Consultation on the OfS's proposed regulatory advice and other matters relating to freedom of speech

The draft regulatory advice on freedom of speech can be downloaded here. *Below are responses to the consultation questions from the London Universities Council for Academic Freedom (LUCAF).*

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 greatly welcome the requirements for institutions and student unions to take 'reasonably practicable' steps to secure freedom of speech, and maintain a code of practice, as specified in HERA. However, we believe that at least some provisional guidance should be provided on the 'promote' duty, as mentioned in footnote 8. While recognising the pressures of time, and the need for institutions to determine their actions by the early date of 1 August 2024, we think this process would be facilitated by extra guidance, which could be mentioned here, such as:

- Each institution and student union should appoint at least one officially designated champion of pluralism in views, this role would seek to support free speech and academic freedoms, and may coordinate promotional activities. For a higher education institution, this should be a senior academic.
- A sample provided of the types of ways (such as a sample document) in which institutions should actively promote free speech and academic freedom in all areas of teaching and research.
- A requirement to promote free speech and academic freedom in advertisements for jobs at an institution, and in the documentation accompanying promotion or probation processes.
- A clear recognition that institutional requirements to include EDI criterion to teaching content, and job or promotion applications risk systematically excluding a sub-section of colleagues with divergent beliefs and viewpoints and are discriminatory.
- Mandatory training sessions for all staff and students which promote free speech and academic freedom. These would include clarity of definitions, and full information of the process to follow if it is felt that these have been breached.
- Guidance on hosting of events and the importance of entertaining diverse viewpoints, not using process to exclude speakers on ideological grounds.

We think that with such guidance, institutions and student unions will take their promotional requirements much more seriously.

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?

Various parties have attempted to claim that Article 10(2) of the European Convention of Human Rights (ECHR), relating to free speech "prescribed by law", implies that institutions are free to prescribe their own laws in this respect. This would seriously negate the effect of the Act. A comprehensive response to this has been provided by the London Universities' Council for Academic Freedom (LUCAF), which we wish to echo. This is available at https://nms.kcl.ac.uk/lucaf/viewdocument.php?id=4

Parliament did not evoke Article 10(2) of the ECHR, and there is nothing in the act which suggests this extended meaning of "within the law". As LUCAF have argued cogently and in detail, the ECHR provides a floor, not a ceiling, for free speech rights, and the Higher Education (Freedom of Speech) Act (HEFOSA) has strengthened the protection. This should not be used to limit such things as the ability of academics to venture beyond their previously-established research areas (as a great number do, at different points in their careers, often as part of the process of expanding their range).

It is vital that the OfS maintains its current position, in order that HEFOSA has some real meaning, and is not subject to filibustering tactics on the part of some institutions to bypass its primary objectives. We urge the OfS to clarify the meaning of "within the law" for this reason, and also the relationship to ECHR Article 10.

We also feel the definition of Harassment in Section 2 could be clearer. It is defined by Section 26 of the Equality Act 2010 and the Protection from Harassment Act 1997. Sections 20-30 of Section 2 do attempt to clarify the duties of institutions under these Acts and how such duties interact with duties under free speech law. Section 30 indicates 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." This could potentially be expanded with requirements for clearer definitions of other terms and measures to ensure fairness of process.

The term Harassment could be used in opposition to either of the two examples relating to trans issues, Examples 7 and 11 in Section 3, and we think it is important to provide further clarity to eliminate this possibility.

We are concerned that the clause in section 2, point 22, regarding 'whether it is reasonable for the conduct to have that effect', does not go far enough in balancing objective criterion against subjective truths. There are considerable risks to academic freedoms, should an individual decide that certain political/philosophical or other orientations be so deeply offensive to them that they state that they feel harassed by simple virtue of a difference in opinion.

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.

The examples given here are pertinent and important, and the guidance highly valuable in terms of the steps the institution needs to take in such circumstances. As regarding financial restrictions, it is vital that these considerations are implemented in a way which is fair and does not discriminate on the basis of the content. Some example of an institution finding the money for security for an event hosting an individual holding one type of viewpoint, but not for another for a different individual of quite different views, would be welcome here to make clear the institution's responsibilities.

We also think some guidance should be given on the situation in which some individual or group of individuals wish to use their freedom of speech purely to shout down or intimidate another speaker (the so-called "heckler's veto"). This can be reclassified as a type of harassment, and so not protected speech, and it is necessary to do so in order that freedom of speech is realisable in practice.

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 detail and care taken to provide concrete examples throughout this section, and the clear indication that providers, constituent institutions and student unions must take steps which are reasonably practice to secure freedom of speech within the law. We also welcome the mention of "positive steps", which is line with the promotional duty, though this could be foregrounded more often and more prominently within the guidance.

Many of the examples are straightforward and eminently reasonable. We welcome the requirement for prompt responses by institutions, as in Examples 6 and 18, which can work to avoid a phenomenon commonly known as "punishment by process", whereby an academic is made to suffer simply by protracted uncertainty as to their situation.

***Avoiding ideological gatekeeping in recruiting staff*:** Example 5 requires institutions to withdraw requirements in job vacancies, or in processes for probation, promotion or appraisals, for commitment to a particular political theory, when unrelated to disciplinary competence in the appropriate area. But this may be ambiguous, or argued to be so, in certain disciplines, not least those directly linked to identity politics (including Gender, Race, Queer Studies, etc.), those which incorporate such politically loaded terms as "decolonisation" or "social justice" in their titles, or for that matter those in religious disciplines which may require commitment to particular interpretations of the faith in question. In these types of cases, we believe the problems could be addressed by insisting that the positions allow of critical perspectives upon these types of ideologies, that no-one should feel deterred from applying because of heterodox views in this respect. Furthermore, where the ideological pluralism of certain jobs or the good faith in following it in practice is under question, the OfS should clarify that it would undertake its own investigation, and would have power to view shortlists, see interview questions, to prevent discriminatory practices on the basis of belief.

***Conflict between views of academics and institutions*:** Example 6 requires that an institution issue a statement making clear their distance from a view expressed in a newspaper campaign against the academic in question (who in this case claims that "systematic racism" is embedded in Shakespeare's sonnets), through a "clear, prompt and viewpoint-neutral response". In the event that the institution has an official policy which conflicts with this, we ask that they make clear that they respect the right of the academic to make such statements regardless of whether they conflict with institutional policy. We urge the OfS to consider making this part of the guidance.

***External partnerships*:** Example 29 is the only case of an external partnership created domestically rather than internationally, and we believe one or two more examples of this type would be welcome, to do with partnerships with industry, public bodies, arts institutions, estates of individuals who academics are researching, and so on. Above all, we would like to see an absolutely clear statement that academics' critical independence and freedom must be protected in these contexts, and institutions must be firm in this respect even in the event that external partners might remove funding or limit access. This is implied by other examples, but could be stated more clearly. An important historic example of this is the 'butter-margarine controversy' in Iowa in the 1940s - https://www.promarket.org/2021/05/23/iowa-butter-margarine-schultzs-academic-freedom/ .

***Teaching Freedom*:** We welcome the guidance in section 103 making clear the importance of safeguarding "the ability of academics to teach and communicate ideas that may be controversial or unpopular but lawful" and "opportunities for students to be exposed to such ideas", as well as that in sections 111-113 which make clear that students and staff should not be penalised in any way for opinions or ideas. We are a little surprised however by the relative absence of specific examples specifically relating to teaching, and the freedom of those teaching academic subjects not only to question and critique conventional wisdom and orthodoxies, but also to have the maximum autonomy in the way they set about their teaching. We are concerned that terms such as "decolonisation" might be used to prescribe specific ideological content for teaching. We recognise that curricula and constituent modules need to be determined through wider ratification and quality control processes, and that individual academics need to work within the framework provided therein, and also that departments, schools and sometimes whole institutions need to ensure some degree of consistency. Nonetheless, we think there should be some wider example or examples which make clear how, within the framework of module and programme specifications, individual academics are free to determine their own reading lists, choose their own pedagogical means to deliver the content, and deliver it in the manner and format they see best. We would welcome some detail on how an institution which tries to interfere with these is breaching the individual academic's academic freedom.

***Reputational Claims made by Institutions*:** One further consideration not fully addressed in this section is the stipulation often made by institutions that staff may not indulge speech which might cause "reputational damage" or the like. We believe such terms are deeply amorphous, and as such can be used to suppress legitimate and lawful freedom of expression and academic freedom. Furthermore, it is vital that academics have the freedom to be able to criticise aspects of their own institutions' actions or policies, including publicly. Furthermore, they should be able to critique the work of colleagues, just as they could the work of academics working in other institutions – to restrict this is to place artificial and deleterious constraints on academic freedom. We would therefore welcome examples and guidance of these types of situations and wider clarity of policy, including the rights of academic to criticise their institutions during times of industrial dispute.

***Artistic Freedom and Practice-Based Work*:** There is almost nothing in the guidance relating to freedom in artistic work or other types of practice-based output, in which "content" is often less easy to gauge. In arts departments in particular, a good deal of research output often takes the form of practice, and we believe some examples of how work of this type can be protected under the "secure" duty should also be included. For example, some such work may include explicit sexual content, incendiary textual or other material, or may contain visual evidence of horrors which would be disturbing to many. We recommend incorporating the guidance from the Council of Europe on artistic freedom - https://rm.coe.int/free-to-create-council-of-europe-report-on-the-freedom-of-artistic-exp/1680aa2dc0 - into the OfS guidance for academic freedom of artistic work. In healthcare practice education examples of content both in theory and practice that could potentially offend may include reproductive medicine (including abortion), sex based biological matters and potentially disturbing examples of violence for example in forensic psychiatry. There may be examples where students can recuse themselves from observing a procedure (for example in abortion) but should still be taught the theoretical .underpinnings

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

We find the document to embody a sea-change in terms of a culture of free speech and academic freedom, and as such welcome it greatly. We very much hope that none of the content will be watered down in the face of some inevitable pressure from institutions and other lobby groups who are far from committed to these ends, and in some places it will be strengthened along the lines discussed above.

This submission has been prepared by City University Academics for Academic Freedom with various input from individual members.

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

No comments.

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

These seem very fair and reasonable.

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

Only those things mentioned in Question 4.

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?

Only through greater clarity of the “promote” duties, giving some idea of initial steps institutions can take effective from 1 August 2024.

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

These should lead many individuals in academia to feel much more protected and free to explore and research widely, and should lead to a reduction in self-censorship on the part of many.

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?

No comments.