



# Introductory Courses, Training and Tests for Students

## Free Speech Requirements for English Institutions

### Introduction

Many English universities and other Higher Educational Providers (“HEPs”) have compulsory courses, training or tests for students regarding matters such as behaviour and language, diversity and attitudes to racial and sexual matters. Sometimes, such courses are part of the formal matriculation process.

Aspects of these courses have become controversial, particularly where certain viewpoints are required to be agreed with in order to have successfully completed training or “passed” tests. This may be a consequence of HEPs acquiring courses or modules from activist organisations whose purpose is to advocate for a particular viewpoint.

Alumni For Free Speech (“AFFS”) has prepared a detailed statement setting out the law relating to free speech in this context, and what it requires in practice. We can provide it on request. A summary is set out below.

AFFS will be pressurising HEPs over the coming months to ensure that their relevant courses, training and tests for the beginning of the next academic year are free speech compliant, and if necessary following this up with Freedom of Information Requests and publication of the results. In the meantime, we ask anyone who has first-hand experience of such a course, training or test to contact us.

### The relevant law

Under the **Education (No.2) Act 1986** (the “**Education Act**”), HEPs must take such steps as are reasonably practicable to secure freedom of speech for its members, students and employees and, when necessary, visiting speakers. This is a demanding requirement, limited only by reference to the speech being “*within the law*” and by what is reasonably practicable. Free speech obligations otherwise override other considerations.

Under the **Equality Act 2010** (the “**Equality Act**”), HEPs must prevent unlawful discrimination against and harassment of students with the “*protected characteristic*” of holding (or not holding) particular religious or philosophical views, including various viewpoints on

matters of current public controversy. The *Forstater* case in 2021 established that holding gender critical views is a “protected characteristic”. The law in this area is still evolving and, in order to avoid finding themselves in breach of the law, HEPs should work on the basis that advocacy for free speech, and opinions (whether religiously or philosophically based) in respect of other currently contested areas (including, for example, in relation to aspects of Critical Race Theory and “decolonising the curriculum”), must logically also be treated as protected beliefs and will, in time, be confirmed as such. HEPs should therefore act on the basis that they must work to protect the freedom of speech of people in respect of a wide range of opinions held, not held or expressed by them. Their Public Sector Equality Duty (“PSED”) imposed under **Section 149** of the Equality Act will include having due regard to the need to eliminate unlawful discrimination and harassment against people who hold or express those beliefs, to advance equality of opportunity for those people and foster good relations between people who have a protected characteristic (ie these views) and those who do not.

Furthermore, the free speech rights of students are protected under the **European Convention on Human Rights** (as enacted in the UK by the **Human Rights Act 1998** (the “HRA”).

## **What the law requires in practice in this context**

HEPs must not hold courses or training or impose test questions or processes to the extent that such courses, training or tests contravene their obligations (a) to secure free speech, (b) not to discriminate against or harass people in respect of views which count as “protected characteristics”, (c) to fulfil their PSED, and (d) to give effect to students’ free speech rights under the HRA.

Some HEPs appear to have been acting contrary to their legal obligations by doing (or not doing) some or all of the following.

*Directly or indirectly requiring or pressurising students to endorse or acquiesce in specific viewpoints (compelled speech): requirement to mention free speech rights*

To the extent that these courses or tests:

- (a) require specific viewpoints to be expressed or supported or acquiesced in order to have “correctly” answered certain questions, to have “passed” the training or test, or to avoid having to retake the test (or answer specific questions again) until they give the “right” answer or enough “right” answers; and thereby
- (b) effectively disallow or suppress opinions which are contrary to the ones being promoted in the relevant course, training or test,

they are clearly contrary to the primary obligation under the Education Act to secure free speech and are, therefore, unlawful.

Further, effectively disallowing or suppressing or imposing negative consequences in respect of students’ viewpoints is likely to be unlawful discrimination, and could also amount, or lead, to harassment by the HEP under the Equality Act, to the extent that holding (or not

holding) those viewpoints count as religious or philosophical belief which are “protected characteristics” under the Equality Act; it is also a likely failure to comply with its PSED. It might well also involve a contravention of free speech rights protected under the HRA.

To the extent that these courses, training programmes and tests have the effect of sending a message to students that there are views which it is effectively compulsory to hold and express and unacceptable to dissent from at that HEP, and therefore disallow and suppress and impose negative consequences on holding and expressing certain views, they are also likely unlawful as described above.

Materials acquired from (or otherwise designed or approved by) lobby groups or activists will involve increased risks as regards compliance with HEPs’ freedom of speech obligations, not least because they cannot be demonstrated to have been vetted to ensure they comply with HEPs’ free speech obligations. Accordingly, if HEPs wish to provide courses, training or tests in areas of potential public controversy, they should either design them themselves having regard to their free speech obligations or ensure that materials provided by third parties are properly vetted to ensure that they comply with HEPs’ free speech obligations.

HEPs should also, in the context of courses and tests that seek to promote specific viewpoints on areas of public controversy: (a) make clear to students their rights to hold (or not hold) and to express their beliefs and viewpoints (or lack of them) about those issues; and (b) inform students that the HEP has legal obligations to protect students’ free speech, and that those obligations are backed up by rules and complaint and disciplinary processes to which the students may resort if concerned about the courses, training and tests they are being required to undertake.

#### ***Stating inappropriate requirements for student behaviour***

HEPs must ensure that their own requirements for students, particularly about on-campus behaviour and attitudes, are not such as prevent or restrict lawful free speech. In designing course/training/test materials, they must make sure that these complying requirements are correctly reflected. This will ensure that they do not unlawfully mislead students about the range of opinions, and forms of expressions, which are available to them.

#### ***Misrepresenting or overstating the effect of contrary laws***

To the extent that any statement, opinion, action or event contravenes an existing law (e.g. preventing harassment or unlawful discrimination), it is not required to be protected under HEPs’ free speech obligations under the Education Act. However, all lawful speech is protected and must be upheld. It follows that HEPs must be careful not to over-interpret contrary laws, e.g. treat or present them as having wider application than they in fact have in

law. HEPs need to be very careful to word any EDI courses, training and tests so they do not overstate the contrary laws and thus unlawfully restrict students' free speech.

## **Best Free Speech Practice**

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