



Free Speech Governance, Officers and Requirements for English Institutions

Introduction: the relevant law

Under the **Education (No.2) Act 1986** (the “**Education Act**”), English universities and other Higher Educational Providers (together, “**HEPs**”) must take such steps as are reasonably practicable to secure freedom of speech for their members, students and employees (“**Participants**”) and, when necessary, visiting speakers. This is a demanding requirement, limited only by reference to the speech being “*within the law*” and by what is reasonably practicable. Free speech obligations otherwise override other considerations.

A clearly reasonably practicable step, which would make a significant difference to the securing of free speech at English HEPs and is therefore required under the Education Act, would be to have a committee of an HEP’s governing body to oversee its implementation of and compliance with its free speech obligations, and a dedicated officer to promote and defend free speech within the HEP. What the law requires is explained in more detail below.

It appears that the majority of HEPs are not complying with their obligations in this respect and are acting unlawfully in not so doing. With the need to revise their policies, rules, practices and procedures to reflect recent and upcoming changes to the law, and the **Higher Education (Free Speech) Bill** in particular, now is a good time to correct this failure to comply with even existing legal obligations.

AFFS will, from mid-2023, be monitoring HEPs’ performance in this regard, and will be publicising any continuing failures by them to comply with their free speech obligations under the law.

What the law requires in practice

Governing bodies

The governing bodies of HEPs are themselves required under the Education Act to take responsibility for securing free speech. In addition to the governing body itself devoting sufficient time, resources and endeavour to these matters, the above requirements must also logically include forming a committee of its governing body (“**Committee**”) with specific

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:

- (1) consist of appropriately senior and experienced people who do not themselves hold views or have interests which might cast reasonable doubt over their ability or willingness dispassionately to perform their functions; and
- (2) have an appropriate scope of appointment, functions, and powers.

Free speech officer

A reasonably practicable step which will be likely to make a material difference to an HEP's ability to secure freedom of speech for Participants is the appointment of a dedicated Free Speech Officer ("FSO").

The role of the FSO would be to promote and defend free speech within the HEP and to ensure the development of policies and practices aimed at securing compliance with the HEP's obligations. The FSO should:

- (1) Be appropriately senior and experienced and remunerated, and not hold views or have interests which might cast reasonable doubt over their ability or willingness dispassionately to perform their functions.
- (2) Have responsibility for and oversight over free speech training within the HEP.
- (3) Have powers sufficient to enable them to perform the functions described above. This should include the power: 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); to order a range of appropriate remedies; to impose disciplinary sanctions for breaches; and/or bring disciplinary proceedings before an appropriate tribunal. It 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.
- (4) Be provided with appropriate resources, support, facilities and access to documents and other relevant information.
- (5) 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.
- (6) 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 free speech and its compliance with its legal obligations in respect of free speech.

HEP's must, in any event, have an appropriate and properly functioning process for identifying, reporting and remedying activity which is contrary to freedom of speech or the HEP's rules and requirements relating to free speech.

The HEP should have an appropriate review and appeals process in respect of decisions made by the FSO and/or the Committee.

Best Free Speech Practice

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