

Freedom to question, challenge and debate

Introduction and background

Freedom of expression and academic freedom are essential underpinning principles of UK higher education. The core mission of universities and colleges is the pursuit of knowledge, and the principles of free speech and academic

freedom are fundamental to this purpose.¹ They provide a necessary context for advancing new ideas, encouraging productive debate, and challenging conventional wisdom.

It is helpful to explain at the outset what we mean by academic freedom and freedom of expression or free speech. Please see the box on this page.

Public interest governance principles

Academic freedom: This is the principle that academic staff are free within the law to question and test received wisdom, and put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or the privileges they may have at their university. This is included in the public interest governance principles that underpin the Office for Students' (OfS's) regulatory requirements relating to the management and governance of universities and colleges, and its inclusion is a statutory requirement.²

Academic freedom is a component of, rather than being entirely distinct from, freedom of speech.

Freedom of speech: The OfS's public interest governance principles also include a principle on freedom of speech. This principle requires governing bodies to take reasonably practicable steps to ensure that freedom of speech within the law is secured within their universities and colleges. It reflects the statutory duty on free speech with which higher education providers must comply.³

Although the OfS's principle (and the statutory duty) refer to freedom of 'speech', this will include written materials and other forms of expression. It is not limited to the spoken word.

Framing of these principles: Freedom of speech and academic freedom that are 'within the law' are protected. Unlawful speech is not protected. However, there is no need to point to a specific legal basis for particular speech. Rather, the starting point is that speech is permitted unless it is restricted by law. It is important to remember that free speech and academic freedom are bound by this requirement of lawfulness.

Summary

Ensuring freedom of speech and academic freedom in English universities and colleges is not only essential to foster an open and enquiring academic mindset, but is also the subject of a number of legal duties and principles. This area has become increasingly contentious in recent years, and this brief summarises some key points before outlining the legal and regulatory framework within which universities and colleges must make decisions about matters relating to these freedoms. While this brief discusses the regulatory and legal landscape as at the time of writing, material relating to legislation currently before Parliament may become quickly out of date. And, while it provides commentary on a range of regulatory and legal issues, it is not intended to provide legal advice or a comprehensive statement or guide on the law relating to freedom of speech and academic freedom.

The Office for Students is the independent regulator of higher education in England. We aim to ensure that every student, whatever their background, has a fulfilling experience of higher education that enriches their lives and careers. We regulate to promote quality, choice, competition and value for money in higher education, with a particular remit to ensure access, success and progression for underrepresented and disadvantaged groups of students.

While it is not a new issue, public debate over freedom of speech in higher education has intensified in recent years amid concerns that universities and students' unions may not be doing enough to uphold free speech and academic freedom. This has included a growing political focus.

In February 2021 the government set out proposals to strengthen freedom of speech and academic freedom in higher education in England, and a bill on free speech in universities and colleges is currently before Parliament.⁴ The bill's proposals are discussed later in this brief.

In October 2022 organisations representing universities, colleges and students' unions issued a joint statement affirming their commitment to freedom of speech within the law and to academic freedom. The statement presents work on encouraging free speech as congruous with work on inclusion and ensuring all students can be heard.⁵

The debate over free speech, as it plays out in the media, in politics and in universities and colleges themselves, often connects to broader societal issues and concerns. This includes issues relating to identity and equality, harassment and discrimination, the regulation of social media, and even geopolitics. The implications of these concerns for free speech in universities are varied and often complex.

For some, the key concern is the erosion of free speech. Universities must be places where students and staff can openly and rigorously question current orthodoxies and beliefs, and explore new areas of intellectual enquiry, regardless of whether this involves or leads to the expression of views and opinions that may be uncomfortable, offensive or upsetting. Students, it is suggested, are being shielded from exposure to difficult and controversial subject matter, for instance in the denial of

a platform to controversial speakers. There are fears that a climate of self-censorship among academics and students has taken hold, in which the discussion of certain topics has become taboo.

Some commentators have suggested that an emphasis on free speech is at odds with work to reduce inequalities and tackle discrimination in higher education.⁶ Some have drawn attention to the impact on groups who may feel silenced or threatened by the expression of certain views and perspectives. They believe that campuses should be inclusive environments or 'safe spaces', and they worry that an emphasis on free speech, which may encompass lawful but offensive or hurtful speech, might undermine work being done in this area.

Others have challenged claims of a free speech 'crisis'. They say that the debate is a distraction from other pressing issues in higher education.⁷

There have been numerous studies and reports on the state of free speech in English higher education. This Insight brief does not set out to evaluate this issue, although we summarise some key points for context. The focus of this brief is the legal and regulatory framework within which universities and colleges must make decisions about matters relating to academic freedom and freedom of speech. A consideration of that framework reveals some of the complex issues around free speech and equality law with which universities and colleges have been grappling. A sound understanding of this framework will support universities to make good decisions about free speech matters.

After all, it is not always the case that promoting free speech and supporting inclusivity are mutually exclusive. It might be argued, for example, that creating an inclusive environment in a university or college in which all are able to put forward their views and arguments, and each

contributor to a discussion is heard, facilitates and encourages free speech rather than stifling it.⁸ The question arises of how best to achieve this in practical terms.

Recent evidence

The state of free speech in higher education is not easy to measure, and some research findings on the subject have been contested or variously interpreted.

Policy Exchange's 2019 and 2020 publications, both entitled 'Academic freedom in the UK', highlighted evidence of self-censorship of speech by students and academic staff. The reports also set out policy recommendations for strengthening academic freedom.⁹ A 2020 report by Civitas presented analysis of the policies and actions of 137 universities in the UK. It concluded that 48 of them (35 per cent) were performing badly on free speech, and called for government action on the issue.¹⁰

The latest update from the Academic Freedom Index project states that academic freedom in the UK declined between 2011 and 2021. According to this index, the UK is in the top 30 to 40 per cent of countries when it comes to academic freedom.¹¹

Recent research by King's College London suggests that most students think academic freedom and freedom of expression are protected at their universities. Most agree that academic staff are free to express their views at their university, though their number seems to be declining (70 per cent, a seven percentage point decrease from an equivalent study in 2019); that free speech and robust debate are protected (65 per cent, about the same as in 2019); and that debates and discussions are conducted in a civil way (73 per cent, about the same as in 2019).

However, a significant minority of students believe that free speech is under threat. In the same research, 34 per cent report that free speech is 'very'

or 'fairly' threatened in their university (an increase of 11 percentage points from 2019). A quarter of students say that they 'very' or 'fairly' often hear of free speech being inhibited at their university (an increase of 13 percentage points from 2019).

A majority of students in the King's College research also indicated that they supported free speech, but within the confines of discrimination legislation. About three-quarters (74 per cent) said that protecting students from discrimination should have priority over allowing unlimited free speech.¹²

Research published by the Higher Education Policy Institute (HEPI), also in 2022, had similar findings: 61 per cent of students polled said that 'when in doubt' their university should 'Ensure that all students are protected from discrimination rather than allow unlimited free speech' (an increase of 24 percentage points from an equivalent poll in 2016). The HEPI poll also found that a minority of students (38 per cent) believed that universities were becoming less tolerant of a wide range of viewpoints (an increase of 14 percentage points from 2016).¹³

A recent HEPI report suggested that free speech is being inhibited in higher

education debating societies, where suitable speakers are not invited because they have previously expressed views that are deemed controversial or problematic, even though this does not make them unlawful.¹⁴

In 2022, the Times investigated the extent of content warnings and the removal of texts from university reading lists because of concerns about their content.¹⁵ It found 1,081 examples across undergraduate courses where content warnings had been applied to texts, and ten universities that had withdrawn books from course study lists, or made them optional reading, because of content concerns. Its reporting on the findings concluded that concerns about students becoming upset or offended are limiting the range of study materials to which students are exposed.¹⁶ However, students may welcome content warnings: 86 per cent of students responding to the HEPI poll supported them (an increase from 68 per cent in the 2016 poll).¹⁷

The OfS receives notifications from students, staff or others about issues or concerns relating to registered higher education providers. Since the OfS's inception in 2018, we have received approximately

800 notifications in total, of which around 60 were about free speech issues. Only a small number related to book lists or content warnings.¹⁸

The OfS will be collecting new evidence on freedom of speech in higher education. As of 2023, we will be collecting final-year students' views on free speech as part of the National Student Survey. A new survey question will test how comfortable students are to express themselves freely at university or college.¹⁹ We will also be polling academics to ascertain their views on the state of free speech in higher education.

The legal and regulatory framework for free speech

To outline the context in which free speech operates in English universities and colleges, it is necessary to consider both English law and the European Convention on Human Rights (ECHR).

Most of the universities and colleges that are registered with the OfS are 'public bodies' for the purposes of the Human Rights Act 1998. It is unlawful for those higher education providers, as public bodies, to act incompatibly with the ECHR. Article 10 of the ECHR relates to freedom of expression.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

From the European Convention on Human Rights²⁰

There is also legislation on freedom of speech in the specific context of higher education. Section 43 of the Education (No 2) Act 1986 requires universities and colleges to **'take such steps as are reasonably practicable'** to ensure that freedom of speech **within the law** is secured for their members, students, employees and visiting speakers ('the section 43 duty' or 'the free speech duty').

It is important to note that the framing of the section 43 duty is to 'take such steps as are reasonably practicable' and this is likely to entail a wide range of steps needing to be taken in practice. In our view, it is unlikely to be sufficient for a university only to make public statements in favour of free speech.

Section 43 also requires universities and colleges to issue and keep up to date a free speech code of practice.²¹ The legislation specifically requires that code to set out the procedures that must be followed in connection with the organisation of meetings or other activities taking place on a university's premises, and the conduct required of staff and students in connection with those meetings and activities. The legislation also says that the code should deal with 'such other matters as the governing body' of the university 'consider[s] appropriate'.

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.

The OfS is likely to consider the scope of freedom of speech policies across the sector in the future, for example in connection with the implementation of new regulatory powers that may arise from legislation, referred to below. Universities and colleges may wish to review their codes of practice now, with this in mind.

Equality law considerations

Protected characteristics

Universities and colleges must also comply with the requirements of equality law. The relevant provisions are framed in relation to a set of 'protected characteristics' set out in the Equality Act 2010. These are age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity.

Some of these protected characteristics are commonly understood. Others are more complex and incorporate a legal definition that requires careful consideration. Issues relating to the protected characteristics of sex, gender reassignment and belief (which includes philosophical belief) have been the focus of much of the recent public discourse on free speech within universities.

Universities and colleges should ensure that their equality policies and processes do

not misrepresent the scope and meaning of the different protected characteristics, and that they properly consider all the characteristics that may be relevant in a particular situation.

The interaction between different protected characteristics may require careful consideration – for example, some religious beliefs and the protected characteristic of sexual orientation. Both characteristics are afforded protection from harassment and discrimination under the Equality Act, and it may be necessary for universities and colleges to balance the different protected characteristics in certain circumstances. The expression of beliefs in a way that amounts to unlawful harassment or discrimination does not constitute free speech within the law. Universities and colleges may therefore need to weigh up whether the expression of certain religious or philosophical beliefs amounts to unlawful harassment and discrimination, and whether expression of those beliefs should be restricted to protect people with other protected characteristics from unlawful discrimination or harassment.

The public sector equality and Prevent duties

The protected characteristics underpin an overarching equality duty with which public organisations must comply. This is called the public sector equality duty (PSED), and is set out in the Equality Act 2010. Universities and colleges that receive public grant funding from the OfS are public organisations for these purposes and so must comply with the PSED.

The public sector equality duty: A public authority must, in the exercise of its functions have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the Equality Act 2010];
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.²²

The PSED is a duty to ‘have due regard’ to the need to achieve the aims set out above. It is not a duty to achieve those aims. Universities and colleges should be clear about the precise equality implications of their decisions, policies and practices, and although they must recognise the desirability of achieving the aims set out above, they must do so in the context of the importance of free speech and academic freedom, particularly in higher education.

Another duty that universities and colleges may often need to consider when dealing with matters relating to free speech is the ‘Prevent duty’.²³ This duty aims to safeguard people from becoming terrorists or supporting terrorism. Again, it is important to draw out the framing of the Prevent duty; it is a duty to have ‘due regard to’ the need to prevent people from being drawn into terrorism. It is not a duty to achieve the aim of

preventing people from being drawn into terrorism. Relevant legislation specifically states that, in complying with the Prevent duty, universities and colleges must have ‘particular regard’ to the duty to ensure freedom of speech and to the importance of academic freedom.²⁴

Universities and colleges should ensure that their policies and processes, where they reference the PSED and the Prevent duty, do so in a way that accurately reflects the statutory framing of those duties. Similarly, decision-makers in universities should ensure that their consideration of these duties appropriately reflects their framing, particularly in the context of decisions about taking steps to secure free speech. In other words, universities should be mindful that the free speech duty requires them to act, whereas the PSED and Prevent duty require them to think about these matters as they act.

Harassment and discrimination

In recent months, much of the public discourse on free speech in universities has centred around matters that are tightly bound up with equality law considerations; for example, issues relating to antisemitism or sex-based rights and free speech. Universities have commented publicly, including in the media and in evidence to parliamentary committees, about the challenges they experience in navigating this landscape. It may often be the case that universities and colleges need to consider their free speech duties, the PSED (if applicable) and other provisions of the Equality Act 2010 relating to harassment and discrimination.

The Equality Act 2010 prohibits unlawful discrimination. There are two types of discrimination, direct discrimination and indirect discrimination.

Universities and colleges may often need to balance competing interests. This may be more complex where competing protected characteristics are involved, for example sex and gender reassignment. Universities must ensure that they consider all the relevant protected characteristics in any particular case and do not, in focusing on a single protected characteristic, unlawfully discriminate (directly or indirectly) against people with other protected characteristics.

Where a university adopts a policy or practice that promotes a particular protected characteristic to the detriment of others, that may amount to unlawful discrimination. Such a policy may give rise to concerns in relation to freedom of speech and academic freedom if the effect of the policy is that it is curtailing the expression of protected beliefs.

Speech that amounts to unlawful discrimination (direct or indirect) is by its nature unlawful. It therefore falls outside the protections afforded to lawful free speech and academic freedom. Similarly, universities and colleges may lawfully restrict speech that amounts to harassment, since such speech is itself unlawful and so is not protected.

Direct discrimination: Broadly, direct discrimination may occur where someone is treated less favourably than others, because of their protected characteristics. Direct discrimination is always unlawful, except in some situations where discrimination on grounds of age may be lawfully justified.²⁵

Indirect discrimination: Broadly, indirect discrimination may occur where a practice, policy or rule applies to everyone in the same way, but has a worse effect on someone (treating them less favourably) because of their protected characteristics. For example, an employer may decide to introduce rules that treat its part-time workers less favourably than its full-time workers. If the majority of those part-time workers are women, and the majority of full-time workers are not women, the employer’s actions may amount to indirect discrimination on grounds of sex.²⁶

Indirect discrimination can be objectively justified, if it can be shown to be a ‘proportionate means of achieving a legitimate aim’. Whether it can will depend on the individual circumstances of the case. Things like health and safety reasons may amount to a ‘legitimate aim’. In determining whether something is proportionate, the university or college should carry out a balancing exercise. This should consider whether the action is targeted at the legitimate aim and is likely to be effective; and, insofar as there are a range of options available, which is the least onerous or intrusive of those that are likely to be reasonably effective, and likely to result in benefits that outweigh the disadvantages (e.g. unintended consequences). It will be harder to justify discriminatory action if another action that has a less discriminatory impact could achieve the same aim.

Harassment: Harassment (as defined by section 26 of the Equality Act 2010) means unwanted conduct that has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person because of, or connected to, one or more of the person’s relevant protected characteristics. (Marriage and civil partnership and pregnancy and maternity are not relevant protected characteristics for these purposes.)

In deciding whether conduct has the effect referred to, it is necessary to take into account: the perception of the person who is at the receiving end of the conduct; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

The last point is important because it introduces an element of objectivity into the test. The perception of the person who is at the receiving end of the conduct is not the only relevant consideration in determining whether the conduct amounts to unlawful harassment.

Universities and colleges should ensure that any consideration of harassment within their policies and processes reflects the correct legal definition. Policies and processes that define ‘harassment’ too broadly, and so conflate what may be lawful speech with harassment, may act to curtail free speech. Where academic staff could be subject to disciplinary action if they contravene such a policy, that policy may interfere with the academic freedom of those staff.

The Equality and Human Rights Commission guidance to further and higher education providers explains that universities and colleges:

‘are not restricted in the range of issues, ideas and materials [they] use in [their] syllabus and will have the academic freedom to expose students to a range of thoughts and ideas, however controversial. Even if the content of the curriculum causes offence to students with certain protected characteristics, this will not make it unlawful unless it is delivered in a way which results in harassment or subjects students to discrimination or other detriment.’²⁷

Example

A student society at a publicly funded university invites a speaker to an event. The speaker takes a strong anti-immigration stance, and has been accused on social media of holding extreme right-wing views and promoting racial hatred.

Some issues and duties that the university will need to consider, when deciding whether the event can go ahead include the following:

- Whether the proposed speech is lawful – for example, could it amount to harassment, noting the objective element of the test for harassment? Speech that is offensive and hurtful, but lawful, is protected.
- Having ‘due regard’ to the need to achieve the different elements of the PSED.
- Having ‘due regard’ to the need to prevent people from being drawn into terrorism, while having particular regard to the need to secure free speech.
- What reasonably practicable steps the university or college can take to secure free speech within the law for its students.

The OfS’s current regulatory approach

The Office for Students stands for the widest possible definition of free speech within the law. It is not our role to take sides in the contested debates that feature in the higher education sector. We must, and will, apply our understanding of the law to the facts of an individual case and do so with care and impartiality.

The Higher Education and Research Act 2017 requires the OfS to ‘have regard to’, among other things, the need to protect the autonomy of universities

and colleges, which includes academic freedom, when we exercise our functions.²⁸ Again, this framing does not mean that the OfS is required under its general duties to protect institutional autonomy, including academic freedom, but to ‘have regard to’ the need to protect institutional autonomy. In any given case, the OfS will have regard to each of its duties, affording them appropriate weight, in performing our functions.

Currently, the OfS regulates matters relating to free speech

and academic freedom through the relevant public interest governance principles, which underpin initial and ongoing conditions of registration relating to management and governance (the E conditions).²⁹ The public interest governance principles on freedom of speech and academic freedom (which are relevant to the OfS's E conditions) are set out at the beginning of this Insight brief.

Condition E1: The higher education provider's governing documents must uphold the public interest governance principles that are applicable to the higher education provider.³⁰

Condition E2: The higher education provider must have in place adequate and effective management and governance arrangements to, among other things, deliver, in practice, the public interest governance principles that are applicable to it.³¹

Governing documents include documents that are directly relevant to issues set out in one of the OfS's public interest governance principles. This will include a university's free speech code, and may include its broader policies relating to equality matters, where those policies may be relevant to a consideration of free speech matters or set out the university's objectives and values.

In deciding whether a university's governing documents uphold the **freedom of speech** public interest governance principle, under **Condition E1**, we may consider questions such as:

- Do those governing documents provide for reasonable steps that facilitate securing lawful speech?
- Do those governing documents include content

that provides for steps that may undermine free speech?

In deciding whether a university's governing documents uphold the **academic freedom** public interest governance principle, under **Condition E1**, we may consider questions such as:

- Is there anything in those documents that would result in less favourable treatment of staff because of their lawful academic opinions?
- Is there anything in those documents that would result in disciplinary action against staff because of their lawful academic opinions?

Condition E2 requires universities and colleges to have adequate and effective management and governance arrangements to deliver in practice the freedom of speech and academic freedom public interest governance principles (as well as other relevant principles that are not the focus of this Insight brief).

In deciding whether a university is complying with those requirements of **Condition E2**, we may consider questions such as:

- Does the university have robust decision-making arrangements, which require it to consider the impact of its decisions on free speech and academic freedom as part of the decision-making process?
- Does the university have checks and balances to ensure that its policies and processes do not adversely affect free speech or academic freedom?
- Does the university ensure that staff are appropriately trained, in particular those who are making decisions that may affect free speech and academic freedom matters?

If we consider that a university or college has breached or is at increased risk of breaching

our regulatory requirements, we can intervene. We may decide to impose specific conditions of registration requiring the university to take specific action to safeguard free speech and academic freedom. In the event of a breach of a condition of registration, we may impose a formal sanction, for example a monetary penalty.

Changes to the legal and regulatory landscape

Legislative changes are proposed that would strengthen the legal requirements on universities and colleges in relation to free speech and academic freedom, and the OfS's regulatory role, even further. Note that, while this brief is accurate at the time of writing, material relating to legislation currently before Parliament may become quickly out of date.

In the Higher Education (Freedom of Speech) Bill, which is currently going through Parliament, the government has proposed new duties on universities, colleges and their students' unions, and an enhanced role for the OfS in promoting free speech.³²

Key features of the government's bill are:

- A new duty on the OfS to promote the importance of freedom of speech within the law and academic freedom.
- New OfS conditions of registration for universities and colleges relating to free speech and academic freedom. These include conditions requiring universities and colleges to comply with new free speech duties, thereby giving the OfS a direct role in determining whether universities and colleges are meeting those statutory duties.
- Reframed free speech duties, to include a duty for universities and colleges to 'actively promote' freedom of speech, and an extension of the duty, and the OfS's

regulation, to apply directly to students' unions.³³

- A new complaints scheme, operated by the OfS, to consider free speech complaints about universities and colleges or their students' unions, from students, staff or visiting speakers.
- A new role of Director for Freedom of Speech and Academic Freedom in the OfS, to champion free speech and oversee the OfS's functions in this area.
- The introduction of a statutory tort for breach of the duty (meaning that individuals would be able to seek legal redress for any loss they have suffered because of a breach of the free speech duty).

These provisions may be subject to change as the bill progresses through Parliament. For instance, an amendment was passed in December to include provisions in the bill to prohibit universities and colleges from using non-disclosure agreements in relation to complaints of misconduct.³⁴

The OfS is looking forward to working with the government to implement the provisions of the bill, once it has received royal assent. We expect to consult on our approach to the new mandatory conditions of registration and to publish guidance to support universities, colleges, staff and students to understand the new legal and regulatory requirements.

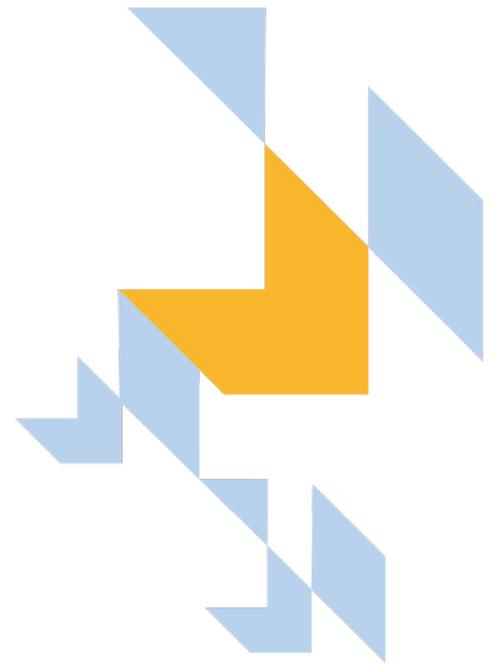
Conclusion

Freedom of speech and academic freedom have always been essential features of higher education in England. But universities and colleges have not always found it easy to navigate the complexities in this area in practice. There are different views among students and academics about the approaches that would best serve vigorous debate in pursuit

of new knowledge, particularly where there is disagreement about strongly held beliefs.

Universities and colleges recognise that, in upholding free speech and academic freedom, they will have to uphold the rights of those whose views are regarded by some as offensive. In doing so they must ensure they operate with an accurate understanding of equality matters, and the extent of their duty to take reasonably practicable steps to secure freedom of speech within the law. New legislation, subject to parliamentary approval, may go further in placing a duty on universities and colleges to promote free speech.

Understanding how to engage with and address the full range of relevant requirements will be essential – for universities and colleges, and for the OfS – as higher education navigates the free speech landscape in the coming years.



Notes

¹ In this brief, for the sake of readability, we have used ‘universities and colleges’, or sometimes simply ‘universities’, to refer to what our regulatory framework and other more formal documents call ‘higher education providers’.

² Section 14 of the Higher Education and Research Act 2017 requires the OfS to determine and publish a list of principles applicable to the governance of English higher education providers, which must include this principle on academic freedom (section 14(7)).

³ Under section 43 of the Education (No.2) Act 1986, the governing bodies of English universities and colleges are required to ‘take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers’.

⁴ Department for Education (DfE), ‘Higher education: Free speech and academic freedom’, February 2021 (<https://www.gov.uk/government/publications/higher-education-free-speech-and-academic-freedom>); UK Parliament, ‘Higher Education (Freedom of Speech) Bill’, (<https://bills.parliament.uk/bills/2862>).

⁵ Universities UK, Advance HE, Committee of University Chairs, GuildHE, National Union of Students (NUS) Charity, ‘Higher education sector statement on promoting academic freedom and free speech’, first issued October 2022, last updated November 2022 (available at <https://www.universitiesuk.ac.uk/latest/news/higher-education-sector-statement>).

⁶ For a discussion of the issue of ‘safe spaces’ see Hubble, S, and Lewis, J, ‘Freedom of speech in universities’, March 2021 (available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9143/>), pp17-18.

⁷ For examples of the discussions on free speech and higher education, see Hubble, S, and Lewis, J, ‘Freedom of speech in universities’, March 2021 (available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9143/>); Lewis, J, ‘Higher Education (Freedom of Speech) Bill: Progress of the Bill’, House of Commons Library, July 2022 (available at <https://commonslibrary.parliament.uk/research-briefings/cbp-9295/>); House of Commons Education Committee, ‘Oral evidence: Free speech and research content in English universities, HC 673’, 7 September 2022 (available at <https://committees.parliament.uk/committee/203/education-committee/publications/oral-evidence/>).

⁸ For example, see Universities UK, Advance HE, Committee of University Chairs, GuildHE, NUS Charity, ‘Higher education sector statement on promoting academic freedom and free speech’, first issued October 2022, last updated November 2022, (available at <https://www.universitiesuk.ac.uk/latest/news/higher-education-sector-statement>); and West, S, ‘Universities stepping up to promote free speech and academic freedom’, Higher Education Policy Institute (HEPI), October 2022 (<https://www.hepi.ac.uk/2022/10/31/universities-stepping-up-to-promote-free-speech-and-academic-freedom/>).

⁹ Simpson, Tom, and Kaufman, Eric, ‘Academic freedom in the UK’, Policy Exchange, November 2019; Akekoya, Remi, Kaufman, Eric, and Simpson, Tom, ‘Academic freedom in the UK: Protecting viewpoint diversity’, Policy Exchange, August 2020.

¹⁰ Civitas, ‘Academic Freedom in Our Universities: The Best and the Worst’, December 2020 (available at <https://www.civitas.org.uk/publications/academic-freedom-in-our-universities/>).

¹¹ Kinzelbach, K, Staffan, I, Lindberg, L, and Spannagel, J, ‘Academic freedom index 2022 update’, 2022 (available at <https://www.pol.phil.fau.eu/academicfreedom/>).

¹² The Policy Institute, King’s College London, ‘The state of free speech in UK universities: What students and the public think’, September 2022 (available at <https://www.kcl.ac.uk/news/free-speech-in-universities-new-data-reveals-student-and-public-perceptions>). The data is taken from representative surveys of UK university students.

¹³ Hillman, N, “‘You can’t say that!’ What students really think of free speech on campus”, HEPI, June 2022 (available at <https://www.hepi.ac.uk/2022/06/23/you-cant-say-that-new-polling-shows-students-want-more-controls-on-free-expression/>). 1,000 full-time undergraduates were polled via YouthSight, a market research company.

¹⁴ Freeman, J, ‘No platform: Speaker events at university debating unions’, HEPI, October 2022 (available at <https://www.hepi.ac.uk/2022/10/13/new-study-finds-quiet-no-platforming-to-be-a-bigger-problem-than-actual-no-platforming/>). It should be noted that the most prominent organisations discussed, the Oxford and Cambridge Unions, are private members’ societies not affiliated to their respective universities or students’ unions.

¹⁵ A ‘content warning’ (sometimes known as a ‘trigger warning’) is a short message at the start of a book, film or other course material identifying elements that could be distressing or challenging for a reader or viewer.

¹⁶ The Times, ‘Censorship on campus: Universities scrap “challenging” books to protect students’, 10 August 2022 (<https://www.thetimes.co.uk/article/censorship-on-campus-universities-scrap-challenging-books-to-protect-students-dp50d9fsd>). The Times sent almost 300 freedom of information requests to 140 UK universities asking for details of trigger warnings and of texts removed from reading lists because of concerns about their content.

¹⁷ Hillman, N, “‘You can’t say that!’ What students really think of free speech on campus”, HEPI, June 2022 (available at <https://www.hepi.ac.uk/2022/06/23/you-cant-say-that-new-polling-shows-students-want-more-controls-on-free-expression/>).

¹⁸ House of Commons Education Committee, ‘Oral evidence: Free speech and research content in English universities, HC 673’, 7 September 2022 (available at <https://committees.parliament.uk/committee/203/education-committee/publications/oral-evidence/>), Q116.

¹⁹ OfS, ‘Students to be asked about mental wellbeing services and free speech in National Student Survey shake-up’ (www.officeforstudents.org.uk/news-blog-and-events/press-and-media/students-to-be-asked-about-mental-wellbeing-services-and-free-speech-in-national-student-survey-shake-up/).

²⁰ Referenced in the Human Rights Act 1998 (<https://www.legislation.gov.uk/ukpga/1998/42/schedule/1>).

²¹ Education (No. 2) Act 1986 (section 43) (<https://www.legislation.gov.uk/ukpga/1986/61/section/43>).

²² See <https://www.gov.uk/government/publications/public-sector-quick-start-guide-to-the-public-sector-equality-duty>.

²³ The Prevent duty applies to the governing bodies or proprietors of ‘relevant higher education bodies’. For more information see www.officeforstudents.org.uk/advice-and-guidance/student-wellbeing-and-protection/counter-terrorism-the-prevent-duty/.

24 Section 31 of the Counter-Terrorism and Security Act 2015, available at <https://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>.

25 Direct discrimination is defined in Section 13 of the Equality Act 2010.

26 Indirect discrimination is defined in Section 19 of the Equality Act 2010.

27 Equality and Human Rights Commission, 'What equality law means for you as an education provider: Further and higher education' (available at <https://www.equalityhumanrights.com/en/publication-download/what-equality-law-means-you-education-provider-%E2%80%93-further-and-higher-education>), p39.

28 Section 2 of the Higher Education and Research Act 2017, available at <https://www.legislation.gov.uk/ukpga/2017/29/contents/enacted>.

29 OfS, 'Securing student success: Regulatory framework for higher education in England' (OfS 2018.01), February 2018 (available at www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/),

30 OfS, 'Securing student success: Regulatory framework for higher education in England' (OfS 2018.01), February 2018 (available at www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/), pp110-111.

31 OfS, 'Securing student success: Regulatory framework for higher education in England' (OfS 2018.01), February 2018 (available at www.officeforstudents.org.uk/publications/securing-student-success-regulatory-framework-for-higher-education-in-england/), pp112-117, especially paragraph 444, v, p114.

32 DfE, 'Higher education: Free speech and academic freedom', February 2021 (<https://www.gov.uk/government/publications/higher-education-free-speech-and-academic-freedom>).

33 At the time of publication of this Insight brief, the provisions of the free speech bill relating to students' unions apply only to the students' unions of providers registered in the OfS's Approved (fee cap) category. The student common rooms of the constituent colleges of collegiate universities such as Oxford and Cambridge would be exempt from this.

34 UK Parliament, 'Higher Education (Freedom of Speech) Bill', (<https://bills.parliament.uk/bills/2862>).