Annex A: Condition E11: Freedom of speech: management and governance

Condition E11.1: A provider's governing documents must be consistent with compliance by the governing body of the institution with its duties under sections A1, A2 and A3 of the Higher Education and Research Act 2017.

Condition E.11.2: A provider must have in place adequate and effective management and governance arrangements to secure compliance by the governing body of the institution with those duties.

Summary

Applies to: all providers seeking registration and all registered providers

Initial or ongoing condition: initial and ongoing condition

Legal basis: Section 8A(1) of the Higher Education and Research Act 2017.

Scope

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 including 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.

Condition E11.1: Guidance

5. For the purposes of this condition, the Office for Students (OfS) considers 'governing documents' to be 'documents that have some governing effect, which goes to the constitution or governance of the higher education provider'. Governing documents include, but are not

limited to, a provider's foundational documents and the documents outlined in initial condition of registration E7 at E7.2.

6. In relation to condition E11, a provider's overarching obligation is to ensure that all of its governing documents are consistent with compliance with its section A1, A2, and A3 duties ('the duties'). 'Consistent with compliance by the governing body of the institution with its duties under sections A1, A2 and A3' means that nothing in the governing documents prevents compliance with those duties.

7. As stated in condition E7, in registering with the OfS the provider must have a set of documents that enables the effective governance of the provider in practice. For the purposes of condition E11, all provider documents that could be considered 'governing documents' according to paragraph 5 must be consistent with compliance with the duties. This includes, but is not limited to, the same governing documents as set out under E7.2, listed below:

    a. documents which establish the provider as an institution, including (where applicable to the provider's legal form) its Royal Charter, memorandum and articles of association or trust deed

    b. documents which set out the following information in relation to the provider's governing body:

        i. its purposes or objectives

        ii. the number of governing body members and the roles of each of its members

        iii. processes for appointing members

        iv. roles and responsibilities of the body

        v. procedures for its decision making

        vi. arrangements for meeting of the body (including meeting frequency)

        vii. arrangements for reviewing the body's effectiveness or performance

    c. risk and audit documents

    d. decision-making documents

    e. a conflicts of interest policy

    f. any other documents (including shareholder agreements) which contain rules which govern the operation of the provider's governing body.

8. The OfS expects providers to review their governing documents for consistency with compliance with the duties prior to this condition coming into effect on 1 April 2027. If a provider introduces new governing documents or makes changes to existing governing documents, the provider should consider whether the change is material to its ability to comply with this condition.

9. When considering whether a provider's governing documents are consistent with compliance with the A1, A2 and A3 duties, a provider should consider its specific context (for instance, its shape, size and legal structure). What is consistent with compliance may look different from provider to provider depending on the specific context.

10. The provider should also consider the following questions as part of its review of each governing document or provision within it:

    a. Does the governing document and/or provision relate to, or have consequences for, freedom of speech and/or academic freedom?

    b. If so, is there anything within the governing document that does or could reasonably be considered to prevent compliance with the duties?

11. If a provider determines that its governing documents prevent compliance, it must change its documents to ensure that they are consistent with compliance with the relevant duty/duties.

12. Where the OfS has concerns that a provider's governing documents may prevent compliance, the OfS will engage with the provider to understand how it has assessed its governing documents. As part of this engagement, the OfS may request sight of any review a provider has undertaken of its documents. Where the OfS has concerns that a governing document may not be consistent with compliance and the provider disagrees, it will expect the provider to explain how the governing document is consistent with compliance. Any engagement with the provider over this condition will be in line with the OfS's general approach to monitoring and intervention.

Example 1: Governing body appointments

University A's governing document related to governing body appointments includes Clause B. This clause **states that members of the governing body are prohibited from expressing views that are 'unnecessarily critical' of the university.**

Clause B is likely to be inconsistent with compliance with the A1 duty and therefore in breach of Condition E11.1.

Example 2: Foreign influence

University A is based in foreign country X, which is a one-party state. It opens a branch campus B in England that is registered with the OfS. The governing documents of B specifically prohibit the teaching of views that contest, or are otherwise incompatible with, the values of the ruling party of foreign country X.

By excluding the teaching of a range of lawful political views, these governing documents are likely to be inconsistent with the provider's compliance with its A1 duty and therefore in breach of Condition E11.1. (See Annex D: Free speech guidance paragraph 207 and example 51.)

Condition E11.1: Assessment of initial condition

13. In assessing compliance with initial condition E11.1, the OfS will consider whether:

    a. the provider has submitted the set of governing documents required under condition E7.2 where that condition applies

    b. where condition E7.2 does not apply, the provider has submitted all governing documents it holds that fall within the set listed at paragraph 7 and has confirmed that all its governing documents are consistent with compliance with the duties

    c. the provisions in a provider's governing documents are consistent with compliance with the duties.

14. As part of the registration process, a provider must inform the OfS where it has concerns that any of its governing documents (whether or not submitted under paragraph 13(a) or (b)) are or may be inconsistent with compliance with its duties. When notifying the OfS of concerns, the provider should follow the steps set out in Regulatory notice 7.

15. The OfS will review the governing documents that the provider is required to submit under Regulatory notice 7 for the purposes of condition E11.1. If the OfS determines that any of a provider's governing documents (whether or not submitted under paragraph 13(a) or (b)) prevent compliance with its duties, the OfS may refuse the provider's application for registration

Condition E11.1: Assessment of ongoing condition

16. In assessing ongoing compliance with condition E11.1, the OfS will consider whether a provider's governing documents prevent compliance with any of its duties. As part of this assessment, the OfS will consider relevant information for determining whether the governing documents prevent compliance with the specific duties in question, including any contextual information submitted by the provider. Where needed, we may request additional information from the provider including, for example, where a governing document incorporates an internal policy.

17. In assessing a provider's ongoing compliance with E11.1, the OfS may consider any regulatory information and intelligence it holds. This may include, but is not limited to:

    a. third-party notifications

    b. reportable events

    c. a provider's governing documents

    d. a provider's operational policies and procedures, where a governing document incorporates those policies or procedures

    e. any free speech complaint received as part of the OfS free speech complaints scheme

    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 complaint 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 (DfE).

18. 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 function (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 decisions in relation to a provider's governing documents that involve taking steps to secure freedom of speech and academic freedom

    d. any record of any proportionality analysis undertaken by the provider when determining whether a governing document is consistent with compliance with the A1 duty

    e. information to provide transparency of inter-relationships between companies and other organisations, including relationships with foreign partners.

Condition E11.1: Behaviours

19. The following are non-exhaustive examples of behaviours that may indicate non-compliance with condition E11.1. The provider's governing documents may indicate non-compliance if they:

    a. prohibit or discourage the expression of lawful viewpoints

    b. impose belief requirements on staff, students, members or visiting speakers

    c. do not include obligations imposed by external bodies, such as foreign states or political parties, as potential conflicts of interest requiring declaration and mitigation where appropriate

    d. are not consistent with the governance arrangements set out at paragraphs 189-193F of Annex D: Free speech guidance.

Condition E11.2: Guidance

20. E11.2 requires a provider to have in place adequate and effective management and governance arrangements to secure compliance with the duties.

21. For the purposes of E11.2, an arrangement is 'adequate' if it is capable of delivering its stated or implied objective. An arrangement is 'effective' if it delivers compliance in practice.

22. In practice, this means that for a provider's management and governance arrangement to be both adequate and effective, the arrangements must secure compliance with the duties. The OfS would expect that for an arrangement to be both adequate and effective a provider must have the capacity and resources to deliver compliance in practice.

23. For the purposes of condition E11.2, 'capacity and resources' includes, but is not limited to:

    a. the financial resources of the provider

    b. the number, expertise, and experience of a provider's staff, contractors and members of the governing body

    c. the resources deployed by the provider to secure compliance with the duties, including to:

        i. take steps to secure freedom of speech

        ii. publish and maintain a free speech code of practice

        iii. promote the importance of freedom of speech within the law and academic freedom.

24. For example, the OfS would usually expect the above to include, but not be limited to, capacity and resources to:

    a. undertake investigations, respond to complaints and/or make decisions in relation to freedom of speech and academic freedom

b. take steps to secure the freedom of expression of students and staff who are at risk of harassment, intimidation or coercion for their exercise of freedom of speech and academic freedom

c. establish and maintain control and oversight by the governing body of the provider's duties, including oversight of risks and decisions taken in relation to freedom of speech and academic freedom.

25. Given the diversity of providers in the higher education sector, 'adequate and effective management and governance arrangements to secure compliance with the duties' will be different from provider to provider depending on its size, shape, legal structure and kind of provision. A provider should consider what arrangements are appropriate for its context. For instance, a smaller provider may be likely to have simpler management and governance arrangements and may have fewer staff, contractors and members of the governing body than a larger, more complex provider. The OfS would expect the resources allocated to the duties to be appropriate given the specific context of the provider but to be sufficiently sizeable to enable the provider to meet its duties in full.

26. When determining whether a provider has adequate and effective management and governance arrangements, the OfS would expect a provider to consider the following:

    a. what arrangements are necessary for the provider to understand the legal requirements of the free speech duties

    b. what arrangements are in place to ensure that staff have the necessary training, support and expertise to facilitate compliance with the duties

    c. what arrangements are in place for risks to be escalated to senior staff, managers and/or the governing body, where appropriate

    d. whether a provider's arrangements appropriately identify, record and mitigate risks related to freedom of speech and academic freedom

    e. whether a provider's arrangements promote a culture where staff are encouraged to raise risks early without fear of retribution

    f. how a provider's arrangements enable the provider to respond flexibly to new risks that emerge related to freedom of speech and academic freedom

    g. how a provider's arrangements may impact the student experience

    h. whether the arrangements are capable of securing, and secure in practice, compliance with the A1, A2 and A3 duties in HERA.

27. Each provider should determine how best to deliver governing body oversight, for example whether the governing body should maintain direct oversight of matters related to freedom of speech and academic freedom or if it can be delegated to relevant committee(s) and/or individual(s). A provider should also determine how its leadership team will manage accountability for these issues on a day-to-day basis. However, the governing body retains

responsibility for securing compliance with its duties and the OfS expects the governing body to be properly engaged on the risks to securing compliance with its duties.

28. The OfS recognises that risks related to freedom of speech and academic freedom may evolve and change over time, particularly as the creation and amendment of policies and procedures may give rise to questions of compliance with the duties. Providers should consider how to appropriately adapt and balance their capacity and resources across the organisation as risks change and new risks emerge. As a non-exhaustive example, a provider who has historically not recruited international students, may not have had to consider and respond to risks related to foreign influence. As it starts recruiting international students, the provider should understand the new risks that may emerge related to freedom of speech and academic freedom and determine whether it needs to make changes to its management and governance arrangements to appropriately capture and respond to such risks.

29. As noted in paragraph 26g, providers should consider how their arrangements may impact students' experiences. A provider's arrangements to secure freedom of speech and academic freedom should, where possible, avoid placing unnecessary burden on students and students' unions. The following are non-exhaustive examples:

    a. a provider's free speech code of practice should provide clear guidance to students (and students' unions) on procedures to be followed in connection with the organisation of meetings and other activities, including invited speakers

    b. a provider's rules for the approval of research projects or dissertations should not be overly complex, onerous or restrictive.

    Providers should consider carefully how complex and overly onerous forms and risk assessments may contribute to discouraging ('chilling') lawful speech.

30. Where higher education is delivered through a subcontractual arrangement and the delivery partner is not registered with the OfS, the registered lead provider would be responsible for having adequate and effective management and governance arrangements to secure compliance with the duties for all of its students, whether they are being taught directly by the institution or by a delivery partner.

Condition E11.2: Assessment at point of registration

31. As part of a registration application all providers are required to submit a free speech code of practice, as defined under section A2 of HERA. As part of the assessment of condition E11.2 the OfS will consider whether:

    a. a free speech code of practice has been submitted

    b. the free speech code of practice sets out the required content with a view to facilitating compliance with the provider's duties under A1(1) and A1(10).

32. Providers must notify the OfS of amendments made to the free speech code of practice during the registration process via the portal, within 28 working days.

33. For providers to which condition E7 applies, the OfS will consider the information submitted under condition E7 as part of the assessment of whether management and governance

arrangements are adequate and effective for the purposes of condition E11.2. The OfS may require these providers to complete a self-assessment where management and governance arrangements for the purpose of E11.2 are not clearly set out in these documents.

34. For providers to which conditions D and E7 apply, the OfS will consider the financial information submitted by those providers as part of the assessment of capacity and resources, alongside the capacity and resources considerations under condition E7.6a.

35. Providers that are not required to comply with initial condition E7 are not required to ensure their governing documents meet the requirements of condition E7.3 or to submit a business plan. This means that the OfS may require additional information from these providers to assess whether their management and governance arrangements meet the requirements of condition E11.2. To support this assessment, these providers are required to submit a self-assessment setting out how their management and governance arrangements are adequate and effective to secure compliance with the duties. The OfS will review the arrangements set out in the provider's self-assessment to determine whether they are adequate and effective for the purposes of condition E11.2.

36. The self-assessment may deal with other matters but must set out the following:

    a. how the governing body appointment procedure ensures sufficient skills and expertise in relation to freedom of speech

    b. the provider's procedures for making decisions in relation to freedom of speech, including delegated decision-making arrangements

    c. how the provider makes decisions about the allocation of resources to meet free speech duties

    d. the resources the provider has currently allocated to meet its duties

    e. how the provider identifies and manages free speech risks

    f. the risks currently identified by the provider in relation to freedom of speech and the plans for managing these

    g. how complaints or concerns relating to freedom of speech or academic freedom are raised and dealt with

    h. how the provider reviews free speech governance arrangements

    i. arrangements for identifying and managing any actual or potential conflicts of interests in relation to individuals responsible for the management and governance of the provider where they are making decisions about freedom of speech on behalf of the provider.

37. Where the set of governing documents submitted under initial condition E11.1 includes this information, providers may refer to the relevant paragraphs of those documents in the self-assessment.

38. For those providers not required to comply with condition D, the OfS will use the following to support the assessment of capacity and resources:

    a. information about DfE interventions

    b. published audited accounts

    c. the element of the self-assessment that sets out how decisions are made about the allocation of resources to meet the duties.

39. To support our understanding of the financial resources of the provider, those providers not required to comply with condition D must submit a declaration of interventions by the DfE relating to:

    a. financial health

    b. financial management and other controls

    c. failure to make progress on resolving an issue/s of concern in relation to a. or b.

40. The OfS may also review publicly available information for these providers, including financial statements published by the provider. The OfS may engage with the provider where there are concerns in relation to capacity and resources. This may include seeking contextual information including any mitigating factors. The OfS may also request financial information from a provider where this is necessary for the assessment of capacity and resources. Where possible, the OfS will aim to do so in the least burdensome way. For instance, if needed it may request financial information from the DfE as the primary regulator of further education colleges.

41. In assessing whether a provider's management and governance arrangements are adequate for the purposes of initial condition E11.2, the OfS may have regard to information submitted as part of a registration application, including:

    a. the provider's business plan, which must sufficiently address risks to freedom of speech

    b. information relating to corporate structure and ownership

    c. declarations of directorships or trusteeships submitted in application materials in respect of individuals holding named roles

    d. the provider's conflicts of interest policy

    e. details of any third-party financial support.

42. In assessing whether a provider's management and governance arrangements are effective for the purposes of initial condition E11.2, the OfS may have regard to information available to it, including but not limited to:

    a. third-party notifications

    b. the outcomes of any OfS quality assessment activity

c. data submitted to the OfS by the provider

d. information received from other regulators or relevant public bodies.

43. The OfS is likely to draw on evidence submitted by a provider as part of its application for registration to make a judgement about whether the provider has the capacity and resources necessary to deliver compliance in practice. For example, evidence submitted in relation to a provider's financial viability and sustainability, or its management and governance arrangements, is likely to be relevant. Where providers are required to comply with condition E9, the OfS may also seek to interview applicants for registration to assess whether the key individuals have sufficient knowledge and expertise to enable the provider to comply with the ongoing conditions of registration applicable to it (if registered) and to deliver, in practice, its business plan, governing documents and fraud and public money arrangements. When doing so, it may seek to test the provider's understanding of the free speech duties and its capacity to ensure compliance with these duties following registration.

44. Where a provider is not delivering higher education courses at the point of registration, the OfS will assess the adequacy of the proposed arrangements and the likelihood that those arrangements will be effective in practice.

45. For providers involved in subcontractual arrangements, where a delivery partner applies for registration with the OfS and delivers higher education courses on behalf of a lead provider, the delivery partner is responsible for compliance with the initial condition of registration.

Condition E11.2: Assessment of ongoing compliance

46. In assessing a provider's ongoing compliance with E11.2, the OfS may consider any regulatory information and intelligence it holds. This may include, but is not limited to:

a. third-party notifications

b. reportable events

c. a provider's free speech code of practice

d. a provider's governing documents, where relevant

e. a provider's operational policies and procedures or relevant contractual arrangements

f. financial information submitted via a provider's annual financial return or, in the case of further education colleges, the DfE financial health dashboards

g. any free speech complaint received as part of the OfS free speech complaints scheme

h. actions taken or not taken by a provider in response to a free speech complaint

i. the outcomes of any OfS investigation or improvement work with the provider

j. any data or information submitted to the OfS by a provider (for example data or information 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 DfE.

47. Where the OfS considers that a provider is at risk of breaching this condition, it may request additional evidence and/or information, which may include but is not limited to:

    a. records related to a provider's risk and audit function (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 freedom of speech

    d. a provider's free speech code of practice

    e. a record of a provider's registration with the Foreign Influence Registration Scheme (if applicable)

48. In subcontractual arrangements, where non-compliance arises from actions or omissions involving both the lead provider and the delivery partner, and both are registered, the OfS may determine that both parties have failed to comply with their respective regulatory obligations and may take regulatory action accordingly.

Condition E11.2: Behaviours

49. As condition E11.2 requires that a provider has adequate and effective management and governance arrangements to secure compliance with the duties, providers should refer to Annex D: Free speech guidance for guidance and examples of compliance with the duties. Specific examples of behaviours that may indicate compliance with E11.2, and whose absence may indicate non-compliance, include:

    a. examples in relation to the provider's free speech code of practice (Annex D: Free speech guidance, paragraphs 167-188A)

    b. examples in relation to governance arrangements (Annex D: Free speech guidance, paragraphs 189-193F).

Condition E11: Monitoring, assessment and enforcement of ongoing compliance

50. The OfS will use its general risk-based approach to monitoring and intervention as set out in the regulatory framework.

51. 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.

Definitions

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