

# OfS consultation on proposed regulatory advice and other matters relating to freedom of speech – UA submission

## About University Alliance

University Alliance (UA) represents 16 of the UK's leading professional and technical universities. Our members specialise in working with industry and employers. Their teaching is hands-on and designed to prepare students for careers. Their knowledge and research drive industry to innovate, thrive and meet challenges.

Our members are leading the way in innovation and business support in the green, tech, creative and healthcare industries. They are leading providers of teaching in healthcare, the creative arts, degree apprenticeships and more. We collaborate as UA to benefit our members and their communities, and to provide expertise to policy makers.

## Summary

We welcome the principle of OfS developing guidance on freedom of speech with practical examples.

However, UA members have not found the draft guidance as helpful as it could be. The examples given seem manufactured and simplistic, lacking nuance. More importantly, they do not adequately explore the intersection of free speech with other duties such as preventing harassment and promoting good relations. Going forward, we call on the OfS to work in partnership with representatives from higher education providers and students' unions to co-produce more detailed case studies based on complex real-world situations.

We reiterate the need for the OfS to urgently provide clarity on how it understands free speech 'within the law' in the context of transnational education (TNE).

We are also concerned that a number of elements in the regulatory advice are unduly onerous for providers, notably those related to record keeping in the context of HR processes, governance, training, and induction. These will impose a substantial cost on providers at a time when many institutions are facing fundamental threats to their financial sustainability, as highlighted recently by the OfS itself. More importantly, it is not clear that they will serve to promote a culture of free speech. Ultimately, we believe the most effective way for the OfS to enhance free speech in universities is to encourage an open dialogue that enables staff and students to share information and seek advice from the regulator.

In addition, we have significant concerns about the implementation timescale. Given that the duties and guidance are intended to come in force from 1 August, it is not clear how the OfS will have time to meaningfully consider responses to this consultation (and the [previous one](#), on which the sector is still waiting) before publishing a finalised version of the guidance. This will leave providers and students' unions with extraordinarily little time to consider any changes. We therefore strongly recommend delaying implementation if possible. If delaying is not an option available to the OfS due to statutory requirements, we suggest that a light-touch and phased approach to implementation is the most reasonable and fair approach in the circumstances.

Finally, we agree with other sector bodies that an independent formal review of the free speech complaints scheme should be undertaken after 12 months to ensure it is working efficiently and effectively and does not have any unintended consequences.

## Consultation questions

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

No.

**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?**

No.

**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’?**

No.

**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?**

We welcome the principle of OfS developing guidance on freedom of speech with practical examples. However, UA members have not found the draft guidance as helpful as it could be. The examples given seem manufactured and simplistic, lacking nuance. More importantly, they do not adequately explore the intersection of free speech with other duties such as preventing harassment and promoting good relations. This significantly limits their usefulness to providers, and means they are unlikely to be helpful in informing universities’ approaches to dealing with real cases. Given that the OfS is due to shortly announce a condition on harassment and sexual misconduct, it is essential that these pieces of regulation work together smoothly, especially as this is one of the areas universities tend to find most complex to balance with free speech.

Going forward, we call on the OfS to work in partnership with representatives from higher education providers and students’ unions to co-produce more detailed case studies based on real world situations. Ultimately, we believe the most effective way for the OfS to promote a culture of free speech in universities is to encourage an open dialogue that enables staff and students to share information and seek advice from the regulator on free speech matters. Working together on case studies would be useful first step. Many universities are already developing these detailed examples for their own internal use and would be happy to share with the OfS.

This type of collaboration between government and higher education providers is already happening in other related areas. For example, several universities are part of a HE Prevent leads working with the DfE to help develop Prevent duty ‘Guiding Principles’ reflecting the new Home Office guidance and the freedom of speech legislation. As part of this, universities have been invited to submit potential anonymised case studies for the DfE to include.

We appreciate that rich examples will emerge as the OfS deals with actual cases, and we urge the OfS to publish the Notice of Complaint Outcomes about individual cases as soon as

possible. In the meantime, we recommend that a disclaimer is added to the guidance to explain that the examples given are high level, and that the reality is likely to be much more complex and nuanced.

We are concerned that several elements in the regulatory advice are unduly onerous for providers, notably those related to record keeping in the context of HR processes, governance, training, and induction. These will impose a substantial cost on providers at a time when many institutions are facing fundamental threats to their financial sustainability, as highlighted recently [by the OfS itself](#). More importantly, it is not clear that these measures will actually serve to promote a culture of free speech.

The requirements around training are not only burdensome but impractical, as the type of training envisaged by the OfS is not widely available.

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

We have significant concerns about the timings proposed. Given that the duties and guidance are intended to come in force from 1 August, it is not clear how the OfS will have time to meaningfully consider responses to this consultation (and the previous one on the complaints scheme) before publishing a finalised version of the guidance. This will leave providers and students' unions with extraordinarily little time to consider any changes before 1 August. We therefore strongly recommend delaying implementation if possible.

If delaying is not an option available to the OfS due to statutory requirements, we suggest that a phased approach is reasonable and fair in the circumstances. Early judgements should consider the fact that providers are likely not to have had time to implement all the steps in the guidance. We note also that the OfS has not yet published its decisions on the harassment and sexual misconduct condition, which providers will also need to take into account.

The OfS should clarify expectations for timings on elements such as training, as it is not possible for providers to have this in place for 1 August 2024. As well as this, governing bodies will need to be allowed appropriate time to consider relevant codes, policies, and procedures once the guidance has been finalised by the OfS.

Finally, we agree with other sector bodies that an independent formal review of the free speech complaints scheme should be undertaken after 12 months to ensure it is working efficiently and effectively and does not have any unintended consequences.

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

No.

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

It is vital that the free speech complaints scheme is run in an efficient manner which provides value for money for students, providers and taxpayers, and there must be clear safeguards to ensure this. The OfS registration fee increased in 2023-24 in part to fund this new function. We therefore do not support the OfS also being able to recover its costs from providers in any circumstances.

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

It is not clear from the proposals to what extent they – if at all – relate to transnational education (TNE), i.e. the delivery of UK degrees outside of the UK. This is a matter that requires urgent clarification.

**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?**

Ultimately, we believe the most effective way for the OfS to promote a culture of free speech in universities is to encourage an open dialogue that enables staff and students to share information and seek advice from the regulator about matters related to free speech. We believe a partnership approach between OfS, higher education providers and students' union would be more effective. As a first step, OfS should work with representatives from higher education providers and students' unions to co-produce more detailed case studies based on real world situations.

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

It is highly likely that these proposals will have a disproportionate impact on individuals based on their protected characteristics, as free speech complaints are likely to overlap with complaints regarding harassment relating to providers' duties under the Equality Act. A comprehensive Equality Impact Assessment should be undertaken urgently to assess this fully. We also strongly urge the OfS to ensure that this guidance is aligned with its upcoming condition of registration on tackling harassment and sexual misconduct.

Moreover, a number of our members have noted the negative framing of Equality, Diversity, and Inclusivity (EDI) and Prevent in a number of the examples in the guidance, with an underlying implication that they are in tension with freedom of speech (Examples 6, 7, 9, 11, 13, 29, and 30). The guidance also implies that freedom of speech has primacy over the Public Sector Equality Duty, which does not correspond with our members' understanding of the law. This could discourage providers from taking steps to advance equality of opportunity, prevent harassment and discrimination and promote good relations between groups.

**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?**

We are concerned there could be a number of unintended consequences including a chilling effect brought on by the increased bureaucracy and legal and regulatory risks related to free speech, and abuse of the new free speech complaints scheme by pressure groups. This is why we are calling for an independent formal review to be undertaken after 12 months to ensure the free speech complaints scheme is working efficiently and effectively and does not have any unintended consequences.