Regulatory advice 24

Guidance related to freedom of speech

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Enquiries to regulation@officeforstudents.org.uk

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Contents

Summary

1. This document provides guidance to registered higher education providers and their constituent institutions.[1] The guidance relates to their free speech duties under the Higher Education (Freedom of Speech) Act 2023.[2] It focuses on duties relating to:[3]

    a. securing freedom of speech within the law (the 'secure' duties); and

    b. the freedom of speech code of practice (the 'code' duties).[4]

2. The guidance sets out in broad terms how providers and constituent institutions might ensure they meet the new duties. It gives example of steps that providers and constituent institutions must take to secure freedom of speech. It includes the approach we expect a provider or constituent institution to take to its code of practice.

3. This guidance is in three main sections.

4. **Section 1** says what we mean by 'freedom of speech' and 'academic freedom'.

5. **Section 2** sets out a three-step framework for assessing compliance with the 'secure' duty. These steps apply to any measure or decision that might affect speech or types of speech. The steps are:

    a. **Step 1: Is the speech 'within the law'?** The guidance sets out what this means and gives examples of laws that make speech unlawful.

    b. **Step 2: Are there any 'reasonably practicable steps' to secure the speech?** If yes, take those steps. Do not restrict the speech. The guidance illustrates factors that are likely or unlikely to affect what is 'reasonably practicable'.

    c. **Step 3: Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?** The guidance sets out that any restrictions on speech must be compatible with these requirements, if indeed there are no reasonably practicable steps to secure it.

6. **Section 3** gives concrete examples of steps to secure freedom of speech that are likely to be reasonably practicable in a wide range of circumstances. These are divided by areas of activity (such as 'Codes of conduct' or 'Research'). We expect to publish further examples in the future to reflect experience across the sector and our ongoing engagement with providers on these issues.

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[1] A 'constituent institution', in relation to a registered higher education provider, means any constituent college, school, hall or other institution of the provider. See Part A1 section A4(4) of HERA. This guidance refers to sections of the Higher Education (Freedom of Speech) Act 2023 by reference to the sections of HERA that the 2023 Act introduces or amends.

[2] See Higher Education (Freedom of Speech) Act 2023.

[3] Providers and constituent institutions must also promote the importance of freedom of speech and academic freedom (the 'promote' duty). See Part A1 sections A3 and A4 of HERA.

[4] See (a) Part A1 section A1, A4 of HERA; (b) Part A1 section A2, A4 of HERA.

7. The guidance is not intended to provide legal advice or a comprehensive statement on the law relating to freedom of speech and academic freedom. Providers and constituent institutions should seek independent legal advice on their duties where necessary.

Introduction

8. The core mission of universities and colleges is the pursuit of knowledge. Free speech and academic freedom are fundamental to this purpose. Without free speech there are no new ideas. There is no productive debate. There is no social progress. There is no challenge to conventional wisdom. Even where conventional wisdom reflects truth, it must be open to criticism and discussion. Otherwise, living understanding becomes what John Stuart Mill called ‘dead dogma’.

9. All staff and students are therefore entitled to teach, learn and research in a culture that values vigorous debate. Perhaps most importantly, this includes difficult, contentious or discomforting topics. Higher education providers and constituent institutions should have a high tolerance for all kinds of lawful speech. There should be a very strong presumption in favour of permitting lawful speech.

10. 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.

11. The Act protects free speech within the law. It does not protect unlawful speech. The Act requires providers and constituent institutions to take reasonably practicable steps to secure free speech within the law for their students, staff and members and for visiting speakers. It also requires them to maintain a free speech code of practice and to promote the importance of freedom of speech within the law and academic freedom in the provision of higher education.

12. In more detail, HERA as amended by the Act imposes duties on providers and constituent institutions in relation to freedom of speech and academic freedom. It requires the governing body of each provider and constituent institution, among other things:

    a. to take the 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 students, staff and members and for visiting speakers. This includes, in relation to academic staff, securing their academic freedom (section A1 and section A4 of Part A1 of HERA) (the ‘secure duty’); and

    b. to maintain a code of practice setting out matters relating to freedom of speech (section A2 and section A4 of Part A1 of HERA) (the ‘code’ duty).

13. HERA does not require providers or constituent institutions to take steps to secure freedom of speech in respect of their activities outside England.

Section 1: Freedom of speech

14. This section explains what we mean by 'freedom of speech' and 'academic freedom'.

15. The Act defines freedom of speech as: 'the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the European Convention on Human Rights ("the Convention") as it has effect for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form).'[5] This right includes freedom of artistic expression, such as a painting or the production of a play.

Article 10 of the Convention

16. The Act refers to Article 10(1) of the Convention, 'as it has effect for the purposes of the Human Rights Act 1998'. One effect of the Human Rights Act 1998 is to enshrine the Convention rights into UK Law. Article 10 relates to the right to freedom of expression.

Article 10 of the Convention

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.

17. Higher education providers and their constituent institutions are subject to the requirements of HERA. Those that are public authorities for the purposes of the Human Rights Act 1998 must **also** comply with the Human Rights Act 1998 and the Convention. This includes not acting incompatibly with a Convention right, including the right to freedom of expression.

18. When we are assessing whether a provider or constituent institution is compliant with its free speech duties under HERA, we expect to consider (among other things) whether it has acted compatibly with the Convention right to freedom of expression. This is because:

    a. the Act explicitly defines freedom of speech by reference to Article 10(1) of the Convention; and

[5] See Part A1 section A1(13) of HERA.

b. consideration of Article 10 is necessary to ensure that any restriction or regulation of freedom of speech that may occur where it is not possible to take reasonably practicable steps to secure freedom of speech within the law, is proportionate.

19. Article 10 provides a sensible legal framework and places a ceiling on any restriction or regulation of freedom of speech that a provider or constituent institution may impose. The 'secure' duty in HERA may further narrow the scope for any such restriction or regulation.

Academic freedom

20. The duty to secure freedom of speech includes (as relating to academic staff) securing academic freedom. The Act defines academic freedom, in relation to academic staff at a registered higher education provider (or constituent institution), as their freedom within the law:

    a. to question and test received wisdom, and

    b. to put forward new ideas and controversial or unpopular opinions

    without placing themselves at risk of being adversely affected in any of the following ways:

    c. loss of their jobs or privileges at the provider;

    d. the likelihood of their securing promotion or different jobs at the provider being reduced.

21. The Act is clear that the duty to secure freedom of speech includes a duty to secure academic freedom as so defined.

Section 2: Framework for assessment

22. This section sets out a three-step framework that may be helpful for assessing compliance with the 'secure' duty. These steps apply to any measure or decision that might affect speech or types of speech.

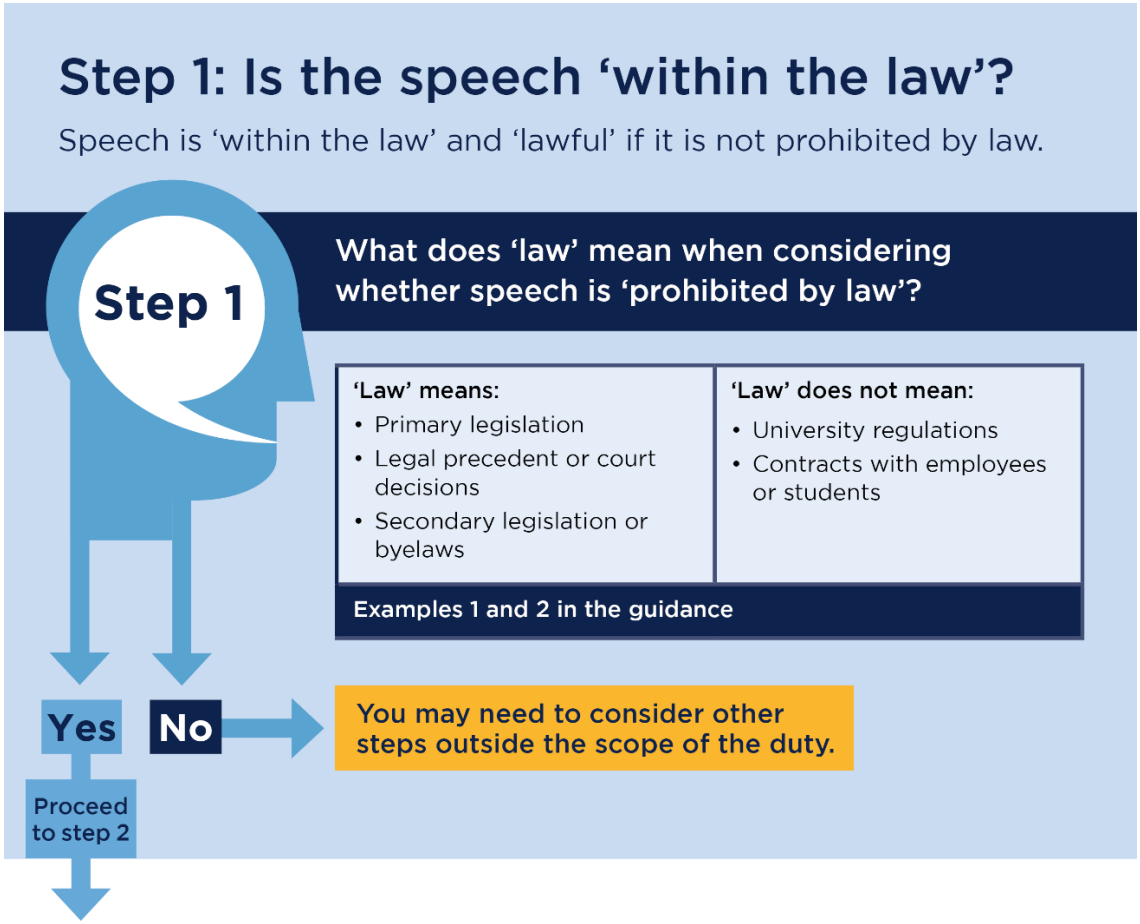
23. Providers and constituent institutions may sometimes take, or already have in place, measures that affect freedom of speech within the law. These may include policies (for instance, room-booking policies) or decisions under those policies (for instance, a decision to take disciplinary action against a member of staff).

24. A provider or constituent institution will therefore wish to ensure compliance with the 'secure' duty in relation to any speech or type of speech. In doing so, we would expect it to be helpful to consider the following steps:

Step 1: Is the speech 'within the law'? If yes, go to step 2. If no, the duty to 'secure' speech does not apply.

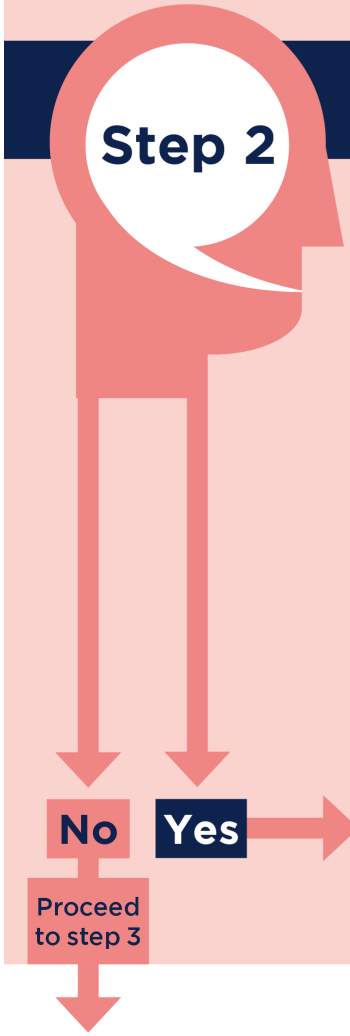
Step 2: Are there any 'reasonably practicable steps' to secure the speech? If yes, take those steps. Do not restrict the speech. If no, go to step 3.

Step 3: Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?



Step 2: Are there any 'reasonably practicable steps' to secure the speech?

The particular circumstances will be important in considering whether a step is reasonably practicable. Reasonably practicable steps may include positive steps – doing something – and negative steps – refraining from doing something.



Factors to consider:

Factors likely to be relevant:	Factors likely to be irrelevant:
• Legal / regulatory requirements e.g. duties in relation to harassment • Maintaining essential functions of the institution (= learning, teaching, research, and administration and institutional resources necessary for essential functions) • Physical safety	• The viewpoint that the speech expresses, including: - whether it aligns with the provider's aims or values - whether it is controversial or offensive - whether external or internal groups approve of the viewpoint that the speech expresses • The reputational impact of the speech on the provider or constituent institution

See examples 3 to 23 in the guidance

No **Yes** → **Take these steps. Do not restrict the speech.**

Proceed to step 3

Step 3: Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?

This step involves considering whether restriction or regulation of the speech ('interference') is compatible with the European Convention on Human Rights (ECHR).

Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?

This step involves considering whether restriction or regulation of the speech ('interference') is compatible with the European Convention on Human Rights (ECHR).

Is the interference prescribed by law?	Is the interference proportionate?
An interference is prescribed by law if: • there is a specific domestic English legal rule or regime which authorises the interference; • the person affected by the interference must have adequate access to the rule in question; and • The rule is formulated with sufficient precision to enable the affected person to foresee the circumstances in which the law would or might be applied, and the likely consequences that might follow.	To assess the proportionality of a measure to interfere in lawful speech, you must consider: • whether the objective of the measure is sufficiently important to justify the limitation of a protected right, • whether the measure is rationally connected to the objective, • whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and • whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

See example 24 in the guidance

The proportionality test in Article 10(2) means that, in practice, it is difficult to restrict or regulate speech in a higher education context. This is because there is a high bar for limitation of a protected ECHR right in general terms, and the particular purpose of higher education is such that limitation of Article 10 rights would undermine that purpose.

Yes **No** → **Your restrictions are not consistent with your free speech obligations. You will need to revise your approach.**

Your regulations or restrictions are likely to be consistent with your free speech obligations.

Regulations or restrictions should:

- **use legal definitions where these are available**
- **incorporate objective tests where appropriate, for instance in relation to harassment**
- **avoid vague language or undefined terms**
- **include clear, adequate and effective 'safeguard' statements protecting academic freedom and freedom of speech within the law (for instance, to the effect that where a policy conflicts with academic freedom, the latter prevails).**

Step 1: Is the speech 'within the law'?

25. The first step assesses whether the measure restricts or regulates speech that is 'within the law'.

26. This might be, for instance, because certain types of lawful speech, or potential speech, fall within the scope of a policy (for instance, a policy regulating student conduct). It might be, for instance, because a decision affects a particular speech (for instance, a decision to penalise a member of staff for writing a particular article). The first step is therefore to assess whether the speech (or type of speech) affected is lawful.

27. All speech is lawful, i.e. 'within the law', unless restricted by law. Any restriction of what is 'within the law' must be set out in law made by, or authorised by, the state, or made by the courts e.g. legislation or legal precedent/court decisions. This includes (for instance) common law on confidentiality and privacy. It does **not** include rules made by a provider or constituent institution through contracts, its own regulations etc. (although see step 3 below on proportionate interference).

28. The 'secure' duty does not cease to apply where a provider or constituent institution sets standards for how employees talk to one another and/or to students. Nor does it cease to apply in relation to any non-legally binding recommendations of any charter, report or review in so far as these may restrict or regulate lawful speech. Providers and constituent institutions should not set such standards or implement such requirements as are incompatible with the 'secure' duty.

29. Freedom of speech within the law is protected. Speech that breaches either criminal or civil law is not protected. There is no need to point to a specific legal basis for speech. Instead, the starting point is that speech is permitted unless restricted by law, made by, or authorised by, the state, or made by the courts.

30. Free speech includes lawful speech that may be offensive or hurtful to some. Speech that amounts to unlawful harassment or unlawful incitement to hatred or violence (for instance) does not constitute free speech within the law and is not protected: see (for instance) examples 1, 4 and 9 below.

31. Many providers will be familiar with the need to assess whether actual or potential speech is within the law. The duty on universities, to take reasonably practicable steps to secure 'freedom of speech within the law', has existed since section 43 of the Education (no. 2) Act 1986 came into force.[6] Moreover, the new free speech duties do not change what speech is lawful: speech that was not 'within the law' before the Act came into force does not become lawful by virtue of any provision of the Act (or vice versa).

32. The following examples are not intended to form an exhaustive list of all the relevant laws. Instead they illustrate a range of legal provisions that make speech unlawful. Relevant statutes include those that create criminal offences but also those that create civil legal obligations, such as the Equality Act 2010 (see step 2 below).

[6] See Education (No. 2) Act 1986.

Public Order Act 1986

33. It is an offence under Section 4 of the Public Order Act 1986 if a person—

    a. uses towards another person threatening, abusive or insulting words or behaviour, or

    b. distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

    —with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

34. No offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is distributed or displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

35. It is an offence under Section 4A of the Public Order Act 1986 if, with intent to cause a person harassment, alarm or distress, a person—

    a. uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or

    b. displays any writing, sign or other visible representation which is threatening, abusive or insulting,

    thereby causing that or another person harassment, alarm or distress.

36. Such speech is not an offence where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

37. It is a defence for the accused to prove:

    a. that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

    b. that his conduct was reasonable.

38. It is important to remember that proving intent is not enough. There must also be evidence of somebody (which need not be the person targeted) suffering actual harassment, alarm or distress as a result.

39. It is an offence under Section 5 of the Public Order Act 1986 if a person—

    a. uses threatening or abusive words or behaviour, or disorderly behaviour, or

    b. displays any writing, sign or other visible representation which is threatening or abusive,

    within the hearing or sight of a person likely to be caused harassment, alarm or distress as a result.

40. Speech that is merely ‘insulting’ does not amount to an offence under Section 5.

41. It is a defence for the accused to prove:

    a. that the speaker had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or

    b. that they were inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or

    c. that their conduct was reasonable.

42. For an offence to have been committed, there must be a person within the sight or hearing of the suspect who is likely to be caused harassment, alarm or distress by the conduct in question.

43. The following types of conduct are (non-exhaustive) examples, which could amount to disorderly behaviour under Section 5:

    a. causing a disturbance in a residential area or common part of a block of flats

    b. persistently shouting abuse or obscenities at passers-by

    c. pestering people waiting to catch public transport or otherwise waiting in a queue

    d. rowdy behaviour in a street late at night which might alarm residents or passers-by

    e. causing a disturbance in a shopping precinct or other area to which the public have access or might otherwise gather.[7]

44. An offence under section 4, 4A or 5 may be committed in a public or a private place, but no offence is committed under these sections where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.

45. Speech that is unlawful under the Public Order Act 1986 is not ‘within the law’ and the Act imposes no obligation to secure it.

Harassment (Protection from Harassment Act 1997)

46. Harassment in the Protection from Harassment Act is different from harassment as defined in the Equality Act 2010. We discuss the Equality Act 2010 under step 2 below.

47. The concept of harassment in this Act is linked to a **course of conduct** which amounts to it.[8] The course of conduct must comprise two or more occasions.[9] Harassment includes alarming

[7] See Public Order Offences incorporating the Charging Standard | The Crown Prosecution Service.

[8] For this and the next three points, see Stalking or Harassment | The Crown Prosecution Service.

[9] See Section 7(3) PHA 1997.

a person or causing them distress.[10] The fewer the occasions and the wider they are spread, the less likely it is reasonable to find that a course of conduct amounts to harassment.[11] Conduct must be oppressive and unacceptable rather than just unattractive or unreasonable and must be of sufficient seriousness to also amount to a criminal offence.[12]

48. Section 1 of the Protection from Harassment Act states that the course of conduct is prohibited if the person whose course of conduct is in question knows or ought to know that it amounts to harassment of another; and that 'the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.' This introduces an element of objectivity into the test.

49. Speech that amounts to unlawful harassment under the Protection from Harassment Act 1997 is not 'within the law' and the Act imposes no obligation to secure it.

Example 1: harassment through social media

Students at provider A participate in a seminar discussion concerning governing divided societies. During the discussion, student B lawfully expresses a controversial position relating to minority groups.

Following the seminar, student C publishes repeated comments on social media attacking student B, tagging them in the posts and encouraging other people to post responses to student B to tell them what they think of their views. Student C's speech is so extreme, oppressive and distressing that their course of conduct may amount to harassment as defined in the Protection from Harassment Act 1997.

Provider A learns of the activity. It carries out an investigation of student C under its social media policy, which forbids unlawful online harassment. In doing so, it is unlikely that provider A has breached its 'secure' duty.

Terrorism Act 2000

50. The Terrorism Act 2000 prohibits (among other things[13]) speech that:

    a. invites support for a proscribed organisation, and the support is not, or is not restricted to, the provision of money or other property; or

    b. expresses an opinion or belief that is supportive of a proscribed organisation, and in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.

[10] See Section 7(2) PHA 1997.

[11] See Lau v DPP [2000] 1 FLR 799.

[12] See Majrowski v. Guy's and St Thomas's NHS Trust [2006] IRLR 695.

[13] See in particular sections 11-13 of Terrorism Act 2000.

51. It is also unlawful to address a meeting if the purpose of the address is to encourage support for a proscribed organisation or to further its activities.[14]

52. A person also commits an offence if they arrange, manage or assist in arranging or managing a meeting which they know is:

    a. to support a proscribed organisation,

    b. to further the activities of a proscribed organisation, or

    c. to be addressed by a person who belongs or professes to belong to a proscribed organisation.

53. Speech that amounts to an offence under the Terrorism Act 2000 is not 'within the law' and the Act imposes no obligation to secure it.

Example 2: speaker from a proscribed group

Members of provider A make a request to invite speaker B to talk at an online event about the cause of nationalist struggle in country C. Provider A carries out checks on the speaker and learns that speaker B has made repeated statements professing to be a member of proscribed organisation D in another jurisdiction. Provider A rejects the request citing the prohibition on inviting proscribed groups under section 12(2c) of the Terrorism Act 2000.

In doing this it is unlikely that provider A has breached its 'secure' duty. This is because it is unlikely that the measure is affecting lawful speech.

Other legislation

54. Other legislation may also be relevant to whether speech is 'within the law'. This includes:

- Malicious Communications Act 1998[15]
- Communications Act 2003[16]
- Terrorism Act 2006[17]
- Equality Act 2010[18] (see below under step 2)
- Public Order Act 2023[19]

[14] For a list of proscribed organisations, see GOV.UK, 'Proscribed terrorist groups or organisations'.

[15] See Malicious Communications Act 1988.

[16] See Communications Act 2003.

[17] See Terrorism Act 2006.

[18] See Equality Act 2010.

[19] See Public Order Act 2023.

Step 2: Are there any ‘reasonably practicable steps’ to secure the speech?

55. The second step applies if lawful speech is affected. This step assesses whether there are ‘reasonably practicable’ steps to secure such speech. In this section we set out and illustrate factors that are likely, and factors that are unlikely, to affect what is ‘reasonably practicable’.

56. Providers and their constituent institutions must take reasonably practicable steps to secure freedom of speech within the law. This means that if such a step is reasonably practicable for it to take, a provider or constituent institution must take it.

57. The requirement to take ‘reasonably practicable steps’ includes a positive duty to take steps. This may include, for instance, amending policies and codes of conduct that may restrict or regulate speech.

58. It also includes a negative duty to refrain from taking certain steps which would have the effect of restricting freedom of speech within the law. For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all. This may include, for instance, not having in place a policy that restricts the range of ideas that may be expressed, not firing a member of academic staff for lawfully expressing a particular viewpoint or not cancelling a visiting speaker event because the speaker’s views are unpopular.

59. In many circumstances the negative duty is likely to have greater positive impact on freedom of speech than the positive duty. It may also be less onerous than the positive duty.

60. If a step (positive or negative) is reasonably practicable, then a provider or constituent institution must take it. For instance, if a controversial speaker has been invited to deliver a lecture (and has accepted), then it is likely to be reasonably practicable for the provider or constituent institution to permit (rather than to prohibit) the lecture. If so, then it must permit it so long as the speech is lawful.

61. Some factors are relevant to whether a step is reasonably practicable for a provider or constituent institution to take. The following is clearly relevant: the impact taking, or not taking, the step will have on freedom of speech. Other relevant factors will be fact-specific but will **likely include**:

    a. Legal and regulatory requirements.

    b. Would taking or not taking the step affect the essential functions of higher education, i.e.:

        - learning
        - teaching
        - research
        - the administrative functions and the provider’s or constituent institution’s resources necessary for the above?

c. Would taking or not taking the step give rise to concerns about anyone's physical safety?

62. However, relevant considerations will **likely not include**:

    a. The viewpoint that any affected speech expresses, including but not limited to:

        i. whether it aligns with the provider's or constituent institution's aims or values

        ii. whether it is controversial or offensive

        iii. whether external or internal groups (for example alumni, donors, lobbyists, domestic or foreign governments, staff or students) approve of the viewpoint that the speech expresses.

    b. The reputational impact of any affected speech on the provider or constituent institution (for more on reputation, see paragraphs 66 and 67 below).

63. The following examples are intended to illustrate these factors. In any actual case, whether a step is reasonably practicable will depend on the specific facts.

Relevant factors: legal and regulatory obligations

64. If a provider or constituent institution is required by law not to do something (e.g. not to permit certain types of speech in certain circumstances), then doing it (e.g. permitting the speech) would be unlawful and therefore not reasonably practicable. Similarly, if a step that secures freedom of speech is required by law, then it would be reasonably practicable.

65. For instance, it would generally not be reasonably practicable for a provider, such as a further education college, to breach the requirements of statutory guidance on safeguarding that apply to it in relation to students under the age of 18.[20]

66. In other cases, there may be no direct conflict between the duty to secure free speech and other legal or regulatory obligations but there may be a balance to be struck. For instance, in the case of charities, charity law and the Act could both be relevant factors in trustees' decision-making. Steps that a charity will need to take to comply with the 'secure' duty will depend on the specific facts and what is reasonably practicable in the circumstances. However, particular regard will need to be given to the importance of freedom of speech.

67. This might happen, for instance, when charity trustees need to balance the duty to avoid exposing the charity's reputation to undue risk against the duty to take reasonably practicable steps to secure freedom of speech. Here particular regard would need to be given to academic freedom and freedom of speech. It is very unlikely that the reputational interests of a provider or constituent institution would outweigh the importance of academic freedom for its academic staff or freedom of speech for its staff, students, members or visiting speakers.

[20] See Keeping children safe in education - GOV.UK.

Equality Act 2010

68. An important example is equality law. Providers and constituent institutions must comply with relevant provisions of the Equality Act 2010.

Protected characteristics

69. The relevant provisions relate to a set of 'protected characteristics'. These are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

70. A protected characteristic that is often relevant in this context is religion or philosophical belief. 'Philosophical belief' means beliefs that are:

    a. genuinely held;

    b. a belief and not an opinion or viewpoint based on the present state of information available;

    c. a belief as to a weighty and substantial aspect of human life and behaviour;

    d. a belief that attains a certain level of cogency, seriousness, cohesion and importance; and

    e. worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.[21]

71. The courts have found the following beliefs, among others, to be protected under the Equality Act 2010: belief in climate change,[22] ethical veganism,[23] gender-critical belief,[24] and belief in Scottish independence.[25]

Discrimination

72. The Equality Act 2010 prohibits unlawful discrimination. Broadly speaking, there are two types of discrimination: direct discrimination and indirect discrimination.

73. In general, direct discrimination may occur where someone is treated less favourably than others, because of a protected characteristic. Direct discrimination is unlawful except in certain situations. These include exceptions for 'occupational requirements' in an employment context that could apply to protected characteristics, including age, sex, religion or belief.[26]

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[21] See Grainger plc v Nicholson [2010] 2 All E.R. 253.

[22] See Grainger plc v Nicholson [2010] 2 All E.R. 253.

[23] See Mr J Casamitjana Costa v The League Against Cruel Sports: 3331129/2018.

[24] See Maya Forstater v CGD Europe and Others: UKEAT/0105/20/JOJ.

[25] See Mr C McEleny v Ministry of Defence: 4105347/2017.

[26] See Schedule 9 of the Equality Act 2010.

Example 3: Direct discrimination

Professor A at University B attempts to run a seminar series and a conference to explore issues of sex and gender. Professor A holds gender-critical beliefs: the belief that biological sex is real, important, immutable and not to be conflated with gender identity. Gender-critical beliefs are protected beliefs for the purposes of the Equality Act 2010.

Following protests about 'transphobia' from staff and students, the university requires her to cancel the seminar and the conference. Because of her gender-critical beliefs, the head of Professor A's department instructs her not to speak to the department about her research, about a cancellation of her invitation to another university, or about the accusation that she is a 'transphobe'.

In acting in this way, University B may have directly discriminated against Professor A. It is also likely to have breached its 'secure' duty.

74. Indirect discrimination happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic, and an individual is disadvantaged as part of this group. If this happens, the person or organisation applying the policy must show that it has an objective justification.[27]

75. Indirect discrimination against students may occur when a provider applies an apparently neutral provision, criterion or practice which puts or would put students sharing a protected characteristic at a particular disadvantage.

76. For indirect discrimination against students to take place, all of the following four requirements must be met:

    a. the education provider applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group, including a particular student, and

    b. the provision, criterion or practice puts, or would put, students who share the student's protected characteristic at a particular disadvantage when compared with students who do not have that characteristic, and

    c. the provision, criterion or practice puts, or would put, the student at that disadvantage, and

    d. the education provider cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim.[28]

77. The mere expression of views on (for instance) theological grounds, that some consider discriminatory, does not by itself imply that the person expressing such views will discriminate

[27] See Direct and indirect discrimination | EHRC. For a definition of 'objective justification', see Terms used in the Equality Act | EHRC.

[28] See Technical guidance on further and higher education | EHRC.

on those grounds.[29] This consideration is relevant when considering whether it would be reasonably practicable to employ or continue to employ (for instance) a member of teaching staff who has expressed such views.

Harassment

78. The Equality Act 2010 also places duties on providers, as employers and providers of higher education, and their staff in relation to harassment.

79. Harassment (as defined by section 26 of the Equality Act 2010) includes 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 related 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.)[30]

80. In deciding whether conduct has the effect referred to, it is necessary to consider:

    a. the perception of the person who is at the receiving end of the conduct;

    b. the other circumstances of the case; and

    c. whether it is reasonable for the conduct to have that effect.

81. The last point (80c) 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. The context within which the alleged harassment has taken place will also be relevant, as will any other legal rights or duties that apply in that context. For public authorities, it may also be relevant to consider whether, in cases of alleged harassment, the alleged perpetrator was exercising any of their other Convention rights (e.g. freedom of thought, conscience and religion).

82. It would not be a reasonably practicable step for providers or constituent institutions to take steps to secure speech, for instance by an employee, that would amount to unlawful discrimination or harassment.

Example 4: harassment in teaching

Tutor A at University B makes aggressive and objectively offensive remarks about gay people in class. The comments appear to be directed to student C, who is gay and who finds this behaviour offensive, hostile and intimidating. Student C complains that Tutor A has harassed them. University B investigates and as a result disciplines Tutor A for his unlawful harassing conduct.

[29] See R (Ngole) v The University of Sheffield [2019] EWCA Civ 1127, 5(10).

[30] See also the other forms of harassment defined at 26(2) and 26(3) of Equality Act 2010.

Depending on the facts of the case, the actions of Tutor A could be likely to amount to harassment under the Equality Act. Although the particular circumstances will be relevant, it is unlikely that University B is in breach of its 'secure' duty.

83. Context is always relevant in determining whether speech is unlawful harassment. Universities and colleges have freedom to expose students to a range of thoughts and ideas, however controversial. Even if the content of the curriculum offends students with certain protected characteristics, this will not by itself make that speech unlawful.[31]

84. In connection with harassment, the Equality and Human Rights Commission (EHRC) 2019 statement on harassment in academic settings is relevant:

'The harassment provisions [of the Equality Act 2010] cannot be used to undermine academic freedom. Students' learning experience may include exposure to course material, discussions or speaker's views that they find offensive or unacceptable, and this is unlikely to be considered harassment under the Equality Act.'[32]

See also the OfS's condition E6.11(j) relating to harassment and sexual misconduct, set out below under: 'Condition E6: Harassment and sexual misconduct'.

85. The objective tests related to harassment under the Equality Act 2010 and the Protection from Harassment Act 1997 (see paragraphs 46-49 above), are of particular importance in a higher education context where a provider may face pressure from students or staff, or pressure from external groups, to curtail speech that is lawful but which is perceived as offensive towards a particular person or group of people. The Equality Act does **not** require providers or constituent institutions to protect students or others from ideas that they might find offensive.

Victimisation

86. Individuals (irrespective of whether they have a protected characteristic) are also protected from victimisation under the Equality Act. Victimisation happens when an individual experiences a detriment linked to a protected act. The individual does not need to have a protected characteristic to be protected from victimisation. Providers and their constituent institutions are covered by this provision as education providers and employers. Victimisation can take place where an employer or education provider (rightly or wrongly) believes that an individual has done or intends to do a protected act.

87. A protected act is any of the following:

- bringing proceedings under the Equality Act
- giving evidence or information in connection with proceedings brought under the Act

[31] See the OfS's Insight brief 16, available at 'Freedom to question, challenge and debate'.

[32] See the Equality and Human Rights Commission, 'Freedom of expression: a guide for higher education providers and students' unions in England and Wales'.

- doing anything which is related to the provisions of the Act
- making an allegation (whether or not express) that another person has done something in breach of the Act.

88. A detriment in the context of victimisation is not defined in the Equality Act. A detriment can take many forms and can include threats. An individual is protected from victimisation even if they give evidence, provide information or make an allegation that turns out to be factually wrong if made in good faith. Bad faith (e.g. vexatious) claims are not protected.

89. Protecting individuals from victimisation can also secure their freedom of speech or academic freedom. Protecting someone from victimisation can sometimes mean a negative step (i.e. choosing not to victimise) in tandem with positive steps (i.e. choosing to do something to protect people from discrimination or harassment).

Example 5: Employment victimisation

Academic A witnesses what they consider to be sexual harassment by manager B against employee C. Employee C brings a complaint against B and A agrees to be a witness in the complaint.

Manager D approaches A and explains that if they continue to support employee C in their claim A's request for research leave is unlikely to be approved.

Depending on the facts of the case, the actions of D may victimise A as the threat to withdraw research leave may be a detriment to their employment as a result of a protected act. The detriment is likely to censor the speech of A and interfere with their academic freedom (for instance, by preventing them from pursuing research).

Reasonably practicable steps in this instance will likely include enabling A's full participation as a witness in the complaint and considering the request for research leave on its merits.

Public sector equality duty

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

91. The duty states that a public authority must, in the exercise of its functions, have due regard to the need to:

    a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

    b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

92. The relevant protected characteristics for these purposes are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

93. The PSED is a duty to 'have due regard' to the need to achieve the aims set out above. Providers, and if relevant constituent institutions, should be clear about the equality implications of their decisions, policies and practices. They must recognise the desirability of achieving the aims set out above. But they must do so in the context of the importance of free speech and academic freedom, particularly in higher education. The PSED does not, therefore, impose any general legal requirement on higher education providers or constituent institutions to restrict or regulate speech.

Example 6: religious and political expression

A Jewish student puts up a mezuzah on their university accommodation doorpost. Following complaints from students alleging the symbol is politically provocative, the university requires the student to remove it to 'maintain harmony', and in light of the need as stated in the Equality Act 'to foster good relations between persons who share a relevant protected characteristic and persons who do not share it'. The university does not assess whether the restriction was necessary or proportionate, nor does it consider that the student's freedom of speech includes a right to religious expression.

By prioritising objections from other students over lawful expression, the university is likely to have failed to take reasonably practicable steps to secure freedom of speech within the law and therefore to have breached its 'secure' duty.

More generally, providers and constituent institutions should take appropriate steps to address any chilling effect. For instance, frequent, vociferous and intrusive anti-Israel protests across campus, including outside lecture blocks and accommodation, may have a chilling effect on pro-Israeli speech or Jewish religious expression. Students may self-censor support for Israel, and Jewish students might be chilled from expressing their religious beliefs on campus. Regulation of the time, place and manner of such protests may be a reasonably practicable step to take to secure the speech of students.

94. The PSED includes duties to have due regard to the need to advance equality of opportunity and to foster good relations between those who share the protected characteristic of religion or philosophical belief, and those who do not share it. Depending on the circumstances, steps that encourage an environment of tolerance and open debate, with regard to the subject matter of protected beliefs, may be relevant to meeting both the free speech duties and the PSED.

Example 7: constructive dialogue

In light of recent and ongoing global conflicts, University A organises and promotes a series of topical events at which speakers and students from different sides are encouraged to take

part in open and tolerant dialogue. These sessions are moderated by expert facilitators who offer models for peaceful and constructive communication.

By organising and promoting these events, University A may have advanced the aims of its PSED. It is very unlikely that in doing so A is in breach of its 'secure' duty.

95. However, we recognise that some activities may be motivated by an intention to advance the aims of the PSED but may be in tension with, or possibly lead to breach of, the 'secure' duty. Several of the examples in this guidance cover cases where activities that may be intended to advance these aims are likely to be in breach of the 'secure' duty (including examples 15, 18, 20, 32, 35 and 39); but also cases where it is likely that they are not (including examples 4, 7, 9, 33, 47 and 54).

Equality policies

When framing their own equality policies, providers and constituent institutions may find it helpful to take the following steps, which taken together are likely to reduce risks of non-compliance with the 'secure' duty (see also 'Codes of conduct' in section 3):

- use legal definitions where these are available
- incorporate objective tests where appropriate, for instance in relation to harassment
- avoid vague language or undefined terms
- include clear, adequate and effective 'safeguard' statements protecting academic freedom and freedom of speech within the law (for instance, to the effect that where a policy conflicts with academic freedom, the latter prevails).

Prevent duty

96. Under the Counter-Terrorism and Security Act 2015, providers and constituent institutions must have due regard to the need to prevent people from being drawn into terrorism (the 'Prevent duty').

97. The Prevent duty 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. 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.[33] They must also have 'regard' to statutory guidance issued under section 29 of the Counter-Terrorism and Security Act.

[33] See sections 26 and 31 of the Counter-Terrorism and Security Act 2015.

Example 8: reporting on an individual at risk of radicalisation

Student A is studying at provider B. Student A is currently being offered support by Channel, the programme designed to support individuals at risk of being drawn into terrorism or violent extremism, because student A is considered to be at risk of radicalisation. Provider B gives reports to Channel on student A's welfare and behaviour. This is because provider B is a partner to Channel and therefore has a duty (under section 38(2) of the Counter-Terrorism and Security Act 2015) to co-operate as far as reasonably practicable and appropriate with it.

Not complying with this duty is not a reasonably practicable step. Depending on the circumstances, it may be unlikely that provider B is in breach of its 'secure' duty.

Condition E6: Harassment and sexual misconduct

98. The OfS's ongoing condition E6 comes into force in full on 1 August 2025. It will make sure that providers have effective policies to protect students from harassment and sexual misconduct, robust procedures to address it if it occurs, and support for students who experience it.[34]

99. Providers and constituent institutions will wish to have robust anti-bullying and anti-harassment policies. The legal duty to take reasonably practicable steps to secure freedom of speech does not prevent them from doing so. Rather, institutions must ensure that these policies are carefully worded and implemented in a way that respects and upholds their free speech obligations. In doing so, particular regard and significant weight must be given to the importance of free speech. Wherever possible, any restrictions should be framed in terms of the time, place and manner of speech, rather than the viewpoint expressed. (See paragraph 109 below).

100. We have set out, in our condition of registration and guidance on harassment and sexual misconduct, our approach to the definition of harassment.

101. The condition also includes paragraph E6.8 relating to freedom of speech. It requires that any provider's approach to harassment must be consistent with the following 'freedom of speech' principles:

E6.11 (j)

i. irrespective of the scope and extent of any other legal requirements that may apply to the provider, the need for the provider to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place;

ii. the need for the provider to apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment:

[34] See Condition E6: Harassment and sexual misconduct - Office for Students.

A. the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures;

B. statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course.

102. The requirement in paragraph E6.8 takes precedence over any other requirement of condition E6.[35]

103. Paragraph 58 of the OfS's guidance on condition E6 also states:

A provider is not required to take a step that interferes with lawful speech in order to meet the requirements of the condition:

a. The OfS recognises that the Equality Act 2010 does not currently give rise to legal obligations for a higher education provider to address conduct by a student that amounts to harassment.

b. One of the aims of this condition is to create obligations for higher education providers in respect of dealing with harassment that goes further than the existing law, but only in so far as that does not involve doing things that could reasonably be considered to have the object or effect of restricting freedom of speech within the law or academic freedom.

c. A provider will need to carefully consider its freedom of speech obligations and ensure that it has particular regard to, and places significant weight on, those obligations when creating and applying policies and procedures that are designed to help protect students from harassment by other students.

d. Freedom of speech obligations should not be considered to be a barrier to creating or applying policies and procedures in respect of types of conduct that may amount to harassment unless such policies and procedures could reasonably be considered to have the object or effect of restricting freedom of speech within the law and/or academic freedom.

104. The following (from paragraph 59 of the guidance) is an illustrative non-exhaustive list of examples of actions a provider or constituent institution could take that are unlikely to have a negative impact on free speech within the law:

Example 9: stirring up racial hatred

Graffiti, images or insignia that stir up racial hatred are removed promptly, with support such as access to counselling, mental health or peer support groups provided to students affected. Students are informed of the actions taken and an investigation conducted to identify the

[35] See E6.4 of Condition E6: Harassment and sexual misconduct - Office for Students.

perpetrators. The provider's disciplinary process is followed with appropriate consequences imposed at the conclusion of the investigation, in line with relevant policies.

Example 10: verbal or physical threats of violence

Verbal or physical threats of violence are investigated quickly. Support is provided to students affected and, if appropriate, interim measures are put in place to protect students while an investigation is undertaken. Action is taken to identify the perpetrators with appropriate consequences imposed once disciplinary processes have concluded.

105. Other conditions of registration are also likely to be relevant to whether a step to secure speech is reasonably practicable. For instance, condition B1 (academic experience) is likely to be relevant in a range of cases. Examples 12 and 14 below are examples of cases that are likely to engage these conditions. This is because steps that undermine the essential function of teaching are unlikely to be reasonably practicable steps if they are likely to breach condition B1.

Relevant factors: essential functions

106. Whether steps or speech interfere with the essential functions of higher education is likely to be relevant to whether the steps are reasonably practicable. 'Essential functions' means teaching, learning, research and the administrative functions and resources that those three things require.

107. If taking a step to secure speech (including permitting the speech) prevents the continuation of these functions, this would make it less likely that the step is reasonably practicable. We recognise that providers and constituent institutions may have to regulate lawful expression, where this is required for their essential functions. This might mean, for instance, that it may in certain circumstances not be reasonably practicable to enable protests that prevent learning, teaching or research.

Example 11: simulated military checkpoints

Students and academics protesting against the internal policies of country A set up simulated military checkpoints and force students to go through them on campus. This causes many students to miss lectures, thus seriously disrupting the everyday learning activities at University B. University B dismantles the checkpoints.

In this scenario, permitting the checkpoints to continue is unlikely to have been a reasonably practicable step that the university could take to secure freedom of speech within the law. There were other opportunities for the protestors to express their particular viewpoint.

The protest was disrupting an essential function of the university (in this case, teaching and learning). Requiring the protestors to leave would be a restriction on the place of expression but would not be punishing, restricting or regulating speech because of its viewpoint. Depending on the circumstances, it is unlikely that B has breached its 'secure' duty.

Example 12: intruding into classrooms and university values

A requirement that protestors should not intrude into classrooms, or attempt to shut down debate and discussion, is suitably neutral as to the viewpoint expressed. By contrast, a requirement that protests should not express views that undermine the university's values, may unlawfully suppress the expression of a particular range of viewpoints.

108. Providers and constituent institutions have an interest in continuing ordinary functions relating to student life beyond learning, teaching, research and underlying administrative functions. These might include, for instance, celebrations following graduation ceremonies or student social events. However, any regulation of speech to protect these additional functions should be narrowly tailored to that function and should not restrict the expression of any particular viewpoint.

Example 13: encampment disrupting ordinary activities

A large lawn on University A's campus, and a nearby building, are ordinarily used for graduation ceremonies. Shortly before the next ceremony, students protesting in favour of Palestine occupy the lawn and set up tents that would prevent the ceremony and related celebrations from taking place. Because of this potential disruption, the university considers two options:

1. requiring the occupiers to vacate this particular lawn for the graduation ceremony and celebrations, without restricting peaceful and non-disruptive activity on other, unused spaces nearby

2. putting in place a general requirement that there will be no pro-Palestine protests on the lawn, or on other university-owned spaces within 400 yards of the lawn, for the next 12 months.

Option 1 is less likely to breach the 'secure' duty than option 2. Although celebrations following the graduation ceremony may not be an essential function of the university, option 1 does not meaningfully restrict the protestors' opportunity to express their viewpoint. It is narrowly focused on a specific time and place and does not target expressive activity because of its viewpoint.

Option 2 is more sweeping and is directed at a particular viewpoint. Adoption of option 2 is more likely to be a breach of the 'secure' duty.

109. We expect that restrictions related to essential functions or any other relevant factors, as well as any regulations related to these wider functions would, as far as possible, focus on the time, place and manner of speech. We would expect that these measures, in intent or effect, ordinarily do not restrict legally expressible viewpoints. In other words, any regulation of the time, place and manner of speech should be viewpoint-neutral. Nor should it be framed so broadly that it may be used to punish or suppress a legally expressible viewpoint.

110. While restrictions on the time, place and manner of speech are themselves neutral as to viewpoint, they may sometimes be a result of the content or viewpoint that the speech expresses (see example 47 below).

111. Where reasonably practicable steps can be taken to secure the lawful exercise of speech via protests, we would expect providers and constituent institutions to take them. However, the functioning of a university or college is also likely to require restriction of speech that prevents other speech, for instance speech employing the 'heckler's veto'. It is therefore unlikely to be reasonably practicable for a provider or constituent institution to permit without restriction speech or protest that itself disrupts speaker events, including through the 'heckler's veto.' For example, this may include speech that is delivered at such a volume and for such a length of time that it prevents any other persons from being heard or from engaging in a lesson, debate or discussion. Similarly, it is unlikely to be a reasonably practicable step to allow incessant shouting in, or outside, a lecture that prevents anyone else from speaking or being heard in the lecture theatre, thereby preventing teaching and learning.

112. In addition, in certain circumstances (this will be a fact-sensitive assessment) it may be necessary and appropriate for a provider or constituent institution to regulate the time, place and manner of a protest or demonstration. For example, this may be necessary if those attending a place of worship are at risk of intimidatory harassment.

Example 14: maths lecturer expressing political views

A university lecturer in maths uses his lectures not to teach maths but to express his political views at length (but within the law). University B disciplines A because of the time and place of this speech However, it does not investigate, discipline or otherwise sanction the lecturer for expressing those views (again within the law) on social media.

In taking these steps it is unlikely that B has breached its 'secure' duty. The lecturer's speech is preventing an essential function of the university, in this case teaching. Therefore it is unlikely to be a reasonably practicable step to permit the speech.

113. The fact that students are offended by a teacher's views does not by itself mean that the teacher's employment (and lawful expression of those views) has a negative effect on the essential function of teaching.

114. The fact that a member of teaching staff holds views about certain groups that may include students need not, absent additional evidence of unfair treatment, mean that the teacher's continued employment (and their lawful expression of those views) has any negative effect on the essential function of teaching. As already explained, the mere expression of views on (for instance) theological grounds, that some consider discriminatory, does not by itself imply that the person expressing such views will discriminate on those grounds.[36]

[36] R (Ngole) v The University of Sheffield [2019] EWCA Civ 1127, 5(10).

Example 15: views on religion

University B employs Dr C, a lecturer in philosophy. Dr C is an outspoken atheist and has published work arguing that religious belief is irrational, contradictory and often harmful to social progress; and that it is correlated with poorer scholastic achievement. In lectures, Dr C occasionally references these views when discussing epistemology and ethics, but does not single out or disparage students for their beliefs.

A group of students who identify as religious submit a complaint, stating that Dr C's views make them feel uncomfortable and unwelcome in class. They request that Dr C be removed from teaching duties.

The university investigates and finds that:

- Dr C's teaching is academically rigorous and respectful of students.
- There is no evidence of discriminatory treatment or exclusion based on students' religious beliefs.
- Dr C's views are relevant to the subject matter and expressed in a way that encourages critical discussion.

Despite this, the university decides to remove Dr C from teaching to avoid further complaints.

In these circumstances it is likely that University B has breached its 'secure' duty. C's views , and her expression of those views, are lawful and do not affect her teaching. B should not have removed Dr C from teaching.

In other circumstances, action by University B may not have breached its 'secure' duty. For instance, if C had discriminated against any students on the basis of their religion, then it is likely that some steps to address this would not breach B's 'secure' duty. These steps may in some circumstances include removing C from teaching duties.

115. Many providers operate courses that lead to professional qualifications because of their accreditation by PSRBs (Professional, Statutory and Regulatory Bodies), or other accrediting bodies. Providers of accredited courses may be required to enforce professional standards, for instance through 'fitness to practise' procedures.[37]

116. We recognise that teaching, including professional training, is an essential function of registered providers and constituent institutions and that this may include accreditation arrangements.

117. However, providers and constituent institutions must not implement any accreditation agreement in a way that disproportionately interferes with students' or others' rights to freedom of expression. Where it is not possible to avoid this, providers or constituent institutions may wish to raise the need for amendments with the accrediting body.

[37] See Fitness to practise - OIAHE.

118. The following steps are also likely to be reasonably practicable steps that providers and constituent institutions should take in relation to accreditation:

    a. clear statements in or alongside fitness to practise policies protecting freedom of speech and academic freedom;

    b. highlighting of the Code of Practice on Freedom of Speech in or alongside fitness to practise policies and procedures;

    c. suitable training on freedom of speech for any staff sitting on fitness to practise panels (or equivalent);

    d. monitoring of academic departments' implementation of fitness to practise schemes to ensure compliance with the 'secure' duty and with Convention rights; and

    e. ensuring that students are aware of the relevant professional accreditation standards, and the implications of not meeting them, even where the provider or constituent institution does not enforce them.

119. Example 24 below describes a case that is of relevance in relation to PSRBs.

Relevant factors: physical safety

120. Factors that are relevant to an assessment of whether a step is reasonably practicable for a provider or constituent institution to take will be likely to include whether there is any credible evidence that it may give rise to concerns about physical safety.

Example 16: protests against fracking

The chief executive of a fracking firm has been invited to discuss energy security at University A.

Protestors against fracking have previously made multiple attempts to throw paint at this speaker and this has resulted in several arrests for assault. There has been a number of calls from students opposed to the speech to disrupt it and follow similar tactics.

The university permits a demonstration opposing fracking at the same time. However, it requires that the demonstration must take place within a specified zone away from the entrance, but still within hearing distance of the lecture hall. It also provides security and introduces ticketing for the event.

The university also communicates that attempts to disrupt the event or the speaker may lead to an investigation on compliance with the university's code of conduct.

In taking these steps, it is unlikely that A has breached its 'secure' duty. Permitting protests to go ahead unrestricted is unlikely to have been a reasonably practicable step, because of the credible risk to physical safety.

Example 17: human rights activist

Speaker A is a human rights activist who speaks out against country B which is an autocratic state. Country B has a long history of attempted and actual assassinations of political dissenters. Speaker A has been invited to speak in person at University C. Credible threats have been made against the life of speaker B should they attend and give their speech.

Rather than cancel the event in the face of these threats to physical safety, C hosts the speaking event online and opens the event only to staff, students and members of the university. In taking these steps University C is very unlikely to have breached its 'secure' duty.

121. Physical safety is more likely to be relevant in relation to a specific danger that the relevant speech directly creates. Unspecific, distant or indirect potential effects of the speech are unlikely to be relevant to whether a step is reasonably practicable.

Example 18: speaker on a regional war

Dr A proposes to invite speaker C to university B on a regional war. Speaker C is strongly on one side of the issue on which they have been invited to speak. There are many international students at University B, including many from the region affected. Because of this, University B is concerned that the event may contribute to an atmosphere of religious and political tension on campus. However, there is no evidence that the event creates any immediate and specific threat to physical safety. Nonetheless, B refuses permission for the event.

Depending on the circumstances, University B may be in breach of its 'secure' duty. There is no direct and specific threat to physical safety from Dr C's lecture. Physical safety concerns are therefore less relevant to the reasonable practicability of permitting the event.

In relation to broader concerns about the atmosphere on campus, University B might have taken steps short of refusing permission to Dr A. For instance, it might have offered additional seminars that take other perspectives on the same issue. It might have created additional platforms for constructive dialogue between speakers on both sides. It might have offered support to students who were affected by issues raised in the event. In taking these other steps, University B would have been unlikely to have breached its 'secure' duty.

122. Physical safety is relevant as it relates to events within the provider's or constituent institution's premises or that are otherwise in its control. Threats to physical safety in external (possibly distant) locations, by persons outside its control, are **not** relevant to whether a step is reasonably practicable.

Example 19: controversial US senator

A controversial US politician, Senator X, has been invited to deliver a lecture at University A (and has accepted the invitation). As the date of X's lecture approaches, groups opposed to X's invitation stage increasingly disruptive protests around the country, though not on the campus of University A, and not involving anyone connected with A.

Some groups threaten that if the lecture goes ahead, these protests may become violent. There is no risk of violence or unmanageable protest on the campus of A. However, University A cancels the lecture in response to the threats.

In cancelling the lecture it is likely that University A has breached its 'secure' duty. In discharging its 'secure' duty, as with section 43 of the 1986 Act, the university is 'not enjoined or entitled to take into account threats of "public disorder" outside the confines of the university by persons not within its control. Were it otherwise, the purpose of [this section] could be defeated since the university might feel obliged to cancel a meeting in Liverpool on the threat of public violence as far away as, for example, London which it could not possibly have power to prevent.'[38]

Irrelevant factors

123. In determining reasonable practicability, the following factors are likely to be irrelevant:

a. The viewpoint that the speech expresses, including but not limited to:

i. whether it aligns with the provider's or constituent institution's aims or values

ii. whether it is controversial or offensive

iii. whether external or internal groups (for example alumni, donors, lobbyists, domestic or foreign governments, staff or students) approve of the viewpoint that the speech expresses.

b. The reputational impact of the speech on the provider or constituent institution.

Example 20: public statements by a visiting lecturer

Professor X has accepted an invitation as a visiting lecturer at University A. Professor X proposes to deliver a set of lectures on religion. Following the invitation, A is made aware of (lawful) public statements by Professor X that are strongly critical of Islamic attitudes towards women's rights. These statements themselves provoke strong reactions from some student groups and staff networks. University A rescinds the invitation on the grounds that it is 'antithetical to the value we place on inter-faith understanding'. There is no evidence that X's lectures could include unlawful speech.

University A has not taken the step of permitting X to deliver the lectures. This step would have secured Professor X's speech. It is likely to be irrelevant to whether this step is reasonably practicable that X has endorsed, or may express, a viewpoint that is inconsistent with A's values or unpopular among students and staff. University A is likely to be in breach of its 'secure' duty. It should now take the reasonably practicable step of renewing Professor X's invitation.

[38] Watkins LJ in R v University of Liverpool ex parte Caesar-Gordon [1991] 1 QB 124, in relation to the s. 43 duty of the 1986 Education (no. 2) Act to take 'reasonably practicable steps'.

Example 21: a student's articles on human rights abuses

Y is a student at University B researching human rights abuses in country C. Y publishes several articles, in journals and in the press, lawfully alleging such abuses by the police of country C. The ambassador of country C complains to B and credibly threatens Y. Y requests security assistance from University B. However, in response, University B suspends Y's studies.

B has not taken the step of allowing Y to continue her studies. It has not taken the step of providing security assistance for Y. In considering whether these steps are reasonably practicable steps to secure Y's speech, it is irrelevant that this speech expresses a viewpoint that attracts disapproval from country C.

It is likely that University B is in breach of its 'secure' duty and that it must now take steps to secure Y's speech: for instance, permitting Y to continue her studies and providing security assistance. Depending on the circumstances, there may also be other steps that University B should take, for instance a statement of public support for Y.

Example 22: professor criticising employment practice

College A imposes contractual obligations on its staff, including a social media policy requiring them not to post material that is 'unnecessarily critical' of the college. During an industrial dispute Professor B, an academic employed at A, strongly but lawfully criticises the college's employment practices in a public post on social media. The college investigates Professor B and issues him with a formal warning.

College A's policy, and its action under this policy, are likely to breach its 'secure duty'. College A should have considered taking reasonably practicable negative steps in this situation. These include not investigating Professor B, and not issuing him with a warning. They also include not imposing this restriction on the speech rights of its academic staff.

By contrast, a social media policy that simply required staff to be clear that all views posted are their own and do not represent the college's views, would have been unlikely by itself to have breached A's 'secure' duty.

Example 23: student post raising issues about accommodation

A student representative A at University Z wishes to raise issues about student accommodation that cast the leadership and governance of Z in an unfavourable light. The representative writes a post on the students' union website describing students' experiences of accommodation. University Z requires the student to remove this post on the grounds that if the post is reported more widely in the media, this would threaten University Z's recruitment plans.

University Z has not taken the step of permitting the post to remain up. In considering whether this step is a reasonably practicable step to secure A's speech, it is unlikely to be relevant that this speech expresses a viewpoint that may affect Z's reputational interests. It is likely that Z is in breach of its 'secure' duty and that it must now take this step to secure A's lawful speech.

Step 3: Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?

124. If indeed there are no reasonably practicable steps to secure speech, any restriction or regulation must meet the conditions set down under Article 10 of the Convention. The third step is to ensure that it does. This section sets out those requirements.

125. Article 10(2) of the Convention is relevant to considering whether any restriction or regulation of speech (any 'interference') is proportionate. The European Court of Human Rights considers that interference with the right to freedom of expression may entail a wide variety of measures that amount to a 'formality, condition, restriction or penalty' on speech.[39]

126. An interference is 'prescribed by law' if:

    a. there is a specific domestic English legal rule or regime which authorises the interference;

    b. the person affected by the interference must have adequate access to the rule in question; and

    c. the rule is formulated with sufficient precision to enable the affected person to foresee the circumstances in which the law would or might be applied, and the likely consequences that might follow.

127. 'Law' **in the context of Article 10(2)** therefore has an extended meaning.[40] In this context, it may include rules set out in contracts of employment, student contracts, regulations or codes of conduct. However, any such rules must have some basis in domestic law and must meet the conditions of accessibility and foreseeability set out in 126b-c.

128. The European Court of Human Rights has held that a norm cannot be regarded as a 'law' unless:

> 'it is formulated with sufficient precision to enable the citizen to regulate his or her conduct and that he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, it went on to state that these consequences do not need to be foreseeable with absolute certainty, as experience showed that to be unattainable'.[41]

[39] See Wille v Lichtenstein 28396/95 at 43: see WILLE v. LIECHTENSTEIN.

[40] See Lord Sumption UKSC/2016/0195 at 16: In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland).

[41] See Guide on Article 10 - Freedom of expression at 63; Perinçek v. Switzerland [GC], § 131.

129. The European Court of Human Rights has stated, with regard to Articles 9, 10 and 11, that 'the mere fact that a legal provision is capable of more than one construction does not mean that it does not meet the requirement of foreseeability.'[42]

130. Article 10(2) also requires that any interference in speech is 'proportionate'. To assess the proportionality of a measure to interfere in lawful speech, providers and constituent institutions must consider:

    a. whether the objective of the measure is sufficiently important to justify the limitation of a protected right,

    b. whether the measure is rationally connected to the objective,

    c. whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

    d. whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.[43]

131. The proportionality test is formulated such that there is a high bar to interfere with any qualified Convention rights, including Article 10 on freedom of expression. In practice this means it is difficult to restrict lawful speech. This is particularly so in a higher education context, where providers are subject to statutory duties to secure the rights protected under Article 10, and where 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).

Example 24: religious expression on social media

As stated by the Court of Appeal: 'This case concerns the expression of religious views, on a public social media platform, disapproving of homosexual acts, by a student, enrolled on a two-year MA Social Work course.'

'Upon being notified of the postings upon social media, the university, the [student's] course provider, embarked upon disciplinary proceedings and took the decision to remove the [student] from his course, on fitness to practise grounds. The [student] sought judicial review of this decision on the basis that (i) it was an unlawful interference with his rights under Articles 9 and 10 of the European Convention on Human Rights as given effect by the Human Rights Act 1998, and (ii) the decision was arbitrary and unfair.'

The High Court dismissed the challenge, but the Court of Appeal allowed the appeal on basis (i). It found that 'the University told the Claimant that whilst he was entitled to hold his views about homosexuality being a sin, he was never entitled to express such views on social media or in any public forum.' It found that 'the implication of the University's submission is

[42] See Guide on Article 10 - Freedom of expression at 67; also Perinçek v. Switzerland [GC], § 135; Vogt v. Germany, § 48.

[43] Lord Reed in Bank Mellat vs HMT (no. 2) UKSC/2011/0040 at 74: Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent).

that such religious views as these, held by Christians in professional occupations, who hold to the literal truth of the Bible, can never be expressed in circumstances where they might be traced back to the professional concerned. In practice, this would seem to mean expressed other than in the privacy of the home. And if that proposition holds true for Christians with traditional beliefs about the literal truth of the Bible, it must arise also in respect of many Muslims, Hindus, Buddhists and members of other faiths with similar teachings.'

It stated: 'In our view, such a blanket ban on the freedom of expression of those who may be called "traditional believers" cannot be proportionate.'

It also stated that 'it seems apparent to us that the position as to the condemnation of any expression of such views as those held by the [student] must have been present in the minds of key players within the University at the time… Secondly, in our view, that underlying attitude may almost certainly have led to a too-rapid and disproportionate conclusion that removal from the course was necessary, rather than the institution of a calm, continuing process of guidance of the [student], spelling out what he could and could not properly say, and the circumstances in which he could say it.'

The Court of Appeal concluded that: 'The swift conclusion that the Appellant was 'unteachable', that it was for him to construe the Regulations and Guidance, for him to understand the impact of religious language on others unfamiliar with it, and that his failure to do so meant he must be removed immediately, do not seem to us to have been shown to be the least intrusive approach which could have been taken. It appears to us that this approach was disproportionate on the part of the University.' [44]

[44] See Ngole vs University of Sheffield, [2019] EWCA Civ 1127, at 1, 3, 124, 127, 129 and 136-7. See: Ngole -v- Sheffield University judgment.

Section 3: Steps to secure freedom of speech

132. This section gives some examples of steps that are likely to be reasonably practicable in a wide range of circumstances. These are divided by areas of activity (such as 'Codes of conduct' or 'Research').

133. Providers and their constituent institutions, having particular regard to the importance of freedom of speech, must take reasonably practicable steps to secure free speech within the law. Whether (and in what timescale) steps are reasonably practicable may vary according to the type of provider or constituent institution involved (for instance depending on size, specialisation or delivery of further education). However, the OfS expects that in a wide range of circumstances it will be reasonably practicable to take many of the steps set out below. This list is illustrative and includes steps that providers and their constituent institutions should take in the majority of circumstances.

134. In any particular case, there may also be other reasonably practicable steps to secure freedom of speech, in addition to those set out here. Where a step is reasonably practicable for a provider or constituent institution, it must be taken.

Admissions, appointments, employment and promotion

Admissions

135. The following may be reasonably practicable steps for providers and their constituent institutions to take in connection with practices and policies relating to admissions.

136. Providers and constituent institutions should not discriminate against a student applying to another course, for instance by refusing them admission or marking them down in the admissions assessment process, because of their viewpoint. They should not revoke or change the terms of their admission of an applicant with a binding offer because of the applicant's viewpoint.

137. Providers and constituent institutions should not admit students or visiting academics on the basis of funding arrangements or other criteria that have the effect of restricting their or others' academic freedom or freedom of speech within the law. Reasonably practicable steps may include proactive checks, particularly where there are known risks relating to possible attempts to monitor, censor or intimidate students or staff at the provider or constituent institution. These may include undertaking robust risk-based human rights due diligence before entering into such arrangements.

Example 25: international students on visiting scholarships

University A accepts international students every year through a programme of visiting scholarships funded by the government of country B. One condition of the scholarships is that recipients must accept the basic principles of the ruling party of country B. Another condition is that recipients must accept direction from country B's government via its diplomatic staff.

Arrangements like these are very likely to undermine free speech and academic freedom at University A. For instance, because of the first condition the university may be in effect setting a political test for entry to scholars. Because of the second condition scholars may be directed, by diplomatic staff of B, to suppress or monitor speech at the English provider where they hold those scholarships, through surveillance or physical intimidation or coercion of staff or other students at that provider.

Amendment or termination of these arrangements is likely to be a reasonably practicable step that University A should now take to comply with its 'secure' duty.

In this situation, it is also likely to be a reasonably practicable step for providers and constituent institutions to have in place, and publicise, robust internal disciplinary processes for addressing harassment and surveillance of this type.

Additional reasonably practicable steps are also likely to include due diligence such as accessing and translating official B-language documentation relating to these scholarships, for instance the contracts signed by students taking up these scholarships. This is likely to be especially important when there is a reasonable suspicion that conditions of funding, such as accepting the basic principles of the ruling party, are not overt.

Appointments

138. Each provider and constituent institution must take reasonably practicable steps to achieve the objective of securing that, where a person applies to become a member of academic staff, the person is not adversely affected in relation to the application because they have exercised their freedom within the law to question and test received wisdom, or to put forward new ideas and controversial or unpopular opinions.[45] The following may be reasonably practicable steps.

139. Providers and constituent institutions should not require applicants to any academic position to commit (or give evidence of commitment) to a particular viewpoint.

140. Any academic appointment process should include a sufficiently detailed record of all decisions. If appropriate (for instance, if concerns about free speech or academic freedom have arisen or might reasonably arise), this record should include evidence that the appointment process did not penalise a candidate for their exercise of free speech or academic freedom. This may include, for instance, written reasons for the decision.

141. Providers and constituent institutions should ensure adequate training on freedom of speech and academic freedom for anyone on an appointment panel. (See also 'Training and induction' below.)

[45] See HERA s.A1(8) and (9).

Example 26: appointments to a foreign-funded institute

Institute A in University B is jointly funded by B and an entity based in a foreign country C. A proportion of staff at Institute A are appointed through a process managed within country C. This process imposes an ideological test as a condition of appointment and of ongoing employment.

These arrangements are likely to have the effect of penalising applicants to academic posts for their exercise of free speech or academic freedom. They may also have the effect of restricting the free speech and academic freedom of students and staff at University B. Amending these arrangements, including immediately and verifiably removing any test, or terminating this arrangement with Institute A, is likely to be a reasonably practicable step that University B should now take.

Example 27: job advert requiring commitments to political aims

University A advertises for a lecturer. The advertisement requires all applicants to demonstrate their commitment to certain political aims.

Depending on the circumstances, this requirement may penalise candidates for opinions or speech that have no bearing on competence in the relevant subject. In these circumstances, removing this requirement before advertising is likely to have been a reasonably practicable step that University A should have taken. Withdrawing the advertisement, and re-advertising without this requirement, is likely to be a reasonably practicable step that University A should now take.

Employment

142. The following may be reasonably practicable steps that a provider or their constituent institution may take in connection with its practices and policies relating to employment.

143. We would generally expect providers and constituent institutions, as promptly as is reasonably practicable and consistent with due process, and where appropriate publicly:

    - to reject public campaigns to punish a student or member of staff for lawful expression of an idea or viewpoint that does not violate any lawful internal regulations

    - to affirm students' and staff members' rights to make such statements regardless of any institutional position on the matter.

    These campaigns may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running, focused media campaigns.

144. Depending on the circumstances, rather than publicly distancing itself, it may be more helpful for a provider or its constituent institution to reiterate the importance of free speech for all staff and students, including the person affected. It may also be especially important for the response to be timely.

Example 28: paper accusing Shakespeare of racism

A postdoctoral researcher, A, publishes a paper accusing Shakespeare of 'systematic racism' based on an analysis of the sonnets. It is clear and accepted by all parties that A's speech is lawful and does not violate any lawful regulations or restrictions at A's university, B.

A national newspaper accuses A of attacking a great national figure. It mounts a campaign calling for A to be fired. After two weeks of unnecessary delay, the vice-chancellor of B issues the following statement:

'University B regards free speech as a fundamental value that is at the heart of everything we do. This extends even to views that we consider wrong and that many in our community reject. The views of A do not represent the views of university B. University B is proud of Britain's literary heritage.'

The vice-chancellor of B did not intervene for two weeks. This period of uncertainty may itself have penalised A. Depending on the circumstances, the statement may have undermined A by criticising their position. The statement was not explicit that University B would not punish A. In these circumstances a clear, prompt and viewpoint-neutral response may have been a reasonably practicable step that University B should have taken.

Example 29: social media backlash against a lecturer's blog

A lecturer, Dr C, writes a blog strongly defending the rights of trans people and claiming that these rights are under attack from activists. It is clear that C's speech is lawful and does not violate any lawful regulations or restrictions at C's employer, College D.

Dr C's speech provokes an intense response on social media, including widespread calls for C to be fired. Dr C's employer, College D, immediately issues the following statement internally, to the wider university community and publicly:

'College D will not limit the views expressed by its staff or students beyond what the law prevents. College D will not require any apology from, or take any action against, its members, staff or students for their lawful expression of any viewpoint.'

This statement is likely to be helpful. It is prompt, categorical and neutral as to content. Depending on the circumstances, the statement may reduce pressure on Dr C. College D is likely to have taken some of the reasonably practicable steps that it should have taken to secure academic freedom for Dr C. There may be other reasonably practicable steps that College D should take.

145. Wherever reasonably practicable providers and constituent institutions should not terminate employment for, or deny reappointment to, any member of staff because they have exercised free speech within the law to express a particular viewpoint.

146. Each provider and constituent institution must take reasonably practicable steps to secure the academic freedom of their academic staff. This means that those staff are free to question and test received wisdom and to put forward new ideas and controversial or unpopular

opinions without placing themselves at risk of being adversely affected by losing their jobs or privileges or reducing their likelihood of securing promotion or different jobs at the provider or constituent institution.

147. Providers and constituent institutions should not require holders of any academic position to commit (or give evidence of commitment) to a particular viewpoint. This is distinct from a requirement to teach within the boundaries of disciplinary relevance and disciplinary competence, which is likely to engage the essential function of teaching.

Example 30: mis-teaching calculus

University A employs Dr B to teach mathematics, including core basic material on calculus. Based on his own lack of knowledge and understanding, Dr B instead teaches an incoherent alternative theory. He criticises standard calculus in class and marks students down for correctly applying standard methods. Following complaints, the university investigates and issues Dr B with a formal warning.

It is unlikely that the university has breached its 'secure' duty. Dr B's marking practices and speech in class undermine the teaching function of University A, because competent teaching of calculus is essential to its course provision. It is unlikely to be reasonably practicable for the university to secure Dr B's speech in this context.

148. Any process of dismissal for a member of academic staff should include a sufficiently detailed record of all decisions. If appropriate (for instance, if concerns about academic freedom have arisen or might reasonably arise), this record should include evidence that the process did not penalise a member of staff for their exercise of academic freedom. This may include, for instance, written reasons for the decision.

149. Providers and constituent institutions should ensure adequate training on freedom of speech and academic freedom for anyone involved in making recommendations or decisions in relation to the dismissal of a member of staff. (See also 'Training and induction' below.)

Example 31: campaign against a staff member with pro-life views

A member of catering staff at University A writes to the local newspaper lawfully expressing pro-life views. Students at the university start a petition to have the member of staff fired. Following an investigation, University A fires the staff member on the grounds that there are students who claim to feel unsafe because of the staff member's continued employment.

Depending on the circumstances, this is likely to have been a breach of University A's free speech duties. This is because there was nothing to suggest that the staff member's speech was unlawful or that it violated any lawful regulations or restrictions at A. For instance, claims that the staff member's employment makes others feel unsafe are not, by themselves, enough to make that member's speech unlawful. In these circumstances, retaining (and not disciplining) the staff member is likely to have been a reasonably practicable step that University A should have taken. Reinstating the staff member may now be a reasonably practicable step that University A should take.

Promotion

150. Each provider and constituent institution must take reasonably practicable steps to achieve the objective of securing that, where a person applies for academic promotion, the person is not adversely affected in relation to the application because they have exercised their freedom within the law to question and test received wisdom, or to put forward new ideas and controversial or unpopular opinions. The following may be reasonably practicable steps.

151. Providers and constituent institutions should not require applicants for academic promotion to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate for exercising their academic freedom within the law.

152. Any academic promotion process should include a sufficiently detailed record of all decisions. If appropriate (for instance, if concerns about academic freedom have arisen or might reasonably arise), this record should include evidence that the process did not penalise a candidate for their exercise of academic freedom. This may include, for instance, written reasons for the decision.

153. Providers and constituent institutions should ensure adequate training on freedom of speech and academic freedom for anyone on a promotion panel. (See also 'Training and induction' below.)

Example 32: requiring a commitment to equality, diversity and inclusion

University A requires all candidates for academic promotion to submit a 500-word statement of evidence of commitment to equality (or equity), diversity and inclusion (EDI).

Depending on the circumstances, this requirement may be restricting the lawful expression of certain viewpoints. For instance, a lecturer might be sceptical of some aspects of EDI and may be deterred from applying for promotion, or may be refused promotion, as a result. Removing this requirement from promotion processes is then likely to be a reasonably practicable step that University A should now take.

Example 33: encouraging applications from underrepresented races

University B takes positive steps to encourage members of underrepresented races to apply for promotion. For instance, it invites members of those groups to special events related to promotion. It also publicises successful role models from within those groups. All applicants for promotion are evaluated solely on merit.

Assume that in the circumstances, the steps taken are a proportionate means of encouraging more people with a certain protected characteristic to apply for promotion and that, in the specific case, the steps are lawful under the Equality Act.

In taking these actions it is unlikely that University B has breached its 'secure' duty.

Codes of conduct

154. The following may be reasonably practicable steps for a provider or constituent institution to take in connection with its codes of conduct.

155. Where a provider or constituent institution adopts a rule of conduct that restricts lawful speech, that rule must, in line with Article 10(2) of the Convention, be prescribed by law. This means that:

    a. there is a specific English legal rule or regime which authorises the interference;

    b. the student, member, member of staff or visiting speaker who is affected by the interference has adequate access to the rule in question; and

    c. the rule is formulated with sufficient precision to enable the student, member of staff or visiting speaker to foresee the circumstances in which the law would or might be applied, and the likely consequences that might follow.

156. In framing restrictions on speech, it is generally helpful for providers or constituent institutions to adopt, within the same document, clear statements explicitly protecting freedom of speech and academic freedom. It will be important for a provider or constituent institution to consider the adequacy of any such statements in protecting both freedom of speech and academic freedom.

157. Restrictions, regulations and protections are more likely to work effectively where they apply objective tests and avoid vague language or undefined terms. Using legal definitions where available is likely to be helpful in setting clear expectations for students, members, staff and visiting speakers.

158. The terms of any code, contract or policy should not be so broad that they suppress the lawful expression of a particular viewpoint or of a wide range of legally expressible content.

Example 34: contracts requiring employees to uphold social justice

College A's employment contract states: 'College employees must uphold the college's commitment to social justice.'

Upholding social justice is not an essential function of the college. Depending on the particular facts of the case, this statement may suppress lawful expression of scepticism about some conceptions of social justice. If so, removing this contractual requirement is likely to be a reasonably practicable step that College A should now take.

Example 35: student handbook on misgendering

University A's student handbook states: 'Misgendering is never acceptable. You must always address or refer to a person using their preferred pronouns.'

This blanket ban on misgendering is likely to breach the 'secure' duty.

For instance, a student writing a dissertation in criminology might refer to trans women as 'he' because the student considers this necessary for clarity. This is unlikely to amount to harassment.

There may be circumstances in which the use of dispreferred pronouns could amount to harassment. For instance, repeated and deliberate misgendering directed by a teacher to a particular student in one of their classes may amount to harassment.

However, we would expect that any code of conduct that regulates the use of pronouns on these grounds would narrowly tailor any restriction to those circumstances. It must not, in intent or effect, prohibit the expression of a lawful viewpoint (for instance, the viewpoint that gender is a fiction).

Removing this blanket rule is likely to be a reasonably practicable step that University A should now take.

Example 36: IT policy

University A's IT acceptable use policy says: 'Users must not transmit offensive material using university internet facilities.'

Many lawfully expressible views are likely to be offensive to some. This includes contributions to academic debate. The policy may restrict essential functions of the university. Removing or amending it is likely to be a reasonably practicable step that A should now take.

A's policy is more likely to be compliant if instead of 'offensive material' it refers to material that is unlawful, including (for instance) under section 1 of the Malicious Communications Act 1988, section 127 of the Communications Act 2003, or Part 10 of the Online Safety Act 2023.

159. Policies and other statements should not discourage lawful speech by misrepresenting a provider's or constituent institution's legal duties. This may include oversimplification – for instance, by omitting the importance of freedom of speech.

Example 37: mis-statements of the law

University A's Prevent guidance document states (without qualification): 'The University has a duty to prevent extremism.'

Its PSED guidance document states (without qualification): 'The University has a duty to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'

These mis-statements of the law may restrict freedom of speech within the law. For instance, they may encourage staff to control or restrict reading lists. In a politics course, for instance, staff might be reluctant to set unorthodox, radical or potentially upsetting texts.

It would be a reasonably practicable step that University A should now take to amend the guidance document to state these duties accurately. For instance, the Prevent guidance

should instead refer to the duty to have due regard to the need to prevent people from being drawn into terrorism. And it should make clear that when carrying out its Prevent duty, University A must have particular regard to the duty to ensure freedom of speech and to the importance of academic freedom. Similarly, the PSED guidance should instead refer to the duty to have due regard to (among other things) the need to foster good relations between the classes of people concerned.[46]

160. Policies that regulate

    a. protests and demonstrations;

    b. posting or distributing written material (such as flyers); or

    c. recruitment activities

    should not restrict these activities because they express or support a particular legally expressible viewpoint. However, in certain circumstances (this will be a fact-sensitive assessment) it may be necessary and appropriate for providers or constituent institutions to regulate the time, place and manner of a protest or demonstration. For example, this may be necessary if those attending a place of worship are at risk of intimidatory harassment.

161. Any regulation of these activities should be proportionate under Article 10 (see section 2, step 3 above).

Example 38: posting flyers and distributing leaflets

College B requires students to seek written permission a month before they post flyers, which must be posted on a designated noticeboard. The noticeboard is small, and flyers may not be posted anywhere else. It also requires students to seek written permission a month before they hand out leaflets anywhere on college premises.

Depending on the particular facts of the case, these regulations may be unnecessarily onerous. If so, rewriting the regulations to address this is likely to be a reasonably practicable step that B should now take.

Complaints and investigation processes

162. The following may be reasonably practicable steps that a provider or constituent institution may take in connection with its complaints and investigations processes.

163. Providers and constituent institutions should not encourage students or staff to report others over lawful expression of a particular viewpoint.

[46] See EA 2010 section 149 and CTSA 2015 section 26 and section 31.

Example 39: reporting 'microaggressions' anonymously

University A promotes an anonymous (and not merely confidential) reporting process. Students are encouraged to use a portal to submit anonymous reports to senior staff of 'microaggressions', which is not further defined. The portal includes free text boxes in which reporters may name or otherwise identify the individuals being accused. University A says that it may take action against named (or identifiable) individuals on the basis of any anonymous report that it receives. It also says that even if it does not take action, it will retain all information that it receives for six years and may share it with external bodies (such as funding agencies).

Depending on the circumstances, the existence of the reporting mechanism and portal may discourage open and lawful discussion of controversial topics, including political topics and matters of public interest.

However, University A might reasonably wish to collect anonymised statistical data for the purposes of identifying geographical and secular trends in relation to harassment or sexual misconduct. Reasonably practicable steps that A could now take may include:

- remove the free text boxes from the anonymous reporting portal to be replaced with radio buttons that do not permit submission of any identifying data
- state the category of reportable speech more precisely and more narrowly, e.g. harassment and/or sexual misconduct as defined in E6.11k and E.611s of the OfS's condition of registration, E6
- clarify in the portal that an anonymous report will result in no further action but is solely for data collection purposes.

Condition of registration E6 requires a provider to ensure that it has appropriate reporting mechanisms in practice and to ensure that information is handled sensitively and used fairly in practice. The OfS's guidance on the condition sets this out in more detail.[47]

164. Every complaints process should promptly reject vexatious, frivolous or obviously unmeritorious complaints relating to speech. In order to avoid unnecessary intrusive investigations, it is likely to be reasonably practicable to include a preliminary assessment/triage to assess whether to commence an investigation. The starting point of any such process should be that lawful speech will not be punished because of a viewpoint that it expresses.

Example 40: complaint about a professor's speech at a protest

Professor A at University B takes part in a protest against the policies of country C. Professor A gives a speech at the protest. In the circumstances this speech is clearly a lawful expression of political views.

[47] See paragraphs 30-31 of the guidance at: Condition E6: Harassment and sexual misconduct.

However, Professor A's expressed views upset some students at University B. They bring a complaint against Professor A. There is a lengthy investigation process. At the end of this process, University B finds that there is no case to answer. This should have been clear to investigators at the outset, but University B was concerned that closing the investigation quickly would further offend the students who complained.

The prospect of a lengthy investigation with an uncertain outcome may deter students and staff from putting forward unpopular views on controversial topics. In this case the investigation itself punished Professor A for lawful expression of a viewpoint. The fact that A's speech offended some students is unlikely to be relevant to whether closing the investigation was a reasonably practicable step. It is likely that University B has breached its 'secure' duty.

A rapid triage process may ensure swift dismissal of complaints about speech that do not warrant further investigation. Putting in place such a triage process is likely to be a further reasonably practicable step that University B should now take.

165. Complaints processes should be concluded as rapidly as is reasonably practicable and compatible with fairness.

166. Providers and constituent institutions should not pursue vexatious complaints or trivial investigations into other matters against an individual solely because of their lawful expression of a viewpoint. In practice, it may not always be possible to determine that a complaint is vexatious at the outset of any investigation.

Free speech code of practice

Publication and format

167. Providers and constituent institutions must bring their free speech code of practice (as well as the provisions of section A1 of the Act) to the attention of students at least once a year.[48] Beyond this, in connection with the publication and format of the free speech code of practice, the following steps are likely to be good practice.

168. It would be good practice for the document to be published in a prominent position. For instance, it should be visible on the provider's or constituent institution's website. It should be easily accessible by students, members of staff, visiting speakers and those considering applying to be students. It should be accessible without any form of password or security check.

169. It would be good practice for there to be a clear and simple statement about the document. This statement should summarise its content. It should also make clear how to access it (for instance, by including a link). It would be good practice for the statement to be:

    a. communicated directly to all students and staff in writing at least once each calendar year;

[48] See HERA Part A1 s. A2 (5) and s. A4.

b. set out in any prospectus of the provider or constituent institution;

c. set out in any student or staff handbooks; and

d. prominently included, or prominently linked to, in any other document stating or explaining any policy that may affect free speech or academic freedom (for instance a bullying and harassment policy, research ethics policy or fitness to practise procedure), along with a statement that in cases of uncertainty, the definitive and up-to-date statement of the institution's approach to freedom of speech is set out in the code. This includes all policies relating to any of the following matters:

- admissions, appointments, reappointments and promotions
- disciplinary matters
- employment contracts (that may include conditions on speech)
- equality or equity, diversity and inclusion, including the PSED
- fitness to practise policies and procedures
- harassment and bullying policies
- IT, including acceptable use policies and surveillance of social media use
- Prevent duty
- principles of curricular design
- research ethics
- speaker events
- staff and student codes of conduct.

Values relating to freedom of speech

170. HERA requires providers and constituent institutions to set out, in their free speech codes of practice, their values relating to freedom of speech with an explanation of how those values uphold freedom of speech.[49]

171. Providers and constituent institutions are well placed to articulate their values relating to free speech and academic freedom. However, providers and constituent institutions may consider including the following:

a. a statement about the overarching value of freedom of speech within the law for the organisation in question

[49] See HERA Part A1 Section A2(2)(a), Section A4 and Section A6(2)(a).

b. an explanation of how the provider's or constituent institution's values relating to freedom of speech uphold freedom of speech

c. a statement emphasising the very high level of protection for the lawful expression of a viewpoint and for speech in an academic context

d. a statement that freedom of speech within the law may include speech that is shocking, disturbing or offensive.

Procedures to be followed by staff and students

172. HERA requires that the code of practice sets out procedures to be followed in connection with the organisation of meetings and other activities. In connection with that section of the code, the following may be reasonably practicable steps for a provider or constituent institution to take to secure freedom of speech.

173. The scope of the procedures section of the document should be broad. It should not be limited to policies relating to external speakers or events. The code of practice should apply to the procedures to be followed by staff and students of the provider or constituent institution when organising teaching or research-related activities, as well as other activities listed in paragraph 171d above. There should be links to the code of practice from the documents setting out the detailed procedures relating to those other activities.

174. The content of the procedures section should clearly and expressly require decision-makers, in making any decision or adopting any policy that could directly or indirectly (and positively or negatively) affect freedom of speech, to act compatibly with the statutory free speech duties.

175. The procedures for organising room bookings and speaker events should adhere to the following principles, which are widely recognised:

a. They should make clear that the starting point for any event is that it should go ahead and that cancellation is exceptional and undesirable.

b. The procedures should be clearly set out.

c. The process should not take longer than necessary.

d. There should where possible be a single, identified point of contact for questions about the process.

e. There should be identified person(s) responsible for approval of an event. Any final decision to cancel an event, or to delay indefinitely, should only be taken by a suitably senior official (who may be, for instance, at pro-vice-chancellor or vice-chancellor level), who has delegated authority to take it.

f. There should not be onerous requirements for information.

176. A provider or constituent institution should set out in this section of its code of practice a process for the timely consideration of risks to the event. The purpose of the process would be to put in place steps that permit the event to go ahead. The document should specify who would be responsible for planning and taking these steps. (See also example 48 below.)

177. For additional guidance on visiting speakers see ‘Speaker events’ below.

Required conduct

178. HERA requires that the free speech code of practice sets out the conduct required in connection with relevant meetings and other activities. In connection with this section of the free speech code of practice, the following may be reasonably practicable steps for a provider or constituent institution to take to secure freedom of speech.

179. The scope of this section should replicate that in the procedures section of the free speech code of practice.

180. The content of this section should be consistent with the following principles:

    a. Everyone has the right to free speech within the law.

    b. Providers and constituent institutions should seek to expose students to a wide range of views, including those that challenge commonly accepted ideas and conventional wisdom. There should be no limit in principle to the range of views within the law to which students, staff and members might be exposed across the full range of speaker meetings and other activities covered by the code. These may include views that some or all students might find shocking, disturbing or offensive.

    c. If those organising an event invite speakers who they might reasonably have suspected would use their platform to break the law (e.g. because they have done so previously) they may fall foul of the law themselves.

    d. Peaceful protest is itself a legitimate expression of freedom of speech. However, protest must not shut down debate.[50]

Criteria for passing on security costs

181. HERA requires that a provider or constituent institution must secure that, apart from in exceptional circumstances, use of its premises by any individual or body is not on terms that require the individual or body to bear some or all the costs of security relating to their use of the premises.[51]

182. The criteria for ‘exceptional’ circumstances, in which the provider or constituent institution may pass on security costs to the organiser of an event, are for the provider or constituent institution to set. However, HERA places a duty on providers and constituent institutions to set out in the free speech code of practice the criteria for determining whether there are exceptional circumstances.[52]

183. As a reasonably practicable step to securing freedom of speech, these criteria should be clear, objective and neutral. This means that both the criteria for assessing security costs,

[50] Similar or overlapping principles are set out in the Joint Committee on Human Rights report ‘Freedom of Speech in Universities’, 2018.

[51] See HERA Part A1 section A1(10), section A5(2).

[52] See HERA Part A1 section A2(2)(d), section A4, section A6(2)(d)(ii).

and the definition of what counts as exceptional circumstances, should not (so far as is consistent with the law) depend on any of the following:

a. in relation to any individual, their ideas or opinions;

b. in relation to any body, its policy or objectives or the ideas or opinions of any of its members; and

c. in relation to the event, the ideas, opinions or information likely to get lawful expression at it.

184. The criteria should be framed in such a way that 'exceptional' circumstances only arise very rarely.

185. For instance, a provider might have a stated policy that it will not pass on the first £X of security costs associated with the use of its premises by an individual or body, where X is stated as a numerical quantity that applies to all individuals or bodies regardless of their ideas, opinions, policies or objectives; and where security costs rarely exceed £X.

Example 41: security costs and offensive views

College A's policy on the use of its premises states: 'We will not pass on security costs for outside events except in exceptional circumstances. "Exceptional" circumstances may include those in which the views expressed at such an event are exceptionally offensive or especially likely to shock or disturb.'

Example 42: security costs above a fixed amount

College B's policy on the use of its premises states: 'We will not pass on security costs for outside events except in exceptional circumstances. Circumstances are "exceptional" when security costs exceed £X. In these circumstances we will pass on the residue of security costs to the organisers.' Security costs would very rarely exceed £X.

In example 41, College A has defined 'exceptional circumstances' vaguely and in a way that depends on the viewpoints that may be expressed. Replacing this definition with a clear, objective and neutral specification of 'exceptional' circumstances, as in example 42, is likely to be a reasonably practicable step that College A should now take towards securing freedom of speech within the law for visiting speakers and others.

186. It may also be a reasonably practicable step for the provider or constituent institution to apply its policy uniformly. That is, it will always pass on security costs above the first £X (or whatever the stated threshold is) where these arise. It should not apply the policy in a manner that depends to any extent on the matters stated in 183a-c.

Example 43: inconsistent approach to security costs

University B has a stated policy that it 'may' pass on security costs above £X to the organisers of an event.

A national Islamic society hires premises of University B to host a conference to which students and staff of University B are invited. There is reason to expect serious disruption at the event. As a result, University B estimates security costs to be £2,000 above the threshold. However, it covers these costs in their entirety.

Two weeks later, a national Jewish society hires the same premises to host a conference to which students and staff of B are again invited. There is reason to expect serious disruption at the event. As a result, University B again estimates security costs to be £2,000 above the threshold. It covers the first £X but passes on the remaining £2,000 to the organisers. As a result, the event is cancelled.

In this example University B may have applied its policy inconsistently to two groups in a way that depends on the policies or objectives of those groups or on the ideas and opinions of their members. If so, University B is likely to have breached its free speech duties. Covering costs equally for both groups is likely to have been a reasonably practicable step that University B should have taken towards securing freedom of speech within the law for visiting speakers.

187. As a reasonably practicable step the provider or constituent institution should supply the organiser of the event with a clear written summary of its calculation of the expected security cost and an explanation for this calculation. Where reasonably practicable it must also have in place a process for appealing this calculation to an independent review, and for the provider or constituent institution to supply this summary in enough time for the event organiser to appeal the calculation.

188. Whether a commercial booking is in scope of the duty relating to security costs depends on whether there is any relation between the commercial event and the objective of securing freedom of speech within the law for the classes of persons set out at A1(2). If there is no relation, the commercial booking would not be captured. However, if a commercial entity hosts an event to which staff, members or students are invited, this may be likely to be captured. As soon as an event involves persons within the categories set out in the objective at A1(2), the provision would be likely to apply.

Governance

189. The following may be reasonably practicable steps for a provider or constituent institution to take in connection with governance.

190. 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).

191. 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.

192. 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:

    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.

Research

194. The following may be reasonably practicable steps for a provider or constituent institution to take in connection with research. ‘Research’ refers to any form of intellectual inquiry.

195. Staff and students should be free to undertake academic research within the law. This freedom should not be restricted or compromised in any way because of a perceived or actual tension between:

    a. any conclusions that the research may reach or has reached or the viewpoint it supports, and

b. the organisation's policies or values.

Nor should it be restricted or compromised in any way because of any external pressure connected with a. If funding bodies exert pressure on researchers to reach or to avoid particular results, amending or terminating these funding arrangements is likely to be a reasonably practicable step for providers and constituent institutions to take.

196. Reasonably practicable steps for providers and constituent institutions to take, in relation to research ethics committees, may include:

a. ensuring that ethical review and requirements are focused on ethical issues and do not impose requirements related to the quality of the proposed research or reputational concerns;

b. ensuring that ethics review committees have particular regard to the importance of academic freedom and to the risks to academic freedom of any decision;

c. ensuring that the ethical review process is transparent; and

d. closely monitoring the ethics review process for evidence of unnecessary suppression of research.

Example 44: conditions on research

Professor A wishes to conduct research among former police officers from country X who engaged in torture and interrogation. This research would include interviews with these officers. These interviews are likely to confirm that some staff from the X police force had attended postgraduate training on policing techniques offered by Professor A's employer, University Y.

Professor A submits her research proposal to the University Research Ethics Committee ('UREC') at University Y. The UREC approves Professor A's proposal on the condition that she does not interview any officers who have attended training at Y.

No reason is given for this restriction in the minutes of the UREC meeting. Nor is there any record that decision-makers have had regard to Professor A's academic freedom. Freedom of Information requests for emails between senior staff reveal that the restrictions on Professor A's research arose from internal concern about the reputational effects on Y.

Imposing this condition on Professor A's research is likely to have been a breach of Y's 'secure' duty. This is because these reputational concerns are irrelevant to whether it is reasonably practicable for Y to approve Professor A's research without this condition. Approving Professor A's research without the condition is likely to be a reasonably practicable step that University Y should now take. Other reasonably practicable steps are likely to include:

- ensuring transparency of decision-making by the UREC
- requiring the UREC to have, and to document how it has had, particular regard in its decision-making for the academic freedom of Y's researchers.

Example 45: response to published research on violent crime and a religion

Research associate X at College A works on the connection between violent crime and religion B. She publishes research suggesting a strong connection. Because her work reaches this conclusion, students at College A start a petition for X to be fired. The petition gains hundreds of signatures internationally.

Following investigation, A finds that the conclusion of this research conflicts with its value of respect for all religions. On this basis it terminates X's employment.

It is likely that College A has breached its 'secure' duty. This is because alignment of X's research findings with A's values is likely to be irrelevant to whether it is reasonably practicable for A to secure X's free speech. It is likely that it would have been a reasonably practicable step not to terminate her employment. It may also be a reasonably practicable step to reinstate her.

Example 46: scholar criticising a foreign country

Dr A is an international relations scholar at University B. Dr A has written articles criticising certain policies of foreign country C. The ambassador of country C calls the vice-chancellor of University B, pressuring the university to censor Dr A. As a result, B does not support Dr A's work on country C. For instance, B does not support his application for a research grant that would have funded work relating to C. Nor does it take any action when Dr A's visa from C is revoked, so that he cannot enter C for purposes of conducting academic research.

It is likely that B has breached its 'secure' duty. This is because the views of country C are irrelevant to whether it is reasonably practicable for University B to support Dr A's research. Supporting Dr A's application for a grant is likely to have been a reasonably practicable step that B should have taken.

There may also be other reasonably practicable steps that University B should now take. For instance, B might have invited the ambassador or other officials of country C to a function at B: if so, it might consider cancelling that invitation. Depending on the level of the threat to Dr A, University B may also be required to put in place suitable security arrangements to protect Dr A's person and his ability to continue research.

197. Academic freedom is fundamental to the functioning of any higher education institution. The effect of the 'secure' duty is that providers and constituent institutions may be required to incur significant costs in defence of the freedom of their own staff and students to conduct research.

Speaker events

198. Providers and constituent institutions must take reasonably practicable steps to secure freedom of speech for visiting speakers and others. This objective includes securing that the use of any premises is not denied to any individual or body on the following grounds:

    a. in relation to an individual, their ideas or opinions;

b. in relation to a body, its policy or objectives or the ideas or opinions of any of its members

and that the terms on which such premises are provided are not to any extent based on such grounds.

199. The 'secure' duty does not mean that any group or speaker has a right to be invited to speak at a provider or constituent institution. What it does mean is that a speaker who has been invited to speak at a meeting or other event should not be stopped from doing so on the grounds of their ideas or opinions.

200. Depending on the circumstances, it may occasionally be consistent with this duty that the provider or constituent institution regulates which premises may be used for a particular event and at what time they may be used, on grounds related (for instance) to the policy or objectives of the body to which it is making the premises available.

Example 47: annual conference of a political society

A political society that supports the governing party of country A seeks to hold its annual conference at University B. It deliberately attempts to book a venue next to prayer rooms used by students and staff belonging to the C faith. The current regime of country A has a long history of persecuting the C minority in that country. B declines to permit the political society to use those premises, but instead offers other premises in another part of the campus.

In this example University B has not made available the premises requested by the society, and it has made that choice based in part on the policy of that society. However, it has not restricted the expression of any viewpoint because it has made appropriate alternative premises available. In itself this regulation of speech is unlikely to breach the 'secure' duty.

201. It is likely to be a reasonably practicable step for a provider or constituent institution to have in place a process for the timely consideration of controversial events. The purpose of the process would be to put in place mitigating steps that permit the event to go ahead. The process should specify who would be responsible for planning and taking these steps.

Example 48: threat to seminar on animal experiments

Professor A is due to visit University B to give a seminar on animal experiments. She has warned the organisers that the event may be controversial. However, University B has no effective notification process for external speakers. Therefore, the warnings are not escalated. Hours before the event, staff at B learn of a credible threat that animal rights activists will attempt to disrupt the event and to attack the speaker. The university cancels the event.

In this example University B may have had no alternative to cancelling the event on the day that it was due to take place. However, if it had had in place, and acted upon, an external speaker policy that enabled timely escalation of the issue, then it need not have got into that position in the first place. There would have been time to consider suitable security

arrangements to enable the event to go ahead. Having in place such a policy, and acting on it, are likely to have been reasonably practicable steps that University B should have taken.

202. In many circumstances it is likely to be a reasonably practicable step for a provider or constituent institution not to cancel any event on the basis of the opinions or ideas of any speaker at that event, in response to objections or protests however widespread.

Example 49: politics seminar involving local MP

A student politics society arranges a seminar between the local MP and representatives of opposing parties. The seminar is to be held on the premises of the students' union. One of the proposed speakers has previously, and legally, campaigned to raise awareness of human rights abuses against members of a minority group in country A by the A majority population. Local activists collect signatures for a petition that criticises the event as a form of persecution of the A community. The students' union cancels the event. It says that it has done this 'out of respect for the feelings of the local A community'.

The associated provider becomes aware of the cancellation. It decides to host the seminar on its own premises citing the need to secure free speech under A1 of HERA. The provider puts on security for the event to ensure students, members and staff can participate as it anticipates there may be some risk of disruption. A protest does take place, allegedly led by an elected students' union representative and other students. This temporarily disrupts the seminar, but it continues and finishes as planned. The provider carries out an investigation into the conduct of the students' union and students in connection with the event, including the cancelled event, citing its need to secure compliance with its code of practice under section A2(4) of Part A1 of HERA.

The steps taken by the provider on learning about the seminar cancellation are likely to amount to reasonably practicable steps to secure free speech. Depending on the facts of the investigation and any outcome to it, the provider may also have taken reasonably practicable steps to ensure compliance with its code of practice under section A2(4).

203. It is likely to be a reasonably practicable step for a provider or constituent institution not to interfere with free speech or academic freedom any more than is necessary to ensure that the event goes ahead safely and within the law.

Example 50: seminar series on political violence

College A is due to hold a seminar series on political violence. One of the speakers, Dr B, is expected to discuss (within the law) some especially extreme and polarising examples that are likely to upset some students in the audience. College A requires Dr B to omit those examples from the discussion.

Requiring Dr B to omit this material is likely to be a breach of college A's 'secure' duty. A might instead have taken evidence-based mitigations short of restricting the content of Dr B's academic speech.

For instance, if there is evidence that this is helpful, then it might have approached its own welfare services to provide support for people affected by the issues raised, rather than preventing them from being raised at all. In many circumstances, this may have been a reasonably practicable step that A should have taken.

Depending on the facts, issuing a 'content note' (informing attendees about sensitive material) in advance of this event may not be a reasonably practicable step for A to take. A standing requirement to use content notes may encourage more intrusive investigation of the content of seminars, readings or speaker events. An expectation of content notes may also discourage academics from exposing students to new controversial material (so as not to risk wrongly including no, or the wrong type of, content note).

However, there may be occasions when the use of specific content notes may be helpful to enable students to access material, if there is evidence that they are in fact helpful.

204. The OfS will not protect Holocaust denial (by visiting speakers or anyone else).

Teaching

205. The following may be reasonably practicable steps for a provider or constituent institution to take in connection with teaching.

206. Providers and constituent institutions should not treat a student unfavourably, or less favourably than it treats or would treat another student—

    a. in the way it provides education for the student;

    b. in the way it affords the student access to a benefit, facility or service;

    c. by not providing education for the student;

    d. by not affording the student access to a benefit, facility or service;

    e. by excluding the student; or

    f. by subjecting the student to any other detriment

    on the grounds of that student's opinions or ideas.

207. Academic staff should not be constrained or pressured in their teaching to endorse or reject particular value judgements.

Example 51: teaching materials on British history

University A requires that all teaching materials on British history will represent Britain in a positive light. This requirement suppresses teaching materials on the basis of the viewpoint that they express. Removing it is likely to be a reasonably practicable step that A should now take.

Example 52: endorsing fossil fuel exploration for accreditation

Department A of University B applies for accreditation to a charter body with links to the fossil fuel industry. The accreditation process requires it to sign up to a set of principles. These include the principle that 'Fossil fuel exploration is the best way to meet our future energy needs.'

Depending on the circumstances, institutional endorsement of this principle may discourage expression of legally expressible views. Not implementing the provisions of any accreditation that risks undermining free speech and academic freedom is likely to be a reasonably practicable step that University B should now take.

Training and induction

208. The following may be reasonably practicable steps for a provider or constituent institution to take in connection with training and induction.

209. So far as is reasonably practicable, providers and constituent institutions should offer adequate training on freedom of speech and academic freedom. This training should be required for all staff involved in making decisions in relation to (for example) the following.

    a. admission, appointment, reappointment and promotion

    b. disciplinary matters

    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

    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.

210. 'Adequate training' means that staff will have an up-to-date understanding of:

    a. the free speech code of practice and how it applies in practice, including its application in detail to the member of staff's role in the organisation; and

b. the requirements of HERA, the Human Rights Act (HRA) and the Equality Act 2010 in relation to freedom of speech and how they apply in detail to the member of staff's role in the organisation.

211. So far as is reasonably practicable, providers and constituent institutions should make available, to all staff and students, adequate induction on freedom of speech and academic freedom. 'Adequate induction' means that all staff and students will have at least an up-to-date understanding of:

a. the free speech code of practice and how it applies in practice;

b. their own free speech rights under HERA, the HRA and the Equality Act 2010; and

c. the free speech rights of members, members of staff, students and visiting speakers under HERA, the HRA and the Equality Act 2010.

212. Providers and constituent institutions should not require training or induction that imposes a requirement on the person completing the training actively to endorse any viewpoint or value-judgement. The preceding sentence and the associated example 53 relate 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.

213. By contrast, we do not intend to discourage institutions from offering or requiring training on sensitive subjects, including training that itself asserts positions with which some users may disagree.

Example 53: race-awareness training that compels assent

A department at University A requires incoming students to complete race-awareness training. As part of the training, they must complete a test. They cannot matriculate unless they answer all questions correctly.

One question on the test is as follows: 'All white people are complicit in the structural racism pervading British society. True or false?' The only answer marked correct is 'True'. A candidate who ticks 'False' is required to re-take the test until they have explicitly assented to 'True'.

Depending on the circumstances, this training may impose a requirement to endorse a particular viewpoint. For instance, it may penalise anyone who thinks that some white people are not complicit in racism. If so, removing this question from the training is likely to be a reasonably practicable step that University A should now take.

Example 54: race-awareness training that does not compel assent

A department at University B requires incoming students to complete race-awareness training. As part of the training, they must complete a test. They cannot matriculate until they have completed the module.

One question on the test is as follows: 'White people can sometimes be victims of racism. True or false?' The only answer marked correct is 'True'. If a candidate ticks the box marked

‘False’, the module explains to them why it has marked this as wrong. Having explained this, it does not then require the candidate explicitly to assent to this or to undergo significant additional training because of their answer.

This training does not compel assent to any viewpoint, although it does itself make assertions with which some students may disagree. Requiring students to take training that does not compel assent is in itself unlikely to breach the ‘secure’ duty.

Annex A: Relevant legislation

Communications Act 2003
https://www.legislation.gov.uk/ukpga/2003/21/contents

Counter-Terrorism and Security Act 2015
https://www.legislation.gov.uk/ukpga/2015/6/contents

Education (No. 2) Act 1986
https://www.legislation.gov.uk/ukpga/1986/61/contents

Equality Act 2010
https://www.legislation.gov.uk/ukpga/2010/15/contents

Higher Education and Research Act 2017
https://www.legislation.gov.uk/ukpga/2017/29/contents/enacted

Higher Education (Freedom of Speech) Act 2023
https://www.legislation.gov.uk/ukpga/2023/16/enacted

Human Rights Act 1998
https://www.legislation.gov.uk/ukpga/1998/42/contents

Malicious Communications Act 1988
https://www.legislation.gov.uk/ukpga/1988/27/contents

Online Safety Act 2023
https://www.legislation.gov.uk/ukpga/2023/50

Protection from Harassment Act 1997
https://www.legislation.gov.uk/ukpga/1997/40/contents

Public Order Act 1986
https://www.legislation.gov.uk/ukpga/1986/64/contents

Public Order Act 2023
https://www.legislation.gov.uk/ukpga/2023/15/contents

Terrorism Act 2000
https://www.legislation.gov.uk/ukpga/2000/11/contents

Terrorism Act 2006
https://www.legislation.gov.uk/ukpga/2006/11/contents

Annex B: Glossary of terms

Academic freedom

Academic freedom is defined at Part A1 of HERA (as amended by the Act):

> 'A1 (6) In this Part, "academic freedom", in relation to academic staff at a registered higher education provider, means their freedom within the law—
>
> (a) to question and test received wisdom, and
>
> (b) to put forward new ideas and controversial or unpopular opinions, without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).
>
> A1 (7) Those ways are—
>
> (a) loss of their jobs or privileges at the provider;
>
> (b) the likelihood of their securing promotion or different jobs at the provider being reduced.'

Academic staff

A member of staff who is employed, or otherwise engaged, for the purpose of teaching or conducting research.

Constituent institutions

Constituent institution is defined at Part A1 Section A4 of HERA:

> 'Any constituent college, school, hall or other institution of a registered higher education provider.'

Governing body

As defined at section 85 of HERA.

Member

Whether a person is a 'member', in relation to a registered higher education provider or constituent institution, is a product of the legal constitutional arrangements of the provider (for example, the membership provisions in a Royal Charter or legislation for a higher education corporation) and/or contractual arrangement.

A member does not include a person who is a member of the provider or constituent institution solely because of having been a student of the institution.

Premises

Includes all land, buildings, facilities, and other property in the possession of, or owned, leased, used, supervised or controlled by the university, college or students' union.

Prevent duty

Defined at section 26 (1) of the Counter-Terrorism and Security Act 2015:

> 'A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism.'

Section 31 of the Counter-Terrorism and Security Act 2015 states:

> '(1) When carrying out the duty imposed by section 26(1), a specified authority to which this section applies—
>
> (a) must have particular regard to the duty to ensure freedom of speech, if it is subject to that duty;
>
> (b) must have particular regard to the importance of academic freedom, if it is the proprietor or governing body of a qualifying institution.'

Registered higher education provider and governing body in relation to such a provider

These terms have the same meanings as at Part 1 of HERA (see section 85). The OfS publishes a Register of registered higher education providers on its website.

Registered higher education provider that is eligible for financial support

A registered higher education provider that is an eligible higher education provider for the purposes of section 39 of HERA. These providers are registered in the OfS's 'Approved (fee cap)' registration category.

Staff (of an organisation)

Someone who is either:

a. an employee of that organisation or other person working for that organisation under a contract of employment, including, without limitation, a fixed-term contract, a zero-hours contract, an hourly-paid contract or other type of casual or atypical contract of employment; or

b. an individual who has entered into or works under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

Student

A person undertaking, or with a binding offer to undertake, a course of study or a programme of research (i) at the institution in question or (ii) that leads to an award granted by the institution in question, and in either case this may include a trainee or apprentice.

‘Student’ also includes students not on credit-based programmes, or students on courses provided through franchising or validation arrangements with a registered provider. In these types of arrangement the registered provider will owe its ‘secure’ and ‘code’ duties to students on courses provided through a franchising or validation arrangement with an unregistered provider.

Students’ union

‘Students’ union’, in relation to any institution, has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that part applies (see section 20 of that Act).

Visiting speakers

A person who was invited to speak at a registered higher education provider, constituent institution or students’ union, or who would have been invited had there not been a restriction on this or does not include a person who wanted or requested an invitation to speak but was not invited. It may include a person whose invitation has not been approved through an internal approvals process.