

+ Freedom of speech in higher education: legal framework

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This supplementary document sets out the context within which HEIs operate and the place of free speech in that context.

The legal framework

Domestic law in the UK, along with European law, establishes the framework within which institutions will manage freedom of speech. Legislation in this area can be characterised by three key themes:

- + anti-discrimination and promotion of equality
- + protection of free speech and academic freedom
- + qualification of rights.

This guidance focuses on the main pieces of UK legislation relevant to issues of freedom of speech and academic freedom within the law. It is not an exhaustive list of all legislation in this area, nor does it constitute legal advice. Institutions should always seek clarification of their particular legal position from their own independent legal advisers.

Nation-specific differences

The devolved nature of some legislative powers in the UK means that the four nations, on occasion, have different laws, although often the rights, responsibilities and principles described in the statutes are similar. Below is an overview of the legislation relevant to each nation. This guidance mentions the most significant differences, but is not intended to be a detailed or comprehensive guide, nor does it constitute legal advice.

Theme	England	Northern Ireland	Scotland	Wales
Anti-discrimination and promotion of equality	Equality Act 2010	Northern Ireland Act 1998 and additional anti-discrimination legislation	Equality Act 2010	Equality Act 2010
Protection of free speech and academic freedom	Human Rights Act 1998 Higher Education (Freedom of Speech) Act 2023	Human Rights Act 1998 Education (Academic Tenure) (NI) Order 1988	Human Rights Act 1998 Further and Higher Education (Scotland) Act 2005	Human Rights Act 1998 Education (No. 2) Act 1986 Tertiary Education and Research (Wales) Act 2022

Theme	England	Northern Ireland	Scotland	Wales
Qualification of rights	Equality Act 2010 Public Order Act 1986 Protection from Harassment Act 1997 Serious Organised Crime and Police Act 2005 Protection of Freedoms Act 2012 Crime and Disorder Act 1998 Terrorism Act 2000 Terrorism Act 2006 Racial and Religious Hatred Act 2006 Counter Terrorism and Security Act 2015	Northern Ireland Act 1998 and additional anti-discrimination legislation Public Order Act 1986 Public Order (NI) Order 1987 Protection of Freedoms Act 2012 Protection from Harassment (NI) Order 1997 Terrorism Act 2000 Criminal Justice (No.2) (Northern Ireland) Order 2004 Serious Organised Crime and Police Act 2005 Terrorism Act 2006 Counter Terrorism and Security Act 2015	Equality Act 2010 Public Order Act 1986 Criminal Law (Consolidation) (Scotland) Act 1995 Criminal Justice (Scotland) Act 2003 Protection of Freedoms Act 2012 Offences (Aggravation by Prejudice) (Scotland) Act 2009 Crime and Disorder Act 1998 Terrorism Act 2000 Serious Organised Crime and Police Act 2005 Terrorism Act 2006 Counter Terrorism and Security Act 2015	Equality Act 2010 Public Order Act 1986 Protection from Harassment Act 1997 Serious Organised Crime and Police Act 2005 Protection of Freedoms Act 2012 Crime and Disorder Act 1998 Terrorism Act 2000 Racial and Religious Hatred Act 2006 Terrorism Act 2006 Counter Terrorism and Security Act 2015

Legal framework for students' unions

Most students' unions exist as separate legal entities and have their own obligations under relevant legislation, such as the Higher Education (Freedom of Speech) Act 2023 in England, and under charity law if they have charitable status. In practice, making the distinction between the activity of the students' union and that of the institution can be complex as frequently the students' union and the institution will have legal obligations towards each other as procurers, suppliers and users of services.

Further reading (please note, these documents pre-date the Higher Education (Freedom of Speech) Act 2023 in England):

Advance HE: [Equality Act 2010: implications for students' unions](#)

[Freedom of expression: a guide for higher education providers and students' unions in England and Wales | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

[Freedom of expression: a guide for higher education providers and students' unions in Scotland | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

Anti-discrimination and promotion of equality

See also this section for anti-discrimination provisions in human rights law.

The Equality Act 2010

In England, Scotland and Wales, the Equality Act 2010 protects students, staff and recipients of services from unlawful discrimination, harassment or victimisation on the basis of certain protected characteristics:

- + age
- + disability
- + gender reassignment
- + marriage and civil partnership (only applies to employment)
- + pregnancy and maternity
- + race
- + religion or belief
- + sex
- + sexual orientation.

One protected characteristic of particular relevance to free speech is belief. Beliefs are protected under this characteristic if they meet certain criteria, known as the ‘Grainger criteria’. Examples of protected beliefs from case law include ethical veganism, gender critical beliefs and environmentalism. The right to hold protected beliefs is an unqualified right, meaning that it cannot be interfered with by the state, while the right to express them is qualified, meaning that a proportionate balance needs to be struck against the rights of others.

Further reading: Advance HE’s [protected beliefs guidance](#).

The public sector equality duty

The public sector equality duty (PSED) set out in the Equality Act 2010 requires public bodies, including HEIs, in England, Scotland and Wales to, in the exercise of their functions, have ‘due regard’ to the need to:

- + eliminate discrimination, harassment, victimisation and other conduct that is prohibited by or under the EA 2010
- + advance equality of opportunity between people who share a protected characteristic and those who do not
- + foster good relations between people who share a protected characteristic and those who do not.

Further reading (please note these documents pre-date the Higher Education (Freedom of Speech) Act 2023 in England):

Advance HE: [Public sector equality duty](#)

[Freedom of expression: a guide for higher education providers and students’ unions in England and Wales | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

[Freedom of expression: a guide for higher education providers and students’ unions in Scotland | Equality and Human Rights Commission \(equalityhumanrights.com\)](#)

Northern Ireland

Northern Ireland’s legislative framework on equality is outlined in section 75 of the Northern Ireland Act 1998 and in separate anti-discrimination legislation that broadly mirrors the position in England, Scotland and Wales pre-2010. The law in Northern Ireland protects people from unlawful discrimination on the same nine protected characteristics in the Equality Act 2010 and, in addition, on the grounds of political opinion.

Read more: [Advance HE: Anti-discrimination law in Northern Ireland](#)

Protection of free speech and academic freedom

The Human Rights Act 1998

The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) into national UK law. Institutions in England, Northern Ireland, Scotland and Wales must carry out their public functions in accordance with the rights guaranteed by the ECHR.

The ECHR rights most likely to be engaged in this context are set out below. None of these rights are absolute which means they can, where necessary, be restricted but only on the grounds set out within the specific ECHR article.

A number of ECHR rights are particularly relevant to freedom of speech and expression.

- + Article 9 of the Human Rights Act 1998 (the “**HRA 1998**”) protects a person’s freedom of thought, conscience and religion – this includes both religious and non-religious beliefs, and includes the right to change religion or belief and the right not to be forced to have a particular religion. This is an absolute right, which means that it cannot be interfered with by the state.
- + Article 9 of the HRA 1998 also protects a person’s freedom, either alone or in community with others, and in public or private, to manifest their religion or beliefs. This, however, is a qualified right, which means that it can be interfered with by the state in certain situations, such as those that are prescribed by law and are necessary in a democratic society in the interests of public safety; for the protection of public order health or morals; or for the protection of the rights and freedoms of others.
- + Article 10 of the HRA 1998 protects a person’s freedom of expression – this includes the right to hold opinions and to receive and impart information and ideas without interference by the state. Views can be expressed out loud (for example, through public protest or discrimination) or in writing (for example, through articles, books or leaflets, television or radio broadcasting, works of art, or on the internet).
- + Article 10 of the HRA 1998, like the second part of Article 9, is a qualified right – this means that the state can restrict the right if it can show its action is lawful, necessary and proportionate in order to protect national security, territorial integrity, or public safety; prevent disorder or crime; protect health or morals; protect the rights and reputations of other people; prevent the disclosure of information received in confidence; or maintain the authority and impartiality of judges.
- + The right to freedom of peaceful assembly and to freedom of association with others is protected by Article 11.
- + Article 14 provides an overarching principle of non-discrimination and can only be used in relation to other ECHR rights. It entitles an individual to exercise his or her rights under the ECHR without discrimination on any grounds, including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

- + Article 17 of the HRA 1998 states that nothing in the ECHR may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the ECHR or at their limitation to a greater extent than is provided for in the ECHR.

The rights under Articles 9 (in relation to the manifestation of one's religion or belief), 10 and 11 are not absolute but subject to limitations, including those set by law and 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, or for preventing the disclosure of information received in confidence.

The prohibition on discrimination outlined in Article 14, unlike Articles 9, 10 and 11, is unqualified and cannot be restricted.

Professor Naomi Waltham-Smith draws on the ECHR in calling for the sector to [champion academic freedom](#).

Protection of free speech and academic freedom within higher education

England

The Higher Education (Freedom of Speech) Act 2023 **strengthens** the existing duties on English universities, colleges and their students' unions, and introduces new powers which give the Office for Students (OfS) an enhanced role in promoting and protecting free speech. It replaces the relevant sections of the Education (No. 2) Act 1986 for English higher education providers.

The Act requires universities, colleges and students' unions in England to have particular regard to the importance of free speech and to take all reasonably practicable steps to ensure lawful freedom of speech on campus. This does not include unlawful speech, such as harassing others or inciting violence or terrorism. It will be up to the institution/students' union to consider whether the speech in question is lawful, by taking into account other legislation.

In particular, the Act:

- + requires the OfS to create new conditions of registration, requiring HEIs to comply with the new duties and measures set out in the Act
- + requires HEIs to strengthen their existing codes of practice relating to freedom of speech and academic freedom
- + extends the new duties and measures to students' unions, and obliges the OfS to maintain regulatory oversight of student unions by monitoring compliance
- + creates a new statutory tort, giving individuals the ability to bring civil proceedings against HEIs and students' unions if they think that there has been a breach of the duties in relation to freedom of speech and academic freedom

- + introduces a new free speech complaints scheme, under which individuals can complain to the OfS if they have suffered 'adverse consequences' due to action (or inaction) in relation to the duties in relation to freedom of speech and academic freedom
- + creates a new role of Director for Freedom of Speech and Academic Freedom, who will sit on the OfS board and whose responsibilities include overseeing the OfS' functions relating to freedom of speech
- + requires the OfS to monitor overseas funding of HEIs and student unions to assess the extent to which funding presents a risk to academic freedom and freedom of speech
- + prohibits the use of non-disclosure agreements in complaints relating to harassment and sexual misconduct.

The Act is not yet fully in force as the Government will make regulations and set out more detail about how the Act will work. The OfS will consult on how the new duties should be regulated and how the new complaints scheme should operate.

Further reading:

Universities UK: [How can universities prepare for the Higher Education \(Freedom of Speech\) Act?](#)

Office for Students: [Consultations on free speech](#)

Scotland

Under section 26 of the Further and Higher Education (Scotland) Act 2005, HEIs in Scotland must aim to uphold (so far as the body considers reasonable) academic freedom for those engaged in teaching, the provision of learning, or research.

Wales

The provisions for freedom of speech set out in the Education (No. 2) Act 1986 will continue to apply to Welsh higher education providers.

Under section 43 of the Education (No. 2) Act 1986, HEIs in Wales must take reasonably practicable steps to ensure that freedom of speech within the law is secured for staff, students and visiting speakers. This duty includes ensuring that the use of the HEI's premises is not denied to an individual or group on the grounds of views or beliefs held by the individual/group, or the policy or objectives of the group. Welsh institutions must balance the same considerations and qualifications as those applying to the right to freedom of speech (see below, starting at Provisions that qualify rights).

The Tertiary Education and Research (Wales) Act 2022 establishes a Commission for Tertiary Education and Research. The Act requires the Commission and the Welsh Ministers to have regard to the importance of protecting the academic freedom of higher education providers and of their academic staff.

Northern Ireland

In Northern Ireland, an equivalent provision to section 202 of the Education Reform Act 1988 (which, historically, compelled those making amendments to English, Welsh and Scottish university statutes to ensure that academic staff have freedom within the law to: (i) question and test received wisdom; and (ii) put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or any privileges they may have at an institution) is contained in article 3 of the Education (Academic Tenure) (Northern Ireland) Order 1988.

Provisions that qualify rights

An individual's rights can be lawfully restricted under certain circumstances. In particular, where the speech or expression is contrary to law. Unlawful discrimination and harassment on the basis of a protected characteristic is prohibited by UK anti-discrimination law or there are public order or terrorism risks. Additionally, the following pieces of legislation are relevant to the issue of the management of free speech and good relations in higher education.

Public order

The Public Order Act 1986 (all parts of UK) outlaws:

- + acts or threats of violence – riot, violent disorder or affray
- + causing fear or provocation of violence – a person using threatening, abusive or insulting behaviour towards another, or displaying threatening abusive or insulting material, may be guilty of causing fear or provocation of violence if he or she intends or causes a fear of violence, or intends to provoke or causes a fear that violence will be provoked
- + harassment, alarm or distress – using threatening, abusive or insulting words or behaviour, or disorderly behaviour, or displaying threatening, abusive or insulting material, within the hearing or sight of a person likely to cause harassment, alarm or distress; higher penalties apply to the more serious offence of intentionally causing harassment, alarm or distress
- + incitement to racial hatred – using threatening, abusive or insulting words or behaviour, or displaying, publishing or distributing threatening, abusive or insulting material intended or likely to stir up racial hatred, which is defined as hatred against a group of persons defined by reference to colour, race, nationality or ethnic/national origins.

Harassment

England and Wales

The Serious Organised Crime and Police Act 2005 and the Protection of Freedoms Act 2012 added further offences to the Protection from Harassment Act 1997 with the result that an individual may be guilty of an offence if he or she:

- + pursues a course of conduct that amounts to harassment of another, which the harasser knows, or ought to know, amounts to harassment

- + pursues a course of conduct that involves harassment of two or more persons, which the harasser knows or ought to know involves harassment and which is intended to persuade any person not to do something he/she is entitled or required to do, or to do something that he/she is not obliged to do
- + pursues a course of conduct that amounts to stalking
- + pursues a course of conduct that amounts to stalking and either causes another person to fear, on at least two occasions, that violence will be used against the person or causes another person serious alarm or distress which has a substantial adverse effect on the person's usual day-to-day activities.

Additionally, there is a separate offence of causing fear of violence – pursuing a course of conduct that causes another to fear that violence will be used against him/her.

Scotland

In Scotland there is no criminal offence of harassment in terms of the Protection from Harassment Act but civil proceedings can be brought by a victim of harassment and the court can grant an interdict or make a non-harassment order (which has a similar effect to a restraining order) as well as awarding damages. If the perpetrator breaches the terms of the interdict or of the non-harassment order this is a criminal offence.

Harassment which is racially aggravated is an offence in Scotland under the Criminal Law (Consolidation) (Scotland) Act 1995. Harassment is racially aggravated if the perpetrator evinces malice or ill-will towards someone based on that person's membership of a racial group or towards members of a racial group because of their membership of it. It is irrelevant whether or not the person is actually a member of that group. Racial group is defined as reference to race, colour, nationality or ethnic or national origins.

Northern Ireland

A number of provisions in the Serious Organised Crime and Police Act 2005 apply in Northern Ireland and the Protection from Harassment (NI) Order 1997 applies and mirrors the 1997 Act. Harassment on grounds of a protected characteristic is also prohibited in a number of different anti-discrimination pieces of legislation (see The Northern Ireland Act 1998 above).

Offences aggravated by prejudice

England and Wales

The Crime and Disorder Act 1998 increased the penalties applicable to certain offences committed in England and Wales (eg harassment, public order and assaults) if they are racially or religiously aggravated. As long as some of the motivation is wholly or partly racial or religious, the offence will count as a racially or religiously aggravated offence. This Act also increased the penalties applicable to offences committed in Scotland if they are racially aggravated.

In England and Wales, the Racial and Religious Hatred Act 2006 amends the Public Order Act 1986 to include offences involving public order against persons on religious grounds. The Act does not outlaw disagreement with or disapproval of a particular religious viewpoint but rather focuses on those who stir up violence and hatred on religious grounds.

The following acts are criminal offences if they are committed with the intention of stirring up religious hatred:

- + The use of threatening words or behaviour
- + The display, publication or distribution of any written material which is threatening, or possession with intent to display, publish or distribute
- + The public performance of a play which involves the use of threatening words or behaviour
- + The distribution, showing or playing of a recording of visual images or sounds which are threatening, or possession with intent to distribute, show or play.

Northern Ireland

The Public Order (Northern Ireland) Order 1987 made it a criminal offence to incite or arouse fear of racial or religious hatred (and hatred by reference to sexual orientation and disability). The Criminal Justice (No.2) (Northern Ireland) Order 2004 includes similar provision for offences aggravated by racial, religious, sexual orientation and disability hostility.

Scotland

The Criminal Justice (Scotland) Act 2003 includes a similar provision for offences aggravated by religious prejudice. An offence is racially or religiously aggravated if at the time, or immediately before or after committing an offence, a person demonstrates hostility towards the victim based on the victim's actual or presumed membership of a racial or religious group, or the offence is motivated (wholly or partly) by malice and ill-will towards members of a racial or religious group because of their membership of that group.

The Offences (Aggravation by Prejudice) (Scotland) Act 2009 makes provision in Scotland for the aggravation of offences by prejudice relating to disability or to sexual orientation or transgender identity. As long as some of the motivation is wholly or partly relating to disability, sexual orientation or transgender identity the offence will count as an offence aggravated by prejudice on those grounds. Disability refers to a mental or physical impairment of any kind.

An offence is aggravated by prejudice relating to disability or sexual orientation or transgender identity if at the time or immediately before/after committing an offence, a person evinces hostility or ill-will towards the victim relating to the victim's actual or presumed disability, or if the offence is motivated by ill-will towards persons who have a disability or a particular disability or towards the sexual orientation or transgender identity of the victim or those who have a particular sexual orientation or transgender identity.

The Hate Crime and Public Order (Scotland) Act 2021 updates existing laws around hate crime and pulls most of these laws into one piece of legislation. It also adds to the groups currently specifically protected by hate crime laws. The Act was given royal assent on 23 April 2021, and came into force on 1 April 2024.

Terrorism

The Terrorism Act of 2000 provides that it is illegal to incite the commission of terrorist acts overseas or invite or encourage support for a proscribed terrorist organisation.

The subsequent Terrorism Act of 2006 makes it illegal to glorify terrorism or the commission or preparation of terrorist acts, or to publish or circulate terrorist publications or to encourage terrorism and disseminate terrorist publications through the internet.

Counter terrorism

The Counter Terrorism and Security Act 2015 (Prevent duty), which covers all parts of the UK, requires HEIs to:

- + have due regard to the need to prevent people from being drawn into terrorism
- + in doing so, to have particular regard to the duty to ensure freedom of speech and to the importance of academic freedom
- + have regard to statutory guidance in carrying out their duties.

The Prevent duty is explained in the applicable statutory Prevent Guidance for Higher Education which was drawn up by the Secretary of State. We note that paragraph 11 of the wording of the statutory guidance was criticised by the Court of Appeal in 2019 as it was too prescriptive and failed to account for the ‘particular regard’ which HEIs must give to their duty to ensure freedom of speech and academic freedom. The updated guidance (paragraph 197) now notes that “In most cases, we expect that these [Prevent] risks can be mitigated without shutting down free speech”.

Other relevant legislation

UKBA

Institutions that are on the UK Border Agency (UKBA) sponsors’ registers for the recruitment of international students or staff have specific responsibilities in relation to reporting information to the UKBA. Institutions should ensure that they consider how this responsibility may affect relations on campus and take steps to minimise any potential disruption.

Disclosing of information

Institutions have responsibilities under the Freedom of Information Act 2000, the Data Protection Act 2018 and the Environmental Information Regulations 2004 to provide disclosures of information where it is lawful but any disclosures must be balanced against competing duties under the legislation to safeguard sensitive personal information that they hold so that individuals are not put at risk through disclosure.

Contact us

All enquiries

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