



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

**PRELIMINARY** – this Statement sets out the currently applicable legal obligations under the Education (No. 2) Act 1986 and other legal requirements for free speech protection at English HEPs, and their implications in practice. This Statement is also an accurate statement in most material respects of the effects in practice of the main provisions of the Higher Education (Freedom of Speech) Act 2023, were these brought into effect. Those requirements are more demanding than is currently the case, so this Statement would be updated to reflect them in time.

**IMPORTANT** – THIS STATEMENT WILL BE REVISED from time to time as the law, guidance and knowledge develop. IT MAY BE OUT OF DATE: see its publication date.

### 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 to have appropriate governance for securing free speech. With the need to revise their policies, practices and rules to reflect the changing legal and regulatory environment, now is a good time to correct this.

### The relevant law and governance requirements

#### Section 43

**Section 43** (“**Section 43**”) of the Education (No.2) Act 1986 (the “**Education Act**”) requires every individual and body of persons concerned in the government of any HEP to take “*such steps as are reasonably practicable*” to ensure that freedom of speech (within the law) is secured for the members, students and employees (“**Participants**”) of, and visiting speakers to, the

HEP<sup>1</sup>. This is a demanding requirement and requires active, positive steps to be taken<sup>2</sup>. The obligations are stated in objective terms, giving limited 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*”.

Clearly reasonably practicable steps, which would make a significant difference to the securing of free speech at English HEPs and are therefore required under Section 43, are set out in detail below.

The amendments to the Higher Education and Research Act 2017 (“**HERA**”) introduced by the Higher Education (Freedom of Speech) Act 2023 (“**HEFSA**”) included enhancements of the free speech duties under Section 43 which were due to come into force on 1 August 2024. Following the General Election, however, the new government revoked the commencement provisions pending a review of HEFSA (including its potential repeal). By then, though, pursuant to provisions of HEFSA already in force, the Office for Students (“**OfS**”) had already issued draft guidance (“**Draft OfS Guidance**”)<sup>3</sup> which includes provisions which are relevant to relationships between HEPs and campaign organisations. We consider that the Draft OfS Guidance generally correctly reflects the relevant legal requirements under HEFSA.

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. Relevant sections of the Draft OfS Guidance are reflected in this Statement, which will require updating when a final version of the Draft OfS Guidance as to comply with Section 43 or HERA (as the case may be) is brought into effect.

The Section 43 obligation to take reasonably practicable steps to secure freedom of speech does not apply to the individuals and bodies which govern constituent institutions (such as the colleges, schools or halls) of HEPs, or students’ unions. However, the Section 43 obligation is likely to require an HEP to take such steps as are reasonably practicable in the circumstances to require or encourage constituent institutions and students’ unions to have in place governance structures which are sufficient to secure freedom of speech within the law. HEPs’ ability to secure this in practice will, of course, be limited by factors such as operational independence.

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<sup>1</sup> See Sub-section 43(1).

<sup>2</sup> The Office for Students (“**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>.)

<sup>3</sup> I.e. “*Regulatory advice 24: Guidance related to freedom of speech*”.

This area of law is complex and currently evolving. For more information, see BFSP's Statement **Free speech protection at English universities: the law and requirements in practice** (the "Principal Statement"), which can be found at <https://bfsp.uk/universities-and-free-speech>.

## Requirements as to governance

HEPs are required by their conditions of registration to have governing documents that uphold (condition E1), and to have in place adequate and effective management and governance arrangements to deliver in practice (condition E2), the public interest governance principles that apply to them. These include principles relating to securing freedom of speech and academic freedom.

The OfS has stated<sup>4</sup> 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?
- Does the university ensure that staff are appropriately trained, in particular those who are making decisions that may affect free speech and academic freedom matters?

(The above regulatory requirements now appear to be reflected in the Draft OfS Guidance, as that Guidance is applicable in the context of Section 43.)

## What the law requires in practice

### *Governing bodies and other officers: sufficient attention and a focused committee*

The governing bodies of HEPs are themselves collectively required under Section 43 to take responsibility for securing free speech. In addition to the governing body itself devoting sufficient time, resources and endeavour to these matters (free speech 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:

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<sup>4</sup> OfS December 2022 Publication.

- 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.

Section 43 applies to “every individual and body of persons concerned in the government of” any HEP. HEPs should identify who those people are – in addition to members of its governing body – and ensure that they are aware of their responsibilities and are appropriately prepared to fulfil their obligations.

### *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.

The FSO should:

- Be appropriately senior (sufficiently so to participate in governing body meetings), experienced and trained, and have sufficient time for the task.
- Not hold views or have interests or responsibilities which might cast reasonable doubt over their ability or willingness to perform their functions dispassionately. Although a FSO could combine this function with other functions, they could not do so as to cause a potential or perceived conflict of interest. Given that controversies around aspects of EDI 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. As stated in the Dandridge Review into the free speech protection failures at the Open University as regards Professor Jo Phoenix: “the only possible way forward that allows for the appropriate manifestation of protected beliefs (even where those beliefs might conflict with another person’s identity) and yet acknowledges each member of staff’s fundamental right to determine and manifest their own identity, is for the OU to separate out its approach to issues of belief from its approach to other aspects of identity, as a matter of both principle and practice.”<sup>5</sup>
- Have a good understanding of the legal requirements and their implications in practice for protecting free speech and academic freedom at their HEP.

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<sup>5</sup> Dandridge Review, paragraph 4.17. See more at BFSP’s Statement [ ], see <https://bfsp.uk/universities-and-free-speech>.

- Have responsibility for and oversight over, or at least sufficient involvement in, 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.

### *Free speech code*

HEPs must issue and keep up to date a “*code of practice*” (“**FS Code**”) which sets out: the procedures to be followed by Participants in connection with the organisation of meetings and other activities at the premises of the HEP or an associated students’ union; and the conduct required of such persons in connection with those meetings and activities. HEPs must themselves take all reasonably practicable steps to secure compliance with their FS Code, including where appropriate by the initiation of disciplinary measures.<sup>6</sup>

The Draft OfS Guidance<sup>7</sup> requires that a statement about an HEP’s FS Code should be included prominently in any document stating or explaining any policy that may affect free speech, along with a statement that nothing in that other document should be read as undermining or

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<sup>6</sup> **Sub-sections 43(3) and (4)** of the Education Act. See the Principal Statement for more details of what is required for the FS Code.

<sup>7</sup> Paragraph 75d.

conflicting with the FS Code, and that in case of any conflict the FS Code will take precedence. This includes all policies relating to equality or equity, diversity and inclusion, harassment and bullying and staff and student codes of conduct. This measure will materially enhance free speech protection and is almost certainly reasonably practicable, so is highly likely to be required by Section 43(1) and also likely to still represent what the OfS thinks appropriate.

### ***Staff Accountability***

All staff with responsibilities relating to areas that could affect compliance with free speech duties should have clear responsibilities for promoting and securing free speech within those areas and understand those responsibilities. This will particularly apply in respect of leaders in areas such as EDI and some academic disciplines in relation to which controversial agendas have sometimes been enforced, including by requiring agreement to contested opinions in induction, training, recruitment or promotion processes, and in respect of the curriculum. There should be an appropriate chain of responsibility and supervision between those staff members and the governing body.<sup>8</sup>

The Draft OfS Guidance<sup>9</sup> states that HEPs should ensure that terms of reference of all committees that could affect compliance with free speech duties expressly provide for consideration of this impact. Even if not required pursuant to the general obligation to take all reasonably practicable steps under Sub-section 43(1), this probably still represents what the OfS regards as desirable. HEPs that wish to adopt best practice should therefore include this.

### ***Recording decisions***

The Draft OfS Guidance<sup>10</sup> states that HEPs should record all decisions that could directly or indirectly (and positively or negatively) affect free speech within the law. These records should demonstrate how the HEP has had particular regard for the importance of free speech within the law. Even if not required for compliance with the general duty under Sub-section 43(1), this measure likely represents what the OfS regards as appropriate and is therefore best practice.

### ***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.

### ***Miscellaneous requirements***

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<sup>8</sup> It is unclear how much of the above is required in practice by Section 43. It would all appear to be likely to make a material difference to securing free speech, and to be reasonably practicable. Some at least may be required under HEPs' conditions of registration.

<sup>9</sup> Paragraph 102.

<sup>10</sup> Paragraph 100.

An HEP must ensure that all staff with responsibilities for areas in which free speech issues could arise have sufficient training and understanding of the nature of the requirements to protect free speech in the context of their responsibilities and the nature of their area.

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 HEP 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

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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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