

# How can universities prepare for the Higher Education (Freedom of Speech) Act?

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# About this briefing

This briefing is intended to support Universities UK (UUK) members ahead of the implementation of the Higher Education (Freedom of Speech) Act.

The government introduced the Act with the intention of strengthening freedom of speech and academic freedom in higher education in England, and received Royal Assent in May 2023.

The legislation will have a wide-ranging impact on universities in England, as well as the role and remit of the Office for Students (OfS), including:

1. a new strengthened duty to promote freedom of speech and academic freedom
2. new OfS condition(s) of registration
3. requirements for codes of practice
4. regulation of students' unions on freedom of speech
5. the introduction of a statutory tort
6. establishment of a free speech complaints scheme
7. creation of the role of the Director for Freedom of Speech and Academic Freedom
8. monitoring of overseas funding in relation to risks to academic freedom and freedom of speech
9. prohibition of non-disclosure agreements in complaints relating to harassment and sexual misconduct

This briefing sets out the legal landscape around freedom of speech and academic freedom, listing the other legal duties on universities that are relevant to freedom of speech and academic freedom. This includes the European Convention on Human Rights, the Human Rights Act 1998, the Prevent duty, the Equality Act 2010 and the public sector equality duty.

It also covers what universities may wish to consider when updating existing codes of practice on freedom of speech and academic freedom and offers suggestions of other steps universities can take to prepare for their new duties, including reviewing other governing documents.

# Introduction

Academic freedom and freedom of speech sit at the heart of the UK's higher education sector. They are critical to driving forward research and innovation, as well as providing students with the opportunity to think critically and engage with different perspectives.

Without them, universities would not be able to fulfil one of their most essential aims: the advancement of understanding and pursuit of truth.

Universities take their responsibility to protect and promote both freedom of speech and academic freedom seriously. These responsibilities have been strengthened by the [Higher Education \(Freedom of Speech\) Act 2023](#), which became law earlier this year and will be regulated by the Office for Students. The legislation creates a new duty on universities to promote freedom of speech and academic freedom, replacing the existing duty to protect freedom of speech and academic freedom. As a result of this legislation, universities in England will need to review – and possibly update – several policies, processes, and procedures to prepare for the new law coming into effect.

This briefing is intended to support members ahead of the implementation of the Higher Education (Freedom of Speech) Act. It covers what has changed as a result of the new legislation and provides an overview of the legal landscape around freedom of speech and academic freedom. It also suggests some steps which universities can consider taking now to ensure they are prepared for when their new duties in relation to free speech and academic freedom come into effect.

The briefing was developed with Shakespeare Martineau. UUK's advisory group on freedom of speech, chaired by Professor Shitij Kapur, President and Principal of King's College London, also provided input.

We would encourage members to circulate this briefing to relevant colleagues within your institution, including to colleagues responsible for governance, risk management and legal compliance.

Please note that this briefing is not regulatory advice and is not intended to cover how universities should meet the new regulatory requirements which follow due to the Higher Education (Freedom of Speech) Act. Formal guidance on this will be published by the Office for Students following consultation.

### What do ‘freedom of speech’ and ‘academic freedom’ mean?

While they are often used interchangeably, freedom of speech and academic freedom are different terms that relate to each other.

There are several different definitions for each concept, but broadly speaking:

**Freedom of speech** means everyone has the right to express lawful views and opinions freely, in speech or in writing, without interference.

**Academic freedom** means protecting the intellectual independence of academics to question and test received views and wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in danger of losing their jobs or privileges or reducing the likelihood of them securing promotion or different roles at the university.

# Background to the Higher Education (Freedom of Speech) Act

The government introduced the Higher Education (Freedom of Speech) Act with the intention of strengthening freedom of speech and academic freedom in higher education in England.

This is in response to what it considers to be a ‘chilling effect’ on staff and students’ ability to express their views at UK universities. A relatively small number of high-profile incidents are cited as evidence of constraints on freedom of speech and academic freedom. The government has stated that the aim of the new legislation is to drive culture change across campuses, rather than having a narrow focus on cancelled events or no-platformed speakers.

The Act had its first reading in the House of Commons in May 2021. It received Royal Assent in May 2023, becoming law. The new legislation will replace the relevant sections of the Education (No. 2) Act 1986 for English higher education providers. The provisions for freedom of speech set out in the Education (No. 2) Act 1986 will continue to apply to Welsh higher education providers.

In October 2022, Universities UK (UUK) published a [statement reaffirming the sector’s commitment to promoting free speech and academic freedom](#), alongside Advance HE, GuildHE, the Committee of University Chairs (CUC) and NUS. The statement reiterates universities’ firm commitment to protecting and promoting free speech and academic freedom, while continuing to oppose all forms of harassment and discrimination.

**[READ MORE: HIGHER EDUCATION SECTOR STATEMENT ON PROMOTING ACADEMIC FREEDOM AND FREE SPEECH](#)**

# Summary of the new legislation

The Higher Education (Freedom of Speech) Act will have a wide-ranging impact on universities in England, as well as the role and remit of the Office for Students (OfS). This section summarises the main changes resulting from the legislation. However, we anticipate that the majority of this will be subject to a consultation with the sector in due course.

## 1. A new strengthened duty to promote freedom of speech and academic freedom

The new legislation replaces the existing Section 43 duty under the Education (No. 2) Act 1986, which requires higher education providers to protect freedom of speech within the law for students, staff members and visiting speakers. The new legislation strengthens this, requiring higher education providers to *promote* freedom of speech and academic freedom.

### ‘Within the law’: what does this mean?

The new legislation protects freedom of speech within the law. This means that speech is protected unless it contravenes some other law. It is not therefore necessary to point to a specific legal basis for particular speech. Rather, the starting point is that all speech is permitted unless it is restricted by law.

For example, some areas of criminal law restrict the ambit of protected speech such as:

- racially or religiously aggravated offences
- threats to kill
- endeavours to break up a public meeting
- fear or provocation of violence
- intentional harassment, alarm or distress
- acts intended or likely to stir up hatred on the grounds of race, religion or sexual orientation
- encouraging or assisting the commission of an offence
- incitement to commit acts of terrorism overseas



- inviting or encouraging support for proscribed organisation
- encouragement of terrorism including the glorification of the commission or preparation of terrorism
- dissemination of terrorist publications
- encouragement of terrorism and dissemination of terrorist publications through the internet

Separately, protected speech can also be limited by civil law. For example, the expression of views and opinions in a manner which amounts to harassment, discrimination or defamation, are not regarded as free speech 'within the law.'

The Office for Students has stated that it 'stands for the widest possible definition' of free speech within the law. However, the OfS reiterates that unlawful speech is not protected.

Importantly, the duty to promote academic freedom is also extended explicitly to academic staff. The Act defines academic freedom as freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions without being at risk of being adversely affected. Being adversely affected is defined as either losing their jobs or privileges at the provider, or a reduction in the likelihood of the staff member securing promotion or a different job at the provider.

The duty also states that universities must have 'particular regard' to the importance of freedom of speech when taking the 'reasonably practicable' steps – both these concepts are outlined further in this briefing.

### **'Reasonably practicable': what does this mean?**

**Reasonably practicable** is a reasonably common statutory formulation, but case law has established that how it is construed within one piece of legislation does not necessarily mean it will be construed in the same way in another. There are at least two ways in which it can be construed.

The first is within the context of health and safety law, where a duty is placed on employers to ensure, so far as is reasonably practicable, the health, safety and welfare of its employees at work and others who may be affected by their undertaking.

In this context, reasonable practicability has been interpreted as meaning that an organisation does not need to take measures to avoid or reduce risks if the time and costs involved in any measures would be grossly disproportionate to the risk. It is for the employer to demonstrate that the decision not to implement measures on the grounds that it was grossly disproportionate to do so is justified and a court will be able consider the merits of whether or not the justification is a valid one.

The second is a broader, public law approach, whereby it is for the body on whom the duty is imposed to decide what steps are reasonably practicable and the courts will only interfere if the judgment is one that no reasonable body properly directing itself on the considerations before it could have arrived at. Provided that there is some basis for reaching the decision, the court will not consider whether the decision is a proportionate one.

Until a court has had cause to determine what the phrase means in the context of the Act, it is not possible to say for sure which of these approaches is correct. However, there are reasons to think that institutions will be required to justify the proportionality of their decisions if they decide not to take certain steps to protect free speech:

- The duty is to have ‘particular regard to the importance of free speech’, suggesting that steps to protect free speech need to be prioritised above other institutional objectives;
- The free speech complaints scheme will allow the OfS to make recommendations on what institutions should or should not do if a complaint is upheld. This is more consistent with an assessment of whether or not the institution has reached a proportionate and justified decision than merely a question of whether there was some evidence to support the institution’s decision.

The fact that an aggrieved party is able to bring a claim for damages for breach of the free speech duties supports the view that the court will be able to assess the merits of the institution’s judgment on what steps it was reasonably practicable to take to protect the individual’s freedom of speech.

## 2. New OfS condition(s) of registration

The Act requires the OfS to create new condition(s) of registration relating to free speech and academic freedom. These conditions will require universities and colleges to comply with the new free speech duties set out in the legislation. Timescales for the OfS consultation have not yet been published.

## 3. Codes of practice

Universities are already required to maintain a code of practice related to free speech and academic freedom. The new legislation requires these to be strengthened and make specific reference to:

- values relating to freedom of speech
- procedures to be followed by staff, students and the students' union for organising of meetings and other activities to be held on campus, and conduct required of people in connection to those activities
- the criteria to be used by providers in making decisions about whether to allow use of campus and on what terms

Universities must bring the code of practice to the attention of all students at least once a year. More information on codes of practice can be found on [page 17](#).

## 4. Students' unions

The new legislation extends the strengthened duty to promote the importance of freedom of speech and academic freedom to cover students' unions and, in doing so, places a duty on students' unions to take 'reasonably practicable' steps to promote freedom of speech.

This includes members of the students' union, staff and students at the provider, staff of the students' union and visiting speakers. It also requires students' unions to have a code of practice in relation to freedom of speech and to share it with members at least once a year. The OfS will monitor students' unions' compliance with these duties, which will be the first-time the OfS have had regulatory oversight of students' unions directly.

## 5. Statutory tort

Under the Act, individuals can bring civil proceedings against a university or students' union if they think that the university or students' union has breached their duties to freedom of speech and academic freedom, and this has caused them to sustain loss.

This can only be done once the individual has been through the OfS or Office of the Independent Adjudicator for Higher Education (OIA) complaints scheme, including receiving a decision, however an individual may still be able to take out an injunction prior to civil proceedings if they anticipate a breach of the new strengthened duty.

## 6. Free speech complaints scheme

The Act has introduced a free speech complaints scheme, which will be free to use and operated by the OfS. Individuals can make complaints to the OfS about either a higher education provider or students' union if they have 'suffered adverse consequences' due to actions or inactions in relation to free speech duties. Students, staff members and visiting speakers are all able to use the scheme to make a complaint.

## 7. Director for Freedom of Speech and Academic Freedom

The role of Director for Freedom of Speech and Academic Freedom at the OfS was created by the new legislation. The Director for Freedom of Speech and Academic Freedom sits on the OfS Board and has responsibility for overseeing OfS' free speech functions. Professor Arif Ahmed has been appointed as the first Director for Freedom of Speech and Academic Freedom.

## 8. Overseas funding

The legislation requires OfS to monitor overseas funding of providers and students' unions to assess the extent to which funding presents a risk to academic freedom and freedom of speech. Relevant overseas funding includes:

- endowments, gifts or donations
- research grants
- research contracts
- educational or commercial partnerships

We understand that there will be exemptions for certain countries and that the OfS will consult on, and then set, a financial threshold for overseas funding that needs to be reported to them as part of the new duties.

## 9. Non-disclosure agreements

Under the Act, the use of non-disclosure agreements (NDAs) is outlawed in complaints relating to harassment and sexual misconduct. A 'non-disclosure agreement' (sometimes known as a confidentiality clause) refers to any agreement which prevents complainants from publishing or sharing information about or talking about their complaint.

The OfS has also included a proposal to prohibit NDAs in relation to harassment and sexual misconduct in their [consultation on regulating harassment and sexual misconduct](#). This proposal includes prohibiting the enforcement of any previously agreed NDAs. We will work with OfS to understand how these two duties will work together in practice, and urge them to provide clear guidance on this.

Outside of the provisions in the Act, the increased attention on freedom of speech has led to the addition of a new question in the [National Student Survey \(NSS\)](#). From this year, the OfS will collect final year students' views on free speech through a new survey question which will ask students about how comfortable they feel expressing their views. In the 2023 results, 86% of students agreed that they feel free to express their ideas, opinions and beliefs.

# Other legal duties relevant to freedom of speech and academic freedom

There are a number of other legal duties that overlap with the duties set out in the Act. Wherever there is a question whether freedom of speech or academic freedom is being appropriately protected, higher education providers will need to consider these other legal duties in the context of the specific circumstances to decide what the appropriate balance between any competing rights and responsibilities is.

## European Convention on Human Rights (the Convention)

### Freedom of Expression

Article 10 of the Convention states that everyone has the right to freedom of expression. This includes freedom to hold opinions and to receive and impart information and ideas without undue interference by public authority.

Article 10 is a qualified right.

### Freedom of thought, conscience and religion

Article 9 of the Convention provides that everybody has the right to freedom of thought, conscience and religion. The freedom to hold a particular belief is absolute, but the right to manifest religion or belief (ie through worship, observance, and teaching) is a qualified right.

## Qualified rights

A qualified right may be interfered with, provided that:

- (a) Any restrictions are 'prescribed by law', which means they must be accessible and set out with sufficient clarity to enable individuals to anticipate what the impact of acting in a particular way is likely to be; and
- (b) The restrictions go no further than is necessary in a democratic society to achieve **one or more of** the following legitimate goals:
  - i. national security
  - ii. territorial integrity or public safety
  - iii. the prevention of disorder or crime
  - iv. the protection of health or morals
  - v. the protection of reputation or rights of others
  - vi. preventing the disclosure of information received in confidence
  - vii. maintaining the authority and impartiality of judiciary

## Prohibition on abuse of rights

Article 17 prevents the Convention being interpreted in a way that implies a right to seek to destroy or limit the Convention rights and freedoms of others.

This Article is interpreted very strictly and is relevant only where an individual seeks to take advantage of the rights the Convention guarantees to justify, promote or perform acts that are contrary to the text and spirit of the Convention, or incompatible with the fundamental values of democracy such as justice, tolerance, social peace and non-discrimination.

## Human Rights Act 1998

Universities are regarded as public authorities for the purposes of the Human Rights Act and are therefore obliged to act in a manner compatible with the Convention. If they act in a manner incompatible with Convention rights they could face claims for damages and/or judicial review.

## Counter Terrorism and Security Act 2015 (Prevent Duty)

The Counter Terrorism and Security Act 2015 requires universities to:

- Have due regard to the need to prevent people from being drawn into terrorism;
- in doing so, to have particular regard to the duty to ensure freedom of speech and to the importance of academic freedom; and
- have regard to statutory guidance in carrying out their duties.

Further guidance on the meaning of ‘have regard to’ and ‘have particular regard to’ is set out on [page 15](#).

## Equality Act 2010

There are a number of aspects of the Equality Act 2010 that do or could interact with universities’ duties relating to freedom of speech and academic freedom. The Equality and Human Rights Commission has produced a guide to the interaction of these statutory duties and relevant extracts are included below to illuminate how universities should balance these responsibilities.

### Protected characteristics

The Equality Act makes it unlawful to discriminate on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. Of these, the protected characteristic of ‘belief’ may be particularly relevant in the context of freedom of speech and academic freedom.

#### What is a protected belief?

Under the Equality Act 2010 ‘belief’ means any religious or philosophical belief, and includes a lack of belief.

Case law has established that all qualifying beliefs are equally protected.

In order to be a qualifying and therefore protected belief, the following conditions must be satisfied:



1. The belief must be genuinely held;
2. it must be a belief and not an opinion or viewpoint based on the present state of information available;
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. it must attain a certain level of cogency, seriousness, cohesion and importance; and
5. it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

The fifth criterion above has been held to be a low bar to satisfy. A belief would likely only fail this particular criterion if the belief would be excluded from the protection of rights under Articles 9 and 10 of the ECHR by virtue of Article 17 (see [page 11](#)). The example has been given of a belief akin to Nazism or totalitarianism.

The courts have made clear that their role is not to evaluate the merits of any belief. Provided it meets the five criteria above, it will be protected even if it is considered controversial, questionable, offensive or disturbing to some.

Applying these principles, the courts have held the following to be protected beliefs:

- the sanctity of life, extending to anti-fox hunting and anti-hare coursing
- the higher purpose of public service broadcasting to encourage debate and citizenship in a public space
- that it is wrong to lie under any circumstances
- gender critical views
- ethical veganism environmentalism and belief in manmade climate change
- national independence
- the ability of mediums to communicate with the dead
- stoicism

However, the case law draws a distinction between the right to hold a protected belief (an absolute right) and the right to express it (a qualified right, in which a proportionate balance needs to be struck with the rights of others, for example not to be harassed).

## Harassment

The Equality Act 2010 prohibits harassment related to a protected characteristic. All of the protected characteristics are listed on page 12. Harassment consists of engaging in unwanted conduct related to the protected characteristic which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

If the conduct has the effect (rather than the purpose) of violating dignity or subjecting a person to an intimidating, hostile, degrading, humiliating or offensive environment, it must be reasonable in the circumstances for the conduct to have had that effect, taking into account the perception of the individual. There is thus a subjective and an objective element to meeting the threshold for harassment under the Equality Act: although the perception of the individual is the starting point, it must be objectively reasonable in the circumstances for the conduct to have been perceived in that way. These circumstances will include the duties universities are subject to in relation to freedom of speech and academic freedom.

In the university context, guidance issued by the Equality and Human Rights Commission states as follows:

*'The harassment provisions cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act 2010.'*

*'Also, if the subject matter of a talk is clear from material promoting an event, then people who attend are unlikely to succeed in a claim for harassment arising from views expressed by the speaker.'*

*'Views expressed in teaching, debate or discussion on matters of public interest, including political or academic communication, are therefore unlikely to be seen as harassment, even if they are deeply offensive to some of the people who are listening, as Article 10 will protect them.'*

It is therefore extremely unlikely that academic discussions, or discussions about matters of public interest will constitute harassment, even though some may find them deeply offensive or upsetting.

## Public sector equality duty

The Equality Act 2010 imposes a general equality duty on public authorities, including universities ('PSED'). This means that universities must, when exercising their functions, have due regard to the following three aims:

- a. The need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
- b. The need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- c. The need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

In the EHRC guidance referred to above, the discharge of the PSED in the context of freedom of expression is addressed as follows:

*'This means HEPs (higher education providers) have a legal responsibility to think about how they can promote equality and minimise tension and prejudice between different groups on campus. This is something that HEPs must consider when they are promoting freedom of expression. For example, when a HEP takes steps to ensure a debate on a divisive topic can go ahead – to protect free speech – it must consider the potential impact on students who may feel vilified or marginalised by the views expressed. They should think about how to ensure those students feel included and welcome within the HEP environment. HEPs who are subject to the s.43 duty should therefore use the PSED to encourage good relations, but without restricting lawful free speech.'*

### What do the terms 'have due regard' and 'have particular regard' mean?

Case law has established a number of points:

- **The duty to have 'due regard' is procedural and not a duty to achieve any particular result.** The decision maker must demonstrate proper and conscientious focus on the statutory criteria, be clear precisely what the equality implications are and recognise the desirability of achieving them, when deciding what weight they should be given in light of all relevant factors, including countervailing ones.

- **The duty must be exercised with rigour and with an open mind and be integrated within the discharge of the public functions of the decision-maker.** It involves a conscious and deliberate approach to policy-making and needs to be thorough enough to show that 'due regard' has been paid before any decision is made. It is not a question of 'ticking boxes'.
- **It is evidentially useful for the policy itself or the decision-maker to make reference to the duty and any code or other non-statutory guidance.** This will reduce the chance of someone successfully arguing that 'due regard' has not been paid to the considerations covered by the duty. This will also ensure that relevant matters are in fact taken into account when exercising the function in question.
- **It is also evidentially useful to keep an adequate record showing that the decision-maker had actually considered their equality duties and pondered relevant questions.** Appropriate record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their disability equality duties conscientiously. If records are not kept, it will be difficult, evidentially, for a public authority to persuade a court that it has fulfilled its general equality duty.

There is by way of contrast very limited case law currently available on the meaning of 'particular regard'. Case law that has considered the phrase in other contexts has suggested that where a duty requires 'particular regard' to be paid to certain matters, it requires them to be considered specifically and separately from other relevant considerations.

## Other types of discrimination

It is possible that other types of discrimination may be engaged when considering freedom of speech and these are summarised briefly below.

Direct discrimination occurs where a university treats a person less favourably because of a protected characteristic.

Indirect discrimination occurs where a person with a particular protected characteristic is subject to a provision, criterion or practice ('PCP') which is applied to people generally but which puts or would put people with that protected characteristic at a particular disadvantage by comparison to others and which does put the individual at disadvantage. If the PCP is a proportionate means of achieving a legitimate aim it will be justified and there is no unlawful discrimination.

Universities must not directly or indirectly discriminate when acting as a service provider, employer or education provider.

## **Charity law**

For those universities that are charities, the governing body is responsible for ensuring compliance with charity law and this may interact with the institution's obligations in relation to freedom of speech and academic freedom in a number of ways.

First and foremost, the governing body must ensure the university carries out its charitable purposes for the public benefit. The charitable purposes are usually to advance learning and knowledge through teaching and research. Achieving this purpose is likely to require the university to ensure that there is freedom, within the law, to pursue all relevant lines of enquiry and to question and challenge ideas, views and opinions.

## **Balancing competing rights and responsibilities**

Every case will be different and therefore it is not possible to establish a fixed hierarchy of the rights and responsibilities set out above. However, higher education providers will need to be able to show that they have, whilst having regard to the particular importance of freedom of speech, conscientiously considered all other relevant duties and reached a reasonable judgement on whether or not there is any grounds for interfering with the speech in question.

# Updating existing codes of practice on freedom of speech and academic freedom

The Act requires the governing body of the institution to maintain a Code of Practice (the Code). The purpose of the Code is to facilitate the discharge of the duties in the Act.

Apart from being a statutory requirement, a well-drafted, tailored and comprehensive Code of Practice can provide:

1. a shared understanding of the institution's values and expectations around freedom of speech
2. a shared framework of how those values and expectations will be delivered in practice
3. a reference point to ensure that oversight of a wide range of university activities includes appropriate consideration of those values and expectations
4. a relevant reference point where there is disagreement between members of the institution
5. assurance for internal and external stakeholders and regulators that the statutory requirements are being met

## Matters that must be included

The Act specifies certain matters that must be included:

- (a) the institution's values relating to freedom of speech and an explanation of how those values uphold freedom of speech
- (b) the procedures to be followed by staff and students and any students' union in connection with the organisation of any specified meetings or other activities on the institution's premises
- (c) the conduct expected of staff and students in connection with any such meeting or activity

- (d) the criteria to be used by the institution in making decisions about whether to allow the use of premises and on what terms
- (e) the criteria for determining the exceptional circumstances in which the costs of security for using the premises might be passed on to those arranging the relevant activity or meeting

## Matters that may be included

The Code may deal with such other matters as the governing body considers appropriate.

However, taking into account the wider provisions of the Act, there are other matters that may by implication be appropriate to include or cross-referenced in the Code:

- (a) **Definition of freedom of speech and academic freedom.** Given the changes to the statutory definitions, and to ensure a clear and shared understanding of the concepts, the Code could include appropriate definitions and explanations of the concepts.
- (b) **Prohibition on use of non-disclosure agreements.** As the purpose of the Code is to facilitate the discharge of the statutory duties, and as one of the ways in which the statutory duties are to be met is by ensuring that the institution does not enter into non-disclosure agreements related to complaints about sexual misconduct, bullying or harassment, it may be sensible to set out in the Code the institution's commitment not to enter into such agreements.
- (c) **Overseas funding.** The Act confers on the OfS the duty to monitor the extent to which certain overseas funding presents a risk to freedom of speech and academic freedom. This covers funding from endowments, gifts, donations, research grants and contracts, and educational or commercial partnerships, from any overseas country except those specified in the Act or in regulations. Therefore, the Code of Practice could set out that the institution has a process to consider whether the terms of any overseas funding present a risk to freedom of speech and/or academic freedom, to ensure that these risks are considered and mitigated, and that OfS reporting requirements in this regard are met.
- (d) **Securing compliance and awareness-raising.** The governing body should receive assurance that reasonably practicable steps have been taken to secure compliance with its code of practice, including where appropriate disciplinary action. It is also under an obligation to draw its statutory duties on

freedom of speech and the Code to the attention of students at least once a year. The Code could record and explain these obligations.

- (e) **Duty to promote freedom of speech and academic freedom.** The governing body must promote the importance of freedom of speech and academic freedom and the Code could set out how this will be done.
- (f) **Provisions for review and monitoring.** It is important that the Code sets out clear expectations on monitoring compliance with the Code, review of any issues arising and how necessary changes will be made.

## Regulatory expectations

In its insight briefing on freedom of speech, the OfS states:

*'In our view, it would not be sufficient for a university's free speech code only to deal with the organisation of meetings and speaking events. In our view, a free speech code should go a lot further than that. We consider that such a code should provide a broader framework for ensuring free speech at the university or college. This means that we would expect a university's free speech code to include broader statements about free speech and academic freedom, and to extend to activities such as teaching and curriculum content.'*

Therefore, in addition to the matters set out above, the Code should record that how the duties in relation to freedom of speech/academic freedom will be reflected in its processes for:

- a) programme development, approval and delivery
- b) facilitating research
- c) the wider administration of its relationships with staff and students
- d) establishing and maintaining relationships with third parties

Elsewhere in its insight briefing, the OfS states that demonstrating that an institution has done all that is reasonably practicable to secure freedom of speech requires a wide range of steps to be taken. The Code of Practice may be a useful place to set out what steps the institution will take.

These steps will vary depending on institutional context, but might include:

- a) Ensuring the Code and the principles set out within it are drawn to the attention of staff and students on arrival at the institution.
- b) Drawing the Code to the attention of students annually.



- c) Clarifying responsibilities for freedom of speech matters within the university's governance, leadership and management structures.
- d) Ensuring all relevant staff receive training on their role in helping to discharge the institution's obligations in relation to freedom of speech.
- e) Ensuring that whenever relevant policies and procedures are introduced, consideration is given to their impact on freedom of speech and academic freedom.
- f) Periodically engaging with staff and students on freedom of speech and academic freedom.
- g) Ensuring that there are adequate and effective mechanisms to raise concerns about freedom of speech and academic freedom within complaints procedures.
- h) When concerns are raised about freedom of speech and academic freedom, ensuring that, so far as is reasonably practicable, they are addressed and any lessons to be learned are incorporated when undertaking reviews of relevant policies, practices and procedures.

# What else can universities do to prepare for their new duties?

Ahead of the new law coming into effect, universities will need to review – and possibly update – several other governing documents (alongside existing codes of practice) to prepare for the new duties.

The OfS defines governing documents broadly. The [regulatory framework](#) defines governing documents as ‘documents adopted, or that should have been adopted, by the provider that describe any of the provider’s objectives or values, its powers, who has a role in decision making within the provider, how the provider takes decisions about how to exercise its functions or how it monitors their exercise’.

As such, universities may wish to review a wide range of their policies, procedures and codes. Below is a suggested list which may be a helpful starting point, but universities will have different documents depending on their own institutional arrangements.

It is worth noting that the Office for Students has indicated that policies need to be coherent across the whole institution, and a compliant code of practice in relation to freedom of speech and academic freedom will not be sufficient if it does not align with other policies.

Universities may find it helpful to bear this in mind is when reviewing their policies in relation to harassment, hate and sexual misconduct. The OfS has previously indicated their concern about universities defining ‘harassment’ too broadly and conflating lawful speech with harassment (see their [Insight brief on freedom of speech and academic freedom](#)). Universities may therefore wish to pay particular attention to the alignment between their freedom of speech and harassment-related policies to ensure that definitions used do not curtail lawful free speech.

The OfS has also indicated that policies and procedures relevant to freedom of speech and academic freedom should be publicly accessible.

Universities may wish to consider reviewing policies, procedures and codes in relation to:

- ✓ teaching and learning
- ✓ research
- ✓ equality, diversity and inclusion, including any charters or external assurance schemes
- ✓ harassment and sexual misconduct
- ✓ events, room bookings and external speakers
- ✓ international partnerships
- ✓ overseas gifts and donations
- ✓ graduations
- ✓ ethical investment
- ✓ student and staff complaint schemes
- ✓ staff contracts
- ✓ memorandums of understanding and working with students' unions
- ✓ induction policies for staff members and governors
- ✓ recruitment and appraisal policies for staff members and governors

Several of the policies, procedures and codes listed above relate to university staff members. HR directors may wish to carefully consider the implications of freedom and speech and academic freedom for staff and review policies in this light. HR directors may also find it helpful to refer to Part A1, subsections 6 and 7 of the Act, which sets out the definition of academic freedom and how it relates to the roles of academic staff members.

# What could universities consider when reviewing their governing documents?

When reviewing governing documents, universities might find it helpful to consider the following questions:

- How does this policy/procedure/code relate to freedom of speech and academic freedom?
- Are there explicit references to the Section 43 duty which need to be updated?
- Are there any provisions that do or could reasonably be considered to restrict academic freedom and freedom of speech and are these restrictions compatible with the statutory duties?
- Are there provisions to ensure that any decisions made under the relevant document take into account to whatever extent is relevant freedom of speech and academic freedom?
- Are there processes to ensure that any disagreements about whether a document complies with the statutory duties are resolved at an appropriate level?

# Communication with staff and students

Universities may also find it helpful to consider how information on free speech and academic freedom is communicated to staff and students, including:

- building a shared understanding of what freedom of speech and academic freedom mean
- communicating how different policies work together
- signposting how any concerns about freedom of speech and/or academic freedom should be raised by staff and by students

## Further resources

Office for Students, [Freedom to question, challenge and debate](#), Insight 16 (2022)

The Education Hub (GOV.UK), [Freedom of Speech Act: How it will affect university students](#) (2023)

Equality and Human Rights Commission, [What equality law means for you as an education provider – further and higher education](#) (2014)

Equality and Human Rights Commission, [Freedom of expression: a guide for higher education providers and students' unions in England and Wales](#) (2019)

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