

London Higher response to the OfS consultation on proposed regulatory advice and other matters relating to freedom of speech

Question 3: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 3 on what are 'reasonably practicable steps'? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out.

Further clarity is still needed regarding 'reasonably practicable steps', as the illustrative examples do not reflect the diversity of institution type or how this will differ across different contexts. OfS acknowledgement that these steps will vary between institutions and specific circumstances is welcome, however the examples given in paragraph 39 only refer to a 'large provider' or 'small relevant students' union' - more guidance is needed that adequately appreciates the diversity of the HE landscape and what may constitute 'reasonably practicable' for several different types of institution.

As mentioned in previous responses, as well as responses to other free speech consultations by our members and their students' unions, further guidance is still needed for students' unions in order that they may comply with their duties, as the current iteration is of limited use. Examples of practical guidance that would be welcomed by students' unions has included (as set out by [UCL SU](#)):

- Risk assessment templates/toolkits for managing external speaker events.
- Code of Practice template that considers the 'broad range of activities' this is expected to cover.
- Template external speakers' approval procedure.
- Documents outlining expected approach to the regulation of freedom of speech in clubs, societies, networks and during elections.
- An example decision-making framework to help navigate the tension between charity law, equalities law and the free speech duties.
- Examples of what might be considered a 'failure to comply or a risk of failing to comply' and examples of the likely response from the OfS to different types of breach.
- An explainer with examples of what the OfS considers as 'Freedom of Speech within the law' in context, bearing in mind that the same use of words in one context might be 'legal' and appropriate in one setting and potentially fall into the realms of harassment or incitement in another.
- A clear point of contact at the OfS, empowered to support students' unions with decision making in line with the new duties to ensure full compliance.

Question 4: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 4 on steps to secure freedom of speech? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out.

Provision of guidance by the OfS on free speech matters is welcome, and we recognise that the examples given are illustrative and not intended to be comprehensive. As illustrative examples, they are short and simplified, in order to paint an indicative picture of potential scenarios. Nevertheless, the brevity of the examples provided means that they lack nuance and do not adequately reflect the complexity of real-world cases. In the absence of established practice or real-world examples to draw from, there is a risk that the examples provided by the OfS are used as reference points and accepted practice for similar topics, even if this is not the OfS' intention. Further examples, which help institutions to understand the procedural elements of new regulation, will be of more use in shaping institutional processes regarding the implementation of new free speech duties.

As referenced in previous London Higher responses, free speech duties are often balanced against other responsibilities, such as duties under the Equality Act or institutional codes of research ethics. It is therefore concerning that Paragraph 75(d) of the guidance document states and that in 'any case of any conflict the free speech code of practice will take precedence'. This appears to go beyond 'reasonably practicable steps' to secure free speech within the law and towards an absolute requirement and a prioritisation of policies by the OfS which could lead to:

- Interference with disciplinary matters, bullying and harassment, as set out by the OfS elsewhere – such as a condition of registration pertaining to harassment; and
- Disregard for ethical research as established and accepted as international good practice.

We reiterate our earlier call for the OfS to provide support to universities on balancing their duties regarding free speech and academic freedom and potential intersections with equality, diversity and inclusion (EDI) and harassment considerations, including recent concerns around growing antisemitism and insecurity reported by Union of Jewish Students, and urge this to be taken into account. Reference in paragraph 75(d), to precedence of the free speech code of practice over 'processes and policies relating to equality or equity, diversity and inclusion, including the Public Sector Equality Duty and harassment/bullying is of concern, and we stress that the free speech regulation must work in harmony with the OfS' own wider work, e.g. on harassment and sexual misconduct including a potential condition of registration and the OfS' Office for Fair Access and Participation's work on:

- Equality of opportunity (e.g. [Access and Participation Plans](#)); and
- Equality of outcome (e.g. [attainment/awarding.gaps](#)).

Paragraphs 30-33 provide an overview of academic freedom, and the intersection with the Equality Act 2010 and the Public Sector Equality Duty (PSED). More guidance is needed on this issue, as well as how universities balance their duties with regards to harassment and free speech. This is extremely important, given the long-awaited response to the OfS' May 2023 consultation on harassment and sexual misconduct.

AdvanceHE sets out examples of protected beliefs, and how these add complexities to higher education institutions and their duties. It cites *Miller v Bristol* [1400780/2022] and philosophical beliefs that may count as protected (per the Grainger criteria), where manifestations thereof, as stated in paragraph 30 of this guidance 'will therefore not amount to unlawful harassment by virtue of viewpoint or opinion that it expresses, except in the most exceptional circumstances'. As UUK notes, in the context of the ongoing Israel-Gaza conflict, this is the delicate balance universities are trying to manage: upholding freedom of speech and academic freedom within the law, fostering good relations between multiple groups/stakeholders, long-standing commitments to EDI work, and responsibilities to students and staff regarding bullying and harassment. It is critical that the OfS' own work across the piece is joined up, ensuring a coherent regulatory framework and allowing members to confidently take reasonably practicable steps to secure and promote free speech within the law, whilst noting other multiple commitments.

It is positive that the OfS' Director for Freedom of Speech and Academic Freedom recognises that institutions 'may face difficult decisions when balancing the right to freedom of speech within the law against the need to protect students from unlawful harassment and intimidation. We acknowledge that they may have to take these decisions quickly, on the basis of incomplete or conflicting reports, and in the presence of extensive media and public interest' (letter dated 10 May 2024). We welcome dialogue with – and guidance from – the OfS as it seeks to 'avoid imposing obligations on institutions to prevent harassment that conflict with their new free speech duties'.

Another concern that has been raised is the potential conflict of interest regarding the OfS as the regulator for freedom of speech and also the regulator (but not statute holder for) Prevent duties. Clarification is needed regarding potential situations in which these two duties may come into conflict. We welcome AdvanceHE's latest publications on protected beliefs in higher education, promoting good relations in HE, and freedom of speech in a HE legal framework. Universities know that under their Prevent duties, they must have particular regard to academic freedom/freedom of speech, such as having due regard to the need to prevent people from being drawn into terrorism. Any further guidance and examples of the intersection between freedom of speech and Prevent duties are welcomed by our members as they seek to balance their duties.

As regards research ethics, London Higher’s members (via our Research Excellence network) have existing commitments to research integrity and ethical conduct. Paragraph 105(b) stating that academic freedom within the law should not be restricted/compromised because of perceived/actual tension with an organisation’s policies or values does not take into account considerations beyond the law, such as internationally accepted good practice and norms regarding the research process. Many London Higher members are subscribers to the UK Research Integrity Office (UKRIO) and are involved in work the UK Committee on Research Integrity (UKCORI), which serve to promote good practice, tackle research misconduct and ensure good governance. Careful consideration of unintended consequences must be given, as referenced in UUK’s response.

The interaction between free speech and academic quality assurance and standards is also important to highlight. Academic freedom within the law is defined in Part A1 of HERA 2017 as being able to ‘question and test received wisdom and put forward new ideas and controversial or unpopular opinions’ without risk of adverse consequences, but clarification is urgently needed regarding instances in which:

- ideas or opinions put forward may be legally expressible, but also
- against established international standards as set out through rigorous research.

Given the OfS’ role as designated quality body, and institutions’ duties to provide an academic experience that is of high quality and standards, further clarification from the OfS on this intersection is needed.

Question 5: Do you have any other comments on our proposed Regulatory advice?

We are concerned with the burden associated with the implementation of new free speech regulation, especially if this is expected to be operational by 01 August 2024. For example, offering adequate training and induction on free speech/academic freedom is challenging – this is a policy area that is still not fully understood, so there is insufficient training currently available. Moreover, in the early stages of implementation, institutions may be competing for the same external training providers and services. As a developing policy area, and one which is highly nuanced, steps should be taken to reduce institutional burden, for example:

- The OfS should be expected to deliver (or assist with the delivery of) adequate training as regards Paragraphs 114, 115(a-k) and 116(a-c).
- Acceptable ‘milestone markers’ or reasonably practicable steps to develop/deliver training should be set out, in order that institutions, students’ unions and other bodies may evidence their progress whilst they fully get to grips with the new requirements.

As regards paragraph 75, it seems unnecessarily burdensome that free speech policies must be included in so many different documents – as opposed to, for example, free speech duties being displayed on a university website and noting the different areas with which it will interact.

Another concern raised by members is that the guidance states that the OfS ‘may’ seek information from a respondent who has had a complaint brought against them. It is our view that the OfS should contact respondents as a matter of course – it would be extremely concerning if the OfS was to find a complaint partially or fully justified without having sought representation from the respondent.

Question 7: Do you have any comments on our proposed approach to recovery of costs?

We note that the proposed approach to recovering costs is in line with existing OfS practices as set out in Regulatory advice 19 (paragraphs 46-53). It is positive that cost recovery under free speech regulation is in line with established process. We are in alignment with UUK’s call that a cap for costs recovered per investigation (e.g. at 100% of actual costs incurred) be set and published for transparency. Members have raised concerns regarding value for money – with institutions already paying a registration fee, excessive cost recovery could negatively impact an institution, at a time of increased pressure on higher education finances, per the OfS’ own recent [insight briefing](#).

Paragraph 58 states that the OfS is empowered to recover costs incurred in making a decision that finds a complaint partly or fully justified against a respondent. Clarification would be welcomed from the OfS on whether institutions have recourse to reimbursement of costs in cases where a complaint is not found to be justified.

Question 8: Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.

There is a concern about the jurisdiction and applicability of the free speech regulation across several settings. Annex B defines ‘students’ included under the regulation as individuals on any course leading to an award granted by an institution. It is unclear whether this is limited to direct award by an institution, or if this extends to franchised/partnership provision. This raises particular concerns around how this regulation relates to:

- Franchised provision and partnerships;
- Transnational education (TNE); and
- Placements and Professional Statutory and Regulatory Bodies (PSRBs);

On the latter point, an illustrative example would be – how should a university deal with a situation in which a student on placement in a healthcare setting who expresses something that is both:

- permissible under the free speech regulation; but also
- in contravention of placement guidelines/codes of conduct regarding behavioural standards?

With reference in paragraph 75(d) stating that no content in other documents ‘should be read as undermining or conflicting with the free speech code of practice’, urgent clarification is needed in situations such as the above where professional standards and expectations are concerned.

Reference to ‘providers, constituent institutions and relevant students’ unions’ does not specify the extent to which, if at all, overseas campuses and other forms of transnational education (TNE) are included. This is a particularly delicate issue, and clarification is urgently needed. For example, if TNE falls under the scope of these proposals, it is unclear how paragraph 75(d) specifying the precedence of the free speech code of practice would relate to the laws of the countries in which TNE is delivered.

In countries where laws on free speech are markedly different to the UK, the implementation of (in this case) English regulatory duties may cause individuals to be at risk of contravening host country’s legal or regulatory duties. We support UUK’s call for clarity regarding the scope of application of free speech regulation as concerns TNE, and urge the OfS to consider how it avoids potential harm to, and undue burden on, institutions and individuals related to the provision of TNE outside the UK.

Another issue that has been raised is whether the regulation extends to digital/hybrid events and social media, or only to physical events taking place on campus. Clarification is welcomed on this point, as is guidance on how complaints against (sub)contractors/partners and similar are handled.

We also endorse UUK’s call for clarification regarding whether commercial bookings are within scope of free speech regulation.

Question 9: In your view, are there ways in which the objectives of this consultation could be delivered more efficiently or effectively than proposed here?

London Higher reiterates its support for a light-touch, risk-based approach to regulation to avoid undue burden and stress. Clarifications regarding tensions between free speech and other regulatory duties (such as harassment) must be addressed, and requirements should be streamlined to allow effective implementation and operationalisation of all duties by institutions.

Question 10: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

London Higher members believe careful attention should be paid to the issue of individuals with protected characteristics. Universities are often in a difficult position when balancing the protection of both free speech and their responsibilities according to the Equality Act. Students and staff members who belong to protected groups, particularly groups at the forefront of media debate, must have their needs considered in detail at the earliest possible stage of planning new complaints systems. Universities must have the time and resources to deliver on all their responsibilities to all groups and make sure no protected groups are left out in the cold. This is a particular consideration for London, where students from all walks of life share space in the country's most diverse student population. As noted in sector responses to the OfS' consultation on a new approach to regulating harassment and sexual misconduct in English higher education, we strongly urge the OfS to provide support to universities on balancing their duties regarding free speech and academic freedom and intersections with EDI, harassment and sexual misconduct considerations.

Question 11: Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider, constituent institution or relevant students' union or for any particular types of student?

It is important that free speech regulations do not lead to self-censorship or risk aversion that may unintentionally curtail free speech. This may occur due to the requirements as set out being perceived as too burdensome, leading to institutions, individuals and students' unions pre-emptively deciding not to host events that may be subject to lengthy processes. We note that the OfS states (paragraph 67) that 'regulation of these activities should not be unnecessarily onerous' - more detailed guidance that sets out reasonably practicable steps for diverse institution types may help those subject to free speech regulation to be confident in organising events and ensuring they have suitable processes and structures in place, without undue administrative or compliance burdens.