

Annex B: Condition E12: Compliance with free speech duties

Condition E12: The governing body of a registered provider must comply with its duties under sections A1, A2 and A3 of the Higher Education and Research Act 2017.

Summary

Applies to: all registered providers

Initial or ongoing condition: ongoing condition

Legal basis: Section 8A(2) of the Higher Education and Research Act 2017 – mandatory.

Scope and background

1. This condition:
 - a. covers subject matter related to freedom of speech and academic freedom
 - b. applies in relation to matters involving students, staff, members and visiting speakers.
2. The Higher Education (Freedom of Speech) Act 2023 ('the Act') amends the Higher Education and Research Act 2017 ('HERA') to strengthen the legal requirements placed on universities and colleges relating to freedom of speech and academic freedom.
3. The Act imposes duties on a provider or constituent institution to:
 - a. take steps to secure freedom of speech (the A1 'secure' duty)
 - b. maintain a free speech code of practice (the A2 'code' duty)
 - c. promote the importance of freedom of speech and academic freedom (the A3 'promote' duty).
4. Providers should refer to the statutory provisions as the primary source of what the duties require. Providers should refer to Annex D: Free speech guidance for further guidance on how they might comply with those duties.

Guidance

5. Condition E12 requires the governing bodies of providers to comply with their duties under sections A1, A2 and A3 of HERA. Constituent institutions of registered providers are also subject to these statutory duties, although condition E12 does not apply directly to them, unless they are registered in their own right.

6. In summary, the duties under section A1 of HERA¹ require the governing body of a provider:
- a. to take steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to secure freedom of speech within the law for its staff, members, students and visiting speakers, including securing:
 - i. that the use of premises is not denied based on an individual's ideas or opinions or a body's policy or objectives, or the ideas or opinions of any of its members.
 - ii. that the terms on which premises are provided are not based on an individual's ideas or opinions, or a body's policy or objectives, or the ideas or opinions of any of its members.
 - iii. academic freedom for its academic staff. Academic freedom is the freedom within the law for academic staff to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions without being at risk of loss of their jobs or privileges, or reduction of their likelihood of securing promotion or a different job at the provider
 - b. to take steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to secure that a person applying to become a member of academic staff is not adversely affected in relation that their application because they have exercised their freedom to question and test received wisdom and to put forward new ideas and controversial or unpopular opinions
 - c. to secure that, apart from in exceptional circumstances, an individual or body is not required to bear some or all of the costs of security relating to use of provider premises
 - d. to secure that the provider does not enter into non-disclosure agreements with its staff, members, students or visiting speakers in relation to misconduct or alleged misconduct involving sexual abuse, sexual harassment, sexual misconduct, bullying or harassment.

¹ See Higher Education and Research Act 2017 - GOV.UK - Section A1.

7. In summary, the duties under section A2 of HERA² require the governing body of a provider to:
- a. Maintain a free speech code of practice setting out:
 - i. the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech;
 - ii. the procedures staff, students, and any students' union of the provider will follow in organising meetings or activities to be held on its premises that fall within any class of meeting or activity specified in the code of practice;
 - iii. the conduct required of staff, students, and students' unions in connection with any such meeting or activity; and
 - iv. the criteria the provider will use in making decisions about whether to allow the use of premises and on what terms
 - b. Take the steps that are reasonably practicable for it to take in order to secure compliance with its code of practice
 - c. Bring the provisions of section A1 and its code of practice to the attention of all of its students at least once a year.
8. In summary, the duty under section A3 of HERA³ requires the governing body of a provider to promote the importance of freedom of speech within the law and academic freedom for academic staff of registered higher education providers and their constituent institutions in the provision of higher education.
9. The OfS has set out further guidance in Annex D for providers on the meaning and content of their duties under sections A1, A2 and A3 of HERA, including definitions of statutory terms. This includes guidance to help determine whether providers are complying with their free speech duties, and therefore with condition E12.

Monitoring, assessment and enforcement of ongoing compliance

10. To comply with E12, a provider must comply with their A1, A2 and A3 duties. The OfS has provided guidance on how providers can achieve compliance in Annex D: Free speech guidance.
11. The OfS will use its general risk-based approach to monitoring as set out in the regulatory framework.

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

³ See [Higher Education and Research Act 2017 - GOV.UK - Section A3](#).

12. Where monitoring activity produces intelligence or evidence that suggests there may be compliance concerns for an individual provider, the OfS may adopt one or more of the following approaches (in any order):
 - a. Engage with a provider to ensure it is aware of the issues
 - b. Gather further information it considers relevant to the scope of the potential concerns, from a provider or from elsewhere on a voluntary basis, to facilitate an assessment of whether there is, or has been, a breach of one or more conditions
 - c. Use its regulatory and/or investigatory powers where it is considered appropriate for any reason.

Assessment and monitoring

13. In assessing ongoing compliance with condition E12, the OfS will assess whether a provider is breaching, has breached or is at risk of breaching any of its A1, A2 or A3 duties.
14. In assessing whether a provider has complied with its A1 duty, the OfS will adopt the three-step approach set out in Annex D: Free speech guidance. in relation to any arrangement, policy or decision that may affect speech.
 - Step 1: Is the speech 'within the law'? If yes, go to step 2. If no, the duty to 'secure' speech does not apply.
 - Step 2: Are there any 'reasonably practicable steps' to secure the speech? If yes, take those steps. Secure the speech. If you are interfering with the speech in any way, go to step 3.
 - Step 3: Are any interferences 'prescribed by law' and proportionate under the European Convention on Human Rights? Facts that are relevant at step 3 may also be relevant at step 2.
15. When determining whether a step is 'reasonably practicable' for the provider to take to secure speech, the OfS will consider the relevant factors set out in Annex D: Free speech guidance (see paragraph 24 of Annex D: Free speech guidance and the infographic that follows it).
16. In assessing a provider's ongoing compliance with E12, the OfS may consider any regulatory information and intelligence it holds on the provider. This may include, but is not limited to:
 - a. third-party notifications
 - b. reportable events
 - c. a provider's code of practice
 - d. a provider's operational policies and procedures or relevant contractual arrangements
 - e. any free speech complaint received as part of the OfS free speech complaints scheme (see paragraphs 18 to 22 for further explanation)
 - f. actions taken or not taken by a provider in response to a free speech complaint

- g. the outcomes of any OfS investigation or improvement work with the provider
 - h. any OfS quality assessment
 - i. any data audit
 - j. any data submitted to the OfS by a provider (for example, data submitted to the OfS as part of the review of a complaint submitted to the OfS free speech complaints scheme or as part of the Prevent accountability and data return)
 - k. any information from other relevant regulatory or public bodies, such as the Office of the Independent Adjudicator for Higher Education (OIA) or the Department for Education.
17. Where the OfS considers that a provider is at risk of breaching this condition, it may request additional evidence and/or information. This may include, but is not limited to:
- a. any record related to a provider's risk and audit functions (for example, internal audit plans and annual report, risk register or event risk assessments)
 - b. a provider's conflicts of interest register
 - c. any record of any proportionality analysis undertaken by the provider when taking decisions related to restricting speech and academic freedom
 - d. a provider's free speech code of practice
 - e. a record of a provider's, or individual or entity within a provider's, registration with the Foreign Influence Registration Scheme (if applicable).

The OfS free speech complaints scheme and E12 assessment of compliance

18. The OfS may consider a range of information and intelligence when making assessments about any aspect of this condition, including those set out in paragraphs 16 and 17. One of those sources of intelligence is the free speech complaints scheme.
19. In line with the OfS's general approach to monitoring and intervention, it may decide to investigate or take other regulatory action about information it has received. The free speech complaints scheme does not affect the OfS's ability to investigate or take regulatory action if a provider does not comply with any condition of registration or other regulatory requirement. Information provided to us in a free speech complaint may identify areas of concern in relation to any of the OfS's regulatory requirements.
20. A finding that a complaint is justified or partly justified is indicative of a breach of condition E12, but that is not the same as a regulatory decision that a provider has breached, or is breaching, a condition of registration. This is because our role in reviewing complaints is separate from our role in assessing providers against our conditions of registration. When deciding whether to take regulatory action, the OfS will also consider whether the provider has followed any recommendations made after we find a complaint justified or partly justified. If a provider does not follow the recommendations, the OfS will engage with it as a part of our

work to assess compliance with the conditions of registration. This may escalate to regulatory action where appropriate and proportionate.

21. A provider's compliance with condition E12 does not depend solely on the outcome of a complaint. Other information and intelligence that the OfS holds, including other information arising from the complaint, may also be relevant to compliance. This includes the content of the complaint as well as its outcome, including whether it was settled, withdrawn, justified, partly justified or not justified. It also includes the provider's response to any information requests, and (as indicated above) whether the provider has taken actions to improve (for instance) relevant policies or procedures following a recommendation that the OfS has made after a justified or partly justified complaint.
22. In considering this information and its relevance to compliance, the OfS will use its general risk-based approach to monitoring as set out in the regulatory framework.

Behaviours that suggest compliance or non-compliance with E12

23. Annex D contains guidance on the A1, A2 and A3 duties, and what they require. Contained in that guidance are descriptions and illustrations of how a provider might meet the requirements of these duties, and how it might be in breach of them.
24. As condition E12 requires providers to comply with their A1, A2 and A3 duties, these descriptions and illustrations therefore contain non-exhaustive examples of behaviours that suggest compliance or non-compliance with E12.

Definitions

25. Please see Annex D: Free speech guidance for a full list of definitions.