

# Improving university governance: what we can learn from the OfS latest regulatory report

09 April 2025  Nathalie Jacoby-Danesh and Kate Gallagher

[Freedom of speech and academic freedom sat at the heart of the recent decision by the Office for Students \(OfS\) to fine the University of Sussex a headline-grabbing £585,000 on 26 March 2025.](#)

The fallout will continue to engage the sector for months to come, especially in light of reports that the university is planning to challenge the decision in court.

The OfS's decision constitutes a stark indication of the regulator's expectations in relation to governance and its expansive approach as to the policies and issues which might be taken into account when making its assessment.

This was the first monetary penalty issued by the OfS for a university's non-compliance with two initial and ongoing conditions of registration regarding governance:

- Condition E1 (public interest governance).
- Condition E2 (management and governance).

It's difficult to know to what extent the regulator's focus on governance was driven by a desire to make a strong statement regarding freedom of speech and academic freedom, particularly with the imminent introduction of the delayed Higher Education (Free Speech) Act 2023.

However, we would recommend that registered higher education (HE) providers review the terms of policies impacted by the decision and how EDI, free speech and social media use policies and governing constitution terms connect in practice, to review whether additional steps might be taken to shore up compliance with Conditions E1 and E2.

## “much to contend with...”

Institutions already have much to contend with in terms of both finance and resource climate; however, the OfS has reminded the sector that while it does focus a large amount of its own internal resources on supporting those institutions struggling to comply with financial sustainability and viability (for instance by putting all new applications for registration or DAP on hold), it will continue to monitor and enforce all other ongoing conditions of registration.

With this in mind, we set out below a reminder of guiding principles and would advise registered providers to ensure that their governance reviews continue to take place on a regular basis, including considering the effectiveness of their governance arrangements, appropriateness of (and compliance with) their various schemes of delegation and to take great care when considering whether any event needs reporting to the OfS.

## What is governance and why does it matter?

The [CUC Code of Governance](#), which many HE institutions have adopted on a 'comply and explain' basis provides that:

*“Effective governance requires an organisational culture which gives freedom to act; establishes authorities and accountabilities; and at its core fosters relationships based on mutual respect, trust and honesty.”*

As stated by the [Charity Governance Code for large charities](#) (such as most publicly funded universities):

*“Good governance is fundamental to a charity’s success. It enables and supports a charity’s compliance with the law and relevant regulations. It also promotes a culture in which everything works towards fulfilling the charity’s vision.”*

Good governance is an initial and ongoing condition of registration with the OfS. The OfS will have evaluated at registration whether a provider’s governance structure, governing body and governing documents are appropriate for the institution’s size, complexity and legal form.

It will continue to monitor a provider’s governance on an ongoing basis, including on how management and governance allow a provider over time to remain compliant with all other material conditions of registrations, such as financial sustainability and quality assurance.

## What are the key take aways from the OfS’s decision regarding the University of Sussex?

Condition E1 of the OfS Regulatory Framework states that a provider’s governing documents must uphold the public interest governance principles applicable to the provider.

The governing documents of the provider comprises all constitutional and governing documents, ranging from the top tier documents (such as Royal Charters, Instrument & Articles of Government, Articles of Association) to second tier documents (such as Statutes, Regulations, Bye-Laws) and auxiliary documents (such as schemes of delegation and policies).

### Upholding the public interest governance principles

All these governing documents must uphold the public interest governance principles, which are set out in Annex B of the OfS Regulatory Framework. Academic freedom and freedom of speech are two of the twelve principles which apply to registered English providers with degree awarding powers and in receipt of public funding.

In this particular case, the OfS found that certain elements of the University’s Trans and Non-Binary Equality Policy Statement prohibited lawful speech and had a chilling effect, which was in breach of the public interest governance principle to safeguard freedom of speech adequately.

However, institutions should not lose sight of all the other principles which could equally give rise to OfS scrutiny, such as:

- The provider must operate **openly, honestly, accountably and with integrity** and demonstrate the values appropriate to be recognised as an English HE provider.
- **Students must have the opportunity to engage** with the governance of the provider and influence perspectives of the governing body. Effective engagement with students is also part of Condition B2 (Resources, support and student engagement) which forms part of the quality and standards conditions.
- The governing body is responsible for receiving and testing assurance that the institution’s **academic governance arrangements** are adequate and effective through explicit protocols with the academic board.
- Comprehensive corporate **risk management and risk control arrangements** (including for academic risk) need to be in place to ensure the sustainability of the provider’s operations and its ability to continue to comply with all of its conditions of registration. A risk register needs to be maintained, reviewed and updated, risk mitigation strategies need to be adopted and audited on a regular basis.
- The size, composition, diversity, skills mix and term of office of members of the **governing body** need to be appropriate for the institution,
- Sufficient numbers of the governing body need to be **independent** of any institution in receipt of public funding, and their terms of office should normally be limited to eight to nine years in accordance with principles of good governance, also applicable in the wider charities sector. All members of the governing body need to meet the **‘fit and proper’** person test when they are appointed to office and on an ongoing basis. Institutions should also note that the OfS Regulatory Framework does not conclusively define all the criteria for this test and that they need applying in light of other applicable regimes (such as company law, charity law, HMRC guidance, Financial Conduct Authority).
- **Regularity propriety and value for money**: Providers need to ensure that they are compliant with the new Procurement Act, that public funds are managed appropriately and in line with any conditions of grants and that the use of funds by any sub-contractors, sub-grantees or franchisees are monitored and compliant with initial conditions of funding. Transparency about value for money needs to be ensured for the benefit of students and taxpayers.

- The provider must **retain** records of its governing documents setting out its degree awarding powers (where there are no orders issued under Acts of Parliament to that effect).

## Condition E2 (Management and Governance)

This condition states that a registered provider must have in place adequate and effective management and governance arrangements to operate in accordance with its governing documents, deliver in practice the public interest governance principles that are applicable to it, provide and fully deliver the higher education courses advertised, and continue to comply with all conditions of its registration.

As far as the University of Sussex is concerned, the OfS found that several of the governing documents setting out the University's position on free speech, academic freedom and trans and non-binary equality policy statements had been approved by governance groups within the University that did not hold the appropriate delegated authority to do so.

According to the OfS, this amounted to a failure to have adequate and effective management and governance arrangements in place.

## Ultimate responsibility

The governing body of registered providers retains ultimate responsibility for the affairs of a registered provider. Authority can only be delegated in accordance with duly approved, documented and clearly drafted schemes of delegation, whether they are set out in committees' terms of reference, regulations, policies, employment contracts or other internal documents.

In case of doubt, terms of delegations should be narrowly construed, and the governing body should be asked to either clarify the terms of delegation or adopt the decision themselves.

Acting outside of a delegated authority can have serious consequences for the office holders or employees concerned (e.g. disciplinary issues), which can open up the institutions to third party claims, as well as OfS fines.

## Other potential breaches

As far as other potential breaches of Condition E2 are concerned, the OfS Regulatory Framework sets out a non-exhaustive list of behaviours that may indicate a provider is not compliant with this condition.

This list includes the following:

- The provider does **not act openly, honestly, accountably** and with integrity: a potential catch-all provision.
- The provider is **unable or unwilling to provide** timely, accurate and complete information to the OfS [...] to its students and other stakeholders: 'inability' to provide information can be a difficult scenario to navigate, especially where external factors come to play, such as external audits or the interplay between private providers and their wider corporate group.
- The provider **does not review the adequacy and effectiveness** of its own governance arrangements, in particular with regard to the public interest governance principles and to ensure course delivery and compliance with its conditions of registration, or it carries out such a review but does not take appropriate action: the effectiveness of a provider's governance arrangement need to be reviewed on a regular basis. External audits of the effectiveness of the governing body and its committees should be carried out, together with a regular review of the governing documents and policies of the institution.
- **Delegations are inappropriate**, either delegating important matters below the governing body or retaining too much material to the governing body and so reducing its ability to scrutinise important issues
- **Not all governing documents are readily and publicly available**, publications on open websites should be the norm these days.
- **Reports to or minutes of decision-making bodies are perfunctory** or designate extensive material as confidential without adequate reason.
- **Students or staff complain** that higher education courses are not delivered as advertised – such complaints also tie in with the institution's obligations to comply with CMA guidance for HE providers and wider issues regarding the handling of complaints by students.
- **Conditions of registration are breached** and/or steps are not taken to mitigate an increased risk of a breach – this constitutes a reminder of the importance of governance as the mechanism which should ensure full legal and regulatory compliance.

Please contact us if you would like to discuss the current position in relation to free speech and academic freedom, including how your institution can strengthen its governance arrangements.

# Contact

Nathalie Jacoby-Danesh

Partner

nathalie.jacoby-danesh@brownejacobson.com

+44 (0)330 045 2833

Kate Gallagher

Partner

kate.gallagher@brownejacobson.com

+44 (0)330 045 1314

---

## Related expertise

Constitutional and governance advice in higher education