



The Promotion and Protection of Free Speech

Issue

1. This paper provides an update on the OfS's developing sector level work to champion free speech and the evidence base to support it. Particular focus is given here to the challenges facing providers in how to ensure there are effective mechanisms in place to protect and promote freedom of speech; OfS's facilitation role is explored in response.

Recommendations

2. The OfS board is invited to:
 - a. Note the latest evidence base.
 - b. Discuss the proposal that the OfS works in partnership with others to develop and deliver an interactive event to bring senior staff leaders in higher education, Students' Union executives and others together to showcase projects and initiatives that are tackling some of the challenges around operationalising free speech.
 - c. Discuss and advise on the OfS's proposed approach to champion freedom of speech within the law across the English higher education sector.
 - d. Consider the proposed plan of activity until year end 2018.

Further information

3. Available from Lucy Parker (0117 931 7326, lucy.parker@officeforstudents.org.uk) or Yvonne Hawkins, Director for Teaching Excellence and Student Experience (0117 931 7214 or yvonne.hawkins@officeforstudents.org.uk).

Members' interests

4. None

Background

5. Free speech in the higher education sector continues to be a topical issue, with a narrative that has the potential to stir strong emotions and opinions. This issue was discussed at the board meeting in May 2018 when members agreed the OfS's position should be to ensure that the widest possible definition of free speech within the law should be upheld by providers. The board agreed that this serves the student interest, as education and learning are advanced through dialogue and debate, and the OfS should work with the sector to bring about a culture of 'robust civility' where a broad spectrum of opinions is encouraged.

6. Members also asked that the development and delivery of this position be evidence based so that the OfS can speak with clarity on this sensitive, important matter. Critically, members said they wanted to explore existing evidence to ascertain whether the public narrative of freedom of speech being suppressed in the HE sector was accurate or not. This paper provides that evidence base together with an update on developments since May.

The Legal Context: Free speech and HERA

7. The OfS's regulatory role in relation to uphold free speech potentially operates at both provider and sector level. At provider level there are conditions (E1 and E2) to comply with the public interest governance principles. This is described more fully below. However, this paper will mostly discuss the position and activity the OfS can undertake at sector level to protect and promote free speech and how proactive we wish our activity to be. It should be noted in this context, that the OfS's powers to act at both provider and sector level are limited by the terms of the Higher Education and Research Act 2017 (HERA).

8. Freedom of speech receives only passing mention in HERA. Schedule 11 refers to s. 43 of the 1986 Education Act which it amends by broadening the providers covered by this legislation to 'any registered higher education provider'.

9. Otherwise, HERA refers to the OfS's powers to intervene in relation to free speech indirectly. HERA notes that the OfS must have regard to 'the need to protect the institutional autonomy of English higher education providers, usually in terms of securing academic freedom such as:

- a. 'the freedom within the law of academic staff at English higher education providers –
 - i. To question and test received wisdom, and
 - ii. To put forward new ideas and controversial or unpopular opinions,
- b. Without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.'

10. In relation to the register, HERA refers to an institution's registration being subject to satisfying general ongoing registration conditions and specific ongoing registration conditions. Section 14 covers the public interest governance condition. Again, here free speech is not mentioned specifically but this section refers to the provider's governing documents being consistent with the principles in the list published in this section which includes 'freedom within the law of academic staff at English Higher Education providers'.

11. The Act also says that the 'OfS must have regard to guidance given to it by the Secretary of State'. In his Strategic Guidance letter – Priorities for Financial Year 2018/19 – the Minister of State for Universities, Science, Research and Innovation specifically stated:

'I would also like the OfS to be a champion of freedom of speech, which is so crucial to higher education. Free speech is essential in ensuring that universities are places which expose students to new and uncomfortable ideas, and encourage robust, civil debate and challenge.'

12. An objective of the OfS's strategy is that 'all students, from all backgrounds, receive a high quality academic experience, and their interests are protected while they study'. Few dispute that free speech is essential to immersing students in new and uncomfortable ideas and in encouraging debate where other viewpoints are understood and respected. This is a key component in delivering a high quality educational experience.

The Evidence Base

13. The Joint Committee on Human Rights' (JCHR) report on 'Freedom of Speech in Universities' concluded that the 'press accounts of widespread suppression of free speech are clearly out of kilter with reality'. The Committee did note however that a number of factors are currently limiting free speech. These include:

- a. intolerant attitudes, often incorrectly using the banner of "no platforming" and "safe-space" policies;
- b. incidents of unacceptable intimidatory behaviour by protestors intent on preventing free speech and debate;
- c. unnecessary bureaucracy imposed on those organising events;
- d. fear and confusion over what the Prevent duty entails;
- e. regulatory complexity;
- f. unduly complicated and cautious guidance from the Charity Commission;
- g. concern by student unions not to infringe what they perceive to be restrictions.

14. The factors that most impact on the OfS thus far, and on which we have received evidence, are that:

- a. students, students' unions and events' organisers are struggling with regulatory complexity;
- b. for some groups, the steps required in order to organise an event safely are perceived to be disproportionately burdensome and expensive, and
- c. there are groups with intolerant attitudes to others' views which those groups seek to shut down.

15. The OfS has found no evidence to demonstrate that fear and confusion over the Prevent duty is impacting free speech.

16. The Committee's report examined the impact of these factors on free speech in universities and made recommendations for those involved, including the OfS. The Department for Education (DfE) has advised that they now consider the JCHR report as the most up to date evidence base.

17. In the course of its work thus far, the OfS obtained and examined a variety of material concerning free speech through public interest disclosure, press office inquiries, as well as the Prevent data. Like the JCHR, we have found no evidence of free speech being systematically suppressed. Our experience to date is that providers are working hard to be compliant with their duty under section 43 of the 1986 Education Act.

18. The JCHR argues, however, that there are real problems which act as disincentives for students to put on challenging events. Even though most Students' Union officers who responded to the JCHR's survey say they are confident that they and their companions can speak freely, the Committee believes these disincentives could be having a wider 'chilling effect' on free speech. Whether there is this 'chilling effect' is hard to measure, not least because it is difficult to ascertain instances of self-censorship and the extent to which some events never get beyond the planning stage.

19. Regulatory complexity results from the fact that the s.43 duty in the 1986 Education Act extends to the entire campus, including Students' Union buildings, even if they are owned by the Students' Union and/or located off campus. Students' Unions are not directly covered by the s.43 duty but they are indirectly required to comply with it due to the relationship with their Provider. The duty requires providers to take steps to ensure their partner students' union does not interfere with the free speech of students and staff on campus, or deny use of Students' Union premises to speakers based on their views.

20. The current evidence suggests that the main challenge facing the sector is how to operationalise free speech: ensuring that the mechanisms are in place so that uncomfortable ideas can be expressed without causing groups of students to feel threatened or unsafe.

Progress with EHRC guidance on free speech

21. The Minister of State for Universities, Science, Research and Innovation called a Summit in early May inviting key regulators and stakeholders to work out a response to

deal with the lack of definitive guidance which is causing regulatory confusion and complexity. As a result, the OfS has been working with DfE, the Equality and Human Rights Commission (EHRC) and others during the summer on the development of comprehensive guidance on free speech which the Minister is planning to launch in 2018. This publication aims to provide clarity on the legal framework which applies to freedom of speech and expression in England and Wales and to set out practical advice as to how that legal framework can be put into action, whilst highlighting grey areas where the law is not definitive.

22. The guidance, which is being produced by the EHRC, is targeted at multiple audiences¹, and aims to illustrate how the tensions between the different legal frameworks have been resolved through case studies. We have been given a strong indication that the Minister will want to know what activity the OfS plans in addition to its work on the EHRC guidance.

23. The JCHR has stated it will continue to follow developments in the free speech debate closely and has indicated it intends to review the EHRC guidance.

Recommendation: The board is invited to note the evidence base.

Next steps: Developing OfS's position and plan of action

24. The OfS should therefore be cognizant of the fact that its activities in regulating providers' efforts to uphold free speech will continue to be subject to public scrutiny. The Government set out an expectation in its response to the JCHR report that the OfS should take an active role in publicising regulatory action where there has been a breach of a registration condition, particularly in relation to free speech.

25. In its response, the OfS did not agree with the JCHR's recommendation that it publish this in a standalone report; the JCHR has now responded that including this information in an OfS annual report would suffice. The OfS's response to the JCHR report can be found in Annex C. The JCHR's response to this is included in Annex D.

26. Against this external scrutiny the OfS has a stated public position that it stands for the widest possible definition of freedom of speech: that is, anything within the law. English law imposes some restrictions on speech, such as prohibitions on harassment, or incitement to hatred but it does include the right to say things which may shock or offend others. If the OfS stood for a narrower definition, that would shut down some areas of free speech. Whilst the legal boundaries to free speech may limit both what can be said

¹ These audiences are listed in the guidance as the governing bodies of universities and other higher education institutions (collectively 'HEPs'), HEP and students' union trustees, as well as academic staff, students' union elected officers and other representatives, students' union society and club leaders, members of the students' union, and individual students, speakers, regulators and inspectorates and other policy makers.

and who is permitted to speak on campus, universities must also consider the safety of those involved in events.

27. The JCHR report identified events which discuss controversial or divisive issues as likely flashpoints for protest. Some of these, such as speech which is thought to incite or support terrorism, pro-life or anti-abortion views, transgender issues, Islamophobia and the Israel/Palestine conflict will continue to fuel protests.

28. Free speech is topical partly because debate today has become so polarised and toxic. This extends beyond campus to society as a whole. So far, the OfS has not received any evidence to demonstrate that providers are not using best efforts to tackle this problem on campus and to keep debate as civil as possible. Thousands of events take place on campus every year; there are only issues at a few but, when these issues arise, they usually gain substantial media coverage and such media coverage propagates myths. The media has also given prominence to claims that 'no platforming' and 'safe space' policies are suppressing freedom of speech in universities fuelling a perception that the current generation of students are unwilling to hear views different to their own. Two of the most commonly cited incidents as evidence of students restricting free speech by "no platforming" speakers are student protests at Germaine Greer's appearance at the University of Cardiff in 2015, and the refusal of an NUS Officer to share a platform with Peter Tatchell at Canterbury Christ Church University in 2016. However, in both cases, the speaker's freedom of speech was not curtailed as both went on to speak. The event with Germaine Greer went ahead amid tight security whilst some students exercised their right to protest peacefully.

29. There is little doubt that minority groups may on occasions feel threatened and unsafe, that some groups cite barriers in having their voice heard, and that other groups are using debate to incite violence, racism or hatred. This external environment means some providers are feeling under pressure as they try to protect and promote freedom of speech.

OfS's role as a facilitator of good practice

30. The OfS's work and analysis to date in relation to free speech has involved:
- a. positioning the organisation as a meaningful contributor to the debate and reiterating that it promotes the widest possible definition of free speech within the law;
 - b. ensuring that the regulatory complexity around free speech is not complicated further by the OfS acting outside of its regulatory powers and intervening in situations in which other regulators have a clearer role, as well as
 - c. minimising any reputational damage through negative coverage of incidents relating to free speech.

More information on this is provided under 'Communications and engagement' below.

31. As described above, there is a need for greater regulatory clarity given the roles of the Charity Commission, the EHRC and the OFS. Since publication of the JCHR report

the Charity Commission has undertaken to review its guidance *Protecting Your Charity From Harm* and of its publicly available staff operational guidance on Students' Unions. The JCHR has committed to review this guidance once it is available.

32. The other challenge facing the sector today, which partly relates to the issue of regulatory complexity, is how to operationalize free speech effectively. The next section of this paper explores an evolving role here for the OfS.

33. We are aware of pockets of timely, impactful work to improve student safeguarding, supported by the Catalyst Fund, at campuses across England. This work, which often involves students as co-creators (with providers) in developing solutions, includes the development of safeguarding apps, the roll out of bystander training and revisions to existing policies and procedures to make them more relevant.

34. We are therefore proposing that the OfS, in partnership with the government and other regulators, develops and delivers an interactive event to bring senior staff leaders in the sector, Students' Union executives and others together to showcase projects and initiatives that are tackling these challenges. The event would also include knowledge sharing sessions as well as the opportunity for attendees to raise and discuss pressing issues with peers from across the sector. At sector level the OfS can facilitate better sharing of best practice whilst keeping itself apprised of emerging issues. Such an event would also raise awareness of the difficulties providers and Students' Unions face in upholding free speech as well as some of the solutions which have been developed. The event would encourage better understanding of the regulatory landscape so that complainants were able to direct their complaints more appropriately.

35. This event would fit within the planned body of work outlined in Annex B. The purpose of this work is to provide further clarity for the sector and students on: how the different forms of regulation will work together in practice; what initiatives are having a positive impact in operationalising free speech; and demonstrate the OfS's commitment to securing free speech. The programme also seeks to minimise the risk of free speech incidents and issues causing reputational damage to the OfS.

Recommendation: the board is invited to discuss the proposal that the OfS works in partnership with others to develop and deliver an interactive event to bring senior staff leaders in the sector, Students' Union executives and others together to showcase projects and initiatives that are tackling some of the challenges around operationalising free speech

Communications and engagement

36. There are expectations on the OfS to take a stance in the wider free speech debate but, with the debate becoming highly charged and emotive, the facts of a case are often distorted and the resultant media coverage can be reductive with key nuances getting

overlooked. The OfS must ensure that, when it is asked for public comment, these nuances are not ignored.

37. The OfS needs to have an unambiguous and agreed structure for deciding when it will comment on free speech issues, who in the organisation will comment and where (which channels). This also means agreeing when the OfS will comment proactively and seek to shape the debate and when an OfS comment will be purely reactive. It is important that all relevant OfS spokespeople and commentators align on the organisation's messaging. The debate concerning free speech is subject to considerable public scrutiny and inconsistencies in the OfS's public position will be picked up and dissected.

38. Work is therefore underway internally to agree a communications approach. As a high profile, topical issue, crafting and documenting a communications approach presents an opportunity for the OfS to develop a template of how other policy areas could manage their response to reputational issues in future. This work is outlined in Annex B.

Recommendation: the board is invited to:

- a. Discuss and advise on the OfS's proposed approach to champion freedom of speech within the law across the English higher education sector.
- b. Consider the proposed plan of activity until year end 2018 (updated since Members were first cited on it in May).

Resource implications for Office for Students

39. Staff resource will need to be dedicated to this in quarter 3 and most likely beyond, either in horizon scanning, responding to media requests, inquiries and/or in working with other sector bodies in clarifying roles and responsibilities. The current approach has been built around reputational issues management but there are occasions when legal advice is required.

40. The Student Panel has indicated that they want to be kept apprised of the OfS's work in relation to free speech. In early August a detailed conversation was held with a Student Panel member, who offered themselves as a sounding board as they have direct experience of how media coverage of events on campus can play out. The Student Panel could play a useful and insightful role in any work that the OfS may do to expand the current evidence base on what students think of free speech.

Regulation and sector impact assessment

41. Our role is to regulate providers; the OfS should not intervene in cases that take place off campus unless they are in Students' Union premises covered under the s.43 duty in the 1986 Act.

42. A free speech public interest governance principle was included in the OfS' regulatory framework and this forms part of our approach to ensure that all registered providers have adequate and effective management and governance arrangements. Where management and governance do not meet baseline standards, the OfS is able to intervene and apply sanctions where these are considered necessary. As part of our assessment of providers during the registration process this summer, we will ensure that a provider's governing documents uphold the freedom of speech public interest governance principle. We will only intervene or engage when there is a threat to free speech. Should an issue arise, it is anticipated that our intervention will consider if the provider has a sufficient process in place to uphold free speech, whether that process was followed, whether the provider is dealing with any concerns responsibly and whether there is a pattern to any complaints that have been made. Whilst there are a number of regulatory levers which the OfS could apply if free speech is being suppressed, it is hoped that we will not have to use these and that this course of action would be taken only after very careful consideration.

Conclusion

43. The OfS's approach to free speech needs to be responsive and highly adaptive; the debate is constantly evolving and the ubiquity of social media and recurrent topicality of the flashpoints outlined above mean it will remain an important area for some time. The evidence base to support arguments that there is a 'chilling effect' on free speech is limited and building a more complete picture of this issue is not straightforward. The OfS's public position continues to be anchored around the following key statements:

- a. Ensuring that the widest possible definition of free speech within the law is upheld at institutions serves the student interest; the OfS is committed to working with the sector to ensure that freedom of speech and robust, rigorous debate remain an integral part of the UK higher education experience. Education and learning are advanced through dialogue and debate; we believe that the sector must work together to bring about a culture of 'robust civility' where a broad spectrum of opinions is encouraged. The OfS will champion and facilitate debate, where it is required, to ensure the best possible outcomes for students.
- b. The OfS stands for the widest possible definition of freedom of speech: that is, anything within the law. English law imposes some restrictions on speech, such as prohibitions on harassment, or incitement to hatred but it does include the right to say things which may shock or offend others.
- c. The OfS supports the objective of ensuring that students feel safe and free to express themselves; there is no place for violence, intimidation or criminality on university campuses and we believe that censoring or marginalising some groups to protect others is not appropriate and that an entire university campus cannot become a safe space.

Annex B - Plan of OfS activity in relation to free speech in addition to work underway as part of registration process (this replaces the plan discussed at the May Board meeting)

Item	Activity
1.	<p>Work initiated by JCHR investigation and report:</p> <p>Respond to Joint Committee on Human Rights report; COMPLETED</p> <p>Work with other relevant bodies to scope out OfS's role following the Ministerial Summit to ensure the landscape around free speech is as clear and simple for students and providers as possible and that policies and procedures are complementing institutions' free speech obligations, not conflicting with them; IN PROGRESS</p> <p>Prepare communications activity from OfS in response to the Minister's announcement when the guidance is published; TO START</p> <p>The JCHR argues in its latest report that it would be helpful for the OfS to include some information on the state of free speech in the sector in the OfS's annual report; TO START WHEN APPROPRIATE</p> <p>The JCHR also communicated its expectation that the OfS will publish details of regulatory action, and the reasons for this action to be taken, where there has been a breach of a registration condition. These details can also be included in any OfS annual report; TO START WHEN APPROPRIATE</p>
2.	<p>Scoping the OfS's position externally:</p> <p>Respond to correspondence and enquiries on free speech; ONGOING</p> <p>Establish internal repository of provider best practice in upholding free speech which demonstrates:</p> <p>How a culture of free speech has been promoted</p> <p>How external speakers and events have been managed and facilitated effectively</p> <p>How good relations on campus have been maintained TO START</p> <p>Track progress and impact of projects related to the recent Catalyst Fund call looking at work in student safeguarding which tackles sexual violence, hate crime and harassment linked to religion. Explore suitability for recording and capturing best practice to be shared more widely across the sector; SCOPING OF A TOOLKIT REPOSITORY INITIATED</p>
3.	<p>In relation to the Prevent duty:</p> <p>Continue to be alert to any issues or instances which arise as a result of OfS' work monitoring the Prevent duty and which indicate that the correct balance in securing free speech is not being met; ONGOING</p>

	<p>Work with the Department for Education and other partners to better develop information sharing processes and ensure work around Prevent strikes the right balance between security and transparency (RELATED TO WORK ON EHRC's FORTHCOMING GUIDANCE)</p> <p>Capture examples of how institutions have combined freedom of speech responsibilities with the Prevent duty and share best practice more widely. TO START</p> <p>Spring 2019 – host an interactive event to showcase examples of best practice and initiatives as well as discuss ongoing operational issues in relation to free speech. PROPOSED</p>
4.	<p>Communications protocol:</p> <p>Develop generic communications materials which can be updated as and when comment is sought; COMPLETED</p> <p>Develop interim OfS messaging on free speech and agree strategy for dealing with media coverage and requests for comment. This will also include defining areas for OfS to comment publicly; TO START</p> <p>Develop plan of activity to year end based around trigger points where OfS comment might be sought; TO START</p> <p>Create content for OfS website on free speech; this <u>could</u> cover:</p> <p>OfS's roles and responsibilities</p> <p>Information on where students can complain about free speech issues</p> <p>Some key messages on the OfS's work to simplify the landscape</p> <p>Link to Free speech board papers TO START</p>

Annex C – Office for Students’ response to the Joint Committee on Human Rights Fourth Report of Session 2017-19 on Freedom of Speech in Universities

General comments

The Office for Students (OfS) is committed to working with the sector to ensure that freedom of speech and robust, rigorous debate remains an integral part of the UK university experience and we welcome the Committee’s recognition of the importance of freedom of speech in universities.

We are encouraged by the Committee’s work in establishing the scale and nature of any threats to free speech on campus and their finding that ‘overall there is support for the principle of freedom of speech’² across the sector and that there is no wholesale censorship of debate in universities.

The OfS recognises that the issues around free speech are highly complex and nuanced and there is often no easy answer. We also recognise that, with the growth of communications in the digital environment, this adds further layers of complexity.

We are, however, concerned by the evidence presented which suggests that there are disincentives for students to put on events which discuss topics or include speakers that other groups may want to contest. We are also concerned that there seems to be a number of events which never take place because students are dissuaded from organising them by onerous bureaucracy or because they fear the consequences of being involved with a controversial subject and that this is having a ‘chilling effect’ on freedom of speech.

We support the objective of ensuring that students feel safe and free to express themselves but we believe that the most effective way to do this is not through censorship or marginalising some groups to protect others; free speech must be for everyone. We agree with the Committee that there is no place for violence, intimidation or criminality on university campuses.

Many of the recommendations in the Committee’s report are for bodies other than the OfS to comment on so we have limited our response to the areas most appropriate for us.

The OfS’ role in promoting and protecting freedom of speech

The OfS’ mission to ensure that ‘all students, from all backgrounds, with the ability and desire to undertake higher education, are supported to access, succeed in, and progress

² <https://bit.ly/2NDwl0t>

from higher education³ places the protection of students' interests at the heart of its work. Ensuring that free speech within the law is secured at institutions serves the student interest; free speech is essential in exposing students to new and uncomfortable ideas, in encouraging robust but civil debate where other viewpoints are understood and respected. It underpins the diversity of the sector and is a key component in delivering a high quality educational experience.

Together with other bodies in the sector, the OfS will champion free speech. A free speech public interest governance principle was included in the OfS' regulatory framework and this forms part of our approach to ensure that all registered providers have adequate and effective management and governance arrangements. Where management and governance do not meet baseline standards, the OfS is able to intervene and apply sanctions where these are considered necessary. We would never intervene to restrict free speech, only to extend it. As part of our assessment of providers during the registration process this summer, we will ensure that a provider's governing documents uphold the freedom of speech public interest governance principle.

Prevent duty

Recommendation 8. The Committee strongly endorses the need for Prevent as a strategy for preventing the development of terrorism. However, the Committee said in 2016 that rigorous and transparent reporting is needed to dispel myths about Prevent and called for an independent review of the Prevent policy in its report on Counter Extremism. We repeat that recommendation; we consider any such review should include an assessment of the Prevent duty's effectiveness in higher education, and its impact on freedom of speech and association. Such a review should also include consideration of whether Prevent duty reports should be published, and on what basis.

The OfS currently receives Prevent annual reports from relevant higher education bodies (RHEBs). Under the current process these reports are submitted to the regulator in confidence, as part of a co-regulatory approach. There is a significant risk that publication would therefore damage the regulator's relationship with institutions and its ability to monitor the Prevent duty effectively. That is why the Information Commissioner supported the OfS' decision not to share Prevent annual reports, a decision which the government also supported.

In the interest of transparency, the OfS intends to publish a sector level summary of the reports. We are also working with the Department for Education and other partners to develop better information sharing processes and ensure work around Prevent strikes the right balance between security and transparency.

³ https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf

Bureaucracy

Recommendation 12. It is reasonable for there to be some basic processes in place so that student unions and universities know about external speakers. Codes of practice on freedom of speech should facilitate freedom of speech, as was their original purpose, and not unduly restrict it. Universities should not surround requests for external speaker meetings with undue bureaucracy. Nor should unreasonable conditions be imposed by universities or student unions on external speakers, such as a requirement to submit their speeches in advance, if they give an assurance these will be lawful.

The OfS will stand for the widest possible definition of freedom of speech: namely, anything within the law. In performing our functions, we will also consider our general duty to have regard to the need to protect institutional autonomy.

We recognise that there is significant variability in the approaches taken by institutions, which is in part a reflection of the sector's diversity, and that there is a need to ensure greater clarity and consistency with the guidance offered to both providers and student unions in relation to freedom of speech.

The OfS has a commitment under its Prevent monitoring to ensure that providers' Codes of Practice are appropriate and proportionate; a number of institutional Codes of Practice and related external speakers policies and processes have been reviewed as part of our monitoring of the Prevent duty. We will continue to review these as appropriate. Our experience to date has been that, in practice, most events undergo a light touch approach from providers and, again, our experience has been that Prevent has compelled many providers to pay more attention to freedom of speech issues and the preparation of codes of practice. If we discover wider concerns in relation to free speech that may provide evidence of non-compliance with a provider's conditions of registration, this information will be taken into account and shared appropriately.

Providers have a responsibility to facilitate respectful, civil debate and we will continue to expect providers and student unions to do this effectively. This means institutions and student unions ensuring that robust processes are in place to manage events appropriately. We welcome the clarity provided by the Committee on what conditions imposed on speakers are considered unreasonable. We could, however, foresee that having an advance copy of a speech would be appropriate under certain circumstances such as an instance where a speaker had not given an assurance that a speech will be lawful.

If students are deterred from inviting speakers by complicated processes and bureaucratic procedures then we would also expect this feedback to be shared at an institutional level and, if necessary, for these processes to be independently reviewed.

The way forward

Recommendation 14. We welcome the OfS' strong support of free speech. We would expect the OfS to intervene if problems emerged at particular institutions. They should ensure that university policies do not inhibit legal free speech and are not overly burdensome. To help facilitate this, the OfS should have an accessible means of feedback for students to report incidents of intimidation and issues related to free speech, on which the OfS could act as an arbiter between the students, student unions and universities. The OfS should also visit universities that have faced issues regarding freedom of speech, and ensure universities and student unions are respecting this right. The OfS should report annually on free speech in universities, including naming when universities have been non-compliant with their responsibility to secure free speech, under the Education Act 1986.

We recognise that each institution's context is different and in performing our functions, we will consider our general duty to have regard to the need to protect institutional autonomy.

We will only intervene or engage when there is a threat to free speech. Whilst there are a number of regulatory levers which the OfS could apply if free speech is being suppressed, it is hoped that we will not have to use these and that this course of action would be taken only after very careful consideration.

We believe there are a number of accessible means of feedback for students to report incidents of intimidation already; these include feedback channels at individual institutions, through the NUS and – ultimately once a provider's internal complaints process has been exhausted – with the Office of the Independent Adjudicator (OIA).

We will also be collecting data about complaints reaching the OIA (which includes any complaints made in relation to freedom of speech) and this may inform our judgements.

The OfS is also implementing a notification process for students, whistle-blowers, or others to report issues of concern to us. We would expect to receive notifications in relation to freedom of speech and would investigate these if credible evidence is provided and assuming that they do not relate to an individual or collective employment dispute.

We do not agree, however, that the OfS should act as an arbiter between students, student unions and universities as our function is to ensure that a provider is complying with its conditions of registration.

At present the OfS is not planning to visit providers that have faced issues regarding freedom of speech but we may engage with providers or other bodies to understand what action they have taken as a result of these issues and what lessons learned can be carried forward in future. This would also include an assessment of whether these

lessons have wider applicability across the sector and should, therefore, be communicated.

The OfS does not agree that there is currently a need to report annually on free speech in the higher education sector, in part because developments from year to year may not merit this level of reporting frequency. We do, however, agree that from time to time it may be helpful to report on free speech and this is likely to be prompted by a change in the risk profile in how free speech is upheld. At present, the OfS is not planning to name and shame providers in cases where free speech has been suppressed but we would publish regulatory action and the reasons for this where there has been a breach of registration condition E2.⁴

Recommendation 15. It is welcome that the Government is taking a broad look at the policy context for freedom of speech, and that the Minister plans to hold a summit with key bodies to work out where responsibilities lie and how all bodies can work together to promote freedom of speech. The Government should ensure that all bodies with an interest in this area, such as the EHRC, are included in this summit to ensure a joined-up approach across the different bodies. Moreover, although we understand that this is a complex area, the Government should consider whether there is any case for the OfS to take over the regulation of student unions rather than the Charity Commission.

The OfS recognises that there are, currently, key issues in relation to free speech which need to be addressed. We are committed to working with all the relevant bodies to address these issues and to manage and mitigate their effects.

Based on the Committee's findings, it is clear that the complexity created by various forms of guidance and regulation is not serving the student interest and we welcome the Committee's recommendation that the guidance should be made clearer and simpler. The OfS also anticipates contributing to work with others in the sector on simplifying the current landscape of guidance on free speech. We envisage this to include:

- Working with the Government and others to manage the issues and overcome the challenges identified at the Minister's Summit in early May 2018;
- Developing a repository of best practice and case studies for sharing with the sector.

The OfS does not have the legal powers to regulate student unions. We also understand that the NUS and individual student unions are strongly supportive of the status of

⁴ Condition E2: The provider must have in place adequate and effective management and governance arrangements to: i. Operate in accordance with its governing documents. ii. Deliver, in practice, the public interest governance principles that are applicable to it. iii. Provide and fully deliver the higher education courses advertised. iv. Continue to comply with all conditions of its registration.

student unions as registered charities and we do not think it would be appropriate for the OfS to regulate student unions.

However, the regulation of student unions and of universities must be complementary and there must be clarity on the roles, responsibilities and remits of all parties. We will work closely together with others to make sure guidance and regulation are consistent and clear with regard to free speech.

Conclusion

We support the Committee's view on a number of issues and recognise the challenges which have been outlined in the report. We also differ from the Committee in some of the areas where it has recommended the OfS intervene, such as the OfS acting as an arbiter between students, student unions and universities. We welcome the opportunity to work with the Government and other relevant bodies to ensure clearer, more consistent guidance is available.

Annex D - Excerpt from Joint Committee on Human Rights' Eighth Report of Session

Office for Students

11. We very much welcome the fact that the OfS shares our concerns that there are disincentives for students to put on events which discuss topics include speakers that other groups may want to contest, and that this or onerous bureaucracy may be having a chilling effect which results in events never even taking place.

12. We understand that the OfS is both independent, and a new institution which needs to establish its ways of working. Moreover, the OfS needs to consider its general duty to have regard to the need to protect institutional autonomy. We note that the OfS will be collecting data about complaints reaching the Office of the Independent Adjudicator, in addition to implementing a process for students, whistleblowers or others to report issues of concern to the OfS itself.

13. The Committee recommended that “the OfS should report annually on free speech in universities, including naming when universities are been non-compliant with the responsibility to secure free speech, under the Education Act 1986.” The OfS has not committed to report annually on free speech, but may do so from time to time. **We remain of the view that it would be helpful for the OfS to report annually on free speech issues, but this need not be as a stand-alone report: inclusion in the Annual Report would suffice.**

14. **We welcome the OfS’s commitment to publish regulatory action and to publish the reasons for this action being taken where there has been a breach of registration condition E2. We consider this meets our recommendation to indicate where universities have been non-compliant with their duty to secure free speech, although we would prefer it if such actions were also referred to in any discussion of free speech in an annual report or other document.**