

Annex C: Proposed additions and amendments to Regulatory advice 24 / Annex D of the regulatory framework

We are planning to move Regulatory advice 24: Guidance related to freedom of speech into an annex of our regulatory framework.¹ This will be Annex D: Free speech guidance. When this move happens, we are proposing to add some new text to Regulatory advice 24. This annex sets out the proposed additional text.

1: Additional introductory material and minor amendments

[Note: We will add this guidance to Regulatory advice 24 in the introductory sections, after paragraph 6 and at paragraph 12c. We have not included below any minor amendments to Regulatory advice 24 that we would make as a consequence of the proposed additional text (for instance, the deletion of 'and' at the end of paragraph 12a).]

To add to paragraph 1:

- c. Promoting the importance of freedom of speech and academic freedom (the 'promote' duty)

To add to paragraph 2:

It also includes examples of steps that may assist providers to meet their 'promote' duty.

Paragraph 3 to read: This guidance is in four main sections.

- 6A. **Section 4** gives guidance on the duty to promote the importance of freedom of speech within the law and academic freedom in the provision of higher education.

- 12. c. to promote the importance of—
 - i. freedom of speech within the law, and
 - ii. academic freedom for academic staff of registered higher education providers and their constituent institutions,

in the provision of higher education (section A3 and section A4 of Part A1 of HERA) (the 'promote' duty).

2: Additional guidance on free speech code of practice

[Note: We will add this guidance to Regulatory advice 24 in the section on free speech code of practice, starting with a new paragraph 188A.]

Students' unions

¹ See [Regulatory advice 24: Guidance related to freedom of speech - Office for Students](#).

188A. HERA requires that the code of practice sets out the procedures to be followed by any students' union of the provider or a constituent institution in connection with the organisation of:

- a. meetings which are to be held on the provider's or constituent institution's premises and which fall within any class of meeting specified in the code, and
- a. other activities which are to take place on those premises and which fall within any class of activity so specified.

It also requires that the code of practice sets out the conduct required of such persons in connection with any such meeting or activity.²

188B. HERA also sets out that the governing body of a provider or a constituent institution must take the steps that are reasonably practicable for it to take (including where appropriate the initiation of disciplinary measures) to secure compliance with its code of practice.³ See example 49.

3: Additional guidance on governance

Current text on 'Governance' in Regulatory advice 24

Please note that the text in this box is for information only and is not being consulted on.

1. The following may be reasonably practicable steps for a provider or constituent institution to take in connection with governance.
2. Providers and constituent institutions should record all decisions that are likely to have a substantial (positive or negative) effect on freedom of speech within the law. These records should demonstrate how the provider or constituent institution has had particular regard for the importance of freedom of speech within the law. Wherever reasonably practicable, records should be kept for as long as necessary to be available for external review (for instance, through judicial review, a regulatory investigation or a relevant complaints process).
3. Providers and constituent institutions should put in place and follow delegation arrangements setting out clearly and explicitly which committees or individuals are authorised to make decisions that are likely to have a substantial (positive or negative) effect on compliance with any free speech duties.
4. Providers and constituent institutions should ensure that terms of reference, of all committees that could affect compliance with free speech duties, expressly provide for consideration of this impact. This includes committees responsible for any of the following matters:

² See [Higher Education and Research Act 2017 - GOV.UK - Section A2 \(2\)\(b\) and \(c\)](#).

³ See [Higher Education and Research Act 2017 - GOV.UK - Section A2\(4\)](#).

- a. admission, appointment, reappointment and promotion processes
 - b. disciplinary processes
 - c. employment contracts (that may include conditions on speech)
 - d. processes and policies relating to equality or equity, diversity and inclusion, including the PSED
 - e. fitness to practise
 - f. harassment and bullying policies
 - g. IT policies and processes, including acceptable use policies and surveillance of social media use
 - h. Prevent duty
 - i. principles of curricular design
 - j. research ethics
 - k. speaker events
 - l. staff and student codes of conduct.
193. Providers and (where relevant) constituent institutions should ensure that decisions about the curriculum and the way it is delivered:
- a. safeguard the autonomy of individual academics to teach and communicate lawful ideas that may be controversial or unpopular or that some (or many) find offensive; and
 - b. do not restrict the exposure to students of such ideas because they are controversial or unpopular or because some (or many) find them offensive.

[Note: This guidance is to be added to Regulatory advice 24 in the section on governance, starting with new paragraph 193A.]

193A. The following is a non-exhaustive set of examples of steps related to governance that may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'secure' duty.

Transparency and oversight

193B. Depending on their size and structure, it may assist providers and constituent institutions to appoint a suitably senior person or body, reporting for instance to the governing body, to oversee and report on its work on academic freedom and freedom of speech. Their activities and role could, for example, include:

- a. acting as an internal source of information / point of contact on academic freedom and freedom of speech

- b. oversight of internal processes and activities relating to freedom of speech
- c. reporting on risks to freedom of speech and proposing mitigations.

193C. It may assist providers and constituent institutions to meet their 'secure' duty for their governing bodies to receive, annually or more frequently, a report on freedom of speech and academic freedom. This report could include both qualitative information and data (e.g. management information) on any matters that are relevant to freedom of speech and academic freedom. This could, for example, include:

- a. an evaluation of the impact of the steps that the provider has taken to promote the importance of freedom of speech and academic freedom
- b. the average timescales and other aggregate data of any internal free speech or academic freedom complaints process
- c. any decision to reject or rescind an invitation to an external speaker; or a decision to reject a proposal for an event or to cancel an event, where these are relevant to freedom of speech
- d. any decision to pass on the security costs for an event to a speaker or host
- e. any complaints from staff, members, students and visiting speakers that are upheld in full or in part by the provider, the OfS or the OIA, relating to freedom of speech
- f. any application for a court order to limit or restrict any form of expression by staff or students
- g. any member of governing body or a person with significant control, or member of the senior management team at the provider or constituent institution, who has registered activity under the Foreign Influence Registration Scheme (FIRS)
- h. any selection or appointments process for academic staff at the provider, or any selection or admissions process for students at the provider (for instance, a scholarship selection process) that is managed or partly managed by the provider, involving an ideological test imposed by the provider or by a partner.

193D. It may assist providers and constituent institutions to meet their 'secure' duty to have in place the following arrangements:

- a. suitable confidential reporting routes for students and staff to escalate concerns about coercion, monitoring and harassment in relation to their freedom of speech

- b. transparency with students and staff about risks to their freedom of speech and academic freedom, including (but not limited to):
 - i. the existence of obligations or expectations on individuals or institutions within the provider, for instance, because of their affiliation with a foreign political party or government, to monitor and/or report on lawful expression on campus
 - ii. any funding agreements, donations etc. that may create risks to freedom of speech or academic freedom for staff or students
- c. provision to support students or staff who are at risk of coercion, monitoring or harassment for the exercise of their freedom of speech or academic freedom, including through the use of strategic litigation against public participation (SLAPPs) and targeted visa denial
- d. suitable protocols for the escalation of concerns about foreign interference to the OfS, the police or other state agencies or bodies as appropriate
- e. where governing body members or senior managers are based in a foreign state, effective arrangements where possible to prevent monitoring by that state of the provider's internal communications or decisions where this threatens freedom of speech or academic freedom in England, or to mitigate its effects on freedom of speech or academic freedom in England
- f. adequate resources and arrangements to assess and communicate risks to freedom of speech and academic freedom, including through geopolitical risk; and having these risks suitably reflected on its risk register
- g. processes in place to identify and address risks to freedom of speech and academic freedom that might arise in relation to contractual arrangements, including:
 - i. appropriate due diligence, including human rights due diligence, before entering into contractual arrangements, at contract review points and as a result of relevant legal or geopolitical changes
 - ii. translation of foreign-language versions of contracts with foreign parties
 - iii. where the contractual partner has an influence on academic appointments or the curriculum, contractual assurance of full transparency about any of its process to ensure the provider or constituent institution can achieve compliance with its A1, A2 and A3 duties.

Decision making

193E. It may assist providers and constituent institutions to meet their 'secure' duty for their scheme of delegation to require that serious or far-reaching **negative** decisions relating to speech always be escalated to a suitably senior level. This could, for example, include decisions:

- a. to cancel a speaker event or seminar because of the viewpoints of the speaker or expressed in their speech;

- b. to limit an academic's freedom to teach or to conduct research because of the viewpoint they express or the conclusions that the teaching or research might support
- c. to dismiss an academic wholly or partly because of their lawful speech.

193F. It may assist providers and constituent institutions to meet their 'secure' duty that in circumstances where a decision may risk an interference with freedom of expression they ensure that decision makers assess:

- a. whether their decision does interfere with the freedom of expression of staff, students, members, or visiting speakers; and
- b. the proportionality of any interference with freedom of speech (see paragraphs 124-131 and examples 24 and 24A).

4: Additional guidance on non-disclosure agreements

[Note: This guidance is to be added to Regulatory advice 24 in a new section on 'Non-disclosure agreements', starting with new paragraph 193G.]

Non-disclosure agreements

193G. HERA requires that, to achieve the objective of securing freedom of speech within the law, the governing body of a provider or constituent institution secures that the provider or constituent institution does not enter into a non-disclosure agreement with:

- a. its staff,
- b. its members,
- c. its students, or
- d. visiting speakers

in relation to a complaint made to the provider by that person, relating to:

- a. sexual abuse, sexual harassment or sexual misconduct, or
- b. bullying or harassment not falling within a.

by any person. If such a non-disclosure agreement is entered into it is void.⁴

193H. In this context, a 'non-disclosure agreement' is an agreement which purports to any extent to preclude the person from—

- a. publishing information about the complaint, or

⁴ See [Higher Education and Research Act 2017 - GOV.UK - Section A1 \(11\) and \(12\)](#).

- b. disclosing information about the relevant complaint to any one or more other persons.⁵

5: Guidance on the ‘promote’ duty

[Note: This guidance is to be added to Regulatory advice 24 as ‘Section 4’ starting with new paragraph 214.]

Section 4: The ‘promote’ duty

214. Section A3 of HERA places a duty on registered higher education providers and their constituent institutions⁶ to promote the importance of:

- a. freedom of speech within the law; and
- b. academic freedom for academic staff of registered higher education providers and their constituent institutions

in the provision of higher education (the ‘promote’ duty). This duty is distinct from the ‘secure’ and ‘code’ duties set out in sections A1 and A2 of HERA.

215. The ‘promote’ duty is proactive in character. This means that it is not merely a duty on providers and constituent institutions, while they are doing other things, to ‘have regard’ to the importance of 214a and 214b above in the provision of higher education. Rather, it is a duty on providers and constituent institutions to take active steps to promote the importance of 214a and 214b in that setting. In particular, compliance with the A3 duty may be likely to result in an environment in which:

- a. students and staff have the confidence to express, debate, teach and research a very wide range of lawful ideas and approaches, including those that some may find shocking, disturbing or offensive;
- b. students and staff are fully exposed to the idea that freedom of speech and academic freedom, both for themselves and for others of differing views, are of fundamental importance to higher education; and
- c. this importance is reflected in the way the provider or constituent institution operates on a day-to-day level. For providers this will be in the context of governance structures and internal processes that operate in accordance with E11 (see regulatory framework, paragraphs [TBC]).

216. The OfS’s initial approach is that, given the variety of institutions in the higher education sector, it expects institutions to be well placed to consider what steps are appropriate in relation to fostering an environment as set out in 215a to 215c.

⁵ See [Higher Education and Research Act 2017 - GOV.UK - Section A1 \(12\)](#).

⁶ [Section A4 of HERA](#) extends the duty under section A3 to constituent institutions.

217. This section provides a non-exhaustive set of examples of steps that may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty. These examples are suggestions rather than requirements.
218. These activities are suggestions that governing bodies may wish to consider alongside compliance with their A1 'secure' and A2 'code' duties. They are not substitutes for, or alternatives to, meeting these two duties.

Information and events

219. It may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for providers to include a single web page consolidating or linking to all information for students and staff that may be relevant to freedom of speech and academic freedom at the provider.
220. Governing bodies may also wish to consider the introduction of additional events or activities on freedom of speech during student induction as a way to engage students' interest. Where appropriate, this may include lectures or panel events open to new students and/or a stand at any freshers' fair advertising this activity, as well as any relevant training, and giving students access to the institution's statutory free speech code of practice.

Teaching and research

221. It may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty to consider actively supporting and modelling classroom discussion of difficult or controversial topics. Relevant activities could include:
- a. offering short training or courses and publishing guidance for academics and students to help them to discuss difficult topics from a dispassionate and intellectually open perspective
 - b. organising and promoting a series of topical events at which speakers and students from different sides are encouraged to take part in open and tolerant dialogue, moderated by expert facilitators who offer models for peaceful and constructive communication (see example 7)
 - c. giving students opportunities to write essays or give presentations defending controversial positions that they reject, or attacking positions that they defend.
222. It may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for institutions to consider the physical settings in which debate takes place (such as classroom layout). For instance, seating people in small groups around tables rather than in lecture-theatre style seating.
223. It may also, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for institutions to consider other aspects of the settings in which debate and teaching take place (including the debate format). The OfS's research suggests that steps that could be helpful in this respect may include:
- a. staff explicitly stating that the class is a safe space to discuss various ideas

- b. clear guidelines and boundaries discussed at the beginning of classes or lectures
- c. strong safeguards against online harassment and bullying
- d. more student-led debate and discussion spaces
- e. a consistent approach to, and consequences or repercussions for anyone who violates, the guidelines (i.e. whatever their point of view)
- f. more training for staff, for instance on the code of practice or how to handle contentious discussions
- g. more university or college-led debating events or discussion spaces
- h. smaller class sizes, e.g. moderated seminars.⁷

224. Additional steps in relation to the setting and format of debate and discussion may include:

- a. the Chatham house rule for discussion (participants can share the content of discussions with others, but they must not attribute any of those comments to a specific person or organisation)
- b. offering discussion sessions/Q&A in lectures that are **not** recorded
- c. in discussions following a lecture or presentation, giving more junior audience members/participants the first opportunity to comment or ask questions.

225. It may also, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for them to give careful consideration to the freedom of speech rights of those who share protected characteristics (for instance, race and disability) and to consider taking additional steps to address barriers that may be faced by those groups. Some of these steps may already be among those that providers are taking in compliance with the Public Sector Equality Duty and/or condition E6.

Training and orientation

226. It may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for governing bodies to include training or instruction on freedom of speech prominently in induction programmes for incoming students and for new members of staff. It will be for governing bodies to decide on the content of any training or instructional materials. However, they may wish to consider including discussions of the importance of freedom of speech and academic freedom. It may also be good practice for the institution to refresh training for students and members of staff on an annual or more frequent basis.

227. This training and orientation may be of special importance for visiting scholars and incoming students from countries where principles of academic freedom are not recognised. In the

⁷ See Students' perceptions of freedom of speech: Student insight report - Office for Students.

case of international students and scholars, it may also be good practice to make key orientation content available in their first languages.

228. It may also be helpful for any such training and instruction to include completely clear and unambiguous warnings of robust internal disciplinary processes for students or staff who harmfully disclose the lawful speech of other international students or staff (for instance, by passing on the political speech of a student in class to diplomats from the embassy of that student's home country). See example 25.
229. The training suggested here is additional to the training that may be offered to students or staff, or required for relevant decision makers, under the 'secure' duty. See paragraphs 208-213. In accordance with those paragraphs of the guidance, the training suggested here should not impose a requirement on the person completing the training actively to endorse any viewpoint or value judgement. This relates to compelled speech within training: training that cannot be completed unless the user actively assents to a particular viewpoint or value judgement that they may reject. See examples 53 and 54.

Other steps

230. It may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for their most senior or visible leaders (for instance, the chancellor, the vice-chancellor and the chair) to affirm frequently, unequivocally and both publicly and internally, the importance of freedom of speech and academic freedom. They could also reassure staff and students, expressly including the most junior and/or precariously employed academic staff, that the institution will protect their freedom as scholars and students to discuss, teach and research the widest possible range of ideas within the law. It is also likely to be helpful to include prominent statements to this effect on internally and externally facing websites. See also paragraphs 143-4 and Examples 28 and 29.
231. It may, depending on the circumstances, be likely to assist providers and constituent institutions to meet their 'promote' duty for governing bodies to adopt and to state publicly a position of institutional neutrality. For instance, this could be that the institution will not make organisational comments on national or global events or support political causes or campaigns that are outside the legitimate sphere of its educational remit and (in the case of a charity) where this does not support delivery of its charitable purpose. Adopting such a stance may reduce the probability of discouragement (or 'chilling') of lawful speech by students and staff, especially junior or precariously employed staff.