

Consultation on the OfS's approach to regulating students' unions on free speech matters

Arts Students' Union's consultation response

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

We do not have any comments on the OfS's proposals on maintaining and making publicly available a list of relevant students' unions. We can understand the rationale behind creating a publicly available list of relevant students' unions, with details provided by the university provider.

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

We are very concerned about the guidance issued, its lack of clarity, and the provision for future guidance to be issued that students' unions cannot anticipate (and therefore adhere to) in advance.

We are concerned by the following points:

- Under point 61 of the consultation document, it sets out that the OfS may issue separate guidance and further information about how it will determine whether or not students' unions are complying with free speech duties. We query how students' unions are expected to comply with guidance if it has not been issued in full. We are concerned that this could lead to *ex post facto* judgements against students' unions and their compliance with free speech duties. We believe this feels like the OfS is writing itself a blank cheque, for the OfS to rewrite its guidance and regulations to fit particular cases or align with certain political agendas as they emerge, as opposed to setting out the expectations for students' unions in full and in advance. We also observe that this seems to be in contradiction to point 66a of the consultation document, which states that

the OfS will be required to determine each individual case on its own facts, and as such will not be issuing specific guidance.

- Under point 64 of the consultation document, it sets out the guidance considers the framing of the duty to take ‘reasonably practicable’ steps to secure freedom of speech within the law. We are concerned that there is no definition provided of what ‘reasonable practicable’ steps would look like in practice. We query under whose definition of ‘reasonable’ and ‘practicable’ the guidance is addressing, whether that is the OfS’s definition or that of the individual students’ union. Without clear and concrete guidance, rooted in real world examples, we are concerned this leaves this duty open to interpretation that could ultimately be used to unduly punish students’ unions for failing to meet a criterion of compliance without clear definition.
- Under point 66a of the consultation document, it sets out the notion that the OfS will be required to determine each individual case on its own facts in relation to compliance with free speech obligations. The consultation document justifies this as a reason to withhold providing more specific guidance. We are concerned that this appears to be setting students’ unions up to fail, by withholding detailed guidance and guidelines; this shifts blame onto the individual failings of a students’ union rather than the parameters for success as issued by the regulator.

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

There are several areas about which we are concerned with the OfS's proposed approach to monitoring. In particular we are concerned about the robustness of the impartiality and transparency of the sources of information the OfS plans to use to determine whether a students' union has infringed upon its free speech obligations, the lack of specificity around proposed additional monitoring actions and investigations, and the definition of 'risk' in the proposed 'risk-based approach'.

We are concerned by the following points:

- Under point 70 of the consultation document, it sets out that the OfS is proposing to take a 'risk-based and targeted' approach to monitoring. We are unclear on the definition of 'risk' the OfS is using; namely, whose risk? And who is determining that risk: the OfS or the individual students' union? For example, will the risk basis involve an assessment of risk of the institution or is this separate assessment? It is unclear in the guidance where the risk falls, and how that may affect the OfS's approach to monitoring and regulation.
- Under point 71a of the consultation document, it sets out that the OfS will use notifications and complaints from third parties in their monitoring of students' unions, including media reporting and 'wider intelligence relating to the sector'. We are highly concerned that this places a disproportionate amount of influence on the views and alleged concerns of external actors, who may have no relationship with the provider, students' union, or students' union members. This may result in situations tantamount to 'trial by media', where a students' union is deemed to be worthy of investigation by the OfS based on the reports of unconnected yet politically motivated external actors, who are able to utilise media platforms they have available to them to push a certain agenda. Given the potential monetary sanctions students' unions can face for infracting on their duties, and the financial liabilities students' unions may incur in defending themselves during an

investigation (including potential legal advice), this could lead to a situation where students' unions are required to withdraw services from its members in order to dedicate resources to respond to complaints raised by politically motivated external actors with no connection to the provider, its students' union or its members.

- Under point 71b of the consultation document, it sets out that the OfS will use notifications and complaints from students in their monitoring of students' unions. We are unsure from the guidance how this will be determined; will the OfS assess based on the quantity of complaints from students, at which point this will trigger an investigation? Will it assess some complaints more worthy of investigation than others? How will the OfS reconcile competing and contradictory complaints from students? None of this is made clear in the guidance, nor sets out how students' unions should be expected to respond to these issues.
- Under points 72 and 73 of the consultation document, it sets out that the OfS may at a later date undertake further monitoring activity (such as additional information reporting requirements), as well as setting out that the OfS may decide to investigate individual students' unions. Nowhere in the guidance does it set out in what form these additional interventions will take, the criteria for successful compliance with these monitoring measures, nor the range of powers such investigations would receive. We again believe this feels like the OfS writing itself a blank cheque to give itself additional powers as and when it needs them, without setting out clearly to students' unions what to expect in advance or how to successfully interact with these interventions.

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

Our primary concern about the OfS's proposed interventions is the imposition of monetary penalties on students' unions, in light of all of the concerns we have listed above: insufficient guidance issued in advance, fear of *ex post facto* judgements made with the issuing of subsequent guidance, overreliance and over-empowerment of politically motivated third parties for monitoring, and leaving open the assumption of additional powers for the OfS that have not clearly been stated in the guidance.

Taking all of these concerns together, we feel that the intervention of imposing monetary fines on students' unions is a disproportionate use of force against the sector, especially when students' unions have limited resources and are largely dependent on the donation of block grants from their providers to run their services.

We feel that if any interventions are issued, they should be limited to voluntary undertakings under the guidance and recommendation of the OfS.

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

We believe the metric used to determine the amount of monetary penalty is overly punitive and could risk the closure of services provided by Students' Unions to its members (which would potentially infringe on their rights to free speech).

The metric set out in the consultation document mirrors the same level of financial penalty as providers, with the sanction set at a proportionate level; yet students' unions often run on a budget a fraction of the size of an institution, with little ability to control its sources of income. Most students' unions depend on the donation of a block grant from their provider to run their services, while providers may generate additional income through student recruitment and other business operations.

Imposing the proportionately same level of penalty on a students' union as on a provider is harmful to students, as it risks services closing. In this event, students' right to free speech and assembly through the democratic mechanisms of a students' union could be infringed upon. This seems contradictory to the aims of the OfS's regulatory purpose.

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

No, we do not have any comments on the OfS's proposed minor and consequential revisions to the regulatory framework.

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

No, we do not have any comments on the OfS's proposed approach to the publication of information.

Question G: Do you have any comments about any unintended consequences of these proposals, for example for particular types of provider, constituent institution or students' union or for any particular types of student?

Our largest concern is that there will be significant unintended consequences for students by introducing these regulations. We are concerned that they will have the opposite effect of protecting and incubating free speech, as students' unions will now be expected to cover the security costs of hosting events under the grounds of free speech, without adequate provisions made to fund students' unions.

Without adequate funding to undertake the new duties imposed on students' unions, students' unions will face huge financial liabilities placed on them, without

support in place. Students' unions will be dependent on the beneficence of their provider to help them meet these financial liabilities.

With such large financial risks involved, an unintended consequence of these regulations may be fewer events taking place due to the attached costs, or students' unions accruing significant debts that renders them unable to provide services to their members.

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

No, we do not have any comments about the potential impact of these proposals on individuals on the basis of their protected characteristics.

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

We are unclear on the resolution of any conflict of interest between our regulators, as Students' Unions will now be regulated by both the Office for Students and the Charity Commission.

The guidance does not set out how any tensions may be resolved in ensuring the free speech of our members, as regulated by the OfS, and the duty of care we have to our members, as regulated by the Charity Commission. This could lead to a conflict of interest (and conflicting duties) without clear advice on how to resolve these tensions provided by the OfS or Charity Commission, explaining which regulation takes priority.