

Freedom of speech and academic freedom – finding the balance in higher education



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1. The New Act

In 2023 the U.K. Government passed the Freedom of Speech (Higher Education) Act 2023. This legislation will give the Office for Students (OfS) much greater power to regulate higher education providers and their Students' Unions over freedom of speech issues. Sanctions could include fines or potentially suspension of registration. Universities and colleges will have a new duty to actively promote freedom of speech. They will need to show the OfS that they are upholding the principles on freedom of speech and academic freedom and that they have adequate and effective arrangements to deliver on this duty.

The proposal for additional scrutiny over freedom of speech in higher education has been an area of discussion for the last few years. When the Bill was first discussed, there was scepticism across the sector about whether it was needed or just stoking a 'culture war'. With all the changes and pressures facing the higher education sector it might seem like the duty around freedom of speech is just yet another issue causing more work. Now that it has become law, the Act will have a broad impact on how different parts of universities work together and how staff and students act. All higher education providers will need to be prepared for what is coming. Students' Unions will also need to prepare, and work with universities on their plans (however, their responsibility is not covered in this briefing).

This briefing is directed at governors and senior leaders who have a particular interest in ensuring compliance with the duty and avoiding breaches. Senior leaders will also want assurance from their staff that the risk is being managed. They should familiarise themselves with the new duty and be aware of what is now expected of them in addition to other conditions of registration with OfS. They should be particularly aware of the potential reputational risks of staff or students breaching the duty; recent court cases and cancelled speaking events have shown that freedom of speech and academic freedom are not always understood.

2. Early indicators from OfS and government

The OfS have already appointed a Director of Freedom of Speech and Academic Freedom (Arif Ahmed) and will be consulting on the implementation of the duty this year. They have already started consulting on the complaints process element of the legislation¹. The new duty will have a broad impact on higher education providers and there is a lot that universities can do in advance to prepare, and sector bodies are already preparing advice and guidance².

The timescales set out in the OfS consultation on complaints tells us that the provisions for the new general duties, general functions and complaints scheme are expected to come into force in August 2024, with some further changes expected to come into force in September

¹ <https://www.officeforstudents.org.uk/consultations-on-free-speech/consultation-on-the-ofs-s-new-free-speech-complaints-scheme/>

² One in particular to note is the guidance and case studies provided by Universities UK -

<https://www.universitiesuk.ac.uk/what-we-do/policy-and-research/publications/how-can-universities-prepare-higher>.



2025. While this gives many months to prepare, planning cycles mean that there will be work to do in 2023/24 to get papers through university and governing body committees. The OfS may provide some guidance following consultation but given the timescales this could make it difficult to update policies and processes before duties are in force.

We have seen some early indications of what the sector could expect, both from Arif Ahmed's first speech at the OfS³, but also from Michelle Donelan's letter to UK Research and Innovation over appointments to an equality, diversity and inclusion group. Professor Ahmed expressed concern about the number of students who said they felt unable to freely express their own views at university, and urged that "it is essential that we learn to tolerate views, and the expression of views, that we might find wrong-headed and even appalling". Donelan expressed concern over the views on social media of new members of the equalities group, but also commented on what she saw as the burden and bureaucracy of EDI; this was following her comments at the Conservative party conference about 'woke ideology' at universities and the worry that some bodies were going beyond equality law. In an election year, freedom of speech may become an increasingly hot topic in ways that we may not yet anticipate; universities can try to reduce the potential impact by starting to review policies and processes now.

The sector is already experiencing the difficulties it may encounter in trying to find the balance between different positions and different laws in this area. The OfS has taken over two years to investigate a university over free speech issues, which they say could have breached conditions of registration. We may well see some of their learning from that investigation in the upcoming consultation, but it shows the complexity of the area that the regulator itself cannot come to a quick decision.

3. Understanding the risks

There has been some scepticism in the sector on why this legislation is needed and there is a risk that staff and students do not engage as they see it as an attack on their freedoms, rather than as a tool to provide some balance in what is becoming an increasingly partisan environment. We only need to look at the issues being generated on campuses relating to the current situation in Gaza, or to increasingly heated equality clashes relating to trans rights and women's rights, to see that there are already many challenges around free speech and what this includes. The new duty may bring various risks to institutions, including:

- Governance risks: policies and processes need to be reviewed and updated to assure senior managers and governors that the potential overlap between different legal duties have been considered, alongside appropriate equality impact assessments to consider possible clashes between different protected characteristics;
- Reputational risks: universities will need staff and students to comply with policies to avoid breaches (e.g. cancelling speakers where a topic might cause offense to some people but would not be breaking any law), the OfS may choose to name and shame, and in the worst case can suspend registration;
- Financial risks: the OfS has suggested that they may recover costs from an institution for freedom of speech complaints they consider, there could be fines for breaches, and the potential for complainants to bring a claim for damages could increase the possibility of (costly) legal action.

³ [Transcript of Arif Ahmed's speech at King's College London - Office for Students](#)

Universities will want to review their institutional risk registers to ensure the new duty is reflected appropriately as a risk itself, and as an element of other risks (for example, the risk that staff or students may, knowingly or unknowingly, act in a way which will breach the duty and damage the reputation of the university), and to document ways in which they will mitigate the risk.

4. Reviewing policies and processes

The new duty will impact a large swathe of policies which will need to be reviewed to ensure coherence and manage any overlaps. This includes a variety of policies related to administrative processes (especially around HR) and policies related to learning and teaching, and research, and will need to take account of other legislation such as the Equality Act 2010. The duty requires universities to take 'reasonably practicable' steps in protecting free speech (in having 'particular regard' to the importance of freedom of speech), and policies should be looked at in this context. Some policies might need to be broader than at present, and all should include updated equality impact assessments (ones which consider free speech).

Some strategies and policies which will need to be reviewed include:

- Code of practice on free speech and academic freedom (the Act specifies what to include)
 - this must align to other policies and show a coherence of approach
- Codes of conduct for staff and students
- Student Charters
- Prevent
- HR policies including harassment and bullying
- Guidance for students and/or student agreements
- Strategic plans on equality, diversity and inclusion, including any policies on equality impact assessments
- External speakers and room bookings (including the use of security and how this is funded)
- Complaints, including processes for 'regular' complaints vs Freedom of Speech complaints, use of report and support tools if applicable, and how to deal with complaints about social media use
- Communications strategy (particularly how to respond to any potential breaches or suggestions of breaches and potential reputational damage)
- Social media policy (including personal social media use)
- Learning and teaching
- Research
- Whistleblowing
- Governing documents

The OfS have also been granted powers to monitor overseas funding to a higher education provider, including donations, research grants and contracts; universities may wish to wait until the consultation to review policies on overseas funding, to get a better understanding of how the OfS might wish to monitor this.

5. Training for the new duty

The new duty will require training for staff, not only generally – to understand the updated code of practice on free speech and academic freedom and what it means for them – but also specifically for those who carry out roles which are directly impacted by the changes. There have already been cases where staff have successfully taken their employers to court because they believed they were denied their free speech and suffered detriment; policies and training should be reviewed to avoid some of the reasons these have been successful (including misunderstanding of the law). There have also been cases where academic staff have had to avoid promoting events or have had to hire security or avoid revealing the location and time, because others disagree with their topic; this could put their institution at risk of breaching the duty. Staff and students will need to understand that freedom of speech protects the right to offend, and that not everything that is offensive is prohibited.

Universities frequently rely on staff to carry out work investigating complaints and sitting on disciplinary panels and there will need to be training to help people taking on these roles understand the implications of the new duty. The importance of considering how to manage investigating complaints is shown by the recent judgement in the tribunal case of Rachel Meade against Social Work England and Westminster City Council⁴. This found that Ms Meade was disciplined and suspended on the basis of malicious complaints related to personal social media posts. Her comments were related to a protected characteristic under the Equality Act 2010, and the judgment shows that the two organisations had an inaccurate understanding of the law and had received poor advice. Their investigation processes should be read by anyone wanting to review how they manage their own complaints processes, to understand how mistakes can snowball and increase the risk to an organisation.

Universities also need to consider what training staff will need to understand how to implement new policies. For example, understanding the difference between harassment and voicing a reasonable opinion which might cause offense; how best to use equality impact assessments to consider the impact on different protected characteristics and how the organisation complies with its public sector equality duty; and how to balance what could be conflicting policies on freedom of speech and Prevent. The work already done on sexual harassment in the higher education sector shows how complex this area can be, and staff will need support to understand how to approach the work, including considering whether a complaint is vexatious, or whether something is an actual breach (an issue many universities have had to grapple with during the recent protests over Gaza). Prevent can provide a useful guide on how to train senior managers and members of the governing body, and how to disseminate information to staff and students.

⁴ <https://www.colekhan.co.uk/news/uvzuy6kcrtb5lwg59pxbs44tqbeuj2> and <https://static1.squarespace.com/static/607d6cba0ef43a2dbb27df45/t/659d3816f1b61a3f93f35e32/1704802327468/2200179+2022+and+2211483+2022+Meade+v+Westminster+City+Council+and+Social+Work+England+judgment+give+to+parties+8+January+2024.pdf>

6. Are the governance structures ready?

Governance structures will need assessing to consider whether they will support the duty, such as who in the management structure is responsible for freedom of speech and academic freedom (and what does this role entail). Also, universities should review how decisions around the duty are made and documented in the committee structure, and the role of the governing body in both approval as well as scrutiny (including having a champion in the governing body, in addition to someone on the senior team).

Universities should reflect on how processes like risk and equality impact assessments are used, by those drafting policies and those considering the policies and making decisions, to consider impact and mitigations. They should also review how decision making at meetings is documented. If the minutes of a meeting are being scrutinised by the OfS as part of a complaint, will they provide assurance that the decision-making body has taken reasonable steps to comply with the duty and is this being done consistently across all committees? And does your scheme of delegation reflect any changes related to the new duty?

7. Is your culture ready?

The Act requires governing bodies of higher education providers to take steps which are reasonably practicable to secure compliance with the updated code of practice. At least once a year it should bring the provisions of section A1 of the Act and the code of practice to the attention of all its students. This means communications around the changes will be a vital element of this process, and organisations will want to look not only at the routes by which they do this, but also how they can test whether the information is embedded in practice. Universities often have mixed responses to policy implementation and compliance (whether people are aware of policies or choose to adhere), but this will increase the risk to the organisation of possible breaches. It may take a change of culture to increase compliance.

Senior management and governing bodies should reflect on the culture of their organisation in considering how they will meet their legal duty: for example, do staff and students generally comply with policies? The Covid pandemic provided a clear impetus to comply, and this was generally quite successful; the approaches taken then could provide good learning opportunities in how to encourage people to follow the rules.

Consultation on policy updates, particularly the code of practice on free speech and academic freedom, could help improve engagement as well. Managers may feel that their staff have freedom to speak about issues that concern them, but consultation may reveal different responses. When the University of Essex undertook a review into free speech issues at the institution, the Vice Chancellor was “deeply concerned to read the input into the review from some staff and students who said that they felt constrained to self-censor their speech and activity because of concerns about how we manage the balance between freedom of speech and our commitment to diversity, equality and inclusion.”⁵ Consultation on policy review could be helpful in strengthening relationships between the institution and its stakeholders; staff, students, external partners where appropriate, and members of the governing body. It is also worth considering what opportunities there are for real discussion across the academic community, through existing structures (such as committees) or new routes.

⁵ <https://www.essex.ac.uk/blog/posts/2021/05/17/review-of-two-events-with-external-speakers>

The culture on social media can be very different from organisational culture, where people can often communicate in ways that they would not at work; both official and personal accounts can impact on the reputation of a university, and social media policies will need to be updated to reflect freedom of speech and academic freedom codes of practice. While universities may not want to comment on personal social media use, senior managers should consider whether guidance is needed about how staff present themselves when they post content, or at the very least consider providing a statement that they do not police personal accounts and how they would deal with complaints about these. Staff who manage official accounts should understand the context of the duty and the importance of not bringing the university into disrepute.

8. Sharing good practice

Many universities have already started to make some preparations in advance of the legislation being fully implemented, and there is good practice to share across the sector. Some examples include:

- The University of Derby: Professor Dennis Hayes is Emeritus Professor of Education and the director of the campaign group Academics for Academic Freedom, and he has written a blog about the work already carried out at Derby to prepare (<https://www.derby.ac.uk/blog/freedom-of-speech-legislation/>). Their Vice-Chancellor has made strong statements in support of free speech, and they have clear statements on freedom of speech and external speakers which can provide useful guidance for those looking to update their documents.
- University College London took a consultative approach with their academic community when exploring whether to renew their membership of Stonewall, which had lapsed during the pandemic⁶. There were strong views on both sides of the argument and the question was brought to their Academic Board. This was a wider discussion than had previously been had on the membership; staff were able to discuss papers for and against the proposal, which have all been published. The decision was made through an anonymous vote and provided a decisive outcome against rejoining. The decision was endorsed by UCL's management committee. The process reinforced the importance of universities being places of civil discourse and constructive challenge, even on potentially divisive topics, and is a model of good practice in consultation.
- The Vice-Chancellor of the University of Essex commissioned an independent review after there were concerns raised following the cancellation of a number of events, including the withdrawal of an invitation to an external speaker. The review was carried out by Akua Reindorf KC and included submissions from a range of stakeholders (who were offered the opportunity to provide feedback anonymously)⁷. As part of the work following the review, the University developed an action plan based on the recommendations and have been transparent in providing updates on progress towards these actions. These have included updating a number of policies, amending their Royal Charter, and supporting staff and students throughout the process. Senior management have shown that they took the issues, as well as the recommendations, seriously, and that they wanted to engage people and bring them along in developing solutions and changing the culture.

⁶ UCL and the Stonewall Diversity Champions Programme and Workplace Equality Index | UCL News - UCL - University College London

⁷ <https://www.essex.ac.uk/-/media/documents/review/events-review-report-university-of-essex-september-2021.pdf>

- Michael Roth, the president of Wesleyan University, has noted the importance of encouraging civil discourse in a university environment and the importance of enabling differences of opinion. He wrote blog posts expressing concerns about the Hamas attack on 7 October, as well as one expressing his concerns about Palestinian suffering, and was criticised by people on both sides of the issues. He has encouraged discussion around this disagreement, inviting Jewish and Muslim students to talk to him about their concerns, and is encouraging them to understand openness as well as the limits to openness⁸. His approach shows that it can be difficult to discuss contentious topics and how important it is to be able to have these difficult discussions.

9. Impact of delay

The OfS is planning to introduce the new general duties, general functions and complaints scheme by August 2024. As a result, there is potentially considerable work to do to review and revise policies and processes prior to the summer, especially when many these will need to go through formal approval routes. Delaying work until the OfS consultation could have several impacts:

- Concerns from the governing body that the changes will not be completed within the timescales
- Little time to promote the new code of practice to staff and students and to embed it in the culture
- Insufficient time to co-ordinate with the Students' Union on the work they will need to be, which should be complementary to the university's approach
- Changes to complaints policies and processes being incomplete, so that new freedom of speech complaints may come in with insufficient resource or inappropriate processes to manage
- Little time within the current academic year to develop training or carry out any work on changing the culture.

Preparatory work now will also help universities think through some of the issues that they may want to raise in the OfS consultation, including some of the potential challenges they may face in balancing the new duty against existing requirements.

While this might seem like a lot of work, universities can be doing this alongside regular policy review to minimise additional workload. Senior management and governing bodies might want to consider how they can incorporate this review work into regular governance reviews, to provide some additional external scrutiny. They should also seek advice from legal experts with experience in this area, as the attention being paid to freedom of speech in higher education could lead to unprecedented external scrutiny of university policies.

⁸ <https://www.theguardian.com/us-news/2023/nov/25/us-students-colleges-universities-israel-hamas-gaza>

10. Key Freedom of Speech recommendations

We recommend that universities plan for the new duty and associated complaints process by:

- Reviewing organisational risk registers and ensuring the duty is referenced appropriately
- Ensuring organisational structures are fit for purpose for the new duty, including governance structures
- Reviewing policies and processes holistically to take into account changes that the legislation will bring that impact the university across the board
- Reviewing organisational complaints processes to reflect differences between those covered by the new legislation and those which are not, including necessary changes to report and support tools
- Carrying out work with staff and students to better understand the culture of the university in terms of free speech, establishing a baseline for the organisational culture and what might need to change
- Ensuring communications policies are fit for purpose, particularly for social media use.

With expertise covering governance, policy and employment law, the team at SUMS Consulting would be happy to help in supporting conversations further.

If you wish to discuss these topics further or need any additional information, please contact Christine on christine.fraser@reading.ac.uk

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