

INDEPENDENT HIGHER EDUCATION

IHE response to the OfS consultation on proposed regulatory advice and other matters relating to freedom of speech

May 2024

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?

We strongly encourage OfS to delay the implementation of the free speech duties, including those duties relevant to students' unions in the interest of fair, transparent and effective regulation. Implementation of the 'secure' and 'code' duties is not possible within the timeframe given, and the guidance provided is not suitable for most independent providers as it does not reflect their students, provision or governance. In publishing this consultation so close to 1 August 2024 implementation, OfS has placed providers and student groups in a very difficult position where governing bodies and student representatives must take steps which are "reasonably practicable" to secure and promote free speech without clarity on what those expectations are.

As we outlined in our previous response, the definition of a students' union has caused considerable concern amongst IHE members, as the representation models chosen by their students do not match the types of students' unions referred to in this guidance, nor the narratives surrounding the Higher Education (Freedom of Speech) Act 2023. As such, it has been difficult to support engagement with student groups on this issue, where these groups do not have the structures or responsibilities they see reflected in the guidance. IHE's Student Advisory Board raised concerns in the previous two consultations on this issue that they are still unclear if their group is a students' union, or what responsibilities they have.

IHE members are also concerned that the timeline for implementation will not allow them to work collaboratively with their students, to develop a code of practice or implement any changes to process to ensure the student group identified by OfS as the 'union' can meet the

duty, given that most students will not be present on campus between now and 1 August 2024. Most IHE members hold elections for their student representatives – which then form councils, groups or committees that they are now finding may constitute a students' union by the definition in the Act – in October or early November. They have a high turnover of representatives, with most not continuing after one year, and this is especially the case for shorter courses including Master's degrees or accelerated degrees. Any action taken now to support the student group identified to meet the duty will not be able to be approved by student representatives as they will not yet have been elected.

IHE members will face similar challenges moving their code of practice through internal governance structures as the proposals will not be able to meet expectations set by governing bodies for student and staff consultation, as well as any legal or regulatory advice they require. IHE members are already putting a considerable amount of resource into understanding what is "reasonably practicable" and developing a code of practice, however the guidance published on 26 March 2024 (four months before implementation of these regulatory changes) provided new information that they need time to process and, critically, agree through their governing body.

Most IHE members must also defer to their academic partners when considering many aspects of the code's duty, including admissions, appointments, complaints, and governance. Complex legal contracts must be managed and, most importantly, students should not be unduly impacted by required changes to policy and process. Students need to be given notice when these must change, and in some cases they will need to do so to meet the guidance proposed. Academic partnerships are intricate and require alignment between two sometimes very different institutions. OfS guidance will need to address expectations for academic partnerships, in particular where what is reasonable for the awarding provider may not be reasonable for the teaching provider.

IHE members will face unique constraints on the actions they can take to secure and promote freedom of speech, and these will vary based on their circumstances. OfS should ensure their guidance is clear that the code's duty can and should include transparency on where freedom of speech may be limited, or where the provider or students' union is unable to take action to secure or promote freedom of speech.

Examples that OfS could provide include:

- Partnerships: where HE providers are restricted in their policies or process by their partnerships with other universities, or funders.
- Professional accreditations: courses with professional accreditations often have codes of conduct for staff and students to work in their industry, such as health and allied health fields, religious ministry, legal professions, and education.
- Industry environments: some teach in industry environments which offer a unique experience to students but can mean that some activities such as guest speakers, protests, or certain types of expression are restricted.
- Student employees/apprenticeships: where providers teach only employees of theirs or other organisations and those relationships rely on matching the requirements of the

employer. We note the absence of any examples for apprenticeship providers in the guidance.

- Integrated students' unions: Where student groups qualifying, or potentially qualifying, as students' unions for the purpose of this regulation are not independent of the higher education provider and therefore do not have their own policies or procedures for many of the activities related to this regulation. They are likely to use the policies and procedures of their higher education provider and decisions on external speakers, events or student meetings are made by the provider.

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?

IHE welcome inclusion in the guidance proposed of different case studies and the recognition that providers may have different approaches related to freedom of speech based on their size, delivery model and available resources.

OfS should seek to publish additional guidance on what is unlawful, as the definition remains unclear in its application across different higher education environments. Interpreting free speech within the law is a difficult area, especially for those with little experience of challenge on the issue of free speech or academic freedom. The regulation itself will prompt more cases, as we have recently seen with the introduction of hate speech legislation in Scotland.

We strongly encourage OfS to take a supportive approach of providers in applying this new regulation. This is particularly the case for smaller and newer providers who have had limited experience of responsibilities for freedom of speech prior to OfS regulation. These providers have limited processes or expertise to identify what is unlawful, nor the relationships with law enforcement or legal practices to draw on support where needed. We urge OfS to consider the different history of freedom of speech issues, as well as the limited access to resources many small and specialist providers have to identify lawful and unlawful speech, when making decisions on regulatory compliance.

We remain very concerned about the extension of this regulatory approach to students studying under TNE arrangements, especially in jurisdictions with different definitions of unlawful speech. We urge the OfS to clarify as soon as possible what is expected of regulated providers where the definition of lawful speech differs between the UK and the home jurisdiction for the TNE campus/activity.

We urge the OfS to give more guidance and examples on the difference between harassment and unlawful speech, which is a particular concern raised by our Student Advisory Board and our Student Support Network. Our duties to equality law, and the OfS duties to support progression and success for underrepresented groups have been prioritised since our members registered with the OfS. It is unclear what may change under the proposed regulation. An example provided by one of our members teaching wholly online was where the provider implemented a code of conduct to online spaces to ensure students with protected characteristics and students with mental health concerns had a supportive environment to

share their latest work. This has resulted in an increase in activity from students in peer and student/staff online forums and an increase in retention of students with mental health concerns. In online environments it can be more difficult to control conduct. Would this code of conduct conflict with OfS's expectations to secure or promote freedom of speech, where speech which offends creates a hostile environment for students with protected characteristics and mental health concerns?

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.

We welcome recognition that the context and the particulars of a specific situation are crucial in determining the reasonably practical steps that should be taken to secure free speech.

We welcome more information in the guidance on what factors are relevant to the assessment of whether steps are reasonably practicable and recommend the following be considered for inclusion:

- effective and efficient use of resource (in addition to practical costs)
- risk level (where the risk to freedom of speech is low compared to other risks which could be increased)
- legal jurisdiction (for TNE cases)

An example would be where the risk of a particular aspect of a code of conduct (such as the requirement to act with integrity) could restrict freedom of speech is weighed against the risk that students could lose their work placement at a particular employer if that requirement is not clear.

The OfS should seek to publish further guidance on what they consider reasonable as soon as possible after the complaints scheme is opened. This guidance could include the most common steps by provider group and should include examples of reasonable steps across the provider groups identified in other OfS work, such as the financial sustainability report released recently. This guidance needs to reflect the most relevant cases for that group, as the current guidance suggests only the most extreme examples. The guidance should include more in-depth case studies, which include where particular processes or external reference points were used to support better decision making in other providers. The examples in the current guidance are too short to be useful in this regard – they are able to identify areas of concern, but not what is reasonable in different contexts.

There is one example we particularly disagree with that suggests providers should not recruit or continue scholarships from specific overseas governments where to do so may restrict the student's freedom of speech. We believe it should be considered reasonable for a provider to act in the best interests of a student, to protect their opportunity to study. Termination of contracts with a foreign government would have a negative impact on the student and the UK's

foreign relations. This is even more relevant where these scholarships currently offer the only opportunity for international postgraduate taught (PGT) students to bring their families while studying, following recent changes to immigration rules. Maintaining this route for students to study in the UK is important to the UK's global reputation and ensures better routes for students with family caring responsibilities to study in the UK.

We urge OfS to provide a case study where changing the provider's code of practice to include professional codes of conduct (or similar) are or are not considered reasonable, especially where all students at the provider study under a course by a single professional body.

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.

It is unclear where the legal duty for compliance stops when the registered higher education provider offers far more activity than higher education provision. For some IHE members, their higher education provision is a small aspect of their organisation, but to meet OfS rules the overarching body was registered. This includes charitable trusts where higher education is one of many charitable aims, such as the protection of the environment, specific art practices, or agricultural interests. It is not clear how far the responsibility to secure and promote freedom of speech reaches, and if it extends to areas outside higher education delivered under regulation including, for example, the provision of tourism services or agricultural festivals.

We would welcome further clarification if the OfS expects regulated providers to undertake a review of all areas listed in section 4. As noted above, the governance processes to review and address all areas in section 4 alone would take an academic year to complete to ensure changes did not adversely affect students during the course of their study. A review of all policies in these areas would also be considerably costly and require training to be completed before review. This is not possible in the timeframe given. If OfS has priority areas for this work they should make this clear as soon as possible.

IHE would welcome specific examples or guidance in the section on teaching, which are more likely to occur in technical or practical education. IHE members have specifically raised the concern where a member of teaching staff offers opinions or endorses value judgements outside of the context of the curriculum they were hired to teach, or where the one student exercising their freedom of speech subjects another student to detriment. Both examples given are not realistic for IHE members and don't reflect more modern subjects or teaching models.

Question 5: Do you have any other comments on our proposed Regulatory advice?

Many IHE members are specialist providers who cultivate a small academic community committed to their specialist subject in an immersive setting. The vast majority of students choose the setting as much as the subject, looking for a supportive environment of like-minded

individuals. Examples include providers who teach SEND education professionals, courses focused on addressing climate change, or courses delivered in an environment which allows those with specific religious beliefs to learn where they may otherwise not be able to access higher education. In all these cases, providers have made their mission, vision and ethos clear to staff, students and visitors. Those who do not wish to learn or teach in that environment are able to choose an alternative higher education provider.

Our members' main concern is that they would be penalised for preventing potential staff, visitors or students seeking only to disrupt their unique environments, to the detriment of their students and staff. It would not be in the best interests of the students and staff of that provider and could cause such reputational damage to a small and specialist provider to risk their long-term sustainability to offer staff roles or to agree to guest speakers who do not plan to act in the best interests of the staff and students committed to the institution.

Our members are also concerned they will be further penalised where their curriculum focuses on specific viewpoints or approaches, and this may not meet the OfS requirement to promote freedom of speech. Such providers have strong reputations for the specialism they teach and their academic community. OfS should make clear as soon as possible the possible implications of this new regulatory requirement on the independence of higher education providers to set their own curriculum. It is likely that this will create a further barrier to registration should OfS's regulatory advice intentionally or unintentionally limit the curriculum choices of providers.

This issue cuts across all of OfS proposals in this area and to the fundamental OfS general duty to protect student choice. IHE members with these specialist missions are willing to publish justifications for their approach and ensure it is clear to applicants, prospective students and possible visitors, why their approach to free speech may differ from a large multi-subject higher education provider. We would ask the OfS to be reasonable when considering the actions of specialist providers, and as soon as is practicable to provide clarity on their expectations in these cases.

Question 6: Do you have any comments on our proposed amendments to the OfS?

No specific comments.

Question 7: Do you have any comments on our proposed approach to recovery of costs?

In line with IHE's response to previous consultations on the recovery of costs, we agree with the recovery of some costs for investigations, but the OfS should seek to:

- have a clear process for notifying the provider when an investigation is open and that OfS will be accruing costs from that point
- ensure that any external organisations engaged in the investigation provide value for money and are reviewed for efficiency

- only recover the actual costs of the specific complaint in the complaints scheme – costs associated with running the scheme should be covered by OfS's operating costs
- establish clear acceptable methods of investigation and publish a list of costs associated with each method
- reduce the costs of investigation for micro and small providers, and students' unions to ensure that these costs do not impact the student experience at an individual provider
- allow payment plans where the costs of investigations are significant
- ensure all investigations are subject to a value for money review to ensure future investigations can reduce unnecessary costs.

We also urge OfS to review proposals for cost recovery and monetary penalties for smaller students' unions, where they have no bank accounts or independent methods of raising funds.

Question 8: Are there aspects of the proposals you found unclear? If so, please specify which, and tell us why.

It remains unclear what students' unions should do to secure and promote freedom of speech where they are not separate from their higher education provider and have little to no power over the processes outlined in the guidance.

It is not clear what providers or students' unions should do when there is a conflict between this guidance and the Prevent guidance.

It is not clear what providers should do when there is a conflict between this guidance and their equality duty or safeguarding processes.

It is not clear how to apply this guidance to the provision of apprenticeships, where the student may have freedom of speech restricted in several examples by their employer, who holds the contract with the higher education provider.

It is not clear how this guidance should be managed with regards to students under the age of 18 studying at the provider and subject to different restraints on curriculum, requirements with the Prevent duty, and safeguarding concerns. This includes those studying courses that would not normally be considered higher education.

It is unclear what staff this guidance should apply to, where staff are part of a larger organisation with little or no engagement with the higher education provision and whether the guidance applies across all aspects of their role.

It is unclear what activity is subject to this guidance where the higher education provision is only a small part of what the regulated provider does. For example, would the requirement to invite speakers include where the provider runs a festival on the estate where the provision is based?

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?

IHE believes that the objectives of this consultation could be more efficiently and effectively met by delaying the implementation of the proposals for a further year, and delaying this consultation until OfS has fully considered the sector's response to the previous consultation.

Question 10: Do you have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics?

IHE members often offer education which supports specific learners with protected characteristics to access higher education, including students with disabilities, students of particular faith or belief, and older students. These specialist environments are critical to their access to education. OfS risks removing access to these higher education providers, and particularly their specialist environments, through the implementation of some aspects of this regulation and the lack of clarity in others.

For example, the guidance suggests that providers with clauses that require applicants to adhere to the specifics of a particular religion may be failing in their duty to secure or promote freedom of speech. However, removing this clause may mean that students who choose this specialist provider because all staff and students respect their religious codes may mean that this student cannot access the education they seek due to their religious beliefs. The staff member can choose to teach at another institution, but for some students this is their only opportunity to learn in an environment in line with their religious beliefs.

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?

IHE has serious concerns that this guidance will reduce the desire of students to take roles in student organisations if they have to undertake the additional burdens outlined in this guidance. There is little desire from students at IHE members for students' union models from the traditional sector, with sabbatical offers with the time to train and understand this duty, and staff to guide them. This could act as a serious deterrent.

We are also concerned that the cost of this duty, along with the risk of monetary penalty and costs for investigation will have a serious impact on the ability of micro or small providers to deliver the student experience. These funds come from student fees and as such will be taken from students' experience if they are demanded by OfS.

Apprenticeship providers are seriously disadvantaged by these proposals; as it is, this guidance is not suitable for these environments.

Contact IHE

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