

GuildHE response to:

OfS Consultation on proposed regulatory advice and other matters relating to free speech

22 May 2024

About GuildHE

GuildHE is an officially recognised representative body for UK Higher Education, championing distinction and diversity in the sector. Our 60+ members include universities, university colleges, further education colleges and specialist institutions, representing over 150,000 students. Member institutions include some major providers in professional subject areas including art, design and media, music and the performing arts; agriculture and food; education; business and law, theology, the built environment; health and sports.

Overview

1. This is the third OfS consultation on their implementation of the 'secure' duty in relation to Free speech and academic freedom. GuildHE responded to the free speech complaints scheme [consultation](#) and also the students' unions and free speech consultation.
2. This [consultation](#) was published on the 26th March and runs until the 26th May. Arif Ahmed, OfS Director of Free Speech and Academic Freedom, attended a GuildHE members session Friday 5th April and this consultation response draws on that discussion as well other conversations with members and the sector.
3. The GuildHE response was submitted 22 May.

Summary

4. We welcome that the Office for Students have published further guidance relating to freedom of speech. GuildHE, and many other organisations and institutions, called for this guidance following the publication of the first two consultations to give a bit more clarity on particular scenarios.
5. We also welcome the recognition in the guidance that "What is reasonably practicable may vary from institution to institution". This is particularly important given the huge diversity of providers - and students' unions - which will have hugely different resources and contexts. Maintaining a proportionate and risk-based approach, based on the context of the institution will be key, and we welcome the highlighting of this in the guidance.

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Case studies

6. In principle it was helpful to include a large number of case studies in the guidance, across a large number of different areas, however in practice this has meant that these case studies have necessarily been kept to a few hundred words each. They have therefore ended up losing much of the nuance and context that would be necessary to be useful for institutions to get a fuller understanding of the case and whether the university had taken reasonably practicable steps in the example and had appropriate processes in place.
7. This has resulted in a series of case studies that come across almost as a caricature of a real-life example with the resultant challenge that they are fairly clear-cut cases of what should be done in a particular case. The inclusion of these brief case studies therefore implies that universities wouldn't know how to respond in these more extreme examples, suggesting a lack of maturity in dealing with these issues than is the case in reality.
8. We appreciate that fuller case studies will emerge as the OfS deals with particular complaints and publishes reports on these. It does, however, mean that in the meantime we are left with a set of examples that portray universities in a negative light suggesting simplistic responses to difficult questions. If this guidance had just been published to the higher education sector this may not have been so bad, but the accompanying press release - and resulting media headlines - had the resulting impact of further entrenching these negative views that the sector doesn't have a grip on this issue or know how to deal with cases when they arise.
9. We recommend that there should be a clarificatory paragraph before the case studies highlighting that they are high level examples to give indicative responses to some cases, but that every example will need to be carefully considered in the context of the case and is likely to be much more complex and nuanced than these examples suggest. Paragraph 40 in the guidance should be amended to reflect these points.
10. There are many actions that might be reasonably practicable in some circumstances but that does not mean that all the possible steps should be taken in every example, as is outlined in para 41 in the guidance. Not least this wouldn't be reasonably practicable in terms of the use of the resources of the institution. The guidance should be clearer on the processes by which institutions can demonstrate that they have identified the reasonably practicable steps that should be taken in a particular case. We don't expect the OfS to provide all the answers but rather guidance on the processes by which institutions have got to the answer that they have.
11. It should also be noted that the record-keeping required to record all of these decision-making processes - as outlined in para 100 - is likely to create a significant additional burden on providers. As are the requirements to update all policies, contracts, training and so on (paras 75 7

102) - the financial costs to the sector need to be considered in the implementation of the guidance.

Intersection with EDI

12. Secondly, the guidance also does not properly address the balancing of harassment and free speech duties. The guidance does outline that universities and colleges must comply with the requirement of equality law, but does not provide much advice on balancing of these - sometimes conflicting duties. This is one of the areas our members tend to find most difficult and complex.
13. Despite the reference to equality law there is a sense that free speech should be prioritised over all else. The OfS will be publishing further guidance on harassment in the coming weeks and a likely accompanying condition of registration it would therefore be helpful for the guidance to address this.
14. For example, the guidance does not address how the reasonably practicable steps to secure free speech should be balanced alongside the need to promote good relations on campus and prevent harassment.
15. We would recommend that the OfS reviews the impact of the implementation of their free speech duties in relation to protected characteristics after a year to ensure that there have not been any unintended consequences.

Other issues

16. The OfS' duty to secure free speech and academic freedom comes into force on the 1st August 2024. This consultation closes on the 26th May and so that does not leave much time to analyse and respond to the consultation responses.

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 specific comments

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 welcome that the Office for Students have published further guidance relating to freedom of speech. GuildHE, and many other organisations and institutions, called for this guidance following the publication of the first two consultations to give a bit more clarity on particular scenarios.

We also welcome the recognition in the guidance that “What is reasonably practicable may vary from institution to institution”. This is particularly important given the huge diversity of providers - and students’ unions - which will have hugely different resources and contexts. Maintaining a proportionate and risk-based approach, based on the context of the institution will be key, and we welcome the highlighting of this in the guidance.

The guidance does not properly address the balancing of harassment and free speech duties. The guidance does outline that universities and colleges must comply with the requirement of equality law, but does not provide much advice on balancing of these sometimes conflicting duties. This is one of the areas our members tend to find most difficult and complex.

Despite the reference to equality law there is a sense that free speech should be prioritised over all else. The OfS will be publishing further guidance on harassment in the coming weeks and a likely accompanying condition of registration it would therefore be helpful for the guidance to address this.

For example, the guidance does not address how the reasonably practicable steps to secure free speech should be balanced alongside the need to promote good relations on campus and prevent harassment.

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.

There are many actions that might be reasonably practicable in some circumstances but that does not mean that all the possible steps should be taken in every example - not least this wouldn’t be reasonably practicable in terms of the use of the resources of the institution. The guidance should be clearer on the processes by which institutions can demonstrate that they have identified the reasonably practicable steps that should be taken in a particular case. It should also be noted that the record-keeping required to record all of these decision-making processes is likely to create significant additional burden on providers.

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.

We welcome the recognition in the guidance that “What is reasonably practicable may vary from institution to institution”. This is particularly important given the huge diversity of providers - and students’ unions - which will have hugely different resources and contexts. Maintaining a proportionate and risk-based approach, based on the context of the institution will be key, and we welcome the highlighting of this in the guidance.

In principle it was helpful to include a large number of case studies in the guidance, across a large number of different areas, however in practice this has meant that these case studies have necessarily been kept to a few hundred words each. They have therefore ended up losing much of the nuance and context that would be necessary to be useful for institutions to get a fuller understanding of the case

and whether the university had taken reasonably practicable steps in the example and had appropriate processes in place.

This has resulted in a series of case studies that come across almost as a caricature of a real-life example with the resultant challenge that they are fairly clear-cut cases of what should be done in a particular case. The inclusion of these brief case studies therefore implies that universities wouldn't know how to respond in these more extreme examples, suggesting a lack of maturity in dealing with these issues than is the case in reality.

We appreciate that fuller case studies will emerge as the OfS deals with particular complaints and publishes reports on these. It does, however, mean that in the meantime we are left with a set of examples that portray universities in a negative light suggesting simplistic responses to difficult questions. If this guidance had just been published to the higher education sector this may not have been so bad, but the accompanying press release - and resulting media headlines - had the resulting impact of further entrenching these negative views that the sector doesn't have a grip on this issue or know how to deal with cases when they arise.

We recommend that there should be a clarificatory paragraph before the case studies highlighting that they are high level examples to give indicative responses to some cases, but that every example will need to be carefully considered in the context of the case and is likely to be much more complex and nuanced than these examples suggest. Paragraph 40 in the guidance should be amended to reflect these points.

There are many actions that might be reasonably practicable in some circumstances but that does not mean that all the possible steps should be taken in every example, as is outlined in para 41 in the guidance. Not least this wouldn't be reasonably practicable in terms of the use of the resources of the institution. The guidance should be clearer on the processes by which institutions can demonstrate that they have identified the reasonably practicable steps that should be taken in a particular case. We don't expect the OfS to provide all the answers but rather guidance on the processes by which institutions have got to the answer that they have.

It should also be noted that the record-keeping required to record all of these decision-making processes - as outlined in para 100 - is likely to create a significant additional burden on providers. As are the requirements to update all policies, contracts, training and so on (paras 75 & 102) - the financial costs to the sector need to be considered in the implementation of the guidance.

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

The OfS' duty to secure free speech and academic freedom comes into force on the 1st August 2024. This consultation closes on the 26th May and so that does not leave much time to analyse and respond to the consultation responses.

It isn't clear whether the guidance applies to transnational education, where a campus might be a "constituent institution" but would this also apply to franchise or validated provision? The extent to which something is reasonable practicable may differ depending on the law of the country in which the education is delivered.

If the regulatory guidance applies to TNE, it will be necessary for the OfS to clarify the scope of the application of this guidance concerning TNE, specifically:

- What specific types of TNE provision are in scope?

- What are the deciding factors for the scope
- What examples demonstrate the application in practice and illustrate reasonably practicable actions with regard to TNE that is in scope

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

No specific comments

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

Whilst we don't object to the approach we would reiterate our response to the previous consultation that it will be important to ensure that the costs of the scheme do not rise exponentially, as awareness rises and cases get taken to Judicial Review. If the costs are excessive it will result in money being taken away from front-line teaching and learning activities.

We would also argue that institutions have already paid for much of this activity on free speech through the increased OfS subscriptions that were raised this year explicitly to pay for this activity. The OfS will need to provide transparent information on how this additional funding has been allocated and provide assurances that there is no double-counting of the costs of the OfS' free speech activities.

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

As highlighted within our response we found the following things unclear:

- the processes by which institutions can demonstrate that they have identified the reasonably practicable steps that should be taken in a particular case
- whether the guidance applies to transnational education or franchise
- how this duty intersects with new harassment condition and the legal safeguarding duties we have to our students

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?

The regulatory advice entails a high level of burden for providers, which will take considerable time and resource to enact. As the OfS is aware, the sector is already under considerable strain, and these burdensome requirements will add to that. We strongly suggest the OfS look to streamline requirements wherever possible, especially when it comes to considering the condition(s) of registration which will accompany this guidance.

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 without clarity on the intersection between this and our duty to protect our communities from harassment then these proposals could have significant negative impacts on individuals with protected characteristics.

We would recommend that the OfS reviews the impact of the implementation of their free speech duties in relation to protected characteristics after a year to ensure that there have not been any unintended consequences.

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 about the additional burden on smaller institutions and students' unions. The guidance recognises that there are likely to be different approaches required in different institutions but the guidance is not clear enough on the kind of reasonably practicable steps that should be taken in an institution with fewer resources or less-complex structures.

In the previous consultation on students' unions we highlighted our concerns about the potential unintended consequences on the independence of students' unions that are formally part of the institution if the ultimate responsibility for paying monetary penalties or other sanctions end up falling on the institution.