

# INDEPENDENT HIGHER EDUCATION

IHE response to the OfS consultation on their approach to regulating students' unions on free speech matters

March 2024

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

### ***Definition of a students' union***

While we understand that the OfS must use the definition of students' union proscribed in the Higher Education (Freedom of Speech) Act 2023, the language is complex and not aligned with a modern view of a students' union. Before compiling the list through their F3 powers, it would have been helpful for OfS to offer some guidance for the criteria used to determine if a student group fits the definition. This guidance is needed before a list is formalised.

The lack of clear criteria has already caused confusion for both providers and students. Several members remain unsure if they should have returned student organisations that may fit some aspects of the definition, but they did not feel fit all aspects of Part II of the 1994 Act. As SMEs they do not have the legal expertise to apply the definition, with little experience in students' unions themselves.

None of the students from IHE's Student Advisory Board were able to identify if the council, committee or society they were part of would meet the definition. None of the groups our SAB come from were charities or companies, and were formed for a very narrow purpose, either representation or social activities. The language in the 1994 Act is not student-friendly yet it will be the student leaders held responsible for any action OfS chooses to take against the group or organisation they lead.

### ***The case-by-case model***

OfS should publish the criteria it plans to use to consider if an organisation is a 'relevant students' union' for their purposes. IHE members and our Student Advisory Board are concerned that groups could become students' unions under the proposals in paragraph 50 of the consultation but have no transparency on the criteria used to determine this. We urge OfS to publish criteria, including if they plan to consider student groups from providers within the Approved Category as students' unions under paragraph 50: *"From time to time, we may receive information about an organisation that is not on our list of students' unions. In those circumstances, we propose to consider, on a case-by-case basis, whether the organisation is a 'relevant students' union' for our purposes."*

It is also unclear what action OfS will take if the organisation or group is considered a 'relevant students' union'. Will they be expected to have already been complying with the regulation which applies to students' unions? It is important that OfS consider their responsibilities under the regulators code to *"improve confidence in compliance for those they regulate, by providing greater certainty; and encourage and promote compliance"*. This must include confidence that they fall within the scope to be regulated, and for providers to be certain they are compliant in identifying the correct groups for the list, or acting to protect freedom of speech where no 'relevant students' union' is identified.

### ***Conflict with Prevent guidance***

The government's Prevent Guidance for Higher Education has a different description of a students' union: *"Student unions which are charitable bodies and registered with the Charity Commission are subject to charity laws and regulations, including those that relate to preventing terrorism."*<sup>1</sup>

This is a considerably different delineation of students' union to the criteria in the 1994 Act which do not require organisational structure, constitution, or articles of association, let alone charitable status. While there is an evident emphasis on cooperation within the Prevent guidance, it is clear that only those bodies with charitable status are considered a students' union with separate responsibility for Prevent.

The actions of student organisations who are not independently accountable for the Prevent duty are the responsibility of their higher education provider. This includes external speakers, events, and activities within the higher education provider or in an external venue but with the name of the student organisation or provider.

This creates conflict between the Prevent guidance and the OfS's framework to regulate students' unions in circumstances where the student organisation is not a charity. For example, if a student group on the OfS list of students' unions invited an external speaker to an event that the higher education provider considered may encourage terrorism, under the Prevent guidance it would be the higher education provider's responsibility to judge if they should provide a platform for that speaker. Yet, when that speaker complained about their invitation being rescinded, it would be the student organisation on the OfS list who was held responsible. Both the higher education provider and the students' union are responsible, but to different regulatory requirements. And both bodies could face consequences under regulation, despite making different decisions to align with the regulation they were required to meet.

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<sup>1</sup> <https://www.gov.uk/government/publications/prevent-duty-guidance/prevent-duty-guidance-for-england-and-wales-accessible#section-5-sector-specific-guidance>

IHE members are understandably confused if they are responsible for freedom of speech in activities led by the student groups within their provider, as they are currently responsible for Prevent activity according to the Prevent guidance. Should the two conflict, which regulatory requirement would take precedence? With only a single set of processes, for example external speaker policies, how can providers and student groups separate their decision making and responsibilities? We do not believe it is practical, in such small organisations, for student groups to be responsible for freedom of speech and not Prevent.

We believe it is best for both regulatory processes that those bodies who are not legal entities such as charities, companies or similar, should not be accountable for freedom of speech within the regulation, and instead their activities should be the responsibility of their higher education provider.

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

IHE members feel the guidance as described offers little to support the student organisations they feel OfS may include in their list. They would encourage OfS to consider a greater list of factors under 201L in the guidance, including where the student organisation does not have within its powers the ability to make decisions on that matter, including where it does not own or occupy space on a provider's campus or online environment, where it does not have access to independent funding, or where it is supported by staff wholly employed by the higher education provider.

We would also encourage guidance specific for providers who support their representative student groups, on how they can offer appropriate assistance to ensure the student group is compliant with the freedom of speech regulation.

While we understand that OfS must act separately in a complaints scheme, we do not consider this role to be in conflict with its role as a regulator offering guidance to ensure those it regulates can comply. It does so across several other areas, and freedom of speech should not be managed differently than student complaints on different areas related to the OfS's overall regulatory responsibilities.

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

We support a risk-based approach to monitoring students' unions and that OfS will not use a cyclical model, as this will not only reduce overall burden, but allow student organisations to act in ways reasonable for their individual circumstance.

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

We strongly encourage OfS to consider their interventions relative to the size, structure and funding of student organisations on the list of students' unions. We remain concerned that interventions could impose a monetary penalty on a student organisation without access to a bank account or funds.

Interventions, and even perceptions of interventions, may also irreparably damage the ability of student organisations to attract leaders, a situation many IHE members currently face. With small student populations, often with a majority of underrepresented student groups, students are unable to dedicate the time to lead student organisations, groups or associations. OfS should consider if their actions in pursuing their regulatory aims, may undermine student representation at these types of providers.

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

We consider it unreasonable for OfS to impose a monetary penalty for any student organisation which has no access to independent funds, or which qualifies as a micro entity as we believe this will cause student organisations within our membership to cease operating. It is important to our members that the student voice be protected and encouraged. It is likely that student leaders will not wish to form any organisation which may meet the definition should the regulation be considered a risk to individual leaders as they do not have an organisation with the size required to meet the regulatory requirements.

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

No.

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

No.

**Question G: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider, constituent institution or students' union or for any particular types of student?**

As noted above, we remain deeply concerned that OfS regulation of students' unions, clearly positioned for a traditional model of union, with funding for sabbatical officers, staff, and students' union space, will cause smaller student organisations to cease operation as they cannot resource the regulatory burden of this regulation. Without clear guidance for these student groups, the perception of regulatory burden itself also poses a similar danger.

Student organisations at IHE members are often led by students who are underrepresented across higher education, because IHE members have higher numbers of students from these groups. The ability of these students to be represented within the higher education provider's governance could be at risk if the regulatory burden of freedom of speech requirements is too high. We understand that it is not OfS's intention to act unreasonably in considering smaller student groups or bodies who may find themselves on the OfS list, or considered by OfS to be a 'relevant students' union' after the list is published, but the lack of clarity within the regulation and guidance on what OfS considers reasonable is likely to cause many student groups to reconsider their model and cease operating.

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

See above.

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

- We remain unclear how OfS expects higher education providers to manage two inter-linked regulatory processes with very different descriptions of students' unions and their responsibilities. Urgent guidance is needed that addresses the diverging definitions between the government's Prevent guidance and OfS's approach to identifying 'relevant students' unions.'
- It is unclear what role higher education providers have in supporting smaller student groups who may meet the definition, to comply with their regulatory responsibilities as defined by this consultation.
- It is unclear how OfS will approach interventions for a student group who is not on the published list, but OfS finds to be a 'relevant students' union' at a later date. It is also unclear if student groups of higher education providers within the Approved category can be considered a 'relevant students' union.'
- It is unclear how OfS will approach a 'relevant students' union' made entirely of students on apprenticeships, especially where all or the majority are employees of the regulated higher education provider. Their status as employees and as a 'relevant students' union' would conflict under the regulation.
- It is unclear how OfS will approach employees of the higher education provider who support a student group which finds itself labelled a 'relevant students' union.'
- IHE remains unclear if OfS has or intends to undertake an SME impact assessment of this regulation on SME students' unions given that this is a new group they are regulating. This is particularly relevant to approaches to interventions which involve fines or monetary penalties.

**Contact IHE**

- For more information, or to speak to someone about this consultation response, please email [info@ihe.ac.uk](mailto:info@ihe.ac.uk)
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