

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

We do not have any comments on these proposals.

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

In order to fulfil the OfS's new legal duty under s.75 HERA 2017 (as amended), we would welcome the publication of detailed and clear guidance setting out, with examples, how students' unions can ensure compliance with our new FOS duties. Unfortunately, we do not believe that the current proposals provide the clarity the sector needs. We are an organisation with a proud tradition of promoting freedom of speech and we need the regulatory framework to make clear what is now, practically, expected of us.

While we appreciate the challenge presented by the ambiguity of the incoming statutory requirements, we believe it is incumbent on the OfS as regulator to provide guidance on what it expects us to do in practice to ensure we are able to robustly demonstrate we have taken 'reasonably practicable steps' to 'secure freedom of speech within the law' as we carry out our substantial portfolio of functions and activities.

Does Freedom of Speech have a limit?

Freedom of Speech, is, of course, a restricted right and the OfS understandably has highlighted that illegal speech is not protected by the new statutory requirements. There is a risk in that although it is reasonable for the OfS to expect students' unions to have 'an accurate understanding' of what constitutes freedom of speech 'within the law', this underestimates the complexity of the legal framework at play. There is no clear freedom of speech 'line', no point where speech suddenly becomes illegal. Instead, much of the speech which may be considered challenging or controversial by interested parties exists in a legal grey area - something students' unions have been navigating since their formation. It is important to remember that neither the OfS, HEI's or students' unions can decide what is and is not illegal speech, neither can legal professionals. Whether or not the 'boundaries of protected speech' have been crossed can only be decided through legal proceedings resulting in a ruling, with a relatively limited amount of case law to refer to.

This isn't new, but it is difficult

This is not a new challenge by any means, but one we have been navigating for many years to enable thousands of speaker events, student group activities and conversations to happen. The tension between equalities legislation, relevant criminal law and the wide range of regulatory duties placed on us as a registered charity requires near daily consideration for our organisation. The balancing act is made more complex when we consider that at UCL we have more than 400 different affiliated student led groups with more than 20,000 individual students registered as members of these groups, around 40% of the Union's total membership of 50k. Each group is essentially a semi-autonomous organisation with a constitution, members, committees, internal and external events and activities led by student volunteers. We act as the 'regulator' of these groups, providing support and guidance designed to empower community leaders to create a vibrant and inclusive culture that enables Freedom of Speech to thrive. The lack of clarity in the current proposals could make this endeavour more challenging.

We would also like to highlight that there are a number of non-affiliated student groups that are not regulated by, or the responsibility of, the students' union and therefore we should not be held responsible for their actions relating to the FOS duty.

The OfS must produce guidance that recognises both the complexity of the legal framework and the complexity of students' unions as charities, representative bodies, and regulators of affiliated groups.

The Charity Commission

We are concerned by the lack of reference to the charitable status of students' unions, and our current responsibilities to the Charity Commission as our primary regulator. The interaction between our role as an educational charity operating for the public benefit and the FOS duty needs to be considered, and we encourage the OfS and Charity Commission to produce joint guidance to ensure our Trustees are able to carry out their duties appropriately.

We note that:

- Previous guidance set out by the Charity Commission takes a risk-based approach to managing complex activities which highlights a variety of considerations for Trustees when making decisions about events and initiatives often with a FOS element.
- To date, guidance has broadly focused on the **process** of decision making as opposed to the **outcome** itself. Even if a 'breach' were to occur at an individual event (i.e. a speaker's freedom of speech is curtailed or 'illegal speech' occurred) if a robust risk assessment is in place (and under ongoing review), steps taken to mitigate risks and regulate the activity appropriately and evidence of decision making having been reasonable and considered in the context, then it is our understanding that we have done all that is practicable to fulfil our regulatory duties.
- We would suggest the OfS adopt this approach in its guidance and specifically outline what it would require from us to demonstrate we have taken practical steps to protect FOS within the law.

Ultimately the sector needs specific guidance about how the OfS will judge what is 'reasonably practicable' to secure freedom of speech within the law, how the new duty differs from previous risk management approaches and how we can continue to adhere to guidance as set out by the Charity Commission.

Producing guidance when things go wrong

We disagree with the OfS' current view that more detailed guidance should not be produced until the OfS has 'actual experience monitoring relevant students' unions'. This approach is not in line with Provision 1 of the regulators code as it does not, for example, support the regulated to 'comply and grow'. As things stand it is not clear what constitutes a failure to comply with free speech duties as compared with our existing approach to navigating these complex areas.

We believe that waiting for 'failures' to happen and then creating guidance, as well as potentially penalising students' unions, is not within the spirit of the regulators code. We are concerned that retrospectively implementing guidance could lead to unfair outcomes.

The guidance we'd like to see

We don't envy the challenge the OfS is facing here, and we would welcome the opportunity to work closely with them to develop practical guidance and examples of best practice. We are open to supporting the OfS in any way we can, but we ask that until practical guidance addressing the multitude of concerns across the sector is produced and 'tested' that the regulator accepts it is not in a place to impose penalties of any kind on students' unions.

We suggest the following practical pieces of guidance should be created:

- Risk assessment template and toolkit 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.
- A 'how to' document outlining expected approach to the regulation of freedom of speech in clubs, societies, network and during elections.
- An example decision-making framework to help navigate the tension between charity law, equalities law and the FOS duty.
- 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.

We would also welcome a clear point of contact at OfS, empowered to support students' unions with decision making in line with the new duties to ensure full compliance.

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

We generally welcome the decision to take a risk-based approach to monitoring, however we are concerned about how this will operate on a case-by-case basis without consideration of the broader FOS culture students' unions might seek to create.

While we agree that enforcing annual or other cyclical compliance reporting would not be a good use of resources, there is risk associated to a case-by-case approach to monitoring that does not take into account the broader efforts, strategies and projects pursued by students' unions to promote freedom of speech.

At Students' Union UCL we have a rich tradition of actively promoting freedom of speech, exposing our community to a wide variety of often antithetical viewpoints and challenging them to see the world from other perspectives. We committed to this in UCL's Student Life Strategy and have subsequently rolled out our Impartial Chairs Programme - a skills development programme designed to upskill student leaders to tackle contentious issues, navigate discussions with individuals with differing views, and in doing so build resilient and reflective students able to disagree well at UCL and beyond.

Through a range of learning techniques our aim is to empower our students to facilitate external speaker events that take place on campus, recognising the role that power and privilege plays in debate and in doing so facilitate opportunities for robust debate at UCL in a respectful and inclusive environment.

We facilitate over 1,500 external speakers every year, over 6,000 events and support over 400 affiliated student groups across UCL. We act as a quasi-regulator for these groups, and through robust procedures, training and resources we are committed to promoting freedom of speech within the law and continuing to upskill our incredible student community to lead in this area.

If a concern was raised, for example in the media, about one of these individual affiliated groups or events it would be important to take the broader picture of the students' unions efforts into account when making decisions about if a regulatory intervention was appropriate.

We suggest that the OfS consider an annual (non-compulsory) good practice sharing exercise where students' unions are invited to report on initiatives taken to create a best practice culture around promoting Freedom of Speech.

Moreover, we are concerned that adverse media coverage is disproportionately directed at certain institutions. The weaponisation of Freedom of Speech related issues against the sector is nothing new, but we believe it is the responsibility of the regulator to rise above 'the politics' and therefore not be drawn into making unfair assessments that free speech issues might exist because of partisan media reporting.

The Double Bind

We are concerned about how the imposition of an enduring information reporting requirement will work in practice. As it stands students' unions will be required to report 'any event or matter that, in the reasonable judgement of the OfS, negatively affects or could negatively affect the relevant students' union's ability to comply with any of its free speech duties'. While there appears to be a wide scope for what the regulator may consider 'a reasonable judgement' in general, it does appear that this judgement will be decontextualised.

Essentially students' unions are being asked to consider our FOS duty without regard for any of the other duties and responsibilities we have outlined. This means when considering if we have met the

threshold to report concerns to our new regulator we must judge if we are 'acting in the interests of compiling with [our] free speech duties' alone, and **must not** consider 'commercial, reputation or other interests' when making our decision.

Without considering the other duties imposed by the Charity Commission and the broader legal and regulatory framework, this approach is highly problematic. Moreover, we may find ourselves in a double bind around the reporting requirement itself.

As a registered charity, students' unions are primarily regulated by the Charity Commission and have specific reporting requirements including the need to report serious incidents as defined here: <https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity#the-responsibility-to-report>

We believe that there is a genuine risk that the Trustees of a students' union may be required to report an incident to the Charity Commission due to a robust adherence to the new OfS regulated free speech duties. For example, hosting an extremely controversial speaker event that did not 'cross the line' into criminality could result in substantial negative media coverage that caused harm to the charity's work and reputation. The Trustees in this case may have weighed up their wide range of duties in considering the risk associated with the event and taken the view that there would be a potential 'FOS compliance issue' if the event did not go ahead in the speakers proposed format. The issues could of course happen the other way round with the students' union deciding it must report itself to the OfS as out of context, a reasonable balanced decision to postpone an event could be considered a reportable FOS breach.

It is our view that a joint approach to reporting must be agreed between the OfS and Charity Commission to ensure that student's unions are not stuck between conflicting regulators expectations. Such a situation could lead to decision making based on which regulator has more 'teeth' rather than in pursuance of charitable objects or mission to promote a positive, inclusive Freedom of speech culture.

- We suggest that the OfS should develop guidance in partnership with the Charity Commission to ensure a joined-up approach to regulation that recognises students' unions other regulatory duties.
- We would like to see detailed criteria to help us to comply with the enduring information reporting requirement and a clear and joined up 'serious incident' reporting policy that avoids the potential for a clash between regulators.

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

Broadly we feel the interventions should be seen as a positive step to support achieving full compliance in the first instance and are supportive of the voluntary undertaking model proposed.

We believe that, as FOS matters will rarely be open and shut, that the regulator should focus on understanding if the organisation has acted reasonably, fairly and with an appropriate process and robust risk management, as opposed to focussing on a potential individual 'breach' of the duty. For example, if there is evidence that a sensible risk assessment, sound judgment, clear steps to protect FOS were taken and an issue still occurs, it would seem unreasonable for any form of enforcement action to take place unless done so in a supportive rather than punitive manner. Instead, if a suspected 'breach' occurs, we propose that the OfS share recommendations with the students' union, supporting them to make changes to their policies and processes and thereby preventing future breaches. A penalty should only be considered if the OfS can demonstrate that reasonable steps have not been taken by the students' union to take on board these recommendations.

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

The issuing of monetary penalties should be a last resort, where responses to investigations have not taken place within the reasonable timeframe issued and/or where there are multiple examples of students' unions breaching freedom of speech duties with no attempt to reform processes.

Consideration should be given to the impact a monetary penalty might have on the students' unions' ability to deliver their core charitable objects.

The OfS has identified that a specific consultation is needed on this area, and we will be happy to contribute.

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

No comments

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

While we do not have any major concerns, we believe that in the interests of fairness and transparency representation must always be sought from the students' union before any information is published.

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?

The OfS Strategy 2022-25 rightly focuses on quality and standards and equality of opportunity. Without clear guidance in place there is a risk that the pursuit of compliance with the new duties will result in an inconsistent and potentially reputationally damaging approach across the sector, could lead to the breach of other duties as set out by the Charity Commission and deliver a worse experience for our student population.

We believe a nuanced and contextualised approach to regulation should be taken which focuses on empowering institutions to create a positive culture around freedom of speech that recognises the complexity of decision making in this highly contested area. There is an opportunity here to focus on supporting students to build a vital toolkit of skills, including increased intercultural competence, emotional intelligence and understanding of power dynamics. These will help students to navigate challenging conversations, open new opportunities for dialogue across political divides and build understanding of how to balance the values of inclusivity and respect with the right to disagree, challenge and debate. We would welcome the chance to shape such an approach in partnership with the OfS, and look forward to our future conversations.

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

No comments