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

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 are surprised that the OfS has omitted to issue advice and guidance on the "promote duty". We consider that it would assist Providers to understand what the OfS would expect from Providers to satisfy this duty. We would welcome advice on this as soon as possible, with examples of the types of complex situations Providers can encounter to support the advice.

At para 10 of the Regulatory Advice 24 ("the **Advice**") it states: *"the OfS expects that in a wide range of circumstances it will be reasonably practicable to take many of these steps".* This implies that if the suggested steps are not followed that the OfS is likely to consider a Provider has not met the requirement to take reasonably practicable steps. We consider that this baseline is too simplistic and could potentially lead providers to take steps simply in order to meet this expectation, but which are in fact not required in the circumstances. We suggest this sentence is deleted.

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?

We are very concerned about the misstatement of the law and the potential impact and effect of paragraph 13 of the Advice which states: *"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. This includes (for instance) provisions of the Equality Act 2010 prohibiting discrimination. It also includes common law on confidentiality and privacy."* We suggest that this is an incorrect expression of the law and misstates the meaning of freedom of speech "*within the law*". Most Providers operate as public authorities, and are therefore subject to the responsibilities and rights of the Human Rights Act, which incorporates the European Convention on Human Rights (ECHR). Under Article 10 of the ECHR, it is clear that in fact there can be interference with freedom of speech if it is in accordance with the law. This includes lawfully made policies (such a disciplinary and grievance policies) and contracts (including contracts of employment and with students).

The OfS' interpretation could have a number of wide ranging consequences, which we suggest are unintended. We are concerned that if, for example, an academic member of staff was found after investigation to have bullied another member of staff it would mean that a Provider could not take disciplinary action if the bullying conduct was not a breach of the Equality Act 2010 (because, for example, it was not related to a protected characteristic) or a criminal act (for example, violence or inciting violence). We also consider that it could have the perverse effect that Providers could not require teaching materials to be accurate or relevant, or take disciplinary action against staff or students who bring the University into disrepute. We suggest that this paragraph is re-drafted to be compatible with the ECHR.

We consider that the Advice must expressly address the scenario where employees/students are engaging in offensive, degrading or offensive speech that is NOT a breach of the Equality Act (i.e. discriminatory), but is, in the reasonable opinion of the employer, in breach of either a Code of

Conduct and/or University Policy and/or the implied term of trust and confidence. Very often such speech or conduct will not be concerned with academic subjects or issues, nor be related to a protected characteristic or belief; for example, an employee could use degrading language to describe single parents. This is not a protected belief, but could nonetheless cause offence and distress, and breach a University's 'dignity and respect' (conduct) policy. We suggest clarification is required as to whether disciplinary action in situations such as this would, or would not, breach free speech duties.

The Equality and Human Right's Commission's 2015 Freedom of Expression Guidance states that freedom of expression does not protect workers from disciplinary action arising *either* from a breach of the Equality Act *or* of the employer's policies. The case of *Webb v London Underground Ltd (2021*) is authority for University codes of conduct and policies lawfully placing limitations on freedom of speech where they have been incorporated into employees' terms and conditions of employment and are clearly set out and accessible. We believe that clarification is required on how the OfS will approach free speech compliance where the University takes disciplinary action in this scenario, as requested above.

At para 15 of the Advice the OfS has stated "*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*". However, the Guidance offers little help in navigating the complex intersection between speech which may be offensive or hurtful, but nonetheless lawful, and when the speech has "crossed the line" to constitute unlawful harassment, or incitement to hatred or violence. The Advice itself (together with the examples contained within it) offers little assistance in determining when it is proportionate to interfere with free speech in order to prevent harassment.

Further, although para 16 states that *"Universities and colleges must comply with equality law*" no mention is given to the complexity of this law, nor any latitude which might be given in recognition of this, nor to the numerous cases currently going through the tribunals and courts concerning allegations of breaches of the Equality Act, some of which will set binding legal precedents. The OfS fails to acknowledge in its Advice that this area of law is fast changing, and it would assist Providers and Students Unions for the OfS to confirm that it will not retrospectively apply the law to decisions taken before the law was changed, either by statute or binding precedent.

At para 17, we think the OfS should be clear that other forms of unlawful practice exist (for example victimisation and discrimination arising from disability) – it is not just limited to direct or indirect discrimination.

We consider that paragraphs 18, 19 and 21 misstate the law. For example, Paragraph 21 mis-states the law on harassment: "*because of*" is not the applicable test. Whilst we note that the OfS has invited respondents to comment on any aspects of the law which they consider are incorrect, we do not think that the OfS should rely on responses received to inform its revised draft. We consider that the OfS should obtain independent legal guidance from Counsel to ensure that its Advice is legally accurate, so that Providers and Student Unions can be confident in their reliance upon it.

At para 30 of the Advice the OfS states "*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."* The legal test for harassment remains that set out in section 26 Equality Act 2010 and we are concerned that the OfS appears to be overlooking this test and potentially misleading Providers in stating that conduct by academics will only amount to harassment in "*exceptional circumstances*". In our view this is not correct. In addition, no guidance is given on

what the "*exceptional circumstances*" might be, which are likely to be the most complex and borderline cases where Universities may feel that the exercise of academic freedom is in fact unlawful harassment, and unacceptable. It would be helpful for the OfS to address the potential conflict here between the right to exercise free speech in controversial areas, and when this could constitute harassment and breach a Providers' EDI policy, with examples. Additionally, distinguishing between speech in academic context and personal context is not always straightforward. It would be helpful, for instance, to have guidance on social media use and when the OfS consider the distinction sits between personal social media use and social media use in an academic context.

At para 31, the OfS has noted the context of "*the importance of free speech and academic freedom*" but we consider that the PSED duty requires providers to consider all matters relevant to a decision, and to then accord appropriate weight to equality considerations (see R (Bracking) v Secretary of State for Work and Pensions – "The duty to have due regard obliges a public authority to consider relevant matters that may affect a decision, then decide what weight to accord to the equality considerations. The level of due regard considered sufficient in any particular context depends on the facts."

Finally, there is a focus on "speech", but "conduct" is omitted – and conduct can materially contextualise speech and potentially change lawful speech into unlawful harassment through the manner and circumstance in which it is delivered. Again, the OfS has not addressed this.

Throughout the Advice the OfS refers to "steps" but other than in the examples, gives very little practicable indication of what these actually are, and in particular lacks positive advice of steps that create an atmosphere and environment in which free speech is secured. E.g. the Advice states at para 33, 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 'secure' duties and the PSED".* It would assist for the OfS to set out what it considers these steps could be, to encourage that environment.

We request that the OfS must particularly address when freedom of speech can be lawfully interfered with and set out further advice on the complex interplay between the different legal obligations and duties. We also consider that the OfS should directly address more of the complex contemporary contentious issues which Providers are facing on campuses (including, for example, the war in Israel-Palestine), as well as the scenario when free speech breaches a Provider's lawful internal policy, which could give rise to disciplinary action, in order to give meaningful guidance.

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.

A theme throughout this Advice is that many of the examples are so clearly a breach that it is manifestly obvious, and they are therefore of limited value as guidance. The OfS has avoided the complex and most challenging types of scenarios that can arise in favour of overly clear and/or simplistic ones. This means that the Advice gives Providers very little help, whilst constraining them to follow the "steps" which the OfS said at para 10 it considers will apply in "many" situations. This is particularly concerning given the potential financial penalties that Providers may face if they get free speech matters wrong according to the OfS's determination. For example, if a death threat is made, and there is evidence it could have come from students, then it is highly likely that a Provider would choose to investigate, unlike the scenario in example 2. A more challenging scenario, which the OfS has not explored, is the outcome of that investigation e.g. if no disciplinary action is taken, or action

is considered inadequate? Would a failure to take disciplinary action against students amount to a failure to secure and/or promote free speech in this scenario?

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.

NOTE: we have not carried out a legal assessment to ascertain whether legal duties apply, and in any event consider this would be difficult given the brevity of the examples and lack of context.

Admissions, Appointments, Promotions & Employment

Admissions

The OfS should expand on para 44 when it states Providers *"should be proactive about checking that those applying to be visiting academics do not pose risks to academic freedom".* What "proactive" checks does the OfS envisage providers should take? The Advice has not given Providers any steer on how to develop guidelines to assess whether visiting academics could pose a risk to academic freedom, and the type of scenarios in which the OfS envisages that a visiting academic could pose a threat to academic freedom, nor is there any guidance on proportionality. The potential wider benefits of encouraging visiting academics from countries with governments that restrict free speech and exposing them to a different set of values (including the values of academic freedom and freedom of speech), as well as hearing first hand of their experience, is also unmentioned. We are also concerned that refusing or rescinding an offer to a visiting academic based on their posing a threat to academic freedom is, in itself, a potential restriction on that individual's academic freedom and/or free speech.

Many students (& visiting academics) come to the UK on scholarships funded by their home country, some of which are regimes which restrict free speech and academic freedom. In Example 3 it appears that the OfS is suggesting that Providers must be obliged to check individual recipient agreements to ensure that there are no restrictions on free speech, and also ensure in scholarship agreements that the funder will not enter into any other agreements with the recipient other than ones disclosed. Clarification on this would be helpful, as to exactly what steps the OfS envisages a Provider must take.

Furthermore, we are concerned that the amendment or termination of the scholarship agreement as a suggested reasonably practicable step in this example might in fact constitute direct or indirect race discrimination against nationals from specific countries, or effectively institutes a boycott (and "cancellation") of academics from particular countries. We request that the example explicitly addresses this issue and that the OfS provides guidance on this point.

Scholarship agreements might also be signed by international students in order to receive the funding; however this does not necessarily mean that the scholarship agreement represents the views of those students. Indeed, in seeking to study abroad they are likely to be open to considering different ideas outside their own country, therefore pragmatic agreement to the terms by a student does not necessarily mean they would consider themselves to be bound or, even if they were, that it would impact on free speech in England. It is unclear how a student or visiting academic would negatively impact academic freedom or free speech of others at their Provider, and in the UK they would, for example, be free to advocate the views of their country's ruling party, even if others found these offensive, providing that they were lawful views.

Finally, we consider that there is an inference in Example 3 that the principles of a ruling party should not be challenged. How is a Provider to assess this? Are Providers to review all materials provided to recipients in their home country about scholarships? We would welcome suggestions from the OfS on the reasonably practicable steps Providers will be expected to undertake in due diligence.

Appointments

At para 47, we request that the OfS provides examples of the "*evidence*" required in the "*sufficiently detailed record*" that a candidate was not penalised for exercising academic freedom? Similarly, at para 55 states that "*any process of dismissal for a member of academic staff should include a sufficiently detailed record of all decisions.. [which]…should include evidence that the process did not penalise a member of staff for their exercise of academic freedom*." Again, we are not sure what evidence the OfS would require. Much greater clarity is needed, with examples of "evidence" that will meet this threshold, and how long the evidence needs to be retained.

Example 4 is a scenario where a Provider part-funds a commercial entity in foreign country C and staff recruited to this entity are subject to an ideological test. It is unclear how the OfS envisages that this test would come to the Providers' attention. Does the OfS have an expectation that the Providers should ensure they have an understanding of the recruitment processes undertaken by such commercial entities in other countries? The OfS needs to clarify this.

We note that in Example 4 the OfS considers it is "*likely"* to be reasonably practicable for a university to terminate a partnership and close down an institute where the appointment of staff in that institute involves an ideological test as part of the appointment process managed by a foreign country for a proportion of staff at the Institute, on the basis that this "*may"* restrict freedom of speech and/or academic freedom of university staff and students. We are concerned that this "reasonably practicable step" would significantly impact staff and students at the institute and is a simplistic suggestion to a highly complex situation. We would welcome consideration of other reasonably practicable alternatives to closure.

Furthermore, we request the OfS clarifies whether – to satisfy either the secure or the promote duty - Providers will be expected to oversee appointment processes overseas and/or obtain ongoing assurance. We are concerned that this may in be unacceptable to overseas commercial entities and have the effect of limiting international partnerships, even when no free speech issues may arise.

Example 5 is unhelpful and unrealistic. We cannot conceive of such a situation unless it relates to an expectation regarding equality, diversity and inclusion, in which case it overlaps with Example 10. It also suggests that no Provider can support "*political theories*" of any nature, for example the IHRA working definition of antisemitism (which many UK Providers do indeed adhere to, as we believe does the OfS). The OfS's meaning of "*political theory*" is not clear and does not seem to conform with its ordinary meaning in academic thought and practice.

We also consider that Example 5 will require Providers to introduce additional checks to approve the text for adverts and job descriptions to ensure that no requirements are potentially included which could potentially disadvantage candidates for exercising academic freedom. Adverts and job descriptions are prepared by line managers with the subject expertise, and they will require guidance and training in order to ensure that no adverts inadvertently require applicants to commit to any values, beliefs or ideas, if that may disadvantage them. It will also require checks before going live and an additional administrative burden on Human Resources departments.

The OfS also needs to confirm whether a Provider's explicitly stated institutional "values" are ones which it is still acceptable to ask applicants to demonstrate, or whether this could now potentially be considered a disadvantage – for example, demonstrating support of a value of "inclusion", "openness", or "internationalism". Under this guidance, is it no longer possible for a Provider to articulate institutional values and behavioural expectations of staff and students? Please can the OfS provide clarity on this point.

The OfS also needs to address the more likely scenario that academics of certain viewpoints or theoretical persuasions might potentially be dominant in a department and that this, in itself, could prove a barrier to applicants (or promotion). This is where guidance on the "promote" duty would also assist Providers, for example to clarify that the OfS does not envisage a form of positive discrimination (appointing a less able candidate of a different viewpoint over a better qualified candidate of similar views) to promote diversity of academic views.

Employment

We are concerned about the language used at para 50. Whilst some views might be manifestly lawful, and therefore it would be correct for Providers to "*promptly reject*" public campaigns to discipline/dismiss staff for lawfully expressing their opinion, we are concerned that this is again presenting a complex area in a simplistic way. Identifying whether a view is lawful is not always straightforward, or quick, depending on the circumstances. In particular, there are challenges delineating between speech which is offensive but lawful, and speech which is unlawful harassment. We agree a response must be timely, and prompt, but "promptly rejecting" campaigns and calls for dismissal could also lead to its own restriction on freedom of speech, reducing lawful protest and challenge.

We consider that it is important that statements which emphasise the importance of freedom of speech and academic freedom should be given when there are campaigns, but also that Providers should not feel pressured into reaching instant judgments as to whether in fact a student or staff member should, or should not be disciplined, or even dismissed, and that a process must be followed to reach a fair outcome.

We are concerned that providers will feel pressured to use the sample wording in example 7. Rather, guidelines (not quotations) on the type of appropriate statement should be given. The "other steps" should also be given as examples, without any obligation, as it will depend on the circumstances.

The OfS has identified a controversial area in example 8, but again it is far too simplistic in our opinion and highly unlikely that a Provider would take this step. It undermines confidence in the OfS's Advice to use examples like this and demonstrates that it is of little value as a toolkit to help Providers and Student Unions navigate a complex and evolving areas of law.

We would, for example, welcome an example where a lecturer with pro-abortion views articulated these forcefully in a teaching session, to the extent that students who held pro-life views complained that they felt unable to give their own opinion and, should the Provider uphold subsequent complaints and follow the staff disciplinary policy, what the OfS considers would be reasonable and practicable steps to be taken.

Similarly, whilst the OfS stresses (para 30) 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*". As outlined earlier, we have concerns that this guidance is not consistent with the legal test for harassment under the Equality Act and it would be helpful to have

guidance from the OfS on when controversial views in an academic context could tip into "*exceptional circumstances*" and also, if they are given in a personal context (as in example 8), whether it could be reasonable and proportionate for a Provider to seek to interfere with the expression of those views.

At paragraph 53, the OfS could assist Providers by giving examples of what it considers the reasonably practicable steps to be, rather than re-stating the law.

At paragraph 55, the record of a decision to dismiss a member of staff is usually found in the minutes of a disciplinary hearing and in the disciplinary outcome letter. It would be helpful for the OfS to provide guidance or examples about what would constitute *"evidence that the process did not penalise a member of staff for their exercise of academic freedom".*

The OfS, throughout the Advice, is avoiding the tension which exists between the need to have particular regard for freedom of speech, and also the right for others not to be unlawfully harassed. We would welcome the OfS providing greater clarity on the distinction between free speech which causes upset or distress, but is lawful, and speech on the same subject area that crosses the line into unlawful harassment. This is particularly pertinent when Providers are expected to protect students from harassment.

<u>Promotion</u>

With regard to para 57, is the OfS prepared to give examples of what it would consider to be reasonable practical steps for a Provider to take to ensure that an applicant for a promotion is not disadvantaged through exercising academic freedom – this is unclear from the Guidance.

The University has a set of institutional Values, which we ask all staff to consider (collaboration, integrity, inclusion, courage and kindness). In our annual review process, we ask all staff to reflect on how they have upheld the University values in the past academic year (we do not require staff to state that they adhere to them, and we also ask staff to reflect on how they have upheld and/ or experienced academic freedom and freedom of speech). Similar to our point in relation to example 5 above, we invite the OfS to confirm that institutional values will not fall foul of paragraph 58 in which the OfS states that Providers *"should not require applicants for academic promotion to commit…to values, beliefs of ideas*"?

Example 9 may be considered a reasonable means of achieving a legitimate and indeed a regulatory aim (e.g. closing the attainment gap), and we are unsure how this sits with a Provider's duty under Regulation A1, to take all reasonable steps to comply with the approved Access and Participation Plan. We consider that, where an approved APP is seeking to improve outcomes that it should not be unlawful for a candidate to demonstrate how they have sought to advance this, irrespective of their own beliefs, which they are still free to hold and articulate We invite clarity from the OfS on this point. We also posit whether, in example 9, it would be a reasonably practicable step to adjust the wording to demonstrate commitment to advancing "*equality*" for example, rather than "*equality of outcome*"?

We are also concerned that Example 9 effectively means that a Provider cannot risk asking a candidate for academic promotion to submit a statement advancing any concept, idea, theory, value etc. where there are contrary views, in case the academic holds such a contrary view and they 'may' feel deterred from expressing this view. This example is likely to have a stifling effect on Providers. We are concerned at para 59 and the requirement that: "*Any academic promotion process should include a sufficiently detailed record of all decisions. This record should include evidence that the*

promotion process did not penalise a candidate for their exercise of academic freedom". What "*evidence*" does the OfS envisage is required (at para 59) to evidence in a promotion record that the process did not penalise a candidate for exercising academic freedom? How is a Provider expected to assess this? What timeframe does the OfS envisage Providers must keep records for? It would also be helpful for the OfS to expand on what it considers, at para 60, "adequate" training to constitute and whether it will be offering such training.

Finally, we would also find it helpful for the OfS to provide an example of a promotions Panel coming to a decision about a promotion case, the training they have received, the reasonably practicable steps they take and the evidence they provide that they have done so.

Codes of Conduct

We agree that it is important that policies, codes and other statements should not discourage lawful speech by misrepresenting legal duties, and the procedures and regulations must not be unduly onerous and must not create unnecessary barriers to lawful free speech.

At Example 10, we reiterate our queries over far less obvious forms than a contractual *"commitment to political theory X"* set out above and emphasise that there is a need for clarity over the duty to "*promote*" freedom of speech. For example, if a number of 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. We are concerned that a promote duty could potentially influence a Provider's ability to recruit the best qualified, and able, staff it chooses. We would welcome clarification.

At Example 11, we would welcome comment from the OfS on steps other than "*removal*" of a blanket rule; for example, there is a significant difference between deliberate misgendering which causes offence, and accidental and unintentional misgendering. As emphasised by the Employment Appeals Tribunal in the *Forstater* judgment, there are circumstances when misgendering can, depending on the circumstances, amount to harassment and/or discrimination. We would welcome an example of a situation where a staff member holding gender critical beliefs is exercising their freedom of speech and will not use preferred pronouns. It would be helpful for the OfS to address this issue.

At Examples 15 & 16, the OfS has again given a manifestly obvious example of something which would be unreasonable and suggests re-writing the regulations. It does not, however, suggest what "re-writing" it would consider to be reasonable. Moreover, there might be occasions when, having followed process and conducted a risk assessment, a Provider or Union determines that a protest will not be permitted. An expansion of when the OfS considers this could be "*exceptional*" and within the law would be helpful.

<u>Complaints and Investigation Process</u>

We are concerned that the emphasis being placed on a "*rapid*" triage system could lead to complex cases being given incorrect investigation over pressure to be seen to reach "*rapid*" outcomes. We think it would be helpful if the guidance recognised that complaints about speech will often need to be investigated to determine whether, for example, the speech complained about was the exercise of academic freedom or whether it crosses the line into unlawful harassment. These are often difficult determinations, sometimes requiring legal advice, and the emphasis on responding at pace does not take sufficient account of this. Whilst our grievance procedure does include a form of

triage procedure, in our experience, most complaints do require some level of investigation before decisions can be taken.

We are unclear why, in the example given in 17, the OfS considers that the anonymous online portal could potentially discourage free speech and should be removed or replaced – could the OfS expand on its reasoning? We consider that there can be advantages to anonymous reporting, and that it can promote free speech. Additionally, it would be helpful if the OfS expanded on what it considers "*a reporting mechanism which would not have this effect*" (i.e. of discouraging open and lawful discussion) would look like, including potential appropriate wording to be included in such a portal that would not discourage open and lawful discussion.

We have an anonymous portal where students can air their concerns, including about freedom of speech, without fear of identification in order to encourage students to report issues. Example 17 states that the portal in the example could "*discourage open and lawful discussion*." It is not clear to us how the portal would have this effect and greater clarity on this is required. We consider it is important that students have vehicles in which they can report issues, including "problematic" speech which they may find harassing, offensive or discriminatory.

In regard to example 18, the University considers that it is important to investigate matters when a complaint is made. We operate within regulations and best practice guidelines and are not sure when it should be "clear" at the outset that a matter should not be investigated, although we do recognise that there might be some very limited circumstances in which this would be apparent. However, there would be a risk to a Provider if it closed an investigation quickly – or did not open one at all - that it could be considered that the Provider did not investigate sufficiently. We believe that in almost all circumstances it is necessary to investigate a complaint, even if that investigation is quick and short, before concluding that there is no case to answer, rather than making a decision and dismissing a complaint without any investigation at all.

<u>Free Speech Code of Practice</u>

As at other points, it would be useful to see suggestions from the OfS on how to promote a university community where lawful views can be discussed, particularly when those views can be offensive, controversial, and upsetting but not unlawful *per se*. This underscores the need for guidance on the promote duty in tandem with guidance for the secure duty, which is particularly important for the Code of Practice.

<u>Values Relating to Freedom of Speech</u>

We are pleased that the OfS has acknowledged that Providers, constituent institutions and Students' Unions are well-placed to articulate for themselves their values relating to free speech and academic freedom.

It is important that Providers do not feel coerced in adopting values in order to align with a regulator's and/ or government's viewpoint.

<u>Procedures and Conduct</u>

At para 86 c) of the Advice it states that *"if a speaker breaks the law, it is the speaker who is culpable"* – but how does this intersect with HERA? Does the OfS envisage any culpability for a Provider or Student Union if they invite or permit a speaker even if it is known to them the there is a high risk that the speaker might break the law?

We agree that "*protest must not shut down debate*". If therefore, it is felt that a protest is reasonably likely to interfere with an activity and shut down a debate where there is free speech within the law, would this be considered an "*exceptional*" circumstance in which to refuse permission for a protest to take place? If protesters continued regardless, and a Provider took disciplinary action against student protesters, would the OfS consider that this was upholding freedom of speech, or conversely, failing to secure it?

Generally, the Advice does not consider the complex intersection between lawful speech which is nonetheless offensive and in breach of a Provider's conduct policies. We would welcome clarification from the OfS on what steps it considers would be reasonable for a Provider to take where conduct and/or speech by employees or students is lawful but where the Provider wishes to discipline those employees/students under its own internal conduct policies.

Criteria for Security Costs

We agree that it is sensible to apply policy uniformly and also to have defined parameters on what would constitute exceptional costs.

We consider the example at 21 to be so obvious and directly discriminatory that it is of little value to Providers or Student Unions. We would consider it more valuable to indicate thresholds proportionate to income which the OfS might consider reasonable, for example.

Complaints Scheme

We have already commented on the complaints scheme in our response to the OfS's 'Consultation on the OfS's new free speech complaints scheme' published on 14 December 2023.

Governance

The statement at para 100 that *"Providers, constituent institutions and relevant students' unions should record all decisions that could directly or indirectly (and positively or negatively) affect free speech within the law. These records should demonstrate how the organisation has had particular regard for the importance of free speech within the law."*

This is both a confusing and potentially exceptionally onerous burden. The statement above is so broad, with the inclusion of the word "could", that it will lead to this consideration being recorded for a huge swathe of decisions. It is also unclear exactly what the OfS expects to be recorded, and how each record demonstrates the particular regard to freedom of speech.

The University operates under its Charter and Statutes which set out the institutional commitment to academic freedom and freedom of speech. All University decisions are made in accordance with these documents and under their authority. Replicating the commitment in all terms of reference and processes is duplication and not required. At para 101, we have a concern that this could be unduly burdensome as the variation of considerations on freedom of speech are so broad, as there are multitudes of decisions on matters that "*could directly or indirectly (and positively or negatively) affect free speech within the law".* Whilst decisions in some areas, such as Promotions Panels or approval of amendments to the Code of Practice, can be clearly referenced with delegations, we are concerned that issues which only indirectly in the loosest sense could affect freedom of speech duties could have additional layers of delegation imposed which could impede the day-to-day work of the University.

All institutional decisions could directly or indirectly impact academic freedom and freedom of speech; this statement is too broad for institutions to meaningfully comply with. It is likely that providers will add bureaucracy and undertake performative governance to provide evidence of compliance; this is not good governance and does not represent efficient use of resources. In addition, it represents a misunderstanding of how provider governance operates: minutes should not provide a verbatim record of decisions and how they were made. "Minutes" is derived from "minuta scriptura" meaning "small notes", so they should act as a summary not a transcript.

Research

No guidance is provided on grant funding, or partnerships. When receiving funding, academic researchers should not feel pressured or compelled to reach outcomes which could restrict freedom of speech. The OfS also do not address whether Providers should terminate arrangements if they consider there is a risk of interference with academic freedom, and how that risk assessment should be conducted.

This is lightly touched on in Example 29, on accreditation, but the example given is simplistic and one where academic freedom is likely to be constrained. A greater challenge is a scenario which is counter to the prevailing view - "the echo chamber" - and ensuring the academic researchers do not feel unable to exercise academic freedom for fear that this is unlikely to be successful in obtaining grants.

Speaker Events

The OfS has not given any indication of what it considers "timely" to be. We appreciate that the OfS will not want to be constrained by specifics, but it would be helpful to have an indication of what might be unacceptably long in an example, and what might be reasonable. Additionally, a list of factors which the OfS consider would be relevant in carrying out a risk assessment in order to assess whether an event can safely proceed would assist Providers and, in particular, Student Unions who have very limited resources.

At para 108 it would assist Student Unions if the OfS gave an indication of what it considers "*mitigating steps*" which enable a controversial event to go ahead could be.

Teaching

We do not consider Example 28 to be realistic or helpful. The OfS has not given any meaningful guidance on a key controversial area, decolonisation. As before, we would welcome the OfS giving examples which are more realistic and reflective of the controversial issues with which Providers and academic staff are dealing in the current moment.

Example 29 is more useful to Providers; however, it would also be helpful to have seen greater exploration of this in relation to other areas, including overseas partnerships, and research grants.

Training and Induction

We do not consider example 30 to be realistic or representative. We are interested to know whether the OfS is intending to produce training materials to assist Providers and Student Unions using

illustrative examples that mirror the complex, contemporary issues with which Providers and Student Unions must engage.

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

We note that the OfS has not issued Guidance on the "promote" duty. We consider that the interplay between the "secure duty" and the "promote" duty are so intertwined that it is erroneous to just limit guidance to the "secure duty."

We also note that the Advice does not reference the new condition of registration on harassment and sexual misconduct or the Prevent duty and associated guidance. There are potential tensions between the Prevent duty and freedom of speech obligations, which it would be helpful if this Advice could directly address to support Providers in balancing these obligations.

An area the OfS does not appear to have addressed in the Advice is around "echo chambers" – the criticism that universities and colleges are facing that there is homogeneity in institutions.

The OfS has also not issued any guidance on steps it considers could be taken to foster a positive critical culture and promote tolerance, openness, and debate. It would be helpful to see the OfS suggest positive steps.

The OfS has not provided any guidance on what academic freedom is and when speech is and is not an exercise in academic freedom in the opinion of the OfS. There is limited legal guidance on this point and so some insight into how the OfS will view academic freedom complaints would be of assistance. For example, would an academic talking on social media about an academic subject that is not within the normally conceived scope of their academic discipline be protected by academic freedom?

The OfS has omitted to include any examples of particularly contentious areas including the adoption of the IHRA working definition of antisemitism, decolonisation, protected beliefs such as gender critical beliefs and anti-Zionism, and the Israel-Palestine conflict. We would welcome more examples incorporating these.

As emphasised throughout, we consider clarification is needed on how the OfS will approach free speech compliance where the University takes disciplinary action against staff or students whose conduct and/or speech is lawful, but which causes such offense or upset that it breaches University policy or terms and conditions of employment. The OfS needs to explicitly consider how Providers can continue to regulate conduct and behaviour within institutions and how they can promote values and practices that they consider essential to the effective functioning of academic communities and student living situations without falling foul of OfS regulatory advice 24.

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

None.

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

We are concerned that if sanctions are imposed, and the OfS is empowered to recover costs under s 73 of HERA, that this could be onerous if external legal counsel are consulted by the OfS due to the

costs of this expertise, and the time likely to be incurred in an area of law which is complex and subject to new precedents following court and tribunal decisions. We are concerned at the lack of transparency on how such costs could be incurred and calculated. We are also concerned that the fear of costs could pressurise Providers to settle without a full exposition of the OfS's case and without a real opportunity to respond.

We would suggest that a cap should be imposed on the OfS limiting the maximum it could look to recover, which is currently unlimited under paragraph 47 of Regulatory Advice 19 (RA19), particularly in regard to legal fees.

We also suggest that there should be an amnesty on the OfS seeking to recover costs from any Provider or Student Union in the first 24 months.

We are particularly concerned that the OfS might look to recover costs from Student Unions, who usually have very limited financial resources. We are aware that RA19 sets out factors for the OfS to take into account when determining whether to recover costs and would suggest that the "qualifying income" calculation is inappropriate for Student Unions and that the starting principle should be that the OfS should not seek to recover costs from Student Unions or, in the alternative, that RA19 is amended to set out a specific calculation for Student Unions.

Finally, we consider that there is a potential conflict of interest and that the potential costs recovery could cause the OfS to determine that a sanction be imposed in order to recover costs where these have reached a significant level.

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

We are particularly unclear about overseas partnerships and scholarships, and the expectations on Providers in regard to these. It is not clear from the proposals to what extent they relate to transnational education (TNE) and this is a matter that requires urgent clarification. Universities UK has set out detailed concerns about the application of the regulatory guidance in relation to TNE, to which we refer the OfS and which wefully endorse.

We remain unclear on how Providers are expected to comply with the "promote duty".

As we have said above, we consider clarification is needed on how the OfS will approach free speech compliance where the University takes disciplinary action against staff or students whose conduct and/or speech is lawful, but which causes such offense or upset that it breaches University policy or terms and conditions of employment.

The OfS needs to explicitly consider how Providers can continue to ensure the highest levels of academic standards, regulate conduct and behaviour within institutions, and promote values and practices that they consider essential to the effective functioning of academic communities and student living situations without falling foul of OfS regulatory advice 24.

Providers need to uphold and promote academic standards and build and create diverse communities. There is no recognition by the OfS of the complexity of this.

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?

Please see our specific answers to earlier questions where we have outlined our concerns with the draft Advice, including where we believe the law has been mis-stated, better examples could be used, and where the Advice could be expanded e.g. to take account of the Prevent duty.

We are concerned at the burden that will be placed on Providers and Student Unions. We invite that the OfS to be mindful of these demands, and seek to minimise the requirements on Providers, in particular with regards to the conditions of registration to accompany the Advice.

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

We are concerned that there could be direct or indirect discrimination against overseas students of particular nationalities if Providers are unable to enter into partnerships with specific countries or accept students on funded scholarships. We are concerned about the potential impact on Providers' ability to create diverse and inclusive communities and to act to prevent and address harassment and discrimination on the grounds of protected characteristics. In particular, we think the OfS needs to engage explicitly with the relationship between this Advice and the proposed condition of registration related to harassment and sexual misconduct.

Has the OfS carried out an equality analysis/ equalities impact analysis of Regulatory Advice 24? We would like to see it, please.

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?

Whether intended or not, there is an undertone of hostility towards the values and practices of equality, diversity and inclusion throughout Regulatory Advice 24, which potentially impacts on members of marginalised groups and those with legally protected characteristics.

As stated in earlier answers, we are also concerned about the lack of reference to and alignment with the Prevent duty, and the guidance in place and awaited in this area.