

DRAFT Response to OfS Consultation the OfS's Approach to Regulating Student Unions on Free Speech Matters

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

No comment – this is as required by HERA.

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

We suggest that the proposed guidance at Annex B is further developed to include more detailed information on all aspects of the free speech duties, including the boundaries of free speech. Relevant students' unions are expected to have an '*accurate understanding of the boundaries of free speech*'. In our view, this necessitates an up-to-date understanding of a range of complex legal areas, including criminal, human rights and equality law, and the ability to make a correct assessment of when speech is likely to be unlawful. We are concerned that many students' unions will not have this knowledge and skill in-house and nor will they have the resources to pay for external advisors. Relevant students' unions will therefore be heavily reliant on the guidance provided by the OfS, which we suggest should include many hypothetical examples to aid understanding. We consider that there is a serious risk that a lack of knowledge and understanding, coupled with fear of breaches and potentially onerous consequences, could in fact lead student unions to reduce the number of events held so as to limit potential exposure, inadvertently curtailing freedom of speech. Therefore, clear guidance is vital to try and reduce this risk.

The Guidance should also set out clear expectations on the extent of the role universities are expected to take in helping their student unions understand and adhere to their freedom of speech duties.

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

There are a large number of activities that take place within (or associated with) students' unions that have the potential to engage free speech duties, including political society meetings, events, clubs and protests. We think that there is a high risk of over-reporting by relevant students' unions, especially if guidance from the OfS remains limited. We are also very concerned about relevant students' unions capacity, resources and ability to monitor its activities for freedom of speech compliance. Additionally, we consider that the proposed 10 day time frame to be unrealistic, and consider that Student Unions could decide not to run events rather than have to potentially report within this window. We suggest that the timeframe be extended to either 30 days, or as soon as reasonably practicable.

We request that it is clarified what response a relevant students' union will receive from the OfS when it reports an event or matter, and the timeframe for receiving any response. We envisage scenarios where a student union has reported an on-going matter and is waiting for a response from the OfS before taking a decision about whether an event can proceed. We propose that there should be a duty on the OfS to respond to reports with an initial view not less than 7 days before the proposed event, to give Student Unions the opportunity to postpone the event if there is a high risk.

It is not clear whether the OfS will inform the associated HE provider when an intervention or monetary penalty is applied to a relevant students' union. We request that the HE provider is informed by the OfS, or alternatively an obligation is placed on the student union to report an OfS intervention or monetary penalty to the HE provider.

We are also concerned that there is insufficient clarity over reportable events, which will be part of the OfS monitoring of student unions yet are the responsibility of the HE provider. Synergy is needed between the students' union and the provider in relation to this, and we consider the Rules should make clear that if a Student Union reports a matter to the OfS, it must also be obliged to inform its relevant provider. We recommend that the OfS provide greater clarity on the expectations that it has on providers in relation to reportable events for freedom of speech which concern student unions.

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

Given the legal complexities around free speech and the limited resources and finances of students' unions to support the assessment and monitoring of compliance with free speech duties, we strongly believe that monetary penalties should be imposed only as a last resort. We suggest that the primary objective should be to support Student Unions in understanding and complying with their freedom of speech duties and propose that monetary fines are only imposed where: (a) a relevant student union has been put on notice by the OfS that it has seriously failed to comply with its free speech duties; and (b) has failed to put this right within a reasonable time without reasonable excuse.

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

We are concerned about the potential levels of monetary penalties and students' unions ability to pay these fines. We are concerned about students' unions potentially going into debt to fund these penalties and that significant fines could lead to the closure of students' unions.

If the intention is to base the assessment of monetary penalties on the Regulatory advice 19, then we request that the maximum penalty be lowered substantially from the £500,000 figure set out in Regulatory advice 19.

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

None.

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

We are concerned, given the limited expertise and resources within students' unions, that minor and inadvertent breaches of free speech duties will occur, especially in the early years of regulation. The publication of these investigations and other information may have a significantly damaging effect on the reputation of students' unions and their HE provider, who the public often regard as one and the same. With this in mind, we request that the OfS take a cautious approach to the publication of information, especially in the early years of

regulation. We also invite the OfS to conduct a review of the scheme after 12 months, consulting with providers and Student Unions on its effectiveness.

We think that there should be an obligation on the OfS to inform the relevant student union and associated HE provider in advance of the publication of a decision or other information, and a requirement to consider any representations made by the students' union or HE provider.

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?

We consider it likely that relevant students' unions will want to seek legal advice on their compliance with the freedom of speech duties and on individual freedom of speech matters as they arise. Doing this will add to the financial burdens on relevant students' unions. We are also concerned about the financial burden of penalties imposed by the OfS as discussed elsewhere in our response.

We consider that there is a risk that these obligations may inadvertently close down freedom of speech if relevant students' unions decide that the burden of potential reporting obligations and lack of resources leads them to limit activities and events.

Noting that the Charity Commission is the primary regulator of Student Unions, we request that the OfS engages with them and that joint guidance and advice is issued to ensure that the Student Unions meet both their regulatory requirements from the Charity Commission and their reporting obligations to the OfS.

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

We would recommend that an equality impact assessment be carried out on all aspects of these proposals.

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

Please see comments on specific proposals.

We are unclear whether an intervention (which we understand is either a voluntary undertaking or monetary penalty) does or doesn't require an investigation first. We request clarification of the interplay between interventions and investigations.

Generally, greater consideration needs to be given to the relationship between the Student Unions and their relevant HE provider, who in practice work closely together. For example, clarity is needed about notification obligations when a complaint is made/received and whether (as we suggest) providers will be invited to make representations.

Additionally, we are unclear whether a relevant students' union has any right to appeal/ review the outcome of an investigation. The only explicit right of appeal referred to is in relation the

monetary appeal process to the First Tier Tribunal. We request that there should be a clear appeal process against an outcome with timeframes indicated