

# Equality and Human Rights Commission guidance on freedom of expression at universities

## ANALYSIS

### BACKGROUND

There are well-evidenced problems with free speech in universities, particularly around contentious issues like transgenderism or abortion, and also political issues.<sup>1</sup>

In 2017, Parliament's Joint Committee on Human Rights (JCHR) launched an inquiry into freedom of speech in universities. Its [report](#), published in March 2018, said that a number of factors were limiting free speech, including:

- "intolerant attitudes, often incorrectly using the banner of 'no platforming' and 'safe-space' policies;
- incidents of unacceptable intimidatory behaviour by protestors intent on preventing free speech and debate" (page 3).

One of the key recommendations in the report was:

*"The Government should take the lead in encouraging all the bodies involved in this field to produce coherent, consistent and accessible guidance and material by January 2019 at the latest, paying full attention to the extent of universities' legal responsibilities to secure free speech" (para. 101).*

This recommendation led to Equality and Human Rights Commission (EHRC) guidance (see below). Alongside its report the JCHR [issued its own guidance on free speech](#), which the EHRC guidance draws on.

### GUIDANCE FOR HIGHER EDUCATION PROVIDERS AND STUDENT GROUPS

The EHRC published its guidance in February 2019, to advise universities and other higher education providers (HEPs) and those involved in students' unions (SUs) on what the law says on freedom of expression. The guidance applies to England and Wales. It is generally very helpful, though disappointing at points. Although it makes clear that free speech is well protected in law, the reality of the situation is even better.

The EHRC guidance is divided into seven sections, prefaced by 'About this guide' and with three annexes at the end. Our analysis considers it section by section.

✔ Where the EHRC gets it right, our analysis indicates this with a tick.

✘ Where we believe the EHRC misstates the law or makes an unhelpful comment, this is indicated with a cross.

When we use the term universities in our analysis, we include other HEPs.

### 'About this guide'

✔ The guidance starts in the right place, strongly emphasising the importance of free speech:

*"The right to express views and ideas freely, without fear of interference or persecution, is an essential part of democracy".*

*"Freedom of expression is a key part of the higher education experience" (page 5).*

The EHRC sets out 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" (page 6).

✘ The EHRC's fifth core idea opens the door to restrictions on freedom of expression. This is picked up later in the guidance, and underpins the less helpful sections.

## Section 1: Introduction

✔ The guidance highlights the protections available in the current law. Everyone has the right “to express lawful views and opinions freely” without interference from higher education providers. This is the case even when these views may “offend, shock or disturb” others. Freedom of expression includes “both the spoken and written word, as well as actions, gestures and the display of images intended to show meaning” (page 8).

## Section 2: Freedom of expression in UK law

✔ The guidance sets out the protections for free speech, pointing to Article 10 of the European Convention on Human Rights (the right to freedom of expression). As public authorities, most universities must comply with Article 10.

✔ It also highlights section 43 of the Education (No. 2) Act 1986, which obliges universities to protect free speech on their premises and those of the SU. This includes issuing a code of practice setting out how they will fulfil the duty, and ensuring members, students and staff follow the code.

✔ The guidance says 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 “would lead the host organisation to breach other legal obligations”.

✔ Though SUs are not directly covered by these provisions, the guidance points out that the section 43 (s.43) duty applies to its premises and SUs must also follow the university’s code of practice.

## Section 3: Where does the law allow for limitations on freedom of expression?

✘ This section is disappointingly muddled. It covers very different forms of law without always making the appropriate distinctions between them, and even confuses lawful and unlawful behaviour.

By the end of this section there’s a danger that the initial emphasis on free speech has been diluted, after a whistle-stop tour of:

- criminal offences (section 3.1);
- civil law breaches (including the Equality Act) (section 3.2);
- charity law (section 3.3); and
- duty of care (section 3.4).

The guidance seems to want to set out all the legal duties which could possibly be considered by universities. This risks causing confusion by allowing legal provisions of dubious relevance to distract from the clear law on free speech.

Section 3 includes an inset box on ‘hate speech’ (page 19). The guidance accepts that the term does not have any legal meaning. Picking carefully through what the EHRC says in this box suggests it is wrongly using ‘hate speech’ to cover three different levels of conduct:

1. Unlawful criminal behaviour, including incitement to violence;
2. Discrimination contrary to civil law;
3. Behaviour that is entirely lawful.

✘ Unfortunately, this is confused and misleading. Putting discrimination on a par with criminally inciting violence could cause universities and SUs to give too much weight to untested allegations of harassment/discrimination when balancing them with the right to free speech.

The term ‘hate speech’ should really only be used for conduct in the first category above. It requires evidence to be weighed against the criminal standard of proof. Claims of being offended fall well short of this level. It is also surprising that this section makes no reference to robust free speech protections that are part of even incitement offences.

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

Section 4 covers the Prevent duty and the Public Sector Equality Duty (PSED).

✔ The guidance rightly says at the outset of the section: “These do not usually require restrictions to be put on lawful speech and other forms of expression” (page 24).

### Prevent duty

This requires public authorities to “have due regard to the need to prevent people from being drawn into terrorism”.

✔ The guidance rightly points out that “Compliance with the Prevent duty does not prevent HEPs from upholding their duty to protect freedom of speech” (page 24). Universities have to have particular regard to the s.43 duty when carrying out the Prevent duty.

There is [statutory guidance from the Government](#) on the Prevent duty. The Court of Appeal ruled in March 2019 that [Prevent guidance for universities](#) must be rewritten to better protect free speech. The EHRC has also published [Prevent duty guidance for universities](#).

### PSED

It’s not clear why the PSED is included in the guidance at such length.

The duty in s.149 of the Equality Act 2010 is to “have due regard” to certain things. These include the need to “eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act” and to “foster good relations between persons who share a relevant protected characteristic and persons who do not share it” (para. 1).

The PSED is not a duty to secure a particular outcome. So it should never be used in a way which restricts fundamental rights.

The part of the duty on eliminating certain conduct only covers behaviour prohibited under the Equality Act. But the guidance says the PSED means that Higher

Education Providers must consider “the potential impact on students who may feel vilified or marginalised by the views expressed” (page 26).

✘ These are very subjective concepts and don't meet the legal thresholds for discrimination or harassment in the Equality Act.

The need to “foster good relations” between people has its place, but doesn't give any basis for limiting Article 10 rights. Article 10 rights can only be limited to prevent free speech undermining the pillars of a free and democratic society. The guidance says that universities “should therefore use the PSED to encourage good relations, *but without restricting lawful free speech*” (page 26). However, it is difficult to see how raising the PSED in the context of freedom of expression is likely to do anything other than limit that freedom.

‘Freedom from harm’

✘ Probably the most disappointing part of this section comes at the end when it cites NUS guidance on the need to balance freedom of speech with ‘freedom from harm’ (page 27).

This is a nebulous and highly subjective concept that has no place being balanced with the right to free speech, which is internationally recognised as one of the essential foundations of a democratic society. (The EHRC may have included this reference to the NUS guidance as part of building the broadest possible base of support for its own document.)

## Section 5: How HEPs and SUs can work together on freedom of speech

✔ This section notes that “HEPs should ensure that their s.43 code and Prevent duty policies do not create unnecessary barriers to freedom of speech” (page 29).

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

This section has the right emphasis:

✔ “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” (page 31).

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

Case studies

There are case studies in this section that give some cause for concern.

The first deals with transgenderism:

*“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” (page 36).*

✔ On the one hand, the belief that biological men are still men regardless of a Gender Recognition Certificate is acknowledged as a lawful view.

✘ But despite this, an SU policy barring such views is effectively endorsed. According to the guidance, it's acceptable for an SU official to decide that a lawful view is in fact hate speech that disqualifies a speaker from being heard.

The guidance should give much shorter shrift to such censorship.

A second concerning case study relates to religion or belief:

*“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” (page 37).

The highlighted phrase must be applied with caution by universities. Importantly, it presumes the society is fully involved in discussions, and recognises that a meeting allowing a range of views may not be viable.

A previous version of the guidance suggested that a university could require the atheist society to ensure a “range of views” were presented. But this is plainly ludicrous. It would mean atheists having to give theists a platform. It would undermine the society’s right to organise an event in accordance with its aims, which is to promote atheist views. By extension, it could have seen CUs being forced to give atheists a speaking slot at evangelistic events.

The job of the university should be to use its authority to uphold the rights of the atheist society to proceed with the event and the rights of the protesters to engage in reasonable protest. The amended guidance now better reflects the right to freedom of association under Article 11 of the European Convention on Human Rights, which also applies to universities.

## Disputes with Student Unions

Section 7 includes short sections on several key potential flashpoints:

- ‘No-platforming’ (page 35) – An SU might have a ‘No-platform’ policy that prevents certain people or organisations speaking at events. SUs can be at risk of breaching its university’s code of practice and undermining freedom of expression if it attempts to stop a speaker invited by e.g. the CU.

✓ The guidance is clear that in such a case the university decides if the speech is protected in law, and if so it has a legal duty to allow them to speak.

- Affiliation (page 41) – SUs are required to allocate its resources in a way that is fair, in writing, and freely accessible to all students. A group having trouble accessing funding or other support might find it helpful to look at the SU policy explaining its values and ethos. The SU should be able to clearly demonstrate why a group cannot affiliate with it, and how it does not support its objectives. The guidance includes a case study at this point about a pro-life group being refused affiliation. It warns that an SU “will need to ensure that it is not discriminating against the group”, but the overall message of this case study is not very clear.
- Freshers’ fairs (page 42) – A freshers’ fair is a private event usually organised by the SU. Usually there would be a wide range of views represented but they do not have to allow every view.

✓ However, the guidance considers a situation where a freshers’ fair is generally open to all who are interested. If a certain group’s application was refused on the basis of its beliefs, the SU must consider if it is discriminating against them on a protected characteristic.

The guidance advises that if there is a concern regarding the actions of a SU, the first step is to raise the issue with its president. If the response is unsatisfactory, a complaint can be made to the university, or the Charity Commission could be approached. (The Charity Commission has itself produced helpful guidance emphasising the importance of free speech.)

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

Annex A gives more information about three regulators: The Office for Students, the Higher Education Funding Council for Wales and the Charity Commission.

✓ It emphasises free speech: “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” (page 45).

## Annex B: Relevant criminal offences

Annex B sets out a series of criminal offences that the guidance says “place limitations on freedom of expression in England and Wales”. It expands the summary of criminal offences given in section 3.1.

✗ The guidance fails to distinguish between the offence of stirring up hatred on the grounds of race and the offences of stirring up hatred on the grounds of religion or sexual orientation.

The offences on religion and sexual orientation have a high threshold, requiring threatening conduct that is intended to stir up hatred. There are also robust free speech clauses built in (see sections 29J and 29JA of the Public Order Act 1986).

## Annex C: HEPs and legal duties

Annex C simply lists a range of legal duties and the institutions they apply to.

<sup>1</sup> E.g. <https://www.christian.org.uk/news/greer-delivers-lecture-despite-abuse-from-pro-trans-students/>; <https://www.christian.org.uk/news/strathclyde-su-drops-ban-pro-life-groups/>; <https://www.christian.org.uk/news/bristol-uni-students-want-ban-feminists-saying-men-arent-women/>; <https://www.christian.org.uk/news/bid-silence-pro-life-group-fails-amid-university-free-speech-attacks/>; <https://www.christian.org.uk/news/university-trans-censorship-revealed-new-study/>