

# **The Higher Education (Freedom of Speech) Act**

PPE Society Annual Meeting

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1. **The Higher Education Freedom of Speech Act:** Its complicated history, and its key duties

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2. **The interaction with Article 10(2) of the European Convention:** Implications for academic freedom

# Plan of Talk

1. **The Higher Education Freedom of Speech Act:** Its complicated history, and its key duties
2. **The interaction with Article 10(2) of the European Convention:** Implications for academic freedom
3. **Conclusion:** Looking ahead

# The legal landscape

The most important laws governing free speech and academic freedom at universities in the UK are:



1. Article 10 of the **European Convention of Human Rights (ECHR)**, implemented via the Human Rights Act 1998. Applies throughout UK, and beyond the context of universities.



2. The **Higher Education (Freedom of Speech) Act 2023 (HEFSA)**. Applies only in England, and only relevant for universities.

Some other laws, most notably the protection of philosophical belief under the Equality Act 2010, are also relevant for free speech and academic freedom.

# Free Speech and academic freedom as defined by HEFSA

*Freedom of Speech* is defined in HEFSA with reference to “Article 10(1) of the Convention as it has effect for the purposes of the Human Rights Act 1998”: it is the **freedom to impart ideas, opinions or information by means of speech, writing or images.**

*Academic freedom* is defined as the **freedom** of (current or future) **members of academic staff to question and test received wisdom and put forward new ideas and controversial or unpopular opinions,** without facing the risk of losing their jobs or privileges or the likelihood of their securing promotion.

# The Higher Education (Freedom of Speech) Act 2023

- Motivated by high profile cancellations of speakers, increasing concerns about cancel culture and chilling effect. Pressure from pro free-speech organisations.
- The Act began its journey as a bill introduced in the Commons in **May 2021** (following a DoE policy paper from February 2021).
- What did this bill do? Key provisions of the original bill:
  1. “Secure” Duty
  2. “Code” duty
  3. “Promote” duty
  4. Director for Freedom of Speech and Academic Freedom
  5. Complaints scheme
  6. Statutory tort

# The passage of the bill

The Bill faced opposition at the House of Lords (upper house of parliament), the statutory tort proving to be the most controversial part.

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On **7th February 2023**, Claire Coutinho restores the tort in full. Following an extended period of ping-pong, the Act passed on **10 May 2023** with a compromise on the tort and became law the next day.

## 2023–2024: A new hope

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- **Prof Arif Ahmed** is appointed the Director for Free Speech and Academic Freedom in **June 2023**.



- The OfS releases its draft guidance for consultation for the complaints scheme in **Dec 2023**.
- **March 2024**: The OfS issues a draft of **Regulatory Advice 24**: a groundbreaking document.

## 2024: Political Disruption and fightback

- **May 2024:** Rishi Sunak calls an early general election.
- **July 4, 2024:** The new Prime Minister is Keir Starmer. The education secretary is Bridget Phillipson.
- **July 26, 2024: In a shock move, Phillipson pauses the commencement of the main duties of the Act**, six days before they were due to come into force, and indicates she will repeal it.
- **August - December: A sustained fightback.** Numerous open letters, including one signed by **7 Nobel laureates**. Countless **articles** in the press. A **legal challenge** spearheaded by the Free Speech Union. Several **meetings** of campaigners with **ministers and DfE officials**, three of which I was part of.

## 2025: Partial Restoration

- **January 15, 2025:** Bridget Phillipson announces in parliament that the Act would be partially restored:
  1. The main duties for universities would **remain unchanged**, and would take effect from **August 1, 2025**.
  2. The **complaints scheme** would be **amended** by parliament at a future before being allowed to come in to force: it would not be legally required to consider every complaint, and it would no longer consider complaints from students.
  3. Arif Ahmed would **continue** as Director for Free Speech and Academic Freedom.
  4. The **tort** and the **student union duties** would be **repealed**.
- **June 2025:** The OfS releases the final version of Regulatory Advice 24. Even more robust than the draft, it is a historically strong and detailed statement on how to defend free speech in higher education within the parameters of English law.

## The secure duty of HEFSA

1. This duty says that universities must take **reasonably practicable** steps, with *particular regard for the importance of freedom of speech*, to **secure** free speech and academic freedom for staff, students, and visiting speakers.
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3. RA 24 sets out 53 examples of reasonably practicable steps:
  - Universities must not require commitment to any particular values or viewpoints in hiring or promotions.
  - Academic freedom trumps reputational concerns of the university.
  - Research ethics process must not hamper academic freedom.
  - Mandatory free speech training for all key decision-makers.
  - Promptly reject online pile-ons aimed at silencing staff.
  - Any policies regulating protests must be viewpoint-neutral.
  - No mandatory training can impose a requirement to endorse any value judgement.

## Interaction of the secure duty with the ECHR

**ECHR Article 10(1)** gives substantive protections to **freedom of expression** but this right is **qualified**. It can be **restricted by Article 10(2)** in a range of circumstances and for a range of reasons, such as the “protection of the reputation or rights of others” or “for the protection of health or morals”. Employers have wide latitude to restrict speech through internal policies provided they are proportionate and for a legitimate purpose.



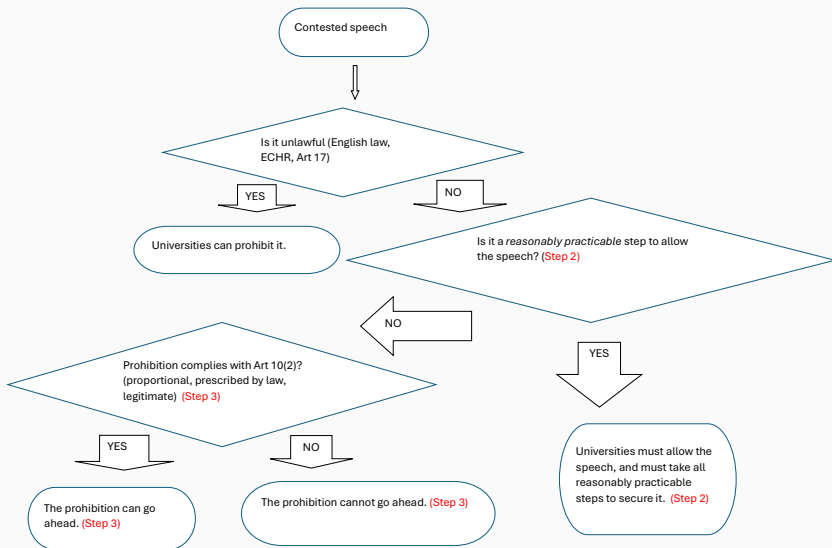
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**The Human Rights Act 1998** requires all English legislation to be interpreted in a way compatibly with the ECHR. In addition, free speech itself is defined in HEFSA with reference to Article 10(1).

The OfS has interpreted this in the context of HEFSA to mean that speech in universities must be assessed through a **3 step process**.

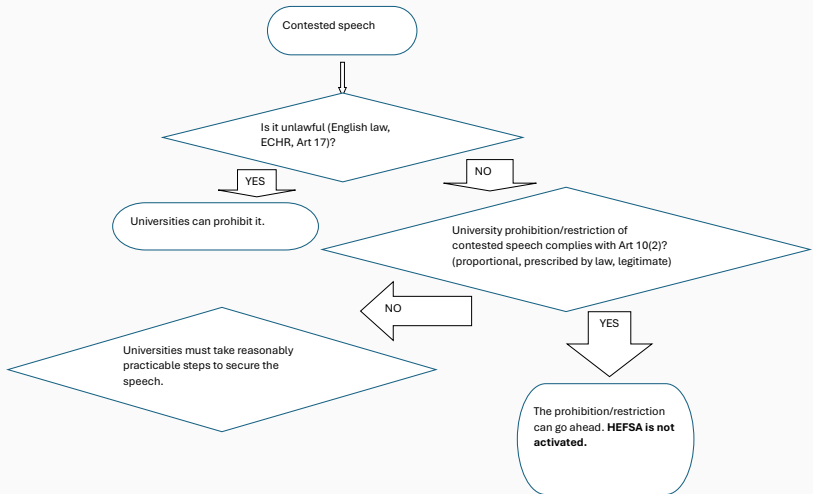
# The OfS interpretation of the secure duty



Some have contested the current OfS guidance and claimed it should be interpreted differently. This view has been driven primarily by lawyer and academic **James Murray**, who has long taken an ECHR-centric approach to academic freedom in his academic writing.

According to Murray, HRA-compatibility and the language used in the Act means that universities have an *absolute right to restrict speech through their internal policies*, as long as they do so compatibly with ECHR Article 10(2).

# The Murray interpretation of the secure duty



## What does it mean?

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- Murray might counter that there is very limited scope for Article 10(2) interference in “academic” contexts (**minimum professional standards** and fall within the academic’s **area of expertise**). I would contend that European case law and history reveals these qualifiers as tools to enforce academic orthodoxy and facilitate gatekeeping. Further, universities often abuse “proportionality” to clamp down on unfashionable views.

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- HEFSA is **much more speech-protective than the ECHR** (while still staying within the parameters of lawfulness). RA 24 takes a broadly **viewpoint-neutral** approach. If restrictions are required, RA 24 puts a very strong preference on **time, place, manner** restrictions rather than blanket prohibitions.

- Universities may be tempted to embrace the Murray interpretation as it will allow them to carry on largely as before. That would, in effect, be the **counter-revolution** to HEFSA.
- However, the OfS already has significant powers to impose its will. Recently, it fined Sussex university half a million pounds for failing to protect academic freedom.
- These powers will be substantially enhanced when the complaints scheme come into effect, which will require primary legislation. DfE officials have told me such legislation may be laid next year at the earliest, and may take time to pass.



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2. RA 24, which interprets the secure duty of HEFSA, is an *extraordinary document* — quite possibly the most robust and detailed statement on academic freedom ever issued by any governmental body. It marks a **decisive break away from ECHR jurisprudence**, substantially rejecting the paradigm of proportionality and perceived expertise in favour of an unabashedly viewpoint-neutral, free-speech-centric view.

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