

Office for Students' response to the Joint Committee on Human Rights Fourth Report of Session 2017-19 on Freedom of Speech in Universities

General comments

The Office for Students (OfS) is committed to working with the sector to ensure that freedom of speech and robust, rigorous debate remains an integral part of the UK university experience and we welcome the Committee's recognition of the importance of freedom of speech in universities.

We are encouraged by the Committee's work in establishing the scale and nature of any threats to free speech on campus and their finding that 'overall there is support for the principle of freedom of speech'¹ across the sector and that there is no wholesale censorship of debate in universities.

The OfS recognises that the issues around free speech are highly complex and nuanced and there is often no easy answer. We also recognise that, with the growth of communications in the digital environment, this adds further layers of complexity.

We are, however, concerned by the evidence presented which suggests that there are disincentives for students to put on events which discuss topics or include speakers that other groups may want to contest. We are also concerned that there seems to be a number of events which never take place because students are dissuaded from organising them by onerous bureaucracy or because they fear the consequences of being involved with a controversial subject and that this is having a 'chilling effect' on freedom of speech.

We support the objective of ensuring that students feel safe and free to express themselves but we believe that the most effective way to do this is not through censorship or marginalising some groups to protect others; free speech must be for everyone. We agree with the Committee that there is no place for violence, intimidation or criminality on university campuses.

Many of the recommendations in the Committee's report are for bodies other than the OfS to comment on so we have limited our response to the areas most appropriate for us.

The OfS' role in promoting and protecting freedom of speech

The OfS' mission to ensure that 'all students, from all backgrounds, with the ability and desire to undertake higher education, are supported to access, succeed in, and progress from higher education'² places the protection of students' interests at the heart of its work. Ensuring that free speech within the law is secured at institutions serves the student interest; free speech is essential in exposing students to new and uncomfortable ideas, in encouraging robust but civil debate where other viewpoints are understood and respected. It underpins the diversity of the sector and is a key component in delivering a high quality educational experience.

¹ https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/58903.htm#_idTextAnchor003

² https://www.officeforstudents.org.uk/media/1406/ofs2018_01.pdf

Together with other bodies in the sector, the OfS will champion free speech. A free speech public interest governance principle was included in the OfS' regulatory framework and this forms part of our approach to ensure that all registered providers have adequate and effective management and governance arrangements. Where management and governance do not meet baseline standards, the OfS is able to intervene and apply sanctions where these are considered necessary. We would never intervene to restrict free speech, only to extend it. As part of our assessment of providers during the registration process this summer, we will ensure that a provider's governing documents uphold the freedom of speech public interest governance principle.

Prevent duty

Recommendation 8. The Committee strongly endorses the need for Prevent as a strategy for preventing the development of terrorism. However, the Committee said in 2016 that rigorous and transparent reporting is needed to dispel myths about Prevent and called for an independent review of the Prevent policy in its report on Counter Extremism. We repeat that recommendation; we consider any such review should include an assessment of the Prevent duty's effectiveness in higher education, and its impact on freedom of speech and association. Such a review should also include consideration of whether Prevent duty reports should be published, and on what basis.

The OfS currently receives Prevent annual reports from relevant higher education bodies (RHEBs). Under the current process these reports are submitted to the regulator in confidence, as part of a co-regulatory approach. There is a significant risk that publication would therefore damage the regulator's relationship with institutions and its ability to monitor the Prevent duty effectively. That is why the Information Commissioner supported the OfS' decision not to share Prevent annual reports, a decision which the government also supported.

In the interest of transparency, the OfS intends to publish a sector level summary of the reports.

We are also working with the Department for Education and other partners to develop better information sharing processes and ensure work around Prevent strikes the right balance between security and transparency.

Bureaucracy

Recommendation 12. It is reasonable for there to be some basic processes in place so that student unions and universities know about external speakers. Codes of practice on freedom of speech should facilitate freedom of speech, as was their original purpose, and not unduly restrict it. Universities should not surround requests for external speaker meetings with undue bureaucracy. Nor should unreasonable conditions be imposed by universities or student unions on external speakers, such as a requirement to submit their speeches in advance, if they give an assurance these will be lawful.

The OfS will stand for the widest possible definition of freedom of speech: namely, anything within the law. In performing our functions, we will also consider our general duty to have regard to the need to protect institutional autonomy.

We recognise that there is significant variability in the approaches taken by institutions, which is in part a reflection of the sector's diversity, and that there is a need to ensure greater clarity and consistency with the guidance offered to both providers and student unions in relation to freedom of speech.

The OfS has a commitment under its Prevent monitoring to ensure that providers' Codes of Practice are appropriate and proportionate; a number of institutional Codes of Practice and related external speakers policies and processes have been reviewed as part of our monitoring of the Prevent duty. We will continue to review these as appropriate. Our experience to date has been that, in practice, most events undergo a light touch approach from providers and, again, our experience has been that Prevent has compelled many providers to pay more attention to freedom of speech issues and the preparation of codes of practice. If we discover wider concerns in relation to free speech that may provide evidence of non-compliance with a provider's conditions of registration, this information will be taken into account and shared appropriately.

Providers have a responsibility to facilitate respectful, civil debate and we will continue to expect providers and student unions to do this effectively. This means institutions and student unions ensuring that robust processes are in place to manage events appropriately. We welcome the clarity provided by the Committee on what conditions imposed on speakers are considered unreasonable. We could, however, foresee that having an advance copy of a speech would be appropriate under certain circumstances such as an instance where a speaker had not given an assurance that a speech will be lawful.

If students are deterred from inviting speakers by complicated processes and bureaucratic procedures then we would also expect this feedback to be shared at an institutional level and, if necessary, for these processes to be independently reviewed.

The way forward

Recommendation 14. We welcome the OfS' strong support of free speech. We would expect the OfS to intervene if problems emerged at particular institutions. They should ensure that university policies do not inhibit legal free speech and are not overly burdensome. To help facilitate this, the OfS should have an accessible means of feedback for students to report incidents of intimidation and issues related to free speech, on which the OfS could act as an arbiter between the students, student unions and universities. The OfS should also visit universities that have faced issues regarding freedom of speech, and ensure universities and student unions are respecting this right. The OfS should report annually on free speech in universities, including naming when universities have been non-compliant with their responsibility to secure free speech, under the Education Act 1986.

We recognise that each institution's context is different and in performing our functions, we will consider our general duty to have regard to the need to protect institutional autonomy.

We will only intervene or engage when there is a threat to free speech. Whilst there are a number of regulatory levers which the OfS could apply if free speech is being suppressed, it is hoped that we will not have to use these and that this course of action would be taken only after very careful consideration.

We believe there are a number of accessible means of feedback for students to report incidents of intimidation already; these include feedback channels at individual institutions, through the NUS and – ultimately once a provider’s internal complaints process has been exhausted – with the Office of the Independent Adjudicator (OIA).

We will also be collecting data about complaints reaching the OIA (which includes any complaints made in relation to freedom of speech) and this may inform our judgements.

The OfS is also implementing a notification process for students, whistle-blowers, or others to report issues of concern to us. We would expect to receive notifications in relation to freedom of speech and would investigate these if credible evidence is provided and assuming that they do not relate to an individual or collective employment dispute.

We do not agree, however, that the OfS should act as an arbiter between students, student unions and universities as our function is to ensure that a provider is complying with its conditions of registration.

At present the OfS is not planning to visit providers that have faced issues regarding freedom of speech but we may engage with providers or other bodies to understand what action they have taken as a result of these issues and what lessons learned can be carried forward in future. This would also include an assessment of whether these lessons have wider applicability across the sector and should, therefore, be communicated.

The OfS does not agree that there is currently a need to report annually on free speech in the higher education sector, in part because developments from year to year may not merit this level of reporting frequency. We do, however, agree that from time to time it may be helpful to report on free speech and this is likely to be prompted by a change in the risk profile in how free speech is upheld. At present, the OfS is not planning to name and shame providers in cases where free speech has been suppressed but we would publish regulatory action and the reasons for this where there has been a breach of registration condition E2.³

Recommendation 15. It is welcome that the Government is taking a broad look at the policy context for freedom of speech, and that the Minister plans to hold a summit with key bodies to work out where responsibilities lie and how all bodies can work together to promote freedom of speech. The Government should ensure that all bodies with an interest in this area, such as the EHRC, are included in this summit to ensure a joined-up approach across the different bodies. Moreover, although we understand that this is a complex area, the Government should consider whether there is any case for the OfS to take over the regulation of student unions rather than the Charity Commission.

³ Condition E2: The provider must have in place adequate and effective management and governance arrangements to: i. Operate in accordance with its governing documents. ii. Deliver, in practice, the public interest governance principles that are applicable to it. iii. Provide and fully deliver the higher education courses advertised. iv. Continue to comply with all conditions of its registration.

The OfS recognises that there are, currently, key issues in relation to free speech which need to be addressed. We are committed to working with all the relevant bodies to address these issues and to manage and mitigate their effects.

Based on the Committee's findings, it is clear that the complexity created by various forms of guidance and regulation is not serving the student interest and we welcome the Committee's recommendation that the guidance should be made clearer and simpler. The OfS also anticipates contributing to work with others in the sector on simplifying the current landscape of guidance on free speech. We envisage this to include:

- Working with the Government and others to manage the issues and overcome the challenges identified at the Minister's Summit in early May 2018;
- Developing a repository of best practice and case studies for sharing with the sector.

The OfS does not have the legal powers to regulate student unions. We also understand that the NUS and individual student unions are strongly supportive of the status of student unions as registered charities and we do not think it would be appropriate for the OfS to regulate student unions.

However, the regulation of student unions and of universities must be complementary and there must be clarity on the roles, responsibilities and remits of all parties. We will work closely together with others to make sure guidance and regulation are consistent and clear with regard to free speech.

Conclusion

We support the Committee's view on a number of issues and recognise the challenges which have been outlined in the report. We also differ from the Committee in some of the areas where it has recommended the OfS intervene, such as the OfS acting as an arbiter between students, student unions and universities. We welcome the opportunity to work with the Government and other relevant bodies to ensure clearer, more consistent guidance is available.