

# **Our response to the Office for Students (OfS) consultation on the OfS's approach to regulating students' unions on free speech matters**

Universities UK (UUK) is the collective voice of 142 universities in England, Scotland, Wales, and Northern Ireland. Its mission is to create the conditions for UK universities to be the best in the world, maximising their positive impact locally, nationally, and globally. Universities UK acts on behalf of universities, represented by their heads of institution.

This response was developed in partnership with the Universities and Colleges Employers' Association (UCEA), Association of Heads of University Administration (AHUA), the Association of Managers of Student Services in Higher Education (AMOSSHE) and the Committee of University Chairs (CUC), and with support from an advisory group with representation from across the sector.

## **Question A: Do you have any comments on our proposals on maintaining and making publicly available a list of relevant students' unions?**

No.

## **Question B: Do you have any comments on our proposed approach to providing guidance for students' unions, in the regulatory framework?**

We welcome the proposal to provide guidance for students' unions (SUs). It will be important for the OfS to consider how regularly this information is disseminated and

publicised, given that not all students' unions have employed staff and the annual turnover of officers.

The OfS must ensure guidance is clear and accessible to students' unions, acknowledging that this is new territory for students' unions and they do not have the familiarity with regulatory language that providers do. Students' unions should be supported to understand the boundaries of protected speech, recognising that this is a difficult and complex issue covering many legal aspects (eg charity law, equality law, criminal law) and that students' unions are unlikely to have resource to seek specialist legal advice in each case. The OfS guidance should reflect that SUs need to undertake a balancing exercise, having particular regard to the importance of freedom of speech and other legal obligations, taking proportionate advice where required, and come to a reasonable decision. It should also provide further information on the scope of a code of practice, including what should be included and the parameters of the 'exceptional circumstances' in which a students' union can ask for a contribution towards security costs.

The guidance should also recognise that the majority of students' unions have charitable status, and have legal duties to promote the educational purposes of the union, enforceable by the Charity Commission, as highlighted by the National Union for Students (NUS) Charity. For example, this includes a duty to promote activities that are within the scope of the charity's educational objects, for the benefit of the public, which includes a requirement for balance. This duty could result in certain speakers being invited or not invited. These duties also include acting prudently and preserving the charity's assets and reputation, which could be damaged by inviting speakers that cause harm and offense. The OfS should further consider how students' unions' new duties under these proposals interact with students' unions legal duties enforceable by the Charity Commission, and make clear how they expect students' unions to manage and balance these duties in practice.

Furthermore, it is important that guidance does not inadvertently have a chilling effect on free speech by causing undue nervousness of students' unions about breaching their duties. We understand the proposals have caused distress and concern for many students' unions, and we urge the OfS to work with students' unions as partners in implementing this regulation, understanding their concerns and seeking to mitigate them wherever possible.

Students' unions may have very small budgets or no budget, particularly at small providers, so their ability to take 'reasonably practicable' steps will need to be viewed with proportionality.

It is also essential that the guidance clearly sets out the responsibility of the university for the students' union, and how the OfS expects this to work in practice.

### **Question C1: Do you have any comments about our proposed approach to monitoring?**

We are supportive of a risk-based and targeted approach, and welcome the OfS' proposal to not systematically assess the compliance of each relevant students' union on a cyclical basis. We would welcome further clarity on how complaints received via the complaints scheme will feed into this risk-based monitoring.

We note that the consultation states that reportable events will form part of the OfS' monitoring of students' unions in relation to free speech. Reportable events are the responsibility of the provider, so it is essential that the OfS provides further guidance on expectations on the provider to submit reportable events in relation to free speech, and how that is intended to work in practice. Free speech-related events will often have crossover between the provider and the students' union and the OfS should clarify how they see this working.

We note also that a students' union will be required to report an event or matter within ten days of the day that it is identified. At particularly busy periods (eg elections, welcome week) it may not be possible for students' unions to meet this requirement. We suggest that this requirement is amended to be 'as soon as reasonably practicable'.

Students' unions should be supported to understand and comply with the information reporting requirement, again acknowledging that this is a new process and new territory for students' unions.

We also urge the OfS to work closely with the Charity Commission as students' unions' primary regulator, and ensure that the OfS' regulation is appropriately joined up with the regulation by the Charity Commission.

### **Question C2: Do you have any comments about our proposed approach to interventions?**

We note that, should guidance be amended as a result of responses to this consultation, there is likely to be insufficient time for students' unions to prepare for their new duties before 1 August 2024. The OfS should provide a guarantee to students' unions that they will be given adequate time to prepare following the

publication of revised guidance, and consider introducing a transition period in which students' unions will not be penalised, including monetary penalties.

The OfS should make clear in guidance whether and how a students' union being found to be in breach of their duties could impact on a university's status with OfS.

In guidance, we would encourage OfS to include examples of voluntary undertakings, to provide further clarity for students' unions and providers.

It would also be useful to understand whether a provider can make representations on behalf of the students' union, reflecting that in practice universities work extremely closely with their students' unions.

### **Question D: Do you have any comments on our proposed approach to determining the amount of a monetary penalty?**

In its approach to monetary penalties, the OfS should recognise the limited resource of students' unions, their capacity to seek legal advice and the need for students' unions to balance this duty alongside others. Monetary penalties would have an adverse effect on students' unions, many of whom have very small budgets. The OfS should consider what the impact of this might be, including having a direct impact on provision for student societies, welfare and other issues.

It may also include the possibility of ending the students' union entirely. Our view is that it would not be in the interest of students for a students' union to have to close because of a penalty from the OfS. Monetary penalties should be a last resort in only the most serious cases of deliberate failure to comply with the duties, and this should be made clear to students' unions to avoid an unintentional chilling effect on free speech.

### **Question E: Do you have any comments on our proposed minor and consequential revisions to the regulatory framework?**

No.

### **Question F: Do you have any comments on our proposed approach to the publication of information?**

Our view is that OfS should inform providers about the publication of information regarding the provider's students' union.

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

There is a wide variety of relationship structures between providers and students' unions in the sector, and the OfS needs to ensure that it understands these structures and how this proposed regulation relates to different types of students' union. For example, some smaller providers have students' unions that are not fully independent and are instead departments of the institution itself. The OfS needs to clarify how this regulation is intended to work in these kinds of cases, and to be clear about where responsibility lies with the provider and where it lies with the students' union.

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

Our view is that there is a potential negative impact of these proposals on individuals on the basis of their protected characteristics. Although the consultation sets out that OfS' intention is for the approach to support open, tolerant discussion of controversial matters, this fails to acknowledge inequalities in power and privilege between different groups. Speech which marginalises, offends, victimises, harasses or discriminates against people who share particular protected characteristics or have otherwise been oppressed is more likely to be harmful than against other groups.

We urge the OfS to undertake and publish an equality impact assessment on the proposals. In all its work on freedom of speech, the OfS must ensure SUs are supported to balance their requirements on freedom of speech with their other legal requirements and duties (including on harassment and discrimination, equality law, charity law (as outlined in the other current consultation) and safeguarding, among other things, and ensure that staff and students from marginalised groups' safety and sense of belonging in higher education is not in any way compromised by this work.

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

Not applicable.