

Promoting and protecting freedom of speech in the higher education sector

Issue

1. This paper provides the current context for free speech in the higher education sector and sets out proposals for how the OfS will exercise its functions in this area. It also discusses the findings from the recently published investigation into free speech at universities by the Joint Committee on Human Rights (JCHR). The proposed submission to the Committee's recommendations, which will be submitted by 25 May, is included in **Annex A**.

Recommendations

2. The OfS board is invited to:
 - a. Discuss and advise on the OfS's proposed approach to working with others across the sector in championing freedom of speech within the law.
 - b. Consider the proposed approach to communications activity until year end 2018.

Further information

3. From Lucy Parker, 0117 931 7326, lucy.parker@officeforstudents.org.uk or Kate McAlister, 0117 931 7031, kate.mcalister@officeforstudents.org.uk.

Background

Free speech in a higher education setting

4. Advancing ideas and learning through debate is one of a higher education institution's fundamental purposes and protecting freedom of speech is integral to its core mission. English and Welsh universities have a legal duty to protect freedom of speech within the law under section 43 (No. 2) of the 1986 Education Act. This requires them to publish a Code of Practice setting out the procedures to be followed by members, students and employees for upholding free speech. Lawful free speech should never be prevented or inhibited on campus.
5. Universities' responsibilities to uphold free speech have to be combined with other statutory obligations: all higher education institutions are subject to Article 10 of the European Convention on Human Rights (ECHR), the right to freedom of expression, and Article 11, the right to freedom of assembly and association. The ECHR is incorporated into UK law by the Human Rights Act 1998.
6. In addition, universities are also subject to the Equality Act 2010 and section 26 (1) of the Counter-Terrorism and Security Act 2015.
7. Free speech within the law means allowing people to say things which, though lawful, others may find upsetting or disturbing and Professor Timothy Garton Ash has argued that free speech should 'foster freedom of expression within a framework of robust civility.'¹
8. Freedom of speech in a higher education setting has become a topical issue. Incidents occurring during events held in university or student union premises are frequently reported in the media². Politicians have commented on instances where there have been claims that free speech has been suppressed; the previous Minister of State for Universities, Science, Research and Innovation, Joseph Johnson MP, spoke publicly of student-led policies such as 'no platforming'³ and 'safe spaces' stifling debate on campus. In late 2017 he announced that the OfS would have powers to punish institutions where free speech had been suppressed. In early May 2018 the current Minister, Sam Gyimah, spoke of issues around the diversity of thought being suppressed⁴.
9. Additionally, universities have a duty to secure freedom of speech across the campus which also includes on student union premises, even if these are off campus and/or owned by the students' union.
10. Student unions, unlike universities, are regulated by the Charity Commission and assert that they are private bodies with a right to refuse speakers or groups. They argue that they are not subject to the same obligations as public bodies, even though they are required to comply with the provider's free speech duty. Additionally, student union trustees are subject to duties under

¹ <https://www.theguardian.com/commentisfree/2016/sep/16/safe-spaces-free-speech-university-prevent-no-platforming-academic-freedom>

² There have been some high profile media stories where speakers were said to have been 'no platformed' (an NUS officer refusing to share the stage with Peter Tatchell in 2016), events have been disrupted by protestors (Jacob Rees Mogg MP's speech at the University of the West of England in February 2018) or have gone ahead amid tight security (Germaine Greer speaking in Cardiff in 2015). The over-reporting of such incidents has fuelled a perception that free speech is threatened at English and Welsh universities

³ According to the NUS, the purpose of a 'no platform' policy is to prevent individuals or groups known to hold racist or fascist views from speaking at student union events and to ensure that student union officers do not share a public platform with such individuals or groups. Accusations that individual or groups have been 'no platformed' are common though the term is often applied incorrectly.

⁴ Comments made at the Free Speech Summit convened by the Minister on 3rd May 2018.

charity law requiring them to ensure that debates are balanced, well run, ensure free speech and that the associated risks are appropriately managed.

Discussion

How OfS is positioned in relation to freedom of speech

11. The OfS's 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 from higher education' 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 and 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 higher educational experience.
12. The Higher Education and Research Act 2017 (HERA) extended the existing freedom of speech duty to all providers registered by the OfS but did not give the OfS any particular functions, powers or duty in relation to freedom of speech. As it developed its regulatory framework, the OfS decided to include in its list of public interest governance principles a principle relating to the freedom of speech. This says that 'the governing body [of a provider] takes such steps as are reasonably practicable to ensure that freedom of speech within the law is secured within the provider.'⁵ This language deliberately mirrors the language used in the 1986 Education Act.
13. The public interest governance principles will be considered as part of the OfS's initial registration process as follows:
 - An assessment of whether a provider's governing documents uphold the public interest governance principles applicable to the provider – this is condition of registration E1.
 - An assessment of whether a provider has in place adequate and effective management and governance arrangements – this is condition of registration E2.

In relation to the public interest governance principle on freedom of speech we would expect a provider to demonstrate that it has in place a Code of Practice to ensure compliance with the duty in section 43 of the Education (No.2) Act 1986.

14. Once condition E2 is in force as an ongoing condition of registration (for providers currently funded by the OfS or regulated by the DfE from 1 August 2019, and for new providers from the date of a provider's first registration) the following behaviours may indicate non-compliance:

'the provider fails to abide by its own freedom of speech code.'⁶

When fully operational in 2019, this should result in free speech being protected in a more systematic way; how providers manage this will be open to more scrutiny than before.

15. The OfS will 'stand for the widest possible definition of freedom of speech: namely, anything within the law'⁷. In performing its functions, it is required to have regard to the need to protect

⁵ https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf p. 145

⁶ https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf p. 117

⁷ Sir Michael Barber's oral evidence on Freedom of Speech in Universities to Joint Committee on Human Rights Wednesday 24th January 2018]

institutional autonomy⁸.

16. If the OfS considers that a provider has failed to abide by its own freedom of speech code, it will consider whether this is sufficiently serious to constitute a breach of condition E2 or an increased risk of a breach of this condition. In such circumstances, a range of interventions would be available, including enhanced monitoring, the imposition of specific conditions of registration, or a sanction for a breach of the condition. Whilst the OfS has indicated elsewhere it would want to try and resolve a breach without using its formal sanction powers, 'the fact that we have the powers would give us the locus to have the discussion.'⁹
17. The OfS will proudly champion free speech across the sector, working collaboratively with actors such as providers and student unions to draw on the latest thinking and practice, reduce the likelihood of silos and the duplication of work. A clearer demarcation of what OfS's roles and responsibilities are in relation to other bodies in protecting freedom of speech will, in part, be informed by the work of the Summit the Minister convened in early May. The OfS will clearly articulate its role and the work done in concert with other partners and stakeholders this in its own external communications, (addressing related concerns raised during the regulatory framework consultation).
18. The OfS is in a unique position with its regulatory powers and helicopter view of the sector; this position should be used to best effect to gather evidence of both good and bad practice and to ensure freedom of speech and expression is secured.

Report from the Joint Committee on Human Rights (JCHR)

19. Prompted by a series of high profile events reported in the media, the JCHR launched an inquiry to establish the extent to which there was a problem of free speech being suppressed within the higher education setting and, if so, to identify its causes.
20. During the inquiry, the Committee conducted eight oral evidence sessions with a total of 34 witnesses, received 109 written submissions, hosted a web forum on the Student Room, surveyed individual student union officers for their views and commissioned research on free speech policies from the Higher Education Policy Institute (HEPI).
21. Both HEFCE and the OfS provided written submissions to the Committee and Sir Michael Barber also gave oral evidence in January 2018. The submission from HEFCE set out the initial work it had undertaken in relation to its role as monitor of the Prevent duty. This included working with over 300 higher education providers to support them in reviewing their external speakers policies and processes, including Codes of Practice on freedom of speech, to ensure these were fit for purpose in meeting all of their legal obligations and were also proportionate. As part of this assessment, clear evidence was gathered that providers were finding an appropriate balance between their duty to prevent individuals being drawn into terrorism and their duty to uphold freedom of speech.
22. The Committee's report, published in late March 2018, concludes that the problem of students and/or members of the public restricting free speech at universities is not pervasive but it does occur and, when it does, is a problem. It identifies a number of factors inhibiting freedom of speech: intolerant attitudes, often incorrectly using the banner of "no platforming" and "safe-space" policies; incidents of unacceptable intimidatory behaviour by protestors intent on

⁸ Sir Michael Barber's oral evidence on 'Freedom of Speech in Universities' to Joint Committee on Human Rights Wednesday 24th January 2018]

⁹ Sir Michael Barber's oral evidence on 'Freedom of Speech in Universities' to Joint Committee on Human Rights Wednesday 24th January 2018]

preventing free speech and debate; unnecessary bureaucracy in organising events; fear and confusion over what the Prevent duty entails; regulatory complexity; unduly complicated and cautious guidance from the Charity Commission and concern by student unions not to infringe what they perceive to be restrictions.

23. The report makes recommendations, some of which refer either directly to the OfS or will impact its work. These are expectations that the OfS will:
- a. intervene if problems emerge at particular institutions;
 - b. ensure university policies do not inhibit legal free speech and are not overly burdensome;
 - c. provide 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;
 - d. visit universities that have faced issues regarding freedom of speech, and ensure universities and student unions are respecting this right, and
 - e. 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.

In addition, the Committee also recommends reviewing both the Prevent duty guidance for higher education institutions and the Charity Commission guidance to student unions. A draft copy of OfS's response to these recommendations has been included under **Annex A**.

24. The JCHR report demonstrates that there is some confusion across the sector amongst students, student unions, regulators and even speakers about what constitutes interference with freedom of speech. Students are not obliged to invite a particular speaker or to continue with an invitation if they no longer want to hear from that person. Speakers can also decline to participate in events or refuse to share a platform with a speaker they oppose. However, the report argues that freedom of expression is unduly interfered with when protests become so disruptive that speakers are prevented from speaking or attendees from attending, or when student groups are unable to invite speakers ostensibly because other groups protest, or students are deterred from inviting speakers by complicated processes and bureaucratic procedures.
25. Evidence presented to the Committee also demonstrates that incidents where freedom of expression have been restricted frequently involve groups who are perceived as minorities, and/or as having views which are not unlawful but which some could consider to be offensive. Examples of such groups are: pro- or anti-abortion views, issues of sexuality or gender, and matters concerning faith or atheism.
26. The report also argues that the current guidance in relation to the Prevent duty is over-reaching, causing confusion and resulting in some events not proceeding, thereby having a 'chilling effect'. It cites some concern about the lack of clarity on the definition of 'extremism' in the Prevent guidance but acknowledged that further clarification has come following the judgement in *Salman Butt v Secretary of State for the Home Department*¹⁰. The Committee recommends that the Prevent duty guidance is updated to reflect this judgement.
27. The Committee also criticises the Charity Commission guidance for student unions arguing that it currently takes a more restrictive approach in relation to an institution's political activities and

¹⁰ In this case it is argued that the Prevent duty guidance is restricted to views that actively risk drawing others into terrorism.

campaigning than other regulators in the UK.

28. As a result of their investigation, the JCHR has issued limited guidance aimed at reducing some of the complexity around freedom of speech to improve the current situation whereby conflicting advice exists between different regulatory bodies.
29. Whilst the Committee's report makes many helpful observations, the report's contents focus primarily on events where speakers are invited and does not engage much with free speech in the digital environment. It also concentrates on student-initiated events, ignoring those arranged by an institution's professional or academic staff.

Current perceptions of free speech at English universities

30. The evidence to date demonstrates that the sector is wholly committed to upholding freedom of speech; this is reflected in the significant steps providers have taken and in the resources they have employed to allow contested subjects to be debated. Sometimes, despite providers' and others' best efforts, free speech can be suppressed and/or instances of self-censorship occur; in such instances, expectations are that the OfS will respond.
31. Current public discourse includes beliefs that there are opinions – particularly political and religious ones - which are not welcome on campus. Spiked's Free speech University rankings (FSUR) for 2018 claim that censorship in universities is a chronic problem and that restrictions on free speech are increasing every year; 'Our survey, ranking 115 UK universities... shows that 54 per cent of universities now actively censor speech, 40 per cent stifle speech through excessive regulation, and just six per cent are truly free, open places.¹¹' The JCHR report does not agree with this assessment and argues that media accounts of incidents are 'out of kilter with reality'. It also references its own student survey which suggests that free speech was not overly inhibited and that it was valued by students.
32. Incidents relating to free speech attract media comment; pictures and films of protests are dramatic and people are happy to provide soundbites and commentary. The complex web of opinions, beliefs and tensions in each interaction are unlikely to be represented comprehensively in the bite-sized formats in which news is digested today and this is exacerbated further by social media commentary. Reporting on free speech in the higher education easily lends itself to distortion.
33. Freedom of speech is open to subjective interpretations; what is considered controversial can change. A significant portion of a student body can unite behind an issue which they collectively consider controversial but personally may have no strong interest in challenging. A tendency toward group cohesiveness can ensure that positions become entrenched and protests gather momentum.

Next steps

34. Current interest in and scrutiny of incidents – as well as their frequency – means free speech in higher education will continue to receive high profile treatment for months to come and the OfS's new role in this area will continue to be in the spotlight. The OfS will need to be proactive and fast-paced in its external messaging whilst embedding its new regulatory approach.

¹¹ <http://www.spiked-online.com/free-speech-university-rankings#.WumTDNMvy-o>

35. The OfS has received several items of correspondence and requests for action in the past few weeks; it needs to be actively participating in and shaping the current debate. This is partly being delivered through its involvement with the Minister's Summit but this alone is not enough. The JCHR report demonstrates that the landscape around free speech, and who requires and regulates what is confused. This has been borne out in the diverse requests for comment, recently directed at the OfS, and the organisation needs to take a position on what it will and will not comment on over the coming months.
36. In addition, the ubiquity of social media and digital communications means that this landscape is constantly evolving with recent high profile news stories about the Universities of Exeter¹² and Warwick¹³.
37. **Annex B** sets out some proposed next steps and activity to work with partners and key stakeholders to shape the OfS's role further.

Resource implications

38. Staff resource will need to be dedicated to this in summer 2018 and most likely beyond, either in responding to media requests, inquiries and/or in working with other sector bodies in clarifying roles and responsibilities.
39. Evidence provided by the Committee demonstrates that there is a need for more information and education to ensure there is greater clarity on what is free speech, when is it being suppressed and when is it not;
40. The OfS, potentially with other bodies, will need to develop a robust external position to tackle the disproportionate perceptions created by media coverage.

Risk implications

| Risk Type | Description |
|--------------|---|
| Reputational | Violent protests at an event on a provider's premises which receives media coverage that gives the impression the sector is not protecting free speech (and students) effectively; |
| | Current perception that OfS regulates or actively monitors freedom of speech in the sector; this could lead to a negative reputational impact of OfS as a regulator if there are high profile media stories about freedom of speech not being properly regulated; |
| | Evidence versus assurance; the implication of insufficient scrutiny of Codes of Practice during the registration process and how will this impact the OfS if some Codes are later found not to be fit for purpose; |
| | Feeds into existing discourses such as the perception that students are 'snowflakes' and unwilling to hear views different to their own; |
| Political | Increasing perception that universities are becoming a hostile environment for people holding certain views which could provoke additional political interest; |
| Security | Risk that unpopular views of minority groups go underground (social media, dark web) and no longer seek to participate in open debate; |

Communications and engagement

¹² <http://www.bbc.co.uk/news/uk-england-devon-43966504>

¹³ <http://www.bbc.co.uk/news/uk-england-coventry-warwickshire-44052070>

41. It is proposed that an external communications plan is developed to support the OfS's work in championing freedom of speech for the remainder of 2018. This work would need to be built around the following key themes:
- Free speech on campus is in the student interest; freedom to debate is central to a high quality student academic experience and the OfS stands for the widest possible definition of free speech;
 - The OfS is a partner in championing free speech, together with other bodies, and believes in working collaboratively with the sector to secure free speech;
 - The evidence to date demonstrates that there is broad commitment across the sector to uphold freedom of speech:
 - The new regulatory environment will help to ensure this continues to be the case;
 - Thousands of events take place each year without serious incident;
 - Localised issues do occur from time to time and, where appropriate, the OfS will work with others to ensure the learnings from these are captured.
 - The OfS will be respectful of institutional autonomy and will not interfere or monitor free speech directly but it will engage with providers and other sector bodies when specific issues emerge.
42. The OfS needs to agree what elements of the discourse around free speech it intends to engage with and which should be left alone. This should also help in clarifying what action could be taken in relation to incidents involving free speech before the new regulatory framework is fully operational.
43. In addition, communications work should seek to establish and populate an internal repository of best practice which can become a resource to be shared more widely with the sector. It also foresees the publication of work to promote projects, which are being funded through recent Catalyst Fund rounds, to promote harmony on campus and safe and respectful approaches to freedom of speech.
44. The OfS needs to be seen to be active and effective in securing free speech in universities and to follow up incidents and build on any lessons learned.
45. Our intention is to make this paper available on the OfS website in line with our standard publication procedures.

DRAFT: For discussion**Office for Students' response to the Joint Committee on Human Rights report 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' 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's role in promoting and protecting freedom of speech

The OfS's 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 from higher education' 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 higher 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's 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 our requirements 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's 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.

However, we are working 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.

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 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.

While this is separate to the OfS's work on registration, where the Prevent team detects wider concerns in relation to freedom of speech that may provide evidence of non-compliance with a provider's conditions of registration, this would be shared with colleagues.

Providers have a responsibility to facilitate respectful, civil debate and we will continue to expect providers and student unions to promote and facilitate meaningful debate. We respect the institutions' and student unions' responsibilities to manage the arrangements and logistics around speakers and events effectively and to clarify the purpose and intent with each speaker's participation with them.

We welcome the clarity provided by the Committee on what conditions imposed on speakers are considered unreasonable although we could, however, foresee that having an advance copy of a speech would be appropriate under certain circumstances 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, the processes should be independently reviewed.

The way forward

Recommendation 14. We welcome the OfS's 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 OIA.

We will also be collecting data about complaints reaching the Office of the Independent Adjudicator (OIA) (which includes any complaints made in relation to freedom of speech) which may inform our judgement.

The OfS is 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 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 the 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 either 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 be thus 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 E2.¹⁴

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

¹⁴ 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.

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 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 and 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 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 universities must be complementary and clear about the roles, responsibilities and remits of all parties and we will work closely together with others to make sure the 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 the students, student unions and universities. We also welcome the opportunity to work with the Government and the other relevant bodies to ensure clearer, more consistent guidance is available.

Suggested plan of OfS activity in relation to free speech (in addition work which is part of the registration process)

| Item | Activity |
|------|--|
| 1. | <p>Work initiated by JCHR investigation and report:</p> <ul style="list-style-type: none"> • Respond to Joint Committee on Human Rights report; • Work with other relevant bodies to scope out OfS's role following Summit and to ensure the landscape around free speech is as clear and simple for students and providers as possible, that clearer, more consistent guidance is available and that policies and procedures are complementing institutions' free speech obligations, not conflicting with them; • (Potentially) Involvement with broader survey on students' opinion to assess levels of confidence amongst students as a whole in free speech. |
| 2. | <p>Scoping the OfS's position externally:</p> <ul style="list-style-type: none"> • (Reactive) respond to correspondence and requests for involvement; • (Proactive) develop OfS messaging on free speech and agree strategy for dealing with media coverage and requests for comment; • (Proactive) establish internal repository of provider best practice in upholding free speech which demonstrates: <ul style="list-style-type: none"> ○ How a culture of free speech has been promoted ○ How external speakers and events have been managed and facilitated effectively ○ How good relations on campus have been maintained • (Proactive) 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. |
| 3. | <p>In relation to the Prevent duty:</p> <ul style="list-style-type: none"> • Continue to be alert to any issues or instances which arise as a result of OfS's work monitoring the Prevent duty and which indicate that the correct balance in securing free speech is not being met; • 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; • Capture examples of how institutions have combined freedom of speech responsibilities with the Prevent duty and share best practice more widely. |