



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

PRELIMINARY – EFFECTIVE DATE: this Statement sets out the position as at 1 August 2024, when the main provisions of the Higher Education (Freedom of Speech) Act 2023 come into effect.

IMPORTANT – THIS STATEMENT IS OUT OF DATE: it was written before draft OfS guidance was produced, so needs to be significantly revised. THIS STATEMENT WILL BE REVISED after 1 August, and from time to time as the law, guidance and knowledge develop. SEE ALSO the important notice at page 5.

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 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

HERA

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 (within the law) for the staff, members and students (“**Participants**”) of and visiting speakers

¹ With effect from 1 August 2024.

to the HEP. This is a demanding requirement and requires active, positive steps to be taken². The obligations are stated in objective terms, giving no material discretion to an HEP as to what steps it needs to take. 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 take the steps set out in detail below.

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 certain students’ unions. This is a major change.

Requirements as to governance

HEPs are required by their conditions of registration (E1 and E2) to have governing documents that uphold, and 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.

The OfS has stated³ that, in considering whether an HEP complies with condition of registration E1, it may consider questions such as whether those governing documents provide for reasonable steps that facilitate securing lawful speech or include content that provides for steps that may undermine free speech. In the same publication, the OfS stated that, in considering whether an HEP complies with condition of registration E2, it may consider questions such as:

- Does the HEP have robust decision-making arrangements, which require it to consider the impact of its decisions on free speech and academic freedom as part of the decision-making process?
- Does the HEP have checks and balances to ensure that its policies and processes do not adversely affect free speech or academic freedom?

Pursuant to **Section 8A** of HERA⁴, the OfS must also ensure that HEPs’ conditions of registration include a requirement that:

- their governing documents are consistent with compliance with their duties under

² The OfS recently put it thus: “*this is likely to entail a wide range of steps needing to be taken in practice. In our view, it is unlikely to be sufficient for a university only to make public statements in favour of free speech*”. (Insight publication *Freedom to question, challenge and debate*, December 2022 (the “**OfS December 2022 Publication**”).. <https://www.officeforstudents.org.uk/media/8a032d0f-ed24-4a10-b254-c1d9bfcfe8b5/insight-brief-16-freedom-to-question-challenge-and-debate.pdf>.)

³ OfS December 2022 Publication.

⁴ Due to come into force on 1 September 2025.

Sections A1 to A3 of HERA to take reasonably practicable steps to secure and promote freedom of speech;

- HEPs must have in place adequate and effective management and governance arrangements to secure compliance with those duties;⁵ and
- the governing body of the HEP complies with its primary obligations under HERA described above.

See further detailed statements by BFSP on the protection of free speech, including protected viewpoints under the Equality Act, at <https://bfsp.uk/universities-and-free-speech>.

What the law requires in practice

Governing bodies: sufficient attention and 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 (free speech promotion and protection should be a sufficiently regular agenda item), the above requirements must also logically include forming a committee of its governing body or other senior working group (“**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:

- 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
- 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 requirements to secure compliance with the HEP’s legal obligations, and to work to ensure that these are given effect and complied with in practice.

⁵ See also the OfS’s *Securing student success: regulatory framework for higher education in England*.

The FSO should:

- Be appropriately senior (sufficiently so to participate in governing body meetings) 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 dispassionately⁶.
- Have responsibility for and oversight over free speech training within the HEP.
- 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.

- Be provided with appropriate resources, support, facilities and access to documents and other relevant information.
- 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.
- 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.

Risk management

An HEP should ensure that its risk officers and functions are aware of free speech related issues and the risks they create, and that significant free speech risks are on its risk register and given an appropriate level of seriousness.

⁶ 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. Given that controversies around aspects of diversity agendas appear to have given rise to many of the free speech problems in recent years, it is hard to see how a FSO can also have material functions in an HEP's EDI department without insuperable conflicts of interest.

Related requirements

An HEP must ensure that relevant staff are properly trained and understand the nature of the requirements to protect free speech.

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 and/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 and/or the complaints process.

An HE will need to ensure that these functions are structured and staffed so as to deal with issues and complaints promptly and effectively, and appropriately address the fact that many complaints will be against the HEP and its staff, so will need to be resolved by people who are sufficiently independent to avoid material conflicts of interest.

Best Free Speech Practice

February 2024

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

www.bfsp.uk / info@bfsp.uk

BFSP is part of DAFSC Ltd, company no, 14189200. Registered office: 27 Old Gloucester St, London W1N 3AX.

Important: *This document:*

- *is a short summary of a complex area of law and its implications, 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;*
- *does not seek to prescribe detailed specific policies, practices and requirements for particular HEPs, will have to be developed by HEPs themselves, in the context of their own particular circumstances;*
- *will be revised from time to time as the law, guidance and knowledge develop; and*
- ***MAY BE OUT OF DATE:*** *see its publication date above.*