



Free Speech Governance, Officers and Reporting: Requirements for English Institutions

PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at the date when the main provisions of the Higher Education (Freedom of Speech) Act 2023, which amends HERA so as to have the effects described below, come into effect. This Statement is also an accurate statement in all material respects of the effects in practice of the existing legal obligations under the Education (No. 2) Act 1986.

Introduction

Best Free Speech Practice (“**BFSP**”) is a non-partisan campaign to clarify and disseminate what the legal requirements and their implications in practice actually are for protecting free speech and academic freedom at UK universities and other higher education providers (“**HEPs**”).

It appears that the majority of HEPs have not been complying with their effective obligations under previous law to have appropriate governance for, and a dedicated officer focusing on, securing free speech. With the need to revise their policies, practices and rules to reflect recent changes to the law, now is a good time to correct this.

Alumni for Free Speech (www.affs.uk) will be monitoring and liaising with HEPs to ensure that they are free speech compliant, and if necessary following this up with Freedom of Information Requests. It will be publicising any continuing failures by them to comply with their free speech obligations under the law.

The relevant law and governance requirements

HEPs are required by their conditions of registration (E2) to have in place adequate and effective management and governance arrangements to deliver in practice the public interest governance principles that apply to it. These include principles relating to securing freedom of speech and academic freedom.

Sub-sections A1(1)-(2) of the Higher Education and Research Act 2017¹ (“**HERA**”) require the governing body of an English HEP to take *“the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take”* to secure freedom of speech

¹ As introduced by the Higher Education (Freedom of Speech) Act 2023, with effect from a date to be fixed, but which is currently expected to be in late 2023.

(within the law) for the staff, members and students (“**Participants**”) of and visiting speakers to the HEP. This is a demanding requirement, and gives no material discretion to an HEP. It is limited only by reference to the speech being “*within the law*” and by what is “*reasonably practicable*”. Free speech obligations otherwise override other considerations.

Clearly reasonably practicable steps, which would make a significant difference to the securing of free speech at English HEPs and are therefore required under HERA, would be to have a committee of an HEP’s governing body to oversee its implementation of and compliance with its free speech obligations, and a dedicated officer to promote and defend free speech within the HEP. This is explained in more detail below.

It appears that the majority of HEPs have not been complying with their equivalent obligations under the previous law in this respect. They have been acting unlawfully in not so doing. With the need to revise their policies, practices and rules to reflect recent changes to the law, now is a good time to correct this failure.

The same legal duties and legal remedies under HERA now also apply to colleges, halls, and other “constituent institutions” of HEPs, with minor adjustments. Similar legal duties and legal remedies now also apply to students’ unions. This is a major change.

What the law requires in practice

Governing bodies: a focused committee

The governing bodies of HEPs are themselves required under HERA to take responsibility for promoting and securing free speech. In addition to the governing body itself devoting sufficient time, resources and endeavour to these matters, the above requirements must also logically include forming a committee of its governing body (“**Committee**”) with focused responsibilities to oversee the HEP’s implementation and enforcement of its free speech obligations, to supervise the free speech officer referred to below, and to report back to the governing body.

In order to carry out this role effectively, the Committee should:

- (1) consist of appropriately senior and experienced people who have sufficient time for the task and who do not themselves hold views or have interests or responsibilities which might cast reasonable doubt over their ability or willingness dispassionately to perform their functions; and
- (2) have an appropriate scope of appointment, functions, and powers.

Free speech officer

A reasonably practicable step which will be likely to make a material difference to an HEP’s ability to secure freedom of speech for Participants is the appointment of a dedicated Free Speech Officer (“**FSO**”).

The role of the FSO would be to promote and defend free speech and academic freedom within the HEP and among its Participants, to ensure the development and implementation of improved policies, practices and rules to secure compliance with the HEP's legal obligations, and to work to ensure that these are given effect and complied with in practice.

The FSO should:

- (1) Be appropriately senior and experienced, have sufficient time for the task, and not hold views or have interests or responsibilities which might cast reasonable doubt over their ability or willingness to perform their functions dispassionately².
- (2) Have responsibility for and oversight over free speech training within the HEP.
- (3) Have powers sufficient to enable them to perform the functions described above. This should include powers to investigate alleged breaches of the HEP's rules and requirements relating to free speech, and (to the extent that this is not a responsibility reserved to the Committee or governing body itself or another appropriate officer or body) to:
 - order (or recommend) a range of appropriate remedies, and/or impose (or recommend) disciplinary sanctions for breaches; and/or
 - bring disciplinary proceedings before an appropriate tribunal (or recommend that such proceedings are brought).

This should also include the power, when appropriate, to require or recommend any reasonable and practicable action to be taken or not taken by the HEP or any Participant.

- (4) Be provided with appropriate resources, support, facilities and access to documents and other relevant information.
- (5) Be required to report to the Committee (or the governing body itself) on a regular basis (and immediately in the case of significant problems) about the implementation and effectiveness of the HEP's rules and requirements relating to free speech and about any problems or issues which have arisen.
- (6) Be required to make recommendations to the Committee (or the governing body itself) for the better implementation and functioning of the HEP's rules and requirements relating to the protection of free speech and its compliance with its legal obligations in respect of free speech.

² Although a FSO could combine this function with other functions, they could not do so so as to cause a potential or perceived conflict of interest, for instance through also being part of the diversity or complaints functions or processes.

Related requirements

An HEP must have an appropriate and properly functioning process for identifying, reporting and remedying activity which is contrary to lawful freedom of speech, the law relating to securing free speech or the HEP's rules and requirements relating to free speech.

An HEP should have an appropriate review and appeals process in respect of decisions made by the FSO and/or the Committee.

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Details of the Committee (authors) and Editorial and Advisory Board of BFSP are on the BFSP website.

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Important: *This document is a short summary of a complex area of law, and does not purport to be complete or definitive. It is not (and may not be relied on as) legal or other advice: HEPs and others should consult their legal and other advisers in respect of all matters relating to free speech in connection with their institution, including those referred to in this document. It does not seek to prescribe detailed policies and practices. These will have to be developed by HEPs themselves, in the context of their own particular circumstances.*