

Higher Education (Freedom of Speech) Act 2023 – FAQs

DOES THE HIGHER EDUCATION (FREEDOM OF SPEECH) ACT 2023 CHANGE THE ABILITY OF UNIVERSITIES AND STUDENT UNIONS TO EXCLUDE COMPANIES IN CERTAIN INDUSTRIES FROM THEIR RECRUITMENT ACTIVITIES AND PUBLICATIONS?

Generally speaking, the answer is likely to be 'no'.

The Higher Education (Freedom of Speech) Act 2023 (HEFSA) creates a general duty, on the governing body of universities and on student unions, to take the steps that are reasonably practicable to secure freedom of speech for 'visiting speakers' (the Duty)¹. Securing freedom of speech includes securing that:

- The use of university or student union premises is not denied on the basis of the company's policy or objective or the ideas or opinions of any of its members.²
- The terms on which the premises are provided are not based on the company's policy or objective or the ideas or opinions of any of its members.

There are three reasons that universities and student unions are unlikely to breach the Duty when excluding companies from recruitment activities and publications.

- First, the company is being excluded on the grounds of its commercial trading activities and actions; not on the grounds of its policy or objectives or the ideas or opinions of any of its members. In other words, the company's policy and objective, properly determined, is to make a profit and that is not the basis on which it is being excluded.
- Second, the term 'visiting speaker' is not defined in the HEFSA and so must be given its natural and ordinary meaning within the context of the Higher Education and Research Act 2017 as a whole.³ If no invitation has been extended, the company is arguably not a 'visiting' speaker.
- Third, the supporting documents and debates in Parliament on the HEFSA all focus on securing the freedom for staff, students and visiting speakers to express ideas and opinions at higher education providers where those ideas may be contentious. The HEFSA was not intended to secure a right for companies to advance their commercial interests in accessing potential graduates and volunteers at university recruitment events. The scope of the HEFSA should be interpreted having regard to its purpose and the 'mischief' it was intended to cure.

RISK OF FAILING TO DISCHARGE THE DUTY

The impact and scope of the HEFSA is not entirely clear cut and there are some risk areas which will depend on the specific facts of each case. That is because the particular prohibited grounds of a company's policy or objectives or the ideas or opinions of any of its members, as cited in the HEFSA, are not exhaustive. An excluded company may be able to argue that the Duty has been breached in other ways.

This risk is balanced by the fact that the 'speech' of companies in a recruitment context is fundamentally commercial in nature and so may not attract the same protection as the type of speech contemplated by Parliament in enacting the HEFSA. Freedom of speech is defined in the HEFSA as the freedom to impart ideas, opinions or information (referred to in Art 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedom). Though the European Court of Human Rights has recognised that information of a commercial nature could be protected by Art 10, the 'expression' under consideration has usually also contributed more broadly to public debate.⁴ By contrast, a company's recruitment information is unlikely to make such a contribution.

Separately, there is also a risk that a company could successfully argue that its particular industry participation is in fact its policy or objective. It may be able to demonstrate this through its mission statement, other strategic documents, or even its memorandum of association (though this will be less likely for newer companies where detailed and particularised memoranda of association are very rare). The level of risk here will be company specific.

Both of these risk areas are limited by the requirement that the company be a 'visiting speaker'. As noted above, companies that have not been invited may not meet this threshold requirement.

ARE THERE WAYS TO TRY AND ADDRESS THE RISK?

Yes. In addition to establishing the Duty, the HEFSA also creates some new requirements which can give universities and student unions an opportunity to test their understanding of the HEFSA and address the risks identified above.

Codes of Practice

Universities and student unions could set out, in their Codes of Practice, their position on the involvement of a given industry, including fossil fuel, in recruitment activities.

Universities and student unions are now required to maintain Codes of Practice to help them discharge the Duty. Both universities and student unions must take 'reasonably practicable' steps to secure compliance with the Code of Practice and publicise it.

- Universities are required to maintain a code of practice setting out, amongst other things:
 - i. The university's values relating to freedom of speech and an explanation of how those values uphold freedom of speech.
 - ii. The criteria to be used by the university in making decisions about whether to allow the use of premises and on what terms.
- Student unions must maintain a Code of Practice setting out amongst other things:
 - i. The student union's values relating to freedom of speech and an explanation of how those values uphold freedom of speech.
 - ii. The criteria used by the student unions in making decisions about the union's support and funding for events and activities; and the use of premises and on what terms.

A Code of Practice could be explicit that the university/student union does not consider a given industry (including fossil fuel)'s involvement in recruitment related activities to fall within the scope of the Duty to secure freedom of speech for visiting speakers. That position could be further enforced in the values statement and criteria.

The Office for Students

The HEFSA creates some additional functions for the Office for Students (OfS) including to give advice on good practice in supporting freedom of speech and academic freedom. Universities and student unions may be able to test their position with the OfS.

IS THERE A DIFFERENCE BETWEEN EXCLUSION FROM ONSITE RECRUITMENT ACTIVITIES AND EXCLUSION FROM ONLINE EVENTS?

Potentially. At the very least, there would be an additional issue for an excluded company to contend with in relation to whether the scope of the HEFA extends to online events.

The focus of the HEFSA is on the use of physical premises. A proposed amendment to expand the Duty of universities to 'premises or online platforms' was rejected in the House of Commons.⁵

Nevertheless, it is possible, given the non exhaustive nature of the Duty, that a company could assert that the Duty has been breached by its exclusion from an online event.

In that case, the same considerations as above would apply in addition to considering whether the scope of the HEFSA extends to online events.

WHAT ABOUT DIGITAL WRITTEN CONTENT, HARDCOPY BROCHURES AND OTHER MATERIALS?

There is an even stronger argument that the HESFA does not apply to exclusion from digital media/hardcopy brochures and other materials.

Companies in those circumstances may well be 'speakers' but are not 'visiting' speakers.

IS THERE A DIFFERENCE BETWEEN ACTIONS TAKEN BY UNIVERSITIES AND ACTIONS TAKEN BY STUDENT UNIONS?

Student unions are subject to substantially the same duty as universities, save that their obligations apply to 'premises occupied by the student union'.

The Duty does not apply to all student unions. It only applies to 'a student union for students at a registered higher education provider that is eligible for financial support'.⁶

The Duty also applies to 'constituent institutions', being any college, school, hall or other institution of the university.

WHEN DOES THE HEFA COME INTO FORCE AND WHERE DOES IT APPLY?

The HEFSA became law on 11 May 2023 but has not yet come into force. The government has stated that it expects the Duty and other measures to come into force before the 2024-25 academic year.⁷

The HEFSA extends to England and Wales.

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REFERENCES

1. The Duty also applies to staff, members of the university and students but that is not the subject of this advice.
2. A different test applies to individual visiting speakers but we only consider companies in this advice.
3. Under the complaints scheme established by (new) Sch 6A Higher Education and Research Act 2017 (HERA), a complaint may be made by a person who was, or was at any time invited to be, a visiting speaker. The failure to similarly expand the concept of 'visiting speaker' in the Duty itself suggests that it may be more confined.
4. SEE for example *Gachechiladze v Georgia* 259/19 (EctRH, 22 October 2021); *Sekmadienis Ltd v Lithuania* 69317/14 (ECtHR, 20 April 2018).
5. Higher Education (Freedom of Speech Bill, PBC Deb 15 September 2021).
6. (new) s A5(1) HERA.
7. SEE 'Freedom of Speech Act: How it will affect university students' at <https://educationhub.blog.gov.uk/2023/05/30/freedom-of-speech-act-how-it-will-affect-university-students/>, accessed 15 June 2023.