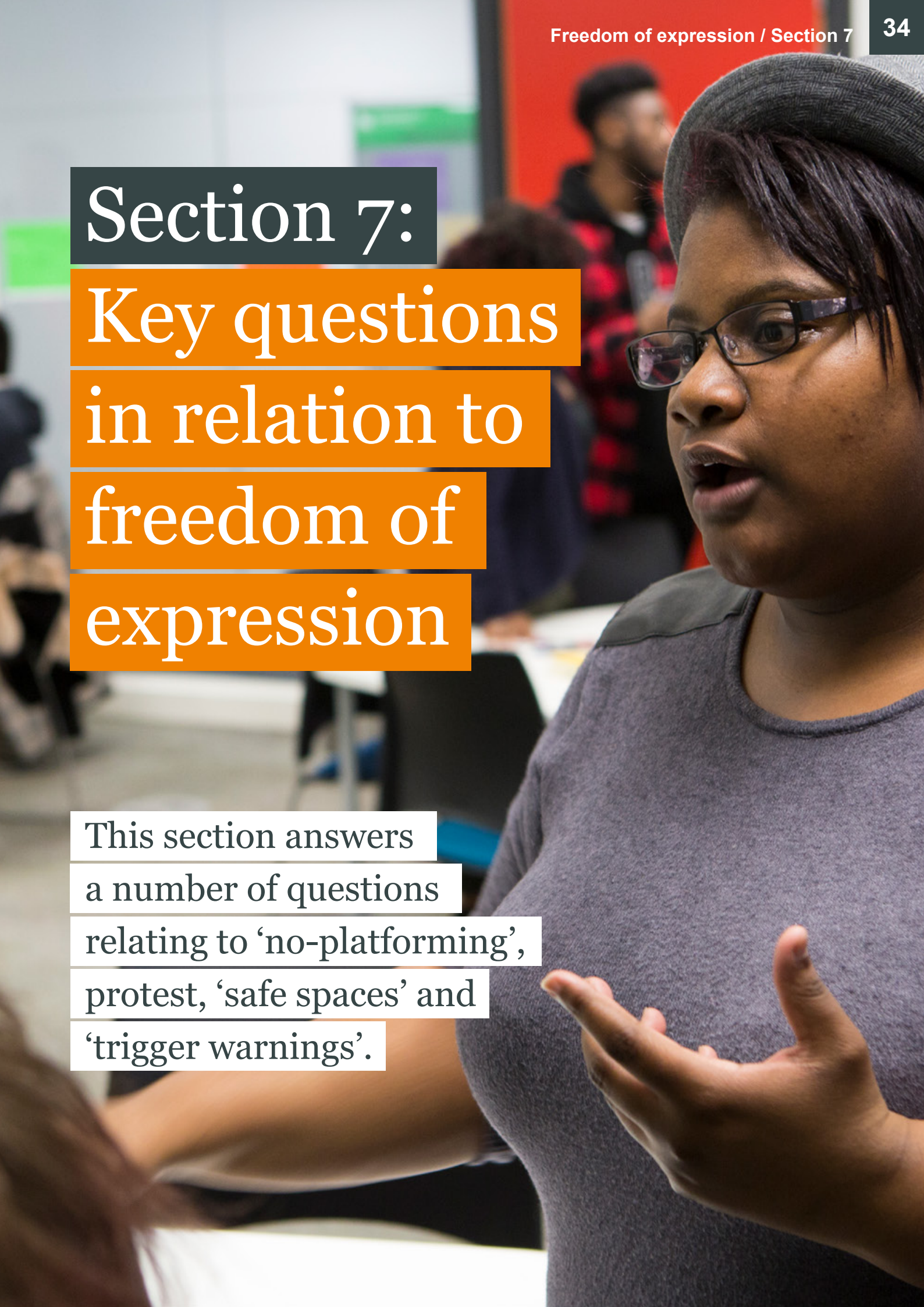
## What might 'reasonably practicable steps' or 'risk mitigations' be?

To meet the s.43 duty HEPs have to consider if there are reasonably practicable steps they can take to ensure lawful speech is protected.

Promoting balanced debate and challenge at events can often reduce any legal risks as well as furthering the purpose of the PSED and Prevent duties.

Steps might include:

- challenging high-risk speakers with opposing views
- having an independent chairperson to facilitate an event and make sure a range of viewpoints can be heard
- filming an event to deter the use of unlawful speech
- putting additional security in place
- ticketing an event to avoid non-student violent protest
- requesting to see any promotional materials before the event
- having a policy setting out principles of respectful discourse that speakers have to follow
- supporting and encouraging the SU and student body to host debates
- training staff on how to facilitate well-balanced debate, and
- postponing the event if necessary to enable one or more of the steps above to be taken.

A woman with dark hair and glasses is speaking at a public event. She is wearing a grey t-shirt and has her hands raised in a gesture. The background is slightly blurred, showing other people and a red wall.

# Section 7: Key questions in relation to freedom of expression

This section answers a number of questions relating to ‘no-platforming’, protest, ‘safe spaces’ and ‘trigger warnings’.

## What is 'no-platforming' and is it lawful?

'No-platforming' has attracted a lot of media attention but is often misunderstood and misreported.

The NUS has a formal **No Platform policy** that prevents the organisations it lists, which are known to hold racist or fascist views, from speaking at NUS events. It also says that NUS officers should not take part in public events with members of these groups. The NUS' National Conference decides the policy and the organisations included.

The NUS is not a charity and is not subject to the s.43 duty. It is free to adopt and enforce its no-platforming policy in relation to its own activities. The NUS's policy does not extend to SUs, although many SUs have adopted similar policies. These are shaped and voted on by their members, and tend to either ban proscribed groups (as required by law) and/or exclude people or organisations who are associated with 'hate speech', fascist views and/or support for violence which are likely to be unlawful.

The term 'no-platforming' is also sometimes used to describe individual decisions not to invite a certain speaker. These are not 'no-platform' policies.

Policies not to invite certain individuals or groups may be adopted by trustees, for example, to protect the reputation of the SU, the welfare of students, and to prevent funds being used for a purpose which is not in the public benefit. However, if a student group or member of staff invited a speaker from an organisation that is subject to a 'no-platform' policy and the SU, their officials or other students attempt to stop them from speaking, the HEP must decide whether the speech is protected by the s.43 duty. If so, the HEP has a legal duty to take steps to enable them to speak.

SUs should be aware that creating a ban for certain groups or named individuals, could breach a HEP's s.43 code of practice and undermine the right to freedom of expression. In relation to named individuals, SUs should be cautious about the risk of liability for defamation, which could place it in breach of charity law obligations by exposing its assets and reputation to risk.

## Case study

An SU considers inviting a writer to debate gender equality. It has a policy of not inviting speakers who use what it calls 'hate speech'. During planning, they find out that the writer has spoken on social media about their belief that women with a Gender Recognition Certificate are still men. The SU official organising the debate decides that the writer's views amount to transphobic hate speech, and announces on Twitter that they have decided not to invite the writer. The writer complains that the SU's decision to 'no-platform' them violates their right to freedom of expression.

The writer has not yet been invited to speak, and, as there is no legal duty on the SU to invite them, there is no infringement of the writer's freedom of speech.

However, if an affiliated society or other students invited the same speaker to talk, the SU could not prevent them from doing so as the speaker's views are lawful. This would engage the HEP's s.43 duty to protect free speech, informed by the Article 10 rights of the students and speaker to give and receive ideas.

## Can students protest events without breaching the speaker's right to freedom of expression?

Protests in higher education often occur in relation to events hosted by HEPs and SUs. The right to protest non-violently is a vital part of democratic society, and a way in which individuals can use their right to freedom of expression. Because of this, it is protected by Article 10.

For decades, HEPs have hosted a tradition of students organising rallies, holding counter-events and staging sit-ins to protest around issues they are passionate about. However, there may be occasions where through disruption, a speaker is stopped from speaking freely; HEPs should take steps to ensure this does not happen at events. HEPs may want to consider working with their student body to support peaceful protest, while making it clear that protest should not be at the expense of others' right to freedom of expression.

Concerns about security and people's safety have been cited as the reason for cancelling some events in the past. While this is sometimes a valid reason for cancelling an event, the s.43 duty requires HEPs to take all 'reasonably practicable' steps to enable the event to go ahead, which may include increasing security measures.

## Case study

An event is organised by an atheist SU-affiliated society to debate whether God exists. Before the event, people complain that it should not go ahead because some of the group's views and campaigning materials are offensive to individuals with a religion or belief. The event happens, but is interrupted by chanting and shouting from faith student activists in the audience. Those activists are eventually escorted off the premises by security, and the event is postponed.

The views expressed by the speakers and protestors are not unlawful; both are protected by the s.43 duty. But there is a need to balance the rights to freedom of expression of the members of the atheist student society, by enabling the event to proceed, and the faith student activists' right to protest.

The HEP knew there was opposition to the event, and was under a duty to take all "reasonably practicable" steps to ensure the event could go ahead. This could have included providing additional security to ensure that protestors could be removed if they refused to leave or stop their protest after having a reasonable opportunity to express their views, or exploring with the society whether an event where a range of views would be expressed was a viable alternative.

As an issue that is causing confrontation on campus between groups of individuals who share protected characteristics, the PSED requires the HEP to consider what steps it can take to ensure atheists feel able and safe to organise future events, and to promote good relations between atheist and religious students on campus.

There have also been concerns that protest can lead to harassment or intimidation of students. If the actions or views expressed by protestors break the law then they are not protected by the s.43 duty.

## Case study

A group of students organise a protest in a public area on campus, holding banners and handing out leaflets criticising the policies of the state of Israel. During the protest a student defaces an Israeli flag with a swastika, and makes a Nazi salute.

University security officers are made aware of the protest, but decide to let it continue as nobody is threatening violence or disorder against a specific individual. Complaints are later made to the HEP that the Nazi salute and flag defacement was anti-Semitic and the protest should have been stopped to protect Jewish students from anti-Semitic hostility on campus.

While students are allowed to hand out leaflets and protest in a peaceful and lawful manner, the use of a Nazi salute and defacement of the flag may amount to a public order offence and/or the offence of incitement to racial or religious hatred, because of the association of the Nazis with anti-Semitism and atrocities against Jewish people, including the Holocaust.

The HEP should have decided whether the individual student's actions were linked to the wider protest. If this was the action of one individual, removing them from the protest and allowing the lawful protest to continue, would probably strike the right balance between preventing unlawful acts and protecting free speech.

When the HEP decided whether to let the protest carry on, they should have considered what steps they should take to ensure Jewish students on campus do not feel discriminated against or harassed, and promote good relations between Jewish and non-Jewish students, to comply with the PSED.

## **Do HEPs have to take disciplinary action against protesters who infringe freedom of speech?**

When a student group complains to a HEP that another group with opposing views is infringing their freedom of speech, for example, by conducting disruptive protests, a HEP may take disciplinary measures against the student protesters, if this is an appropriate step they can take to secure compliance with their s.43 code and protect free speech.

The HEP will need to consider whether disciplinary proceedings are appropriate, and what other steps it can take to ensure compliance with their s.43 code. They should investigate the complaint and make sure they give full respect to the protesters' right to freedom of expression, and the HEP's duty to protect lawful speech, before taking disciplinary measures. If the protests have included unlawful actions, such as public order offences, then disciplinary action may be appropriate. However, disciplinary action should not be used to prevent lawful protest protected by the s.43 duty and Article 10.

The PSED should inform the HEP's decision on how to address the complaint. Even if disciplinary action is not appropriate, there may be steps the HEP can take to promote good relations between students, and prevent discrimination and harassment on campus.

Some HEPs require students to sign codes of conduct that prevent them from acting in a way that affects the interests of the HEP or damages its reputation. HEPs must not rely on a code of conduct to take disciplinary action against a student where they consider a student protest or public statement has damaged the HEPs reputation, if this will interfere with the student's right to freedom of expression. Disciplinary proceedings in relation to speech should only take place if the HEP considered the speech to be unlawful. Otherwise, it is likely that the HEP will be in breach of its s.43 duty.

## **What are 'safe spaces' and are they allowed?**

Some SUs have 'safe space' policies, which aim to create welcoming, inclusive environments on campus, and ensure that people with particular protected characteristics are free from harassment and discrimination. In some cases, safe spaces also refer to meetings of individuals sharing protected characteristics (e.g. a women's group or LGBT+ group) where only people sharing that characteristic can attend.

Safe spaces have been cited as a reason why freedom of expression may be restricted by SUs, although actual examples are hard to find. Creating a 'safe space' is not unlawful, but care should be taken when applying any policies in a 'blanket manner', for example, across campus, to make sure they do not restrict freedom of expression.

## Case study

A group calling itself 'Laddism Reborn' applies to the SU to be affiliated, so it can get funding and use the SU facilities for its activities. The group aims to promote 'lad culture', encouraging sexist and homophobic 'banter', heavy drinking and sexual harassment of women on its promotional material (printed leaflets and social media platforms).

The SU refuses affiliation, expressing its view that the group is misogynistic and citing its aim to create 'safe spaces' for all students using its zero tolerance to sexual harassment policy and equality and diversity policy, as well as its general commitment to ensuring student welfare. It notes that the HEP has similar policies in respect of these issues. The SU also refuses to allow the group to promote itself by putting leaflets in buildings or on notice boards on campus. The group states that its right to freedom of expression is being infringed.

The SU is allowed to have a policy to protect members from harassment, including on the grounds of sex. While the NUS encourages SUs to take a balanced approach to affiliating societies, a decision not to approve and provide funding on the basis that it would not comply with its charity law obligation to use its assets for the public benefit, or further its charitable object of promoting student welfare, may be justified.

There may have been a concern that the non-affiliation breached the HEP's s.43 code, but neither Article 10 nor s.43 require SUs to provide funds and support to any particular group.

Because the distribution of leaflets and use of noticeboards would be in a public place, where people have not chosen to go and hear about the group, this could be seen as harassment under the Equality Act 2010. If the promotional material was unlawful, the HEP would have no obligation under the s.43 duty to require the SU to let the group advertise on public noticeboards or hand out its leaflets on their premises.

The students could continue to meet as 'Laddism Reborn'. However, reputational harm may be done to the HEP, and the group members could face disciplinary action if their expressed views are so offensive and discriminatory against women that Article 10 or the s.43 duty does not protect them.



## Can an SU refuse to affiliate certain societies?

There are concerns about whether refusing a particular group or society affiliation to an SU is denial of freedom of speech. This is because refusing affiliation would mean that certain student groups would not have access to the funding and resources that other groups have.

The Education Act 1994 requires SUs to have a system for allocating resources to groups or clubs, which is fair, in writing and freely accessible to all students.

### Case study

An anti-abortion group requests affiliation to its SU. The SU advises that it restricts promotional material, such as the use of imagery likely to distress, as a condition of approval.

The group refuses to agree to the conditions so the SU refuses affiliation. The group feels that its freedom of expression is being violated and complains to the HEP and the Charity Commission.

SUs have no legal obligation to affiliate every group that applies to them as long as its decision-making is well reasoned and justifiable. However, it is possible that members of the group seeking affiliation may have a particular protected characteristic (for example, religion or belief). If that is the case, the SU will need to ensure that it is not discriminating against the group based on that protected characteristic, by refusing affiliation.

The SU might find it helpful to have a clear policy explaining its values and ethos and how these support its charitable objectives, which would demonstrate where this group does not align with them, and to carry out a careful analysis of whether not allowing the group to affiliate is the best decision.

## Are SUs allowed to refuse certain groups access to freshers' fairs?

A freshers' fair is a private event and most are managed by an SU.

As good practice, an SU should make sure a wide range of views are represented at freshers' fairs, but this does not mean they have to give a platform to every view, and they are under no obligation to invite certain groups, for example, they may limit participation to groups with SU affiliation. However, if the freshers' fair is generally open to all those who are interested in having a stall, but a certain group or individual has their application refused based, for example, on their views or beliefs, the SU would need to consider whether the decision to refuse them access discriminates against them on the basis of a protected characteristic. The parent HEP would also need to decide whether this is a breach of their s.43 duty and whether steps should be taken to ensure a stall is not denied on this basis.

### Case study

A far-right group applies and pays for a space to promote 'Christian British identity' at a number of freshers' fairs across the UK. Three institutions reject its application. The rejections cite various grounds, such as that the organisation does not provide impartial information to students, that it promotes an issue that is not suitable for a freshers' fair or that the topic is highly politically sensitive. The organisation makes a complaint to the OfS stating that their right to free expression is being curtailed by the denial of a space at the fairs.

The OfS concludes that the evidence does not provide grounds for them to intervene. The OfS would be concerned if all efforts by a certain group to speak on campus were being systematically denied over a period of time; however, it does not regulate SUs or deal with individual complaints about them. They note this in their response to the organisation, explaining that the evidence did not demonstrate a systematic breach of the freedom of expression of this organisation and that individual complaints should be raised through SU channels.

In their decision, taking into account that SUs do not have to issue an invitation or offer space to external organisations, the responsible HEP's s.43 duty does not apply. The SU is also not obliged to ensure all views are represented at their events, although they must not unlawfully discriminate. If it was found that any of the SUs were denying a stall to the organisation because of a protected characteristic, such as religion or belief or sex, this might amount to unlawful discrimination.

The OfS also consult the Charity Commission, who conclude that there is no evidence of a violation of charity law.

## What are ‘trigger warnings’? Is using them lawful?

Trigger warnings are used to let people know that subjects are due to come up with content that some of them may find distressing or difficult. For example, some HEPs use trigger warnings to signal that material may include scenes or references to sexual violence. By warning event attendees about the nature of views that may be expressed, trigger warnings may help to facilitate free speech by enabling balanced debate to take place without causing harassment. People who might find the views offensive or distressing can make an informed decision to stay or leave.

Although trigger warnings may lead certain students to choose to opt-out of debate or discussions, the action is not stopping anything being discussed by those who want to attend. Event organisers should, however, think about how trigger warnings may be provided in a way that does not risk unnecessarily putting people off participation.

## How can individuals report a concern?

If an individual – whether staff, student or member of the public – has a concern about the actions of a HEP, the first step is to raise this with the senior management of the HEP. Individuals should be able to contact either the communications team, or the office of the vice-chancellor (or equivalent). If the response is unsatisfactory, a formal complaint can be made to the HEP.

Once the complaint procedures of their HEP have ended, students can take unresolved complaints about free speech to the Office of the Independent Adjudicator (OIA). The OIA will assess how the provider has considered the complaint; whether it was in line with its procedures and whether those procedures were fair. It will also consider whether the final decision was fair and reasonable given the circumstances.

If the concern regards an SU, the first step is to raise the issue with either the president or CEO of the SU. If their response is unsatisfactory, the individual can make a complaint to the parent HEP or approach the regulator, the Charity Commission.

## The OfS's notification process

The OfS is introducing a notification process for whistle-blowers, or others to report issues of concern; this will include notifications in relation to freedom of speech.

The OfS will use any relevant information to decide whether there are any broader, systemic issues which mean free speech is being prevented at either a particular HEP or more widely across the higher education sector. The OfS can take action to ensure the provider is acting in line with the public interest governance principle in the OfS's regulatory framework and there are a number of actions the OfS could take if free speech is being suppressed. These will only be used after careful consideration.

The OfS is not a complaints resolution body: it will consider complaints as intelligence about whether providers are at risk of breaching conditions, but will not arbitrate or rule on individual disputes.

More information about how the OfS will regulate in relation to freedom of expression is included in **Annex A**.

# Annex A: Regulation of HEPs and SUs in relation to freedom of speech

There are different regulators for HEPs and SUs:

- The Office for Students regulates HEPs in England and also ensures that they comply with the Prevent duty and with Charity Law.<sup>38</sup>
- HEPs in Wales are regulated by the Charity Commission, in relation to their obligations under charity law, and the Higher Education Funding Council for Wales (HEFCW) ensures compliance with the Prevent duty.
- SUs in England and Wales are regulated directly by the Charity Commission and must follow the guidance it produces.

Regulators carry out public functions and are subject to the Human Rights Act 1998 and the PSED. Each regulator has to consider the obligation to protect free speech alongside other duties and rights, remembering that speech that engages the public interest, particularly debate intended to inform and political comment, has high protection under Article 10.

Our fellow regulators set out below how they work to uphold freedom of speech.

## The Office for Students (OfS)

The Office for Students (OfS) regulates English HEPs. It was set up by the Higher Education and Research Act 2017 and its new regulatory regime will be fully operational from 1 August 2019.

The OfS's role to uphold free speech operates at both provider and sector level. It will also consider its general duty to have regard to the need to protect institutional autonomy. It is committed to working with the higher education sector to ensure that freedom of speech and debate remain an integral part of the UK higher education experience.

The OfS's regulatory framework explains how it will carry out its regulatory functions and exercise its powers; this framework also includes measures to protect freedom of speech.

As a condition of registration with the OfS, providers are expected to adhere to a list of public interest governance principles; these include a requirement that a provider's governing body 'takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider'.

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<sup>38</sup> Most English universities and HEPs are 'exempt charities', as specified in Schedule 3 to the Charities Act 2011. Exempt charities have to comply with charity law but are exempt from registration with the Charity Commission and, as of 1 April 2018, they are regulated by the Office for Students.

As part of its assessment of providers during the registration process, the OfS ensures that a provider's governing documents uphold the 'freedom of speech' public interest governance principle.

Where these arrangements do not meet baseline requirements, the OfS is able to intervene and apply sanctions where these are considered necessary.

When issues of concern or evidence of a possible breach of a registration condition (or of an increased risk of non-compliance with a registration condition) are reported, the OfS will take a risk-based, proportionate response. In such circumstances, a range of interventions by the OfS would be available, including enhanced monitoring, the imposition of specific conditions of registration, or a sanction. The OfS will aim to identify if there is credible evidence to support the area of concern but it is not able to investigate an individual or collective employment dispute.

The OfS may also publish details of regulatory action taken where there has been a breach of a registration condition.

The OfS is also responsible for monitoring the implementation of the Prevent duty in higher education to ensure HEP policies and procedures are adequate, effective and proportionate, and appropriately balance their Prevent and freedom of speech duties.

As the principal regulator for HEPs in England, the OfS must also promote charity trustees' compliance with charity law and monitor charity law compliance. However, the OfS does not have any powers to enforce charity law. It can ask the Charity Commission to open an inquiry if it thinks that a HEP is not complying with charity law. The Charity Commission must consult the OfS before using any of its powers in relation to HEPs.

## Higher Education Funding Council for Wales

Higher education is devolved in Wales. Although HEPs in Wales are covered by the Education (No.2) Act 1986, they are also subject to the provisions in the Higher Education (Wales) Act 2015, which provides a specific regulatory framework overseen by the Higher Education Funding Council for Wales (HEFCW).

HEFCW's duties include monitoring HEPs' compliance with fee and access plans, and assessing the quality of education provided, including taking into account the importance of academic freedom. They are also responsible for monitoring the implementation of the Prevent duty in higher education in Wales, and ensuring that HEP's policies and procedures balance their Prevent and freedom of speech duties. However, although HEPs in Wales are subject to the s.43 duty and have to keep a code of practice, HEFCW has no regulatory role in ensuring freedom of speech.

Charitable HEPs in Wales have to register with the Charity Commission and are subject to their requirements. HEFCW and the Charity Commission work together to share information and coordinate their regulatory activities.

## Charity Commission

The Charity Commission is the registrar and regulator of charities in England and Wales, and is responsible for maintaining the charity register. The Charity Commission is constituted as a non-ministerial government department, independent of ministerial influence and from charities. It has a number of quasi-judicial functions.

Under the Charities Act 2011, in England and Wales, an organisation is a charity if it is established for exclusively charitable purposes for the public benefit and falls within the jurisdiction of the High Court regarding charities.

Charitable SUs are independent charities, which, since 2010, have been required to register with the Charity Commission if their income exceeds £100,000. Charitable SUs with an income of £100,000 or less are recognised as 'excepted charities' and, though they not required to register or submit annual returns, are still regulated by the Charity Commission.

Most charitable English HEPs are 'exempt charities', specified in Schedule 3 to the Charities Act 2011. Exempt charities must comply with charity law but do not have to register with the Charity Commission. Under the Charities Act 2011, exempt charities must have a 'principal regulator' to regulate them. The principal regulator for English HEPs is the Office for Students. Exempt charities are still subject to the enabling, investigation and enforcement powers of the Charity Commission, although the Charity Commission must consult with the principal regulator before using any of its powers.

In Wales, universities and other HEPs are also registered with and regulated by the Charity Commission.

The Charity Commission's guide '**The Essential Trustee: what you need to know, what you need to do (CC3)**' explains the legal responsibilities and key duties of all trustees of charities in England and Wales. Those duties include that trustees have obligations to:

- act in line with the charity's purposes for the public benefit
- act in the charity's best interests
- act reasonably and prudently, and
- safeguard and protect the charity's assets, including its reputation.

Other Charity Commission guidance that all charity trustees are required to comply with, includes:

- **Campaigning and political activity guidance for charities (CC9)**
- **Chapter 5 - Protecting charities from harm: compliance toolkit**

## Annex B: Relevant criminal offences

Laws that place limitations on freedom of expression in England and Wales include:

Crime and Disorder Act 1998

- racially or religiously aggravated offences (sections 29-32)

Offences Against the Person Act 1861:

- threat to kill (section 16)

Public Meeting Act 1908:

- endeavour to break up a public meeting (section 1)

Public Order Act 1986:

- fear or provocation of violence (section 4)
- intentional harassment, alarm or distress (section 4A)
- harassment, alarm or distress (without intent) (section 5)
- acts intended or likely to stir up hatred on the grounds of race (sections 18-23); religion (sections 29B-29F); or sexual orientation (sections 29B-29F)

Serious Crime Act 2007:

- encouraging or assisting the commission of an offence (sections 44-46)

Terrorism Act 2000:

- incitement to commit acts of terrorism overseas (section 59)
- inviting or encouraging support for a proscribed organisation (section 12)

Terrorism Act 2006:

- encouragement of terrorism (section 1) including the glorification of the commission or preparation of terrorism (sub-section 1(3))
- dissemination of terrorist publications (section 2)
- encouragement of terrorism and dissemination of terrorist publications via the internet (section 3)



## Annex C: HEPs and legal duties

Use this table to see which legal duties may apply to your institution. Because of the diverse range and legal nature of HEPs and changes to legislation, it is not comprehensive. If you are not sure about which duties apply to your institution, you should seek your own legal advice.

Legal duty	Higher education bodies the legal duty applies to:
Section 6 Human Rights Act 1998	<p>'Public authorities' have to comply with the European Convention on Human Rights, including Article 10.</p> <p>Most publicly funded HEPs are likely to be 'public authorities' in connection with the promotion of freedom of expression for their students, members, employees and visiting speakers.<sup>39</sup></p>
s.43 (1) Education (No. 2) Act 1986 (duty to secure freedom of speech within the law)	<p>This applies to establishments listed in s.43(5) Education Act 1986<sup>40</sup> which includes any university, and university colleges. It also includes (broadly speaking) all HEPs that directly receive public funding. When s.43(4A) of the Education Act 1986 comes into effect, the duty will cover all providers registered with the OfS.</p> <p>The s.43 duty applies indirectly to the activities of the responsible HEP's SU through requirements to comply with the HEP's s.43 code of practice, for example in a Memorandum of Understanding between the SU and HEP, or as a condition of use of HEP premises.</p> <p>HEP disciplinary codes may also require students to comply with an s.43 code of practice.</p>
Charity law	SUs and HEPs that are charities are subject to charity law.

<sup>39</sup> See footnote 1.

<sup>40</sup> Section 43 (5) will be amended by Sch 11, para 5 of the Higher Education and Research Act 2017 when it comes into force, which brings into scope any HEP registered with the OfS.

Legal duty	Higher education bodies the legal duty applies to:
Harassment under s.26 the Equality Act 2010	<p>SUs, student societies/clubs and HEPs acting as services providers (Part 3 Equality Act 2010) or associations (Part 7 Equality Act 2010) are prohibited from harassment related to the protected characteristics of age, disability, gender reassignment, race or sex (the protected characteristics of religion or belief and sexual orientation are not covered by the harassment provisions in these contexts).</p> <p>HEPs or SUs as employers (Part 5 Equality Act 2010), and HEPs as education providers (Part 6 Equality Act 2010)<sup>41</sup> are prohibited from harassment related to age, disability, gender reassignment, race, religion or belief, sex or sexual orientation.</p>
Direct and indirect discrimination under ss. 13 and 19 of the Equality Act 2010	Under the relevant parts of the Act noted in the harassment section above, HEPs and SUs must not directly or indirectly discriminate when acting as service providers, associations or employers. HEPs also must not directly or indirectly discriminate under the Act in their role as education providers.
Prevent duty under section 26 (1) of the Counter-Terrorism and Security Act 2015	This duty applies to 'specified authorities' listed in Schedule 6 of the Counter Terrorism and Security Act 2015, which includes most HEPs.
Public sector equality duty under section 149 of the Equality Act 2010	This applies to HEPs that are 'public authorities' listed in Schedule 19 of the Equality Act 2010. This includes education providers in the higher education sector as defined in Section 91(5) Further and Higher Education Act 1992, universities that receive grant funding, and other HEPs that are eligible for direct receipt of grant funding.

<sup>41</sup> Under s.94(5) of the Equality Act 2010, this applies to higher education institutions defined in s.91 Further and Higher Education Act 1992.

## Further reading

**Campaigning and political activity guidance for charities (CC9), The Charity**

**Commission:** <https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9>

**Cracking the code: a practical guide for university free speech policies, The Higher**

**Education Policy Institute:** <https://www.hepi.ac.uk/2018/07/19/cracking-code-practical-guide-university-free-speech-policies/>

**Delivering the Prevent duty in a fair and proportionate way: a guide for higher**

**education providers in England, Equality and Human Rights Commission:** <https://www.equalityhumanrights.com/en/publication-download/delivering-prevent-duty-proportionate-and-fair-way>

**External speakers in higher education institutions, Universities UK:** <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/external-speakers-in-higher-education-institutions.aspx>

**Freedom of Expression Legal Framework, Equality and Human Rights Commission:**

<https://www.equalityhumanrights.com/en/publication-download/freedom-expression-legal-framework>

**Gender segregation at events and meetings: guidance for Universities and Students'**

**Unions, Equality and Human Rights Commission:** <https://www.equalityhumanrights.com/en/publication-download/gender-segregation-events-and-meetings-guidance-universities-and-students>

**Joint Committee on Human Rights Inquiry into freedom of speech in universities:**

<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2017/inquiry/>

**Managing the risk associated with external speakers - England and Wales, NUS:**

<https://www.nusconnect.org.uk/resources/managing-the-risks-associated-with-external-speakers-england-and-wales>

**NUS No Platform policy:** <https://www.nusconnect.org.uk/resources/nus-no-platform-policy-f22f>

**Prevent Duty Guidance for higher education institutions in England and Wales, HM Government:** [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445916/Prevent\\_Duty\\_Guidance\\_For\\_Higher\\_Education\\_\\_England\\_\\_Wales\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/445916/Prevent_Duty_Guidance_For_Higher_Education__England__Wales_.pdf)

**Protecting charities from abuse for extremist purposes, The Charity Commission:** <https://www.gov.uk/government/publications/protecting-charities-from-abuse-for-extremist-purposes/chapter-5-protecting-charities-from-abuse-for-extremist-purposes>

**Public Sector Equality Duty guidance, Equality and Human Rights Commission:** <https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty-guidance>

**The essential trustee: what you need to know, what you need to do (CC3), The Charity Commission:** <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>

**What equality law means for you as a student in further or higher education, Equality and Human Rights Commission:** <https://www.equalityhumanrights.com/en/publication-download/what-equality-law-means-you-student-further-or-higher-education>

# Contacts

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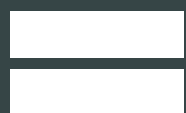
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