THE FREE SPEECH NETWORK

The Equality and Human Rights Commission: Advice to student free speech societies

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SPEAKERS' CORNER TRUST

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Executive summary

This note summarises and critiques the guidance on freedom of expression provided by the Equality and Human Rights Commission for higher education providers and students' unions.

The guidance from the Equality and Human Rights Commission is on the whole positive, and aims to protect freedom of speech at UK universities.

However the guidance does too little in advising on how the free speech protections it recommends can be implemented in practice. In particular, questions remain about:

- How far universities must go in providing security to enable events to go ahead; and

- How universities can encourage students' unions (SUs), and if necessary compel them, to comply with freedom of speech duties.

The guidance takes a bold and welcome stance in stating that universities' statutory duty to secure freedom of speech can override the charity law obligations that bind SUs. However it does not go far enough in exploring the (potentially far-reaching) effects of this position.

Freedom of speech campaigners should welcome this guidance as a first step in laying down fundamental principles. The omissions in the guidance, while regrettable, nevertheless highlight the next steps that need to be taken in order to protect freedom of expression on UK campuses.

Those next steps can be summarised as follows:

1. Putting universities and SUs on notice that they are under legal duties to protect students' freedom of speech, and that failure to meet those duties will have consequences.

2. Persuading SUs to adopt freedom of speech policies that comply with legal requirements – and if that fails, requesting that university authorities step in to compel them.

3. Pressurising universities and SUs to put in place clear and detailed policies for providing security for controversial speaking events.

4. Defying unlawful extensions of existing no-platform policies.

5. Challenging blanket safe space policies.

Please note – this note describes and comments on some of the legal issues surrounding campus free speech. However it is not, and is not intended to be, legal advice. If you need legal advice you should consult a lawyer.

Background

The guidance, titled *Freedom of expression: A guide for higher education providers and students' unions in England and Wales*, was written by the Equality and Human Rights Commission, working with the Office for Students among others. It originated from a call by the parliamentary Joint Committee on Human Rights in a report of March 2017 for a clarification of the law governing freedom of expression as it applies to universities. The Committee was particularly keen that the advice should clarify how the different laws applying to campus free speech interact with one another.

The guidance is not a statement of the law. It does, however, give a useful pointer to the standard of free speech protection that the OfS will (hopefully) demand from UK universities. It also gives students and student societies useful support, from an authoritative body established by parliament, in reminding universities and SUs of their legal and moral obligations regarding freedom of expression.

First principles

The guidance sets out five core ideas for protecting freedom of speech on campus (p.6). They are:

1. Everyone has the right to freedom of speech (FoS).

2. Higher Education Providers (HEPs) should always work to widen, and never narrow, debate and challenge.

3. Any decision about speakers and events should seek to promote and protect the right to FoS.

4. Peaceful protest is a right, but it must not infringe the exercise of FoS.

5. FoS should not be abused for purposes of unchallenged hatred or bigotry. HEPs should always aim to promote respectful and balanced debate.

This is a useful set of core principles. It is positive too that the guidance stresses FoS as a key part of higher education (p.9).

It is also helpful that the EHRC reminds readers (p.11) that the duties upon universities to protect FoS are *legal* duties, and failure to meet them could result in a university being taken to court. HEPs need to understand (as they surely do already) that failures to uphold FoS expose them to the risk of legal liability, and the reputational harm that comes from being found to have acted unlawfully. In turn, student FoS advocates should also be aware that legal action is a weapon in their armoury in resisting restrictive university and SU policies.

The key principles laid out by the guidance are positive, however the key question is whether the EHRC makes concrete proposals for implementing those principles. We turn to this question now.

The duties on universities

Human rights

The guidance on the protection of freedom of speech under the Human Rights Act 1998, which applies to HEPs but not to SUs, is generally helpful or, at least, inoffensive.

It is pointed out more than once that the Human Rights Act, which makes the European Convention on Human Rights part of UK law, protects the freedom to express views that 'offend, shock or disturb' others. It is also asserted that the Convention extends as far as protecting intolerant views which are expressed in a debate where views are being exchanged and can be challenged (p.12).

The Article 10 right to freedom of expression can, however, be restricted in order to protect the rights and freedoms of others. As the guidance points out (p.12) the most relevant limitation in the university context is the law against incitement to hatred on the basis of religion or sexuality.

Here the guidance could be clearer. Students need to know, in clear terms, what unlawful incitement looks like, and when universities could legitimately cite the danger of it as grounds for cancelling an event. If offending, shocking, or disturbing students, or expressing intolerant views will not on their own constitute incitement, then it is hard to envisage any likely campus speaking event that *would* constitute unlawful incitement beyond the scope of the Article 10 right. The controversial speaking events that have gained press attention following a ban or other restriction would almost certainly all be protected by Article 10.

By failing to be clearer about what is and what is not incitement, the guidance leaves open the possibility of blurring the boundary, and describing merely offensive views, which are lawful, as incitement, which is not. Students will therefore have to look beyond the guidance in order to get a clearer sense of where the dividing line falls, and to make sure HEPs and SUs do not shift it in order to narrow the range of lawful free speech.

The guidance also omits to mention that in some circumstances a university might be under a positive obligation to protect FoS. That means an obligation to take steps to protect it, not merely an obligation not to infringe it. It is legally debatable whether the positive duty applies to universities, but practically desirable. The duty under the Education Act 1986 (discussed below) anyway compels universities to take positive steps to secure FoS.

More important for freedom of speech advocates is the political and tactical usefulness of human rights law. It can be a powerful weapon for them. Few universities will want to be justifiably accused of infringing human rights. Although the Human Rights Act does not apply to SUs, many cite human rights in their governing documents and policies – a well-founded claim that an SU is, according to the legal definition, an abuser of human rights is likely to be politically uncomfortable, even if there were no chance of taking the SU to court.

Section 43

In England and Wales, the key legal protection of freedom of speech is by way of section 43 of the Education Act (No 2) 1986.

Under this Act, university authorities must 'take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured.' This includes in particular a duty not to deny use of university premises (*including SU premises*) to someone on the ground of their beliefs or views.

There are difficulties in the meaning and implementation of the s.43 duty, and the EHRC's guidance on it is a mixed bag.

Reasonable security measures

A key difficulty in the meaning of s.43 is what is meant by the 'reasonably practicable' steps HEPs have to take in order to secure freedom of speech on university premises. The guidance gives a useful rule of thumb (p.31) for how this should be put into practice: **HEPs 'should only consider cancelling an event if there are no reasonable options for running it**.'

In the current climate, a HEP or SU is most likely to claim that security costs are a legitimate reason to cancel an event, particularly where a controversial speaker is likely to attract protestors. The guidance (p.36) is clear that HEPs have a duty to lay on security, but is light on detail:

> *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.*

It is helpful that the guidance states that university authorities may be compelled by law to provide security for controversial speaking events, rather than simply cancel them.

However, given that many event cancellations come about due to security concerns being raised, this is an issue where the EHRC really should give detailed practical advice. The advice is that the s.43 duty 'may' include increased security – what determines when the duty does and does not apply?

Could a university cancel an event if the necessary extra security would be too costly? If so, when would security be so costly that it would not be 'reasonably practicable'? It is obviously impossible for the EHRC to suggest a precise figure, as university budgets differ. Free speech societies should consider the following criteria, among others, in deciding whether they think their university or SU has taken reasonably practicable steps:

- What would the extra expense be in relation to the wider security budget?
- If the event is organised by a student society, could they realistically make a monetary contribution?
- How much advance notice did the event planners give the HEP or SU?
- Is the event likely to be attended by a large number of students?
- Does the planned event concern a particularly pressing ethical or topical issue that university students would benefit from discussing?

Using the above criteria, it would probably be on balance unreasonable for university authorities to cancel an event on the ground that it incurred, say, a 10% increase to the security budget, if that event had been properly planned, and was likely to attract a large audience wanting to hear debate of an important topic (e.g. student fees, Brexit, abortion). In the case of a hastily planned event, however, which would incur a significant hike in the security budget for the benefit of only a small number of student attendees, university authorities might legitimately argue that the extra expense would exceed the reasonably practicable steps they are compelled to take.

The EHRC makes the right noises on security, but its guidance lacks the specifics needed to resolve the disputes that regularly arise at our universities. It is hard to see how we will get clearer answers on what constitutes reasonable security measures without further guidance from the OfS, or court action. Neither of those interventions is likely to be welcomed by HEPs. **Student free speech groups should urge universities to revise freedom of speech codes of practice to include details of how they will make decisions on security provisions for controversial speaking events**. Making these criteria clear from the outset is in universities' own interests – it will make disputed decisions less likely, and reduce the chance of legal challenges.

Sharing the duty with SUs

A key problem with the section 43 duty is that it compels universities to secure freedom of speech on SU premises, but does not suggest how universities can compel SUs, which are independent organisations, to follow the university's freedom of speech code of practice.

A later Education Act in 1994 laid down rules governing the relationship between universities and SUs. It required universities to bring their freedom of speech code of practice to students' attention, but did not say how universities are to make sure that SUs then comply with it.

As a result, it is unclear how SUs can be brought into line with universities' freedom of speech duties. Simply compelling SUs to comply would be controversial and inconsistent with SUs' status as self-governing democratic bodies, a status which is protected by law. The current status quo, however, is untenable. Many freedom of speech codes of practice give SUs decision-making power over speaking events, but leave the university powerless if the SU then disregards fundamental principles of freedom of speech.

This gap in the law deprives section 43 of much of its potential force as a protection of freedom of speech.

The EHRC is aware of this problem. It advises that 'SUs should comply with their institution's code' (p.14) and that SUs and HEPs should align their policies to take account of the section 43 duty (p.29).

This is sound advice. There is, however, more to be said.

By law, the relationship between SUs and HEPs has to be governed by a code of conduct. This usually takes the form of an informal agreement, or memorandum of understanding. A good example is the agreement between University of Sussex and its students' union. In it the university agrees to fund the SU, and in turn the SU agrees to abide by the laws and university policies governing, among other things, freedom of speech.

A contractual or quasi-contractual agreement, in which an SU agrees to keep its partner HEP out of trouble by treating its free speech duties as if they were its own, is, we suggest, a *very good* way for universities to fulfil their section 43 duty while also respecting the autonomy of students' unions. It is absolutely right that universities hold their SUs to this fundamental duty.

The *best* way forward, however, is for SUs to write their own, autonomous policies for protecting freedom of speech. They would have to meet the minimum requirements set out in section 43, and probably also those set out by the HEP, but beyond that they would have a free hand.

This is the best way forward, we suggest, because *not* to take this way forward presents the greater risk to SUs. Restrictive SU actions and policies are causing more and more

reputational damage to universities, and exposing them to mounting risk of legal action. If it comes to it, the universities, as funders of students' unions, will have the brute bargaining power to force SUs to take a more reasonable, and less damaging, stance on freedom of speech. To avert that outcome, and to protect SU autonomy, **free speech societies should aim to persuade their SU officers to get to work now on protecting freedom of speech on their own terms**.

What section 43 does not cover

The guidance is right to point out (p.13) that the duty to secure freedom of speech regardless of the views or beliefs of speakers does not that mean everyone has a right to come and speak at a campus. HEPs and SUs are entitled to use their discretion in deciding whether or not to invite a speaker.

Despite this limitation, the guidance points out two crucial protections.

First, the EHRC emphasises that free speech protections kick in once an event is planned or a speaker is invited. There is no obligation to invite certain speakers, or hold events on certain topics, but *once plans are in motion* a university or SU cannot cancel the event without risking falling foul of the law under s.43. An SU might also risk falling foul of charity law. This is a reasonable position to take though, as discussed below, it is an arguable one.

The second protection limits the power of SUs and universities to maintain blanket policies against inviting specified groups or individuals (p.35). As the guidance points out, by doing so an SU could breach its charitable obligation to promote education, and both organisations would risk breaching the section 43 duty not to deny use of premises on grounds of speakers' beliefs or views. We turn to this next.

No platforming

The advice on no platforming is sensible (p.35). The current NUS list of no-platformed organisations is almost certainly justified by the obligation on SUs as charities to protect their reputations and to avoid promoting extremism.

As the guidance points out, however, it is unlikely that the no-platform list could be extended any further without infringing freedom of speech protections.

The EHRC's position on no platforming is the most significant part of the guidance. It states that while the no-platform list can legitimately prohibit certain speakers from being invited to speak, if an invitation is made anyway, despite the no platform ban, then an SU or HEP *would not be able cancel the event* if doing so would infringe the section 43 duty to secure freedom of speech on campus.

> *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.*

Again, the key moment for the EHRC is the issue of an invitation to a speaker. Once that has happened, the section 43 duty takes effect.

The implication of the EHRC's advice is that when there is a charity law obligation to prevent a speaker from speaking, and a simultaneous freedom of speech obligation to allow him or her to speak, then in their opinion *the freedom of speech obligation must take precedence*. The SU would not be able to defend a ban on the event by arguing that they have an obligation to do so under charity law. (It would, however, be able to justify the ban the event if it were unlawful in some other way, for instance if it involved a proscribed terrorist organisation.)

This advice is particularly helpful as it resolves the difficult question, noted by the Joint Parliamentary on Human Rights, of what to do when mutually conflicting obligations collide.

Student societies should be careful in acting on this part of the guidance. It would help no one, least of all freedom of speech advocates, if this advice were to be tested by a rash of invitations to, say, BNP members to speak on campus, even if doing so were entirely lawful.

There are, however, two useful conclusions, one practical and one potential.

First, student societies should feel emboldened by this guidance to challenge any attempt by students' unions to extend their no-platform policies beyond the current roster of extremists. One example is the recent motion by the University of Bristol SU to ban speakers promoting transmisogyny. If a 'contraband' event could be successfully organised, for instance by holding it on university rather than SU premises, then as long as the speaker will not incite hatred, or disturb public order, or harass attendees, the university will be under a legal duty to facilitate the event. More importantly, the SU would not be able to quash the event without defying the guidance of the Equality and Human Rights Commission as to what the law is.

The second, potential conclusion concerns the scope of the section 43 duty. The EHRC thinks that once it bites, it prevails – but it only bites once an invitation has been issued. It could be argued, however, that the duty to take reasonably practicable steps to secure freedom of speech is in fact wider than merely ensuring that events go ahead once they have been organised. If it could be successfully argued that the duty extends, for instance, to resisting restrictive external speaker *policies*, or to opposing blanket safe space policies, then universities will be legally obliged to take what reasonable steps it can towards opposing those SU policies.

Equality Act 2010 no barrier

The EHRC has statutory authority in advising on the Equality Act 2010, and its advice here is helpful and restrained.

The guidance points out that harassment is a serious form of misconduct – unwanted conduct related to someone's identity that has the effect or purpose of violating that person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

Unless something goes badly wrong, it is unlikely that campus speaking events will meet the threshold for harassment:

> *discussions or speaker's views that they [students] find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.* (p.18)

> *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.* (p.19)

The guidance also points out that student event organisers and attendees should *both* exercise a degree of personal responsibility. Event organisers should make clear the subject matter of upcoming talks. Students should not attend talks that are likely to offend them. A claim for harassment on the basis of views expressed by the speaker would be unlikely to succeed if a student knew they were likely to be offended (p.18).

Safe spaces

The guidance on safe spaces is disappointing. It is welcome that the EHRC points out that a blanket safe space policy could restrict campus freedom of speech (p.39). More should have been said, however, on the dangers that need to be avoided in implementing such policies, namely:

- Allocating SU resources on the basis of students' identity could, if not done fairly, give rise to claims of discrimination.

- Setting aside spaces for students of a certain identity could unnecessarily restrict students' freedom of association.

- An unchecked notion of when speech is 'safe' could disproportionately limit students' freedom of speech.

Most reasonable people would not contest the desirability of safe spaces. However we suggest that the EHRC should have given practical advice on how overly stifling, blanket safe spaces can be avoided. Students and student societies will have to make their own case for how this can be done – we suggest that safe spaces respectful of freedom of speech would be limited to specific areas or times, and would not cover key shared SU facilities, such as student bars, which constitute shared civic space within student communities.

SU affiliation

The guidance on when SUs can lawfully deny affiliation to student societies is disappointing.

It is pointed out, rightly, that SUs have a duty under the Education Act 1994 to allocate resources to student groups in a way that is fair, and must also not discriminate, for instance on the basis of religion (p.41).

Its case study, illustrating how an anti-abortion society could be lawfully denied SU affiliation, raises questions. In some cases, recent and ongoing, SUs have imposed policies against affiliating anti-abortion groups. While the guidance is right to point out that SUs are free to offer or deny affiliation on a case-by-case basis, it is far from clear that a blanket ban on ethical advocacy groups could be fair, or consistent with SUs' charity law obligation to advance education.

Conclusion

The overall impression created by the guidance of the Equality and Human Rights Commission is that there is little that is likely to inhibit freedom of speech at UK universities.

There are strong protections of freedom of speech laid down by Parliament, in the form of the Human Rights Act 1998 and the Education Act (No 2) 1986.

The potential restrictions imposed by charity law are not strong enough, in the EHRC's opinion, to overcome statutory protection of free speech.

Protections against harassment are unlikely to inhibit the free and fair exchange of ideas and opinions.

Criminal laws protecting against speech that causes public order or incites hatred are rarely invoked by universities or SUs, and are unlikely to be relevant in the vast majority of cases.

All that being so, why do we find ourselves where we are, with many students and academics complaining of a hostile environment to freedom of speech on our campuses?

The likely answer is that not enough is being done to implement, promote and protect freedom of speech protections.

The next step for students wishing to protect their free speech must be to take this guidance, which is largely helpful, and implement it. That will entail:

1. Reminding their universities and SUs that they are under legal duties to protect students' freedom of speech, and that failure to meet those duties will have consequences.

2. Persuading their SUs to adopt freedom of speech policies that comply with legal requirements – and if that fails, requesting that university authorities step in to compel them.

3. Pushing their universities and SUs to put in place clear and detailed policies for providing security for controversial speaking events.

4. Defying unlawful extensions of existing no-platform policies.

5. Challenging blanket safe space policies.

Appendix:

Freedom of expression: A guide for higher education providers and students' unions in England and Wales

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