

# Free Speech Code – checklist

Name of HEP:

Date of review:

## Introduction

- This checklist reflects the obligations under **Section 43** of the Education (No.2) Act 1986 (“**Section 43**”) and the draft guidance (“**Draft OfS Guidance**”) as to the requirements in practice for English Higher Education Providers (“**HEPs**”) issued by the Office for Students (“**OfS**”) in connection with **the Higher Education (Freedom of Speech) Act 2023** (“**HEFSA**”) as *Regulatory advice 24 – Guidance relating to freedom of speech*. Even though the full coming into force of HEFSA on 1 August 2024 was revoked by the new Government on 25 July 2024 pending a review of HEFSA (including its potential repeal), many of the core duties in HEFSA are substantially identical or very similar to the core duties in Section 43, so it appears that the Draft OfS Guidance continues (to that extent) to be an accurate reflection of the requirements in practice under Section 43 as well as being likely still to reflect the OfS’s expectations for HEP compliance: compliance with the relevant provisions of the Draft OfS Guidance is therefore both prudent and best practice. Those relevant sections of the Draft OfS Guidance are reflected in this checklist.
- Under Sub-section 43(3), the issuance of a code of practice (“**FS Code**”) is required, with a view to facilitating the discharge of the duty imposed by sub-section (1) i.e. the general duty to take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees [of the HEP] (“**Participants**”) and for visiting speakers. This general duty is relevant to FS Codes and their contents and enforcement.
- Section 43(8) extends HEPs’ duties in respect of meetings described below to include premises occupied by an associated students’ union which are not premises of their associated HEP. This imposes duties on HEPs to regulate the behaviour of their associated students’ unions in respect of meetings.
- The requirements and implications of Section 43 and other relevant legal requirements are explained in detail in BFSP’s statement **Free speech protection at English universities: The law and requirements in practice** (the “**Principal Statement**”). See also more detailed information about the requirements relating to meetings in BFSP’s statement *Meetings at English HEPs: Free speech requirements and risks*. These can be found at <https://bfsp.uk/universities-and-free-speech>.

| Obligation/Best Practice   | Complies? | Comments on compliance | Further information re requirements  |
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| <b>General requirements pursuant to Section 43</b>   |           |                        |  |
| <p>HEPs must issue an FS Code and keep it up to date. As well as the detailed requirements explained below, an FS Code must “deal with such other matters as the governing body consider appropriate”.</p> <p>Is the FS Code up to date: <b>when was it last revised?</b></p>  | [N/a]     |                        | <p>Section 43(3).</p> <p>With the rapidly changing legal environment, FS Codes will need to be reviewed regularly for compliance.</p>  |
| <p><b>General contents about free speech and its importance:</b></p> <p>The FS Code should set out the HEP’s <b>values relating to freedom of speech</b>, together with an explanation of how those values uphold freedom of speech. HEPs are expected to at least consider including the following:</p> <ul style="list-style-type: none"> <li>- a statement about the overarching value of freedom of speech within the law for the HEP;</li> <li>- a statement about how those values uphold freedom of speech within the law at the HEP;</li> <li>- a statement emphasising the very high level of protection for the lawful expression of a viewpoint and for speech in an academic context; and</li> </ul> |           |                        | <p>These items appear to be “reasonably practicable”, and will make a significant contribution to free speech protection, so are almost certainly required pursuant to Section 43. They will be required if the main provisions of HEFSA come into effect, and/or are reflected in the Draft OfS Guidance so are likely to reflect continuing OfS expectations as to compliance in any event. It is therefore prudent, and best practice, to give them effect.</p> <p>See: Draft OfS Guidance, paragraphs 76 and 77.</p> |

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| <ul style="list-style-type: none"> <li>- a statement that freedom of speech within the law may include speech that is offensive.</li> </ul>  |  |  |  |
| <p><b>Publicity and publication:</b></p> <p>The FS Code should be published in a prominent position, and easily accessible online.</p> <p>An HEP should have a clear and simple statement about the FS Code, which should summarise its contents and make clear how to access it. The statement should be:</p> <ul style="list-style-type: none"> <li>- communicated to Participants at least annually;</li> <li>- contained in any prospectus and staff and student handbooks; and</li> <li>- included prominently in any other document stating or explaining any policy that may affect free speech or academic freedom, along with a statement that nothing in that other document should be read as undermining or conflicting with the FS Code and that in case of any conflict the FS Code will take precedence.</li> </ul> |  |  | <p>The general duty under Section 43(1) must require that reasonably practicable steps are taken in terms of the publication and format of the FS Code so as to ensure its existence and contents are sufficiently communicated to all Participants.</p> <p>These items appear to be “reasonably practicable”, and some if not all of them will make a significant contribution to free speech protection, so are likely to be required pursuant to Section 43.</p> <p>These actions will be required if the main provisions of HEFSA come into effect, and/or are reflected in the Draft OfS Guidance (paragraphs 74 and 75) so are likely to reflect continuing OfS expectations as to compliance in any event. It would therefore be prudent, and best practice, to give them effect.</p> |
| <p>An HEP must itself <b>take all reasonably practicable steps to secure compliance</b> with its FS Code, including where appropriate by the initiation of disciplinary measures. This clearly requires HEPs to:</p> <ul style="list-style-type: none"> <li>- have appropriate rules in place requiring compliance with the code, but also rules prohibiting</li> </ul>  |  |  | <p>Section 43(4).</p>  |

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| <p>discrimination, harassment, bullying and other attacks (such as complaints and false accusations) against staff and students for their viewpoints; and</p> <ul style="list-style-type: none"> <li>- enforce those rules actively and appropriately.</li> </ul> |  |  | <p>This has many implications in practice, which are discussed in BFSP’s Statement <i>Meetings at English HEPs: Free speech requirements and risks</i>.</p> <p>See also BFSP’s Statement <i>Requirements for staff and student behaviour: English HEPs’ free speech compliance obligations</i>.</p> |
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| <b>Impact of important wider legal obligations under other relevant legislation</b>  | <b>Complies?</b> | <b>Comments on compliance</b> | <b>Further information re requirements</b>   |
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| <p>The primary duty to secure free speech under Section 43, and the need to avoid discrimination against and harassment of Participants in connection with their protected viewpoints under the Equality Act (or to qualify for the defence in Section 109(4) of the Equality Act (“<b>Section 109(4) Defence</b>”) against liability for their employees’ discrimination and harassment), mean that the <b>following requirements also apply in respect of FS Codes:</b> in some cases as a legal requirement or compliance need, and in others as a matter of prudence or best practice.</p> | [N/a]            |                               | <p>Under Section 109(4), HEPs will have a defence against legal liability as a result of discrimination or harassment by their employees if they can prove they have taken “all reasonable steps” to the alleged act or anything of that description.</p>                                    |
| <p>The FS Code <b>must require Participants:</b></p> <ul style="list-style-type: none"> <li>- to comply with the FS Code; and</li> <li>- not to discriminate against, harass or bully Participants in connection with their viewpoints (giving examples to help Participants understand the sorts of viewpoints that are protected including, for example, in relation to aspects of gender and race ideology). This needs to be stated clearly and with sufficient detail, but may be</li> </ul>  |                  |                               | <p>Required pursuant to Section 43(4). Also to qualify for the Section 109(4) Defence, in respect of Participants who have “protected viewpoints”: recent case law has clarified that rules requiring employees not to harass people are essential in order to qualify for this defence.</p> |

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| <p>stated in full separately in rules regarding Participants' behaviour, but referred and linked to in the FS Code.</p> |  |  |  |
| <p>FS Codes should contain a statement of <b>institutional neutrality</b> on contentious issues.</p>                    |  |  | <p>This is not a specifically identified obligation, but is a clear need in order for an HEP itself not to disadvantage people with dissenting viewpoints and thus fail to comply with their obligations. Further, employers will be liable where they fail to take all reasonable steps to ensure that employees do not discriminate and harass other people<sup>1</sup>.</p> <p>If a HEP itself takes sides in contentious debates about controversial ideological issues, it will make it harder to establish that it has taken all reasonable steps to prevent discrimination against or harassment of staff or students on the other side of such debates.</p> <p>Institutional neutrality is enshrined in the Chicago Principles and would once have been thought foundational at any HEP.</p> <p>In light of recent criticism of HEPs for taking official stances (e.g. via their EDI Departments) on contentious ideological issues, some institutions (e.g. Imperial College, London, Queen Mary University of London and Harvard in the USA) are leading the way back to the once unquestioned norm via institutional neutrality statements in their FS Codes.</p> |

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<sup>1</sup> A key example is by failing to reject complaints against a person for their viewpoints early on because of an assumption they must be reasonable, which led to humiliating liability for an employer and regulator in the *Meade* case.

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| <p>FS Codes and other policies and rules should refer to <b>"tolerance" not "respect"</b>.</p>   |  |  | <p>People must not be prevented from expressing strong disagreement with, including disrespect for, other viewpoints. A requirement in codes and policies for "respect" for people and their views effectively limits people from expressing profound disagreement on strong terms, and this is unlawful or quickly leads to unlawfulness. What is required is "tolerance": allowing people to hold and express views one may profoundly disagree with, and not abusing or attacking them personally for those views - while being free to oppose the viewpoints themselves. This is not an explicit requirement, but is important in order to minimise risks of compliance failures.</p> |
| <p><b>Sufficient training</b> of Participants about their free speech requirements. (While this would not be "in" the FS Code, such training would normally refer to the FS Code extensively.)</p>   |  |  | <p>This is "reasonably practicable" and would make a huge difference to free speech protection, so is required pursuant to Section 43. Also confirmed by case law as required (in respect of employees, at least) to qualify for the Section 109(4) Defence, in respect of Participants who have "protected viewpoints".</p>  |
| <p>HEPs must <b>not misdescribe, misinterpret or misapply definitions and obligations</b> (including "contrary obligations", eg to avoid discrimination and harassment) under the Equality Act, as this leads to mistakes and unlawfulness. Examples of errors include:</p> <ul style="list-style-type: none"> <li>- Failure to update policies to cater for developments in what count as "protected viewpoints"</li> <li>- Exaggeration/misstatement of definitions or obligations in the Equality Act, in particular giving "harassment" a wider meaning than it restricted,</li> </ul> |  |  | <p>Required pursuant to Section 43 and to qualify for the Section 109(4) Defence and otherwise avoid liability under the Equality Act.</p> <p>These issues are in our experience endemic in UK institutions, and lead to unlawfulness and liability, e.g. the now famous <i>Fahmy</i>, <i>Meade</i> and <i>Phoenix</i> cases. For instance, in the <i>Fahmy</i> case, the employer had not updated its policies to cater for what count as "protected viewpoints", and was held liable under Section 109 of the Equality Act when its employees harassed a colleague over her viewpoints.</p>   |

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| <p>objective statutory one, eg so as to give weight at any claim of “offence”.</p> <ul style="list-style-type: none"> <li>- Working on the basis that an HEP’s requirement under the Equality Act to protect people from harassment and discrimination applies more widely than just in respect of their employees and (to a degree) students*. It is important to understand that HEPs don’t have to protect: <ul style="list-style-type: none"> <li>(a) third parties (who don’t otherwise have express protections as regards the HEP) from the behaviour of their employees or students, or</li> <li>(b) their employees or students from the behaviour of parties other than the HEP itself and its employees, save re sexual harassment.</li> </ul> </li> </ul> <p>So, an HEP couldn’t invoke the Equality Act to cancel a <u>student-organised</u> event because it might result in its employees or students** claiming to experience harassment or discrimination as a result of the subject-matter or views expressed at the meeting (subject to its wider anti-bullying rules, although this would have to be exercised compliantly with Section 43 and “proportionately” under the Human Rights Act).***</p> |  |  | <p>AFFS will be conducting a review of HEP policies in this regard, and where these are not promptly corrected on notification, or appear to be materially and negligently defective, will be reporting them to the OfS.</p> <p>* HEPs have very limited duties under the Equality Act as regards the behaviour of their students, save possibly under their weak duties (to consider) under the PSED.</p> <p>** Except possibly under its weak duties (to consider) under the PSED.</p> <p>*** But note that relevant parties, including external speakers, may well have protections under Section 43 and the Human Rights Act.</p> |
| <p>Any <b>policies and procedures relating to harassment of students</b> in, or referred to in, the FS Code will need to comply with <b>new condition of registration E6</b> as from 1 August 2025. (This condition generally reflects legal obligations which already exist as regards free speech protection and its interaction with concepts regarding</p>   |  |  | <p>A new general ongoing condition of registration E6, relating to harassment of students, will come into effect on 1 August 2025. It requires providers to provide and operate in accordance with a single, comprehensive source of information which sets out policies and procedures on subject matter relating to incidents of harassment and sexual misconduct.</p>  |

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| <p>harassment, so HEPs would do well to be reflecting it in practice as soon as possible.)</p> <p>Important safeguards for free speech include the need for those policies and procedures to comply with two freedom of speech principles.</p> <ul style="list-style-type: none"> <li>- Irrespective of the scope and extent of any other legal requirements that may apply to an HEP, the need for the HEP to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place.</li> <li>- the need for an HEP to apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment: <ul style="list-style-type: none"> <li>• the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures; or</li> <li>• statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course.</li> </ul> </li> </ul> |  |  | <p>This new condition addresses problems arising from HEPs’ policies and rules all too often overstating, or misdescribing, key concepts such as harassment so as to go above and beyond what is strictly considered unlawful harassment pursuant to relevant law. This has resulted in frequent free speech failures.</p> <p>An HEP will be required to comply with specified “freedom of speech principles” in respect of such policies and procedures, including when taking decisions about whether its policies and procedures will include content on harassment which goes further than is required under the Equality Act, or could reasonably be considered capable of having a negative impact on, or the object or effect of restricting free speech or academic freedom.</p> |
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| Meetings: detailed provisions of FS Code   | Complies? | Comments on compliance | Further information re requirements  |
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| <p>The FS Code needs to <b>apply to all types of meeting</b>, including lectures, seminars and the like, and management meetings; and both to internal meetings and ones with external speakers (including participants in debates or discussions).</p>  |           |                        | <p>There are many implications in practice, which are discussed in BFSP's Statement <b><i>Meetings at English HEPs: Free speech requirements and risks.</i></b></p>  |
| <p>Does the FS Code <b>extend to premises occupied by an associated students' union</b> of the HEP, even though not premises of that HEP?</p>  |           |                        | <p>Section 43(8) extends HEPs' duties in respect of meetings to include premises occupied by an associated students' union which are not premises of their associated HEP.</p>   |
| <p>Under Sub-section 43(3), FS Codes must set out the <b>procedures to be followed</b> by Participants in connection with the organisation of meetings and other activities (which fall within any class of meeting/activity specified in the FS Code) at the premises of the HEP or an associated students' union<sup>2</sup>and the conduct required of such persons in connection with those meetings and activities and dealing with such other matters as the governing body consider appropriate.</p> <p>The Draft OfS Guidance states that such procedures should:</p> <ul style="list-style-type: none"> <li>- be broad, not be limited to policies relating to external speakers or events, but, rather, applicable to all staff and students, and students' unions when organising any activities that related to academic life both on and off campus; and</li> </ul> |           |                        | <p>Detailed procedures could be (and often are) contained in a separate document. A section in the main FS Code describing these requirements and linking to the separate document is sufficient.</p> <p>These actions appear to be "reasonably practicable and would make a material difference to free speech protection, so are likely required pursuant to Section 43. They are in draft OfS</p> |

<sup>2</sup> The phrase "*premises of [the HEP]*" is extended by **Section 43(8)** to include premises occupied by an associated students' union which are not premises of their associated HEP.

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| <ul style="list-style-type: none"> <li>- clearly and expressly require decision-makers, in making any decision or adopting any policy that could directly or indirectly (and positively or negatively) affect freedom of speech, to act compatibly with the statutory free speech duties.</li> </ul>  |  |  | <p>Guidance paragraphs 79 and 80, and probably reflect the continuing expectations of the OfS, so should in any event be followed as a matter of prudence and best practice.</p>  |
| <p>The <b>procedures for organising room bookings and speaker events</b> should:</p> <ul style="list-style-type: none"> <li>- be sufficient to ensure timely, user-friendly and appropriate processing and consideration of planned meetings and events, and should not operate as an effective inhibitor on holding successful meetings and events, for instance by being too slow or being so cumbersome and unwieldy that they put potential organisers off; and</li> <li>- adhere to the following principles: <ul style="list-style-type: none"> <li>- They should make clear that the starting point for any event is that it should go ahead and that cancellation is exceptional and undesirable.</li> <li>- The procedures should be clearly set out.</li> <li>- The process should not take longer than necessary.</li> <li>- There should be a single, identified point of contact for questions about the process.</li> </ul> </li> </ul> |  |  | <p>See further information at BFSP’s Statement <b><i>Meetings at English HEPs: Free speech requirements and risks.</i></b></p> <p>See the Draft OfS Guidance at paragraphs 82 and 83, which states that these principles are “are widely recognised”. This probably reflects the continuing expectations of the OfS,</p> <p>These actions appear to be “reasonably practicable and would make a material difference to free speech protection, so are likely required pursuant to Section 43.</p> <p>The terms on which the HEP’s premises are provided must not be based on the views of the organisers or people likely to speak or attend at the meeting or event, and this includes as to any</p> |

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| <ul style="list-style-type: none"> <li>- There should be an identified person responsible for deciding whether and how an event may proceed.</li> <li>- There should not be onerous requirements for information.</li> </ul> <p>This section of the FS Code should set out a process for the <b>timely consideration of risks</b> to the event. The purpose of the process would be to put in place steps that permit the event to go ahead.</p>   |  |  | <p>requirements imposed in relation to hiring and using venues.</p> <p>The Draft OfS Guidance contemplates (at paragraph 107) that there may occasionally be circumstances in which an HEP regulates which premises may be used for a particular event and at what time they may be used, on grounds related (for instance) to the policy or objectives of the body to which it is making the premises available. For instance, where there are two mutually hostile gathering at the same time.</p> |
| <p>The FS Code must set out the <b>conduct required</b> of Participants in connection with any such meeting or activity (the scope of this section should replicate that in the procedures section of the FS Code).</p> <p>The content of this section should be consistent with the following principles:</p> <ul style="list-style-type: none"> <li>- Everyone has the right to free speech within the law.</li> <li>- HEPs should seek to expose their members and students to the widest possible range of views.</li> <li>- If a speaker breaks the law, it is the speaker who is culpable.</li> <li>- Protest is itself a legitimate expression of freedom of speech. However, protest must not shut down debate.</li> </ul> |  |  | <p>Section 43(3)(b).</p> <p>See Draft OfS Guidance at paragraphs 85 and 86. This was written with reference to HERA, but must also be prudent and represent best practice (and what we would anticipate that the OfS would expect) under Section 43.</p> <p>See further information at BFSP's Statement <b><i>Meetings at English HEPs: Free speech requirements and risks.</i></b></p>  |

| Costs of meetings  | Complies? | Comments on compliance | Further information re requirements  |
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| <p>The FS Code should set out the <b>criteria for determining</b> whether the HEP will pay the security costs of a meeting or event.</p> <p>These <b>criteria should be</b> clear, objective and neutral.</p> <p>These criteria should not (so far as is consistent with the law) <b>depend on any of the relevant person’s or body’s viewpoints</b>, policies or objectives or the ideas or opinions likely to get legal expression at the meeting or event.</p> <p>Where an HEP requires an organiser to bear any security costs, it should supply the organiser of the event with a clear written summary of its calculation of the expected security cost and an explanation for this calculation.</p> |           |                        | <p>The imposition of unaffordable security costs has previously resulted in meetings on unpopular subjects being cancelled, with activists threatening physical force and noisy disruption.</p> <p>HEPs will need to be actively involved in monitoring and supervising security issues and assisting often inexperienced organisers to arrange appropriate security.</p> <p>It must in many cases be “reasonably practicable” for the purposes of Section 43(1) for HEPs to pay for security costs of a meeting or event, and case law recognises that this may be required. There must, however, be limits to what would be considered to “reasonably practicable”. The uncertainty over the point at which it would in a particular case cease to be reasonably practicable that an HEP pays the security costs of a meeting militates towards caution and prudence: paying security costs in cases of doubt is the only safe way forward.</p> <p>The above is a requirement for action in practice, rather than for code content. It must, however, be highly likely to be a “reasonably practicable” step, which will be very helpful to event organisers and thus help the planning and holding of potentially controversial events, that HEPs make clear in their FS Codes what their criteria are for determining whether the HEP will pay the security costs of a meeting or event.</p> |

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|  |  |  | <p>The Draft OfS Guidance (paragraphs 97 to 94) requires that HEPs pay security costs, save in exceptional circumstances, and sets out detailed consequent requirements. While the provision of HEFSA that this reflects have not come into effect, and parts of this section of the Draft OfS Guidance go further that what is required under Section 43, HEPs should consider (with legal advice) which of them are “reasonably practicable” for the purposes of Section 43, and put those into effect. Parts of this section of the Draft OfS Guidance may well also reflect, to some extent, the continuing expectations of the OfS. Clarification would be helpful.</p> |
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