Consultation on proposed regulatory advice and other matters related to freedom of speech

Analysis of responses and decisions

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Executive summary

The Office for Students (OfS) aims to ensure that students from all backgrounds benefit from high quality higher education, delivered by a diverse, sustainable sector that continues to improve.

In May 2023 the Higher Education (Freedom of Speech) Act ('The Act') received royal assent. It placed new and strengthened requirements for providers, their constituent institutions and some students' unions in relation to freedom of speech.[1] It strengthened the definition of academic freedom. The legislation also strengthened the OfS's role in regulating freedom of speech and academic freedom in English higher education, including administering a free speech complaints scheme and a new condition of registration.

Most of these provisions were expected to come into force through secondary legislation passed through Parliament. We anticipated that these provisions would take effect on 1 August 2024. The OfS therefore consulted on proposals in late 2023 and early 2024 concerning:

a. the free speech complaints scheme;

b. how it would regulate students' unions; and

c. regulatory advice on the free speech and academic freedom duties on providers, their constituent institutions, and students' unions.

A new government was elected in July 2024. The new Secretary of State decided to pause the implementation of the provisions contained in the Act and to consider its approach. This meant that the free speech complaints scheme did not open, and our regulation of students' unions did not start, on the anticipated date of 1 August 2024.

In January 2025, the Secretary of State confirmed in a statement to Parliament the outcome of the government's review.[2] She announced that the main duties of the Act on registered providers and their constituent institutions will commence shortly (now expected 1 August 2025):

- a duty to take reasonably practicable steps to secure freedom of speech within the law
- a ban on the use of non-disclosure agreements to silence victims of bullying, harassment or sexual misconduct on campus
- a requirement for all registered providers and constituent institutions to have codes of practice to ensure the protection of free speech
- a duty to promote the importance of freedom of speech in higher education.

This statement also confirmed that the OfS will have a duty to promote freedom of speech, and continue to have a director for freedom of speech and academic freedom. Following additional

[1] 'Constituent institution', in relation to a registered higher education provider, means any constituent college, school, hall or other institution of the provider. See HERA part A1 section A4(4).

[2] See GOV.UK, 'Government reaffirms commitment to Free Speech in universities'.

primary legislation, it is expected to operate an amended complaints scheme and to have the power to introduce a condition of registration relating to freedom of speech.

Consultation on our proposed regulatory advice and other matters relating to freedom of speech

On 26 March 2024 we consulted on our proposed regulatory advice and other matters relating to freedom of speech.[3]

During the consultation period we engaged with and spoke to students, parents, staff, members of the public, universities and colleges and their representative bodies, students' unions officers, other regulators, and advocacy and faith groups. The consultation was open until 26 May 2024 and we received 112 group completed responses and 24 individual responses. This included:

- 112 group responses from providers, students' unions, advocacy groups, sector bodies, membership bodies, regulators, and other organisations
- 24 individual responses from staff working at providers, students, parents of students, and individual members of the public.

In more detail, we received:

- 55 responses from providers
- 30 responses from students' unions, students and parents of students
- 14 from advocacy, campaign or research groups
- 16 responses from individual staff working at providers
- Nine from sector bodies
- Two from regulators
- Two from membership bodies
- The remaining eight were from individual members of the public or companies.

We would like to thank all those who took the time to consider and respond to the questions in the consultation or provided feedback at our webinars and roundtables, including those who have responded to discuss their personal experience of restriction of freedom of speech or academic freedom. We know that restriction of freedom of speech or academic freedom are serious issues affecting students, staff and visiting speakers.

We have carefully considered all the responses we received, including partially completed responses, and these insights have assisted our decision-making.

[3] See Consultation on proposed regulatory advice and other matters relating to freedom of speech - Office for Students.

Freedom of speech and academic freedom are essential to higher education. The core mission of universities and colleges is the pursuit of knowledge, and the principles of free speech and academic freedom are fundamental to this purpose. They provide an environment to advance new ideas, encourage productive debate and challenge conventional wisdom. All staff and students are entitled to teach, learn and research in a culture that values vigorous debate, including in relation to difficult, contentious or uncomfortable topics.

As a first step in preparation for the revised duties taking effect, this document sets out our analysis of responses and outcome to the free speech duties consultation we ran in 2024.

We are also publishing the new Regulatory advice 24: guidance related to freedom of speech, and we are making amendments to the regulatory framework reflecting our updated duties on freedom of speech and academic freedom. The amendments to the regulatory framework will come into effect on 1 August 2025.

Key themes

This report on our decisions discusses how feedback from these responses informed our regulatory approach, and our judgement about whether our guidance was likely to have any unintended consequences.

We published separate but related consultations on our proposed freedom of speech complaints scheme, and on our approach to regulating relevant students' unions, in December 2023.

Students' unions were covered by the duty to secure freedom of speech at the time of our original consultation, but following the government decision in January, the relevant provisions are expected to be repealed. We have chosen to include responses concerning students' unions within this publication so as to record faithfully the responses to the consultation as it was conducted at the time. However, we have only responded to and made decisions on matters that remain relevant i.e. provisions that will take effect following the outcome of the government's review. This means that we will not comment on matters relating to students' unions within the document unless this is relevant to the duties in the Act that will commence.

Our original consultation also covered the recovery of costs associated with the freedom of speech complaints scheme, and also in relation to the process that results in the imposition of a monetary penalty on a relevant students' union in relation to a breach of any of its free speech duties. The government announced intended changes to the freedom of speech complaints scheme as part of the 15 January announcement (and, as already stated, the relevant provisions applying to students' unions are expected to be repealed.) We have therefore chosen not to provide a response on this question in advance of legislation.

Respondents to this consultation also raised other matters concerning the complaints scheme. However, our response to our consultation on our proposed regulatory advice and other matters relating to freedom of speech will not discuss the complaints scheme in detail because its implementation will depend on future legislation.

As part of our consultation on the complaints scheme, we proposed definitions for terms such as 'visiting speaker' and sought feedback on these. As these terms affect the scope of the duties covered in Regulatory advice 24, we have included responses on some of the definitions in the

complaints scheme in this consultation decision document. We have included this under question 5.

Overall, while some respondents agreed with the aims of the proposals, some respondents also expressed concern about their feasibility and clarity, and some expressed concern about potential unintended consequences.

- Some respondents had concerns about the original timescales for implementation i.e. 1 August 2024.
- Some respondents called for a delay to implementing the duties or to our regulation of the duties.
- Some respondents agreed with our proposed approach relating to the 'secure' and 'code' duties.
- Some respondents were concerned that the proposals would be onerous to implement and could restrict institutional autonomy.
- Some respondents believed the proposals would negatively affect people with protected characteristics and that they would experience discrimination or harassment. Some respondents were concerned the proposals would protect Holocaust denial.
- Some respondents welcomed our proposed approach on reasonably practicable steps.
- There were mixed views on the examples we included. Some found them helpful; others called for more examples, or greater clarity on the examples used.
- Some respondents wanted greater clarity on how the duties interacted with other legal and regulatory requirements, e.g. the Equality Act, the Prevent duty, and other restrictions on speech beyond harassment and discrimination.

Summary of decisions

After carefully reviewing all the responses we have decided to publish a final version of Regulatory advice 24 that takes these views into account. We have provided a more detailed summary of the changes in the table below:

Proposal	Decision
Proposal A – introduce Regulatory advice 24: Guidance related to freedom of speech	We have made a final decision to publish Regulatory advice 24. We discuss revisions based on feedback from respondents below.
Proposal B – introduce changes to the Regulatory Framework to reflect new general duties on and functions of the OfS concerning freedom of speech and academic freedom	We have made a final decision to make these changes based on our original proposals.
Proposal C – apply our approach to recovering costs in Regulatory advice 19 to free speech	We are not taking this forward. We await further details of the free speech complaints scheme and we expect that students' unions

Proposal	Decision
complaints we uphold or partially uphold, and students' unions	will no longer be directly subject to the free speech duties.

We have illustrated in the table below several examples of amendments to the final Regulatory advice following feedback from respondents to the consultation. This is not an exhaustive list of the changes we have made to the final Regulatory advice:

What respondents sought	What we said or did	Example of change
More guidance on decision-making	We have introduced an analytical framework to help providers in their approach to securing freedom of speech.	We have introduced a three-step framework in new section 2 of the final Regulatory advice.
Guidance on other laws or regulation restricting speech	We have introduced additional sections covering some legal provisions restricting speech	New paragraphs 33-54 New examples 1 and 2
More guidance on relevant factors in deciding reasonably practicable steps and the relevant factors involved in deciding on those steps	We have distinguished between positive steps and negative steps that can be taken to secure freedom of speech. We have also clarified what we consider to be relevant factors and what are irrelevant factors.	New paragraphs 61-63 New paragraphs 64-123 New examples 3-23
Interaction between free speech duties and Public Sector Equality Duty	We have clarified the Public Sector Equality Duty and its interaction with the free speech duties. We have also introduced new illustrative examples on this.	New paragraphs 90-95 New examples 6, 7, 9, 15, 18, 20, 32, 33, 35, 39, 48 and 54
Guidance on regulation of speech that is compliant	We have provided a range of examples covering situations of restrictions and regulation of speech and other activity that is compliant with the secure duties.	New examples 1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16
Clarity on whether transnational education is covered	We confirmed that the duties do not have an extraterritorial effect.	New paragraph 13
Guidance on visiting speaker, students, and staff	We have confirmed definitions of these having included relevant parts of the complaints scheme consultation analysis into this analysis document.	New glossary
Guidance on research ethics	We have expanded a section in the final Regulatory advice and introduced an illustrative example.	New paragraphs 194-7 New example 44

What respondents sought	What we said or did	Example of change
Criticising your own provider or constituent institution	We have said that reputational effect is unlikely to be relevant to whether a step is reasonably practicable.	New paragraphs 62, 66, 67, 123 New examples 22, 23
Guidance on encampments and protests	Speech that interferes with essential functions may be regulated, but this should focus on its time, place or manner.	New paragraphs 106-112 New examples 11-13
More guidance concerning antisemitism	We have introduced a range of examples that may be relevant to antisemitic harassment.	New examples 2, 6, 7, 9, 11, 12, 13
Whether the OfS would protect Holocaust denial	We will not protect Holocaust denial.	New paragraph 204
More advice on victimisation under the Equality Act	We have introduced material on victimisation and how it can interact with free speech, and an illustrative example.	New paragraphs 86-89 New example 5
Guidance on Professional, Statutory and Regulatory Body (PSRB) expectations	We have introduced new text covering PSRB expectations and fitness to practise proceedings.	New paragraphs 115-119 New example 24

Next steps for providers

We expect every registered provider and constituent institution to identify the reasonably practicable steps that it can take to secure freedom of speech within the law. We have developed the guidance to allow for variation in how providers achieve this core requirement as we recognise that differences in types of provider and context, including how courses are delivered and the characteristics of students, might involve different approaches.

The guidance emphasises that often freedom of speech is more about what you say than how you say it. In general this means that universities cannot ban ideas but can sometimes regulate when, where and how students, staff and invited speakers talk. We have created a three-step guide to help providers approach this (on pages 7-9 of the guidance).

We recognise that many providers and constituent institutions have already taken steps towards ensuring compliance. They should continue their work to prepare for the new duties that will commence on 1 August 2025. For instance, higher education providers and their constituent institutions should continue to review as appropriate relevant policies and procedures. These may include:

- personnel processes (appointments, promotions, disciplinary processes)
- governance and decision making processes concerning free speech matters
- research ethics policies

- existing free speech statement and code of practice
- student and staff training materials, to ensure they include freedom of speech in line with the guidance and provide training to ensure students and staff understand the requirements of the guidance.

Links to relevant documents

Higher Education (Freedom of Speech) Act 2023

Higher Education and Research Act 2017

Regulatory advice 24: Guidance related to freedom of speech

Introduction

1. We are publishing the consultation analysis and outcome to the free speech duties consultation we ran in 2024 and ‘Regulatory advice 24: guidance related to freedom of speech’, and we are making amendments to the regulatory framework reflecting our updated duties on freedom of speech and academic freedom. The amendments to the regulatory framework will come into effect on 1 August 2025.

2. We published separate but related consultations on our proposed freedom of speech complaints scheme, and on our approach to regulating relevant students’ unions, in December 2023. As part of seeking views on the complaints scheme, we proposed definitions on terms such as ‘visiting speaker’, and sought feedback on these. As these terms affect the scope of the duties covered in Regulatory advice 24, we have included responses to some of the definitions in the complaints scheme in this consultation decision document. We have included this in our response to Question 5.

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

General comments

3. Many respondents indicated broad agreement with the guidance in our proposed Regulatory advice relating to section 1 on the 'secure' duties and the 'code' duties. In some cases, this was because respondents considered the guidance to be clear and in line with the Act.

Timing

4. Many respondents expressed concern about implementing the secure and code duties prior to 1 August 2024. Specific challenges cited include:

    a. the limited time between publication of guidance and 1 August 2024

    b. students being off campus for the summer months

    c. additional time needed to align duties within academic partnerships

    d. resource limitations.

5. Several respondents noted the potential for reputational and financial risk if students' unions and providers are unable to meet the requirements as laid out in the guidance by 1 August 2024.

6. Some respondents suggested that the OfS implements an interim period of one year with no penalties for lack of compliance. A few respondents suggested that publications about any investigations carried out by the OfS in the interim period remain anonymous and that the OfS updates the guidance and relevant examples at the end of the one-year period.

7. Along similar lines, a few respondents suggested either a delayed or phased implementation of the duties.

Timing: our response

8. The timing of commencement of the new duties is a matter for Parliament, which has decided that the relevant duties will commence on 1 August 2025. The freedom of speech complaints scheme and new condition of registration are expected to come into operation following future legislation.

9. We address delaying or phasing the implementation of the duties in more detail in our response to question9.

‘Promote’ duty

10. While many respondents found the guidance relating to the ‘secure’ and ‘code’ duties clear, many respondents requested clarification and further guidance regarding the promote duty. Some respondents suggested that the guidance be developed in consultation with the sector and that it be published in advance of the new condition of registration that at the time of consultation was due to take effect in 2025. A few respondents offered specific suggestions for the promote duty guidance, including several reasonably practicable steps they believed that universities should be advised to take.

11. A respondent recommended that footnote 8 of the proposed Regulatory advice is moved to the main text to highlight the existence of the promote duty and that the OfS clarify whether providers must comply with the promote duty by the 1 August 2024.

12. A few respondents requested further examples of good practice in promoting freedom of speech and academic freedom in job advertisements and relevant HR documents. Further guidance around hosting events, mandatory training and managing the cultural changes that may arise at providers was also requested.

13. Some respondents suggested that the OfS should delay enforcement of the promote duty until guidance has been issued, with a few requesting further clarity about how the promote duty will be monitored. A few respondents requested further clarity regarding the interplay between the ‘secure’ and ‘promote’ duties.

‘Promote’ duty: our response

14. When the OfS consulted on Regulatory advice 24 we expected to be operating, from 1 August 2024, a complaints scheme to enforce the ‘secure’ duty. We therefore considered that it would be important to set out guidance on that duty. We also considered that the freedom of speech code of practice required by the ‘code’ duty would need to set out many of the policies and procedures required by the ‘secure’ duty. We therefore considered that it would be appropriate to publish guidance on the ‘code’ duty. The duties themselves have not changed and we therefore consider that this guidance, as updated following this consultation, remains relevant.

15. We do not expect to enforce the ‘promote’ duty through the free speech complaints scheme. Instead, we may enforce it (as well as the ‘secure’ and ‘code’ duties) via a new condition of registration following the passage of legislation. We may therefore publish guidance on the ‘promote’ duty as part of guidance on the new condition of registration.

16. However, we accept that it may be helpful to give the ‘promote’ duty more prominence in the introduction to Regulatory advice 24. As part of our changes to the Regulatory advice we have therefore **decided** to insert the promote duty into the introduction in new paragraph 11 to read:

> ‘The Act protects free speech within the law. It does not protect unlawful speech. The Act requires providers and constituent institutions to take reasonably practicable steps to secure free speech within the law for their students, staff and members and for visiting speakers. It also requires them to maintain a free speech code of practice and to promote

the importance of freedom of speech within the law and academic freedom in the provision of higher education.'

Scope of guidance

17. A few respondents sought clarity regarding the definition of a 'relevant students' union'. A respondent noted that the definition of students' unions does not match the representation chosen by students at independent higher education providers.

18. Some respondents requested that the guidance distinguish between colleges with higher education provision and universities. A few respondents requested that the guidance also clearly demarcates duties and relevant requirements for students' unions from duties and relevant requirements for providers. A respondent commented that placing guidance that only relates to providers alongside guidance that only relates to students' unions may result in unnecessary confusion.

19. A few respondents expressed concern that the guidance is not suitable for independent higher education providers as it does not reflect their governance, students or provision.

20. While many respondents considered that the guidance adequately reflects a diverse sector, some respondents commented that further guidance is required to cover the breadth of the sector.

21. A few respondents queried the application of the guidance to a students' union which is part of a constituent institution.

Scope of guidance: our response

22. Former paragraph 9 of the Regulatory advice sets out the duties on students' unions under sections A5 and A6 of part A1 of the Act. We do not now expect those duties to come into effect. We have therefore **decided** to delete this paragraph. We have also **decided** to delete, throughout the final document, references to students' unions in the context of these expected duties.

23. The duties extend to all registered providers, and we would not expect give separate Regulatory advice to registered further education colleges. However, we have discussed matters such as statutory safeguarding requirements as part of our discussion of reasonably practicable steps and relevant factors under question 3.

24. We have sought to factor in a range of different scenarios through our set of examples in part to reflect the diversity of the higher education sector as well as comments made by respondents throughout this document.

25. We recognise that the sector contains a diversity of higher education provision. For this reason, we consider that steps that might be required of some providers might not be required of others as set out at new paragraph 133. For instance (and as stated in new paragraph 65) a further education college would not be required to breach the requirements of statutory guidance on safeguarding that apply to it in relation to students under the age of 18.

26. Because the ‘secure’ and ‘code’ duties apply to constituent institutions as well as to providers, we have also **decided** to add, to the final guidance, additional references to ‘constituent institutions’ as well as ‘providers’ where appropriate.

‘Code’ duty

27. A few respondents expressed concern that the requirement for a students’ union to maintain a code of practice does not appropriately acknowledge the diversity of students’ unions across the sector. They commented specifically on the limited capacity of many students’ unions in terms of time and resource. Additionally, a respondent said that further education colleges with students’ unions led by students under 18 have a unique challenge. These students would need the emotional and academic capacities to appropriately interpret and apply the guidance and relevant legislation.

28. A few respondents queried the acceptability of students’ unions and their parent institutions maintaining joint codes of practice.

‘Code’ duty: our response

29. The responses to section 1 of the draft guidance relating to the ‘code’ duty mainly concerned the application of that duty to students’ unions. We do not now expect those duties to come into force.

Reasonably practicable steps

30. Some respondents requested further explanation of the term ‘reasonably practicable’. A few respondents considered that a lack of collective understanding may result in students’ unions becoming increasingly risk averse, particularly smaller students’ unions or providers without in-house legal representation.

31. A few respondents noted that it is unclear what would constitute a ‘reasonably practicable step’ in relation to the ‘secure’ duty.

32. A few respondents queried whether providers will be required to justify why they took (or did not take) certain steps.

33. A few respondents considered that while the guidance in section 1 begins by recognising that reasonably practicable steps will vary from one body to another, it then goes on to understate this position, particularly in the following sentences from paragraph 10: ‘...the OfS expects that in a wide range of circumstances it will be reasonably practicable to take many of these steps. It may also be reasonably practicable for providers and others to take other steps, in any particular case.’ Other comments about this excerpt include:

    a. A respondent recommended removing these sentences from the guidance.

    b. Another considered the language unclear and requested further clarity to support both providers and students’ unions in remaining compliant. Similarly, a few respondents found the language vague and unhelpful.

c. A few respondents believed that the excerpt insinuates that the OfS expects universities to over-prioritise free speech considerations. A respondent highlighted that this is relevant to what they called the quasi-judicial role that the Act assigns to the OfS.

34. Respondents emphasised the importance that the guidance throughout section 1 remain consistently clear that what is reasonably practicable will vary significantly between bodies, particularly in relation to practicability and timescales. Specific suggestions included replacing the term 'may' with 'will significantly', in the following statement from paragraph 10: 'Whether (and in what timescale) they are reasonably practicable may vary from one body to another'. A few respondents noted that insufficient clarity may result in the duties being perceived as overly onerous and that this, in turn, could result in a chilling effect on free speech and risk aversion from students' unions.

35. A few respondents requested further guidance about what contextual factors the OfS might consider when assessing whether a step may or may not be reasonably practicable, other than the size of the body. It was suggested that further examples demonstrating the diversity of students' unions and providers should be included in the guidance.

36. A few respondents suggested that the OfS offers informal advice to assist providers and students' unions in making decisions regarding what might be a reasonably practicable step. This open dialogue would encourage providers and students' unions to seek advice without the fear of regulatory intervention.

37. A few respondents encouraged the OfS to take a proportionate approach in relation to further education colleges and other institutions that are dual-regulated, particularly when making judgements about what constitutes a reasonably practicable step.

Reasonably practicable steps: our response

38. We have **decided** to re-write section 1 of the final Regulatory advice to reflect feedback from respondents elsewhere and to make the advice clearer. In section 3 of this analysis of responses we address in more detail the meaning of 'reasonably practicable steps', and the likely relevant factors involved in deciding what is reasonably practicable. We accept that the impact of securing freedom of speech on the administrative functions or institutional resources necessary to perform the essential functions of a provider is a relevant factor.

39. Currently, the OfS may require providers and/or constituent institutions to explain why they took (or did not take) certain steps. We may do this as part of any investigation under our existing E1 condition of registration on public interest principles concerning freedom of speech and academic freedom and any related investigation on management and governance under condition E2.

40. Our regulatory advice is intended to help to navigate the free speech duties. We may also provide further advice in future as we have a power under the Act to identify and give advice on good practice about freedom of speech and academic freedom.

41. In section 3 of this analysis, we address regulatory requirements as part of the relevant factors in the framework for assessing whether a step is reasonably practicable. We consider that steps that might be required of some providers might not be required of others, or may only be reasonably practicable at different timescales, and as already indicated we have

decided to set this out at new paragraph 133. Whether this is the case could depend on the step in question and we therefore consider that 'may vary' remains appropriate.

Within the law

42. Some respondents suggested that the definition of 'unlawful' should be narrowly drawn so as not to allow conflation of 'political correctness' with legality.

Within the law: our response

43. We explain in more detail our approach to 'within the law' in our response to section 2.

Complaints scheme

44. Some respondents urged the OfS always to allow universities and students' unions to make representations as part of the complaints process, particularly given the complexity of the legal landscape (and therefore the complexity of decisions to be taken by providers and students' unions) and the lack of precedent for OfS judgements on complaints.

Complaints scheme: our response

45. Following the government's decision in relation to the freedom of speech complaints scheme, we have decided not to include material on the scheme in the current guidance.

General comments

46. A few respondents commented on the need for the OfS to ensure that the guidance is regularly updated to reflect changing legislation.

47. A respondent highlighted that the guidance does not include reference to 'institutional autonomy' or its synonyms. The respondent stated the OfS duty to have regard to the need to protect institutional autonomy.

48. Some respondents emphasised the need for the guidance to be amended to ensure it accurately reflects the law and regulatory position. Respondents highlighted the importance that the OfS does not mislead students' unions about the nature of the law, or present it as unduly onerous, as to do so may negatively affect equality, diversity and inclusion (EDI) initiatives and the culture of campuses.

49. Many respondents requested that the OfS explicitly reference the potential interplay between free speech requirements and upcoming OfS requirements relating to harassment and sexual misconduct.

50. A few respondents suggested that freedom of speech cannot be used to allow misinformation, conspiracy theories and weak evidence to take hold. They stated that this created a risk of fuelling antisemitism.

51. A few respondents requested further detail regarding the OfS's likely response to different types of breach.

52. A respondent stated that universities struggle to comply with negative obligations (e.g. to tolerate freedom of speech), and that compliance may be increased if the OfS flags positive obligations early and clearly.

General comments: our response

53. We may update our guidance or issue additional guidance as appropriate depending on legislative and other changes.

54. In the consultation on this guidance, and in these decisions, we have had regard to our general duties under the Higher Education and Research Act 2017 (HERA), including those that relate institutional autonomy. We discuss this in Annex D of the original consultation and in Annex D of this document.

55. In drafting the Regulatory advice, we have kept in mind the relevant legal framework and the OfS's regulatory requirements, including its new condition of registration E6 related to harassment and sexual misconduct which will come into force on 1 August 2025.

56. We discuss antisemitism in subsequent sections of this document, in particular in our responses to question 4 and question 10.

57. In relation to any potential breach of a condition of registration, our regulatory approach will depend on the nature of the potential breach itself and how a provider responds to it.

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

Freedom of speech within the law: overarching comments

58. In response to Question 2 and to other questions, respondents made overarching comments that have had consequences for the overall structure of original sections 2 and 3 of our guidance. We summarise and respond to those comments here.

59. Some respondents stated that institutions may have reasonable grounds for restricting speech that is within the law. An example that a few respondents mentioned was bullying, which they said was not against the law. They commented that it was unclear whether the free speech legislation would protect an individual who was accused of bullying.

60. On the same point, a respondent commented that the OfS cannot intend institutions not to restrict speech that is 'within the law' in the limited sense described in section 2 of our proposed guidance, including gratuitous insults, belittling comments not linked to a protected characteristic, and the deliberate spreading of falsehoods. These are, they said, matters where the OfS would expect providers to take proportionate steps to intervene. Similarly, some respondents requested that the OfS address whether institutions could restrict bullying speech or speech that may be incompatible with a right under the European Convention on Human Rights (ECHR).

61. Respondents also expressed concern that assessments previously made by the courts and/or legal bodies as to the lawfulness of speech will need to be made by staff within providers, constituent institutions and/or students' unions. A respondent stated that while section 2 of the guidance paraphrases all the relevant legislation in this area, that does not equip colleagues within universities to ascertain whether speech is lawful or not. The requirement to determine unlawful speech would need considerable interpretation within the law and this adds to the resource required by each provider, constituent institutions or students' unions. Some of these responses requested clarity from the OfS as to what is and what is not lawful, for instance in relation to speech relating to matters in international politics or to sex and gender.

62. One respondent said it was unclear how providers can take disciplinary action against staff who cause offence that is against its policies, terms, and conditions.

Freedom of speech within the law: overarching comments: our response

63. Freedom of speech is defined in the Act as the freedom to impart 'opinions, ideas and information'. Similarly Article 10(1) of the Convention, to which the Act refers, protects the freedom to receive and impart 'information and ideas'. 'Freedom of speech' includes the

freedom to express opinions, ideas or information that may be shocking, offensive or disturbing.[4]

64. Therefore it is likely to be extremely difficult for higher education providers and other relevant organisations to comply with their free speech duties if they seek directly or indirectly to restrict the content of lawful speech. For instance, a provider or constituent institution may wish to restrict or prohibit speech because it has made a negative value judgement about the content of the speech. There is likely to be very little scope to restrict or prohibit lawful speech in this way.

65. We recognise that for providers and constituent institutions to manage their affairs in respect of their essential functions, there must be some (extremely limited) scope to place proportionate restrictions or constraints on free speech within the law where there are compelling reasons to do so. For instance, a protest, in some circumstances, may directly interfere with others' learning, teaching or research (for instance by occupying a classroom). A university or college may need to restrict a protest and take action so that it can continue its essential functions.

66. Wherever reasonably practicable, restrictions on speech should focus on the time, place and manner of that speech. They should not, in intent or effect, restrict the expression of a lawful viewpoint simply because it expresses that viewpoint. Therefore, they should not be framed so broadly or vaguely that they may be used to punish or suppress the expression of a lawful viewpoint. For instance, a requirement that a speaker should not interrupt an exam is suitably neutral as to the viewpoint expressed. By contrast, a requirement that speech should not undermine the university's values may suppress lawful expression of opinions, information or ideas. Restrictions on the time, place and manner of lawful speech should be the least intrusive ones necessary for ensuring safety of persons and continuity of essential functions.

67. In relation to the comment about potentially lawful conduct including belittling and insult, we recognise that universities and colleges that are public authorities are subject to the duty under section 6 of the Human Rights Act not to act incompatibly with a Convention right.[5] It is arguable that they have an obligation under Article 8 of the Convention to prohibit some workplace bullying. In any case, it may not be reasonably practicable to permit bullying conduct. This is because it may undermine the essential functions of universities and colleges and/or conflict with other legal obligations and regulatory requirements on providers. We accept that there may be scope to include more detail in the guidance on the circumstances in which providers and constituent institutions might regulate speech, including speech that is within the law.

68. We recognise that providers and constituent institutions may need to assess whether actual or potential speech is within the law. We do not consider that it is the OfS's role to provide a definitive list stating, in advance and in detail, whether or not particular speech is within the law. Such a list could in any case become outdated as new legislation was passed and/or caselaw clarified. Nor do we consider that it is the OfS's role to predict in detail what view we would form of specific types of cases before they come to us through a future freedom of speech complaints scheme or when assessing compliance with a future condition of

[4] Scottow v CPS [2020] EWHC 3421 (Admin) 33.

[5] See Human Rights Act 1998.

registration relating to freedom of speech. Those matters are likely to be highly fact-specific. However, we accept that there may be scope to give more details without attempting to be exhaustive.

69. Many providers will in any case be familiar with the need to assess whether actual or potential speech is within the law. The duty to take reasonably practicable steps, to secure 'freedom of speech within the law', has applied to many universities and colleges since Section 43 of the Education (no. 2) Act 1986 came into force.[6] Moreover, the new free speech duties do not change what speech is lawful: speech that was not 'within the law' before the Act came into force does not become lawful by virtue of any provision of the Act (or vice versa).

70. To clarify these points, we have **decided** to alter the structure of original chapters 2 and 3 of Regulatory advice 24. We have **decided**:

    a. to amalgamate original section 2 and original section 3 into one new section 2, setting out a framework that providers and constituent institutions might find helpful for assessing compliance, including measures that might restrict lawful speech;

    b. to include in new section 2 three steps, covering:

        i. whether speech is lawful: (non-exhaustive) details of legislation that is relevant to determining whether speech is 'within the law';

        ii. whether a step is reasonably practicable: relevant factors for assessing whether a step is reasonably practicable, including factors that may mean that it is not reasonably practicable to secure all lawful speech; and

        iii. the requirements of Article 10 of the Convention that any interference with the right to freedom of expression is 'prescribed by law' and proportionate; and

    c. to include in new section 2 a range of examples covering situations of restriction and regulation of speech, and other activity by providers and constituent institutions, that is likely to be compliant with the 'secure' duty. This includes new examples 1, 2, 4, 6, 8, 9, 10, 11, 12, 13, 15 and 16.

Freedom of speech

71. Some respondents commented that freedom of speech is not an absolute right.

72. Some respondents commented that it would be helpful for us to include a definition of academic freedom alongside the definition of freedom of speech and/or to distinguish academic freedom from freedom of speech. For instance, a respondent commented that academic freedom is typically part of a university's charter or statute, as well as employment contracts. Changes would require extensive consultation with unions and academic staff, and approval by university governing bodies and potentially the Privy Council.

[6] See Education (No. 2) Act 1986.

Freedom of speech: our response

73. We agree that freedom of speech as protected by the Act is not an absolute right. Rather, the Act imposes duties to take reasonably practicable steps to secure freedom of speech within the law. This means that unlawful speech is not protected.

74. We have defined academic freedom as it is defined in the Act. We do not have scope to vary this definition. The Act defines academic freedom, in relation to academic staff at a registered higher education provider, as their freedom within the law—

    a. to question and test received wisdom, and

    b. to put forward new ideas and controversial or unpopular opinions

    without placing themselves at risk of being adversely affected in any of the following ways:

    a. loss of their jobs or privileges at the provider;

    b. the likelihood of their securing promotion or different jobs at the provider being reduced.

75. We have **decided** to set out these definitions in new section 1.

Freedom of speech within the law: Article 10 and Article 17

76. The proposed Regulatory guidance stated that:

    > 'All speech is lawful, i.e. "within the law", unless restricted by law. Any restriction of what is "within the law" must be set out in law made by, or authorised by, the state, or made by the courts.'

    Many respondents expressed views on this statement.

77. Some respondents stated that speech is only within the law for these purposes if it is not 'prescribed by law', as set out in Article 10(2) of the European Convention of Human Rights (ECHR). According to some of these respondents, 'within the law', as it occurs in the Act, has an extended meaning that covers (for instance) contractual obligations that meet the conditions set out in Article 10(2). The effect of this, according to these and other respondents, would be that providers and constituent institutions that are subject to the 'secure' duty could still create internal rules and policies that restrict speech in line with Article 10(2) of the ECHR; and that they would not need to take reasonably practicable steps to secure speech that had been so restricted.

78. One argument that respondents made for this reading was that the Human Rights Act makes it unlawful for a public body (such as the OfS) to act incompatibly with a Convention right and that, so far as it is possible to do so, any court or tribunal, when interpreting the Act, must read and give effect to it in a way that is compatible with the Convention rights.

79. Another argument referred to the comment of Baroness Barran, speaking in the House of Lords during the passage of the Act, that 'this Bill… does not change how Article 10(2)

applies'. This, some respondents said, was evidence that the Act does not affect the right of providers and constituent institutions to restrict speech in line with Article 10(2).

80. However, some respondents agreed with the OfS's interpretation of 'within the law': all speech is within the law, except where restricted by Parliament or the courts. One argument that some of these respondents put forward was that it would defeat the point of the legislation if providers and constituent institutions remained free to restrict speech in line with Article 10(2), and were under no obligation to secure speech that they had so restricted.

81. Another argument that some of these respondents put forward was that Baroness Barran's comments do not support the interpretation of 'within the law' to exclude what is restricted by internal rules or policies in line with Article 10(2). Baroness Barran's statement in context was:

> 'People are free to say what they want, so long as their speech is not prohibited under the law. As the noble and learned Lord explained, the right to freedom of speech is a qualified right, meaning that, for example, there is no right to incite racial hatred or to harass others. I am aware that my noble friend Lord Moylan is concerned that freedom of speech is perhaps becoming more qualified by some of the restrictions set out in Article 10(2) but that is beyond the scope of this Bill which does not change how Article 10(2) applies.
>
> This Bill does not change what is or is not lawful under UK law; that is for other legislation to do. The reference to "freedom of speech within the law" in new Section A1(2) simply means freedom of speech that is lawful.'

82. According to these respondents, the context of Baroness Barran's statement is a rejection of the idea that adopting the Article 10(1) definition of 'freedom of speech' permits providers and constituent institutions to create their own restrictions on freedom of speech.

83. A third argument that some of these respondents put forward was that the phrase 'within the law' implies a single demarcation of speech into what is and what is not lawful. For instance, if it is lawful for a lecturer employed at provider A to utter a given sentence in a given context, then it must be lawful for a lecturer at provider B to utter the same sentence in the same context. However (it was argued), a reading of 'within the law' that permits restrictions in line with Article 10(2) does not have this effect. Instead (it was argued), it creates an entirely mobile barrier: speech that is 'within the law' at one provider may not be 'within the law' at another.

84. Some respondents commented that while freedom of speech is defined in the Act by reference to Article 10(1) of the Convention, this must be interpreted in the light of Article 17. Article 17 states that:

> 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'[7]

85. These respondents commented that Article 17 has the effect that speech that aims at the destruction or limitation of Convention rights is not speech that is protected by Article 10(1).

[7] See Human Rights Act 1998.

Some of them also commented that they would welcome clarification of this point in Regulatory advice 24.

Freedom of speech within the law: Article 10 and Article 17: our response

86. We are grateful for the many thoughtful and detailed submissions on this point. We accept that the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. We also accept that the same legislation means that, so far as it is possible to do so, any court or tribunal, when interpreting the Act, must read and give effect to it in a way that is compatible with the Convention rights.

87. However, we do not believe that it follows from either of these points, or from both together, that the Act permits providers or constituent institutions to restrict speech as they wish, as long as this is in line with Article 10(2), and not to take reasonably practicable steps to secure the freedom of any speech that is so restricted.

88. This is because the Convention right at issue is the right to freedom of expression. This right is set out in Article 10(1). If 'freedom of speech within the law' in the Act means freedom of speech within statute and common law, that does not make the duty to secure that freedom incompatible with the Convention right to freedom of expression as set out in Article 10(1).

89. Article 10(2) does not itself create a new Convention right. Instead, it sets out how the right in Article 10(1) can be restricted: it can be restricted by measures which are (i) prescribed in law, and (ii) necessary in a democratic society in the interests of certain listed objectives such as national security, territorial integrity or public safety. Caselaw has clarified that the restriction must also be proportionate. Article 10(2) describes the balancing exercise which the public authority must undertake in order for the restriction imposed to be permissible.

90. However, the balancing act in Article 10(2) is just one of the factors which constrains how far universities can restrict free speech. Universities and colleges that are public authorities must comply with the Human Rights Act 1998 and the Convention, but as higher education providers they are also subject to additional duties under section A1 of HERA to 'secure freedom of speech within the law', and must take 'reasonably practicable steps' in order to do so. These duties are positive duties. However, positive duties inherently contain a negative duty to refrain from doing things which undermine the positive duty or have the effect of frustrating the statutory purpose.

91. The position is therefore that universities and colleges may create rules, contractual obligations etc. that restrict or regulate lawful speech. Such rules must meet two conditions. First, they can only restrict lawful speech if it would not be reasonably practicable to permit that speech. Second, they must be compliant with Article 10(2).

92. However, while Article 10 places a ceiling on any restriction of freedom of speech that a provider or constituent institution may impose, HERA may further narrow the scope for any such restriction.

93. What is 'within the law' for the purposes of HERA (and s.43 before it) is a matter of statutory interpretation of English law. Although in the context of free speech at universities Article 17

will be relevant to ensuring that Art.10 is not applied in a way that seeks to destroy other Convention rights, that relevance has no bearing on the statutory interpretation of 'within the law' in HEFSA.

94. We have therefore decided to retain our original approach to whether speech is 'within the law.' This is now set out in section 2, step 1.

Freedom of speech within the law: other

95. A respondent stated that original paragraph 13 was misleading because (they said) it was intended to imply that other regulatory guidance (including from the Charity Commission) and legal duties are not relevant, which would be misleading.

96. A respondent commented that paragraph 14 conflates 'protected' speech (being rights that could be enforced under Article 10 ECHR) with 'lawful' speech (speech which is not restricted). They suggested amending it to state 'There is no need to point to a specific legal basis for speech. Instead, the starting point is that speech is permitted (lawful) unless restricted by law. Freedom of speech within the law is protected under Article 10 ECHR. Unlawful speech is not protected.'

97. Some respondents requested that the OfS directly address how providers and students' unions should balance competing duties (e.g., sexual misconduct and harassment, employment law, potential criminality, the Race Equality Charter, Athena SWAN and the findings of the Cass review) with free speech duties.

Freedom of speech within the law: other: our response

98. We do not accept that the original paragraph 13 implies that other regulatory guidance and legal duties are irrelevant. We do not accept that original paragraph 14 conflates speech that is 'protected' by Article 10 with 'lawful' speech. All 'lawful' speech is in scope of the 'secure duty' which provides that universities and colleges must take reasonably practicable steps to secure it. We have **decided** to include these points in new paragraphs 27 and 29-32, which now read as follows:

> 'All speech is lawful, i.e. 'within the law', unless restricted by law. Any restriction of what is 'within the law' must be set out in law made by, or authorised by, the state, or made by the courts e.g. legislation or legal precedent/court decisions. This includes (for instance) common law on confidentiality and privacy. It does not include rules made by a provider or constituent institution through contracts, the provider's own regulations etc. (although see step 3 below on proportionate interference).
>
> …
>
> Freedom of speech within the law is protected. Speech that breaches either criminal or civil law is not protected. There is no need to point to a specific legal basis for speech. Instead, the starting point is that speech is permitted unless restricted by law, made by, or authorised by, the state, or made by the courts.
>
> Free speech includes lawful speech that may be offensive or hurtful to some. Speech that amounts to unlawful harassment or unlawful incitement to hatred or violence (for instance)

does not constitute free speech within the law and is not protected: see (for instance) examples 1, 4 and 9 below.

Many providers will be familiar with the need to assess whether actual or potential speech is within the law. The duty on universities, to take reasonably practicable steps to secure 'freedom of speech within the law', has existed since section 43 of the Education (no. 2) Act 1986 came into force. [fn.: See Education (No. 2) Act 1986.] Moreover, the new free speech duties do not change what speech is lawful: speech that was not 'within the law' before the Act came into force does not become lawful by virtue of any provision of the Act (or vice versa).

The following examples are not intended to form an exhaustive list of all the relevant laws. Instead they illustrate a range of legal provisions that make speech unlawful. Relevant statutes include those that create criminal offences but also those that create civil legal obligations, such as the Equality Act 2010 (see step 2 below).'

99. The 'secure' duty does not protect speech that is not within the law. Providers and constituent institutions are not required to take steps to secure speech that is unlawful. While the analysis of specific cases is very likely to be fact-sensitive, we have set out in the guidance matters that we consider to be relevant to whether a step is reasonably practicable. This includes legal duties on providers and constituent institutions.

100. To help explain the scope of the 'secure' duty, we have also **decided** to add the following new paragraph 28:

'The 'secure' duty does not cease to apply where a provider or constituent institution sets standards on how employees talk to one another and/or to students. Nor does it cease to apply in relation to any non-legally binding recommendations of any charter, report or review in so far as these may restrict or regulate lawful speech. Providers and constituent institutions should not set such standards or implement such requirements as are incompatible with the 'secure' duty.'

Equality Act 2010: general

101. One respondent stated that it would be helpful to note in paragraph 16 that students' unions are also subject to the prohibitions on discrimination, harassment and victimisation under the Equality Act 2010, although they are not subject to the public sector equality duty (PSED) because they are not public authorities.

Equality Act 2010: general: response

102. The original version of this guidance included material on other legislation (in particular the Protection from Harassment Act 1997) under the overall heading of 'Equality Act 2010'. Because this might be misleading, we have **decided** to move the discussion of the Equality Act 2010 to section 2, step 2, where we have divided it under the following headings:

- Protected characteristics
- Discrimination

- Harassment
- Victimisation
- Public Sector Equality Duty.

103. We have also **decided** to include, in section 2, step 1, a new section under 'Harassment (Protection from Harassment Act 1997)'.

104. We have **decided** not to include material in relation to students' unions here because students' unions are not expected to be subject to the 'secure' duty.

Equality Act 2010: discrimination

105. A respondent suggested that paragraph 17 ignores specific prohibitions on discrimination relating to disability, pregnancy and maternity, gender reassignment, and failure to make reasonable adjustments for disability. They recommended that paragraph 17 be amended to read that 'Broadly speaking' there are two types of discrimination.

106. Some respondents made comments about the points in the proposed guidance related to discrimination. Some commented on our statement that discrimination on the grounds of age may sometimes be justified. They stated that there are strictly controlled exceptions for 'occupational requirements' that could also apply to other protected characteristics including sex (e.g. where personal medical support is needed) or religion / belief (e.g. for ministers of religion or heads of faith-based schools).

107. A respondent commented on the statement in paragraph 19 in relation to indirect discrimination, that while it was (they said) accurate, it does not give any meaningful insight into the interaction between the Equality Act 2010 and free speech.

108. One respondent stated in relation to paragraph 19 that for indirect discrimination to be proven, both group and individual disadvantage need to be present.

109. A respondent commented that it is fundamentally important that the expression of religious beliefs does not amount to discrimination within the meaning of the Equality Act (citing R (Ngole) v The University of Sheffield [2019] EWCA Civ 1127, 5(10), 135-137). It is therefore important (they said) for the guidance to set out that the Equality Act does not require providers to protect students from ideas (expressed by other students, staff or guest speakers) that they may find discriminatory and that this should be considered an interference with freedom of expression.

Equality Act 2010: discrimination: response

110. We are grateful to consultation respondents for raising a range of points about the details of the Equality Act 2010. In response we have **decided**:

    a. in response to the comment that paragraph 17 ignores specific prohibitions on discrimination relating to disability, pregnancy and maternity, gender reassignment, and failure to make reasonable adjustments for disability, to amend original paragraph 17 to new paragraph 72, which reads: 'Broadly speaking, there are two types of discrimination';

b. in response to the comment that there are exceptions to the prohibition on direct discrimination, to amend original paragraph 18 to new paragraph 73, which reads:

> ‘In general, direct discrimination may occur where someone is treated less favourably than others, because of a protected characteristic. Direct discrimination is unlawful except in certain situations. These include exceptions for ‘occupational requirements’ in an employment context that could apply to protected characteristics including age, sex, or religion or belief. [fn.: See Schedule 9 of the Equality Act 2010.]’;

c. in response to the comment that for indirect discrimination to be proven, both group and individual disadvantage need to be present, to change original paragraph 19 to new paragraphs 74 to 76, which read:

> ‘Indirect discrimination happens when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected characteristic, and an individual is disadvantaged as part of this group. If this happens, the person or organisation applying the policy must show that it has an objective justification. [fn.: See Direct and indirect discrimination | EHRC. For a definition of ‘objective justification’, see Terms used in the Equality Act | EHRC.]
>
> Indirect discrimination against students may occur when a provider applies an apparently neutral provision, criterion or practice which puts or would put students sharing a protected characteristic at a particular disadvantage.
>
> For indirect discrimination against students to take place, all of the following four requirements must be met:
>
> a. the education provider applies (or would apply) the provision, criterion or practice equally to everyone within the relevant group, including a particular student, and
>
> b. the provision, criterion or practice puts, or would put, students who share the student’s protected characteristic at a particular disadvantage when compared with students who do not have that characteristic, and
>
> c. the provision, criterion or practice puts, or would put, the student at that disadvantage, and
>
> d. the education provider cannot show that the provision, criterion or practice is justified as a proportionate means of achieving a legitimate aim. [fn.: See Technical guidance on further and higher education | EHRC]’; and

d. in response to the comment that it is fundamentally important that the expression of religious beliefs does not amount to discrimination within the meaning of the Equality Act, to add the following new paragraph 77:

> ‘The mere expression of views on (for instance) theological grounds, that some consider discriminatory, does not by itself imply that the person expressing such views will discriminate on those grounds. [fn.: R (Ngole) v The University of Sheffield [2019] EWCA Civ 1127, 5(10).] This consideration is relevant when considering whether it

would be reasonably practicable to employ or continue to employ (for instance) a member of teaching staff who has expressed such views.'

111. In response to the comment about the interaction between freedom of speech and the Equality Act 2010, we have **decided** to set out that where speech amounts to unlawful discrimination or harassment under the Equality Act 2010, it is not a reasonably practicable step for a provider to secure it (new paragraph 82). We have also **decided** to include, at the end of the section on the Equality Act 2010 following new paragraph 95, a section on equality policies:

Equality policies

When framing their own equality policies, providers and constituent institutions may find it helpful to take the following steps, which taken together are likely to reduce risks of non-compliance with the 'secure' duty (see also 'Codes of conduct' in section 3):

- use legal definitions where these are available
- incorporate objective tests where appropriate, for instance in relation to harassment
- avoid vague language or undefined terms
- include clear, adequate and effective 'safeguard' statements protecting academic freedom and freedom of speech within the law (for example, to the effect that where a policy conflicts with academic freedom, the latter prevails).

Equality Act 2010 and Protection from Harassment Act 1997: harassment

112. Many respondents commented on the points in the proposed guidance document relating to harassment, as defined in the Equality Act 2010 and in the Protection from Harassment Act 1997. Of these, many expressed the view that harassment of, and discrimination against, religious staff and students is widespread. A few also expressed the view that there was a risk that the guidance would embolden those who wish to engage in religion-related harassment.

113. Some respondents agreed with the statement in the proposed guidance that how the person at the receiving end of conduct perceives that conduct is not the only relevant consideration in determining whether the conduct amounts to unlawful harassment, and that there is also an objective element in both the 2010 and the 1997 definitions. One respondent who agreed with this statement stated that perception is nonetheless a very important factor.

114. Some respondents said that the guidance does not acknowledge, or fully address, the complexity that arises in practice in trying to determine when speech has risen to the level of harassment.

115. For instance, a respondent gave the example of protest on an issue that is controversial and linked to a protected characteristic, where it is very likely that the protest would cause offence

for one group and chanting could be seen as intimidating, yet the views of the protesters may well be within the law. In this scenario, the respondent suggested, there would be a tension between the requirements of the free speech duty and the requirements of the Equality Act 2010. Another respondent said that recent legal precedent has shown that if the manifestation of legal views results in the harassment of others, then action can be taken against individuals who spoke 'within the law', citing the case of Lister v New College Swindon. Some respondents commented that it was difficult to comment on this aspect of our proposed consultation without having seen our response to the consultation on harassment and sexual misconduct.

116. A respondent commented that paragraph 21 refers to Section 26 of the Equality Act 2010, and defines harassment as unwanted conduct 'because of, or connected to' a protected characteristic. The respondent suggested that it would be preferable to use the statutory language, 'related to'.

117. A respondent commented that paragraphs 20 to 23 could usefully mention that the reasonableness test for harassment (referred to in paragraph 22 of the guidance) means that the context within which alleged harassment has taken place will be relevant, as will any other legal rights or duties that apply in that context. A respondents stated that as public authorities, it may also be relevant for universities to consider whether, in cases of alleged harassment, the perpetrator was exercising any of their other Convention rights (e.g. freedom of thought, conscience and religion).

118. A respondent commented that at paragraph 23, it would be helpful to clarify the type of harassment prohibited under the Protection from Harassment Act 1997 as this is distinct from harassment prohibited under the Equality Act 2010. They said that it would be helpful to specify that 'course of conduct' means two or more occasions. Conduct must be oppressive and unacceptable rather than just unattractive or unreasonable and must be of sufficient seriousness to also amount to a criminal offence.

Equality Act 2010 and Protection from Harassment Act 1997: harassment: our response

119. We are grateful to respondents for specific comments on this section. We have **decided**:

    a. in response to the comment about the wording of Section 26 of the Equality Act 2010, to change the words 'because of, or connected to,' in original paragraph 21 to 'related to', now in new paragraph 79;

    b. in response to the comment about the reasonableness test for harassment, and the comment about factors that are relevant to determining whether conduct amounts to harassment, to add to new paragraph 81:

    c. 'The context within which the alleged harassment has taken place will also be relevant, as will any other legal rights or duties that apply in that context. For public authorities, it may also be relevant to consider whether, in cases of alleged harassment, the alleged perpetrator was exercising any of their other Convention rights (e.g. freedom of thought, conscience and religion).'; and

d. in response to the comment about clarifying the type of harassment prohibited by the Protection from Harassment Act 1997, to separate the discussion of the Protection from Harassment Act 1997 from that of the Equality Act 2010 and to replace original paragraph 23 with new paragraphs 46 to 49 and new example 1:

'Harassment in the Protection from Harassment Act is different from harassment as defined in the Equality Act 2010. We discuss the Equality Act 2010 under step 2 below.

The concept of harassment in this Act is linked to a **course of conduct** which amounts to it. [fn.: For this and the next three points see Stalking or Harassment | The Crown Prosecution Service.]. The course of conduct must comprise two or more occasions. [fn.: Section 7(3) PHA 1997] Harassment includes alarming a person or causing them distress. [fn.: Section 7(2) PHA 1997] The fewer the occasions and the wider they are spread, the less likely it is reasonable to find that a course of conduct amounts to harassment. [fn.: Lau v DPP [2000] 1 FLR 799] Conduct must be oppressive and unacceptable rather than just unattractive or unreasonable and must be of sufficient seriousness to also amount to a criminal offence. [fn. Majrowski v. Guy's and St Thomas's NHS Trust [2006] IRLR 695]

Section 1 of the Protection from Harassment Act states that the course of conduct is prohibited if the person whose course of conduct is in question knows or ought to know that it amounts to harassment of another; and that 'the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.' This introduces an element of objectivity into the test.

Speech that amounts to unlawful harassment under the Protection from Harassment Act 1997 is not 'within the law' and the Act imposes no obligation to secure it.

Example 1: harassment through social media

Students at provider A participate in a seminar discussion concerning governing divided societies. During the discussion, student B lawfully expresses a controversial position relating to minority groups.

Following the seminar, student C publishes repeated comments on social media attacking student B, tagging them in the posts and encouraging other people to post responses to student B to tell them what they think of their views. Student C's speech is so extreme, oppressive and distressing that their course of conduct may amount to harassment as defined in the Protection from Harassment Act 1997.

Provider A learns of the activity. It carries out an investigation of student C under its social media policy, which forbids unlawful online harassment. In doing so, it is unlikely that provider A has breached its 'secure' duty.'

120. From 1 August 2025, the remaining requirements of ongoing condition of registration E6: Harassment and sexual misconduct come into effect. As part of this condition, registered

providers must have effective policies to protect students from harassment and sexual misconduct, robust procedures to address it if it occurs, and support for students involved in incidents. In this condition, the OfS has defined 'harassment' following the meanings given in Section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act 1997.

121. The condition includes a paragraph (E6.8) relating to freedom of speech. This paragraph takes precedence over every other requirement of the condition.

122. In response to the comments on the effects of the guidance on harassment (including religion-based harassment), we have **decided** to make reference to our guidance on harassment and sexual misconduct in this guidance by replacing original paragraphs 29 and 30 with a new section on 'Condition E6: Harassment and sexual misconduct', new paragraphs 98 to 105, new examples 9 and 10 and quotation from the text of, and guidance to, the new condition. In particular we have **decided** to include new paragraph 99, which reads:

> 'Providers and constituent institutions will wish to have robust anti-bullying and anti-harassment policies. The legal duty to take reasonably practicable steps to secure freedom of speech does not prevent them from doing so. Rather, institutions must ensure that these policies are carefully worded and implemented in a way that respects and upholds their free speech obligations. In doing so, particular regard and significant weight must be given to the importance of free speech. Wherever possible, any restrictions should be framed in terms of the time, place, and manner of speech, rather than the viewpoint expressed. (See paragraph 109 below.)'

123. In the Equality Act 2010, the reasonableness test only applies where the purpose of the conduct was not to violate B's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for B. If this was the purpose, the conduct will be harassment. If this was not the purpose, there is both a subjective and an objective test. The subjective element is the subjective perception of B. The objective element is whether it was reasonable for A's conduct to have the effect it did in the circumstances. Relevant circumstances may include, for example, B's mental health and previous experiences of harassment, the personal circumstances of the person affected, the power relationship between the individuals and the environment.

124. We accept that there may be circumstances where the content or views expressed by a protest are within the law but that the protest amounts to harassment (and so may be subject to regulation or restriction) because of the time, place and/or manner at, or in which, that content or viewpoint was conveyed. We have **decided** to set this out in the paragraphs in original section 4 dealing with protest. New paragraph 160 now reads:

> 'Policies that regulate
>
> a. protests and demonstrations;
>
> b. posting or distributing written material (such as flyers); or
>
> c. recruitment activities

should not restrict these activities because they express or support a particular legally expressible viewpoint. However, in certain circumstances (this will be a fact-sensitive assessment) it may be necessary and appropriate for providers or constituent institutions to regulate the time, place and manner of a protest or demonstration. For example, this may be necessary if those attending a place of worship are at risk of intimidatory harassment.'

This is consistent with the point that it is likely to be extremely difficult, if not impossible, for higher education providers and other relevant organisations to comply with their free speech duties if they seek directly or indirectly to restrict the particular content of lawful speech.

Public sector equality duty

125. Some respondents made comments relating to the PSED. A few respondents reflected on a perceived tension between that duty and our statement in paragraph 15 that 'Free speech includes lawful speech that may be offensive or hurtful to some' whilst other respondents welcomed this statement.

126. A respondent also stated that paragraph 24 notes that the PSED applies for 'Universities and colleges that receive public grant funding from the OfS'. The respondent suggested stating explicitly that this does not include all universities, so for the avoidance of doubt the ensuing discussion is not relevant to all.

127. More broadly, some respondents requested further clarification in relation to the PSED. Some of these requests sought more detail on how providers and others should balance the PSED and the free speech duty. Other respondents requested clarity that the PSED does not apply to students' unions, although they are subject to the Equality Act 2010 prohibitions on discrimination, harassment and victimisation.

Public sector equality duty: our response

128. We do not accept that there is any inconsistency between the PSED and the statement in original paragraph 15 that 'Free speech includes lawful speech that may be offensive or hurtful to some.' We accept that open debates on sensitive issues may not always be conducted in ways that foster good relations between those who share a protected characteristic and those who do not. However, we consider that in the long run, an atmosphere of openness around contentious issues is likely to foster better relations between these groups than a prolonged period in which one side of any debate is suppressed.

129. We have therefore **decided** not to amend this statement, which now appears in new paragraph 30.

130. For clarity, we have **decided** to amend original paragraph 24 to new paragraph 90, which reads as follows:

'The protected characteristics underpin an overarching equality duty with which public organisations must comply. This is called the public sector equality duty (PSED). It is set out in the Equality Act 2010. Universities and colleges that are public organisations for these purposes must comply with the PSED.'

131. We accept that providers and constituent institutions are likely to have to make decisions about complex cases that involve competing considerations. For instance, it may be necessary to balance the duty to take reasonably practicable steps to secure freedom of speech against the PSED. We have therefore **decided** to include a range of examples of activities that appear to advance equality aims and are likely to be in breach of the 'secure' duty (including new examples 15, 18, 20, 32, 35 and 49) and a range examples of activities that appear to advance equality aims and are likely to be compliant with the 'secure' duty (including new examples 4, 7, 9, 33, 47 and 54).

132. We also accept that many respondents have requested specific, detailed and definitive guidance on cases that involve these complexities. However, those matters are likely to be highly fact-specific.

Free speech and the Equality Act 2010

133. Some respondents commented that the section 'Free speech and the Equality Act 2010', while helpful, could more clearly describe situations where speech is unlawful and universities would be expected to take steps to restrict such speech. Some commented more specifically that protected belief is the only protected characteristic that this section mentions, and warned against giving the impression that it was at the top of any hierarchy of protected characteristics.

134. A respondent commented that paragraph 29 as written could be misinterpreted as suggesting that academic freedom should be restricted by disciplinary boundaries and prior expertise.

135. Many respondents commented on our statement that 'Speech in academic contexts will therefore not amount to unlawful harassment by virtue of the viewpoint or opinion that it expresses, except in the most exceptional circumstances.' Some of these respondents stated that the statement would prevent universities from recognising religion- and belief-based harassment where these occur. Others stated that the statement did not define 'academic contexts'. Some respondents said that the guidance did not address the expression of views by students on campus but outside of the academic context.

136. A respondent also commented, in connection with this paragraph 30, that it fails to recognise the cumulative impact of speech that creates an intimidating, hostile, degrading, humiliating and offensive environment for many Jewish students and academics, as well as other students and academics who have connections with and/or are supportive of or sympathetic to Israel. Another respondent commented that Jewish students and staff have been left with little support and protection from hate speech, hate crimes and harassment. They expressed a concern that the guidance might inadvertently be simply enabling the loudest voices to curtail freedom of expression.

137. Several respondents commented on the statement, in paragraph 31, that 'The PSED is a duty to "have due regard" to the need to achieve the aims set out above', and on the statement that 'the PSED does not impose any general legal requirement on higher education providers or constituent institutions to restrict or regulate speech.' Some of these respondents inferred from these statements that the OfS prioritises, or believes that those subject to both duties should prioritise, the duty to secure freedom of speech over the PSED. Others stated that it was in danger of being misunderstood as implying that providers can disregard the PSED.

138. A respondent commented on paragraph 32 that more clarity is needed to establish what constitutes a 'philosophical belief' on equal footing with 'religious belief'. A respondent also commented that the reference to 'common law' in the last line of paragraph 32 is inappropriate in relation to a matter of statutory interpretation; and that the sentence wrongly suggests that veganism, gender-critical belief and Scottish independence should be regarded in all circumstances as protected beliefs.

139. Some respondents welcomed the wording in paragraph 33 to the effect that the duty in the PSED to have regard to the need to foster good relations between groups, and freedom of speech, are mutually reinforcing. One of these respondents suggested that paragraph 33 could helpfully mention that steps to encourage an environment of tolerant and open debate will also be relevant to a provider's meeting its duty to promote the importance of freedom of speech in higher education.

Free speech and the Equality Act 2010: our response

140. We accept that this section could give examples of cases where speech may be unlawful under the Equality Act 2010. We accept that it would be helpful to state all protected characteristics. We also accept that original paragraph 29 could be misinterpreted to give a misleading impression of the scope of academic freedom as it is defined in the Act.

141. We have therefore **decided**:

    a. to include examples of speech or conduct that may amount to unlawful discrimination (new example 3), harassment (new example 4) or victimisation (new example 5) under the Equality Act 2010;

    b. to include a statement of all protected characteristics (see new paragraph 69); and

    c. to delete original paragraph 29.

142. We do not accept that our statement that 'Speech in academic contexts will therefore not amount to unlawful harassment by virtue of the viewpoint or opinion that it expresses, except in the most exceptional circumstances' would prevent universities from recognising religion- and belief-based harassment where these occur. However, we accept that the statement did not define 'academic contexts'. We also accept that the guidance did not address the expression of views by students on campus but outside the classroom.

143. We have therefore **decided**:

    a. To add a new section on 'Condition E6: Harassment and sexual misconduct' which includes the following free speech principle:

E6.11 (j)

i. irrespective of the scope and extent of any other legal requirements that may apply to the provider, the need for the provider to have particular regard to, and place significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for

controversial views in an educational context or environment, including in premises and situations where educational services, events and debates take place;

ii. the need for the provider to apply a rebuttable presumption to the effect that students being exposed to any of the following is unlikely to amount to harassment:

A. the content of higher education course materials, including but not limited to books, videos, sound recordings, and pictures;

B. statements made and views expressed by a person as part of teaching, research or discussions about any subject matter which is connected with the content of a higher education course.

; and

b. to include the following examples covering, or applying to, speech by or potentially by students outside the classroom: new examples 1, 9, 10, 11, 16, 21 and 23.

144. We have always been clear that freedom of speech within the law does not, and cannot, include unlawful harassment of, or discrimination against, Jewish students or students of any other religious group.

145. In our new ongoing condition of registration relating to harassment and sexual misconduct, we have set out that 'harassment' has the meaning given in Section 26 of the Equality Act 2010 and section 1 of the Protection from Harassment Act (PHA) 1997 (in its entirety, and as interpreted by Section 7 of the Act).[8] Being Jewish, and membership of any other religion or race, is a characteristic which attracts protection under the race and religion or belief provisions of the 2010 Act.[9]

146. From August 1 2025, the remaining requirements of ongoing condition of registration E6: Harassment and sexual misconduct come into effect. As part of this condition, registered providers must have effective policies to protect students from harassment (including antisemitic harassment), robust procedures to address it if it occurs, and support for students involved in incidents.

147. Our proposed guidance stated that the PSED is a duty to 'have due regard' to the need to achieve certain aims, and that the PSED does not impose any general legal requirement on higher education providers or constituent institutions to restrict or regulate speech. It is also important for providers and constituent institutions to be aware that they can continue to meet the PSED without restricting ideas, opinions or information that some may find offensive, shocking or disturbing.

148. We do not consider that a careful reader will infer, from this statement, that the duty to secure freedom of speech takes precedence over it. The statement simply sets out the content of the legal duty without implying that it takes priority over any other legal duty, or that any other

[8] See Condition E6: Harassment and sexual misconduct.

[9] Fraser v UCU case no. 2203290/2011.

legal duty takes priority over it. We have therefore **decided** not to amend original paragraph 31 (now new paragraph 93).

149. We are grateful for comments on philosophical belief in this subsection. We accept that it would be more accurate to describe what courts have found than to state that certain viewpoints would in all circumstances constitute protected beliefs. We have therefore **decided** to amend original paragraph 32 to new paragraph 71:

> 'The courts have found the following beliefs, among others, to be protected under the Equality Act 2010: belief in climate change, [fn.: Grainger plc v Nicholson [2010] 2 All E.R. 253] ethical veganism, [fn.: Mr J Casamitjana Costa v The League Against Cruel Sports: 3331129/2018] gender-critical belief, [fn.: Maya Forstater v CGD Europe and Others: UKEAT/0105/20/JOJ] and belief in Scottish independence. [fn.: Mr C McEleny v Ministry of Defence: 4105347/2017]'

150. We accept that it may be helpful to set out that some steps that achieve the aims of the PSED may also be relevant to meeting the free speech duties. We have **decided** to replace original paragraph 33 with the following new paragraph 94 and new example 7:

> 'The PSED includes duties to have due regard to the need to advance equality of opportunity and to foster good relations between those who share the protected characteristic of religion or philosophical belief, and those who do not share it. Depending on the circumstances, steps that encourage an environment of tolerance and open debate, with regard to the subject matter of protected beliefs, may be relevant to meeting both the free speech duties and the PSED.

Example 7: constructive dialogue

In light of recent and ongoing global conflicts, University A organises and promotes a series of topical events at which speakers and students from different sides are encouraged to take part in open and tolerant dialogue. These sessions are moderated by expert facilitators who offer models for peaceful and constructive communication.

By organising and promoting these events University A may have advanced the aims of its PSED. It is very unlikely that in doing so A is in breach of its 'secure' duty.'

Other comments

151. Some respondents requested clarity on the interaction between the free speech duties and other legislative or regulatory requirements. These included: the Public Order Act 1986, the Malicious Communications Act 1988, the Education Act 1994, the Defamation Act 2013, the Counter-Terrorism and Security Act 2015; also the requirements of charity law.

152. Some respondents welcomed the recognition that free speech may include speech that may be unpopular or offensive: for instance, in paragraph 27 that even content that 'offends students with certain protected characteristics is not unlawful unless delivered in such a way that results in unlawful harassment or is otherwise unlawful'.

153. Some respondents requested clarity on the effect of the duty on transnational education and whether its overseas effect depended on the laws of other countries.

Other comments: our response

154. We recognise that the Equality Act 2010 is not the only legislation that is relevant to whether speech is lawful. We consider that it would not be feasible for us to specify, in relation to all such legislation, what speech it does or does not rule out. Nor have we tried to do this in connection with the Equality Act 2010. Instead, we have focused, in this section of the guidance, on broadly outlining the interaction between the 'secure' duty and the Equality Act 2010. This was for two reasons. First, the Equality Act 2010 places particular duties on providers (for instance, the PSED); and these duties may be misunderstood to require the restriction of lawfully held opinions, information and ideas. The second, complementary reason is that we consider the aims of the Equality Act 2010, and those of the Higher Education (Freedom of Speech) Act 2023, to be mutually supportive.

155. However, we have **decided** to include additional sections setting out details from legislation and regulation that it may be helpful for providers and constituent institutions to consider in this context. These sections cover the following:

- Public Order Act 1986 (new paragraphs 33-45)
- Harassment (Protection from Harassment) Act 1997 (new paragraphs 46-49)
- Terrorism Act 2000 (new paragraphs 50-53)
- Prevent duty (Counter-Terrorism and Security Act 2015) (new paragraphs 96 and 97)
- Condition E6 (Harassment and sexual misconduct) (new paragraphs 98-105)

They also include new examples 1, 2, 7, 8, 9 and 10.

156. We agree that it may be helpful to set out that free speech may include speech that may be unpopular or offensive to some. We have therefore **decided** to retain the following statement in original paragraph 27 (now in new paragraph 83): 'Even if the content of the curriculum offends students with certain protected characteristics, this will not by itself make that speech unlawful.'

157. With regards to transnational education, the Act does not impose duties on providers or constituent institutions to take steps to secure freedom of speech in respect of their activities outside England. We have **decided** to add the following paragraph 13:

'HERA does not require providers or constituent institutions to take steps to secure freedom of speech in respect of their activities outside England.'

Question 3: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 3 on what are 'reasonably practicable steps'? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out.

Reasonably practicable steps

158. Many respondents welcomed the proposed approach because they considered it would afford flexibility and a case-by-case determination of appropriate actions, dependent on circumstances. Among those welcoming the proposed approach, several commented that it recognised the diversity of the providers and students' unions to whom the duties would apply (as was then expected), and that it helpfully clarified that a reasonably practicable step for one institution would not be such for another.

159. Some respondents stated that it was useful that the guidance distinguished between 'positive' and 'negative' steps. One respondent suggested that the value of negative tolerance of speech should be emphasised more, stating that it did not cost anything to start tolerating more.

160. Other comments included agreement that, if it is reasonably practicable for a relevant institution to take a step, then it should take that step. Some considered that this was the correct framing of the duty to take reasonably practicable steps. However, some considered the framing vague and likely to give the OfS a wide remit to intervene. One respondent stated that the requirement to take reasonably practicable steps appeared open-ended, affording the OfS scope to penalise relevant institutions for not taking one last step when it had taken many others.

161. A few respondents were concerned that the OfS would be acting without judicial guidance in determining whether a relevant institution had taken reasonably practicable steps, and that the proposed freedom of speech complaints scheme did not provide for appeals against OfS decisions. Some noted that until there was relevant case law, there would be uncertainty about what constituted 'reasonably practicable steps'.

162. A few respondents suggested that the OfS should set out the process, data and assumptions it intended to use to determine compliance.

163. A few respondents noted that Charity Commission guidance relevant to students' unions focused on the process, due diligence, and reasonableness of decision-making as opposed to purely the 'outcome'. These respondents suggested that the OfS adopt a similar approach.

164. Some respondents considered that the language used in the guidance around 'reasonably practicable steps' should be less categorical to reflect dependence on circumstances. For example, in relation to taking steps, the wording 'should take' should be replaced by the more

illustrative ‘may take.’ Conversely, some comments suggested that the guidance was not categorical enough and should set out clearer expectations of relevant institutions.

165. For some respondents, the guidance was considered to have conflated regulatory guidance and regulatory requirements.

166. Several respondents said that the guidance on reasonably practicable steps had avoided complex and challenging scenarios.

Reasonably practicable steps: our response

167. We accept that it may be helpful to emphasise the distinction between negative and positive steps, particularly in relation to the burden that they may impose. We have therefore **decided** to replace original paragraph 35 with the following new paragraphs 57-59:

> ‘The requirement to take ‘reasonably practicable steps’ includes a positive duty to take steps. This may include, for instance, amending policies and codes of conduct that may restrict or regulate speech.
>
> It also includes a negative duty to refrain from taking certain steps which would have the effect of restricting freedom of speech within the law. For instance, if a measure affects lawful speech, it may be a reasonably practicable step not to take that measure at all. This may include, for instance, not having in place a policy that restricts the range of ideas that may be expressed, not firing a member of academic staff for lawfully expressing a particular viewpoint or not cancelling a visiting speaker event because the speaker’s views are unpopular.
>
> In many circumstances the negative duty is likely to have greater positive impact on freedom of speech than the positive duty. It may also be less onerous than the positive duty.’

168. We do not consider that the duty, to take reasonably practicable steps to secure freedom of speech within the law, gives organisations discretion over whether to take a step that is reasonably practicable for them to take. It is a statutory duty that they must take reasonably practicable steps to secure freedom of speech. To clarify this we have **decided** to state in new paragraph 60, that:

> ‘If a step (positive or negative) is reasonably practicable, then a provider or constituent institution must take it. For instance, if a controversial speaker has been invited to deliver a lecture (and has accepted), then it may be reasonably practicable for the provider or constituent institution to permit (rather than to prohibit) the lecture. If so, then it must permit it.’

169. We set out at original paragraph 40 of the proposed guidance, that where we frame a step as one that an organisation ‘should’ take, we mean that it may be reasonably practicable in a wide range of circumstances, though not necessarily in all circumstances and not necessarily for all organisations. We do not consider that replacing ‘should’ with ‘may’ in this context would be an accurate representation of the ‘secure’ duty. However, for clarity we have now worded new paragraph 133 as follows:

‘Providers and their constituent institutions, having particular regard to the importance of freedom of speech, must take reasonably practicable steps to secure free speech within the law. Whether (and in what timescale) steps are reasonably practicable may vary according to the type of provider or constituent institution involved (for instance depending on size, specialisation, or delivery of further education). However, the OfS expects that in a wide range of circumstances it will be reasonably practicable to take many of the steps set out below. This list is illustrative and includes steps that providers and their constituent institutions should take in the majority of circumstances. This list is illustrative and includes steps that providers and their constituent institutions should take in the majority of circumstances.’

170. We do not accept that there is any conflation of guidance and requirements. The purpose of the guidance is to help providers and constituent institutions navigate their free speech duties, which commence on 1 August.

171. We understand that many respondents would have preferred the examples to have been more detailed. We have discussed this matter under question4 on original section 4 of Regulatory advice 24. We also understand that many respondents have claimed that the examples are not all realistic. We consider that many of the examples contain elements that may have appeared, or could easily appear, in real cases. We also consider that decisions in complex cases are likely to be highly fact-sensitive.

Relevant factors

172. Some respondents commented on the non-exhaustive list of factors relevant to an assessment of whether steps are reasonably practicable.

173. Some respondents stated that ‘practical costs’ and ‘financial constraints,’ listed in the guidance as separate factors relevant to an assessment of reasonably practicable steps, were difficult to distinguish. Some were unclear about which source of finance should be considered in the context of students’ unions, where a budget may be held by a student group or at an organisation-wide level: the listed factors did not account for the complexity of students’ union finances.

174. Several respondents encouraged the OfS to consider the current financial state of the higher education sector when assessing relevant institutions’ consideration of ‘financial constraints’. Some respondents questioned how to judge the point at which financial constraints would make a step unreasonable. Another respondent suggested that ‘reducing’ consideration of reasonably practicable steps to a matter of resources would give universities considerable discretion to limit speech, which would be difficult to counter.

175. While some agreed with the content of the non-exhaustive list of relevant factors in the guidance, or recognised that the list was illustrative, others proposed additional ones:

    a. Whether a step (or a decision not to take a step) is content-neutral. For example, a provider, constituent institution or relevant students’ union could take steps to restrict speech according to considerations of time, place and manner of expression, where such restrictions would be content-neutral, such as requiring only quiet speech in the library.

b. Going further than the guidance suggests in assessing practical costs and financial constraints to consider broader factors, such as the effective and efficient use of resource to ensure public and student funding is spent to maximise benefits to students.

c. The risks associated with taking certain actions to secure free speech.

d. Consideration of local context and laws where speech is taking place overseas.

e. In recognition of the need to operate as effective institutions and communities, whether a step would safeguard or, conversely, be detrimental to an institution's essential functions. In the context of universities, one respondent suggested this could mean teaching and conducting research. Others referred to contractual obligations to students. Some comments suggested that 'essential functions' would need to be carefully defined so as not to allow excessive discretion in assessment of this factor at the expense of free speech. The more important the speech (for example, academic speech), the less significance could be placed on this factor.

f. Many respondents said that deciding on 'reasonably practicable steps' would require relevant institutions to balance consideration of their freedom of speech duties and those stemming from other obligations. The legal duties respondents cited included:

   i. Equality Act 2010 and PSED;

   ii. Prevent duties under the Counter-Terrorism and Security Act 2015;

   iii. Protection from Harassment Act 2017;

   iv. Foreign Influence Registration Scheme;

   v. In relation primarily to students' unions, charity law.

176. Some respondents said that the OfS should set out what would not be a reasonably practicable step, either to help relevant institutions make decisions, or to ensure that they did not underestimate the extent of their freedom of speech duties.

177. Some respondents provided examples of factors that they said should not be considered in determining reasonably practicable steps. Avoidance of disrepute, for example, was cited as a factor that should not be considered relevant in determining whether a step is reasonably practicable. Conversely, in the context of students' unions, the point was made that allowing speech that would damage reputation would undermine the confidence of members and would have serious consequences for the organisation. Further, this could run counter to trustees' 'Duty of Prudence', which requires them to avoid undertaking activities that might place the charity's endowment, funds, assets or reputation at undue risk.

178. Some respondents stated that the guidance should consider reasons not to take steps to secure lawful freedom of speech that are not legal duties. For example, even though bullying speech may be strictly speech 'within the law,' respondents considered that it would not be reasonably practicable to secure bullying conduct.

179. One respondent suggested that relevant institutions could adopt internal policies that prohibit lawful speech on two strict conditions: first, the policy must seek to secure essential functions,

or some other indisputable imperative that means that a provider or constituent institution cannot take reasonably practicable steps; and second, the policy must have what they described as the 'quality of law'.

180. Several respondents said the guidance should clarify that it would not be reasonable to secure the speech of those preventing others from speaking, e.g. by shouting down others (the so-called 'heckler's veto').

181. One respondent considered that original paragraph 35, in which it is stated that it might be a reasonably practicable step not to fire a member of academic staff for lawful speech, conflates wrongful termination (and employment laws) with the duty to secure freedom of speech. The issue was, rather, whether a dismissal would be fair and appropriate. The respondent stated that providers will need to have due regard to the employment contract, relevant policies and the law (i.e., employment laws and other laws, including HERA) to make such a determination. They stated that if an employee has lawfully expressed a view in accordance with their Article 11 (sic.) rights, then a dismissal on this ground alone would likely be an unfair dismissal.

182. One respondent considered that for providers, constituent institutions and students' unions to be able to consider reasonably practicable steps, it would be important for relevant parties to have used the correct channels and processes in the first instance, e.g., to book meetings or speakers.

183. Many respondents considered that the guidance on reasonably practicable steps did not help them navigate the boundary between free speech and unlawful discrimination, harassment, and victimisation. Several called for guidance on the relative weighting of considerations or for guidance on how providers, constituent institutions and students' unions can adjust or balance reasonably practicable steps in such circumstances.

184. In relation to other regulatory obligations, one respondent stated that establishing freedom of speech as a primary condition and failing to consider holistically the demands of the full regulatory framework could lead to non-compliance with other regulatory requirements.

Relevant factors: our response

185. We are grateful for the many helpful comments on relevant factors. The intention behind distinguishing 'practical costs' and financial constraints was to distinguish between absolute and relative costs. However, we accept that there was scope for more clarity on this distinction. We also accept that reducing reasonable practicability to costs may give a misleading impression that universities and colleges have a very wide discretion to determine whether a step is reasonably practicable. However, we do consider that costs are likely to be relevant in so far as they affect resources available for essential functions.

186. We accept that some respondents were right to emphasise the essential functions of a university: whether a step is reasonably practicable will depend on the extent to which it may threaten or undermine those functions. This is consistent with our letter on campus protests of May 2024, where we set out that in order to preserve its essential functions, a university can

restrict protest.[10] We also accept that these essential functions comprise teaching, learning and research (and the administrative functions and the provider's or constituent institutions resources necessary for them).

187. We also accept that respondents were right to emphasise the importance of an impartial, neutral approach towards regulation of speech. This too is in keeping with our approach, as set out in our letter on campus protests of May 2024.

188. We do not consider that the assessment of reasonable practicability is best understood as a broad assessment of the overall efficiency and effectiveness of a step. If a step to secure freedom of speech is reasonably practicable for an institution to take, then it must take that step, irrespective of whether an alternative and more restrictive step is more efficient by some other measure.

189. We accept that the risks involved in taking a step are relevant to whether it is reasonably practicable, as well as legal obligations (which may include contractual obligations where these are legally binding).

190. In relation to the relevance of local laws covering speech taking place overseas, the Act does not impose duties on providers or constituent institutions to take steps to secure freedom of speech in respect of their activities outside England. See new paragraph 13.

191. We also accept that other regulatory requirements on providers and constituent institutions, as set out (for instance) in the regulatory framework, are relevant to whether a step is reasonably practicable.

192. We also accept that it may be helpful to give examples of factors that should not be considered relevant to the reasonable practicability of a step, and we accept that reputational concerns are among these factors that are unlikely to be relevant.

193. We have therefore **decided** to replace original paragraphs 36-7 with new paragraphs 61-63 as follows:

> 'Some factors are relevant to whether a step is reasonably practicable for a provider or constituent institution to take. The following is clearly relevant: the impact taking, or not taking, the step will have on freedom of speech. Other relevant factors will be fact-specific but will **likely include**:
>
> a. Legal and regulatory requirements.
>
> b. Would taking or not taking the step affect the essential functions of higher education, i.e.:
>
> - learning
> - teaching
> - research

[10] See Protests on campus: tackling harassment and securing freedom of speech.

- the administrative functions and the provider's or constituent institution's resources necessary for the above?

c. Would taking or not taking the step give rise to concerns about anyone's physical safety?

However, relevant considerations will **likely not include**:

a. The viewpoint that any affected speech expresses, including but not limited to:

i. whether it aligns with the provider's or constituent institution's aims or values

ii. whether it is controversial or offensive

iii. whether external or internal groups (for example alumni, donors, lobbyists, domestic or foreign governments, staff or students) approve of the viewpoint that the speech expresses.

b. The reputational impact of any affected speech on the provider or constituent institution (for more on reputation, see paragraphs 66 and 67 below).

The following examples are intended to illustrate these factors. In any actual case, whether a step is reasonably practicable will depend on the specific facts.'

194. We have also **decided** to include new subsections on relevant factors i.e. on legal and regulatory obligations (new paragraphs 64 to 105), on essential functions (new paragraphs 106 to 119), on physical safety (new paragraphs 120 to 122) and on irrelevant factors (new paragraph 123), along with associated new examples 3 to 23.

195. While we accept that reputational impact is often unlikely to be relevant to whether a step is reasonably practicable, we recognise that charity trustees may need to consider reputational impact under charity law, although it is unlikely to outweigh the importance of freedom of speech and academic freedom. We have therefore **decided** to include, under 'Relevant factors: legal and regulatory obligations', the following new paragraphs 66 to 67:

'In other cases, there may be no direct conflict between the duty to secure free speech and other legal or regulatory obligations but there may be a balance to be struck. For instance, in the case of charities, charity law and the Act could both be relevant factors in trustees' decision-making. Steps that a charity will need to take to comply with the 'secure' duty will depend on the specific facts and what is reasonably practicable in the circumstances. However, particular regard will need to be given to the importance of freedom of speech.

This might happen, for instance, when charity trustees need to balance the duty to avoid exposing the charity's reputation to undue risk against the duty to take reasonably practicable steps to secure freedom of speech. Here particular regard would need to be given to academic freedom and freedom of speech. It is very unlikely that the reputational interests of a provider or constituent institution would outweigh the importance of academic freedom for its academic staff or freedom of speech for its staff, students, members or visiting speakers.'

196. We also agree that restrictions on speech should where possible be neutral as to viewpoint. However, instead of framing this as a relevant factor in the assessment of whether to take a step to secure freedom of speech, we have decided to frame it as a condition on any restriction or regulation on speech that a provider or constituent institution might impose. We have therefore **decided** to include new paragraph 109, under 'Relevant factors: essential functions' which states:

> 'We expect that restrictions related to essential functions or any other relevant factors, as well as any regulations related to these wider functions would, as far as possible, focus on the time, place and manner of that speech. We would expect that these measures, in intent or effect, ordinarily do not restrict legally expressible viewpoints. In other words, any regulation of the time, place and manner of speech should be viewpoint-neutral. Nor should it be framed so broadly that it may be used to punish or suppress a legally expressible viewpoint.'

197. We consider that it would not be likely to be reasonably practicable for institutions to secure harassing or bullying conduct. As already stated, we have **decided** to clarify this by including new paragraph 99 under 'Relevant factors: legal and regulatory obligations'.

198. Regarding the comment on the 'quality of law', we have **decided** to include, in new section 2, step 3 a statement of when an interference in the Article 10 right is 'prescribed by law'.

199. We accept that it would not be reasonably practicable to secure the speech of those preventing others from speaking, e.g., by shouting down others (the 'heckler's veto'). We have therefore **decided** to include the following new paragraph 111:

> 'Where reasonably practicable steps can be taken to secure the lawful exercise of speech via protests, we would expect providers and constituent institutions to take them. However, the functioning of a university or college is also likely to require restriction of speech that prevents other speech, for instance speech employing the 'heckler's veto'. It is therefore unlikely to be reasonably practicable for a provider or constituent institution to permit without restriction speech or protest that itself disrupts speaker events, including through the 'heckler's veto.' For example, this may include speech that is delivered at such a volume and for such a length of time that it prevents any other persons from being heard or from engaging in a lesson, debate, or discussion. Similarly, it is unlikely to be a reasonably practicable step to allow incessant shouting in, or outside, a lecture that prevents anyone else from speaking or being heard in the lecture theatre, thereby preventing teaching and learning.'

200. On the relation between the 'secure' duty and employment law, contractual expectations set by a provider or constituent institution around the way staff should behave might breach the provider or constituent institution's free speech duties. Whether they do so is fact-specific. If these expectations result in limitations on lawful speech, that can have an impact on the provider or constituent institution's compliance with their free speech duties. Contractual expectations set by the provider or constituent institution may well be interpreted as a restriction on freedom of speech in some cases.

201. We do not consider that the 'secure' duty excludes the use of processes and procedures, for instance in connection with the booking of events or the invitation of speakers. On the

contrary, we consider that having or putting in place a suitable notification process, for instance to make security arrangements, may be a reasonably practicable step for an organisation to take to secure freedom of speech (see, for instance, new example 48). However, these processes should not be so onerous or time-consuming that they themselves discourage (for instance) the invitation of controversial speakers (see new paragraph 176).

202. We do not accept that the guidance gives no indication on navigating the boundary between free speech and unlawful discrimination, harassment and victimisation. In both the draft version of the guidance, and in this final version, we have (for instance) given guidance on the interaction between free speech and the Equality Act 2010 and the Protection from Harassment Act 1997. The relative weighting and balancing of reasonably practicable steps will always be fact-sensitive; however, this guidance sets out factors that are relevant to that exercise.

203. In relation to whether freedom of speech is a 'primary duty', the 'secure' duty is a statutory obligation on the governing bodies of providers and constituent institutions. They must ensure that all their actions, including in relation to regulatory duties or other legal obligations, are compliant with this duty.

More guidance and examples

204. Many respondents requested further guidance. Several thought that the guidance was not tailored sufficiently to the needs of a diverse sector and that more guidance relevant to different types of institution was required. The needs of students' unions, further education colleges and smaller institutions were considered by many to have been overlooked in the guidance. Some requested more guidance to support relevant institutions in writing policies and codes of conduct.

205. Several respondents reflected on the specific examples given in the draft guidance. Some respondents welcomed the examples (original examples 1 and 2) as useful illustrations of reasonably practicable steps. Some respondents stated that original example 1 did not convey sufficiently the processes underpinning the university's decision and suggested that relating the example explicitly and in more detail to the OfS's own guidance would be helpful. One respondent suggested that the university in example 1 may fail to take reasonably practicable steps if a meeting is postponed, even if it is not cancelled. Others raised hypothetical circumstances that they said could affect the scenario: if, for example, a speaker had a history of spreading hate speech or support for terrorism; or if individuals had been barred from entry to UK but were to appear on campus or online.

206. In relation to example 2, some respondents considered it unrealistic that a university would not act on death threats against a staff member. Some stated that this should be a matter for the police. A few respondents suggested that the example should consider the legitimate right of students to take action around their academic experience. Some noted that institutional autonomy is also important in the amended HERA 2017 and suggested that it should be a matter for the provider to consider whether reputational concerns outweigh Dr A's freedom of expression.

207. Some respondents considered that the examples presented extreme, but not typical, circumstances. According to these respondents, examples illustrating more typical scenarios

occupying ‘grey areas’ would have been more useful. Others found the examples ‘convoluted’ and difficult to follow, while many considered them oversimplified or unrealistic. Several respondents suggested that the examples should be revised in a year to reflect practical experience of the duties. One respondent felt that the examples did not ‘recognise the harm’ that even lawful speech could do on campus.

208. Several respondents would have liked more examples in this section, with some suggesting that additional examples should cover a wider range of issues and circumstances, including:

    a. examples about students’ unions, on the basis that speaker events are more relevant to them

    b. the circumstances in which a student society is being treated less favourably because of its views (e.g., pro-life)

    c. an example showing institutions’ obligations towards members of the public booking their facilities

    d. how to comply with freedom of speech duties while implementing anti-bullying programmes that educate students about the impact of harmful speech

    e. ensuring that intranet content does not violate user protocols while allowing a broad range of viewpoints to be expressed

    f. an example related to the work of research ethics committees

    g. more examples relating to religious belief, which is a sensitive area that, according to some respondents, relevant institutions find difficult to manage appropriately

    h. examples relating to current international problems

    i. positive examples of good practice.

More guidance and examples: our response

209. We recognise the wide variety in the sector across types and scales of organisation. Many specific points about the detailed application of the free speech duties, for instance in relation to specific policies and codes of conduct, could only be settled on a case-by-case basis and could not be included in a guidance document at this stage. We would expect that more detailed guidance within the framework adopted here may be possible following consideration of actual cases, for instance through a future freedom of speech complaints scheme.

210. However, we recognise that many steps that may be reasonably practicable for larger providers may not be reasonably practicable for smaller ones. We also recognise that steps that are reasonably practicable for some higher education providers may not be reasonably practicable for further education colleges, for instance due to safeguarding requirements.

211. We have therefore **decided** to make this explicit and set out how the provider’s or constituent institution’s resources are relevant to whether a step is reasonably practicable. As already stated, we have set this out at new paragraphs 61 and 62.

212. We have also **decided** to include new paragraph 65, which reads:

> 'For instance, it would generally not be reasonably practicable for an institution, such as a further education college, to breach the requirements of statutory guidance on safeguarding that apply to it in relation to students under the age of 18. [fn.: See Keeping children safe in education - GOV.UK].'

213. We accept that alternative situations, or hypothetical additional circumstances, might affect the outcome in original examples 1 and 2. We consider that these examples illustrate relevant (and irrelevant) factors. However, we consider that there is scope to treat distinct relevant (and irrelevant) factors in different examples. We have therefore **decided** to replace original examples 1 and 2 with:

- new example 20 (speech that expresses a potentially unpopular viewpoint);
- new example 21 (speech that prompts threats to the speaker's physical safety);
- new examples 22 and 23 (speech that affects reputational interests).

214. We have also **decided** to retain original examples 19 and 21 (now new examples 41 and 43), which cover approaches to security costs based on content or viewpoint.

215. In relation to any harm that might be an effect of even lawful speech, we accept that concerns about physical safety could be a relevant factor when considering the reasonable practicability of a step. We have decided to set this out at new paragraph 61, which states:

> 'Some factors are relevant to whether a step is reasonably practicable for a provider or constituent institution to take. The following is clearly relevant: the impact taking, or not taking, the step will have on freedom of speech. Other relevant factors will be fact-specific but will **likely include**:
>
> […]
>
> Would taking or not taking the step give rise to concerns about anyone's physical safety?'

216. We also accept that there may be scope for a wider range of additional examples. We are conscious of the need for the guidance not to be unreasonably long, and that the purpose of the examples is not to give definitive guidance on all possible cases that might arise, but rather to illustrate factors that are likely to be relevant in a wide range of cases. We have **decided** to include examples in the guidance covering (among other things):

- students' union events and a student society (to the extent that HERA applies): see new example 49;
- third-party bookings: see new example 43;
- reporting, 'content notes' and training: see new examples 39, 50, 54 and 54;
- IT policies: see new example 36;
- research ethics: see new example 44;

- examples relating to religious belief: see new examples 15, 18, 24, 43, 45 and 47;
- examples relating to international problems: see new examples 2, 6, 7, 11, 13, 17, 18, 21, 40, 44, 46, 47 and 49; and
- examples of good practice or likely compliance: see new examples 1, 2, 4, 7-12, 16, 17, 29, 30, 33, 42, 49 and 54.

Burden

217. Many respondents raised concerns about the burden on relevant institutions in adopting the approach to 'reasonably practicable steps' set out in the guidance. For many, this burden would stem from the complex decisions required to determine appropriate steps to secure free speech in the context of other legal requirements. Several also considered the associated record-keeping requirement to be excessively burdensome. Some felt that the burden would be acute in smaller institutions, especially those without in-house counsel. One respondent suggested, however, that securing academic free speech would necessarily require 'extensive (and expensive)' steps.

218. The burden on students' unions was also a concern for many. Respondents suggested that the guidance for students' unions was insufficient. Some said that students' unions would require templates or further guidance to assist them in taking decisions about reasonably practicable steps, e.g., in relation to a code of practice, examples of free speech within and outside the law and speaker approvals, and for navigating the perceived tension between charity law, equality law and free speech duties. Some respondents requested a dedicated point of contact at the OfS to support decision-making.

Burden: our response

219. Freedom of speech and academic freedom are fundamental to the core mission of universities – the pursuit of knowledge. It is therefore to be expected that the 'secure' duty requires significant steps. We accept that there may be ways in which, in pursuing its own duty to promote freedom of speech, the OfS can help to reduce unnecessary burdens in practice. This may be, for instance, through publishing model codes, sharing good practice or convening or co-ordinating joint responses to common external threats. We may engage with these as appropriate when the duty to promote freedom of speech comes into force alongside the 'secure' duty on providers and constituent institutions. Providers may also find it helpful to refer to details of complaints outcomes, and case reports on regulatory activity, if and when they become publicly available.

Question 4: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 4 on steps to secure freedom of speech? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out.

General comments

220. Many respondents commented, either overall or in relation to particular subsections, that this section of the guidance appeared to create an onerous burden on providers, constituent institutions and students' unions. Some respondents raised questions about how the examples were framed. For instance, a respondent said that it was wrong to frame them in terms of things that providers, constituent institutions or students' unions 'should' do. A respondent also commented that the OfS should assert to providers that the guidance is more than aspirational, and spell out the consequences of departing from it without justification.

221. Many comments related to the examples in this section. Some respondents found the examples to be helpful, but many said that they were either too unrealistic, too lacking in detail or too heavily caveated to be helpful. Some respondents expressed the hope that we could publish details of real-world examples after the complaints scheme had begun operation.

222. A respondent cautioned against the term 'legally expressible viewpoint', commenting that in principle almost all viewpoints are 'legally expressible' in some contexts; they suggested 'lawful expression'. Some respondents also commented that the examples in section 4 were focused largely on examples of reasonably practicable steps that could secure lawful speech; but they would welcome examples of unlawful speech, and stated that 'examples relating to antisemitic, Islamophobic or transphobic speech would be particularly helpful.'

223. A respondent commented that overall, the guidance appears to give precedence to freedom of speech over other policies; and that this could lead to interference with disciplinary matters, bullying and harassment, and a disregard for ethical research.

224. There were also various subjects that some respondents thought should have been included in the guidance. These included the subject of 'artistic freedom' (e.g. for 'artistic works that have visual, textual or audio qualities'); the freedom of individual academics to determine the curriculum and guidance related to technical or practical education.

225. There were two subjects that several respondents wanted to see covered in more detail. One of these was the interaction between freedom of speech and harassment. Respondents commented that our work on free speech and academic freedom must be in harmony with our work on harassment and sexual misconduct, and on equality.

226. In particular, a number of respondents raised concerns about the relation between freedom of speech and academic freedom, and attempts to combat antisemitic harassment, and antisemitism on campus more broadly. Some of these respondents pointed to the report, by the Union of Jewish Students, of growing antisemitism and related insecurity. In connection with this point, respondents went on to raise specific concerns. Some of these are mentioned below (for instance, under 'Training' or 'Speaker events'); but respondents also commented more generally that it would be important that the free speech duties do not undermine protection for Jewish students.

227. The second topic was the freedom of students and/or students' unions to criticise their own university or college. Respondents raised concerns that over time they had seen an 'insidious silencing' of students (and staff and members of the public) who attempt to criticise universities and paint them in even a 'slightly poor light.' Some respondents commented that students' union representatives had been told by providers to refrain from publicly criticising the provider (for instance, its teaching) in public, and that student leaders who do criticise the provider are often publicly reprimanded by administrators. Respondents who raised this topic said that it was essential that universities and colleges consider amending their policies on students' unions, student engagement and student representation in light of the free speech duties imposed by the Act.

General comments: our response

228. We accept that some of the steps to secure freedom of speech are more likely to create a burden than others. However, we consider that many of the negative steps are less likely to be onerous. These negative steps include but are not limited to the following (where reasonably practicable):

    a. Not requiring academic staff, or applicants to any academic position, or applicants for academic promotion, to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate for exercising their academic freedom within the law.

    b. Not misrepresenting a provider's legal duties.

    c. Not terminating employment for, or denying reappointment to, any member of staff because they have exercised their freedom of speech within the law to express a particular viewpoint.

    d. Not restricting protests and demonstrations, the posting of written material or recruitment to clubs, societies etc. because those activities express or support a particular legally expressible viewpoint.

    e. Not pursuing vexatious complaints or trivial investigations into other matters against an individual because of their lawful expression of a viewpoint.

    f. Not restricting the freedom to undertake academic research within the law because of a perceived or actual tension between:

        i. any conclusions that the research may reach or has reached or the viewpoint it supports, and

ii. the organisation's policies or values.

We consider that wherever they are reasonably practicable to take, organisations that take these negative steps may be more likely to be meeting their 'secure' duty than organisations that do not.

229. With regard to steps that may be onerous, we recognise that whether a step is reasonably practicable for an organisation to take will vary from one organisation to another. Original section 4 of the proposed guidance sets out steps that may be reasonably practicable for organisations to take in a wide range of circumstances. As we set out at original paragraph 40 of the proposed guidance, where we frame a step as one that an organisation 'should' take, we mean that it may be reasonably practicable in a wide range of circumstances, though not necessarily in all circumstances and not necessarily for all organisations.

230. We understand that many respondents would have preferred the examples to have been more detailed and realistic. However, we were limited in the level of realism and detail that we could use.

231. This is because those matters are likely to be highly fact-specific. Whether speech is within the law and whether a step is reasonably practicable will depend on the particular circumstances, which will involve detail. What is reasonably practicable for one provider in one set of circumstances may not be for another provider in a different set of circumstances. Any examples therefore need to be indicative or would need to include very specific details, and this may not be helpful (as it may only apply to that very specific set of facts).

232. We remain of the view that 'legally expressible viewpoint' may sometimes be a more helpful expression than 'lawful speech'. This is because we consider the focus of freedom of speech to be on the content of the speech, including the viewpoint that it expresses. We consider that while there may be some scope for universities and colleges to restrict the time, place and manner of expression (for instance, to restrict loud noises in library or an exam hall), there is likely to be far less scope to restrict speech because of the viewpoint that it expresses (for instance, for a provider to restrict speech because it opposes some aspect of that provider's policies). We have also included some examples of potentially unlawful speech, for instance new examples 1 and 4.

233. Registered providers and their constituent institutions are required to take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for them to take in order to secure freedom of speech for the relevant classes of person. This legal duty, which sits alongside all other legal duties, is not framed to exclude their approach to disciplinary processes, research ethics policies or any other internal policy or process. We consider that it applies to all such policies and processes. We therefore consider that it is appropriate that the guidance considers a wide range of activities.

234. Section 4 aims to set out a range of steps to secure freedom of speech that may be reasonably practicable in a wide range of circumstances. We accept that there may be other steps, relating to particular areas of activity, that may also be reasonably practicable to take in some circumstances, and for some organisations. We would expect to consider these on a case-by-case basis through the operation of the free speech complaints scheme. We may also publish additional guidance on, or insights into, these areas, for example through

updating this document, or through subject-specific publications such as Insight briefs in pursuit of our 'promote' duty.

235. In response to the comments on the matter, we accept that 'speech' includes artistic expression. We have **decided** to clarify this by including the following text within new paragraph 15:

    'This right includes freedom of artistic expression, such as a painting or the production of a play.'

236. With regards to antisemitism and antisemitic harassment, we are clear that freedom of speech within the law does not, and cannot, include harassment of, or discrimination against Jewish students or other illegal conduct.

237. We are also clear that providers and constituent institutions must protect lawful freedom of religious expression. This includes the expression of religious identity, for instance Jewish religious identity. Providers must, for instance, take steps to secure the freedom to express religious beliefs, including through lawful speech and the displaying of religious symbols.

238. We have **decided** to include a range of examples that may be relevant to antisemitic harassment and to the experience of Jewish students more generally:

    - new example 1 (harassment through social media)
    - new example 2 (speaker from a proscribed group)
    - new example 6 (religious expression)
    - new example 7 (constructive dialogue)
    - new example 9 (stirring up racial hatred)
    - new example 10 (verbal or physical threats of violence)
    - new example 11 (simulated military checkpoints)
    - new example 12 (intruding into classrooms and university values)
    - new example 13 (encampment disrupting ordinary activities).

239. We have also decided to amend original paragraph 66 (now new paragraph 160) to include material on harassing protests, for instance outside a place of worship. We have also decided to include new paragraph 204 stating that the OfS will not protect Holocaust denial.

240. With regards to the comments on the freedom of students and/or students' unions and others to criticise their own university or college: we accept the potential importance of this matter and have **decided** to include examples that are relevant to it:

    - new example 22 (professor criticising employment practice)
    - new example 23 (student post raising issues about accommodation).

241. We have also **decided** to state at new paragraph 62 that reputational interests are unlikely to be relevant to whether a step is reasonably practicable to take.

Admissions, appointments, employment and promotion

Admissions

242. Some respondents commented that paragraph 43 should be strengthened, to say that students already enrolled on courses should not be refused qualifications on grounds of their opinions; or to say that providers and constituent institutions should not discriminate against a person in the admissions process in connection with their viewpoints, for instance by refusing them admission, marking them down in the admissions assessment process or revoking or changing the terms of their admission.

243. Some respondents commented that paragraph 44 should give clearer advice, for instance relating to 'proactive' steps to check whether visiting academics pose a threat to free speech or academic freedom. They also commented that refusing a place to a visiting academic may itself restrict academic freedom, and that there is value in encouraging academics to visit from countries where freedom of speech is relatively restricted. Respondents also queried the extent of an institution's responsibility for the unlawful speech of a visiting academic. Others commented that paragraph 44 was too narrow, and that it should state that any probing questions about an individual's values, and whether they align with those of the institution, is not appropriate.

244. Many respondents commented on example 3. Some commented that the example lacks nuance and does not take account of the complexity of higher education in an international context. Others commented that it is unclear what the line is between acceptance of the cultural norms of another nation, including restrictions on speech, and the removal of academic freedom/freedom of speech from international staff and/or students. Similarly, some respondents stated that termination of these contracts, as suggested in the guidance, would be disproportionate. As an alternative, they suggested that a reasonably practicable step would be for universities to set out clearly how freedom of speech will be secured for recipients of the scholarship once they are in the UK.

245. A respondent commented that in example 3 and example 4, a reference should be added to the need for universities to be alert to the risk that, in some countries, conditions of funding, such as accepting the basic principles of the ruling party, may not be applied overtly, and that reasonably practicable steps may include reasonable due diligence in this regard.

246. A respondent commented, on examples 3 to 5, that they do not consider there are any likely circumstances which could provide a different outcome. They therefore recommended the omission of the words 'depending on the circumstances'.

247. Others sought clarification on example 3. For instance, one respondent questioned whether the OfS's 'recommendation' (as they described it) would still apply if only the first of the conditions existed – that recipients must accept the basic principles of the ruling party of country B? Another respondent queried whether the requirement to follow the instructions of local consular staff could apply in an emergency. Another respondent queried whether the example was suggesting that universities may be held responsible for funding arrangements that they could not be expected to know about.

Appointments

248. One respondent commented that paragraph 46 does not sufficiently accommodate the religious freedom of independent theological institutions accredited by universities. They commented that the guidelines need to be amended so that universities do not undermine criteria for religious freedom and freedom of speech set out by independent institutions with whom they have accrediting relationships.

249. One respondent queried how the guidance (in paragraph 46) that providers 'should not require applicants to any academic position to commit to values, beliefs, or ideas' should be applied to cases of visiting speakers or lecturers who must commit to a set of values or beliefs to receive funding from an outside organisation or party or an overseas provider. The respondent argued that such individuals should not be 'cancelled' but rather be required to disclose their conflict of interest prior to the event or placement.

250. Some respondents proposed that paragraph 47, and similarly paragraphs 55 and 59, should include a caveat, to read: 'If appropriate…' or that they should only apply when concerns about academic freedom have arisen or could reasonably be raised. A respondent also suggested that the guidance was not sufficiently broad, and should cover other forms of speech than those falling under the definition of academic freedom.

251. Many respondents commented on example 4. Some respondents stated that the example was overly simplistic in its consideration of international partnerships; and that it was not clear whether (and if so how) providers were meant to oversee appointments processes on overseas campuses. Some respondents commented that while the OfS may have a view as regards freedom of speech, any termination of an agreement would be subject to the terms of the contract and common law. However, some respondents cited examples of what they considered to be serious interference with free speech in England via arrangements similar to those described in original example 4.

252. Respondents also commented that it was important that the final guidance sets out a clear position on whether the Act would apply to activities based or undertaken outside the UK, i.e. within other legal jurisdictions. Respondents also requested guidance on the Foreign Influence Registration Scheme; and on Chevening scholarships, which (they said) required students not to engage in political activities likely to affect the British government adversely. A respondent also requested an example of how domestic partnerships might threaten academic freedom and freedom of speech.

253. Some respondents raised concerns that it would be disproportionate to terminate a contract; or that it would have a significant impact on foreign relations. A respondent proposed as an alternative that the provider publishes its free speech policy and communicates this to participants once in the UK.

254. There were some comments on example 5. Some respondents said that the example was unrealistic or requested further detail, for instance as to what counts as a 'political theory'. A respondent also commented that in this example, the qualification 'depending on the circumstances' is unduly cautious. It is (they said) very difficult to imagine any circumstances in which it could be justified to require applicants for a lectureship in mathematics to demonstrate commitment to a particular political theory.

255. Other respondents suggested that the effect of example 5 might be to create difficulties for roles relating to identity politics; or that it might exclude providers from adopting the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism.

Employment

256. There were many comments on the subsection on employment and on the examples included in it. Some respondents commented that the steps proposed to secure freedom of speech in relation to admissions, appointments, employment and promotion were onerous, in particular the requirement to evidence the absence of a consideration of an individual's views. Some of these respondents requested that the OfS gives examples of the physical, digital or other 'evidence' of non-consideration of an academic's exercise of academic freedom/free speech it would expect a provider to retain. Alternatively, they requested an indication of the type of evidence the OfS already retains (or now will retain) in relation to all interactions with providers to evidence its non-consideration of academic, staff and student views to ensure that, as a regulator, it will be able to evidence, when challenged, that its activities and actions do not constrain or have a chilling effect on free speech across the sector it regulates.

257. A respondent suggested that there was a disconnection between paragraph 46 and paragraph 50. Paragraph 46, they said, demands that universities should not require commitment to 'values, beliefs or ideas, if they may disadvantage any candidate for exercising their academic freedom within the law'. However, paragraph 50 is (they said) significantly more widely drawn to protect any student or member of staff (including non-academic) expressing a lawful viewpoint.

258. A respondent who strongly agreed with original paragraph 50 added that the OfS should consider most campaigns as mentioned there, as exercises of freedom of speech. They commented that the principled position is that the target should be protected, rather than those campaigning punished.

259. Other respondents suggested that original paragraph 50 does not consider the extent to which a university or students' union disciplining student protesters may itself suppress freedom of expression; or that it does not make reference to elected officers who may be subject to calls of 'no confidence' and other criticisms that students can legally express but which may include a call for dismissal; and that these calls are a part of a well-functioning democracy.

260. There were many comments on original examples 6 and 7, which formed a contrasting pair. Some respondents stated that original example 6 seemed to imply that providers could not take public positions on any social issue. Others stated that they might have legitimate reasons for not making public statements in situations of this type. Others took issue with the suggestion that a two-week delay might be unacceptable, for instance in complex situations. This last category included some respondents who broadly supported what they considered to be the OfS's stance on the rejection of vexatious complaints and campaigns against a specific member of staff. Those respondents also commented that it is important to ensure appropriate communication with students, staff and the wider university community.

261. A respondent suggested that that we should state in guidance that providers should state academics' right to make such statements as in example 6, regardless of institutional policy. A respondent agreed that statements in such situations should be balanced and neutral, but

stated that this does not mean institutions cannot indicate that the views expressed by an individual do not represent those of the institution. This is part of stressing the provider's neutrality and can be done in a way that does not call the individual's free speech rights into question.

262. Several respondents commented that the statement attributed to Dr C in example 7 could amount to harassment and that acting as suggested might be inappropriate pending an investigation. Other respondents took the view that the statement was not harassment and that we should make this clear, citing the objective elements of the relevant definitions.

263. A respondent commented, in connection with paragraph 52, that students' unions have policies and training to provide clear guidance on separation between students and established staff who are there to support and therefore restricted as to speech: would these policies need to be fundamentally reviewed?

264. A respondent commented on paragraph 54 that it should be clarified to set out that providers may require employees to treat others – including those with protected characteristics – respectfully.

265. A respondent commented on paragraph 56 that 'anyone involved in a process of dismissal' should be clarified to cover decision-makers (and not, for instance, witnesses or the subject themself).

266. Several respondents commented that, while they broadly agreed with the principle that original example 8 illustrated, the example itself seemed unrealistic. A few respondents commented that it concerned an employment issue, and that it was therefore far-fetched to conflate it with freedom of speech. A respondent also stated that the qualifications 'depending on the circumstances' and 'may' are unduly cautious. It is, they said, very difficult to imagine any circumstances in which it could be justified to fire a member of catering staff for expressing pro-life views within the law. Some respondents also commented that it is not clear how the principle of this example would apply to the speech of students' union staff members.

Promotion

267. Some respondents commented that it was for providers as autonomous employers to set their own promotion criteria. Others requested clarity on specific procedural steps that providers could take to ensure that applicants for promotion are not disadvantaged through the exercise of academic freedom. Some respondents requested guidance and examples to illustrate how, compatibly with paragraph 58, institutions can legitimately include a commitment to inclusivity (in line with the PSED) in promotion criteria, especially where inclusivity is one of the institution's values. Some respondents commented that it was unclear what sort of evidence was being suggested at paragraph 59.

268. One respondent commented that the focus on promotion should be on excellent teaching of the most worthwhile topics and they should be rewarded for such. If (they said) a teacher provides a poor education because their choice of topics, then their promotion should be viewed negatively not because of their viewpoint, but because of how their choices affect the quality of their work.

269. With regard to example 9, some respondents commented that it would benefit from further nuance to clarify that where promotions are based on teaching and scholarship, such a requirement may be lawful as this may be a legitimate requirement for the university to achieve its access and participation plan targets or to close the attainment gap. More broadly, some commented that the effect of example 9 would be that a provider cannot risk asking a candidate for academic promotion to submit a statement advancing any concept, idea, theory or value where there are contrary views; and that this was inconsistent with academic freedom.

270. Others said that example 9 appears to conflate the exercise of academic freedom with promotion criteria, or that it did not raise freedom of speech issues. Others commented that the example should highlight explicitly that academics have the right to criticise the institution that they work in.

Admissions, appointments, employment and promotion: our response

Admissions

271. In response to the comment that original paragraph 43 should be strengthened, to say that students already enrolled on courses should not be refused qualifications on grounds of their opinions: we consider that original paragraph 112 (which we are retaining in the final version as new paragraph 206) already has this effect.

272. The 'reasonably practicable' steps required by the secure duty relate to freedom of speech for students (among others). We do not consider that the definition of 'student' includes all those who have not yet begun a course. However, many who apply to admission on a course at a provider are already students of that provider. Therefore, we have **decided** to strengthen original paragraph 43 of the guidance: new paragraph 136 now reads:

> 'Providers and constituent institutions should not discriminate against a student applying to another course, for instance by refusing them admission or marking them down in the admissions assessment process, because of their viewpoint. They should not revoke or change the terms of their admission of an applicant with a binding offer because of the applicant's viewpoint.'

273. The intent behind paragraph 44 was not to encourage providers and constituent institutions to restrict visits from external academics on the basis of their viewpoint. Nor was it to encourage probing questions about an individual's values. Rather, it was intended to clarify that reasonably practicable steps may include proactive checks, particularly where there are known risks relating to possible attempts to monitor, censor or intimidate students or staff at the provider or constituent institution. We have therefore **decided** to amend the text of original paragraph 44 to reflect this. New paragraph 137 now reads:

> 'Providers and constituent institutions should not admit students or visiting academics on the basis of funding arrangements or other criteria that have the effect of restricting their or others' academic freedom or freedom of speech within the law. Reasonably practicable steps may include proactive checks, particularly where there are known risks relating to possible attempts to monitor, censor or intimidate students or staff at the provider. These may include undertaking robust risk-based human rights due diligence before entering into such arrangements.'

274. Original example 3 was intended to cover international scholarship arrangements for students that may result in those scholars being directed, by diplomatic staff of the partner country, to suppress or monitor speech at the English provider or constituent institution where they hold those scholarships. For instance, they might be directed to engage in surveillance or coercion of staff or other students at that provider. We consider that such a situation would raise serious concerns about freedom of speech at the provider and we accept that there are no likely circumstances in which it would not. We do not consider that termination of the arrangement would be a disproportionate step.

275. We accept that additional questions might arise from hypothetical variations on this example (for instance, where scholars were not requested to take direction from embassy staff, or what might happen in an emergency). We do not consider that it is possible to address all such contingencies in guidance; however, we have sought to separate potential effects of the two conditions.

276. We do not accept that the example implies that universities may be held responsible for funding arrangements that they could not be expected to know about. We consider that providers and constituent institutions should conduct due diligence before engaging in arrangements with countries where reasonable suspicions might arise.

277. We have therefore **decided** to retain this example with additional text to clarify this intent and to set out the effects of the conditions. We have also **decided** to remove the words 'Depending on the circumstances' from this example and from original examples 4 and 5. New example 25 now reads as follows:

Example 25: International students on visiting scholarships

University A accepts international students every year through a programme of visiting scholarships funded by the government of country B. One condition of the scholarships is that recipients must accept the basic principles of the ruling party of country B. Another condition is that recipients must accept direction from country B's government via its diplomatic staff.

Arrangements like these are very likely to undermine free speech and academic freedom at University A. For instance, because of the first condition the university may be in effect offering a political test for entry to scholars. Because of the second condition scholars may be directed, by diplomatic staff of B, to suppress or monitor speech at the English provider where they hold those scholarships, through surveillance or physical intimidation or coercion of staff or other students at that provider.

Amendment or termination of these arrangements is likely to be a reasonably practicable step that University A should now take to comply with its 'secure' duty.

In this situation, it is also likely to be a reasonably practicable step for providers and constituent institutions to have in place, and publicise, robust internal disciplinary processes for addressing harassment and surveillance of this type.

Additional reasonably practicable steps are also likely to include due diligence such as accessing and translating official B-language documentation relating to these scholarships,

for instance the contracts signed by students taking up these scholarships. This is likely to be especially important when there is a reasonable suspicion that conditions of funding, such as accepting the basic principles of the ruling party, are not overt.

Appointments

278. We accept that there may be circumstances in which areas of academic teaching or research presuppose certain principles. However, it is not clear why this must involve commitment to a viewpoint. In any case the step is framed as one that may be reasonably practicable; and we have stated that a step may not be reasonably practicable where it prevents essential functions. We have therefore **decided** to retain the text of original paragraph 46, now at paragraph 138. We also consider that there is a distinction between a requirement to commit to a viewpoint and a requirement to reflect certain basic principles in (for instance) teaching activity, as stated at new paragraph 147.

279. In relation to the comment about overseas academics and students, original paragraph 46 refers to duties on providers and constituent institutions.

280. The intention of paragraphs 47, 55, and 59 was that providers should seek out and document significant additional evidence about appointments, dismissals and promotions where there are concerns about academic freedom

281. In response to a comment asking for examples of the relevant type of evidence, we consider that it may be a reasonably practicable step for the documented reasons for these decisions (for instance, a candidate's teaching record) to make clear that the decisions did not relate to their exercise of academic freedom.

282. We accept that the wording proposed may be helpful in clarifying this point. We have therefore **decided** to amend original paragraph 47 of the guidance to new paragraph 140. (This amended version also adds 'free speech' to include applicants who are not already academic staff):

> 'Any academic appointment process should include a sufficiently detailed record of all decisions. If appropriate (for instance, if concerns about free speech or academic freedom have arisen or might reasonably arise), this record should include evidence that the appointment process did not penalise a candidate for their exercise of free speech or academic freedom. This may include, for instance, written reasons for the decision.'

283. We have **decided** to amend original paragraph 55 to new paragraph 148, which reads as follows:

> 'Any process of dismissal for a member of academic staff should include a sufficiently detailed record of all decisions. If appropriate (for instance, if concerns about academic freedom have arisen or might reasonably arise), this record should include evidence that the process did not penalise a member of staff for their exercise of academic freedom. This may include, for instance, written reasons for the decision.'

284. We have **decided** to amend original paragraph 59 to new paragraph 152, which reads:

'Any academic promotion process should include a sufficiently detailed record of all decisions. If appropriate (for instance, if concerns about academic freedom have arisen or might reasonably arise), this record should include evidence that the process did not penalise a candidate for their exercise of academic freedom. This may include, for instance, written reasons for the decision.'

285. We do not consider that original example 4 proposes a disproportionate remedy. Closure of a foreign-funded institute may be a reasonably practicable step to secure free speech at the English provider within which the institute exists. This may happen, for instance, if the institute in question breaches the 'secure' duty in its own teaching or hiring practices.

286. In response to comments on this example, we do not consider that the existence of a contract could obstruct the termination of an agreement that breaches the 'secure' duty. It is not for the OfS to give guidance on the Foreign Influence Registration Scheme. We do not consider that the comments on Chevening scholarships are relevant to this example. We discuss domestic partnerships at Question 8.

287. In response to other comments on this example, we do not consider that termination of the agreement is disproportionate where it is creating a serious breach. We do not consider that publication of a free speech policy is likely to be an effective step by itself to counter this issue. We do not accept that HERA permits exceptions to the 'secure' duty for cases of this type.

288. We have therefore **decided** to retain this example in the form in which it was proposed except to remove the words 'commercial' and 'Depending on the circumstances'; to change 'may' to 'are likely to' in the third sentence; (for clarity) to change 'academic freedom' to 'free speech or academic freedom' so as to cover applicants who are not academic staff at a registered provider; and (for clarity) changing 'In these circumstances, terminating or amending these arrangements with Institute A' to 'Amending these arrangements, including immediately and verifiably removing any test, or terminating this arrangement with Institute A'. New example 26 reads as follows:

Example 26: appointments to a foreign-funded institute

Institute A in University B is jointly funded by B and an entity based in a foreign country C. A proportion of staff at Institute A are appointed through a process managed within country C. This process imposes an ideological test as a condition of appointment and of ongoing employment.

These arrangements are likely to have the effect of penalising applicants to academic posts for their exercise of free speech or academic freedom. They may also have the effect of restricting the free speech and academic freedom of students and staff at University B. Amending these arrangements, including immediately and verifiably removing any test, or terminating this arrangement with Institute A, is likely to be a reasonably practicable step that University B should now take.

289. The intent behind example 5 was to illustrate that it may be a breach of the 'secure' duty to require applicants for an academic post to conform to a particular viewpoint that has no

bearing on disciplinary competence. It is not necessary, to illustrate this point, to replace 'political theory X' with a more detailed description. Nor does the example have any bearing on whether the provider itself decides to adopt a particular definition, for instance the IHRA definition of antisemitism. However, we have decided to clarify this point by changing 'political theory X' to 'certain political aims' and to broaden the scope of the example by not specifying the subject. For clarity, we have also decided to change 'disciplinary competence' to 'competence in the relevant subject'. New example 27 now reads:

Example 27: job advert requiring commitments to political aims

University A advertises for a lecturer. The advertisement requires all applicants to demonstrate their commitment to certain political aims.

Depending on the circumstances, this requirement may penalise candidates for opinions or speech that have no bearing on competence in the relevant subject. In these circumstances, removing this requirement before advertising is likely to have been a reasonably practicable step that University A should have taken. Withdrawing the advertisement, and re-advertising without this requirement, is likely to be a reasonably practicable step that University A should now take.

Employment

290. We have responded to the points about record-keeping in relation to dismissal processes in the sub-section on appointments above.

291. Original paragraph 46 applies to applicants for academic posts. Original paragraph 50 is drawn more widely to cover all members of staff. The reason for the difference in approach is that the 'secure' duty specifically protects applicants to academic positions at the provider or constituent institution. However, it also includes an obligation to take reasonably practicable steps to secure the freedom of speech of all staff, including non-academic staff.[11]

292. However, we recognise that it may not be reasonably practicable for a provider or constituent institution to secure the freedom of all speech within the law (see question3 on reasonably practicable steps). We also accept that public responses to such campaigns may not always be practicable in the timescale suggested. We also accept that providers should affirm the rights of staff and students to make statements, such as in original examples 6 and 7. Therefore we have **decided** to amend original paragraph 50 to new paragraph 143, which reads as follows:

'We would generally expect providers and constituent institutions, as promptly as is reasonably practicable and consistent with due process, and where appropriate publicly:

- to reject public campaigns to punish a student or member of staff for lawful expression of an idea or viewpoint that does not violate any lawful internal regulations

[11] HERA part A1 section A1(9) and A1(2).

- to affirm students' and staff members' rights to make such statements regardless of any institutional position on the matter.

These campaigns may take the form of organised petitions or open letters, an accumulation of spontaneous or organised social media posts, or long-running, focused media campaigns.'

293. We accept that there is scope to amend original examples 6 and 7 to make clear that the speech in question is not unlawful harassment. We also accept that there is scope to include reference to communication with the wider community. We also accept that providers may be able to express neutrality on any issue without necessarily undermining the position of a student or member of staff; however, we do not consider that examples 6 and 7 conflict with this point. We do not accept that the examples imply that providers should never take public stances on any issue. We accept that a two-week delay might occur for reasons to do with the complexity of a case and that there is scope to clarify that in original example 6 there is (for instance) no question of any investigation.

294. We have therefore **decided** to amend original examples 6 and 7 to new examples 28 and 29, which (including a few minor stylistic changes) read as follows:

Example 28: paper accusing Shakespeare of racism

A postdoctoral researcher, A, publishes a paper accusing Shakespeare of 'systematic racism' based on an analysis of the sonnets. It is clear and accepted by all parties that A's speech is lawful and does not violate any lawful regulations or restrictions at A's university, B.

A national newspaper accuses A of attacking a great national figure. It mounts a campaign calling for A to be fired. After two weeks of unnecessary delay the vice-chancellor of B issues the following statement:

'University B regards free speech as a fundamental value that is at the heart of everything we do. This extends even to views that we consider wrong and that many in our community reject. The views of A do not represent the views of University B. University B is proud of Britain's literary heritage.'

The vice-chancellor of B did not intervene for two weeks. This period of uncertainty may itself have penalised A. Depending on the circumstances, the statement may have undermined A by criticising their position. The statement was not explicit that University B would not punish A. In these circumstances a clear, prompt and viewpoint-neutral response may have been a reasonably practicable step that University B should have taken.

Example 29: social media backlash against a lecturer's blog

A lecturer, Dr C, writes a blog strongly defending the rights of trans people and claiming that these rights are under attack from activists. It is clear that C's speech is lawful and does not violate any lawful regulations or restrictions at C's employer, College D.

Dr C's speech provokes an intense response on social media, including widespread calls for C to be fired. Dr C's employer, College D, immediately issues the following statement internally, to the wider university community and publicly:

'College D will not limit the views expressed by its staff or students beyond what the law prevents. College D will not require any apology from, or take any action against, its members, staff or students for their lawful expression of any viewpoint.'

This statement is likely to be helpful. It is prompt, categorical and neutral as to content. Depending on the circumstances, the statement may reduce pressure on Dr C. College D is likely to have taken some of the reasonably practicable steps that it should have taken to secure academic freedom for Dr C. There may be other reasonably practicable steps that College D should take.

295. We accept that free speech includes lawful speech protesting against a staff member's speech. Paragraph 50 does not suggest that providers, constituent institutions or students' unions should punish or discipline anyone who engages in such protest.

296. We accept that some regulations and restrictions on the speech of staff may be essential for the continuation of the essential functions of the provider or constituent institution. We consider that this qualification is implicit in original paragraph 49 of the guidance. However, we have **decided** to clarify this by adding the words 'Wherever reasonably practicable,' to original paragraph 52 as it was written (and to remove the reference to students' unions). This is now new paragraph 145.

297. In relation to original paragraph 54, we do not consider that the 'secure' duty requires further amendments in relation to 'treating oth0ers… respectfully'. However, to reflect the distinction between a requirement to commit to a viewpoint and a requirement to reflect certain basic principles in (for instance) teaching activity, we have **decided** to amend original paragraph 54 to new paragraph 147, which reads:

> 'Providers and constituent institutions should not require holders of any academic position to commit (or give evidence of commitment) to a particular viewpoint. This is distinct from a requirement to teach within the boundaries of disciplinary relevance and disciplinary competence, which is likely to engage the essential function of teaching.'

298. To illustrate this distinction, we have also **decided** to add the following new example 30 after new paragraph 147.

Example 30: mis-teaching calculus

The University of A employs Dr B to teach mathematics, including core basic material on calculus. Based on his own lack of knowledge and understanding, Dr B instead teaches an incoherent alternative theory. He criticises standard calculus in class and marks students down for correctly applying standard methods. Following complaints, the university investigates and issues Dr B with a formal warning.

It is unlikely that the university has breached its 'secure' duty. Dr B's marking practices and speech in class undermine the teaching function of University A, because competent teaching of calculus is essential to its course provision. It is unlikely to be reasonably practicable for the university to secure Dr B's speech in this context.

299. We accept that paragraph 56 does not make clear that it is intended to apply to decision-makers (and not, for instance, to the subject of the process). We have therefore **decided** to amend paragraph 56 to new paragraph 149, which reads:

> 'Providers and constituent institutions should ensure adequate training on freedom of speech and academic freedom for anyone involved in making recommendations or decisions in relation to the dismissal of a member of staff. (See also 'Training and Induction' below.)'

300. We accept that example 8 relates to employment. We do not accept that the 'secure' duty fails to apply in this case. We consider that not firing a member of staff for their lawful expression of a particular viewpoint may in a wide range of circumstances be a reasonably practicable step to secure their, and others', freedom of speech and/or academic freedom. We consider that this example illustrates that principle irrespective of whether it captures, or resembles, any actual case. Therefore, we have **decided** to retain this in the form proposed except for minor changes of wording, to add that the speech did not violate any internal regulation, and to strengthen 'may' to 'is likely to'. This example, which is now new example 31, now reads as follows:

Example 31: campaign against a staff member with pro-life views

A member of catering staff at University A writes to the local newspaper lawfully expressing pro-life views. Students at the university start a petition to have the member of staff fired. Following an investigation, University A fires the staff member on the grounds that there are students who claim to feel unsafe because of the staff member's continued employment.

Depending on the circumstances, this is likely to have been a breach of University A's free speech duties. This is because there was nothing to suggest that the staff member's speech was unlawful or that it violated any lawful regulations or restrictions at A. For instance, claims that the staff member's employment makes others feel unsafe are not, by themselves, enough to make that member's speech unlawful. In these circumstances, retaining (and not disciplining) the staff member is likely to have been a reasonably practicable step that University A should have taken. Reinstating the staff member may now be a reasonably practicable step that University A should take.

Promotion

301. We do not accept that the 'secure' duty fails to apply to promotion criteria. On the contrary, the Act specifically identifies the likelihood of securing promotion as a factor in its definition of academic freedom.[12] Providers and constituent institutions are free to set their own promotion

[12] See HERA part A1 section A1(7)(b).

criteria within the boundaries set by the law, including the 'secure' duty. Providers are also well placed to decide on the appropriate procedural steps for applying those criteria.

302. The PSED is the duty to have due regard to the need to:

    a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;

    b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

    c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

303. Providers will be well placed to decide for themselves how best to pursue the aims of the PSED. However, we do not consider that it requires providers or constituent institutions to require applicants for academic promotion to commit (or give evidence of commitment) to values, beliefs or ideas, if that may disadvantage any candidate for exercising their academic freedom within the law. Indeed, those values, beliefs or ideas may be inconsistent with religious or philosophical beliefs that are themselves protected characteristics. To the extent that that is so, any such requirement may be in tension with the PSED.

304. In response to the comment about access and participation plans, we note that as stated at Regulatory notice 1, approval of a plan does not provide evidence of compliance with any other condition of registration and should not be relied on in any OfS investigation of compliance with any other condition of registration.[13] We also note that, similarly, approval of a plan should not be taken to imply compliance with a provider's or constituent institution's 'secure' duty.

305. We do not accept that there is any inconsistency between original paragraph 59 and a focus on excellent teaching in promotion. This is because example 59 is about a requirement on staff to commit to values, beliefs or ideas, and not about excellence in teaching. To emphasise this, we have **decided** to amend the example to refer to 'equality (or equity), diversity and inclusion (EDI)'.

306. We do not consider that original example 9 suggests that providers cannot, during a promotion process, ask an applicant to discuss any theory or concept. However, we do consider that applicants for promotion should not be disadvantaged because of their viewpoint in relation to particular theories or concepts, where this has no bearing on their disciplinary competence.

307. We accept that academics have the right to criticise the institution that they work in. We have discussed this elsewhere in connection with reasonably practicable steps and the relevance (or irrelevance) of reputation: see under 'General comments' in this question.

308. We accept that there is scope to clarify the application of original example 9. We also accept that there is scope to say more about how providers and constituent institutions can have due

[13] OfS, 'Regulatory notice 1: Access and participation plan guidance', s. 137.

regard to the aims of the PSED. We have therefore decided to amend original example 9 to new example 32, and to add new example 33, as follows:

Example 32: requiring a commitment to equality, diversity and inclusion

University A requires all candidates for academic promotion to submit a 500-word statement of evidence of commitment to equality (or equity), diversity and inclusion (EDI).

Depending on the circumstances, this requirement may be restricting the lawful expression of certain viewpoints. For instance, a lecturer might be sceptical of some aspects of EDI and may be deterred from applying for promotion, or may be refused promotion, as a result. Removing this requirement from promotion processes is then likely to be a reasonably practicable step that University A should now take.

Example 33: encouraging applications from underrepresented races

University B takes positive steps to encourage members of underrepresented races to apply for promotion. For instance, it invites members of those groups to special events related to promotion. It also publicises successful role models from within those groups. All applicants for promotion are evaluated solely on merit.

Assume that in the circumstances, the steps taken are a proportionate means of encouraging more people with a certain protected characteristic to apply for promotion and that, in the specific case, the steps are lawful under the Equality Act.

In taking these actions it is unlikely that B has breached its 'secure' duty.

Codes of conduct

309. There were many comments on the subsection on codes of conduct and the associated examples 10 to 16. Some respondents stated that the OfS should go further by (for instance):

    a. directing universities to consider whether adopting legal prohibitions and language in internal policy documents might hinder compliance with the duty to promote freedom of speech;

    b. stating that where a provider adopts a conduct rule that prohibits unlawful speech (e.g. harassment relating to a protected characteristic), that rule will only be enforceable, as an Article 10(2) restriction, if it possesses the 'quality of law' – i.e., is clear, foreseeable in its operation and not conferring vague or general discretion on a decision-maker; and

    c. advising universities to ensure that any rules restricting speech meet this basic standard, in line with the proposed guidance regarding security costs at paragraphs 87 to 94.

310. Some respondents commented that the scope of the material on codes of conduct was unclear. For instance, some commented that it was not clear whether and to what extent it applied to students' unions. Others commented that paragraph 62 appeared to be extremely broad in scope and that they would welcome clarification on this. Several respondents asked about whether paragraph 62 had a bearing on the IHRA definition of antisemitism.

311. Others commented that it was unclear whether paragraph 66 (relating to protests and demonstrations) was consistent with (then) ‘recent letters’ from the Department for Education (DfE) ‘and other parts of government’. A respondent also stated that it would be unfair and impractical to suggest that what they described as the onerous steps in this subsection should be taken prior to 1 August, including a review of ‘any code, contract or policy’ (original paragraph 64 and examples 11-12).

312. Some respondents commented that example 10 was oversimplified or unrealistic; respondents also requested clarification on what might be meant by a political theory and how the example fits with the duty to promote the importance of freedom of speech in higher education. For example (it was suggested), if several academics in a department subscribe to a political theory and this is apparent through published research and teaching which is openly available, this could arguably suppress a viewpoint at odds with this political theory more than an employment contract.

313. There were many comments on example 11. Some respondents commented that the wording in the example suggests removing the blanket rule is a reasonably practicable step, but that it does not indicate what if anything should replace this rule: for instance (as a respondent suggested) a change of wording to the student handbook to say that misgendering a person could be harassment on grounds of gender reassignment. They commented that the example should provide guidance as to what alternative should be put in place as simply removing the rule would appear to allow individuals to misgender others in any situation. A respondent commented that this is an example of a situation where the OfS guidance implies a value judgement itself (stating that misgendering may plausibly be necessary for ‘accuracy’), which could interfere with the provider or students’ union’s ability to promote respect, tolerance and equality.

314. A respondent also commented that while the categorical wording of the rule quoted in the example may be taken to extend to academic writing and could be moderated, there is no reason why staff and students should not be directed to use a student’s preferred pronoun. There may even be compelling safety reasons to do so because outing a trans student may expose them to the risk of harm. Other respondents suggested that this element of the guidance should be more ‘robust’, in line (they said) with recent legal judgements; or that it should make clear that the conduct mentioned in example 11 did not amount to harassment.

315. Other respondents commented that it would be helpful to see more detail on when and where offensive material would no longer be lawful, but would stray into illegality (for example with respect to stalking or harassment), or when and where actions would be considered discriminatory.

316. There were also many comments relating to example 12. Several respondents said that it was oversimplified. A respondent commented that it was an unreasonable requirement that would put providers out of line with many employers. A respondent also suggested that it be realigned to reflect wider concerns and emerging legal and ethical frameworks around IT, AI and social media-related offences (e.g. deepfakes and circulation of false material online). Some respondents commented that providers will wish to ensure that use of their internet facilities does not breach equality laws and that exchanges are respectful of other points of view. Therefore, they said, the reference to ‘offensive material’ and the use of the University A’s internet facilities does need to be qualified.

317. A respondent commented that there needs to be more protection for students who have been defamed as a result of expressing their views or targeted.

318. Some respondents commented on example 13. Several respondents suggested that adding the caveats and qualifications to a statement of the law that the example suggested risked making the associated policy difficult to understand. Some respondents asserted that preventing 'people from becoming terrorists or supporting terrorism' must imply a duty to prevent extremism, because (they said) this is the step that can lead to terrorism.

319. There were relatively few detailed comments on examples 14 to 16. A respondent commented, with regards to example 14, that if a society is affiliated, they are automatically allowed to be present at a freshers' fair. More broadly, respondents asked for clarity concerning whether the society was affiliated and about various scenarios in which a students' union might ban a group from affiliation. Respondents also queried whether students' unions could deny affiliation to a group based on its beliefs, for instance when this had been democratically voted on.

320. A few respondents commented that examples 15 and 16 were unrealistic or lacking in nuance. One respondent suggested that in example 16, it is not clear whether the issue is the size of the noticeboard, that flyers cannot be posted anywhere else, or that the length of the permission required either to post flyers or hand them out is not appropriate.

Codes of conduct: our response

321. We have considered, and have set out guidance regarding, the adoption of legal prohibitions and language in relation to our condition of registration E6 on harassment and sexual misconduct.

322. We accept that it may be helpful to emphasise the applicability of Article 10(2) here and to advise that rules governing speech should meet this basic standard. We have therefore decided to add the following as new paragraph 155:

> 'Where a provider or constituent institution adopts a rule of conduct that restricts lawful speech, that rule must, in line with Article 10(2) of the Convention, be prescribed by law. This means that:
>
> a. there is a specific English legal rule or regime which authorises the interference;
>
> b. the student, member, member of staff or visiting speaker who is affected by the interference has adequate access to the rule in question; and
>
> c. the rule is formulated with sufficient precision to enable the student, member of staff or visiting speaker to foresee the circumstances in which the law would or might be applied, and the likely consequences that might follow.'

323. The intention in this section was to set out steps that providers and constituent institutions should take when they are both applicable and reasonably practicable for them to take.

324. As with many of the other steps described in section 4, the steps set out in original paragraph 62 are steps that providers and constituent institutions should take to the extent that it is

reasonably practicable to do so. We accept that some regulations and restrictions on the speech of staff may be essential for the continuation of the essential functions of the provider or constituent institution; and this may place limits on what is reasonably practicable for provider and constituent institutions.

325. We do not comment in this guidance on the IHRA definition of antisemitism or on any other proposed non-legally binding definition that a provider or constituent institution may wish to adopt. Nonetheless, we have adopted the IHRA definition because we believe that it is a useful tool for understanding how antisemitism manifests itself in the 21st century. The IHRA definition does not affect the legal definition of racial discrimination, so does not change our approach to implementing our regulatory duties, including our regulatory expectations of registered providers. A provider that adopts any definition (of anything) must do so in a way that has particular regard to, and places significant weight on, the importance of freedom of speech within the law, academic freedom and tolerance for controversial views in an educational context or environment.

326. We have therefore decided to replace original paragraphs 62 and 63 with new paragraphs 156-158:

> 'In framing restrictions on speech, it is generally helpful for providers or constituent institutions to adopt, within the same document, clear statements explicitly protecting freedom of speech and academic freedom. It will be important for a provider or constituent institution to consider the adequacy of any such statements in protecting both freedom of speech and academic freedom.
>
> Restrictions, regulations and protections are more likely to work effectively where they apply objective tests and avoid vague language or undefined terms. Using legal definitions where available is likely to be helpful in setting clear expectations for students, members, staff and visiting speakers.
>
> The terms of any code, contract or policy should not be so broad that they suppress the lawful expression of a particular viewpoint or of a wide range of legally expressible content.'

327. We do not consider that the 'secure' duty permits the suppression of lawful protest solely on the basis of the lawful viewpoint that it expresses. Nor do we consider that this is inconsistent with DfE or other government advice on protest. However, we accept that it may be necessary for a provider or constituent institution to regulate the time, place and manner of such protest for reasons that are connected with that viewpoint. For instance, it may be necessary to regulate the time, place and manner of a protest expressing a viewpoint that is hostile to a particular religion, where that protest might otherwise harass those attending a particular place of worship.

328. We have therefore decided to amend original paragraph 66 to new paragraph 160, which reads as follows:

> 'Policies that regulate
>
> a. protests and demonstrations;
>
> b. posting or distributing written material (such as flyers); or

c. recruitment activities

should not restrict these activities because they express or support a particular legally expressible viewpoint. However, in certain circumstances (this will be a fact-sensitive assessment) it may be necessary and appropriate for providers or constituent institutions to regulate the time, place and manner of a protest or demonstration. For example, this may be necessary if those attending a place of worship are at risk of intimidatory harassment.'

329. We do not consider that example 10 creates any conflict with the duty to promote the importance of freedom of speech in higher education. It might happen that the academic staff in a department predominantly adhere to one particular political theory; however, they should remain individually free to change their minds (and to say so) without putting their jobs at risk. The focus in example 10 is on a requirement within an employment contract. However, we have **decided** to amend original example 10 to illustrate more clearly that placing requirements that staff must subscribe or uphold particular beliefs may supress lawful speech. New example 34 now reads as follows:

Example 34: contracts requiring employees to uphold social justice

College A's employment contract states: 'College employees must uphold the college's commitment to social justice.'

Upholding social justice is not an essential function of the college. Depending on the particular facts of the case, this statement may suppress lawful expression of scepticism about some conceptions of social justice. If so, removing this contractual requirement is likely to be a reasonably practicable step that College A should now take.

330. In response to comments on example 11, our condition of registration (along with guidance) on harassment and sexual misconduct, sets out the positive steps that we would expect providers to take to address harassment and sexual misconduct. The example is phrased in terms of a student's judgement of 'clarity' rather than expressing an OfS position on the accuracy of this language, and so does not itself express a value judgement.

331. The OfS accepts that providers and constituent institutions may need to restrict or regulate speech that amounts to harassment in relation to the protected characteristics of sex or gender reassignment (or any other relevant protected characteristic).

332. We have therefore **decided** to amend example 11 to reflect this point. New example 35 now reads as follows:

Example 35: student handbook on misgendering

University A's student handbook states: 'Misgendering is never acceptable. You must always address or refer to a person using their preferred pronouns.'

This blanket ban on misgendering is likely to breach the 'secure' duty.

For instance, a student writing a dissertation in criminology might refer to trans women as 'he' because the student considers this necessary for clarity. This is unlikely to amount to harassment.

There may be circumstances in which the use of dispreferred pronouns might amount to harassment. For instance, repeated and deliberate misgendering directed by a teacher to a student in one of their classes may amount to harassment.

However, we would expect that any code of conduct that regulates the use of pronouns on these grounds would narrowly tailor any restriction to those circumstances. It must not, in intent or effect, prohibit the expression of a lawful viewpoint (for instance, the viewpoint that gender is a fiction).

Removing this blanket rule is likely to be a reasonably practicable step that University A should now take.

333. We do not consider that example 12 is inaccurate or unnecessarily oversimplified. A blanket ban on 'offensive' (rather than, for instance, 'grossly offensive') material is likely to include the lawful expression of opinions, information or ideas that many would find offensive, disturbing or shocking. This is likely to include, for instance, the lawful transmission of images or texts that are critical of religion. Suppressing this material, or punishing its sender, on the grounds that it is offensive, is likely to be a breach of the 'secure' duty.

334. However, we accept that the example could be refined to give more helpful advice on a potential restriction that may not be in breach of the 'secure' duty. We have **decided** to amend original example 12 to new example 36, which reads as follows:

Example 36: IT policy

University A's IT acceptable use policy says: 'Users must not transmit offensive material using University internet facilities.'

Many lawfully expressible views are likely to be offensive to some. This includes contributions to academic debate. The policy may restrict essential functions of the university. Removing or amending it is likely to be a reasonably practicable step that A should now take.

A's policy is more likely to be compliant if instead of 'offensive material' it refers to material that is unlawful, including (for instance) under section 1 of the Malicious Communications Act 1988, section 127 of the Communications Act 2003, or Part 10 of the Online Safety Act 2023.

335. We accept that universities and colleges may reasonably restrict or regulate speech that is not within the law or that amounts to harassment on social media. We also accept that it may be reasonable for universities and colleges to do so to protect their own students and staff from unlawful online conduct. We have therefore also **decided** to introduce new example 1:

Example 1: harassment through social media

Students at provider A participate in a seminar discussion concerning governing divided societies. During the discussion, student B lawfully expresses a controversial position relating to minority groups.

Following the seminar, student C publishes repeated comments on social media attacking student B, tagging them in the posts and encouraging other people to post responses to student B to tell them what they think of their views. Student C's speech is so extreme, oppressive and distressing that their course of conduct may amount to harassment as defined in the Protection from Harassment Act 1997.

Provider A learns of the activity. It also carries out an investigation of student C under its social media policy, which forbids unlawful online harassment. In doing so, it is unlikely that provider A has breached its 'secure' duty.

336. We consider that the risk of self-censorship arising from oversimplification or mis-statement of the law outweighs the risk that students and staff at universities and colleges may need to read accurate statements of the law with care.

337. We have therefore **decided** to retain original example 13 in the form we have proposed it (except for minor stylistic changes), as new example 37.

338. Because of the expected repeal of the duties on students' unions, we have **decided** to delete original example 14.

339. We consider that it is clear from original examples 15 and 16 that what is at issue is overly onerous regulation of protesting, campaigning and posting activities. However, we accept that example 15 may be less helpful than example 16. In the case of example 16 we consider that it is clear that the example illustrates how a combination of requirements may be unnecessarily onerous. We have therefore decided to retain example 16 (now new example 38) with minor stylistic changes.

Complaints and investigation processes

340. There were many comments on the subsection on complaints investigation processes, including original examples 17 and 18. Some respondents said that the guidance should not be prescriptive in terms of complaints processes and timelines. Some respondents said that the guidance should recognise that providers are already required to ensure that they have in place a robust, fair and transparent student complaints process.

341. There were many comments on example 17. Some respondents stated that the OfS statement of expectations, for preventing and addressing harassment and sexual misconduct affecting students in higher education, clearly sets out an expectation that providers should have adequate and effective policies and procedures in place for all students to report and disclose incidents of harassment and sexual misconduct; and that this includes provision of anonymous reporting. More broadly, some respondents stressed the importance of encouraging the reporting of harassment (anonymously or otherwise).

342. Other respondents requested clarity on the focus of the example: was the concern related to anonymous reporting or 'problematic speech'? Some respondents suggested that removing a facility for certain kinds of anonymous complaint would itself stifle freedom of speech. Some respondents stated that the example was overly broad, and appeared to be suggesting that any reporting tool should be taken down if it includes the ability to report people for lawful speech. Some respondents said that any infringement of free speech arising from an anonymous reporting portal would come from the provider's response and not the portal itself. A respondent commented that original example 17 should explain what steps, short of removing the complaints portal, might be reasonable in the circumstances. For example, the reporting mechanism could be amended to refer to unlawful speech rather than problematic speech.

343. Some respondents commented on the statement in original paragraph 70 that complaints processes should include a fair, objective and rapid triage process for complaints relating to speech. Some respondents said that the focus on rapidity in the process may come at the expense of natural justice or thoroughness in the investigation, and that the guidance should state that providers will be given the opportunity to carry out adequately thorough investigations reflecting the circumstances of individual cases. A respondent also stated that the views of alleged victims of speech should be treated in line with the Victims' Code. Respondents made similar comments in relation to original example 18.

344. Other respondents strongly supported original paragraph 70. One respondent commented that the step would lead to fewer free speech complaints. A respondent also suggested that the guidance should go further in recommending a preliminary assessment of whether there are grounds to investigate, with the starting point being that lawful speech is not punishable. A respondent commented that a prompt response by institutions would help to reduce the risk of 'punishment by process' because of the protracted uncertainty arising from a lengthy investigation.

345. A respondent commented, in connection with original paragraph 72, that the guidance should acknowledge that depending on the circumstances of the case, it may not be possible to determine that a complaint is vexatious without first investigating. A respondent also commented that there is no evidence in practice that providers are pursuing trivial investigations.

Complaints and investigation processes: our response

346. In response to the comments on prescriptiveness, this guidance sets out steps that may be reasonably practicable for providers and constituent institutions to take to secure freedom of speech. Where a step is reasonably practicable for a provider or constituent institution to take, it must take that step. While we recognise that many providers and constituent institutions will already have robust, fair and transparent complaints processes in place, the purpose of this guidance is to set out reasonably practicable steps for making those processes compliant with the 'secure' duty.

347. The intention behind original example 17 was that an anonymous portal encouraging the reporting of a broadly defined category of speech ('problematic speech') may discourage open discussion of controversial topics. We do not consider that this would necessarily arise

only from the provider's or constituent institution's response; the mere existence of such a process may itself chill speech.

348. However, we accept that there may be uses for anonymous reporting (for instance, for statistical purposes related to sexual misconduct) that are less likely to have this effect. We have therefore **decided** to change original example 17 to reflect this, and to make minor additional clarifications and to add relevant detail. New example 39 reads as follows:

Example 39: reporting 'microaggressions' anonymously

University A promotes an anonymous (and not merely confidential) reporting process. Students are encouraged to use a portal to submit anonymous reports to senior staff of 'microaggressions', which is not further defined. The portal includes free text boxes in which reporters may name or otherwise identify the individuals being accused. University A says that it may take action against named (or identifiable) individuals on the basis of any anonymous report that it receives. It also says that even if it does not take action, it will retain all information that it receives for six years and may share it with external bodies (such as funding agencies).

Depending on the circumstances, the existence of the reporting mechanism and portal may discourage open and lawful discussion of controversial topics, including political topics and matters of public interest.

However, University A might reasonably wish to collect anonymised statistical data for the purposes of identifying geographical and secular trends in relation to harassment or sexual misconduct. Reasonably practicable steps that A could now take may include:

- remove the free text boxes from the anonymous reporting portal to be replaced with radio buttons that do not permit submission of any identifying data
- state the category of reportable speech more precisely and more narrowly, e.g. harassment and/or sexual misconduct as defined in E6.11k and E.611s of the OfS's condition of registration, E6
- clarify in the portal that an anonymous report will result in no further action but is solely for data collection purposes.

Condition of registration E6 requires a provider to ensure that it has appropriate reporting mechanisms in practice and to ensure that information is handled sensitively and used fairly in practice. The OfS's guidance on the condition sets this out in more detail. [fn.: See paragraphs 30-31 of the guidance at: Condition E6: Harassment and sexual misconduct.]

349. We acknowledge that many providers and constituent institutions may already have in place fair and robust complaints processes.

350. We do not consider that a fair, objective and rapid triage process will compromise natural justice or the thoroughness of any investigation. Rather, it will be an opportunity for swift dismissal of complaints relating to speech that are vexatious, frivolous or plainly unmeritorious (for instance, because the speech being complained about does not, and is not

alleged to, break the law or violate any lawful internal code or policy). We accept that there may be scope for a preliminary assessment. We have **decided** to clarify original paragraph 70 to new paragraph 164 which reads as follows:

> 'Every complaints process should promptly reject vexatious, frivolous or obviously unmeritorious complaints relating to speech. In order to avoid unnecessary intrusive investigations, it is likely to be reasonably practicable to include a preliminary assessment/triage to assess whether to commence an investigation. The starting point of any such process should be that lawful speech will not be punished because of a viewpoint that it expresses.'

351. We do not consider that this paragraph is inconsistent with the guidance in the Victims' Code because the code does not cover vexatious, frivolous or unmeritorious complaints[14]

352. For clarity, and to align the example with our approach to reasonably practicable steps, we have decided to include the following sentences in original example 18, now new example 40:

> 'In this case the investigation itself punished A for lawful expression of a viewpoint. The fact that A's speech offended some students is unlikely to be relevant to whether closing the investigation was a reasonably practicable step. It is likely that University B has breached its 'secure' duty.'

353. For clarity, we have **decided** to change the wording of original paragraph 71. New paragraph 165 now reads:

> 'Complaints processes should be concluded as rapidly as is reasonably practicable and compatible with fairness.'

354. We acknowledge that in practice, it may not always be possible to determine that a complaint is vexatious without investigating. Accordingly we have **decided** to amend original paragraph 72 to new paragraph 166, which reads as follows:

> 'Providers and constituent institutions should not pursue vexatious complaints or trivial investigations into other matters against an individual solely because of their lawful expression of a viewpoint. In practice, it may not always be possible to determine that a complaint is vexatious at the outset of any investigation.'

Free speech code of practice

Publication and format

355. Many respondents commented on the subsection on the code of practice. Some of these commented that the publication requirements were not reasonably practicable in the current timeframe. This included for instance the step stated at paragraph 75d of the guidance, of referring to the code of practice in the range of places listed there. Some respondents commented that in most cases it will not be reasonably practicable to communicate the code of practice in writing to learners with multiple complex disabilities who are receiving very high levels of special educational needs (SEN) support and are unable to read or communicate in

[14] See GOV.UK, 'Code of Practice for Victims of Crime in England and Wales (Victims' Code)'.

a written format. More broadly, some respondents commented that the requirements at paragraphs 73 to 75 would not be reasonably practicable for small providers, especially further education colleges.

356. A number of respondents commented further on paragraph 75. Of these, several stated that it was inappropriate to include statements in other policies to the effect that nothing in those policies should be read as conflicting with the code of practice on freedom of speech, or that the code of practice would take precedence in the event of any conflict. Some respondents commented that this involved an inappropriate prioritisation of freedom of speech. A respondent commented that referring to the statement in the context of other policies, with which it might be in tension, risked creating uncertainty.

357. There were relatively few comments on the subsection on values relating to freedom of speech. A respondent commented that paragraph 77b was unclear, because it was unclear to what the phrase 'those values' referred. A respondent commented regarding this subsection that it is unclear what the requirement to set out procedures for the holding of meetings and other activities requires, and greater clarity about what is expected would be welcome. 'Activities' is (some said) an extremely broad word and it would not be feasible for the code of practice to include detailed procedural information about the arrangements for all university activities; others raised similar queries about 'on or off campus'. Some respondents queried whether the guidance applies to commercial activities (for example, the renting of premises for external events such as weddings, conferences, accommodation) and requested clarification from the OfS.

Required conduct

358. Some respondents commented that paragraph 86b was overstated: 'the widest possible range of views' was likely to include views that are devoid of academic merit.

359. One respondent argued that it is not feasible for 'providers, constituent institutions and relevant students' unions [to] seek to expose their members and student to the widest possible range of views' due to cost constraints, employer expectations of staff, Professional, Statutory and Regulatory Bodies (PSRB) oversights, and subject-specificity.

360. Another respondent commented that as the guidance is currently written there is an implicit expectation that students and staff of providers should use their personal time to engage with discourse on a provider campus. However, it is their view that this is an unrealistic expectation and both students and staff should be able to choose whether or not they want to engage with diverse discourse as a part of their student experience.

361. A further respondent argued that students should not be forced to consider the views of others and instead their right to choose to expose themselves to the views of others (including trade unions, associate organisations, and voluntary groups) should be respected. They also argued that this requirement should not be included in student-provider contracts as it is overly paternalistic.

362. Some respondents commented that 86c was simplistic and does not allow for the possibility of vicarious liability, for instance of employers for their staff.

363. Some respondents welcomed the statement in 86d that while protest is itself a legitimate expression of freedom of speech, protests must not shut down debate.

364. Respondents commented that organisers of student protests should be held accountable if participants express unlawful speech and have not acted before or during the event to prevent this; also that provider security should be able to act swiftly to shut down protests that inhibit others' freedom of movement and/or expression. More broadly, several respondents requested detail on the need to restrict behaviour such as attempting to disrupt a meeting.

Criteria for passing on security costs

365. Some respondents agreed with the statement at paragraph 88, that the criteria for 'exceptional' circumstances, in which the provider, constituent institution or relevant students' union may pass on security costs to the organiser of an event, are for the provider, constituent institution or relevant students' union to set. Some respondents also agreed with the statement at paragraph 89 that these criteria should be clear, objective and neutral.

366. Some respondents raised particular questions about students' unions. These included: whether students' unions could charge security costs to student societies that were not legally distinct from them; and whether there were expectations that providers would assist students' unions in covering these costs.

367. Others commented that there is no basis in the legislation for confining the definition of exceptional circumstances to a costs threshold, and that this appears to be an unduly restrictive interpretation. One respondent stated that the criteria for assessing security costs should take into account special needs to protect individuals, ideas, opinions and policies that are particularly vulnerable to efforts to suppress freedom of expression; and that this might require that institutions are prepared to pay additional security expenses for speakers who hold those opinions.

368. Some respondents commented that it would be helpful to give an indication of how this threshold might be calculated and whether institutions can legitimately consider the number of events for which they have had to cover security costs within a 12-month period when making decisions. A respondent also requested clarity around how the suggested definition of 'exceptional' circumstances would work when different units of an institution have autonomous budgets that include provision for security costs.

369. There were several comments on examples 19, 20 and 21. Some respondents commented that it was unclear that examples 19 and 20 reflected the principle set out in paragraph 91.

370. One respondent commented, in relation to examples 19 and 20, that exceptionally offensive speech that is likely to shock or disturb would be outside of the law because it will almost certainly cause offence to those opposed to it.

371. Some comments agreed with the principle, illustrated in these examples, of applying a uniform, fair and transparent threshold to all events that may carry additional security costs. A few respondents commented that example 21 seems to conflate visiting speakers and commercial bookings, adding that it seems unreasonable to expect universities to cover the security costs of commercial bookings, whereas it is reasonable for the university to cover the costs of security for university events.

Free speech code of practice: our response

Publication and format

372. We accept that paragraph 75d states steps that may involve a significant investment of time and resources. We consider that it may be helpful to set out in this section what matters are mandatory and what matters may be good practice.

373. We acknowledge that communication of the code of practice may present some challenges for some institutions, as set out in comments. However, registered higher education providers and their constituent institutions are required to bring the provisions of A1 and the code of practice to the attention of all their students, at least once a year.[15] Our final Regulatory advice provides support on what providers and constituent institutions can do to promote the code of practice.

374. The policy intent behind the proposed text, in 75d, that 'in case of any conflict the free speech code of practice will take precedence' was not to suggest that the legal duties imposed by the Act take precedence over any other legal duties. Instead, the purpose was to ensure that the code of practice would be a reliable source of information for students, staff and others about their speech rights. The intention was to avoid a situation where a reader of the code formed a mistaken impression about their free speech rights or the processes upholding these rights, when in fact these rights or processes had been superseded or revised as set out in another document which the code had not yet been revised to reflect.

375. We have therefore **decided** to amend original paragraph 73 to 75. New paragraphs 167-9 now read:

> 'Providers and constituent institutions must bring their free speech code of practice (as well as the provisions of section A1 of the Act) to the attention of students at least once a year. [fn.: See HERA Part A1 s. A2 (5) and s. A4.] Beyond this, in connection with the publication and format of the free speech code of practice, the following steps are likely to be good practice.
>
> It would be good practice for the document to be published in a prominent position. For instance, it should be visible on the provider's or constituent institution's website. It should be easily accessible by students, members of staff, visiting speakers and those considering applying to be students. It should be accessible without any form of password or security check.
>
> It would be good practice for there to be a clear and simple statement about the document. This statement should summarise its content. It should also make clear how to access it (for instance, by including a link). It would be good practice for the statement to be:
>
> a. communicated directly to all students and staff in writing at least once each calendar year;
>
> b. set out in any prospectus of the provider or constituent institution;

[15] HERA part A1 section A2(5) and A4.

c. set out in any student or staff handbooks; and

d. prominently included, or prominently linked to, in any other document stating or explaining any policy that may affect free speech or academic freedom (for instance a bullying and harassment policy, research ethics policy or fitness to practise procedure), along with a statement that in cases of uncertainty, the definitive and up-to-date statement of the institution's approach to freedom of speech is set out in the code. This includes all policies relating to any of the following matters:

- admissions, appointments, reappointments and promotions
- disciplinary matters
- employment contracts (that may include conditions on speech)
- equality or equity, diversity and inclusion, including the PSED
- fitness to practise policies and procedures
- harassment and bullying policies
- IT, including acceptable use policies and surveillance of social media use
- Prevent duty
- principles of curricular design
- research ethics
- speaker events
- staff and student codes of conduct.'

Values relating to freedom of speech

376. In response to comments about paragraph 77b, we have **decided** to amend original paragraph 77b to read, at new paragraph 171b:

'an explanation of how the provider's or constituent institution's values relating to freedom of speech uphold freedom of speech.'

377. We have also **decided** to amend original paragraph 77d to clarify that free speech may include speech that could shock, disturb or offend, at new paragraph 171d:

'a statement that freedom of speech within the law may include speech that is shocking, disturbing, or offensive.'

Procedures to be followed by staff or students

378. We accept that the 'Procedures' section of the code of practice is broad in scope. We accept that it may not be feasible to include, in a single document, detailed statements of procedures connected to all the activities listed in original paragraph 75d. However, we did not intend to suggest this. Instead, the intention of original paragraph 79 was that the code of practice

should apply to all such activities; and that it may be reasonably practicable for organisations to link to the code of practice from the other documents, setting out procedures relating to those other activities. We also consider that there is scope to clarify that 'academic life' refers to teaching and research. Therefore, we have **decided** to amend paragraph 79 to read as follows:

> 'The scope of the procedures section of the document should be broad. It should not be limited to policies relating to external speakers or events. The code of practice should apply to the procedures to be followed by staff and students of the provider or constituent institution when organising teaching or research-related activities, as well as other activities listed in paragraph 171d above. There should be links to the code of practice from the documents setting out the detailed procedures relating to those other activities.'

379. We have also **decided** to remove the references to the complaints scheme in this section of the final Regulatory advice.

380. We have also **decided** to refer to the advice on speaker events at the end of this sub-section because codes of practice should cover visiting speakers (see new paragraph 177).

Required conduct

381. The intention of paragraph 86b was that within the law there should be no limit in principle to the range of views to which students, staff and members might be exposed across the full range of speaker meetings and other activities covered by the code. We have **decided** to amend original paragraph 86b to new paragraph 180b, which reads as follows:

> 'Providers and constituent institutions should seek to expose students to a wide range of views, including those that challenge commonly accepted ideas and conventional wisdom. There should be no limit in principle to the range of views within the law to which students, staff and members might be exposed across the full range of speaker meetings and other activities covered by the code. These may include views that some or all students might find shocking, disturbing or offensive.'

382. We do not consider that including this paragraph in Regulatory advice 24 constitutes a paternalistic approach. HERA places the 'secure' duty on providers and constituent institutions and the purpose of Regulatory advice 24 is simply to give guidance on what reasonably practicable steps this requires.

383. We agree that there may be forms of liability beyond those envisaged in original paragraph 86c. We have therefore **decided** to amend it; new paragraph 180c now reads:

> 'If those organising an event invite speakers who they might reasonably have suspected would use their platform to break the law (i.e. because they have done so previously) they may fall foul of the law themselves.'

384. We remain of the view that peaceful protest is itself a legitimate expression of freedom of speech and that it must not itself shut down debate. We accept that it will be helpful for organisations to understand in detail how this applies in particular cases. However, it is likely that this will be highly fact-specific. We have therefore **decided** to retain original paragraph 86d except to add at the start of new paragraph 180d (for clarity): 'Peaceful'.

Criteria for passing on security costs

385. We are clear in the text of original paragraph 91 that the costs threshold for 'exceptional circumstances' is illustrative, not prescriptive. Providers and constituent institutions will need to consider for themselves how best to frame their criteria for 'exceptional circumstances' in ways that are lawful, clear, objective and neutral. They will also need to consider for themselves how these can work within their own budgetary administration processes. We have therefore decided to retain original paragraph 91 as originally written.

386. We accept that original example 19 does not, and original example 20 does not precisely, illustrate the policy approach described at paragraph 91. However, that was not the intention of those examples. As set out in the succeeding paragraph, the intention of those examples was to illustrate the distinction between a vague and content-based definition of 'exceptional circumstances' on the one hand, and a clear and neutral definition on the other. We do not consider it relevant to this point that original example 20 does not make it explicit that security costs very rarely exceed £X.

387. However, we have **decided** to amend original examples 19 and 20 so that they do not apply to students' unions and so that the new version of original example 20 illustrates the policy approach set out at original paragraph 91, in new examples 41 and 42:

Example 41: security costs and offensive views

College A's policy on the use of its premises states: 'We will not pass on security costs for outside events except in exceptional circumstances. "Exceptional" circumstances may include those in which the views expressed at such an event are exceptionally offensive or especially likely to shock or disturb.'

Example 42: security costs above a fixed amount

College B's policy on the use of its premises states: 'We will not pass on security costs for outside events except in exceptional circumstances. Circumstances are "exceptional" when security costs exceed £X. In these circumstances we will pass on the residue of security costs to the organisers.' Security costs would very rarely exceed £X.

In example 41 College A has defined 'exceptional circumstances' vaguely and in a way that depends on the viewpoints that may be expressed. Replacing this definition with a clear, objective and neutral specification of 'exceptional' circumstances, as in example 42, is likely to be a reasonably practicable step that College A should now take towards securing freedom of speech within the law for visiting speakers and others.

388. In relation to these examples, we do not accept that even exceptionally offensive speech is necessarily outside the law. The right to freedom of speech includes speech that disturbs, shocks or offends.

389. In relation to the third party or commercial use of premises, the Act sets out the duties of providers and constituent institutions to secure that the use of premises is not denied, or the

conditions of their use are not based on, the policy, objectives, ideas or opinions of any third party or of its individual members.[16]

390. In our view it may be difficult to draw a clear line between a speaker invited by the provider, or by a member of the provider, and a speaker invited by an external organisation, when this organisation may have a relationship to the provider. We have therefore **decided** not to exclude from the definition of 'visiting speaker' someone invited onto the relevant institution's premises by an external organisation. However, where the external organisation is not connected to the provider, persons that it invites to speak would not qualify as 'visiting speakers' at the provider.

391. We accept that there is scope for more clarity in relation to commercial bookings. Whether a commercial booking is in scope of the duty relating to security costs depends on whether there is any relation between the commercial event and the objective set out at A1 (2). If there is no relation, the commercial booking would not be captured. However, if a commercial entity hosts an event to which members, staff or students are invited, this may be likely to be captured. As soon as an event involves persons within the categories set out in the objective at A1(2), the provision would be likely to apply.

392. To clarify this, we have decided to change original example 21 to new example 43 which is as follows:

Example 43: inconsistent approach to security costs

University B has a stated policy that it 'may' pass on security costs above £X to the organisers of an event.

A national Islamic society hires premises of University B to host a conference to which students and staff of University B are invited. There is reason to expect serious disruption at the event. As a result, University B estimates security costs to be £2,000 above the threshold. However, it covers these costs in their entirety.

Two weeks later, a national Jewish society hires the same premises to host a conference to which students and staff of B are again invited. There is reason to expect serious disruption at the event. As a result, University B again estimates security costs to be £2,000 above the threshold. It covers the first £X but passes on the remaining £2,000 to the organisers. As a result, the event is cancelled.

In this example University B may have applied its policy inconsistently to two groups in a way that depends on the policies or objectives of those groups or on the ideas and opinions of their members. If so, University B is likely to have breached its free speech duties. Covering costs equally for both groups is likely to have been a reasonably practicable step that University B should have taken towards securing freedom of speech within the law for visiting speakers.

[16] See HERA Part A1 section A1(3)-(4).

393. We have also **decided** to add the following new paragraph 188:

> 'Whether a commercial booking is in scope of the duty relating to security costs depends on whether there is any relation between the commercial event and the objective of securing freedom of speech within the law for the classes of persons set out at A1(2). If there is no relation, the commercial booking would not be captured. However, if a commercial entity hosts an event to which staff, members or students are invited, this may be likely to be captured. As soon as an event involves persons within the categories set out in the objective at A1(2), the provision would be likely to apply.'

394. We do not expect the 'secure' duty to apply to students' unions and we have therefore **decided** to delete original paragraph 94.

> For clarity we have also **decided** to change 'ideas or opinions' to 'ideas, opinions or information' at new paragraph 183c.

Free speech complaints scheme

395. There were relatively few comments on this subsection. Some respondents proposed that providers should be required to refer to the complaints scheme in their relevant policies (e.g. complaints procedures) and freedom of speech codes of practice, and to include information about the OfS scheme in a 'completion of procedures' letter confirming that a complainant has completed the institution's internal processes. Some respondents stated that the complaints scheme will be referenced in the code of practice on freedom of speech, which will be drawn to staff members' attention at the start of each year. They said that the requirement to additionally include this information in application materials seems unnecessary in the light of this.

396. Some respondents raised similar concerns, in relation to the advertisement of the complaints scheme, as they had in relation to the advertisement of the code of practice, for instance, that it would not be reasonably practicable to advertise the complaints scheme in writing to learners with multiple complex disabilities who are receiving very high levels of SEN support and are unable to read or communicate in a written format. In relation to paragraph 96, one respondent stated that an appropriate and effective internal complaints system in respect of internal free speech complaints together with an internal webpage with details of the provider's free speech policies, which could function as a complaints page, would be a reasonably practicable step. A respondent also commented that it was incongruous to include the same texts for students' unions, which do not have responsibility for recruitment to academic posts. A respondent queried whether the text could be used on an HR website while policies are being updated in accordance with internal processes.

397. One respondent suggested that we introduce stronger countermeasures against vexatious complaints in the form of a penalty or limitation in ability to use the service. They said that otherwise the sector would be in a constant state of triage that could be influenced by literacy levels running counter to the intent behind the Act.

Free speech complaints scheme: response

398. The form of the new free speech complaints scheme remains dependent on future legislation. We have therefore **decided** to delete this material.

Governance

399. There were many comments on the subsection on governance. Many respondents suggested that the steps relating to recording and terms of reference, in paragraphs 100 and 102 respectively, were likely to be onerous. Some respondents also commented that the recording of all decisions that could 'directly or indirectly' affect free speech was likely to be especially onerous.

400. A respondent stated that it would be useful to understand the context for the recording mentioned in paragraph 100, and queried whether it will be required to be reported in some format to the OfS (e.g. for annual monitoring purposes etc). Some respondents queried how long it would be necessary for the records to be kept.

401. A respondent stated that paragraph 103 left it unclear whether the guidance was suggesting modification to the curriculum to include exposure to a wider range of ideas, and if so whether this would undermine (a) providers' autonomy and/or (b) course coherence.

402. Some respondents also stated that the subsection on governance should mention training of risk officers in matters of freedom of speech, or the appointment of a designated officer responsible for those matters.

Governance: our response

403. We accept that this section sets out steps that may involve time and resources. We consider that freedom of speech in higher education is fundamental to the quality of that education and to society more broadly. Providers and constituent institutions should take reasonably practicable steps to secure freedom of speech, even where these steps are demanding.

404. However, we accept that the wording in this section could lead to a range of activities that may not have significant impact on freedom of speech and academic freedom. We consider that records should be kept for as long as necessary to be available for external review (for instance, through judicial review, a regulatory investigation or a relevant complaints process). Therefore, we have **decided** to amend original paragraphs 100-101 to new paragraphs 190-191, which read:

> 'Providers and constituent institutions should record all decisions that are likely to have a substantial (positive or negative) effect on freedom of speech within the law. These records should demonstrate how the provider or constituent institution has had particular regard for the importance of freedom of speech within the law. Wherever reasonably practicable, records should be kept for as long as necessary to be available for external review (for instance, through judicial review, a regulatory investigation or a relevant complaints process).

Providers and constituent institutions should put in place and follow delegation arrangements setting out clearly and explicitly which committees or individuals are authorised to make decisions that are likely to have a substantial (positive or negative) effect on compliance with any free speech duties.'

405. We are not proposing to scrutinise these records through any scheduled cyclical review process.

406. We were not proposing in original paragraph 103 that providers should modify their curricula. The intent behind that paragraph was rather that decisions about the curriculum do not:

    a. put at risk the autonomy of individual academics to teach and communicate ideas that are controversial or unpopular, or that some may find offensive; or

    b. narrow the range of ideas taught to exclude those ideas.

407. To clarify this point, we have decided to amend original paragraph 103 to new paragraph 193, which reads as follows:

    'Providers and (where relevant) constituent institutions should ensure that decisions about the curriculum and the way it is delivered:

    a. safeguard the autonomy of individual academics to teach and communicate lawful ideas that may be controversial or unpopular or that some (or many) find offensive; and

    b. do not restrict the exposure to students of such ideas because they are controversial or unpopular or because some (or many) find them offensive.'

408. We discuss training in the relevant section below.

Research

409. There were some comments on the sub-section on research. Some respondents agreed that staff and students should be free to undertake academic research within the law. However, they sought more clarity on whether 'research' in this context meant published and/or funded research, as opposed to intellectual opinion. Some others stated that some legally expressible ideas may be inconsistent with standards of rigorous research.

410. Many of the comments on this subsection raised a variety of points in relation to research ethics. One respondent stated that the considerations on research need to be wider than the law: otherwise, they said, the unintended consequence could be that staff undertake research without the proper research ethics in place, and then have cause for complaint that a university is contravening their academic freedom when asked to stop the research until its research requirements are satisfied.

411. Another respondent said that the guidance posed a reputational risk: if a research partner has the potential to damage other opportunities (e.g. tobacco funding precludes the university from seeking funding from a cancer research charity), or the university's reputation, the current wording does not allow the university to refuse funding for that research. The

guidance (this respondent said) should distinguish between the topic (or expected conclusion) of the research and the source of funding.

412. Other respondents commented that researchers should not feel pressured to reach particular results because of funding, and that providers should terminate funding arrangements where they consider there to be a risk of such interference.

413. Some respondents expressed concern about the potential implications of paragraphs 104-105 on the ability of universities to make valid choices about research areas which contribute to its wider strategy and civic mission. A respondent also commented that it would welcome an unequivocal statement that institutional autonomy in relation to research will be respected.

414. Some respondents suggested additional steps that providers and constituent institutions should take in relation to research ethics and that additional examples should be provided to illustrate how institutions might fall short of this. These steps included:

    a. Ethical review and requirements should be proportional to the potential risks of the research.

    b. Ethical review should be focused on what is ethical rather than on the quality of research or reputational concerns.

    c. Research ethics committees should themselves consider the risks for academic freedom from any decisions they take and the consequences of those decisions.

    d. The ethical review process should be transparent.

    e. The ethical review process should be monitored closely for evidence of any bias or unnecessary gatekeeping.

415. A few respondents commented, with regard to original example 22, that it illustrates an overlap between regulation of freedom of speech and employment law issues which may come before the employment tribunals or the courts. These respondents took the view that the example is based on a prioritisation of freedom of speech.

416. Several respondents commented, in connection with original example 23, that it was unrealistic to expect a university to be able to take meaningful action in protest at another country's revocation of a visa of a member of its academic staff. Some respondents said that they did not consider it reasonable for a university to protest when a visa is revoked. Some respondents also commented that charity law would be likely to restrict an institution's political activity.

Research: our response

417. We accept that there is scope to clarify that we mean 'academic research' broadly, to cover all forms of intellectual inquiry, whether published or not and however funded.

418. We have therefore **decided** to amend original paragraph 104 to new paragraph 194, which reads:

'The following may be reasonably practicable steps for a provider or constituent institution to take in connection with research. "Research" refers to any form of intellectual inquiry.'

419. We accept that some lawful ideas would be unlikely to withstand rigorous scrutiny. However, free and well-conducted research is the process by which such scrutiny is brought to bear. Therefore, we do not consider that this could justify the suppression of research in the context of the 'secure' duty.

420. We consider that paragraph 105 is consistent with research ethics requirements that do not infringe on academic freedom. We also consider that the wording of paragraph 105 does not infringe on institutional autonomy in relation to research or create reputational risks in relation to research funding. This is because the paragraph is directed at the conclusions that a specific proposed item of research might reach rather than the source of funding. It is not focused on a provider's or constituent institution's broader decisions relating to research strategy.

421. We accept that researchers should not feel pressured to reach particular results because of funding and that terminating arrangements where such pressure exists may be a reasonably practicable step for providers and constituent institutions to take.

422. We have **decided** to amend original paragraph 105 to new paragraph 195:

'Staff and students should be free to undertake academic research within the law. This freedom should not be restricted or compromised in any way because of a perceived or actual tension between:

a. any conclusions that the research may reach or has reached or the viewpoint it supports, and

b. the organisation's policies or values.

Nor should it be restricted or compromised in any way because of any external pressure connected with a. If funding bodies exert pressure on researchers to reach or to avoid particular results, amending or terminating these funding arrangements may be a reasonably practicable step for providers and constituent institutions to take.'

423. We accept that original example 22 relates to employment. We do not accept that the 'secure' duty fails to apply in this case. We consider that not firing a member of staff because of the conclusion of their research is likely to be a reasonably practicable step to secure their and others' academic freedom. Therefore, we have decided to retain example 22 as written.

424. We accept that there may be scope for additional reasonably practicable steps in relation to research ethics. We also accept that there may be scope for an example illustrating these points. We have therefore **decided** to add the following new paragraph 196 and new example 44 as a further illustration:

'Reasonably practicable steps for providers and constituent institutions to take, in relation to ethics committees, may include:

a. ensuring that ethical review and requirements are focused on ethical issues and do not impose requirements related to the quality of the proposed research or reputational concerns;

b. ensuring that ethics review committees have particular regard to the importance of academic freedom and to the risks to academic freedom of any decision;

c. ensuring that the ethical review process is transparent; and

d. closely monitoring the ethics review process for evidence of unnecessary suppression of research.'

Example 44: conditions on research

Professor A wishes to conduct research among former police officers from country X who engaged in torture and interrogation. This research would include interviews with these officers. These interviews are likely to confirm that some staff from the X police force had attended postgraduate training on policing techniques offered by Professor A's employer, University Y.

Professor A submits her research proposal to the University Research Ethics Committee ('UREC') at University Y. The UREC approves Professor A's proposal on the condition that she does not interview any officers who have attended training at Y.

No reason is given for this restriction in the minutes of the UREC meeting. Nor is there any record that decision-makers have had regard to Professor A's academic freedom. Freedom of Information requests for emails between senior staff reveal that the restrictions on Professor A's research arose from internal concern about the reputational effects on Y.

Imposing this condition on Professor A's research is likely to have been a breach of Y's 'secure' duty. This is because these reputational concerns are irrelevant to whether it is reasonably practicable for Y to approve Professor A's research without this condition. Approving Professor A's research without the condition is likely to be a reasonably practicable step that University Y should now take. Other reasonably practicable steps are likely to include:

- ensuring transparency of decision-making by the UREC
- requiring the UREC to have, and to document how it has had, particular regard in its decision-making for the academic freedom of Y's researchers.

425. In relation to original example 22, we do not consider that this example involves an inappropriate prioritisation of freedom of speech. However, we accept that there may be scope to clarify why this is so in relation to the factors that are relevant to whether a step is reasonably practicable. We have therefore decided to amend the example to new example 45 as follows:

Example 45: response to published research on violent crime and a religion

Research associate X at College A works on the connection between violent crime and religion B. She publishes research suggesting a strong connection. Because her work reaches this conclusion, students at A start a petition for X to be fired. The petition gains hundreds of signatures internationally.

Following investigation, A finds that the conclusion of this research conflicts with its value of respect for all religions. On this basis it terminates X's employment.

It is likely that College A has breached its 'secure' duty. This is because alignment of X's research findings with A's values is likely to be irrelevant to whether it is reasonably practicable for A to secure X's free speech. It is likely that it would have been a reasonably practicable step not to terminate her employment. It may also be a reasonably practicable step to reinstate her.

426. In relation to original example 23, we do not accept that there is no action that University B can take against a foreign country that revokes the visa of one of its academics. For instance, University B might have invited the ambassador or other officials of country C to a function at University B. If so, it might consider cancelling that invitation.

427. We have therefore **decided** to amend original example 23 to new example 46 as follows:

Example 46: scholar criticising a foreign country

Dr A is an international relations scholar at University B. Dr A has written articles criticising certain policies of foreign country C. The ambassador of country C calls the vice-chancellor of University B, pressuring the university to censor Dr A. As a result, B does not support Dr A's work on country C. For instance, B does not support his application for a research grant that would have funded work relating to C. Nor does it take any action when Dr A's visa from C is revoked, so that he cannot enter C for purposes of conducting academic research.

It is likely that B has breached its 'secure' duty. This is because the views of country C are irrelevant to whether it is reasonably practicable for University B to support Dr A's research. Supporting Dr A's application for a grant is likely to have been a reasonably practicable step that B should have taken.

There may also be other reasonably practicable steps that University B should now take. For instance, B might have invited the ambassador or other officials of country C to a function at B: if so, it might consider cancelling that invitation. Depending on the level of the threat to Dr A, University B may also be required to put in place suitable security arrangements to protect Dr A's person and his ability to continue research.

428. We also consider that the effect of the 'secure' duty is that providers and constituent institutions may be required to incur significant costs in defence of the freedom of speech. Therefore we have **decided** to add the following new paragraph 197:

‘Academic freedom is fundamental to the functioning of any higher education institution. The effect of the secure duty is that providers and constituent institutions may be required to incur significant costs in defence of the freedom of their own staff and students to conduct research.’

Speaker events

429. There were many comments on the subsection on speaker events. Several of these focused on the definition of ‘visiting speaker’ in connection with the complaints scheme. Some respondents requested clarity on whether the relevant free speech duties in relation to visiting speakers also apply to commercial bookings by external entities, stating that this was unclear in the Act. We address those matters in the sub-section on criteria for passing on security costs. A respondent also commented that it would be helpful for this sub-section to provide guidance on the distinction between withdrawing and/or denying use of premises based on views, and choosing not to invite particular speakers.

430. Some respondents also raised the concern that the new free speech duties would protect speakers who defended Holocaust denial.

431. Many respondents stated that they welcomed the recognition, in example 24, that a constituent institution or students’ union can take into account wider factors in deciding which rooms to allocate to speakers, because (they said) this may be a practical tool in allowing them to navigate conflicting duties and regulatory regimes. Many respondents recommended that this was expanded to cover what they described as the OfS’s separate articulation that bodies have discretion over the ‘time, place and manner’ of events, and asked that this was reflected clearly in the guidance (and not expressed to be ‘occasional’). Another respondent suggested that the example should link directly to Article 10(2) of the Convention.

432. A respondent commented that paragraph 109 was in their view unhelpful, because (they said) it states that it may be reasonably practicable not to cancel an event on the basis of protests and/or objections to lawful speech, however widespread. The respondent stated that it is appropriate to factor in reputational considerations, cost considerations and other factors which are relevant towards the pursuit of its educational charitable purposes.

433. Some respondents welcomed the recognition, in example 25, that there may be situations where an event has to be cancelled at the last minute for urgent safety reasons. Some respondents agreed that mitigations should be planned in advance as soon as possible. However, some respondents stated that it was unclear what notice period was acceptable and that there were potential tensions between this example 25 and paragraph 82f of the guidance (which covered onerous information requirements on visiting speakers); or between the example and original examples 14 and 15 and original paragraphs 66 and 67 (which mentioned onerously long notice periods).

434. A respondent commented that example 27 sets out a scenario where one mitigation considered by a provider could be a ‘trigger warning’ or ‘content note’. The respondent commented that it would be helpful for this example to set out the view of the OfS regarding the appropriateness of this as a mitigation.

435. Several respondents said the approach to vetting or preparing to receive external speakers was unclear and potentially contradictory. For instance, it was unclear what preparation would be needed to understand what reasonably practicable steps are needed, or what vetting would be needed to be assured that a speaker is unlikely to break the law. Another said there was no clear example of securing the free speech of a speaker with a history of illegal speech.

Speaker events: our response

436. We accept that it may be helpful to mention the distinction between refusal of the use of premises based on a speaker's views, and a non-invitation to speak; and more broadly that freedom of speech does not include the right to an invitation. Accordingly, we have **decided** to amend original paragraph 106 and to add an additional paragraph. Accordingly, new paragraphs 198-9 are now as follows:

> 'Providers and constituent institutions must take reasonably practicable steps to secure freedom of speech for visiting speakers and others. This objective includes securing that the use of any premises is not denied to any individual or body on the following grounds:
>
> a. in relation to an individual, their ideas or opinions; or
>
> b. in relation to a body, its policy or objectives or the ideas or opinions of any of its members
>
> and that the terms on which such premises are provided are not to any extent based on such grounds.
>
> c. The 'secure' duty does not mean that any group or speaker has a right to be invited to speak at a provider or constituent institution. What it does mean is that a speaker who has been invited to speak at a meeting or other event should not be stopped from doing so on the grounds of their ideas or opinions.'

437. We have **decided** to amend original example 24 to explain that the restriction was on time, place or manner and not on the speech itself. New example 47 now reads as follows:

Example 47: annual conference of a political society

A political society that supports the governing party of country A seeks to hold its annual conference at University B. It deliberately attempts to book a venue next to prayer rooms used by students and staff belonging to the C faith. The current regime of country A has a long history of persecuting the C minority in that country. B declines to permit the political society to use those premises, but instead offers other premises in another part of the campus.

In this example University B has not made available the premises requested by the society, and it has made that choice based in part on the policy of that society. However, it has not restricted the expression of any viewpoint because it has made appropriate alternative premises available. In itself this regulation of speech is unlikely to breach the 'secure' duty.

438. We also accept that it may be helpful to include reference to this connection in section 3 on reasonably practicable steps. We have therefore **decided** to add the following new paragraph 110:

> 'While restrictions on the time, place and manner of speech are themselves neutral as to viewpoint, they may sometimes be a result of the content or viewpoint that the speech expresses (see example 47 below).'

439. While we accept that practical costs may be relevant to whether a step is reasonably practicable (because of their impact on the institution's essential functions), and that physical safety is also relevant, we remain of the view that in many circumstances providers and constituent institutions should not cancel an event in response to objections or protests at a speaker's lawful expression of views, however widespread those objections or protests are. We have decided to strengthen the wording of original paragraph 109 to clarify this. We have **decided** to amend that paragraph to new paragraph 202, which reads:

> 'In many circumstances it is likely to be a reasonably practicable step for a provider or constituent institution not to cancel any event on the basis of the opinions or ideas of any speaker at that event, in response to objections or protests however widespread.'

440. In relation to the comments on original example 25, we consider that providers and constituent institutions will be well placed, bearing in mind their internal resourcing and processes, to determine how best to balance the need for a notice period in which to escalate security concerns with the need not to place onerous information requirements on those wishing to invite visiting speakers. We have therefore **decided** to retain original example 25 in the form in which it was written except for minor stylistic changes (as new example 48).

441. We agree that mitigations for controversial speakers should be planned in advance and as soon as practicable so that reasonably practicable steps can be taken to secure the speaker's speech. We have therefore **decided** to amend the first sentence of original paragraph 108 to strengthen the advice on the need to have a process for the timely consideration of controversial events. New paragraph 201 starts:

    a. 'It is likely to be a reasonably practicable step for a provider or constituent institution to have in place a process for the timely consideration of controversial events.'

442. We do not expect the 'secure' duty on students' unions to come into force. Therefore, we have **decided** to change original example 26 so that it refers to a provider instead: this is now new example 49.

443. We accept that there may be scope to address 'trigger warnings' or 'content notes' in original example 27. Therefore, we have decided to amend the example to new example 50:

Example 50: seminar series on political violence

College A is due to hold a seminar series on political violence. One of the speakers, Dr B, is expected to discuss (within the law) some especially extreme and polarising examples that are likely to upset some students in the audience. College A requires Dr B to omit those examples from the discussion.

Requiring Dr B to omit this material is likely to be a breach of College A's 'secure' duty. A might instead have taken evidence-based mitigations short of restricting the content of Dr B's academic speech.

For instance, if there is evidence that this is helpful, then it might have approached its own welfare services to provide support for people affected by the issues raised, rather than preventing them from being raised at all. In many circumstances, this may have been a reasonably practicable step that A should have taken.

Depending on the facts, issuing a 'content note' (informing attendees about sensitive material) in advance of this event may not be a reasonably practicable step for A to take. A standing requirement to use content notes may encourage more intrusive investigation of the content of seminars, readings or speaker events. An expectation of content notes may also discourage academics from exposing students to new controversial material (so as not to risk wrongly including no, or the wrong type of, content note).

However, there may be occasions when the use of specific content notes may be helpful to enable students to access material, if there is evidence that they are in fact helpful.

444. We accept that it may be helpful for us to set out the extent to which we consider that the 'secure' duty permits regulation of the time, place and manner of speech. We have done so in a general way, as described under question 3 on reasonably practicable steps. We also consider that there may be no single, universally applicable answer to where best to strike a balance between the need to give timely consideration to security matters and the need not to impose onerous information requirements on those arranging speaker events. This is likely to be highly fact-sensitive.

445. We will not protect Holocaust denial, including because it is difficult to see how it could not amount to incitement to racial hatred and harassment. We have **decided** to set this out at new paragraph 204.

Teaching

446. There were some comments on this sub-section and on the associated original examples 28 and 29. Some respondents commented on example 28 that it was the only example given to explain paragraph 113 and that it was unhelpful, because (they said) it describes a university taking an extreme position that most people would agree is unacceptable.

447. Several respondents commented that example 29 could be regarded as constraining freedom of speech, because (they said) it restricts institutions from supporting lawful viewpoints. Some respondents stated in connection with this point, that accountable officers across the sector are comprised primarily of academic staff who enjoy the right to academic freedom and related protection under law.

448. Some respondents said that the example would be more credible if the example statement had been stronger, for example if it had mentioned the statement that '[f]ossil fuel is the only way to meet our future energy needs' rather than '…one of the best ways to meet our future energy needs'. Other respondents stated that the example seems to indicate that universities should not sign up to any accreditation schemes, including those which may be currently

expected by funding bodies. A respondent also queried whether the example would also apply to an affiliation by a students' union that had been democratically voted on.

449. More broadly, several respondents raised the question of institutional neutrality, with some commenting that this was a requirement of the Act, while others commented that institutions should be free to adopt their own values (which should, however, include freedom of speech).

Teaching: our response

450. Examples 28 and 29 are intended to illustrate positions taken by providers and constituent institutions that may have the effect of restricting or constraining the positions that academics take in their teaching. We do not consider that the fact that some respondents consider these examples to be far-fetched reduces their value in that connection. However, we accept that it may be helpful to be clear about an aspect of original example 28 that may generalise to other cases. Therefore, we have **decided** to amend original example 28 to new example 51, which reads as follows:

Example 51: teaching materials on British history

University A requires that all teaching materials on British history will represent Britain in a positive light. This requirement suppresses teaching materials on the basis of the viewpoint that they express. Removing it is likely to be a reasonably practicable step that A should now take.

451. Original example 29 concerns the speech of an institution, or of an individual speaking as representative of such an institution, rather than that of any individual academic speaking as such. Therefore, we do not consider that this example by itself constrains academic freedom.

452. We accept that not every institutional endorsement of every statement is likely to raise equal risks for academic freedom. However, we consider that institutional endorsement of positions that are not essential to their functioning have the inherent potential to chill speech.

453. Therefore, we have **decided** to retain original example 29 in the form in which it was written, except to change 'one of the best' to 'the best' to make the example stronger. This example is now new example 52.

Training and induction

454. There were several comments on this subsection and on the associated example 30. Of these comments, many stated that the steps were likely to cover many staff.

455. Many also stated that the steps related to training were likely to be burdensome, particularly in a short timeframe. There were also questions about the provision of the training, what was meant by 'adequate' training, whether the OfS would be expected to approve any training and whether an institution would be required to show evidence that the training had taken place. Some respondents commented that the training should consider freedom of speech and harassment together.

456. Some respondents also raised concerns about the difficulties involved in taking the steps relating to students. For instance, some respondents stated that in many curriculum areas offered in further education colleges, it is not reasonable or appropriate to expect providers to be able to ensure students hold an up-to-date understanding of the concepts outlined in paragraph 117a-d.

457. A respondent raised concerns around this sub-section that it would make it difficult to provide antisemitism training. We understand this to be a reference to paragraph 118 and original example 30. The respondent said that this was because antisemitism training may require attendees to discuss and identify contemporary antisemitism or use the IHRA definition in the training.

458. One respondent stated that in the case of students' unions, the step, of not requiring training that enforces the acceptance of controversial statements would:

    a. require the imposition of value judgements itself;

    b. impose on the freedom of speech of the trainer (which will be regulated if the training is given internally by a member of staff at a students' union);

    c. limit the ability of the organisation to have values as appropriate in light of its other duties, including in charity law and as an employer; and

    d. be unhelpful for students' unions that aim to provide training in induction materials with the goal of creating an inclusive environment.

459. Another respondent stated in relation to example 30 that advancing equality of opportunity is itself controversial and objectionable to some, even though it is set in legislation as part of the PSED. More broadly, there were some comments that 'controversial' is itself difficult to define.

Training and induction: our response

460. With regard to steps that may be more onerous, we recognise that whether a step is reasonably practicable for an organisation to take will vary from one organisation to another and that an organisation that does not already have suitable training in place may take time to put it in place. We have therefore **decided** to amend the start of original paragraphs 115 and 117 to reflect this. These paragraphs are now new paragraphs 209 and 211, which begin as follows:

    'So far as is reasonably practicable, providers and constituent institutions should offer adequate training on freedom of speech and academic freedom. This training should be required for all staff involved in making decisions in relation to (for example) the following...

    So far as is reasonably practicable, providers and constituent institutions should make available, to all staff and students, adequate induction on freedom of speech and academic freedom...'

461. In response to comments, the OfS would not expect formally to approve any such training outside of the context of a future complaints scheme and condition of registration. It is for providers and constituent institutions to consider how best to provide adequate training on

freedom of speech in the context of training on related matters such as harassment; this may include considering both together.

462. We accept that institutions will need to explain the relevant concepts to students at different levels. However, it is a requirement of HERA that the attention of all students should be drawn to section A1 and to the code of practice.[17] It is therefore reasonable to expect that all students should be given information to help them understand their rights as set out in these documents and associated legislation.

463. We do not consider that original paragraph 118 or original example 30 would rule out the possibility of offering or requiring training related to antisemitism or other forms of racism. That paragraph, and the associated example, relates to speech they are compelled to agree with in training: training that cannot be completed unless the user actively assents to a position that that user may reject.

464. By contrast, we do not intend to discourage institutions from offering or requiring training on sensitive subjects, including training in which views are expressed with which some users may disagree. For more details on our training on harassment, see our conditions of registration and guidance relating to harassment and sexual misconduct.

465. To clarify this, we have **decided** to replace paragraph 118 with new paragraphs 212 and 213, which read as follows:

> 'Providers and constituent institutions should not require training or induction that imposes a requirement on the person completing the training actively to endorse any viewpoint or value-judgement. The preceding sentence and the associated example 53 relate to compelled speech within training: training that cannot be completed unless the user actively assents to a particular viewpoint or value-judgment that they may reject.
>
> By contrast, we do not intend to discourage institutions from offering or requiring training on sensitive subjects, including training that itself asserts positions with which some users may disagree.'

466. We have also **decided** to amend original example 30 to new example 53, which reads:

Example 53: race-awareness training that compels assent

A department at University A requires incoming students to complete race-awareness training. As part of the training, they must complete a test. They cannot matriculate unless they answer all questions correctly.

One question on the test is as follows: 'All white people are complicit in the structural racism pervading British society. True or false?' The only answer marked correct is 'True'. A candidate who ticks 'False' is required to re-take the test until they have explicitly assented to 'True'.

[17] See HERA part A1 section A2(5).

Depending on the circumstances, this training may impose a requirement to endorse a particular viewpoint. For instance, it may penalise anyone who thinks that some white people are not complicit in racism. If so, removing this question from the training is likely to be a reasonably practicable step that University A should now take.

467. We have also **decided** to add an additional, contrasting example as new example 54:

Example 54: race-awareness training that does not compel assent

A department at University B requires incoming students to complete race-awareness training. As part of the training, they must complete a test. They cannot matriculate until they have completed the module.

One question on the test is as follows: 'White people can sometimes be victims of racism. True or false?' The only answer marked correct is 'True'. If a candidate ticks the box marked 'False', the module explains to them why it has marked this as wrong. Having explained this, it does not then require the candidate explicitly to assent to this or to undergo significant additional training because of their answer.

This training does not compel assent to any viewpoint, although it does itself make assertions with which some students may disagree. Requiring students to take training that does not compel assent is in itself unlikely to breach the 'secure' duty.

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

Timing and commencement

468. Many respondents were concerned about the timing of the release of the finalised version of Regulatory advice 24 and the complaints scheme, and gave a variety of reasons for their concern. The general concern of most respondents was that there would be very little time between publication and commencement for providers and students' union to make changes to comply with the new legislation and guidance.

469. Some were concerned that providers and students' unions would not have sufficient time to make changes to their codes of practice, policies and procedures in time to comply with the new legislation and guidance by 1 August 2024. Similarly, some raised the concern that providers will need time to create and disperse appropriate training to their staff, students and members. Others raised the point that some changes made to policies and procedures would need to be done in consultation with the appropriate trade unions and governing bodies, which will take time. Not consulting such groups, they said, would be against the OfS's conditions of registration on good governance (the 'E conditions'). A few respondents commented that further education colleges and small and specialist institutions will have less resource than bigger universities to respond to the results of the consultation in time for the 1 August commencement of the new legislation.

470. Some respondents expressed concern that the three different consultations may propose different guidance. They urged the OfS to ensure that the final versions of all three consultation results do not contradict one another.

471. Others were concerned that because there is very little time between the closing date of the consultation and commencement of the legislation on 1 August, that there is a risk that not all comments will be considered in forming the finalised guidance. Many of those respondents argued that the commencement of the legislation should be delayed to ensure that all responses are considered. Many respondents commented that the results of the consultation on sexual misconduct and harassment should be published in conjunction with the free speech consultations since there will be significant overlap between the two. Some urged the OfS to ensure that guidance is clear and consistent across both consultations and that they are not in contradiction with one another.

472. Many respondents requested clarification on whether timing constraints of the commencement and consultation results would be considered when determining whether a step is reasonably practicable or not.

Timing and commencement: our response

473. We note that the timing, and the sequencing, of commencement of various provisions of the Act has changed considerably since we consulted on the proposed guidance. We also note that the proposed complaints scheme is now expected to come into force following new legislation. We consider that providers and constituent institutions have known since 15 January (the date of the government's announcement) that the A1 duty would be commenced

shortly. We therefore consider that publishing Regulatory advice 24 in the early summer of 2025 may be less likely to give rise to the difficulties in regard to timing than had been raised in response to our earlier consultation.

474. We note that we are not at present planning to publish the responses to the consultations on the rules for the complaints scheme or on regulating relevant students' unions. Therefore, the issue of consistency between these documents does not at present arise.

475. We accept the importance of consistency between this work on freedom of speech and academic freedom, and our new E6 condition on harassment and sexual misconduct. We have considered the responses to the consultations on Regulatory advice 24 and on E6 and we have drafted our decisions on Regulatory advice 24 to be consistent with condition E6. Condition E6 does not require providers to restrict speech that is within the law.

476. We consider that it is possible for all providers to tackle harassment and sexual misconduct while taking reasonably practicable steps to secure freedom of speech on campus. For instance, we have set out at new examples 9 and 10 of the guidance some examples (taken from the guidance on the E6 condition) of actions a provider or constituent institution could take that are unlikely to have a negative impact on freedom of speech within the law.

Monetary penalties

477. Some respondents commented that they were concerned that both small providers and small students' unions may be unable to afford paying a monetary penalty in the event of a breach.

Monetary penalties: our response

478. The OfS does not now expect to have a power to impose monetary penalties on students' unions. The OfS will not impose monetary penalties in respect of breaches of any new condition of registration until after that condition comes into force.

Diverse sector

479. Some respondents commented that it was unclear to them whether small providers that lack a formal students' union but have informal student body activity would be subject to the new students' union regulations.

480. Some respondents were concerned over of the impact of our regulation on non-higher education learners, especially children and those studying at an academic level where (they said) it would not be reasonable or appropriate to expect learners to be able to understand the robust concepts involved in this guidance. Many of them suggested that we collaborate more closely with DfE to publish guidance that directly lays out the expectations of staff working with non-higher education learners and children.

Diverse sector: our response

481. The OfS accepts that the sector includes a diversity of providers and that it includes further education providers that are subject to the 'secure' duty. The OfS notes that it expects that the new freedom of speech complaints scheme will be discretionary, so that it has a power to

consider complaints rather than a duty to consider every complaint. In deciding whether to launch any investigation in relation to a complaint or a condition of regulation, the OfS will take into account the nature of the provider where appropriate.

482. On the comment about the need for those at different academic levels to understand the relevant concepts, we consider that the guidance sets out reasonably practicable steps for providers and constituent institutions to take and that it does so as simply as is consistent with accuracy. We also note that registered higher education providers and their constituent institutions are required to bring the provisions of A1 and the code of practice to the attention of all their students, at least once a year.[18]

Funding

483. One respondent commented that, to receive funding, external funding bodies require some EDI statements. This may require a department, individual, or group of individuals to have an EDI statement on hand and be able to evidence their EDI commitments for such purposes.

Funding: our response

484. Providers and constituent institutions should carefully consider any criteria or conditions of any funding arrangement to ensure that they do not have the effect of restricting freedom of speech or academic freedom within the law. This should also include any EDI requirements. There will be, of course, a range of activities that a provider or constituent institution can commit to that do not risk restricting lawful speech.

Transnational education

485. One respondent requested more guidance on how free speech duties apply in contexts of transnational education.

486. Another respondent commented that it is not clear whether the guidance applies to transnational education, especially where a campus or partner may be considered a 'constituent institution' but also a franchise or validated provision as well.

487. One respondent requested that we further outline our guidance to specify what kinds of transnational education provisions are within scope of the Act and suggested that we provide some illustrative examples of such cases.

Transnational education: our response

488. HERA does not require providers or constituent institutions to take steps to secure freedom of speech in respect of their activities outside England. We set this out at new paragraph 13 of the final guidance.

[18] See HERA part A1 section A2(5) and A4.

Teaching quality

489. One respondent noted that they are dissatisfied with the quality of teaching their child is receiving at a provider. They commented that teaching quality was poor because staff are 'indoctrinated with critical theory/intersectionality'.

490. Another respondent commented that they are concerned with the teaching quality their child is receiving at a provider as a result of constraints on their child's freedom of speech.

Teaching quality: our response

491. We are grateful to respondents for their comments on teaching quality. We are clear in Regulatory advice 24, and elsewhere, that freedom of speech is fundamental to the quality of higher education.

More examples and further guidance

492. One respondent requested that we provider further clarity on the criteria for judging whether a practice or policy is unlawful or lawful. They requested clear and concrete examples of what providers and students' unions should do to manage these practices.

493. One respondent requested that we define 'academic life' and 'academic settings' for clarity and precision. Their reasons for this included that there are some events on provider campuses that could potentially be classed as 'academic' or as contributing to 'academic life' which are not meant to be instructive or a part of a course's content.

494. Further respondents noted that the terms 'academic life' and 'academic setting' are overly ambiguous and could apply to almost all activities that occur at a provider, including non-compulsory activities such as sport. One respondent requested further guidance on the expectations regarding the new training and induction process that may need to be implemented as a result of the new legislation.

495. Another respondent requested further guidance on how further education colleges should weigh their safeguarding responsibilities and requirements with the guidance proposed in Regulatory advice 24, especially given further education colleges rarely have in-house legal resource.

496. One respondent requested that the OfS clearly outline in the guidance how providers and students will be assessed to judge compliance with the new legislation.

497. Some respondents commented that there were too many examples in the guidance.

498. One respondent asked for more guidance on how providers should frame behavioural expectations while maintaining freedom of speech. They highlighted the voluntary statement of expectation the OfS had concerning harassment and sexual misconduct which stated that there should be a clear statement of behavioural expectations and the sanctions that could be imposed if these are not followed. The gave the example of misogynistic language in a classroom where gender is not being discussed, and whether that would amount to harassment.

499. One respondent argued that the OfS should have a test for determining whether someone's speech can be restricted on the basis of the 'content vs. expression' distinction provided in the guidance. This test would be particularly useful in regulating cases that involves online behaviour or speech that could be viewed as harassment rather than debate.

500. One respondent commented that we should provide further guidance on how informal sanctions can be used to curb free speech.

More examples and further guidance: our response

501. Regulatory advice 24 sets out matters that we consider relevant to determining whether a practice or policy is in breach of the 'secure' duty. The guidance provides examples that are intended to assist providers in navigating their duties. The 'secure' duty is similar to the previous duty under section 43 of the Education (No. 2) Act 1986.[19] If providers consider that further advice regarding specific cases would be helpful, they may wish to seek independent legal advice.

502. We accept that the concepts of 'academic life' and 'academic settings' may include borderline cases, although we consider that is also likely to be true of many other useful concepts in this area. However, as set out under question4, we refer where appropriate to 'teaching, learning and research' or to 'an educational context or environment, including in premises and situations where educational services, events and debates take place.'

503. We have set out, in new paragraphs 210 and 211 of Regulatory advice 24, what we expect adequate training and induction to achieve. It will be for providers to determine how to deliver training that has this effect.

504. We have set out at new paragraph 65 of Regulatory advice 24 that a step would generally not be reasonably practicable for an institution to take if taking it breaches that institution's statutory safeguarding requirements.

505. While the analysis of specific cases is very likely to be fact-sensitive, we have set out in the guidance matters that we consider to be relevant to whether a step is reasonably practicable and therefore required under the new duty. We have set out examples to illustrate this. We consider that the number and variety of examples reflects the range of areas to which the 'secure' and 'code' duties apply.

506. We consider that new example 14 in Regulatory advice 24 addresses a situation where a university teacher is using their lecturing platform to express personal views that are irrelevant to the curriculum. We consider that in the situation where this speech amounts to unlawful harassment, as defined in the Equality Act 2010 or the Protection from Harassment Act 1997, it would not fall within the scope of the 'secure' duty. This follows from paragraphs 49 and 82 of Regulatory advice 24.

507. Whether speech amounts to harassment in any context is likely to be highly fact-sensitive, whether the speech takes place online or offline. We have set out guidance on harassment at paragraphs 46-9/78-85 79 to 87 of Regulatory advice 24 and in our guidance on condition E6.

[19] See Education (No. 2) Act 1986.

508. We have set out at new paragraphs 86-89 that providers and constituent institutions should not subject staff or students to informal sanctions or other detriments for their speech where doing so amounts to victimisation under the Equality Act. We have set out at new paragraphs 143 and 144 that providers and constituent institutions should promptly support staff and students in the face of external pressures that might seek to restrict their lawful freedom of speech. We have set out at new paragraph 181 that they should normally (that is, in circumstances that are not exceptional) cover security costs for external speakers. We have set out at new paragraph 48 that they should have in place processes in relation to threats to disrupt speaker events, so that risks can be escalated and the speaker event can go ahead. We may take other opportunities as appropriate to raise with providers and constituent institutions any concerns in relation to the use of informal sanctions to restrict speech.

Burden and feasibility

509. One respondent argued that the guidance does not appreciate the context of large complex universities that deliver much of their teaching and research online. Specifically, they argued that it is unrealistic and burdensome to advise that one individual is responsible for approving all invitation requests.

Burden and feasibility: our response

510. The intention of original paragraph 82e was that there should be at least one identified person responsible for approving events. However, we recognise that it may be burdensome and unrealistic for one person always to take this decision. Because part of the burden is that cancellation is a very serious decision, consider that it would be appropriate for decisions to cancel to be escalated to very senior level because of their gravity.

511. We have therefore **decided** to re-draft this section as new paragraph 175e:

> 'There should be identified person(s) responsible for approval of an event. Any final decision to cancel an event, or to delay indefinitely, should only be taken by a suitably senior official (who may be, for instance, at pro-vice-chancellor or vice-chancellor level), who has delegated authority to take it.'

Students' unions

512. One respondent said that students' unions can make a statement about not passing on costs wherever possible but that often the level of cost depends on the length of event and the location, which makes it hard to generalise what is reasonable in a policy.

513. Another respondent said that unlike students' unions at universities, most college students' unions lack a legal envelope. They may have bank accounts or budgets, but do not have charity registration or trustees. Students' unions at colleges do not require student officers to be over 18, and some students' unions are run by 16- to 17-year-olds that may not have GCSEs in English. Students' unions roles can be entirely voluntary, unpaid posts where one of the main functions is to offer free products to students during freshers' weeks.

514. One respondent commented that given the context in which students' unions operate at colleges, they will not be able to develop their own codes of practice and will instead need to adhere to their college's code of practice.

Students' unions: our response

515. As we have said in our summary, we have chosen not to respond to comments concerning students' unions because they will not be subject to the 'secure' or 'code' duties.

General comments

516. One respondent commented that we should take the same approach to free speech as we have taken to access and participation, where the plans to protect, promote and secure free speech would be developed in collaboration with the sector and evaluated by both internal and independent bodies to monitor progress in the area. They also argued that the OfS should commit to a yearly evaluation of, and report on, the complaints scheme to inform the sector about what kinds of cases are being submitted and develop lessons learned.

517. A few respondents used this section to make general comments concerning our proposed Regulatory advice 24. Many of the comments were in general agreement with our proposals and some noted that they hope the new regulations and complaint scheme will strengthen freedom of speech on university and college campuses.

518. One respondent commented that some of the examples are quite limited in scope and that they are unhelpful because they do not describe the context that may be informing a particular case. For instance, many of the examples do not consider where the freedom of speech of two or more parties may be in conflict. Another respondent commented that many of the examples provided are relatively clear cut and that many cases involving free speech will be much more complex and nuanced.

519. One respondent noted that some of the guidance issued by the OfS should be expanded on or further developed to reflect the kinds of complaints submitted through the complaint scheme.

520. One respondent argued that the proposed Regulatory advice 24 indicates that the OfS is moving away from a 'principles-based' approach to regulation in favour of a more 'rules-based' approach. The respondent was concerned that as a result, the OfS's regulation of the sector will become overly burdensome and interfere with institutional autonomy.

521. One respondent commented that the proposed guidance is disproportionate in relation to the reality of free speech violations and restrictions present in the sector. They further commented that (in their view) the OfS asks providers to weight the free speech duty over all other duties, responsibilities, and concerns.

522. One respondent stated that uncertainty remains over the OfS's intended approach to the monitoring of international funding. They stated that they would welcome an early indication of the financial threshold for monitoring international funding. They also encouraged the threshold to be set at a level that is not so low that tracking and recording all such instances

of funding would be administratively burdensome and resource-intensive. They stated that monitoring could create significant burdens for some student clubs and societies.

General comments: Our response

523. The OfS's approach to freedom of speech is laid down by legislation. The OfS does not have discretion over what the 'secure' duty requires. The purpose of Regulatory advice 24 is to give providers and constituent institutions guidance on determining what reasonably practicable steps they may need to take to meet these duties. We note that we expect an amended freedom of speech complaints scheme to come into force after the passage of the relevant primary legislation.

524. In relation to comments on the examples, see our response under 'General comments' above.

525. In relation to institutional autonomy, see Annex D below.

526. We do not consider that anything in Regulatory advice 24 gives undue weight to the importance of freedom of speech. Section A1 of HERA places statutory obligations on registered providers.

527. With regards to the monitoring of overseas funding, we have not included any comments in the guidance in advance of a decision on the future of this provision.

Key terms glossary from the complaints scheme consultation

528. The proposed Regulatory advice contained a glossary with definitions of key terms.

529. We ran a consultation in December 2023 concerning the rules of the complaints scheme which we expected to open in August 2024. Those rules included a glossary with definitions of key terms that were relevant to the complaints scheme and our regulation of freedom of speech and academic freedom more broadly.

530. We acknowledged in paragraph 36 of the original consultation on Regulatory advice 24 that there would be overlaps between that consultation and the other similar consultations we ran e.g. on the complaints scheme. We said that because of that overlap we would consider comments on those issues in response to the other consultations when making decisions on the duties consultation and vice versa.

531. Originally, we anticipated that we would include the definitions of these key terms in the final version of the Regulatory advice as well as the final complaints scheme. However, the new complaints scheme is expected to come into force following primary legislation. We have chosen, therefore, to incorporate in this document the consultation responses on the relevant key terms in the glossary of the complaints scheme consultation so that they can feature in the final Regulatory advice.

532. We have chosen to summarise our proposals on key terms from the complaints scheme in this section alongside the responses and our decisions. This will make this section easier to follow and reduce the need for cross-referral against multiple consultation documents.

Academic staff

Proposal summary

533. In our proposed complaints scheme rules, a person who is or was a member of academic staff may be eligible to use the complaints scheme. A person who has applied to become a member of academic staff may also be eligible to use the complaints scheme. There were some comments on the definition of ‘academic staff’.

534. In section T of the proposed scheme rules (and in proposed Regulatory advice 24), we defined a member of academic staff as: a member of staff who is employed, or otherwise engaged, for the purpose of teaching or conducting research.

Summary responses

535. Some respondents commented that this definition is too narrow. They proposed extending it to include, for example, those holding life fellowships, honorary fellowships and/or emeritus positions; trustees; those who visit to talk to students often; and academic visitors. A respondent also proposed that academic staff of a constituent institution of a registered provider (such as a college of a university) should include those of its fellows, trustees etc. who are not engaged to teach or research for that institution but who do conduct teaching or research for that provider.

536. Some respondents commented that the definition is too broad. They proposed narrowing it to exclude, for example, contracted members of staff brought in for expert consultation; clinical staff; and staff mainly or exclusively working in further education.

537. A respondent also requested clarification as to whether a person who had applied for an academic post, but did not want to submit an EDI statement, would count as a member of academic staff for purposes of the complaints scheme.

Response and decision

538. We consider that teaching and research are essential elements of academic activity. Therefore, we have decided not to expand our definition of ‘academic staff’. Whether a life fellow, honorary fellow, trustee etc. is a member of academic staff of the relevant institution will depend on the particular facts of the case. They may in any case be members of the relevant institution, depending on its legal constitutional and/or contractual arrangements.

539. Section A1 does not restrict the relevance of the ‘secure’ duty within the category of academic staff. We do not have scope to exclude particular persons or classes of person falling within that category. Therefore, we have decided not to restrict our definition of ‘academic staff’. Schedule 6A states that the complaints scheme will be open to someone who has applied to be a member of academic staff at a provider or constituent institution. This will include someone whose application was rejected because of their response to one or more requirements of the application process.

540. The Act defines academic freedom in relation to academic staff at a registered higher education provider. We have defined a member of academic staff as ‘a member of staff who is employed, or otherwise engaged, for the purpose of teaching or conducting research’.

Whether a member of professional services staff counts as a member of academic staff depends on whether they meet this definition.

Constituent institutions

Summary proposal

541. In our proposed complaints scheme rules, an eligible person could make a complaint about a constituent institution of a registered provider.

542. In section T of the proposed scheme rules (and in draft Regulatory advice 24), a constituent institution was defined as: any constituent college, school, hall or other institution of a registered higher education provider.

Summary response

543. Some respondents sought more clarity on what constitutes a 'constituent institution'. Queries included whether the term covers delivery partners, for example a provider which delivers a course leading to an award made by another provider, or spin-out companies or subsidiaries of a provider.

Constituent institutions: response and decision

544. The definition of 'constituent institution', in the glossary and scheme rules on which we consulted, reflected the definition of that term set out in the Act. We have **decided** to retain that definition in the final glossary.

545. In our proposals, we did not propose to publish a definitive list of 'constituent institutions' to which the new free speech duties apply. Our final decision is that we will not publish such a list. The Act defines 'constituent institution' broadly.[20] That definition is incorporated into the glossary. Providers are well placed to determine which organisations are their 'constituent institutions'. Any list that we create, based on information that we currently hold, may exclude some constituent institutions.

Member

Summary proposal

546. In Section T of the proposed scheme rules we defined a 'member' of an organisation as:

> ''Member', in relation to a registered higher education provider, may include board members, faculty, staff, students and administrators. A member does not include a person who is a member of the provider solely because of having been a student of the provider.
>
> 'Member', in relation to a constituent institution of a registered higher education provider, may include board members, faculty, staff, students and administrators. A member does not

[20] 'Constituent institution', in relation to a registered higher education provider, means any constituent college, school, hall or other institution of the provider' (HERA Part IA sect. A4(4)).

include a person who is a member of the institution solely because of having been a student of the institution.

'Member', in relation to a students' union which is a representative body and not an association (see section 20(1)(b) of the Education Act 1994), means those whom it is the purpose of the union to represent, excluding any student who has signified that they do not wish to be represented by it.'

547. In the glossary of draft Regulatory advice 24, we defined a 'member' of an organisation as follows:

'Whether a person is a 'member', in relation to a registered higher education provider or constituent institution, is a product of the legal constitutional arrangements of the provider (for example, the membership provisions in a Royal Charter or legislation for a higher education corporation) and/or contractual arrangement.

A member does not include a person who is a member of the provider or constituent institution solely because of having been a student of the institution.

'Member', in relation to a students' union which is a representative body and not an association (see section 20(1)(b) of the Education Act 1994), means those whom it is the purpose of the union to represent, excluding any student who has signified that they do not wish to be represented by it.'

Summary response

548. A respondent on the complaints scheme commented that 'members' of a provider should be limited to the provider's governing body, faculty and staff. A consultee also commented that it was unclear whether an institution's emeritus staff, honorary award holders, alumni and governors fall under this definition.

Member response and decision

549. Section A1 does not restrict the relevance of the 'secure' duty within the category of members. We do not have scope to exclude particular persons or classes of person falling within that category. Therefore, we have **decided** not to restrict our definition of 'member' to make such exclusions.

550. However, we accept that whether a person is a 'member', in relation to a registered higher education provider or constituent institution, is a product of the legal constitutional arrangements of the provider (for example, the membership provisions in a Royal Charter or legislation for a higher education corporation) and/or of its contractual arrangements. We have therefore **decided** to define a 'member' of a relevant institution as follows:

'Whether a person is a "member", in relation to a registered higher education provider or constituent institution, is a product of the legal constitutional arrangements of the provider (for example, the membership provisions in a Royal Charter or legislation for a higher education corporation) and/or contractual arrangement.

A member does not include a person who is a member of the registered higher education provider or constituent institution solely because of having been a student of the institution.'

551. We have also **decided** not to include a definition of a 'member' of a students' union. This is because HERA will not impose free speech duties directly on students' unions.

Premises

Summary proposal

552. In our consultation on Regulatory advice 24, we proposed to define 'premises' as 'Includes all land, buildings, facilities, and other property in the possession of, or owned, leased, used, supervised or controlled by the university, college or students' union.'

Summary responses

553. A respondent stated that the definition of 'premises' should be clear that premises owned by the provider but leased out are not caught by the definition.

Premises response and decision

554. We consider that premises owned by a provider or constituent institution may be leased out to a third party that has a relationship to the provider and constituent institution and that carries out activities there involving, for instance, its staff or students. We have therefore **decided** to retain our original definition of 'premises'.

Staff

Summary proposal

555. In our proposed rules, a person who is or was a member of staff may be eligible to use the complaints scheme. A person who has applied to become a member of academic staff may also be eligible to use the complaints scheme. There were many comments on the definition of 'member of staff'.

556. In section T of the proposed scheme rules we defined a 'member of staff' of an organisation as:

> 'an employee of that organisation or other person working for that organisation under a contract of employment, including, without limitation, a fixed-term contract, a zero-hours contract, an hourly-paid contract or other type of casual or atypical contract of employment.'

557. In the glossary of draft Regulatory advice 24, we defined 'staff' as follows:

> '(of an organisation): an employee of that organisation or other person working for that organisation under a contract of employment, including, without limitation, a fixed-term contract, a zero-hours contract, an hourly-paid contract or other type of casual or atypical contract of employment.'

Summary responses

558. One respondent commented that this definition was too narrow. The respondent proposed extending the definition to include 'workers' not employed under a contract of employment but who otherwise fall within section 230(3)(b) of the Employment Rights Act 1996. The respondent commented that this was particularly important given the prevalence of casual labour within the sector.

559. Some respondents commented that this definition was too broad. They proposed narrowing the definition to exclude, for example, board members, students' union staff and/or staff employed by contractors. Some of these respondents commented that board members are charity trustees and as such are required by Charity Commission guidance to avoid conflicts of interest. A respondent also commented that board members are under a duty of confidentiality which a free speech complaint might breach. Some respondents also commented that there was a convention that staff of a students' union do not comment on political decision-making at the relevant students' union.

Staff: response and decision

560. Section A1 does not restrict the relevance of the 'secure' duty within the category of staff. We do not have scope to exclude particular persons or classes of person falling within that category. Therefore, we have decided not to restrict our definition of 'member of staff' to make such an exclusion.

561. However, we accept that an institution may have members of staff who are not employees on a contract of employment. We have therefore decided to expand the definition of 'member of staff' to include workers not employed under a contract of employment but who otherwise fall within section 230(3)(b) of the Employment Rights Act 1996.

562. We have therefore **decided** to define 'staff' (of an organisation) in the glossary as follows:

> 'Someone who is either:
>
> a. an employee of that organisation or other person working for that organisation under a contract of employment, including, without limitation, a fixed-term contract, a zero-hours contract, an hourly-paid contract or other type of casual or atypical contract of employment; or
>
> b. an individual who has entered into or works under any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'

Student

Summary proposals

563. In our proposed rules, a person who is or was a student may be eligible to use the complaints scheme. There were many comments on the definition of 'student'. In section T of the proposed scheme rules, we defined 'student' to mean:

> 'a person undertaking a course of study or a programme of research (i) at the institution in question or (ii) that leads to an award granted by the institution in question, and in either case this may include a trainee or apprentice.'

564. In our draft Regulatory advice 24, we defined 'student' to mean:

'A person undertaking, or with a binding offer to undertake, a course of study or a programme of research (i) at the institution in question or (ii) that leads to an award granted by the institution in question, and in either case this may include a trainee or apprentice.'

Summary responses

565. Many respondents took the view that the proposed definition in the complaints scheme is too broad. Respondents proposed the exclusion of various categories, including:

- those taking short courses not leading to an award
- those in the negotiated employment of industry clients
- students at overseas campuses
- those who are not enrolled on higher education courses, including students studying at further education colleges
- former students.

566. Some respondents referred to safeguarding requirements that apply to students and others under the age of 18 and suggested that the scheme rules do not take account of this.

567. Some respondents took the view that the definition should be broadened to include those who are applying to be students and/or those who hold an offer of a place.

568. Many respondents also requested clarifications as to who would fall under this definition of 'student'. Respondents queried whether the definition covered students not on credit-based programmes, or students on courses provided through franchising or validation arrangements with a registered provider.

569. Some respondents expressed concerns about the potential inclusion of further education students in this definition. This included concerns in relation to frivolous complaints, the process for complaints brought by children and the possibility that the OfS will consider complaints relating to courses that it does not otherwise regulate.

Student: response and decision

570. We have **decided** to define 'student' broadly as follows:

'A person undertaking, or with a binding offer to undertake, a course of study or a programme of research (i) at the institution in question or (ii) that leads to an award granted by the institution in question, and in either case this may include a trainee or apprentice.

'Student' also includes students not on credit-based programmes, or students on courses provided through franchising or validation arrangements with a registered provider. In these types of arrangement the registered provider will owe its 'secure' and 'code' duties to students on courses provided through a franchising or validation arrangement with an unregistered provider.'

571. We consider that all students may be affected by failures to meet the free speech duties. This includes students not on credit-based programmes, students on courses provided through

franchising or validation arrangements with a registered provider. We also consider that a broad definition is suitable because section A1 of HERA does not restrict the relevance of the 'secure' duty within the category of staff.

Students' union

Summary proposals

572. In our proposed scheme rules, in our consultation on the OfS's approach to regulating students' unions on free speech matters, and in draft Regulatory advice 24, we defined a students' union as follows:

'**Students' union**: has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that Part applies (see section 20 of that Act).'

573. This proposed definition reflected the wording of the Act.[21]

Summary responses

574. In response to each of the consultations, some respondents requested more information about what groups, organisations or bodies constitute 'students' unions' for the purposes of the Act and the free speech complaints scheme. Some stated that the Act, and our proposals, do not refer to the governing body of a students' union and queried exactly who or what within a students' union could be the subject of a complaint. For example, they asked whether a complaint must be about the 'governing body' of a students' union or whether it can be about the wider membership of the students' union. Some respondents stated that the 'governing body' may differ depending on the legal form of the students' union and that some students' unions may have more than one 'governing body', each with a different remit. Some respondents queried whether free speech complaints about students' unions must relate to the actions or inactions of elected officers or paid staff, or could relate more broadly to any student who had booked a space within students' union premises to hold an event.

575. Respondents also commented specifically on some forms of students' unions and on students' unions in particular contexts. Common themes included:

a. Queries about why the duties and OfS regulation would not extend to students' unions at providers registered in the OfS's 'approved' registration category, given they may be carrying out the same activities.

b. Some students' unions may not be called 'students' unions', or may not be recognised by their provider, and so may not have been reported to the OfS. On a similar theme, it was suggested that student organisations may struggle to identify for themselves whether they are 'students' unions' for the OfS's purposes.

c. Some students' unions may not have a separate legal identity. Are they, or should they be, covered by the new duties and subject to OfS regulation? Similarly, is a student organisation that is in a satellite campus, or a department of its provider, or some other (unincorporated) body within the provider, a 'students' union' for these purposes?

[21] HERA Part A1 section A5(6).

d. Specific comments about the applicability of the new duties and OfS regulation to students' unions in further education colleges. These may have no separate legal identity or budget and may be staffed by children. Those children should not be expected to understand the Act or to comply with its requirements. The burden of compliance will instead fall on staff in further education colleges. The duties and OfS regulation should not extend to students' unions in further education colleges, or at least not to further education provision within those providers.

e. Queries about student organisations that are not students' unions for these purposes and specifically, who has, or should have, responsibility for free speech issues within those organisations. Some suggested that the OfS should be explicit that such responsibility falls on the relevant provider.

f. Queries about how societies, such as debating societies, will be treated for these purposes where they are part of the students' union.

g. Comments on the importance of alignment between the free speech processes and procedures of a students' union and those of its provider, and of clarity about the balance of responsibilities between those bodies.

576. Many respondents queried whether a students' union could, or should, be held responsible for the actions of its individual societies and sought guidance on how students' unions should manage their societies in relation to free speech matters. Some respondents referred to certain policies or activities of student societies and queried whether they would infringe the new free speech duties.

Students' union: response and decision

577. Since the publication of our consultations, the government has stated its intention to repeal the provisions of the Act creating duties for students' unions.

578. However, duties on providers and constituent institutions that will come into force do relate to students' unions. For instance, the provider's or constituent institution's code of practice must include (among other things) 'the procedures to be followed by staff and students of the provider and any students' union for students at the provider in connection with the organisation of' certain activities. Therefore, we have **decided** to retain a definition of 'students' union' in the glossary to Regulatory advice 24.

579. We remain of the view that, where the Act defines specific terms, we should use those same definitions in guidance. In our view, using different language to that set out in the Act may create confusion or risk divergence from the provisions of the Act that underpin the 'secure' duty. We have **decided** to include, in the glossary of Regulatory advice 24, the following definition:

> '**Students' union**: has the same meaning as it has in Part 2 of the Education Act 1994 in relation to establishments to which that Part applies (see section 20 of that Act).'

Visiting speaker

Summary proposal

580. In section T of the proposed scheme rules, we defined 'visiting speaker' to mean:

> 'a person who was invited to speak at a registered higher education provider, constituent institution or relevant students' union. It does not include a person who wanted or requested an invitation to speak but was not invited.'

581. In draft Regulatory advice 24 we defined 'visiting speaker' to mean:

> 'A person who was invited to speak at a registered higher education provider, constituent institution or relevant students' union. It does not include a person who wanted or requested an invitation to speak but was not invited. It may include a person whose invitation has not been approved through an internal approvals process.'

Summary responses

582. Many respondents expressed the view that the initial definition was too broad. It was suggested that visiting speakers should have to go through a formal approval process to count as such, or that they should have to be invited by an officer of the provider to be a 'visiting speaker' for the purposes of the scheme. However, there was also some agreement that a refusal to approve an invitation to a visiting speaker may give rise to a question about a breach of the relevant duty.

583. One reason given for narrowing the definition in this way was that these processes are relevant to considerations of health and safety. Another reason given was that providers and students' unions should not be held responsible for speaker events that occur without their knowledge. A third view was that unofficial events may put students' safety at risk and the regulator should not be condoning them. It was also suggested that a broad definition might have the consequence that thousands of individual students could each issue an invitation on behalf of a students' union, with the students' unions then having to uphold these invitations and cover any security costs.

584. Some respondents also commented on the inclusion of anyone who 'was' invited. A few comments suggested that this definition gave past invitees open-ended eligibility to complain about ongoing issues unrelated to the previous invitation.

585. There were also a few comments in favour of broadening the initial definition of 'visiting speaker' to cover those who had not been invited to speak but for whom an invitation was in contemplation. Reference was made to the case of R (Butt) v SSHD [2019] EWCA Civ 256. In that case the Court of Appeal recognised (169-72) that it would be arbitrary to distinguish between those who have been invited to speak, and those who would have been invited to speak but for the effect of the Higher Education Prevent Duty Guidance. The court also recognised that protection extended to those who will or would in future be invited to speak. It was argued that 'visiting speaker', as defined in the scheme rules, should get similar latitude.

586. Some also supported the broadening of the definition in this way because they suggested it would mean that where an individual is prohibited from being invited by (for instance) university management, that would then be a breach of the free speech duty.

587. Finally, there were comments requesting clarifications of the definition of ‘visiting speaker’. Some comments requested clarification as to whether an organisation invited for commercial purposes would count as a ‘visiting speaker’ under the scheme. Some comments requested clarification as to whether a third party that hired an institution’s premises would count as a ‘visiting speaker’. Some comments requested clarification as to whether a person invited by those third parties would themselves count as a ‘visiting speaker’ for those purposes. Some comments requested clarification as to who could issue an invitation.

588. In the glossary to draft Regulatory advice 24 we defined ‘visiting speaker’ to mean:

> ‘A person who was invited to speak at a registered higher education provider, constituent institution or relevant students’ union. It does not include a person who wanted or requested an invitation to speak but was not invited. It may include a person whose invitation has not been approved through an internal approvals process.’

589. Some who commented on this definition said that if someone whose invitation has not been approved would count as a visiting speaker, the definition would be inconsistent with the role of processes for mitigating risks around a visiting speaker event and the ability of students’ unions and providers to enforce it effectively. Another respondent stated that more detail was needed as to what constitutes a legitimate invitation. Others commented that the definition was too broad.

590. A respondent raised the concern that this definition may leave institutions and students’ unions open to ‘tenuous complaints’ where a student may have asked someone to give a talk without following the correct procedures i.e., three weeks' notice that allows for due diligence or the day before the proposed event and a room is not available. They also raised concerns about cases where students, after making initial contact about a proposed event to an individual, decide not to go ahead due to workload or costs or a belief that the speaker is not the most appropriate for the discussion they wish to have at the event.

591. A respondent also raised two concerns with the definition:

    a. that individual students – or individuals working in the university in a non-academic capacity – would have a prerogative to issue invitations to anyone

    b. that once those invitations have been made, the Regulatory advice gives invitees the full protection and privileges of the Act. This, they said, created the risk that providers’ and constituent institutions’ resources would be spent – for instance, in relation to security costs – on purposes that were irrelevant to their core mission.

592. This respondent proposed restricting the definition of ‘visiting speaker’ to those who had been invited by a member of academic staff, or by one of the institution’s organised clubs and societies.

Visiting speaker: response and decision

593. Neither definition of ‘visiting speaker’ would require a person’s invitation to have been approved by any internal process for them to count as such. This would mean that an invited speaker, whose invitation has not been formally approved or even formally considered, would count as a ‘visiting speaker’.

594. Non-approval of an invitation is not necessarily a breach of the relevant free speech duties. Whether it is may depend on the reasons for the non-approval. However, we consider that there may be circumstances in which a refusal to approve an invitation, or any mitigation or condition placed on the event, may itself give rise to questions about whether there has been a breach of a duty to secure free speech within the law. Therefore, we have **decided** not to restrict 'visiting speaker' to include only those whose invitation has been formally approved by an institutional process.

595. We also accept the considerations stated in R (Butt) v SSHD [2019] EWCA Civ 256 at 171-2. There the Court of Appeal stated that:

> 'The category of "visiting speakers" cannot, in our view, be restricted to "speakers who have already been invited to visit". Nor is such a gloss on the phrase supported by the decision in [R v University of Liverpool, ex parte Caesar-Gordon [1991] 1 QB 124]. That case simply decided that the duty on an RHEB [Relevant Higher Education Body] under section 43(1) [of the Education (no. 2) Act 1986] is confined to what happens on campus, and that must include (as in Caesar-Gordon) what will be permitted on campus. Viewed in that way, a distinction between speakers who have been invited to visit, and those who would be invited but for the effect of the Guidance, will be arbitrary. In neither case is the RHEB drawn into considering matters beyond their area of responsibility.
>
> The point is reinforced by the broad categories of persons whose freedom of speech is protected by the legislation. If the duty only extended to those already invited to speak, then could the same limitation apply to members and students? Could freedom of speech and academic freedom be said to be preserved by granting freedom of speech to existing members and students, while restricting recruitment of members and students on the ground of their political opinions? We think not. In our judgement the statutory duty in the 1986 Act, and thus the Counter-Terrorism and Security Act 2015, extends to those who will in future be invited to visit and speak.'

596. We consider that the 'secure' duty aligns with the statutory duty under section 43(1) of the 1986 Act and the duty under Section 31 of the Counter-Terrorism and Security Act 2015, which it amends to make reference to Section A1(1) of HERA. Therefore, we consider that the 'secure' duty extends to those who will in future be invited to visit and speak, and to those who would have been invited to speak but for something that the provider or constituent institution did. For instance, if a provider puts in place a rule prohibiting invitations to speakers who express a particular lawful viewpoint, there may be speakers who hold that viewpoint who are not invited but who would have been invited to speak had the provider not imposed the rule. The imposition of the rule may then breach the provider's secure duty as it is owed to those potential visiting speakers.

597. We have therefore **decided** to expand the definition of 'visiting speaker' to:

> 'A person who was invited to speak at a registered higher education provider, constituent institution or relevant students' union, or who would have been invited but for something that the provider or constituent institution has done. It does not include a person who wanted or requested an invitation to speak but was not invited. It may include a person whose invitation has not been approved through an internal approvals process.'

598. In response to the comments about mitigation of risks and legitimate invitations, we accept that institutions have an interest in knowing who has been invited to speak there. For instance, they may need time to put in place suitable security arrangements. However, we note that the definition of a ‘visiting speaker’ for the purposes of the ‘secure’ duty does not automatically confer eligibility to make a free speech complaint under any future freedom of speech complaints scheme. That will depend on the rules of a future scheme.

599. Instead, the definition simply identifies one of the classes of persons to whom the ‘secure’ duty is in principle owed. Whether, in any actual case, a provider or constituent institution is meeting its ‘secure’ duty to any such person will depend on the facts of the case. These include what would, in the circumstances, be reasonably practicable steps for the provider or constituent institution to take. For instance (and in response to the comment about students who choose not to pursue an invitation), it may not be reasonably practicable for the provider or constituent institution to insist that students invite a speaker to address a student reading group when those students have decided that another speaker would be better suited to its intellectual direction.

600. In response to the comment about individual students (and others) issuing invitations, we do not consider that the ‘secure’ duty requires providers and constituent institutions to approve all invitations. Nor does the ‘secure’ duty prohibit providers and institutions from putting processes in place to manage invitations; and these may include, for instance, requirements that invitations may only be made by certain classes of individuals or organisations. Whether such processes comply with the ‘secure’ duty may be fact-sensitive; but we accept that it is unlikely to be reasonably practicable for providers and constituent institutions to approve (and then to cover security costs for) all invitations and room-bookings made by any student, or other members, without any internal process.

601. On the applicability of this definition to external organisations and commercial bookings, see the response to question 4 in relation to criteria for passing on of security costs.

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

Summary of responses

602. Most respondents did not have any comments on our proposed amendments to the OfS regulatory framework or expressed agreement with our amendments.

603. However, one respondent asked us to amend the regulatory framework further to provide for a private law cause of action (which we understand to mean the legal right to seek a remedy) to strengthen the force of the statutory duties created by the Act, as this would allow groups or individuals who have their freedom of speech deprived, or suffer a detriment because of a breach of the free speech duties, to seek financial damages as a remedy.

604. One respondent recommended that we amend Section 2 of HERA to include reference to Article 10 of the European Convention on Human Rights and Section 12 of the Human Rights Act 1998.

605. A few respondents used this section to underscore some comments they raised in other sections of the consultation. Among these comments were:

    a. that the OfS should recognise and embed the experiences of vulnerable individuals who have been unable to express their viewpoints and beliefs as a result of institutional intervention in our guidance to providers and students' unions;

    b. that groups who speak out against injustice need to be better protected;

    c. that some of the examples given in the regulatory advice were not helpful; and

    d. that the appointment of vice-chancellors at some institutions require that the appointed person meet a faith requirement and that this is a protected characteristic under 'belief.'

Our response and decision

606. We thank respondents for their comments to question 6. Question 6 asked respondents for comments on our proposed amendments to the OfS regulatory framework. These amendments revise the OfS's regulatory framework to include reference to its new general duties and general functions as defined by the Act. All comments, including those not relevant to this section, have been considered in our response and decision below. We have considered the points listed above in our response to question 4 and question 9.

607. Section 2 of HERA sets out the general duties to which the OfS must have regard in performing its functions. The Higher Education (Freedom of Speech) Act 2023 amends Section 2 of HERA to include two additional general duties. These are:

    a. The need to promote the importance of freedom of speech within the law in the provision of higher education by English higher education providers.

b. The need to protect the academic freedom of academic staff at English higher education providers.[22]

608. The Higher Education (Freedom of Speech) Act 2023 also amends HERA to insert a new Section 69A. Subsections (1) and (2) of new Section 69A set out new general functions for the OfS. These are:

> (1) The OfS must promote the importance of—
>
> (a) freedom of speech within the law, and
>
> (b) academic freedom for academic staff of registered higher education providers and their constituent institutions,
>
> (2) in the provision of higher education by registered higher education providers and their constituent institutions.
>
> The OfS may—
>
> (a) identify good practice relating to how to support freedom of speech and academic freedom, and
>
> (b) give advice about such practice to registered higher education providers and their constituent institutions.[23]

609. In response to the comments suggesting additional powers or duties, any amendments to Section 2 of HERA must be made by Parliament. Therefore, we are unable to include any further amendments to Section 2 of HERA such as the reference to Article 10 of the ECHR or Section 2 of the Human Rights Act 1998. However, our Regulatory advice 24 directly references Article 10 and the Human Rights Act 1998 in setting out the three-step process that providers may find it helpful to follow in assessing compliance with their freedom of speech duties. See also our response to question 2 above.

610. We have **decided** to amend the OfS regulatory framework to refer to these new general duties and general functions.[24] The proposed amendments are:

a. An addition to the text of paragraph 10 setting out new general duties.

b. New paragraphs 54A and 54B referring to the OfS's new general functions as stated in new Section 69A of HERA.

We have **decided** to amend the text from that in our consultation document to reflect changes in the date of commencement. This means that paragraph 10 refers to '1 August 2025' instead of '1 August 2024'.

[22] See HERA section 2(1)(aa) and 2(1)(ab).

[23] See HERA section 69A(1) and 69A(2).

[24] See Regulatory framework for higher education in England.

611. The finalised text of the amendments is as set out in Annex C.

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

General comments

612. Some respondents stated their agreement with the proposed approach without further comments. A few additional responses gave qualified agreement, stating that they agreed in principle if, for example, the cost recovery process is transparent, proportionate and subject to an appeals process.

613. However, most respondents raised concerns about the proposed approach to cost recovery, including some who expressed disagreement with the recovery of costs in our original proposals: that we would recover costs: where a free speech complaint under our scheme was justified or partly justified, or where we considered there to be a breach of the free speech duties and imposed a monetary penalty. The reasons given for these concerns are outlined below.

OfS fees and value for money

614. Many respondents stated that providers already pay registration fees under existing OfS powers, and some further stated that these fees had recently increased. These respondents suggested that the OfS's existing fee collecting powers should be sufficient and that existing registration fees should be used to cover the OfS's costs.

615. Many of these respondents further remarked that a recent uplift in OfS registration fees was associated with the cost of implementing the Act. They voiced concern about the proportionality of any additional cost recovery and the potential for double counting in the OfS's funding of its free speech activities through both the fee uplift and the recovery of costs.

616. A few respondents also suggested that the estimated cost to the sector of implementing the free speech measures is already high and additional costs should be avoided.

617. Several respondents questioned whether the proposed approach to cost recovery would deliver economic value (for those charged). It was suggested that it is important that the OfS does deliver economic value to registered providers and therefore that the complaints scheme is run in a cost-effective manner. Some of these responses raised concerns about the length of previous OfS investigations.

618. Respondents made suggestions about how the OfS should manage costs and make costs more transparent. These suggestions included that the OfS should develop and publish a plan for controlling costs relating to investigations or a list of methods of investigation and the costs associated with each method. It was also suggested that the OfS should produce timescales for the completion of an investigation, publish performance indicators against these timescales, and undertake a value-for-money review of each investigation. A review of efficiency was also suggested for any external input that the OfS employs in reaching a decision.

619. It was also suggested that the OfS should not consider the recovery of costs in the period following the introduction of the free speech duties, as it would be inappropriate to use this power while building up knowledge and experience in handling cases efficiently, especially as expertise is more likely to be needed to build up OfS knowledge.

620. A few respondents stated that the proposed approach is inconsistent with that of other complaints schemes, which do not seek to recover costs. These respondents held that the OfS should not seek to recover costs associated with the complaints scheme.

Level of cost recovery

621. Many respondents suggested that the costs the OfS can seek to recover should be limited to those costs actually incurred in finding specific complaints to be justified or partially justified and not those incurred in running the scheme more generally.

622. Several respondents raised concerns relating to the financial vulnerability of providers and students' unions in the current financial climate. It was suggested that costs recovered should be proportionate to the finances of the provider to protect providers from excessive costs associated with long investigations.

623. Following this concern, respondents suggested that there should be a cap on the total cost recovery per investigation, either as a total amount or a proportion of the total costs, or alternatively that a fixed minimum charge should be indicated. Comments included that a cap on cost recovery should be subject to consultation and published for transparency. Some respondents that did not suggest a cap nonetheless cautioned against allowing the costs associated with the scheme to increase greatly.

624. Some respondents stated that there was not enough detail in the proposals about the levels of cost recovery. Questions included whether the costs recovered would be banded and how proportionality would be judged, especially in cases where a partly justified decision had been reached on a complaint.

625. Other concerns included the uncertainty caused by unknown levels of cost, and therefore impact, of future cost recovery. Comments included that volume of future complaints is unknowable and that a decision not to detail a limit on cost recovery is at odds with the OfS's request for providers to undertake accurate financial forecasting.[25] It was also suggested that the OfS should have a clear process for notifying the provider when an investigation is open and that the OfS will be accruing costs from that point.

626. A few respondents objected to, or sought further clarity on, the proposed inclusion of external expertise and other costs that the OfS may seek to recover. These included legal advice, third-party costs and the need for meetings in person.

627. It was also recommended that the OfS allows payment plans where the costs of investigations are significant.

[25] See Increased pressure on higher education finances.

Unintended consequences

628. Several respondents stated that cost recovery would divert funds from frontline, student-facing services, such as teaching or student services. Some commented that this was contrary to the goals of the OfS.

629. A few respondents suggested that the proposed approach to the recovery of costs could have an especially disproportionate impact on frontline services of further education colleges and small or specialist providers. Comments about further education colleges said that they are at particular risk from the proposed approach for reasons including their limited resources, lack of legal support, and young student body. It was suggested that the OfS should reduce the costs of investigation for these providers, and for students' unions, to ensure that costs do not affect the student experience they offer.

630. Several respondents were concerned that the scheme creates a conflict of interest or perverse incentive for the OfS to reach justified or partly justified outcomes on complaints, or scope for there to be a perception of this incentive in its decision-making. Some respondents further commented that the relevant cases would be complex and high cost, and therefore the OfS would be motivated to seek to recover costs on this basis. It was also stated that the OfS has freedom to decide the extent of an investigation and therefore the level of costs associated with any investigation.

631. A few responses considered that the threat of cost recovery could lead to a chilling effect, where providers or students' unions would avoid inviting speakers altogether.

632. It was also commented that a fear of the recovery of costs could pressure respondents to settle complaints.

633. One respondent raised that the prospect of causing financial harm to a provider could incentivise malicious or vexatious complaints. Another response stated that the proposal would open providers to covering the costs of understanding malicious and unfounded allegations.

634. One respondent raised concerns that the impact of cost recovery on either a provider or associated students' union will be felt by both organisations.

Commencement

635. Some respondents raised concerns about the recovery of costs soon after the commencement of the duties. One respondent suggested that costs should not be recovered where providers or students' unions have not been able to prepare compliance by 1 August, because they would not have received the guidance with sufficient lead-in time. This response also stated that there were exacerbating factors in summer, namely the turnover of student officers and the General Election. Another response recommended that there should be an amnesty on cost recovery for the first 24 months following the implementation of the new duties and complaints scheme.

Students' unions

636. Many respondents raised concerns relating to the recovery of costs from students' unions, with most disagreeing that costs should be recovered from students' unions in the circumstances or manner proposed. It was suggested that OfS functions should be funded without charging students' unions for reasons such as that students' unions are charitable bodies and that they lack professional long-term staff.

637. Several respondents stated that the impact of cost recovery on students' unions usually will be significant and disproportionate owing to their limited resources and existing financial challenges. Respondents suggested that financial penalties and cost recovery would have an impact on the delivery of student-facing services, and in certain cases could lead to the bankruptcy of a students' union.

638. Some respondents objected to the proposed approach's inclusion of students' unions in existing regulations. For example, it was stated that the proposed approach to bringing students' unions into the scope of the OfS's guidance on determining the amount of a monetary penalty[26] without additional clarifications is inappropriate. Students' unions do not have public funding or student fees, meaning that they do not have relevant qualifying income, and the factors in the OfS's guidance are not relevant to them.

639. It was suggested that the OfS should review its approach and consult on a different model for financial penalties and cost recovery for students' unions. One respondent suggested that it is more important that the OfS's approach to cost recovery is proportionate for students' unions than it is that the approach is consistent across students' unions and providers. Another suggestion was to amend the OfS's guidance on determining the amount of a monetary penalty to provide more clarity on the inclusion of students' unions.

640. One respondent requested additional clarity on the interaction between the proposed approach and section 22 of the Education Act 1994, concerning students' unions.

Further consultation or guidance

641. A few respondents suggested that this consultation on the recovery of costs is not sufficiently detailed to fulfil the objective of paragraph 104 of the 'Consultation on the OfS's approach to regulating students' unions on free speech matters'. This consultation stated that there would be further consultation on the approach to calculating monetary penalties in the event that regulations on monetary penalties for relevant students' unions may set out factors which, in our judgement and when taken together, are materially different from the factors referred to in our guidance on determining the amount of a monetary penalty.

642. A few respondents questioned the level of consultation with students' unions before implementing the proposed approach and suggested further discussion would be needed. It was also stated that our guidance on determining the amount of a monetary penalty had not been subject to consultation with students' unions.

[26] See Regulatory advice 19: The OfS's approach to determining the amount of a monetary penalty.

643. Some respondents stated that they found the scope and scale of the proposals unclear, including in relation to the complaints scheme. These responses included a suggestion that we should provide examples of cost recovery in relation to freedom of speech.

644. Another respondent stated that without the publication of the complaints scheme consultation outcomes, it would be difficult to comment on this proposal in adequate detail. They suggested that publishing this proposal ahead of the outcomes of previous consultations itself suggested that the OfS has predetermined an outcome.

Appeals and representations

645. Some respondents stated that processes for appeals or representations were not clear in the proposals. Some suggested that the OfS should commit to publicising rights to appeal and/or to make representations about its activities, including cost recovery, for instance in its guidance. Others also suggested that the right to secure legal representation should also be made explicit in published guidance. A few responses suggested that there should be a right to appeal any decision made against a students' union, and that students' unions should also have the right to reply to allegations being investigated.

Other comments

646. In relation to settled complaints, it was stated that although these result from private conversations, universities should not be bound by the equivalent of a non-disclosure agreement if they disagree with the OfS's conclusions. Another respondent also suggested that confidential settlements are at odds with transparency.

647. A couple of responses concerned cost recovery by respondents in the scheme. One respondent requested a mechanism for students' unions to recover costs from the OfS in relation to false media reporting. Another asked whether a respondent will be able to recover costs where a complaint is not upheld.

648. One respondent said that this section was difficult to navigate because they had to cross refer through relevant documents and links to review cost recovery documents in financial regulations.

Financial penalties

649. Some responses also commented on financial penalties.

650. It was suggested that the OfS has other powers available to it and should not use financial penalties for providers or students' unions in relation to free speech duties. It was also stated that the use of financial penalties should be sufficient without the use of cost recovery. The OfS should make it clear that a monetary penalty with cost recovery will only be considered as a last resort where all other interventions have failed. Another asked for more guidance on how the maximum fine will be applied if needed, and suggested that fines be reserved for exceptional or repeated cases of failure to comply with free speech duties.

651. One respondent disagreed with the inclusion of deterrence in the list of factors considered when imposing financial penalties and suggested that this should be based only on the merits of the potential breach in the case in question.

Our response

652. We have chosen not to respond in advance of the legislation that is expected in relation to the complaints scheme and in light of the fact that students' unions will not be subject to the new duties.

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

General comments

653. Many respondents did not respond to this question or highlighted that they had addressed what was not clear in responses to previous questions. Several made references to answers given in previous questions. Several others gave general comments that multiple areas of the draft Regulatory advice were not clear but did not expand on this.

Scope of the duties

654. A number of respondents said it was unclear how the proposals affected transnational education. This included:

- whether it applied at all, and if it did, to what extent
- that it should not cover transnational education at all or its coverage to transnational education could make partnerships unviable
- it was unclear what 'reasonably practicable' constitutes in other jurisdictions
- that the proposals may conflict with overseas law, and the conflict could place individuals at risk in extreme circumstances.

655. Several respondents said that it was unclear whether the draft Regulatory advice extended to commercial bookings and activities e.g. summer schools. Another respondent said it was unclear whether it extended to digital or hybrid events.

656. One respondent said it was unclear whether non-academic staff would be covered by the guidance.

657. Another respondent said it was unclear what types of student would be covered e.g. franchised students, partnerships, students on placements or PSRB requirements, and how the guidance would apply to legal speech that may contravene guidelines of professional conduct.

Scope of the duties: our response

658. We address transnational education in our response to question5. We have also provided advice in new paragraph 13 of the final Regulatory advice.

659. In respect of partnerships within England, the extent to which the duties apply will again depend on the nature of any partnership and whether the providers involved are registered. In sub-contractual teaching arrangements i.e. franchises, if both providers are registered with the OfS, then both providers will be subject to the duties. If the lead provider is registered, but the teaching provider is not, then the lead provider will be subject to the duties and the

students franchised to the teaching provider may be covered by the lead provider's duty to secure their freedom of speech. We address what students are in scope in our response to question 5. We address PSRB requirements in our response to question 11.

660. The free speech duties extend to non-academic staff. We illustrate this in new example 31. The duties extend to hybrid or digital speech or events e.g. events held on the internet using information technology. We illustrate this in new examples 1, 17 and 36.

661. We address commercial bookings in the sub-section on criteria for passing on security costs.

Students' unions

662. One respondent said it was unclear how students' unions are to balance their duties and said that advice on reconciling intersecting demands was vital.

663. One respondent said that we had mis-stated the law on speaker culpability at events in students' unions. They also said that the OfS lacked an understanding of how students' unions are governed, including in relation to their legal duties, and the guidance did not acknowledge their status in the 1994 Education Act. They strongly advised that we publish guidance similar to the Charity Commission in specifying what students' unions 'must do', 'should do', or 'could do' to distinguish legal requirements from good practice and steers from government.

664. One respondent said that there were insufficient examples covering students' unions.

Students' unions: our response

665. We have chosen not to respond to comments concerning students' unions because they will not be subject to the new duties.

Examples

666. A number of respondents made comments on the examples. They included:

    a. the examples were too vague, unrealistic, did not reflect the complexity of relationships providers had, or not specific enough

    b. requests for examples illustrating balancing duties together e.g. academic freedom and the Equality Act, freedom of speech and harassment

    c. a request to work with the sector in creating more realistic examples

    d. querying whether further guidance would be shared in future and whether this would include exemplars on the code of practice or other templates.

Examples: our response

667. The examples are illustrative of where a provider's or constituent institution's secure and code duties can interact with various areas of activity as a means of helping them navigate their statutory duties. We cannot provide an exhaustive list that will apply to all providers in all

circumstances. This is because whether a provider has taken reasonably practicable steps will depend on the particular facts or circumstance of each case. We note that what may be a relevant example for one provider, may not be relevant to another, particularly given the diversity of the types of provider that exist in the English higher education sector.

668. We have however added examples in response to comments made by respondents where they have made suggestions that could clarify expectations more helpfully, including where the 'secure' duty interacts with the Equality Act. We may share good practice under the Act and we may as part of this consider template codes in the future.

Balancing other duties

669. A few respondents highlighted the Prevent duty. A couple said it was unclear how the guidance interacted with the Prevent duty. One respondent specifically highlighted the Prevent monitoring framework guidance and wanted more clarity on which policies needed reporting following updates.

670. One respondent said sections covering the Equality Act were unclear as the language used was conditional, which did not feel strong enough when considering the rights of individuals under the Equality Act. Using an example of the impact of hosting a series of gender-critical speakers on the trans community, they asked whether a provider could place lawful conditions on academic freedom to balance the needs of opposing groups. Another respondent said it was unclear whether assessing candidates for academic appointments on their commitment to EDI or similar would be prohibited and suggested that we make this clear through an example.

Balancing other duties: our response

671. We recognise that many respondents have asked for examples illustrating balancing duties. We have introduced new examples to illustrate the interaction between duties (for instance, new examples 4 and 6). We have also introduced further information on the Equality Act which we discuss further in our response to section 10.

672. On the Prevent duty specifically, we have introduced new example 8. The Prevent monitoring framework guidance advises that a provider covered by the Prevent duty should report a material change where there has been a substantial change or revision to a policy or process which affects the way it is delivering the Prevent duty. This will usually be a policy or process previously assessed by the OfS.[27] Providers should report matters accordingly.

673. On whether commitments to EDI can be included in assessments to academic appointments, while this will depend on the particular facts of the case, we have been clear that providers and their constituent institutions should not require applicants to commit or give evidence of commitment to values, beliefs, or ideas, if that may disadvantage a candidate for exercising their academic freedom within the law (see new paragraph 139 and new example 27).

[27] See OfS, 'Prevent duty: Framework for monitoring in higher education in England 2018-19 onwards', paragraphs 74 to 75.

Other comments

674. A number of other respondents made individual miscellaneous comments about the proposals being unclear. They included:

    a. How costs would be recovered

    b. the timetable we adopted in introducing the new free speech requirements

    c. the advisory status of the guidance

    d. whether written speech was covered to protect student researchers from potential harassment

    e. what the status of ‘values’ were e.g. respect and kindness

    f. how these proposals would interact with safeguarding and under 18s

    g. how providers should uphold and maintain academic standards and create diverse communities

    h. guidance on the promote duty.

Other comments: our response

675. We cover cost recovery in our response to question7.

676. We address issues on timescales that we have adopted and issues such as the promote duty in our response to question1.

677. In respect of safeguarding and under-18s, we have said in our response to question2 that it would not be reasonably practicable to secure speech that would conflict with statutory safeguarding requirements.

678. The Regulatory advice gives advice to providers and their constituent institutions on how they navigate their new statutory ‘secure’ and ‘code’ duties. It does not remove the requirement on them to make their own judgements and decisions based on the relevant facts and circumstances of each individual case on their compliance with these duties.

679. On student (as well as academic staff) researchers see ‘Research’ under question 4. The free speech duties cover written and other forms of expression.

680. The guidance is focused on the free speech duties rather than on particular values, although we consider that many other values can be realised in ways that are consistent with, and typically complement, the values of freedom of speech and academic freedom.

681. Maintaining academic standards is an essential function (as part of learning, teaching, or research) of a provider or constituent institution. This should therefore be a relevant factor when considering reasonably practicable steps and should be considered as part of the decision-making steps we illustrate in our response to question3.

682. In respect of creating diverse communities, we consider these proposals may support the diversity of thought in particular.

683. In relation to the ‘promote’ duty, the final version of the guidance focuses on the matters on which we consulted, namely the ‘secure’ and ‘code’ duties. Those were the focus of the initial consultation because at that time we had expected to operate a complaints scheme in relation to the ‘secure’ duty, to which the ‘code’ duty was also relevant.

Question 9: In your view, are there ways in which the objectives of this consultation could be delivered more efficiently or effectively than proposed here?

Guidance publication and 'lead-in' time

684. A few respondents commented that the consultation could be delivered more efficiently and effectively if it were published earlier in the year given that the duties were originally due to commence in August 2024. Some respondents stated that we should have published draft guidance for input from the sector earlier in the year to ensure that the finalised guidance would be available to providers and students' unions well before the 1 August commencement of the complaint scheme. Some respondents who made this point noted that this would have allowed the sector to understand which policies and activities might need to be altered or suspended to comply with expectations.

685. Furthermore, since the consultation was not delivered earlier in the year, some respondents commented that implementation of the Act should be delayed until after the finalised guidance is published.

686. Others acknowledged that since delaying the implementation of the Act may not be feasible, there should be a grace period during which providers and students' unions can better understand their duties and what changes they may need to make to internal processes.

687. Some, however, argued that given that the complaint scheme opens on 1 August 2024 and the finalised guidance is unlikely to be published in June, we should delay publishing guidance until after the complaint scheme has launched. The guidance could then be revised based on anonymised case studies emerging from actual complaints received. Some argued that this would result in more helpful examples that reflect the kinds of complaints providers, students' unions and the OfS are likely to receive.

688. A few respondents noted that, whenever the finalised guidance is published, it should be amended and kept up to date based on lessons learned from the actual complaint scheme.

689. Other respondents commented that when the OfS is deciding a complaint outcome, we must consider that providers and students' unions have not had ample time to consider which policies, codes, and procedures may need to be changed or removed to comply with the new regulations and legislation. This consideration should be weighed when deciding any recommendations, suggestions, or penalties.

Guidance publication and 'lead-in' time: our response

690. A number of respondents commented on the timelines on publishing the final Regulatory advice and the commencement of the free speech duties contained in the Act. We note that respondents gave differing views on whether it would be more helpful to publish the guidance before the duties commenced or before the complaints scheme opened. We accept that publishing guidance before the revised duties in the Act take effect would be more helpful.

We have decided to publish the final Regulatory advice in June 2025 before the duties commence on 1 August 2025.

691. We may consider further scenarios based on future cases in any future guidance.

692. The commencement of the free speech duties and our responsibilities under the Act are a matter for Parliament. However, we note that many providers have been subject to similar duties for a significant period. For a significant number, this will have begun in the late 1980s and will have been regulated by the OfS in relation to E1 conditions on public interest principles since 1 August 2019.

693. We also think it is helpful to clarify that we have engaged with providers and their representatives throughout the time we have been developing our proposals on free speech and subsequently alongside this consultation.

694. We have chosen not to comment on the complaints scheme in advance of expected primary legislation.

Burden, cost and autonomy

695. Many respondents expressed concern that our proposed guidance was significantly burdensome and was not proportionate. The following reasons were given:

    a. The cost of compliance to providers and students' unions. The OfS should model the average costs providers and/or students' union are likely to incur if they were to do everything recommended in the guidance.

    b. The guidance is too prescriptive and verges on infringing institutional autonomy.

    c. The guidance does not consider how small and specialist providers will be uniquely affected and unable to meet certain expectations due to a lack of resources (both financially and structurally).

    d. The guidance is not streamlined and is too open to interpretation. Respondents who took this view recommended that we clearly lay out regulatory requirements to ensure providers and students' unions comply.

696. A few respondents recommended that we commit to reviewing the complaint scheme after one year and amend our guidance so that it is based on representative cases.

697. Some respondents commented that the consultation could have been delivered more efficiently and effectively if the sector had been consulted earlier in the process. Some of these respondents recommended that we hold discussion groups and workshops with students, providers, and sector representatives to hear from them about what kinds of cases are most relevant to their situations and what kind of guidance would be most useful.

698. Some respondents suggested that any regulations imposed on providers and students' unions should be made in partnership with the providers and students' unions rather than imposed on them.

699. One respondent suggested that we provide better support for students' unions in helping them understand the new regulations: for instance, we should offer a specialist helpline for students' unions.

700. One respondent suggested that we create a specialist team to deal with student research that is suppressed, especially research that deals with particularly sensitive issues. It was suggested that these cases are given priority.

Burden, cost and autonomy: our response

701. We note that the 'secure' and 'code' duties on providers and constituent institutions are statutory duties. Regulatory advice 24 assists providers in navigating these duties: it does not in itself introduce additional burdens. We accept that the duties are requirements to do, or not to do certain things.

702. We set out relevant factors for determining reasonably practicable steps in our response to question3. We therefore do not accept that the guidance is too open to interpretation.

703. We accept that the duties may incur cost for providers and their constituent institutions. We do not accept that this is disproportionate. Freedom of speech and academic freedom are central to the mission of a higher education provider and the quality of a student's academic experience. However, what the duties require in any particular case will depend on the facts of the case.

704. We have sought to address the point about laying out our requirements clearly in the revisions we have made based on the consultation responses.

705. On costs, we note that the government plans to repeal the statutory tort to which providers and constituent institutions would have been subject, and that this may affect the cost implications of the Act. Modelling of these costs would necessarily vary from one provider to another and would be contingent on the particular facts relating to any cases that might arise.

706. On the specific point concerning sensitive research, we have set out our approach to research as part of our answer to question 4.

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

General comments

707. Many respondents considered it likely that these proposals would negatively impact individuals on the basis of their protected characteristics, while a few considered that there would be no marked effect as the proposals aim to protect speech which is already lawful.

708. A few respondents expressed concern that an overemphasis on freedom of speech may discourage students with protected characteristics from reporting instances of harassment or discrimination. Along similar lines, a respondent considered that this effect may be exacerbated by the subjective nature of determining whether something constitutes harassment.

709. A few respondents stated that the Act could lead to an increase in tension between groups based on their protected characteristics, rather than encouraging understanding and debate, as was intended.

710. A few respondents urged the OfS to identify legitimate preventative measures for institutions to better support those with protected characteristics.

711. A few respondents considered that the balance of risk should be more 'justly weighted', with further consideration being given to equality and the protection of individuals based on their protected characteristics.

712. A few respondents suggested that the OfS review the impact of the implementation of the free speech duties in one year to ensure that there have not been any unintended consequences that affect individuals based on their protected characteristics.

General comments: our response

713. We do not accept that these proposals would negatively affect individuals based on their protected characteristics. People with protected characteristics will continue to have protection from discrimination and harassment under the Equality Act. The new duties do not affect these protections. Providers and their constituent institutions need to comply equally with their duties under the Equality Act and under HERA.

714. The Equality Act gives enhanced protections for people making good faith claims on harassment and discrimination by outlawing victimisation linked to protected acts. It also gives protections for individuals who support people with protected characteristics on harassment or discrimination claims as protected acts.

715. We do not accept that it is a purely subjective question whether conduct amounts to unlawful harassment. Both the Equality Act 2010 and the Protection from Harassment Act 1997 include an objective element in their respective definitions of harassment.

716. We disagree that the proposals are more likely to increase tensions between groups. We believe that open debates between groups are more likely to foster good relations. Suppression of lawful speech is more likely to create antagonism.

717. We disagree that the framing of the Regulatory advice implies that freedom of speech outweighs legal protections for others. However, we agree that it may be helpful to illustrate the relationship between the 'secure' duty and other legislation and regulatory requirements that protect individuals. In the final Regulatory advice, we have decided to highlight relevant areas of criminal law and civil law (including the Protection from Harassment Act 1997 and the Equality Act 2010). In relation to support for those with protected characteristics, we have since consultation published the content of, and guidance on, new condition of registration E6. This condition, which comes into force in full on 1 August 2025, will ensure that providers have effective policies to protect students from harassment and sexual misconduct, robust procedures to address it if it occurs, and support for students who experience it.[28]

718. In relation to any review of the effect of the new duties on those with protected characteristics, we note that these are statutory requirements imposed by Parliament. The Act includes a provision that the Secretary of State may, by direction, require the OfS to report to the Secretary of State on such matters relating to freedom of speech and academic freedom as may be specified in the direction.[29]

Balancing duties

719. Many respondents highlighted the need for the OfS to provide further support and guidance to universities and students' unions on balancing their free speech duties, EDI, and the upcoming condition on harassment and sexual misconduct. A few respondents highlighted the time and resource pressures as additional challenges when attempting to find this balance.

720. A few respondents asked the OfS to ensure that the guidance is aligned with the upcoming harassment and sexual misconduct condition.

721. A few respondents expressed concern that in circumstances where institutions apply their internal policies to protect an individual based on their protected characteristics, they could then be challenged in relation to freedom of speech.

722. A few respondents requested clarity around balancing free speech duties and guidance from government. As an example, a respondent mentioned government advice in relation to protests on campus as conflicting (in their view) with the letter issued by the OfS, which they said suggested that universities ensure protests are permitted to go ahead while ensuring that there are no instances of antisemitism. Clarity was requested around responding to guidance from government in relation to ongoing events, while upholding free speech requirements.

[28] See Harassment and sexual misconduct.

[29] See HERA (as amended by the Act) section 69A(3).

Balancing duties: our response

723. We agree it would be helpful to include references to the harassment and sexual misconduct guidance contained in condition E6 in the final version of the Regulatory advice. This appears in new section 2, step 2 of the guidance.

724. We discuss the Public Sector Equality Duty in our response to Question 2.

725. In relation to guidance, the 'secure' duty is a statutory duty on providers and constituent institutions, and they should ensure that their implementation of any guidance is consistent with compliance with the 'secure' duty.

Equality, diversity and inclusion (EDI)

726. Some respondents expressed concern that the guidance generally takes a negative view on EDI initiatives, particularly through its chosen examples.

727. Some respondents considered that the guidance presents equality initiatives as a barrier to free speech.

728. A few respondents noted that students' unions pride themselves on fostering inclusive environments, and that the Act and the guidance risks negatively affecting this.

Equality, diversity and inclusion: our response

729. We do not accept that the Regulatory advice frames EDI negatively. The point of the examples presented was to highlight where activities could have the unintended consequence of restricting lawful speech. Implementation of the 'secure' duties can have a positive impact on EDI, including equality of opportunity for those with protected beliefs, enabling diversity of opinion, and including those with minority opinions. Providers and their constituent institutions will continue to be able to carry out a broad range of activity in support of EDI. For instance, they can take positive action on recruitment where doing so is lawful. New example 33 in the guidance illustrates this.

Equality Impact Assessment (EIA)

730. A few respondents queried whether the OfS has already conducted an EIA. Others highlighted the need for the OfS to conduct an EIA as soon as possible. Some respondents recommended that once complete, the full EIA conducted by the OfS should be published.

Equality Impact Assessment: our response

731. We consider that we have shown an assessment of equality matters in our original proposals, this document, and in the final Regulatory advice. We sought views on the impact of our proposals on those with protected characteristics through this question and have taken full account of these.

Equality Act 2010

732. Some respondents requested that the Equality Act and its relation to, and interaction with, the Act be more explicitly considered and stated.

733. A few respondents suggested that the concept of victimisation be considered in relation to the guidance, and a few others requested that it be explicitly mentioned in the guidance.

734. A few respondents considered that the proposals will make it challenging for institutions to meet their PSED. Conversely, a few considered that the proposals would support them in meeting this duty.

735. A few respondents suggested that the guidance should include reference to the PSED requirement to advance equality of opportunity. A few suggested that it should be specifically highlighted that universities could consider whether actions to encourage and support free speech and democratic participation for protected characteristic groups could help them meet this duty.

736. A few respondents expressed support for how the proposed guidance clarifies the PSED and equality obligations relating to religion or belief, particularly as they considered this to be an area which has been largely neglected by government guidance and that this has affected Christians across England.

737. A few respondents considered that the guidance implies that freedom of speech takes precedence over existing legislation and duties, particularly the PSED. They requested that the OfS provide clarity about this.

Equality Act 2010: our response

738. We have considered the Equality Act in the final Regulatory advice, particularly in relation to step 2 of the framework for assessment introduced in new section 2.

739. We agree that victimisation can manifest in the restriction of lawful speech i.e. silencing or censoring someone because they have made a complaint about discrimination or harassment related to a protected characteristic. We believe that this is an area in which the Equality Act and the secure duties are mutually reinforcing.

740. We have therefore **decided** to include a new section concerning victimisation in section 2 of the Regulatory advice, and an example to illustrate how the 'secure' duty may reinforce protection against victimisation. These new paragraphs 86 to 89 and new example 5 read as follows:

> 'Individuals (irrespective of whether they have a protected characteristic) are also protected from victimisation under the Equality Act. Victimisation happens when an individual experiences a detriment linked to a protected act. The individual does not need to have a protected characteristic to be protected from victimisation. Providers and their constituent institutions are covered by this provision as education providers and employers. Victimisation can take place where an employer or education provider (rightly or wrongly) believes that an individual has done or intends to do a protected act.

A protected act is any of the following:

- bringing proceedings under the Equality Act
- giving evidence or information in connection with proceedings brought under the Act
- doing anything which is related to the provisions of the Act
- making an allegation (whether or not express) that another person has done something in breach of the Act.

A detriment in the context of victimisation is not defined in the Equality Act. A detriment can take many forms and can include threats. An individual is protected from victimisation even if they give evidence, provide information or make an allegation that turns out to be factually wrong if made in good faith. Bad faith e.g. vexatious claims are not protected.

Protecting individuals from victimisation can also secure their freedom of speech or academic freedom. Protecting someone from victimisation can sometimes mean a negative step (i.e. choosing not to victimise) in tandem with positive steps (i.e. choosing to do something to protect people from discrimination or harassment).

Example 5: Employment victimisation

Academic A witnesses what they consider to be sexual harassment by manager B against employee C. Employee C brings a complaint against B and A agrees to be a witness in the complaint.

Manager D approaches A and explains that if they continue to support employee C in their claim A's request for research leave is unlikely to be approved.

Depending on the facts of the case, the actions of D may victimise A as the threat to withdraw research leave may be a detriment to their employment as a result of a protected act. The detriment is likely to censor the speech of A and interfere with their academic freedom (for instance, by preventing them from pursuing research).

Reasonably practicable steps in this instance will likely include enabling A's full participation as a witness in the complaint and considering the request for research leave on its merits.'

741. We accept that it would be helpful to include the duty to have due regard to advance equality of opportunity under the PSED in the final version of the guidance.

742. We also accept that it may be helpful to set out that religion or philosophical belief is a protected characteristic to which the PSED equally applies, and that steps that encourage an environment of tolerance and open debate, with regard to the subject matter of protected beliefs, may be relevant to meeting both the free speech duties and the PSED.

743. We also accept that it may be helpful to clarify that the PSED does not impose any general legal requirement on higher education providers or constituent institutions to restrict or regulate speech.

744. We have therefore **decided** to include new paragraphs 90 to 95 and new examples 6 and 7:

> ‘The protected characteristics underpin an overarching equality duty with which public organisations must comply. This is called the public sector equality duty (PSED). It is set out in the Equality Act 2010. Universities and colleges that are public organisations for these purposes must comply with the PSED.
>
> The duty states that a public authority must, in the exercise of its functions, have due regard to the need to:
>
> a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010
>
> b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
>
> c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> The relevant protected characteristics for these purposes are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
>
> The PSED is a duty to ‘have due regard’ to the need to achieve the aims set out above. Providers, and if relevant constituent institutions, should be clear about the equality implications of their decisions, policies and practices. They must recognise the desirability of achieving the aims set out above. But they must do so in the context of the importance of free speech and academic freedom, particularly in higher education. The PSED does not, therefore, impose any general legal requirement on higher education providers or constituent institutions to restrict or regulate speech.

Example 6: religious expression

A Jewish student put up a mezuzah on their university accommodation doorpost. Following complaints from students alleging that the symbol is politically provocative, the university requires the student to remove it to ‘maintain harmony’, and in light of the need as stated in the Equality Act ‘to foster good relations between persons who share a relevant protected characteristic and persons who do not share it’. The university did not assess whether the restriction was necessary or proportionate, nor does it consider that the student’s freedom of speech includes a right to religious expression.

By prioritising objections from other students over lawful expression, the university is likely to have failed to take reasonably practicable steps to secure freedom of speech within the law and therefore to have breached its ‘secure’ duty.

More generally, providers and constituent institutions should take appropriate steps to address any chilling effect. For instance, frequent, vociferous and intrusive anti-Israel protests across campus, including outside lecture-blocks and accommodation, may have a chilling effect on pro-Israeli speech or Jewish religious expression. Students may self-censor support for Israel, and Jewish students might be chilled from expressing their religious beliefs

on campus. Regulation of the time, place and manner of such protests may be a reasonably practicable step to take to secure the speech of students.

The PSED includes duties to have due regard to the need to advance equality of opportunity and to foster good relations between those who share the protected characteristic of religion or philosophical belief, and those who do not share it. Depending on the circumstances, steps that encourage an environment of tolerance and open debate, with regard to the subject matter of protected beliefs, may be relevant to meeting both the free speech duties and the PSED.

Example 7: constructive dialogue

In light of recent and ongoing global conflicts, University A organises and promotes a series of topical events at which speakers and students from different sides are encouraged to take part in open and tolerant dialogue. These sessions are moderated by expert facilitators who offer models for peaceful and constructive communication.

By organising and promoting these events, University A may have advanced the aims of its PSED. It is very unlikely that in doing so A is in breach of its 'secure' duty.

However, we recognise that some activities may be motivated by an intention to advance the aims of the PSED but may be in tension with, or possibly lead to breach of, the 'secure' duty. Several of the examples in this guidance cover cases where activities that may appear to advance these aims are likely to be in breach of the 'secure' duty (including examples 15, 18, 20, 32, 35 and 39); but also cases where it is likely that they are not (including examples 4, 7, 9, 33, 47 and 54).'

Religious institutions

745. A few respondents queried the application of the guidance to religious institutions. Respondents felt that students may want to study at an institution that respects their religious beliefs and felt that these proposals could jeopardise this. A few respondents requested further examples relating to religion and/or religious institutions.

Religious institutions: our response

746. We have addressed appointments that may presuppose certain principles in the sub-section on 'Appointments' under question 4 above. We do not consider that the 'secure' duty would interfere with a provider's decision to offer or not to offer services e.g. chaplaincy, faith facilities etc. Religion is a protected characteristic and therefore protections from harassment, discrimination, and victimisation will apply. We have also decided to include a number of examples relating to religion as set out in the sub-section on 'More guidance and examples' under question 3.

Antisemitism

747. Many respondents expressed concern that Jewish students will continue to be targeted by antisemitism that falls below the legal threshold, as perpetrators could use the new guidance to express anti-Jewish views in a way that is protected by law.

748. More generally, a few respondents felt that unless regulations are amended to include protections for Jewish students from antisemitism, there will be an increase in harassment and discrimination against Jewish students.

749. A few respondents noted that the then Minister for Universities (Michelle Donelan) confirmed that Holocaust denial is not protected under Article 10 of the ECHR. Respondents queried the omission of this fact from the proposed guidance and suggested that Holocaust denialism be explicitly addressed in the guidance.

Antisemitism: our response

750. We have been clear throughout this document and in the Regulatory advice that antisemitic harassment and discrimination will not be protected. We have also set out that we would not expect providers or constituent institutions to take steps to secure freedom of lawful speech that prevents their essential functions, including education. This means that we would not expect them to take steps that would have the effect of obstructing education for (for instance) Jewish students.

751. Providers will also need to comply with the E6 requirements to protect students from harassment alongside their duties to secure freedom of speech and academic freedom. This includes harassing conduct that is unlawful under the Equality Act 2010. We have stated that we will not protect Holocaust denial.

International students

752. A few respondents expressed concern that overseas students would be discriminated against based on worries about overseas government influence.

International students: our response

753. The Act protects the free speech rights of all students of a registered provider or constituent institution, including international students. The Act does not protect unlawful speech, including unlawful racial harassment or stirring up of racial hatred. Registered providers will need to protect students from harassment under condition E6, irrespective of any concerns about overseas government influence.

Age

754. Some comments were made concerning children and/or legal minors in respect of their age as a protected characteristic.

Age: our response

755. We have chosen to address this in our response to Question 11 as we consider it relates to safeguarding.

Question 11: Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider, constituent institution or relevant students' union or for any particular types of student?

General comments

756. Many respondents did not respond to this question. Some respondents considered that the proposals would lead to no, or to minimal, unintended consequences.

757. One respondent suggested that it would be possible to avoid unintended consequences if a pragmatic approach could be pursued. Such an approach would mean heeding the practicalities of securing and promoting free speech alongside consideration of criminal and civil restrictions on freedom of expression, and the duty of care institutions have to their staff and students.

758. One respondent suggested that freedom of speech in the higher education sector would continue to be a difficult balancing exercise, requiring context-driven, sensitive decisions.

759. Several respondents expressed general concern and disappointment with the proposals overall.

General comments: our response

760. We agree that many cases involving freedom of speech and academic freedom are likely to be fact-sensitive. (This is one reason why we cannot give a definitive list of reasonably practicable steps for all circumstances.) However, we agree that it would be helpful to illustrate further where there are civil and criminal restrictions on speech and we have introduced this into the final Regulatory advice. We believe that the framework for assessment we have introduced into the final Regulatory advice, which we discuss in our response to question 3, may support providers and their constituent institutions in complying with the 'secure' duty.

Potential effects

761. Some respondents said that the proposals could lead to self-censorship or risk aversion that could unintentionally curb free speech. For example, relevant institutions could perceive requirements relating to hosting events to be too burdensome, leading to a decision not to host an event at all or to scale back programmes. A few suggested that this could be compounded by potential uneven decision-making: actions or omissions not considered to be a breach one day, could (they suggested) become a breach the next, depending on changing political views.

762. Many respondents stated that, whether intended or not, they perceived bias in the proposals against initiatives intended to foster EDI. Many anticipated a chilling effect on providers,

academics or students speaking out to support inclusivity campaigns. While one respondent considered it important that relevant institutions allow expression of opinions, including extremely controversial ones, this should not be allowed to result in a freedom to 'intimidate, discriminate, demonise, de-legitimise or re-write the history of people belonging to a particular race, religion or nationality.' Some were concerned that the proposals could undo important progress made by providers and students' unions in combating harassment and discrimination on campus. One respondent said that some matters of debate are not intellectual issues for some, but rather permeate all parts of their lives: the proposals did not appear to account for the need to support psychological safety.

763. One respondent sought guidance on dealing with the knock-on effects of lawful but inflammatory speech leading directly to abusive or unlawful behaviour, harm or speech toward students or staff based on protected characteristics.

764. Some respondents said that the proposals should be amended to include protections for Jewish students on campus. Unless these were included, the proposals would lead to an increase in harassment and racism directed at Jewish students. Some considered that training provided by Jewish organisations on antisemitism and Holocaust denial could be in jeopardy if the draft proposals were to be implemented.

Potential effect: our response

765. We do not accept that these proposals will reduce programmes or events. If providers were to reduce the number of events they run or become risk averse, this may indicate that a provider or constituent institution is not taking reasonably practicable steps to secure freedom of speech. We believe it is more likely that these proposals will increase programmes and events, because our advice has been that the free speech duties mean that providers and constituent institutions should expose their staff, students, and members to a wide range of ideas and views. Our analytical framework also illustrates the narrow range of circumstances in which speech may be restricted. This framework supports an impartial and viewpoint-neutral approach to the protection of freedom of speech and academic freedom.

766. We accept that the cost of facilitation will mean that resources will need to be factored into what will constitute reasonably practicable steps. However, where physical space may be a restriction, the availability of information technology (e.g. to host events online) may overcome potential barriers. We also believe that the analytical framework for assessment we have introduced in the final Regulatory advice may support consistent and impartial decision-making. As part of this framework, we have highlighted that the representations of internal or external groups are unlikely to be relevant to whether a step is reasonably practicable.

767. We have discussed matters related to EDI throughout this document and particularly in our response to questions 2 and 10. We have done the same on harassment, discrimination, and victimisation. We have illustrated ways in which, for instance, the aims of PSED may be pursued compatibly with the 'secure' and 'code' duties.

768. The OfS will not defend Holocaust denial, as set out in our final Regulatory advice at new paragraph 204.

Burden

769. Several respondents considered that implementation of the proposals would create a significant burden. Particular concerns were raised about the impact on students' unions and smaller providers. Some stated that the effort to support freedom of speech would come at the cost of delivering other important aspects of the student experience and that the effort and expense of compliance they anticipated would be disproportionate. A few stated that the potential cost of implementation ran counter to the OfS's stated aim to reduce the regulatory burden on providers.

770. Many respondents raised the timeframe for implementation, concerned that without a discretionary or lead-in period, providers and students' unions would struggle to comply and could face penalties they could not afford.

771. Considering the requirement for training on freedom of speech, a few respondents questioned whether there was sufficient supply of relevant training and trainers of the appropriate quality.

772. One respondent suggested that complaints and related costs could disproportionately affect institutions that promote the freedom of speech complaints scheme effectively. This, in turn, could lead to variable student experiences across providers.

773. One respondent said that the OfS was likely to face large volumes of complaints because of further education colleges' misinterpreting free speech regulation, placing a strain on limited OfS resource. Another respondent thought that the scope for abuse of the free speech complaints scheme – by pressure groups, for example – suggested that there should be an independent formal review of the scheme after 12 months of its operation. This should consider, among other things, unintended consequences.

Burden: our response

774. We have given responses in relation to burden under question 3, question 5 and question 9, and in relation to lead-in times under question 9.

Further education

775. Some respondents said were concerned that there was no distinction in the guidance between different age groups and types of student. Balancing freedom of speech and safeguarding and Prevent duties in institutions educating children were cited as potential issues. According to these respondents, Ofsted rules for the education of children could conflict with freedom of speech duties.

776. A few respondents believed there was a risk that students' unions or other representative bodies at further education colleges would have to be dismantled as a result of the proposals. Student representatives in colleges are under 18 and they could be exposed to vexatious complaints under the free speech complaints scheme which may cause potential, distress and anxiety. Colleges may feel that there would be no way they can comply with their statutory safeguarding responsibilities on that basis. One respondent added that this issue gave them significant concerns about the impact of our proposals on these students' mental health and highlighted age as a protected characteristic.

777. A respondent requested clarification regarding the requirement to update policies to reflect both higher education and further education provision, and whether it would be appropriate to have two sets of policy documents for various processes, for example guest speakers.

778. A respondent highlighted that the Prevent duty in further education colleges potentially conflicts with the proposed Regulatory advice.

Further education: our response

779. We accept that some providers and constituent institutions will have responsibilities for children e.g. further education colleges. This will necessarily mean that they will need to factor their statutory safeguarding requirements into their decision-making on reasonably practicable steps. We discuss this further as part of introducing relevant factors to the analytical framework for making decisions on securing freedom of speech. They will also need to do the same for showing due regard to the need to prevent people from being drawn into terrorism for children. We have stated at new paragraph 65 of the Regulatory advice that it would not be a reasonably practicable step to secure speech where this conflicts with a statutory safeguarding requirement.

780. We also accept there will be some circumstances where certain values will need to be promoted as part of an essential function of a provider i.e. in order to meet regulatory requirements for teaching certain types of provision (in further education, for example). In these instances, neutrality may not be a reasonably practicable step in securing freedom of speech. We also discuss PSRB expectations concerning fitness to practise below.

781. In relation to Prevent, we accept the Prevent duty creates legal obligations on providers and constituent institutions: see new paragraphs 96-7 and new example 8 in our final guidance.

782. As we have said in our summary, we have chosen not to respond to comments concerning students' unions because we do not expect the 'secure' or 'code' duty to apply to them.

PSRBs, codes of conduct, fitness to practise

783. Others raised concerns about partnerships between providers and Professional, Statutory and Regulatory Bodies (PSRBs). PSRBs often impose codes of practice or conduct on students.

PSRBs, codes of conduct, fitness to practise: our response

784. We accept that providers and their constituent institutions will need to navigate guidelines issued by PSRBs. Many providers operate courses that lead to professional qualifications because of their accreditation by PSRBs or other accrediting bodies. This may mean that providers and constituent institutions of accredited courses may be required to enforce professional standards. This may require putting individuals through fitness-to-practice procedures to assess their suitability to the course.

785. We accept that professional training through teaching is an essential function of a provider or a constituent institution and this may include accreditation arrangements.

786. To illustrate this point, we have **decided** to include PSRBs as part of the advice concerning 'Relevant factors: essential functions' in new paragraphs 115-119 of the Regulatory advice:

> 'Many providers operate courses that lead to professional qualifications because of their accreditation by PSRBs (Professional, Statutory, and Regulatory Bodies), or accrediting bodies. Providers of accredited courses may be required to enforce professional standards, for instance through 'fitness to practise' procedures. [fn.: See Fitness to practise - OIAHE.]
>
> We recognise that teaching, including professional training, is an essential function of registered providers and constituent institutions and that this may include accreditation arrangements.
>
> However, providers and constituent institutions must not implement any accreditation agreement in a way that disproportionately interferes with students' or others' rights to freedom of expression. Where this is not possible to avoid, providers may wish to raise the need for amendments with the accrediting body.
>
> The following steps are also likely to be reasonably practicable steps that providers and constituent institutions should take in relation to accreditation:
>
> a. clear statements in or alongside fitness to practise policies protecting freedom of speech and academic freedom;
>
> b. highlighting of the Code of Practice on Freedom of Speech within fitness to practise policies and procedures;
>
> c. suitable training on freedom of speech for any staff sitting on fitness to practise panels (or equivalent);
>
> d. monitoring of academic departments' implementation of fitness to practise schemes to ensure compliance with the 'secure' duty and with Convention rights; and
>
> e. ensuring that students are aware of the relevant professional accreditation standards, and the implications of not meeting them, even where the provider or constituent institution does not enforce them.'

787. We have also decided to refer to the following new example 24, which appears later in the guidance.

Example 24: religious expression on social media

As stated by the Court of Appeal: 'This case concerns the expression of religious views, on a public social media platform, disapproving of homosexual acts, by a student, enrolled on a two-year MA Social Work course.'

'Upon being notified of the postings upon social media, the university, the [student's] course provider, embarked upon disciplinary proceedings and took the decision to remove the [student] from his course, on fitness to practise grounds. The [student] sought judicial review of this decision on the basis that (i) it was an unlawful interference with his rights under

Articles 9 and 10 of the European Convention on Human Rights as given effect by the Human Rights Act 1998, and (ii) the decision was arbitrary and unfair.'

The High Court dismissed the challenge, but the Court of Appeal allowed the appeal on basis (i). It found that 'the University told the Claimant that whilst he was entitled to hold his views about homosexuality being a sin, he was never entitled to express such views on social media or in any public forum.' It found that 'the implication of the University's submission is that such religious views as these, held by Christians in professional occupations, who hold to the literal truth of the Bible, can never be expressed in circumstances where they might be traced back to the professional concerned. In practice, this would seem to mean expressed other than in the privacy of the home. And if that proposition holds true for Christians with traditional beliefs about the literal truth of the Bible, it must arise also in respect of many Muslims, Hindus, Buddhists and members of other faiths with similar teachings.'

It stated: 'In our view, such a blanket ban on the freedom of expression of those who may be called "traditional believers" cannot be proportionate.'

It also stated that 'it seems apparent to us that the position as to the condemnation of any expression of such views as those held by the [student] must have been present in the minds of key players within the University at the time… Secondly, in our view, that underlying attitude may almost certainly have led to a too-rapid and disproportionate conclusion that removal from the course was necessary, rather than the institution of a calm, continuing process of guidance of the [student], spelling out what he could and could not properly say, and the circumstances in which he could say it.'

The Court of Appeal concluded that: 'The swift conclusion that the Appellant was 'unteachable', that it was for him to construe the Regulations and Guidance, for him to understand the impact of religious language on others unfamiliar with it, and that his failure to do so meant he must be removed immediately, do not seem to us to have been shown to be the least intrusive approach which could have been taken. It appears to us that this approach was disproportionate on the part of the University.' [fn.: Ngole vs University of Sheffield, [2019] EWCA Civ 1127, at 1, 3, 124, 127, 129 and 136-7. See: Ngole -v- Sheffield University judgment.]

788. We have also **decided** to:

a. include fitness to practise policies and procedures in the list of policies and procedures in which it would be good practice to link to or include a statement about the freedom of speech code of practice at new paragraph 169d of our final guidance;

b. include committees responsible for fitness to practise in the list at new paragraph 192 of those committees whose terms of reference should expressly provide for consideration of the impact of their decisions on compliance with any free speech duties; and

include staff involved in making decisions on fitness to practise in the list at new paragraph 209 of those who should be offered adequate training on freedom of speech and academic freedom.

Annex A: list of consultation questions

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

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

Question 3: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 3 on what are 'reasonably practicable steps'? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out.

Question 4: Do you have any comments on the guidance in our proposed Regulatory advice relating to section 4 on steps to secure freedom of speech? If you disagree with any of the examples in this section, please state reasons for thinking that the relevant legal duties do not apply to that example in the way that we have set out.

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

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

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

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

Question 9: In your view, are there ways in which the objectives of this consultation could be delivered more efficiently or effectively than proposed here?

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

Question 11: Do you have any comments about any unintended consequences of these proposals, for example, for particular types of provider, constituent institution or relevant students' union or for any particular types of student?

Annex B: Regulatory advice on freedom of speech

Regulatory advice 24: Guidance related to freedom of speech is available at: www.officeforstudents.org.uk/publications/regulatory-advice-24-guidance-related-to-freedom-of-speech/

For all OfS regulatory notice and advice documents, see: www.officeforstudents.org.uk/for-providers/regulatory-resources/regulatory-notices-and-advice/

Annex C: Amendments to the regulatory framework

1. In paragraph 10, after ‘a. The need to protect the institutional autonomy of English higher education providers’, add:

    a. ‘(aa) The need to promote the importance of freedom of speech within the law in the provision of higher education by English higher education providers. (This general duty applied from 1 August 2025.)

    b. (ab) The need to protect the academic freedom of academic staff at English higher education providers. (This general duty applied from 1 August 2025.)’

2. After paragraph 54, add the following:

    ‘**Promoting the importance of freedom of speech and academic freedom**

    54A Under HERA section 69A the OfS must promote the importance of—

    a. freedom of speech within the law, and

    b. academic freedom for academic staff of registered higher education providers and their constituent institutions,

    in the provision of higher education by registered higher education providers and their constituent institutions.

    54B under HERA section 69A the OfS may—

    a. identify good practice relating to how to support freedom of speech and academic freedom, and

    b. give advice about such practice to registered higher education providers and their constituent institutions.’

Annex D: Matters to which we have had regard in reaching our decisions

General duties

1. In formulating the decisions we have set out in this document, we have had regard to the OfS's general duties set out in section 2(1) of the Higher Education and Research Act 2017 (HERA). We are required to have regard to:

    a. the need to protect the institutional autonomy of English higher education providers,

    b. the need to promote quality, and greater choice and opportunities for students, in the provision of higher education by English higher education providers,

    c. the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers,

    d. the need to promote value for money in the provision of higher education by English higher education providers,

    e. the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers,

    f. the need to use the OfS's resources in an efficient, effective, and economic way, and

    g. So far as relevant, the principles of best regulatory practice, including the principles that regulatory activities should be:

        i. transparent, accountable, proportionate and consistent, and

        ii. targeted only at cases in which action is needed.

2. We have carefully considered each of our general duties. We consider that the decisions made on the final Regulatory advice (contained in this document) are particularly relevant to general duties (a), (b), (e), (f), and (g): institutional autonomy; quality, choice, and opportunity for students; equality of opportunity; efficient, effective and economic uses of the OfS's resources; and best regulatory practice.

3. In making decisions we have placed significant weight on our general duty to have regard to institutional autonomy (general duty (a)). HERA currently defines 'institutional autonomy' to include '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

without placing themselves in jeopardy of losing their jobs or privileges they may have at the providers.'[30]

4. Publishing our final Regulatory advice will help promote this freedom. The final Regulatory advice is intended to help providers and their constituent institutions navigate their free speech duties. It sets out a number of steps which may be reasonably practicable for them to take to secure freedom of speech within the law. It also provides advice on what may be relevant factors and factors in determining whether a step is reasonably practicable.

5. HERA also currently defines 'institutional autonomy' to include the freedom of English higher education providers within the law to conduct their day to day management in an effective and competent way, and the freedom of English higher education providers—

    i. to determine the content of courses and the manner in which they are taught, supervised, and assessed,

    ii. to determine the criteria for the selection, appointment, and dismissal of academic staff and apply those criteria in particular cases, and

    iii. to determine the criteria for the admission of students and apply those criteria in particular cases.

6. In making final decisions on the Regulatory advice, we gave weight to this aspect of institutional autonomy. We have been clear that whether a step is reasonably practicable, may depend on the individual circumstances of the provider. This means that providers will be able to, and will need to, exercise judgement in how they achieve compliance with their free speech duties. However, we have balanced the need to protect this aspect of institutional autonomy against the legal requirement to protect academic freedom for individual members of academic staff.

7. The OfS must have regard to the need to promote quality, and greater choice and opportunities for students, in the provision of higher education providers (general duty (b)). We believe that students will not have a high quality education or experience if it is not grounded in freedom of speech. Academic freedom is also essential to quality because it will provide students access to new ideas, encourage productive debate and challenge conventional wisdom. These are essential to high quality education.

8. The final Regulatory advice provides guidance to providers and their constituent institutions on how they can navigate their statutory duties. It thereby promotes quality in the provision of higher education. Similarly, the final Regulatory advice also promotes greater opportunities for students because it is designed to help to secure students' ability to express themselves and to have access to and learn new/varied ideas and a wider range of information. We also consider that our decisions will also promote greater choice and opportunities for students

[30] HERA 2017 2(8)(c). The Act will amend HERA to omit 2(8)(c): see Schedule para 2(4)(c) of the Higher Education (Freedom of Speech) Act 2023. However, the Act will also add two additional general duties to section 2 of HERA, of which one will be '(ab) the need to protect the academic freedom of academic staff at English higher education providers'. See section 5(1) of the Act. The Act will also introduce a definition of academic freedom into HERA. The wording of this new definition is in terms that are close to that in current section 2(8)(c).

through securing academic freedom as we consider it likely that this will broaden the range of subjects and ideas that they may choose to pursue.

9. We accept that the exercise of freedom of speech may sometimes cause offence and that this may mean that some individuals, or groups, may feel that this has impacted on their access to educational opportunities. However, we have been clear in Regulatory advice 24 that providers and constituent institutions should not take steps that prevent an essential educational function by denying students opportunities to access education (see for instance new examples 6 and 11). On the other hand, we consider that exposure to a wide range of ideas is itself an essential element of high-quality higher education.

10. The OfS must also have regard to the general duty (e): the need to promote equality of opportunity in connection with access to and participation in higher education provided by English higher education providers. Securing free speech within the law will help to ensure that all students will have equal opportunity to participate fully in higher education. We believe that this may be especially important for those who could otherwise suffer discrimination or harassment related to relevant protected characteristics, including philosophical belief and religion. We have decided to illustrate in the final Regulatory advice how free speech and academic freedom, and equal opportunity, may be mutually reinforcing. We consider that illustrating this will promote equality of opportunity within higher education in English higher education providers.

11. We have also had regard to the need to use our resources in an efficient, effective and economic way (general duty (f)). Providing guidance and illustrative examples in the final document is intended to help providers to navigate their new free speech duties. Improved compliance across the sector may enable the OfS to use its resources more efficiently and effectively by targeting regulation of free speech matters.

12. In making final decisions about what guidance and examples to include in the Regulatory advice, we have had regard, so far as relevant, to the principles of best regulatory practice (general duty (g)). These include the principles that regulatory activities should be transparent, proportionate, consistent and targeted only at cases in which action is needed. We have given regard to this in making decisions on producing further or amended areas of guidance and examples based on:

    a. our consideration of the responses we obtained in the consultation

    b. the duties we now expect to commence following the Secretary of State's decision on the review of the Act e.g. the removal of duties for relevant students' unions.

13. We have also had regard to our general duty (g) in making decisions about revisions to the regulatory framework to reflect changes to the OfS's general duties and general functions required by the new legislation. These revisions will provide transparency about our new general duties and general functions.

14. We consider duties (c) and (d), which relate to competition where this is in the interests of students and value for money, to be important. However, in formulating these proposals we have given more weight to our other general duties.

15. The OfS is required to have regard to the need to encourage competition between English higher education providers in connection with the provision of higher education where that competition is in the interests of students and employers, while also having regard to the benefits for students and employers resulting from collaboration between such providers.

16. Competition could be encouraged by giving providers less guidance, so that different providers may have variable understanding of their duties. However, this would not reflect the new statutory duties on providers in relation to free speech. In addition, we consider that this form of competition would not be in the interests of students. We therefore consider that other general duties, such as the duty relating to quality, outweigh this general duty in this instance.

17. The OfS must have regard to the need to promote value for money in the provision of higher education by English higher education providers. We consider that freedom of speech within the law and academic freedom are essential conditions for higher education that is high quality and accessible. It follows that securing free speech is also a prerequisite of value for money for students.

The Regulators' Code

18. We have had regard to the Regulators' Code in making final decisions on the Regulatory guidance.

19. Provision 1 of the Code states that regulators should carry out their activities in a way that supports those they regulate to comply and grow. The final Regulatory advice has been framed to help providers and constituent institutions navigate their duties. For example, the Regulatory advice provides examples of 'reasonably practicable steps', including the mandatory code of practice on freedom of speech. We have also been clear about areas where the new duties do not apply to providers' and constituent institutions' activities, for instance in relation to transnational education. We believe that this advice will support providers and constituent institutions to comply and grow.

20. Furthermore, we have set out in our final decisions and in the Regulatory advice that reasonably practicable steps can in many instances include negative steps i.e. refraining from certain acts. These are likely to be less onerous than positive steps. This will mean that our Regulatory advice ensures that any burden or cost incurred in complying with these duties remains proportionate.

21. Provision 2 states that regulators should provide simple and straightforward ways to engage with those they regulate and hear their views. We have run a consultation exercise on this guidance and have considered issues such as the impact on providers and constituent institutions in making final decisions on the Regulatory advice.

22. Provision 3 states that regulators should base their regulatory activities on risk. The final Regulatory advice offers guidance on the areas that may pose greatest risk to freedom of speech and academic freedom.

23. Provision 4 states that regulators should share information about compliance and risk. The final Regulatory advice sets out a number of examples (depending on the particular facts) in which providers and their constituent institutions may or may not comply with their relevant free speech duties. We believe this guidance includes helpful information about compliance

and risks to compliance. This provision also states that regulators should share information where the law allows. We believe that publishing the final Regulatory advice will assist organisations such as the Office of the Independent Adjudicator (OIA) in considering free speech complaints made by students. We will also consider, where appropriate, developing ways of co-operating with the OIA.

24. Provision 5 states that regulators should ensure that clear information, guidance, and advice are available to help those they regulate meet their responsibilities to comply. In framing the final version of the guidance and examples, we have sought to provide clarity and an appropriate level of detail. This gives transparency while being clear that the application of the relevant duties is likely to be highly fact-sensitive. The final Regulatory advice will help providers and their constituent institutions to that end, having considered responses to the draft version.

25. Provision 6 states that regulators should ensure their approach to their regulatory activities is transparent. This consultation decision document provides transparency on our reasons for taking the decisions that we have taken. Our final Regulatory advice gives transparency on a range of issues that we consider to be relevant for providers in relation to their duties . The revisions to the regulatory framework also provide transparency on how the Act influences the regulatory framework.

Public sector equality duty

26. We have given due regard to the aims of the PSED under Section 149 of the Equality Act 2010. This duty states that the OfS must in the exercise of its functions have due regard to the need to:

    a. eliminate unlawful discrimination, harassment, victimisation and any other conduct that is prohibited under the Equality Act 2010;

    b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

    c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

27. We accept that the exercise of freedom of speech may sometimes cause offence. We also accept that this may mean that some people with protected characteristics may consider themselves negatively affected by lawful expression that they find offensive.

28. However, our starting point is that securing the freedom of speech through open debate can and does advance equality of opportunity and foster good relations between those with protected characteristics, including those with the protected characteristic of religion or philosophical beliefs, and those who do not share those characteristics.

29. We accept that an increase in the freedom with which ideas are expressed has the potential sometimes to increase tension. It is unlikely that open debates on sensitive issues will always be conducted in ways that foster good relations between those who share a protected characteristic and those who do not.

30. However, we consider that in the long run, an atmosphere of openness around contentious issues is likely to foster better relations between these groups than a prolonged period in which one side of any debate is suppressed. Open debates can provide opportunities to dispel myths about those with protected characteristics which can be a cause of discrimination, harassment, or victimisation. The alternative of potential censorship risks unintended consequences e.g. concealing tensions and fostering antagonism, which could lead to harassment or discrimination rather than fostering good relations.

31. We are also clear, and have made clear in this Regulatory advice, that prohibited conduct under the Equality Act 2010 is not acceptable and securing free speech does not mean allowing or enabling such conduct e.g. unlawful discrimination or harassment.

32. The decisions we made concerning the final Regulatory advice considered the responses from the consultation of potential unintended consequences for those with protected characteristics, and different types of student or provider. This is reflected throughout the decision document. For instance, we have strengthened the Regulatory advice on victimisation as a result of consultation responses, and we have given greater detail on individual examples (see, for instance, new examples 1 and 4 about the interaction between free speech and academic freedom and harassment) to avoid unintended consequences for people with protected characteristics.

Guidance issued by the Secretary of State

33. We are also required to have regard to statutory guidance given to the OfS by the Secretary of State under Section 2 (3) of HERA.

34. Guidance issued in May 2025 restated the importance of academic freedom in relation to the public interest governance principles.[31]

35. Guidance issued in March 2022 set out the government's view that it is essential for the higher education sector to uphold freedom of speech and for the OfS to regulate on free speech matters:

> 'Freedom of speech and academic freedom are fundamental principles which underpin our HE sector. Without action to counter attempts to discourage or even silence unpopular views, intellectual life on campus for both staff and students may be unfairly narrowed and diminished.' [32]

36. We consider that freedom of speech and academic freedom are fundamental to higher education. We consider that the final Regulatory advice will help providers and their constituent institutions navigate their free speech duties and will support effective OfS regulation of those duties in support of these fundamental principles.

37. The Secretary of State's March 2022 guidance also asked the OfS to find ways to communicate our expectations more clearly and ensure that regulatory burden is

[31] See Statutory guidance on freedom of speech commencement given to the OfS by the Secretary of State, June 2025.

[32] See: Guidance to the Office for Students on strategic priorities for FY22-23.

proportionate. Our final Regulatory advice gives registered providers and their constituent institutions clarity on:

a. the nature and importance of their legal duties relating to freedom of speech and academic freedom;

b. how they may comply with these duties, highlighting different areas and scenarios they may need to consider, as well as discussing other legal duties alongside this e.g. the Equality Act, the Prevent duty, and areas where the Act does not impose a duty to secure freedom of speech.