Universities UK

Our response to the Office for Students (OfS) 'Consultation on proposed regulatory advice and other matters relating to freedom of speech'

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 Advance HE, the Association of Heads of University Administration (AHUA), the Committee of University Chairs (CUC) and the Universities and Colleges Employers Association (UCEA), and with support from an advisory group with representation from across the sector.

Our response

Question 1: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 1 on the 'secure' duties and the 'code' duties?

No

Question 2: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 2 on free speech within the law?

We appreciate the OfS setting out the legislation relevant to free speech. However, we have concerns about paragraph 13, which states that:

'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. This includes (for instance) provisions of the Equality Act 2010 prohibiting discrimination. It also includes common law on confidentiality and privacy.'

This paragraph fails to recognise that:

1. Many universities are themselves public authorities for the purposes of the Human Rights Act and thus exercise the responsibilities, and the powers, of the state in relation to Convention rights. This must include the right to interfere with those rights to the extent permissible by the Convention. The phrase 'within the law' must be interpreted in a manner compatible with Convention rights.

2. This means that employment contracts, policies and procedures or student policies and procedures can also lawfully restrict speech where the restrictions are necessary in a democratic society to protect the rights and freedoms of others, provided that these restrictions are proportionate and go no further than is necessary in the circumstances. This point has been noted by the European Court of Human Rights in many cases, for example in Giniewski v France (2006) which states that, 'As paragraph 2 of Article 10 recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs'.

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.

We understand that the steps set out in the guidance are intended to be illustrative rather than exhaustive and that what is reasonably practicable will vary for different institutions and students' unions. It is positive that in this section the OfS acknowledges that what a reasonable step will vary for different providers and students' unions.

However, our view is that the guidance fails to meaningfully recognise the range of types and sizes of provider, and that reasonably practicable steps will significantly differ across provider types. In particular, the guidance has limited applicability to students' unions and for many students' unions the steps suggested by the OfS are not at all reasonably practicable. The OfS should provide further guidance for students' unions to enable them to comply with their new duties.

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.

Examples

Although we welcome the OfS' decision to provide guidance on freedom of speech, the examples provided by the OfS are oversimplified and exaggerated in nature and do not reflect the highly complex, nuanced situations that providers face relating to freedom of speech. This significantly limits their usefulness to providers, and means they are unlikely to be helpful in informing universities' approaches to dealing with real cases. Several of the examples touch on sensitive areas, and we are concerned that the simplistic way in which these examples are presented without nuance or context means that there is a risk they could be used to justify decisions on much more complex real-life cases. There is a risk of the examples becoming de facto

instructions for dealing with certain topics and gaining traction of their own, even if this is not how they are intended to be used by the OfS.

For example, Example 6 presents an exaggerated, simplified situation in which the OfS states that the vice-chancellor not making a statement on the situation outlined for two weeks may be unacceptable. In a real-life situation, it may be perfectly reasonable for a provider to take time to consider its response, as the provider may need to conduct an investigation to find out what happened and it is essential that a fair, proper process is followed, including consulting with the person that the situation concerns. The statement should not prejudice the outcome of the investigation one way or the other by committing not to take any disciplinary action. If, during the investigation, other findings emerge which mean that the provider does need to take some action, then the provider is already on record as ruling this out, thereby undermining trust and confidence in future statements from the provider.

Another example which is concerningly oversimplified is Example 12 on IT acceptable use policies, which is likely to apply to all providers. It does not adequately reflect the current legal context and we strongly suggest it is mapped against IT-related offences, eg sharing false information about someone online. As well as this, this example could make it very difficult for providers to set expectations about staff and student online behaviour. Providers could and do list specific types of content that are not permitted, but the onus to not restrict speech should be in the application of the policy, not just in ensuring that the terms used in the policy are specific enough that there is no risk that legitimate speech could ever be 'caught' in them.

In Example 10, it would be very helpful for the OfS to clarify what is meant by 'political theory'.

We appreciate that real case studies will emerge as the OfS deals with cases, and we urge the OfS to publish information about this in an appropriate way as soon as possible once the duties are in force. In the meantime, we recommend that there should be a clarificatory paragraph before the case studies highlighting that the case studies are high level examples to give indicative responses to some cases, but that every example will need to be carefully considered in the context of the case, the reality is likely to be much more complex and nuanced than these examples suggest, and the examples should not prejudice decisions on real cases. It would also be helpful for the OfS to develop a few more detailed case studies that explicitly set out the process of approaching these cases and the various duties that universities need to balance, as has already been done by several of our members in preparation for their new duties.

Burden

It should be noted that the guidance represents significant burden for providers. For example, the requirements around training are onerous, and we note that this kind of training is not currently available. Our view is that the training requirements on providers are unrealistic given that any training has to account for the current understanding of the law including ambiguity, that judgements have been inconsistent in their treatment of free speech and academic freedom, and the importance of context and circumstances of individual cases in decision making. We propose that an alternative reasonably practicable step would be to ensure staff involved in making decisions in relation to the activities listed in paragraph 115 are able to access advice related to free speech that they may need, for example through a named contact.

We are also concerned about other areas of potential burden for our members, including:

- Paragraph 100, which says that providers and students' unions should record all decisions that could directly or indirectly affect free speech within the law. This could become an enormous record keeping exercise given the breadth of topics in the guidance and complexity of decision making.
- The requirements around code of conduct, in particular paragraph 62, which is extremely wide in scope. The OfS should provide further clarity on what they consider to be in scope.
- Paragraph 102, which asks that the terms of reference for a very broad range of committees consider the potential impact on free speech.
- The requirement for free speech to be cross referenced in all of the other policies listed in paragraph 75, which seems to be disproportionate.
- Paragraph 47, which sets an expectation that providers keep a record of evidence on decisions made. This is likely to be disproportionate and inefficient, as employment practices are already robustly regulated by employment law.

Equality, diversity and inclusion (EDI) and tackling harassment

The position of the draft guidance on issues related to equality, diversity and inclusion is of significant concern, and we urge the OfS to give further consideration to how universities' EDI activity, including work to tackle harassment, is intended to work with this guidance in practice. The guidance seems to take a particular negative

position on EDI work, assuming it is undertaken in bad faith. EDI work is a well-established, valuable part of universities' work and in many cases is mandated or encouraged by the OfS, eg work to close the ethnicity attainment gap. We strongly suggest that the OfS reviews the guidance in this light, ensuring both that it aligns with the rest of the OfS' activity and that there are not potential negative impacts on advancing equality of opportunity and work to promote equality, diversity and inclusion.

The guidance fails to properly address the balancing of harassment and free speech duties. Given that the OfS is due to shortly announce a condition on harassment and sexual misconduct, it is essential that these pieces of regulation work together smoothly, especially as this is one of the areas our members tend to find most complex to balance with free speech duties. There is an oversimplified implication in the guidance that free speech for each individual should be prioritised over all else, including EDI considerations and the need to promote good campus relations. However, in practice, work to promote good campus relations is an essential part of the picture, as our members rely on their values and behaviours expectations or frameworks to manage difficult cases and to promote good relations, tolerance and respect between all staff and students. This needs to be balanced against freedom of speech considerations. This involves some inherent restriction of speech (eg bullying and harassment policies), but is part of universities' role as communities and students and staff being good citizens of that community. This is also essentially the balance that universities are attempting to strike in the context of the Israel-Gaza conflict. The draft guidance does not acknowledge this responsibility at all.

For example, Example 17 says that an anonymous reporting mechanism to report 'problematic speech' may suppress free speech. This is extremely concerning, as it sets an extremely high bar for reporting incidents, and puts an unreasonable onus on students or staff members to understand what is and what is not legally harassment. In our view, an infringement of free speech would come from the university response, not just the receiving of information. If a report is not dealt with appropriately, we agree that this would be a concern, but we do not agree that the existence of such reporting mechanisms would be restrictive to free speech. As acknowledged in other aspects of the OfS' work, encouraging reporting is essential to tackling harassment. There is a risk that perpetrators of harassment will be emboldened by this guidance because of the framing of the duties as presented here.

Quality assurance and academic standards

We also have significant concerns about how this guidance is intended to relate to quality assurance and academic standards. We agree that academics should be able

to teach and communicate ideas that may be controversial or unpopular but lawful, but the guidance fails to acknowledge that course content has to be submitted to quality assurance processes, which are required by the OfS. For example, if an academic was proposing to teach a course in which the majority of the content would go against internationally agreed upon scientific evidence (eg anti-vaccination), the provider's duties to quality and academic standards would mean that this course should not go ahead, even if it restricts the academic's free speech. Universities are autonomous institutions whose primary purpose is learning and academic enquiry, and they therefore must be able to uphold standards of scientific rigour that some may see as restrictive to free speech. Because of this, the statement 'providers, constituent institutions and relevant students' unions should seek to expose their members and students to the widest possible range of views' is too widely framed and problematic, and the OfS should consider reframing this to acknowledge academic standards and the importance of strong academic governance in the final version of the guidance.

Research

On research, the guidance as drafted (paragraph 105) could pose problems for the multiple factors that need to be considered, and put in place, before research can be conducted. The considerations that need to be taken into account should be wider than the law. The wording in the guidance should be amended to acknowledge the norms of research integrity and ethics as set out in policies and guidance. Otherwise, the unintended consequence of the proposed could be that staff undertake research without the proper research ethics in place, and then have cause for complaint that a university is contravening their academic freedom when asked to stop the research until research ethics are in place.

The guidance on research, as drafted, also has the potential to pose reputational risk. Universities undertake due diligence on partners and if a partner has the potential to damage other opportunities (eg if tobacco funding precludes a university from seeking funding from a cancer research charity), or an institution's reputation, the current wording does not allow a university to refuse funding for that research. The guidance should distinguish between the topic (or expected conclusion) of the research and the source of funding.

Further points for clarification

We are concerned about the assertion in paragraph 75d that in a case of conflict with other policies, 'the free speech code of practice will take precedence'. It would be useful to understand how the OfS has reached this view, as it seems to be an absolute

statement of requirements beyond the taking of 'reasonably practicable steps'. This prioritisation of policies could potentially be extremely problematic, especially regarding disciplinary matters and harassment.

Paragraph 86 of the guidance states that if a speaker breaks the law, it is the speaker who is culpable. However, this may not always be the case. For example, in cases of harassment taking place at an event, the university could in certain circumstances be liable, such as where the speaker is an employee. As well as this, there is a lack of clarity around some of the terms used for visiting speakers, eg references to 'unnecessarily onerous' processes and 'longer than necessary'. The guidance does not acknowledge that the timescales for a process could vary depending on the level of risk associated with different speakers.

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

We have significant concerns about the timings proposed by the OfS. Given that the duties and guidance are intended to come in force from 1 August, we question how the OfS will have time to meaningfully consider responses to this consultation before publishing a finalised version of the guidance. If delaying implementation is not an option, we suggest that a phased approach is essential and that the OfS should take a proportionate and reasonable approach to early judgements, for example taking into account that providers may have not yet had time to implement all of the steps in the guidance. We note also that the OfS has not yet published its decisions on the harassment and sexual misconduct condition, which providers will also need to take into account.

This is because there are elements of the guidance which will be burdensome and time-consuming for providers to implement, as noted in our response to question 4, perhaps even after some of our significant concerns are suitably addressed. For example, the requirements around training are extensive and will require development and roll out of appropriate training. The OfS should clarify their expectations for timings on these aspects of the guidance, as it is not possible for providers to have this in place for 1 August 2024. As well as this, governing bodies will need to be allowed appropriate time to consider relevant codes, policies and procedures once the guidance has been finalised by the OfS.

As stated in our response to previous consultations on free speech, we strongly advise that the OfS makes a commitment to undertake a review in twelve months, to

include consultation with providers, students' unions and students. Our strong view is that this is appropriate given the novelty and complexity of the subject matter.

Question 6: Do you have any comments on our proposed amendments to the OfS regulatory framework?

No

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

We welcome that the approach to recovery of costs proposed is in line with the OfS' usual practices. We restate our strongly held view that the OfS should only seek to recover the actual costs incurred in the operation of the complaints scheme with reference to each individual complaint that is escalated and then found to be justified or partially justified. We also recommend that the OfS sets a cap for the costs that can be recovered per investigation, and publishes that what the cap is for transparency. This is to mitigate the risk that excessive cost recovery could negatively impact the wider student experience.

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

It is not clear from the proposals to what extent they – if at all – relate to transnational education (TNE), ie the delivery of UK degrees outside of the UK. This is a matter that requires urgent clarification.

It is our very strong view that the application of the regulatory guidance in TNE settings requires greater consideration, for example, where the extraterritorial application of English regulation may conflict with legal obligations and requirements in the host country, which could – in extreme cases – put individuals at risk. If the application of the guidance remains unclear in TNE settings, this could have a chilling effect on partnerships.

UK institutions operate in more than 200 countries and territories globally. Given the diversity of models for delivering TNE, of legal jurisdictions in which TNE partnerships operate and of legal and contractual relationships between the English TNE provider

and staff and students, we would recommend pausing the application of the regulatory guidance to TNE students pending further consultation and consideration.

For example, clarification is needed on:

- modes of TNE delivery that are within scope of the guidance
- the parameters for deciding which partnerships, staff and students based overseas are in scope
- what constitutes 'reasonably practicable' in different legal jurisdictions and models of TNE partnerships

The application of the guidance to TNE, if not managed proportionately by the OfS, would be extremely problematic. It could potentially be extraordinarily damaging for English universities operating overseas. There is a risk that it could make TNE for English providers no longer viable.

Students studying overseas under a TNE arrangement will be subject to the laws of the country they are studying in, and the imposition of UK law or English regulation onto these students and/or partner processes may not be feasible. We urge the OfS to confirm that these students would not be in scope.

Staff members who deliver a UK TNE degree at a partner institution are generally not employed by the English TNE provider. We seek confirmation that these individuals would be out of scope, unless the actions resulting in the perceived impingement of freedom of speech were undertaken directly by the English TNE provider.

English TNE providers have responsibilities to all their students and staff, whether they study on campus or as part of a collaborative arrangement in the UK or overseas. Applying the regulatory guidance to TNE may put students and staff at risk of breaking local laws where freedom of speech laws differ from those in England and may also have far-reaching diplomatic and foreign policy consequences.

In all countries in which universities operate TNE partnerships, freedom of speech will be regulated very differently than in England. Where a TNE host country's freedom of speech laws differ from those of England, the application of OfS regulatory guidance needs to be very carefully considered to ensure that the English TNE provider does not contravene the laws and regulations of the host country or put staff and students at risk. The parameters for eligibility could be aligned to those returned as fully enrolled students under the HESA return, therefore encompassing those who are subject to the university's code of conduct. As the TNE provider already has a clear process in place for the management of student complaints with partner

organisations, any complaints relating to freedom of speech could be managed in the same way.

Online and distance learning (ODL) programmes, where students are registered with the English provider, use the English provider's systems and are subject to the same policies and procedures as home students, but are permanently resident in the overseas country, may also require particular consideration. Staff delivering tutorials and online support may also not be employed by the university directly and could be located in several different countries.

As noted above, if the regulatory guidance is applied to TNE without further clarification, then it is highly likely to impose a very significant administrative burden and negatively impact partnerships. English TNE providers may be limited in the extent to which they can solely determine the content of a legally binding contractual agreement that is subject to the laws and regulations of the host country and where the overseas governments' use of terminology and policy priorities differ from that of the UK.

Separately from TNE, we urge the OfS to provide clarity on whether commercial bookings are in scope of the guidance, eg booking of premises for conferences, summer schools and other events. Our strong view is that the commercial use of university premises should not be in scope of the guidance or the free speech regulation, as they are not part of university business concerned with education and research.

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?

As stated in our response to previous questions, our view is that the regulatory advice entails a high level of burden for providers, which will take considerable time and resource to enact, and the cost of this regulatory burden does not appear to have been assessed. As the OfS is aware, the sector is already under considerable strain, and these burdensome requirements will add to that. We strongly suggest the OfS look to streamline requirements wherever possible, especially when it comes to considering the condition(s) of registration which will accompany this guidance.

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

We have concerns about the impact that these proposals could have on individuals on the basis of their protected characteristics. The requirement for universities to balance upholding freedom of speech with tackling harassment often comes into sharp focus in relation to debates around protected characteristics. The OfS must ensure providers are supported to balance their requirements on freedom of speech and harassment, and ensure that staff and students from marginalised groups' safety and sense of belonging in higher education is not in any way compromised by the regulatory advice set out in this proposed guidance. In particular, we note the risk of a potential detrimental impact on students' and staff members' ability and confidence to report incidents of harassment and sexual misconduct, and we strongly urge the OfS to ensure that this guidance is aligned with its upcoming condition of registration on tackling harassment and sexual misconduct.

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?

A potential unintended consequence of these proposals is a chilling effect on free speech at universities and colleges. The requirements set out in the guidance may cause a chilling effect because staff members and students could see holding an event either as carrying too much risk in complying with free speech duties, or too burdensome administratively to organise. Our members will of course look to mitigate these risks, but the OfS should carefully consider the overall messaging they are signalling about free speech, and the possible risk aversion this could lead to.